

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

CPIP/2306/2015

Before Upper Tribunal Judge Gray

Decision

Decision: This appeal by the claimant succeeds. Having given Permission to appeal on **25 August 2015** in accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting at **Cheltenham** and made on **10 March 2015** under reference **SC 189/14/00534**.

I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

REASONS

Background

1. This case concerns the potential entitlement to a Personal Independence Payment (PIP) of a young woman aged 25 at the date of claim, who from her very early childhood has suffered impairment of her hearing described before me as moderate to profound. To her own credit and through the dedication of her parents she has learned to speak with clarity; she also has some ability to lip read. She wears bilateral hearing aids and at her parents home she has the benefit of the loop system.
2. She was previously in receipt of disability living allowance at the middle rate of the care component and the lowest rate of the mobility component. Then she was required to apply for PIP. She was awarded six points under the activities of daily living, insufficient for an award to be made, and no points under the mobility criteria. She appealed to the First-Tier Tribunal (FTT) which confirmed that decision.
3. The case before me has concerned daily living activities 7 and 9 which deal respectively with communicating verbally and engaging with other people face to face. A ground of appeal originally lodged in relation to mobility entitlement was not pursued before me, but in light of my decision may be renewed at the fresh hearing.
4. I granted permission to appeal on the basis of there being arguable points in respect of the two daily living activities that I have cited. The

Secretary of State filed a response accepting that there had been errors in the approach of the FTT, and advocating remission to a fresh Tribunal. The matter was then put before Upper Tribunal Judge Ovey for a decision or for further directions. She was of the view that, were the case to require remitting to the FTT the difference between the parties upon the issues before the Upper Tribunal was too great to make proper directions as to the approach of the fresh Tribunal, and she directed an oral hearing of the issues. Skeleton arguments followed and the oral hearing took place before me at the Rolls Building.

5. The appellant was represented by Ms Dyer of FRU (the Bar's Free Representation Unit); the Secretary of State by Ms Scolding of counsel. I am grateful to both of them for their legal arguments and their patience with my questions as the issues developed, which necessitated some thinking on their feet.
6. During the argument the Secretary of State indicated that permission to appeal had been granted by the Court of Session in the case of *MMcK-v-SSWP [2016]UKUT 0191(AAC)* (hereafter *MMcK*), a Scottish case cited to me. A short while after the hearing I notified the parties that Upper Tribunal Judge Hemingway had granted permission to appeal in the case of *GH -v- SSWP (PIP) CPIP/65/2016 (GH)*. Separately permission had also been granted in *AH-v-SSWP [2016] UKUT 276 (AAC)*, a decision of Upper Tribunal Judge Humphrey. I asked for the parties views as to whether this case should be stayed pending those matters. Both parties wanted me to decide the case. The appellant understandably wishes for a decision; the respondent indicates that a further judicial view may be of assistance to the Court deciding those other cases.

The issues before me

7. I will summarise these in relation to each of the descriptors which were in contention, but initially I will set out the relevant legal provisions. All references are to the Social Security (Personal Independence Payments) Regulations 2013. The activities used to assess the level of need are set out in schedule 1 to those regulations and the interpretation of phrases used are set out either in the schedule or in regulation 2.

Activity 7

Communicating verbally

a can express and understand verbal information -0 points

b need to use an aid or appliance to be able to speak or hear -2 points

c needs communication support to be able to express or understand complex verbal information 4 points

d needs communication support to be able to express or understand basic verbal information- 8 points

EG v Secretary of State for Work and Pensions (PIP)

e cannot express or understand verbal information at all even with communication support-12 points

Relevant Interpretation

"basic verbal information" means information in C's native language conveyed verbally in a simple sentence

"complex verbal information" means information in C's native language conveyed verbally in either more than one sentence or one complicated sentence

"communication support" means support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into an non-verbal form and vice versa

Activity 9

Engaging with other people face-to-face

a can engage with other people unaided -0 points

b needs prompting to be able to engage with other people- 2 points

c needs social support to be able to engage with other people -4 points

d cannot engage with other people due to such engagement causing either-

(i) overwhelming psychological distress to the claimant; or

(ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person -8 points

Relevant Interpretation

"unaided" means without-

(a) the use of an aid or appliance; or

(b) supervision prompting or assistance

"aid or appliance"

(a) means any device which improves ,provides or replaces C's impaired physical or mental function; and

(b) includes a prosthesis

"supervision" means the continuous presence of another person for the purpose of ensuring C's safety

"prompting" means reminding, encouraging or explaining by another person

"assistance" means physical intervention by another person and does not include speech

"engage socially" means-

- (a) interact with others in a contextually and socially appropriate manner;
- (b) understand body language; and
- (c) establish relationships

"social support" means support from a personal trained or experienced in assisting people to engage in social situations

Regulation 4

"Assessment of ability to carry out activities".

