

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. UK/5459/2014

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision:

1. The decision of the First-tier Tribunal, taken on 26th September 2014 (First-tier Tribunal reference: *SC 225/14/00090*), involved an error of law in so far as it struck-out that part of the proceedings which involved an appeal against the Secretary of State's decision to award Mr S Personal Independence Payment for a fixed term of three years.

2. The First-tier Tribunal did not make an error of law in striking-out that part of the proceedings which involved an appeal against the Secretary of State's decision as to the date on which Mr S became entitled to Personal Independence Payment under the Personal Independence Payment (Transitional Provisions) Regulations 2013.

3. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I set aside the First-tier Tribunal's decision.

4. Under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I re-make the decision of the First-tier Tribunal as follows:

- (a) the Secretary of State's application for the proceedings on Mr S's appeal against the Secretary of State's decision of 22nd April 2014 to be struck out is allowed in part;
- (b) in so far as Mr S's case involves an appeal against the Secretary of State's decision as to the date on which Mr S became entitled to Personal Independence Payment, the proceedings are struck out because they do not have a reasonable prospect of succeeding;
- (c) in so far as Mr S's case involves an appeal against the Secretary of State's decision to award him Personal Independence Payment for a fixed term of three years, the proceedings are not struck out.

5. These proceedings are to be transferred back to the First-tier Tribunal. Case management directions for the disposal of the proceedings are to be given by the First-tier Tribunal.

REASONS FOR DECISION

Introduction and summary of reasons

1. This appeal raises two questions of general importance. Firstly, what is the start date of an award of Personal Independence Payment (PIP) granted to a transfer claimant (a person who

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was previously entitled to Disability Living Allowance (DLA))? Secondly, what is the legal framework for deciding whether a PIP award should be an indefinite award or for a fixed term?

2. The answer to the first question is that PIP transfer awards have effect from a date determined by reference to the Secretary of State's entitlement decision, not the date of the transfer claim.

3. The second question raises a number of issues. In summary, my conclusions in this respect are:

(a) the Welfare Reform Act 2012 ("the 2012 Act") enacts a qualified requirement that PIP awards are to be for a fixed term;

(b) the statutory qualification to the requirement for fixed term awards is that a fixed term award would be "inappropriate". In deciding whether a fixed term would be inappropriate, a key consideration is the likely persistence of an individual's limiting conditions. A further consideration in favour of fixed term awards is the relative ease with which the DWP may re-open the question of a PIP recipient's entitlement even if s/he has an indefinite award;

(c) if a fixed term award would be inappropriate, an indefinite award is to be made;

(d) the First-tier Tribunal has jurisdiction to hear an appeal against a decision not to make an indefinite award;

(e) if the Secretary of State issues guidance under section 88(3) of the 2012 Act about deciding whether a fixed term award would be inappropriate, the First-tier Tribunal is required to have regard to the guidance. But the guidance must not be treated as if it were a rule;

(f) in fixing the duration of a fixed term award, relevant considerations will include the likely persistence of an individual's limiting conditions and the relative ease with which PIP entitlement may be re-opened before the end of the fixed term. Generally, the likely persistence of limiting conditions and duration of a fixed term award are positively related;

(g) rigid categories for the duration of fixed term awards are not compatible with the purpose of the 2012 Act;

(h) the First-tier Tribunal has jurisdiction to hear an appeal against the duration of a fixed term award.

Background

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4. From at least 2005, Mr S was entitled to Disability Living Allowance (DLA). He had an indefinite award of the higher rate of the mobility component but no award of the care component.

5. Mr S thought his health conditions had deteriorated. He notified the Department for Work & Pensions (DWP) of a change of circumstance in writing on 28th October 2013. In response, the DWP applied the PIP transitional legislation and invited Mr S to claim that benefit. Mr S's claim form was received by the DWP at some point in November 2013 (the precise date is not clear) and in January 2014 he had a PIP consultation with a healthcare professional. Neither Mr S's claim form, nor a report of the consultation, were subsequently supplied to the First-tier Tribunal.

6. On 25th March 2013, some five months after Mr S notified his change of circumstances, the Secretary of State decided he was entitled to PIP. His award of the enhanced rate of the mobility and daily living components was, financially, a better award than the DLA award it effectively replaced. In fact, it was the maximum possible PIP award. Unlike the DLA award, however, the PIP award was for a fixed term of three years.

7. The Secretary of State also decided that Mr S's PIP entitlement took effect approximately one month after the PIP award decision. And so Mr S's award began some six months after the date on which he notified his change of circumstances.

8. Mr S appealed to the First-tier Tribunal. While his appeal form only disputed the start date of his PIP award, by the time the matter came before the Tribunal the question whether the Secretary of State correctly refused to make an indefinite award had become an issue.

9. The DWP applied to the Tribunal for Mr S's appeal to be struck out on the basis that it had no reasonable prospect of success (under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008).

10. In response to the DWP's application, Mr S's representative argued that the PIP transitional legislation requires a transfer award, made in response to a notified change of circumstances, to commence as from the date of the successful claim. Commencing PIP transfer awards by reference to the date of the PIP award was wrong, argued the representative. It meant claimants paid the price for delays in operating the PIP transfer process. At this point, it is right that I acknowledge the skill and dedication with which Mr Williams, who is Mr S's friend and not a professional representative, has advanced Mr S's case.

