IN THE UPPER TRIBUNAL **Appeal No. CPIP/737/2021**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

LH

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decision date: 04 February 2022
Decided on consideration of the papers

Representation:
Appellant: N/A
Respondent: N/A

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 23 December 2020 under number SC168/20/00699 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
2. **The First-tier Tribunal must (by way of an oral hearing) undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.**

3. **The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 23 December 2020.**
4. **A copy of this decision should be included in the appeal bundle before the panel of the First-tier Tribunal dealing with the remitted appeal.**
5. **In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: R(DLA) 2 & 3/01.**
6. **If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction 5 above).**
7. **The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Appellant, and what this appeal is about

1. The Appellant is a young man with a diagnosis of autism spectrum disorder (**"ASD"**). In common with many people with his diagnosis he experiences a lot of anxiety and feelings of overwhelm, particularly when out in public. He has no physical health problems other than a hearing impairment for which he wears a hearing aid.

2. This appeal is about the Appellant's entitlement to a Personal Independence Payment (**"PIP"**) and, in particular, whether his award of PIP should have included an award of the mobility component given the difficulties which he experiences due to his ASD.

The law

3. PIP was introduced by the Welfare Reform Act 2012 (the **"2012 Act"**). It has two components: the daily living component and the mobility component. Section 80 of the 2012 Act provides that a person's ability to carry out mobility activities is to be determined in accordance with regulations. Regulations made under section 80(3) of the 2012 Act provide that the ability to carry out mobility activities is to be decided on the basis of an assessment. The various activities to be assessed for the purposes of possible entitlement to PIP are set out in the Social Security (Personal Independence Payment) Regulations 2013 (the **"Regulations"**). Regulation 3(2) provides that mobility activities are those set out in column 1 of a table appearing at Part 3 of Schedule 1 to the Regulations. Each activity has associated descriptors attracting points (or, in the case of those descriptors which describe an ability to carry out the contemplated activity unaided, no points). The threshold for entitlement to an

award of the mobility component at the standard rate is 8 points in respect of the mobility descriptors and the threshold for entitlement to an award of the mobility component at the enhanced rate is 12 points in respect of the mobility descriptors.

4. Mobility activity 1 and its associated descriptors are concerned with a claimant's ability to plan and follow the route of a journey. The activity and its associated descriptors have been designed to assess the barriers claimants may face in consequence of mental, cognitive or sensory difficulties.

5. The first section of Part 3 of Schedule 1 to the Regulations is as follows:

Column 1 *Activity*	*Column 2* *Descriptors*	*Column 3* *Points*
1. Planning and following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4
	c. Cannot plan the route of a journey.	8
	d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10
	f. Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12

6. The second section of Part 3 of Schedule 2 to the Regulations concerns the physical activity of "moving around" and is not relevant to this appeal because the Appellant has no physical health problems that restrict his ability to move around.

Procedural background

7. The decision maker for the Respondent who first considered the Appellant's claim on 05/02/2020 decided that he scored no points under either the daily living or mobility activities and therefore refused his claim to PIP. The Appellant

asked for that decision to be reconsidered and on 30/04/2020 another decision maker for the Secretary of State examined his claim afresh by way of a "mandatory reconsideration" and decided that he should instead score 14 points in relation to the daily living activities and 4 points in relation to the mobility activities, resulting in an award of PIP with the daily living component at the enhanced rate from 18/07/2019 to 15/01/2022, but not the mobility component at either rate (the **"SoS Decision"**).

8. The Appellant's Appointee (his mother) disagreed with the SoS Decision because she thought that he should be entitled to the mobility component of PIP as well as the daily living component. She appealed the SoS Decision to the First-tier Tribunal (Social Entitlement Chamber) on her son's behalf.

The hearing before the FtT

9. The Appointee asked for an oral hearing of the appeal and consented to a remote hearing by telephone. On 23 December 2020 a three-member panel of the First-tier Tribunal (Social Entitlement Chamber) sitting at Fox Court convened to hear the appeal remotely by way of a telephone hearing (the **"Tribunal"**). Although the Appellant didn't participate in the hearing himself, his mother/Appointee addressed the Tribunal.

