

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 5 March 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 5 March 2018 is in error of law. The error of law will be explained in greater detail below.
2. Pursuant to the powers conferred on us by Article 15(8) of the Social Security (Northern Ireland) Order 1998, we set aside the decision appealed against.
3. We are able to exercise the power conferred on us by article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which we consider the appeal tribunal should have given as we can do so having made a further finding of fact. The fresh finding in fact is outlined below.
4. Our substituted decision is that the appellant is entitled to the enhanced rate of the care and mobility components of Personal Independence Payment (PIP) from and including 21 June 2017.

Background

5. The appellant had enjoyed previous awards of disability living allowance (DLA) continuously from 14 November 1995. Most recently, she was awarded the high rate of the mobility component and the high rate of the care component of DLA from 25 September 2009 for an indefinite period. As her DLA award was due to terminate under the provisions of the Welfare Reform (NI) Order 2015, she was invited to claim personal independence payment (PIP) by the Department for Communities (the

Department). She duly claimed PIP from 27 February 2017 on the basis of needs arising from mental health issues, bipolar disorder and personality disorder, depression, and rubeotic glaucoma.

6. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and she returned it to the Department on 13 March 2017. She was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 11 May 2017. On 22 May 2017 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 27 February 2017. The appellant requested a reconsideration of the decision, submitting further evidence. She was notified that the decision had been reconsidered by the Department and that she had been awarded the standard rate of the daily living component from 21 June 2017 to 10 May 2021. Nevertheless, she appealed.
7. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 5 March 2018 the tribunal allowed the appeal, awarding the enhanced rate of the daily living component and the standard rate of the mobility component from 21 June 2017 for a fixed period of five years. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 6 July 2018. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 14 August 2018. On 13 September 2018 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

8. The appellant, represented by Law Centre (NI), submits that the tribunal has erred in law on the basis that:
 - (i) it had not given any reasons for time-limiting the award to five years;
 - (ii) it had failed to make adequate findings of fact in relation to mobility activity 2.
9. The Department was invited to make observations on the appellant's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs accepted that the tribunal had erred in law as alleged in the first of the two grounds and he indicated that the Department supported the application.

The tribunal's decision

10. The LQM has prepared a statement of reasons for the tribunal's decision. From this it can be seen that the tribunal had documentary material before it including the Department's submission containing the

questionnaire completed by the appellant and the consultation report from the HCP. It also had a letter from the appellant's general practitioner (GP) dated 8 February 2018 and access to her medical records. The appellant attended the tribunal hearing and gave oral evidence. She was represented by Mr McCloskey of Law Centre NI, who provided a written submission to the tribunal. The Department was represented by Ms Muldoon.

11. The tribunal accepted that the appellant satisfied scoring criteria within the daily living activities of Preparing food (descriptor 1(d)), Managing a therapy or monitoring a health condition (descriptor 2(b)(ii)), Washing and bathing (descriptor 4(c)), Dressing and undressing (descriptor 6(c)(ii)), Communicating verbally (descriptor 7(c)), Engaging face to face with other people (descriptor 9(c)) and Making budgeting decisions (descriptor 10(b)), awarding 17 points. It found that she should be awarded points for Planning and following journeys (descriptor 1(e)), awarding 10 points for the mobility activities. In relation to mobility activity 2, the tribunal observed that nothing in the GP records indicated that the appellant had a physical health condition that would impact on her ability to walk and that nothing in recent records indicated that previously reported problems with fatigue and breathlessness were still prevalent. It observed that the HCP had found a good range of movement. It found that the appellant used moderate pain relief for a back condition, with no specialist referral. It noted that a mobility scooter used by the appellant had been self-purchased and not prescribed. While noting the previous award of high rate mobility component of DLA, it found that evidence of the appellant's current situation did not indicate substantial problems with moving or walking around.

Relevant legislation

12. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.
13. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a claimant who obtains a score of 12 points will be awarded the enhanced rate of that component.
14. The first ground of appeal is addressed to the adequacy of the tribunal's reasons for fixing the duration of the award it made. The legislative

provisions dealing with the duration of an award of PIP are found at Article 93 of the Welfare Reform (NI) Order 2015. This provides:

93.—(1) A person is not entitled to personal independence payment for any period before the date on which a claim for it is made or treated as made by that person or on that person's behalf.