11. On 6th August 2014, the Tribunal directed the DWP to supply details of Mr S's previous DLA award. While the DWP complied with that direction, they also questioned its relevance because "the previous award of DLA should have no bearing on the PIP decision". Subsequently, a Tribunal judge responded "I should have thought that the answer to that

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question is obvious; especially since it had not been revealed that the existing award of the higher rate of the mobility component was a lifetime award that has been replaced by an award for three years' only". However, the DWP's evidence did not explain why, in 2005, Mr S was granted an indefinite DLA award.

12. On 11th September 2014, Mr S's representative wrote to the Tribunal that "the appellant did not know that his award for disability allowance had been altered from a lifetime award to one for just three years" and his correspondence indicated he was aware that the "scope" of the appeal included the duration of Mr S's PIP award and the application of section 88 of the 2012 Act. The Tribunal also informed Mr S in a direction notice that "any appeal is not limited to the commencement date of the award. That award might be made for a greater (or lesser) period; or it could be reduced or extinguished".

13. By supplementary submission dated 15th September 2014, the DWP addressed the duration of Mr S's PIP award. After asserting that the PIP legislation contained a statutory presumption in favour of fixed term awards, this went on:

"In Mr S's case, and taking into account the guidance issued by the Secretary of State, it was felt a fixed award of PIP was appropriate and it is for this reason the PIP award was limited. The indefinite award of DLA was based upon different legislation and different criteria".

14. On 26th September 2014, the Tribunal struck out Mr S's appeal. Neither party requested a hearing and the application was decided on the papers. The Tribunal found that, under the PIP transitional legislation, the Secretary of State correctly fixed the start date of Mr S's PIP award by reference to his PIP award date. So far as the duration of Mr S's PIP award was concerned, the Tribunal's statement of reasons said:

"As the Secretary of State submits it was felt in this case that a fixed award of PIP was appropriate and the previous indefinite award of DLA was based on different legislation and criteria. Accordingly, I cannot interfere with the fixed award".

15. Following an oral hearing at Cardiff Civil Justice Centre, I granted Mr S permission to appeal to the Upper Tribunal. The grounds of appeal, grouped according to the issues raised, the parties' arguments and my conclusions are set out below. The Secretary of State did not request a hearing of this appeal, nor did Mr S's representative.

Issue 1 – the commencement date of an award of PIP to “transfer claimant”

16. The first issue is whether the First-tier Tribunal made an error of law in concluding that Mr S had no reasonable prospect of successfully arguing that his award should have commenced as from the date on which he notified his change of circumstance.

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Legislative framework

17. PIP was created by Part 4 of the Welfare Reform Act 2012 (“the 2012 Act”) as a replacement for DLA. Accordingly, section 90 of the 2012 Act repeals the DLA provisions of the Social Security Contributions and Benefits Act 1992.

18. This was a significant legislative change, affecting millions of DLA recipients. Phasing-in arrangements were necessary. Section 93(1) of the 2012 Act empowers the Secretary of State by regulations “to make such provision as the Secretary of State considers necessary or expedient in connection with the coming into force of any provision of this Part”. Schedule 10 to the Act specifically authorises these regulations to make:

(a) “provision for making an award of [PIP] to a person whose award of [DLA] is terminated” (Schedule 10(4)(1));

(b) in relation to such an award, “provision as to the terms on which, and conditions subject to which, such an award is made, including provision temporarily or permanently disapplying, or otherwise modifying, conditions of entitlement to [PIP] in relation to the award” (Schedule 10(4)(2)(c)(i)).

19. Since Mr S argues the First-tier Tribunal’s decision was contrary to fundamental PIP principles, I also need to describe certain features of the mainstream PIP legislation.

20. Section 88(1) of the 2012 Act provides that “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”. This needs to be read with the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment & Support Allowance (Claims & Payments) Regulations 2013 (S.I. 2013/380) (“the PIP Claims and Payments Regulations”). Regulation 12(1) contains general rules about the “date of claim”. For claims made in writing:

(a) where, before making a claim, a person notifies the DWP that s/he intends to claim, the date of claim is the date of notification if, within one month of that date, a properly completed claim in writing is received at an appropriate DWP office. The Secretary of State also has power to allow a longer period than one month between notification and receipt; and

(b) otherwise, the date of claim is the “first day in respect of which the claim is made”.

21. Section 80(1)(c) of the 2012 Act requires that “the following questions are to be determined in accordance with regulations”. The “questions” are the core PIP entitlement questions, namely whether a person’s ability to carry out daily living activities and mobility activities is “limited” or “severely limited” by “the person’s physical or mental condition”.

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Those questions must be determined “on the basis of an assessment” (section 80(3)(a)). This is an assessment in the sense of a mental evaluation, rather than a physical examination (as is shown by the 2012 Act’s separate provision for requiring a person to participate in a “consultation” (section 80(4) & (5)).

22. Regulation 4 of and Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (the PIP Regulations) contain the PIP assessment. It involves, in relation to prescribed daily living and mobility activities, comparing a claimant’s abilities with the different ability levels prescribed for the activities in Schedule 1. These are called descriptors and each has an associated points score. At least eight daily living points are required for an award of the standard rate of the daily living component and, likewise, at least eight mobility points for the mobility component. The threshold for the enhanced rates is 12 points.

