

Opinion - Case Comment

PERSONAL INDEPENDENCE PAYMENTS, MENTAL DISTRESS AND UNIFORM POLICY IN DETERMINING MOBILITY CLAIMS

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ABSTRACT

In December 2018, the Minister of State for Disabled People, Health and Work revealed to Parliament that only 140,000 Personal Independence Payment (PIP) cases had been officially reviewed and cleared for the given year.¹ Disclosure of this meagre number (at the time less than 10 per cent of all applications) was preceded by a decision of the High Court (*RF v Secretary of State* [2017] EWHC 3375) which found that regulations that came into force last year were "blatantly discriminatory" to people who were suffering from mental health problems.

The issue that it brings to the surface is that this is an integrated benefit where the mental health component and the mobility component are overlapping. This has been revealed by the "psychological distress" suffered as a consequence of a lack of mobility of the claimant who has been awarded the benefit. This paper enquires if the PIP is a social security provision that has been injudiciously implemented without sufficient consultation given its anomalies, and it argues for the need for clarity and the application of a set criteria for evaluation. There is also a basis to argue that it should be deemed as an integral mobility and mental health-based benefit with greater regard for the claimant's existing welfare provisions rather than a subjective reliance on the assessor's report.

Keywords: Personal Independence Payment; PIP; mental health; discrimination; mobility; psychological distress, Article 14, paragraph 2.4, descriptor 3 (b) (2).

I. INTRODUCTION

The Department of Works and Pensions (DWP) introduced the Personal Independence Payment (PIP) in January 2017 to replace the Disability Living Allowance.² The Personal Independence Payment (PIP) is a form of non-contributory social security provision paid to people who have daily living and/or mobility needs, designed to help with the extra costs of living with a long-term illness or disability. They have to be eligible for 3 months and

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¹ Minister of State for Disabled People, Health and Work, Hansard, HC Series 6, Vol 651 col 82-4 WS, (20 Dec 2018), <https://hansard.parliament.uk/commons/2018-12-20/debates/18122039000023/PersonalIndependencePayment>

² In December 2010, the new coalition Government launched a consultation on the reform of Disability Living Allowance (DLA) (Cm 7984). The ministerial foreword stated: "*We are steadfast in our support for the principles of DLA, as a non-means-tested cash benefit contributing to the extra costs incurred by disabled people. However, we need to ensure that the benefit reflects the needs of disabled people today, rather than in the 1990s. It is time that we had a disability benefit which is easier for individuals to understand and provides clear criteria and consistent awards*". *Personal Independence Payment will also be a more dynamic benefit – it will take account of changes in individual circumstances and the impact of disabilities, as well as wider changes in society, such as social attitudes and equality legislation.*"

need the payment for at least 9 months until they are terminally ill. ³This is a non-means tested benefit which is paid regardless of income, savings, or National Insurance contribution record and is a tax-free benefit. It is possible to receive PIP even if a person is working or studying and if a person who is a carer with care needs, it is possible to claim PIP and this will not reduce the Carer's Allowance.⁴

The framework of this benefit includes a daily living component (how your mental health affects your daily life) and, a mobility component (how your mental health affects your ability to travel and make journeys). There has been controversy from the start regarding the claim to this benefit of those who are suffering from the mental health problems which require the support in their lives to cope with the disability. The recent debate has been characterised by the claims of applicants based on the lack of expert guidance of the DWP in dealing with the mental incapacity that impacts on the mobility criteria and that led to review and guidelines set by judges. ⁵

The PIP regulations fall within the ambit of the Welfare Reform Act (WRA) 2012 and the European Convention on Human Rights (ECHR). The WRA 2012 Part IV contains the parent power for the making of regulations to bring the new PIP scheme into effect. Section 77(2) provides that PIP has two components, namely the daily living component and the mobility component (section 77(2)). Section 79(1) provides that a person is entitled to the mobility component at the standard rate if the person's ability to carry out mobility activities is limited by his or her physical or mental condition. Section 79(2) provides that a person is entitled to the mobility component at the enhanced rate if the person's ability to carry out mobility activities is severely limited by their physical or mental condition. The "physical or mental condition" is not defined in the Act and Section 79(4) provides that the relevant mobility activities may be prescribed. Section 80(1)(c) and (d) provide that a person's ability to carry out mobility activities is to be determined in accordance with regulations. Regulations made under section 80(3) must provide that the ability to carry out mobility activities is to be decided on the basis of an assessment. ⁶

The recipients of the Personal Independence Payments are also covered by the Equality Act 2010 which combines previous equality legislation in England, Scotland and Wales and includes a new Public Sector Equality Duty (PSED) that enables protection against form of racial, disability and gender discrimination. This duty combines the previous public sector equality duties into one single duty and extends the areas of discrimination covered.⁷ The PSED have compelled the public authorities to promote equality of

