

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No. CPIP/3656/2016**

**Before Judge of the Upper Tribunal Miss E. Ovey**

**Decision:** The decision of the First-tier Tribunal given on 7<sup>th</sup> October 2016 contained an error of law. Accordingly, I allow the claimant's appeal and I set aside the tribunal's decision. In exercise of the powers given by s.12(2)(b) and (3)(a) of the Tribunals, Courts and Enforcement Act 2007 I remit the case to the First-tier Tribunal and direct that it be heard by a differently constituted tribunal.

**REASONS FOR DECISION**

**Introduction and facts**

1. This is an appeal by the claimant against the decision of the First-tier Tribunal given on 7<sup>th</sup> October 2016. By its decision the tribunal dismissed the claimant's appeal against the decision of the Secretary of State made on 23<sup>rd</sup> February 2016 that he was not entitled to either component of the personal independence payment ("PIP") from 7<sup>th</sup> December 2015 (although the tribunal gave as the relevant date 15<sup>th</sup> December 2015). The effect was that the claimant's existing award of disability living allowance ended on 22<sup>nd</sup> March 2016.

2. Entitlement to PIP depends upon scoring a minimum number of points in accordance with the Social Security (Personal Independence Payments) Regulations 2013, S.I. 2013 No. 377 ("the Regulations"). Schedule 1 to the Regulations sets out 10 daily living activities and 2 mobility activities, in relation to each of which a series of descriptors is prescribed. Each descriptor has a specified number of points to be scored by a claimant who satisfies the descriptor. Regulations 4 and 7 make further provision about the conduct of the assessment and the application of the descriptors. Regulation 5 provides that a claimant who scores 8 points has limited ability to carry out daily living activities and a claimant who scores 12 points has severely limited ability to carry out daily living activities. Regulation 6 makes comparable provision as respects mobility activities. Where ability is limited, the claimant is entitled to an award of the relevant component at the standard rate, and where ability is severely limited, the claimant is entitled to an award at the enhanced rate.

3. It is not disputed that the claimant suffers from anxiety and depression and has done so for many years. The question is how it affects his ability to perform the daily living and mobility activities set out in Schedule 1 to the Regulations when assessed in accordance with the Regulations themselves.

4. In his PIP questionnaire dated 15<sup>th</sup> December 2015 the claimant said that in March 1994 he had been diagnosed with clinical depression, generalised anxiety disorder and symptoms of bipolar disorder. He identified his medication and said:

"The above medication is to help alleviate serious symptoms of depression (Dosulepin). The chlorpromazine is to help alleviate severe anxiety. It is also to help minimise

symptoms of psychosis, and the fear that this can bring. The side effects can be extreme daytime tiredness, dry mouth and poor motivation. However, there are times when the side effects are not always present.”

5. As respects the activities in Schedule 1, the claimant said:

- (1) he sometimes needed help from another person to prepare or cook a simple meal;
- (2) he sometimes needed help from another person to monitor his health conditions, take medication or manage home treatments;
- (3) he found it difficult to mix with other people because of severe anxiety or distress;
- (4) he sometimes needed help from another person in connection with going to somewhere he knew well.

6. He gave further information as follows:

“My ability to prepare food varies. When I am not as well as could be, I receive encouragement from family and friends. When I feel well, I feel really good and positive. This doesn’t last long, though, and deep depression reoccurs. This is very frustrating, but I have learned to accept it, and am aware that it will pass in time.” (p.11)

“I avoid other people as much as possible. I feel very anxious amongst others and feel as if I am being scrutinised. I leave my home as infrequently as possible. On the occasions where I do leave home I only feel relatively less anxious when I am back home. I do have days when I am less anxious amongst others, but the bad days far outweigh the good days.” (p.27)

“Being out can be an extremely anxious and distressful time for me. Once again, I only start to settle when I am back home. I have days when I can cope reasonably well with going out, but these ‘good’ days are far outweighed by the ‘bad’ days. This is very frustrating, as when I am feeling well, I cope reasonably well. I just wish I could feel reasonably well on a consistent basis.” (p.31)

“I was imprisoned in December 2014. I have been released on 4<sup>th</sup> December 2015. Obviously, prison was an extremely stressful time for me. Prior to going into prison, I was in receipt of employment support allowance and disability living allowance. For obvious reasons, I have now had to reclaim. Due to my ongoing mental health issues, I am finding it difficult to readjust to life out of prison. My feelings of worthlessness, anxiety, stress, depression and up and down feelings of well-being are now worse than ever. I take one day at a time ...” (p.34).

