**IN THE UPPER TRIBUNAL** **Case No. UA-2023-001112-PIP**
**ADMINISTRATIVE APPEALS CHAMBER** **[2024] UKUT 289 (AAC)**

**AM**

Appellant

**-v-**

**Secretary of State for Work and Pensions**

Respondent

**Before** **Thomas Church, Judge of the Upper Tribunal**
Decided on the papers without a hearing

**Decision:** **As the decision of the First-tier Tribunal (which it made at Bradford on 19 December 2023 under reference SC240/22/00512) involved the making of an error of law, it is <u>set aside</u> and the case is <u>remitted</u> to the First-tier Tribunal for rehearing before a differently constituted panel.**

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

## DIRECTIONS FOR THE REHEARING:

A. 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.
B. The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 19 December 2022.
C. 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.
D. 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 C above).

E. 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.

## REASONS FOR DECISION

### What this case is about

1. This appeal is about the requirement that a claimant is only to be assessed as satisfying a descriptor for the purposes of entitlement to a Personal Independence Payment (**"PIP"**) if they can carry out the relevant activity "safely" (see Regulation 4(2A)(a) of the Social Security (Personal Independence Payment) Regulations 2013 (the **"PIP Regulations"**)).
2. In this decision I consider the proper test for assessing the ability of a claimant who experiences seizures to carry out activities "safely", and in particular:
    a. the significance of whether the claimant experiences prodromal/pre-ictal symptoms prior to a seizure;
    b. to the extent that the tribunal finds that the claimant experiences prodromal/pre-ictal symptoms and relies upon these symptoms serving as a "warning sign" of an impending seizure, the fact finding that is required to support a finding that the occurrence of such "warning signs" permits the claimant to carry out the relevant activity "safely";
    c. where a claimant loses consciousness, the significance of the period of time for which consciousness is lost, and the fact finding that is required to support a finding that the brevity of such loss of consciousness permits the claimant to carry out the relevant activity "safely".
    d. the significance of whether the claimant experiences post-ictal symptoms.
3. In this decision I will refer to the Appellant as the **"claimant"** and the Respondent as the **"Secretary of State"**.

### Factual background

4. The claimant suffers from numerous physical health conditions (including muscle spasms and seizures) and mental health conditions (including anxiety and depression, bipolar affective disorder and borderline personality disorder) for which she has been awarded PIP since 2014.
5. While she had in the past been awarded the mobility component of PIP (sometimes at the standard rate and sometimes at the enhanced rate), from 20 October 2020 she was in receipt of the daily living component only.
6. On 18 January 2021 the claimant telephoned the Department for Work and Pensions to report a deterioration in her health condition. This was prompted by an incident at work on 18 November 2020 when the claimant collapsed and was taken to hospital. She was admitted for two nights. During her admission she had a seizure lasting 10 minutes, followed by two further seizures and a long period off work. The claimant reported that she had had a number of seizures and that CT scans showed significant brain damage. She complained

of problems with sleeping, concentration and co-ordination, as well as feeling fatigued, depressed and anxious.

7. The disclosure was treated as an application for supersession of the claimant's PIP award.
8. On 14 October 2021 a decision maker for the Secretary of State superseded the claimant's award with effect from 18 January 2021. The ground for supersession was that there had been a relevant change of circumstances. The decision to supersede was itself revised in the Appellant's favour on 22 March 2022 following mandatory reconsideration.
9. The upshot of the supersession decision as revised was that the claimant was entitled to an award of PIP with the daily living component at the enhanced rate from 18 January 2021 for an ongoing period, but was not entitled to any award of the mobility component at either rate (the **"SoS Decision"**).

