Neutral Citation Number: [2025] UKUT 240 (AAC)
Appeal No. UA-2023-001664-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

MP

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Hearing date: **6 February 2025**
Further written submissions on 6 March 2025 and 8 April 2025

Representation:
Appellant: Reiza Khan, welfare rights appeals officer, Leicester City Council
Respondent: Denis Edwards of counsel

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC314/23/00269
Tribunal Venue: Leicester
Decision Date: 8 June 2023

SUMMARY OF DECISION

This decision is mainly about one issue: whether the ability to move around, or carry items in, a kitchen is relevant under PIP daily living activity 1 (preparing food). It decides that moving around or carrying is not relevant to daily living activity 1. This is because the statutory acts of 'preparing a simple meal' or 'cooking a simple meal' are not connected and because 'making food ready for cooking' does not include carrying the (prepared) food to the place where it is to be cooked at or above waist height. It also decides that dentures may in principle constitute an aid for the purposes of PIP daily living activity 2 (taking nutrition), though the FTT's failure to investigate this issue was not a material error of law.

KEYWORD NAME (Keyword Number) 42 (Personal independence payment - daily living activities); 42.1 (Activity 1: preparing food); 42.2 (Activity 2: taking nutrition)

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 8 June 2023 under case number SC314/23/00269 did not involve the making of any material error of law.

REASONS FOR DECISION

Introduction

1. Two issues arise on this appeal about Personal Independence Payment ("PIP").

2. The main issue is whether the ability (or inability) to move around or carry items (e.g., food or cooking utensils) when preparing food or cooking is relevant to daily living activity 1 in Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regs").

3. The second issue is whether dentures can be an aid to 'taking nutrition' under daily living activity 2 in Part 2 of Schedule 1 to the PIP Regs.

Relevant background and the First-tier Tribunal's decision

4. The Secretary of State by a decision dated 5 April 2022 had awarded the appellant the standard rate of both the daily living component and the mobility component of PIP for an indefinite period from 9 November 2021. The appellant appealed that decision to the First-tier Tribunal ("the FTT"), but by its decision of 8 June 2023 the FTT upheld the Secretary of State's decision and dismissed the appeal. Materially, the FTT upheld the award of two points under PIP daily living activity 1 on the basis of the appellant needing to use an aid or appliance to be able to either prepare or cook a simple meal. The FTT also confirmed that the appellant did not score any points for taking nutrition under PIP daily living activity 2 (taking nutrition).

5. The material parts of the FTT's reasons for its decision suitably frame the two points in issue on the appeal. They read as follows:

> "10. In relation to the activity of 1 - Preparing Food, the respondent has scored the appellant 1b - 2 points. The appellant reported to the HCP that he usually prepares microwave meals. If sitting down, he would be able to peel and chop vegetables, open packaging and cook at a hob. He has pain in his back and his leg that restricts him standing for longer than 5 to 10 minutes.

11. Mr Khan's principle submission is that the appellant would still need to move around the kitchen when preparing and cooking a simple meal. Mr Khan argues that the appellant is not able to carry out the following parts of cooking a simple main meal safely, in a reasonable time or to an appropriate standard:

a) Carry food which has been peeled and chopped to the sink to wash it
b) Carry food from the sink to the table or cooker
c) Carry food from the cooker to the sink (e.g. to drain rice, pasta, cooked vegetables)

12. Mr Khan argues that the above tasks are all normal procedures which are required when cooking a simple meal from fresh ingredients. Mr Khan argues that carrying items to the sink safely and without pain, fatigue etc. must therefore be considered a necessary part of the simple meal test. Mr Khan submits that the Northern Ireland case of *JMcG v Department for Communities (PIP)* supports the submission he makes.

13. We have carefully considered *JMcG v Department for Communities* (PIP). With respect, we find the case does not contain the *ratio decidendi* ascribed to it by Mr Khan. The relevant paragraphs are 33 to 36. We find there is nothing here to suggest that carrying food between various points in the kitchen and elsewhere can come within the definition of either "prepare" or "cook". Both "prepare" and "cook" are defined in the PIP Regulation 2013 and both have a narrow meaning. Neither definition encompasses carrying food between various places within the kitchen.

14. The appellant states in oral evidence that he is worried about carrying a pan of boiling water from the cooker to the sink which he states is a distance of about 10 to 15 feet. His friend Simon Sharp states that the distance between the cooker and sink is about 5 to 6 feet. We find there are inconsistencies in the oral evidence regarding the distance between the cooker and sink. Whatever that distance might be, we find the appellant does not need to carry a pan of boiling water. We find the appellant could easily use a slotted spoon to remove the cooked food from the pan of boiling water during the cooking process. We find the use of a slotted spoon is wholly unlikely to increase the appellant's level of pain and fatigue. We are not persuaded the appellant requires assistance or supervision to prepare and cook a simple meal for one person. We find that the preparing and cooking process can easily be accomplished with the use of various aids in the kitchen. We find he is likely to be able to prepare and cook a simple meal with aids safely, repeatedly, within a reasonable time period and to an acceptable standard for over 50% of the days in the required period. We have scored the appellant no more points for this activity.

15. In relation to the activity of 2 - Taking nutrition, the appellant reported to the HCP he uses normal cutlery to eat. Mr Khan's principle submission is that the appellant needs to be prompted to eat. It is argued that the appellant often lacks appetite and his carer regularly prompts him to eat. It is also argued relying on *CB v SSWP* (PIP) [2022] UKUT 100(AAC) that the appellant has been given dentures and this can be considered as an aid.

16. Dealing firstly with the issue of prompting, we find there is nothing within either the HCP report or the oral evidence we have heard to indicate the appellant requires prompting to eat. The appellant confirmed that when food is placed in front of him, he is able to use normal cutlery to feed himself. We heard

no evidence to indicate he would require any more than the food being placed in front of him for him to eat. We reject the submission that the appellant requires prompting to eat. We find the submission to be unsupported by the oral and documentary evidence.

17. As for whether dentures can be an aid, we find Judge Hemmingway's comment to be *obiter dicta* and in any event related to just one aspect of the many questions of whether in principle, dentures can be an aid or an appliance. The questions posed in *CB v SSWP (PIP)* were whether any loss of teeth must be attributable to an identifiable health condition; and whether an aid, to count as such, must assist with anything more than chewing. Judge Hemmingway only expressed a view that dentures did not need to assist with more than one of the necessary components of the definition of "take nutrition" for it to count as an aid. No other views were expressed. We find that the comments of Judge Hemmingway were in any event non-binding. Mr Khan did not adduce any relevant evidence as to whether the appellant's need for dentures was related to a health condition and we heard no relevant submissions on this point. The Tribunal gleaned from the appellant's oral evidence that he has had dentures for over 30 years and that he wears them every day. The appellant told us that he has not changed the food that he eats because of having dentures. Whilst we accept the appellant does have dentures, we are unable to conclude that the dentures is an aid to take nutrition because there is nothing to suggest, on the facts of this case, that it is a device which improves or replaces the appellant's impaired physical or mental function. We conclude there is nothing to indicate the appellant requires either an aid or prompting to take nutrition. We find that he is likely to be able to carry out this activity safely, repeatedly, within a reasonable time period and to an acceptable standard for over 50% of the days in the required period. He scores no points on this activity."

