

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 21 April 2015

DECISION OF THE TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. The decision of the appeal tribunal dated 21 April 2015 is not in error of law. Accordingly, the appeal to the Social Security Commissioners does not succeed.
2. This decision will come as a disappointment to the appellant. We, accept, as did the appeal tribunal below, that the appellant has a significant limitation in her vision. As will be explained below, however, a decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. Having considered the appeal we are satisfied that no error of law can be identified.
3. The basis on which we have reached our conclusion that there is no error of law in the decision of the appeal tribunal is unrelated to the comprehensive grounds of appeal which were advanced on the behalf of the appellant. We have not, accordingly, addressed those substantive grounds of appeal in this decision. We wish to acknowledge, however, the lucidity of the arguments advanced by the appellant's representative and the energy with which they were argued in written and oral submissions. We appreciate, in addition, the detailed and articulate responses made on behalf of the first and second respondents and the thorough contribution made to the appeal by the notice party.

Relevant legislative provisions

4. The mobility component of DLA is established by section 73 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 ('the 1992 Act'). So far as relevant, this provides:

73.—(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which—

(ab) he falls within subsection (1AB) below;

(b)....

(1AB) A person falls within this subsection if—

(a) he has such severe visual impairment as may be prescribed; and

(b) he satisfies such other conditions as may be prescribed.

5. Entitlement to the mobility component, as relevant to this case, is further refined by regulation 12(1A) to (1C) of the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992, as amended, ('the 1992 Regulations'). This provides:

12.—(1A) For the purposes of section 73(1AB)(a) (mobility component for the severely visually impaired) a person is to be taken to satisfy the condition that he has a severe visual impairment if—

(a) he has visual acuity, with appropriate corrective lenses if necessary, of less than 3/60; or

(b) he has visual acuity of 3/60 or more, but less than 6/60, with appropriate corrective lenses if necessary, a complete loss of peripheral visual field and a central visual field of no more than 10 degrees in total.

(1B) For the purposes of section 73(1AB)(b), the conditions are that he has been certified as severely sight impaired or blind by a consultant ophthalmologist.

(1C) For the purposes of paragraph (1A)—

(a) references to visual acuity are to be read as references to the combined visual acuity of both eyes in cases where a person has both eyes;

(b) references to measurements of visual acuity are references to visual acuity measured on the Snellen Scale; and

(c) references to visual field are to be read as references to the combined visual field of both eyes in cases where a person has both eyes.

...

6. The above provisions of regulation 12 of the DLA Regulations were inserted by regulation 2 of the Social Security (Disability Living Allowance) (Amendment) Regulations (Northern Ireland) 2010 from 11 April 2011 (SR 2010 No. 332, 'the 2010 Regulations').

Background

Initial decision-making in the Department

7. The appellant claimed DLA from the Department from 13 October 1998. She was awarded an entitlement to the lower rate of the mobility component and the lowest rate of the care component for an indefinite period.
8. On 28 April 2003, upon supersession, the award was increased to the lower rate of the mobility component and the middle rate of the care component from 6 April 2003 for an indefinite period. The Department refused further applications for supersession on 20 April 2010 and on 14 February 2011.
9. On 13 May 2014 the appellant again requested supersession, seeking an entitlement to the higher rate of the mobility component under the severe visual impairment criteria and attaching a certificate to show that she was registered as blind or severely sight impaired. The Department obtained a report from the appellant's general practitioner (GP) on 30 May 2014. On 24 June 2014 the Department decided on the basis of all the evidence that there were no grounds to supersede the existing award. The appellant appealed. In the meantime, the appellant made a further supersession request on 29 August 2014.

Proceedings before the appeal tribunal

10. After a hearing on 21 April 2015 the appeal tribunal disallowed the appeal.
11. The appeal tribunal's substantive reasoning on the claimed entitlement to the higher rate of the mobility component on the basis of satisfaction of the severe visual impairment criteria was as follows:

'In its further submission the Department wrote that (the appellant) did not satisfy the conditions of entitlement to the high rate of the Mobility Component on the grounds of a severe visual impairment as prescribed by the legislation because not all of the criteria were satisfied, namely that the appellant had a visual acuity of 6/12 in the right eye.

The Department took its figure for visual acuity from a certificate of blindness dated 27.01.2011 (with Tab 16). However this figure has been overtaken after further testing, the results of which were set out in a letter of 06.10.2014 from Moya McClure a specialist Optometrist, part of whose report stated:

“Compromise in central visual acuity is evident for (the appellant) as her distance vision measures 0.5 log MAR (6/18 Snellen) on 06.10.2014.”

The report continued “(The appellant) has no stereopsis as her left eye has only light perception”. Ms McClure’s report referred to extensive academic studies which showed that the visual defect was a better predictor of quality of life than visual acuity.

Plainly, the appellant has very poor vision. However, the Department had attached to its further submission an Upper Tribunal judgment of Judge Green – CDLA/3065/2013. It was clear from the authority of this judgement that the Tribunal had no discretion to do other than to refuse the high rate of the mobility component where there was clear evidence that, even in one eye, visual acuity was better than 6/60.

Mindful of this authority the Tribunal refused the appeal on the grounds of severe visual impairment.’