³ Money Advice Service. Personal Independence Payments An Introduction. <https://www.moneyadviceservice.org.uk/en/articles/personal-independence-payment-an-introduction#who-can-get-pip>

⁴ Personal Independence Payments explained. Scleroderma & Raynauds UK https://www.sruk.co.uk/scleroderma/managing-scleroderma/person-independence-payment-explained/?qclid=EAIaIQobChMI-LG9saKz6AIVRLTtCh0HugtbEAAYAiAAEqJTUPD_BwE

⁵ The first statutory review into PIP was the Independent Review of the Personal Independence Payment Assessment (December 2014) that stated "The latest published data on PIP awards at the time of publishing this Report were to July 2014, when 106,400 were in payment" www.gov.uk/government/publications/personal-independence-payment-pip-assessments-first-independent-review

⁶ These sections were brought into force on 10 June 2013.

⁷ The previous Public Sector Equality Duties were the Race Equality Duty which came into force in May 2002; the Disability Equality Duty which came into force in December 2006; and the Gender Equality Duty which came into force in April 2007. The General Equality Duty came into force. The Essential Guide to the

opportunity and eliminate discrimination for service users and staff, rather than waiting for individuals to complain.

Section 149(1) of the Act defines what the PSED means in terms of general and specific duties. The Act places "a general duty on the public sector in the exercise of its functions, to have due regard to the need to: eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Act, advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and foster good relations between people who share a relevant protected characteristic and people who do not".

The aim of these duties is to encourage public bodies to consider how they can positively contribute to the advancement of equality and good relations. Equality considerations should be reflected in the design of policies, the delivery of services, including internal policies and reviews.⁸ The public bodies are national and local Government bodies carrying out functions for the public and include Government departments such as DWP, HM Revenue and Customs, etc, Local authorities, NHS bodies e.g. hospitals, transport and educational bodies; the police, and other bodies carrying out public functions on behalf of the above.⁹

Francine Morris, has observed that the "*DWP and its agents are service providers for the purposes of the Equality Act 2010. This means that they must comply with the duties not to discriminate against, harass or victimise individuals and to make reasonable adjustments for disabled people to access their services. This duty applies at every stage of the process from application. The DWP also carries out public functions, and must comply with the Public Sector Equality Duty*".¹⁰

The PSED imposes an obligation to issue a public sector equality statement annually in order to substantiate that it has abided by the norms of this duty. The legal decisions show the extent to which the courts hold the public bodies responsible in maintaining their duty. In *Aaron Hunt v North Somerset Council*¹¹ the local authority was faced with significant reductions in funding based on their budgetary needs to consider making substantial financial savings in respect of providing youth services. This was because the authority decided to 'review youth service provision through promoting non-[council] funded positive activities, supporting transfer of responsibility to towns/parish councils and community groups or closing youth centres as a last resort ([ensuring] targeted youth support will continue for the most vulnerable)'.

The Claimant argued that in approving specific budget reductions, the authority had failed to comply with its PSED to have regard to section 149. The judge overruled these

Public Sector Equality Duty p 10
https://www.equalityhumanrights.com/sites/default/files/pseed_essential_guide_-_guidance_for_english_public_bodies.pdf

⁸ Ibid, p11

⁹ The complete list is in Schedule 19 of the Act. There is also provision for additional bodies specific to Wales (Part 2) and Scotland (Part 3). See www.legislation.gov.uk/ukpga/2010/15/schedule/19

¹⁰ Francine Morris, *The Trials of Welfare Reform* (2015) p 6-7 Equality and Human Rights Commission https://www.equalityhumanrights.com/sites/default/files/the_trials_of_welfare_reform_0.pdf

¹¹ [2012] EWHC 1928 (Admin)

objections and held the evidence showed council members did have due regard to the PSED when they reached their decision to approve the revenue budget. The EIA identified the budget proposals which had a high impact on service-users; it dealt explicitly and in detail with the impact of the reduction in the youth-service budget; it referred explicitly to the impact on a number of the protected characteristics itemised in section 149. Furthermore, it disclosed information on which it based its conclusions and steps to be taken to minimise or mitigate that impact.¹²

There is further evidence that the courts have developed principles in how public bodies should take action to comply with the PSED and the correct approach. In *AA and others v Sandwell Metropolitan Borough Council*¹³ the Sandwell Council introduced minimum two year residency requirements for anyone claiming Council Tax Reduction (CTR) in their area. This excluded three women who were exempted from this waiver and raised judicial review. The High Court struck down the policy on various grounds, including the failure with the PSED under section 149 of the Act.

