[2020] UKUT 59 (AAC)

IN THE UPPER TRIBUNAL **Appeal CE/2126/2018**

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

PPE

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: **Upper Tribunal Judge Poynter**

Decision date: 21 February 2020
Decided on consideration of the papers

Representation
Appellant: In person
Respondent DWP Decision-Making and Appeals, Leeds

DECISION

The appeal succeeds.

The making of the decision of the First-tier Tribunal given at Liverpool on 22 March 2018 under reference SC068/17/06394 involved the making of a material error on a point of law.

That decision is set aside.

I re-make the decision in the following terms:

1. **The appeal is allowed.**

2. **The decision issued by the Secretary of State on 1 November 2017 is set aside.**

3. **Regulation 23(2) of the Employment and Support Allowance Regulations 2008 does not operate so as to treat the claimant as not having limited capability for work from and including 19 October 2017.**

4. **Therefore:**

   (a) **there are no grounds on which to supersede the decision awarding the claimant employment and support allowance from and including 21 July 2011 ("the original decision") so as to bring that award to an end from and including 19 October 2017; and**

   (b) **the claimant continued to be entitled to employment and support allowance from and including 21 July 2011 on the basis of the original decision.**

REASONS

Summary

1. This appeal is about what happens when the Secretary of State wants to obtain evidence and advice to help her decide whether an award of employment and support allowance ("ESA") should be made, or should continue.

2. One of the things the Secretary of State may do in those circumstances is to arrange for the claimant to be called to attend for a medical examination.

3. The law says that a person who “fails without good cause” to attend for, or submit to, such an examination “is to be treated as not having limited capability for work”: see regulation 23 of the Employment and Support Allowance Regulations 2008 (page iii below).

4. The main condition of entitlement to ESA is that the claimant should be assessed or treated as *having* limited capability for work.

5. So a decision that the claimant is treated as *not* having limited capability for work, means that the claimant is not entitled to ESA and that any previous entitlement comes to an end.

6. For the reasons given below, I have decided that when the First-tier Tribunal decides an appeal against a decision made under regulation 23, it must—unless it adjourns for further evidence—allow the appeal and reinstate the claimant's benefit unless both:

(a) the papers before it include either:

(i) a copy of the letter that was sent to the claimant calling him or her for examination; or

(ii) a specimen of the standard letter that would have been sent and evidence from the relevant computer system that a letter in that form was generated and despatched; and

(b) that letter imposes a legal obligation on the claimant to attend for the examination, as opposed to merely inviting, advising, or encouraging her to do so.

7. I have also decided that the wording of the standard letter that would have been used in this case was ***not*** effective to impose such a legal obligation.

The relevant law

8. The law governing failure to attend an ESA medical examination is set out in section 8 of the Welfare Reform Act 2007 ("the 2007 Act") and regulations 21-24 of the Employment and Support Allowance Regulations 2008 ("the ESA Regulations"). So far as relevant to this appeal, those provisions are set out in Appendix A to this decision.

9. It will also be necessary for me to refer to the equivalent—but differently-worded—law relating to a failure to attend a consultation with a health care professional ("HCP") in connection with a claimant's entitlement to personal independence payment ("PIP"). Section 80 of the Welfare Reform Act 2012 ("the 2012 Act") and regulations 8-10 of the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations") are set out (again so far as relevant) in Appendix B to this decision.

Facts and procedural history

10. These are not significantly in dispute.

11. At the time of the Secretary of State's decision, the claimant was 60 years old. The medical evidence confirms that she had been diagnosed with fibromyalgia, vertigo, hypertension (*i.e.,* raised blood pressure), tinnitus, depression and anxiety, low back pain, dysthymia (also known as persistent depressive disorder) and chronic pyelonephritis (*i.e.,* infected kidneys).

12. The claimant had had an award of ESA since 21 July 2011 (having apparently been in receipt of incapacity benefit before that). In 2017, the Secretary of State wished to consider whether the award was still correct and referred the claimant's case to Medical Services.

13. On 10 July 2017, the claimant was requested to complete a *Limited Capability for Work Questionnaire* (Form ESA50) under regulation 21(1)(b) of the ESA Regulations (see page ii below). A reminder was issued on 1 August 2017 (see regulation 22(2) on page iii below).

14. Although no copy appears in the papers, it seems probable that the claimant completed and returned the *Questionnaire* because, on 3 September 2017, Medical Services sent her an appointment letter for what was described as a "Work Capability Assessment" ("WCA") on 27 September 2017 at 9.25 am.

15. The claimant did not attend that appointment. Her daughter telephoned the medical examination centre at about 10.20 am and informed Medical Services that the claimant was too ill to attend.

16. Medical Services accepted that explanation and, on the same day, they sent a further appointment letter for a WCA on 18 October 2017 at 1.45 pm. From their computer records, it appears that that date may have been agreed with the claimant's daughter while she was on the telephone.

17. The claimant did not attend the second appointment either. Again, her daughter rang the medical examination centre at about 11.25 am and left a message that—according to Medical Services records—the claimant could not attend that day because of "poorly back and legs".

18. That explanation was not accepted. On 19 October 2017, Jobcentre Plus issued the claimant with a Form BF223, which is the standard form asking for information about why a claimant has not attended a medical examination.

19. The claimant completed and signed that form on 23 October 2017, but it must have gone astray. It was not available to the decision maker who, on 1 November 2011, decided that the claimant was no longer entitled to ESA because she had failed to attend the medical examination on 18 October and (implicitly) that she had not established good cause for that failure (see regulation 23(2) on page iii below).

20. However, the completed Form BF223 became available shortly afterwards and was treated as an application to revise the decision made on 1 November. On 6 November 2017, a different decision maker refused to revise that decision on the ground that the claimant had not produced medical evidence to support her case that she had been too ill to attend.

21. Legally, that refusal to revise amounted to what is known as a "mandatory reconsideration" decision. Nevertheless, also on 6 November 2016, the case was referred to the Dispute Resolution Team as a request for a mandatory reconsideration. On 13 November 2017, a third decision maker also refused to revise the decision and a mandatory reconsideration notice was issued.

22. On 21 November 2017, the claimant appealed to the First-tier Tribunal. Her appeal was listed for a hearing in Liverpool on 22 March 2018, which the claimant attended with her sister.

23. At the time of the hearing, the papers included screen prints of the computerised records maintained by Medical Services of their contacts with the claimant and her daughter. Those records confirmed that appointment letters had been sent to the claimant as set out at paragraphs 14 and 16 above. However, there was no evidence of the terms of those letters: the papers did not include either a copy of the actual letters sent or a specimen of the standard form that would have been used to generate those letters from Medical Services' computer system.

The First-tier Tribunal's decision

24. The Tribunal refused the claimant's appeal and confirmed the Secretary of State's decision.

25. The Tribunal's written statement of reasons mostly deals with the issue of "good cause". It demonstrates that the Tribunal had regard to the matters set out in regulation 24 of the Employment and Support Allowance Regulations 2008 (see page iii below); that it correctly applied the legal test for "good cause" established by previous, binding, decisions of the Social Security Commissioner; and that it rationally analysed the evidence. Other Tribunals might, perhaps, have reached a different conclusion on that evidence. But weighing evidence is a matter of fact for the First-tier Tribunal, not the Upper Tribunal. If the only issue had been whether the claimant had good cause, then the Tribunal would not have made any error of law.

26. However, there was another issue that the Tribunal did not address. The statement assumed, without analysis or evidence, that the claimant did "fail" to attend the appointment on 18 October 2017. That assumption was an error of law.

