IN THE UPPER TRIBUNAL **Appeal No. CDLA/2600/2019**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

XTC

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church
Decided on consideration of the papers

Representation (written submissions only):
Appellant: Mr Xiang Long Chen, lay representative
Respondent: C Clark, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 14 June 2019 under number SC242/19/01104 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 First-tier Tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the First-tier Tribunal's discretion under Section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.**
3. **The First-tier Tribunal hearing the remitted appeal shall not involve the members of the panel who heard the appeal on 14 June 2019.**
4. **A copy of this decision should be included in the appeal bundle before the panel of the First-tier Tribunal dealing with the remitted appeal.**
5. **In reconsidering the issues raised by the appeal the First-tier Tribunal must not take account of circumstances which were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided it relates to the time of the decision: R(DLA) 2 & 3/01.**

6. **If the claimant has any further evidence to put before the First-tier Tribunal this should be sent to the regional office of Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued. Any such further evidence must relate to the circumstances as they were at the date of the decision of the Secretary of State under appeal (see Direction 5. above).**
7. **The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes the new panel may reach the same or a different outcome from the previous panel.**

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

Background

1. This appeal concerns a decision of the First-tier Tribunal sitting at Fox Court on 14 June 2019 (the **"Tribunal"**) which refused the Appellant's appeal and confirmed the Respondent's decision dated 04 January 2019 (the **"FtT Decision"**) that, while the Appellant continued to be entitled to Disability Living Allowance (**"DLA"**) with the Daily Living Component at the highest rate from 10 March 2019 to 08 March 2022 he was no longer entitled to the Mobility Component of DLA at the higher rate from 10 March 2019, but only to the lower rate of that component.

The Permission Stage

2. The Appellant disagreed with the FtT Decision and applied, through his Appointee, for permission to appeal to the Upper Tribunal. This was refused by a salaried judge of the First-tier Tribunal. The Appellant exercised his right to renew the application before the Upper Tribunal and the matter came before me.

3. The Appellant asked for an oral hearing of the permission application. I considered that it would serve the interests of justice to give the Appellant's Appointee or representative an opportunity to develop arguments at an oral hearing and that it was proportionate to have one.

4. On 09 September 2019 the Appellant's representative attended an oral hearing at Field House, London and elaborated on the arguments he had made in writing. The Respondent did not attend and was not represented at the hearing.

5. The only issue in the appeal before the Tribunal was whether the Appellant was entitled to the higher rate of the Mobility Component of DLA, either because he was unable or virtually unable to walk, or because he satisfied the criteria set out in section 73(3) of the Social Security Contributions and Benefits Act 1992 (the **"1992 Act"**), as further defined in regulation 12(6) of the Social Security (Disability Living Allowance) Regulations 1991 (the **"DLA Regulations"**; the **"SMI Criteria"**).

6. The Tribunal found that the Appellant satisfied the conditions in paragraph (a) of section 73(3) of the 1992 Act because his autistic spectrum disorder arises from a state of arrested or incomplete development of the brain and because it decided that the evidence before it indicated that the Appellant's intelligence was severely

impaired. It was not in dispute that the Appellant satisfied section 73(3)(c) of the 1992 Act. However, the Tribunal decided that the Appellant did not satisfy section 73(3)(b) because he did not display "severe behavioural problems".

7. The grounds of appeal put forward by the Appellant's representative developed in the course of the oral hearing of his permission application. By the end of the hearing they amounted to these:

a. the Tribunal managed its procedure in a way which was unfair because it refused the Appellant's father's application at the hearing to admit a video of his son which he said would illustrate why it was necessary for him to hold his son's hand when out walking, and it failed to explain why it refused to admit this evidence;

b. the Tribunal was not entitled on the evidence before it to make the finding that the Appellant spent "60% of his time in the autism unit and the remainder in mainstream classes" (see paragraph 15 of the Tribunal's statement of reasons);

c. the Tribunal was wrong to find that the Appellant "regularly walked alone without guidance or supervision to visit family members" (paragraph 37(f) of the statement of reasons) and "regularly walked to see his [father's] in-laws unsupervised" (paragraph 55(d) of the statement of reasons) given the evidence noted in paragraph 33 that he was watched as he made the journey;

d. the Tribunal erred in law when it found that the Appellant's playing with his penis in public (including at the supermarket, at school and in front of a neighbour's child) did not amount to "extremely disruptive" behaviour; and

e. in assessing whether the Appellant's behaviour satisfied the criteria in Regulation 12(6) of the DLA Regulations the Tribunal erred in law in failing to assess the evidence about his behaviour as a whole, failing to consider the totality of the Appellant's behaviour, and focussing excessively on whether the Appellant's behaviour was "violent", which was not part of the criteria in Regulation 12(6).

