IN THE UPPER TRIBUNAL **Appeal No: CE/1850/2014**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Walsall on 22 August 2013 under reference SC196/13/01439 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) The appellant is reminded that the tribunal can only deal with his situation as it was up to 24 August 2012 and not any changes after that date.

(3) If the appellant has any further evidence that he wishes to put before the tribunal which is relevant to his health and functioning in August 2012 this should be sent to the First-tier Tribunal's office in the Birmingham within one month of the date this decision is issued.

(4) The First-tier Tribunal should have regard to the points made below.

REASONS FOR DECISION

Introduction

1. The central issue of law with which this appeal is concerned is whether, in the form in which the Employment and Support Allowance Regulations 2008 (the "ESA Regs") stood before their amendment with effect from 28 January 2013, the words "unaided by another person" in descriptor 1(b) in Schedule 2 the ESA Regs - which was concerned with whether a claimant could not "mount or descend two steps unaided by another person even with the support of a handrail " - were limited to physical aid by the other person. I have concluded that no such limitation was then in place. (The position after 28 January 2013 may be different but did not arise on the facts of this case given that the Secretary of State's decision under appeal was dated 24 August 2012.)

2. This issue is potentially important in this case because at the relevant part on his ESA50 form the appellant had said he could not "go up or down two steps without help from another person, if there is a rail to hold on to" (this was the wording of the question on the ESA50). He gave as his reasons "The Council gave me a downstairs Flat, the stairs are a problem so someone stands behind me".

3. The appellant in the ESA 50 also said that on a weekly basis he had to wash or change his clothes because of difficulty controlling his bowels. He referred to not having had a firm stool for over 12 months.

The factual background in more detail

4. The appellant was found not to have limited capability for work and therefore not to be entitled to employment and support allowance (ESA) in a decision made by the respondent on 24 August 2012. He had scored 6 points under descriptor 1(d) in Part 1 of Schedule 2 to the ESA

Regs, but as that did not meet the required 15 points his entitlement to ESA ended. Put very broadly at this stage, descriptor 1(d) concerned whether someone could mobilise 200 metres.

5. In the medical report on form ESA85 which had preceded the respondent's decision, the health care professional (HCP) identified the appellant's medical conditions as "Respiratory problem, Muscoskeletal problem [and] Abdominal problem". The HCP noted, relevantly, that the appellant lived alone in a ground floor flat and had stated that he did not use stairs. The HCP's examination of the appellant's right knee showed instability, tenderness and mild swelling. This problem in the right knee was due to a road accident the appellant had been involved in some 12 years earlier. He also had restriction in his right hip. As for the appellant's abdominal or bowel problem, the HCP found that none of the scoring continence descriptors under activity 9 in Schedule 2 to the ESA Regs applied. This was on the basis that the appellant did not go to the local shops due to pain and breathlessness. As for the appellant's evidence that he had diarrhoea every day, the HCP recorded "but no continence problems indicated".

6. Despite the physical nature of the medical conditions identified, the HCP also considered the "mental, cognitive and intellectual function" descriptors under Part 2 of Schedule 2 to the ESA Regs and found none of the scoring descriptors in Part 2 were satisfied.

7. The Secretary of State's decision was upheld on appeal by the First-tier Tribunal on 22 August 2013 ("the tribunal") without a hearing. It, too, limited the points scored to 6, for descriptor 1(d). In terms of the mental, cognitive and intellectual function descriptors in Part 2 of Schedule 2, the tribunal seems to have proceeded on the basis that the appellant did not have a mental illness or disability and had claimed functional problems under Part 2 of Schedule 2 because of his physical health problems. However the tribunal considered the Part 2

descriptors the appellant had claimed problems with and found none of them met.