23. The entitlement conditions for both PIP components also include a “required period condition” (section 78(1)(b) and (2)(b), and section 79(1)(c) and (2)(c) of the 2012 Act). Regulations must make provision for determining whether a person meets the required period condition (section 80(2)). The legislative die has already been cast, to a significant extent, by section 81’s requirements as to the contents of the regulations. I summarise but, in essence, section 81 requires the regulations to provide for the question whether the required period condition is met by asking whether:

(a) “in the previous 3 months”, had the person’s abilities been assessed it is likely that a determination would have been made that the person’s limitations met the entitlement criteria; and

(b) “in the next 9 months”, were the person to be assessed, it is likely that a determination would be made that the person’s limitations met the entitlement criteria.

24. The reference point for that evaluation is the “prescribed date”. By regulation 14 of the PIP Regulations, on a mainstream PIP claim this is typically the date of claim.

25. For DLA transfer claimants, however, the required period condition is modified. For convenience, I deal with this here.

26. Regulation 23(1) of the Personal Independence Payment (Transitional Provisions) Regulations 2013 deems the historical element (“previous three months”) of the required period condition to be met:

“In applying the required period condition under Part 3 (required period condition) of the PIP Regulations to a claim by a transfer claimant...the claimant shall be regarded as meeting such of the conditions contained in the following provisions of Part 3 (which relate to a claimant's abilities in the past) as are relevant to the claim regardless of whether those conditions have been met—

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(a) in regulation 12 (required period condition: daily living component), paragraph (1)(a) or (2)(a),

(b) in regulation 13 (required period condition: mobility component), paragraph (1)(a) or (2)(a).”

27. And, by regulation 24, the “prescribed date” (by reference to which the prospective element of the required period condition is to be evaluated) is for a transfer claimant “the date on which the claim is made”. By regulation 8(3) of the PIP transitional regulations, where a claim is made in writing the date of claim is the day of delivery to, or receipt at, an appropriate DWP office.

28. The Secretary of State does not have an express duty to carry out a PIP assessment, in response to a PIP claim, although such a duty is clearly implied because, without an assessment, almost no one apart from the terminally ill would ever become entitled to PIP. There is also no express statutory requirement for a PIP assessment or consultation to be carried out, or a PIP claim decided, by any specified date.

29. Mr S’s representative draws my attention to the High Court’s decision in *R (C & Another) v Secretary of State for Work And Pensions & Another* [2015] EWHC 1607 (Admin). On that claim for judicial review, the Secretary of State conceded that delays in carrying out PIP assessment consultations, and deciding PIP claims, were “unacceptable”. The parties agreed that “in domestic law ... the Secretary of State is under a public law duty to determine the PIP applications within a reasonable time”. The High Court (Patterson J) went on to hold that delays of 10 and 13 months in determining the claimants’ PIP claims were unlawful. In the light of the claimant’s personal circumstances, their PIP claims were not decided within a reasonable time. However, Patterson J declined to rule generally on what would be a reasonable time for deciding a PIP claim. This would vary according to the circumstances of individual claimants.

30. It is not within my jurisdiction on this appeal to decide whether Mr S’s PIP transfer claim was determined within a reasonable time. I therefore decline Mr S’s invitation to do so. I note, however, that, unlike the claimants in *C & Another*, Mr S received DLA payments while waiting for a decision on his PIP transfer claim. Against that, however, the claimants in *R (C) v Secretary of State*, not being transfer claimants, had their awards backdated to the dates on which they made their claims. I also observe that, in cases where a PIP transfer claim results in no PIP award or a lower financial award than the DLA award it replaces, delays in deciding the claim will, in that sense, work in a claimant’s favour.

The PIP transitional legislation

31. The PIP transitional scheme is contained in the Personal Independence Payment (Transitional Provisions) Regulations 2013 (S.I. 2013/387), as amended (“the PIP transitional regulations”). The regulations need to be read with the mainstream PIP regulations, including the PIP Claims and Payments Regulations, because regulation 2(3) of the PIP transitional

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regulations applies these regulations “except where (a) these Regulations provide otherwise, or (b) the application of those Regulations would be inconsistent with the application of these Regulations”.

32. Regulation 3(5) of the PIP transitional regulations applies if, after 27 October 2013, a “DLA entitled person”, such as Mr S, notifies the DWP of a change of circumstances. The definition of “change of circumstances” in regulation 2(1) shows that the change of circumstances must be one that is relevant to DLA entitlement, not PIP entitlement. There are certain exceptions to regulation 3(5) but none arise in Mr S’s case. The notification triggers a duty on the Secretary of State to send a notice under regulation 3(1) inviting the person to claim PIP.

33. The regulation 3(1) notice must “state the date of the last day of the period within which the person should claim personal independence payment, that period being one of 28 days starting with the day that is the stated date of notification”. It is not disputed that Mr S made his PIP claim within that period so that he became a “transfer claimant” for the purposes of the PIP transitional regulations. That term is defined by regulation 2(1) to include a “notified person who has claimed personal independence payment in response to a notification sent by the Secretary of State under regulation 3(1)”.

34. The next step is an “assessment determination”, that is “a determination, under regulation 4 (assessment of ability to carry out activities) of the PIP Regulations, of a claim for personal independence payment made by a transfer claimant” (regulation 2(1) of the PIP transitional regulations). In other words, a mainstream PIP assessment.

