

**DECISION OF THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Before: Upper Tribunal Judge Paula Gray**

DECISION

**This appeal by the claimant succeeds.**

Permission to appeal having been given by me on 30 May 2017 in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Cardiff and made on 20 December 2016 under reference SC 188/16/03430. I remake the decision as follows:

**The claimant is entitled to the highest rates of the care component and the higher rate of the mobility component of disability living allowance between 6 June 2015 and 5 December 2023.**

**REASONS**

**Background**

1. This appeal concerned the entitlement to Disability Living Allowance (DLA) of E, a young boy aged nine at the date of the decision under appeal. That decision re-awarded DLA at the highest rate of the care component and the lower rate of the mobility component, and E's mother, who is his appointee, appealed it to the first-tier tribunal (FTT). She had that award already for E, and she had applied for a supersession contending for a higher rate mobility award. E has global developmental delay, poor communication skills and behavioural difficulties including PICA syndrome, an eating disorder which concerns eating non-nutritious objects, such as dirt. The case concerned only the application of the severe mental impairment criteria in relation to a potential award of higher rate mobility. I set out the relevant legal provision at the outset. It is contained in the primary legislation, and expanded upon further in the related regulations.

*Section 73 (3) Contribution and Benefits Act 1992 [hereafter the Act] provides:*

*(3) a person falls within this subsection if –*

*(a) he is severely mentally impaired; and*

*(b) he displays a severe behavioural problems; and*

*(c) he satisfies both the conditions mentioned in 72 (1) (b) and (c) above*

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There has been no dispute that E qualifies for the higher rate of the care component, a precondition for the severe impairment criteria to apply: the provisions of section 73 (3) (c) are satisfied and I need not discuss them further.

*Regulations 12 (5) and (6) Disability Living Allowance Regulations 1991 [hereafter the Regulations] provide:*

*(5) a person falls within subsection (3) of section 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.*

*(6) a person falls within subsection (3) (b) of section 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.*

2. The FTT confirmed the decision under appeal, and permission to appeal was refused by the District Tribunal Judge.

### **The appeal to the Upper Tribunal**

3. The grounds of appeal were filed by Ms Morgan of Diverse Cymru on behalf of the appointee. They were in large part a disagreement with the decision of the FTT, although a legal point was raised as to the use of a buggy as a means of restraint. I granted permission to appeal on the basis of that point and for additional reasons, saying:
  3. *It seems to me arguable that the FTT either applied the [Severe Mental Impairment] test wrongly, or failed to explain their reasoning adequately.*
  4. *The finding that the evidence of Dr Norton did not equate to a severe impairment of intelligence may be insufficient in not setting out what the tribunal understood by the meaning of that term and the evidence said to support that conclusion.*
  5. *At paragraph 13 (on page 4) the FTT may have applied too high a test in relation to the need for regular restraint, in light of their comment that there was “no evidence given that information in this book had referred to incidents of physical aggression and regular restraint **for the majority of the time**” (my*

*emphasis). In this context the lack of any reference to the letter from Helen Jones, the Principal Social Worker which refers to the challenges in transporting E “as he will attack anyone sat near to him” and the references to his mother and siblings being subjected to physical attacks whilst in the family car, as well as his behaviours which are described as “unpredictable and extremely challenging” and include eye gouging and hitting, is notable, as well as any lack of reference in the statement of reasons to the observation that E’s class teacher confirms that he is “not yet ready to be toilet trained.” Given that E is nine, there was a need to explain whether or not that assertion was accepted, and if so, how those facts impacted on the decision that he did not suffer from severe impairment of intelligence and social functioning.*

- 6. Further, there may be an issue as to whether it is appropriate to deal with the assessment of severe impairment of intelligent and social functioning together, rather than separately as the FTT seems to have done: see paragraph 16, in which Dr Norton’s evidence is prayed in aid in respect of impairment of intelligence, and the class teachers evidence in respect of impairment of social functioning.*
- 7. If the tribunal did misunderstand the test, that may have had an impact on their considerations in respect of other aspects. 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.*
- 8. What I might call the “buggy point” in the grounds of appeal is arguable. The FTT does not seem to have dealt with the argument that the buggy was a form of restraint. It seems to me that there may be a legal issue as to whether the use of the buggy to take E out is intervention from another person to physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property within subsection (6) (b). If the intervention is limited to, perhaps, putting the person into the buggy, is the restraint by the straps thereafter a continuation of the initial physical restraint by another? How does restraint of this type, if reasonably required, fit in with the statutory provisions?*
- 3. The Secretary of State has responded to the appeal in a submission from Mr O’Kane supporting the appeal for the reasons that I indicated were arguable. I need only be brief in my reasons in the absence of any dispute about the error of law. I have, however, decided to remake the decision rather than remit the case for re-hearing as she envisaged, and I will spend a little time in explaining why and setting out my reasoning.*

4. In view of the support for the appeal an oral hearing is not necessary and I am able to decide the matter fairly on the papers before me.

