



[2025] UKUT 363 (AAC)
Appeal No. UA-2025-000404-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

NK

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

**Before: Upper Tribunal Judge Stout
Decided on consideration of the papers**

Representation:

Appellant: Gavin Conway, Citizens Advice Bradford & Airedale Law Centre
(assisted by CPAG Upper Tribunal Project)

Respondent: Uroosa Ali, DMA Leeds

On appeal from:

Tribunal:	First-Tier Tribunal (Social Entitlement Chamber)
First-tier Tribunal Case No:	SC240/24/00719
First-tier Tribunal Digital Case No:	1716-4588-6827-8386
First-tier Tribunal Venue:	Bradford (in person)
First-tier Tribunal Hearing Date:	23 December 2024

SUMMARY OF DECISION

PERSONAL INDEPENDENCE PAYMENT (41)

The First-tier Tribunal erred in law by wrongly regarding the appellant as having put in issue on the appeal the descriptors in respect of which the Secretary of State had awarded her points because she had appealed on the basis that she should have been awarded *more* points in respect of those activities. The “issues” in the appeal for the purposes of section 12(8)(a) of the Social Security Act 1998 are the descriptors that are in dispute between the parties, not the descriptors in respect of which the Secretary of State has awarded points. Those descriptors are not in issue in the appeal, although the Tribunal has a discretion to consider them, provided it acts fairly in raising the additional issue(s).

In this case, the First-tier Tribunal had not acted fairly because it only warned the appellant in general terms that it had power to decrease her award as well as increase it. The Tribunal should also have identified the specific descriptors in relation to each activity where it was minded to reduce the points that the appellant had scored so that the appellant would have a fair opportunity to address the Tribunal's concerns.

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 judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.
2. The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 23 December 2024.
3. The appellant is reminded that the new First-tier Tribunal can only consider the appeal by reference to their health and other circumstances as they were at the date of the original decision by the Secretary of State under appeal (namely 21 January 2024).
4. If the appellant has any further written evidence to put before the First-tier Tribunal relating to that period, including any further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.
5. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

REASONS FOR DECISION

Introduction

1. The appellant appeals against the First-tier Tribunal's decision of 23 December 2024 on the appellant's appeal against the decision of the Secretary of State of 21 January 2024.
2. The First-tier Tribunal set aside the Secretary of State's decision that the appellant was entitled to Personal Independence Payment (PIP) under Part 4 of the Welfare Reform Act 2012 (WRA 2012) and The Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) (the PIP Regulations) at the standard rate for the mobility and daily living activity components. The Tribunal substituted a decision that the appellant was not entitled to PIP.
3. The Secretary of State had assessed the appellant as scoring 11 points on the daily living activities against descriptors 1b, 3c, 4e, 5b, and 6b and 10 points on the mobility activities against descriptor 2d. The First-tier Tribunal assessed her as scoring only 6 points on the activities of daily living against descriptors 3c, 4b and 5b and only 4 points on the mobility activities against descriptor 2b.
4. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 26 January 2025 and permission to appeal was refused by the First-tier Tribunal in a decision issued on 25 March 2025. The appellant, through her representative, filed the notice of appeal to the Upper Tribunal on 3 April 2025 (in time). I granted permission to appeal in a decision sent to the parties on 21 May 2025.
5. The Secretary of State has responded to the appeal and supports it. Both parties are content for me to issue a decision on the papers without a hearing. I am satisfied that it is appropriate and in accordance with the overriding objective for me to do so given the narrow issue in the appeal and the absence of dispute between the parties.

The grounds of appeal

6. There are two grounds of appeal:
 - (1) Misdirection in law as to what was raised by the appeal and consequent failure properly to exercise the discretion in section 12(8)(a) of the Social Security Act 1998 (SSA 1998) in a conscious manner;
 - (2) Failure to give adequate warning not just that the Tribunal might, but that it probably would, remove an existing award.

The First-tier Tribunal's decision

7. The First-tier Tribunal hearing was conducted by telephone. The appellant was accompanied by her daughter and gave her evidence through a Russian interpreter. The respondent was represented by a presenting officer.
8. So far as is relevant to the present appeal, the First-tier Tribunal's SoR reads as follows:-

15. In her appeal, the appellant puts every descriptor for which she has been awarded points back in issue (1, 3, 4, 5, 6, and 12) as well as descriptors 2, 9, 10 and 11.

...

19. In previewing the appeal, the Tribunal noted that extreme lack of function being claimed by the appellant, with little to support such extreme deficit. The extremity of the disability she claims is neither consistent with the medication she is prescribed nor with the interventions she is having.