7. The claimant had a consultation with a health professional on 4<sup>th</sup> February 2016. The history of conditions in the report reads:

“Anxiety and depression diagnosed 1994 by GP. Current symptoms are low mood, poor concentration most days but he does not let it affect his daily life. Had Cognitive Behavioural Therapy 2000 but not effective. Has an appointment for counselling starting this month. Difficulties stem from childhood ... No thoughts of self harm. No support worker. Managed with medication, monitored by GP.”

In relation to current medication, the health professional noted “effective, side effect is drowsiness”, and as part of the social and occupational history she recorded “lives in a shared house after release from prison.”

8. The health professional advised that:

- (1) the claimant could prepare and cook a simple meal unaided (daily living activity 1). She noted that the claimant stated his girlfriend brought ready meals 2 or 3 days a week and he made sandwiches, something on toast or soup for himself the other days. She referred to the condition history and said that on the mental state examination she noted the claimant was fully orientated and did not require prompting, with adequate general memory and concentration and no apparent cognitive or sensory deficit.
- (2) the claimant could manage his medication unaided (daily living activity 3). The health professional again referred to the mental state examination.
- (3) the claimant could engage with other people unaided (daily living activity 9). She noted that he stated that he saw his probation officer weekly, saw his girlfriend regularly and was looking forward to being housed where he used to live, so that he could have regular contact with old friends. His interaction was normal, not restless or withdrawn. He coped well at interview, with normal manner, not anxious, agitated or tense, with adequate rapport and eye contact.
- (4) the claimant could manage complex budgeting decisions unaided (daily living activity 10);
- (5) the claimant could plan and follow the route of a journey unaided (mobility activity 1).

9. The Secretary of State in the decision dated 23<sup>rd</sup> February 2016 proceeded on the basis that the activities in issue were daily living activities 1, 3 and 9 and mobility activity 1. The decision was said to be based on the help the claimant needed most of the time, it being recognised that his needs varied. Given the advice received from the health professional, it is perhaps not surprising that the claimant was not awarded any points from any of the activities.

10. The decision was reconsidered on 17<sup>th</sup> June 2016, but was not changed. The claimant appealed by letter dated 11<sup>th</sup> July 2016. In that letter he stated that:

- (1) his girlfriend prepared a main meal for him every day;
- (2) his girlfriend had to prompt him to take his medication every day;
- (3) he struggled the most with engaging with other people. He had very high social anxiety and did not function at all in social situations, as a result of which he very rarely went out;
- (4) his girlfriend and other family members ensured that all his utility bills were paid.

He contended that the points which should have been awarded for those activities (i.e., daily living activities 1, 3, 9 and 10) qualified him for PIP.

11. Before the appeal was heard by the tribunal, the claimant was seen by a consultant psychiatrist, whose report was provided to the tribunal. In his covering letter the claimant stated that he was referred by the crisis team on 1<sup>st</sup> September 2016. The report itself, which is dated 15<sup>th</sup> September 2016 and is addressed to the claimant's G.P., stated:

“... As you may be aware, [the claimant] had self-referred an assessment ... The purpose of this review was to review his diagnosis.

On assessment today, [the claimant] told me that he has been feeling depressed and anxious for many years; however he felt that since April 2016 his symptoms have become more intense. He attributes this to the fact that after he had been released from prison, he went to Social Services requesting access to his family records. At that point, [the claimant] went through the history ... [he] felt that reading through the history has brought about distressing and sad memories from the past, and this he said impacted adversely on his mental health. He described experiencing regular panic attacks for the past 5-6 months. In addition he has felt increasingly low in mood with disturbed sleep and he has become socially withdrawn.

[The claimant] told me that in the past these symptoms were helped by Dosulepin hydrochloride which you have recently increased to 120 mg a day and chlorpromazine which you have kindly also increased to 50 mg OD to help improving his sleep...

...

On examination [the claimant] came across as casually dressed with good self-care. He engaged easily in our conversation however it was clear that [the claimant] felt very distressed while he was describing issues from his childhood experiences. There was objective evidence of symptoms of anxiety along with anger ... There was no evidence of psychosis at the time of this meeting. On enquiring about any suicidal thoughts, he denied any intention to end his life or harm himself.