8. In relation to the ground summarised in paragraph 7(a) above, the Appellant's representative said that the Tribunal gave no reasons for refusing to admit the father's application to introduce video evidence. There was no mention of the Appellant's father requesting to introduce video evidence either in the record of proceedings, the statement of reasons or either the original or corrected decision notices. I had no reason to doubt the Appellant's father's evidence that he made the request he said he made.

9. In my decision granting permission to appeal I said:

> "Under the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 the Tribunal had broad powers to manage its own procedure, including a wide discretion when deciding what should and should not be admitted in evidence. The Tribunal may well have been entitled to refuse to admit the video recording into evidence. However, it is arguable that it was incumbent upon the Tribunal to explain why it decided not to allow the video to be played. [The Appellant's father] says that the reason he wanted to

> play the video to the Tribunal was to demonstrate how large and powerful his son was, and to show why it was necessary for him to keep a firm grip on his hand when near roads. A central issue in the appeal was the applicability or otherwise of the SMI Criteria (including whether the Appellant "regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property"). Given this, if the Tribunal did err in the way suggested, the error might have been material to the outcome of the appeal. This justifies a grant of permission to appeal."

10. Because I was satisfied that it was appropriate to grant permission to appeal in relation to the ground summarised in paragraph 9 I didn't address the other grounds raised by the Appellant, but I did not restrict my grant of permission.

11. I invited the Respondent to make submissions on the appeal, and gave the Appellant an opportunity to respond. I asked the parties to say whether they wanted an oral hearing so that I could consider whether it was appropriate to hold one.

The Parties' Submissions

12. C Clark, on behalf of the Respondent, made detailed written submissions supporting the appeal on the basis that the Tribunal had erred in the ways summarised in paragraph 7(a), (b) and (c) above. The Respondent did not accept that the Tribunal erred in its decision-making as to whether the Appellant satisfied the requirements of section 73(3)(b) of the 1992 Act, but because the Respondent accepted that the errors she had made were material she invited me to allow the appeal and remit it to the First-tier Tribunal for rehearing before a fresh panel.

13. The Appellant's representative took issue with the Respondent's approach to regulation 12(6)(b) of the DLA Regulations, saying that it wrongly equated "extreme" behaviour with "violent" behaviour. He also argued that, in any event, the Appellant's behaviour was violent.

Why there was no oral hearing of this appeal

14. C Clark, for the Respondent, did not request an oral hearing. Mr Chen, for the Appellant, said that he felt that an oral hearing would be helpful as it would give him an opportunity to explain matters in detail.

15. I considered whether it was in the interests of justice to hold an oral hearing of the appeal but given the Respondent's support for the appeal and the nature of the remaining issues I didn't think that an oral hearing was necessary or proportionate. I decided that I could determine the appeal fairly and justly on the papers alone, which is what I did.

The Tribunal's refusal to admit video evidence

16. Rule 15 of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 (the **"FtT SEC Rules"**) sets out the tribunal's powers in relation to evidence and submissions:

> "15. — (1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to —
> (a) issues on which it requires evidence or submissions;
> (b) the nature of the evidence or submissions it requires;

(c) whether the parties are permitted or required to provide expert evidence;
(d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
(e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given —
(i) orally at a hearing; or
(ii) by written submissions or witness statement; and
(f) the time at which any evidence or submissions are to be provided.

(2) The Tribunal may —
(a) admit evidence whether or not —
(i) the evidence would be admissible in a civil trial in the United Kingdom; or
(ii) the evidence was available to a previous decision maker; or
(b) exclude evidence that would otherwise be admissible where —
(i) the evidence was not provided within the time allowed by a direction or a practice direction;
(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or
(iii) it would otherwise be unfair to admit the evidence.

(3) The Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose."

17. Tribunals have a broad discretion in deciding what evidence to admit or to exclude, but in doing so they must exercise their discretion consciously and judicially. If a tribunal is to exclude evidence that it would otherwise be allowed to take into account then it must justify doing so, including by reference to the overriding objective.