**The decision under appeal**

10. The claimant disagreed with the outcome and appealed the SoS Decision to the First-tier Tribunal. On 19 December 2022 a three-member panel of the First-tier Tribunal in Bradford convened to hear the claimant's appeal by way of a remote telephone hearing (the **"Tribunal"**). The claimant was represented at the hearing and she gave oral evidence in support of her appeal. The Secretary of State was not represented.
11. The Tribunal dismissed the appeal and confirmed the SoS Decision (the **"FtT Decision"**).
12. The FtT Decision is the decision under appeal, and the appeal is brought by the claimant.
13. The only matter in issue between the parties in the appeal before the First-tier Tribunal was entitlement to the mobility component of PIP (it being common ground that the claimant was entitled to the daily living component at the enhanced rate).
14. The claimant had complained of numerous mental and physical health problems over the years. She had longstanding diagnoses of bipolar affective disorder, depression and anxiety, and borderline personality disorder. In terms of her physical health problems, those treating her had not been able to identify a clear explanation for her symptoms. The Tribunal explained it in this way:

> "[The claimant] has a long and complex medical history with various diagnoses over the years. In particular, since she had a collapse or possibly a seizure on 18/11/2020, [the claimant] has been seeking a diagnosis which will explain her symptoms. It has been suggested by various medical professionals that she may have had a Transient Ischaemic Attack (TIA), that she may have Non-Epileptic Attack Disorder, or that she possibly has a functional neurological disorder. The neurologists who have treated [the claimant] do not think that she has epilepsy. She is awaiting a further appointment with a neurologist in Sheffield who specialises in functional neurological disorder." See paragraph [14] of the Tribunal's statement of reasons.

15. The Tribunal rightly observed that, while a clear diagnosis might be important to the claimant, the absence of a clear diagnosis was no barrier to establishing

entitlement to the mobility component of PIP. The Tribunal's job was to make findings of fact about how the claimant's conditions affect her ability to plan and follow journeys (mobility activity 1) and to move around (mobility activity 2) (see paragraph [14] of the Tribunal's statement of reasons).

16. The Tribunal's decision making in relation to mobility activity 1 (planning and following journeys) is set out in paragraphs [28] – 38] of its statement of reasons:

> "28. [The claimant's] representative submitted that [the claimant] should be awarded descriptor 1(f), on the basis that she could not follow the route of a journey safely as a result of seizures, or in the alternative 1(d), on the basis that she could not follow the route of an unfamiliar journey without another person due to her anxiety.
>
> 29. We considered whether or not [the claimant] is able to follow the route of a journey safely without another person. There would be a safety issue if she has seizures that arise without warning and involve a loss of consciousness. We concluded that what she describes as seizures do not involve her losing consciousness without warning. She has provided a description at p322: she loses muscle tone, the left side of her face droops, and she loses the ability to speak. The neurologists treating [the claimant] have been of the opinion ever since her admission on 18/11/2020 that any seizures she has are non-epileptic [pZ23]. While a non-epileptic seizure can cause injury, the Tribunal is aware, using its medical expertise, that they are less likely to happen without warning when a person is doing a potentially dangerous activity. The description that [the claimant] gave of the seizures are that they are very brief, lasting only 5-10 seconds [occupational health report, p 386], and also that she has some warning.
>
> 30. In gauging any risk to [the claimant] in following journeys, we found it significant that [the claimant] continued to drive, and that she was not advised by any of the medical professionals who saw her in the months after her seizure on 18/11/2020 that she could not drive. It was not until she saw a neurologist on 13/08/2022 that she was told not to drive and to inform the DVLA; reading the whole of that letter, we formed the view that this was the neurologist being cautious rather than being of the view that there was a genuine risk [Z23 page 115].
>
> …"

**The permission stage**

17. I gave the claimant permission to appeal the FtT Decision to the Upper Tribunal. In my grant of permission (which was addressed to the claimant) I said:

> "4. Your representative says that the First-tier Tribunal which heard your PIP appeal erred in law because it gave too narrow an interpretation to the decision of the three judge panel of the Upper Tribunal in *RJ, GMcL and CS v SSWP* [2017] AACR 32 (*"RJ"*). In particular, it is argued that the First-tier Tribunal took the approach that it applied only to people who lose consciousness without warning as a result of seizures.

