DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Aldershot First-tier Tribunal dated 18 June 2018 under file reference SC321/17/00754 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not able to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's original decision dated 13 December 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing. This may be a 'remote' hearing, e.g. by telephone or, if appropriate, by Skype.

(2) The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 18 June 2018.

(3) The Appellant is reminded that the tribunal can only deal with the appeal, including his health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 13 December 2016).

(4) If the Appellant has any further written evidence to put before the tribunal and, in particular, further medical evidence, this should be sent to the HMCTS regional tribunal office in Cardiff within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were at the date of the original decision of the Secretary of State under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is directed to accept the award of the daily living component by the previous tribunal and accordingly to confine its consideration to the mobility component. Subject to that, the new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.

(6) If there has been a further appeal against the renewal decision, then the District Tribunal Judge should consider listing the appeals to be heard together.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

This appeal to the Upper Tribunal: the result in a sentence

1. The Appellant's appeal to the Upper Tribunal succeeds; but there will need to be a fresh hearing of the original PIP appeal, confined to the question of entitlement to the mobility component, before a new First-tier Tribunal.

The conundrum in this appeal

2. The conundrum in this case is that the Appellant's appeal succeeds but not because of the reason he wants it to succeed. At the end of the day he may be no better off, but that depends on the outcome of a further appeal hearing.

The Upper Tribunal's decision in summary and what happens next

3. I allow the Appellant's appeal to the Upper Tribunal. The decision of the First-tier Tribunal involves a legal error. For that reason, I set aside the Tribunal's decision.

4. The case now needs to be reheard by a new and different First-tier Tribunal in Aldershot or another more convenient venue. I cannot predict what will be the outcome of the re-hearing. So, the new tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes when applying the correct and relevant law.

The Appellant's contingent request for an oral hearing at the Upper Tribunal

5. In his reply dated 19 June 2019 (p.275) the Appellant stated that he did not want an oral hearing of his Upper Tribunal appeal. However, more recently (letter dated 17 February 2020) the Appellant has stated he would, if required, be willing to attend a hearing in central London if he could travel by taxi. I have considered rule 34. I am satisfied it is fair and just to determine this appeal, which turns on legal issues, on the papers. There will be a new First-tier Tribunal closer to the Appellant's home which will deal with the factual issues. Given the coronavirus crisis, that re-hearing may be remote (e.g. by telephone).

The mobility descriptors

6. The legal issue at the heart of this appeal turns on the mobility component to personal independence payment (PIP). Entitlement to this component is governed by the criteria set out in Part 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377; "the PIP Regulations"). There are two generic mobility activities, namely "planning and following journeys" and "moving around". As the Appellant has noted, the DWP confusingly sometimes refer to these activities numerically as 1 and 2 and sometimes (presumably allowing for the ten daily living activities) as 11 and 12. I follow the former usage as it is what the legislation actually says.

7. At various stages the Appellant has been found to meet the descriptors set out in the moving around activity as descriptors 2b (4 points, so no entitlement), 2d (10 points, standard rate mobility component) and 2e (12 points, enhanced rate mobility component).

8. However, irrespective of any entitlement under mobility activity 2, the Appellant's argument throughout has been that, properly analysed, his circumstances meet the condition set out in descriptor 1d (10 points). In other words, he says he qualifies under 1d as he "cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid."

9. Part 3 of Schedule 1 to the PIP Regulations reads as follows:

PART 3

MOBILITY ACTIVITIES

Column 1 *Activity*	*Column 2* *Descriptors*	*Column 3* *Points*
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. Cannot plan the route of a journey.	8
	d. 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. Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12
2. Moving around.	a. Can stand and then move more than 200 metres, either aided or unaided.	0
	b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.	4
	c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
	d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.	10
	e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
	f. Cannot, either aided or unaided, – (i) stand; or (ii) move more than 1 metre.	12

The background to this appeal to the Upper Tribunal

10. The relevant decision-making history for the Appellant's claim to PIP is as follows.

11. On 26 June 2015 (see p.84) the Secretary of State's decision-maker awarded the Appellant the standard rate of the PIP daily living component (11 points) and the enhanced

rate of the mobility component (12 points). Both awards were to run from 17 April 2015 to 22 June 2017. The basis of the mobility award was the moving around activity, descriptor 2(e).

12. On 13 December 2016 (see p.173) the Secretary of State's decision-maker conducted a review and awarded the Appellant the standard rate of the daily living component (11 points) but this time no mobility component (4 points). The award was to run from 13 December 2016 to 17 May 2019. The basis for the decision about the mobility component was the moving around activity, descriptor 2b. That decision was maintained on mandatory reconsideration (pp.187 and 196). The Appellant lodged an appeal.