Mr Justice Hickinbottom ruled the two year residency rule was unlawful on six separate grounds. The Council acted outside its statutory powers, the rule was irrational and discriminated on grounds of race and gender, and the Council failed to hold any consultation or comply with its equality duties. The ruling stated:

94. Section 149 was undoubtedly engaged: indeed, that was well- recognised by the Council, in the way in which it conducted an EIA at various stages before the residence requirement was tabled. However, there is simply no evidence that the Council conducted any assessment at all of the race or gender impact of the residence requirement at or before it adopted the 2013-14 CTR Scheme; and scant evidence that it did so prior to the 2014-15 Scheme. I do not consider that the evidence that there is (e.g. with regard to feedback towards the end of 2013, from wherever it came) is sufficient to show that the Council grappled at all with the effects of the requirement on those with the identified protected characteristics.

95. On the evidence, I cannot but find that the Council was in breach of its section 149 duty. That duty is important; and, had the Council been rigorous in satisfying its obligation to have due regard to the relevant characteristics, then, again, it may not have proceeded with the unlawful course that it followed.

The PIP scheme comes within the ambit of Article 1 of the First Protocol to the ECHR and covers the Article 8 Right to a Private and Family Life. It also engages Article 14, which prohibits discrimination in the enjoyment of Convention rights and the discrimination on a number of grounds in "other status" which includes disability. This is when there is different treatment of people in the same position which will be unlawful if the different treatment cannot be "objectively" justified.

There are some overlapping rules such as for those who may be covered by mobility but fall under the daily living needs such as whether or not a person finds it hard to make a journey because of 'overwhelming psychological distress.'¹⁴ The issue that has caused the

¹² Paras 93-94

¹³ CO/633/2014

¹⁴ OPD means distress related to a mental health condition or intellectual or cognitive impairment resulting in a severe anxiety state in which the symptoms are so severe that the person cannot undertake a journey without being overwhelmed. The threshold is a very high one - a claimant who, without prompting, would be left feeling anxious, worried or emotional does not meet it. OPD may occur in conditions such as

most controversy regarding the PIP claim is how will the affect will be determined by the date of the claim and the catalyst on how people with mental health conditions had been discriminated against. From 16 March 2017, new PIP regulations prevented an award of the enhanced PIP mobility rate in cases where someone cannot follow the route of a familiar journey without another person unless it is "for reasons other than psychological distress". This meant that those with serious mental health conditions, who are unable to plan or undertake a journey because of overwhelming psychological distress were only entitled to a lower level of support, if any.

There have been recent issues that have surfaced which have caused the PIP framework to be questioned. The fact that the DWP has allegedly discriminated against people with mental health conditions in the way it has dealt with their PIP claims where the mobility component is under consideration. This includes the disregarding of the evidence relating to mental health and focusing instead on other impairments and made no attempt to seek medical evidence from their GP. There are also allegations that the assessors are not accurate about the assessment of the patient's symptoms and the medication that they are dependent upon.¹⁵

The tribunal has to undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration. The tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: R(DLA) 2 and 3¹⁶

The argument in this paper is that where psychological distress is concerned there should be a flexible approach towards admitting the expert evidence to be submitted at the tribunal and that this should include evidence of other benefits such as the Employment and Support Allowance (ESA) and the GP records.

II. INTERPRETING 'MOBILITY' IN THE REGULATIONS

The payment of PIP retains the key principles of DLA by providing welfare benefits to help claimants overcome the barriers which prevent disabled people from participating fully in everyday life. It has the objective of a fairer, more consistent and sustainable provision of social security. The intention is that support should be aimed at those disabled people who face the greatest challenges to leading independent lives. In terms of dealing with those who suffer from a disability relating to mobility there are provisions in the Social Security (Personal Independence Payment) Regulations 2013¹⁷. Descriptors c, d and f are relevant for the mobility component of the PIP.

generalised anxiety disorder, panic disorder, dementia or agoraphobia. PIP Assessment Guide Part 2 - The Assessment Criteria DWP 30/9/19.

¹⁵ PIP Assessment report being inaccurate. Scope: Equality for disabled people. 27/9/18. <https://community.scope.org.uk/discussion/49756/pip-assessment-report-being-inaccurate> Under Section 12 (8) of the Social Security Act the tribunal has to take account of circumstances that were obtaining at the time and the later evidence is only admissible provided that it relates to the time of the decision. RL (DLA) 2 AND 3/01

¹⁶ R(DLA)2/01 (formerly CDLA/2934/1999) states that evidence obtained late must be relevant to circumstances obtaining at the date of decision. See also R(DLA)3/01 (formerly CDLA/4734/1999).

¹⁷ S.I. 2013 No.377

The Claimant is entitled to receive the benefits in these circumstances as follows:

- c. For reasons other than psychological distress, cannot plan the route of a journey.
- d. For reasons other than psychological distress, cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.
- f. For reasons other than psychological distress, cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.