4(2A) where C's ability to carry out an activity is assessed, C is to be assessed as satisfying descriptor only if he can do so-

- (a) safely
- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period;

(3) omitted

(4) in this regulation-

(a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;

(b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and

(c) "reasonable time period" means no more than twice as long as the maximum period that person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity.

Regulation 7

Scoring.

7-(1) the descriptor which applies to C in relation to each activity in the tables referred to in regulations 5 and 6 is-

- (a) where one descriptor is satisfied on over 50% of the days of the required period, that descriptor;
- (b) where two or more descriptors are each satisfied on over 50% of the days of the required period, the descriptor which scores the higher or highest number of points; and
- (c) when a descriptor is satisfied on over 50% of the days of the required period but 2 or more descriptors (other than a descriptor which scores 0 points) are satisfied her periods which, when added together, amount to over 50% of the date of the required period-

(i) the descriptor which is satisfied with a greater or greatest proportion of days of the required period; or,

(ii) where both or all descriptors are satisfied to the same proportion, the descriptor which scores the higher or highest number of points.

(2) for the purposes of paragraph (1) the descriptor is satisfied on a day in the required period of it is likely that, if she had been assessed on that date, but it would have satisfied that descriptor.

Regulation 7 (3) refers to the required period and is not in issue this case.

The relevant FTT findings

8. The findings were set out fully and clearly in the statement of reasons, and they were explained. In awarding the six points, four under activity 7 (c) and two under activity 9 (b), the FTT found as follows. I quote the material parts of certain paragraphs only.

22. Her hearing loss is not variable but her ability to manage it depends on external factors. She has difficulty coping in a group situation with more than one person speaking at a time, or where there is environmental noise. She avoids busy and noisy venues and groups of people she does not know well.

24. She has difficulty making and taking telephone calls on her mobile or landline. Her ability to hear with her hearing aids can be compromised by the line quality or an accent. She can use her iPhone to send texts and uses Whats App and the Internet.

29. Her assessment of her need underestimates her ability and on occasion her inability stems from a preference not to undertake an activity rather than an inability to do so. For example she prefers not to travel alone, and to have help shopping, but she is able on her own evidence to do this unassisted on a reasonably regular basis. Despite everything she has achieved, she feels vulnerable and articulates concern about the prospects of maintaining her independence..... we found that the inconsistencies in her evidence were a reflection of her lack of confidence and anxiety rather than a lack of credibility.

35. She does not have difficulties understanding people she knows or unfamiliar people unless the environment is problematic or they have a strong accent, or mumble.

9. In conclusion the tribunal found that despite the environmental difficulties identified the appellant was able to understand basic information for the majority of the time by a combination of her hearing aid and her ability to see, read and write, together with the application of her cognitive and intellectual faculties to a situation. The telephone was, it was considered, one infrequent method of communication and she had other means at her disposal.

10. In their application of regulation 4 the focus of the Tribunal's reasoning in relation to activity 7 was as to the appellant's safety, which they found not to be significantly compromised.
11. In relation to activity 9, the Tribunal's position was that there were limitations on the appellant's ability to socialise, but they did not find that she was *only* (emphasis in the original) able to socialise with support of most of the time. Noisy venues such as clubs and restaurants, were not her environment most of the time. The tribunal noted that she demonstrated an ability to socialise unsupported with her family, friends and work colleagues and her Support Worker. Whilst there could be embarrassment from misunderstanding or missing a communication that did not amount to an inability to carry out the function most of the time. She did not have any difficulties understanding the behaviour of others or reading body language, aspects relevant to the descriptor due to the definition of 'engage socially' in the schedule.
12. Despite the care it had taken it was common ground before me that there were flaws in the approach of the FTT. The parties diverged as to the correct way forward.
13. I was further agreed that, due to ambiguity I was entitled to take into account extraneous material to interpret the intent of Parliament, and certain government consultation documents were provided for me to consider.