35. Making the assessment determination has two consequences:

(a) the determination activates regulation 17(1)(b) of the PIP transitional regulations. This provides, subject to an immaterial exception, that “the claimant’s entitlement to disability living allowance shall terminate...on the last day of the period of 28 days starting with the first pay day after the making of the determination”. “Pay day” means the claimant’s DLA pay day (regulation 2(1));

(b) in conjunction with DLA’s termination, entitlement to PIP commences (if that is the outcome of the assessment determination) because regulation 17(2) provides:

“Where the outcome of an assessment determination is an award in respect of either or both components of personal independence payment, the claimant’s entitlement to personal independence payment starts with effect from the day immediately following the day referred to in paragraph (1)(b).”

The arguments

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36. The Secretary of State argues the transitional provisions are clear and were correctly applied in Mr S's case. His PIP award decision was taken on 27th March 2014 and was an "assessment determination" for the purposes of the transitional regulations. As a result, regulation 17(1)(b) required Mr S's PIP award to take effect 28 days, plus one day, after Mr S's next DLA payday. The Secretary of State had no discretion to set a different start date. He correctly applied the PIP transitional regulations in Mr S's case. The First-tier Tribunal correctly struck out this aspect of Mr S's appeal.

37. Mr S's representative argued the result in Mr S's case was incompatible with fundamental principles of the PIP legislative scheme. He drew attention to the required period condition and how, under the PIP transitional regulations, this is to be evaluated as from the date of claim. Since satisfaction of the entitlement conditions is to be evaluated by reference to the date of a transfer claim, that must mean entitlement commences as from the date of claim.

Conclusion

38. I agree with the Secretary of State that the PIP transitional regulations were correctly applied in Mr S's case. The start date for a PIP transfer claimant's award (the date on which entitlement begins) is fixed by regulation 17 by reference to the date of the PIP award decision, not the date of claim.

39. Mr S's representative's argument overlooks an important feature of the PIP transitional regulations. They modify the mainstream PIP rules about the date on which entitlement commences, so that it is not fixed by reference to the date of claim. The representative's reliance on the transitional legislation's modification of the required period condition is mistaken. While I accept that, under the transitional legislation, there may be a confusing array of dates, the underlying picture is clear. While satisfaction of the required period entitlement condition is evaluated as at the date of claim, entitlement itself commences from a later date. It may assist if I summarise the key dates and decision points on a transfer claim:

- (a) the date of claim is fixed by regulation 8 of the PIP transitional regulations;
- (b) the historical element of the required period condition is not relevant (regulation 23);
- (c) the prospective element of the required period condition is relevant and must be applied. The "prescribed date" for that purpose is the date of claim (regulation 24);
- (d) the start date of a PIP transfer award is fixed by reference to the date of the "assessment determination", i.e. the date the Secretary of State decided that a transfer claimant met the PIP entitlement conditions (regulation 17).

40. This pattern differs from that for mainstream PIP decisions because the date of claim is not used to fix the start of the award; instead its role is to fix the date for evaluation of the required

period condition. That is what the regulations clearly require. I therefore find that the First-tier Tribunal did not err in law in deciding Mr S had no reasonable prospect of successfully arguing that his award (or entitlement) should have commenced from either his date of claim or the date on which he notified a change of circumstances. To that extent, I uphold the Tribunal's decision.

Issue 2 - Duration of PIP awards

41. The issue here is whether the First-tier Tribunal erred in law in confirming the Secretary of State's decision to award Mr S PIP for a fixed term of three years. Originally, the ground of appeal was that the Tribunal erred in law in its approach to the Secretary of State's guidance about deciding when a fixed term award would be inappropriate. The terms of the guidance were not drawn to the Tribunal's attention. Since section 88(3) requires regard to be had to the guidance, the question was whether the Tribunal could in law have taken into account guidance the terms of which were not drawn to its attention. But, as the appeal progressed, it transpired that no guidance has ever been issued. It does not exist. As a result, the grounds of appeal have altered to comprise the more general question whether the Tribunal erred in law in its approach to the period of Mr S's award.

The legislative framework

42. For DLA, section 71(3) of the Social Security Contributions and Benefits Act 1992 provides "a person may be awarded either component [of DLA] for a fixed period or for an indefinite period". In *PH v Secretary of State* [2013] UKUT 0268 (AAC) Upper Tribunal Judge Rowland said:

"It seems to me that the reason for making a fixed award [of DLA] is therefore likely to be that the current prognosis is uncertain and the decision-maker is not sufficiently satisfied that the claimant will continue to qualify for entitlement after the end of the fixed period for it to be appropriate to make an award for an indefinite period or a longer period".

43. The PIP legislation takes a different approach to award duration (which it refers to as the award's term, rather than its period). Section 88 of the Welfare Reform Act 2012 provides:

"(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 Secretary of State."

The arguments

44. The Secretary of State in fact disputes that the duration of Mr S's award was an issue raised by his appeal. Apart from that, the Secretary of State supports the Tribunal's approach. His written submission argues that, under section 88, a fixed term award is the "default

position” and that “section 88(3) only bites in those exceptional circumstances where the decision maker (or tribunal) considers that a fixed term award is inappropriate”. The submission goes on:

“the obligation under section 88(3) only kicks in once it has been determined that the default position (a fixed term award) should not apply...If they’ve decided that a fixed term award is appropriate, there is no need to take into account guidance on when an indefinite award should be made”.