Schedule 1 Part 3 contained the table for mobility activities. This provides in the Activity column Planning and following journeys. In the Descriptor column, if a can plan and follow the route of a journey unaided then they get awarded zero points; Descriptor b, Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant. The award is of 4 points; Descriptor c, Cannot plan the route of the journey gains 8 points; Descriptor d, Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid gains 10 points; Descriptor e, Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant gains 10 points; and Descriptor f, Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid gains 12 points.

The Social Security (Personal Independence Payment) Regulations 2013 were amended by para 2(4) of the Social Security (Personal Independence Payment) (Amendment) Regulations 2017¹⁸. Para 2(4) provides:

In the table in Part 3 (mobility activities), in relation to activity 1 (planning and following journeys), in descriptors c, d and f, for "Cannot" substitute "For reasons other than psychological distress, cannot.

These regulations were interpreted by the tribunal reviewing appeals based on the infringements of these rules. In *MH v Secretary of State for Work and Pensions (PIP)* ¹⁹ the appeal concerned the approach to the mobility descriptors, particularly mobility activity 1.

The claimant had been found to be unable to undertake any journey because it would cause overwhelming distress to him (descriptor 1(e)) but appealed on the ground that the overwhelming distress he would suffer if he went out meant that he also could not follow the route of a familiar journey without another person (descriptor 1(f)) and that the retching he would experience would make him unable to move more than 50 metres (descriptor 2(c)). The challenge stated the effect of these regulations was that many people with mental health problems and some people with learning disabilities and brain injuries were prevented from accessing the mobility component of PIP, even if their mental illness, learning disability or brain injury was so severe that they were entirely unable to travel, if the reason for this was psychological distress.²⁰

The Upper Tribunal Judges Rowland, Rowley and Hemingway held "that, applying regulation 4(2A)(a), a person who cannot walk along a pavement or cross a road safely by himself because he is at risk of having a fit and so needs supervision to do so, is unable safely to follow a route and satisfies descriptor 1f. We consider that the same analysis

¹⁸ SI 2017 No. 194

¹⁹ [2016] UKUT 531 (AAC)

²⁰ Para 12

applies to a claimant who is unable to follow a route safely because he or she is unaware of dangers due to a sensory or cognitive impairment".²¹

The Upper Tribunal referred to the 'overwhelming' psychological distress and although this term may appear to be setting a high-or difficult-to- meet threshold, in practice, if someone's psychological distress impairs their ability to mobilise outdoors to such an extent that they cannot plan a route, or go there unaccompanied, it should be self-evident that the level of distress is 'overwhelming'. This has had a bearing on later judgments and in the review that the DWP has applied it will apply in the 'anti-test case rule', whereby the outcome of a test case is only applied to other similar cases from the date of the test case judgment.

The Court considered the application of regulation 7 to the application of the requirements in their regulation 4(2A), which provides that a descriptor applies only where it is satisfied on over 50% of the days. The tribunal referred expressly to this requirement when giving its reasons for disallowing (the appellant's) appeal.²² It is the risk of losing their mobility or such an occurrence which creates the need for her to have supervision in order to be able to carry out the relevant descriptor safely. This meant that descriptors 'c', 'd' and 'f' could be satisfied by claimants by virtue of 'overwhelming psychological distress'. The claimant was eligible to score points under descriptor 1c, 1d or 1f if their inability to follow the route of a familiar journey was caused by psychological distress, even if they had the intellectual capacity to navigate the journey.

In response to this ruling the Government amended the PIP regulations from 16 March 2017, replacing the word 'cannot' in descriptors 'c', 'd' and 'f' with the phrase: 'For reasons other than psychological distress, cannot'. This meant that claimants whose ability to plan and follow journeys was impaired by mental, rather than physical, health problems could only score a maximum of 10 points under descriptor 'e' and it prevented them from an entitlement claim to the enhanced rate of the PIP mobility component.

III. ESSENTIAL PROBLEM WITH PARAGRAPH 2(4)

The concept of psychological distress has been in dispute in the context of the mobility for the descriptors to meet the requirements set out in the legislation. This is of considerable impact for claimants who, within the parameters of the Act, have been assessed as not suffering from psychological distress. There is a risk that public bodies can discriminate against different groups of disabled people, not simply against disabled people as a whole by comparison with non-disabled people.

These are matters that require consideration after the coming into force after the commencement of the substantive provisions of Part 4 of the Welfare Reform Act 2012 and (Regulation 1(2); , he the Human Rights Act 1998 provisions and the consultation by the DWP with the stakeholders before making the regulations. This is because the issue can involve the mental health of the person in terms of their capacity and the need to be mobile with regard to the descriptors in the Mobility component of the allowance.

²¹ Para 37

²² Paras 54 and 55

In *RF v Secretary of State for Work and Pensions (Mind and Equality and Human Rights Commission intervening)*²³ there was a challenge by a judicial review to the Social Security (Personal Independence Payment) (Amendment) Regulations 2017 SI No 194, which excluded claimants from any entitlement to the mobility activity 1 if the cause of meeting the descriptor is psychological distress for descriptors 1c, 1d, and 1f.