12. The appeal tribunal also considered whether the appellant could satisfy the conditions of entitlement to the higher rate of the mobility component under section 73(1)(a) of the 1992 Act, as a result of problems associated with chronic fatigue syndrome and the conditions of entitlement to the highest rate of the care component but decided that there was no such entitlement. The conclusions and reasoning of the appeal tribunal on these issues were not challenged in the proceedings before the Social Security Commissioners.
13. The appellant applied to the Legally Qualified Panel Member (LQPM) for leave to appeal from the decision of the appeal tribunal and leave to appeal was granted by a determination issued on 8 September 2015.

Proceedings before the Social Security Commissioners

14. On 6 October 2015 the appeal was lodged in the office of the Social Security Commissioners.
15. The Department was directed to make observations on the appellant's grounds. Mr Hinton of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the appeal.
16. The appellant's grounds had alleged a violation of her rights under Article 1, Protocol 1 and Article 14 of the ECHR. Arising from this, she submitted that a devolution issue arose in the case, under section 24 of and Schedule 10 to the Northern Ireland Act 1998. She submitted that there was a requirement that the Attorney General for Northern Ireland, the Advocate General and the Executive Office should be notified accordingly. The Department responded to submit that no devolution issue arose.
17. On 8 November 2016 Commissioner Stockman ('the Commissioner') held an interlocutory hearing on the issue of whether a devolution issue arose in the appeal. Mr White of counsel appeared for the appellant. Mr McKeown of counsel appeared for the Department.
18. Following the hearing, the Commissioner concluded that a devolution issue arose in the appeal, namely whether the 2010 Regulations were invalid by reason of section 24(1)(a) of the Northern Ireland Act 1998. He directed that a notice of a devolution issue should be issued.
19. Notice of a devolution issue was given to the Attorney General and to the Advocate General on 12 December 2016. Following the issuing of the notice of a devolution issue, on 12 January 2017 the Attorney General applied to be joined as a notice party to the proceedings. The Commissioner directed that he should be joined as a notice party with the right to make written submissions and to appear and be heard at any oral hearing of the appeal.
20. The Commissioner directed an oral hearing of the appeal.
21. Subsequently, on 20 January 2017, solicitors on behalf of the Advocate General wrote to apply for the Department for Work and Pensions ('the DWP') to be joined as a party to the appeal. On 23 January 2017 the Commissioner directed that the DWP should be joined as a party to the appeal.
22. On 20 January 2017, in the light of these developments in the case, the Commissioner sought a direction from the Chief Commissioner under Article 16(7) of the Social Security (NI) Order 1998. The Chief

Commissioner determined that the appeal involved a question of law of special difficulty and, on 24 January 2017, directed that the appeal should be dealt with by a tribunal consisting of three Commissioners.

23. The appeal was first listed for oral hearing on 28 February 2017. The appeal was adjourned to enable the first and second respondents to provide additional materials relevant to certain of the issues arising in the appeal.
24. The substantive oral hearing of the appeal took place on 17 and 18 October 2017. The appellant was represented by Mr White from the pro-bono unit of the Bar Library. The first and second respondents were represented by Mr Wolfe QC. The notice party was represented by Ms Maura McCallion.
25. On 22 February 2018 a further direction was issued by the Chief Commissioner on behalf of the Tribunal of Commissioners. This direction noted the medical evidence which had been before the Tribunal of Commissioners, including additional medical evidence which had not been before the appeal tribunal. The following direction was made:

‘I direct that the appellant’s representative provides a supplementary submission which addresses the relevance of all of the above materials to the conditions of entitlement to the higher rate of the mobility component of Disability Living Allowance (DLA) to be found in section 73(1)(ab) and (1AB) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, as amended and regulation 12(1A) of the Social Security (Disability Living Allowance) Regulations 1991, as amended.

The appellant’s representative shall have fourteen days from the date of issue of this Direction to provide the supplementary submission. The First and Second respondents and the Notice Party will then have a period of fourteen days in which to respond.

The parties to the proceedings should note that the Tribunal of Commissioners has not, as yet, made a determination as to whether any of the evidence adduced in proceedings before the Social Security Commissioners and which was not, accordingly, before the appeal tribunal, is admissible in the present proceedings.’

26. Supplementary submissions in response to the direction were received from Mr White on 30 March 2018 and from the Crown Solicitor’s Office on behalf of the first and second respondents on 30 May 2018. The notice party declined to make a response to the supplementary submission received on behalf of the appellant.

The submissions of the parties

27. The submissions on behalf of the appellant are summarised as follows:

- The appellant challenged the vires of the 2010 Regulations and argued that they were in breach of Article 1, Protocol 1 of the European Convention on Human Rights (ECHR) taken in conjunction with Article 14 (ECHR), and consequently had been enacted contrary to Section 24, Northern Ireland Act 1998.
- The Department of Health had three categories of 'severely visually impaired persons' – see the explanatory notes to the Department of Health document 'Certificate of Vision Impairment'.
- The appellant has Retinitis Pigmentosa (RP), is certified and registered as 'severely sight impaired' (a categorisation which used to be called 'blind') and fits into the Department of Health's third sub-category. 'Sight impaired' is the other categorisation used in relation to the classification of visually impaired persons (a category which used to be called 'partial sight') and it has 3 sub-categories of its own. The appellant's eyesight is worse than that found in the 'Sight Impaired' categories.
- The impugned Regulation, therefore, confers automatic entitlement to DLA mobility component (higher rate) on the first two sub-categories of 'severely impaired persons' but not on the third sub-category, the one to which the appellant belonged.
- Article 1 Protocol 1 is engaged by the fact that entitlement to a social security benefit is at issue: see, for example, *Stec v United Kingdom* (2006) 43 EHRR 1017
- Article 14 (ECHR) is engaged not least because in the Upper Tribunal Decision of CSDA/235/13 the Secretary of State accepted that Article 14 (ECHR) was engaged and "that the claimant's particular sight disabilities constitute a 'personal characteristic' conferring on her an 'other status' for the purposes of Article 14." [para 20] Additionally, the engagement of both Article 1, Protocol 1 and Article 14 does not appear to have been not doubted in the litigation leading to and including, *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58, for example.