45. As I have already mentioned, to my surprise the Secretary of State informed the Upper Tribunal during the course of these proceedings that no guidance has been issued under section 88(3). For that reason, the role played by section 88(3) guidance is an academic point in these proceedings. Despite that, the Secretary of State’s representative makes the following somewhat bold argument. He refers me to internal decision-makers guidance called *Advice for Decision-Making* and, I think, invites me to assume that any section 88(3) guidance would be framed in similar terms. That document deals with when indefinite awards should be made and also with deciding the period of fixed term awards (it is mainly concerned with the latter). So far as indefinite awards are concerned, the document informs PIP ‘case managers’:

- an “ongoing award” (which must mean the same thing as an indefinite award in my view) is indicated where “any change is very unlikely and with a planned intervention date no more than 10 years from the award date” (para. 343). An ‘intervention date’ is “an opportunity to look at entitlement at set intervals to ensure the claimant continues to get the right amount of PIP”. This is an administrative, rather than formal legal, process although it may lead to a formal supersession of a PIP award;
- “ongoing awards are appropriate where the claimant’s restrictions on daily living and or mobility are unlikely to change significantly” (para. 370).

46. On the assumption described above, the Secretary of State’s argues any failure to have regard to the guidance could never amount to a material error of law:

“as the guidance accords with the ordinary approach of appeal tribunals to questions that arise before them, if there was an error on the part of the Tribunal, I submit that it was not a *material* one. Even if the Tribunal *had* taken into account the guidance, this would not have changed any decision it ultimately gave. This applies in all circumstances, so I would submit that no Tribunal can have materially erred by not having regard to this SofS guidance”.

Conclusions on issue 2

How section 88 operates

47. Section 88(2) of the 2012 Act requires fixed term PIP awards. Its opening words state without ambiguity that a PIP award “is to be for a fixed term”. However, this is a qualified

requirement. It applies “except where the person making the award considers that a fixed term award would be inappropriate”.

48. I note the following features of section 88(2):

(a) it is not directly concerned with the duration of a fixed term award. Section 88(2) is only directly concerned with two things. Firstly, enacting a qualified requirement that PIP awards are to be for fixed terms. Secondly, identifying the one case in which the requirement does not apply, namely where the person making the award considers that a fixed term award would be inappropriate;

(b) section 88(2) does not set out the legal consequence of a decision that a fixed term award would be inappropriate. However, the necessary implication is that an indefinite award is to be made. This is the converse of a fixed term award and the general rule for most social security benefits is that they are awarded for an indefinite period (regulation 17 of the Social Security and Child Support (Decisions and Appeals) Regulations 1987);

(c) impliedly, section 88(2) confers a function of determining the duration of a fixed term award. It is vitally important that claimants know the length of their awards so it must be assumed that Parliament requires the decision maker to determine the fixed term. This does not just happen of its own accord.

49. Since it has been addressed in argument, I shall also make some observations about the legal role played by section 88(3) guidance:

(a) section 88(3) confers a power on the Secretary of State to issue guidance. Such guidance is only expressly concerned with one matter – the person making the award’s decision whether it would be inappropriate to make a fixed term award. Despite that, it can be argued that evaluating whether a fixed term award would be inappropriate can legitimately involve evaluating whether a fixed term award of any particular duration would be appropriate;

(b) it would be a misdirection in law for a decision-maker to consider itself bound by section 88(3) guidance. The statutory obligation is simply to have regard to it. The Secretary of State submits, and I agree, that the obligation is as set out in the Court of Appeal’s decision in *London Borough of Newham v Khatun & Others* [2004] EWCA Civ 55, [2004] 3 WLR 417 (which I note was recently applied by the Supreme Court in *Nzolameso v City of Westminster* 2 All ER 942, [2015] WLR(D) 165, [2015] UKSC 22) [2015] HLR 22). In *Khatun*, the Court of Appeal held the obligation to “have regard” to the statutory guidance with which it was concerned was an obligation to “(a) take it into account and (b) if they decide to depart from it, give clear reasons for doing so”;

(c) if no guidance has been issued under section 88(3), there is nothing to have regard to. I make that ultra-obvious point because, despite the DWP’s submission to the First-tier Tribunal in this case, I now know there is currently no section 88(3) guidance.

Why the First-tier Tribunal erred in law

50. Since no section 88(3) guidance exists, any ground of appeal connected to the First-tier Tribunal's approach to section 88(3) guidance falls away. The Tribunal cannot have erred in law by failing to have regard to non-existent guidance.

51. The Tribunal did, however, give inadequate reasons for fixing the period of Mr S's at three years. Its reasons were that it "felt" a fixed term award was appropriate and the indefinite DLA award replaced by the PIP award was not relevant because it was "based on different legislation and different criteria". I do not accept the Secretary of State's argument that award duration was not an issue raised by Mr S's appeal. By the time the Secretary of State's application for strike-out was determined, both parties had made submissions about the duration of Mr S's PIP award and at no point did the Secretary of State argue that it was not an issue raised by the appeal.

52. I shall approach this aspect of the appeal on the assumption that the Tribunal had jurisdiction in this case to decide whether a fixed term award would be inappropriate and, if not, what the duration of the fixed term award should be. In fact, and as explained below, I think it is unlikely that the Tribunal had jurisdiction since it was dealing with a strike-out application. Nevertheless, I address whether the Tribunal erred in law in fixing Mr S's award at three years because it raises important issues on which there is no Upper Tribunal authority. And the topic is likely to take on increasing importance as the PIP transfer process gathers pace since most DLA awards (as I understand it) are for an indefinite period.

