

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Bristol First-tier Tribunal dated 5 June 2018 under file reference SC186/17/04244 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 1 September 2017 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

**DIRECTIONS**

**The following directions apply to the hearing:**

- (1) The appeal should be considered at an oral hearing.
- (2) The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member who previously considered this appeal on 5 June 2018.
- (3) The Appellant is reminded that the tribunal can only deal with the appeal, including her health and other circumstances, as at the date of the original decision by the Secretary of State under appeal (namely 1 September 2017).
- (4) If the Appellant has any further written evidence to put before the tribunal, and especially medical evidence, this should be sent to the HMCTS regional tribunal office in Cardiff within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (see Direction (3) above).
- (5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

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

## REASONS FOR DECISION

### **The Upper Tribunal's decision in summary and what happens next**

1. I allow the Appellant's appeal to the Upper Tribunal. The First-tier Tribunal's decision involves an error on a point of law. I therefore set aside the tribunal's decision.

2. The case now needs to be reheard by a new First-tier Tribunal (or "FTT"). I cannot predict what will be the outcome of the re-hearing. The fact that this appeal to the Upper Tribunal has succeeded *on a point of law* is no guarantee that the re-hearing of the appeal before the new FTT will succeed *on the facts*.

3. So, the new tribunal may reach the same, or a different, decision to that of the previous tribunal. It all depends on the findings of fact that the new tribunal makes. The previous FTT may or may not have come to the right decision on the facts; that assessment is not for me to make.

### **The background to this appeal to the Upper Tribunal**

4. The Appellant suffers from multiple physical and mental health conditions including anxiety and depression. Her fresh claim for personal independence payment (PIP) was initially scored at nil points for both daily living and mobility and so was refused. Following a request for mandatory reconsideration, the Appellant's score edged up to 2 points for daily living (preparing food; descriptor 1d) and 4 points for mobility (moving around; descriptor 2b), but plainly this was still not sufficient to qualify for PIP.

5. The Appellant then appealed to the FTT. Her representative, from Avon and Somerset Law Centre, put in a written submission arguing that the Appellant qualified for additional daily living descriptors 3b (1 point), 6c (2 points), 9c (4 points) and 10b (2 points) as well as mobility descriptor 1d (10 points). If all those points had been made out, the Appellant would have qualified for the standard rate of the daily living component (11 points) and the enhanced rate of the mobility component (14 points). The representative, in the submission for the FTT, seems to have suggested that she would qualify for the enhanced rate of both components but it seems to me something has gone awry with the representative's arithmetic.

6. Be that as it may, the FTT dismissed the appeal following an oral hearing. According to its decision notice, the FTT now scored the Appellant at 6 points for daily living (for descriptors 1d, 9b and 10b, all of which were dependent upon a finding of the need for prompting) and 4 points for mobility (the FTT expressed its doubts about the applicability of mobility descriptor 2b but left the matter undisturbed). As a result, the FTT, although it arrived at a higher score for daily living, confirmed the Secretary of State's decision not to make any award of PIP. In the subsequent application for permission to appeal, the Appellant's representative, argued that the FTT had failed to make sufficient findings of fact and/or give adequate reasons with regards to daily living activities 9 (engaging with other people face to face) and 10 (making

budgeting decisions), as well as mobility activity 1 (planning and following journeys).

### **The proceedings before the Upper Tribunal**

7. Upper Tribunal Judge Wright gave the Appellant permission to appeal in the following terms:

“2. This is an odd case because on the face of the Decision Notice the First-tier Tribunal **awarded** [the appellant] two points each for needing prompting (or assistance) to engage socially (activity 9) and needing prompting (or assistance) to make complex budgeting decisions (activity 10). However, in its statement of reasons the tribunal appears to have reasoned on the basis of an award of no points for either of these PIP daily living activities.

3. To the extent, however, that the tribunal awarded the two points the appellant sought for activity 10 (page 101), any deficit in its reasoning on activity 10 would seem to be immaterial to the decision it arrived at.

4. However, the position is arguably different on activity 9 as the dissonance between the Decision Notice and the statement of reasons suggests the tribunal may arguably have approached the issue of ‘social support’ from the wrong place in its reasoning (i.e. by not starting from the position that [the appellant] needed prompting (or assistance) to engage with others). Starting from the correct position (based on the Decision Notice), would have focused attention on whether what [the appellant] needed was social support *instead of* prompting, rather than whether she needed any help at all to engage with others.

