



**DECISION OF**

Lord Young

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

PY

per Toryglen Law & Money Advice Centre

Appellant

- and -

Social Security Scotland

Respondent

FTS Case Reference: FTS/SSC/AE/23/01153

26 August 2024

**DECISION**

Permission to appeal is REFUSED.

**REASONS FOR DECISION**

*Background*

1. The appellant made an application for adult disability payment (“ADP”) in January 2023. Social Security Scotland (“SSS”) issued a determination on 27 June 2023 in which the appellant was awarded 6 points in respect of daily activities which was insufficient for an



ADP award. The 6 points awarded were in respect of prompting the appellant to prepare a simple meal (2 points); prompting the appellant to dress or undress (2 points); and prompting the appellant to engage in social activities (2 points). The appellant sought a re-determination. By notice of determination dated 14 October 2023, the appellant was assessed as having no entitlement to any points for either daily or mobility activities.

2. The appellant appealed to the First tier Tribunal (FTS) on the basis that he ought to have been awarded points under descriptors 1(d), 4(c), 6(c) & 9(c) in respect of daily activities, and 1(d) in respect of mobility activities. As part of his submissions before the FTS, the appellant relied upon a report from Dr M, a clinical psychiatrist.
3. By a decision dated 21 May 2024, the FTS refused the appeal and found that the appellant was only entitled to a total of 4 points for daily activities in respect of descriptor 1(d) (prompting to make a simple meal) and descriptor 9(b), (prompting to engage in social activities).
4. The appellant has sought permission to appeal against the decision of the FTS and has produced four grounds of appeal. The FTS refused permission to appeal on 19 June 2024 on the basis that the grounds of appeal did not identify any error of law. An oral hearing was heard on the appellant's application for permission to appeal on 13 August 2024.

## Grounds of appeal

5. The grounds of appeal lodged on behalf of the appellant are as follows:-

"1. It is submitted that the Tribunal have erred in law in their treatment of Dr M's report at paragraph (15) of the decision notice. In paragraph (15) the Tribunal make no reference to the clinical findings in Dr M's report. It seems they have failed to take these into consideration and as such have erred in law. Reference is made to Case Number UA-2023-SCO000014-UC (copy attached). While it is accepted that a decision of the UK Upper Tribunal is not binding on the First Tier

# Upper Tribunal for Scotland

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Tribunal for Scotland, it is submitted that such a decision is persuasive. Reference is made to Upper Tribunal for Scotland decision UTS/AS/23/0985 (copy attached), in which at paragraph (8) reference is made to *DS v SSWP* [2019] UKUT 347. It is submitted therefore that the decision of the UK UT should at least be persuasive. It is submitted that by failing to take into consideration the clinical findings of the report by the Consultant Psychiatrist, the Tribunal have erred in law.

2. Further to the above, it is submitted that in paragraph (15) it is not clear to the Appellant why they would have rejected a report from Dr M. The reasons given state "It is based upon a one-off meeting only. The author relies upon the presentation of the Appellant on that day together with his own self reports that day". It further states "the author has also completed a proforma of the daily living activities but has no direct knowledge of the Appellant's undertaking of such daily activities in the real world." It is submitted that with respect to the Tribunal, the Tribunal hearing was also a one-off meeting, and the Tribunal also do not have 'direct knowledge' of the Appellant's undertaking of such daily living activities in the real world. The Tribunal's decision at paragraph (13) was stated to be "the decision of the Tribunal was directly based upon the Appellant's own oral evidence." It is not clear to the Appellant what difference there would be on the Tribunal making a decision upon his oral evidence but then rejecting the report from the Psychiatrist on the basis that the Psychiatric opinion was based on the Appellant's oral evidence or "self-report." Additionally given the meeting with 009 the Psychiatrist was face to face, again, the Appellant would not be clear why a Psychiatric report would be given limited weight for the reasons stated by the Tribunal, particularly in light of paragraph (1) above. It is submitted therefore that the Tribunal have erred in law by failing to give adequate reasons.