10. The Tribunal refused the appeal, confirming the 14 daily living points and 4 mobility points in the SoS Decision, and confirming the award made previously (the **"FtT Decision"**).

11. The Appointee wrote to the First-tier Tribunal to say that she felt that the Tribunal had made an error of law by failing to make reasonable adjustments in relation to her disability, as a result of which she was disadvantaged at the remote hearing. In particular, she argued that the Tribunal's finding that her evidence was unreliable was unfair because the "inconsistencies" in her evidence it relied on were as a result of her multiple sclerosis.

12. The Appointee also took issue with the Tribunal's fact finding in several respects, as well as the inferences it drew from the facts it found.

13. On 11/03/2021 Judge Guest of the First-tier Tribunal refused to review the decision on the basis that it involved no material error of law and refused permission to appeal to the Upper Tribunal on the basis that it was not arguable with a realistic prospect of success that the Tribunal erred materially in law.

14. The Appointee then applied to the Upper Tribunal for permission to appeal and the matter came before me.

The permission stage – grounds of appeal

15. The Appellant's representative pointed out that, unusually, the representative of the Secretary of State had produced a submission to the Tribunal in which he sees fit to "recommend" that the Tribunal should award 10 points under mobility descriptor 1 (e) in place of the 4 points under mobility descriptor 1 (b) in the SoS Decision. The representative wrote "I ask the tribunal to consider awarding [the Appellant] the standard rate of the mobility component of PIP".

16. The Appellant's representative argued that this recommendation was a significant factor which the Tribunal was obliged to address or consider and to draw attention to ahead of the hearing, but nowhere either in the decision notice or the statement of reasons is there any reference to this submission. It was argued that

failure to do so amounts to a material error of law which vitiates the FtT Decision (**"Ground 1"**).

17. The Appellant's Representative also argued that the Tribunal's evaluation of the evidence of Ms Darling (as being essentially the passing on of information that she had been given by your Appointee rather than being based on Ms Darling's own observations and experience of your functional ability) was flawed given that the letter from Ms Darling reveals on its face that she had an "exceptional level of personal familiarity" with your family (**"Ground 2"**).

18. The Appellant's representative also takes issue with inferences the Tribunal drew from the evidence about the Appellant's attendance at Reynold's Training Academy, arguing that the basis on which it concluded that he attended for two years with no reported problems and only stopped attending because his placement ended appeared to be based on assumptions, and was in conflict with what the Appellant had told Dr Robins about the having problems throughout his education (**"Ground 3"**).

19. The Appellant's representative challenged the Tribunal's reasoning in paragraph 21 of its statement of reasons (**"Ground 4"**).

20. The grounds relied upon in the Appointee's application to the First-tier Tribunal were also relied upon.

Permission stage - my grant of permission to appeal

21. I considered the application on the papers and decided to grant permission to appeal. In my decision notice (which was addressed to the Appellant) I said:

> "18. The fact that the Secretary of State's representative had submitted that it was "reasonable to suggest" that you satisfied mobility descriptor 1 (e) and saw fit to "recommend" that the Tribunal award you 10 points for mobilising did not mean that the Tribunal had to award those points.
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> 19. The Tribunal had to make its decision based on the evidence before it. The submission on behalf of the Secretary of State was not determinative of the issue of your ability to follow the route of a journey any more than your evidence, or that of your mother was. The Tribunal had to make its own evaluation of the evidence and decide, where the evidence conflicted, which evidence to prefer. It had to make findings of fact based on the evidence as it assessed it, and had to make a decision on your entitlement by applying the relevant law to the facts it found. Having done so it had to explain its decision to the required standard of adequacy.
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> 20. The Tribunal had a very broad discretion in the way it assessed the evidence and in its fact finding. It is clear from its statement of reasons that the Tribunal made clear findings of fact and it made a decision based on those findings. It explained its decision methodically by reference to the evidence.
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> 21. However, I am satisfied that it is arguable with a realistic prospect of success that, while not bound by the recommendation of the representative of the Secretary of State, it was obliged to address the submission and explain why, despite that submission, it decided that you

