IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER **Case No UA-2024-000378-PIP**
NCN: [2024] UKUT 283 (AAC)

Appellant: **JM**
Respondent: **SSWP**

DECISION OF THE UPPER TRIBUNAL

E FITZPATRICK

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal: **First-tier Tribunal (Social Security and Child Support)**
Tribunal Case No: **1672-3327-7286-3892**
Tribunal Venue: **Southampton**
Decision date: **19.12.23**

Decision date: 29th August 2024
Decided on consideration of the papers

Representation
Written submissions on behalf of appellant, Astraea Linskills solicitors.
Written submissions on behalf of the respondent, DMS, L Ropel.

RULE 14 Order Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings.

Before: Ms E Fitzpatrick, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (1672-3327-7286-3892) of 19.12.2023 involved the making of an error on a point of law.

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I **set aside** the Tribunal's decision and **remit the appeal for re-hearing** before the First-tier Tribunal. Directions for the re-hearing are at the end of the reasons for the decision.

REASONS FOR DECISION

Background

1. In brief, the appellant made a claim for Personal Independence Payment (PIP) via telephone on 20/06/2022. A PIP2 questionnaire was completed on 24/07/2022. Ms M attended a Health Care Professional (HCP) consultation on 06/10/2022. The Decision Maker made a decision on 25/10/2022 that the appellant scored 4 points for the daily living descriptor 9(c) and 0 points for the mobility component. Thus, she was not entitled to any rate of PIP. A Mandatory Reconsideration (MR) was undertaken on 30/11/2022, resulting in no change to the decision. This decision was appealed by the appellant to the First-tier Tribunal (FTT). The appeal was allowed by the FTT on 19th December 2023 and the decision made by the Secretary of State on 25/10/2022 was set aside. The FTT awarded the appellant 4 points for daily living descriptor 9(c) and 8 points for mobility descriptor 1(c). Thus, Ms M was entitled to the standard rate of the mobility component. As per the appellant's request written reasons were issued to her on 09/02/2024.The appellant applied for permission to appeal the FTT decision of 19/12/2023, permission to appeal was refused by the DTJ on 07/03/2024. The appellant then applied to the Upper Tribunal for permission to appeal, this was granted by me on 22/04/2024.

Proceedings before the Upper Tribunal

2. The appellant's grounds of appeal, as set out by her representative, relate to the activities of Preparing food, Washing and bathing, Dressing, Reading, Making

budgeting decisions and Planning and following journeys. In general terms it is argued the FTT provided inadequate reasons for its findings and failed to consider Regulation 4(2A) of the Social Security (PIP) Regulations 2013. It is also submitted on behalf of the appellant the FTT failed to consider whether an aid was reasonably required in the context of Activity 8 (Reading), that the appellant's mum had applied to be her appointee in the context of Activity 10 (Making budgeting decisions) and that the FTT had failed to consider the totality of the evidence, in particular the ASD assessment report of 29/8/23 and had in effect adopted a "blanket assumption" expert evidence, particularly that of the HCP, had more value than that of a lay person (in this case the appellant and her mother) which was contrary to the decision of Judge Ovey in *CE V SSWP*. Unfortunately, neither the citation nor a copy of this decision was provided with the appellant's written grounds of appeal.

3. I granted permission to appeal on 22nd April 2024. In doing so I suggested the FTT may have been in error of law by failing to provide adequate reasons, to fully consider Regulation 4(2A) Social Security (PIP) Regulations 2013, and to consider the totality of the evidence. The respondent has forwarded a submission supporting the appeal.

4. I have decided this case on the papers as I consider I have sufficient information to do so fairly, bearing in mind the overriding objective. Neither party requested an oral hearing. I have provided full reasons at the appellant's request, and I also consider it may be helpful in assisting Tribunals in making specific findings of facts, how this might be reflected in the written reasons and the pitfalls of elliptical extrapolation.

Discussion – error of law

Activity 1 Preparing Food; Finding the facts, providing reasons and extrapolation.

5. The appellant has been diagnosed with autism spectrum disorder (ASD) and suffers from significant social anxiety.
6. In regard to this activity, the appellant and her mother submit that due to the experienced functional limitations from ASD, the appellant requires supervision and prompting when preparing a simple microwave meal in order to meet the provisions of Regulation 4(2A) of The Social Security (Personal Independence Payment) Regulations 2013 ('PIP Regulations'), particularly safely.