18. The overriding objective is set out in Rule 2(1) of the FtT SEC Rules and provides:

"2.— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction."

19. There is no reference to the application made at the hearing to admit video evidence, either in the Tribunal's statement of reasons, the record of proceedings or in either the original or corrected decision notices.

20. When considering whether to grant permission to appeal I had to be satisfied that it was arguable, with a realistic (as opposed to fanciful) prospect of success, that the Tribunal erred in law. At this stage if I am to allow the appeal I must be satisfied to the civil standard (i.e. that it is more likely than not) that the Tribunal erred in law.

21. Given that there is no mention of the application at all I have no idea what the Tribunal thought about the application to admit video evidence. It might have had good reasons not to admit it, but if it did it didn't explain them, and it didn't say how its decision to exclude the video furthered the overriding objective of dealing with the appeal fairly and justly.

22. Since the Tribunal said nothing about the issue I cannot be confident that it exercised its discretion consciously or, if it did, that it applied the correct test to decide whether to admit it or not. What I can be certain of is that it hasn't explained its decision to the required standard of adequacy, and this is itself an error of law.

23. Given that the purpose for which the Appellant's father sought to have the video evidence admitted (i.e. to demonstrate why it was necessary for him to hold his son's hand when walking outdoors) and given that this related to a key issue in the appeal (i.e. the regular need for restraint) it certainly had the potential to be material to the outcome.

Explanation of Tribunal's finding that Appellant spent "60% of his time in the autism unit and the remainder in mainstream classes"

24. The Appellant's representative argued that the Tribunal was not entitled on the evidence before it to make its finding that the Appellant spent "60% of his time in the autism unit and the remainder in mainstream classes" (see paragraph 15 of the Tribunal's statement of reasons).

25. The Tribunal had before it some evidence that supported this finding in the form of the "Autism Support Team Record of Visit" (at page 200 of the appeal bundle), which indicates that the Appellant spends the majority of his time in the resource base. However, it was incumbent on the Tribunal to explain to the standard of adequacy how it reached its finding that he spent 60% of his time in the resource base, and it didn't do so. This amounts to another deficiency in the Tribunal's reasons, albeit one that doesn't, on its own, reach the threshold of materiality.

Explanation of Tribunal's finding that the Appellant "regularly walked alone without guidance or supervision to visit family members"

26. The Tribunal's statement of reasons recites the Appellant's father's evidence that his son

> "was regularly encouraged to walk from his home to visit his in-laws. He would do this independently. [His father] would watch him from their flat and the in

> laws would be waiting. He could be seen for most of the journey which was about 50 to 100 metres" (see paragraph 33 of the statement of reasons).

27. The Tribunal went on to find as a fact that the Appellant "would regularly walk alone without guidance or supervision" and that he "regularly walked alone without guidance and supervision to visit family members" (see paragraph 37(c) and (f) of the statement of reasons). These findings appear to be based on the Appellant's father's evidence about his son's visits to his in-laws quoted above, which the Tribunal appears to have accepted.

28. Given the evidence that he was watched as he made the journey, which the Tribunal does not dispute, it was incumbent on the Tribunal to explain why his parents watching him as he made that journey did not amount to "supervision" for the purposes of the DLA Regulations. This amounts to another deficiency in the Tribunal's reasons.

The requirements of regulation 12(6) of the DLA Regulations

29. To satisfy the SMI Criteria, as well as satisfying the severe mental impairment condition in paragraph (3)(a) of section 73 and both the day and night conditions set out in paragraphs (1)(b) and (c) of section 72 of the 1992 Act (all of which were accepted by the Respondent), the Appellant also had to satisfy paragraph (3)(b) of section 73 of the 1992 Act, which requires that he "displays severe behavioural problems". This condition is further explained in regulation 12(6) of the DLA Regulations, which provides:

> "(6) A person falls within subsection (3)(b) of section 73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which –
>
> (a) is extreme;
>
> (b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and
>
> (c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake."

30. The Tribunal heard evidence from the Appellant's father that the Appellant had played with his penis in public at the supermarket, at school and in front of a neighbour's child. In its statement of reasons, when considering whether the SMI Criteria were satisfied, the Tribunal said:

> "Although [the Appellant] played with his penis in public, this did not happen regularly and it did not cause any physical injury to [the Appellant] or any other person. In any event it was not extremely disruptive" (paragraph 55(c) of the statement of reasons).