Mr Justice Mostyn relied on the following three grounds in support of the application to quash paragraph 2(4) of the 2017 regulations.

- i) the 2017 regulations are in breach of the prohibition against discrimination in Article 14 of the European Convention on Human Rights (ECHR), read together with Article 8 and Article 1 Protocol 1;
- ii) the 2017 regulations are ultra vires Part 4 of the Welfare Reform Act 2012; and
- iii) SoS unlawfully failed to consult prior to making the 2017 regulations.²⁴

Mr Justice Mostyn considered the four-limbed test from *Bank Mellat v HM Treasury*²⁵ when evaluating whether or not the 2017 regulations were in breach of Article 14 ECHR: firstly, the objective of the measure is sufficiently important to justify the limitation of a protected right; secondly, the measure is rationally connected to that objective; thirdly, a less intrusive measure could not have been used without unacceptably compromising the achievement of the objective; and finally, when balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.²⁶ The Court relied on the judgment in *R. (on the application of MA) v Secretary of State for Work and Pensions*²⁷ that this principle "no doubt that this applies to this social security measure" and that "this reflects the wide margin of appreciation given to national governments when enacting measures with a macro-economic effect". The common factor in these limbs was to be determined according to whether or not the measure is 'manifestly without reasonable foundation'.²⁸

The objective of the paragraph 2 (4) was to save on the financial costs of PIP payments but Mr Justice Mostyn concluded that the measure that saving costs alone could not be "objectively justified, and that paragraph 2(4) of the 2017 regulations were manifestly without reasonable foundation" and was ultra vires.²⁹ The measure failed to achieve a fair balance between the severity of the impact on people experiencing psychological distress and the importance of the objective and quashed it. The other grounds of challenge were also satisfied in that the parent statute did not grant the power to make secondary legislation with this effect, which was incompatible with the purpose of the scheme as defined in the parent statute. There had also been any consultation before the enactment of this measure.³⁰

This was premised on the process of consultation that led to the Welfare Reform Act 2012. This began with the consultation process which the government undertook before enacting

²³ [2017] EWHC 3375 (Admin)

²⁴ Para 40

²⁵ [2013] UKSC 39

²⁶ Para 42

²⁷ [2016] UKSC 58

²⁸ Para 43

²⁹ Para 44

³⁰ Para 45

the legislation. The Government published its response to the consultation (Cm 8051) in April 2011. At para 15 on page 4 it proposed: "There will be two components of Personal Independence Payment; a daily living component and a mobility component, each with a standard and enhanced rate."³¹

However, there was no consultation when the process started to receive feedback for the definition of psychological distress. This was stated by the judge when he referred "to written evidence filed by the claimant and the first intervener about what specialist consultees were given to understand, during the period of gestation of these regulations, as to the scope of the "psychological distress" factor. The claimant filed witness statements by Ms Lambert of the National Autistic Society, Mr Butler of Disability Rights UK, Mr Anders of Revolving Doors and Ms Kotova of Inclusion London. The first intervener filed a statement from Mind's director of external relations, Ms Sophie Corlett. All of these people worked at organisations which contributed to the consultation process in the run-up to the 2013 Regulations. None of them recalls being told of an intention to distinguish overwhelming psychological distress from other mental health issues. On the contrary, had the intended distinction been made clear, all of these people would have raised concerns and objections".³² Mr Justice Mostyn highlighted that the intention of differentiating between individuals with physical and mental health issues was never communicated to 'the outside world' and could not be inferred from either a literal or purposive construction of the original 2013 regulations. The later amendment utilising the secondary legislation was done by legal *fiat* and was not a logically connected to the legislative objective.³³ The judge referred to Article 19 of the UN Convention on the Rights of Persons with Disabilities, which protects disabled people's right to live independently and be included in the community.³⁴

Mr Justice Mostyn held that the intention of separating the individuals with physical and mental health issues was never conveyed into the public domain and could not be inferred from the statutory interpretation of the regulations. These were 'blatantly discriminatory' against those with mental health impairments and which cannot objectively be justified.³⁵ The regulations had been passed into law by secondary legislation. The appellant's claim was supported through amicus curiae interventions by the National Autistic Society, Inclusion London, Revolving Doors and Disability Rights UK. Mind and the Equality and Human Rights Commission (EHRC) intervened in the case as third parties supporting RF's claim.

