IN THE UPPER TRIBUNAL **Appeal No: CDLA/799/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Fox Court on 2 August 2018 under reference SC242/17/02491 involved an error on a material point of law and is set aside.

The Upper Tribunal is not able to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing shall be at an oral hearing.

(2) The appellant is reminded that the tribunal can only deal with his situation as it was on or before 15 December 2016 and not any changes after that date.

(3) If the appellant has any further evidence that he wishes to put before the tribunal relevant to his health conditions and their affect impact on his care or mobility needs on or before 15 December 2016, this should be sent to the First-tier Tribunal's office in Sutton within one month of the date this decision is issued.

(4) The new First-tier Tribunal will need to have regard to the points made below.

REASONS FOR DECISION

1. I am satisfied in the light of the arguments made on this appeal that the First-tier Tribunal erred materially in law in its decision of 2 August 2018 ("the tribunal") and that its decision should be set aside and the appeal remitted to a completely differently constituted First-tier Tribunal to be redecided entirely afresh. Both parties agree with this result.

2. Put in general terms, the tribunal erred in law in its consideration of the test for the lowest rate of the care component ('lrcc) of Disability Living Allowance ("DLA") of requiring attention for "a significant portion of the day". This is set out in section 72(1)(a)(i) of the Social Security Contributions and Benefits Act 1992, which provides as follows.

> "72.-(1)Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which—
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> (a)he is so severely disabled physically or mentally that—
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> (i)he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods)"

3. Also relevant is section 72(1A)(b) of the same Act and its provisions that:

> "72.-(1A) In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, subsection (1) has effect subject to the
> following modifications…
> (b) none of the other conditions mentioned in subsection (1) shall be taken to be satisfied unless–
> (i) he has requirements of a description mentioned in the condition substantially in excess of the normal requirements of persons of his age, or
> (ii) he has substantial requirements of such a description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have."

4. The tribunal said the following of relevance about the lrcc in its reasoning.

> "8. The Tribunal held that [the appellant] did not satisfy [the needing attention for a significant portion of the day] test. [His mother] provides some attention with his bodily functions. [The appellant] has a mental disability in that he has been diagnosed with autism. Although the diagnosis was after the date of decision, the disability and its effect on his daily life were present at the date of decision. He was provided with assistance by his mother, but not at the school, at the date of decision. The bodily functions to which it relates are getting up, washing, dressing, eating and sleeping. The assistance is sufficiently intimate and personal to qualify as attention because it is delivered one to one directly by [the mother] to [the appellant]. We were satisfied there was a causal link between the bodily functions, the relevant attention and the relevant functional ability.
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> 9. However, the Tribunal held that the provision of such support does not satisfy the test of being for a significant portion of the day. Taking a broad-brush approach, we found that getting [the appellant] to wake up, get washed and dressed, to take food to his room and to settle him to sleep would take more than one and half hours per day. The Tribunal noted the guidance laid down in *Ramsden v SSWP* [2003] EWCA Civ 32 and *SSWP v Moyna* [2003] UKHL 44. We took a broad approach, as this was not a matter of arithmetical calculation.
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> 10. Furthermore, in addition to the previous conditions, [the appellant] must satisfy us that either his requirements are substantially in excess of the normal requirements of a person of his age; or he has substantial requirements which a younger person may also have but which children of his age would not have.
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> 11. The Tribunal was not satisfied that his requirements for such support in relation to his autism are substantially in excess of the normal requirements of a person of his age. Further, the Tribunal was not satisfied he has substantial requirements of such a description which younger person in normal physical and mental health may have also but which persons of his age and in normal physical and mental health would not have. We applied the guidance set down in *BM v SSWP* [2015] UKUT 18 AAC. His food is cut up and brought to him. His washing is supervised and his dressing is supervised with some assistance with buttons and shoelaces. He has to be woken in the morning and settled for sleep at night. Considering section 72(1A)(b)(i) are: normal healthy children of 13 require some assistance with their bodily functions. [The appellant's] requirements may be considered to be greater than those of normal healthy 13 year old children, but they are not substantially in excess of those usually required. Applying section 72(1A)(b)(ii) [the appellant's] requirements are not substantial; although they may be different from those of children of his age in normal and physical and mental health and younger children in in normal physical and mental health would be likely to have those requirements."