> were not entitled to the points argued for on behalf of the Secretary of State. This may render its reasons inadequate, which would amount to an error of law. The difficulty with an inadequacy of reasons is that an inadequate explanation of a decision means that the reader cannot know whether the basis of the decision was sound. This justifies the grant of permission to appeal to the Upper Tribunal."

22. I decided that, given that I was satisfied that it was appropriate to grant permission to appeal in respect of Ground 1, it was not necessary to address the other grounds argued by the Appellant at that stage. My grant of permission was unrestricted.

23. I issued Case Management Directions inviting the Respondent to comment on the appeal and I provided the Appellant with an opportunity to respond to any comments of the Respondent.

The parties' submissions

24. Ms Keates, on behalf of the Secretary of State, made detailed, thorough and thoughtful submissions on the appeal. She supported the appeal and invited me to set aside the FtT Decision as being materially in error of law and to remit the appeal for rehearing by a differently constituted First-tier Tribunal, with appropriate directions for redetermination.

25. The Appellant's representative responded noting the Respondent's support for the appeal and her request to remit the matter to be reheard by the First-tier Tribunal.

26. The Appellant's representative invited me instead to remake the decision based on the evidence in the papers, which they argue is ample to justify an award of 10 points under mobility descriptor 1(e), which they say should have been the starting point for the Tribunal as highlighted in the Upper Tribunal case of *DO v SSWP (PIP)* [2021] UKUT 161 (AAC).

Why there was no oral hearing of this appeal

27. Neither party asked for an oral hearing. Having considered the paper file, and given the degree of agreement between the parties, I could see no compelling reasons to hold an oral hearing. I was satisfied that the interests of justice did not require one. I therefore decided to determine the appeal on the papers.

My decision

28. At the permission stage I had to be persuaded only that it was arguable with a realistic (as opposed to fanciful) prospect of success that the Tribunal had erred in law in a way which was material. At this stage I need to be satisfied on the balance of probabilities that the Tribunal did so err.

29. The Tribunal explained its decision not to award the Appellant more points for the mobility activities than the 4 points which he had been awarded by the Respondent for mobility activity 1(b). This explanation is set out in paragraphs 17 to 22 of its statement of reasons:

> "17. We could see no evidence of a condition that would prevent [the Appellant] from planning the route of a journey (descriptor 1 c). He does not have a visual or intellectual impairment, he can read, is numerate and can use a phone.

18. We did not accept that [the Appellant]'s anxiety prevents him from leaving the house as claimed (page 102). This is because he attended Reynolds Academy four days per week for three months of the required period and had attended regularly with no reported problems for two years. We thought that he stopped going out four days per week because his placement had ended, and not because undertaking any journey would cause him overwhelming psychological distress. [The Appellant] also travelled from his home in Swanley to the assessment centre in Gillingham on 18 July 2019 where he arrived on time, was cooperative, and no significant abnormalities linked to autism were observed (page 93). This indicates an ability to undertake journeys without suffering overwhelming psychological distress and so descriptor 1 (e) does not apply.

19. We then considered [the Appellant's] ability to follow the route of familiar and unfamiliar journeys. We accept that [the Appellant] was driven to and from the placement by his mother. However, this is not the same as being unable to follow the route by himself. [The Appellant]'s older brother, who is apparently entitled to the enhanced rate of the mobility apart (sic) of PIP, was attending the same placement and so it was sensible and convenient for [their mother] to drive both of her sons to and from the placement. Points can only be scored if the route of a journey cannot be followed without assistance from another person because of a physical or mental condition.