8. I gave the appellant permission to appeal on three grounds, which were:

> "First, the tribunal's reasoning on mobilising 50 metres is arguably inadequate. Why is an ability to get around a flat (which is only likely to involve walking distances of between 5-20 metres in one go) contrary to the appellant's case? Furthermore why is walking for up to one minute contrary to meeting the 50 metre tests, especially the repeatedly mobilise test?
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> Second, the tribunal's reasons do not appear to address the appellant's case that he could not go up and down 2 steps unaided; nor does the ESA85. Does a person standing by waiting to intervene amount to "aid"? Can this include supervisory or psychological "aid" such as cajoling or encouraging the person to walk up or down the two steps or watching over him in case he falls (where absent such watching over the claimant might reasonably not carry out the action). It may be instructive to contrast the "unaided" word in descriptor 1(b) with the wording in descriptor 2(a) in Schedule 2 with its reference to "**receiving physical assistance from another person**". That narrower focus might suggest that "unaided" has a wider scope.
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> Third, the tribunal's reasoning arguably does not address the "at risk" continence test, which may have been put in issue on the appeal given the comments made by [the appellant] in his appeal letter on page 14."

9. The Secretary of State then filed a submission supporting the appeal on the first and third grounds on which permission had been given but resisting the second ground. He argued in respect of the second ground that the relevant 'aid' under descriptor 1(b) was limited to "physical assistance to the claimant" because the test was "physical ability to climb stairs even with the support of a handrail". Accordingly, so the Secretary of State argued, a psychological barrier a claimant might have to climbing stairs was not relevant to the application of descriptor 1(b) in any case.

10. The appellant's response, perhaps understandably, did not grapple with this legal argument. It was filed by the appellant's support worker and emphasised, inter alia: (i) the appellant worried about going out as he needed rapid and regular access to toilet facilities due to his

bowel/stomach problems and had to plan any journeys around being able to access a toilet; and (ii) he suffered from anxiety and depression due to his restricted lifestyle and distress caused by his bowel problems.

11. I then held an oral hearing on the appeal as I was not entirely sure that the Secretary of State's approach to "aid", or strictly speaking "unaided", in descriptor 1(b) was correct. The appellant did not appear at that hearing nor was he represented at it either. The Secretary of State was represented by Mr Stephen Cooper, solicitor. He in essence adhered to the earlier written submission of the Secretary of State.

12. Following that hearing I issued directions raising issues that Mr Cooper had not been able to deal with fully at the hearing. The directions said:

> "the Secretary of State….[is to make] further written submissions on two issues in particular. Those two issues are:
>
> (i) what effect regulation 19(5) of the ESA Regs (in the form that regulation was in as at the 24th of August 2012) and *JG –v- SSWP* (ESA) [p2013] UKUT 037 (AAC); [2013] AACR 23, has on the Secretary of State's argument that the words "unaided by another person" refer to physical assistance only and cannot encompass assistance in the form of cajoling and encouraging in order to enable a person to mount or descend two steps. On the face of regulation 19(5) in its then form and given what is said in *JG*, aiding a person in the form of coaxing or cajoling them so as to enable them to overcome their anxiety about using the contemplated stairs arguably ought to count for the purposes of descriptor 1(b), so that if the person cannot mount or descend the two steps without such help or aid from another person then descriptor 1(b) would have applied; and
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> (ii) whichever is the correct answer under (i), whether "aid" or "unaided" in the descriptor 1(b) statutory context requires <u>active</u> help such as holding or talking or whether <u>passive</u> help of standing by waiting to intervene if the person were physically to slip or mentally to freeze mid-stair will suffice?"

13. In further submissions the Secretary of State maintained that activity 1 in Schedule 2 to the ESA Regs was aimed at assessing a person's physical mobility and, in context, "unaided" had to be read as meaning not needing help with their physical mobility. A person able to use the

stairs (only) with coaxing and encouragement was, so the Secretary of State argued, physically able to carry out that descriptor unaided. As to the second point, the Secretary of State argued that "unaided" was referring to a lack of *active* support by the other person. A person standing passively by in case intervention was needed was not providing 'aid' in the usual meaning of that word.