The appellant's arguments

Activity 7

14. The appellant contended for activity 7(d) because of the difficulties which arose from environmental issues, noise and other factors which interfered with her hearing aids, and the difficulties that she had in groups and on the telephone. These made communication problematic even at a basic level due to uncertainty; the appellant was not repeatedly able to communicate to an acceptable standard.
15. She argued that there was no need for a finding as to how often she would be in a difficult environment; because of the application of regulations 4 and 7 it was reasonably be expected that a person would be in a difficult environment more than 50% of the time. She relied upon the decision of Upper Tribunal Judge Hemingway in *TR-v-SSWP [2016] UKUT 626(AAC) (TR)* at [32] to the effect that if someone was affected for more than a trivial part of a day that day counted towards the 50%. She said that other than by organising her life to avoid such difficult environments it was inevitable that she would be so affected daily, and avoidance was not genuine choice; it was dictated by the difficulties which her disability created.

16. As to the telephone, she said that it would be usual to expect a person to speak on the telephone for part of each day. She avoided doing so because of her physical impairment and, despite it often being the communication means of choice for younger people the ability to use telephone functions such as WhatsApp or text was not relevant to the descriptor concerning verbal communication.

Activity 9

17. As to the satisfaction of descriptors 9b or 9c, prompting as opposed to social support, she put forward these propositions in the light of the definitions:

- (i) Entry into activity 9 can derive from a hearing impairment.
- (ii) Engagement must be looked upon with people generally, not just people who are well known to the claimant
- (iii) The issue is the reasonable need for social support, not whether or not it is in fact given
- (iv) The social support does not need to be given at the moment of engagement
- (v) Social support differs from prompting only in relation to the quality of the person providing the support; there is no need for a qualitative difference as to the support itself

18. Propositions (i) (ii) and (iii) were not contentious. Propositions (iv) and (v) were the subject of conflicting decisions in the Upper Tribunal.

The conflicting decisions

19. As to (iv) the appellant relied in particular upon the judgement of Upper Tribunal Judge Mark in *PR-v-SSWP [2015] UKUT 584 (AAC)*. at [31] in which he identified the appropriate question as being *not "were they there at the time of the engagement?" but "would have the claimant has been able to engage with other people without the social support she received?"* .

20. Proposition (v) had provoked similar conflict. She argued, in addition to citing Upper Tribunal decisions in the cases of *MMcK* and *GH* that the terms of the example given in the Government Response to the consultation in relation to the PIP Activities (at page 71) "*May apply to people who are only able to interact with others by the presence of a 3rd party*" meant that the person may not be present.¹

21. Prompting means reminding, encouraging, explaining, but those concepts could also amount to social support if they needed to be provided by someone trained or experienced; the regulations do not define support but its normal meaning is to give confidence or comfort.

22. She suggested that the two concepts were not qualitatively different, and the FTT had accepted that she needed prompting, but the evidence pointed to whatever help was provided needing to come from

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181181/pip-assessment-thresholds-and-consultation-response.pdf

someone who was experienced or trained. [Page 95 of the FTT bundle, the statement of Ms P, a hearing impaired worker]. The references in the Statement of Reasons at [43] to misunderstandings and embarrassment suggest that she needs social support from someone experienced with her personally and not just communication support.

23. She pointed out that communication support under activity 7 at a basic level scored eight points whereas social support under activity 9 merited only four, which added weight to the argument that social support did not necessarily have to be provided at the time of engagement, since it should merit more points if that was necessary.

The position of the Secretary of State

Activity 7

24. Ms Scolding agreed that there were errors in the approach of the FTT to activity 7. The appellant's overall communication abilities had been assessed, including lip-reading, but there were policy reasons why that should not be taken into consideration because it is not seen as an adequate mechanism to understand what is being said.
25. She said that there was an issue, best determined by a fresh FTT, as to whether the appellant did indeed have communication difficulties every day to more than a trivial extent, following *TR*. An investigation needed to take place as to whether her choosing quieter environments was genuine choice or whether the position been foisted on her because of her hearing impairment.