13. On 18 June 2018 (see p.211) the First-tier Tribunal (FTT) allowed the Appellant's appeal. The FTT scored the Appellant at 14 daily living points and 10 mobility points (for moving around descriptor 2d). It followed the FTT made an award of the enhanced rate of the daily living component and the standard rate of the mobility component. The period of the award was from 13 December 2016 to 17 May 2019 (as before).

14. To bring matters up to date, the Appellant made a further (presumably a renewal) claim on 19 February 2019. The outcome of this new claim is not apparent on the file. However, an Upper Tribunal registrar has made enquiries of the DWP in this regard. It appears the Secretary of State made a further award of PIP, but this time an award of the standard rate daily living component but no mobility. This was, it seems, on the basis that the Appellant scored 11 daily living points (descriptors 1b, 2b, 3b, 4b, 5b and 6b) and 0 mobility points. This award ran from 18 May 2019 and appears to have been an open-ended award. It is not known whether the Appellant has made an appeal against the new decision. I return to the implications of this later.

15. It may assist to see the different awards set out in a table:

Date of decision	Period of PIP award	Daily Living Component	Mobility Component
(1) 26.05.2015 (Sec of State)	17.04.2015 to 22.06.2017	Standard rate (11 points)	Enhanced rate (12 points, 2e)
(2) 13.12.2016 (Sec of State)	13.12.2016 to 17.05.2019	Standard rate (11 points)	No award (4 points, 2b)
(3) 18.06.2018 (Tribunal)	13.12.2016 to 17.05.2019	Enhanced rate (14 points)	Standard rate (10 points, 2d)
(4) Renewal decision (Sec of State)	18.05.2019 onwards	Standard rate (11 points)	No award (0 points)

16. The First-tier Tribunal's decision dated 18 June 2018 (decision (3)) obviously replaced the Secretary of State's decision of 13 December 2016 (decision (2)). Subject to that qualification, the various decisions are not necessarily inconsistent with one another, despite the variations in the levels of the components. The Appellant's condition and its effects on his daily living and mobility may have varied at different dates. The available evidence may have been different at the various times.

The reasoning behind the June 2018 First-tier Tribunal's decision

17. In its statement of reasons, the FTT explained its decision not to award the Appellant any points for mobility activity 1 in the following terms:

> "**1) Planning and following a journey**: [The Appellant] is an intelligent man who worked in accountancy until his stroke and fortunately has not suffered any enduring cognitive impairment because of it; he confirms he can plan a journey and use standard navigational equipment. He is able to travel to his local town centre unaccompanied.

> [The Appellant] is able to manage unfamiliar journeys unaccompanied, as long as it is relatively simple and does not involve long walks. He prefers to be accompanied because he feels more secure in case he falls, but he is able to rise unassisted and has sustained no significant injury as a result of such falls. He is able to use a stick to assist with his balance issue. [The Appellant] also believes that if accompanied this would extend the distance he would be able to walk. [The Appellant's] access to public transport is limited by the distance he can walk which make bus stops, platforms etc hard to reach or negotiate (p.182). This physical limitation is properly addressed and reflected in the 'mobility' [*sic – presumably what was meant was 'moving around'*) activity. The Tribunal appreciated [the Appellant] believes 10 points should be awarded for this activity but decided [the Appellant] fulfils the parameters of this activity the majority of the time. **No points awarded**."

18. At this juncture I just make two observations on the FTT's reasoning.

19. First, and unfortunately, the meaning of the FTT's reasoning got rather mangled in the penultimate two sentences of this passage. However, from the wider context it is clear the FTT meant to say "The Tribunal appreciated [the Appellant] believes 10 points should be awarded for this activity but decided [the Appellant] *does not* fulfil the parameters of this activity the majority of the time." Alternatively, and achieving the same result, the Tribunal could have meant "The Tribunal appreciated [the Appellant] believes 10 points should be awarded for this activity but decided [the Appellant] fulfils the parameters of *activity 1a* the majority of the time." This sort of typographical error does not amount to a material error of law where the FTT's meaning overall is perfectly clear.

