



Neutral Citation Number: [2026] UKUT 336 (AAC)
Appeal No. UA-2025-001394-PIP

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

Muhammad Hasnain (by his appointee Kosar Parveen)

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decided on the papers

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Tribunal members: Judge L McDonald (13 February 2025 decision) and Judge KC Ormsby, Mrs J Hardy and Dr K Bitra (9 May 2025 decision)

Tribunal Case No: SC240/24/00829

Tribunal Venue: Bradford

Decision Dates: 13 February 2025 and 9 May 2025

SUMMARY OF DECISION

This decision holds that an FTT being ‘unhappy’ about the decision it made is not a ground for set aside of the FTT’s decision under rule 37 of the FTT (SEC) Rules. Nor is the mere fact a set aside has been requested a sufficient basis for a rule 37 set aside. The terms of rule 37 must be satisfied and one of the rule 37(2) procedural errors met.

The FTT which then reheard the appeal erred in law in failing to take into account the Secretary of State’s continued support for the decision under appeal when bringing into issue on the appeal an aspect of the decision which was not under appeal.

KEYWORD NAME (Keyword Number) 34 (Tribunal procedure and practice); 34.8 (set aside applications)

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 and DIRECTIONS

The decision of the Upper Tribunal is to allow the appeal.

The decisions of the First-tier Tribunal made on 13 February 2025 and 9 May 2025 under case number SC240/24/00829 were both made in error of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set aside the First-tier Tribunal's decision of 9 May 2025 but I do not set aside its decision of 9 February 2025.

The appellant's appeal against the Secretary of State's decision of 2 February 2024 is remitted to an entirely freshly constituted First-tier Tribunal (which must not include any of Judges L McDonald and KC Ormsby, Mrs L Wade and Mrs J Hardy, or Drs S Harrison and K Bitra) to be redecided, after an oral hearing.

I direct that the Secretary of State must, within one month of the date of issue of this decision, file with the First-tier Tribunal and serve on the appellant a submission on the appeal which sets out clearly the Secretary of State's view on whether he wishes to raise an issue on the appeal about (i) the appellant's epilepsy and (ii) whether the points and PIP award made under the 2 February 2024 decision were correctly awarded. If the Secretary of State now wishes to raise an issue on the appeal about either or both of (i) or (ii), he should explain in clear terms in the submission here directed what the issues are and why he did not raise them before. If the Secretary of State remains content with the points and award of PIP made to the appellant on 2 February 2024, he should make this clear in the submission and explain why he remains of that view.

REASONS FOR DECISION

1. This appeal has a somewhat complicated history.
2. The Secretary of State's decision of 2 February 2024, about which the appeal was made to the First-tier Tribunal ("the FTT"), was a decision that the appellant was not entitled to the daily living component of PIP from 6 March 2024 (scoring only 6 daily living points) but was entitled to the enhanced rate of the mobility component of PIP from 6 March 2024 to 18 January 2027 (scoring 12 mobility points under PIP mobility descriptor 1f).
3. Unsurprisingly, the appeal against this decision to the FTT was about whether the appellant qualified for any award of the daily living component of PIP. Put another way, the only issue raised on the appeal (per section 12(8)(a) of the Social Security Act 1998) was whether Muhammad qualified for additional points under the daily living component of PIP.
4. The appellant's appeal against the Secretary of State's decision of 2 February 2024 was first heard by the First-tier Tribunal ("the FTT") on 27 January 2025. The appeal was refused and the Secretary of State's decision of 2 February 2024 confirmed. The FTT commented in its Decision Notice of 27 January 2025 that

the appellant had been awarded points on the basis of his epilepsy. The FTT went on to record its view that it was far from clear whether Muhammad was suffering from epilepsy at the material time. The FTT said it would not have awarded him points on this basis but as the points awarded had not been put in issue by the Secretary of State the FTT “elected to leave them in place”.

5. Muhammad applied through his appointee for the FTT’s decision of 27 January 2025 to be set aside. This request was granted on 13 February 2025. The FTT judge (Judge McDonald) noted that the appointee (Mrs Parveen) was really disputing the decision of 27 January 2025 and that “the normal next step would be the preparation of a Statement of Reasons for Tribunal’s decision”. The judge went on, however, as follows:

“The Tribunal would be unable to justify the decision in a Statement of Reasons.

The Tribunal made a decision which it was not happy to make on the basis that Muhammad Hasnain had been awarded the enhanced rate of the mobilising component of Personal Independence Payment, which as the respondent had not put the award in issue, the Tribunal felt bound to honour. Now that the appellant seeks to set aside the Tribunal’s decision, the Tribunal is content to set the decision aside.”

