

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

As the decision of the First-tier Tribunal (made on 19 January 2017 at Southampton under reference SC266/16/00055) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.
- B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 29 January 2016 and refused on 10 April 2016, from the effective date of 11 May 2016.
- D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

A. The issue in this case

1. This case is concerned with activity 9 in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI No 377):

Activity	Descriptors	Points
Engaging with other people face to face	a. Can engage with other people unaided.	0
	b. Needs prompting to be able to engage with other people.	2
	c. Needs social support to be able to engage with other people.	4
	d. Cannot engage with other people due to such engagement causing either-	8
	(i) overwhelming psychological distress to	

UPPER TRIBUNAL CASE NO: CPIP/1127/2017

the claimant; or

- (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.

2. There is a definition of 'engage socially' in paragraph 1 of the Schedule. It is generally accepted as applying to activity 9, although that expression is not used there or anywhere else in the Regulations for that matter:

'engage socially' means-

- (a) interact with others in a contextually and socially appropriate manner;
- (b) understand body language; and
- (c) establish relationships;

In particular, the issue in this case is the meaning of 'establish relationships'.

3. Regulation 4(2A) is also relevant:

(2A) Where C's ability to carry out an activity assessed, C is to be assessed as satisfying a descriptor only if C can do so-

- (a) safely;
- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period.

B. The claimant's condition

4. There is a report from a Cognitive Behavioural Therapist from 2007, which described the claimant as experiencing 'repetitive thoughts and images of a homosexual nature' causing him to engage 'in a range of overt and covert rituals as well as safety behaviours, in order to neutralise these distressing thoughts/images.'

5. There is evidence from a Consultant Neuropsychopharmacologist that the claimant has had obsessive compulsive disorder for over 25 years and that his condition is the most treatment refractory that she knew of in England.

C. The claim for a personal independence payment

6. The claimant was receiving a disability living allowance consisting of the care component at the middle rate when he was invited to claim a personal independence payment. He did so on 29 January 2016. This is how the claimant described his condition in his questionnaire:

I have O.C.D. I can have mild or extreme times of the day or night whenever I'm near or see men no matter who, young, old or even men in my own family, I see images of men in books magazines and on TV the problems start all over again then again then again. I truly wish I had what it takes to end this thing called life.

UPPER TRIBUNAL CASE NO: CPIP/1127/2017

In his comments on activity 9 in his questionnaire, he wrote:

I can remember before the O.C.D. started I was at peace in my mind but ever since that first morning when I came down the stairs and got gay thoughts about my dad then went to school and the same thing in my head about my friends and men school teachers, it took me a break down that was 12 years later to try and get help but over the years I've had so many prescribed drugs and three brain surgeries I truly wish I was dead but can't do it myself, so find it extremely difficult mixing with men.

7. The health professional gave the opinion that the claimant did not score any points for either the daily living component or the mobility component. The decision-maker accepted that opinion and refused the claim on 10 April 2016, effective from 11 May 2016.

D. The appeal to the First-tier Tribunal

8. On appeal, the First-tier Tribunal found that the claimant scored two points for activity 9b and two points for needing prompting or assistance to make complex budgeting decisions, but that was not enough to allow an award. The presiding judge spent almost two pages explaining the tribunal's decision on activity 9. She recorded detailed findings about how the claimant managed or avoided contact with men in his daily life. The essence of the tribunal's reasoning was this:

The Tribunal considered the extent to which [the claimant] could engage socially with people he did not know. There was nothing to indicate that he could not engage with women, indeed he chose to do so. At the least therefore some of the people that he met were not going to provide a difficulty for him. In respect of the remainder while he was by himself he might find engaging difficult but with someone there to encourage and support there was nothing to indicate that social engagement as a reciprocal exchange (rather than friendship or a longer relationship) would not be possible.

I gave permission to appeal on the ground that the tribunal's analysis of the evidence might not support its finding that he could establish relationships.

9. The Secretary of State's representative has not supported the appeal. She has pointed out that the claimant's difficulties are only with men, he has at least one male friend, and he is able to engage with men to some extent at least. As to establishing relationships, she referred to the tribunal's finding that the claimant could engage in a reciprocal exchange with men and submitted that establishing relationships means 'the ability to reciprocate exchanges'.