(2) An award of personal independence payment is to be for a fixed term except where the person making the award considers that a fixed term award would be inappropriate.

(3) In deciding whether a fixed term award would be inappropriate, that person must have regard to guidance issued by the Department.

(4) Information supplied under this Part is to be taken for all purposes to be information relating to social security.

15. The second ground of appeal is addressed to mobility activity 2. This sets out the descriptors for awarding points as follows:

2. Moving around.

a. Can stand and then move more than 200 metres, either aided or unaided.	0
b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.	4
c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.	10
e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
f. Cannot, either aided or unaided, –	12
(i) stand, or	
(ii) move more than 1 metre.	

Interlocutory matters

16. On 5 February 2019 the Commissioner issued a direction to the parties. This was as follows:

In *RS v Secretary of State for Work and Pensions* [2016] UKUT at paragraph 41, it would appear that Upper Tribunal Judge Mitchell found that no guidance had been issued under s.88(3) Welfare Reform Act 2012 - the Great Britain equivalent of Article 93(3) of the Welfare Reform (NI) Order 2015. It would appear that he disregarded the Great Britain equivalent of the Advice for Decision Making Guide which has been referred to in the submissions of both parties. However, in each of the submissions from the parties, it is implied that paragraph P2062 of the Advice for Decision Making Guide may be relevant to the question before a tribunal.

Please clarify,

- (i) Do you submit that paragraph P2062 of the Advice for Decision Making Guide amounts to “guidance issued by the Department” under Article 93(3) of the Welfare Reform (NI) Order 2015?
- (ii) If so, what do you say in response to the analysis of Judge Mitchell at paragraphs 41-46 of *RS v SSWP*?
- (iii) If there was a failure to issue guidance under Article 93(3), what criteria would be relevant for a tribunal to decide that an award for a fixed term was inappropriate and where might such criteria be derived from?

17. The parties duly responded. Mr Arthurs for the Department stated:

“We do not submit that P2062 of the Advice for Decision Makers Guide (ADM) amounts to guidance in isolation however we would submit that paragraphs P2062 to P2065 would amount to guidance issued by the Department. These paragraphs are as follows:

P2062 Where following an assessment consultation, it is considered that the claimant has

1. a level of functional ability which is not likely to change in the long term or
2. high levels of functional impairment which are only likely to increase

a fixed term award will be inappropriate and an on-going award with a Personal Independence Payment award review date after 10 years will be applicable.

Note: this is the guidance issued by the Department in accordance with legislation.¹

¹ *WR (NI) Order 15, art 93(2)*

P2063 When deciding the duration of an award¹ of Personal Independence Payment the decision maker should look at all the evidence and facts of the case, including the advice from the Healthcare Professional. There will be two types of fixed term awards

1. short fixed term awards, which will be for a minimum of 9 months and a maximum of 2 years or
2. longer fixed term awards, where the decision maker will set an expiry date 12 months after the date on which the claimant is due to be referred to the Healthcare Professional for a review or [sic]

Note: Decision makers will also have a role in deciding the Personal Independence Payment Award review date which will be detailed in the decision maker's procedural guidance.

1 WR (NI) Order 15, art 93(2)

P2064 When deciding the length of the award the decision maker will have regard to

1. the advice from the Healthcare Professional, within the Personal Independence Payment assessment report and
2. any further evidence gathered by the Healthcare Professional and
3. the evidence given by the claimant in the questionnaire (How your disability affects you), and any additional information supplied by the claimant.

Note: Decision makers should refer to the procedural guidance on Award Periods and Reviews (within the Decision Making Process Guidance), when deciding the length of the award and setting review periods.

P2065 The advice on prognosis from the Healthcare Professional advising when they wish to see the claimant again in accordance with P2066 - P2067, will have had consideration as to

1. whether there is likely to be an improvement or deterioration in the disability or its functional effects and
2. whether further treatment is required and
3. the time any improvement or deterioration is likely to be expected and
4. the natural progress of the underlying condition and
5. any adjustments and adaptations.