> 5. It is further argued that the tribunal failed adequately to explain what it made of evidence before it which tended not to support its finding that your seizures last "5-10 seconds", and that it failed to deal with evidence which indicates that you were told that you should not drive by the Occupational Health Adviser, which tends not to support its finding that you were not advised by any of the medical professionals who saw you in the months after your seizure on 18 November 2020 that you should not drive.
>
> 6. It is suggested that the tribunal's finding that the neurologist who advised in the letter of 13 August 2022 was "being cautious rather than being of the view that there was a genuine risk" may have been irrational or otherwise unreasonable.
>
> 7. I am satisfied that each of the grounds of appeal is arguable with a realistic prospect of success. If the tribunal did err in the way I say it might have done, such an error could have been material in the sense that had it not been made the outcome of the appeal might have been different. This warrants permission to appeal to the Upper Tribunal. My permission is unlimited."

18. I made case management directions for the Secretary of State to make a submission, and for the parties to indicate whether they requested an oral hearing of the appeal.

**The Secretary of State's position**

19. Mr Naeem, on behalf of the Secretary of State, provided helpful written submissions in support of the appeal.
20. He said the Secretary of State accepted that the Tribunal had erred in law, including in failing adequately to explain how it resolved the conflicting evidence about the frequency of the claimant's seizures and the length of time for which she lost consciousness. He said that it also erred by failing to consider the evidence in a holistic manner, and taking too narrow an approach to the issue of the claimant's ability to follow the route of a familiar journey safely.
21. Mr Naeem invited me to set aside the Tribunal's decision and remit the case back to the First-tier Tribunal for rehearing.

**The claimant's position**

22. The claimant's representative asked that I set aside the FtT Decision, remit the matter for redetermination by the First-tier Tribunal, and give guidance to the First-tier Tribunal as to how *RJ* should be applied in the context of mobility activity 1 (planning and following journeys), and in particular the relevance of:
    a. a finding that the claimant experiences 'warning' symptoms in advance of a seizure,
    b. any pre-seizure or post- seizure confusion or co-ordination difficulties that the claimant may experience, and
    c. the length of time for which a claimant loses consciousness.

**Why there was no oral hearing of this appeal**

23. Neither party requested an oral hearing of this appeal. Given the agreement between the parties I could identify no compelling reason to hold one and I decided that the interests of justice didn't require one. The overriding objective of the Upper Tribunal to deal with cases fairly and justly is best advanced by my determining this appeal without an oral hearing.

**The legislative framework**

24. The primary legislation which establishes PIP and governs entitlement to it is the Welfare Reform Act 2012 (the **"2012 Act"**). PIP has two components: the daily living component and the mobility component. An award of PIP may comprise either or both components.
25. By section 79 of the 2012 Act a person is entitled to the mobility component if their ability to carry out mobility activities is limited (standard rate) or severely limited (enhanced rate) by their physical and/or mental health condition. Section 78 of the 2012 Act makes similar provision for entitlement to the daily living component (which is not in issue in this appeal).
26. The Social Security (Personal Independence Payment) Regulations 2013 (the **"PIP Regulations"**), which were made under section 80 of the 2012 Act, provide for the determination of whether a claimant's ability to carry out daily living and mobility activities (set out in Schedule 1 to the PIP Regulations) is limited or severely limited by their physical or mental condition. Each activity is subdivided into descriptors representing degrees of limitation in carrying out that activity, each of which attracts a prescribed points score (the greater the limitation, the higher the points awarded).
27. Regulations 5 and 6 of the PIP Regulations provide that the scores for daily living and mobility activities are determined by adding the number of points awarded for each activity. A total of 8-11 points in respect of a component of PIP entitles a claimant to an award of the standard rate of that component, and an award of 12 points or more in respect of a component of PIP attracts an award at the enhanced rate.
28. Regulation 4 of the PIP Regulations deals with the assessment of the ability of a claimant (referred to within that regulation as "C") to carry out the activities set out in Schedule 1. It provides:

> **"Assessment of ability to carry out activities**
>
> **4.**- (1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.
>
> (2) C's ability to carry out an activity is to be assessed-
>
> (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
>
> (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.
>
> (2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so-
>
> (a) safely;

(b) to an acceptable standard;
(c) repeatedly; and
(d) within a reasonable time period.
…

(4) In this regulation-
(a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
(b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and
(c) "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity."