10. The claimant's representative has pointed out that the claimant goes out infrequently to avoid encounters with men and is always fearful and anxious whenever he is out.

E. My analysis

11. I have decided that the tribunal did make an error of law by not dealing with head (c) of the definition of 'engage socially' and by not appearing to have taken sufficient account of regulation 4(2A), despite setting it out. I will concentrate in my analysis on how a tribunal should approach that aspect of engaging with other people face to face.

12. The Secretary of State's representative has cited from the three-judge panel in *JC v Secretary of State for Work and Pensions* [2014] UKUT 352 (AAC). That case concerned activity 16 (coping with social engagement due to cognitive impairment or mental disorder) in Schedule 2 to the Employment and Support Allowance Regulations 2008 (SI No 794). There may be much of value in that decision for activity 9, but I do not find anything particularly relevant to head (c) of the definition that applies in the personal independence payment legislation.

13. I do not accept that establishing a relationship means no more than 'the ability to reciprocate exchanges'. There is more to it than that. A brief conversation with a stranger about the weather while waiting for a bus does not involve establishing a relationship in the normal sense of the word. Nor does buying a burger or an ice cream, although both involve reciprocating exchanges.

14. Heads (a) and (b) are important parts of establishing relationships, but more is required. Relationships vary in duration (from fleeting to life-long), nature (acquaintance, business, friendship, partnership, sexual) and intensity. Head (c) refers to relationships without qualification. I take that to mean that it is concerned with skills relevant to relationships in general rather than with a particular type of relationship. And the focus is on establishing a relationship rather than nurturing or developing one.

15. The claimant is able to establish relationships with women, but that still leaves roughly half the population that cause him a problem. I have not had argument on this, but I consider that difficulties of that magnitude would be sufficient to satisfy the definition.

16. I am not going to attempt to list the essential characteristics of a relationship. 'Relationship' is a word that we all use and the law reports are replete with example of judges explaining why it is a mistake to try to define such words. Not only is that task difficult if not impossible, it is also dangerous. I doubt that I would have envisaged the facts of this case if I had tried to compile a list. That is why I have not attempted itemise the various skills that are brought to bear in establishing a relationship.

17. The way I have approached this case – and the approach I would recommend to the First-tier Tribunal – is to begin by asking what it is that the claimant says is preventing or inhibiting establishing relationships. Assuming that the tribunal accepts the evidence, the next question is whether that forms part of the claimant's physical or mental condition for the purposes of section 78 of the Welfare Reform Act 2012.

UPPER TRIBUNAL CASE NO: CPIP/1127/2017

18. By way of illustration, I set out below how I have approached this case. It is not binding on the First-tier Tribunal that rehears this case. That tribunal must make its own independent assessment of the evidence.

19. The claimant has set out vividly how his homosexual thoughts hamper his daily life. I have no hesitation in accepting what he says, supported as it is by the medical evidence. Given that medical evidence, there is no doubt that this is part of the claimant's mental condition and not merely some personal preference or prejudice. How, then, does activity 9 apply? The claimant's difficulties are embedded and have proved intractable to licensed and unlicensed medication, psychotherapy, and surgery. I doubt that they will be overcome by prompting or social support (activity 9b and c). Either prompting or support may help him to go through the motions of engaging in some form of contact with others, but the way he described his condition suggests that even a small amount of contact causes him distress. Even if that distress does not reach the level of 'overwhelming psychological distress', it may still be relevant to regulation 4(2A)(b) in that, from his point of view, he is not doing establishing a relationship to an acceptable standard. That leaves activity 9d. The claimant's avoidance tactic seems to rule out 9d(ii). What about 9d(i)? It may be that his distress does reach the level of overwhelming psychological distress. He certainly refers to wishing he were dead and his self-imposed isolation may support how he describes his feelings.

F. Disposal

20. Having gone through this process, the issue arises whether I should re-make the decision. I have not done so, because the issues were not explored sufficiently in the tribunal's questioning – I suspect that the tribunal lost sight of the definition. That is why I have directed a rehearing. As I say, my thoughts are not binding on the tribunal that rehears the case, but I hope that they may be of some help in suggesting an approach.

**Signed on original
on 29 August 2017**

**Edward Jacobs
Upper Tribunal Judge**