Activity 9

26. Ms Scolding accepted that it was possible for someone to score under both activities 7 and 9, as confirmed by Upper Tribunal Judge Rowley in *HB-v-SSWP (PIP) [2016] UKUT 160 (AAC) (HB)* but put forward three reasons to disagree with that being the position in this case.

- (i) On the facts her difficulties are within 7 and not 9
- (ii) The line of authority on prompting versus social support suggests a material distinction not just in the identity of the person but the quality of the support; and
- (iii) The social support does need to take place at the time of the engagement.

27. Of cases which decided otherwise, in *MMcK* permission to appeal has been granted by the Court of Session; the grounds of appeal being essentially

- (i) The 'qualified person' must be there
- (ii) Social support is qualitatively different from prompting.

28. The matter was then also before the Upper Tribunal for permission to appeal to the Court of Appeal in Judge Hemingway's decision in *GH*. She relied upon the decisions in *HB* at [27], *SL-v-SSWP (PIP) [2016] UKUT 147(AAC)* and *CPIP/1861/2015* [21 to 25 and at 24 quoting Judge Parker] to support the argument that in this context social support must be active intervention beyond prompting or descriptors b and c would merge; it must be intended that to mean more than just having someone with you who is trained or experienced.
29. Ms Scolding used as an example a person with cognitive difficulties who may need some encouragement from a friend or family member to attend a social event, or just a reminder about it. This could, she said, be an oral prompt at home, prior to the event to get ready and go out. If the prompt was required to the level established by the regulation 7 criteria, then descriptor 9 (b) applies and two points are scored, but where the disabled person needs to be accompanied to the event by a person qualified to give social support then the applicable descriptor is 9 (c).
30. She argued for a proper delineation between activities 7 and 9 and what they each assessed: social communication was not verbal communication; the support in activity 9 might be to deal with any social anxiety that existed because of difficulties in relation to the disability, but it could not replicate the communication support which had already been accounted for.
31. The FTT need to ask themselves what sort of person is this person, and where do their problems come from? Is the difficulty because they don't understand, or is it a measure of social anxiety arising from their impairment? Activity 7 deals with difficulties comprehending, activity 9 with problems of social context, functioning in a social environment, understanding social clues. She argued that the statement of Ms P, the hearing support worker at page 95 of the bundle conflated those issues.

My analysis

Lip Reading and Activity 7

32. The parties were in agreement that the appellant's ability to lip read should not be taken into account, nonetheless I felt that I needed to explore that aspect.
33. Ms Scolding explained that as a matter of policy it had been determined not to take lip reading into account. Albeit of use to some, as a practice it is beset with problems. Some people cannot be lip read with any ease or reliably (those with facial hair for example) and the result of lip reading in any event tended to be imprecise. The policy intention to ignore the ability is in effect an acknowledgement in advance that if an assessment were to be made of the ability to lip

read on the usual bases under regulation 4 it would, or should, be found unsatisfactory, so the enquiry need not be conducted. She accepted that the activity being silent on the point, the issue was for me to decide.

34. The title of activity 7 is 'Communicating verbally', and the term 'verbal information' is used in the descriptors. The drafters' choice of 'verbal', the immediate dictionary sense of which concerns words written or spoken, rather than the terms aural and oral, that is to say to do with the ability to hear and speak, may be thought to include within the ability to communicate verbally the augmentation of the spoken word by use to the written word. However in the original draft which went out for consultation activities 7 and 8 appeared together in one activity. The decision to separate them implies that the two activities are designed to deal with different issues. Activity 8 is headed 'Reading and understanding signs symbols and words'. The distinction appears to be that activity 7 tests communication by way of the spoken word, whereas activity 8 deals with written words and other written material.
35. I draw some support for that view from the decision of Upper Tribunal Judge Markus in *AT & VC –v-SSWP (ESA) [2015] UKUT 0445 (AAC); [2016] AACR 8* albeit that she was dealing with the Employment and Support Allowance Regulations 2008 which relate to sensory deprivation more generally, and in which lip reading is specifically included within the title of the activity. Judge Markus finds that the terms 'verbal' and 'non-verbal' communication relate, respectively, to the spoken word and the written word.
36. Lip reading is a way of trying to understand the spoken word. To disregard the ability entirely seems to me to go against the Secretary of State's general contention that the descriptors are a test of function which calibrates the level of disability as a whole, subject to the provisions of reliability under regulation 4 and the regulation 7 criteria.
37. Lip reading is mentioned neither in the activity itself, nor does it appear in the definitions; that is in contrast, for example, to Braille, which is defined as not being included in the meaning of the word 'read', used in activity 8. The omission is regrettable, given what I have been told.
38. My difficulty in relation to Ms Scolding's submission is that, save for the PIP Assessment Guide which states that lip reading is not to be taken into account but not why, there was no material before me to support her argument as to policy intent. I accept, however, the concession in this case, based on the approach that the reliability criteria are not met. That is in respect of this individual claimant, and it will apply at the re-hearing.
39. I have sympathy with the pragmatic approach to lip reading as it has been explained to me. I can see that it has advantages, both in the administration of the benefit as a whole, for bright line rules can in

