



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CPIP/596/2020

On appeal from The First-tier Tribunal (Social Entitlement Chamber)

Between:

EE

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge M R Hemingway

Decision date: 21 January 2021.

Decided on consideration of the papers.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 3 January 2020 under number SC944/19/00349 was made in error of law. Under section 12(2)(a) and (b)(i) 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 First-tier Tribunal panel which reconsiders the case should not involve any of the panel members previously involved in considering this appeal on 3 January 2020. In deciding the appeal, the panel must not have regard to circumstances not obtaining at the date of the original decision of the Secretary of State under appeal. Post-decision evidence is admissible if it relates to the circumstances at the time of the decision.**
- 3. Before the appeal is reheard, the First-tier Tribunal must consider in accordance with paragraph 6 of the Practice Direction: First Tier and Upper Tribunal – Child, Vulnerable Adult and Sensitive Witnesses, how to facilitate the giving of any evidence by the claimant so as to give effect to the overriding objective and, in particular to the obligation to ensure, so far as is practicable, that the parties are able to participate fully in the proceedings.**

REASONS FOR DECISION

Introduction

1. This is the claimant's appeal to the Upper Tribunal, brought with my permission, from a decision of the First-tier Tribunal (F-tT) which it made following a hearing of 3 January 2020. I have decided to allow this appeal, to set aside the F-tT's decision and to remit for a full rehearing before a differently constituted F-tT. What follows amounts to an explanation as to why I have done so.

The background

2. The claimant, who was born on 25 April 1985, applied for a personal independence payment (PIP), listing her conditions as being autism, dyslexia, dyspraxia and depression. She explained the ways in which she felt those difficulties impacted upon her in a claimant questionnaire of 10 September 2018. As to her ability or otherwise to venture out of doors alone, she wrote:

"I am able to plan routes and travel in familiar routes. However, I have a very severe Phobia of Dogs which is a result of sensory issues from my ASD which prevents me from undertaking journeys which are unfamiliar without someone to go with me or by travelling via car. This is due to my very severe anxiety that a dog may be present in the unfamiliar route".

3. In answering a question in the questionnaire inquiring as to whether she would need any help in attending a face-to-face consultation with a health professional she wrote:

"I will need to bring someone with me and have no dogs in the vicinity of the assessment centre."

4. The claimant did indeed attend a face-to-face assessment. She was driven to the relevant Assessment Centre by her mother (see page 89 of the Upper Tribunal bundle). The assessment took place on 19 November 2018 and the health professional (a nurse) produced a written report of that date. She recorded the claimant's stated fear of dogs but opined that she would, nevertheless, be able to plan and follow journeys. On 3 December 2018 a decision-maker acting on behalf of the Secretary of State decided, seemingly largely in reliance upon the health professional's report, that the claimant was not entitled to any points under any of the activities and descriptors relevant to the daily living component or the mobility component of PIP and was not, therefore, entitled to that benefit. That decision was subsequently upheld by way of mandatory reconsideration.

The appeal to the First-tier Tribunal and its decision

5. The claimant appealed to the F-tT. She secured representation for that purpose. Her then representative (she has pursued these proceedings before the Upper Tribunal in person) sent the F-tT a written submission in advance of the hearing but made it clear that it was the claimant herself, rather than the representative, who had prepared it. The claimant asserted, in that submission, entitlement to various points in relation to various descriptors and activities. As to mobility activity 1 (Planning and following journeys) she specifically claimed to

be entitled to 10 points under mobility descriptor 1d (Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid). In support of that contention she made similar points to those she had made in the claimant questionnaire.

6. The F-tT, having heard from the claimant and from her then representative, dismissed the appeal. It did, though, decide that she was entitled to 5 points under the activities and descriptors relevant to the daily living component of PIP although that was not sufficient to establish entitlement. It also decided that she was not entitled to any points under the activities and descriptors relevant to the mobility component of PIP. So, it dismissed the appeal. A request for a statement of reasons for decision (statement of reasons) followed. It was sent to the parties on 3 February 2020.