As we consider this to be the guidance issued by the Department we have no comments to make on the analysis of Judge Mitchell in Upper Tribunal decision *RS v SSWP* [2016] UKUT.

If the Department had not issued guidance then it would be a matter for the Tribunal to assess all the scheduled evidence before it and with the benefit of having the GP notes and records and the expertise of the Medically and Disability Qualified Members, it can make an informed decision as to the nature and length of the award. Factors to be considered in determining the award would include the claimant's condition and functional restrictions and the likelihood of any improvement or deterioration that would impact on the functional restrictions, whether any reasonable adjustments could be made that would assist the claimant. As well as this the Tribunal would obviously have to consider the relevant legislation".

18. For the appellant, Mr McCloskey also submitted that the Departmental guidance at paragraphs 2062 and 2064 of the Advice for Decision Making Guide amounted to guidance issued under Article 93(3) of the Welfare Reform (NI) Order 2015. He referred to the Great Britain version of the guidance, and submitted that this was the guidance before Judge Mitchell in *RS v SSWP*. However, he suggested that the footnote referencing the Great Britain equivalent of the Welfare Reform Order may have been inserted after Judge Mitchell's decision. Nevertheless, he submitted that a tribunal will not be bound by the Departmental guidance, provided that reasons are given for departing from it. He submitted that tribunals may have information that was not before the first instance decision maker and that any prognosis by the HCP should be considered in the context of information that was not available at the time of the face to face assessment.

19. Mr McCloskey submitted that the duration of an award is an appealable element of a decision and therefore it is necessary to provide adequate reasons for the duration of the award.
20. On 15 May 2019 the Chief Social Security Commissioner decided that the provisions of Article 16(7) of the Social Security (NI) Order 1998 were satisfied and that, as this appeal involved a question of law of special difficulty he directed that it should be dealt with by a Tribunal consisting of three Commissioners.
21. By a further direction of 4 December 2019, we granted leave to appeal. We directed an oral hearing of the appeal and invited argument on particular issues, including:
 - (a) whether the expression “the person making the award” in article 93(2) of the Welfare Reform (NI) Order 2015 includes a tribunal determining an appeal;
 - (b) if so, whether a tribunal, is required to have regard to the guidance issued by the Department when considering whether a fixed term award is inappropriate;
 - (c) if remitting an appeal to a newly constituted tribunal, whether a Commissioner can direct the tribunal to consider the duration of an award as a discrete issue,
 - (d) while maintaining the rate of entitlement.

Hearing

22. At the oral hearing of the appeal, the appellant was represented by Mr McCloskey of Law Centre NI. The Department was represented by Mr Arthurs of Decision Making Services. We are grateful to the parties for their helpful submissions.
23. At the outset, we asked Mr McCloskey to clarify whether the tribunal was specifically asked to address the duration of the award. The written record of the tribunal proceedings did not expressly refer to a submission that the appellant was seeking an indefinite award. However, we accepted the submission of Mr McCloskey, who had represented the appellant before the tribunal, that she was particularly focused on the duration of the award and that duration was certainly raised in the course of the tribunal hearing.
24. Mr McCloskey outlined the nature of the tribunal’s duty to give reasons, submitting that the appellant should be able to understand both nature of any award made and its length. He submitted that the duration of an award should be explained in terms such as the possibility of improvement of a condition or conflict in evidence, unless it was obvious, for example from scheduled surgery.

25. While accepting the general premise advanced by Mr McCloskey, Mr Arthurs submitted that it was only if duration was specifically raised by an appellant that a failure to give reasons would amount to an error in law. Whereas generally it might be beneficial to have reasons, if an award for a particular duration was not asked for, a failure to give reasons would not be erroneous in law. He suggested that it may be disproportionate to ask tribunals to give reasons in all cases where duration might matter to the appellant only in a few.
26. As to the evidence relevant to the duration of an award, the parties generally submitted that it could be based on direct evidence of prognosis, the expertise of the specialised panel members and the contents of the GP records.