The grounds on which permission to appeal was given

6. The appellant sought permission to appeal on five grounds. The grounds relevant to daily living activities 1 and 2 in summary were: (i) whether the need to move within a kitchen is a part of daily living activity 1; and (ii) whether a denture may be an aid under daily living activity 2. These grounds were expanded as follows:

"**Moving around a kitchen**

1. The tribunal was asked to decide whether Daily Living component Activity 1 requires consideration as to whether a person could move around a kitchen safely (e.g. risk of falls, knocking things over or dropping things) and to an acceptable standard (without causing significant pain).The tribunal decided that JMcG-v-Department for Communities (PIP) [2019] NICom 77 did not support the need to move around a kitchen and I would submit that this is wrong in law. In paragraph 35 of this decision Judge Stockman stated the following:

It seems to me that "to make food ready for cooking ..."has quite a narrow meaning, however. To make food ready for cooking implies to me that only a range of tasks immediately preliminary to the process of heating food at or above waist height can be considered. This might include washing, peeling and chopping fresh vegetables; preparing meat or fish, including cutting it into smaller pieces; opening packets of pasta, rice or noodles;

opening tins and packets containing other foodstuffs, including frozen items; pouring or emptying foodstuff items from packets or tins; using common kitchen equipment such as graters, grinders and food processors; putting food into pots or pans, and adding boiled water to pots. I do not intend to be prescriptive but to give a broad range of examples to which other relevant tasks may be analogous.

2. I accept only those tasks immediately preliminary to the process of heating food at or above waist height can be considered. I .would submit that some of the above tasks implicitly involve moving around a kitchen e.g. washing food items (getting to the sink and back to the cooker or preparation table), opening frozen items (involves getting to the freezer, taking things out and putting unused food back in the freezer). The tribunal was asked to consider CPIP/1695/2015 in which the use of lever taps was considered as an aid. This would imply that getting to the sink to use the lever tap must be considered.

3. In paragraph 14 of the full statement the tribunal has stated that a slotted spoon could be used to take cooked food out of a pot of boiling water. This may be appropriate for cooking foods such as peas it would not be appropriate for foods such as rice or pasta which generally need to be removed from the water at the same time to avoid some of it being overcooked. I would submit that the tribunal applied the law incorrectly when deciding that my client's ability to safely move around the kitchen carrying food as part of the normal meal preparation and cooking process did not need to be considered…..

Dentures as an aid

6. The tribunal found that my client's use of dentures did not amount to him using an aid for nutrition. I would submit that this is wrong in law based on CB v SSWP (PIP). Although Judge Hemingway's comments were obiter dicta he did state the following:

   So, I have formed what is only an Opinion, albeit I have to say a very strongly held one, that for an item to count as an aid or appliance for the purpose of taking nutrition it does not need to assist with more than one of the necessary components as set out in the definition appearing at Schedule 1 part 1 of the PIP regulations and set out above

7. In paragraph 17 of the full statement the tribunal stated that I did not adduce any relevant evidence as to whether the need to use dentures was due to a health condition. The tribunal was told that my client had used dentures for about fifteen years because of the 'loss of his teeth. The tribunal stated that it was unable to conclude that my client's dentures were an aid to help with taking nutrition and I would submit that this is irrational finding as well as a failure to apply the law correctly."

7. I gave permission to appeal as I considered the issues raised in the grounds of appeal about 'moving around a kitchen' and 'dentures as an aid' were arguable and raised potentially important points of law. I did not refuse permission to appeal on the remaining three grounds of appeal, but I said those remaining

grounds would only need to be addressed if the first two grounds were not determinative of the appeal to the Upper Tribunal.

8. The other grounds of appeal may be summarised as follows. Under daily living activity 3 (managing therapy or monitoring a health condition) it is argued that the FTT had failed to consider the appellant's risk of falls, had failed to consider evidence showing the appellant's medical condition was at risk of deterioration due to his high blood pressure and evidence that he had an increased risk of hospital admission and that his mental health had deteriorated. The fourth ground of appeal argues the FTT had ignored evidence which it is said was relevant to whether it was reasonable for the appellant to use hearing aids at the date of the decision under appeal to the FTT. The final ground of appeal concerns PIP mobility activity 2 (moving around). This raises various points about the evidence before the FTT including whether the appellant walked to the Co-op twice a week.

9. When giving permission to appeal I suggested that these three remaining grounds of appeal might fall into the category of reargument of the evidential merits of the appeal to the FTT. I consider that is the case and will briefly explain why once I have dealt the first two grounds of appeal.

Relevant law

10. Part 4 of the Welfare Reform Act 2012 ("the WRA") created the social security benefit PIP. By section 77(2) of the WRA a person can have an entitlement to the daily living component of PIP or the mobility component of PIP, or both.

11. Section 78 of the WRA deals with the daily living component of PIP and provides, insofar as is material, as follows:

> "**Daily living component**
> **78**:-(1) A person is entitled to the daily living component at the standard rate if—
> (a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition….
> .
> (2) A person is entitled to the daily living component at the enhanced rate if—
> (a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition….
>
> (4) In this Part "daily living activities" means such activities as may be prescribed for the purposes of this section.
> (5) See section…80…for provision about determining—
> (a) whether the requirements of subsection (1)(a) or (2)(a) above are met…"

12. Section 80 of the WRA has the heading "Ability to carry out daily living or mobility activities" and, again only insofar as is material, sets out:

> "**80**:-(1) For the purposes of this Part, the following questions are to be determined in accordance with regulations—

> (a) whether a person's ability to carry out daily living activities is limited by the person's physical or mental condition;
> (b) whether a person's ability to carry out daily living activities is severely limited by the person's physical or mental condition…
>
> (3) Regulations under this section—
> (a) must provide for the questions mentioned in subsection… (1)… to be determined, except in prescribed circumstances, on the basis of an assessment (or repeated assessments) of the person;
> (b) must provide for the way in which an assessment is to be carried out;
> (c) may make provision about matters which are, or are not, to be taken into account in assessing a person.
> (4) The regulations may, in particular, make provision—
> (a) about the information or evidence required for the purpose of determining the questions mentioned in subsections (1) and (2);
> (b) about the way in which that information or evidence is to be provided;
> (c) requiring a person to participate in such a consultation, with a person approved by the Secretary of State, as may be determined under the regulations (and to attend for the consultation at a place, date and time determined under the regulations).”

13. The decision in *TK v Secretary of State for Work and Pensions* (PIP) [2020] UKUT 22 (AAC); [2020] AACR 18, helpfully elucidates what is meant by a claimant’s ability to carry out daily living activities being limited by their physical or mental condition. As Upper Tribunal Judge Markus KC explained at paragraphs [39]-[40] of *TK*:

> “39. As with DLA, there is a limit to the scope of section 78. The phrase “limited by the person’s physical or mental condition” means that there must be a physical or mental cause of their limitation. A person must lack the physical or mental power or capability to perform the activity in question. A person will not qualify if the limitation on their ability to carry out an activity is due to their belief or habits (see paragraph 39 of *R (DLA)3/06*), choice or other circumstances such as their living arrangements or financial position (*SC v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0317 (AAC) at paragraphs 14-15). Although in practice a claimant’s limitation will very often be a consequence of what might be described as a “health condition”, it is not appropriate to add words to the statutory language. The unqualified use of the word “condition” reflects the aim of the legislation to focus on a functional approach to entitlement.
>
> 40. Moreover, there is nothing in the statutory wording which requires a physical or mental condition to be a direct cause of the limitation. As in relation to DLA (see R(DLA) 4/01 at paragraph 18), it is permissible to take into account a physical or mental condition which gives rise to some other factor which itself causes the limitation. In R(DLA) 4/01 the claimant’s functional limitation was caused by anxiety which itself was a consequence of deafness. Ms Apps [counsel for the Secretary of State] gave the examples of a physical or mental condition which gives rise to lack of appetite or brain fog.”

