IN THE UPPER TRIBUNAL **Case No. CPIP/3759/2016**

ADMINISTRATIVE APPEALS CHAMBER

Decision:

The decision of the First-tier Tribunal of 22 August 2016 is wrong in law for the reasons set out below. I set that decision aside and remit the case to the First-tier Tribunal (Social Entitlement Chamber) for reconsideration by a differently constituted Tribunal, which should conduct a complete rehearing of the matter.

Background and procedural history

1. The appeal relates to the personal independence payment ('PIP'), in particular, whether the claimant was entitled to the mobility component of PIP.

2. The claimant is a woman now aged 48 who suffered from right-sided hemiplegia, expressive dysphasia and memory problems (following a stroke in 2000), as well as depression.

3. The claimant had been awarded the mobility component of disability living allowance ('DLA') at the higher rate and the lowest rate of the care component of DLA. On 15 May 2015 she made a telephone claim for PIP.

4. On 23 July 2015 a decision-maker decided that the claimant's entitlement to DLA would end on 25 August 2015. From 26 August 2015 the claimant was awarded the daily living component of PIP at the enhanced rate. There was no award of the mobility component of PIP as the decision-maker gave the claimant a score of only four points for the mobility activities. Those four points were for descriptor 2(b) 'Can stand and then move more than 50 metres but no more than 200 metres either aided or unaided'.

5. On 22 September 2015 the decision of 23 July 2015 was reconsidered but not changed.

6. On 25 May 2016 the claimant appealed against the decision of 23 July 2015.

7. On 22 August 2016 the First-tier Tribunal (the 'FtT') heard and allowed the claimant's appeal. The claimant attended the hearing and was represented.

8. The FtT's decision was that the claimant scored ten points for mobility activity 1 (descriptor (d)) and four points for mobility activity 2 (descriptor (b)). The daily living activities award was confirmed.

9. The Secretary of State appeals against the decision of 22 August 2016 with the permission of a Judge of the Upper Tribunal. The original grounds of appeal were set out on form UT1 dated 5 December 2016 (see pages 181 to 182 of the Upper Tribunal bundle) and were, broadly, that the FtT erred in law in that:

   (1) they concluded that the claimant's satellite navigation system ('SatNav') was an 'orientation aid' for the purposes of mobility activity descriptor 1(d); and

   (2) the FtT misunderstood mobility activity descriptor 1(d) which was concerned with navigation only.

10. The appeal was stayed pending the decision of a three-Judge-panel in *MH & Others v Secretary of State for Work and Pensions [2016] UKUT 531 (AAC).*

11. On 15 February 2017, following the release of the decision in *MH*, the Secretary of State amended his second ground of appeal. Having accepted that descriptor 1(d) was not restricted to navigation alone but meant 'making one's way along a route or going along a route,' the Secretary of State's assertion was that the FtT had erred in law in disregarding the evidence before it that the claimant was able to follow a route (see paragraph 3 of the Response to Case Management Directions at page 187 of the Upper Tribunal bundle). In *MH* the three-Judge-panel decided that it was only if a claimant was suffering from 'overwhelming psychological distress' would anxiety be a cause of a claimant being unable to follow the route of a journey. That was not the case here.

12. On 26 July 2017 the Secretary of State confirmed that he was not seeking to challenge the award of the daily living component of PIP at the enhanced rate.

The appeal

13. An appeal to a Judge of the Upper Tribunal will be successful only if the decision of the tribunal below is erroneous in point of law. An appeal on a question of law is not a rehearing of all or parts of the evidence (*Yeboah v. Crofton [2002] IRLR 634*).

14. There will be an error of law if:

    (1) The tribunal got the law wrong.

    (2) The decision is not supported by the findings of fact made by the tribunal.

    (3) The tribunal's decision was perverse, in other words, on the basis of the facts as found no person acting judicially and properly instructed as to the relevant law could have come to that decision.

    (4) There has been a breach of natural justice.

    (5) The tribunal did not give adequate reasons for its decision.

Reasons for decision

15. In relation to the mobility component, the FtT awarded ten points for descriptor 1(d) (Planning and following journeys – Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid) and four points for descriptor 2(b) leading to an award of the mobility component of PIP at the enhanced rate. The FtT confirmed the award of the daily living component of PIP at the enhanced rate.

16. Descriptor (d) of mobility activity 1 is satisfied where a claimant 'cannot follow the route of an unfamiliar journey without another person, an assistance dog or orientation aid'. The FtT found that the claimant needed either an orientation aid or another person to be able to follow an unfamiliar route.

17. An 'orientation aid' is defined in paragraph 1 of Schedule 1 to the Social Security (Personal Independence Payments) Regulations 2013 (the 'PIP Regs') as:

    'a *specialist* aid *designed to* assist *disabled* people to follow a route safely.'