5. As can be seen from the above passages, the first basis for the tribunal concluding that no lrcc award was merited was because the qualifying attention of more than one and a half hours a day did not amount to a significant portion of the day. However, given the decision in *CDLA/58/1993* (where 'significant portion' was held to equate to an hour or thereabouts) and paragraph 39 of *Ramsden v SSWP* [2003] EWCA Civ 32; *R(DLA) 2/03* - "..while in broad terms it seems to me that a period of one hour.....would reasonably be regarded as a significant portion of the day..."), even if it was not irrational for the tribunal to conclude that more than 1½ hours of what it held **was** qualifying attention did not amount to a significant portion of the day, in my judgment the tribunal needed to provide more by way of reasoning to explain why it considered that the number of hours or parts of an hour it did accept amounted to qualifying attention (and it is noteworthy that the tribunal said *more than* one and half hours a day) did not amount to a significant portion of the day. It is of relevance in this regard, in my judgment, that the social security commissioner's decision quoted from in paragraph 40 of *Ramdsen* seemingly sought to distinguish *CDLA/58/1993* on the basis that periods of time of less than one hour may still nevertheless amount to a significant portion of the day.

6. Paragraphs [38] to [40] of Lord Justice Potter's judgment in Ramsden (with which Mr Justice Sullivan agreed, so it forms the judgment of the Court of Appeal) read as follows.

> "38. As already indicated, we have heard rival submissions, based on an examination of the evidence, as to whether, had the tribunal properly applied the Cockburn test, it would have made any difference to the tribunal's finding that attention was not required for a significant portion of the day. In this respect, Mr Blake submits that if, as he contends, the attention, properly assessed, was at or about the level of one hour a day then, on any view, that would amount to a "significant portion" of the day. In that respect he argued that the only sensible way in which to define or explore the meaning of "significant" was by equating it with the phrase "not insignificant", and that on that approach it was plain that attention to the incontinence of the applicant for one hour a day or thereabouts was "significant" so far as his mother or any carer was concerned.

39. I do not find such a method of definition of real assistance. If resort is to be had to the dictionary, the words of definition which precede Mr Blake's formula in the Concise Oxford Dictionary are: "of considerable amount or effect or importance". Those words seem to me to provide a more helpful guide to the meaning of the word "significant" in this context. It is clear to me that, when the word "significant" is applied to a part or portion of a day, its size or significance requires to be assessed as a percentage of the day as a whole. In this context, the word "day" is used in contrast to the word "night" (see section 72(1)(c)). It does not mean the period between sunrise and sunset but the period when, in accordance with the domestic routine of the household in which the disabled person lives, the household becomes active in the morning until it closes down for the night: (cf. *R v National Insurance Commissioner, ex parte Secretary of State for Social Services* [1974] 1 WLR 1290 [also reported as an appendix to R(A) 4/74]). In those circumstances the assessment of the tribunal as to whether or not the time spent in attention to the bodily functions of the applicant constitutes a significant portion of the day depends principally upon the mathematical exercise to which I have referred. However, it is also likely to be affected by the total time available in the day, by the extent to which the relevant tasks become a matter of routine, and the concentration and intensity of the activity comprised in those tasks. Thus, while in broad terms it seems to me that a period of one hour, made up of two half-hour periods of concentrated activity, would reasonably be regarded as a significant portion of a day, in different circumstances there may well be room for a different view.

40. Following the conclusion of the argument, we have had drawn to our attention a decision of Mr W M Walker QC, Social Security Commissioner in the disability appeal tribunal in Glasgow, CSDLA/29/1994. In paragraph 8 of that decision the Commissioner stated as follows:

> " … I accept Miss Dunlop's submission that the whole, or at least the main part, of section 72 … prescribing tests for qualification for the care component are time related, one way or another. I also accept her submission that the use of the word 'portion' tends to indicate an assessment by percentage or fraction rather than a totalling up of bits of time which might be more appropriately covered by the word "period". The words in parenthesis in section 72(1)(a)(i), that the portion must be assessed 'whether during a single period or a number of periods', seem to support that view. The length of the individual periods must be assessed and then the total found on a general percentage or fraction basis. That does not mean that the new Tribunal will have to assess the precise times involved. The claimant's case, as I understand it, and which may not have been fully assessed or appreciated by the Tribunal, was that he required attention in connection with his bodily functions when dressing, possibly undressing, when at the toilet and when feeding. Each of these may well have required relatively short periods of attention but the Tribunal will require to get some sort of idea of how long each would normally take and how often it would be required on an

