



DECISION OF

Lady Poole

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

KW

Appellant

- and -

Social Security Scotland

Respondent

FTS Case Reference: FTS/SSC/AE/23/01130

Representation:

For appellant: Ms Jean Fields, North Ayrshire Health and Social Care Partnership

For respondent: Mr Sandy Raeburn, Scottish Government Legal Department

8 November 2024

Decision

Permission to appeal is REFUSED.

Reasons for decision

Summary

1. This is an application for permission to appeal to the Upper Tribunal for Scotland (“UTS”) in a case about adult disability payment (“ADP”). The decision sets out three of



the principles which guide the grant or refusal of permission in social security appeals, and applies those principles. Permission is refused in this case, because the essence of the application is a dispute over the facts and credibility findings of the First-tier Tribunal for Scotland (“FTS”). Those were matters primarily for the FTS. The grounds on which the application proceeds disclose no arguable errors on points of law.

Background facts

2. The appellant applied for ADP. Social Security Scotland (“SSS”) initially refused the application, because the appellant had not provided proof of his identity. The appellant then requested SSS to redetermine his claim, and provided proof of identity. SSS investigated his claim. It held a consultation with the appellant to gather information. It also obtained a report from the GP practice with which the appellant was registered. After considering everything before it, SSS found that the appellant did not qualify for ADP.
3. The appellant appealed to the FTS. The FTS had documentary evidence before it, which contained the evidence relied on by SSS, but also additional evidence added by the parties. The documents available to the FTS contained medical information, including the report from the GP practice, case discussion advice from a practitioner, and lengthy GP records. There was also a written submission provided by the appellant’s representative, which listed multiple conditions from which the appellant claimed to suffer, and point-scoring descriptors claimed on his behalf. The submission acknowledged there was conflicting information in relation to health conditions from which the appellant suffered, because the GP had not supported all conditions reported by him as being confirmed diagnoses. The documents also contained a submission from SSS.
4. The FTS held a hearing at which the appellant gave evidence, and was represented. It took further evidence at that hearing from the appellant. The FTS, having considered everything before it, refused the appeal on 30 May 2024.
5. The appellant applied to the FTS for permission to appeal to the UTS on 26 June 2024, which was refused. He then applied directly to the UTS, and an oral hearing of his application was heard on 29 October 2024. In reaching its decision, the UTS has taken into account everything before it, including the papers before the FTS, materials provided by parties in advance of the hearing before the UTS, and oral submissions at that hearing. Following the hearing, the UTS invited further written submissions on specified cases and legislation referred to in this decision. The further submissions received from both parties on those matters have also been taken into account.



General approach to appeals to the UTS

6. Permission to appeal is sought in the application form on the basis of “Failure to consider relevant factors and evidence and failure to provide adequate reasons for decision/not considering the relevant factors and evidence”. These grounds were expanded in later written submissions to add failure to make proper findings in fact and taking into account incorrect information resulting in unfairness. To support these grounds of appeal, there is a four page, closely typed, detailed critique of selected paragraphs of the decision of the FTS (as well as the later written submissions). There is frequent reference to particular aspects of the extensive evidence before the FTS, which the appellant considers should have been preferred by the FTS, and led to a different outcome. The oral submissions and further written submissions were similarly critical of the decision of the FTS. The respondent on the other hand submitted the reasons given by the FTS for its decision were adequate, and the weighing of the evidence, issues of credibility, and findings of fact were matters for the FTS. That remained its position in the further written submissions.
7. The clearest way to address the application for permission is to restate three matters relevant to the grant of permission to appeal to the UTS in social security cases. They have been called principles below, and are based on legislation or decided cases.

Principle 1 - the jurisdiction of the UTS is limited to errors on points of law.

8. The UTS will not ordinarily grant permission for grounds which are in reality disputes about the facts found by the FTS or credibility findings made by it. There are a number of reasons for this.
9. First, the law restricts appeals to the UTS to points of law only (Section 46(2)(b) of the Tribunals (Scotland) Act 2014).
10. Second, there are sound policy reasons why the legislature chose to restrict the scope of an appeal in this way. By the time the case reaches the UTS, there will already have been multiple opportunities for the facts to be examined. There are ordinarily two opportunities before the SSS, on determination and redetermination (although in this particular case, the facts were only examined on redetermination due to the initial absence of proof of identity). The FTS then considers everything afresh. Both appellants and respondents are able to provide additional evidence to the FTS. The jurisdiction of the FTS in an appeal to it covers matters both of fact and law. It is proportionate at UTS level to restrict appeals to points of law, because of these previous opportunities for examination of the facts.