14. The details of the entitlement rules for PIP are found in the Social Security (Personal Independence Payment) Regulations 2013 (“the PIP Regs”).

15. Under regulation 2 of the PIP Regs an *"'aid or appliance' means any device which improves, provides or replaces [the claimant's] impaired physical or mental function*". And Part 1 of Schedule 1 to the PIP Regs sets out that "*aided*" means "*with the use of an aid or appliance*".

16. Regulation 4 of the PIP Regs is concerned with the "*Assessment of ability to carry out activities*" and provides, relevantly, as follows (with 'C' meaning 'the claimant'):

> "4(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the [WRA], whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment…. (2A) Where C's ability to carry out an activity is 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….
> (4) In this regulation—
> (a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
> (b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and
> (c) "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity."

17. Regulation 5 of the PIP Regs provides for an assessment by reference to the daily living activities listed in Part 2 of Schedule 1 to the PIP Regs. Each applicable descriptor under each activity attracts specified points. A claimant will have limited or severely limited ability to carry out daily living activities where they score at least 8 or 12 points respectively.

18. The activity in Part 2 of Schedule 1 to the PIP Regs with which daily activity 1 is concerned is "Preparing food". Part 1 of Schedule 1 to the PIP Regs helps with what is meant by "prepare" in this context. It provides that "*'prepare', in the context of food, means make food ready for cooking or eating*". Part 1 of Schedule 1 also tells us that "*'cook' means to heat food at or above waist height*", and it further provides that "*simple meal*" means "*a cooked one-course meal for one using fresh ingredients*".

19. The following point scoring descriptors apply under daily living activity 1.

1(a) Can prepare and cook a simple meal unaided.	**0 points**
1(b) Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	**2 points**
1(c) Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	**2 points**
1(d) Needs prompting to be able to either prepare or cook a simple meal.	**2 points**

1(e) Needs supervision or assistance to either prepare or cook a simple meal.	**4 points**
1(f) Cannot prepare and cook food.	**8 points**

20. Daily living activity 2 in Part 2 of Schedule 1 to the PIP Regs is about the activity of "taking nutrition". Part 1 of Schedule 1 also assists with what is covered by "taking nutrition" as it sets out that "*take nutrition*" means (inter alia) "*cut food into pieces, convey food a drink to one's mouth and chew and swallow food or drink*".

21. The following points scoring descriptors apply under daily living activity 2.

2(a) Can take nutrition unaided.	**0 points**
2(b) Needs- (i) to use an aid or appliance to be able to take nutrition; or (ii) supervision to be able to take nutrition; or (iii) assistance to cut up food.	**2 points**
2(c) Needs a therapeutic source to be able to take nutrition.	**2 points**
2(d) Needs prompting to be able to take nutrition.	**4 points**
2(e) Needs assistance to be able to manage a therapeutic source to be able to take nutrition.	**6 points**
2(f) Cannot convey food and drink to their mouth and needs another person to do so.	**10 points**

22. Two decisions of the Upper Tribunal lay at the heart of the appellant's arguments and are worth referring to here.

23. The first is the decision of Mr Commissioner Stockman in *JMcG v Department for Communities* (PIP) [2019] NICom 77. The relevant debate in that case was whether a litter picker could be an aid under, what in Great Britain, is PIP daily living activity. It was accepted by the appellant in *JMcG* that the litter picker was not an aid to 'cooking', but it was argued that it could be an aid to 'preparing food' if that part of daily living activity 1 involved bending. The respondent argued that the litter picker was used to gather utensils and food and therefore was involved at a stage preliminary to preparing food. Commissioner Stockman decided that a litter picker could not constitute an aid to preparing food, for these reasons.

> "32. I accept Mr Black's concession that a litter picker is not an aid in cooking food. The definition of "cook" in the 2016 Regulations is to heat food at or above waist height. This removes any consideration of bending to take things out of an oven or reaching for things below waist height. The [PIP Regs] also provide a definition of preparing food. "Prepare", in the context of food, means make food ready for cooking or eating.
>
> 33. Mr Black indicates that the litter picker is used by the appellant to reach utensils and food from low cupboards. Ignoring the question of why someone with the claimed level of disability would store regularly used items in low cupboards, the more immediate question is whether preparing food includes taking items out of a cupboard.

> 34. It seems to me that there are many preliminaries before a claimant arrives at the activities assessed in the legislation. Food needs to be obtained, which typically involves shopping. Shopping bags need to be carried and items unloaded from bags. Items may then be stored and may need to be accessed from cupboards, refrigerator or freezer. Work surfaces may need to be cleared and cleaned. Items such as chopping boards, knives, pans and stirring spoons may need to be put into place.
>
> 35. It seems to me that "to make food ready for cooking …" has quite a narrow meaning, however. To make food ready for cooking implies to me that only a range of tasks immediately preliminary to the process of heating food at or above waist height can be considered. This might include washing, peeling and chopping fresh vegetables; preparing meat or fish, including cutting it into smaller pieces; opening packets of pasta, rice or noodles; opening tins and packets containing other foodstuffs, including frozen items; pouring or emptying foodstuff items from packets or tins; using common kitchen equipment such as graters, grinders and food processors; putting food into pots or pans, and adding boiled water to pots. I do not intend to be prescriptive but to give a broad range of examples to which other relevant tasks may be analogous.
>
> 36. I consider that the act of taking an item out of a cupboard – whether a cooking utensil or a cooking ingredient - cannot reasonably bear the meaning of making food ready for cooking. That expression can only refer to some action that readies an item of food for cooking forthwith. Simply taking an item from a cupboard does not do that, whether an aid is required to accomplish it or not. I see no reasonable function for the litter picker in the context of preparing food. I therefore do not accept the submission of Mr Black that the tribunal has erred in its approach to this issue."

24. The second decision was made by Upper Tribunal Judge Hemingway in *CB v SSWP* (PIP) [2022] 100 (AAC). In that case Judge Hemingway made it clear (in paragraph [1] of the decision) that he had not considered it appropriate to decide whether dentures used by the claimant are an aid with respect to her ability to take nutrition. What that '*obiter*' qualification in mind, the other relevant parts of the decision in *CB* read as follows:

> "3……The argument under 2b(i) was founded upon a contention that the claimant had missing teeth and so used dentures which, in such circumstances, ought to be regarded as an aid or appliance. The F-tT, whilst deciding the claimant scored 6 points under the activities and descriptors relevant to the daily living component and 10 points under the activities and descriptors relevant to the mobility component (translating into the award of the standard rate of the mobility component only) rejected [this] contention... On my reading of the statement of reasons it decided the claimant's dentures could not be an aid or appliance for three reasons being: a) Parliament could not have intended dentures to be an aid or appliance for PIP purposes because they are a commonly used item; b) even if there were circumstances whereby dentures could be an aid or appliance such was not the case here due to a lack of any identifiable health condition which had led to the claimant's loss of teeth and hence her need for dentures; and c) the definition of "taking nutrition" as set out at Part 1 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations") requires an item to be

needed for both chewing food and (my underlining) swallowing food before it can count as an aid…..