Analysis

27. There are three issues for determination.
28. The first is the adequacy of the appeal tribunal's reasons for the level of the award. We can deal shortly with the substantive aspect of this issue. The reasons given by the tribunal for an award, to the effect that there were no, or no significant physical difficulties in walking, were insufficient to enable the appellant to understand why her contentions were rejected. That was particularly important in light of her previous DLA award of the higher rate of mobility. Although this tribunal understands that the criteria for DLA and PIP differ, the higher rate mobility award would suggest physical walking problems that would score some points within the descriptors in the PIP schedule, and a complete absence of those required explanation. The inadequacies will become clear when we examine the medical evidence in relation to our conclusions.
29. The second issue is the adequacy of reasons in making a fixed term award. The starting point for an award of PIP is that it is for a fixed term. This is set out in paragraph 2 of Article 93(2) The Welfare Reform Order, above. The award is to be for a fixed term except where the person making the award considers that would be inappropriate. The wording places an onus on the person making an award to consider whether a fixed term would be inappropriate. Those considerations require some explanation, as does the length of any fixed term award made.
30. We appreciate that these are essentially issues of judgment, and cannot be explained to a nicety; nonetheless, some reasoning is necessary to explain to somebody why, for example, a two-year award has been made, rather than, say, a ten-year award. In *C2/09-10(DLA)*, the then Social Security Commissioner said the following, at paragraphs 43 to 47:

'43. Of course the appeal tribunal is entitled to make an award of DLA for a fixed period.

44. Section 71(3) of the Social Security Contributions and Benefits (Northern Ireland) Act, as amended, provides that a 'person may be awarded either component for a fixed period or for an indefinite period.'
45. In making an award for a fixed period the appeal tribunal is also entitled to disagree with the Department's alternative view that the award should be for an indefinite period.
46. The duties of an appeal tribunal, in determining an appeal against a decision of the Department, were comprehensively analysed and reviewed by a Tribunal of Commissioners in Great Britain in *R(IB)2/04*. At paragraph 55(2) of their decision, and in referring to parallel decision-making legislative provisions in Great Britain, the Commissioners state:

'Taking first the position of an appeal against the initial decision on a claim, the section 8 outcome decision under appeal will have been either to award or not to award benefit. As described above (paragraphs 24-26), unless there is some express provision to the contrary, the appeal tribunal's jurisdiction on the appeal is to make any decision which the Secretary of State could have made on the claim (although in doing so it need not consider any issues not raised by the appeal). That seems to us to follow simply from (a) the decision under appeal being generally an outcome decision deciding entitlement to benefit on the claim and (b) the appeal being a full appeal by way of rehearing on fact and law. In short, the appeal tribunal either upholds the Secretary of State's decision or holds it to have been wrong: but, if the latter, it goes on to make the decision on the claim which it considers the Secretary of State ought to have made. This may involve the appeal tribunal considering issues which have not been considered by the Secretary of State.'

It is clear, however, that where an appeal tribunal makes a decision that an award of entitlement to DLA should be for a fixed period then the appeal

tribunal, in its statement of reasons, should provide an explanation as to why the award is for such a fixed period. Support for that conclusion is to be found in the decision of the Chief Social Security Commissioner in *C6/94(DLA)*. In that decision, the Chief Social Security Commissioner was discussing the making of awards of DLA in the context of a general provision relating to the duration of awards. Nonetheless, his remarks concerning the requirement for a clarification of the reasons for the limitation of an award remain applicable.

47. The Chief Social Security Commissioner made it clear that the requirement to explain a limitation in award is not onerous. He described it, in paragraph 7, as the appeal tribunal making it:

‘... clear that they have considered the point and explain in brief terms why they have decided that the award should be for the fixed period which they have selected, ...’

48. In the present case, nowhere in the statement of reasons is there any indication as to why the appeal tribunal decided that a limited award of the lowest rate of the care component was appropriate. Accordingly, the minimal requirements set out in *C6/94 (DLA)* are not met and the decision of the appeal tribunal is in error of law for failing to meet those minimal requirements.’