"Failure" requires the breach of an obligation

27. It was not in dispute that the claimant did not attend for examination. But did she "fail" to do so? The two are not the same. The difference is that one can only "fail" to do something one is under an obligation to do.

28. For example, the Tribunal of Commissioners in *R(IS) 9/06* noted (at [13(4)]) that it was a "well settled" proposition of construction that:

> "(4) "Failure to disclose" does not mean simply "non-disclosure". It imports a breach of some obligation to disclose."

On appeal the Court of Appeal also treated that proposition as axiomatic: see *B v Secretary of State for Work and Pensions*, [2005] EWCA Civ 929 (also reported as part of R(IS) 9/06)) where it is recorded (at [10(2)]) as uncontentious:

> "(2) that failure to disclose something required not merely the negative fact of non-disclosure but an affirmative obligation to disclose".

Many other examples exist in the decisions of the higher courts. I will give just one more. In *Secretary of State for Work and Pensions v Hinchy* [2005] UKHL 16 (also reported as R(IS) 7/05), Lord Scott of Foscote (dissenting, but not on this point) stated at [39]:

> "… In their submissions before your Lordships both Mr Drabble QC for the Secretary of State and Mr Howell QC for Ms Hinchy were in agreement that the concept of a failure to disclose, for section 71(1) [*i.e.,* section 71(1) of the Social Security Administration Act 1992] purposes, imported the notion that a duty to disclose had been broken. I think this must be right. One would not normally describe a person as having "failed" to do something that the person in question had no reason to do. "Failed" or "failure" both in the context of section 71(1), *and in normal speech*, has a tendentious quality. It implies that something has not been done that should have been done" (my emphasis).

The obligation must be a *legal* obligation

29. Moreover, before a failure to perform an obligation can have legal consequences, the obligation itself must be a *legal* obligation.

30. With hindsight, that proposition seems obvious to the point of being trite. *Of course*, the law is concerned with legal rights and obligations as opposed to moral duties.

31. However, at one point, and in relation to section 71, the prevailing view among the former Social Security Commissioners (who were the predecessors of the Administrative Appeals Chamber of the Upper Tribunal) was to the contrary.

R(SB) 21/82

32. *R(SB) 21/82* was a case about the meaning of the words "failed to disclose" in what is now section 71(1). In its current form—which is materially the same as the provision under consideration in *R(SB) 21/82*—that section provides:

> "71.—(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—
>
> (a) a payment has been made in respect of a benefit to which this section applies; or
>
> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
>
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

33. Interpreting that section, Mr Commissioner Edwards-Jones QC stated, at [4(2)]:

> "… whilst the concept of making or not making a misrepresentation needs no explanation or refinement, I consider that a "failure" to disclose necessarily imports the concept of some breach of obligation, *moral or legal*—i.e. the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected: see amongst the definitions of "failure" in the shorter Oxford English Dictionary:
>
> "1 .... non-performance, default, also a lapse …"" (my emphasis)

I will refer to that passage as "the Edwards-Jones formula".

34. The fact that *R(SB) 21/82* is a reported decision means that it "[commanded] the assent of at least a majority of the Commissioners, and [was] to be followed as [a precedent] by the Commissioners and by the tribunals from which appeals lie to the Commissioners": see the Practice Direction issued by the Chief Commissioner on 28 October 1982.

35. That is what occurred. As noted in *R(IS) 9/96* at [49], the Edwards-Jones formula was usually followed without comment or argument and was cited with approval in three decisions of Tribunals of Commissioners. Although there were some grumblings of

dissent, *R(SB) 21/82* remained good law for over 20 years until it was disapproved by a fourth Tribunal of Commissioners in *R(IS) 9/96*.

R(IS) 9/96

36. In *R(IS) 9/96* the claimant's children were taken into care and moved to a different address. She had received the standard "INF4" leaflet that is issued to income support claimants and which told her unambiguously that she "must" tell the Department as soon as she could if anyone she had claimed for moved to a different address or if any children she was claiming for were taken into care. In addition she was paid by an order book that included very similar instructions in the notes on the back. However, the claimant lacked mental capacity and was unable to understand those instructions. So although she knew and that her children had been taken into care, she did not appreciate that that circumstance might affect her entitlement to benefit and did not disclose it to the Department.

37. Following the Edwards-Jones formula in that case would probably have led to the claimant not having to repay the resulting overpayment. The decision maker would probably have found that her inability, through mental incapacity, to appreciate the materiality of what had happened meant she was not under any moral obligation to disclose. And even if she were under a legal obligation to disclose, the added gloss that "the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected" would probably have relieved her of any liability to repay. How could disclosure reasonably be expected when the "person in question" was incapable of understanding that disclosure was necessary?

38. The Tribunal of Commissioners in *R(IS) 9/96*, however, did not take that approach. Rather it held that regulation 32 of the Social Security (Claims and Payments) Regulations 1987 ("the Claims and Payments Regulations"), provided for two legal duties, the first being to furnish information and evidence when "required" to do so by the Secretary of State, and the second being a duty to notify the Secretary of State of any change of circumstance which the claimant might reasonably be expected to know might affect the right to benefit.

39. The unambiguous requirement by the Secretary of State in Form INF4 that the claimant must tell him as soon as she could if her children were taken into care meant she was subject to the first duty established by regulation 32 and, as she knew that her children had been taken into care and did not report that fact to the Secretary of State, she was in breach of the duty and was therefore liable to repay the overpayment as having "failed" to disclose that (material) fact.

40. In so deciding, the Tribunal of Commissioners also held that, to the extent that *R(IS) 21/83* had decided that the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected it had incorrectly imported words from the second duty in regulation 32 into the interpretation of section 71(1) and was wrongly decided.

41. Given that conclusion—and that on the facts the claimant was subject to the first legal duty under regulation 32—it was unnecessary for the Tribunal of Commissioners to decide whether a breach of a moral obligation could form the basis for the recovery of an overpayment. However, its decision did discuss the issue at [16] to [17]. Having recited the Edwards-Jones formula, it continued:

> "16. We have some difficulty with the concept of a "moral obligation" in this context. *If a breach of an obligation has legal consequences (eg loss of benefits already paid), it seems to us difficult not to describe that as a "legal obligation"*. We know of no authority where recovery has been sought from a claimant, in which such a "moral duty" has been vital; and, indeed, we cannot envisage a case in which it would be necessary for the Secretary of State to rely upon a moral duty when seeking recovery from a claimant.
>
> 17. In any event, both parties to this appeal agreed that any duty to disclose resting on the claimant was a legal duty, and consequently we do not consider it is necessary to consider the circumstances in which a moral duty to disclose may arise and, if it does, in respect of whom it might arise and the circumstances in which and terms on which it might arise. These matters are better addressed in the context of a case in which they may arise on the facts, and after full argument" (my emphasis).

Hinchy

42. The claimant in *R(IS) 9/96* appealed to the Court of Appeal. However, in March 2005, before that Court gave its decision, another appeal about the meaning of "failed to disclose" in section 71 was decided by the House of Lords.

43. The facts of *Hinchy* (see paragraph 28 above) are not relevant for present purposes and the main issue was *to whom* any disclosure should be made. However, two of the Law Lords expressly considered, and disapproved, the Edwards-Jones formula.

44. In a continuation of the passage quoted at paragraph 28 above, Lord Scott of Foscote set out that formula and continued:

> "This passage has been the subject of criticism, most recently in [R(IS) 9/96] (which I understand is pending appeal to the Court of Appeal) and *I would not accept that, for section 71(1) purposes, the failure to disclose could be based on breach of no more than a moral obligation to disclose. The coherence of the statutory scheme requires, in my opinion, that the failure to disclose be based on breach of an obligation to disclose imposed by the statutory scheme itself*. For present purposes the obligation must, I think, be founded either in section 71(1) or in regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987." (my emphasis).

