DA -v- Department for Communities (DLA) [2024] NICom 44

Decision No: C1/23-24(DLA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 24 February 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 24 February 2023 is in error of law. The error of law identified will be explained in more detail below.

2. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

3. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made a further finding of fact. The fresh findings in fact are outlined below.

4. My substituted decision is that the appellant is entitled to the highest rate of the care component of Disability Living Allowance (DLA) and the higher rate of the mobility component of DLA from 10 February 2020 to 9 February 2025.

5. I set aside the decision of the appeal tribunal with a degree of reluctance as the appeal tribunal's consideration of the difficult issues arising in the appeal was, for the most part, careful and thorough. Nonetheless, I am satisfied that an error of law has arisen.

Background

6. On 18 January 2022, in which a decision maker decided not to supersede an earlier decision of the Department for Communities (the Department)

(itself dated 12 May 2020) and that appellant was entitled to the highest rate of the care component of DLA and the lower rate of the mobility component of DLA from 10 February 2020 to 9 February 2025. Following a request to that effect, and the receipt of additional evidence, the decision dated 18 January 2022 was reconsidered on 15 April 2022 but was not changed. An appeal against the decision dated 18 January 2022 was received in the Department on 15 April 2022. The appeal was received outside of the prescribed time limits for making an appeal but it was accepted by the Department 'in the interests of natural justice.'

7. Following an earlier adjournment, the substantive appeal tribunal hearing took place on 24 February 2023. The appellant was represented by his mother, who is, for the purpose of the relevant legislation his appointee. The appellant was represented by Ms Michelle McCabe from CANMID. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 18 January 2022.

8. On 2 March 2023 an application to set aside the decision of the appeal tribunal was received in the Appeals Service (TAS). On 13 April 2023 the set-aside application was refused by the Legally Qualified Panel Member (LQPM).

9 On 17 July 2023 an application for leave to appeal to the Social Security Commissioner was received in TAS. The application was received outside of the prescribed time limits for making such an application. On 15 August 2023 the late application was accepted for special reasons and, on the same date, the application for leave to appeal was granted by the LQPM. In granting leave to appeal the LQPM determined that she considered that '… it is arguable that the statement of reasons provided to the appellant is not adequate'.

Proceedings before the Social Security Commissioners

10. On 25 September 2023 the appeal was received in the office of the Social Security Commissioners. In this application the appellant was represented by Mr McCloskey of the Law Centre (Northern Ireland). On 3 October 2023 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations on the application dated 18 October 2023, Mr Clements, for DMS, supported the appeal on most of the grounds set out in the appeal.

11. The written observations were shared with the appointee and Mr McCloskey on 18 October 2023. On 17 November 2023 written observations in reply were received from Mr McCloskey and were shared with Mr Clements on 28 November 2023. In email correspondence dated 29 November 2023, Mr Clements indicated that he had no further comments to make. Further evidence was received from the appointee on 24 January 2024.

Errors of law

12. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

13. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

> "(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
>
> (ii) failing to give reasons or any adequate reasons for findings on material matters;
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> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> (iv) giving weight to immaterial matters;
>
> (v) making a material misdirection of law on any material matter;
>
> (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …
>
> Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

The sole issue identified by the appeal tribunal

14. The appeal tribunal identified that the only issue between the parties was whether the appellant should have been awarded the higher rate of the mobility component of DLA based on section 73(3) of the Social Security Contributions and Benefits Act 1992 ('the 1992 Act').

Relevant legislative provisions

15. As noted by the appeal tribunal in the statement of reasons for its decision:

> "Section 73(3) of the Social Security Contributions and Benefits Act 1992 provides:

73(3) A person falls within this sub-section if -

(a) he is severely mentally impaired; and

(b) he displays severe behavioural problems; and

(c) he satisfies both the conditions mentioned in s.72(l)(b) and (c) above.

There was no dispute in relation to the applicability of paragraph 73(3)(c); the two conditions to which it refers concern entitlement to the higher rate care component.

Regulation 12(6) of the Social Security (Disability Living Allowance) Regulations specifies who falls within section 73(3)(b):

12(6) A person falls within sub-section (3)(b) of s.73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which -

(a) is extreme,

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.

The Tribunal accepted that the appellant satisfied the conditions of section 73(3)(b).

The primary issue under consideration in this appeal was whether or not the appellant satisfied the conditions of section 73(3)(a).