20. Secondly, in its reasoning the FTT referred to p.182 of the bundle. This was the Appellant's letter disputing the level of the award dated 13 December 2016. In doing so, the Appellant claimed that mobility activity 1d — "cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid" — applied to him. By way of explanation, the Appellant added (p.183):

> "The criteria specifically say:
>
> '*A person should only be considered able to follow an unfamiliar journey if they would be capable of using public transport*'.
>
> I can't physically either walk to the nearest bus stop/ train station, or use buses/trains when I get there. I currently have to use taxis for hospital/ dental appointments etc."

The application for permission to appeal

21. The Appellant reiterated the same point in his application to the Upper Tribunal for permission to appeal. He continued (emphasis as in the original):

> "I am incapable of using public transport. The evidence for this is my statements (both written and oral) and a written statement by my physiotherapist (fully qualified, 30+ years of experience, sees me once a week). Together we hold the dubious honour of being the 2 people in this world who know most about my stroke and subsequent disability. The evidence against is **NONE!!** Not a single person, medical or not, who has had anything to do with my stroke and subsequent partial recovery has ever even suggested they felt I am capable of using public transport, much less submitted anything into any of the 199 pages of evidence."

22. For the avoidance of doubt, I should note that there has never been any dispute as to the Appellant's inability to access public transport. That can be taken as a 'given' in this appeal. But it does not necessarily get him home as regards mobility activity 1.

23. Upper Tribunal Judge Poynter subsequently gave permission to appeal. In doing so, and unusually, the Judge was "not at present persuaded that it [was] arguable" that the FTT had erred in law. Rather, Judge Poynter gave permission to appeal as he considered there was "some other good reason" for doing so, namely whether the official DWP guidance on mobility activity 1 (as cited by the Appellant) properly reflected the relevant legal test as laid down in the PIP Regulations. The case has since been transferred to me for decision.

The appeal proceedings before the Upper Tribunal

24. The appeal to the Upper Tribunal is supported by Mr R. Naeem, the Secretary of State's representative, but not on the ground advanced by the Appellant. In Mr Naeem's submission, the FTT came to the right decision on mobility activity 1 (planning and following a journey) and for the right reasons. However, Mr Naeem argues that the FTT erred in law on its approach to mobility activity 2 (moving around), in that it failed to provide adequate reasons for its decision that the Appellant did not satisfy mobility descriptor 2e. In particular, the FTT did not address the issue of 'repeatability' in terms of the Appellant's ability to mobilise (see regulation 4(2A) of the PIP Regulations). That is enough to allow the appeal. But the Appellant makes a different point.

25. The Appellant, in his reply, focuses on and maintains his arguments in connection with mobility activity 1 and does not directly address the support of the Secretary of State's representative for his appeal as regard mobility activity 2. However, by inference the Appellant argues that he is entitled, in aggregate, to at least 20 points for mobility activities 1d and 2d, if not 22 points for mobility activities 1d and 2e. Either way, on the Appellant's submission, he is entitled to the enhanced rate of the PIP mobility component and so the precise descriptor for activity 2 is, in his eyes, perhaps somewhat academic.

The Upper Tribunal's analysis of the primary ground of appeal

Introduction

26. The main issue on this appeal concerns the Appellant's claim that descriptor 1d applies to him as (and as is not disputed) he is unable to access public transport. The principal basis for the Appellant's argument is the passage in the official DWP guidance (the *PIP assessment guide part 2: the assessment criteria*, updated 30 September 2019, available online at https://www.gov.uk/government/publications/personal-independence-payment-assessment-guide-for-assessment-providers/pip-assessment-guide-part-2-the-assessment-criteria#mobility-activities. This document undoubtedly states (at p.109 of the hard copy) as follows, in relation to descriptor 1(d):

> "A person should only be considered able to follow an unfamiliar journey if they would be capable of using public transport – the assessment of which should focus on ability rather than choice."

27. However, there are three inter-connected reasons why the Appellant's argument on this point cannot succeed.

The status of the PIP Assessment Guide

28. The first reason is that the passage cited above is, quite simply, not the law. It is a DWP interpretation of, or a gloss on, the law. As Upper Tribunal Judge Williams observed in *MF v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 554 (AAC) (at paragraph 22) "it must be emphasised that this guidance reflects the view of the Secretary of State and advisers. It is *not* the law." Similarly, as Upper Tribunal Judge Wright expressed it even more

firmly in *MM and BJ v Secretary of State for Work and Pensions* [2016] UKUT 490; [2017] AACR 17, at paragraph 33:

> "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."

29. Thus, Judge Jacobs had 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. Instead:

> "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).