20. Whilst the Tribunal accepts that the usual starting point for an appeal is the award made by the respondent, its role is to put itself in the shoes of the Secretary of State and make the award that the Tribunal finds, the Secretary of State should have made. In this rare instance, the Tribunal could not necessarily support the award of points made to the appellant based upon the evidence and warned the appellant that, by putting descriptors for which she had already been awarded points in issue in the appeal, and asking the Tribunal re-look at those areas, she faced the possibility that not only could the Tribunal confirm or increase the points awarded, it could also reduce or remove them.

21. In such circumstances the Tribunal would usually adjourn to allow the appellant to take advice. However, this was not a course of action she favoured given that, she explained, she had already been given this warning by her representative and was choosing to proceed on the basis of full knowledge of the potential outcome.

22. The appellant confirmed, several times, that her representative had advised her of the Tribunal's powers should she choose to put in issue areas in for which she had already been awarded points.

23. She confirmed, several times, that, whilst she was aware of the risk she took, she wished to proceed with the appeal.

24. The Tribunal proceeded with the appeal in the face of the appellant's clear evidence that her representative had advised her of the potential

consequences of her chosen course of action and that she wished to proceed on the day.

25. The appellant's representative was on holiday on the date of the hearing. He had never intended to participate in the hearing as he knew he would be away. The representative now applies to have the Tribunal's decision set aside on the basis that he was not there. The application to set aside on this basis is refused. The appellant stated that her representative was not there. No application was made for an adjournment of the appeal on that basis. Indeed, there is no automatic right to a representative. In this case, the appellant was supported by her daughter.

9. As noted above, the Tribunal went on to remove the appellant's awards of the standard rate of the daily living and mobility components of PIP, essentially on the basis that it found her evidence of the extent of her difficulties not to be credible and not supported by medical evidence.

The approach of the Upper Tribunal

10. An appeal to the Upper Tribunal under section 11 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) can only succeed if there is an error of law in the decision of the First-tier Tribunal. Errors of law include misunderstanding or misapplying the law, taking into account irrelevant factors or failing to take into account relevant factors, procedural unfairness or failing to give adequate reasons for a decision.
11. An error of fact is not an error of law unless the First-tier Tribunal's conclusion on the facts is perverse. That is a high threshold: it means that the conclusion must be irrational or wholly unsupported by the evidence. An appeal to the Upper Tribunal is not an opportunity to re-argue the case on its merits.
12. These principles are set out in many cases, including *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[13] and *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82; [2016] 1 WLR 2793 at [13].
13. In scrutinising the judgment of a First-tier Tribunal, the Upper Tribunal is required to read the judgment fairly and as a whole, remembering that the First-tier Tribunal is not required to express every step of its reasoning or to refer to all the evidence, but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made: cf *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [57]. That case also makes the point (at [58]) that where the First-tier Tribunal has correctly stated the law, the Upper Tribunal should be slow to conclude that it has misapplied it.

Consideration of the grounds of appeal

Ground 1: discretion to consider issues not raised by the appeal

14. Section 12(8)(a) of the Social Security Act 1998 (SSA 1998) provides that, in deciding an appeal, the First-tier Tribunal “need not consider any issue that is not raised by the appeal”. The appellant argues that the First-tier Tribunal erred by proceeding as if it had no discretion as to whether it should consider removing points for each of the activities that the appellant had put in issue on the appeal.
15. The appellant argues that the First-tier Tribunal misdirected itself in law as to what issues were raised by the appeal. The appellant submits that, just because the appellant had appealed on the basis that she should have been awarded more points for each of the daily living activities on which the Secretary of State had awarded her points, as well as on other activities, the First-tier Tribunal should have regarded the points that she had already been awarded as not being issues raised by the appeal, so that it had a discretion whether or not to consider taking those points away rather than being bound to consider them just because the appellant had appealed in relation to those activities.
16. The appellant relies on the decision of Judge Church in *LH v SSWP (PIP)* [2022] UKUT 32 (AAC) in which he held as follows at [33]-[34]:

33. The upshot of the submission I have quoted at paragraph 29 above is that entitlement to the mobility component at the standard rate was not in issue between the parties. The Tribunal has an inquisitorial jurisdiction and has a discretion to decide matters which are not in dispute between the parties, but that discretion must be exercised consciously and judicially. There is no indication in the Tribunal's decision notice or its statement of reasons that it was aware that the Respondent had conceded that the Appellant satisfied mobility descriptor 1 e., and if the Tribunal was unaware of that fact then the Tribunal did not exercise its discretion consciously or judicially, but rather did so accidentally, labouring under a misapprehension that the matter remained in dispute. This amounts to an error of law and one that was clearly material in the sense that had the error not been made the outcome of the appeal might well have been different.

