IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001458-PIP**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

H.R.A.

Applicant

– v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley
UT Hearing Date: 24 April 2023
Determination date: 11 May 2023

Representation:
Applicant: In person
Respondent: No attendance or representation

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DETERMINATION

The issues in this case

1. As to the law, a claimant for Personal Independence Payment (PIP) must have been "present in Great Britain for … not less than 104 weeks out of the 156 weeks" immediately preceding the date of claim (Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377; 'the PIP Regulations'), regulation 16(b)). This requirement is known as the past presence test.

2. As to the facts, the Appellant, Mr A, had spent most of the three years (and indeed longer) before the date of claim in jail in Afghanistan. As he explained in his grounds of appeal to the First-tier Tribunal:

> "DWP has decided not to grant me PIP as I was away from the UK for more than [2 years] in last 3 years. The decision is contrary to DWP decision dated 30/06/2014 in which I was granted DLA for an indefinite Period. I went to Afghanistan on 16/01/2017 to submit entry clearance applications of my family members to join me in the UK. I was wrongfully arrested in Afghanistan on false allegations and put in jail. I was only released from the jail when Taliban took over the country and I somehow managed to return to the UK on 17/08/2021. I provided this detail to DWP however they have decided to not to grant me PIP."

This application for permission to appeal: the result in a sentence

3. Mr A's application for permission to appeal to the Upper Tribunal is dismissed, there being no arguable error of law in the First-tier Tribunal's decision.

4. I should make it clear from the outset that I have considerable sympathy for Mr A's predicament. The problem is that I can see no way under the law that his proposed appeal can succeed. My reasons follow.

The factual background

5. The First-tier Tribunal made careful findings of fact, which Mr A does not contest. Further facts emerged from the documentation or during the course of the Upper Tribunal permission hearing. In summary, Mr A is a dual Afghan-British national who came to the UK in 2002 and became a British citizen in 2008. He has various medical conditions and disabilities. He went to Afghanistan in January 2017, intending to stay for no more than 15-20 days, to try and secure entry clearance to the UK for family members. However, in February 2017 he was imprisoned in a high security jail in Kabul. He was charged with corruption offences and tried in the Supreme Court of the Islamic Republic of Afghanistan (Directorate of Appeal Courts), where he was found guilty after a short trial and sentenced to 5½ years' imprisonment. He was released in the chaos that accompanied the Taliban's return to power in August 2021 and immediately returned to the UK, but without his Afghanistan-based family members. Once back in the UK, he sought to make a claim for PIP in October 2021.

6. Mr A told me that there was no justice in Afghanistan. He argued there were no democratic processes in the country and the rule of law was absent – instead, he described it as the rule of "the powerful and the corrupt". He told me that he had been incarcerated and convicted on trumped up corruption charges, probably simply because he was a British citizen. Obviously, at this distance I have no way

of assessing whether Mr A was lawfully or unfairly and/or unlawfully imprisoned. For the purposes of this application, I will assume the latter was the case. However, for reasons that will become evident, as a matter of our domestic law it makes no difference as to whether Mr A was lawfully or unlawfully incarcerated while in Afghanistan.

The decision of the First-tier Tribunal

7. The essence of the First-tier Tribunal's decision was captured by paragraph 4 of its Decision Notice:

> Mr A is not entitled to Personal Independence Payment because he does not satisfy Regulation 16(b) Social Security (Personal Independence Payment) Regulations 2013. He is a British Citizen. He went to Afghanistan on 8 January 2017 for family matters. He was imprisoned from 16 February 2017 until 15 August 2021. He returned to the UK on 17 August 2021. At the date of the claim and then the date of the decision, he had not been in Great Britain for the requisite minimum period of 104 weeks out of the previous 156 weeks. The Tribunal gave consideration to the very limited possible exceptions to this Regulation, but none applied in Mr A's case.

8. In its statement of reasons, and having found the relevant facts, the First-tier Tribunal dismissed the Appellant's appeal, elaborating on its reasoning as follows:

> 9. In order to be entitled to PIP, a Claimant has to fulfil the Residence and Presence Conditions set out in Part 4 of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regs"). Regulation 16(b) states that the claimant must have "…been present in Great Britain for a period of, or periods amounting in aggregate to, not less than 104 weeks out of the 156 weeks immediately preceding …". On the facts above, Mr A does not meet that condition as he had been out of Great Britain from 8 January 2017 until 17 August 2021, and the decision on his claim for PIP was 7 October 2021. From 8 October 2018 until 7 October 2021 (156 weeks), he been in Great Britain for less than two months – well short of the required 104 weeks.
>
> 10. There are, though, exceptions to this Regulation, contained in Regulations 17-23A PIP Regs. The Tribunal considered the possible application of all of these Regulations carefully. The Tribunal found that Mr A did not have a terminal illness (based upon his oral evidence and the medical records), and therefore Regulation 21 could not apply. Mr A is not a serving member of Her Majesty's forces, an aircraft worker or a mariner; Mr A was not abroad receiving medical treatment; Mr A's absence exceeded 52 weeks; Mr A is not a refugee; and Mr A had not been away in another EU country – therefore, none of Regulations 17-20 or 22-23A applied.

