

IRO RMcC (A CHILD)

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 21 November 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Omagh.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The applicant, born in March 2000, was awarded disability living allowance (DLA) from 4 July 2013 as a minor. His most recent award was at the high rate of the care component and the low rate of the mobility component of DLA. Following the legislative changes consequent to the introduction of the Welfare Reform (NI) Order 2015, he was invited to claim personal independence payment (PIP) from the Department for Communities (the Department). He duly claimed from 10 August 2017, when aged 17, on the basis of needs arising from depression, anxiety, self-harm, acid stomach, hay fever, dyslexia, and irritable bowel syndrome.

4. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 16 October 2017. The applicant was then asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 29 November 2017. On 5 December 2017 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 10 August 2017. The applicant requested a reconsideration of the decision. He was notified that the decision had been reconsidered by the Department but not revised. Through his appointee, his mother, he appealed.
5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 20 February 2019. The applicant applied 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 10 April 2019. On 18 April 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant, represented by Mr Buchanan MLA, submits that the tribunal has erred in law on the basis that:
 - (i) it has not obtained relevant information in relation to the applicant's mother acting as his appointee;
 - (ii) it has not addressed all the relevant descriptors raised at hearing;
 - (iii) it misunderstood the factual circumstances relating to non-referral to CAMHS.
7. The Department was invited to make observations on the applicant's grounds. Mr Williams of Decision Making Services (DMS) responded on behalf of the Department. Mr Williams submitted that the tribunal had not materially erred in law. He indicated that the Department did not support the application.

The tribunal's decision

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the PIP2 questionnaire completed by the applicant and a PA4 V3 consultation report from the HCP. It had past DLA evidence in the form of a GP factual report from 2013. It also had sight of the applicant's medical records. The appointee attended the hearing of the appeal to give oral evidence on the applicant's behalf, represented by Mr Buchanan MLA.

Ms Donnelly attended to represent the Department. The tribunal asked the Department about the basis for the appointment and about difficulties with daily living and mobility.

9. The tribunal noted that the applicant was seen twice by psychiatry in 2013 for disruptive behaviour in school, and was discharged in the basis that he did not present with a mental health disorder. He was referred back in 2016 with anger and disruption issues but did not attend. The tribunal found no clinical physical or mental grounds for appointment and considered that the Department had made the decision to appoint the applicant's mother to act as his appointee in error. It found that the applicant had a past history of low mood and depression, asthma and behavioural problems. The tribunal indicated that the appointee gave evidence that the applicant needed prompting to get up and dress, that she got his meals, that he wouldn't use public transport, needed help filling in forms and wouldn't come out of the house by his own volition. However, it found that the appointee's evidence was not persuasive. It awarded no points for either component and disallowed the appeal.

Relevant legislation

10. 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 Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.
11. 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.
12. Under provisions governing administration of DLA claims, an appointment must be made by the Department on for someone to act on behalf of a child, namely a claimant under the age of 16. The relevant provision is regulation 42(1) of the Claims and Payments Regulations which reads:

42.—(1) In any case where a claim for disability living allowance for a child is received by the Department, it shall, in accordance with paragraphs (2) to (9), appoint a person to exercise, on behalf of that child, any right to which he may be entitled under the Act in connection with disability living allowance and to receive and deal on his behalf with any sums payable by way of disability living allowance.

...

13. A more general power of appointment of a person to act on behalf of a claimant who is personally unable to act is governed by regulation 33 of the Social Security (Claims and Payments) Regulations (NI) 1987. This provides:

33.—(1) Where—

(a) a person is, or is alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf;

(b) that person is unable for the time being to act; and

(c) no controller has been appointed by the High Court with power to claim or, as the case may be, receive benefit on his behalf,

the Department may, upon written application made to it by a person who, if an individual, is over the age of 18, appoint that person to exercise, on behalf of the person who is unable to act, any right to which that latter person may be entitled and to receive and deal on his behalf with any sums payable to him.