7. *"[The appellant] needs supervision and prompting from another person when preparing a simple microwave meal or snack, for example she is*

able to use a microwave and kettle to prepare snack and microwave meals but needs to be told how long the microwave needs to be set to as she cannot read and make sense of the cooking instructions on the item being prepared, [the appellant] needs to be reminded that the food tray coming out of the microwave will be hot and to be careful. It's the same thing with the cooker [the appellant] needs to be told what the oven knob needs to be set on. She needs to be reminded to set a timer she cannot tell if the food is cooked or needs a bit longer after the timer has ended. She cannot remove the food from the oven safely without the supervision of someone else. [The appellant] would struggle with preparing a more complex meal unsupervised as she struggles with starting tasks that require organising, she is also easily distracted and would leave for example something in the oven and forget about it." (Question 3 of the claim form, page 14 of the FTT Bundle)

8. *"She (the appellant) doesn't know how to cook but she has tried to attempt to cook with the help of her mum in case she messed up. She would be able to make herself a microwaved meal, she would ask her mum how long to put something in for as she gets confused with instructions and is unsure what buttons to press on the microwave. Had incidents where she burnt herself in the past, last time this happened was 2 months ago." (HCP report at page 49, FTT Bundle]*

9. While the FTT acknowledge the evidence submitted by the appellant and her mother in the PIP2 questionnaire and the HCP report in regard to her functional limitations due to her neuro-divergent condition, I am in agreement with the respondent that the FTT has not, in my respectful view, provided sufficient reasons for its decision to reject this evidence. The FTT is entitled to reject what evidence it (rationally) choses, but it must say *why* it is doing so.

10. The FTT's reasoning in respect of the appellant's ability to do other activities and the somewhat strained extrapolatory exercise it has carried out in respect of the relevance of these activities to preparing food is also problematic. In my view the FTT has not adequately explained how passing "key" GCSEs, playing video games and driving lessons which will take place in the future demonstrates the appellant's ability to cook and prepare a simple meal. Within the written reasons it states at paragraph 19:

"In the Tribunal's judgment, J is able to prepare and cook a simple meal for one without prompting or supervision and to do so safely. She may require some help the first time she cooks something new but should then be able to manage. She has the cognitive ability to follow simple instructions, having passed key GCSEs with limited support and has coped with quiet demanding courses at college (including a work placement): that necessitates a degree of concentration. She is able to shop online - for example, for a takeaway - and use a mobile phone and computer. She plays video games for around two hours a day [49], indicating an ability to follow instructions. She plans to have driving lessons in future [49]: that will again necessarily involve following

a complex set of instructions and an ability to anticipate and react to danger. J clearly has confidence that she would cope. She is able to access and engage in social media. The HCP noted that she was able to give a detailed medical history, indicating that J does not have significant memory problems." [para 19]

11. In my respectful view, which again agrees with the respondent's submission, the FTT has not been mindful of the guidance set out by Commissioner Stockman in *C25/18-19(PIP)*, paragraph 20:

> *"It is legitimate for a tribunal to consider how the actions involved in driving a car may read across into the scheduled daily living and mobility activities. Nevertheless, that general principle is subject to the qualification that the* ***activity in question is genuinely comparable and that it is done with the same level or regularity as the scheduled activity****. The ability to perform daily living activities has to be addressed within the context of regulation 4 and regulation 7 of the PIP Regulations."*

12. While of persuasive authority, the view that in order to "read across" from the ability to perform one activity to the ability to do another, it seems eminently sensible that *the activity is genuinely comparable* in terms of, for example, movement(s) required, cognitive demands etc in addition to, as is explicitly referred to by Commissioner Stockman, the degree of regularity with which it is performed. At first blush it is difficult to see how passing "key" GCSEs, playing video games and the inevitably speculative consideration of driving lessons which may occur at a future date fall within the "genuinely comparable" category in the context of assessing the appellant's ability to prepare and cook a simple meal.

13. Furthermore, I am also in agreement with the respondent's submission that it is not apparent from the written reasons that the FTT have made sufficient findings of fact to determine if the appellant can complete daily living activity 1 safely in accordance with Regulation 4(2A) of the Social Security (PIP) Regulations 2013, considering the evidence proffered that the appellant has burned herself and needs reminding if something is hot. For these reasons the FTT is in error of law in regard to making sufficient findings of fact, providing adequate reasons and extrapolating beyond the bounds of what is "genuinely comparable" in relation to its consideration of this activity.