45. Baroness Hale of Richmond took a similar view. She stated:

> "52. Although it had been consistently stated by Commissioners for many years, the principle that 'disclosure by the person in question was reasonably to be expected' has recently been disapproved by another Tribunal of Commissioners in [R(IS) 9/96]. That decision turned on whether the individual characteristics of the claimant were relevant to whether she was in breach of the duty to disclose. It is currently under appeal to the Court of Appeal. We are concerned with a different issue and nothing in this case should be seen as prejudicing the outcome of that appeal.
>
> 53. All of these decisions are consistent, however, in requiring that there be some breach of a duty to disclose. Indeed, in [R(IS) 9/96] the Tribunal of Commissioners disapproved of the idea that there might be only a moral duty to disclose. *In my view they were right to do so. Failure to disclose has legal consequences which may be very serious for the person concerned; a breach of a moral duty, even if disclosure is reasonably to be expected in the circumstances, should not suffice.* Furthermore, section 71(1) permits recovery from the person who misrepresented or failed to disclose the fact, rather than from the person who received the overpaid benefit. *It could not be right to require such third parties to pay back money which they had never received unless they were in breach of a legal duty to disclose the information in question.* Section 71(1) clearly presupposes the existence of a legal duty to disclose the fact in question and failure to disclose refers to a breach of that duty" (my emphasis).

B v Secretary of State for Work and Pensions

46. In July 2005, the Court of Appeal in *B v Secretary of State for Work and Pensions* (see paragraph 28 above) upheld the decision of the Tribunal of Commissioners in *R(IS) 9/96*.

47. At [46] Sedley LJ said of the Edwards-Jones formula:

> "… I confess that I have found it baffling. The Commissioner cited no authority for his secondary test beyond the definition of "failure" in the Shorter Oxford English Dictionary ("non-performance, default; also a lapse"), which afforded no very obvious basis for it. Nor was it apparent why his preferred construction ("some breach of obligation, moral or legal") required him to interpret the legal obligation contained in the Regulations as involving a secondary test of what was reasonably to be expected. To articulate the two by the phrase "i.e." was to suggest a spurious identity between two quite different things. Moreover, as Baroness Hale pointed out in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 1 WLR 967 (also reported as R(IS) 7/05) at [53] the introduction of a moral duty to disclose places people at risk of serious legal consequences for breach of a wholly indeterminate obligation. If there is a reason for construing "failure" as involving fault, it has to be better than this."

48. And at [48] and [49], Buxton LJ stated:

> "48. And it is notable that the gloss introduced by the decision of Mr Edwards-Jones QC did not give a special meaning to the word "disclosure", but sought to do so in respect of the word "failure". That could only be achieved by the insertion into the requirements of section 71 of a "breach of obligation moral or legal" to disclose, to take the place of the bare fact of non-disclosure. But as my Lord has demonstrated that step is plainly misconceived. The legal obligation to disclose is that imposed by regulation 32, so that limb adds nothing. *There is no basis at all in the statute for imposing or requiring a moral obligation to disclose, a step that would only have the effect, if it were taken seriously, of introducing vagueness and contention into what is clearly supposed to be a simple, albeit austere, system.*"

49. At [45] Sir Martin Nourse agreed with both judgments.

Conclusions on the meaning of "fails to attend"

50. I acknowledge that the authorities I have cited above were not concerned with an alleged "failure" by a claimant to attend for, or submit to, a medical examination. I judge, however, that the underlying principles to be derived from them are not confined to the recovery of overpayments but apply throughout the social security system.

51. In none of those authorities (other than *R(SB) 21/82* itself) is there any support for the proposition that a breach of a moral obligation or duty can form the basis of a legal obligation to repay an overpayment. On the contrary, those judges who have addressed the point—including a unanimous Court of Appeal in *B*—have all said that it cannot. A number of reasons are given for that conclusion, namely:

(a) that there is no statutory basis for such a conclusion;

(b) that the introduction of a legal obligation to repay based on the breach of a moral obligation would introduce vagueness and contention into the system;

(c) that the coherence of the statutory scheme requires that a failure to disclose be based on breach of an obligation to disclose imposed by the statutory scheme itself;

(d) that failure to disclose has legal consequences which may be very serious for the person concerned; and that a breach of a moral duty, even if disclosure is reasonably to be expected in the circumstances, should not suffice; and

(e) that, as a matter of definition, where breach of an obligation has legal consequences, it cannot sensibly be described as anything other than a legal obligation (see paragraph 41 above).

52. I find the last of those reasons compelling. Legal consequences stem from legal rights and obligations and not otherwise. Even if Parliament were to legislate expressly that the breach of a moral obligation was to have legal consequences, it would thereby convert the moral obligation into a legal one.

53. Moreover, all the other reasons set out above are as true of a "failure" to attend under regulation 23(2) as they do to a "failure to disclose" under section 71.

54. In particular, regulation 23(2) provides for claimants to lose the whole of what is always likely be their main—and will usually be their only—earnings replacement benefit if they "fail" without good cause to attend for or submit to a medical examination. The consequences may be just as—if not more—serious for the person concerned, as a failure to disclose a material fact leading to an overpayment.

55. I should add that the name given to the process by which the legal obligation is imposed is irrelevant. Regulation 23 talks of the claimant being "called" attend for a medical examination; regulations 8 and 9 of the PIP Regulations and regulation 32(1) and (1A) of the Social Security (Claims and Payments) Regulations 1987 use the word "require"; regulation 21 of the ESA Regulations uses the word "request". However, the provisions that impose adverse consequences on claimants who do not attend when called, or comply with the requirement or request, all use some form of the verb "to fail", and a failure having legal consequences can only arise through breach of a legal obligation.

56. For all those reasons, I judge that regulation 23(2) does not permit the Secretary of State to treat a claimant as not having limited capability for work unless:

(a) she was under a legal obligation to attend for and submit to a medical examination;

(b) in breach of that obligation she did not do so; and

(c) she did not have good cause for her breach of that obligation.

Imposing a legal obligation

57. There is a clear line of authority in the case law of the Social Security Commissioners, the Upper Tribunal and the higher courts that, before the Secretary of State can subject a claimant to adverse consequences for failing to do something—whether that something is to provide information, notify a change of circumstances, or to attend a specified place and undertake a specified activity—she must tell the claimant in the most unambiguous terms:

(a) that it must be done; and

(b) what it is that must be done.

In short, there needs to be "the language of clear and unambiguous mandatory requirement" and there needs to be "crystal" clarity.

Remilien

58. In *OM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 458 (AAC), Upper Tribunal Judge Mesher cited the decision of the House of Lords in *State for Social Security and another v Remilien and Wolke* [1998] 1 All E.R. 129, R(IS) 13/98 as authority that "something worded as a request rather than a creation of a legal obligation may not count".

59. The question in *Remilien* was whether an EC national who had received a letter from Home Office telling her that:

> "You should now make arrangements to leave the United Kingdom."

had been

"required by the Secretary of State to leave the United Kingdom"

within paragraph (h) of the definition of "person from abroad" in regulation 21(3) of the Income Support (General) Regulations 1987 as they were then worded.