11. Third, the FTS in social security cases, in general terms, is in a better position than the UTS to make judgements about factual matters and credibility. Judges of the UTS in social security cases are lawyers. In contrast, the FTS sits in this type of case not only with legal expertise, but also with members who have disability and medical expertise. The FTS hears evidence, which often includes oral evidence from claimants given at a hearing. The medical and disability expertise of the FTS is of particular value where part of the evidence before the FTS contains medical records and information, and factual judgements are required about functional limitations as a result of medical conditions. The findings of the FTS on credibility and reliability, and matters of fact, are matters primarily for it.
12. Fourth, the FTS is an independent judicial body. Before a case comes to the UTS, it has already been the subject of a judicial decision. In the interests of efficient administration of justice, the decisions of the FTS may only be upset on appeal if they have been positively wrong in law (*Edwards v Bairstow* [1956] AC 14 at 38).
13. For these reasons, the UTS will scrutinise proposed grounds of appeal carefully to ensure they are truly concerned with errors of law. If they are in essence a disagreement with factual and credibility findings of the FTS, the UTS may find they do not properly come within its appellate jurisdiction, because it is limited to points of law. While there is a relatively low threshold for arguability in decisions about permission, that threshold applies to errors on points of law, not disputes of fact.
14. Finally, in assessing whether grounds are arguable, the UTS will ordinarily take into account whether, if proposed grounds succeed, they would make any difference to the outcome. In the context of the UTS, this principle is often given effect by a requirement that there are arguable grounds on a material point of law (*PY v Social Security Scotland* 2024 UT 48 para 14). It is not accepted, as SSS suggests, that materiality has no part to play in the test for grant of permission. The requirement of materiality is a recognition that the function of courts and tribunals is to decide real disputes. They do not exist as debating chambers or to “beat the air in vain”. The UTS is publicly funded and is subject to these underlying principles. Grounds may be found not to be arguable when it is clear that, even if they succeed, it would make no difference to the outcome of the case.

Principle 2 – to be proper and adequate, the reasons of the FTS for its decision do not have to involve consideration of every aspect of the evidence before it

15. The classic test for adequacy of reasons in Scotland is found in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345. The tribunal 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". The decision of the FTS has to be read as a whole, in a straightforward manner, and recognising it is addressed to parties well aware of the issues involved (*AK v Social Security Scotland* 2024 UT 5 para 8). Reasons, to be adequate, do not have to involve consideration of every issue raised by the parties, or deal with every piece of material in evidence.

Principle 3 - a person is not eligible for ADP merely because they have a medical condition or conditions; eligibility depends on satisfying statutory criteria.

16. Points counting towards an award of ADP are scored only where the claimant's ability to carry out daily living or mobility activities is limited (or severely limited) by the individual's physical or mental condition or conditions (regulations 5 and 6 of the Disability Assistance for Working Age People (Scotland) Regulations 2022).
17. As said in *Social Security Scotland v FK* 2024 UT 23, "ADP is targeted towards people who have impairments with significant and not short-term effects... [The] rules for ADP make it clear that suffering from a medical condition or conditions, and taking medication, is not enough for an award. The eligibility rules focus on functional limitation as a result of physical and/or mental conditions. By the required period condition, the eligibility rules also ensure that only longer term functional limitations will meet the criteria for an award. In this way finite public funds are targeted where the legislature considers they are most needed".
18. As a matter of law, to score points there must be a causal link between a physical or mental condition or conditions and functional limitation. Limitations which arise due to factors such as choice, financial position, belief, habit, or living arrangement, rather than medical conditions, will not score points. Often the FTS will identify medical conditions from which it accepts the appellant suffers. However, the FTS is not required in all cases to diagnose or pinpoint all conditions which cause functional limitations, so long as it has considered what functional limitations have been caused by the individual's physical or mental conditions it has accepted (see *Social Security Scotland v AM* 2024 UT 46 paras 18-23).