31. It is axiomatic that we appreciate that the DLA and PIP are two different social security benefits with their own discrete rules of entitlement. Nonetheless, we are of the view that the general principle set out in *C2/09-10(DLA)* is applicable to adjudication in connection with entitlement to PIP.
32. Applying the principle in *C2/09-10(DLA)* the tribunal here failed to explain why it limited its award to 5 years. This was significant because of the chronic nature of the appellant’s conditions both physical and mental. Accordingly, the omission amounts to a material error of law.
33. This aspect of the judicial decision-making process requires further consideration under the third issue, which is the place of the Guidance.
34. On its face, Article 93(3) requires the person making an award of PIP to have regard to the guidance issued by the Department on the duration of the award. This raises three questions, however. Firstly, does the expression “the person making the award” refer only to a first instance

Departmental decision maker, or does it also refer to appellate bodies, which might potentially include the tribunal, the Commissioner, the Court of Appeal or the Supreme Court? Secondly, if it does refer to those appellate bodies, what is the effect of the expression “have regard to” and to what extent does it constrain the exercise of that body’s judgment? Thirdly, if it can constrain the exercise of that body’s judgment, how does the fact that an independent appellate body might be constrained by guidance issued by a party in the proceedings affect the fairness of those proceedings, and to what extent is it compatible with Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) as it applies in Northern Ireland under the Human Rights Act 1998 and the Northern Ireland Act 1998.

35. In *RS v SSWP* [2016] UKUT 9, at paragraphs 81-82 Judge Mitchell agreed with the submission of the Secretary of State for Work and Pensions that the equivalent provision in Great Britain applied to the First-tier tribunal. However, since it was accepted in that case that no guidance had in fact been issued by the Secretary of State, his comments were *obiter*. In the present case, the Department submitted that the position adopted by Judge Mitchell was correct, and acknowledged that his observations implied that, not only did the guidance apply to tribunals, it also applied to the Commissioner and Courts. Mr McCloskey, for the appellant, submitted initially that this position was correct, but resiled from it in further submissions. He observed that a Commissioner would be obliged to have regard to Departmental guidance by this principle, even where the Departmental guidance might reflect an erroneous understanding of the law. He submitted that a tribunal being required to have regard to guidance issued by a party in an appeal before it might breach the right to a fair hearing guaranteed by Article 6 ECHR.
36. In general, social security adjudication is based upon regulations. Whereas statute law typically gives the broad outline of the conditions of entitlement to a benefit, the finer details are typically derived from secondary legislation. The Department employs guidance, such as the Advice for Decision Makers Guide (or the PIP Assessment Guide in Great Britain) to assist its own staff in the interpretation of what the regulations mean and what actions they may require. However, there is ample case law to demonstrate that the Department’s guidance on the interpretation of regulations is not binding on bodies other than Departmental staff. For example, Judge Wikeley in *YW (dec’d) by MM v SSWP (PIP)* [2017] UKUT 0042 said:

“25. It is well-established that the PIP Assessment Guide is not legally binding (see e.g. Judge Markus QC in *PS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 326 (AAC) at paragraph 12). Thus, according to Judge Williams, “it must be emphasised that this guidance reflects the view of the Secretary of State and advisers. It is not the law” (see *MF v Secretary of State*

for *Work and Pensions* (PIP) [2015] UKUT 554 (AAC) at paragraph 22).

26. Accordingly in *MM and BJ v Secretary of State for Work and Pensions* (PIP) [2016] UKUT 490 (AAC) Judge Wright struck the following cautionary note:

“The PIP Assessment Guide in particular is no more than the DWP’s view of how the regulations once enacted were thought to apply for the benefit of those carrying out the PIP assessments. Its legal worth as a permissible aid to statutory construction therefore seems negligible, if not non-existent” (at paragraph 33).”

37. The same approach to Departmental guidance has been followed in Northern Ireland, for example by Commissioner Stockman in *MG-v-Department for Social Development* [2013] NI Com 359 at paragraph 32.
38. In social security law, it is quite unusual for guidance to be referred to directly in primary legislation as in the present case. Apart from the old Social Fund, which involved discretionary decisions, it is not a familiar mechanism to social security lawyers. As noted above, the SSWP had not yet issued guidance in Great Britain at the time Judge Mitchell was hearing *RS v SSWP*, perhaps suggesting that the approach was unfamiliar to the SSWP also. As we have also seen, even when it was issued, the guidance was not contained in a separate document. Rather, text was inserted to the Advice for Decision Makers Guide – the Northern Ireland equivalent of the PIP Assessment Guide - at paragraph 2062, in the form of a footnote reading:

“Note: this is the guidance issued by the Department in accordance with legislation.¹

1 WR (NI) Order 15, art. 93(2)”

39. While the Advice for Decision Makers Guide is accessible online, this was a relatively obscure way in which to issue statutory guidance. We observe that the guidance was not referred to in the standard Departmental submission made to the tribunal in this case, and understand that it is not made known in submissions by the Department generally to tribunals hearing PIP appeals. For good measure, we further observe that the footnote contains a typographical error, as the guidance is actually referred to by Article 93(3), rather than 93(2) of the 2015 Order. This accidental error has no particular significance, other than to reinforce the impression that the material is not externally focused.

40. For all these reasons, the guidance appears to have characteristics of internal material addressed to the Department's own decision makers, rather than other bodies involved in different tiers of adjudication. There is nothing to suggest that the guidance at paragraph 2062 should be considered by tribunals to have any greater authority than more general guidance issued by the Department in the rest of the Advice for Decision Makers Guide, as referred to above in the cases of the Upper Tribunal in Great Britain and the Commissioner in Northern Ireland. Moreover, if the Department expected that tribunals would be bound to have regard to this guidance, we would anticipate that it would have informed tribunals of its content.
41. It further seems to us that, had the content of the guidance had been targeted at all levels of decision makers, then the more obvious mechanism for doing that would have been to put the provisions on the duration of PIP awards into regulations. Those are unambiguously binding at all levels of adjudication. However, by not putting the provisions into regulations, it would appear more likely that the Department did not intend them to bind tribunals.
42. Indeed, as observed above, the Department guidance further provides at paragraph P2063 for "short" fixed term awards and "longer" fixed term awards, referring again to Article 93(2) in a footnote in a manner indistinguishable from P2062. However, the legislation makes no mention of those categories of fixed term award. The requirement to have regard to guidance referred to in Article 93(3) is for the sole purpose of determining only whether a fixed term award is inappropriate. Mr Arthurs submitted at hearing that the tribunal would also be required to have regard to the guidance on short and longer fixed term awards. However, as Article 93 does not refer to these sub-categories of fixed term award, there is no legislative basis for that submission.
43. Further, by P2063, the decision maker is to have regard to the evidence in fixing the duration of any fixed term award. Where a longer fixed term award is made, it is to be fixed to expire 12 months after the date on which the claimant is due to be referred to the HCP for a review. The function of review and reference to the HCP is limited to Departmental decision makers. It has no relevance to tribunals, who have no knowledge of such matters as they are internal to the Department. However, on the face of the guidance, no distinction is made between the footnotes to P2062 and P2063 to imply that they are targeted at different levels of decision maker. As P2063 can only be of relevance to the Department, the inference is that P2062 is similarly exclusively of relevance to the Department.
44. In holding that the guidance was applicable to tribunals, Judge Mitchell in *RS v SSWP* considered the requirement on local authorities in England and Wales to have regard to guidance issued by central government. He considered the case of *London Borough of Newham v Khatun & Others* [2004] EWCA Civ 55 (*Khatun*). The principle in *Khatun* was cited with

approval by Baroness Hale in the Supreme Court decision in *Nzolameso v City of Westminster* [2015] UKSC 22, namely that local authorities were required to take central government guidance into account, but that if they decide to depart from the guidance, they must have clear reasons for doing so. We do not differ from that proposition, but we do not consider that it applies in the present context: the circumstances in *Khatun* differ materially from those before us.