appropriate circumstances aid the process, and also for individual claimants as, depending upon the level of deaf awareness by those making the decisions; someone who apparently has good lip reading ability may be credited with an overall ability which denies them the benefits of the rule 7 criteria as set out in the case of *TR*. However I cannot accept that the concession made in this case can be read into the PIP legislation without amendment to give that effect to it.

40. Pending any such amendment the Secretary of State might wish to make known the concession, either in individual cases where the issues arises or perhaps in open correspondence with the President of the Social Entitlement Chamber.

Other aspects of Activity 7

41. I look at the activity not in an isolated sense but given its place in the overall schedule assessment. It has some linguistic overlap with activities 8 and 9, as well as the overlap which I discuss here between activities 7 and 9, and potential, perhaps, for overlap with activity 8.
42. It shares with activity 8 the concepts of understanding basic and complex information. With activity 9 it shares the concept of being able to carry out certain descriptors with “support”. Communication support is relevant to activity 7; social support to activity 9, but those concepts have in common the fact that such support is defined in similar terms, to encompass support from a person trained or experienced in the relevant technique. Both terms are defined in the schedule itself. The structures of the 3 activities, 7, 8 and 9, are also broadly similar.
43. The title is integral to the activity, and important in understanding the descriptors. Activity 8 appears to be testing the ability of the claimant to receive information in the form of signs, symbols and words; that is to say, it tests a one-way process. Activity 7, however, appears to be testing not just a claimant’s ability to take in verbal information, but to express it as well. Communicating verbally is thus a two-way process.
44. The baseline descriptor for activity 7, a “can express and understand verbal information unaided” refers to the spoken word and does not include written communication. The wording of descriptor b, meriting 2 points, “needs to use an aid or appliance to be able to speak or hear” is not assessing the ability to communicate in writing. Under my analysis a text to speech machine, or even a mobile phone used for a similar purpose, which communicated information at least in part in written words to another person does not satisfy the concept of two way communication by way of the spoken word.
45. The ability to use a telephone to speak and hear, whilst not essential within the terms of the descriptors will take its place in the analysis of whether certain environments are avoided due to the impairment: for a

person with hearing impairment the telephone might create problems over and above the line difficulties that we may all experience, and the circumstances discussed in *TR* will come into play.