Regulation 12(5) of the Social Security (Disability Living Allowance) Regulations (1992 – the '1992 Regulations') specifies who falls within paragraph (a) of section 73(3):

12(5) A person falls within sub-section (3)(a) of s. 73 of the Act (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain which results in severe impairment of intelligence and social functioning.

The Tribunal noted that the Department had initially suggested that the appellant did not suffer from a state of arrested development or incomplete physical development of the brain. This was incorrect. It is established law that autism has a physical cause in the form of a disorder of the brain. The Tribunal was advised that this position has been corrected by the Department."

The appeal tribunal's conclusions with respect to section 73(3)(a) of the 1992 Act

16. The statement of reasons for the appeal tribunal's decision on this issue is as follows:

"Documentary evidence

The panel had before it the Appellant's claim form dated 1 October 2021, a report of the Educational Psychologist who assessed the Appellant in September 2021, the Statement of Special Education Needs dated 30 November 202 [sic], a letter from Autism NI dated 30 May 2022 and the Appellant's GP notes and records. The panel also had been provided with a letter from his Consultant Paediatrician following his review on 25 January 2023 and a letter (undated) from a senior Mental Health Practitioner.

On the claim form the Appointee, Ms A, indicated that her son has ASD and Dyslexia. In relation to mobility, she stated that it was impossible for the Appellant to walk outdoors due to severe behavioral [*sic*] problems and mental impairment. She stated that he would stop and refuse to walk, was very sensitive to touch and sound, terrified when outside at noises and traffic and is a danger to himself. She stated that he would not walk due to the feeling of his feet on the hard road. She stated that he needs someone to supervise him constantly when outside, normally one-to-one, as it can be very difficult to ensure his safety. She stated that he had attempted to go on the road whilst being extremely overwhelmed by his sensory needs. She highlighted his difficulties regarding attention and listening skills, his emotional wellbeing and noted that his sensory processing difficulties affect his daily functioning.

The report of the Educational Psychologist confirms that the Appellant was diagnosed with Autism Spectrum Disorder in October 2019 and that he is known to the Education Authority's Autism Advisory an Intervention Service. It was noted that he had been referred for assessment of Attention Deficit Hyperactivity Disorder. The report noted that the Appellant had initiated and

responded appropriately to social interactions during the individual assessment. It was noted that school reports indicated that he is an integrated member of his class and that parental and school reports indicated that he needs support and guidance regarding the interpretation and processing of social cues and conceptualization of another person's perspective, priorities and reasoning. It was noted that his attention and listening skills are an area of significant concern and that he requires additional adult support to complete tasks. It was reported that the rapidity and intensity of his of his frustration can be extreme. The overall results of the cognitive assessment a Full Scale IQ of 92 which is in the average range. The assessment of his educational attainments identified that he was either low average or below average in both literacy and numeracy. The results of an assessment using the Strengths and Difficulties Questionnaire (SDQ) identified that he was in the very high range in relation to emotional symptoms, hyperactivity and concentration and peer problems. The report concluded that the Appellant had Special Education Needs as a result of his social and behavioural difficulties, communication and social interaction difficulties, emotional and wellbeing difficulties and dyslexia. The Education plan provided outlined the provision which would be required to support him in school.

The letter from the Consultant Paediatrician confirmed that there have been recent concerns about the Appellant's emotional wellbeing and that a referral had been made to the CAMHS team. It was noted that he had been able to engage in a short conversation and answered questions about school and home life. It was noted that school seems to be a significant stressor for him and that many of his difficulties seem to be in relation to other children and his perception of their actions. The report noted that he appeared to be happier at home and enjoyed watching TV and playing on his tablet. It was noted that the Appellant's mother reported that he continues to enjoy social events and activities and that he has a good relationship with his younger siblings. She also reported that his mood can fluctuate quickly from seeming happy and settled to reflective and sad. The letter confirmed that at that date the CAMHS assessment was pending. It was confirmed that further assessment would take place in relation to a possible co-morbid diagnosis of ADHD.

The letter from the Senior Mental Health Practitioner advised that a communication book, which had been used during the academic year 2020/2021, would be of benefit for the academic year 2022/2023 for everyone involved in

the Appellant's care. It was noted that this was particularly important as he does not verbally communicate particularly well.

Evidence at hearing

The Appellant's Appointee attended the hearing on his behalf together with her representative. The oral evidence given by Ms A is recorded in the Record of Proceedings. She outlined a number of examples of how the Appellant's disabilities impact on his day-to-day life.