### **The position of the Secretary of State**

5. Mr O’Kane agrees with the points that I have made above, although as to what I called "the buggy point" he submits that the FTT failed to address that issue at all, but, notwithstanding that matter he concedes that there is sufficient evidence to indicate that E 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. The concession is well made given the evidence and I accept it.

### **My analysis**

6. In my judgment the FTT did indeed apply too high a test in their finding that there was no requirement for regular restraint for the majority of the time (my emphasis). The test in regulation 12 (6)(b) is whether the claimant *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*. ‘Regularly’ is a word which bears its natural meaning; it is not otherwise qualified. Mr O’Kane agrees with that. In *Secretary of State For Work and Pensions-v-MG (DLA) [2012] UKUT 429 (AAC)* Upper Tribunal Judge Wikeley at paragraph 23 explained that the word is a “*protean one, so taking its meaning from its context.*” In CDLA/2470/2006 it was said that “*such a degree of intervention and restraint is likely to be required on a significant proportion of occasions...*”. All the above point to the FTT having fallen into error in their approach to this.
7. It was a material omission for the FTT to fail to address the evidence of the principal social worker Helen Jones. The references by her to E’s being prone to physically attack anyone sitting near to him were graphic and are sufficiently set out in my grant of permission to appeal. Similarly the point that made by the class teacher about his lack of ability to engage in toilet training at nine years old. The omission to deal with that evidence was of itself a material error of law that warrants the decision being set aside. It is not possible to understand from the statement without reference to that evidence why the FTT found that he did not suffer from a severe impairment of social functioning.
8. The evidence, noted by the FTT, was that E has global developmental delay and PICA; that he is non-verbal, and has no conversational skills, communicating by gestures and using the PEC system. That evidence also required explaining in relation to the conclusion that E did not suffer from a severe impairment of intelligence.
9. The process of deciding whether the latter part of the test under regulation 12 (5) is met, that is to say whether E’s arrested development or incomplete

physical development of the brain results in severe impairment of intelligence and social functioning demands consideration of all the evidence in relation to it. The FTT appears to have looked at the various strands of evidence in isolation, because they found that the evidence of Dr Norton indicated that he did not suffer from severe impairment of intelligence; they then found that the evidence from the class teacher indicated that he did not have severe impairment of social functioning. However the evidence should not be compartmentalised in that way. The evidence from one witness can inform or be informed by evidence from another. In *Re T (Abuse: Standard of Proof)* [2001] 2 FLR 838 Lady Justice Butler Sloss, then President of the Family Division said

*It seems to me that the judge, having rejected the medical evidence in isolation from the non-medical evidence, found himself in the difficulty that evidence cannot be evaluated and assessed in different compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.*

10. The relevance of evidence from a variety of sources is shown by the decision of the Court of Appeal in *M (A child) -v- Chief Adjudication Officer* reported as *R(DLA) 1/00*. (*M* hereafter) Prior to that it had been the practice for tribunals to consider that an IQ of less than 55 was indicative of severe impairment of intelligence, but in the case of that claimant, who had autism, the Court of Appeal explained that a full evaluation of intelligence should include other elements of social interaction, “sagacity” and “insight”, and that “in some cases at least an impairment of social functioning will shade into an impairment of intelligence.”

11. *DM-v-Secretary Of State for Work and Pensions (DLA) [2015] UKUT 87 (AAC)* was another case in which Judge Wikeley considered aspects of the SMI criteria. He referred to *M*, noting also that in *CD-v-Secretary Of State for Work and Pensions [2013] UKUT 68 (AAC)* Upper Tribunal Judge Bano held that regulation 12 (5) required:

*an evaluation of a claimant’s ‘useful intelligence’, including what the Court of Appeal in [M] called “insight and sagacity”. Mrs Dean, on behalf of the Secretary of State has in my view helpfully and accurately equated those qualities to “the ability to function in real-life situations”, and I agree with her that in order to assess that ability the tribunal to have taken into account the very considerable body of evidence in this case concerning the claimant’s lack of sense of danger.”*

12. Here, what was observed by the school and the social worker should have been looked at together with the medical evidence to paint the whole picture,

and the tribunal's finding (as to whether the regulation 12 (5) test was satisfied) informed by that depiction.

