AT v SSWP (PIP)
[2023] UKUT 186 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001498-PIP**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

A.T.

Appellant

- v -

Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 31 July 2023
Decided on consideration of the papers

Representation:

Appellant:	In person
Respondent:	Mr Denis Edwards of Counsel instructed by the Government Legal Department on behalf of DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal concerns the past presence test for the purposes of entitlement to personal independence payment (PIP). In summary, this test requires a claimant to have been present in Great Britain for two years out of the previous three years before the date of claim.

The background

2. The Appellant is a British citizen who lived in South Africa from 2001 until 2021. Following her divorce, she had planned to relocate to the UK in 2019, but suffered a serious brain injury following a fall in April 2018, spending a month in intensive care and six months in a nursing home. She repeatedly requested to return to the UK but the doctors treating her refused to agree, given the difficulties in securing NHS support and the cost of private care in the UK. She was also regarded as medically unfit to travel. One of her doctors wrote to confirm that "I therefore detained her in South Africa against her will due to mental health reasons", citing that country's Mental Health Care Act 2002.

3. The Appellant very sadly suffered further trauma when she was the victim of a gang rape in February 2021 and was then held up at gun point in June of the same year. However, the damaging effect of these traumatic incidents on her mental health was such that her doctors relented and agreed to approve her return to the UK. The Appellant duly returned to the UK on 25 August 2021 and claimed PIP on 9 September 2021. The Secretary of State's decision-maker acknowledged that there was no dispute about the Appellant's medical conditions, but on 14 September 2021 refused the Appellant's PIP claim on the basis that she did not meet the past presence test.

The legislation

4. The legislation governing entitlement to all social security benefits typically requires some sort of linkage with the UK. For contributory benefits, that is demonstrated by having the necessary national insurance contributions record. For non-contributory benefits, such as PIP, the various presence and/or residence criteria fulfil a similar purpose.

5. As far as the primary legislation governing PIP is concerned, section 77(3) of the Welfare Reform Act 2012 provides that a claimant is not entitled to such benefit "unless the person meets prescribed conditions relating to residence and presence in Great Britain".

6. As to the secondary legislation, regulation 16 of (Part 4 of) the PIP Regulations provides for those prescribed conditions as follows (emphasis added; and 'C' means the claimant – see regulation 2):

> **Conditions relating to residence and presence in Great Britain**
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> **16.** Subject to the following provisions of this Part, the prescribed conditions for the purposes of section 77(3) of the Act as to residence and presence in Great Britain are that on any day for which C claims personal independence payment C—
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> (a) is present in Great Britain;

> (b) has been present in Great Britain for a period of, or periods amounting in aggregate to, not less than 104 weeks out of the 156 weeks immediately preceding that day;
>
> (c) is habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands; and
>
> (d) is a person–
>
> > (i) who is not subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999; or
> >
> > (ii) to whom, by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, section 115 of that Act does not apply for the purpose of personal independence payment.

7. Thus, the Secretary of State's decision-maker refused the Appellant's claim on the basis of regulation 16(b), namely that she had not "been present in Great Britain for a period of, or periods amounting in aggregate to, not less than 104 weeks out of the 156 weeks immediately preceding that day". In fact, as was not in dispute, the Appellant had been present in Great Britain for just over a fortnight when she made her claim for PIP.

The First-tier Tribunal proceedings

8. Before the First-tier Tribunal the Appellant's then representative sought to argue in a written submission that her position was analogous to that of being an asylum-seeker or a refugee and so she should be exempt from the presence test. However, as the First-tier Tribunal correctly pointed out, the Appellant is a British citizen and as such would have no need to claim asylum or refugee status. The Appellant's representative further argued that the Appellant should be entitled to PIP given the mitigating circumstances preventing her from returning to the UK any earlier as planned. However, as the Tribunal noted, the representative "could not provide a legal basis for this decision to be made." The First-tier Tribunal considered of its own initiative whether there was any human rights or discrimination argument that could assist the Appellant but could identify none. The Tribunal accordingly dismissed the appeal but granted permission to appeal to the Upper Tribunal, given the Appellant was "in a very difficult position" and in the light of the representative's submissions.

The Upper Tribunal's analysis

9. The Appellant asks for an oral hearing of her appeal if she should need to explain why she was not permitted to return to the UK before she did. However, her reasons for not returning earlier are accepted. The question is rather whether the legislation provides any scope for those reasons to exempt her from the past presence test. In the circumstances I am satisfied it is fair and just to proceed to decide this appeal without an oral hearing.