In my opinion [the claimant] presents with symptoms of depression and anxiety with an underlying Emotionally Unstable Personality Disorder. ...”

### The tribunal hearing and reasons

12. The claimant attended the hearing on 7<sup>th</sup> October 2016 and gave evidence but was not represented. He described himself as a very anxious person but said that since his chlorpromazine had been increased he felt more settled and could get to sleep, although he still had thoughts and memories about his childhood. He was by then living on his own. He had a friend who had dropped him off at the tribunal hearing and similarly he got a lift to see his probation officer every fortnight. In the absence of a lift he would get a taxi; he would not get a bus because he felt people were looking at him. His sister drove him to a shop but his regular shopping was done by his brother-in-law and friend.

13. As respects engaging with other people, the claimant said he did not go out socially and felt anxious among other people. It was worse since he had come out of prison and seen the Social Services papers. In the past he drank and socialised with other people by being drunk. Now when he was with people he suffered panic attacks, in which he would go shaky and his heart would pound. He would wake up shaking. He went nowhere on his own. Most days of the week he could not cope. He was not OK in his house and was worse when he went out. When he came out of prison he lived for 15 to 16 weeks in bail accommodation where he had his own room. His girlfriend had left in early August; she could not be bothered with him. He wanted to be on his own. Alcohol was no longer a solution to dealing with his childhood experiences.

14. In response to specific questions about Daily Living Activities 1, 3, 9 and 10, the claimant said:

- (1) he ate microwaved meals. Anxiety, nerves and stress stopped him cooking.
- (2) he had had to be reminded by his then girlfriend to take his medication. Now his brother-in-law stored the medication and gave it to him. All the medication was to be taken in the evening;
- (3) mixing with other people was covered by the evidence already summarised;
- (4) his brother-in-law looked after his finances because of his anxiety, although on a better day he could pay bills.

15. By its decision, the tribunal determined that the claimant scored 6 points, as follows:

1. Preparing Food	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2 points
9. Engaging with other people face to face	c. Needs social support to be able to engage with other people.	4 points

As the tribunal stated, that score was insufficient to entitle the claimant to the daily living component of PIP. The tribunal went on to determine that the claimant did not score any points for mobility activities.

16. In its statement of reasons, the tribunal made a number of findings of fact and then continued:

“13. Descriptors in issue

Daily Living Component

(a) The Appellant said that at the time of his appeal his girlfriend ordinarily prepared his main meal. He emphasised his ongoing feeling of low mood and lack of motivation. We accepted his oral account that he relies on microwave meals and has ongoing stress and anxiety issues.

(b) Managing therapy

The Appellant said that at the time of the appeal he had to be reminded to take his medication by his girlfriend. That relationship has now ended. His oral account was that his brother in law has now assumed this role. However, we are mindful that the Appellant lives alone and his medications are all taken in the evening. He manages his own medication from standard packets. At the hearing he was able to recall the names of his medication and had good insight into his medication needs. At the hearing he was orientated in time, place and person.

(c) Engaging with others face to face

The Appellant emphasised that he has a high social anxiety. Moreover that he rarely goes out. He said that the diagnosis is chronic and long standing. We accept that the Appellant needs social support to be able to engage with other people. His sister takes him to shop at Matalan. He sees his Probation Officer every fortnight and gets a lift to the appointment. Social support means support from a person trained or experienced in assisting people to engage in social situations. The Appellant was anxious at the hearing, his relationship with his girlfriend has ended and it is likely that he has minimal contact with third parties.

(d) Making budgeting decisions

The Appellant said that at the time of the appeal his girlfriend made sure weekly utility bills were paid. But in his oral account he conceded that he would be able to pay his own bills when his mood is buoyant. We are mindful that the Appellant is living alone, is supporting himself independently having been rehoused after a share arrangement upon release from prison.

Mobility

(a) The Appellant emphasised his anxiety and panic attacks in terms of his problems with going out. He did not claim any functional physical restrictions. However, at the hearing he demonstrated adequate memory and concentration with no apparent cognitive or sensory deficit. He attended the Tribunal alone. He had good insight into his healthcare needs and symptoms. He is able to plan and follow a journey. We are particularly mindful that he had the wherewithal to make a self referral to First Steps and to pursue a referral to a Psychiatrist.”