34. Even if the Tribunal was aware of the Respondent's submission, and did exercise its discretion consciously and judicially but omitted to explain that in its decision notice or statement of reasons, that too amounts to an error of law because that represented a significant part of its decision making and without any explanation of it the Appellant cannot know whether that part of its decision making was in accordance with the law.

17. The Secretary of State agrees with the submission of the appellant and so do I. The Tribunal in this case erred in law by proceeding as if the word “issue” in

section 12(8)(a) was synonymous in this context with “activity of daily living” or “mobility activity”. In my judgment, it is not, although I note there has not been unanimity of thought on this question in the authorities. For example, in the case that the appellant relied on in relation to ground 2 (*LJ v SSWP* [2017] UKUT 455 (AAC)) Judge Hemingway at [8]-[9] indicated *obiter* that he took the opposite view and that the “issues” in the appeal corresponded to the particular activities in respect of which the appellant appealed. Judge Wright in *EG v SSWP (PIP)* [2015] UKUT 0275 (AAC) at [7] suggests that the “issues” in a PIP appeal will be whether the appellant should be awarded the daily living component or the mobility and at which rate, with it being possible to appeal one component and not the other but (it appears) any of the activities relevant to that component then being ‘in issue’ on the appeal. At [9], however, Judge Wright equated the “issues” in the appeal with particular descriptors. Considering a submission that the Tribunal was bound by its inquisitorial function to consider every issue that was clearly apparent from the evidence, whether or not it was expressly raised by the appeal, Judge Wright held:

9. I can see the force of these submissions. However I do not consider they necessarily support the view that the First-tier Tribunal, as this tribunal effectively said it had to do, must consider all descriptors as a matter of course including those for which the Secretary of State had awarded points which were not subject of any challenge on the appeal. R(IS)2/08 is not, in my view, support for such a proposition. Whether descriptors that have not been challenged expressly on the appeal come into issue on the appeal will depend on the facts of each case.

18. I agree with Judge Wright’s approach in that paragraph [9]. An issue in the appeal is what is in dispute. In this case that was, in relation to each activity, whether the appellant should be assessed as meeting a descriptor that scored more points than the descriptors that the Secretary of State had awarded, The descriptors that the Secretary of State **had** awarded were not in issue between the parties and thus were not issues that were raised by the appeal. The Tribunal had a discretion to consider removing the points that had been awarded by the Secretary of State, but it was not bound to do so because the appellant had not, through her appeal, put the points she had been awarded in issue. However, the Tribunal’s SoR in this case reads as if the Tribunal regarded the appellant as having put in issue the points that she had already been awarded just by contending on appeal that she ought to have scored more points in relation to those activities. That was an error of law.

Ground 2: insufficient warning

19. The appellant further argues that the First-tier Tribunal erred in law by failing not only to warn her of what she had already been told by her representative, namely that the Tribunal has the power to remove points as well as to increase them, but also that it was in fact minded to reduce her points in relation to various particular activities. The appellant relies on *LJ v SSWP* [2017] UKUT 455 (AAC)

where Judge Hemingway held that it was necessary for fair warning to be given even where the claimant had an experienced representative:

10. Assuming the matter was one raised by the appeal, it was still necessary for the tribunal to comply with its duty to act fairly. Such a duty might be said to arise through general principles of fairness and natural justice, through the need to comply with the requirements of Article 6 of the European Convention on Human Rights and through what is contained in its Rules of Procedure concerning “overriding objective”. For my part I am not sure that Article 6, in this situation, adds anything to the general duty to act fairly. But be that as it may, the tribunal did end up taking away the points previously awarded by the Secretary of State under daily living descriptor 2(b) without actually intimating to the claimant or his representative that it was contemplating such a course of action. That does beg the question as to whether it did not act fairly. The point is a material one because, given that it did decide to award 6 daily living points, had it not taken those 2 points away that would have led to entitlement being established.

11. The tribunal does not make it clear, in its statement of reasons, as to at what point it realised that the removal of those 2 points might be a possibility. But its approach seems to have been that, whenever the concern might have been identified, there would be no need to indicate that such was in its contemplation because the claimant had the assistance of an “experienced representative”. That was because it took the view that it would be appropriate to assume that any such representative would be aware of the tribunal’s powers to remove points previously awarded and would have given appropriate advice. Perhaps, though, there is something of an inconsistency in the tribunal stating that and then, in the same paragraph of its statement of reasons (set out above) observing that representatives often assume that points awarded by the decision maker can be “banked”. Perhaps at that point the tribunal had in mind inexperienced representatives or perhaps it was saying that even experienced ones who are aware of the full range of the tribunal’s powers nevertheless make such assumptions. But in my judgment the tribunal was wrong in taking the view that it need not indicate its contemplating the removal of points simply because a claimant has an experienced representative.