14. The appellant has made no response to the Secretary of State's further submissions.

Relevant Law

15. Having what is termed "limited capability for work" is a basic condition of entitlement to ESA: see section 1(3)(a) Welfare Reform Act 2007 ("WRA"). Section 8 of the WRA provides, so far as is here relevant:

> "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."

A critical feature is therefore the assessment of the extent to which a person is capable or incapable of performing such activities as may be prescribed.

16. This concept is unpacked further in the ESA Regs, and regulation 19 of those regulations in particular. It provided as at the date of the Secretary of State's decision here under appeal, so far as is material, as follows:

> "**19.**—(1) For the purposes of Part 1 of the Act, whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.
> (2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities…..
>
> (5) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 2, it is a condition that the claimant's incapability to perform the activity arises from—
> (a) a specific bodily disease or disablement;
> (b) a specific mental illness or disablement; or
> (c) as a direct result of treatment provided by a registered medical practitioner, for such a disease, illness or disablement."

17. It is important at this stage to emphasise one feature of regulation 19. This concerns regulation 19(5). It is best explained by setting out what was said about this version of regulation 19(5) by a three judge panel of the Upper Tribunal in *JG –v- SSWP* [2013] UKUT 37 (AAC); [2013] AACR 23. What was said is accurately summarised in the headnote to the decision in *JG* .

> "the award of points for an incapability to perform an activity under Part I of Schedule 2 could be made where it arose from a specific bodily disease or disablement and from a mental illness or disablement (and vice versa)…….although no causative link was made in regulation 19(5), care must be taken in identifying the cause of the person's incapability to perform certain activities because a specific link to a physical or mental cause was sometimes present in the wording of the individual activities and descriptors in Schedule 2 to the ESA Regulations……. the Employment and Support Allowance Regulations 2013 have..[effective from 28.01.13] reinstated the position under the incapacity for work scheme, with points under Part I of Schedule 2 having to arise "from a specific bodily disease or disablement" and points under Part 2 "from a specific mental illness or disablement"

18. The only other relevant part of the ESA Regs is activities 1 and 9 in Schedule 2 to the ESA Regs, as in force in August 2012. Activity 1 at that time provided as follows

1. Mobilising unaided by another	(a) Cannot either:	**15**

person with or without a walking stick, manual wheelchair or other aid if such aid could reasonably be used.	(i) Mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (ii) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion. (b)Cannot mount or descend two steps unaided by another person even with the support of a handrail. **9**

The numbers in bold are the points awarded if the descriptor is met. I have not set out the rest of the descriptors as they then were under activity 1. Descriptor 1d under which the appellant was found to have scored 6 points was in the exact same format as descriptor 1(a) above save that the reference to 50 metres in both places was replaced by 200 metres; and descriptor 1(c) was again the same as 1(a) save that the distance was 100 metres in both places and the points awarded were 9.

19. The "at risk" descriptor for continence I referred to in the third ground of the grant of permission to appeal was found in descriptor 9(b) in Schedule 2 to the ESA Regs. If it was met a claimant would score of 6 points. Descriptor 9(b) provided as follows:

> "At risk of loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder, sufficient to require cleaning and a change in clothing, if not able to reach a toilet quickly."

20. Also potentially relevant to the discussion set out below on "unaided" and descriptor 1(b) is the decision of Upper Tribunal Judge Rowland in *MC –v- SSWP* (ESA) [2015] UKUT 0646 (AAC), in particular at paragraph 9. This was a case decided after the amendments made to regulation 19(5) of the ESA Regs in January 2013. It concerned activity 15 ("getting about") in Part 2 of Schedule 2 to the ESA Regs (i.e. what may be termed 'the mental health descriptors'). *MC* holds that the regulation 19(5)(b) "specific mental illness or disablement" only had to be

an *effective* cause of the qualifying getting about problems under activity 15 and not the root or primary cause of those problems. As Judge Rowland explains further in paragraph 9 of *MC*:

> "...where a specific mental illness or disablement would not by itself have been sufficiently serious to enable a claimant to satisfy a descriptor, it is enough for the purposes of regulation 19(5)(b) that it has made the difference between the claimant being able to satisfy a descriptor and not being able to do so even though there may have been another, perhaps more important, cause."