On the issue of severe impairment of intelligence she asked the Tribunal to consider factors other than her son's assessed IQ. She had researched the case law on this topic and referred to information provided online by Contact.org.uk which indicated that factors other than assessed IQ should be taken into account and she stated that with autistic children what matters is how they are able to use their intelligence.

Assessment of the evidence

The Tribunal accepted that there was medical evidence which confirmed that the Appellant has been diagnosed with Autism Spectrum Disorder and Dyslexia. It was noted that he has been referred for assessment of Attention Deficit Hyperactivity Disorder. The Tribunal accepted that he has Special Education Needs as outlined in the report of the Educational Psychologist. The Tribunal also accepted that there are concerns regarding the Appellant's emotional regulation and that he has been referred to CAMHS.

In assessing the evidence, the Tribunal has taken account of the fact that the Appointee challenged the weight which should be attached to her son's assessed overall IQ of 92. The Tribunal accepted that the reported Full Scale IQ score is not of itself sufficient means of assessing intelligence. The Tribunal referred to the ruling of the Court of Appeal in England and Wales in the case of Megarry -v- Chief Adjudication Officer (29th October 1999) (reported as R (DLA) 1/00), as followed by the NI Commissioner in MMcG-v-Department for Social Development (DLA) [2012] NICom 292.

The Tribunal noted that in the application of section 73(3)(a) intelligence and social functioning are not to be regarded as strictly separate concepts. The Tribunal considered the extent to which the Appellant may be

lacking in the qualities of insight and sagacity resulting in impairment of his functional ability in relation to both intelligence and social functioning.

The Tribunal accepted that the Appellant has social and behavioural difficulties, communication and social interaction difficulties, and emotional and wellbeing difficulties which impact his functioning in different contexts. These issues were well documented. The Tribunal however considered that there was evidence which indicated that his social functioning is not so severely impaired that it impacts on his functional intelligence to the extent that he falls within section 73(3)(a). The Tribunal has taken account of the fact that the Appellant is reported to be an integrated member of his class and that he was able to respond to and initiate social interactions during assessment by the educational psychologist. He enjoys social events and activities and this included his regular participation in a football club with children of a younger age group. The Tribunal accepted his mother's evidence that he needs accompanied into school more than half the time but noted that he is often able to be dropped off and go into school himself. The Appellant's mother told the Tribunal that when she takes him out she holds his hand or she tells him to hold on to the pram and that he can run away if he gets upset. There was evidence that he goes to indoor play area and a local park which is securely fenced. The Tribunal noted that he can experience emotional upset in these situations and needs support to settle.

This was a difficult case to assess. There was evidence of a wide range of difficulties which this young child experiences. It was evident that he has challenges in relation to his social functioning and that these are multifactorial. The Appellant's assessed IQ falls within the average range. The Tribunal considered that the evidence as a whole indicated that he does have the ability to use his intelligence in a functional way in certain contexts. The issue was one of degree. The Tribunal accept that the Appellant's social functioning is impaired but on balance the panel did not consider that this is to such a degree that there is severe impairment of intelligence.

Taking account of the evidence as a whole the Tribunal did not consider that the evidence suggested that the Appellant comes within section 73(3)(a). The Tribunal considered that the award of low rate of the mobility component was appropriate in the context of the Appellant's requirement for guidance and supervision to

enable him to take advantage of the faculty of walking outdoors.

Accordingly, the appeal was dismissed."

The initial ground of appeal on section 73(3)(a) of the 1992 Act

17. The appellant set out the following initial ground of appeal:

> '…
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> The tribunal correctly considered that autism has a physical cause connected to the arrested development of the brain but focused on the interpretation of severe impairment of intelligence and social functioning.
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> The tribunal have noted M (A child) v Chief Adjudication Officer reported as R(DLA) 1/00 which found that IQ was not to be a conclusive factor with other issues such as sagacity and insight to be a useful starting point.
>
> We would submit that the tribunal should not have considered 73(3)(a) in isolation from section 73(3)(b). This is because a finding of fact that the appellant had severe behaviour problems … is relevant to a determination of factors such as sagacity and insight.
>
> If it is accepted, as in this case, that the appellant has an arrested development of the brain with impaired intelligence and social functioning, then their disruptive behaviour which is extreme; requires physical intervention; and is so unpredictable that it requires watching over; is relevant to the severity of the accepted mental impairment.
>
> …'

The Department's response to the initial ground of appeal

18. In his written observations on the appeal, Mr Clements said the following, at paragraphs 10 to 17:

> 10. "Ms A submits that, although the tribunal acknowledged that "*in the application of section 73(3)(a) intelligence and social functioning are not to be regarded as strictly separate concepts*", it went on to make statements which, in her view, regarded intelligence and social functioning as separate concepts. She cites this finding as an example: "*The Tribunal accept that the Appellant's social functioning is impaired but on balance the panel did not consider*

that this is to such a degree that there is severe impairment of intelligence".

