CPIP/190/2016

DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The claimant's appeal to the Upper Tribunal is allowed. The decision of the Birmingham First-tier Tribunal dated 3 September 2015 involved an error on a point of law and is set aside. The case is remitted to a differently constituted tribunal within the Social Entitlement Chamber of the First-tier Tribunal for reconsideration in accordance with the directions given in paragraph 12 below and any further procedural directions that may be given by a First-tier Tribunal judge (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)).

REASONS FOR DECISION

1. The claimant appeals against the decision of the tribunal of 3 September 2015 with the permission of Upper Tribunal Judge Gray given on 25 April 2016. The carefully reasoned submission on behalf of the Secretary of State dated 17 May 2016 supported the appeal, with the suggestion that the case be remitted to a new tribunal for rehearing. The reply dated 20 June 2016 from the claimant's representative, Habib Ullah of Birmingham Community Law Centre, requested that consideration be given to the substitution of a decision by the Upper Tribunal, in the light of what had been said in the Secretary of State's submission.

2. The tribunal was concerned with the Secretary of State's decision dated 31 October 2014 that the claimant was not entitled to personal independence payment (PIP) from 18 March 2014. He had previously been entitled to the lower rate of the mobility component and the lowest rate of the care component of disability living allowance on an award running to 2 December 2014. The decision maker considered that the claimant qualified for two points under daily living activity 1(c) (cannot cook a simple meal using a conventional cooker but can using a microwave) and four points under activity 9(c) (needs social support to be able to engage with other people). It was considered that he also qualified for four points under mobility activity 1(b) (needs prompting to be able to undertake any journey to avoid overwhelming psychological distress). The tribunal adopted the same points in disallowing the claimant's appeal, although for some reason it preferred to award two points for daily living descriptor 1(b) rather than 1(c). For the purposes of the present decision I need only look, at least initially, at daily living activity 1. If there is a legal flaw in not awarding four points or more under that activity, that would mean that there was a flaw in not accepting that the claimant reached the threshold of eight points for the standard rate of the daily living component, so that the error of law would be material to the decision.

3. Although the claimant had ticked the no boxes on the questionnaire signed on 28 May 2014 about using aids or appliances to prepare or cook a simple meal or needing help from another person to prepare or cook a simple meal, he wrote in that the only thing he made was tea for himself, which took ages, and that he did not prepare any meals, but got it from the shop ready-made. He also wrote that he could not concentrate for long and would forget things. The healthcare professional who carried out the consultation on 29 September 2014 wrote this in the

section on activity 1:

> "[The claimant] stated in his claimant questionnaire that he doesn't cook at all and only buys and reheats ready meals. He stated during the assessment that he always buys ready meals as he doesn't know how to cook. And states he uses a microwave to reheat all the meals."

The healthcare professional apparently accepted those statements and did not suggest that they were inconsistent with the limitations resulting from the claimant's condition.

4. The tribunal in its statement of reasons merely referred to the claimant's evidence on 3 September 2015 that he could not cook, but was able to use a microwave to reheat food, which it evidently accepted. Then it stated that plainly the claimant needed an appliance to prepare or cook a simple meal. The record of proceedings shows the claimant saying that he could not cook (page 83) and could not remember how to cook, even curries (page 88) and that he preferred takeaways from a curry place and used a microwave to reheat leftovers (page 89).

5. I agree with the representative of the Secretary of State in the submission of 17 May 2016 that the tribunal (and I think also the healthcare professional) overlooked the definition of "simple meal" for the purposes of the Schedule given in Part 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013. That phrase means "a cooked one-course meal for one using fresh ingredients". For completeness I should add that "cook" is defined as "heat food at or above waist height" and "prepare" is defined, in the context of food, as "make food ready for cooking or eating". I come back in paragraphs 8 and 9 below to the impact of the definition of "simple meal" on descriptor 1(c).

6. The immediate importance of the definition is that, even if the terms of daily living descriptor 1(b) and/or (c) were satisfied, the tribunal of 3 September 2015 should also have considered the potential application of descriptors 1(d) to (f), the general rule under regulation 7(1)(b) being that where two or more descriptors under an activity are satisfied the higher or highest scoring descriptor is taken into account. Thus, taking the terms of descriptor 1(e) (since 1(d) only scores two points), what the tribunal appears to have accepted as the limits (as a result of his mental condition) to the claimant's abilities in the preparation etc of food would suggest that he would only be able to prepare a meal using fresh ingredients and go on to cook a meal prepared in that way if someone else, assuming that such a person were available, was with him either supervising or assisting. "Supervision" is defined to mean "the continuous presence of another person for the purpose of ensuring [the claimant's] safety", so might be problematic. "Assistance" is defined as "physical intervention by another person and does not include speech". It may need to be decided in some future case whether assistance can cover the doing of an entire task of preparation or cooking instead of it being done by the claimant or whether the claimant has to retain some input into the task as the ordinary meaning of "assistance" would suggest.

7. There is some difficulty in working out the differences between descriptors 1(e) and (f).

Descriptor 1(f) refers to food, not to a simple meal, but still appears to be satisfied if the claimant either cannot prepare food or cannot cook food. Presumably, in the context, that must mean that the claimant cannot both prepare and cook food even if prompted, supervised or assisted. If that is right, that points against its applying in the claimant's circumstances, but in my judgment its application cannot be ruled out on the basis of what might be revealed by further inquiry into the factors relevant to descriptors 1(e) and (f). It also in my view follows from the logical progression through the descriptors that in considering the cooking parts of descriptors 1(d) to (f) ability to use a microwave to cook a meal prepared from fresh ingredients must be taken into account. Of course, if the preparation part of the descriptor is satisfied it will not be necessary to reach a definitive conclusion on the cooking part.