Discussion and conclusions

21. I can deal with Grounds 1 and 3 relatively shortly as I am satisfied that the tribunal erred in law on both grounds. Had it addressed these areas adequately then it may have led to the appellant being awarded 15 points and therefore the errors of law are plainly material to the decision.

Ground 1

22. As set out above, ignoring descriptor 1(b) and using stairs the descriptors under activity 1 in Schedule 2 to the ESA Regs cover the ability to mobilise 50, 100 and 200 metres (or more than those distances) respectively. As Judge Rowland emphasised in paragraph 5 of *KB –v- SSWP* (ESA) [2014] UKUT 0126 (AAC), an ability to mobilise one of the longer distances in one go under the relevant descriptors under activity 1 does not necessarily preclude a person scoring points under the "repeatedly mobilise" descriptors for one of the shorter distances. Given this, in my judgment the tribunal's explanation for why the appellant only scored 6 points under activity 1 (based on his walking around his flat and walking for one minute) was materially inadequate as it does not reason out adequately the basis on which the tribunal found the appellant was able to repeatedly mobilise 50 metres or 100 metres under descriptors 1(a)(ii) and 1(c)(ii).

Ground 3

23. This ground concerns the "at risk" descriptor under activity 9 – descriptor 9(b). The appellant in his ESA 50 had said he had to wash or change his clothes weekly because of difficulty controlling his bowels. In his appeal letter he had said, apparently, that if he wasn't housebound and had to walk to the Jobcentre he doubted they would let him 'sign on' as he would have to ask for the toilet as he would have soiled himself. On the face of what is said in the appeal grounds in particular, it seems to me that the descriptor 9(b) was being raised as an issue to be addressed on the appeal.

24. It is difficult to see where the ESA85 addresses and explains away this "at risk" problem. The statement that "has diarrhoea but no continence problems indicated" is difficult to follow as a determinative resolution of this issue given what the appellant had at least indicated on his ESA50 form about weekly washing or changing of his clothes *because of* bowel control problems. Nor is it made clear in the ESA85 that absent "pain and breathlessness" the appellant would have no other problems going to his local shops. Even if he did not have any other problems on such journeys, the ESA85 says nothing about whether that was because the appellant was able to reach a toilet quickly.

25. These deficits are not addressed or resolved in the tribunal's statement of reasons. The tribunal noted the appellant was not being prescribed any medication in respect of difficulties with incontinence. That may have been true but does not address the *Condition History* taken by the HCP that the appellant saw his GP for advice and treatment for this condition. More importantly, the tribunal accepted that the appellant had diarrhoea but not loss of control. It is not explained why these were mutually exclusive, particularly given the appellant's evidence about soiling himself if he had to go to the Jobcentre and having to wash or change his clothes weekly because of problems controlling his bowels. And the "at risk" descriptor is not addressed at all.

26. The new First-tier Tribunal will need to have regard to Upper Tribunal Judge Grey's decisions in *DG –v SSWP* (ESA) [2015] UKUT 370 (AAC) and *FR –v- SSWP* (ESA) [2015] UKUT 0151 (AAC) when addressing activity 9.

Ground 2

27. I turn now to the issue of construction on this appeal which may have a wider significance, namely ground 2 above and whether the word "unaided" by another person in its relevant statutory context has the limited meaning of "without physical assistance" from another person.

28. Before doing that, however, I need to consider how the tribunal addressed this issue. That is quite easy as the tribunal said nothing at all directly about the appellant's ability to mount or descend the statutory two steps. Living alone in his ground floor flat, and walking around that flat, of itself does not deal with steps, at least not directly or obviously, as the arguable implication was that the appellant had no steps in his ground floor, or as the appellant described it "downstairs", flat.