30. I recognise that there have been several Upper Tribunal decisions in which judges have noted that their construction of descriptors in the PIP Regulations is consistent with the interpretation advocated in the *PIP Assessment Guide* (see e.g. *TK v Secretary of State for Work and Pensions (PIP)* [2020] UKUT 22 (at paragraphs 24-25)). Such decisions are themselves entirely consistent with the principle embodied in the case law summarised above, namely that the tail (the *PIP Assessment Guide*) cannot wag the dog (the proper interpretation of the legislation).

The legislative scheme as a whole

31. The second reason is that the Appellant's argument is not consistent with the legislative scheme as a whole. The leading case on the construction of mobility activity 1 remains the decision of the three-judge panel of the Upper Tribunal in *MH v SSWP (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12. The three-judge panel held that the interpretation of the individual descriptors "must be considered in the light of the natural or ordinary meaning of the descriptors and the structure of the activity" (at paragraph 35). The genesis of that case is significant. The three-judge panel was convened to resolve two conflicting lines of authority in decisions by judges of the Upper Tribunal sitting alone.

32. In *DA v Secretary of State for Work and Pensions* (PIP) [2015] UKUT 344 (AAC), Upper Tribunal Judge Jacobs had held that the "natural meaning of 'follow the route of an unfamiliar journey' is that it is concerned with navigation rather than coping with obstacles of whatever sort that may be encountered on the route" (at paragraph 13).

33. By contrast, in *RC v Secretary of State for Work and Pensions* (PIP) [2015] UKUT 386 (AAC), Upper Tribunal Judge Sir Crispin Agnew of Lochnaw Bt QC had rejected the Secretary of State's submission that the term "follow the route" was concerned exclusively with the ability to navigate and therefore with problems stemming from sensory or cognitive impairment but not from conditions such as anxiety.

34. Finally, in *HL v Secretary of State for Work and Pensions* [2015] UKUT 694 (AAC), Upper Tribunal Judge Ward had preferred the approach adopted by Judge Jacobs. Judge Ward observed that "the words 'follow the route' must be taken to have been adopted advisedly; that 'route' refers to (in the broad sense) the pathway to somewhere and that to follow has connotations of keeping to such a pathway. I accept the submission that 'the deliberate use of the words "follow" and "route" focuses us upon the claimant's ability to navigate along pathways and is not concerned with other possible problems that a claimant may have when being in the natural environment.'"

35. The three-judge panel in *MH*, at least as regards that particular issue, concluded that the correct approach was that taken in *RC* as against the view expressed in *DA* and *HL*:

> "36. As was said in *RC*, mobility descriptors 1d and 1f do not contain any reference to navigation. We agree with the rejection in *DA*, *RC* and *HL* of the Secretary of State's argument that the references to an assistance dog and an orientation aid indicate the type of assistance that might be provided by a person in a case where descriptor 1d or 1f applies and so throw light on the meaning of the phrase "follow the route". The context does not require the words "another person" to be given such a narrow meaning. The phrase "follow the route", when given its natural or ordinary meaning, clearly includes an ability to navigate but we do not consider that it is limited to that. Navigation connotes finding one's way along a route, whereas "follow a route" can connote making one's way along a route or, to use one of Ms Scolding's dictionary definitions, "to go along a route" which involves more than just navigation."

36. The Upper Tribunal in *MH* also held that "the use of the word "navigate" in *DA* and *HL*, taken from the Secretary of State's submissions in those cases, may sometimes be unhelpful to the extent that it glosses the statutory wording. It tends to focus too closely on a person's ability to find his or her way along a route, whereas a need to be supervised in order to make one's way along a route safely is as important" (paragraph 37). However, there is nothing in the Upper Tribunal's analysis to suggest that the three-judge panel took the view that a purely physical inability to progress on foot would score points in terms of an ability to follow a route.

37. The three-judge panel in *MH* also considered the inter-relationship between mobility activities 1 and 2 (see paragraphs 49-52). Whilst they did not specifically address the issue that arises on this appeal, they did observe as follows:

> "51. We accept there is no statutory restriction to the effect that mental health problems may only be considered under mobility activity 1 or, for that matter, to the effect that only physical problems may be considered under activity 2. Nevertheless, it is abundantly clear from the actual wording of the descriptors that mobility activity 1 is designed to relate to those who have limitations in consequence of mental health and sensory concerns and activity 2 to those who have physical concerns. In our judgment a physical inability to stand and then move is what is required in order to trigger any entitlement to points under the activity 2 descriptors. However, we also accept that claimants who have symptoms which emanate from a mental health condition but which are nevertheless experienced as physical symptoms could potentially qualify in appropriate cases under activity 2, following the reasoning in *NK*. At the end of the day, there was not really any difference between the parties on those issues."