- By including a limitation based on the Snellen test the impugned Regulation amounts to unjustifiable discrimination contrary to Article 1, Protocol 1 (ECHR) taken in conjunction with Article 14 (ECHR), because without any objective justification, they treat the appellant and the sub-category to which she belongs differently to the other two sub-categories by conferring automatic entitlement on the other two sub-categories but not on the third sub-category and/or because the approach taken in the Regulation to conferring entitlement to the DLA (high rate mobility component) utilises visual acuity scores (measured by reference to the Snellen test) which do not assess the extent of difficulty for the appellant in mobilising out-of-doors and which do not recognise the appellant's limited visual field, a condition of her RP.
- This failure to create a mechanism or process by which severely visually impaired person, such as the appellant (i.e. with RP and whose visual field, rather than visual acuity, is the more significant limitation in her vision and whose visual acuity out-of-doors is poorer than the Snellen test suggests) could have secured an award of DLA (high rate mobility component) amounted to *Thlimmenos* discrimination.
- The impugned Regulation creates a bright line rule which leaves the appellant inexplicably on the 'wrong' side of it, and whose impact is not ameliorated by any other mechanism or discretionary process by which she could alternatively apply for DLA (higher rate mobility component). No reasonable justification arises for treating the appellant differently to other categories of severely visually impaired persons or persons whose mobility out-of-doors is severely impacted by their limited vision.
- The approach adopted by the Department in devising the impugned Regulation will render it discriminatory if the distinction made in the Regulation between the appellant and other severely visually impaired persons who qualify by dint of their Snellen test scores (ie they belong to the other two sub-categories) is 'manifestly without reasonable foundation' and whether it is with foundation is to be subject to careful scrutiny [see *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58
- The Regulations have a negative or adverse impact on a group of disabled persons, namely that category of

severely impaired persons to whom the appellant belongs. She is registered as such, but unlike the other two categories of registered severely impaired persons cannot benefit from automatic entitlement. Nevertheless, the appellant's categorisation is a matter that is capable of being tested and measured and objectively assessed, as the evidence adduced for the purposes of the Appeal Tribunal hearing attests.

- There is no rational connection or reason for omitting the third category of blind persons, or at least, those such as the appellant who have severe visual impairment, but who 'fail' to fall into one of the automatic categories on the basis of their Snellen test scores. And certainly, no objective reason is offered in the DWP's Equality Impact Assessment (EIA), nor in the Explanatory Memorandum to the impugned Regulations, nor can one have been offered at the time of the enactment of the enabling provision found in section 13 Welfare Reform Act (Northern Ireland) 2010.

- The impugned Regulation has been framed without any, or any adequate, regard for its impact on the appellant (a severely visually impaired person with RP). No alternative mechanism has been created or considered to reflect her circumstances and to allow her to qualify for DLA (higher rate mobility component) other than the usual method of qualifying. No coherent justification has been offered for the difference in treatment of the appellant and other severely visually impaired persons. Any inclusion of the appellant within the category of persons who would benefit from DLA (high rate mobility component) by dint of certification (or similar form of ophthalmic assessment) would be capable of robust, objective review and control.

- In the event that the Tribunal of Commissioners concluded that the impugned Regulation was outwith the competence of the Department, as limited by the Northern Ireland Act 1998, the Commissioners' relevant powers appeared to lie in section 81 of the Northern Ireland Act 1998.

28. The response on behalf of the first and second respondents is summarised as follows:

- The appellant's skeleton argument incorrectly uses the formulation "severely visually impaired' persons to describe the three groups described in the explanatory notes to the Department of Health document 'Certificate

of Vision Impairment'. "Severely visually impaired" is the language of the impugned Regulation is not the language of the publication, and the cross-referral of the term is confusing and incorrect. The language used in the publication is "severely sight impaired." Those who fall into this category may qualify for a certificate of vision impairment.

- The relevance of the categorisations in the context of the appeal is, in any event, unclear. If the intention is to ensure that it is recognised that the appellant has a severe sight impairment, that is accepted and acceptable. However, the relevance of the categorisations would appear to end there. They certainly have no linkage to the impugned Regulations.

- Any appeal to the Commissioner should relate to the decision of the Tribunal, and it should be directed to an error of law in that decision - Article 15 of the Social Security (Northern Ireland) Order 1998. At no point in the appellant's skeleton argument was any reference made to any error of law in the Tribunal's decision. Instead, the argument targeted the legality of the Regulations themselves. It was not at all clear what error of law, if any, lay within the scope of the appellant's appeal.