60. Mr Commissioner Mesher (as he then was) held that she had not. He stated (at [20])

> "Without attempting to give any comprehensive or exhaustive definition of the words "is required to leave" in paragraph (h), in my view their ordinary everyday meaning carries with it notions of compulsion or insistence such that the terms of the letter … did not "require" the claimant to leave the United Kingdom. That approach is consistent with the identification of a certain central meaning. I accept that in some contexts "require" may mean little more than "ask", but I am quite satisfied that that expanded and loose meaning is not tenable in the context of paragraph (h). The letter … drew attention to the Secretary of State's not being satisfied that the claimant was lawfully resident in the United Kingdom. It may of course be said that a person who is not lawfully resident in the United Kingdom is under a legal obligation to leave, but the statement of the Secretary of State's view added nothing to any such obligation which already existed by operation of law. Then the letter said that the claimant should now make arrangements to leave the United Kingdom. In my view, that form of words simply falls short of the necessary degree of insistence or compulsion for it to be possible to say that on receipt of the letter the claimant was required to leave the United Kingdom. I would characterise the form of words as advice to the claimant to make her own arrangements to leave. That seems to me to fall well short of a requirement actually to leave."

61. Mr Mesher's decision was subsequently appealed to the Court of Appeal (Sir Stephen Brown P, Kennedy and Phillips LJJ) and was reversed by a majority (Phillips LJ dissenting). On further appeal to the House of Lords (Lords Browne-Wilkinson, Slynn of Hadley, Hoffmann, Hope of Craighead and Hutton) the Court of Appeal's decision was itself reversed—again by a majority (Lord Slynn of Hadley dissenting)—and Mr Mesher's order was reinstated.

62. However, the conclusion of the majority of the House of Lords was that a requirement to leave "would involve the making (after any appeals had run their course) of a deportation order or an order for removal under article 15(2) of the [Immigration (European Economic Area) Order 1994]". On that basis, it was unnecessary for their Lordships to consider Mr Mesher's reasoning about the wording of the letter. His reasoning was neither approved nor criticised.

63. It therefore appears to me that the true authority for Judge Mesher's decision in *OM* and his subsequent decision in *MB v Secretary of State for Work and Pensions* (PIP) [2018] UKUT 213 (AAC) lies in his own earlier decision in *Remilien* (R(IS) 13/98) rather than in anything said by the House of Lords in that case. However, I do not consider that the authority of those decisions is thereby diminished. *R(IS) 13/98* is a reported decision of the Commissioner that has not been overturned by a higher court. I am bound to follow it unless I am sure that it is wrong. And, if I may respectfully say so, I have no doubt at all that it is correct.

Kerr

64. R(IS) 13/98 was a case about the requirement for mandatory language. The requirement for clarity can be traced back at least as far as the decision of the House of Lords in *Kerr v Department of Social Development*, [2004] UKHL 23, R 1/04 (SF) and derives from the model of social security adjudication as a co-operative process that was developed in that decision; see the speech of Baroness Hale (with which all the other members of the appellate committee expressly agreed) at [62].

65. The issue in *Kerr* was (in brief) whether the Department could rely on the burden of proof against a claimant who had not provided relevant information because he had not been asked for it. It was held (at [65]) that the Department could not use its own failure to ask questions which would have led it to the right answer to defeat the claim.

Hinchy

66. *Kerr* was a case about the information a claimant was required to provide at the outset of a claim. In *Hinchy* (see paragraphs 42 to 45 above) similar principles were extended to the requirements for existing claimants to keep the Secretary of State informed.

67. Speaking of regulation 32 of the Claims and Payments Regulations, Baroness Hale said:

> "55. This is commonly regarded as imposing two duties: a duty to give the information and supporting evidence required by the Secretary of State and a further duty to notify changes which the claimant might reasonably be expected to know might affect the right to benefit to the appropriate office. It is not entirely plain whether the second duty is merely a particular instance of the first, so that the Secretary of State must have required such changes to be notified, or whether it is a free-standing duty. In my view, nothing turns on that difference here. In the first case, it is incumbent upon the Secretary of State to make it *crystal clear* what it is that he needs to know and in the second case the

> claimant cannot reasonably be expected to know that something might affect his claim to benefit unless the Secretary of State has made it clear what sort of changes might do so" (my emphasis).

68. *Hinchy* is itself a good practical example of the level of clarity required. The notes in Ms Hinchy's order book told her to tell the local office as soon as she could if "[a]ny benefit goes up or down". Sitting at first instance as a Deputy District Chairman of the former appeal tribunals, I had held that that statement was a "simple instruction", by which I meant in context, one that was clear and comprehensible. Although the House of Lords eventually upheld my decision for different reasons, it is now clear to me that I was wrong about that. Lords Hoffmann and Scott disagreed about what the instruction meant—the latter dissenting because (among other things) he considered the instruction did not cover the circumstances in which benefit ceased altogether—and Baroness Hale pointed out that, taken literally, the instruction would have required Miss Hinchy to notify her local office annually when her benefits were uprated.

69. Appeals to the House of Lords were on points of law only, so what I had decided on the facts about the wording of the instruction could not be challenged. Had that not been the case, I do not believe that the finding would have survived. Almost by definition, a statement cannot be a "simple instruction" if two Law Lords cannot agree about what it means and a third correctly points out that it is over-inclusive.

Hooper

70. The level of scrutiny that the courts will apply when considering whether instructions from the Secretary of State are sufficiently clear and insistent can be seen at its starkest in the decision of the Court of Appeal in *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495.

71. The case concerned the rules about the circumstances in which those on incapacity benefit were permitted to work without losing their benefit. Following a change in those rules, the Secretary of State sent the claimant a factsheet that included the following paragraph:

> "You will no longer need to get a doctor to agree that the work will help your medical condition, but you should tell the office that deals with your benefit before you start work. You should fill in an application form before you do any permitted work."

The claimant subsequently started work but did not fill in an application form or otherwise tell the office that dealt with his incapacity benefit before he did so. He was therefore overpaid benefit. The claimant disputed that the overpayment was recoverable

and an issue therefore arose whether the passage quoted above amounted to a requirement for the purposes of regulation 32 of the Claims and Payments Regulations (see paragraph 38 above).

72. The Court of Appeal unanimously decided that it did not. Dyson LJ (as he then was) stated:

> "56. … Read in the context of the factsheet as a whole, I do not consider that the words "you should tell the office… before you start work" and "you should fill in an application form before you do any permitted work" are the language of clear and unambiguous mandatory requirement. The consequences for a claimant of not complying with a requirement in accordance with regulation 32(1) can be very serious. That is why in my view, if the Secretary of State wishes to impose a requirement on claimants within the meaning of regulation 32(1), it is incumbent on him to make it absolutely clear that this is what he is doing. There should be no room for doubt in the mind of a sensible layperson as to whether the SSWP is imposing a mandatory requirement or not.
>
> 57. Mr Commissioner Jacobs said that the word "should" in the factsheet was a "polite way of wording an instruction". There may be contexts where the dictates of politeness are such that "should" means "must". Even in a social context, "should" may not mean "must". As Thomas LJ pointed out in argument, "you should go to the doctor" does not mean the same as "you must go to the doctor". The former is more the language of "you would be well advised to go to the doctor". The latter is an instruction. But there is no reason why the Secretary of State should have felt inhibited from using the clear and unambiguous word "must" in the present context. The context is not one which demanded politeness at the expense of clarity."

Reilly and Wilson

73. Most recently in *R (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AACR 9, the Supreme Court held that the notice purporting to require Mr Wilson to participate in the Community Action Programme ("CAP") was invalid. Regulation 4(2)(c) of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 provided that the notice must specify :

> "(c) details of what C is required to do by way of participation in the Scheme".

In fact the notice stated:

> "… To keep getting Jobseeker's Allowance, you will need to take part in the [CAP] until you are told otherwise or your award of jobseeker's allowance comes to an end; and complete any activities that Ingeus asks you to do."