4…….As to the dentures issue, I thought the F-tT might have erred through speculating as to what Parliament might or might not have intended as opposed to focusing on the words used in the relevant legislation, through wrongly requiring an identifiable health condition which had led to the loss of teeth, and through thinking that to be an aid as defined an item had to assist with both chewing and swallowing rather than with just one of those functions…..

6. The Secretary of State, through her representative and having taken legal advice (paragraph 2 of a holding submission of 13 December 2021), accepted, I think essentially for the same reasons which had caused me to give permission on the point, that the F-tT had erred with respect to its consideration of the toileting issue…..and I was, therefore, invited to set aside the F-tT's decision on that basis and to substitute my own decision awarding a further 2 points under daily living descriptor 5b, thus enabling the claimant to reach the threshold for entitlement to the standard rate of the daily living component. The representative for the Secretary of State, Mr R Naeem, acknowledged my direction that the issue of the dentures be dealt with too but addressed it by suggesting that, if I were to do as asked, the issue would be rendered immaterial because a further 2 points under daily living descriptor 2b(i) would not change the level of entitlement. It was also suggested that there had been insufficient findings by the F-tT to demonstrate whether any inability of the claimant to chew was limited by a physical or mental condition (see section 78(1) of the Welfare Reform Act 2012) such that there would be little merit in the Upper Tribunal attempting to take matters further. But striking a partially conciliatory note, Mr Naeem did say "*It is, however, my submission that if any claimant cannot carry out any of the relevant actions prescribed in the statutory definition of taking nutrition, it can be said they cannot take nutrition*".

[Having decided to allow the appeal on the issue of toileting and not deciding the dentures issue, Judge Hemingway went on to give his opinion on one aspect of the F-tT's reasoning on dentures as follows]

9……..I do not see the harm in my expressing an opinion as to the F-tT's view that to be an aid or appliance an item must assist with both chewing and swallowing, as the matter has been addressed and effectively conceded on behalf of the Secretary of State in the context of this appeal.

10. The F-tT thought that for dentures to be an aid or appliance (assuming in principle that they could be) they would have to assist with both the task of chewing and the task of swallowing. Regulation 2 of the PIP Regulations defines the term "*aid or appliance*" to mean "*any device which improves or replaces C's impaired physical or mental function*" and to "*include a prosthesis*". Schedule 1 Part 1 of the above Regulations contains a definition of "*aided*" which includes "*the use of an aid or appliance*" and defines taking nutrition as *"(a) cut food into pieces, convey food and drink to one's mouth and chew and swallow food and drink; or (b) take nutrition by using a therapeutic source*". Moving to Part 2 of Schedule 1, daily living activity 2 is "*Taking nutrition*" and descriptor 2b(ii) relevantly reads *"(b) Needs-(i) to use an aid or appliance to take nutrition*".

> 11. I do not agree with the conclusion reached by the F-tT that for dentures to count as an aid or appliance they must assist with both chewing and swallowing. That is because the language used in the legislation does not point to such an interpretation; because the process of taking nutrition involves four components being cutting food, conveying it to the mouth, chewing it and swallowing it all of which are necessary (according to the definition) to achieve the taking of nutrition such that if only one of the components (such as chewing) cannot be done the overall task cannot be done; because the F-tT's interpretation would seem to require an aid or appliance of considerable and quite probably unrealistic versatility if it is required to assist with all four components, and because Mr Naeem has, both fairly and realistically in my view, conceded the point in his submission on this appeal. So, I have formed what is only an opinion, albeit I have to say a very strongly held one, that for an item to count as an aid or appliance for the purpose of taking nutrition it does not need to assist with more than one of the necessary components as set out in the definition appearing at Schedule 1 part 1 of the PIP Regulations and set out above."

Analysis and conclusion

Dentures as an aid for taking nutrition

25. I will take this ground of appeal first because, as with Judge Hemingway in *CB*, I have less to say about it and it featured less in the arguments before me. Furthermore, as the appeal is being disallowed I do not need to concern myself with directing a new FTT on what the law requires in respect of dentures as an aid to taking nutrition.

26. The Secretary of State argues in essence that even if the FTT erred in law in failing to consider properly on the evidence whether the appellant's dentures were an aid to his taking nutrition (most notably in terms of his chewing food), an award of two points for daily living descriptor 2(b)(i) would not itself affect the FTT's decision as, the arguments under daily living activity 1 and the other grounds of appeal apart, it would still have left the appellant with a daily living score of less than 12 points. In other words, any error of law the FTT may have made in its approach to whether daily living descriptor 2(b)(i) was met was not a material error of law as it would not change the standard daily living component award which the FTT upheld.

27. I agree. The FTT upheld an award of the daily living component of PIP of 9 points: 2 points for daily living activity 1, 3 points under daily living activity 4 (washing and bathing), and 2 points each under daily living activities 5 (managing toilet needs) and 6 (dressing an undressing). The high point of the appellant's case under daily living activity 2 is he needs to use an aid (his dentures) to take nutrition. That could only lead an award of another 2 points, and so a daily living score of 11 points. 12 points are needed for the enhanced rate of the daily living component of PIP. If it was the case that any of the other grounds of appeal succeeded then an error of law by the FTT in its consideration of the use of dentures as an aid to taking nutrition could be material, but none of the other grounds of appeal do succeed (for reasons which I explain below). In these

circumstances, I limit what I say about dentures as an aid to taking nutrition. The point is better decided in a case where it may affect the result.

28. The Secretary of State's written submissions on the appeal say the following about dentures being an aid to taking nutrition.

> "4. …it cannot be said in general that dentures are an aid to take nutrition…Whether dentures are an aid to the activity (that is, being able to "chew and swallow food and drink") depends on the facts of each particular case. Further fact finding would be required in the Appellant's case to determine his ability in this respect, including his need for dentures and the aid which they give him for the purposes of this activity.
>
> 28…..the role of dentures as a general matter in the activity of taking nutrition is a subject which requires expert evidence from a suitably qualified expert in dentistry. There are issues of functionality surrounding dentures and what, if any, contribution they make to chewing and swallowing and the taking of nutrition on which only a dentist can give evidence.
>
> 29. That said, there would have to be adequate findings in fact in a particular case before it would be proportionate to obtain an expert opinion from a dental expert, for the expert to be able to give both a general opinion and one which is of use in the particular case. Given that there are inadequate findings of fact in the Appellant's case on his need for dentures and their role for his ability to take nutrition, it is not appropriate in this appeal to obtain an expert opinion.
>
> 30. As a general matter, but subject to any contrary expert view, there will be an obvious difference between a person who has a full set of dentures and someone who only has a plate with one or more dentures. There will also be cases where a denture (or dentures) mainly serve cosmetic ends and have no relevance to the activities of chewing or swallowing food. Detailed fact finding is required about dentures in an individual case before any view could be taken about their role as an aid to taking nutrition.
>
> 31. Furthermore, a person's needs for chewing or swallowing and what can or can't help with this are factual issues, requiring an assessment of the facts and personal needs of different cases. Dentures may be able to "help with function as in chewing ability" but, then again, dentures in many cases will not assist adequately or at all with chewing or swallowing. There may also be issues in particular cases about the implications of bone absorption, or bone loss leading to receding gums, which factors will inevitably be relevant to the function of dentures for the purposes of chewing or swallowing to take nutrition.
>
> 32. In the Appellant's case, it is notable that he has had dentures for a long period without, apparently, interfering with the type of food he eats. No issue in this respect was raised during the HCP assessment but only during the FTT appeal. It is not possible to address the contribution of dentures, if any, to taking nutrition in the Appellant's case without much more detailed factual findings on this activity. That being so, the Respondent respectfully declines to make any further submission on the general utility of dentures to taking nutrition."

