

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the claimant for leave to appeal and appeal to a Social Security Commissioner on a question of law from a Tribunal's decision dated 28 December 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's late application for leave to appeal from the decision of an appeal tribunal with reference AR/6935/17/03/D.
2. For the reasons I give below, I grant leave to appeal and I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

REASONS

3. The proceedings in this case were stayed on 9 December 2020 pending the decision of a Tribunal of Commissioners in *HH v Department for Communities* [2024] NI Com 8. The decision in that case was given on 28 May 2024. I acknowledge that the present application has been pending for an unusually long time for that reason and I apologise to the applicant for the resulting delay.

Background

4. The applicant had previously been awarded disability living allowance (DLA) from 22 March 2006 at the middle rate of the care component. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he claimed personal independence payment (PIP) from the Department for Communities (the Department) from 28 April 2017 on the basis of needs arising from

conditions including diabetes, depression, anxiety, Asperger's syndrome, cardiomyopathy, a hernia, hearing loss and irritable bowel syndrome.

5. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 10 May 2017. A factual report from the applicant's general practitioner (GP) was obtained by the Department on 8 June 2017. The applicant asked for evidence relating to his previous DLA claim to be considered. The applicant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 14 June 2017. On 26 July 2017 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 28 April 2017. The applicant requested a reconsideration of the decision, submitting further evidence. He was notified that the decision had been reconsidered by the Department but not revised. He appealed.
6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member on 28 December 2017. The tribunal disallowed the appeal. The applicant then made a late request for a statement of reasons for the tribunal's decision and this was issued on 6 September 2018. On 31 January 2019 the applicant made a late application to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 7 October 2019. On 19 June 2020 the applicant made a late application to a Social Security Commissioner for leave to appeal.
7. The application was received after the expiry of the relevant statutory time limit under regulation 9(2) of the Social Security Commissioners (Procedure) Regulations (NI) 1999, which is one month of the refusal of leave to appeal by the LQM. However, on 9 December 2020 I admitted the late appeal for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999. I then stayed the proceedings pending resolution of the proceedings in the similar case of *HH v Department for Communities* [2024] NI Com 8.

Grounds

8. The original ground of application, submitted by Mr Black of Law Centre NI on behalf of the applicant, was that the tribunal had misdirected itself in law by failing to take proper account of the decision of a three-judge panel of the Upper Tribunal in Great Britain in the case of *MH v Secretary of State for Work and Pensions* [2016] UKUT 531, and the psychological distress that might be experienced by the applicant.
9. The application was opposed by Mr Kirk of Decision Making Services on behalf of the Department.
10. It was clear that another issue arose in the particular case. The relevant legislation applied by the tribunal was the version of mobility activity 1 that

was amended from 20 April 2017 by regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017. For the word “Cannot” in paragraphs (c), (d) and (f) were substituted the words “For reasons other than psychological distress, cannot”. The purpose of the legislative change was to reverse the effect of *MH v SSWP*, the case relied upon by Mr Black. However, in the decision of the High Court in England and Wales in *RF and others v Secretary of State for Work and Pensions* [2017] EWHC 3375, the equivalent amendment in the Great Britain version of the Regulations was declared *ultra vires*.

11. The effect of the amendment in Northern Ireland was subsequently reversed from 15 June 2018 by regulations 2 and 3 of the Personal Independence Payment (Amendment) Regulations (NI) 2018 (2018; No.121), which substituted the original wording by regulation 2 and which revoked regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017 by regulation 3. However, there was already a case pending before the Commissioners addressed to the question of what form of the law ought properly to have been applied in Northern Ireland between 20 April 2017 and 15 June 2018. It became apparent that a question arose as to whether the tribunal in the present proceedings had applied the correct form of the law in Northern Ireland.

The tribunal’s decision

12. The LQM of the tribunal has prepared a statement of reasons for the tribunal’s decision. From that, it is evident that the tribunal had documentary evidence before it consisting of a Departmental submission, additional evidence submitted by the applicant prior to the hearing and the applicant’s general practitioner medical notes and records. The applicant attended the hearing and gave oral evidence.
13. The tribunal addressed the daily living component and the mobility component, and found that the applicant did not score sufficient points for an award of either. In addressing mobility activity 1, the activity affected by the *RF* decision, it noted “however, the appellant’s evidence focused on issues such as anxiety and procrastination as opposed to the ability to plan and follow a route”. Therefore it is clear that the tribunal did not place weight on psychological factors affecting the applicant’s ability to plan and follow a route.

Relevant legislation

14. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The 2016 Regulations set out the detailed requirements for satisfying the above conditions.

15. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a claimant who obtains a score of 12 points will be awarded the enhanced rate of that component.
16. The appellant's claim for PIP was made on 28 April 2017. The decision under appeal to the tribunal was made by the Department on 26 July 2017. A key aspect of dispute in the present appeal addresses the question what form of mobility activity 1 in Schedule 1, Part 3 to the 2016 Regulations is legally valid in Northern Ireland in the relevant period.
17. Mobility activity 1 was amended from 20 April 2017 by regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017 (the 2017 Regulations). For the word "Cannot" in paragraphs (c), (d) and (f) were substituted the words "For reasons other than psychological distress, cannot".
18. Subsequently, the equivalent amendment in the Great Britain version of the Regulations was declared *ultra vires* in *RF and others v Secretary of State for Work and Pensions* [2017] EWHC 3375.
19. The effect of the amendment in Northern Ireland was subsequently reversed from 15 June 2018 by regulations 2 and 3 of the Personal Independence Payment (Amendment) Regulations (NI) 2018 (the 2018 Regulations), which substituted the original wording by regulation 2 and which revoked regulation 2(4) of the 2017 Regulations by regulation 3.
20. As amended in the relevant period by the addition of the words, "For reasons other than psychological distress," and before it was subsequently re-amended to the original form, the descriptors in mobility activity 1 at the date of claim and decision were as follows, with the added words underlined:

<i>Activity</i>	<i>Descriptors</i>	<i>Points</i>
1. Planning and Following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4
	c. <u>For reasons other than psychological distress,</u> cannot plan the route of a journey.	8

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| d. <u>For reasons other than psychological distress</u> , cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid. | 10 |
| e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant. | 10 |
| f. <u>For reasons other than psychological distress</u> , cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid. | 12 |

Submissions and assessment

21. In the case of *HH v DfC*, it was held that a tribunal,
- “had an obligation under section 6(1) of the Human Rights Act to disapply regulation 2(4) of the 2017 Regulations. This would have the clear effect that the amended form of mobility activity 1 in Northern Ireland between 20 April 2017 and 15 June 2018 should not be applied. The correct form of the activity that should be applied in Northern Ireland in that period is the unamended form as originally appearing in the 2016 Regulations”.
22. The parties in the present case were directed to make submission on the implications of *HH v DfC* for the present case and to make submissions as to its proper disposal.
23. For the applicant, Ms MacCabe of Law Centre NI submitted,
- “On 28 May 2024 a Tribunal of Commissioners in *HH v DfC* (PIP) [2024] NI Com 8 disapplied the identical NI equivalent amendment contained in regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017. In that case it was held at para 64 that the High Court’s finding in *RF*, that the identical regulation 2(4) in the Great Britain Regulations breaches the Convention rights of the ‘psychologically distressed cohort’,
- “has sufficient authority to require a Tribunal in Northern Ireland to disapply that regulation*

in a case where it accepts that a claimant falls within that cohort”.

The present case relates to an applicant with a long history of mental health issues. It is our position that he falls within the psychologically distressed cohort.

It is submitted that the Commissioner should follow *HH* and disapply the amendment of Mobility Activity 1 by regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017 from 20 April 2017.

As a result, the pre-amended version of Mobility Activity 1 should apply in this case and it should be interpreted in the way envisaged by *MH v SSWP (PIP)* [2016] UKUT 531 (AAC). That is, that descriptors ‘c’, ‘d’ and ‘f’ could be satisfied by claimants by virtue of ‘overwhelming psychological distress’.

Due to the fact that the correct legal test in respect of Mobility Activity 1 was not applied by the Appeals Tribunal in this case, we would submit that this aspect of the appeal therefore warrants further consideration by a three person Appeal Tribunal panel. In terms of disposal of this case we would therefore respectfully ask that the matter be referred back to a new Tribunal for determination.”

24. The Department was directed to make observations in turn. Mr Morrison responded on behalf of the Department. He said:

“In light of the above judgment and following further consideration of [the appellant]’s case, it is now the Department’s submission that the Tribunal has erred in law in that it has failed to apply the correct form of legislation.

The Department would have no objections with Ms McCabe’s submission of 11 June 2024 that the case is remitted to a new Tribunal for re-determination and to consider whether [the appellant] falls within the ‘psychologically distressed cohort’ referred to the *HH* Judgment, also whether descriptors ‘c’, ‘d’ or ‘f’ of mobility activity 1 of the Personal Independence Payment Regulations (Northern Ireland) 2016 are satisfied.”

25. The parties are in agreement, and it is consistent with the decision in *HH v DfC*, that the proper disposal of this case is to allow the appeal and refer the appeal to a newly constituted tribunal for determination.
26. I therefore allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

27. I acknowledge the difficulty for the tribunal in assessing the evidence relevant to the date of the decision under appeal after such a long period of time. However, there is no other way in which the appeal can properly be determined.

(Signed): O STOCKMAN

COMMISSIONER

5 August 2024