74. Giving the judgment of the Court, Lords Neuberger and Toulson stated:

> "55. In our opinion, there was a failure to comply with regulation 4(2)(c). The letter … merely informed Mr Wilson that he had to perform "any activities" requested of him by Ingeus, without giving him any idea of the likely nature of the tasks, the hours of work, or the place or places of work. It seems to us, therefore, that the letter failed to give Mr Wilson "details of what [he was] required to do by way of participation". Again, it is necessary to balance practicality, in the form of the need of the Secretary of State and his agents for flexibility, against the need to comply with the statutory requirement, which was plainly included to ensure that the recipient of any such letter should have some idea of where he or she stood. A requirement as general and unspecific as one which stipulates that the recipient must "complete any activities that Ingeus asks you to do", coupled with the information that the course will last about six months falls some way short of what is required by the words of regulation 4(2)(c), even bearing in mind the need for practicality."

Conclusions on imposing a legal obligation

75. The principles I take from that case law are as follows.

76. If the Secretary of State has the power to impose a legal obligation on claimants to do something, she can impose that obligation on a particular claimant simply by telling that claimant unambiguously that she must do it.

77. However, the Secretary of State must use "the language of clear and unambiguous mandatory requirement". No legal obligation is imposed if either:

(a) the Secretary of State merely invites, advises, or encourages the claimant to do the thing, as opposed to telling her she must do it; or

(b) it is unclear whether the Secretary of State has told the claimant that she must do the thing, as opposed to merely inviting, advising, or encouraging her to do it.

78. Moreover, the requirement to use "clear and unambiguous language" is to be applied strictly. The Secretary of State must be "crystal clear".

Reasons for setting aside the First-tier Tribunal's decision

79. It follows that the Tribunal could not lawfully decide this appeal against the claimant unless it was first satisfied that she had been placed under a legal obligation to attend for examination. Given what I say at paragraphs 76 to 78 above, it could not—as a matter of law—be satisfied of that without seeing either:

(a) a copy of the letter that was sent to the claimant calling him or her for examination; or

(b) a specimen of the standard letter that would have been sent and evidence from the relevant computer system that a letter in that form was generated and despatched,

(see, by analogy, Judge Mesher's decision in *MB v Secretary of State for Work and Pensions* (PIP) [2018] UKUT 213 (AAC)). And if the Tribunal could not be satisfied that the claimant was under a legal obligation to attend for examination, it also could not be satisfied that she had "failed" to attend.

80. The Tribunal did not in fact have either of those documents before it, so the only courses lawfully open to it were to adjourn and direct the Secretary of State to supply the missing documents or to allow the appeal.

81. Although it would have been a matter for the Tribunal, I do not favour adjournment of such cases. Ever since Judge Mesher's decision in *OM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 458 (AAC) was published on the website of the Administrative Appeals Chamber on 14 December 2017 it has been clear that the terms of the appointment letter were relevant in PIP failure to attend appeals and, in my judgment, the Secretary of State ought reasonably have anticipated that similar reasoning might apply to ESA and to have supplied the documents that have now been provided to me, as part of the response to the First-tier Tribunal.

82. In any event, for the reasons I give below, adjournment would have made no difference in this case.

83. By deciding the appeal against the claimant in those circumstances, the Tribunal made an error of law. That error was material. It clearly might have affected and—as I hold below, actually did affect—the outcome of the appeal. I therefore exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set it aside.

The Secretary of State's submissions

84. In opposition to that conclusion the Secretary of State relies on the decision of Upper Tribunal Judge Wright in *DW v Secretary of State for Work and Pensions* (ESA) [2016] UKUT 0179 (AAC). Her representative submits that:

> "… Judge Wright looked at the legal requirement laid down by regulation 23 and determined that providing the evidence of the View Letter History (in the instant case – page 22) was sufficient to discharge the S of S's duty under legislation. Neither UT Judge Wright nor the other judges, whose decisions Judge Wright referred to, considered that a copy of the actual appointment letter or a copy of the standard letter needed to be included within the bundle so as to meet the evidential requirements. It follows, therefore that an FtT does not necessarily need to see such a letter in order for it to make a determination regarding regulations 23 and 24."

85. I reject that submission. *DW* was a case about what evidence was required to establish that written notice of the time and place of the examination had been sent to the claimant at least seven days in advance as required by regulation 23(3). Judge Wright agreed with Judge Ward's earlier decision in *SH v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 574 (AAC) that:

> "… in the more straightforward case – and where a claimant has the opportunity of rebutting receipt – printouts of the type in issue [*i.e.*, the View Letter History] are capable of providing evidence from which a tribunal may draw inferences that a document was "sent". It is then for the tribunal of fact to decide what weight to put on it" (Judge Wright's emphasis).

86. It is therefore not necessary for the Secretary of State to produce a copy of the appointment letter as evidence that that letter was "sent". That is very different from saying that she does not need to establish the terms of that letter. Whether or not the Secretary of State has sent the notice in time is a separate issue from whether the notice is worded in a way that is effective to impose a legal obligation. The second of those issues was not raised in *DW*.

Reasons for re-making the decision

87. Having set the decision aside, I have to decide next whether to re-make the decision or remit the case to the First-tier Tribunal with directions for reconsideration.

The appointment letter

88. I am able to take the former course because the Secretary of State has now produced a specimen of the appointment letter that was sent to claimant. I am therefore in a position—as the First-tier Tribunal was not—to assess whether that letter was effective to impose a legal obligation on the claimant.

89. A similar issue recently arose before Upper Tribunal Judge Wikeley in relation to a standard letter used to inform the PIP claimant of a consultation in person: see regulation 9(1)(a) of the PIP Regulations on page v below. In that case, *IR v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 374 (AAC), the Secretary of State ultimately conceded that the claimant had a good reason for any failure to attend. It was therefore academic whether any such failure had actually occurred.

90. However, having received detailed written submissions from the Secretary of State about the wording of that standard letter, Judge Wikeley considered it appropriate to express his reasoned view that it did not impose a legal obligation.

91. The Secretary of State's concession in *IR* meant that—as Judge Wikeley accepted—his analysis of the letter did not form "part of the formal *ratio* (or legal basis) of [that] decision". That, however, is not so in this appeal. The First-tier Tribunal made no legal error about whether the claimant had good cause. And, as a necessary part of the legal reasoning underlying my decision that the claimant remains entitled to ESA, I have decided that the wording of the appointment letter sent to the claimant was not effective to impose a legal obligation on her.

92. A facsimile of that letter appears at Appendix C to this decision. It is three pages long, but there are only two sentences that could even arguably be read as imposing a legal obligation on the claimant to attend the examination rather than merely inviting her to do so.

93. The first appears in the "sidebar" on the first page of the letter (page vii below) and reads:

> "It is very important you go to your assessment on [date]."

And so it is. But an action can be important—or even very important—without the person who ought to take it being under a legal obligation to do so. Hospital appointment letters, for example, frequently tell patients that it is important they should keep the appointment. No-one would dispute that. Non-attendance may put the patient's health at risk and—even if the appointment is purely routine—wastes the time of doctors, nurses and hospital staff that could be spent helping other patients. But telling the patient that it is important she should attend does not impose a legal obligation on her to do so.

94. As Judge Wikeley put it in *IR* (at [34]):

> "… The first sentence is that "**It is important that you attend this appointment**". This by itself plainly fails the test as laid down in the case law. It says no more than that attendance at the appointment is desirable, or even highly recommended, but not *required* in mandatory terms. It is no more than a message that you "should" attend, and as such lacks the necessary element of compulsion identified in *Hooper v Secretary of State for Work and Pensions* so as to constitute a requirement" (original emphasis).