### **The appeal**

17. The claimant sought permission to appeal against the tribunal’s decision by letter dated 9<sup>th</sup> November 2016. His principal ground was, in effect, that the tribunal had failed to apply the law as set out in *Secretary of State for Work and Pensions v. AM* [2015] UKUT 215 (AAC) (UK/5205/2014) in relation to Daily Living Activity 9 and that the appropriate descriptor was descriptor (d), which reads:

“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.”

Descriptor 9(d) carries 8 points, so on that basis the claimant would be entitled to the daily living component of PIP. The claimant also repeated that his brother-in-law paid his bills and asserted that his brother-in-law kept hold of his medication so as to prevent the risk of suicide.

18. The application for permission to appeal was refused by the district tribunal judge but was granted by Judge Lane. In giving permission, she stated that the claimant had raised an arguable point. She noted that the tribunal had identified a number of matters which indicated a level of successful engagement with others on a regular basis, but also pointed out that the tribunal had not explained what it made of some of the evidence relevant to daily living activity 9 or why it concluded that the claimant required social support.

19. The Secretary of State has made a detailed submission dated 14<sup>th</sup> February 2017 which does not support the appeal. The broad thrust of the submission is that the tribunal did make a mistake of law, since it did not make sufficient findings of fact and give sufficient reasons for its conclusion that the claimant satisfied descriptor 9(c), but that the evidence did not show that the claimant suffered overwhelming psychological distress when engaging with others, “as he clearly did so [*sc.* engage] at the date of the decision under appeal”. As I understand it, the Secretary of State submits that on the evidence the claimant was able to engage with others without prompting or social support and so should not score any points in respect of daily living activity 9.

20. In his observations in response dated 20<sup>th</sup> March 2017, the claimant repeats that he:

“cannot engage with others to an acceptable standard without significant psychological distress”

and asserts for the first time that the health professional told a pack of lies in her report.

21. In my view, the tribunal did make an error on a point of law in that it did not make sufficient findings of fact and give adequate reasons in relation to several of the activities in dispute, as explained below. In the absence of the necessary findings of fact, I am not able to substitute my own decision. I shall therefore set the tribunal’s decision aside and remit the matter to be determined by a differently constituted tribunal.

### **The required period**

22. Before I turn to specific activities, I draw attention to some general points. Under reg. 7(1)(a) of the Regulations, the descriptor which applies to a claimant in relation to each activity is the descriptor which is satisfied on over 50% of the days of the required period, if there is such a descriptor. Reg. 7(1)(b) deals with the situation where more than one descriptor is satisfied on over 50% of the days in the required period and reg. 7(1)(c) with the situation where no descriptor is satisfied on over 50% of the days but two or more descriptors are satisfied for periods which, taken together, total more than 50% of the days. Under reg. 7(2) a descriptor is satisfied on a day of the required period if it is likely that, if the claimant had been assessed on that day, he would have satisfied the descriptor.

23. As can be seen, it is therefore important to identify “the required period”. For present purposes, it is defined by reg. 7(3) as the period of three months ending with the prescribed date and the period of nine months beginning with the day after the prescribed date.

24. Regs. 12 and 13 also make use of the “required period” concept to comply with the requirement in ss.78 and 79 of the Welfare Reform Act 2012, which introduced PIP, that a claimant has to satisfy a required period condition to be entitled to the daily living component and the mobility component respectively. The required period condition is that (i) if the claimant had been assessed at every time in the period of three months ending with the prescribed date it is likely that the Secretary of State would have determined at that time that the claimant had limited ability to carry out the relevant activities and (ii) if the claimant were to be assessed at every time in the period of nine months beginning with the day after the prescribed date, it is likely that the Secretary of State would determine at that time that the claimant had limited ability to carry out the relevant activities.

25. Reg. 2 defines “the prescribed date” as the date prescribed by reg. 14 or reg. 15 (the latter of which only applies where the claimant has in the past had an award of PIP). This is, however, subject to reg. 24 of the Personal Independence Payment (Transitional Provisions) Regulations 2013, S.I. 2013 No. 387, (“the Transitional Regulations”) by which “the prescribed date” in regs. 12 and 13 means the date on which the claim is made in relation to a person entitled to disability living allowance who is seeking to transfer to PIP, either voluntarily or following a notification from the Secretary of State. Although reg. 24 does not refer to reg. 7 of the Regulations in addition to regs. 12 and 13, it seems to me that “the prescribed date” must be taken to have the same meaning in reg. 7 as in regs. 12 and 13.