45. The Court in *Khatun* was dealing with a judicial review. It was not deciding the original points at issue between the parties, but whether the decision made by a Local Authority Housing Officer had been made following the correct process. Part of the process was that the housing officer should consult a specific document; that was a relevant consideration for the court because it bore upon the issue of whether the initial decision-making process had been proper. The case is not authority for the proposition that a judicial body must take account of such a document in its decision.
46. Further, the question here is different. It is not about whether the decision-maker took account of the Departmental Guidance: the tribunal decides the case *ab initio*. It has been said that the tribunal on appeal from a Departmental decision maker “stands in the shoes” of the decision-maker (*R(IB)2/04*). The Department’s argument is that if the tribunal stands in the shoes of the decision-maker it must take into account anything that the decision-maker had to consider; but that is to misunderstand the position. References in case law to the tribunal standing in the shoes of the Secretary of State (and therefore the Departmental decision-maker) refer to the hearing being a completely fresh one; to use the legal jargon, a hearing *de novo*. The tribunal is not scrutinising the decision-making process before it; it is making its own decision based on the evidence and such extraneous material as, in its own independent judgment, it considers relevant.
47. Such a judicial body cannot be constrained in its remit or deliberations; it cannot be directed as a matter of law to pay specific attention to an extra statutory document drafted by one party. Of course, that party can put the same document before the tribunal within its evidence or submissions. Then, under the usual judicial process, the tribunal will read the document and decide on its relevance or otherwise; where it is of relevance a tribunal will have to explain what it has made of the document: that is the nature of litigation.
48. It is important where one party to litigation is the State, that the boundaries between legislation and rules of procedure are respected. The distinction between the two positions is a subtle but important one. It turns on the ability of one party to litigation being able, without so much as filing a submission, to direct the tribunal to take notice of documents that form no part of the legislation.

49. Although the party can put itself in the same position by putting the document before the tribunal in each case, to allow that position from the outset, where it can direct a judicial body to consider certain documents or arguments without specifically putting them forward in each case, contravenes the condition of equality of arms in Article 6 of the European Convention of Human Rights (ECHR).
50. In a case such as this, if making its own decision on an appeal, a tribunal must be free to determine the question of whether a fixed term award would be inappropriate on the evidence before it, exercising independent judgment. In remaking the decision before us we now have regard to the Departmental Guidance because it has been, in effect, pleaded. We do not have regard to it because we are bound to do so under the Welfare Reform Order.
51. To conclude this issue, we take note of the rights of appellants under Article 6 of the ECHR to “a fair and public hearing ... by an independent and impartial tribunal”. We do not consider that a tribunal, which is mandated to be independent by Article 6, can be required to have regard to guidance issued by one of the parties to an appeal before it. If there was any remaining doubt as to whether the tribunal was obliged to have regard to the guidance, our construction of Article 93(3) of the Order - as further informed by Article 6(1) – leads us to interpret it in a manner consistent with the independence of the tribunal. This means that Article 93(3) cannot be read as requiring a tribunal to have regard to guidance issued by the Department.
52. Even if we are wrong about that, we consider that the height of any obligation on tribunals is to “have regard to” the guidance. The guidance itself indicates that a fixed term award is likely to be inappropriate where the claimant has a level of functional ability which is not likely to change in the long term, or high levels of functional impairment which are only likely to increase. This is not a particularly contentious formulation, as it reflects basic common sense and pragmatism when it comes to fixing the duration of an award. It is also sufficiently general to be met in a variety of specific circumstances.
53. More practically, in the particular case, there is nothing to indicate that the Department alerted the tribunal to the existence of guidance under Article 93(3) in its submission. If the policy had not been communicated to the tribunal in the present case, we cannot accept that it was required to have regard to it; even less can the tribunal be held to have fallen into error of law in not doing so.

Disposal

54. We have found, in paragraph 31 above, that the reasons given by the tribunal for an award, to the effect that there were no, or no significant physical difficulties in walking, were insufficient to enable the appellant to understand why her contentions were rejected. We repeat that that was

particularly important in light of her previous DLA award of the higher rate of mobility. It is axiomatic that we accept that the criteria for entitlement to DLA and PIP differ, nonetheless, the higher rate mobility award would suggest physical walking problems that would score some points within the descriptors in the PIP schedule, and a complete absence of those required explanation.

55. The award of entitlement to the higher rate of the mobility component of DLA was from and including 25 September 2009. We have been given access to extracts from the appellant's General Practitioner (GP) records which go back to before that date. From these we can understand why a decision was made that the appellant was virtually unable to walk, that being the test for entitlement to the higher rate of the mobility component. Thus, for example, in a Factual Report dated 9 January 2007, her GP states:

'Has loss of sight right eye. Gait and mobility impaired by back pain.'