46. Given my analysis the FTT fell into error. The clear implication of the factual findings was that the appellant's hearing difficulties affected her ability to communicate in noisy environments, so she sought out quiet places. It assessed the level of her difficulties in communication overall, rather than by way of the spoken word, impermissibly including her abilities to see, read and write. Leaving aside visual issues, which are irrelevant if they go further than lip-reading which I have already discussed, the ability to read and write play no part in an assessment of communicating verbally under activity 7. Accordingly an ability to use the telephone for text functions is irrelevant, albeit that in practice it may enable effective communication.
47. In considering the appellant's ability to communicate, which may vary according to the conditions in which she finds herself, applying the principles set out by Judge Hemingway in the case of *TR* (in particular at [31-34]) there needs to be an examination of her regular and preferred activities and if during the course of a day they are impugned to more than a trivial extent she satisfies the descriptor on that day; however the assessment must be within the proper context. The PIP descriptors measure the level of disablement, and it is important that the extent of a person's disability is captured in the context of normal daily life and not a sheltered version of it that the disabled person has imposed upon themselves to make their life easier. The statement of reasons reads as if the appellant could and should avoid certain consequences of her disability, for example the difficulties communicating with people in a noisy public space, by choosing a quiet environment, and it assessed her on that basis. This is the wrong approach. To assess the true effect of the disability in performing an activity, steps routinely taken to make that activity possible or easier must be filtered out; if that does not happen the descriptors that deal with the type of help needed are not being compared with the baseline criteria of a person without a relevant disability who, using activity 7 descriptor a as an example, "*can express and understand verbal information unaided*". That descriptor does not envisage a person who is continually seeking out quiet locations in order to do so.
48. This approach is adumbrated in *TR*. The extent to which steps taken to get round practical problems caused by disability should be taken into account is also taken up by Upper Tribunal Judge Jacobs in *PE-v-SSWP [2015] UKUT 309 (AAC)* which involved consideration of Activity 6, dressing and undressing. He observed that the tribunal approach that the appellant could dress unaided if using simple pull on clothing was in effect to use his disability against him. Equally, an appellant cannot manufacture entitlement by being assessed dressing in clothes with numerous tiny fastenings. In the context of this appellant's disability it cannot be assumed that she is always in a noisy

environment; but if in living a normal life she would expect to meet friends in places where there was background noise, work in such an environment or travel by public transport which is invariably unquiet, then that must be taken into account. In fact because it is easier for her she may well prefer to frequent quiet places, but that must not be used against her by assuming less difficulty in the context of living a normal life than that to which an assessment of her disability in more varied environments would give rise. The precursor to this benefit, disability living allowance, had as its purpose enabling those with disabilities to live as far as possible as they would wish to had they not those disabilities, and I have no reason to believe that the philosophy behind PIP is markedly different.

49. So I agree with Ms Scolding that the appellant is to be assessed as to the extent of her difficulties in relation to her day-to-day activities on the basis that what she chooses to do is a result of genuine choice as opposed to what activities are comfortably available to her given her disability.

50. It is the task of the first-tier tribunal to decide what aspects of a claimant's daily life are attributable to choices made because of their personality or their disability. Somebody who says that they don't much care for outdoor activity but prefer to curl up with a good book may feel that way because the effort of walking is too great or because that is really how they want to spend their time. The issue is whether the choice is because of a person's inherent make-up or is due to how they have become. Where disabilities come later in life it may be easy to establish how somebody behaved before the disability and whether their preferences have changed. If they have changed then, in the absence of other very cogent factors, on the balance of probability that is likely to be because of their disability. If somebody has long-standing or congenital disability it may be harder to assess whether their preference might have been different but for that, however the tribunal is no place for deep philosophical debate given the evidential test of whether something is more likely than not.

The relationship between activities 7 and 9

51. The starting point in relation to activities 7 and 9 is the decision of Upper Tribunal Judge Rowley in *HB* to the effect that a person who scores points under activity 7 can score additional points under activity 9, but there is no automatic assumption that if somebody has point-scoring difficulties in relation to communicating that they must need some assistance engaging with others. Each case must be decided upon its particular facts, and the application of the principles in regulations 4 and 7. Ms Scolding explicitly supports that decision and the position that, subject to the satisfaction of the criteria under section 79 and 80 of the Welfare Reform Act that any difficulties arise out of physical or mental disablement, the activities in the schedule to the PIP Regulations are "impairment blind". I agree.

52. The interrelationship between the two activities, however, is not without difficulty. It will be the task of the FTT to disentangle the practical problems caused by the disability which relate to verbal communication and which have already been covered in activity 7 from any different difficulties encountered engaging with other people. Somebody who has hearing difficulties will not score again under activity 9 because her hearing problems cause problems conversing with others face to face in some environments, but she may score under that activity if her anxiety about those difficulties causes her problems interacting with others; she may then need prompting or social support to do so to the required standards.
53. The decision of Upper Tribunal Judge Jacobs in (*AM-v-SSWP [2017] UKUT 7 (AAC) (AM)*) explains that engaging with other people face to face concerns small groups, rather than dealing with crowds. He also, at paragraph [29] excludes considerations such as background noise. I should clarify, in the context of this appellant who has communication problems due to her hearing, that any problems which affect that due to those features can be considered under activity 7. So in the context of this appellant the FTT must isolate the ‘support’ she might need due to her not hearing or misunderstanding which has been accounted for within Activity 7, and any support she may need due to her anxiety as to those matters occurring, that is to say, support to give her the confidence to engage face to face, in a small group (*AM*). The difficulties being assessed under activity 9 are not the practical difficulties but any emotional difficulties engaging which may flow from them, or which are present but unrelated to any other disability.