29. The appellant's case on dentures as an aid to taking nutrition relies on the decision of the Upper Tribunal in *CB*. However, *CB* does not decide whether

dentures may amount to an aid to taking nutrition. The appeal in *CB* was allowed on the basis that the First-tier Tribunal had erred in its approach to toileting and that was the material error of law. Moreover, although Judge Hemingway went on to give his (self-styled) opinion about the PIP activity of 'taking nutrition', that was only on whether, whatever the device was that said to aid taking nutrition, it had to assist both with chewing and swallowing. At highest, as Judge Hemingway made clear in paragraph [10] of *CB*, the decision in *CB* proceeds on no more than an assumption that in principle dentures can be an aid or appliance for taking nutrition; it does not decide that dentures are an aid or are capable of being an aid.

30. However, the Secretary of State does not dispute that in principle dentures may be an aid to taking nutrition and could have been an aid in this case, and it seems to me that that must be right. To take perhaps the most obvious example, if a person through an infectious illness or cancer loses all of their teeth and has them replaced with dentures, that person on the face of it will (per regulation 2 of the PIP Regs) have an impaired physical function of chewing and the dentures will amount to a device which "improves, provides or replaces" that impaired function. The gap for the FTT in terms of dentures being an aid to taking nutrition was an evidential one rather than a legal one of dentures in principle not constituting an aid. Both parties agree the FTT erred in law in not exploring that evidence further, but as I have explained above that error was not a material error of law.

31. The Secretary of State adhered at the hearing before me to her argument that expert evidence would be needed from an expert in dentistry before a fact-finding decision maker could decide whether the dentures in fact constituted an aid to taking nutrition (and in particular chewing). I am not persuaded why this should be so. If the Secretary of State wishes to seek such evidence in any individual case or class of cases, that is a matter for her. However, the First-tier Tribunal deciding PIP appeals is an expert tribunal and like any issue of fact it ought to be for the First-tier Tribunal to decide on the evidence before it, in a case where the issue is raised, whether an appellant's dentures are an aid to the appellant taking nutrition. Indeed, the Secretary of State accepts that the FTT failed to take such sufficient evidential steps in this case.

32. I am not clear about the relevance of the appellant having had his dentures for a long time to whether they would constitute an aid to his chewing and swallowing food, but as the point was not argued out before me I say no more about it. It does not seem to me, however, that the analysis in *CW v SSWP* (PIP) [2016] UKUT 197 (AAC); [2016] AACR 44 would apply to exclude dentures as an aid as, unlike a bed, dentures are not usually or normally used by someone without any limitation in carrying out the activity of taking nutrition. Nor did the Secretary of State argue that the *CW* analysis would apply.

The three other grounds of appeal

33. Before moving to deal with the key legal issue with which this appeal is concerned, I explain briefly why the other three grounds of appeal are not made out.

34. **Daily living activity 3**. The FTT did not fail to consider relevant evidence concerning daily living activity 3. Paragraph 18 of the FTT's reasons shows that the FTT considered the appellant's arguments that he needed another person to keep a close eye on him because of his history of falls and deteriorations in his health conditions. The FTT did not accept those arguments and has reasoned out in some detail why it rejected those arguments on the evidence. The arguments the appellant makes under this ground are, on final analysis, no more than evidential reargument.

35. **Whether reasonable to use hearing aids**. The FTT dealt with daily living activity 7 (communicating verbally) in paragraph 22 of its reasons and within that the implications of the appellant's hearing loss. The FTT accepted the appellant had hearing difficulties but found on the evidence that these difficulties did not materially affect the appellant's ability to 'communicate verbally'. Most relevantly, the FTT found on the evidence before it that the appellant was not in fact using hearing aids at the relevant time for the appeal before it. The appellant's argument does not dispute this but argues instead that the evidence also showed that the appellant's hearing problems had started about two years before 3 April 2023. This again is no more than evidential reargument. The date of the decision under appeal to the FTT was 5 April 2022. The FTT accepted that the appellant had hearing difficulties in April 2022, which is consistent with what the appellant now argues, but that these difficulties were not sufficient to affect the appellant's ability to communicate verbally. The appellant's ground here, moreover, is not helped by the false premise that the FTT "state that it had found that there was nothing to suggest that [the appellant] suffered from hearing difficulties during the required period". As noted above, the FTT accepted the appellant had hearing difficulties.

36. **Mobility activity 2 (moving around)**. The appellant's ground here seeks to contrast his evidence to the PIP assessment and in a UC85 with his evidence to the FTT and argues, it seems, that these contrasts were not ironed out by the FTT. This is also no more than rearguing the evidence. The FTT addressed all of this evidence in detail in paragraphs 29-31 of the reasons for its decision. That included the health care professionals' views of the appellant's evidence. The FTT upheld the finding that the appellant could stand and move using an aid (his crutches) more than 20 metres but no more than 50 metres. It has reasoned out adequately and clearly why the evidence did not support the appellant's ability to mobilise being 20 metres or less. And the evidence before the FTT did not make it irrational for it to decide that the appellant's ability to mobilise was greater than 20 metres.

Moving and carrying under daily living activity 1 (preparing food)

37. It is perhaps worth emphasising two factual perspectives for this argument. The first is that the FTT agreed with the Secretary of State that the appellant needed an aid or appliance to be able to either prepare or cook a simple meal. In other words, daily living descriptor 1(b) was met. To score two more additional points would require the appellant to have needed supervision or assistance to either

prepare or cook a simple meal, and in the context of this ground of appeal that would seemingly be supervision (or assistance) to mobilise (or carry food) in the kitchen. The second factual point is that the FTT correctly (in the sense of lawfully) decided that the appellant was able to stand and then move with his crutches in excess of 20 metres. Given the extent of the appellant's ability to mobilise and that the FTT were entitled to find that the appellant did not need someone to keep an eye on him because of, inter alia, falls, even if mobilising were part of the assessment under daily living activity 1, it may be unlikely on the evidence the appellant would have qualified for four points under descriptor 1(e): see relevantly Upper Tribunal Judge Butler's decision in *RM v SSWP* (UA-2024-000709-PIP) at paragraphs [34]-[35]. On the other hand, if the FTT never asked itself about mobilising in the kitchen, or perhaps more importantly did not address whether the appellant could carry (in the sense of walk holding) foodstuffs in the kitchen, that may have constituted an error of law if daily living activity 1 includes mobilising/carrying in the kitchen.