3. It is submitted that the Tribunal have erred in law in relation to descriptor 4(c). At paragraph (25) they state "The Tribunal relied upon his oral evidence. He showers twice a week." Reference is made to the Disability Assistance for Working Age People (Scotland) Regulation 2022, Regulation 7(3)(c). Regulation 7 requires that an individual should be able to carry out an activity repeatedly, and this is defined as "As often as the activity is reasonably required to be completed." It is submitted that given he only showers twice a week, this is not as often as is reasonably required, or if the Tribunal believe that to shower twice a week is as often as is reasonably required, it was incumbent upon them to give reasons for



making such a finding, particularly as under Regulation 10 of the aforementioned regulations it states that the relevant descriptor is one which is satisfied in over 50% of the days. Clearly two days out of seven is less than 50% and as such it is submitted that the Tribunal have erred in law in their treatment of both Regulations 7 and Regulation 10.

4. It is submitted that the Tribunal have erred in law in relation to Descriptor 9(c), because given Scottish Security Scotland had also submitted that they believed descriptor 9(c) was satisfied, then the Tribunal had to make findings not only why they rejected the submission of the Appellant, but also why they rejected the submission of the Respondent in relation to the applicability of Regulation 9(c). It is submitted that they have failed to deal with the position of the Respondent at all and as such have erred in law.”

## Discussion

6. The first two grounds of appeal both relate to the manner in which the FTS dealt with the evidence of Dr M’s report. In essence, the grounds of appeal are that the FTS failed to take into account the clinical findings of Dr M, or alternatively, failed to give adequate reasons for rejecting Dr M’s evidence. In its decision at paragraph [15], the FTS stated that it found Dr M’s report to be of “limited weight”. The FTS gave reasons for that opinion. The FTS stated that Dr M’s report was based on a single meeting with the appellant and was based on the appellant’s self report. The FTS considered that Dr M also embarked on speculation of what the appellant was unable to do as opposed to providing an opinion which was evidence based.
7. The contention in ground of appeal 1 that the FTS must have failed to have regard to the clinical findings because they are not mentioned within the decision itself is not a valid criticism. The FTS’s decision stated, in terms, that regard was had to Dr M’s report albeit the weight given to the report was not significant. There is no reason to conclude that the clinical findings were ignored by the FTS. There is no requirement for the FTS to discuss



the clinical findings of a medical report within the decision itself where that Tribunal has concluded that the medical expert's views are of limited weight. On the face of the decision itself, there is no arguable basis for the contention that the FTS failed to have regard to material evidence before it. The authorities set out in the first ground of appeal do not support the proposition advanced.

8. In relation to the second ground of appeal, the reasons provided by the FTS for the limited weight accorded to the report are coherent and understandable. The test for adequacy of reasons in Scotland is found in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345. The FTS must "give proper and adequate reasons for [its] decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader ... 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". Reading the FTS's decision as a whole, the informed reader would be aware that the FTS found the appellant's own evidence at the hearing to be the best evidence of which daily activities he could perform. Where his evidence differed from that of Dr M, the FTS preferred the appellant's own evidence. Given that the factual issues for determination related to the appellant's ability to carry out various daily activities, it is difficult to fault the Tribunal's reasoning. Although this ground of appeal uses the language of "inadequacy of reasons", the reality is that it amounts to a contention that Dr M's evidence ought to have been preferred. The assessment and weighing of witness evidence is part of the Tribunal's fact finding role and is not open to challenge on appeal.
9. Ground of appeal 3 relates to descriptor 4(c) which is a daily activity requiring support or prompting to wash or bathe. The FTS at paragraph [25] determined that the appellant could wash and bathe unaided and that he did not require prompting to do so. He showered twice per week. No adverse comments had been made by others in terms of his



appearance. These findings were based on the appellant's own evidence. It should be noted that his evidence before the FTS was consistent with the appellant's application form for ADP in which he stated that he could bathe and shower unaided and that he did not need reminding to do so. His answers in the original application confirmed that he could wash his hair, wash between his shoulders and waist, and could wash below his waist. When the appellant sought a re-determination of the original decision to refuse ADP, he did not challenge the decision to award 0 points for descriptor 4(c). Dr M's report raised the prospect, apparently for the first time, that the appellant may struggle to wash and bathe. His report does not indicate that the appellant told Dr M this but rather Dr M expressed his opinion that "I think it probable at least for the majority of the time that Mr Y would neglect to bathe....to an appropriate degree."