8. The terms of descriptor 1(c) are significantly different from those of the other descriptors under activity 1 in that they refer only to cooking a simple meal and not to preparing one. Initially, I thought that that would mean that, in considering whether a claimant was able to cook a simple meal using a microwave, a ready-meal purchased as such or prepared by someone other than the claimant or a take-away or its leftovers that are heated up in a microwave would come within the definition of "simple meal" even though they did not involve the use of fresh ingredients by the claimant. Fresh ingredients would no doubt have been used in the making of the ready-meal or the takeaway, so that in the context of looking only at cooking, it could be argued that the definition was satisfied because the meal was prepared used fresh ingredients. However, further reflection suggests that that is not right. In my judgment, in the definition of "simple meal" the phrase "using fresh ingredients" refers to the act of preparation and/or cooking that is the focus of the activity 1 descriptors, rather than to the meal. Then for descriptor 1(c) one has to start by asking whether a claimant can cook (at or above waist height) a simple meal using a conventional cooker. Because the test is in terms of cooking only, I think that one has to ignore whether or not the claimant could prepare such a meal. But even if it is assumed that the preparation has been done by someone else, the primary test is still whether the claimant could cook such a meal, of the sort prepared using fresh ingredients in a way suitable for cooking using a conventional cooker. Considering again the logical progression of the descriptors, that appears to mean whether the claimant is able to do that without prompting, supervision or assistance, on their own. If the answer to that is that the claimant cannot do so, then descriptor 1(c) is satisfied if the claimant <u>can</u> do so using a microwave, i.e. cook a meal of that sort, again without prompting, supervision or assistance. However, in such circumstances before the points awarded are limited to two it would have to be asked whether a higher-scoring descriptor might apply. That would be the case if the claimant could not prepare food at all or could only prepare a simple meal from fresh ingredients with supervision or assistance.

9. The upshot of that analysis, which must be regarded as provisional because I have had no submissions specifically directed to it, is that I agree with Judge Gray in paragraph 23 of *LC v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 150 (AAC) where she says that the mention of microwave cooking in daily living descriptor 1(c) does not mean the heating of ready prepared microwave meals. However, my view the reasoning to support that conclusion requires a careful consideration of the overall structure of the descriptors in activity 1, not just a reference to

the definition of a simple meal. And a claimant's ability to use a microwave to heat up ready-meals or takeaways or their leftovers is relevant in this sense. I have suggested that since descriptor 1(c) is directed only at cooking there has to be an assumption that the preparation of a simple meal using fresh ingredients has been done for the claimant. I further suggest that the preparation, in the light of the definition in terms of making food ready for cooking, would include putting the food into microwaveable containers. If a claimant can, without prompting, supervision or assistance, microwave a ready-meal or a takeaway, it has to be asked why he or she cannot microwave a simple meal prepared in that way.

10. It is my provisional view that the tribunal of 3 September 2015 went also wrong in law in relying on daily living activity 1(b), because a microwave is not an aid or appliance. "Aid or appliance" is defined in regulation 2 of the PIP Regulations to mean "any device which improves, provides or replaces [the claimant's] impaired physical or mental function". I cannot see that using a microwave to cook, or a conventional cooker for that matter, does any of those things. It merely provides one means of cooking. So descriptor 1(b) could not be an alternative to 1(c) in the circumstances of the present case.

11. For the reason given in paragraph 5 above, as amplified in paragraphs 6 and 7, the decision of the tribunal of 3 September 2015 must be set aside. I have considered carefully whether I can substitute a decision on the claimant's appeal; against the decision of 31 October 2014, as requested on his behalf. I might have been prepared to do so if only the daily living component was in issue and there was no possibility of the claimant qualifying for more than four points under descriptor 1. However, Mr Ullah has also challenged the tribunal's conclusions and expressed reasoning on the mobility component (indeed paragraph 15 of the statement of reasons seems simply to be incomplete, with no reason why only 4 points and not any more were awarded under mobility activity 1) and I do not see how a decision on that component could satisfactorily be substituted without further findings of fact that I am not in a position to make. And even on the daily living component, I am not in a position to make findings of fact to determine whether or not the claimant qualified at the relevant time for eight points under activity 1, or about other activities that might be in issue especially taking into account the submissions made on behalf of the Secretary of State in the response of 17 May 2016. Since there has to be a rehearing to examine all the evidence before making those findings of fact, that is best done by a new tribunal in the claimant's area with the expertise and experience of all three members.

12. The claimant's appeal against the Secretary of State's decision of 31 October 2014 is remitted to a First-tier Tribunal in accordance with the following directions. No-one who was member of the tribunal of 3 September 2015 is to be a member of the new tribunal. There must be a complete rehearing of the appeal on the evidence produced and submissions made to the new tribunal, which will not be bound in any way by any findings made or conclusions expressed by the tribunal of 3 September 2015. All the activities in issue, not just the ones specifically mentioned above, are to be considered. I direct the new tribunal to apply the approach in law set out above, except in relation to the points that I have identified as provisional (in effect paragraphs 7 to 10 above), where it may make its own judgment. If the tribunal is minded to differ from any view

expressed in those paragraphs it must give both parties a fair opportunity to comment. Both parties may of their own motion make submissions to the new tribunal that it should differ from any view expressed there. The evaluation of all the evidence will be entirely a matter for the judgment of the new tribunal. The decision on the facts in this case is still open.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 8 July 2016