29. I therefore consider that the tribunal's reasoning here is materially inadequate, even ignoring the issue of what is meant by "unaided" altogether or even adopting the Secretary of State's reading of the statutory test. The inadequacy in the reasoning means that it cannot be said whether the tribunal did misdirect itself as to the law in terms of the meaning of "unaided". However, as the appeal has to be reheard and another First-tier Tribunal will need to address whether descriptor 1(b) was satisfied, this decision needs to grapple with the issue and give directions to the next tribunal as to the correct construction of "unaided by another person" in descriptor 1(b).

30. I will first address the issue on the law in the abstract, so to speak, by which I mean as a matter of statutory construction without reference to the appellant's case. I will then set out how my conclusions on how the statutory test might apply to the appellant's case.

31. In my judgment, the correct starting point for analysing this issue is to ask whether the phrase "unaided by another person" in its statutory context was limited to physical assistance by another person. There can be no disputing that it covers physical assistance. The critical question therefore is whether that is all it covers.

32. As a matter of ordinary English language usage it does not seem to me that the word "unaided" is so limited in its meaning or scope. Most dictionaries refer to the word as meaning without help, support or assistance. That aid (or support, assistance or help) can be given by another person through an act of physical assistance but it can also be given, in an appropriate case and depending on what the aid or help is needed for, by verbal means. For example, a child struggling with maths homework might be 'helped' or 'aided' by a parent talking it through with them. In an exam context that would clearly and properly as a matter of language be viewed as the child not taking part in the exam unaided. Similarly, it is not a misuse of language in my view to say of a person with acute anxiety about flying or using a lift that he was aided (or helped) to fly or use the lift by being spoken to by another person while getting into the lift or aboard the plane so as to reassure him that he would be safe and nothing untoward would happen. The person with the fear of flying might well say that he could not have flown unaided by the other person, or without the help of that other person. Put shortly, there is no *inherent* limitation in the ordinary use of the word "unaided" which confines its meaning to "unaided physically". The context therefore has to be considered.

33. The context in terms of activity 1 in Schedule 2 to the ESA Regs in the form those regulations were in in August 2012 is not limited to descriptor 1(b). This is because the words "unaided by another person" appear in the definition of activity 1 itself – "mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid, if such aid can reasonably be used" – and so cover all the descriptors under activity 1. The Upper Tribunal three-judge panel's decision in *SI –v- SSWP* (ESA) [2014] UKUT 308 (AAC); [2015] AACR 5 was concerned with what was meant by whether a manual wheelchair could *reasonably* be used and, in that context, concluded (in paragraphs 48 and 59) that there were no words expressly qualifying the phrase "which can reasonably be used" and therefore "all circumstances that might impede use of an aid or appliance in a workplace by the individual claimant should be taken into account, whether or not they relate to the claimant's physical or mental condition". *SI* does not, however, address what is meant by the phrase "unaided by another person".

34. The words "mobilising" and "unaided by another person" did not appear in the ESA Regs in their original form. Activity 1 in Schedule 2 was initially concerned with the activity of "Walking with a walking stick or other aid if such aid is normally used". In March 2009, however, what was termed a *department led review* took place into, inter alia, the limited capability for work assessment. This led to a report of a working group on the assessment in October 2009 which concluded that "assessing an individual's ability to walk does not provide the most appropriate measure of their capability for work". The intention of the activity was to assess an individual's mobility and this could be achieved by other means, such as use of a wheelchair. The proposal this working group made, therefore, was that Activity 1 should cover "Mobilising with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used". And descriptor 1(b) was proposed to become "Cannot mount or descend [instead of *walk up or down*] two steps even with the support of a handrail". In neither place, however, was it proposed that the phrase "unaided by another person" be included.

35. There was, however, an addendum report to the working group's report. This was dated March 2010 and was titled as being a *Technical review by the Chief Medical Adviser*. This further considered Activity 1. Relevantly this report said:

> "The intent of the descriptor [this seems to be a mistaken reference and should instead have said "activity]" is to focus on disability and capture the degree of adaptation that an individual might have made. This should be achieved without assistance from another person...."(my underlining added for emphasis).