38. The appellant's case before the FTT under daily living activity 1 was that he was unable to carry (in the sense of walk holding) food which had been peeled and chopped to the sink to wash it, carry (in the same sense) food from the sink to the table or cooker, and carry (again in the same sense) food from the cooker to the sink (e.g., to drain pasta). The key aspects of the FTT's rejection of this argument were its view that *JMcG* did not assist on the 'carry' point and that neither "prepare" or "cook" under daily living activity 1 included carrying food between various places within the kitchen. (In addition, the FTT found there was no need in fact for the appellant to carry a pot of boiling water from the cooker to the sink.) In essence, I agree with the FTT.

39. In the grounds on which permission to appeal was granted, the argument focused on whether daily living activity 1 includes consideration of a person's ability to move around a kitchen.

40. At the oral hearing before me the argument for the appellant changed somewhat. This resulted in the Secretary of State needing time after the hearing to address the revised argument and for the appellant to then reply to the Secretary of State's response. In fact, the appellant's position had changed in a written submission dated 27 November 2024 but, for reasons which were never properly explained, that written submission (on which the appellant's representative was assisted by CPAG's Upper Tribunal Project) was not filed until two days before the hearing and served on the Secretary of State's representative until the day before the oral hearing. Despite this unexcused omission, I regret to have to record that the appellant's representative did not provide his reply to the Secretary of State's post-hearing response within the extra time with which that representative had been provided. The appellant's reply was due by 4 April 2025 (the date his representative had sought) but was not in fact provided until either 7 or 8 April 2025. The appellant's representative provide no explanation why these extra three or four days were needed. Despite this, I extend time to consider all the written arguments.

41. Three arguments were made on behalf of the appellant at the oral hearing.

42. The first argument was that the FTT had misdirected itself in law in holding that carrying food around a kitchen (and implicitly moving around the kitchen) did not fall to be considered under daily living activity 1 because it had wrongly focused exclusively on the terms "prepare" and "cook". This led the FTT, so the appellant argues, to mistakenly decide that "if a person can both "prepare" and "cook" food they would not score points (or if they could do that with an aid they score just 2 points)". The appellant's argument continues:

> "10. What that approaches fails to appreciate is that the test is not whether someone can "prepare food" and "cook food". Rather it is essentially whether they can produce a simple meal by preparing and cooking food. That connects the tasks of "prepar[ing] food" and "cook[ing] food" such that they must be done to produce a specific result.
>
> 11. Once this connection is appreciated, then it is obvious that the task would require moving food between the station where food is heated at waist height and the station where it is made ready to be so heated. Those are the things that must be done in reality to achieve a connection between the preparation of food and its cooking so as to produce that result.
>
> 12. That this is the case is clear from the wording of the activity 1 descriptors…
>
> 13. Activities 1(a) to (e) all refer to the ability to prepare and cook a simple meal. That is what is being tested…
>
> 14. The Appellant's approach to activity 1, is also consistent with the whole purpose of the PIP activities- they are meant to assess the ability of a claimant to perform real activities of daily living and not meaningless partial tasks. In the *Government's Response to the consultation on the Personal Independence Payment assessment criteria and regulations* 13/12/2012, it was said that: "The activities have been selected to cover the key activities that are essential to everyday life, cumulatively providing a good proxy for individuals' levels of participation."
>
> 15. The approach of the FTT and that of the SSWP is wrong in law because it treats the test as a test of being able to prepare food plus being able to cook food: when that is done one can obviously leave out the activities that must be done to bring prepared food to the cooker etc. But that approach is wrong because it fails to appreciate that what is being tested is the ability to do both things in a directed fashion to result in a simple meal being available for eating. The Appellant's approach does not make that error- it tests the activity which is essential to everyday life- getting a meal ready to eat."

43. I am not persuaded by this argument. In my judgement it is wrong for two, related reasons. First, the statutory test in daily living activity 1 does not use the phrase "produce a simple meal". No such phrase appears in daily living activity 1 and the word "produce" does not feature at all in the activity or the descriptors within it. Nor is this language needed as a gloss to the statutory wording and, more importantly, to apply such a gloss would materially change the focus of the statutory. Second, and following on from the very last point I have just made, the language of daily living descriptors 1(b) and 1(d) to 1(e) is, contrary to the appellant's argument, not about, or testing, an ability to prepare and cook a

simple meal. As the statutory language makes plain what is being tested is whether the claimant needs an aid, prompting or supervision or assistance to be able *either* to prepare *or* cook a simple meal. In other words, the language is disjunctive and not conjunctive.

44. If, for example, the claimant needs an aid to cook a simple meal, they will score two points under descriptor 1(b) regardless of whether (or not) they also need an aid to 'prepare' the food for a simple meal using fresh ingredients. If the claimant does not need an aid (or prompting or supervision or assistance) either to cook a simple meal or to prepare the food, it follows that they can, per daily living descriptor 1(a), prepare and cook a simple meal unaided. Likewise, if the claimant cannot either prepare food or cook a simple meal even with an aid, prompting and supervision or assistance, descriptor 1(f) will be met as the claimant cannot, under the statutory wording, prepare and cook food. However, both in the case of descriptor 1(a) and 1(f) the answer is not arrived at by asking the question can the claimant produce a simple meal. The answer instead is arrived at by asking two separate questions: (i) can the claimant prepare (the food for) a simple meal and (ii) can the claimant cook a simple meal. And, as far as descriptors 1(b) and 1(d)-1(e) are concerned, to find an award of the relevant points score to be merited it may be necessary to answer only one of those two questions.

45. There is therefore nothing in the statutory language which, as the appellant argues, 'connects' the discrete daily living activity 1 processes of 'preparing food' and 'cooking a simple meal' to the specific result of producing a simple meal. And with that the foundation for the appellant's argument, that the prepared food needs, under daily living activity 1, to be moved to the area where it is to be cooked falls away. The two processes of 'preparing (the food for) a simple meal' and 'cooking a simple meal' are separated out under daily living activity 1 and, as a result, do not involve moving or carrying between them as part of the tests under the daily living descriptors.

46. Nor do I find anything in the *Government's response to the consultation on the Personal Independence Payment assessment criteria and regulations* of 13 December 2012 which supports a need to read the statutory wording of PIP daily living activity 1 in the manner for which the appellant contends. Even assuming that this response can be used as an aid to statutory construction, it would fall into being a secondary aid: per paragraph [30] of *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255. More importantly, perhaps, there is nothing in that *Government's response* which addresses the wording of the descriptors in daily living activity 1 and whether descriptors 1b) and 1(d) to 1(e) are to be read conjunctively or disjunctively. And the language in the response that "[t]he activities have been selected to cover the key activities that are essential to everyday life, cumulatively providing a good proxy for individuals' levels of participation", does not assist one way or the other. This statement is referring to the PIP activities generally and not any one of those activities or the descriptors within an individual activity. Moreover, it is not obvious that the structure of the descriptors which I have found applies would necessarily offend against a proxy for claimants' levels of participation in acts of daily living.