In August 2017 an inquiry by the UN committee on the Rights of Persons with Disabilities (the committee's first ever inquiry) examined the government's progress in becoming compliant with the UN Convention on the Rights of Persons with Disabilities (UNCRPD). The report found that the UK government is failing to uphold disabled people's rights across a range of areas from education, work and housing to health, transport and social security.³⁶ These findings were further supported by the report of Philip Alston, the UN

³¹ Para 8

³² Para 24

³³ Para 63

³⁴ Para 61

³⁵ Para 59

³⁶ www.theguardian.com/society/2017/aug/31/un-panel-criticises-uk-failure-to-uphold-disabled-peoples-rights. See also Joseph Rowntree Foundation (2018) UK Poverty 2018: A Comprehensive Analysis of Poverty

Special Rapporteur on extreme poverty and human rights in 2018.³⁷ In January 2018 the Secretary State of Work and Pensions announced that the government would not appeal the High Court's judgment and that it would drop its appeal against the original Upper Tribunal decision (*MH v Secretary of State for Work and Pensions* [2016]) that had prompted the regulations under challenge. It also undertook to review all the previous cases that had been decided taking this regulation into consideration that had gone against applicants in similar circumstances and to back date claims for payments of individuals effected by the decisions.³⁸

The *MH* approach can be integrated with the *RF* decision because the former referred to the 'overwhelming' psychological distress and the later has affirmed that it could be linked to circumstances of mental distress generally. Although this text appears to set a high- or difficult-to- meet threshold, in practice, if someone's psychological distress impairs her/his ability to mobilise outdoors to such an extent s/he cannot plan where s/he is going, or go there unaccompanied, it should be self-evident that the level of her/his distress is 'overwhelming'. The DWP has ordered a review which it states would link it to the ruling in *MH*, which implies that it is applying the 'anti-test case rule', whereby the outcome of a test case is only applied to other similar cases from the date of the test case judgment.³⁹

The contentious argument in all retrospective challenges would be that the DWP now accepts that, where applicable, points should be awarded for psychological distress from the date of the decision in *MH* or, if later, the date of claim. The backdating of arrears could be argued on the failure to award points under one of these descriptors because the cause of their impairment was mental health disability rather than physical which was a presumption that now should be regarded as wrong.⁴⁰

IV. UNDERSTANDING MENTAL ELEMENT IN MOBILITY CLAIMS

There have been several claims in which a number of Upper Tribunal decisions resulted in differing approaches to the interpretation of the Activity 1 descriptors for people whose problems with planning and following journeys stem from psychological problems such as anxiety and depression. The issue has been explored in the context of the Daily Living Activity 3 that covers "Managing therapy or monitoring a health condition" and is one of

Trends and Figures. London: Joseph Rowntree Foundation. Last accessed 19 December 2018 at <https://www.jrf.org.uk/report/uk-poverty-2018>

³⁷ Office of the High Commissioner on Human Rights (2018) Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights. London, 16 November 2018. Last accessed 3 December 2018 at https://www.ohchr.org/Documents/Issues/Poverty/EOM_GB_16Nov2018.pdf

³⁸ Changes to the Personal Independence Payment eligibility criteria, House of Commons library, Steven Kennedy. 17/4/18. commonslibrary.parliament.uk/research-briefings/cbp-7911

³⁹ Social Security Act 1998, section 27

⁴⁰ The aftermath of the decision was that On 19 January 2018 the Secretary of State for Work and Pensions announced that the government did not intend to appeal this decision to the Court of Appeal and that the Department for Work and Pensions will now undertake an exercise to go through all PIP cases affected by this judgement, with payments to affected individuals to be backdated to the effective date in each individual claim. Every person receiving PIP will have their claim reviewed, the DWP and a total of 1.6 million of the main disability benefit claims will be reviewed, with around 220,000 people expected to receive more money. The review could cost £3.7bn by 2023. Changes to the PIP eligibility criteria, House of Commons Briefing Paper, no 7911, 13 April 18 by Steven Kennedy. researchbriefings.files.parliament.uk/documents/CBP-7911/CBP-7911.pdf

10 activities in the PIP assessment which, taken together, are intended to assess the extent of an individual's daily living needs.⁴¹

In *Secretary of State for Work and Pensions v LB (PIP)*⁴² the claimant had been entitled to the lower rate of the mobility component of disability living allowance and the middle rate of the care component for the period from 6 July 2013 to 16 June 2015. Prior to expiry of that award she was invited to make a claim for PIP, which she did by she and her partner completing a PIP2 questionnaire that was apparently received on 7 April 2015. This stated the diabetes 1, dyslexia and depression and anxiety among her conditions. The partner mentioned that he was constantly monitoring her blood sugar levels and encouraging her to eat as she could get tired and low due to the diabetes, depression and anxiety.⁴³ He helped her with food and sugar intake as her dyslexia meant she could not judge how much insulin to take.⁴⁴

The assessor who visited her at home scored on descriptors needing prompting to be able to read or understand complex written information (activity 8: 2 points) and for needing prompting or assistance to be able to make complex budgeting decisions (activity 10: 2 points), in both cases because of her dyslexia. The claimant was not in difficulty with reading except for budgeting decisions but otherwise could self manage on treating herself for dyslexia. The total score did not achieve the threshold for payment of the PIP. The DWP's decision was that the claimant was not entitled to PIP because she only scored four points on daily living activities (below the necessary eight for the standard rate) and none on mobility activities. However, she was deemed to have no cognitive impairment, it was accepted that she struggled to understand bills due to her dyslexia and would require help with prompting and assistance to make a complex budgeting decision.