9. The First-tier Tribunal specifically rejected the Appellant's argument that the decision to refuse him PIP was inconsistent with his previous indefinite award of DLA made in 2014: "The decision under appeal is not contrary to the decision of 30 June 2014. The claim for PIP is a claim for a different benefit, with different conditions of entitlement. The Respondent had to make a separate decision" (FTT statement of reasons at [11]).

10. The First-tier Tribunal also considered the submission advanced by Mr A's representative at the hearing that his "prolonged absence abroad was not of his choosing, and was analogous to him having been abducted and kept abroad against his will. He likened the situation to *force majeure* and sought to persuade the Tribunal that time should be stopped, with the time spent in prison being ignored". The First-tier Tribunal rejected this submission, noting that the representative "could provide no legislative provision or precedent in support of his arguments" (FTT statement of reasons at [12]).

The proceedings before the Upper Tribunal

11. I held a conventional face to face oral hearing of this application for permission to appeal on 24 April 2023 at Field House in London. At the oral permission hearing Mr A appeared in person. He spoke through a Dari Persian interpreter, Mr Hashemi, to whom I am indebted for his invaluable assistance. The Secretary of State for Work and Pensions was not represented but there was no direction that he should put in an attendance.

The test for granting permission to appeal

12. In order to give Mr A permission to appeal to the Upper Tribunal, I must find that the proposed grounds of appeal are arguable, in the sense that there is a realistic prospect of success in showing that the First-tier Tribunal went wrong in law in some way (Tribunals, Courts and Enforcement Act 2007, section 11).

13. For the following reasons, I find that test is not met.

The relevant legislation

14. As to the primary legislation, section 77(3) of the Welfare Reform Act 2012 provides that a claimant is not entitled to PIP "unless the person meets prescribed conditions relating to residence and presence in Great Britain".

15. As to the secondary legislation, regulation 16 of (Part 4 of) the PIP Regulations provides for those prescribed conditions as follows (emphasis added; and 'C' means the claimant – see regulation 2):

> **Conditions relating to residence and presence in Great Britain**
>
> **16.** Subject to the following provisions of this Part, the prescribed conditions for the purposes of section 77(3) of the Act as to residence and presence in Great Britain are that on any day for which C claims personal independence payment C—
>
> (a) is present in Great Britain;
>
> (b) has been present in Great Britain for a period of, or periods amounting in aggregate to, not less than 104 weeks out of the 156 weeks immediately preceding that day;
>
> (c) is habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands; and
>
> (d) is a person–
>
> (i) who is not subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999; or

> (ii) to whom, by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, section 115 of that Act does not apply for the purpose of personal independence payment.

16. As at the date of claim, Mr A undoubtedly satisfied the prescribed conditions set out in regulation 16(a), (c) and (d). The issue, of course, was whether he met the condition in regulation 16(b), being the past presence test.

The application for permission to appeal

17. Mr A's application to the Upper Tribunal for permission to appeal against the First-tier Tribunal's decision was short and to the point:

> "I believe that during my First-tier Tribunal the fact that I was unlawfully arrested in Afghanistan was not taken into consideration. The UK embassy in Kabul was aware of this imprisonment and due to my dual nationality they were unable to [obtain] my release."

18. Mr A expanded on those grounds of appeal at the oral permission hearing. He explained that he was under a moral duty to travel to Afghanistan to take steps to reunite his family in the UK. He stressed that he had had no intention to stay for a prolonged period in Afghanistan but matters had been taken out of his control by his unlawful incarceration. He described himself as having been punished twice for an error of judgement – he had lost everything in the UK and had been incarcerated for several years in appalling conditions in Kabul, while his family members still remained separated, split between the UK and Afghanistan. He argued that the First-tier Tribunal's decision had not served the interests of justice, as it had failed properly to consider the terrible circumstances in which he had found himself. He implored the Upper Tribunal to act fairly in the interests of justice and equity.

Discussion

19. The fundamental problem is that the legislation provides only a limited range of exceptions to the past presence test in regulation 16 and none of these assists Mr A. The various exceptions are set out in regulations 17 to 23A. I consider each in turn, although in a little more detail than did the First-tier Tribunal..

20. Regulation 17 deals with temporary absence from Great Britain. Mr A was temporarily absent in as much as at the outset at least his absence was unlikely to exceed 52 weeks (regulation 17(2)). However, this exception only allows a person to be treated as present for the first 13 weeks of absence (regulation 17(1)). Accordingly, this exception does not assist him.

21. Regulation 18 is concerned with absence from Great Britain for medical treatment and so is inapplicable.

22. Regulation 19 deals with various "special cases", such as members of HM forces and mariners, and so also does not apply.

23. Regulation 20 makes further provision for members of HM forces in the context of the habitual residence test, so equally does not assist.

24. Regulation 21 covers cases of terminal illness so likewise does not help.

25. Regulations 22 and 23 deal with certain categories of claimant who fall within the scope of a relevant EU Regulation and is inapplicable.