26. I have referred above to material showing that the claimant was entitled to disability living allowance until his PIP claim was determined and it seems to follow that the required period in relation to his claim was the three months before the date of claim and the nine months after it. As his claim was made on 7<sup>th</sup> May 2015, the required period ran from 8<sup>th</sup> February 2015 to 8<sup>th</sup> February 2016.

27. The Transitional Regulations further provide by reg. 23 that a claimant with an existing award of disability living allowance is to be regarded as meeting the part of the required period condition in regs. 12 and 13 which applies for the three months before the prescribed date. In practical terms, then, the issue for the Secretary of State when considering the required period condition in regs. 12 and 13 in the present case was whether the claimant satisfied the condition during the nine months following 7<sup>th</sup> May 2015, although the effect of reg. 7 was that in determining that issue the Secretary of State had to decide which descriptor the claimant satisfied on more than 50% of the days in the full period from 8<sup>th</sup> February 2015 to 8<sup>th</sup> February 2016 (or how otherwise reg. 7 applied).

28. These provisions are not easy to follow and I have sympathy with the Secretary of State and the tribunal if, having observed that the claimant's conditions are long-standing, they decided not to grapple with the problems they pose. Unfortunately, there is material in the papers to suggest that the claimant's condition was not static between 8<sup>th</sup> February 2015 and 8<sup>th</sup> February 2016, or thereafter. In his questionnaire, the claimant referred to the stressful nature of his time in prison and went on to say he was finding it difficult to adjust to life out of prison and that some of the feelings characterising his mental health condition were worse than ever. There is also the question when the claimant obtained his papers from Social Services and at what point that led to the deterioration to which he refers. The psychiatrist's report refers to increased medication (see p.85 of the bundle), although, confusingly, when the stated dosage is compared with the dosage stated at p.9, the Dosulepin seems to have been decreased rather than increased.

29. I note also that there is no material to explain what abilities the claimant showed in relation either to daily living or mobility activities during his time in prison. In my view, in all the circumstances, it was necessary for the decision maker and the tribunal to identify the required period and to address the question what the available material showed about the claimant's abilities during the nine months after the date of claim. That is all the more the case in the light of what follows below.

### **Daily living activities**

#### *(a) Preparing food*

30. Turning now to activity 1, the tribunal decided that the claimant needs to use an aid or appliance to be able to either prepare or cook a simple meal. There is no finding of fact showing what aid or appliance the claimant needs, in the view of the tribunal. The best explanation for the decision that can be identified is that set out in paragraph 13 of the tribunal's statement of reasons, namely, that the tribunal accepted that the claimant relies on microwave meals and has ongoing stress and anxiety issues.

31. The phrase “aid or appliance” is defined in reg. 2 of the Regulations as a device which improves, provides or replaces the claimant’s impaired physical or mental function and as including a prosthesis. I have seen no reference in the papers to any such device, since a microwave clearly does not fall into that category. I recognise that descriptor 1(c) provides that a claimant who cannot cook a simple meal using a conventional cooker but is able to do so using a microwave also scores 2 points and accordingly any error on the tribunal’s part in referring to descriptor 1(b) might be immaterial if the claimant satisfies descriptor 1(c). That descriptor, however, requires that the claimant be able to cook “a simple meal”, which is defined in Part 1 of Schedule 1 as “a cooked one-course meal for one using fresh ingredients” (a point made in *LC v. Secretary of State for Work and Pensions (PIP)* [2016] UKUT 150 (AAC)). The tribunal made no findings of fact as to what the claimant cooked in the microwave, and the point was not explored in his oral evidence. In his previous evidence to the health professional he referred only to cooking something on toast or soup. In my view it is not possible to be confident that the claimant satisfies descriptor 1(c). His evidence that he has stress and anxiety issues was, however, accepted by the tribunal and in giving that evidence he said that his anxiety, nerves and stress “stopped me cooking”. The net result, once descriptor 1(b) is eliminated, is to leave uncertain which descriptor under activity 1 the claimant satisfies.

*(b) Managing therapy*

32. Moving on to activity 3, it seems from paragraph 13 of the tribunal’s statement of reasons that the tribunal proceeded on the basis that the claimant was contending he needed prompting to take his medication. That does not entirely reflect the evidence. That was the case the claimant advanced originally, although he did not explain why he needed prompting, but his oral evidence was that it was his brother-in-law who now held the stocks of medication, on which basis it would be arguable that the claimant needed his brother-in-law’s assistance in the form of being given the medication. It does not appear from the record of proceedings that the tribunal asked the claimant why his brother-in-law kept the medication, although the claimant has now given an explanation in the course of the present appeal. One interpretation of the tribunal’s reasoning is that the claimant’s evidence on this point was simply not accepted, but that is not clearly stated. This activity will therefore require further consideration by the new tribunal.