- It was impermissible to use the appeal process to challenge the Regulations in the way which was being suggested, having failed to raise any such challenge before the appeal tribunal, and having lost the case before the appeal tribunal on its merits. To permit the appellant to do so would allow the appeal to avoid the necessary connection to a "decision of the tribunal [which] was erroneous in point of law" (Article 15) and would necessarily engage the Commissioners in making fresh findings of fact and exploring new issues of law.

- Regulation 12(1A) does not permit any exercise of a discretion to disregard the appellant's Snellen Scale measurements, as the appeal tribunal held (para 8), a finding which is consistent with the decisions in CSDLA/235/13 and CDLA/3065/2013.

- It was not accepted that Regulation 12 (1A) is discriminatory.

- Having regard to how the appellant now presented her case for the first time it is accepted that Article 1 Protocol 1 is engaged, and that Article 14 ECHR is also engaged.

- However, Regulation 12 (1A) is not incompatible with Article 14 ECHR, read with Article 1 of the First Protocol, and if contrary to the Department's submission the Regulation creates any discrimination it is justified because its enactment was not manifestly without reasonable foundation.
- Even if the Commissioners decided that the appellant's vires and ECHR arguments contained an appropriate challenge to an error of law on the part of the Appeal Tribunal and are well founded in substance (despite the Department's contrary submissions), there was no remedy which the Commissioners could provide. To provide a remedy, the Commissioners would have to do more than simply disapply one or other provision of the Regulations. It would have to re-write them. It could not do so without making legislative policy choices, which would be likely to affect many other cases and have public expenditure implications.
- For the appellant it was contended that if the conclusion is reached that the Regulation was beyond the competence of the Department then "the Commissioners' relevant powers appear to lie in section 81 of the Northern Ireland Act 1998 (Powers of courts or tribunals to vary retrospective decisions)." The practical implications of this were not explained. Nowhere did the appellant explain how section 81 should be used to assist the appellant and provide a remedy.
- It could not be suggested that section 81 could be used to create an entitlement for the appellant where the legislators did not see fit to include one. Moreover, it could not be suggested that section 81 should be used to remove the entitlement to higher rate mobility component from those whose conditions satisfy the terms of the Regulations. If it was proposed to take any steps pursuant to section 81 there was an obligation within subparagraph 3 of that section to have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected.

29. The response on behalf of the notice party is summarised as follows:

- The first question is whether (the appellant) is in a relevantly similar situation to a person/the group who receives the higher rate mobility component on the basis of the visual acuity test.

- Are those whose poor visual function arises mainly from impaired visual acuity and those whose poor visual function arises primarily from an impaired field of vision in a relevantly similar situation as regards the impact of that visual function on their personal mobility? If those who pass the test set out in regulation 2 are more severely impacted then the situations are not relevantly similar, and (the appellant's) appeal falls at this stage.
- If the factual situation is found to be relevantly similar then it is clear that a condition such as retinitis pigmentosa is likely to be treated as an 'other status' which may attract discriminatory treatment for the purposes of Article 14.
- The second question, assuming this stage is reached, is whether the difference in treatment under which the appellant does not, but other persons with poor visual function do qualify as a result of regulation 2 is justified.
- An alternative way to look at (the appellant's) case is to focus on the decision to measure severe visual impairment by using the tool of visual acuity on the Snellen scale rather than by using a tool which is, so it is argued, appropriate for her condition. The argument would be that (the appellant's) situation is relevantly different and should be accommodated in the benefits system. Unlawful discrimination under Article 14 can arise from a failure within the benefits system to treat differently people whose situations are significantly different.
- Objective and reasonable justification involves consideration of whether the provision under challenge pursues a legitimate aim and is proportionate. The policy context is central to establishing the legitimate aim or objective and to enable a proportionality assessment.
- The primary legislation, section 13(4) of the Welfare Reform Act (Northern Ireland) 2010, left the policy choice to the Department as to how to define 'severe visual impairment' and as to what other conditions would be applied. The Department, in making the 2010 Regulations, made a policy choice to require certification as severely sight impaired or blind. In drawing up the test in the way that it did, it awarded the financial advantage to a subgroup of those who are so certified. The subgroup was selected by reference to a test of visual acuity.

- The reason for excluding those who are certified as severely sight impaired but who do not fall within the prescribed categories is that ‘they will have sufficient vision to enable them to be independently mobile in familiar places’.
- It is clear from the Supreme Court decision in R (Carmichael) v Secretary of State for Work and Pensions [2016] 1 W.L.R. 4550 that, in assessing the proportionality of a discriminatory measure in the social security system, the Commissioners should afford significant deference to the legislature’s policy choice, finding it unjustified only if the discriminatory treatment is ‘manifestly without reasonable foundation’ [R (Carmichael) at [38]]. The same deference should be applied to an assessment of whether there has been an unjustified exclusion of (the appellant) from the group defined as having a ‘severe visual impairment’ or a failure to treat (the appellant) differently from those whose visual acuity is poor.
- It is clear that the existence of ‘hard cases’ resulting from the application of a bright line rule does not render the rule invalid.
- If the appellant is able to establish that her level of visual impairment is relevantly comparable to those who qualify under regulation 2, then it may be that the justifications advanced, taken together, are sufficient as an adequate ‘reasonable justification’ for her exclusion from this provision. On the other hand, it would seem clear that applying a visual acuity test to (the appellant) which excludes her is not so justified whenever there is, or appears to be, no rational connection between that test and her demonstrable difficulties with mobility.
- If the appellant makes good her argument on vires (arising from the limitation in s.24 of the Northern Ireland Act 1998) then, subject to any additional argument by the appellant, no-one is entitled to benefit under the impugned provision. If the Commissioners were to reach this conclusion then the tribunal, in refusing the appellant’s claim, did not err in finding that (the appellant) was not entitled to the higher rate mobility component even if the tribunal mistakenly (on the appellant’s case) regarded regulation 2 as valid.