The First tier Tribunal allowed the claimant's appeal on papers and decided that she was entitled to the daily living component of PIP at the enhanced rate for the period from 17 June 2015 to 16 June 2018 and to the mobility component at the standard rate for the same period. The tribunal adopted the four points accepted by the Secretary of State for daily living activities and in addition awarded four points for needing prompting to be able to take nutrition (activity 2(d)), four points for needing supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week (activity 3(d)), and two points for needing prompting to be able to engage with other people (activity 9(b)). This made a total of 14, in excess of the 12 needed for qualification for the enhanced rate.

The Secretary of State appealed to the Upper Tribunal and in his ruling, Judge Mesher stated that the appeal raised "difficult questions" about the proper interpretation of the descriptors under two of the Daily living activities in the context of the conditions affecting the claimant. He stated that it "illustrates once again the gaps left in the drafting of that Schedule, requiring a large expenditure of effort to render its provisions coherent and thus making it ineffective as a simple day- to-day test of disability that needs to be applied by

⁴¹ As set out in Schedule 1 of The Social Security (Personal Independence Payment) Regulations 2013 ; SI 2013/377 as amended.

⁴² [2016] UKUT 0530 (AAC)

⁴³ Page 18

⁴⁴ Page 20

non-lawyers".⁴⁵ He considered this to be an "anomaly" and that he was "acutely aware that other cases will throw up circumstances and difficulties that I have not thought of and which may not be catered for in a ruling made in the context of the circumstances of the present case. But that is so whatever interpretation I adopt."⁴⁶ On balance I have concluded that what I have labelled alternative interpretation A (paragraphs 25 – 30 above) does the least damage to the intended structure of the descriptors under activity 3. It maintains some practical operation for the whole of descriptor 3(b)(ii) and substantially reduces the anomaly of claimants with more needs qualifying for fewer points than claimants with fewer needs".⁴⁷

After exploring various alternative ways of interpreting the descriptors to address the anomaly, Judge Mesher concluded that, even if a claimant needs extensive and time-consuming assistance with managing medication and monitoring a health condition, s/he can never score more than one point under descriptor 3(b), in contrast to those who need help with managing therapy who can score between two and 10 points under descriptors 3(c)(d)(e). He held that:

... descriptor 3(b)(ii) does not apply if supervision, prompting or assistance is needed for both managing medication and monitoring a health condition and only applies if it is needed for one only of those alternatives. It also does not apply if the supervision etc is needed for elements of what would ordinarily be regarded as therapy that go beyond either managing medication or monitoring a health condition within the meaning of descriptor 3(b)(ii). In both those circumstances in which descriptor 3(b)(ii) does not apply, the case would potentially fall within the therapy provisions in descriptors 3(c)–(f), depending on how far the supervision etc relates to something that can properly be called undertaking therapy and with the scale of points depending on the time for which the supervision etc is needed. All elements of therapy in its ordinary meaning could then be considered, including any taking of medication or monitoring of a health condition. If the need for supervision etc is limited to one or other of those alternatives in descriptor 3(b)(ii), then in order to allow the descriptor to have any practical application the application of descriptors 3(c) – (f) would be excluded.⁴⁸

The First-tier Tribunal decision was deemed to contain an error of law and was set aside.⁴⁹ The claimant's appeal was allowed and that she is entitled to the daily living component of PIP at the enhanced rate for the period from 17 June 2015 to 16 June 2018, but not entitled to the mobility component from and including 17 June 2015.

The DWP issued an Explanatory Memorandum in the aftermath of this ruling and viewed the decision to be contrary to the objectives of the legislation. It summarised the effect of the decision as follows:

... the Upper Tribunal held that supervision, prompting or assistance to manage medication or monitor a health condition (which scores 1 point) may amount to supervision, prompting or assistance to manage therapy (which scores 2 to 8 points, depending on the number of hours support required), and in particular will do so where a claimant needs supervision, prompting or assistance both to manage medication and to monitor a health condition.⁵⁰

⁴⁵ Para 1

⁴⁶ Para 24

⁴⁷ Para 33

⁴⁸ Para 34

⁴⁹ Para 51

⁵⁰ DWP, Explanatory Memorandum to The Social Security (Personal Independence Payment) (Amendment) Regulations 2017, no 194, para 7.5. www.legislation.gov.uk/ukxi/2017/194/pdf/ukxiem_20170194_en.pdf