56. In February 2008 there is the following entry:

'Back pain since 2004. Affects all of her back, different areas worse at different times. Pain radiates to both her legs which is present much of the time. At times she cannot get out of bed because of the pain and then she cannot wash or dress. At best she can walk 30-40m. She rarely does her own shopping and her friends help with cleaning. She says it began in 2004.'

57. In correspondence dated 25 August 2009, her GP states:

'This lady wishes to be considered for high rate mobility allowance. She has suffered from chronic back pain since 2004 and also has no vision in her right eye. She has iritis in her left eye so has significantly reduced vision when this flares up. She can walk less than 30m.'

58. These are but three of numerous records of significant impairment in mobility.

59. The appellant's claim to PIP was from 21 June 2017.

60. In her claim form to PIP, the appellant stated that she had 'bone tissue missing of my spine ... caused serious back pain.' She referred to abscess surgery in 2015. She stated that getting around was 'slow' and that she bumped into things because of her eyesight problems. She asserted that she would need a taxi if she was required to go for an assessment. In her notice of appeal, the appellant stated that she had severe pain in her back.

61. An entry in the GP records on 19 October 2015 notes that 'she remains in pain and feels tired'. On 17 February 2016 a request for a change in her medication for pain is noted. On 26 April 2016 the GP notes the appellant's back pain and that she was exhausted.
62. In correspondence dated 7 June 2017 in support of her appeal, her GP states:

'(The appellant) ... has tended to neglect her physical health and she suffered a severe abscess requiring hospital admission in September 2015.'
63. There are two further entries in her GP records on 20 and 23 June 2017 about the appellant's problems with an abscess on her leg. It is noted that she required emergency admission to hospital for surgery and that the GP was making arrangements for an ambulance to take her. This further episode suggests that her problems were ongoing.
64. In the GP records there are ongoing and frequent records of prescriptions for ... medications for pain. There are numerous references to the GP making arrangements for an ambulance to bring the appellant to the surgery and to hospital for appointments.
65. We are satisfied that the appellant's problems with back pain and abscesses are chronic.
66. We are satisfied, therefore, that there have been no changes in the impairment of the appellant's mobility since the date of the award of entitlement to higher rate of the mobility component of DLA. Indeed, it is arguable that her physical condition is worse. Based on the evidence which is before us, we find as a fact that at the date of claim the appellant can stand and then move unaided for more than 20 metres but no more than 50 metres.
67. Accordingly, we are satisfied that the appeal tribunal should have applied descriptor (c) in Activity 2 in Part 2 of Schedule 1 to the 2016 Regulations. Descriptor (c) attracts a score of 8 points. We add those 8 points to the 10 points awarded by the appeal tribunal as a consequence of its application of descriptor (e) of Activity 1 in Part 2 of Schedule 1 to the 2016 Regulations. That gives the appellant a total score of 18 points gaining her an entitlement to the enhanced rate of the mobility component of PIP – regulation 6(3)(b) of the 2016 Regulations.
68. We turn to the duration of the award which we have made.

Duration

69. As was noted above, the starting point for an award of PIP is that it is for a fixed term. The award is to be for a fixed term except where the person making the award considers that would be inappropriate. The wording

places an onus on the person making an award to consider whether a fixed term would be inappropriate.

70. The appeal tribunal thought that a fixed-term award of five years was appropriate. We consider that a fixed term award would be inappropriate. We have noted that the award of DLA, when made, was for an indefinite period. A decision maker decided that it was unlikely that there would a change in the circumstances giving rise to the award. We can understand why the decision maker arrived at that conclusion. Given the chronicity of the appellant's medical conditions it was unlikely that there would be any dramatic change to her ability to function and mobilise. Based on the evidence which is presently before us, we have concluded that there has been no further change in the appellant's medical conditions. As such we conclude that her ability to carry out daily living activities or mobility activities is equally unlikely to change. The guidance, to which we have also had regard, indicates that a fixed term award is likely to be inappropriate in those circumstances.
71. For the reasons which we have set out above this appeal to the Social Security Commissioners is allowed.

(signed): K Mullan

Chief Commissioner

O Stockman

Commissioner

Paula Gray

Deputy Commissioner (NI)

14 February 2022