DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the Appellant's appeal.

The decision of the Durham First-tier Tribunal dated 16 March 2016 under file reference SC225/15/00666 involves an error on a point of law and is set aside. The Upper Tribunal re-makes the Tribunal's decision in the following terms:

> *"The Appellant's appeal is allowed. The Secretary of State's original decision of 30 April 2015 is revised.*
>
> *In addition to the points already awarded under that decision, the Appellant scores a further 1 point for descriptor 3b and 2 points for descriptor 9b. As a result the Appellant scores in total 9 points for daily living and 4 points for mobility. She therefore qualifies for the standard rate of the daily living component of personal independence payment with effect from the date of claim, i.e. 24 February 2015."*

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Pots and pans and "aids and appliances"

1. One of the issues raised by this appeal to the Upper Tribunal is whether a lightweight pan is an "aid or appliance" for the purposes of regulation 2 of (and hence also Schedule 1 to) the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377).

2. For reasons that will become apparent, I do not need to decide that point definitively to resolve this appeal. However, I set out some of the arguments below and explain why my provisional view is that a lightweight pan is not an "aid or appliance" for the purpose of the legislation governing entitlement to personal independence payment (PIP). As and when the point is material, it can if necessary be decided in another case. There are very compelling reasons to move on and decide this particular case without any further delay.

The background to this appeal to the Upper Tribunal

3. On 3 August 2015 the Secretary of State decided that the Appellant scored 6 points for daily living and 4 points for mobility on her PIP claim. It followed that she qualified for neither component of PIP. The Appellant appealed. On 16 March 2016 the First-tier Tribunal (from now on simply "the Tribunal" or "the FTT") confirmed the effect of the Secretary of State's decision and so dismissed the Appellant's appeal. However, the FTT did conclude that the Appellant scored one extra point for daily living descriptor 3b (managing therapy).

4. The Appellant then appealed to the Upper Tribunal. Her representative argued that the Tribunal had erred in law in its approach to two daily living descriptors: those relating to activities 1 (preparing food) and 9 (engaging with other people face to face).

5. A little while later – the precise date is unclear from the file – the Appellant sadly committed suicide. She had previously attempted to commit suicide, as was known to the Tribunal. Her Appointee continued the appeal.

The grant of permission to appeal to the Upper Tribunal

6. On 29 September 2016 I gave permission to appeal, making the following observations:

> "1. The grounds of appeal are arguable. The Appellant scored 7 daily living points at the Tribunal, just short of the 8 points needed for the standard rate of the daily living component. The grounds focus on paras [28]-[30] of the Tribunal's reasons.
>
> 2. The first ground relates to the cooking descriptor (para [28]). 'Aid or appliance' is defined in regulation 2 of the PIP Regulations to mean 'any device which improves, provides or replaces [the claimant's] impaired physical or mental function'. The Tribunal proceeded on the basis that using lightweight pans did not involve using an aid or appliance. Intuitively one can see the force in that approach; an aid or appliance typically brings to mind in this context e.g. a perching stool, single lever arm taps or a spiked chopping board. I note that UT Judge Mesher in *AI v SSWP (PIP)* [2016] UKUT 0322 (AAC) expressed the provisional view that a microwave is not an aid or appliance: 'I cannot see that using a microwave to cook, or a conventional cooker for that matter, does any of those things. It merely provides one means of cooking' (para 10). However, I also recognise that the *PIP Assessment Guide* [published by the Department for Work and Pensions] suggests lightweight pans may be an aid or appliance (p.98). So the point is at least arguable.
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> 3 The second ground relates to engaging with people face to face (paras [29]-[30]). The Tribunal seem to have placed some weight on the Appellant's presentation at the hearing (in March 2016), when she was accompanied and supported. As well as the matters raised in the grounds of appeal, did the Tribunal err by having regard to a circumstance that arose after the date of the decision under appeal (in April 2015)? Or is the possible breach of section 12(8)(b) of the SSA 1998 avoided by the finding in the last sentence of para [13] of the reasons?"

The Secretary of State's response to the appeal (in outline)

7. Mrs S A Powell has provided a full and helpful written response to the appeal on behalf of the Secretary of State. She supports the appeal but only on the second of the two grounds noted above. She proposes that the Tribunal's decision should be set aside and the appeal remitted for a fresh hearing before a new FTT.

Ground 1: preparing food

8. Ms K Wright, a welfare rights officer and the Appellant's representative, argues very simply, on the basis of the DWP's own *PIP Assessment Guide*, that lightweight pans are "aids and appliances". Accordingly, she says, on the facts the Appellant should have scored 2 points for needing to use an aid or appliance to prepare or cook a simple meal (daily living descriptor 1b).