Prompting

54. It will be recalled that prompting means reminding, encouraging or explaining by another person. It is not part of the appellant’s case that the needs she had under activity 9 could be carried out prior to a social event, so I do not need to decide the point but I note Ms Scolding’s concession.

What of social support?

55. As has been pointed out in other cases aspects of the activity as drafted are not defined, but “engage socially” means to interact with others in a contextually and socially appropriate manner; understand body language; establish relationships, and these considerations must be applied in relation to activity 9. (*SF-v-SSWP (PIP) [2016] UKUT 543 (AAC)*)
56. I agree that social support can be provided by friends or family (*SL-v-SSWP (PIP) [2016] UKUT 147 (AAC)*), but does the mere fact that the support is given by experienced friends or family or a trained person, convert what might otherwise be covered by the definition of prompting

into social support, and does social support have to be available at the moment of face to face engagement?

57. Some Upper Tribunal judges have decided that therapeutic work done with a person to enable them to engage socially at some later date is sufficient to engage activity 9(c) (for example *CPIP 1861/2015 and PR*) To my mind that a person has had or continues to have such therapy may be a helpful indication of the severity of their condition but it cannot of itself be taken into account to score points under activity 9. The specialism of those providing such services in advance cannot, in my judgement, amount to social support within activity 9 which relates to a need for help while the activity is being carried out.
58. In all other activities in the schedule the attention given to the disabled person is as it is being undertaken. Whilst activity 9 is more nebulous than others that does not necessarily demand a different approach. To restrict the attention to matters done in the physical presence of the claimant is logical in respect of the schedule as a whole. The converse approach, where 'behind the scenes' support is considered poses real difficulties as to the extent to which historical assistance can be included. The assessment is a calibration of functional problems at the date of claim with the application of the qualifying periods. It is an assessment of actual disability during the activity, not of the level of prior involvement required to get the person to the stage where they can engage alone.
59. The Secretary of State's concession as to prompting envisages a close nexus between a particular social event and the reminding or encouragement and not enhancing a person's confidence generally by longer term means.
60. As to the difference between prompting and social support one argument is that it is only the nature of the person which is the distinguishing feature. I do understand that is not an immaterial difference. In conditions such as autism familiarity may be critical to an ability to provide help, either because the autistic person may require it in order to respond, or because their difficulties may demand somebody with an understanding of them. The knowledge of a trained or experienced person may overcome some of those needs, whereas someone without either quality, however well-meaning, may be of no help at all. It is, therefore, a cogent argument that social support is the need for a trained experienced person, even if what they do is no more than prompting. However, I return to the schedule, the graduation of points, social support being double those awarded in respect of prompting, and Ms Scolding's argument that this interpretation would in effect lead to the merging of descriptors 9 b and 9 c.
61. In assessing that social support amounts to more than prompting, it has been said that moral or emotional support is envisaged, and I agree. In *CPIP/1861/2015* Upper Tribunal Judge West (at [23])

spoke about the difference between the two concepts being the need for there being something left over once the prompting element had been deducted from the attention given. I think that is helpful. He also, whilst not deciding whether or not it was essential, used a situation where physical intervention was needed as being a clear example of social support. It seems to me that, although physical interaction may not be a necessary component the concept of social support connotes something more personal and intimate than prompting. Envisaged is the willingness to step in during the course of a social situation, offering support by more than mere words, possibly by touch but certainly by physical presence. This is conduct that goes beyond prompting. However, I agree with Upper Tribunal Judge Parker in *CSP/203/2015* at [8] that there is no requirement for constant vigilance during the social engagement.