6. The set aside decision notice of 13 February 2025 also included (amongst other directions) a direction warning the appointee that, if the appeal were to proceed to another hearing, the FTT would consider whether the award of the enhanced rate of the mobility component of PIP was appropriately made and the FTT could reduce or remove the points awarded, which could potentially put the award at risk.
7. The appeal was then reheard by a freshly constituted FTT on 9 May 2025. That FTT refused the appeal but also set aside the Secretary of State’s decision of 2 February 2024. This FTT scored Muhammad 0 points under both the daily living and the mobility components of PIP and, accordingly, replaced the Secretary of State’s decision with a decision that Muhammad was not entitled to PIP from 6 March 2024.
8. I gave Muhammad permission to appeal against the FTT’s substantive decision of 9 May 2025 and the set aside decision of 13 February 2025. My reasons for giving permission to appeal were as follows.

“The 9 May 2025 decision

1. I give permission to appeal because in my judgement there is a realistic prospect of it being established that the First-tier Tribunal (“the FTT”) erred materially **in law** in the decision which it made on 9 May 2025, assuming it had jurisdiction to decide the appeal (as to which see below), in failing to take into account all relevant matters when deciding to bring entitlement to the mobility component of PIP into issue on the appeal.
2. Arguably the FTT failed to take into account in exercising its discretion that the Secretary of State on the face of it had remained content for the award of the enhanced rate of the mobility component to be made and to continue notwithstanding the concerns the previous FTT had raised about that award.

3. The appeal before the FTT was against a decision of the Secretary of State dated 2 February 2024 that had awarded [Muhammad] the enhanced rate of the mobility component of PIP from 6 March 2024 to 18 January 2027, but made no award of the daily living component of PIP. That decision was appealed to the FTT, but the only issue raised on the appeal was whether an award of the daily living component of PIP ought also to have been made.
4. The FTT first heard the appeal and disallowed it on 27 January 2025 (Addition D, Page 1). The FTT raised concerns about whether the enhanced rate of the mobility component had been properly made, but elected to leave the award in place because it had not been put in issue by the respondent.
5. The FTT's decision of 27 January 2025 was then set aside by the FTT on 13 February 2025. I will return to this set aside decision below.
6. The appeal was reheard by the FTT on 9 May 2025. That FTT refused the appeal but also set aside the Secretary of State's decision of 2 February 2024 and found that [Muhammad] was not entitled either to the mobility or the daily living components of PIP from 6 March 2024.
7. The FTT at paragraphs 3-12 of its reasons recited the history of the claim and the appeal. It is unclear, per paragraph 10ii of those reasons, on what basis the previous FTT could 'warn' Mrs Parveen that the new FTT would consider whether the award of the enhanced rate of the mobility component of PIP was appropriately made. That was very arguably a matter for the new FTT to decide as the FTT is only obliged to consider issues that are raised by the appeal or which the FTT as matter of its discretion decides should be considered: per section 12(8)(a) of the Social Security Act 1998. Be that as it may, the new FTT on 9 May 2025 (rightly) did not consider itself bound to consider the mobility award. It considered, as shown by paragraphs 14-20 of its reasons, whether as a matter of its discretion it ought to do so, and decided it should. It is the lawfulness of the exercise of that discretion which arises on this appeal against that FTT decision.
8. It is perhaps noteworthy that the FTT on 27 January 2025 took account of the Secretary of State's position when deciding not to exercise its discretion so as to look at the mobility award. Nothing, however, in the FTT's decision of 9 May 2025, or its reason[s] for that decision, indicates that the FTT on 9 May 2025 took account of the Secretary of State's position when exercising its discretion. It is arguable that that omission was an error of law. It was arguably even more important that the Secretary of State, as the payer of the benefit, had not raised any issue with the FTT about whether the mobility component award had been correctly made, even after the FTT had raised the concerns it did about that award in its decision of 27 January 2025. The Secretary of State's apparent willingness to continue with the award notwithstanding the concerns the FTT had raised was arguably a material, if not a strongly material, consideration to be taken into account by the FTT on 9 May 2025 in deciding whether to enquire into the mobility component.
9. The FTT was seized of the PIP award only because an appeal had been made against the decision not to award Muhammad Hasnain the daily

living component of PIP. There was no appeal about the mobility component of PIP and neither party to the appeal was raising any issue about the mobility award on the appeal. In these circumstances and the circumstances outlined immediately above, it was arguably incumbent on the FTT to address the respondent's position on the appeal as at 9 May 2025 in deciding whether to exercise its discretion to look at the mobility component award on the appeal, and its failure to do so was arguably an error of law.