- In the absence of an argument from (the appellant) that the Commissioners can overturn the tribunal's refusal and award her the upper rate of benefit, the Commissioners have no power to make a decision on the vires of regulation 2 of the 2010 Regulations.
- It was common ground that the particular challenge to the vires of the 2010 Regulations was also a devolution issue under schedule 10 of the Northern Ireland Act 1998.
- If the Commissioners are empowered to answer a devolution issue then section 81 of the 1998 Act applies.
- If the Commissioners found that they could decide this devolution issue and hold that the Department did not have the power to make the regulation in question, they are empowered to remove or limit the retrospective effect of that decision or to suspend the effect of that decision.
- Schedule 10, paragraph 8 to the 1998 Act empowers the Commissioners to refer a devolution issue to the Court of Appeal for decision but, unlike in the case of a tribunal from which there is no appeal, they are not required to do so. This suggests that a decision can be made by the Commissioners (where they have the power to do so) with the safeguard being that such a decision is subject to appeal.
- Schedule 10, paragraph 37(2) also presupposes a power to make a decision on the devolution issue, providing a power to both courts and tribunals to award costs no matter what decision is made on the issue itself.
- Neither section 81, nor the above provisions of schedule 10 however go so far as to provide the Commissioners with a free standing jurisdiction to decide any devolution issue which arises. The jurisdiction to decide is determined on the traditional analysis. The Commissioners are therefore only empowered to decide this devolution issue if the conclusion reached will impact on the decision on whether to award benefit. The jurisdiction to decide a devolution issue which is not material to the appeal is not conferred by the 1998 Act. The Commissioners are only empowered to refer the issue on for decision by the Court of Appeal. There is no alternative statutory basis for the Commissioners to decide a non-material devolution issue.

- Should the Commissioners decide that they do have the jurisdiction to decide the devolution issue which arises then the interpretation duty in section 83(2) of the 1998 Act applies. Where it is possible to read regulation 2 of the 2010 Regulations either as being valid or as being invalid by reason of (the appellant's) protected rights then the Commissioners must read the regulation as being valid.
- If the Commissioners consider that either they do not have the jurisdiction to decide the devolution issue, or that if they do, they decline to do so then they must consider whether to refer the issue to the Court of Appeal for decision. The Commissioners are afforded a discretion on this by paragraph 8 of Schedule 10 to the 1998 Act.

The medical evidence before the Social Security Commissioners

30. The following medical evidence formed part of the appeal submission which was prepared for the appeal tribunal hearing:

(i) GP Factual Report dated 12 January 2010 (Tab 9 of appeal submission)

GP notes that the appellant is 'registered blind, hand movements only left hand, limited visual field right eye'. Refers to an eye examination conducted in February 2008 'hand movements only left eye, vision 6/24 right eye, VA 6/9 limited field of vision'

(ii) EMP report dated 16 March 2010 (Tab 10 of appeal submission)

In 'Summary of medical history' it is noted that RP was diagnosed in 1994, registered blind since 1999 'has small amount of central vision right eye'. No sight examination conducted.

(iii) Certificate of sight impairment completed by consultant ophthalmologist 27 January 2011. Primary diagnosis right is 6/12, left 'HM'. Registered blind. Records 'yes' to 'extensive loss of binocular peripheral field'.

(iv) 'DLA 434 SUMM (A)' form (Tab 16 of appeal submission).

Final section completed by GP on 7 May 2014. Notes diagnosis of RP, registration as blind 'She has no vision

in her left eye, very limited central vision in right eye. She can't adjust to changes in light.'

(v) GP Factual report dated 30 May 2014 and extract from GP records detailing attendances and medication regime (Tab 17 of appeal submission)

This GP Factual report is handwritten and hard to read - 'left eye no vision. Right eye small central vision. Sensitive to lights.'

31. The following evidence was submitted in advance of first appeal tribunal hearing on 15 December 2014, which itself was adjourned:

(i) Letter from representative noting that appellant awarded ESA and in support group and attaching (a) correspondence dated 7 July 2014 from Miss Julie McDowell 'Low Vision Optometrist' University of Ulster (UU) and (b) final page from 'DLA 434 SUMM (A) form noted above.

Miss McDowell states that the appellant had attended the Low Vision Clinic since 2009 and notes the diagnosis of RP and registration as 'severely sight impaired'. 'On examination today I note that she has less than 10% peripheral vision, in fact this is measured as only 1%.'

(ii) Further letter from representative dated 9 October 2016 attaching (a) report dated 6 October 2014 from Ms Moyra McClure Lecturer (Optometry) UU and Specialist Optometrist and (b) 2 academic articles.