62. Further, it must not be overlooked that engagement may be possible without social support, but that support may be required for the face-to-face engagement to take place to an acceptable standard given the definition of “engage socially”. The fact that the support is not there, perhaps because it is not available, does not mean that it is not required. The FTT in this case seem not to have appreciated that distinction: points were not available to the appellant because the tribunal could not find that she was *only* able to socialise with support of most of the time. Her ability on occasion to engage socially to a standard which is less than that set out in the definition does not provide the full picture; what is being assessed is her ability to engage socially as that term has been defined.

63. I accept Ms Scolding’s position. I do not find Ms Daly’s argument (at [21]) as to the wording of the example in the consultation document definitive. The use of language in the document is generally imprecise, and the word “may” is used in every example. It seems to me that it is used simply in order to denote that the descriptor may or may not be applicable to a person in that situation, rather than to delineate as Ms Daly suggests.

The errors of the first FTT and the task of the fresh tribunal

64. I have referred to these in part. The clear implication of the findings was that the appellant’s hearing difficulties affected her ability to communicate in noisy environments, so she sought out quiet places. A judgment needed to be made as to the impact of those environmental difficulties, and such areas of verbal communication as using a telephone, in the light of *TR* and the application of regulation 7.

65. The FTT assessed the level of her difficulties in communication overall, rather than ‘verbal communication’ as I have interpreted the meaning of that, impermissibly including her abilities to interpret body language, read and write; an ability to read and write plays no part in an assessment of communicating verbally under activity 7. Accordingly

an ability to use the telephone for text functions is irrelevant even where it is helpful in practice.

66. The relevant aspect of regulation 4 under this activity is not the appellant's safety (4(2A)(a)), despite that being a feature of case law in relation to disability living allowance and hearing impairment (the reason, I imagine, that the FTT paid attention to it). The important PIP question is whether the appellant is able to understand verbal communication at either a basic or a complex level to an acceptable standard (4(2A)(b)); the extent to which she may mistake the information, or require something to be said again or explained differently will need to be probed. A need for explanation or repetition may mean that she is not able to understand the information within a reasonable time period (4(2A)(c)) but if that were so it would be unlikely that the communication would be to an acceptable standard.
67. They must remember that under activity 7 and activity 9 different types of support are being assessed and take care not to replicate communication support within their activity 9 considerations.
68. As to activity 9, the findings indicate that the FTT accepted a genuine psychological difficulty in aspects of her ability to engage with other people. In relation to what is said to be her preference not to travel alone is a reference to her lack of confidence and anxiety. The approach adopted seems to be an objective one that given what the FTT saw as her skill-set she should not feel that anxiety. That was no doubt well meant, but the assessment must be upon the basis of her feelings and the difficulties they cause her, if they are accepted as genuine.
53. I deal finally with the tribunal's conclusions from the fact that the appellant demonstrated an ability to socialise unsupported with her family, friends and work colleagues and her Support Worker. That does not translate into an ability to socialise unsupported with those she does not know. The activity refers to engaging with "other people". I accept Ms Daly's submission, which was not disputed by Ms Scolding, that this includes engagement with people other than those already known to her. I draw upon the meaning given to the term "social engagement" which includes establishing relationships. That envisages new relationships. Given the definition of 'engage socially' the quality of engagement is important, and the calibration of her need for prompting or support must reflect that level of expectation. Any abilities she has to engage in a lesser way may be helpful as a yardstick as to what assistance she might require to raise that engagement to the level as defined, but cannot amount to a satisfaction of the test.
54. I have considered Ms Daly's request to decide the matter myself. Regrettably I have to remit it for the consideration of a tribunal that

contains specialist members. There are findings to be made which will require their expertise.

55. She will be advised as to whether she is able to pursue any aspect of the mobility component in the light of the three judge panel decision in *HM-v- SSWP and others [2016] UKUT 331 (AAC)*. Although this was not pursued before me, she is entitled to argue it once more at the FTT. This is so despite the legislative change as to that aspect of the regulations which is to come into effect later this month, as her claim precedes it.

Directions

1. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.
2. The case will be listed as an oral hearing in front of a freshly constituted tribunal.
3. The appellant must understand that the new tribunal will be looking at how her hearing problems affected her day-to-day life at the time that the decision under appeal was made, 25 September 2014.
4. The new panel will make its own findings and decision on all relevant descriptors in the light of the matters set out in my decision.

Paula Gray
Judge of the Upper Tribunal

Signed on the original on 6 March 2017