11. Commissioner Stockman said the following in paragraphs [53] to [56] of the *MMcG* decision:

> *"53. Turning to the second aspect of the second condition, the tribunal had to consider whether the condition led to severe impairment of intelligence and social functioning. The Court of Appeal in England and Wales held in M (a child), reported as R(DLA) 1/00, that these were two separate conditions rather than a conjoined test which should be approached as a composite question.*
>
> *54. Nevertheless, in approaching the issue of severe impairment of intelligence, the court held that a tribunal would not be bound by the assessment of IQ alone. The court acknowledged the decision of GB Commissioner Rice in CDLA/8353/1995, in which he had found that a person could not be said to be suffering from severe impairment of intelligence unless he had an IQ of 55 of below. While the court accepted that this was a useful starting point, an IQ test score would not necessarily prove decisive. A high IQ score could well give a misleading impression of a claimant's useful intelligence, as opposed to test intelligence.*
>
> *55. Simon Brown LJ said in M (a child) that:*
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> > *"Autistics, however, at least in certain tests, score unusually highly just because they are being tested outside the real-life context. Their success in IQ tests, in short, is not a true indication of what one might call their useful intelligence and it is surely the impairment of the claimant's useful intelligence to which the regulation is directed".*
>
> *56. The Court of Appeal in England and Wales held that regard should be had to the limits of a claimant's "social capacity" in deciding whether a claimant's intelligence*

was severely impaired within the meaning of the legislation. The consequence of this, reasoned the Court of Appeal, was that, in some cases, an impairment of social functioning will shade into an impairment of intelligence. They were not therefore entirely distinct concepts in all cases."

12. As Commissioner Stockman noted, the Court of Appeal in England and Wales held in *R(DLA) 1/00* that intelligence and social functioning are "*two separate conditions rather than a conjoined test which should be approached as a composite question.*" However, while they are separate conditions, in some cases an impairment of social function will shade into an impairment of intelligence (particularly in cases involving autistic claimants) because an assessment of a claimant's intelligence must factor in the limits of their social capacity. The passage from the statement of reasons that has been cited by Ms A shows that the tribunal considered whether Master McK's impairment of social functioning was to such a degree that he had a severe impairment of intelligence. I submit that this approach is in line with the relevant case law and that the tribunal has not erred by taking that approach.

13. Ms A notes that *R(DLA) 1/00* established that a full evaluation of intelligence and social functioning for the purpose of section 73(3)(a) of the Social Security Contributions and Benefits Act (Northern Ireland) 1992 ("the Contributions and Benefits Act") should include factors such as sagacity and insight. She submits that the tribunal's finding that Master McK had severe behavioural problems for the purpose of section 73(3)(b) of the Contributions and Benefits Act is relevant to a determination of factors such as sagacity and insight. Ms A further submits that if, as was found by the tribunal in the instant case, a claimant suffers from a state of arrested development or incomplete physical development of the brain, then disruptive behaviour that falls within the ambit of regulation 12(6) of the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992 ("the DLA Regulations") is relevant to the severity of the mental impairment. She argues that the tribunal should have explained why its findings in respect of regulation 12(6) were not materially relevant to its conclusion in relation to regulation 12(5) of those Regulations.

14. I should point out that the electronic version of the DLA Regulations that is published by the Department as part of the Blue Volumes contains an error. Paragraphs (2) to (6) of regulation 12 are incorrectly numbered as paragraphs (7) to (11). The original version of the DLA Regulations refers to these paragraphs as (2) to (6) and there have been no amendments changing the paragraph numbers. The equivalent paragraphs in the legislation in Great Britain are also numbered (2) to (6). I observe that if the numbering in the Blue Volumes was correct then regulation 12 would have two paragraph (7)s and two paragraph (8)s. I will therefore treat Ms A's references to paragraphs (10) and (11) of regulation 12 as references to paragraphs (5) and (6) in these observations.