5. I also give permission to appeal on the ground concerning mobility activity 1. In addition to the points raised in the grounds concerning use of the car (and Satnav etc), did the tribunal err materially in law in failing to address the point made in the submission made on page 102 about the PIP Assessment Guide and the ability to use public transport? In other words, did the tribunal err in law in concluding that an ability to follow an unfamiliar route whilst driving a car on her own meant the appellant could not satisfy either ‘following a route’ scoring descriptor under mobility activity 1?”

8. There have now been two rounds of written submissions in the Upper Tribunal proceedings. Ms J Blatchford, who now acts for the Secretary of State, supports the appeal to the Upper Tribunal and proposes that the FTT’s decision is set aside and the case remitted for rehearing. She contends that a decision without reasons is unnecessary. Mr J Mowll, for the Appellant disagrees. Given the need for greater clarity on the application of mobility activity 1, I find myself in agreement with Mr Mowll on this matter.

9. In summary, the present appeal succeeds on two grounds.

10. First, as Judge Wright identified, there was a clear and obvious contradiction between the FTT's Decision Notice (DN) and the Statement of Reasons (SoR) (which hardly inspires confidence in the FTT's overall fact-finding and reasoning). The DN was clear that 2 points were awarded for daily living activity 10, but the reasoning was opaque and could be read either in support of or against any such award. The contradiction between the DN and SoR over daily living activity 9 was stark, and problematic for the reason given by Judge Wright. Such a conflict, where material, will lead to the found to be in error of law and set aside: see e.g. the unreported Social Security Commissioners' decisions *CCR/3396/2000* and *CIS/2345/2001* and more recently *SSWP v C O'N (ESA)* [2018] UKUT 80 (AAC). Had the FTT found that descriptor 9c applied (rather than 9b), as the Appellant's representative had argued, then the Appellant would have reached the threshold of 8 points for daily living. This ground of appeal accordingly succeeds.

11. Second, the FTT erred in law in its approach to mobility activity 1 (planning and following journeys). As Ms Blatchford acknowledges, the FTT made multiple references in its reasons to the Appellant's ability to drive to familiar places. In effect, the FTT relied on its finding that the Appellant was able to drive as the sole determiner of her ability to follow the route of either a familiar or an unfamiliar journey. There are several difficulties with this approach. First, the FTT did not adequately investigate how the Appellant would manage on an unfamiliar journey (it found that she would do a 'practice run' but the reasons do not make it clear whether she would need to be accompanied when doing so). Second, the FTT did not consider whether the Appellant would need to be assisted for part of either a familiar or unfamiliar journey – Ms Blatchford contends that if the Appellant needed to be accompanied for parts of a journey outside her car, e.g. walking from a car park to the shops, whether that journey is familiar or unfamiliar, then she would potentially qualify for descriptors 1d or 1f. Third, the FTT's exclusive focus on the Appellant's ability to drive meant that it neglected to address the representative's argument that the Appellant could not cope with public transport. Although the *PIP Assessment Guide Part 2: The Assessment Criteria* (DWP, November 2018) is in no way determinative (see *SSWP v IV ((PIP))* [2016] UKUT 420 (AAC)), I note that it states that "A person should only be considered able to follow an unfamiliar journey if they would be capable of using public transport – the assessment of which should focus on ability rather than choice" (p.111). By the same token, as part of the overall and holistic assessment, a claimant's ability to plan and follow a journey on foot must be considered (see *MH v SSWP (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12 at paragraphs 37 and 44).

12. I therefore agree that the FTT erred in law for the reasons identified in the representatives' helpful submissions. I therefore allow the appeal, set aside the FTT's decision and remit (or send back) the original appeal for re-hearing before a new tribunal. As further facts need to be found, it is not appropriate for me to re-make the decision on the papers. I formally find that the FTT's decision involves an error of law on the grounds as outlined above.

**What happens next: the new First-tier Tribunal**

13. There will need to be a fresh hearing of the appeal before a new FTT. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or the Appellant is entitled to PIP (and, if so, which component(s) and at what rate(s) and for what period). That is all a matter for the good judgement of the new tribunal. That new tribunal must review all the relevant evidence and make its own findings of fact accordingly.

14. In doing so, however, unfortunately the new FTT will have to focus on the Appellant's circumstances as they were as long ago as September 2017, and not the position as at the date of the new FTT hearing, which will obviously be about two years later. This is because the new FTT must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The decision by the Secretary of State which was appealed against to the FTT was taken on 1 September 2017.

**Conclusion**

15. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Signed on the original  
on 3 June 2019**

**Nicholas Wikeley  
Judge of the Upper Tribunal**