9. Mrs Powell, for the Secretary of State, resists the first ground of appeal on two counts. First, she argues that lightweight pans do not fall within the statutory definition of "aids and appliances". Second, and in any event, she notes the FTT's findings that the Appellant had normal upper limb power and normal pinch and power

grip. Therefore, she submits, the Tribunal was entitled to reach the decision it did on the facts.

10. I can see the force of both of Mrs Powell's arguments on this first ground of appeal. However, given the Secretary of State's support for the second ground of appeal, I need not come to a firm conclusion on the first ground of appeal. I return to the issue of pots and (lightweight) pans and "aids and appliances" in the context of PIP below.

Ground 2: engaging with other people face to face

11. Ms Wright argues that the FTT failed to engage with all the evidence about the Appellant's difficulties with engaging socially with others. In particular, in relying on the Appellant's presentation at the hearing, the Tribunal had failed to have regard to the support being provided on the day by both her representative and her support worker.

12. Mrs Powell argues that in principle the FTT was entitled to consider how the Appellant conducted herself at the hearing, and draw appropriate inferences, given the Tribunal's finding that the Appellant's mental health was "no better" at the hearing when compared with the date of the decision under appeal. However, Mrs Powell agrees that the Tribunal failed to make sufficient findings of fact as to whether the Appellant could engage with other people face to face, especially within the terms of regulation 4(2A) (e.g. to an acceptable standard and repeatedly). The FTT had, for example, failed to consider whether the Appellant could have coped with the hearing without the support of her representative and her social worker. On that basis, but not with regard to the first ground of appeal, Mrs Powell supported the appeal.

The Upper Tribunal's analysis

13. I allow the Appellant's appeal to the Upper Tribunal on ground 2 and so set aside the Tribunal decision under appeal.

14. As noted, Mrs Powell proposed that the case be now sent back to another First-tier Tribunal for re-hearing. Ms Wright has not made any representations on this particular matter as regards disposal.

15. Any new FTT is going to be in a similar position to the Upper Tribunal. It will unfortunately not be able to have direct evidence from the Appellant. A new Tribunal might have oral evidence from third parties, but it is not clear whether this would add very much to what is already on file. In the circumstances it is just and proportionate for the Upper Tribunal to re-decide the case originally under appeal.

The Upper Tribunal's re-making of the decision under appeal

16. The Appellant originally scored 6 points with regard to the daily living component. The only three issues in dispute at the hearing related to daily living activities 1, 3 and 9. There is no dispute as to the mobility component.

17. As regards descriptor 1b (preparing food), the case has been put primarily on the basis of the Appellant's physical problems. However, given the intermittent nature of those problems and the FTT's findings of fact on this issue, which I adopt, I conclude that no points are scored for this descriptor.

18. As regards descriptor 3b (managing therapy, etc) I agree with the FTT that the Appellant qualified for 1 point for descriptor 3b, for the reasons the Tribunal gave.

19. As regards daily living activity 9 (engaging with other people face to face), I take a different view to the FTT. I bear in mind the extensive documentary evidence on file about the prompting and support the Appellant received to engage with others in a wide range of social contexts. I also have regard to the definition of "engage socially" in Part 1 of Schedule 1 to the PIP Regulations, which includes establishing relationships. It is clear to me these difficulties were not confined to situations where the Appellant had to interact with officialdom, whether in the form of the HCP assessment or the FTT hearing. These problems were a feature of her everyday life. I am certainly satisfied that she needed *prompting* in this respect at the material date, so qualifying for 2 extra points under descriptor 9b, taking her to 9 points overall. As a result she passed the threshold for entitlement to the standard rate of the daily living component of PIP. There may be an argument instead that she needed social *support*, which counts for 4 points rather than 2 (see descriptor 9c). However, this would not make any material difference to the overall outcome (as she would then have scored 11 points rather than 9, but still satisfying the test for the standard rate). Accordingly I need not consider that possibility.

20. I therefore allow the appeal, set aside the FTT's decision and substitute for the decision of the Tribunal my own decision as set out at the head of these reasons.

21. The Secretary of State will doubtless need to take the necessary steps to recognise the ending of the award in the light of the Appellant's subsequent death.

Some observations on lightweight pans and "aids and appliances"

22. As already noted, it is not necessary to resolve this issue definitively in the context of the present appeal but the following comments are in order. In support of the Appellant's appeal, Ms Wright quite understandably relies on the statement in the DWP's *PIP Assessment Guide*. This states (at p.98, emphasis added):

> "In this activity, aids and appliances could include, for example, prostheses, perching stools, lightweight pots and pans, easy grip handles on utensils, single lever arm taps and spiked chopping boards".