14. Whereas PIP claims cannot be made by persons under 16, transitional provisions allow for the transfer of an appointment made in respect of DLA to PIP. Regulation 28 of the Personal Independence Payment (Transitional Provisions) Regulations (Northern Ireland) 2016, which came into operation on 20 June 2016, reads:

28.—(1) This regulation applies where, immediately before any claim for personal independence payment is made by or on behalf of a person entitled to disability living allowance, there is a person (“the appointed person”)—

(a) appointed by the Department in accordance with regulation 33(1) of the 1987 Regulations (persons unable to act); or

(b) treated, by virtue of paragraph (1A) of that regulation, as being a person appointed by the Department in accordance with paragraph (1) of that regulation,

to exercise rights on behalf of the person entitled to disability living allowance and receive and deal with any sums payable to that person.

(2) Where this regulation applies the appointed person shall be regarded as acting on behalf of the person entitled to disability living allowance for the purposes of the making and pursuit of a claim for personal independence payment under these Regulations and, where applicable, the Claims and Payments Regulations.

15. Further provision appears at regulation 52 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations (Northern Ireland) 2016. This came into force on 20 June 2016 and provides:

52.—(1) Where a person ("P1") is, or may be, entitled to benefit (whether or not a claim for benefit has been made by P1 or on P1's behalf) but P1 is unable for the time being to act, the Department may, if all the conditions in paragraph (2) and the additional conditions in paragraph (3) are met, appoint a person ("P2") to carry out the functions set out in paragraph (4).

(2) The conditions are that—

(a) no controller has been appointed by the High Court under Part VIII of the Mental Health (Northern Ireland) Order 1986 with power to claim or receive benefit on P1's behalf; and

(b) no attorney with a general power, or a power to claim or receive benefit, has been appointed by P1 under the Powers of Attorney Act (Northern Ireland) 1971, the Enduring Powers of Attorney (Northern Ireland) Order 1987 or otherwise.

(3) The additional conditions are that—

(a) P2 has made a written application to the Department to be appointed; and

(b) if P2 is an individual, P2 is over the age of 18.

(4) The functions are exercising on behalf of P1 any right to which P1 may be entitled and receiving and dealing on behalf of P1 with any sums payable to P1.

(5) Anything required by these Regulations to be done by or in relation to P1 may be done by or in relation to P2 or any person mentioned in paragraph (2).

(6) Where a person has been appointed under regulation 80(3) of the Housing Benefit Regulations (Northern Ireland) 2006 by a relevant authority within the meaning of those Regulations to act on behalf of another in relation to a benefit claim or award, the Department may, if the person so appointed agrees, treat that person as if the Department had appointed that person under paragraph (1).

(7) A direct credit transfer under regulation 41 into the account of P2 or any person mentioned in paragraph (2), or the receipt by such a person of a payment made by some other means, is sufficient discharge for the Department for any sum paid.

(8) An appointment under paragraph (1) or (6) comes to an end if—

(a) the Department at any time revokes it;

(b) P2 resigns P2's office having given one month's notice in writing to the Department of an intention to do so; or

(c) the Department is notified that any condition in paragraph (2) is no longer met.

Assessment

16. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
17. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
18. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
19. Mr Buchanan first submitted that the tribunal failed to make adequate findings in relation to the reasons for the appointment of the applicant's mother to act for him. He submitted that, as the Department considered that appointment was required, this should have entitled him to 6 points immediately. I understand this to be a submission to the effect that appointment of the applicant's mother to act on his behalf implied that the applicant could not make any budgeting decisions at all, as per descriptor 10(d).
20. This is an arguable point of law and I grant leave to appeal.
21. Mr Buchanan further submitted that all aspects of the Scheduled activities had been placed in issue at the hearing. However, the tribunal had not addressed the activities of "Taking nutrition", "Managing therapy", "Washing and Bathing", "Managing toilet needs", "Communicating verbally", "Engaging with other people" or "Moving around". The tribunal had stated:

"As noted above the Tribunal gave the Claimant's mother repeated opportunities to describe his need. If the activities were pertinent and relevant the Tribunal would have expected to have heard that from the Claimant's

mother of her own volition and without any prompting by the Tribunal by leading questions”.