7. It is clear from the F-tT's statement of reasons that it accepted the claimant has autism and that she suffers from depression. As to the latter, though, it observed that she had had only limited medical or psychiatric input. It noted that at the time of her face to face assessment she had been studying law and that she possessed a degree in theoretical physics. It is apparent that it found much of her oral evidence to it to be unconvincing and overstated. As to her ability to plan and follow a journey it said this:

“20. With regard to planning and following a journey, [the claimant] made it very clear that her problem was with a fear of dogs. Her argument was that she could not go anywhere familiar in case there was a dog off a lead. We had some difficulty accepting this as a reason for needing to be accompanied to successfully plan and follow a journey. We did not find that she would suffer overwhelming psychological distress.

21. [The claimant] drives her son to school, uses trains and trams and told Nurse Daley (the health professional who provided the above report) that she goes out alone most days. Her mental health is affected by depression, not anxiety, and she does not have a cognitive or sensory impairment that would affect her ability to plan and follow the route of a journey independently. Her fear, we found, was of dogs running free and not of going to unfamiliar places. She made a journey to Sheffield on her own.

22. The medical documentation confirmed [the claimant's] diagnoses. Her fear of dogs was confirmed by her therapist in 2017, who also confirmed her presenting issue as depression. However, we noted that she reported “significant improvements” in function and mood.”

The permission stage

8. The claimant asked the F-tT to give permission to appeal its own decision. On 6 March 2020, in a thoughtful decision, a District Tribunal Judge of the First-tier Tribunal refused permission. The claimant then renewed her application to the Upper Tribunal. In doing so she sought to raise a number of arguments with respect to the way in which the F-tT had dealt with possible entitlement to each PIP component. As to planning and following journeys she said, in summary, that the F-tT had wrongly thought her fear of dogs was caused by her depression whereas it was in fact caused by anxiety linked to her autism; that the F-tT had failed to adequately consider all of the evidence; and that, with reference to what the Upper Tribunal had had to say in *JB v SSWP (PIP)* [2019] UKUT 203 (AAC) and *JC v SSWP (PIP)* [2019] UKUT 181 (AAC) it had failed to

conduct a sufficiently holistic consideration as to her overall ability to follow the route of a journey.

9. I granted permission to appeal on 30 June 2020. In so doing I made it clear that whilst I thought the F-tT might have erred in its consideration as to the possible entitlement of points under the descriptors linked to mobility activity 1, I was unpersuaded, even in the context of what might be thought to be arguable, by the various other grounds the claimant had advanced. Nevertheless, I did not limit the grant of permission. I directed written submissions from the parties.

The parties' submissions

10. The representative for the Secretary of State has, in fact, indicated that the appeal is supported and has invited me to set aside the F-tT's decision and to remit. As to the ways in which the F-tT was said to have erred the Secretary of State's representative argued, in summary, that it had not made it sufficiently clear why it was rejecting the claimant's assertion that she had problems in following journeys despite its seeming acceptance that she did fear encountering dogs; that it had not fully addressed oral evidence she had given about such fears as recorded in the record of proceedings; that it had not carried out a sufficiently holistic consideration as to her ability to follow the route of a journey; and that it had failed to appreciate that her anxiety about dogs was linked to her autism rather than to her depression. It was seemingly accepted that if the claimed fear of dogs was genuine and was linked to a health condition, then such should be taken in to account in assessing the ability to follow the route of a journey so long as the fear caused the claimant to experience overwhelming psychological distress.

11. The claimant, in her written reply to the Secretary of State's submission, appeared to welcome the suggestion of remittal. She said, for clarity, that she had made no further claim for PIP. She said that a journey to Sheffield which the F-tT had referred to in its statement of reasons and which it seemed to have treated as an unfamiliar journey was a familiar one. She asked (if I understand her correctly) me to address, in my decision on the appeal, all of the contentions she had made in her grounds of appeal to the Upper Tribunal including those relating to the daily living component of PIP.

My reasoning on the appeal

12. I have asked myself whether I should hold an oral hearing of the appeal. Having reminded myself of the content of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I have decided not to do so. That is because nobody has asked for a hearing, because there is agreement between the parties as to what the outcome of this appeal should be, because the parties have already set out their arguments in writing and because, putting everything together, I am satisfied that I can justly decide this appeal without one.