**Should I remit or re-decide the appeal?**

13. I have power to remake a decision under section 12 (2) (b) (ii) Tribunals Courts and Enforcement Act 2007. If I feel that I am able fairly to make a decision then I should do so. A first-tier tribunal hearing DLA appeals comprises a judge, a medical member and a member with experience of disability. It is important for me to consider whether any decision that I make will be deficient in some way for the lack of that expertise.
14. The FTT, of course, is the fact-finding body and it is in that aspect that the expertise of the members is so valuable; however so much ground has been conceded by the Secretary of State, that the only matter upon which I need to find facts is as to whether as a result of his arrested development or incomplete physical development of the brain E has a severe impairment of intelligence and social functioning.
15. I hope I do not misinterpret Mr O'Kane's submission over generously if I say that there is some tacit acceptance of that within it. I have sufficient material to decide the case, in any event. On the evidence I have no hesitation in concluding that E has a severe impairment of intelligence and social functioning, due to the following matters which are not exhaustive, but capture what is necessary to establish entitlement under the severe impairment criteria.
16. I look at matters as they are likely to have been at the date of claim, and ignore matters not obtaining at the date of decision.

**Relevant facts and reasons**

17. The diagnosis of global learning delay satisfies me that E suffers from a state of arrested development or incomplete physical development of the brain. I go on to look at whether that results in severe impairment of intelligence and social functioning.
18. The evidence points strongly to the necessary causative link existing; indeed there is nothing to suggest that the impairment of intelligence and social functioning which E clearly has, results from any other factor. I turn to the severity of E's impairment of intelligence and social functioning.
19. He is nine, and is not yet ready to be toilet trained.
20. He is prone to extreme disruptive behaviour.
21. He is non-verbal. His communication skills are limited to indicating his needs via a basic signing format. I accept the submissions made on behalf of the appointee at the FTT that he has no concept of social behaviour.

22. My acceptance of that, and the other facts above come from the evidence of the principal social worker Ms Jones and E's class teacher, which supports E's mother's account given to the FTT and in instructions to her representative Ms Morgan who prepared the submission in respect of mandatory reconsideration which was also before the FTT.
23. This child is, from external appearances, functioning in a number of important ways at well below his chronological age. It is not simply his direct communication difficulties, being without language, but also his lack of communication skills in any social sense with his peer group, which lead me to the view that he has a severe impairment of intelligence and social functioning. The picture comes across of a child who cannot co-operate in play and who has no insight into the effect of his challenging, even violent behaviour on others. He lacks either the understanding to comprehend that, or the ability to control himself, or both. I bear in mind in that context the dicta of Judge Bano set out above. These factors point to the conclusion I have reached in relation to the test in regulation 12 (5). I need only consider the further test in regulation 12 (6) as to the unpredictability of E's behaviour requiring someone to be present and watching over him whenever he is awake, because of the Secretary of State's concession in respect of the other matters.
24. The evidence which I have considered in relation to the question of the level of impairment of intelligence and social functioning also suggests a high level of unpredictability. E's being prone to lash out at others and his PICA which causes a desire or curiosity to ingest potentially dangerous material or objects makes it necessary for him to have another person present and watching over him whilst he is awake. Regulation 12 (6) is made out in its entirety, and therefore section 73(3) of the Act is satisfied.
25. The mother's case, which I accept, is that the above matters reflect the position over some time, and certainly prior to April 2016, that is to say more than three months prior to her application for supersession made on 27 June 2016. Her case as to that is supported by the report of Dr Norton, which strongly implies that the challenging behaviour has been a longstanding feature and not a recent development, and the letter from Helen Jones to similar effect.
26. E is entitled to the higher rate of the mobility component under the Severe Mental Impairment criteria.
27. In the circumstances I need not decide the potentially interesting "buggy point", which must await another day.

### **Length of the award**

28. I consider the period of the award. It cannot be awarded prior to 27 June 2016, the date of the application for supersession of the existing award, but

as I have accepted that the three month qualifying period prior to that was met it can be made from that date.

29. Although there is no indication that E's condition is time-limited his needs may change as he gets older. It seems to me that the approach taken in the departmental decision, to review the position soon after his sixteenth birthday, is the proper one. The mobility award will run at the higher level from 27 June 2016 until the terminal date of the care award made in the departmental decision made on 27 July 2015; that is until 5 December 2023. If his needs continue his mother may apply for the award to be renewed; on the other hand, should his needs reduce for any reason before that, she must inform the Department.

### **Concluding remarks**

30. I have referred to the assistance given to E's mother and appointee from the mandatory reconsideration stage right up to the appeal before me. This was provided by Christine Morgan, a Families First Advocacy Officer at Diverse Cymru, a registered charity in Cardiff. Not for the first time I wish to record my thanks to a charitable organisation for its assistance in establishing entitlement to welfare benefits under a complex statutory framework. Within the general complexity of DLA entitlement the correct application of the severe mental impairment criteria is particularly troublesome, as is shown here by the experienced first-tier tribunal falling into a number of errors of law. I have little doubt that without the support Ms Morgan provided the appeal to the Upper Tribunal would not have been made. It is so often only because of the experience of those who work within the charitable sector (and what little remains of publicly funded welfare benefits advice) that in cases such as this the correct legal outcome is reached.

**Upper Tribunal Judge Gray (Signed on the original on 10 October 2017)**