23. Mrs Powell for the Secretary of State acknowledges that the Appellant did in fact use lightweight pots and pans. She also comments that most pots and pans on general sale are lightweight. Furthermore, given the definitions of "prepare", "cook" and "simple meal", there is no requirement in the context of daily living activity 1 to handle pots and pans filled with large quantities of food. Accordingly Mrs Powell argues that a lightweight pot or pan is not a "device which improves, provides or replaces [the claimant's] impaired physical or mental function" within the meaning of the definition of "aid or appliance" in regulation 2. Such pans merely provide one means of cooking, as Judge Mesher (provisionally) stated in the context of a microwave in *AI v SSWP (PIP)*.

24. Mrs Powell does not address the inconsistency between this submission on behalf of the Secretary of State and the statement to the contrary in the *PIP Assessment Guide*. But did she even need to?

25. It is well-established that the *PIP Assessment Guide* is not legally binding (see e.g. Judge Markus QC in *PS v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 326 (AAC) at paragraph 12). Thus, according to Judge Williams, "it must be emphasised that this guidance reflects the view of the Secretary of State and

advisers. It is *not* the law" (see *MF v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 554 (AAC) at paragraph 22).

26. Accordingly in *MM and BJ v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 490 (AAC) Judge Wright struck the following cautionary note:

> "The *PIP Assessment Guide* in particular is no more than the DWP's view of how the regulations once enacted were thought to apply for the benefit of those carrying out the PIP assessments. Its legal worth as a permissible aid to statutory construction therefore seems negligible, if not non-existent" (at paragraph 33).

27. Thus also Judge Jacobs described the *Guide* as "irrelevant" to the issue he had to determine in *Secretary of State for Work and Pensions v IV (PIP)* [2016] UKUT 420 (AAC), a case in which the Secretary of State was relying on the official guidance to support a particular construction:

> "Entitlement to a personal independence payment is governed by the Welfare Reform Act 2012 and Regulations made thereunder, principally the Social Security (Personal Independence Payment) Regulations 2013" (paragraph 19).

28. So strictly Mrs Powell does not need to address the inconsistency referred to, although obviously the contradiction is less than helpful in terms of furthering people's understanding of the applicable law.

29. I have not had the benefit of full argument on the point in this appeal. However, it appears to me that the relevant test has been most helpfully expounded by Judge Jacobs in *CW v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 197; [2016] AACR 44 (at paragraph 31):

> "The question is this: would this 'aid' usually or normally be used by someone without any limitation in carrying out this particular aspect of the activity? If it would, the 'aid' is not assisting to overcome the consequences of an impaired function that is involved in the activity and its descriptors. So, using an ordinary wooden spoon to stir hot food while it is cooking is using an 'aid' in the everyday sense of the word, but it would not assist in overcoming the consequences of any loss of function, because it would be used anyway."

30. Applying that test, in the typical case a lightweight pan is probably not an "aid or appliance", just as Judge Mesher (provisionally) considered a microwave is not an "aid or appliance" in *AI v Secretary of State for Work and Pensions (PIP)* (the same conclusion may well not be true as regards a talking microwave, as used by the visually impaired). Likewise, a single lever tap is an "aid or appliance" (see *GV v Secretary of State for Work and Pensions* [2015] UKUT 0546 (AAC)). The Secretary of State apparently disagrees with that latter decision (see *AP v Secretary of State for Work and Pensions* [2016] UKUT 0501 (AAC) at paragraph 22), but to date there appears to have been no change to the guidance in the *PIP Assessment Guide*.

31. The current version of the *PIP Assessment Guide* was issued in September 2016 (just before the oral hearing in *AP v Secretary of State for Work and Pensions*). Confusingly it seeks to incorporate the test set out by Judge Jacobs in *CW v Secretary of State for Work and Pensions (PIP)* (decided in April 2016) in its discussion of aids and appliances (paragraph 3.2.20, p.83) but retains the example of

lightweight pans as an aid or appliance in the context of activity 1 (p.98). The internal inconsistency is a further reason for not relying on the guidance.

Conclusion

32. I therefore allow this appeal and set aside the decision of the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The decision that the Tribunal should have made is as set out at the head of these reasons (section 12(2)(b)(ii)).

Signed on the original
on 30 January 2017

Nicholas Wikeley
Judge of the Upper Tribunal