I agree.

95. The second sentence reads:

> "**You could lose your ESA payments and/or National Insurance credits if you don't go to your Work Capability Assessment"** (original emphasis).

I accept that, unlike the equivalent sentence in the PIP letter in *IR*, the sentence above does not misstate the law: not going to the assessment would not automatically lead to the claimant losing her ESA payments because it might be accepted that she had good cause.

96. However, the sentence only avoids legal inaccuracy through ambiguity. There is more than one way in which a claimant can lose entitlement to ESA and the sentence does not adequately explain why non-attendance at a medical examination is one of them. Specifically, it does not explain that the claimant was at risk of losing benefit through *the mere fact of non-attendance* and that, in those circumstances, the health care professional ("HCP") would never consider the medical conditions from which she suffered and the degree of functional disability to which those conditions gave rise.

97. To elaborate, it would *also* have been a correct statement of the law to have told the claimant that she risked losing her ESA payments and/or credits if she **did** go to the work capability assessment. The risk would have been that, even if the claimant attended, the HCP might have decided that she did not score sufficient points.

98. The sentence that was actually used is consistent with the opposite risk, namely that if the claimant did not attend, she could lose her ESA because the HCP would have to advise the Secretary of State on the basis of the written evidence and without hearing in person from her. A claimant who understood the sentence in that way, could properly take the view that the written evidence was good enough to support her case and that

she need not attend. The sentence therefore does not even imply, far less actually express, an unambiguous, "crystal clear" legal obligation on the claimant to attend.

99. In *IR* Judge Wikeley made the telling point (at [35]) that:

> "… it is unclear how an indication of the possible (or even likely) consequences of not undertaking a particular course of action be used to create, or rather retro-fit, a requirement to attend in the first place."

I would respectfully go further. In my judgment, the only way in which a statement of the consequences of not attending an examination could be used to retro-fit a requirement to attend in the first place, would be if the statement made it "crystal clear" that:

(a) it was the mere fact of non-attendance that would lead to loss of benefit unless the Secretary of State accepted that there was a good reason for it; and that

(b) there would therefore be no assessment of whether the claimant actually had limited capability for work.

To be clear enough, the explanation would almost certainly need to say expressly that attendance at the examination was a legal obligation. And if it did so, there would no longer be a need to retro-fit.

100. For those reasons, I judge that the wording of the standard letter that was sent to the claimant did not include anything that unambiguously expressed the element of compulsion to that was necessary to impose a legal requirement on the claimant to attend the medical examination on 18 October 2017.

The Secretary of State's submissions

101. The Secretary of State resists that conclusion. Her representative submits as follows:

> "10. As part of the DWP's long-term intention to make forms etc more user-friendly, it has been the DWP's policy to phase out specific references to legislation. However, the claimant would have been made aware of what the legislation requires and the possible consequences of not attending a medical examination, as can be seen from a copy of an ESA claim form (highlighted section of the notes) and the leaflet that accompanies the appointment letter. I submit, therefore that the information given to the claimant prior to the date of any appointment makes it perfectly clear that

> participation in the WCA and attendance at a medical examination is not optional rather it is a requirement.
>
> 11. As a final point, the claimant in the instant case has given no indication that she thought attending the medical examination was optional. In my opinion, what the claimant has written on form BF223 … clearly shows that she knew she was obliged to attend the examination but she feels she had good cause not to do so, her grounds being medical ones rather than her not understanding the requirements of the legislation. As can be seen from page 61, the claimant knew that her benefit payments could be stopped if she did not attend the medical."

Specific references to legislation

102. I agree that the Secretary of State can require a claimant to attend for medical examination without the appointment letter referring expressly to regulation 23 of the ESA Regulations or section 8 of the 2007 Act.

103. But to have that effect, the appointment letter must use unambiguous terms of requirement. It is not for me to draft the Secretary of State's standard letters, but the use of phrases such as "you must attend", or "the law says you must attend", would go a long way—if not all the way—towards what is necessary without any specific legislation being cited.

The ESA claim form

104. The relevant part of the notes to the ESA claim form are in the following terms:

> "**Work Capability Assessments**
>
> As part of your claim to ESA, you'll be asked to take part in a Work Capability Assessment. We will ask you to read, fill in and return a Capability for Work questionnaire (ESA50) about how your disability, illness or health condition affects your ability to work. You may then be asked to go to a face-to-face assessment with a Healthcare Professional.
>
> **Please note**: The face-to-face assessment is not a medical examination. It is to help us understand how your disability, illness or health condition affects your ability to work.
>
> This means we can give you the right support to help you work when you can. This could include work you haven't thought about before. Not

> everyone is asked to go, but if you are given an appointment, it's important you attend. **If you don't fill in and send back the questionnaire, or go to your Work Capability Assessment if you are asked to, your ESA payments may be stopped**.
>
> We understand you might be nervous about your assessment. If you would like someone to go with you to the assessment, please take them with you. The person you take should know and understand you and your needs (for example, a relative, support worker or friend. They must be 16 or over).
>
> You can find out more about the Work Capability Assessment and see a video of a face-to-face assessment by visiting the Health Assessment Advisory Service website at **chdauk.co.uk"** (original emphasis).

105. The statement that "[t]he face-to-face assessment is not a medical examination" is surprising and, if true, would have potentially far-reaching consequences.

106. Regulation 23(1) of the ESA Regulations only empowers the Secretary of State to call a claimant to something that is a "medical examination". And regulation 23(2) only permits the Secretary of State to treat a claimant as not having limited capability for work if she "fails without good cause to attend for or to submit to an *examination* mentioned in paragraph (1)" (my emphasis).

107. The phrase "medical examination" is not defined in either the 2007 Act or the ESA Regulations. I therefore doubt—although I do not decide—that is being used as a term of art. It is at least arguable that the words are being used in a sense that is close to their meaning in normal everyday English. The use of the phrase "attend *for*" (my emphasis) and the word "submit" tend to support that conclusion: they suggest that whatever a "medical examination" may be, it is something that is being done to the claimant. For example, one does not "submit" to a "consultation" (which is the word used instead of "medical examination" in the PIP Regulations); one "participates" in it: see regulation 9(2) of the PIP Regulations (page v below).

108. It is possible—again I do not decide the point—that the section 8 of the Welfare Reform Act 2007 (page i below) empowers the Secretary of State to make regulations requiring a claimant to attend and participate in something other than a medical examination.

109. The power in section 8(3)(c), which was exercised to make regulation 23(1) of the ESA Regulations (page iii below) is expressed to be a particular example of the general power in section 8(1) to make regulations in accordance with which "whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the

limitation is such that it is not reasonable to require him to work" is to be determined. If the Secretary of State wanted to require claimants to attend a "face-to-face assessment" that was not a "medical examination", then perhaps the general power in section 8(1) could be used to do so.

110. Be that as it may, such regulations have not in fact been made. And those regulations that have been made refer to a "medical examination" and not to any other form of interaction between a claimant and a doctor or other health care professional.

111. In the light of those considerations, the notes to the claim form, taken together with the fact that the appointment letter did not refer to a medical examination, call into question whether the event that—to put it neutrally—was to have taken place on 18 October 2017 at 1.45 pm but did not, was in fact a "medical examination".

112. If it was not, then my initial view is that the Secretary of State had no power to call the claimant to attend it; and—irrespective of whether the claimant had good cause for non-attendance—no power to treat her as not having limited capability for work, if she did not attend. If that is correct, the claimant would be entitled to win her appeal on that ground alone.