31. The words "extremely disruptive" are not defined in the Regulations or in the 1992 Act. In *SSWP v MG (DLA)* [2012] UKUT 429 (AAC) Judge Wikeley reviewed the authorities which considered these words:

> *"What does 'extreme' signify in the context of regulation 12(6)(a)?*
>
> 22. Mr Deputy Commissioner Bano described the word 'extreme' as 'an ordinary English word, connoting behaviour which is wholly out of the ordinary' (CDLA/2054/1998 at paragraph 7a). Although the rest of that passage, which concerned the 'indoors/out of doors' point has been disapproved in R(DLA)

> 7/02, I am not sure that this definition of 'extreme' can be usefully improved upon very much. However, as Commissioner Rowland observed in CDLA/2470/2006, reading the sub-conditions cumulatively, 'extreme' behaviour is 'of a type that regularly requires a substantial degree of intervention and physical restraint' (at paragraph 13). In other words, the behaviour must be extremely disruptive. Furthermore, the disruptive behaviour must result from the severe mental impairment: 'insofar as such problems are primarily a manifestation of a claimant's age rather than of such mental impairment, they are irrelevant to entitlement' (CSDLA/202/2007 at paragraph 11). This is ultimately a question of fact for the tribunal, involving 'a large element of judgment' (CDLA/2167/2010 at paragraph 8)."

32. The Tribunal had a wide ambit of discretion when considering whether the Appellant's behaviour disclosed "severe behavioural problems" falling within regulation 12(6) of the DLA Regulations, but I struggle to see how a 10 year old boy playing with his penis in public is not behaviour which is "extremely disruptive", it being wholly out of the ordinary for a child of that age, and liable to cause very significant disruption. I am satisfied, therefore, that the Tribunal's finding that the behaviour was not "extremely disruptive" was not open to it given its apparent acceptance of the incidents described by the Appellant's father.

33. However, that is not the end of the matter because to fall within subsection (3)(b) of section 73 of the 1992 Act the disruptive behaviour in question must satisfy all three conditions in regulation 12(6): the disruptive behaviour in question must be extreme *and* it must require another to intervene and physically restrain them to prevent them causing physical injury to themselves or another, or damage to property, *and* such intervention must be required "regularly".

34. C Clark, for the Respondent, pointed out that the Tribunal heard evidence from the Appellant's father that the Appellant was "not a violent or disruptive child, either at home, at school, or when out at the park". Indeed, it noted that the Appellant "would get upset if he saw other children crying" (paragraph 55 of the statement of reasons).

35. However, regulation 12(6) of the DLA Regulations does not require the behaviour in question to be "violent", it requires that the behaviour is disruptive, extreme, and regularly requires intervention and physical restraint. The intervention and physical restraint in question must be required for the purpose of preventing the child from causing physical injury to themselves or another, or damage to property, but the behaviour which necessitates the intervention and restraint need not be "violent".

36. The Appellant's representative argued that the Tribunal erred because it equated behaviour that might cause physical injury or damage to property with violent behaviour, erroneously importing a requirement for violence that doesn't feature in regulation 12(6). He argued that the Appellant's behaviour playing with his penis could result in physical injury, albeit that it did not involve violence.

37. Although the Tribunal referred to the Appellant's father's evidence that his son was not "violent", the findings of fact it made were that the Appellant's playing with his penis in public "did not cause any physical injury to [the Appellant] or any other person" and that he "did not need to be regularly restrained to prevent himself causing injury to himself or any other person" (see paragraph 55(c) and (e) of the statement of reasons). Those findings track the language of regulation 12(6) and they were open to it on the evidence. I am not satisfied that the Tribunal confused the

requirements of regulation 12(6)(b) of the DLA Regulations with a requirement for "violent" behaviour.