Daily Living Activity 8 Reading and understanding signs, symbols and words

14. In regard to daily living activity 8, reading and understanding signs, symbols, and words, within the PIP2 questionnaire the appellant's mother states she required blue overlays as an aid in order to read the written word, these were no longer provided after and during GCSEs and the appellant then struggled but was provided a 'reader' and a laptop.

a. *"[The appellant] has always struggled with reading. She skips words when reading and then has to re-read the subject being read again before she can process it. Due to inattentiveness [the appellant] will often loose her place when reading. [The appellant] finds reading a chore and will put off completing subjects/homework." [Question 10 claim form, page 29 FTT bundle].*

b. *"Difficulty around reading handwriting, she no longer gets print on blue paper. When she did her GCSEs, she didn't have the blue overlays, she struggled with reading. When she is scrolling through social media, she is able to read it but it goes back out of her head." [page 50, functional history section of HCP report]*

15. The appellant needed to use a laptop with a blue background and a large font. She also required additional (one to one) support at college. However, it is my view that the Tribunal have failed to make sufficient findings of fact to ascertain whether an aid for this activity is reasonably required. The somewhat blinkered approach of the FTT in this regard is set out at paragraph 38 of the written reasons:

> *"The Tribunal regards it as significant that J does not use blue overlays at college. That suggests that she does not need them, even if they may have helped a little at school. She does not, therefore, require an aid or adaptation within descriptor (b)."*

16. In my judgment, the FTT has failed in its inquisitorial duty to make sufficient findings of fact as to whether the appellant might reasonably require an aid to assist her with reading. It is not sufficient to simply rely on the *suggestion* that an aid is not required, it is incumbent on the FTT, as part of its inquisitorial role, to make the necessary findings of fact that will allow it to come to a reasoned, rational conclusion on this point. The FTT did not sufficiently explore how a blue overlay might improve the appellant's ability to understand and read the written word. In my respectful view, which again accords with the view of the respondent, it has failed to investigate and make sufficient findings of fact and is in error of law in this regard.

17. The respondent has also submitted the tribunal appear to have relied on the appellant using a laptop at college to demonstrate her ability to complete daily living activity 8 but that the Tribunal should also have considered the appellant's ability to read *printed* information. Schedule 1 Part 1 of the Social Security (Personal Independence Payment) Regulations 2013 provides;

"basic written information" means signs, symbols and dates written or printed standard size text in C's native language;

"complex written information" means more than one sentence of written or printed standard size text in C's native language;

18. This view inevitably involves a disjunctive interpretation of the word "or" in the term "*written or printed*" and in that regard is similar to the interpretation of the word *or*

in the phrase "needs assistance to be able to get in or out of a bath or shower" adopted by Judge Rowley in relation to Activity 4, Washing and bathing *in SP v SSWP [2016] UKUT 190 (AAC) (CPIP/2094/2015)* . The word "or" in that case is used in the disjunctive sense ie if a claimant cannot do one of the activities of (i) getting in or out of a bath or ii) getting in or out of a shower, they will satisfy the descriptor. The respondent has taken a similar approach to the interpretation of *or* in this context ie if a claimant cannot read and understand (i) basic or complex written information or (ii) basic or complex printed information this will be relevant to consideration of whether they can satisfy the descriptor. In my view this is a very persuasive submission indeed and is entirely consistent with previous case law, however given the FTT are in error of law on the grounds adumbrated above this point is not germane to my decision.

Daily Living Activity 10 Making budgeting decisions.

19. I agree with the Respondent's submission that both the FTT's findings of fact and adequacy of the written reasons are problematic in respect of this activity. Within the PIP2 questionnaire it states:

20. *"[The appellant] is not very good at managing money. [The appellant] is not able to accurately calculate the cost of things she wants to purchase. She never checks the change she is given." [Question 12 of the claim form]*

21. The functional history section of the HCP report reads *"When going to the shop, she struggles to tell what something costs, usually when her mum gives her money for something, she overspends and needs to ask her mum for mum (presumably more). She tries to add up costs, but she forgets." [page 50 FTT bundle]*

22. While this evidence was accepted by the Tribunal, I agree with the respondent's submission that it appears the FTT has relied on the appellant's lack of experience and age in dealing with money as the reason for her difficulty, rather than her diagnosed ASD. Furthermore, it does not appear that the Tribunal have explored the appellant's understanding of budgeting decisions, and the implications of the decisions made. At paragraph 42 of the written reasons, it states:

23. *"J was only 17 at the time of the decision and would therefore not be particularly experienced at dealing with money. It is not surprising that she would rely to some extent on her parents. She does not at this stage need to manage the household budget or pay household bills. However, in the Tribunal's judgment, she has the cognitive ability to manage finances and there are no other barriers to her doing so. She can calculate change and access her bank account. She can shop online. No learning disability has been diagnosed and she gave a detailed medical history to the HCP [52]." [para 42]*