*(c) Engaging with other people face to face*

33. This brings me to activity 9. There are three broad possibilities here:

- (1) the claimant is correct that he satisfies descriptor 9(d), set out in paragraph 17 above;
- (2) the tribunal is correct that the claimant needs social support to be able to engage with other people;
- (3) the claimant either can engage with other people unaided or needs no more than prompting to do so.

34. There is no definition of “overwhelming psychological distress”, but “psychological distress” is defined in Part 1 of Schedule 1 as “distress related to an enduring mental health condition or an intellectual or cognitive impairment”. As the tribunal noted, “social support” is defined as support from a person trained or experienced in assisting people to engage in social situations”. Again under Part 1 of Schedule 1:

“ ‘engage socially’ means –

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

Reg. 4(2A) of the Regulations further provides that a claimant is only to be assessed as satisfying a descriptor if he can do so safely, to an acceptable standard, repeatedly and within a reasonable time period. “Safely” is defined in reg. 4(4) as meaning in a manner unlikely to cause harm to the claimant or to another person, and “repeatedly” is defined as meaning as often as the activity being assessed is reasonably required to be completed.

35. As I have said in paragraph 17 above, the claimant relies on *Secretary of State for Work and Pensions v. AM*. One of the points made by Judge Mark in that case was that although the defined expression “engage socially” does not feature in the activity 9 descriptors, the elements of the definition are relevant considerations in determining whether a claimant can engage with other people safely and to an acceptable standard: see paragraphs 11 and 12. A similar approach has now been taken in *HJ v. Secretary of State for Work and Pensions* [2016] UKUT 487 (AAC), *SF v. Secretary of State for Work and Pensions* [2016] UKUT 543 (AAC) and *PM v. Secretary of State for Work and Pensions* [2017] UKUT 154 (AAC).

36. That approach appears to me to be correct in principle and is readily applied to descriptors (a), (b) and (c) of activity 9, all of which envisage that, either with or without prompting or support, the claimant is able to engage with other people. If the claimant cannot do so to the level specified by reg. 4(2A), he will not satisfy such a descriptor. As Judge Mark pointed out, it is not as easy to apply that approach to descriptor (d), which refers to the claimant being unable to engage with other people “due to” one of two causes. The question which he identified is whether the descriptor is satisfied if (as the descriptor, read in isolation, provides) the claimant simply cannot engage socially because of overwhelming psychological distress or a substantial risk of harm, or whether the claimant must show that he has the ability to engage socially safely and to an acceptable standard but is prevented from exercising it owing to overwhelming psychological distress or a substantial risk of harm. Such a construction would mean that a claimant who does not have the ability to engage socially safely and to an acceptable standard at all is not catered for anywhere in activity 9, even if he in fact suffers overwhelming psychological distress or behaves in a way giving rise to a substantial risk of harm when trying to engage socially in a way which would satisfy reg. 4(2A).

37. Judge Mark's conclusion was that it is necessary to construe descriptor 9(d) as referring to such engagement as the claimant might be capable of but for overwhelming distress or the risks caused by his behaviour: see paragraph 12. The facts of *Secretary of State v. AM*, were that the tribunal had decided that descriptor 9(d) was satisfied and the Secretary of State argued on appeal that the claimant should have been awarded 0 points on the basis that the evidence was that:

“the claimant was able to engage fully and appropriately throughout the medical consultation and at the tribunal hearing although the tribunal described the claimant as putting on an act. He was able to interact with people he knew and with whom he was comfortable such as his drama group. He went to mainstream school, held an administrative post, worked in a garage and was planning to study history and politics at university. There was no evidence that he experienced overwhelming psychological distress or that he exhibited behaviour which would result in a substantial risk of harm to himself or another person...” (paragraph 15)

Judge Mark decided that there was abundant evidence to entitle the tribunal to conclude that the claimant could not engage with other people as often as was reasonably required and to an acceptable standard: that is to say, the claimant's ability to engage with other people did not reach reg. 4(2A) standards. He also took the view that the tribunal had decided that with more than the relatively minimal engagement the claimant in fact undertook he would be liable to be verbally aggressive, with a substantial risk to his own safety.