22. The tribunal has arguably departed from the typical inquisitorial approach followed by tribunals in Northern Ireland. Therefore, I grant leave to appeal on this ground also.
23. The third issue raised by Mr Buchanan concerns a potential error of fact, leading to an inference that a referral to the Child and Adolescent Mental Health Service (CAMHS) was refused without reason, when there had been a referral to an alternative service, namely the CRAFT training scheme. It is not immediately apparent that this gives rise to an arguable case of a material error of law, but I will also address this issue.

First ground

24. In his response to the appellant's grounds, Mr Williams of DMS noted that a previous tribunal had adjourned to ascertain the basis of the appointment. In a Supplementary Response the Department indicated that, while it had made the appointment from the date of the appellant's 16th birthday in March 2016, it no longer held a copy of the evidence sought and submitted with regard to the appointment. Mr Buchanan submits that proceeding without this evidence amounted to an error of law.
25. However, I cannot agree with that submission. There are many instances where material in the possession of the Department, however relevant, may have been destroyed due to Departmental data protection and retention procedures. It cannot amount to an error of law for a tribunal to proceed where particular evidence, however relevant, may no longer exist. Where material has been destroyed deliberately in the course of proceedings with the purpose of getting rid of evidence it may be a different matter (see e.g. *The Ophelia* [1916] 2 AC 206). However, that is not the case here. The tribunal's job was therefore to construct what significance it can from the evidence of appointment before it.
26. The appointee had previously acted for the appellant in relation to his DLA claim as he was a child under the age of 16. This appointment would have been based upon regulation 42 of the Claims and Payments Regulations. However, this appointment would have expired in March 2016, upon the appellant's 16th birthday. It is evident from the papers before the tribunal that the appointee applied to continue acting beyond the appellant's 16th birthday and that the Department approved this. On 28 November 2015 approval of the new appointment was notified to the appointee, with a commencement date from the date of the 16th birthday in March 2016.
27. As I understand it, as it was made before PIP came into being on 20 June 2016, this further appointment would have been made under regulation 33 of the Claims and Payments Regulations on the basis that

the appellant was “unable to act”, and enabled the appointee to continue to act for the appellant in relation to DLA after his 16th birthday in March 2016. However, the DLA award possessed by the appellant would have been due to terminate once PIP had to be claimed. I understand that the appointment under regulation 33 would have ended with DLA and that any appointment for the purpose of the PIP claim would have to be made under regulation 52 of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations (Northern Ireland) 2016. However, the DLA appointment would have been deemed to continue for PIP purposes under regulation 28 of the Personal Independence Payment (Transitional Provisions) Regulations (Northern Ireland) 2016.

28. I can find no definition of “unable for the time being to act”. However, in the same context, reference is made to the appointment of a controller under the Mental Health (NI) Order 1986. A controller can be appointed where the court is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs. Similarly, in the same context reference is made to enduring powers of attorney, which operate during periods of mental incapacity. From the context, I conclude that the threshold for “unable for the time being to act” must be similarly high.
29. Mr Buchanan submits that because the Department had accepted that the appellant was unable for the time being to act, he should have been awarded 6 points for activity 10 (Managing budgeting decisions). There is a certain logic to this proposition based on the likely meaning of that expression. However, the logic is premised on the appellant actually being unable for the time being to act.
30. As indicated in its Supplementary Response of 6 September 2018, the Department was unable to produce the evidence on which the decision naming an appointee on behalf of the appellant was made. The tribunal enquired into the situation and heard that the appellant was attending a Level 2 NVQ course at college two days per week, used a phone, had his own bank account and bank card that he could use himself. His appointee said that if he received his own employment and support allowance into his own account he would spend it on “useless things” like computer games, and therefore she received it for him and paid his bills.
31. It appears to me that the evidence does not suggest that the appointment was sought because the appellant was unable to act, but rather that the appointee had different views about how he should spend his money. I appreciate that a parent of an immature teenager will have misgivings about trusting him or her with money. However, the question to be addressed in the activity of “Making budgeting decisions” is not about the maturity of the claimant but the issue of his cognitive ability and intellectual function.