15. The tribunal did not explain why it found that section 73(3)(b) of the Contributions and Benefits Act was satisfied. The Department's position had been that Master McK did not satisfy the criteria in regulation 12(6) of the DLA Regulations and therefore that he did not display severe behavioural problems for the purpose of section 73(3)(b). Its submission to the tribunal stated: "*there is no specialist evidence to suggest that this young customer would display extremely disruptive behaviour, regularly require another person to physically intervene and restrain them to prevent them from causing physical injury to themselves, or others, or damage to property, or behave so unpredictably that they require another person to be present or watching over them whenever they are awake*". The matter of whether Master McK satisfied section 73(3)(b) was therefore in dispute between the parties. I submit that the tribunal had a duty to give reasons for its finding that Master McK satisfied section 73(3)(b), and that it erred by failing to do so. However, as the tribunal ultimately decided that Master McK was not entitled to the higher rate of the mobility component of Disability Living Allowance (DLA), and as the error was adverse to the Department rather than to Master McK, I submit that the error is not material to the outcome of the decision and, therefore, is not an error of law.

16. In a decision of the Upper Tribunal in Great Britain where Judge Gray granted permission to appeal in *EC (by SC) v Secretary of State for Work and Pensions (DLA)* [2017] UKUT 391 (AAC), Judge Gray said at paragraph 7 of her grant of permission:

> "*Whilst the criteria in relation to regulation 12(5) must be met before going on to the issue of disruptive behaviour under subparagraph (6), there may have been a requirement to explain the evidence of restraint in the context of the finding that restraint at the level provided did not amount to evidence in support of severe impairment of social functioning. It is hard to understand how a person who requires restraint to prevent danger to themselves or to others does not have a severe impairment of social functioning, without explanation. That is not to conflate the two issues, but evidence of one may be probative of the other*."

I broadly agree with Judge Gray's analysis. Evidence of disruptive behaviour that requires a person to be physically restrained to prevent danger to themselves or others will, in many cases, also be evidence that supports that a person has a severe impairment of social functioning. Therefore, in cases where a tribunal decides that a claimant satisfies regulation 12(6)(b) of the DLA Regulations but does not have a severe impairment of social functioning (or vice versa), an explanation will often be necessary.

17. In the instant case, the only finding that the tribunal made in respect of regulation 12(6) of the DLA Regulations was that Master McK satisfied its conditions. The tribunal did not give any explanation for its finding. Ms A gave oral evidence of Master McK's disruptive behaviour at the hearing, including instances where he had to be physically restrained to prevent him from causing physical injury to himself or to others. I speculate that this evidence was key to the tribunal's finding that Master McK satisfied regulation 12(6)(b), although it is difficult to be certain as the tribunal did not give any reasons for the finding. This oral evidence given by Ms A seems relevant to an assessment of severe impairment of social functioning, and it has not been expressly referred to by the tribunal in its statement of reasons. I further note that none of the evidence cited in the "assessment of the evidence" section could plausibly have been used by the tribunal to support the finding that Master McK requires physical restraint to prevent danger to himself or to others. Therefore, it seems that the tribunal did not consider the evidence used to

find that physical restraint is regularly required when assessing whether Master McK had a severe impairment of social functioning. In the circumstances of the case, I submit that this amounts to an error of law."

Mr McCloskey's further response

19. In his written observations in response to those of Mr Clements, Mr McCloskey stated the following:

> 'We have now reviewed the DfC comments in relation to this case and generally welcome the DfC position that the tribunal has erred in law. Some of the issues have become conflated and there is only one general matter in which we wish to provide further comment and this relates to the tribunal's consideration of section 73(3)(a) in isolation.
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> At paragraph 17 of the comments, Mr Clements notes that
>
> *Ms A gave oral evidence of Master McK's disruptive behaviour at the hearing, including instances where he had to be physically restrained to prevent him from causing physical injury to himself or to others. I speculate that this evidence was key to the tribunal's finding that Master McK satisfied regulation 12(6)(b), although it is difficult to be certain as the tribunal did not give any reasons for the finding…*
>
> In the record of proceedings the tribunal recorded the following materially relevant information:
>
> **Page 1:**
>
> *"the Appointee […] highlighted the appellant's destructive and behavioral issues […]"*
>
> **Page 3:**
>
> *"Appointee: […] He needed restrained, it can take 20 minutes to a couple of hours to settle him."*
>
> **Page 4:**
>
> *"Appointee […] – he piled pillows on top of his younger brother […]"*

"LQM: Can you give us examples of Riley's behaviour?"

"Appointee: […] He can be upset, pulls on his hair, he would scrab his face with his finger nails."

" […] I had to restrain him. He was pulling his hair, he said he wanted to kill himself and that he was going to bang his head off the wall."