53. The Tribunal did not give adequate reasons for its refusal to make an indefinite award (for deciding that a fixed term award would not be inappropriate). This was an issue raised by Mr S's appeal. Simply to rely on the changed legislative framework was an insufficient reason. The Tribunal needed to explain, in the light of the relevant circumstances, including the likely persistence of Mr S's limiting conditions, why it concluded the section 88(2) exception to the presumption in favour of fixed term awards did not apply. Similarly, the Tribunal gave inadequate reasons for deciding a three year fixed term was appropriate. This was not reasoned by reference to the relevant circumstances, including in particular the likely persistence of Mr S's limiting conditions.

Guidance about (a) deciding whether a fixed term award would be inappropriate, and (b) determining the duration of a fixed term award

54. The DWP's submissions to the Upper Tribunal made two rather startling admissions:

(a) as I have already mentioned, no guidance has in fact been issued under section 88(3). It is impossible, therefore, to understand why the DWP's written submission to the First-tier Tribunal asserted that their decision as to the duration of Mr S's award was in accordance with such guidance;

(b) the DWP's PIP Handbook states "awards vary in length from 9 months to 10 years, depending on when changes in a claimant's needs could be reasonably expected, with reviews set at regular periods. The maximum time between reviews is 10 years". In granting permission to appeal, I posed the question whether the Handbook, in failing to acknowledge the possibility

of an indefinite award, was compatible with section 88(2). The Secretary of State fairly concedes it is not. I am confident he will re-draft the PIP Handbook so that it is consistent with the terms of the 2012 Act. This should help to avoid unnecessary appeals.

55. The absence of any section 88(3) guidance and the flawed internal guidance about fixing the length of fixed term awards, along with the general importance of the topic, lead me to conclude I should give guidance about the correct approach to fixing the term of a PIP award.

56. Once the decision-maker is satisfied that the disability-related PIP entitlement criteria are met, the term of the award must be addressed. Initially, there are two options - a fixed term award or an award for an indefinite period. The choice, however, is not at large. The statutory presumption, which the Secretary of State describes as the default position, is for a fixed term award and so there must be some positive justification for departing from the statutory presumption. But, if an appellant argues for an indefinite award, the Tribunal must deal with the argument and decide whether a fixed term award would be inappropriate. The Tribunal may also, provided it does so fairly, raise the issue of its own motion.

57. The statutory test is simply expressed; it is whether a fixed term award would be “inappropriate”. The 2012 Act contains no express guidance as to the factors to be taken into account. However, the question of inappropriateness cannot be considered in a vacuum. Clearly, a fixed term award would be inappropriate if making such an award would not serve Parliament’s purpose in enacting the PIP legislation. In addressing that question, all circumstances that are relevant – in the light of the 2012 Act’s purpose – should be taken into account.

58. The secretary of State’s argument that indefinite awards are only permitted in “exceptional circumstances” involves an element of sophistry. I accept that an indefinite award is an exception to the statutory presumption for fixed term awards. But that does not mean indefinite awards are reserved for what can fairly be termed ‘exceptional’ cases. If Parliament had intended to limit the field to cases that were in some way unusually rare, it would have included words in section 88 for that purpose. It did not do so. Its intention, therefore, must have been that decisions as to whether a fixed term award would be inappropriate are to be guided by the purpose of the PIP legislation. In the light of the legislation’s purpose – discussed below – it cannot be said that indefinite awards must be unusually rare or ‘exceptional’.

59. What, then, is the Act’s purpose? I am sure there are many Ministerial and Departmental statements, made in and outside Parliament, about PIP’s purpose. Identifying legislative purpose, however, must begin with the terms of the legislation itself.

60. The Act supplies financial assistance – an allowance - to individuals whose physical or mental condition means that, on a relatively long-term basis, they have limited ability to carry out prescribed daily living and mobility activities. If the limitation is severe, greater financial assistance is supplied. The assistance is not a type of bounty, paid simply because a person has a physical or mental condition. Instead PIP entitlement and amount is linked to the extent of a

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person's limitations. I acknowledge that the PIP legislation does not begin precisely to match a PIP allowance with the actual costs of services or facilities that would help a person overcome the day-to-day difficulties created by his/her relevant limitations. However, the statutory linkage of PIP entitlement and amount to the extent of a person's limitations recognises that these limitations, if they are to be overcome, are capable of generating costs that would not be faced by those without similar limitations. This shows that, while a PIP recipient is free to spend the allowance as s/he wishes, PIP's purpose is to help meet the extra costs associated with disability.

61. While PIP's purpose is evident from the face of the legislation, I note it was also described in similar terms to that set out above by the Explanatory Notes to the 2012 Act, which state at paragraph 358:

“The Act replaces disability living allowance with a new cash benefit called personal independence payment. The purpose of the benefit is to contribute to the extra costs of overcoming the barriers faced by long-term disabled people to leading full and active lives.”

62. In the light of the 2012 Act's purpose, the stability or otherwise of the individual's relevant limitations will always be a key consideration. In some cases, no material change in those limitations may be expected. That, clearly, is a factor in favour of deciding a fixed term award would be inappropriate. Since the purpose of the PIP legislation is to help with the extra costs associated with disability, it is undoubtedly open to a decision maker or Tribunal to decide that where an individual's limitations (the driver for disability-related costs) are unlikely to change then a fixed term award would be inappropriate.