> average day. They will then have to make a broad determination, recorded again as a finding, of the percentage or fraction of the normal day for this household that total involved. Whether that is then 'significant' is something which will have to be determined by the application of commonsense and the normal understanding of the word. I am aware that in CDLA/58/93 there is some acceptance of the possibility that one hour, in total, may be 'significant'. The Commissioner in that case did not dissent from some such proposition. I am not so sure that the matter can be so qualified. As it seems to me, attention for a lesser period may be 'significant' depending upon the circumstances. Thus if it consists of many short periods of attention, the total significance in time terms may be greater. The attention must be 'for a significant portion of the day' and the preposition 'for' seems to me to open up to consideration the position of the attender. If for that individual to provide the attention necessary on a considerable number of small occasions produces other disruption to his or her own affairs then that may elevate those periods from relative insignificance to an overall and collective significance. Finally, I should add that I do not wish to imply that what is assessed as being the attention required has to be found to be 'insignificant' to avoid being categorised as 'significant'."
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> I understand that, being contained within a starred decision, that passage is one to which the attention of tribunals is directed when coming to decisions in cases of this kind. I would not wish to qualify or detract from the guidance thereby afforded."

7. I can find nothing in tribunal's reasoning which sufficiently explains whether the instances of qualifying attention it had accepted were being given and were reasonably required (e.g. getting the appellant to get washed and dressed) were, for example, of lesser significance because they had become routine or otherwise had ceased to be disruptive of the appellant's mother's other affairs. And if neither of these applied, and so the attention was 'significant' in these senses, the obligation was all the greater, in my judgment, on the tribunal to explain why qualifying attention of more than one and half hours a day did not amount to attention required for a significant portion of the day.

8. The tribunal also found that no lrcc award was merited because neither part within section 72(1A)(b) of the SSCBA 1992 was met. However, in my judgment the tribunal erred in law here too by failing to identify the qualifying attention needs that the comparator 13 year old child would

also reasonably require to have met. Such needs in my judgment are not obvious as most 13 year olds on the face of it would normally to be able to attend to their qualifying bodily functions by the age of 13 by themselves; particularly say in comparison with, for example, the cutting of food, being assisted to dress, and being woken and settled at night (in the qualifying sense of a service of a close and intimate nature involving personal contact), which were the bodily functions the tribunal found the appellant required attention from another with. Given the relevant age comparator here of 13, in my judgment the tribunal needed to do more than it did to identify the requirements for attention that the comparator 'healthy' 13 year old child or children would have.

9. I am somewhat cautious about ruling that the three members of the tribunal which decided the appeal on 2 August 2018 further erred in law for reasons given by its presiding District Tribunal Judge when she then refused the appellant permission to appeal to the Upper Tribunal on 6 March 2019: see *Brewer v Mann* [2012] EWCA Civ 246 (at paragraph 31). The District Tribunal said this, inter alia, when refusing permission to appeal:

> "The Tribunal noted that normal, healthy 13 year old children's needs and attention required can vary between a range of minor needs to very substantial needs. On the evidence before it, the Tribunal was entitled to find that [the appellant]'s needs were not substantially in excess of that higher end of the range."

10. I limit myself to three observations about this statement of the DTJ. **First**, on the assumption that this reasoning may be ascribed to the tribunal as the reasoning that lay behind its decision, it does not feature in the reasoning the tribunal provided on for its decision (I will pass over the fact that the statement of reasons is given the wrong and impossible date of 28 June 2018). **Second**, and again on the same assumption, it still fails to identify what the qualifying attention needs of a 'normal, healthy' 13 year old attention are. **Third**, and perhaps most importantly, it is wrong as a matter of law. Section 72(1A)(b) does

not mandate a comparison only with the needs of a 'normal, healthy 13 year old' who would have had needs towards the higher end of a range including very substantial needs, thereby excluding the normal requirements of a 13 year old, non-disabled child with 'minor needs'? So construed, it effectively raised the bar so as to exclude this appellant from being entitled to the lrcc[1]. What section 72(1A)(b) requires is what it says. The same age comparison is with the normal requirements of (here 13 year old) children or the requirements which (13 year old) children in normal physical and mental health would have. Those 'normal' requirements may involve a range of requirements, but (to state the obvious) not requirements that could not rationally be described as 'normal' for such children.

11. For the reasons given above, the tribunal's decision must be set aside. The Upper Tribunal is not able to re-decide all the issues arising on the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at an oral hearing.

12. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 3rd September 2019

[1] Had entitlement to the lrcc been the sole care component issue on the appeal from the Secretary of State's decision of 15 December 2016, I would have disposed of this appeal by finding the appellant was entitled to the lrcc (as well as the lower rate of the mobility component of DLA, as the tribunal found) However, entitlement to the middle rate of the care component remains a live issue and so I have not adopted this means of disposing of the appeal.