32. In *DP v Secretary of State for Work and Pensions* [2017] UKUT 156, Upper Tribunal Judge Hemingway said:

23. I have already set out how the term “complex budgeting decisions” has been defined. Despite the use of the word complex it does not seem to me that the standard set by the definition or by descriptor 10b is a particularly demanding one or one which will be beyond 16 or 17 year olds simply on account of age. It will be the case, as the Secretary of State’s representative points out, that many 16 year olds and 17 year olds will not have had to acquire experience of calculating household and personal budgets or of managing and paying bills or of planning in relation to future purchases. Nevertheless, as was explained in both CPIP/0184/2016 and CPIP/3015/2015 the emphasis with respect to daily living activity 10 is primarily (though not always exclusively) upon a person’s cognitive ability and intellectual capacity in the context of the function of decision making. Upper Tribunal Judge White who had considered both of those decisions in *RB v SSWP (PIP)* [2016] UKUT 0393 (AAC) observed: “I agree with both decisions insofar as they indicate that the primary focus of the activity of making budgeting decisions is the cognitive or intellectual function of making decisions which fall within the definitions of simple and complex budgeting decisions.”

24. Once it is appreciated that it will normally be a claimant’s cognitive or intellectual function which is important, it seems to me at any rate clear that it is appropriate to assess a claimant aged 16 or 17 on that basis. The focus on cognitive or intellectual function renders the young age to be a less important factor.

25. It is also important, here, to bear in mind once again section 78 of the Welfare Reform Act 2012 and the need for any inability to be in consequence of a claimant’s physical or mental condition. Thus, mere immaturity of itself will not avail a claimant. That is true though of anyone be they under or over the age of 18. Nor will the lack of any actual experience of making budgeting decisions avail a claimant since it is what a claimant is capable of rather than what he/she has done which is relevant.

33. I agree with the Upper Tribunal Judge. It does not appear to me that there was evidence to suggest that the appellant in this case was so limited cognitively and intellectually that he could not make budgeting decisions, and that the appointee’s account of his lifestyle indicated otherwise.
34. While the evidence relied upon by the Department when making the appointment was not before the tribunal, it was not bound in any way by the decision of the Department on this distinct issue. It was also entitled to take the view that the Department’s decision to the effect that the appellant was “unable for the time being to act” was made in error. That view was not relevant one way or the other on the issue of whether the

relevant descriptors were satisfied, but it was consistent with the finding based on the evidence that they were not.

Second ground

35. The second ground raised by Mr Buchanan relates to the tribunal's approach to adducing evidence in the hearing. The appellant had not attended, and his interests were advanced by the appointee and Mr Buchanan.

36. By regulation 49(1) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999:

49.—(1) Subject to the following provisions of this Part, the procedure for an oral hearing shall be such as the chairman or, in the case of an appeal tribunal which has only one member, such as that member, shall determine.

37. This implies a broad discretion on the part of the legally qualified member of the tribunal. However, it is well established that a tribunal has an inquisitorial jurisdiction. This means that it has an enabling role that involves drawing relevant evidence from the parties. Where an appellant attends an oral hearing in relation to PIP, it is typical that the tribunal will address the activities that are in dispute and question the appellant about functional restrictions and daily activities that help it determine whether the appellant satisfies the relevant statutory descriptors.

38. The appellant was not present at the tribunal hearing and therefore the tribunal could not follow the normal procedure. The appellant's interests were represented by the appointee. The oral evidence of the appointee was not as satisfactory as direct evidence from the appellant. This is because it was in some aspects hearsay – i.e. what the appellant had told her – although it was also based on her observations of the appellant's behaviour and her recollection of past medical intervention. The tribunal had the PIP2 questionnaire before it, but this was also completed by the appointee and described the appellant's difficulties in the third person. The only place where the appellant's own "voice" directly appeared in the proceedings was where it was reported by the HCP.

39. The issue in the present appeal is the assertion that the tribunal did not adduce evidence as to all the disputed activities. It is submitted that the tribunal failed to ask the appointee appropriate questions in relation to the appellant's disability.