63. In fact, another feature of the PIP legislative scheme supplies further weight in the 'indefinite award' side of the balance where a person's relevant limitations are likely to be stable (or, where the maximum award has been made, any change is likely to take the form of a deterioration in ability).

64. A PIP award may be superseded (i.e. altered). In order for the power to supersede to arise, a statutory ground for supersession must be made out. The grounds are contained in the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment & Support Allowance (Decisions & Appeals) Regulations 2013. They include grounds recognisable to anyone familiar with the DLA legislation, including grounds related to a relevant change of circumstance (reg. 23), error of law (reg. 24) and mistake as to, or ignorance of, material fact (reg. 24). However, regulation 26 also provides:

“(1) A [PIP] decision may be superseded where, since the decision was made, the Secretary of State has (a) received medical evidence from a healthcare professional or other person approved by the Secretary of State...”

65. Accordingly, the Secretary of State is not required to show a relevant change of circumstances in order to supersede a PIP award. As an aside, I should, note that the mere receipt of medical evidence says nothing about the outcome of any supersession decision. As

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Social Security Commissioner (now Upper Tribunal Judge) Jacobs said in *CIB/1509/2004* about similar provisions within the incapacity benefit legislation:

“[the regulation] merely authorises a supersession procedure. It does not determine the outcome. It merely recognises that evidence has been produced that may, or may not, show that the operative decision should be replaced. The outcome is determined by the conditions of entitlement for an award.”

66. The relative ease with which the Secretary of State is able to re-open the question of an individual’s entitlement to PIP is a factor tending to favour indefinite awards in cases where a person’s limiting conditions are unlikely to change.

67. I acknowledge, however, that prognosis is not an exact science, decision-makers do not have a crystal ball and there is a need to ensure that state resources for disabled persons are focussed on those who are, and remain, genuinely in need. It would not necessarily be wrong, therefore, to make a fixed term award even if stability of limiting conditions was reasonably likely. However, there will I am sure be cases where the prospect of an improvement is remote enough that the only reasonable decision is that a fixed term award would be inappropriate.

68. This is an appropriate point at which to address the Secretary of State’s arguments about the point in the decision-making process at which section 88(3) guidance operates and the consequences of a failure to take the guidance into account.

69. The Secretary of State argues “section 88(2) of the WRA 2012 provides that the default position for PIP is a fixed term award. Section 88(2) also provides for an exception to this default position, in circumstances where the decision maker (or Tribunal) considers that a fixed term award is inappropriate. Section 88(3) only bites in those exceptional circumstances where the decision maker (or Tribunal) considers that a fixed term award is inappropriate...the obligation under section 88(3) only kicks in once it has been determined that the default position (a fixed term award) should not apply”.

70. This misreads section 88. With respect, it also lacks logic. The point in the decision-making process at which section 88(3) guidance operates is the point at which a decision-maker or Tribunal is addressing the section 88(2) question (whether a fixed term award would be inappropriate). That is shown by the introductory words of section 88(3): “In deciding whether a fixed term award would be inappropriate, that person must have regard to guidance issued by the Secretary of State”. That clearly shows section 88(3) guidance operates when the inappropriateness of a fixed term award is under evaluation. It cannot possibly operate, as the Secretary of State argues, “once it has been determined that the default position (a fixed term award) should not apply”. The relevant legal event has passed and there is nothing on which the guidance can then operate.

71. So far as the consequences of failing to take section 88(3) guidance into account are concerned, I shall not spend much time discussing the Secretary of State’s argument that this could never amount to a material error of law. This argument proceeds on an entirely theoretical basis: there is no statutory guidance but, if there was, it would replicate the internal

decision-makers' guidance, and no Tribunal could ever err in law by failing to take that guidance into account. This is a surprising argument implying, as it does, that any section 88(3) guidance is legally irrelevant and could make no difference to the outcome of any particular case. However, I shall not express any further opinion than that given the theoretical basis on which the argument proceeds.

72. Again, this is an academic point but I cannot begin to understand why the Secretary of State argues that this First-tier Tribunal's decision was in accordance with the 'notional' section 88(3) guidance. The guidance says "ongoing awards are appropriate where the claimant's restrictions on daily living and or mobility are unlikely to change significantly". In this case the Tribunal had no evidence about the likely persistence of Mr S's limiting conditions. It was supplied with neither Mr S's claim form nor the report of his PIP consultation. In those circumstances, how can it possibly be argued that a three year fixed term award was in accordance with the notional guidance?

73. If it is decided that a fixed term award would not be inappropriate, the duration of the fixed term needs to be determined. What factors should be taken into account at this stage? I should begin by stressing that this is essentially a person-specific question. I can identify nothing in the PIP legislation that would justify adopting rigid categories of award length for all or different types of claimant.

74. Again, the stability or otherwise of the individual's relevant limitations will always be relevant. Generally, the likely persistence of those limitations and duration of award should be positively related. The greater the likelihood of persistence, the longer should be the term of the award. And, at this stage, the availability of a ground for supersession simply on the ground that medical evidence has been received is also likely to be relevant.

75. There is also the somewhat obvious point that, in the light of the prospective element of the required period condition, the term must not in mainstream PIP cases be for less than nine months.

Issue 3 – is there a right of appeal against the Secretary of State's decision as to the duration of a PIP award?