Ms McClure's report is detailed. It notes severe loss of visual field and effects of this on her mobility. The report sets out results of 'contrast sensitivity' measurements - '... a grading of 1.05 logunits, being a moderate loss on the Peli-Robson chart.' The report also notes 'Compromise in central visual acuity for Alison as her distance vision measures 0.5 logMAR (6/18 Snellen) on 6/10/14. The Snellen chart however is a poor measure of vision.' The report notes other effects of visual impairment on her ability to function.

32. The following medical evidence was made available at the substantive appeal tribunal hearing 21 April 2015:

(i) General Practitioner records

(ii) RNIB leaflet 'Understanding Retinitis Pigmentosa'

(iii) Medical questionnaire completed by the appellant's GP at the request of her representative and dated 31 March 2015.

There are generalised comments from GP about 'poor eyesight' and 'severe sight impairment'.

(iv) In the statement of reasons for its decision, the appeal tribunal noted that it had before it all of the evidence referred to above.

33. No medical evidence was attached to the appeal when received in the office of the Social Security Commissioners.
34. At the first oral hearing on 28 February 2017, the Tribunal of Commissioners was given a folder headed 'appellant's Hearing Bundle'.
35. Section A of this bundle was headed 'Medical records and related material' and was stated to include:
 - Certificate of sight impairment 27/01/11 (as noted above in the evidence in the appeal submission)
 - GP's completed questionnaire 30/5/14 (as noted above in the evidence in the appeal submission)
 - appellant's GP attendance and medication record (as noted above in the evidence in the appeal submission)
 - GP's evidence at end of 'DLA 434 SUMM (A)' (as noted in the evidence in the appeal submission)
 - Report from Miss McDowell 7/7/14 (as noted above in the evidence submitted in advance of the first adjourned hearing)
 - Report from Ms McClure 6/10/14 (as noted above in the evidence submitted in advance of the first adjourned hearing)
36. Section C of the bundle provided to the Tribunal of Commissioners is headed 'Non- Case law Items referenced in the appellant's Skeleton Argument'. This section included:
 - The Department of Health 'Certificate of Vision Impairment: Explanatory Notes for Consultant Ophthalmologists'

- Four academic articles (as noted above in the evidence submitted in advance of the first adjourned hearing)
- Report dated 2 February 2017 from Ms McClure. This report contains the results of tests using the 'Humphrey Visual Field Analyser' on loss of visual field and summarised as showing '... approximately a 90% reduction in Alison's side vision.'

37. At the resumed oral hearing on 17 October 2017 we were provided with two further documents.

38. The first document was a report from an 'ICATS Ophthalmology Nurse Specialist, itself undated but making reference to an examination at a clinic on 9 December 2010. The report states:

'On examination today, visual acuity was 6/12 in the right eye with glasses and hand movements only in the left eye. Anterior segments appeared normal and both eyes are ??? Fundi examination shows advanced Retinitis Pigmentosa with Optic Disc Atrophy, ??? of the retinal vessels and widespread bone spicule pigmentation. There is a large area of atrophy around the macula in the left eye.

Visual fields were taken today. The right eye shows extensive visual field loss with just a central reservation of approximately ten degrees. The left eye was immeasurable due to advanced Retinitis Pigmentosa. The visual prognosis for (the appellant) is quite poor.'

39. The second document appeared to be a report of further visual field tests conducted in October 2014. The summary states that:

'If we are to accept that the Pattern Defect printout is the computer's best attempt to represent the true visual field status of a patient – then we can see from (the appellant's) field plot 02/10/14 that she has less than [sic] 10 degrees of central visual field with a high degree of reliability.'

Responses to the further direction of 22 February 2018

40. As was noted above, the direction of 22 February 2018 noted the medical evidence which had been before the Tribunal of Commissioners, including additional medical evidence which had not been before the appeal tribunal and made a direction seeking an additional submission from the appellant's representative.

41. The supplementary submission received from Mr White on behalf of the appellant was as follows:

'The conditions of entitlement in essence are:

a. 'a person is to be taken to satisfy the condition that he has a severe visual impairment if—

(a) he has visual acuity, with appropriate corrective lenses if necessary, of less than 3/60; or

(b) he has visual acuity of 3/60 or more, but less than 6/60, with appropriate corrective lenses if necessary, a complete loss of peripheral visual field and a central visual field of no more than 10 degrees in total.'

The relevant condition for the purposes of the appellant's appeal is, and has, been Condition (b). (This is because Retinitis Pigmentosa will have a much greater adverse impact on 'visual field' than 'visual acuity', as has been the case with the appellant. The appellant has greater 'visual acuity' than 3/60 - ie condition (a) - but it is the loss of her peripheral visual field and the narrowness of her central visual field that cause her mobility difficulties. That RP has this effect on a person diagnosed with it, and that the loss of visual field impacts significantly upon that person's mobility is supported by the academic articles found in Section C.

There are 2 elements to Condition (b):

(1) that the person has visual acuity of 3/60 or more, but less than 6/60 and

(2) that the person has a complete loss of peripheral field and a central visual field of no more than 10 degrees in total.