The FTS decision

19. The decision of the FTS to refuse ADP must be read as a whole. The FTS stated at paragraph [5] "The Tribunal had before it extensive documentation, amounting to 356 pages relating to the application for ADP, the request for a re-determination, the appeal and a significant volume of medical records supplied. The Tribunal fully considered the documentation". The FTS reiterated that it had considered all of the documentation before it at paragraph [6], as well as evidence at a hearing and from parties, before it made the factual findings it did.



20. The FTS considered whether, as a matter of fact, the appellant suffered from functional limitations which resulted in him scoring points towards an award of ADP. It made clear findings of fact between its paragraphs V and XVI that the appellant did not. The FTS also made a finding on credibility adverse to the appellant at paragraph [8]. Among other things, the FTS rejected the appellant having the mobility issues he claimed at paragraph [9]. It is clear from the decision that the appellant's claim failed because the FTS did not accept his evidence, and did not find that the appellant suffered from the functional limitations he claimed.

The present application

21. The appellant's representative is to be commended for her efforts on behalf of her client. However, despite the grounds being framed as failures to consider matters, make proper findings in fact, give adequate reasons, and having taken into account incorrect information, they are in essence a disagreement about the assessment of the evidence by the FTS, and its adverse credibility finding in relation to the appellant. They fall foul of Principle 1 for appeals to the UTS set out above. It was for the FTS to weigh the evidence, not all of which supported the appellant, and decide what to accept and what to reject. It is clear from paragraphs [5] and [6] of the decision of the FTS that it took everything before it into account, which included submissions about the medical conditions from which the appellant suffered, and functional limitation. Findings of credibility and fact were matters primarily for the FTS, even if the appellant disagrees with the findings made. On scrutiny, the proposed grounds are disagreements of fact and do not raise arguable errors of law.
22. The general approach taken in the proposed grounds of appeal, of picking aspects of the evidence before the FTS favourable to the appellant, and saying there are not enough reasons or findings in fact for the FTS not having decided in accordance with those parts of the evidence, is also misguided. The FTS is not required to make findings of fact on every aspect of the evidence before them, but to make sufficient factual findings to support the decision made. It is not arguable that there were insufficient facts found to support the actual decision made, given the clear findings between paragraphs I and XVI. Further, as set out in Principle 2, reasons, to be adequate, do not require to involve consideration of every issue raised by the parties or deal with every piece of material in evidence. It is not difficult to understand from the FTS decision why the appellant lost – the FTS did not find the appellant had functional limitations which resulted in points being scored sufficient for an award of ADP. It is not arguable that the reasons were not proper and adequate within the *Wordie Property* test.
23. Other arguments, based on identification of the precise medical conditions from which the appellant suffers, also fail to appreciate the matters set out in Principle 3 above. The



FTS accepted the appellant had a medical diagnosis of opioid dependence syndrome at paragraph IV. It then considered the extent of the appellant's functional limitations, and did not find there were any that scored points. It was neither necessary nor appropriate for the FTS to diagnose or list all medical conditions from which the appellant had ever suffered. Whatever the various conditions the appellant may suffer from, the FTS made a clear finding in fact that they did not cause any functional limitation sufficient to score points (paragraphs V to XVI). Further specification by the FTS of conditions suffered would not have been material to the outcome in this particular case.

24. Finally, although there appears to have been an error in the decision of the FTS about the date of a particular consultation with the GP (it referred to March 2023 in paragraph [11] of its decision), this could make no difference to the outcome. The point being made by the FTS was that, despite the appellant claiming constantly to need crutches and sticks to move around, the appellant had not been using crutches and sticks when he had attended the GP surgery. This finding was made in the context of the GP being asked about the appellant's claims of having difficulty walking, and responding, "This did not appear to be true when I saw him in the surgery". There was evidence in the consultation records of a number of direct contacts of the appellant with the report-writing GP, albeit not in March 2023. There was therefore a basis in evidence for the FTS to reject the appellant's evidence about his mobility, and it is not arguable that it materially erred in law.

Conclusion

25. There being no arguable ground of appeal on a point of law, permission is refused.

Lady Poole