24. It does not appear that the Tribunal have had sufficient regard to the guidance set out by Upper Tribunal Judge Ward in *SE v SSWP (PIP) [2021] UKUT 1 (AAC)* regarding the clarification of 'decisions involving' meaning an appellant must not only be able to do the calculation but must also have an understanding of the *budgeting and spending outcome and the consequences of the decision;*

> *"27. The second point made by [the appellant], equally validly, is that the definitions refer to "decisions involving" the matters in limbs (a) to (c), or (a) to (b), of the respective definitions. This means not merely being able (in the case of simple budgeting decisions) to do the calculation, but to have sufficient understanding of the outcome and its implications to take a decision based on it. In CPIP/184/2016 Upper Tribunal Judge Grey QC explained (at [28]) that "The issue under Activity 9 [the judge must have meant Activity 10] is the ability to make "decisions" about financial issues, and this requires a focus upon intellectual capacity.*
>
> *28. It does respectfully seem to me that what is said at para 31 of CPIP/3015/2015 regarding a "simple budgeting decision" may fail to give sufficient weight to the requirement for a "decision". Even though the paragraph references an earlier paragraph recording a submission by the Secretary of State that the activity is concerned with the "decisions" themselves, that was in distinction to the physical acts (e.g. seeing the price tag) involved in the process. While that is true, the requirement for a "decision" in my view is not so limited. I do however accept Ms Smythe's submission that the focus of "simple budgeting decisions" is on the decision immediately in front of the person. Contemplating future purchases will tend to fall within limbs (c) and, to some extent, (a) of the definition of "complex budgeting decisions."*

25. As such, in my respectful view, I consider the FTT were in error of law on the basis of its failure to find sufficient facts, to provide adequate reasons and to apply the law correctly in accordance with the guidance provided by Judge Ward above in its consideration of this activity.

Conclusion

26. Although the FTT is entitled to afford weight to whatever evidence it chooses, where there is conflicting evidence, it must in the first instance explore and consider it in a holistic manner, make sufficient findings of fact and provide adequate reasons explaining why it preferred the evidence that it has. In this appeal the FTT has not done that. The FTT must also proceed with caution when extrapolating or "reading across" from activities to ensure the activity is *genuinely comparable* to the one it is considering in order to avoid comparing "apples with pears".

27. For the sake of completeness, in relation to the appellant's submission that the FTT failed to give sufficient consideration to the ASD diagnostic report dated 29th August 2023, I note the FTT made a fleeting reference to it in paragraph 12 of the written reasons where it simply observed there was some "initial hesitancy"

regarding diagnosis. This is essentially a diagnostic report and is therefore not written with the activities and descriptors comprised in PIP in mind. Having said that it may have potential relevance to a number of activities (not just activity 9 Engaging with other people). In my view the FTT's cursory consideration of this significant piece of evidence was sub optimal however, given the errors of law identified above, I am not required to decide whether this in itself was an error of law.

28. I consider the errors of law identified above are material as they may impact on the assessment of the appellant qualifying for a standard or enhanced award of either or both components of PIP. For the purposes of completeness, I note the appellant has not made a further claim for PIP.

29. I find that the First-tier Tribunal erred in law as set out above. The First-tier Tribunal's decision is set aside.

30. The appellant did not object to the Secretary of State's invitation to the Upper Tribunal to remit her case to the First-tier Tribunal for re-hearing and given further findings of fact are required, it is appropriate to remit the case back to the FTT. As a matter of law, the next tribunal cannot, in its reasoning, take into account the findings of fact or conclusions of the tribunal whose decision I have set aside. The undetermined grounds of appeal are just that – undetermined.

31. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view, on whether the appellant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

Directions for the re-determination of the appellant's appeal

I direct as follows:

32. The appeal against the Secretary of State's decision of 25th October 2022 is remitted to the First-tier Tribunal for re-determination.

33. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.

34. If the claimant wishes the First-tier Tribunal to hold an oral hearing before his remitted appeal is determined she must make a written request to the First-tier Tribunal to be received by that Tribunal within one month of the date on which this decision is issued.

35. If the claimant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.

36. Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.

37. The parties are reminded that the law prevents the First-tier Tribunal from taking into account circumstances not applying at the date of decision (section 12(8) of the Social Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if it says something relevant about the circumstances at the date of decision. OBJ

E Fitzpatrick
Judge of the Upper Tribunal
Authorised for issue 9th September 2024