12. In this context, I appreciate that there are circumstances where a tribunal is able to rely upon a representative which it knows to be competent and experienced, to fulfil various tasks. It may well have been right in taking the view that it could assume that such a representative would, in general terms, explain to his or her client the range of a tribunal’s powers on appeal including the power to remove points and, indeed, to remove an award in certain circumstances. Indeed I touched upon such matters in *MW v SSWP (PIP)* [2016] UKUT 0540 (AAC). But nevertheless, it simply goes too far to say that the duty

to act fairly is complied with without some form of indication being given, once the risk is crystallised in the tribunal's mind, regarding the taking away of points which have been previously awarded. What should follow thereafter will, of course, depend upon the circumstances. Here, it might have been the case that if such a warning had been given the representative would have been able to indicate, perhaps after a brief adjournment to consult his client, that it was intended to proceed notwithstanding the risk. There might be some cases where an adjournment to a different date would be the proper and fair course of action in circumstances where any warning given by the tribunal might lead to its being thought that further medical or other evidence ought to be obtained. There might be circumstances where, even if an adjournment to a different date is sought, a tribunal could legitimately take the view that fairness would not dictate that such would be granted if it thinks that the issue is a simple and straightforward one which does not require further evidence and which the representative is capable of dealing with.

13. But, here, the tribunal did err in law through failing to act fairly. That is why I have decided to set aside its decision.

20. In that case, it will be noted that Judge Hemingway is at [12] indicating that it will not be sufficient warning for the claimant just to have been informed in general terms about the Tribunal's powers on appeal. In *BTC v SSWP* [2015] UKUT 0155 (AAC) at [8] Judge Bano was clearer that what fairness is required is a warning in relation to the risk of the Tribunal disagreeing with the Secretary of State's assessment in relation to a particular descriptor because of the need to give the claimant a fair opportunity to put her case in relation to that particular descriptor and not just the descriptors that she was focusing on in relation to her appeal:

8. Speaking for myself, I can see no reason why the tribunal in this case should have wanted to consider whether the award of mobility component was over-generous. The claimant's case for an increase in her award was moderately and cogently argued and consistent with the independent medical evidence. The award of descriptor 2(c) by the Health Care Professional was fully reasoned, even if the claimant did challenge it on the ground that Regulation 4 of the PIP Regulations was not taken fully into account. Be that as it may, the tribunal's decision to consider on its own initiative whether to remove mobility component led to precisely the kind of unprompted error envisaged in CDLA/884/2008. The tribunal's failure to invite the claimant to put her case with regard to the distance from her home to her G.P.'s surgery and with regard to what she did while on holiday, when she could not possibly know that those matters would be crucial to the tribunal's decision, deprived the claimant of the opportunity to correct any errors by the tribunal and amounted to serious breaches of the requirement of fairness.

21. Likewise in *TS v SSWP (ESA)* [2012] UKUT 182 (AAC) at [23] Judge Wikeley held:

“Be that as it may, the fact remains that both the appellant and his representative assumed (with good reason) that there was no dispute over the award of at least 6 points for “getting about”. I do not think the appellant needed some sort of formal warning at the very start of the hearing to the effect that his points might go up or down. However, at the very least the appellant was entitled to be put on notice at some stage, and before it was too late, that the FTT had misgivings about the 6 points awarded for “getting about”. In doing so, it was important that the appellant had the opportunity to make his case in the knowledge of the arguments to the contrary. For example, the FTT panel could have said something along the lines of “Now, we see that the decision maker awarded 6 points for “getting about”, which conflicts with the view taken by the medical examiner. We’re not sure about the award of those 6 points. So, we’d like to explore with you further what it is that stops you getting out and about...””

22. In this case, the First-tier Tribunal repeatedly checked with the appellant that she was aware that the Tribunal could reduce her assessed points as well as increasing them, but the Tribunal did not give her any specific warning in relation to each of the descriptors that were not in issue between the parties that it was minded of its own motion to put in issue. She was at the hearing without her representative and giving evidence through a translator over the telephone. I agree with the Secretary of State and the appellant that the First-tier Tribunal acted unfairly in the circumstances by not giving the appellant a specific opportunity to address the descriptors that were not in issue on the appeal, but in respect of which the Tribunal was minded to reduce the appellant’s points award. The unfairness occasioned was material in this case because the cumulative effect of the Tribunal’s assessment on each of the activities was to remove entirely the appellant’s entitlement to PIP when the Secretary of State had awarded her both components at the standard rate.

Conclusion

23. The decision of the First-tier Tribunal thus involved errors of law. I set aside the decision and remit the case for a fresh hearing before a different Tribunal panel.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 20 October 2025