47. The appellant also relies on comments I made in paragraph [47] of *KJ v SSWP* (PIP) [2017] UKUT 358 (AAC). The *ratio* of the decision was that daily living activity 1 is not concerned with preparing or cooking the "right" or "dietarily appropriate" food. I did then say, arguably in passing, that the tasks needed to prepare a simple meal for cooking included "lifting and carrying". However, I was not deciding that point in *KJ* and *KJ* was not about whether the focus of the descriptors under daily living activity 1 was on 'producing a simple meal'. *KJ* does not therefore assist the appellant on his main argument.

48. The appellant's second, and alternative, argument is foreshadowed by my comment in *KJ*. It is an argument that mobilising or carrying is part of the 'preparing food' bit of daily living activity 1. The argument is that Part 1 of Schedule 1 to the PIP Regs sets out that 'prepare food' means "make food ready for cooking or eating" and making food *ready for cooking* must mean moving (by carrying the prepared food) to the cooker to heat it at or above waist height.

49. It is perhaps worth noting at this stage, although it is a point of more general consideration and so also may impact on what I have said in paragraphs 44 and 45 above, that the definitions in Part 1 of Schedule 1 to the PIP Regs do not perhaps on first reading fit easily with the wording used in daily living activity 1 in Part 2 of Schedule 1. Nor does daily living activity 1 perhaps use uniform wording. The activity with which daily living activity 1 is concerned is "preparing food". However, save for descriptor 1(f), none of the descriptors in daily living activity 1 use the word "food" or the phrase "prepare food". Descriptor 1(c) apart, on the face of the language of descriptors alone that might suggest that what is being tested is a claimant's ability to "prepare a simple meal" or "cook a simple meal". A "simple meal" is defined in Part 1 of Schedule 1 as meaning "a cooked one-course meal for one using fresh ingredients". It makes no sense, however, to read "prepare a simple meal" in descriptors 1(b) and 1(d)-(e) as meaning prepare a cooked one-course meal, as the cooking of the simple meal (by heating it at or above waist height) is dealt with separately.

50. The answer to this possible difficulty, it seems to me (although I should caution that I need did not receive any direct argument on this particular point of statutory construction), is to read in the definition of "prepare" found in Part 1 of Schedule 1 to the descriptors under daily living activity 1. This definition provides that the word "prepare", when it appears in the rest of Schedule 1 in the context of food, means "to make food ready for eating or cooking". The disjunction between "eating or cooking" is important as it indicates that daily living activity 1 is not focused solely on preparing or cooking a cooked one-course meal for one using fresh ingredients, to which making the food ready for cooking would be a constituent part of preparing the one-course meal to be cooked. Daily living activity 1 also involves consideration of whether the claimant has the functional ability to make food ready for *eating*, not just making it ready for cooking.

51. If this is the correct construction of daily living activity 1 and its descriptors, its focus is therefore not just on preparing the food for, or cooking, the simple cooked meal. A claimant may also score points if instead, and by way of using descriptor 1(b) as the example, they need an aid or appliance to be able to make food ready

for eating. And given the definition of the word "prepare" in the descriptors in daily living activity 1, this must mean, or at least include, making uncooked food, or food which does not need to be cooked, ready for eating. In other words, what is being prepared for eating is not the simple cooked meal. And if this is the correct construction of daily living activity 1, it provides a further reason for rejecting the appellant's argument that daily living activity 1 is about "producing a simple meal by preparing and cooking food". The tests in descriptors 1(b) and 1(d)-1(e) not only divide off the cooking from the preparing for the reasons I have given already, but also because the act of "preparing" under those descriptors need not involve cooking the food at all. This therefore further undermines the appellant's argument that moving (by carrying) the food to be cooked is a necessary part of the functional abilities which daily living activity 1 is assessing.

52. Returning to the appellant's second argument, I do not accept it. It is useful to consider the part of the definition of "prepare" which, as has just been highlighted, is "to make food ready for eating". Nothing in the process or act of making food ready for eating necessarily involves taking it to the place where it is to be eaten. The sandwich a person makes for someone else is just as much 'ready for eating' if it is on plate on the worktop where it has been made as it is when the person for whom it has been made comes to collect it. The act of collecting the sandwich, or carrying it to the person for whom it has been made, does not make that food any more ready for eating than when it had been made. If that is the case for making food ready for eating, I do not see why a different result should obtain on the statutory language where that statutory is about making the food ready for cooking.

53. The focus of the statutory test is on preparing the food, and, in the context of the cooked simple meal, that means making the food ready for cooking. The acts involved in making the food ready for cooking are separate from the acts involved in cooking the food, for the reasons I have given above. The acts involved in preparing food for cooking would not in my judgement involve moving the food to the place where it is to be heated (at or above wait height), as that is not about preparing the food. Likewise, it seems to me, making the food ready for cooking is about readying *the food* for the (separate) act of cooking it, which will involves acts such as peeling and chopping the food. It does not entail then carrying it to the place where it is to be cooked. The food will be 'prepared' and 'ready for cooking' once it has been washed, peeled and chopped, or unpackaged and chopped, and that will be so, in my judgement, *before* it may then need to be moved to the cooker to be cooked. Putting this perhaps another way, as matter of ordinary language the food will be 'prepared' and 'ready' for cooking before it may need to be moved (or carried) to the place where it is to be cooked. That food will not be able to be cooked before it is moved to the place where it is to be cooked, but as food it will have been 'prepared' and 'made ready' for cooking. Furthermore, had the obvious and discrete function relating to cooking a simple meal of carrying the prepared food to the place where it was to be cooked been intended to be included in the statutory test, such wording could and should have been used. As it is, I do not see why such a function should be shoehorned into statutory language which does not as a matter of ordinary language include such a function.

54. Nor does anything said in *JMcG* affect or alter this analysis. To take the most obvious point first, *JMcG* does not decide that 'carrying' is part of the functional tests under daily living activity 1. It was deciding a different issue: whether an aid to get items out of a cupboard was an aid needed to make food ready for cooking. Secondly, nothing in what *JMcG* says about the tasks involved in making food ready for cooking being only those tasks immediately preliminary to the process of heating food at or above waist height, necessarily points to carrying the (prepared) food to the place where it is to be heated. It is instructive that the examples of making food ready for cooking provided for in paragraph [35] of *JMcG* focus (rightly) on making the food ready for being heated at or above waist height. For the reasons I have sought to explain in paragraphs 48-49 above, that does not involve carrying the (prepared) food to the place where it is to be cooked.

55. The third argument made by the appellant was that Judge Butler's decision in the *RM* had decided that mobilising can be considered under daily living activity 1. I do not accept this. It is plain in my judgment that *RM* proceeds on no more than an assumption that mobilising may be relevant to the activity of 'preparing food': see the opening words of paragraph [36] of *RM*. As *RM* has not been published, I set out the key passages from it.