It states further that "Regulations 2(2) and (3) 'clarify the drafting of Schedule 1 to the PIP Regulations to reverse these aspects of the ruling and more clearly reinstate the Government's originally intended meaning'. They do so by separating out the definitions of 'manage medication' and 'monitor therapy' and making it clear that 'monitor therapy' does not include receiving or administering medication (by any means), or any action which (in the case of the particular claimant being assessed) falls within the definition of 'manage medication' or 'monitor a health condition'. They also make it clear that the 1 point score applies even if two or more elements of the descriptor are met".⁵¹

As a consequence of this ruling and *Secretary of State v MH* the government made changes to the legislation. On 23 February 2017, DWP initiated before Parliament the process to amend the PIP eligibility criteria from 16 March to "clarify the drafting and reverse the effect" of two recent Upper Tribunal judgments, which had interpreted the Schedule setting out the assessment criteria "in ways which the Government did not intend." The LB judgment relates to the PIP daily living activity 3 ("managing therapy or monitoring a health condition"); and MH considered Mobility in Activity 1, 'planning and following journeys'.

The DWP in passage the regulations, in particular the exclusion of 'psychological distress' from consideration in descriptors 1(c), (d) and (f), and there is much debate that there should have been prior consultation and debate in Parliament. The House of Lords has considered two motions relating to the PIP regulations following a report from the Lords Secondary Legislation Scrutiny Committee that drew special attention to the regulations "on the ground that they give rise to issues of public policy likely to be of interest to the House".⁵² The Committee received submissions from a number of organisations pointing out the likely negative effect of the changes on claimants, particularly those with mental health conditions.

The Lords Committee has raised the issue against the claim by the DWP that no changes need be made to the guidance for Healthcare Professionals undertaking PIP assessments, following the regulations (original emphasis). The implications of the "two significant Upper Tribunal decisions because the interpretation of the current descriptors was inconsistent or misunderstood. The wording of the descriptors has been changed, which suggests that, as a minimum, those making the assessments should be provided with revised guidance to ensure that they take proper account of the distinctions made".⁵³ The Committee points to the response from DWP at paragraph 28 above which indicates that the assessors do not have either the ability or the capacity to implement the Upper Tribunal decisions "in a safe and consistent manner"⁵⁴ also indicates a need for review.⁵⁵

The House of Lords have in their deliberations considered this to be a matter of public policy. They have shown concern with the manner in which mental health problems are being interpreted and their evaluation by the DWP. It has also brought to the fore the issue of the lack of training of the assessors who come into contact at the earliest stage with the claimants that have these debilitating conditions.

⁵¹ Ibid, para 7.6.

⁵² Lords Secondary Legislation Scrutiny Committee Twenty Seventh Report, HL 126 2016-17, 9 March 2017

⁵³ HL Deb 27 March 2017 cc431-2

⁵⁴ Lords Secondary Legislation Scrutiny Committee Twenty Seventh Report Para 28

⁵⁵ Ibid para 33

V. CONCLUSION

The government took a huge step in transferring from the DLA to the PIP as a welfare benefit that covered the social security claimants.

It achieved a major transformation when it enacted the Welfare Reform Act 2012 which made the DLA obsolete and put in place the Personal Independence Payment. This is an individualised benefit that takes into the personal circumstances of the applicant and has its own criteria for payment which is separate from any other benefit paid. This was inaugurated after a consultation that included stakeholders from different disability organisations and charitable organisations.

This benefit can be divided into 2 components which are Living allowance and the Mobility allowance. These are paid at a basic and at an enhanced rate and there is an intricate criteria that needs to be satisfied in order to fall into the bracket which will trigger the payments. They both have a nexus which is based on the mental health factor and the impact on the psychological effect that is responsible for the stress on those who may have the mobility in carrying out their tasks.

The seeming urgency with which the DWP has implemented this benefit shows that they did not take into consideration the possible impact from the overwhelming stress that those who do not have problem with their mobility. It is this factor that falls within the descriptors that has raised the issue in the courts and which has been heard by means of litigation. The outcome has been that it has shown that there was incomplete consultation at its outset and not enough preparation went into devising its provisions. The government had proceeded to sidestep the legislation by the statutory instrument that led to its interpretation that narrowed the terms under the Act. This meant that it applied in a discriminatory manner and not only it breached the purpose of the legislation but also the Human Rights Act Article 14.

The courts have now expunged that part of the Welfare Reform Act which neglected psychological stress and that has helped place the regulations back on track. The need is for the greater willingness of the Tribunals and the courts to give the claimants a greater benefit of the doubt in order to redress the perceived shortcomings that arise from inconsistent evaluation in the assessment process. This is particularly in circumstances where mental health is a common denominator in both the benefits under the provision.