The proposed changes to activity 1 and descriptors 1(b) were then amended under this addendum report so as to include the words "unaided by another person".

36. Both of these reports appeared in Appendix 4 to the Secretary of State's *Explanatory Memorandum to the Social Security Advisory Committee* in respect of the draft amending regulations which led to Activity 1 in Schedule 2 being amended to the form it was in at the time material to this appeal. The reports are therefore admissible as an aid to statutory construction, at least in terms of identifying the mischief which the amending words were seeking to address and the underlying purpose of those words: see *R(IB)2/07* and *SI* (above - at paragraphs 44-46). The Social Security Advisory Committee (SSAC) did not address the intended amending words "unaided by another person" and, as far as I am aware, they were not addressed further before the amendments were passed into law. If admissible, therefore, the most the reports to SSAC show is that the word "unaided": (a) was thought of as being akin to "unassisted, (b) was not thought of as needing to be qualified or limited by words such as "physically", and (c) that the core concern was to ensure the person's ability to mobilise was assessed by him or her carrying out the activity on their own. I do not consider, therefore, that these reports provide any support for an argument that there is any limitation in the word "unaided" such that it means "unaided physically".

37. That then takes the enquiry as to meaning back to the context within which the word or words in issue appeared in the ESA Regs at the relevant time. Does that context provide for the limitation for which the Secretary of State contends?

38. That context starts with section 8(2)(b) of the Welfare Reform Act 2007 and regulation 19(2) and (4) of the ESA Regs, all of which focus on assessing a claimant's capability to perform the activities in Schedule 2. What has to be assessed therefore is the appellant's capability to "[mobilise] unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used". It is of course obvious that the physical aid of another person is to be discounted. I would, moreover, unhesitatingly accept that physical aid is the most obvious form of aid by another person in the context of mobilising. Thus another person pushing the manual wheelchair would be an obvious form of aid that is not to be taken into account. However, in my judgment there is nothing in the relevant statutory context which limits the aid provided by another person that is to be disregarded to physical aid.

39. Does anything in the rest of the wording of activity 1 at the relevant time point to a different conclusion? I do not consider it does. It is true that the list of aids which may used by the claimant (wheelchair etc) refers to physical objects and those may be limited to providing *physical* help to enable the claimant to mobilise. However the words here are nouns and are referring to objects which are to be taken into account (if they can reasonably be used: per *SI*). By way of contrast the verb aid in "unaided by another person" is referring to an activity which is not to be taken into account. I therefore do not consider that the meaning or scope of the word "aid" in the statutory context of activity 1 dictates or helps with the meaning of "unaided by another person".

40. Nor do I consider that the wording of descriptor 1(b) takes matters any further. Again, I recognise that the most obvious form of aid given by another person to a claimant trying to mount or descend two steps even with a handrail is likely to be physical aid or help. For example, and if the confined stairwell allows for this, the other person might hold the claimant's non-handrail holding hand. However, a person who has an acute phobia of stairs or fear of falling down them may just as much be aided, in my view, by a person talking to, reassuring and cajoling them so as to get them up or down the two steps as does the act of physical aid by another person. The claimant in such a situation would just as much be unable to mount or descend the two steps unaided by another person as the claimant with limited function in his arms and legs.

41. Furthermore, I bear in mind that the mischief which the reports to SSAC indicate the words "unaided by another person" was seeking to address was people not being assessed mobilising on their own. That seems to me to point against the disregarded help from another person being limited to physical help, as long as what is provided by the other person can be described as the giving of aid which would help the claimant to mobilise the relevant statutory distances.

42. Perhaps more importantly, the statutory context in my judgment in fact points against "unaided" in descriptor 1(b) meaning "unaided physically". I say this for two reasons.

