Upper Tribunal for Scotland

2024UT59
Ref: UTS/AS/24/0051

DECISION OF

Lord Lake

ON AN APPLICATION FOR PERMISSION TO APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF

CC
per Money Matters

Appellant

- and -

Social Security Scotland

Respondent

FTS Case Reference: FTS/SSC/AE/23/01652

22 October 2024

Decision

Permission to appeal is refused.

Reasons

Introduction

1. The appellant seeks to challenge a decision of the First Tier Tribunal refusing an appeal against a re-determination by Social Security Scotland dated 12 October 2023 that she was

not entitled to the daily living component of Adult Disability Payment from 11 April 2023. An oral hearing was held on the application for permission to appeal on 21 October 2024.

2. The grounds of appeal which it is sought to advance are as follows:

> *We believe that the First Tier Tribunal has made a finding 'for which there is no evidence or which is inconsistent with the evidence and contradictory of it.' We believe the First Tier Tribunal has made a fundamental error in its approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable Tribunal could properly reach.*
>
> *The Decision Notice and Decision Notice on Application to Appeal makes reference to flare ups which we accept do not constitute the majority of the time. In our written submission we clarified that the appellants health conditions impact on her ability to carry out daily living activities for the majority of the time which we submit is consistent with the appellants oral evidence however, the tribunal appears to have focused only on the flare ups when considering each activity and not how she manages when she is not having flare ups, there is no adequate explanation in the decision notice that they have fully considered how she is when not having flare ups.*
>
> *The Decision Notice and Decision Notice on Application to Appeal prefers the evidence of the claim form over the appellants oral evidence and the preferred medical evidence of Dr W over Dr M without adequate explanation for this being given.*

3. In addition, in the course of the hearing, the representative for the Appellant sought to argue that the bases in which the FTS had reached its decision were not put to the appellant during the hearing to enable her to comment on them.

4. In terms of the Tribunals (Scotland) Act 2014, section 46, an appeal may be made only in relation to a point of law in relation to which the grounds are arguable. The first issue is therefore whether the above grounds raise an issue of law. I am satisfied that they do. Making a decision for which there is no evidence or which is inconsistent with / contrary to the evidence, asking the wrong question, taking into account irrelevant considerations, reaching a decision which no reasonable tribunal could have reached, and failure to statute adequate reasons are all established in case law as potential legal errors.

5. The next issues is whether the grounds are arguable. Considering them in turn:
   (a) Making a decision for which there was no evidence.
   The key conclusion is in paragraph 34 of the decision - that the Appellant's pain, stiffness and fatigue were not as serious or frequent as claimed and that brain fog did not impact her to any significant extent. The Decision identifies the evidence that has been relied on in reaching this conclusion in paragraphs 35. It includes evidence from Dr M, the appellant's written evidence, evidence of her lifestyle,

evidence given to the Tribunal, evidence of the appellant's employment history evidence from Dr W and evidence from the appellant's manager. In relation to the issue of flare-ups, I do not think it can be maintained that the Decision focuses only on these. In each respect where the effect on the appellant is evaluated, there is a conclusion that she is able to carry out activities for more than 50% of the time. This demonstrates consideration of the position when there are no flare-ups. Although the Appellant disputes this evidence and contends that the Tribunal should have preferred other evidence, it cannot be said that there was no evidence for the decision that was taken or that the decision was contrary to the evidence identified.

(b) Asking the wrong question.

The Tribunal has identified the issues it was required to consider and it is not apparent which of them is said to be a 'wrong' one or what other issue has not been considered. I raised this in the course of the hearing and it was explained that the real issue was that the Tribunal did not put their concerns to the appellant at the hearing to give her an opportunity to respond. Particular reference in this regard was made to the issue of the occupational health assessment and the issue of getting into and out of the car and that she was not questioned on inconsistencies in her evidence. This is not a ground of appeal included on the UTS-1 form and was not something of which the respondent had notice. However, even apart from that, I do not consider that it has merit. This means that allowing it to be raised at the hearing could be unfair to the Respondent but it is not necessary to make the decision solely on that basis. Having regard to the merits of the ground of challenge, it was not necessary that the Tribunal should put concerns – including ones that may have developed after the hearing in the course of preparing the decision – to the appellant for comment in order for the hearing to be fair.

(c) Taking account of irrelevant considerations.

No such considerations have been identified.

(d) Reaching a decision which no reasonable Tribunal could have reached.

This is a very high test. Having regard to the matters referred to in the decision, while the appellant contends that the opposite decision should have been reached, no basis has been stated to support a contention that the opposite result was the *only* reasonable one in the circumstances. I consider that the decision is clearly one which a reasonable Tribunal could have reached.

(e) Inadequacy of reasons.

In the course of the hearing, I was referred to *Wordie Property Co* v *Secretary of State for Scotland* (1984 SLT 345), *AK* v *Social Security Scotland* (2024 UT 05) and *Mitchell* v *Renfrewshire Council* (2024 UT 10). In *Wordie* the requirement in relation to giving reasons is said to mean that the decision taker,

> "must give proper and adequate reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to

what the reasons for it were and what were the material considerations which were taken into account in reaching it." (p. 348)

I consider that the reasons stated in the Decision do not give rise to any doubt as to basis on which the conclusion has been reached that the Appellant is not entitled to the benefit she seeks. They have explained the basis on which a conclusion has been reached that each of the descriptors identified did not apply for the majority of the time. They have explained the basis on which they preferred other evidence to the oral evidence given by the appellant. In relation to the evidence of Dr W and Dr M, I do not consider that it is correct to say that the Tribunal have preferred the evidence of one over the other. There is reliance on evidence from both of them in the Decision – Dr M in paragraphs 19, 34 and 45 and Dr W in paragraphs 20, 40, 58. The issue of explaining why one has been preferred does not therefore arise.

Conclusion

6. On the basis set out above, I did not consider that the stated ground of appeal are arguable. I accordingly refuse permission to Appeal.

Member of Upper Tribunal for Scotland