10. Regulation 7(3)(c) of the Disability Assistance for Working Age People (Scotland) Regulations 2022 requires the individual to be able to carry out the activity "repeatedly" which is defined as being "as often as the activity is **reasonably required** to be completed" (emphasis added). The FTS found as a matter of fact that the appellant managed to shower about twice a week without any prompting. The appellant told the FTS that he had not received any adverse comments about his appearance from others which indicates that, for this appellant, such frequency of showering was reasonable. That conclusion is consistent with the appellant's own position from the time of the original application through to his own evidence at the FTS hearing.
11. The third ground of appeal sets out a specific argument, by reference to regulation 10 of the 2022 Regulations, that showering twice per week does not satisfy the test for a repeated activity since it is less than 50% of the week. However, the descriptor is whether the individual needs assistance to wash or bathe. There is no requirement that the individual can carry out a specific activity such as showering on 50% of days. In the present case, the appellant has not put in issue any concern that his ability to wash and



bathe is inadequate for his needs. While Dr M suggests that a deficit in this activity is “probable”, the FTS were perfectly entitled to proceed on the basis of the appellant’s own evidence.

12. Ground of appeal 4 relates to descriptor 9(c). In their submissions to the FTS, SSS submitted that descriptor 9(c) (needs social support to be able to engage socially with other people) was engaged for the appellant and that this would justify an award of 4 points. The FTS at paragraph [26] awarded 2 points under descriptor 9(b) (needs prompting to be able to engage socially with other people). The appellant’s contention is that the FTS have failed to make findings in relation to both parties submissions that 9(c) was engaged. At the oral hearing for permission, it was common ground that the FTS were not bound by the parties approaches but it was contended by the appellant that there was an error in law by failing to have regard to the respondent’s position on this descriptor.
  
13. The FTS deal with this issue briefly and do not make factual findings which extend much beyond the wording of the regulations. In the concluding sentence of paragraph [26], the FTS state that the appellant does not need social support from someone trained or experienced to enable him to engage socially which reflects the Supreme Court’s decision in *MM v Secretary of State for Work & Pensions* 2019 UKSC 34. As such, it is not strictly correct that the FTS has not dealt with the proposition that descriptor 9(c) was satisfied. Perhaps more valid would be a criticism that the FTS has failed to give adequate reasons for adopting a different approach from that taken by both parties. In my view, it is arguable that the concluding sentence in paragraph [26] fails to provide the informed reader with an adequate explanation for the FTS’s conclusion on descriptor 9(c). There are findings at paragraphs 20-22 in relation to the appellant’s ability to engage with voluntary community activities and with family members which may help explain why the FTS awarded points under descriptor 9(b) rather than 9(c) but the FTS do not expressly link



those findings to its conclusion in paragraph [26]. Had this ground of appeal been sufficient on its own, or in combination with other stateable grounds of appeal, to lead to an award of ADP, I would have granted permission that it raised a point of law which was arguable. However, ground of appeal 4 can, at best, only result in a further 2 points which would not result in an award of ADP for the appellant. Accordingly, it cannot be said that the arguable point of law is a material one for which permission should be granted.

## Conclusion

14. Permission can only be granted if there are arguable grounds of appeal on a material point of law (section 46 of the Tribunals (Scotland) Act 2014). As that statutory test is not met, permission is refused.

The Hon. Lord Young  
26 August 2024