40. In C37/09-10(DLA), Chief Commissioner Mullan said at paragraphs 30-34:

“30. The traditional view of the appeal tribunal's inquisitorial role is related to the duty, as was noted at

paragraph 26 of the decision in *R(IS) 17/04*, and following a review of all of the relevant authorities, 'to ascertain and determine the true amount of social security benefit to which the claimant was properly entitled'. In *C15/08-09(DLA)*, I determined that this aspect of the inquisitorial role included a requirement to undertake a full investigation of the validity of an *existing award* and determine whether that award is correct. In making that determination, I disagreed with the views of Commissioner Rowland in *CDLA/884/2008*, who had stated that an appeal tribunal is at liberty to draw any doubts about the validity of the decision to the Department's attention in the decision notice and can arrange for the parties to be sent a copy of the record of proceedings without them having to request it, such action permitting the Department to consider a supersession or revision.

31. The inquisitorial role has been interpreted in another way, however, as including the requirement for the appeal tribunal to provide support to the parties to the proceedings in order to ensure full participation in the appeal process to the fullest possible extent and to enable the parties to present all aspects of their case as fully and completely as possible. In this context, the inquisitorial role is sometimes called the 'enabling' role.

32. In my view, the enabling role takes on its greatest significance in the following situations:

- (i) oral appeals where the appellant is unrepresented, and where the Department may be represented;
- (ii) oral appeals where the appellant is unrepresented and does not make an appearance, and where the Department may be represented; and
- (iii) paper cases where the appellant is unrepresented.

33. In these situations, and in a balanced and objective way, the appeal tribunal is under a duty to explore all of the relevant issues, and assess the evidence linked to those relevant issues, even where some or all of those issues have not been raised by the appellant. Further, the appeal tribunal is under a duty to note, in any statement of reasons (SORs) for the appeal tribunal's decisions, that it has addressed all relevant

issues, assessed the evidence linked to those issues, found facts with respect to those issues and made an appropriate decision, related to entitlement to the benefit at issue.

34. Balance also means that the appeal tribunal does not require, as was noted by Mrs Commissioner Brown in *C5/03-04(IB)*, at paragraph 21 "to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it." It is often the case, however, that unrepresented claimants to social security benefits do not understand the subtleties of the conditions of entitlement to that benefit. In any claim to a disability benefit, or appeal against an adverse Departmental decision with respect to that claim, the claim or appeal is often couched in general assertions with respect to the disability, and may not be specifically related to the conditions of entitlement as understood by the decision-maker or appeal tribunal".

41. In other words, despite the implication of a broad discretion as to how a tribunal may be conducted under terms of regulation 49 above, the reality is that tribunal procedure is relatively restricted. The inquisitorial role is in effect an inquisitorial duty.

42. It can be observed from the record of proceedings that the tribunal sought to clarify the issues in dispute in the appeal. It recorded the following:

Question: Mr Buchanan: Descriptors – activities?

Answer: All the mental health and care. Mobility is affected by asthma and hayfever.

43. When it was put by the medical member that the last prescription for an asthma inhaler appeared to be in 2011, the response was:

It is more the mental health.

44. The tribunal records the following questions and answers:

Question: In your own words would you please explain what help your son gets or needs for his personal care?

Answer: I prompt him to get up and get dressed. He goes to Tech 2 days per week. He couldn't get a 3 day placement. It is hard to get him up and dressed and I do all his meals.

Question: And what does he need or get by way of personal care needs?

Answer: He's in the house with me all day in his room.

Question: What does he do?

Answer: Not a lot.

Question: Is there anything else by way of personal care needs he has or needs?

Answer: He won't use public transport and his sister picks him up and collects him in the afternoon.

45. Then, after some other questions:

Question: And what other help and needs does he get or need?

Answer: Forms. I make appointments for him and I go with him.

Question: Anything else by way of personal care needs? You say he doesn't come out of the house?

Answer: Yes. It's with great difficulty – 2 days per week he goes out to Craft.

46. Towards the end of the hearing:

Mr Buchanan: His mother does his cooking for him and his appearance. If his mother didn't do that and get him up – it takes her 2 hours to do that and get him ready – change his clothes – all those issues done daily by his mother and if she didn't he wouldn't change his clothes. All that is dealt with by his mother. Those questions were not asked today about washing and shaving. All that has to be done by his mother.

Question: Mrs [Appointee], is there anything further you want to say?

Answer: No.

