

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CPIP/2354/2017

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 30 March 2017 under number SC947/16/01786 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**
- 3. The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**
- 4. The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is the 17 July 2016. Any further evidence, to be relevant, should shed light on the position at that time.**
- 5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. The Appellant had made a claim for personal independent payment on the basis that he suffered from ischaemic heart disease, musculoskeletal problems and anxiety and depression. He lived alone and shared custody of his children (aged 13 and 11 at the time of the Secretary of State's decision). In support of his application for PIP the Appellant raised a number of limitations and difficulties, including that as a

result of his depression he needed to be encouraged to undertake a number of activities. The Secretary of State decided that he was not entitled to PIP and the Appellant appealed to the First-tier Tribunal.

2. The tribunal had been provided with a report from the Appellant's GP. This included the following:

"I can report from the patient's description of how his illness is affecting him, that he does need to be prompted to prepare a meal.

[PM's] depression has a large impact upon him. However when he is in the company of his children he finds he needs to make the extra effort to look after them and this has a beneficial effect on him.

However when his children are not present the effect of his depression and anxiety on him are much more pronounced....

[PM] does not need supervision when washing. However reports that he does need prompting when his children are not there and it is only himself who is his concern. He reports he doesn't usually brush his teeth or hair and does not wash or shave unless prompted.

He spends most of the day in his pyjamas unless he has a reason to have contact with other people. So again unless his children are with him he would not normally get dressed in the day.

He doesn't by choice engage with people, again unless his children are present.

When he has to go out for shopping he does so by dark."

(I have corrected the text for obvious typographical errors)

3. The tribunal explained its approach to the GP's letter as follows:

"The letter stated that the Appellant *"reports"* in relation to many activities and not that the letter was based on any examination of the Appellant by the Doctor."

4. In relation to daily living activity 1 (preparing food), the FTT said

"The Tribunal could not reconcile the fact that the Appellant was able to prepare food for himself and his children at least 4 days/nights per week but then when they were not there he found it more difficult."

5. In relation to activity 9 (engaging with other people face to face), the tribunal said

"We found that the Appellant engaged well with his two children who enjoyed overnight staying contact on three nights and four nights each week alternatively. The Appellant has attended C-Tech courses where he would engage with other people. We found that the Appellant met up with his mother and sister regularly and had contact with his Support Worker at least once a month. We noted that the Appellant went to a parent's evening and that whilst he did not stay particularly long he nonetheless was able to have the confidence to attend and engaged to an extent. However, having regard to the other engagements referred to above we found that the Appellant was able to engage with other people face to face for 50% of the days."

6. When I gave permission to appeal I observed as follows:

"2. In this case it is arguable that the FTT erred in law in its treatment of the Appellant's depression and anxiety and the impact of that on him when his children are not with him. The Appellant's case was that it was the children's presence that enabled him to undertake activities which he could not do in their absence. This in itself may indicate that he received prompting in the sense of "encouraging" from his

children. Moreover, the tribunal's statement that it "could not reconcile" the difference between what he could do when his children were there with what he said he could do when he was alone is inadequate to address the case advanced by the Appellant.

3. Further the tribunal arguably erred in its treatment of the GP's report at paragraph 18. This arguably amounted to a dismissal of the report rather than a more nuanced assessment of the evidence as a whole, as explained in HL v SSWP [2011] UKUT 183 (AAC). In addition, it is not presently clear to me why the tribunal thought that the Appellant's evidence was inconsistent with the GP's report."

7. The Secretary of State supports the appeal on these grounds. The Appellant has no comment to make. Neither party has requested an oral hearing and I am satisfied that I can properly determine the case without a hearing.

8. In the light of the positions of the parties it is unnecessary for me to set out in detail the background to the case or the evidence and arguments. It is sufficient to explain that I am allowing the appeal on the above grounds. I find that the First-tier Tribunal's decision was made in error of law for those reasons, and I set the decision aside. I am not in a position to re-make the decision under appeal as further findings of fact are required. There will need to be a fresh hearing before a new First-tier Tribunal.

9. Although I have not had submissions on the point, I make some observations as to the application of the "prompting" descriptors in this case. The evidence of the Appellant and the GP was that the Appellant could undertake certain activities without prompting only when he was sufficiently motivated as a result of the children's presence. If the tribunal accepts that to have been the position, as a matter of fact, it will then need to decide whether that is evidence that the Appellant needed prompting to perform any of the activities in Schedule 1. Part 1 of Schedule 1 of the PIP Regulations defines "prompting" as "reminding, encouraging or explaining by another person". This requires some active steps by another person. It would not be satisfied by something passive such as the mere presence of the children. Nonetheless, it may be that what the children did could have amounted to prompting, for instance if the children actively encouraged the Appellant to undertake certain activities. It does not seem to me to matter that the children were not consciously encouraging him if that was the effect of what they did. Alternatively it may be that the effect of the children's presence is evidence of a need for prompting even if the Appellant did not in fact receive it when he needed it. For instance if when alone the Appellant lacked motivation to perform some activities without prompting, the question then arises as to when that would occur and how it would affect him in practice. If it meant that on the majority of the days in the required period he lacked the necessary motivation at some point in the day and so required prompting in order to perform an activity in accordance with regulation 4(2A) including to do so as often as reasonably required during each day, then the prompting descriptor of the applicable activity would be satisfied: TR v Secretary of State for Work and Pensions (PIP) [2015] UKUT 626 (AAC), [2016] AACR 23. The next tribunal will need to explore these factual matters and make its determination accordingly.

10. Finally, although this was not identified as a ground of appeal, I am concerned that in addressing activity 9 the FTT may not have applied the definition of "engage socially" in Schedule 1. In my view, the various engagements which the tribunal identified the Appellant as being capable of do not necessarily amount to social engagement in that sense. Most of the examples relied on by the tribunal involved

the Appellant's relationships with people that he knew well (his family members and his support worker) and do not of themselves evidence his ability to "establish relationships" (see HJ v Secretary of State for Work and Pensions (PIP) [2016] UKUT 487 (AAC) at paragraph 18). There were no findings as to the nature of his engagement with people on the courses he had attended. It does not appear that the tribunal considered that attendance at parents' evenings would of itself have established the Appellant's ability to engage with other people. In any event the tribunal made no findings as to the nature or extent of the Appellant's interactions at the parents' evenings, bearing in mind that establishing a relationship means more than "the ability to reciprocate exchanges": RC v Secretary of State for Work and Pensions (PIP) [2017] UKUT 0352 (AAC), at paragraph 13.

11. These observations are not binding on the next tribunal but I hope that they will be of assistance in its determination of the appeal.

**Signed on the original
on 20 December 2017**

**Kate Markus QC
Judge of the Upper Tribunal**