113. However, as I have not received submissions on the point—and as I am satisfied that the claimant must succeed on other grounds—I will assume in the Secretary of State's favour, but without actually deciding, that the notes to the ESA claim form are incorrect and that the "face-to-face assessment" to which they refer does amount to a "medical examination".

114. Having made that assumption, I turn next to the sentences:

> "Not everyone is asked to go, but if you are given an appointment, it's important you attend. **If you don't fill in and send back the questionnaire, or go to your Work Capability Assessment if you are asked to, your ESA payments may be stopped."**

in paragraph 10 of the notes. The first of those sentences does not impose a legal requirement on the claimant to attend a medical examination when called to do so. That is for the reasons given at paragraphs 93 and 94 above. Nor, for reasons similar to those given in paragraphs 95 to 99 above, does the second sentence. That is so irrespective of whether the sentences are read on their own or in conjunction with the appointment letter.

The leaflet

115. In the passage quoted at paragraph 101 above the Secretary of State's representative also refers to "the leaflet that accompanies the appointment letter". That leaflet is 8 pages long.

116. Page 1 is introductory and includes the following two paragraphs in bold type:

> "**It is very important you go to your assessment.**
>
> **You could lose your ESA payments and/or National Insurance credits if you don't go to your Work Capability Assessment."**

Readers of this decision will, by now, be familiar with this formulation. For the reasons given at paragraphs 93 to 99 above, the wording does not impose a legal obligation on the claimant to attend the assessment.

117. Neither does the rest of the leaflet. Pages 2 to 5 give the claimant useful practical information about what they need to do before the assessment; pages 6 and 7 explain what happens at the assessment; and pages 7 and 8 explain what happens afterwards. Apart from the words quoted above, the only part of the leaflet that even contemplates that the claimant might not attend the appointment is a single sentence on page 4 which states:

> "If you are too unwell to attend your appointment, please call us straightaway on [**telephone number]**."

118. It is, however, perhaps worth quoting what the leaflet says about recording the assessment:

> "**Getting help and support**
>
> Please let us know **as soon as you get your appointment letter** if you need:
>
> …
>
> - your face-to-face assessment to be **audio-recorded**. Requests will be accepted where possible.
>
> …

> *You do not have a legal right to a recorded assessment and DWP have no legal obligation to provide an audio recording service or equipment*."

(The bold emphasis is original; the italicisation is mine.)

119. The italicised words appear to me to be an excellent example of how it is possible to talk about legal rights and obligations without references to specific legislation (see paragraphs 102 to 103 above). The fact that the Department is prepared to talk in such terms about recording an assessment makes its apparent reluctance to tell claimants in as many words that they are under a legal obligation to attend that assessment in the first place all the more puzzling.

This claimant's stated ground of appeal

120. The final point made by the Secretary of State's representative is that the claimant did not appeal on the basis that she was not under an obligation to attend the assessment but, rather, on the basis that she had good cause for having failed to do so.

121. That is undoubtedly the case. Page 61 of the papers (to which the quoted passage from the response refers) includes the sentence:

> "I was aware my money would be affected so therefore why would I deliberately miss my medical appointment knowing the messing of my benefit being stopped."

122. However, in relation to social security and child support appeals, the First-tier Tribunal exercises an inquisitorial and enabling jurisdiction. As Baroness Hale stated in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 6 (at [41]):

> "41. Another relevant fact of tribunal life is that the benefits system exists to pay benefits to those who are entitled to them. As counsel put it to us in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 1 WLR 967, the system is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less."

It is therefore not restricted to dealing only with the points raised by the parties. On the contrary, it is legally required to deal with all points that are "clearly apparent from the evidence": see *Hooper* (paragraphs 70 to 72 above) at [28] approving the decision of the Court of Appeal in Northern Ireland in *Mongan v Department of Social Development* [2005] NICA 16, R4/01 (IS) at [15]. As indicated at paragraph 81 above, I judge that the question whether the appointment letter imposed a legal requirement was clearly apparent from the day on which the decision in *OM* was made public.

123. As far as what the claimant did or didn't know is concerned, there is some distance between knowing as a fact that one's benefit will probably be stopped if one does not attend an appointment and knowing that one is legally required to attend that appointment. It does not necessarily follow from the fact that someone—even someone in authority—warns you of adverse consequences if you do not take a particular course of action that you are legally obliged to take that action. A clear example of that can be found in *Reilly & Wilson* (see paragraphs 73 to 74 above): Ms Reilly was told by her Jobcentre adviser that it was mandatory for her to take part in the Sector-Based Work Academy scheme, when that was not the case: see [21]. I read the claimant's statement that she was "aware [her] money would be affected" as a statement of her knowledge of what was likely to happen in practice. I do not read it as an acknowledgment that the Secretary of State would be legally entitled to stop her money, far less that she had inferred that she must therefore be under a legal obligation to attend for examination.

124. In any event, the claimant cannot have "known" that she was under a legal obligation to attend for examination because—for all the reasons I have given above—she was **not** under any such obligation. The letter she was sent *invited* her to attend for examination. She would not have been doing anything wrong, or acting unreasonably, if she had accepted that invitation. But she did not do so. No legal consequences follow from that omission because it was no more than that: an omission. She did not *fail* to attend for examination because she was never under any legal obligation to do so.

Signed (on the original)
on 21 February 2020

Richard Poynter
Judge of the Upper Tribunal

Appendix A

Law Relating to Employment and Support Allowance

WELFARE REFORM ACT 2007

Limited capability for work

8.—(1) For the purposes of this Part, whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work shall be determined in accordance with regulations.

(2) Regulations under subsection (1) shall—

(a) provide for determination on the basis of an assessment of the person concerned;

(b) define the assessment by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed;

(c) make provision as to the manner of carrying out the assessment.

(3) Regulations under subsection (1) may, in particular, make provision—

(a) as to the information or evidence required for the purpose of determining the matters mentioned in that subsection;

(b) as to the manner in which that information or evidence is to be provided;

(c) for a person in relation to whom it falls to be determined whether he has limited capability for work to be called to attend for such medical examination as the regulations may require.

(4) Regulations under subsection (1) may include provision—

(a) for a person to be treated as not having limited capability for work if he fails without good cause—

(i) to provide information or evidence which he is required under such regulations to provide,

(ii) to provide information or evidence in the manner in which he is required under such regulations to provide it, or

(iii) to attend for, or submit himself to, a medical examination for which he is called under such regulations to attend;

(b) as to matters which are, or are not, to be taken into account in determining for the purposes of any provision made by virtue of paragraph (a) whether a person has good cause for any act or omission;

(c) as to circumstances in which a person is, or is not, to be regarded for the purposes of any such provision as having good cause for any act or omission.

(5) Regulations may provide that, in prescribed circumstances, a person in relation to whom it falls to be determined whether he has limited capability for work, shall, if prescribed conditions are met, be treated as having limited capability for work until such time as—

(a) it has been determined whether he has limited capability for work, or

(b) he falls in accordance with regulations under this section to be treated as not having limited capability for work.

(6) The prescribed conditions referred to in subsection (5) may include the condition that it has not previously been determined, within such period as may be prescribed, that the person in question does not have, or is to be treated as not having, limited capability for work.

EMPLOYMENT AND SUPPORT ALLOWANCE REGULATIONS 2008

Information required for determining capability for work

21.—(1) Subject to paragraphs (2) and (3), the information or evidence required to determine whether a claimant has limited capability for work is—

(a) evidence of limited capability for work in accordance with the Medical Evidence Regulations (which prescribe the form of doctor's statement or other evidence required in each case);

(b) any information relating to a claimant's capability to perform the activities referred to in Schedule 2 as may be requested in the form of a questionnaire; and

(c) any such additional information as may be requested.