47. The statement of reasons contains the following passages:

“In the claim form all the activities are listed as causing the Claimant difficulty and conflicts with what he told the nurse in regard to eating and drinking, medicating, washing and bathing, toileting, dressing/undressing, communicating, making budgeting decisions, planning and following journeys and moving around. Today we are asked to look at all the activities. When the Claimant's mother was given 5 opportunities to explain [at] the outset of questioning by the Chairwoman what help her son needed or got in regard to his personal care she told the Tribunal that he needed prompted to get up and dress, she got him all his meals, he wouldn't use public transport, that he needed help filling in forms and that he wouldn't come out of the house on his own volition. We heard nothing today about taking nutrition, managing

therapy or monitoring a health condition, washing and bathing, managing toilet needs, communicating verbally, engaging with other people face to face and moving around, although Mr Buchanan on behalf of the Claimant in his summing up did say that questions had not been asked today concerning washing and shaving.

As noted above the Tribunal gave the Claimant's mother repeated opportunities to describe his need. ..."

48. I note that the tribunal had engaged with the appointee and tried to adduce evidence from her by way of open questions. However, the purpose of the enabling approach advocated by Chief Commissioner Mullan above is to ensure that appellants who do not understand the legal issues that the tribunal has to decide are not disadvantaged by their ignorance.

49. Baroness Hale at paragraph 61-62 of *Kerr v. Department for Social Development* [2004] UKHL 23 explains that the process of benefits adjudication is inquisitorial rather than adversarial. The Department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. Lord Hope in the same case said at paragraph 15:

"in this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and the Department must contribute".

50. When a decision taken by the Department is appealed, the appeal tribunal stands in the shoes of the Department. The principles set out by Lord Hope in *Kerr v. Department for Social Development* equally apply in the context of an appeal. Thus, facts which may reasonably be supposed to within the appellant's own knowledge are for the appellant to supply at each stage of the appeal. However, the appellant must be given a reasonable opportunity to supply them.

51. Specific issues, such as dressing and washing had been put in issue by the appellant. Nevertheless, the tribunal clearly struggled to adduce relevant responses from the appointee to its open questions about daily care needs. The process of asking open questions might well be required in examination in chief in adversarial court proceedings. However, in tribunal proceedings, which turn on very detailed specific descriptors and activities, it is clear that open questions are rarely appropriate. People who come before tribunals may often lack the knowledge to understand what information the tribunal needs, may be inhibited by the unfamiliar surroundings from speaking out or, frankly,

may lack the intelligence or insight to explain their circumstances clearly. The tribunal in a PIP appeal is obliged to help such people by asking specific questions aimed at establishing evidence relevant to the activities and descriptors in issue. Any other approach does not give the appellant a reasonable opportunity to supply relevant answers.

52. It is plain from the response of Mr Buchanan towards the conclusion of the hearing that he was objecting to the tribunal's failure to put the specific activity of washing to the appointee for evidence. However, rather than ask the question about washing in a direct way, the tribunal asked the appointee, "Is there anything further you want to say?", to which she replies "No". In its statement of reasons it had said "If all the activities were pertinent and relevant the Tribunal would have expected to have heard that from the Claimant's mother of her own volition and without any prompting by the Tribunal by leading questions". I consider that this statement of the tribunal's approach fundamentally departed from the principles set out by the House of Lords in *Kerr v Department for Social Development*. It is not reasonable to expect a directly relevant response on a specific issue from an appellant without asking a directly relevant question.
53. The tribunal refers to the documentary evidence and it may well have been sceptical about the prospects of being convinced by the appointee's answers. However, at an oral hearing in an inquisitorial process she was entitled to be asked relevant questions on the activities that had been raised, such as washing/bathing and dressing/undressing. Since she was not, I consider that the tribunal has erred in law in its approach to the appeal. I consider that I must set aside the decision of the appeal tribunal and allow the appeal.

Third ground

54. The issue of the refusal of a reference to CAHMS is a matter which I do not now need to address.

Disposal

55. I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.
56. The appointee should be aware that this does not imply that her appeal may succeed on a future occasion. However, Mr Buchanan may wish to take the opportunity to obtain relevant independent evidence that tends to support the appointee's account of the appellant's daily living and mobility needs.

(signed): O Stockman

Commissioner

29 June 2020