38. I note that in *Social Security Legislation 2016-2017*, vol. 1, at paragraph 4.243, it is stated that:

“In the view of Judge Mark it was sufficient for the tribunal to have found, on the evidence that was before them, that the claimant could not engage socially safely and to an acceptable extent; it was not necessary for them then to make a separate finding that this was because of overwhelming psychological distress or the risk of substantial harm. Perhaps the best explanation is that the same evidence fulfilled both requirements”

I read the decision slightly differently. Bearing in mind Judge Mark's conclusion in paragraph 12 as mentioned in the preceding paragraph of this decision, it seems to me that he was not dispensing with the requirement that the claimant's inability had to be causally connected with overwhelming psychological distress or the risk of substantial harm, but was deciding that if such distress or risk was shown, the claimant did not have to establish, in order to satisfy descriptor 9(d), that otherwise he could have engaged socially safely, to an acceptable standard, repeatedly and within a reasonable time period. In practice, the claimant limited substantially his engagement with other people and so avoided the risk of substantial harm which would have been caused by greater engagement. In that sense, he could not engage socially because of the risk of substantial harm.

39. Although Judge Mark did not express himself in this way, this seems to me to be in effect a decision that reg. 4(2A) does not apply to descriptor 9(d), which is satisfied if the claimant cannot do something rather than if the claimant can do it, whether or not with some form of help. In my view, that is the correct approach. As I read Schedule 1 to the

Regulations, its structure in relation to all the activities listed is that it was intended that a claimant should always fall within one descriptor or another, the extremes within each activity being that the claimant can manage it unaided or, in effect, cannot manage the activity at all. That being the case, there will inevitably be a descriptor in relation to each activity which is satisfied by a claimant who cannot reach the reg. 4(2A) standard. Despite the apparent generality of the statutory language, reg. 4(2A) includes the words that the claimant satisfies a descriptor “only if [the claimant] can do so ...”. It seems clear that the function of reg. 4(2A) is to eliminate arguments that a claimant is able to carry on an activity although he can only perform it on isolated occasions and very poorly, in a way which bears no relation to how it might be performed by a person not suffering from the claimant’s illness or disability. Where the argument is not over whether the claimant can do something and so satisfies a descriptor, but whether the claimant cannot do something and so satisfies a descriptor, reg. 4(2A) does not apply.

40. An example may help to illustrate the point. Activity 6 is the activity of dressing and undressing and the descriptors extend from descriptor 6(a), “Can dress and undress unaided” to descriptor 6(f), “Cannot dress or undress at all”. It makes perfectly good sense to apply reg. 4(2A) to all the descriptors which are satisfied if the claimant positively can dress and undress either unaided or with specified help, but it makes no sense to seek to apply it to descriptor 6(f).

41. Returning to activity 9, as I said in paragraph 36 above, reg. 4(2A) works perfectly satisfactorily in relation to descriptors 9(a), 9(b) and 9(c), which are all concerned with what the claimant can do. It does not work satisfactorily when applied to descriptor 9(d) as a means of excluding a claimant from that descriptor. It will necessarily also have excluded the claimant from the other activity 9 descriptors, with the effect that such a claimant would not be catered for in relation to activity 9. In principle that does not seem to me to accord with the intention of the Regulations and as a matter of practical outcome, it would mean that effectively the same scores were achieved by a claimant who engages well and happily with other people, satisfying descriptor 9(a), and by a claimant whose interactions with others are inappropriate, who does not understand body language and who cannot establish relationships, but who, as a consequence of the application of reg. 4(2A), does not satisfy any point-scoring descriptor. There is no obvious justification for such an outcome.

42. I recognise that even if reg. 4(2A) is put to one side, the claimant still has to show that the inability to engage with other people is caused by overwhelming psychological distress or risk-generating behaviour. It seems to me that descriptor 9(d) implicitly envisages that the claimant makes or has made efforts to engage with other people but those efforts have proved unsuccessful either because the claimant’s consequent psychological distress is so great that he cannot continue, at least on more than 50% of the days in the required period and so as to achieve a reg. 4(2A) level, or because the claimant’s behaviour gives rise to a substantial risk of harm. If the claimant is able to overcome the obstacles to engagement with the assistance of social support, even if he experiences psychological distress in doing so, he will satisfy descriptor 9(c). It is therefore relevant to ask what it is that prevents a claimant, if provided with social support, from engaging with other people to the standard required by reg. 4(2A).