The set aside decision of 13 February 2025

10. The set aside decision of 13 February 2025 was made, on its face, under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. However, it is very arguably not clear what the procedural irregularity was in the FTT's decision of 27 January 2025 that allowed for set aside of that decision under rule 37.
11. The purported basis for the set aside was, apparently, the FTT's view that it would be unable to justify its decision in a Statement of Reasons because, seemingly, it had made a decision which it was not happy to make; namely, to uphold the respondent's award of the enhanced rate of the mobility component of PIP.
12. It seems to me to be well arguable that none of this amounted to a procedural irregularity in the FTT proceedings, or otherwise engaged any of the criteria for set aside found in rule 37(2) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules").
13. The basis for the FTT's decision of 27 January 2025 to uphold the Secretary of State's decision to award Muhammad the enhanced rate of the mobility component of PIP was that the FTT had elected to leave that award in place because it had not been put in issue by the respondent on the appeal. It is arguably not apparent why that was not a lawful decision which the FTT could make; less so (at least arguably) is apparent why that decision was undermined by any procedural irregularity.
14. I appreciate that Muhammad has not sought (at least expressly) to challenge the FTT's set aside decision of 13 February 2025. However, the basis of the FTT's jurisdiction to make its decision of 9 May 2025 was arguably founded on the previous FTT's decision having been lawfully set aside under rule 37 of the SEC Rules, and if there was no lawful basis for that rule 37 set aside the FTT on 9 May 2025 arguably had no jurisdiction to decide the appeal. The challenge to the lawfulness of 9 May 2025 FTT decision is arguably therefore bound up with the legality of the set aside decision of 13 February 2025: see generally on matters of the jurisdiction of a later FTT the Tribunal of Commissioner's decision in *R(1)7/94*.
15. Further, the 13 February 2025 decision was not, at least arguably, a decision which cannot be appealed as it was not a set aside decision made under section 9(4)(c) of the Tribunals, Courts and Enforcement Act 2007 ("the Act"): per section 11(5)(d)(iii) of the same Act. It was a decision made under rule 37 of the SEC Rules, and that set aside power

was arguably not made under section 9 of the Act but section 22 and paragraph 15(2) of Schedule 5 to the same Act.”

9. The Secretary of State supports the appeal against both decisions.
10. The Secretary of State argues in respect of the 9 May 2025 decision that “*the FTT erred in law by not considering the fact that the SoS remained content for the enhanced rate of the mobility component to be awarded.... Whilst the FTT is correct that it has “discretion to consider issues not raised in the appeal” (paragraph 14, SOR), I submit that it has failed to adequately consider the SoS’s position.*
11. As part of this argument the Secretary of State helpfully identifies that Secretary of State’s appeal response before the FTT continued to state:

“I’ve considered all the available evidence and considered which descriptors apply for each activity, taking into account Mr Hasnain’s functional ability. This includes the activities Mr Hasnain has disputed and those which he hasn’t. I agree with all descriptors selected.”
12. Reliance is placed in the Secretary of State’s argument on this first issue on paragraph [46] of *DO v SSWP (PIP)* [2021] UKUT 161 (AAC) and paragraphs [33]-[34] of *LH v SSWP (PIP)* [2022] UKUT 32 (AAC).
13. The Secretary of State argues from this that:

“....the FTT erred by failing to explain if it had considered that the SoS was content with the award already made the claimant or, if it had done so, how it came to that conclusion.”
14. As for the FTT’s earlier set aside decision of 13 February 2025, the Secretary of State submits that under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, “*the FTT did not act in the interests of justice when deciding to set aside the appeal*”. This is because, not being able to justify the FTT’s reasoning did not amount to a procedural error under rule 37(2).
15. I agree that the FTT erred materially in law both in its purported set aside decision of 13 February 2025 and in its substantive decision on the appeal of 9 May 2025. My reasons are essentially those I gave when giving permission to appeal, my now being satisfied that what I then referred to as arguable errors of law are material errors of law.
16. In terms of the set aside decision of 13 February 2025, I proceed on the basis (as it has not been argued otherwise) that this is not an excluded decision by virtue of section 11(5)(d)(iii) of the Tribunal Courts and Enforcement Act 2007, and so is appealable. There is nothing to suggest that before setting aside the decision the FTT judge had reviewed the 27 January 2025 decision under section 9 of the Tribunal Courts and Enforcement Act 2007 and rules 39 and 40 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (“the FTT rules”). There is nothing to suggest that Judge McDonald was, per rule 40(2) of the FTT Rules, satisfied that there was an error of law in the FTT’s decision of 27 January 2025 (and absent the FTT’s reasons for its decision it is difficult to see what the error of law would have been). The ability to undertake a review is dependent on rule 40(2) being satisfied, and the set aside power in section 9(4)(c)

of the Tribunals, Court and Enforcement Act 2007 only arises where the FTT has reviewed the decision.