Note that the medical demonstrates that in her left eye she had no useful sight at all. See, for example, in the report of ICATS Ophthalmology Nurse Specialist 9 December 2010, where it is reported that '*The left eye was immeasurable due to advanced Retinitis Pigmentosa*'. And see also the GP's evidence at the end of DLA434 SUMM(A) which provides '*she has no vision in her left eye*'. As a result, the only question that arose about the appellant's eligibility for benefit under the terms

of the impugned regulation is whether her right eye satisfies the condition (b).

What the medical material demonstrates is that the appellant's eye sight in her right eye was as follows, at various diverse dates as set out below (The detail has been digested, in chronological order for convenience of cross-referral).

- ICATS Ophthalmology Nurse Specialist 9 December 2010 - 6/12 in the right eye – extensive visual field loss with a central reservation of approximately ten degrees
- Certificate of Sight Impairment 27/01/11 – ‘Primary Diagnosis Right – 6/12’ – ‘Extensive loss of binocular peripheral field’
- 7 July 2014 – Biometry Clinic, Ulster University, Julie Mc Dowell – Low Vision Optometrist - ‘on examination today I noted she has less than 10 [degrees] of peripheral vision, in fact this measured as only 1 [degree]. This is referred to as tunnel vision and makes mobility impossible, where she is unsafe for herself and others’
- Moyra McClure Report dated 6/10/14 – page 2, Snellen test as of 6/10/14 reads 6/18 but ‘RP has the most impact on visual field and as per the report from Dean Kennedy (optometrist), Alison’s visual fields show severe restrictions.’ As a result, this is the criteria used for classifying Alison ie ‘visual acuity of 6/60 or better but with a very reduced field of vision....’
- Moyra McClure Report dated 2 Feb 2017 – loss of visual field and ‘approximately a 90% reduction in Alison’s side vision.’
- Report of Dean Kennedy of interpretation of field printout – Summary – ‘...that we can see from Alison’s field plot 2/10/14 that she less than [sic] 10 degrees of central visual field with a high degree of reliability’. Mr Kennedy Optometrist was in this report analysing the data recorded in relation to the appellant’s eyesight recorded

in 2014 and assessing the true extent of her visual field.

What the above demonstrates – as does the full breadth of the medical material submitted and hence its relevance to the legal issues at hand - is that the appellant satisfies element (2) of the Condition (b).

What the appellant could not satisfy before the Appeal Tribunal was element (1) of Condition (b), because while her visual acuity was more than 3/60, it was not less than 6/60. Nor could she have met this element of the condition, it must be conceded, because her Snellen test measurement was greater than 6/60, for example, in the Certificate of Sight Impairment dated 27/01/11 and in the ICATS Ophthalmology Nurse Specialist of 9 December 2010 and in Moyra McClure's Report of 6/10/14.

The 'portion' or sub-element of Condition (b), element (1) therefore which impacts adversely upon her is that portion that reads '*but less than 6/60*'.

In short form then, this 'sub-element' of Condition (b) is the source of the alleged discrimination.'

42. The response to the supplementary submission on behalf of the first and second respondents was as follows:

'It is noted that the appellant's representative was directed to address the relevance of various identified documents and materials, having regard to the conditions of entitlement to the higher rate of the mobility component of Disability Living Allowance.

It is assumed that this direction recognises that in principle it is for the party submitting any particular evidential material to establish its relevance to any of the issues in dispute between the parties.

In the appellant's supplementary submission it has been properly acknowledged on her behalf at paragraph 2, that the impugned legislation provides two possible routes to satisfying the condition of 'severe visual impairment'. Those routes have been labelled (a) and (b).

Furthermore, it has been accepted on the appellant's behalf that although she suffers retinitis pigmentosa, the nature and extent of her visual impairment does not bring her within the parameters of either of the two routes which have been established to determine whether the

condition of severe visual impairment is satisfied (see paragraphs 3 and 8 of the appellant's submission).

In particular it has been accepted on behalf of the appellant that the various materials submitted on her behalf, demonstrate that the deficiency in the appellant's visual acuity is insufficiently severe to satisfy the conditions of entitlement. Specifically, it has been accepted that the appellant's visual acuity (measured using the Snellen test) has been found to be greater than 6/60 on a consistent basis: paragraph 8 of the appellant's submission.

At paragraph 7 of the appellant's supplementary submission, a more controversial point is made. It is said that "the appellant satisfies element (2) of the Condition (b)." It is presumed that "element (2) of the Condition (b)" is a reference to that aspect of the condition which requires the appellant to have "a complete loss of peripheral visual field and a central visual field of no more than 10 degrees in total."

Assuming this interpretation to be correct, it is submitted that the material relied upon by the appellant does not demonstrate that she has suffered a complete loss of peripheral visual field and has a central visual field of no more than 10 degrees in total. In her report dated 2 February 2017, Ms McClure describes the central visual field as 12 degrees in total in both the horizontal (8 degrees plus 4 degrees) and vertical (6 degrees plus 6 degrees) planes. In addition she states that the claimant meets the certification and registration criteria on the basis of satisfying the group 3 conditions which are a visual acuity of greater than 6/60 Snellen and a contracted field of vision, especially in the lower part of the field. The group 3 conditions are irrelevant to the DLA regulations.

To summarise, therefore, it is submitted that the relevance of the material submitted on behalf of the appellant as identified by the Chief Commissioner in his direction, is that it confirms for the Commissioners that the appellant fails to satisfy either of the conditions of entitlement.