43. It is to be remembered that activity 9 is concerned with engagement of the kind envisaged by the definition of “engage socially” and it is therefore necessary to consider the ability to engage in a wider range of situations than simply situations involving family, established friends and professionals with clearly defined roles. This point is explained and illustrated by the decisions in *HJ v. Secretary of State for Work and Pensions*, *SF v. Secretary of State for Work and Pensions* and *PM v. Secretary of State for Work and Pensions* referred to in paragraph 35 above.

44. As respects the present case, I agree with the Secretary of State that the tribunal has not sufficiently set out its findings of fact in relation to activity 9 or given adequate reasons for its conclusion that the claimant satisfies descriptor 9(c), although it did make specific findings that he suffers from anxiety and depression, characterised by low mood and poor concentration, and I think it is reasonably clear that the tribunal accepted the claimant’s evidence that he suffers from high social anxiety.

45. I do not, however, accept the Secretary of State’s submission that the evidence reasonably suggests that the claimant was engaging successfully without prompting or social support, which is in substance a submission that the claimant satisfies descriptor 9(a). There are several difficulties with that submission, as follows:

- (1) it does not expressly address the claimant’s reliance on *Secretary of State v. AM*;
- (2) it does not reflect the other decisions on what is meant by engagement with other people mentioned in paragraph 43 above, although in fairness to the Secretary of State it must be noted that *PM* was decided after the submission was made;
- (3) it focuses, as did the evidence before the decision maker and the tribunal, solely on what the claimant did after his release from prison, although the substantial majority of the required period elapsed while he was still in prison. Other than the claimant’s statement that prison was an extremely stressful time for him, there is no evidence relating to that part of the required period.

### **Other matters and conclusion**

46. For the sake of completeness, I refer briefly to daily living activity 10 (making budgeting decisions) and mobility activity 1 also.

47. In his questionnaire the claimant said he did not need help with activity 10, although he referred to anxiety until he had paid his utility bills. He told the health professional that he managed his own money unaided. It seems from page C in the Secretary of State’s submission to the tribunal that the claimant may have raised the question of his girlfriend dealing with his bills when he requested a mandatory reconsideration. Overall I am left uncertain whether the claimant intended to say that he could not make budgeting decisions (and if not, why not) or that he could not take the steps necessary to make payment. I recognise that in his oral evidence the claimant said that his brother in law looked after his finances and that is

unfortunately not referred to by the tribunal in its statement of reasons. As the matter is being remitted for rehearing, it will be open to the claimant to pursue this issue if he sees fit, but as things stand the evidence is very sparse on the point.

48. Although the claimant said in his questionnaire that he sometimes needed help when going somewhere he knew well, he did not say he needed help when going somewhere unfamiliar and he did not say that overwhelming psychological distress prevented him from undertaking any journey, although he did say that going out could be very anxious and distressful for him. The health professional's report states that he told her he could plan and follow a journey. I do not need to go through the various descriptors in detail; as with daily living activity 10, the claimant may pursue this further if he wishes, but there is very little evidence to suggest he satisfies any of the point-scoring descriptors.

49. In conclusion, I should say that I have not taken account of the claimant's criticisms of the health professional's report, because they were not raised before the tribunal. The tribunal cannot have erred in law by taking at face value matters in the report which the claimant did not challenge. If the claimant wishes to maintain an objection to what is said in the report, he will have to make clear what it is he wishes to challenge.

50. The claimant requested an oral hearing of this appeal, but I have been able to decide without hearing from the claimant that the tribunal's findings of fact were insufficient and its reasons inadequate. The necessary further findings of fact will be better made in front of a new tribunal where the claimant will have the opportunity to explain further his difficulties during the required period and to adduce further medical or other evidence if he sees fit. In those circumstances, I take the view that an oral hearing would not offer any further benefit to the claimant and I refuse the request. The claimant may wish to take the opportunity of the rehearing to seek the assistance of a representative, who would enable him to put his case as cogently as possible.

51. For the reasons I have given, I set the decision of the tribunal aside and remit the matter to be heard by a new tribunal, constituted differently from the previous tribunal. In determining the appeal the tribunal must have regard to what I have said above, in particular in relation to the required period and the various daily living activities which are in issue.

**Signed)**

**E H Ovey  
Judge of the Upper Tribunal**

**(Dated) 19<sup>th</sup> May 2017**