38. In his reply to the Secretary of State's response to this appeal, the Appellant prays in aid this passage, and especially the first sentence of paragraph 51. This shows, he argues, that while mental health conditions may well predominate for the purposes of mobility activity 1, physical problems cannot be disregarded. The problem with this submission is that it reads the terms of descriptor 1d in splendid isolation, without considering the ordinary meaning of the words and the overall context. There is nothing in *MH* (or the three previous decisions of single judges that were considered) which would suggest that a purely physical problem in getting from A to B gives rise to entitlement under descriptor 1d.

39. The point can also be put this way. If the Appellant's submission on the construction of mobility activity 1 holds good, it does not simply mean that he qualifies for 10 points under descriptor 1d, on the basis that he "cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid". By the same logic, he should rather score 12 points for descriptor 1f on the basis that he "cannot follow the route of a familiar journey

without another person, assistance dog or orientation aid". His contention, after all, was that he could not access public transport e.g. by reference to a local bus stop or railway station, which involve (very) familiar routes. The only point of difference between descriptors 1d and 1f is whether the route involves a familiar or unfamiliar journey. That distinction must be there for a purpose: words matter, especially in legislation. The semantic difference between descriptors 1d and 1f makes perfect sense in the case of a claimant with a cognitive or mental health impairment – the claimant who cannot manage to follow a familiar route is more disabled than the one who can manage familiar routes but cannot follow the route of an unfamiliar journey. But if the disabling condition is a physical restriction on progressing on foot (to stand and to move), then the familiarity or otherwise of the route becomes a distinction without a difference.

40. There is no doubt that the construction I have set out is consistent with the intent of the policymakers, insofar as that may have any relevance. This is demonstrated by
The *Government's response to the consultation on the Personal Independence Payment Assessment Criteria and Regulations"* (December 13, 2012 (the "consultation response"). This set out the Government's thinking as follows:

> "6.15 A number of respondents asked about how people who [use] taxis to make journeys will score in this activity. This depends on the reason for the use of the taxi. If it is entirely because of a physical barrier to mobility, they would not score in this activity. However, if the use of a taxi is because they are unable to follow the route of a journey without another person present, they can potentially score."

41. The three-judge panel in *MH* ruled that the consultation response could "properly be used as an aid to the construction of the 2013 Regulations because it represents the considered view of the Secretary of State after he had taken into account the representations made by consultees and immediately before he, as legislator, made those Regulations" (at paragraph 34). However, the Upper Tribunal also stressed that the starting point must remain the wording of the legislation, as explored above.

The DWP guidance as a whole
42. The third reason is that, in any event, and on a fair reading of the *PIP Assessment Guide* as a whole, the official DWP guidance (even it if were legally relevant) does not in fact support the Appellant's case. The general guidance on mobility activity 1 (p.109 if the hard copy version) reads as follows (with emphasis added):

> "This activity considers a claimant's ability to plan and follow the route of a journey. It is useful separately to consider:
>
> - ability to plan the route of a journey in advance
> - ability to leave the home and embark on a journey and
> - ability to follow the intended route once they leave the home
>
> This activity is designed for limitations on mobility deriving from mental health, cognitive and sensory impairments, *whereas activity 12 is generally designed for limitations from physical problems.* Cognitive impairment includes orientation (understanding of where, when and who the person is), attention, concentration and memory. *Any issues with the ability to stand and then move are not applicable under activity 11, but under activity 12.*
>
> Regarding falls, consideration must be given to how the risk of falling manifests itself. *Ordinarily the risk to a claimant's safety arising from a physical inability to move safely would be applicable under activity 12.* However, where the fall arises as a result of a sensory or cognitive impairment (for example, seizures associated with loss of consciousness) the risk of the fall to a claimant's safety would be applicable under

> activity 11. When assessing which descriptor might apply, consideration also needs to be given to any risks to an individual arising during the "recovery" period (for example, any post ictal confusion).
>
> 11d or 11f only apply where a claimant could not reliably make their way along a route without an accompanying person, assistance dog or orientation aid. The presence of another person out of preference, is not sufficient."

43. The two main paragraphs (immediately after the three bullet points) give no real support for the Appellant's arguments. Indeed, the italicised passages demonstrate a directly contrary intent.