26. Regulation 23A makes provision for an exception to apply for refugees and certain persons with leave to enter or remain in the UK. While this exception might perhaps have applied to Mr A when he first arrived in the UK, ironically it could no longer assist him once he had attained the status of being a British citizen. Furthermore, regulation 23A(1)(c)-(e) makes special provision for certain categories of Afghan nationals:

> **23A.** (1)—Regulation 16(b) does not apply in relation to a claim for personal independence payment where C has—
>
> …
>
> (c) leave to enter or remain in the United Kingdom granted under the immigration rules by virtue of—
>
> (i) the Afghan Relocations and Assistance Policy; or
>
> (ii) the previous scheme for locally-employed staff in Afghanistan (sometimes referred to as the ex-gratia scheme);
>
> (d) been granted discretionary leave outside the immigration rules as a dependant of a person referred to in sub-paragraph (c); or
>
> (e) leave granted under the Afghan Citizens Resettlement Scheme.

27. This provision was added to regulation 23A by the Social Security (Habitual Residence and Past Presence) (Amendment) Regulations 2021 (SI 2021/1034) and came into force on September 15, 2021, about a month after the Taliban's return to power and some three weeks before the DWP's decision in Mr A's case. Although it applies principally to Afghan nationals (and possibly some other nationals), the criteria are carefully crafted and narrowly drawn and cannot be read as including a person in the Appellant's situation. Rather, a claimant qualifies for the exception in regulation 23A – and so exemption from the past presence test – only if they have come to the UK under one of the specified three Home Office Afghan resettlement schemes. That is not Mr A's case.

28. Mr A's appeal would have had some prospects of success if there had been a separate category of a catch-all exception. For example, Parliament might have included a provision exempting a claimant from the requirement to satisfy the past presence test where e.g. "C was unavoidably stranded or detained overseas through no fault of their own" (the drafting could doubtless be improved). If that had indeed been the law, Mr A may well have been exempt from the need to meet the regulation 16(b) test. However, that is not the law. Moreover, neither the First-tier Tribunal nor the Upper Tribunal (nor indeed any superior court) has any discretionary power to add to the limited range of exceptions provided for by Part 4 of the PIP Regulations. Tribunals can only deliver justice in accordance with the law.

29. Although Mr A did not expressly frame his grounds of appeal in terms of a human rights claim, I considered this possibility in the exercise of the Upper Tribunal's inquisitorial jurisdiction. However, in my judgment a successful human rights claim is implausible. The past presence test applies to nationals and non-nationals alike, so it is difficult to envisage a successful discrimination claim. The Secretary of State is also likely to have a strong justification argument, especially where a bright line rule such as the past presence test is concerned. In that context I note that the validity of the amended past presence test with respect to

disability living allowance (DLA) cases was considered by Upper Tribunal Judge Jacobs in *FM v Secretary of State for Work and Pensions [SSWP] (DLA)* [2017] UKUT 380 (AAC); [2019] AACR 9:

> 36. Once presence is ruled out, the question arises: what form should the test take? Broadly, there are two approaches. One is to draw a bright line; the other is apply a general test such as whether the child was settled or habitually resident in the jurisdiction.
>
> 37. The advantage of bright lines is that they bring certainty for claimants and decisionmakers alike, with an associated saving in administrative and appeal costs. The disadvantage is that the test may not tally precisely with the underlying policy. For example, if the policy is to identify cases where a child is settled in this country, a test that adopts a fixed number of weeks may not reflect, either in the individual case or generally, the period of time that it takes for settlement to occur. My conclusion is that bright lines are permissible in principle, but that if the gap between the test and what it is trying to achieve is too wide the result may be manifestly without reasonable foundation.
>
> 38. In my judgment, the new past presence test is a tough one to establish, but it is not manifestly without reasonable foundation. It was permissible to review and then to change the length of the period in order to take account of the changing pattern of migration; the period fixed was within the proper limits allowed to Parliament and ministers. The new law seeks to distinguish between those children who are settled and those who are not, but taking into the account the child's age, ensuring that the most disabled children can qualify sooner.

30. Subsequently Upper Tribunal Judge Ward took a subtly different approach to the issue of the DLA past presence test as it applies to disabled children: see *TS v SSWP (DLA); EK v SSWP (DLA)* [2020] UKUT 284 (AAC); [2021] AACR 4. However, I do not consider that Judge Ward's decision assists Mr A's case, which essentially turns on a rather different point.

Conclusion

31. In summary, if the First-tier Tribunal has approached its task of fact-finding in a rational manner, has given an adequate explanation for its decision, has properly understood and applied the law, and has acted fairly, then the Upper Tribunal cannot interfere. This principle applies however unreasonable the Appellant (and indeed any bystander reading this determination) considers the outcome of the First-tier Tribunal's decision to be. Mr A's challenge is to the law itself, rather than the First-tier Tribunal's application of the law.

32. For all the reasons above, I must dismiss this application for permission to appeal.

Nicholas Wikeley
Judge of the Upper Tribunal

Signed on the original on 11 May 2023