20. There was very little evidence that [the Appellant] went out alone. Although [the Appellant's mother] was a little evasive in her evidence on this issue we found that occasionally [the Appellant] went to the local shop alone and was able to go straight there and straight back. He did not always get what he had gone for because the shop was busy and he was anxious on his return. He also pushed his mother in a wheelchair when she needed to go to the bank or shops (page 104). In her oral evidence [the Appellant's mother] described one occasion when [the Appellant's] skin started to bleed because he had been anxious and picked his skin. We had some concern about the reliability of this statement because a few minutes earlier she had told the medical member that she could not recall any occasion when she had been out with [the Appellant] and it had gone wrong. However, as described, the anxiety appeared to relate to difficulties with crowds in shops rather than following the route of a journey. [The Appellant's] ability to return home from the local shop, even when anxious, indicates that he was not overwhelmed and was still able to follow the route of a familiar journey.

21. Mrs Sams thought that [the Appellant] spent most of his time in his room and lacked motivation to do anything other than his preferred activities of sleeping or gaming (page 103) A preference to stay in is not the same as being unable to follow the route of a journey, and although [the Appellant] does not go out on his own very often, we thought that this was a matter of choice rather than an inability to do so because of his condition. We accepted that [the Appellant] has social anxiety and difficulty with busy, crowded areas and repetitive sounds because this is what he said during his assessment with Psicon and is consistent with his diagnosis. However, we did not think that this difficulty would prevent him

> from following the route of a journey, whether familiar or unfamiliar. He would not encounter these difficulties on many journeys e.g., on foot to a local shop or park of if travelling by bus in off peak periods. He uses standard earbuds to listen to music which blocks out sounds and this strategy should enable him to follow the route of a journey if there were lots of other people around him. Many people using public transport do so.
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> 22. [The Appellant] has a diagnosis of moderate autistic spectrum disorder and no other diagnoses relating to his mental or cognitive functioning and he is not being treated for any such problems. We do not usually associate the degree of disability claimed with this diagnosis, and the absence of any treatment, despite its availability, indicates that [the Appellant]'s difficulties are not so severe as to prevent him from following routes without another person. We therefore found that descriptors 1 (d) and (f) do not apply."

30. It is striking that in this detailed account of the Tribunal's decision making in relation to the first mobility activity there is no mention of the "recommendation" on behalf of the Secretary of State at page F of the appeal bundle that:

> "Taking into consideration all the available evidence and in particular the telephone call on 30/06/2020 it would be reasonable to suggest [the Appellant] cannot undertake any journey because it would cause overwhelming psychological distress. As [the Appellant] is not leaving the house on the majority of days he would not qualify for descriptor F – 12 points. Therefore I recommend the tribunal to award descriptor E for this activity – 10 points …"

31. As I said in my grant of permission, this submission on behalf of the Secretary of State was not by any means determinative of the issue of the proper scoring of the Appellant's ability to plan and follow journeys. The Tribunal had to make its own evaluation of the evidence and to make findings of fact accordingly. It had to determine your entitlement by applying the relevant law to the facts it found and, having done so, to explain its decision to the required standard of adequacy.

32. The required standard is of "adequacy", not "perfection" (see *B v B (Residence Order: Reasons for Decision)* [1997] 2 FLR 602). The Tribunal didn't have to recite all the evidence it reviewed nor all the submissions it considered, but it had to say enough to allow the Appellant to understand not only the decision it had reached but also how and why it had reached it.

33. The upshot of the submission I have quoted at paragraph 29 above is that entitlement to the mobility component at the standard rate was not in issue between the parties. The Tribunal has an inquisitorial jurisdiction and has a discretion to decide matters which are not in dispute between the parties, but that discretion must be exercised consciously and judicially. There is no indication in the Tribunal's decision notice or its statement of reasons that it was aware that the Respondent had conceded that the Appellant satisfied mobility descriptor 1 e., and if the Tribunal was unaware of that fact then the Tribunal did not exercise its discretion consciously or judicially, but rather did so accidentally, labouring under a misapprehension that the matter remained in dispute. This amounts to an error of law and one that was clearly material in the sense that had the error not been made the outcome of the appeal might well have been different.