44. Nor is the more specific guidance on descriptor 1d any more helpful to the Appellant's case. The single sentence on which the Appellant relies must be read in its context. The preceding paragraph reads as follows (p.111 of the hard copy *PIP Assessment Guide*):

> "This descriptor is most likely to apply to claimants with cognitive, sensory or developmental impairments, or a mental health condition that results in overwhelming psychological distress, who cannot, due to their impairment, work out where to go, follow directions, follow a journey safely or deal with minor unexpected changes in their journey when it is unfamiliar. A claimant who suffers overwhelming psychological distress whilst on the unfamiliar journey and who needs to be accompanied to overcome the overwhelming psychological distress may satisfy descriptor 1d."

45. It follows that when the guidance goes on to state that "a person should only be considered able to follow an unfamiliar journey if they would be capable of using public transport", the focus is on the ability or inability to follow an unfamiliar journey. The capacity of "using public transport" must be read in context as relating back to some form of cognitive impairment or mental health condition. So, for example, the simple fact that a claimant may be able to drive to an unfamiliar destination does not necessarily mean they can "follow the route of an unfamiliar journey, as a holistic assessment needs to be made" (see *SB v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 274 (AAC)).

46. Be all that as it may, I reiterate the point that the *PIP Assessment Guide* is just that, namely an assessment guide and not an authoritative statement of the law relating to PIP.

Conclusion on the primary ground of appeal

47. It follows that the Appellant's primary ground of appeal does not succeed. The First-tier Tribunal did not err in law in deciding that the Appellant failed to qualify for any points under mobility activity 1 (planning and following a journey).

Conclusion on the secondary ground of appeal

48. I agree with Mr Naeem for the Secretary of State that the First-tier Tribunal did err in law in its approach to mobility activity 2 (moving around), for the reason summarised at paragraph 24 above. I am satisfied that the First-tier Tribunal erred in law for that reason and no other. I therefore allow the Appellant's appeal to the Upper Tribunal, set aside the Tribunal's decision and remit (or send back) the original appeal for re-hearing to a new tribunal, which must make a fresh decision. I formally find that the Tribunal's decision involves an error of law on the secondary ground as outlined above.

What happens next: the new First-tier Tribunal

49. There will therefore need to be a fresh hearing of the appeal before a new First-tier Tribunal. Unfortunately, the new Tribunal will have to focus on the Appellant's circumstances as they were as long ago as at December 2016, and not the position as at the date of the new hearing, which will obviously, and regrettably, be more than three years later. This is

because the new Tribunal must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The original decision by the Secretary of State which was appealed was taken on 13 December 2016.

50. I have considered whether I should only set aside that part of the First-tier Tribunal's decision that dealt with the PIP mobility component. Such a course of action is possible in special circumstances (see *KM v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 296 (AAC)). However, given that the relevant PIP award has already expired, and been replaced by the renewal award, nothing is to be gained by such an approach. However, I do direct the new First-tier Tribunal that it need not examine the daily living component. Instead, I direct the new tribunal to accept the award of the daily living component. I bear in mind that there is a considerable overlap between the First-tier Tribunal's award of the enhanced rate daily living component (for descriptors 1e, 2b, 3b, 4e, 5b and 6b) and the renewal award at the standard rate (1b, 2b, 3b, 4b, 5b and 6b). I also bear in mind that there has been no challenge in the present proceedings by the Secretary of State's representative to the First-tier Tribunal's reasoning or conclusions on the daily living component. In all those circumstances it is not fair and just to revisit the daily living component for the past closed period in question.

51. Subject to that, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the Appellant is entitled to the mobility component of PIP for the relevant period (and, if so, at what rate). That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

52. I should also add that on the information before me it is unclear when the Secretary of State's decision-maker made a decision on the Appellant's entitlement on the renewal claim dated 19 February 2019. Nor is it clear whether the Appellant has lodged an appeal against the level of the award in the renewal decision. It is possible that he may have mistakenly considered his present challenge to the First-tier Tribunal's decision also amounted to a challenge to the decision on the renewal claim. In any event, the Appellant had a month from the date of the mandatory reconsideration decision in which to lodge a further appeal, subject to a possible extension for a period of a further 12 months. The maximum limit is therefore effectively 13 months.

53. Assuming there is a further appeal against the renewal claim decision, then it may well make sense for both the remitted appeal and the new appeal to be heard by the same tribunal. That is matter best left to the District Tribunal Judge who is responsible for making re-listing directions.

Conclusion

54. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is as set out above.

Signed on the original
on 21 April 2020

Nicholas Wikeley
Judge of the Upper Tribunal