17. On its face, section 11(5)(d)(iii) of the Tribunal Courts and Enforcement Act 2007 only applies to a section 9(4)(c) set aside, and that was not the basis of the FTT's set aside decision of 13 February 2025.
18. The only other basis for that set aside decision was rule 37 of the FTT Rules. However, rule 37 only applies if there was some form of procedural irregularity in the FTT proceedings up to and including the FTT's decision of 27 January 2025: per rule 37(2). Manifestly, neither the FTT being unhappy about that decision nor the appointee's request for set aside amount to, or show, any procedural mishap in the FTT proceedings. Nor was the FTT's inability to justify its decision by way reasoning a procedural irregularity. The inability to justify relied on by the FTT judge on its face is linked to its unhappiness and not, for example, the FTT no longer having its notes of deliberations. The FTT judge in my judgement plainly erred in law in setting aside the FTT's decision of 27 January 2025 as there was no jurisdictional basis for her to do so under rule 37 of the FTT Rules. The tribunal system is a rules based system and those rules must be satisfied and shown to be satisfied in any tribunal decision.
19. I might add that I cannot see why the FTT could not justify its decision of 27 January 2025. Its reasoning in the Decision Notice of 27 January 2025 for keeping the enhanced rate of the mobility component in place seem to me to be an adequate summary of its reasons on that aspect of the appeal. And it is not apparent why it could not adequately have reasoned out why no more than six points were merited for daily living. Those six points were not in issue on the appeal: see *NK v Secretary of State for Work and Pensions (PIP)* [2025] UKUT 363 (AAC).
20. Turning to the FTT's subsequent and substantive decision on the appeal of 9 May 2025, in my judgement the FTT erred in law in that decision by failing to have any regard to the Secretary of State's view as to the merits of the decision under appeal in bringing into issue on the appeal Muhammad's entitlement to the mobility component of PIP (and the six points he had for daily living). The Secretary of State's view was an obvious material consideration which the FTT failed to take into account, and thereby materially erred in law.
21. For the reasons set out above, I allow the appeal in the terms described above.
22. I set aside the FTT's substantive decision on the appeal, of 9 May 2025, for the reasons set out above and not for any lack of jurisdiction for it to decide the appeal. At the time the FTT decided the appeal on 9 May 2025 the set aside decision of 13 February 2025 remained in place and had not itself been set aside: see *R(Majera) v SSHD* [2021] UKSC 46; [2022] AC 461. The FTT on 9 May 2025 was therefore properly seized of an appeal against the Secretary of State's decision of 2 February 2024.
23. Although the FTT plainly erred in law in its set aside decision of 13 February 2025, I do not set that decision aside. I have a discretion whether to set aside even if the decision is erroneous in law: see section 12(2)(a) of the Tribunals, Court and Enforcement Act 2007, I exercise that discretion not to set aside the FTT's erroneous set aside decision of 13 February 2025 because that would

leave in place the FTT's unreasoned decision of 27 January 2025 and the difficult issue of the FTT now giving reasons for that decision. The appellant's concern is with the FTT's substantive decision of 9 May 2025. That decision is has now been set aside and the appropriate result is for a fresh decision to be made on Muhammad's appeal against the Secretary of State's decision of 2 February 2024.

24. Muhammad's appointee in her most recent submission asks that the Upper Tribunal redecide the appeal on the evidence. I am not in a position to do so. Several issues may arise on the appeal, including whether Muhammad has epilepsy, and those issues are better addressed by the expert, three-member FTT than by an Upper Tribunal judge sitting alone.
25. The appeal will therefore have to be re-decided afresh by a differently constituted FTT to either of the FTTs which have decided the appeal before, and after an oral hearing.
26. Muhammad's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether his appeal will succeed on the facts before the new FTT, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Stewart Wright
Judge of the Upper Tribunal

Authorised for issue on 25th August 2026