"[…] complete meltdown, punching the wall, angry"

"He was playing with his wee sister […] and then he punched her in the face – he thought he was playing."

"LQM: How is Riley when he is out and about?"

"Appointee […] if he gets upset he can run off."

"[…] Riley had a complete meltdown, he went to run away, I had to grab him and hold him."

"Also I got in touch with SureStart last month for family support […] they won't provide help for Riley because he is too high risk for them"

In addition the evidence from the GP in the DBD 370(N) GPFR form dated 29 January 2022 outlined in relation to insight and awareness of danger:

"None – impulsive, self-harm & destructive"

The tribunal reasons outline the legal test for severe behavioural problems and specifically Regulation 12(6) of the Social Security (Disability Living Allowance) Regulations. The reasons then outline that the appellant satisfied the conditions of section 73(3)(b).

We accept that the tribunal could have done more to give reasons for its reasons but not that it was necessary to do so on this occasion. Given the award of highest rate care; the evidence cited above; and the outlining of the relevant legislative test, we believe it is clear why the tribunal determined that section 73(3)(b) was satisfied.

It was therefore an error of law for the tribunal to consider 73(3)(a) in isolation of the conclusions it reached in relation to 73(3)(b).

We welcome Mr Clements helpful reference to *EC (by SC) v Secretary of State for Work and Pensions (DLA)* [2017] UKUT 391 (AAC). We agree with the reasoning of Judge Gray's and Mr Clement's submission that:

Evidence of disruptive behaviour that requires a person to be physically restrained to prevent danger to themselves or others will, in many cases, also be evidence that supports that a person has a severe impairment of social functioning. Therefore, in cases where a tribunal decides that a claimant satisfies regulation 12(6)(b) of the DLA Regulations but does not have a severe impairment of social functioning (or vice versa), an explanation will often be necessary.

We aver that it is necessary to provide reasons why section 73(3)(b) could be satisfied and not 73(3)(a). We agree with the view as outlined by Judge Gray in paragraph 7 of *EC (by SC)* that:

It is hard to understand how a person who requires restraint to prevent danger to themselves or to others does not have a severe impairment of social functioning…

It is hard to understand, we say, *because* it is difficult to envisage a situation in which a person would satisfy section 73(3)(b) but would not be considered to have severe impairment of social functioning.

We submit that the tribunal has made an acceptable and sufficiently reasoned finding in relation to section 73(3)(b) and as a result request that the Commissioner proceed to give the decision the tribunal should have reached on this finding of fact. With reference to paragraph 56 of *MMcG v Department for Social Development (DLA)* [2012] NICom 292 it is submitted that, had the tribunal applied its findings in relation to 73(3)(b), to its consideration of 73(3)(a), then the appeal would have succeeded. If it applied the findings in relation to 73(3)(b) then it would have concluded that limits of the claimant's social capacity evidenced intelligence which was severely impaired within the meaning of the legislation.

56. The Court of Appeal in England and Wales held that regard should be had to the limits of a claimant's "social capacity" in deciding whether a claimant's intelligence was

severely impaired within the meaning of the legislation. The consequence of this, reasoned the Court of Appeal, was that, in some cases, an impairment of social functioning will shade into an impairment of intelligence. They were not therefore entirely distinct concepts in all cases."

We therefore request that the Commissioner allow the appeal and on the application of the tribunal's findings of fact to the law, issue the decision that the tribunal should have.'

Analysis and disposal

20. I am satisfied, for the reasons which have been agreed between the parties, that the decision of the appeal tribunal is in error of law.

21. I am in agreement with Mr McCloskey that there was sufficient evidence before the appeal tribunal for it to determine that section 73(3)(a) of the 1992 Act was satisfied and I find, as facts, that the appellant is severely mentally impaired in that he suffers from a state of arrested development or incomplete physical development of the brain which results in severe impairment of intelligence and social functioning.

22. The appeal tribunal was satisfied, on consideration of all of the evidence which was before it, that sections 73(3)(b) and (c) of the 1992 Act were satisfied.

23. Given that I have found that section 73(3)(a) is also satisfied, the appellant satisfies the legislative criteria for entitlement to the higher rate of the mobility component of DLA. The period of entitlement shall be from 10 February 2020 to 9 February 2025. As the appellant has an extant award of the lower rate of the mobility component of DLA for this period, that award will be taken to be on account for the period of the award of the higher rate consequent on this decision.

Signature): K MULLAN

CHIEF COMMISSIONER

6 November 2024