> "**Appeal ground 1: (preparing food – explaining apparent conflict between awarding descriptor 1.e and mobility descriptor 2.e)**
> 32. While I am not bound by the decision in ***JMcG***, as Mr Martinez concedes, it is a decision of persuasive value. It considers a test for PIP in Northern Ireland that uses identical legislative language to the PIP test in England, Wales and Scotland.
> 33. In ***JMcG***, Commissioner Stockman explained that the definition of "cook" in Schedule 1 to the 2013 regulations confirmed it relates to heating food at or above waist height. Commissioner Stockman also decided that the wording "to make food ready for cooking", used to define "prepare" in Schedule 1, has a narrow meaning, which is a range of tasks immediately preliminary to the process of heating food at or above waist height. He described examples of these at paragraph 35 of his decision.
> 34. Mr Martinez argues that it would be impossible for someone to have their sink, kitchen equipment and cooker all within reach while seated at a perching stool. He therefore argues that there is inconsistency between the Tribunal accepting that RM should score mobility descriptor 2.e and the Tribunal deciding that she could carry out all those preliminary steps.
> 35. In my assessment, this argument might have had more force if the Tribunal had awarded RM mobility descriptor 1.f (cannot, either aided or unaided: (i) stand; or (ii) move more than one metre). However, the Tribunal decided that RM should be awarded descriptor 2.e, which is awarded where a person can stand and then move more than one metre but no more than 20 metres, either aided or unaided. The Tribunal acknowledged expressly that RM experienced pain when walking, and that as a result, it decided she could not undertake the activity of walking 20 metres to an acceptable standard (paragraph 51 of Statement of Reasons). The Tribunal decided RM was able to walk a distance of less than 20 metres once it took into account the pain she experienced when moving around. In my assessment, this defeats Mr Martinez's argument that some level of mobilising must be inherent to both the preparation and cooking parts of the test and that the Tribunal had accepted

> RM was unable to achieve even that level of mobilising for the purpose of mobility activity 2.
> 36. In any event, if one assumes that the actions of preparing and cooking a simple meal do involve elements of mobilising that RM could not achieve as a result of the effects of her patella difficulties, the Tribunal awarded RM descriptor 1.e, and explained that it considered she could prepare and cook a simple meal with some supervision and some assistance. The word "*assistance*" is defined in Schedule 1 to the 2013 regulations as "*physical intervention by another person*". I am satisfied the Tribunal's choice of descriptor 1.e allowed for another person to undertake mobilising as part of the activity if required and if RM was unable to perform it. The Tribunal explained that it had found that RM would also need to use aids, such as a perching stool, *in addition* to receiving assistance (my emphasis added). Regulation 7(1)(b) of the 2013 regulations allows for this approach to be taken.
> 37. The Tribunal made factual findings that RM's patella fracture caused her severe pain, and that she experienced daily headaches with pain and associated fatigue. However, it decided that for the purpose of preparing food, these functional limitations (pain, fatigue, headaches) could be addressed within the meaning of regulation 4 if RM used aids and a combination of assistance and supervision.
> 38. In those circumstances, RM's disagreement with this aspect of the Tribunal's decision becomes a disagreement with those specific factual findings made by the Tribunal. However, the Tribunal is the primary Tribunal of fact, and had the benefit of hearing and evaluating RM's evidence. The Upper Tribunal must respect the FTT's fact-finding role with its range of experience and expertise, which includes legal, medical and in relation to disability matters.
> 39. I am therefore not satisfied that the Tribunal made a material error of law in the terms described in appeal ground one."

56. I have not found it necessary in the exercises in statutory interpretation which I have undertaken above to determine whether, as the Secretary of State argues, mobility activity 2 (moving around) is in law the sole statutory focus for assessing a claimant's ability to mobilise and thus removes, as a matter of law, mobilising (or carrying) from consideration under daily living activity 1. The Secretary of State argued that to read the PIP Regs as allowing for problems with mobilising to be taken into account under both daily living activity 1 and mobility activity 2 would lead to unwarranted double-counting. That argument relies on the legal rule or maxim in statutory construction that where two provisions are capable of governing the same situation, a law dealing with a specific subject matter overrides a law which only governs more general matters (in Latin "*lex specialis derogat legi generali*)[1]: see *Moohan v Lord Advocate* [2014] UKSC 67; [2015] 1 AC 901 at paragraph [62] and *SSWP v TMcL* [2016] UKUT 574 (AAC) at paragraph [14].

[1] The argument that the appellant having been found in fact to be able to mobilise for more than 20 metres would be unlikely to able to mobilise sufficient distances for the purposes of daily living activity 1 (it being conceded by the appellant (rightly it would seem following paragraph [39] of *TK*, paragraphs [14]-[15] of *SC v SSWP (PIP)* [2017] UKUT 317 (AAC) and *ZI v SSWP* (PIP) [2016] UKUT 572 (AAC)) that the size or layout of an individual claimant's kitchen is irrelevant for daily living activity 1), is an evidential and not a legal argument.

57. A potential difficulty with the Secretary of State's argument may be that if (as seems to be the case) the appellant's case is really about *carrying* (in the sense of mobilising while holding) food items, PIP mobility activity 2 is not about the specific subject matter of the ability to 'carry' and so the maxim would not apply. However, all this may then highlight is that if the ability to carry food or food-related items was intended to be part of the functional assessments under the descriptors in daily living activity 1, it would have been easy for the PIP Regs to have made this clear: compare and contrast the 'lifting and carrying' activity which was in place in activity 8 in Part I of the Schedule to the Social Security (Incapacity for Work (General) Regulations 1995[2].

58. Had it been necessary to address this argument of the Secretary of State, I would have been inclined to accept the appellant's arguments in opposition to it. The first of those arguments points out that no decision of the Upper Tribunal has concluded that PIP mobility activity 2 is the only place where a claimant's difficulties with 'standing and then moving' may be taken into account in the PIP activities in Schedule 1 to the PIP Regs. The second argument is that of the Upper Tribunal decisions which have addressed a potential overlap between the PIP activities:

    (a) only *TMcL* has founded on the *lex specialis* rule. However, *TMcL*, so the appellant argues, was decided on the narrow basis that something could not both be 'therapy' and a 'therapeutic source' under Part 1 of Schedule 1 to the PIP Regs, rather than a more general *lex specialis* rule;

    (b) the decisions in *GP v SSWP* [2015] UKUT 498 (AAC) and *MF v SSWP* (PIP) [2015] UKUT 554 (AAC); [2016] AACR 20 have rested instead on the wording of the two activities as precluding the taking account of a function relevant to the other activity under both activities, and have therefore not ruled out as a matter of principle the same functional ability counting under more than one PIP activity: see in particular paragraph [30] of *GP* and paragraph [28] of *MF*; and

    (c) *KW v SSWP* (PIP) [2017] UKUT 54 (AAC) expressly accepts that difficulties under mobility activity 2 might also be relevant to daily living activity 5 (toileting).

59. In these circumstances, I would have needed to hear more by way of argument from the Secretary of State on her *lex specialis* argument than the general proposition(s):

> "that all difficulties with mobility are properly only assessed under the mobility descriptors. There is no place for an assessment of mobility difficulties as part of the daily living activities. If there were, there would be double counting, which is contrary to principle."

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[2] It may be of interest that the definition of 'carrying' in that activity was amended to make it clear that the carrying was to be effected only by use of the upper body and arms and "excluding all other activities in Part I", which in effect wrote into the statutory language the maxim relied on in *Moohan* and *TMc*L.

60. As I hope I have made clear above, my decision that mobilising and carrying are not part of the functional abilities assessed under daily living activity 1 arises on the wording of that activity and its descriptors.

Conclusion

61. I dismiss the appeal for the reasons set out above.

Stewart Wright
Judge of the Upper Tribunal

Authorised for issue on 18 July 2025