29. Part 3 of Schedule 1 to the PIP Regulations sets out the mobility activities and the associated scoring. The first mobility activity is 'Planning and following journeys', and is scored as follows:

| *Column 1*<br><br>*Activity* | *Column 2*<br><br>*Descriptors* | *Column 3*<br><br>*Points* |
|---|---|---|
| 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 orientation aid. | 12 |

30. I do not set out the provisions relevant to the second mobility activity (Moving around) because, for the reasons explained in paragraph [57] below, I do not need to decide whether the Tribunal erred in its decision-making in respect of that activity.

**The authorities**

31. The leading authority on the proper approach to deciding whether an activity can be performed "safely" for the purpose of Regulation 4(2A) of the PIP Regulations is *RJ*.
32. In *RJ* the three-judge panel of the Upper Tribunal considered three previous Upper Tribunal decisions (Judge Hemingway's decision in *CE v SSWP (PIP)* 2015] UKUT 643, Judge West's decision in *CPIP/3006/*2015, and Judge Bano's decision in *SB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 219 (AAC)) which considered this issue. While the approach taken in these cases differed in important respects, they all interpreted the word "unlikely" in the definition of "likely" in regulation 4(4)(a) of the PIP Regulations as importing a requirement that the chances of the risk in question eventuating must be "more likely than not" for the claimant to be considered unable to perform the activity "safely" for the purposes of regulation 4(2A). It followed that a remote risk of serious harm resulting from a claimant carrying out an activity did not prevent that claimant from being assessed as able to carry out the activity safely.
33. The panel in *RJ* declined to take that approach. Instead, it applied the interpretation given to "likely" by the House of Lords in the context of consideration of the threshold criteria for making a care order under the Children Act 1989 in *Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 (***"Re H"***), and by the Divisional Court in *Wallis v Bristol Water plc* [2010] PTSR 1986 (***"Wallis"***) in the context of regulations made under the Water Act 2003.
34. In *Re H* the provision in question required "that the child concerned is suffering, or is likely to suffer, significant harm" if a care order were not made. Lord Nicholls (with whom the majority agreed) explained his interpretation of "likely" in this context as follows:

> "In everyday usage one meaning of the word "likely", perhaps its primary meaning, is probably, in the sense of more likely than not. This is not its only meaning …
>
> In section 31(2) Parliament has stated the prerequisites which must exist before the court has power to make a care order. These prerequisites mark the boundary line drawn by Parliament between the differing interests. On one side are the interests of parents in caring for their own child, a course which prima facie is also in the interests of the child. On the other side there will be circumstances in which the interests of the child may dictate a need for his care to be entrusted to others. In section 31(2) Parliament has stated the minimum conditions which must be present before the court can look more widely at all the circumstances and decide whether the child's welfare requires that a

> local authority shall receive the child into their care and have parental responsibility for him. The court must be satisfied that the child is already suffering significant harm. Or the court must be satisfied that, looking ahead, although the child may not yet be suffering such harm, he or she is likely to do so in the future. The court may make a care order if, but only if, it is satisfied in one or other of these respects.
>
> In this context Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this were the correct reading of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm.
>
> The difficulty with this interpretation of section 31(2)(a) is that it would draw the boundary line at an altogether inapposite point. What is in issue is the prospect, or risk, of the child suffering significant harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less than 50-50 as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant harm as distinct from a real possibility. It is otherwise if there is no real possibility. It is eminently understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not.
>
> In my view, therefore, the context shows that in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

35. The panel also derived assistance from the decision of the Divisional Court in *Wallis*, which was an appeal by way of case stated from the justices' conviction of the defendant of an offence of having a water fitting connected "in such a manner that it causes or is likely to cause" contamination of water, contrary to regulations made under the Water Act 2003. The justices took into account that, while the *probability* of an event causing contamination from any individual installation was not great, the consequences of such an event could be catastrophic to public health. The Divisional Court followed *Re H* and interpreted "likely" in the context of the applicable regulations to mean that there was "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm to public health in the particular case" (per Lord Justice Dyson (as he then was) at [18]).
36. Following those authorities, and considering the legislation as a whole, the panel in *RJ* decided (at [56]) that the proper test of whether a claimant can carry out an activity "safely" for the purposes of regulation 4(2A) was not whether it was "more likely than not" that harm would occur, but rather

whether there was “a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case.”