76. The Secretary of State did not dispute that there is a right of appeal to the First-tier Tribunal against a decision not to make an indefinite award and, where a fixed term award is made, the period of the award. I agree with the Secretary of State.

77. The right of appeal against PIP decisions is conferred by section 12 of the Social Security Act 1998:

“(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which –

(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act...

(2) In the case of a decision to which this section applies, the claimant...shall have a right to appeal to the First-tier Tribunal, but nothing in this subsection shall confer a right of appeal –

(a) in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision...”.

78. Section 8(1) provides that it is for the Secretary of State to decide any claim for a relevant benefit. Section 10 is concerned with decisions that supersede earlier decisions. PIP is a “relevant benefit” having been added to the list of such benefits in section 8(3) of the 1998 Act by an amendment made by the 2012 Act. I am not aware of any regulations that prescribe decisions or determinations as to the term of a PIP award as unappealable.

79. A decision as to the duration of a PIP award must be either be part of the decision made on a claim for PIP or a decision made on an award of PIP. Either way, the duration of an award falls within the First-tier Tribunal’s jurisdiction on an appeal against a PIP decision, as it does on a DLA appeal (see, for example, *PH v Secretary of State* [2013] UKUT 0268 (AAC)).

Issue 4 – is the Tribunal required to follow the Secretary of State’s section 88(3) guidance?

80. Section 88(3) of the 2012 Act imposes an obligation on “the person” making a PIP award to have regard to the Secretary of State’s guidance. Clearly, that must include the Secretary of State himself, acting through the DWP civil servants that take PIP decisions in his name under the *Carltona* principle (*Carltona Ltd. v Commissioner of Works* [1943] 2 All ER 560).

81. The 2012 Act does not define what it means by “person” and the general definition in the Interpretation Act 1978 does not assist in this case (it simply includes “a body of persons corporate or unincorporated” and does not expressly exclude anyone). However, I agree with the Secretary of State that Parliament must have intended for the reference to “person” to include the First-tier Tribunal. The Secretary of State does not argue that section 88 referred to “person” in order to exclude from its ambit the First-tier Tribunal.

82. Section 88(2) is included within an Act that is part of a corpus of social security legislation in which initial decision-making responsibilities are conferred on the Secretary of State. Parliament was clearly aware of that and so it must intentionally have refrained from referring to the “Secretary of State” in section 88(3). Apart from the Secretary of State, the only other PIP decision-maker of real significance is the First-tier Tribunal on appeal. And so, while this is not a point that needs to be resolved on this appeal, my view is that the First-tier Tribunal is required to have regard to any guidance issued by the Secretary of State under section 88(3).

Issue 5 – whether the FtT had jurisdiction to determine the length of Mr S’s award

83. The First-tier Tribunal was dealing with an application to strike-out Mr S’s appeal on the basis that it had no reasonable prospect of success. The application was made under rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008:

“(3) The Tribunal may strike out the whole or part of the proceedings if... (c) the Tribunal considers there is no reasonable prospect of the appellant’s case, or part of it succeeding”.

84. The Senior President of Tribunal’s Practice Statement on *Composition of Tribunals in Social Security and Child Support Cases in the Social Entitlement Chamber on or after 1 August 2013* permits a decision under rule 8 of the procedure rules to be made by a tribunal judge sitting alone. However, paragraph 4 of the Statement provides that “where the appeal relates to... personal independence payment under Part 4 of the Welfare Reform Act 2012, the Tribunal must... consist of a Tribunal Judge, a Tribunal Member who is a registered medical practitioner, and a Tribunal Member who has a disability qualification as set out in article 2(3) of the Qualifications Order”.

85. In this case, the Tribunal, since it was comprised of a single member, only had jurisdiction to decide whether Mr S’s appeal had a reasonable prospect of success. That included deciding whether that part of the appeal which challenged the term of Mr S’s PIP award had a reasonable prospect of success.

86. On my reading of its statement of reasons, the Tribunal strayed outside its jurisdiction. It made no finding as to whether the ‘duration’ aspect of the appeal had a reasonable prospect of success. It simply determined the substantive issue – the duration of the award – but not as part of any evaluation of whether the appeal had a reasonable prospect of success. It strayed beyond making a decision under rule 8 and decided a matter for which it was not correctly constituted, being without a medical member and disability member. For this reason, the Tribunal erred in law.

Disposal

87. Mr S’s argument that the First-tier Tribunal erred in law by striking out that part of his appeal which related to the start date of his PIP transfer award fails. The Tribunal made the only decision that was open to it.

88. However, I set aside the First-tier Tribunal’s decision in so far as it was concerned with Mr S’s appeal against the decision fixing the term of his PIP award at three years (under rule 8 of the First-tier Tribunal’s procedural rules, all or part of proceedings may be struck out). The Tribunal was not properly constituted to decide that matter but, even if it was, gave inadequate reasons for its decision. I re-decide this aspect of the case and my decision is to reject the Secretary of State’s application to strike out those parts of the proceedings that relate to matters other than the start date of Mr S’s PIP award. It cannot be said that these aspects of the appeal do not have a reasonable prospect of success where there is no evidence about the likely persistence of Mr S’s limiting conditions.

89. This case is transferred back to the First-tier Tribunal for it to decide those aspects of Mr S’s appeal against the Secretary of State’s decision that are not struck out. I leave it to the First-tier Tribunal to decide on the necessary case management directions.

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(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
11th February 2016