(2) Where the Secretary of State is satisfied that there is sufficient information to determine whether a claimant has limited capability for work without the information specified in paragraph (1)(b), that information must not be required for the purposes of making the determination.

(3) Paragraph (1) does not apply in relation to a determination whether a claimant is to be treated as having limited capability for work under any of regulations 20 (certain claimants to be treated as having limited capability for work), 25 (hospital in-patients), 26 (claimants receiving certain regular treatment) and 33(2) (additional circumstances in which a claimant is to be treated as having limited capability for work).

Failure to provide information in relation to limited capability for work

22.—(1) Where a claimant fails without good cause to comply with the request referred to in regulation 21(1)(b), that claimant is, subject to paragraph (2), to be treated as not having limited capability for work.

(2) Paragraph (1) does not apply unless—

(a) the claimant was sent a further request at least three weeks after the date of the first request;

(b) at least 1 week has passed since the further request was sent.

Claimant may be called for a medical examination to determine whether the claimant has limited capability for work

23.—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.

(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work.

(3) Paragraph (2) does not apply unless—

(a) written notice of the date, time and place for the examination was sent to the claimant at least seven days in advance; or

(b) that claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

Matters to be taken into account in determining good cause in relation to regulations 22 or 23

24. The matters to be taken into account in determining whether a claimant has good cause under regulations 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work) include—

(a) whether the claimant was outside Great Britain at the relevant time;

(b) the claimant's state of health at the relevant time; and

(c) the nature of any disability the claimant has.

Appendix B

Law Relating to Personal Independence Payment

WELFARE REFORM ACT 2012

Ability to carry out daily living activities or mobility activities

80—(1) For the purposes of this Part, the following questions are to be determined in accordance with regulations—

(a) whether a person's ability to carry out daily living activities is limited by the person's physical or mental condition;

(b) whether a person's ability to carry out daily living activities is severely limited by the person's physical or mental condition;

(c) whether a person's ability to carry out mobility activities is limited by the person's physical or mental condition;

(d) whether a person's ability to carry out mobility activities is severely limited by the person's physical or mental condition.

(2) [*Omitted*]

(3) Regulations under this section—

(a) must provide for the questions mentioned in subsections (1) and (2) to be determined, except in prescribed circumstances, on the basis of an assessment (or repeated assessments) of the person;

(b) must provide for the way in which an assessment is to be carried out;

(c) may make provision about matters which are, or are not, to be taken into account in assessing a person.

(4) The regulations may, in particular, make provision—

(a) about the information or evidence required for the purpose of determining the questions mentioned in subsections (1) and (2);

(b) about the way in which that information or evidence is to be provided;

(c) requiring a person to participate in such a consultation, with a person approved by the Secretary of State, as may be determined under the regulations (and to attend for the consultation at a place, date and time determined under the regulations).

(5) The regulations may include provision—

(a) for a negative determination to be treated as made if a person fails without a good reason to comply with a requirement imposed under subsection (4);

(b) about what does or does not constitute a good reason for such a failure;

(c) about matters which are, or are not, to be taken into account in determining whether a person has a good reason for such a failure.

(6) In subsection (5)(a) a "negative determination" means a determination that a person does not meet the requirements of—

(a) section 78(1)(a) and (b) or (2)(a) and (b) (daily living component);

(b) section 79(1)(a) to (c) or (2)(a) to (c) (mobility component).

SOCIAL SECURITY (PERSONAL INDEPENDENCE PAYMENT) REGULATIONS 2013

Information or evidence required for determining limited or severely limited ability to carry out activities

8.—(1) The Secretary of State may require C to provide any information or evidence required to determine whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities.

(2) Where information or evidence is requested under paragraph (1), C must provide the information or evidence to the Secretary of State within one month from the date of the request being made or within such longer period as the Secretary of State may consider reasonable in the circumstances of the particular case.

(3) Where C fails without good reason to comply with the request referred to in paragraph (1), a negative determination in relation to the component to which the failure related must be made.

Claimant may be called for a consultation to determine whether the claimant has limited or severely limited ability to carry out activities

9.—(1) Where it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities, C may be required to do either or both of the following—

(a) attend for and participate in a consultation in person;

(b) participate in a consultation by telephone.

(2) Subject to paragraph (3), where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination must be made.

(3) Paragraph (2) does not apply unless—

(a) written notice of the date, time and, where applicable, place for, the consultation is sent to C at least 7 days in advance; or

(b) C agrees, whether in writing or otherwise, to accept a shorter period of notice of those matters.

(4) In paragraph (3), reference to written notice includes notice sent by electronic communication where C has agreed to accept correspondence in that way and 'electronic communication' has the meaning given in section 15(1) of the Electronic Communications Act 2000.

(5) In this regulation, a reference to consultation is to a consultation with a person approved by the Secretary of State.

Matters to be taken into account in determining good reason in relation to regulations 8 and 9

10. The matters to be taken into account in determining whether C has good reason under regulation 8(3) or 9(2) include—

(a) C's state of health at the relevant time; and

(b) the nature of any disability that C has.

Appendix C

If you call or write to us, please use this reference:
AB123456C

Department for Work & Pensions

Title, Initial, Surname
Address Line 1
Address line 2
Address line 3
Address line 4
Postcode

[Building/Office Location]
[Office Type]
[Street]
[Town]
[County]
[Post Code]

www.gov.uk

Telephone: 0000 000 0000
Textphone: 0000 000 0000

Employment and Support Allowance (ESA)
Your Work Capability Assessment appointment

Dear
Select Option

Confirm all dropdown options

The Work Capability Assessment will help us to understand your capability to work with your disability, illness or health condition. The assessment helps us find out if you could do some type of work and any support you may need to move closer to work. This could include work you haven't thought about before.

You could lose your ESA payments and / or National Insurance credits if you don't go to your Work Capability Assessment.

It is very important you go to your assessment on .

If you need this letter in braille, large print or audio please call 0800 288 8777.

We don't provide information in other languages

Your appointment details
On this date:
At this time:
Location: Jobcentre,
Postcode:

Please arrive **10 minutes** before your appointment time. If you have any medical evidence, that we haven't already seen, please bring it with you.

AL1
Page 1 of 3

A map to the venue is enclosed in this letter. Please turn the page over to find out how you can claim **travel expenses**.

Find out more about your assessment

Please read the leaflet that came with this letter to find more information including:

- what you need to take to your assessment
- asking for a home visit
- travel, parking and fuel expenses

Getting help and support

We understand you might be nervous about your assessment. If you would like someone to come with you to the assessment please bring them with you. The person you bring should know and understand you and your needs (for example, a relative, support worker or friend). They must be 16 or over.

If you or the person you are bringing to the assessment is a wheelchair user, please let us know on **0800 288 8777** so we can make suitable access arrangements.

If you can't make the appointment

If you are too unwell to attend your appointment, please call the Health Assessment Advisory Service straightaway on **0800 288 8777.** The opening hours are Monday to Friday 8am to 8pm, Saturday from 9am to 5pm.

More information

If you have any questions about this letter please contact the Health Assessment Advisory Service on **0800 288 8777.**

You can also see a video example of an assessment at **www.chdauk.co.uk/videos**

Yours sincerely,

Office manager

Equality and Diversity

We are committed to treating people fairly, regardless of their disability, ethnicity, gender, sexual orientation, transgender status, marital or civil partnership status, age, religion or beliefs. Please contact us if you have any concerns.

Call charges

Calls to 0800 numbers are free from landlines and mobiles.

Assessments are delivered on behalf of DWP by Centre for Health and Disability Assessments operated by MAXIMUS