34. Even if the Tribunal was aware of the Respondent's submission, and did exercise its discretion consciously and judicially but omitted to explain that in its decision notice or statement of reasons, that too amounts to an error of law because that represented a significant part of its decision making and without any explanation of it the Appellant cannot know whether that part of its decision making was in accordance with the law.

35. Ms Keates has identified in her submission other deficiencies in the reasons given by the Tribunal for its decision making in relation to mobility activity 1: the Tribunal has recited some of the evidence it heard about the difficulties the Appellant experiences when out and about, and appears to have accepted this evidence, but has then failed adequately to explain why, notwithstanding the issues identified, it concluded that the Appellant did not satisfy any of the higher scoring descriptors for mobility activity 1.

36. The Tribunal accepted that the Appellant suffers from anxiety and doesn't cope well with crowds. It noted that the Appellant wears earbuds when out and about. The Tribunal reasons that this would help block out the sound of crowds when undertaking a journey, enabling him to manage his anxiety. Having latched onto the evidence about wearing earbuds and seemingly given considerable weight to this strategy in concluding that he is able to manage journeys without experiencing overwhelming psychological distress, the Tribunal was obliged to address the difficulty that the Appellant's claim form said he experienced as a result of wearing earbuds, and say what it made of this (see page 37 of the appeal bundle):

> "When out, even in the car, he will put on headphones and put his hood up to block out all input from the outside world. Due to this he has no awareness of routes travelled."

37. In its explanation of its reasons for not accepting that the Appellant could not follow the route of an unfamiliar journey without another person the Tribunal also failed adequately to address the assertion in the Appellant's claim form that he requires someone to accompany him when he goes out, and that he doesn't go out alone. As Ms Keates points out, the Appellant was accompanied when he attended his face to face assessment, and of the very few journeys about which the Tribunal made findings of fact, some of these were when he pushed his mother's wheelchair when she needed to go to the bank or shops (which were clearly therefore accompanied trips). The Tribunal found that "occasionally [the Appellant] went to the local shop alone and was able to go straight there and straight back", but it accepted that he "did not always get what he had gone for because the shop was busy and he was anxious on his return." If this is the high watermark of success, it is unclear how the Tribunal concluded that he could follow the route of an unfamiliar journey without another person.

38. Considering the reasons given in the statement of reasons and decision notice together and as a whole, while in many respects good, fall short of the standard of adequacy due to:

a. the failure to make reference to the submission on behalf of the Respondent that she supported an award of the mobility component at the standard rate; and

b. their failure to explain what the Tribunal made of some relevant and material evidence on behalf of the Appellant and how it came to the

conclusions it did notwithstanding the specific difficulties the Appellant's mother said that he experienced (at least some of which the Tribunal accepted).

39. For the reasons given in paragraphs 33 and 38 above, I conclude that the FtT Decision involves the making of a material error of law.

Disposal

40. It is appropriate to exercise my discretion to set aside the FtT Decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (the **"TCEA"**). Section 12(2)(b) of the TCEA provides that I must either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision.

41. The Appellant says that I should remake the decision as it should have been made. The Respondent says that it is appropriate to remit it for rehearing by a differently constituted First-tier Tribunal.

42. It is necessary for further facts to be found. The First-tier Tribunal is best placed to evaluate the evidence and to make appropriate findings of fact. Regrettably, I therefore conclude that it is appropriate to remit this appeal to be reheard by a fresh panel of the First-tier Tribunal. I sincerely hope that the rehearing can be listed on an expedited basis.

43. Given that I have remitted the matter for a rehearing it is not necessary for me to deal with the other grounds of appeal relied upon by the Appellant, as any other errors that the Tribunal may have made should be dealt with by the rehearing, which will consider all matters afresh.

JUDGE THOMAS CHURCH
Judge of the Upper Tribunal

Authorised for issue on: **04 February 2022**