13. The claimant has asked that I deal with all of the arguments she raised when asking for permission to appeal. I can understand why she would like me to do so. However, I explained when giving permission why I thought certain arguments had arguable merit and why I thought certain arguments did not. Further, I have considered it proportionate to focus upon the areas where I thought when giving permission the F-tT might have erred and those in which the Secretary of State's representative now accepts it did err. It would not be

necessary or proportionate, in the circumstances of this case, to do anything other than that.

14. In my judgment the F-tT erred through providing unclear reasons as to why it was concluding that the claimant was, absent another person, able to follow the route of an unfamiliar journey (she had not claimed to be unable to follow the route of a familiar journey) in consequence of her fear that she might encounter a dog or, at least, a dog that was not on a lead. It is not sufficiently clear from what the F-tT had to say in the passage which runs from paragraph 20 to paragraph 22 of its statement of reasons and which I have set out above, whether it was rejecting her contention because it simply did not believe her, whether it believed she had a degree of fear but which did not reach the level of overwhelming psychological distress (see paragraph 48 of *MH v Secretary of State for Work and Pensions* [2016] UKUT 0531 (AAC); [2018] AACR 12), or because it thought a fear of “*dogs running free*” was not something which fell within the scope of mobility descriptor 1d or, I suppose for that matter, 1f. I have in mind here the penultimate sentence of paragraph 21 of the statement of reasons as set out above (“*Her fear, we found, was of dogs running free and not of going to unfamiliar places*”).

15. There are elements in the passage running from paragraph 20 to paragraph 22 of the statement of reasons capable of supporting all three of the above possible reasons which the F-tT might have been relying on for its ultimate conclusion that mobility descriptor 1d did not apply. I appreciate it might be that the F-tT was intending to find that there was not overwhelming psychological distress (either because it did not believe her at all or because it accepted there was some fear less than the requisite threshold) and that, in the alternative, it was also concluding that fear of dogs was outwith the scope of the descriptor anyway. But it did not express itself in that way. Accordingly, the lack of clarity means that it has, in this respect though its reasoning as to other matters was thorough and cogent, failed to supply adequate reasons for its decision. That does, therefore, amount to an error of law which justifies the allowing of this appeal to the Upper Tribunal and the setting aside of its decision.

16. I would, though, wish to address the question of whether a fear of dogs, as described by the claimant, might be outside the scope of the descriptors concerned with the ability to follow the route of a journey. It is necessary for me to do so because if the F-tT was deciding it was and was right about that then the claimant could not, in her circumstances, establish entitlement to points under mobility descriptor 1d. However, the requirement in section 79(1)(b) of the Welfare Reform Act 2012 is that a person’s ability to carry out mobility activities is limited by the person’s physical or mental condition. That being so, if a fear of dogs sufficient to lead to overwhelming psychological distress is present when a person is unaccompanied outdoors and attempting to follow the route of a journey, and is attributable to one or other of those types of condition, and does impact adversely upon a person’s ability to follow the route of a journey, and is capable of being sufficiently reduced by the presence of another whilst the route is being followed, then such may, in principle, be taken into account. Whether it is sufficient to establish entitlement in any particular case though will depend upon the precise findings made. Whilst perhaps an objection might be raised (and possibly the F-tT had this in mind though it did not say so) on the basis that

a fear of dogs has nothing to do with an actual ability to navigate, it was established in *MH*, cited above, that the meaning of the phrase “*follow the route of a journey*” is not so limited (see paragraphs 36 to 38 of *MH*).

17. So, in light of the above, I have decided to set aside the F-tT’s decision. I have been urged to remit, I have decided to do so. That means there will be a complete rehearing of the appeal before a differently constituted F-tT panel. The rehearing will not be limited to the grounds on which I have set aside the F-tT’s decision. The new F-tT will consider all aspects of the case, both fact and law, entirely afresh. The claimant should not assume that, merely because I have set aside the F-tT’s decision, she is ultimately likely to succeed. She might but, then again, she might not. All of that will now be for the good judgment of the new F-tT panel.

Conclusion

18. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway

Judge of the Upper Tribunal

Dated 26 January 2021