10. The Appellant's case on appeal, albeit now made without the benefit of any representation, is effectively two-fold.

11. Her first argument is that she is a returning British citizen and as such should be entitled to PIP. One obvious difficulty with this contention is that a claimant's nationality or citizenship is not a criterion of entitlement to PIP. Instead, and as

explained above, one's association with the UK (or technically with Great Britain) is assessed in other ways, e.g. the past presence test.

12. Her second argument is that her own exceptional and tragic circumstances were such that she was effectively prevented from returning to the UK at the time she had intended to in 2019. The fundamental problem facing the Appellant is that the legislation provides for only a limited range of exceptions to the past presence test in regulation 16 and none of these exceptions is framed in terms that assists the Appellant. There is an exception for those claimants who are temporarily absent from Great Britain to receive medical treatment (regulation 18), but this only covers "medical treatment of C for a disease or bodily or mental disablement which commenced before C left Great Britain" (regulation 18(1)(a)), which is obviously not the case here. None of the other exceptions in regulations 17 to 23A can even remotely assist the Appellant.

13. Although the Appellant's circumstances are very different, her legal position is not dissimilar to that of Mr A in *HRA v Secretary of State for Work and Pensions (PIP)* [2023] UKUT 109 (AAC) (a determination of an application for permission to appeal), who had been detained against his will in prison in Afghanistan for several years:

> 28. Mr A's appeal would have had some prospects of success if there had been a separate category of a catch-all exception. For example, Parliament might have included a provision exempting a claimant from the requirement to satisfy the past presence test where e.g. "C was unavoidably stranded or detained overseas through no fault of their own" (the drafting could doubtless be improved). If that had indeed been the law, Mr A may well have been exempt from the need to meet the regulation 16(b) test. However, that is not the law. Moreover, neither the First-tier Tribunal nor the Upper Tribunal (nor indeed any superior court) has any discretionary power to add to the limited range of exceptions provided for by Part 4 of the PIP Regulations. Tribunals can only deliver justice in accordance with the law.
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> 29. Although Mr A did not expressly frame his grounds of appeal in terms of a human rights claim, I considered this possibility in the exercise of the Upper Tribunal's inquisitorial jurisdiction. However, in my judgment a successful human rights claim is implausible. The past presence test applies to nationals and non-nationals alike, so it is difficult to envisage a successful discrimination claim. The Secretary of State is also likely to have a strong justification argument, especially where a bright line rule such as the past presence test is concerned. In that context I note that the validity of the amended past presence test with respect to disability living allowance (DLA) cases was considered by Upper Tribunal Judge Jacobs in *FM v Secretary of State for Work and Pensions [SSWP] (DLA)* [2017] UKUT 380 (AAC); [2019] AACR 9:
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> > 36. Once presence is ruled out, the question arises: what form should the test take? Broadly, there are two approaches. One is to draw a bright line; the other is apply a general test such as whether the child was settled or habitually resident in the jurisdiction.
> >
> > 37. The advantage of bright lines is that they bring certainty for claimants and decisionmakers alike, with an associated saving in administrative and appeal costs. The disadvantage is that the test may

> not tally precisely with the underlying policy. For example, if the policy is to identify cases where a child is settled in this country, a test that adopts a fixed number of weeks may not reflect, either in the individual case or generally, the period of time that it takes for settlement to occur. My conclusion is that bright lines are permissible in principle, but that if the gap between the test and what it is trying to achieve is too wide the result may be manifestly without reasonable foundation.
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> 38. In my judgment, the new past presence test is a tough one to establish, but it is not manifestly without reasonable foundation. It was permissible to review and then to change the length of the period in order to take account of the changing pattern of migration; the period fixed was within the proper limits allowed to Parliament and ministers. The new law seeks to distinguish between those children who are settled and those who are not, but taking into the account the child's age, ensuring that the most disabled children can qualify sooner.

> 30. Subsequently Upper Tribunal Judge Ward took a subtly different approach to the issue of the DLA past presence test as it applies to disabled children: see *TS v SSWP (DLA); EK v SSWP (DLA)* [2020] UKUT 284 (AAC); [2021] AACR 4. However, I do not consider that Judge Ward's decision assists Mr A's case, which essentially turns on a rather different point.

14. So, just as the absence of any broadly-worded catch-all exception was fatal to Mr A's case, so too is it fatal to the Appellant's appeal in the present proceedings.

Conclusion

15. The First-tier Tribunal in this case provided a sufficient explanation of why it had reached the decision it had. In doing so, it applied the law correctly. The Appellant's challenge is in effect to the law itself, rather than the First-tier Tribunal's application of the law. Accordingly, I dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 31 July 2023