The appellant's submission also asks the Commissioners to have regard to the material to support the view that in cases of RP, it is the loss of visual fields which is of most significance in terms of mobility (paragraph 3). It is accepted that this point is made in a number of places

within the materials, particularly amongst the academic articles found in Section C.’

The admissibility of the additional evidence submitted to the Social Security Commissioners

43. As noted above, additional evidence was submitted to the Social Security Commissioners which was not before the appeal tribunal below. We have highlighted the additional evidence which was submitted on behalf of the appellant but it is equally important to note that further evidence, in the form of a witness statement from a civil servant in the Department for Work and Pensions was sought to be adduced on behalf of the first and second respondents.
44. We have reminded ourselves of the principles applicable to the question of the admissibility of additional evidence before the Social Security Commissioners and the parallel appellate authority, the Upper Tribunal – see *DC v Department for Social Development (ESA)* ([2014] NICom 49), *AMcC v Department for Social Development (PC)* ([2015] NICom 12), *DG v Secretary of State for Work and Pensions (II)* ([2013] UKUT 474) and *SH v Secretary of State for Work and Pensions* ([2014] UKUT 574).
45. Concentrating on the additional evidence submitted on behalf of the appellant, we observe that, even if the evidence post-dates the decision under appeal, it is not precluded under Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998, if it describes circumstances obtaining at the time when the decision under appeal was made. Further, we are of the view that this evidence should be admitted in a human rights case such as this. We do not have to be definitive on that matter, however. That is because, for reasons which we set out immediately below, even if this additional evidence is admissible, it is of no assistance to the appellant in establishing entitlement to the higher rate of the higher rate of the mobility component of DLA on the basis of satisfaction of the severe visual impairment criteria.

Why we are disallowing the appeal

46. The outcome decision of the appeal tribunal was that the appellant was not entitled to the higher rate of the mobility component of DLA because she did not satisfy the severe visual impairment criteria set out in regulation 12(1A) of the 1992 Regulations. We remind ourselves that regulation 12(1A) has two limbs and that the second of these, limb (b), is that the claimant has visual acuity of 3/60 or more, but less than 6/60, with appropriate corrective lenses if necessary, a complete loss of peripheral visual field and a central visual field of no more than 10 degrees in total.
47. Mr White’s challenge is to the ‘Snellens’ related part of regulation 12(1A)(b). It is the case, however, that to gain entitlement to the higher rate of the mobility component, the appellant has to satisfy the remainder

of limb (b) which requires her to meet conditions about both her peripheral visual field (a “complete loss” is required) and her central visual field (a restriction to no more than 10 degrees in total is required).

48. In our view, following a review of all of the evidence which was before us, including the additional evidence which was not before the appeal tribunal, that evidence does not demonstrate a “complete loss” of peripheral visual field. In a “certificate of sight impairment”, completed by a consultant ophthalmologist on 27 January 2011, there is a reference to an “extensive loss of binocular peripheral field”. In a further report of 7 July 2014 by the Low Vision Optometrist at the University of Ulster, the conclusion is that the appellant had less than 10% peripheral vision and, in fact, her peripheral vision had been measured at 1%. There is no indication as to how this latter figure has been arrived at. We prefer the report of Ms McClure dated 2 February 2017 on the issue of the extent of loss of peripheral visual field. Ms McClure sets out the specific measurements taken, concluding that there is a 90% reduction in the appellant’s side vision which we take from the context as equating to peripheral vision. A 90% reduction, though doubtless highly disabling, cannot be described as a “complete” loss.
49. We are of the view that the word “complete” leaves little scope for flexibility and we incline to the view that not even a reduction to 1%, the most favourable measurement to the appellant’s case, could be so described. As such, the appellant cannot satisfy a key requirement of regulation 12(1A)(b) and cannot, therefore, get to a point where all that remains for her to prevail is a successful challenge on human rights grounds to the 6/60 Snellens requirement.
50. As regards her central visual field, it is also arguable that she has failed to show the necessary restriction to no more than 10 degrees in total is required. In 2010 the “central reservation” was of “approximately 10 degrees”. Given that the legislation imposes a bright line requirement to show less than 10, that is not of itself good enough. As was noted above, we were provided with a copy of a report dated 17 October 2017 from Dean Kennedy, an Optometrist, and headed “interpretation of field printout”. The conclusion in that well-reasoned report was:

If we are to accept that the Pattern Defect printout is the computer’s best attempt to represent the true visual field status of a patient – then we can see from (the appellant’s) field plot 02/10/14 that she has less than [sic] 10 degrees of central visual field with a high degree of reliability.’

51. We cannot ignore that this summation is predicated on accepting that the Pattern Defect printout is the computer’s ‘best attempt to represent the true visual field status of a patient’. It is difficult, therefore, to accept that without more. Indeed Mr Kennedy himself writes that “the Pattern Defect “trys” (sic) to compensate for generalised loss and reveal defects that

may otherwise be missed". We have noted, in addition, that Ms McClure's second report of 2 February 2017 describes the reduction in central eyesight as "moderate".

52. Ultimately though, we are of the view that the central visual field need not be the determinative issue, as the evidence does not demonstrate a "total loss" of peripheral visual field.

(signed): K Mullan

Chief Commissioner

O Stockman

Commissioner

C G Ward

Deputy Commissioner (NI)

4 April 2019