37. It followed that both the likelihood of the harm occurring and the severity of the consequences were relevant. The panel in *RJ* decided that the same approach applied to the assessment of a need for supervision.

**Discussion**

38. When deciding how to score the claimant’s ability to perform the activities set out in the Schedule 1 descriptors, the Tribunal had to assess whether the claimant could carry out those activities “safely”. In doing so it had to apply the Upper Tribunal authority of *RJ*, which was binding on it.
39. The Tribunal clearly considered the issue of safety:

> “29. We considered whether or not [the claimant] is able to follow the route of a journey safely without another person. There would be a safety issue if she has seizures that arise without warning and involve a loss of consciousness. We concluded that what she describes as seizures do not involve her losing consciousness without warning. She has provided a description at p322: she loses muscle tone, the left side of her face droops, and she loses the ability to speak. The neurologists treating [the claimant] have been of the opinion ever since her admission on 18/11/2020 that any seizures she has are non-epileptic [pZ23]. While a non-epileptic seizure can cause injury, the Tribunal is aware, using its medical expertise, that they are less likely to happen without warning when a person is doing a potentially dangerous activity. The description that [the claimant] gave of the seizures are that they are very brief, lasting only 5-10 seconds [occupational health report, p 386], and also that she has some warning.”

40. The claimant has argued that the Tribunal (mis)understood *RJ* to apply only to people who lose consciousness without warning as a result of seizures. It is not clear to me that the Tribunal laboured under such a misunderstanding, but what is clear is that *RJ* is not of such limited application, not least because one of the appellants whose appeal was allowed had no history of seizures at all (the safety issues arising in her case because of her hearing difficulties and her not being able to wear her cochlear implants in certain circumstances). What *RJ* says about the proper approach to assessing whether Schedule 1 activities can be performed “safely” for the purposes of regulation 4(2A) is of general application, and is not restricted to claimants with any particular symptom or impairment.
41. The test the Tribunal had to apply was that set out in paragraph [56] of *RJ*. To be able to assess whether there was “a real possibility that cannot be ignored of harm occurring” the Tribunal needed to make findings both as to the likelihood of harm occurring and the nature of the harm that might occur should the risk eventuate.
42. The Tribunal acknowledged that “there would be a safety issue” were the claimant to have seizures involving a loss of consciousness that arose without warning. However, it did not find that this was so in respect of the claimant.

43. It isn't entirely clear what the Tribunal meant when it said that non-epileptic seizures were "less likely to happen without warning when a person is doing a potentially dangerous activity", but it seems to be saying that the risk of this occurring is lower in the case of a non-epileptic seizure than it is in the case of an epileptic seizure, and perhaps other kinds of seizure. This relative finding as to the likelihood of loss of consciousness without warning compared with others who experience a different type of seizure is unhelpful because it needed to assess whether it was "likely" in the sense explained in *RJ* and such an assessment is one that is made in absolute terms, not in terms of how safe it is for the complainant compared to someone with a different condition.
44. The experience of "warning signs" (i.e. prodromal/pre-ictal symptoms) *might* be relevant to that combined assessment of likelihood and severity of potential harm, but their significance can't be understood without proper findings as what those warning signs are, how long before loss of consciousness they occur, and what the claimant can be expected to do when they occur to reduce the risk of suffering harm should loss of consciousness follow.
45. Similarly, the duration of an episode of loss of consciousness *might* be relevant to the assessment of the ability of a claimant to carry out an activity "safely", but it was incumbent on the Tribunal to explain why it concluded that a loss of consciousness for such a short period was safe.
46. While the claimant's case was that she experienced a loss of consciousness lasting 10 minutes on one occasion, and she denied having "warning signs" of seizures, the Tribunal found that:
    a. the claimant's episodes of loss of consciousness lasted "only 5-10 seconds";
    b. the episodes were non-epileptic seizures; and
    c. non-epileptic seizures are "less likely" to occur without warning when a person is doing a potentially dangerous activity.
47. However, it didn't make any finding as to:
    a. *how likely* it was that the claimant might have a non-epileptic seizure involving loss of consciousness without warning;
    b. what "warning signs" (prodromal/pre-ictal symptoms) the claimant experiences, and how long before a seizure these symptoms occur;
    c. what harm could occur were the claimant to experience a non-epileptic seizure while carrying out mobility activity 1; or
    d. what post-ictal symptoms the claimant experiences, how long these last, and what risks they might pose to the claimant's safety and the safety of other persons.
48. Neither has the Tribunal explained what the claimant could be expected to do were she to experience "warning signs" of an approaching non-epileptic seizure to reduce the risk that she may herself suffer, or cause another, harm. Clear findings on such matters are necessary if such "warning signs" are to be relied upon as reducing the risk of harm.
49. While the Tribunal made no findings as to what "warning signs" the claimant experienced, the occupational health report at page [386] of the appeal bundle states that:

    > "the only warning signs she had during the first episode in November 2020 are slight confusion and inability to coordinate herself".

50. These “warning signs” don’t sound very promising in terms of the claimant’s ability to manage her safety unsupervised, and they suggest that she might not be at all well-placed to manage her safety.
51. Neither did the Tribunal explain what significance it attached to the short duration of the claimant’s non-epileptic seizures. Even a short episode could potentially give rise to risk of harm depending on the circumstances in which the claimant experiences them. Were she to find herself on an escalator, crossing a busy road, or standing on a railway platform, for instance, a loss of consciousness (or indeed a seizure which doesn’t involve a loss of consciousness but includes other disabling features) for 5 seconds might have very serious consequences. The Tribunal was not entitled simply to assume that because it found the episodes to be short that they were insignificant: it needed to conduct a proper assessment in line with the approach in *RJ*.
52. Turning to the claimant’s criticism of the Tribunal’s assessment of the evidence relating to her driving, the Tribunal was the tribunal of fact and the Upper Tribunal is typically very slow to interfere with its role assessing evidence and making findings of fact, in which it enjoys a very broad discretion. The Tribunal was clearly entitled to make the primary finding of fact that the claimant continued to drive a car, and to attach significance to that finding. However, the fact that the claimant drove did not mean that it was necessarily wise, responsible or safe for her to do. The Tribunal had before it written evidence from the claimant’s consultant neurologist produced in a therapeutic context, which stated in the clearest of terms “[the claimant] must inform the DVLA as it might impact her driving and she must stop driving”. The Tribunal reasoned that the neurologist was “being cautious rather than being of the view that there was a genuine risk”. I consider that given the stark nature of the neurologist’s statement greater explanation was required of the Tribunal.
53. When deciding whether to grant permission to appeal the test I had to apply was whether it was arguable with a realistic prospect of success that the Tribunal erred in law in a way which was material. The test I must now apply is whether the Tribunal did indeed make a material error of law. I find that the Tribunal did indeed err materially in the way I have said it might have done, and the parties agree that it did.

**Disposal**

54. I am satisfied that the First-tier Tribunal erred materially in law. In all the circumstances, the interests of justice require that I exercise my discretion to set the FtT Decision aside.
55. As explained above, further facts must be found. The parties agree that it is therefore appropriate for the matter to be remitted to the First-tier Tribunal for redetermination. Such a disposal best serves the interests of justice.
56. At the rehearing the First-tier Tribunal should follow the directions I have given. The rehearing won’t be limited to the grounds on which I have set aside the First-tier Tribunal’s decision. The First-tier Tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it won’t be limited to the evidence and submissions before the First-tier Tribunal at the previous

hearing. It will decide the case on all the evidence before it, including any written or oral evidence it may receive.

57. While the Appellant made other criticisms of the Decision (including in relation to the Tribunal's decision making in relation to the second mobility activity (Moving around), any such further errors which there might have been will be subsumed into the rehearing so there is no need for me to deal with them now.

58. Nothing in this decision of the Upper Tribunal should be taken as amounting to any view as to what the ultimate outcome of the remitted appeal should be. All of that will now be for the First-tier Tribunal's good judgment.
59. This appeal to the Upper Tribunal is allowed on the basis and to the extent explained above.

**Authorised for issue on**
**13 September 2024**

**Thomas Church**
**Judge of the Upper Tribunal**