38. The Tribunal found that the relevant behaviour did not occur "regularly" (the word used in regulation 12(6)(b) of the DLA Regulations in the context of the requirement for intervention and physical restraint). The DLA Regulations give us no clarity as to how often disruptive behaviour reaching the required threshold must occur for it to be considered to occur "regularly". Several authorities address the requirement and the proper approach to assessing it. These too are reviewed by Judge Wikeley in *SSWP v MG (DLA)*. Judge Wikeley said:

> "23.The claimant's extreme behaviour need not occur constantly, continuously or all the time. That would be to set the threshold for eligibility too high. Rather, it must be such that it 'regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property'. The word 'regularly' is a protean one, so taking its meaning from its context. The Commissioner in CDLA/2470/2006 commented that 'such a degree of intervention and restraint is likely to be required on a significant proportion of occasions when the claimant walks moderate distances outdoors'. I agree with that observation as far as it goes.
>
> 24. I do not agree with [the claimant's representative's] further submission that this means that regularity under regulation 12(6)(b) can be met by such incidents occurring just outdoors. Such an analysis seems to me to be inconsistent with R(DLA) 7/02. Rather, that sort of intervention to deal with extreme disruptive behaviour will also need to be required sufficiently often indoors as well such that, taken overall, one can say that it is required 'regularly' or 'in the ordinary course of events' (see CDLA/2054/1998 at paragraph 7d). When the claimant is outdoors, the need for intervention in the proximity of traffic is the obvious example. The indoors intervention may take any number of different forms: in *MMcG v Department for Social Development (DLA)* the claimant had to be stopped from jumping off the top step of the household stairs. Other examples – and they are no more than that – might be the need for physical restraint to stop the claimant trying to put his fingers in electrical sockets or to stop him damaging internal doors, walls or household furniture when frustrated. As Mr Deputy Commissioner (now Judge) Warren noted in CDLA/17611/1996, the requirements of regulation 12(6) 'fall to be answered in respect of the claimant's conditions generally and not with any special emphasis on behaviour when walking out of doors' (at paragraph 11). However, I also agree with Judge Mark's helpful formulation that 'interventions may be regular if they are frequent in one context but infrequent, or even rare, in another context provided that looked at overall there is a regular requirement to intervene and physically restrain the claimant' (*Secretary of State for Work and Pensions v DM (DLA)* [2010] UKUT 318 (AAC) at paragraph 9)."

39. I agree with what I have quoted Judge Wikeley as saying above. I note that none of these authorities seeks to put a figure on how often something must occur for it to be said to occur "regularly". To do so would be unhelpful because what is required is a global appraisal of the situation in all the circumstances. The Tribunal should have considered the Appellant's behaviour as a whole, and made findings as to:

a. how often behaviour meeting the other aspects of the threshold set out in regulation 12(6) had occurred (i.e. behaviour that was disruptive and extreme and required intervention and physical restraint to prevent physical injury or damage to property);

b. over what period that behaviour occurred; and

c. in what circumstances the behaviour occurred.

Then it had to decide, based on those findings, whether the behaviour occurred "regularly", according to the ordinary meaning of that word.

40. Behaviour which satisfies some but not all of the conditions (e.g. it is disruptive and extreme but doesn't require intervention and restraint to prevent injury/damage to property, or it is disruptive and requires intervention and restraint to prevent injury/damage to property but isn't extreme, or it is disruptive and extreme and requires intervention and restraint but only for a purpose other than preventing injury/damage to property, for example to prevent distress) should not be weighed in the balance when assessing how "regularly" behaviour satisfying the conditions occurs.

Materiality

41. I have found that the Tribunal erred in law in giving inadequate reasons in several important respects. It failed to explain why it refused to admit the Appellant's father's video evidence, why it made the findings it did as to how much time the Appellant spent in the autism unit, or why the Appellant's parents watching him as he made the journey between his home and his grandparents' home did not amount to "supervision" for the purposes of the DLA Regulations.

42. The Tribunal also erred in finding that the Appellant's playing with his penis in public was not "extremely disruptive" behaviour. Whether this error was material depends on whether the Tribunal understood and applied correctly the tests for the other elements of regulation 12(6) of the DLA Regulations, but the Tribunal failed to explain adequately how it assessed the Appellant's behaviour in these other respects.

It is in the nature of an inadequacy of reasons that one cannot know for sure whether the outcome would have been different had the error not been made, as without a clear explanation of the tribunal's reasons one cannot know whether it applied the correct tests, or applied them correctly. I am satisfied, though, that the Tribunal's errors, when taken together, were of sufficient gravity to be classed as "material".

Other arguments

43. The Appellant's representative made some other submissions that amounted in substance to an attempt to reargue the appeal on its facts, including asserting that the Appellant's behaviour was violent. I do not deal with those arguments here because the Appellant will have the opportunity to present his case anew at the remitted hearing.

Thomas Church
Judge of the Upper Tribunal
Signed on the original on 03 December 2020