    (emphasis supplied)

18. The FtT found that the claimant had difficulties caused by the memory problems resulting from her stroke. She could not remember even familiar routes so every journey was unfamiliar to her in the sense that she had forgotten the journey each time she set out. She managed these difficulties by using a SatNav each time she went on a journey even if she had been on it before.

19. The FtT, having noted the definition in paragraph 1 of Schedule 1, decided that:

    (1) The use of a generic piece of technology in a way that was required because of a disability could 'transform' that item into a specialist aid. On this basis a generic SatNav could be a specialist aid.

    (2) The fact that an identical SatNav was used by people who did not have memory problems caused by a stroke as the claimant did, did not mean that her SatNav could not be 'considered a specialist aid for someone who uses it because of their stroke caused memory problems'.

    (3) The claimant used the SatNav on every journey because of the memory problems resulting from her stroke.

    The FtT therefore awarded the claimant ten points for mobility descriptor 1(d) on the basis that the claimant's SatNav was an orientation aid.

20. In order to qualify as an 'orientation aid' as defined an item must be an aid which is specialised in the sense that it has been <u>designed</u> for the specific purpose of assisting disabled people to follow a route safely. Where the item is not designed for that purpose the fact that it is used for that purpose by a disabled person does not convert it into an orientation aid. For this reason the FtT's decision is wrong in law.

21. My conclusion is consistent with the stated policy intention of the provision. Paragraph 6.8 at page 42 of the Government's Response to the Consultation on the Personal Independence Payment Assessment Criteria and Regulations (December 2012) indicates that only specialist SatNavs are to be considered orientation aids. 'Generically available' SatNavs are not 'because many people rely on them, whether or not they have a health condition or impairment.'

22. The District Tribunal Judge, in refusing the Secretary of State's application for permission to appeal against the FtT's decision, made two points in relation to the question of whether a SatNav could be an orientation aid:

    (1) The Secretary of State sought to rely on the decision of Upper Tribunal Judge Rowley in *RB v Secretary of State for Work and Pensions (PIP) [2016] UKUT 304 (AAC)* as authority for the proposition that 'unless the [claimant] can produce evidence that modifications have been made to an otherwise commonly available piece of equipment, it cannot be considered to be a 'specialist aid' for the purposes of the PIP Regulations…' The District Judge's view was that there was no principle of law that a generic SatNav could not be an orientation aid unless the claimant produced evidence of a modification to it.

    (2) The District Judge referred to "*SS v SSWP [2015] UKUT 240*" and said that Upper Tribunal Judge Wikeley had "found that an eye patch could be regarded as an orientation aid". The District Judge's view was that, as it was unlikely that eye patches were designed to assist disabled people to follow a route safely, it could be inferred that it was a claimant's use of the piece of equipment in his particular circumstances that was determinative, not the category into which the equipment fell.

I disagree with both of the District Judge's points.

23. In *CSPIP/229/2015* Upper Tribunal Judge May QC decided that a generically available unmodified SatNav was not an orientation aid as it could be used by anyone driving their car whether or not they had a health condition or impairment (see paragraphs 9 and 10). In *RB* Upper Tribunal Judge Rowley adopted a similar approach when she said (at paragraph 12) that a SatNav 'without a particular modification or specially designed feature as envisaged by the definition … will not, in my judgement, constitute an 'orientation aid' under mobility descriptors 1d and 1f'. The fact that the SatNav was built into a car obtained under the motability scheme, without more, was not sufficient.

24. Upper Tribunal Judge Rowley's remarks in *RB* were obiter (as she accepts at paragraph 7 of her decision) but those of Upper Tribunal Judge May QC in *CSPIP/229/2015* were not. I agree with both Upper Tribunal Judges and disagree with what the District Judge said in this regard. It is clear from the definition set out in paragraph 17 above that, in order to be an orientation aid, a SatNav must either have been specially designed or modified to assist the disabled in following a route safely.

25. The District Judge's reference to *"SS v SSWP [2015] UKUT 240"* was presumably to *Secretary of State for Work and Pensions v SS (PIP)* [2015] UKUT 240 (AAC) but, in that decision, Upper Tribunal Judge Wikeley expressly said (at paragraph 24) that, as it was not necessary for him to do so, he was not expressing a decided view on what he called the 'lurking issue' of whether an eye patch was an aid and/or an orientation aid.

26. There is nothing in the Statement of Reasons or the Record of Proceedings to indicate that the FtT sought to establish whether the claimant's SatNav had been modified or specially designed to assist her as a person disabled by memory loss. For this reason also its decision is wrong in law.

27. The basis on which the FtT found that the claimant needed to have another person with her in order to be able to follow an unfamiliar route is not clear to me.

28. For the reasons set out above the decision of the FtT is wrong in law. The appeal succeeds.

A L Humphrey

Upper Tribunal Judge

6 December 2017