43. First, where it was needed in the statutory context in Schedule 2 to the ESA Regs provision was, and is, made for the disregarded help or aid from another person to be *physical* help or aid. This is shown by activity 2 in Schedule 2, which covers the activity of "Standing and sitting". One of the descriptors under activity 2 provides, and has provided at all times since the inception of the ESA Regs, that 15 points will be awarded where the claimant "Cannot move between one seated position and another seated position located next to one another without receiving physical assistance from another person" (my underlining added

for emphasis). At the time relevant to this appeal this was descriptor 2(a) under activity 2. Descriptor 2(b)(ii) referred at the same time inter alia to "remain….standing unassisted by another person". (I need not address, as it does not arise on this appeal, the scope of the unqualified word "unassisted" in descriptor 2(b)(ii).) The important point in terms of statutory construction is that where the help, aid or assistance was intended to be qualified to physical aid only then Schedule 2 made (and makes) that clear by saying so. The absence of any such qualification to the word "unaided" in descriptor 1(b) is in my view telling and points against it having any such qualification.

44. Nor do I think the Secretary of State can gain material assistance from the argument he makes on this point. He argues that "the physical assistance in helping a person from a chair envisages more physical involvement in taking a persons weight" whereas under descriptors 1(b) and 2(b)(ii) "the aid or assistance required would be more a question of providing balance and is more passive rather than active". I do not see this as a valid distinction. It is a quantitative distinction (the amount of aid, help or assistance needed being said to be more) rather than qualitative. Moreover, I do not follow why, if physical aid is the test as the Secretary of State contends, this excuses its absence from descriptor 1(b). If that is the test then descriptor 1(b) could have said "unaided physically by another person" and that would have covered the lesser aid allegedly needed in helping a person mount or descend the two steps than the greater physical assistance needed to get them out of a chair. The latter part of the Secretary of State's argument here is also difficult to square with his later argument that whatever the meaning of 'aid' may be that descriptor 1(b) is concerned with, it is an active state of giving the aid rather than a passive state of standing by so as to give reassurance (and intervene if necessary) .

45. The second statutory consideration which in my view points against the Secretary of State's argument arises from regulation 19(5) of the ESA Regs. At the material time as noted in *JG* regulation 19(5) allowed that

the extent of a claimant's incapability to perform an activity under Part 1 of Schedule 2 to the ESA Regs could arise from a specific bodily disease or disablement *or* a specific mental illness or disablement; provided that any such cause was not excluded by the particular terms of any activity or descriptor (*JG* at paragraph 35). The Secretary of State's reading of the statutory scheme as it then was would frustrate this aim. For the reasons I have given above, I cannot find anything in the wording of activity 1 or descriptor 1(b) which points to that descriptor only applying at the relevant time where the cause of the incapability to mount or descend two steps was a bodily disease or disablement. (The position may be different since the amendments to regulation 19(5) of the ESA Regs with effect from 28 January 2013 but that is not for me to decide on this appeal.)

46. Take the example of a person diagnosed as having anxiety state which manifests itself particularly in a fear of falling when using stairs. That condition may have arisen because due to their physical limitations the person had fallen previously when using stairs and injured themselves. The person's physical disablements by themselves might not cause the person to be unable to descend two steps on their own. However as a consequence of their anxiety state they might genuinely mentally freeze at the top of the two steps and be incapable of descending them without another person aiding them to do so by reassuring them and, so to speak, 'talking them down'. As I have already said, nothing in descriptor 1(b) in Schedule 2 to the ESA Regs prevents this as counting as "aid". Furthermore, it would, at least prior to 28 January 2013, satisfy the condition that the claimant's incapability to perform the activity arose from a mental disablement: per regulation 19(5)(b) of the ESA Regs in the form they were in before 28 January 2013. The Secretary of State's argument would, however, prevent such a result holding and prevent, contrary to *JG*, regulation 19(5) having its full application in the form it was in at the time material to this appeal. I can find no good justification in statutory construction terms for either result.

47. I do accept, however, the Secretary of State's argument that the aid from another person which is (and was) contemplated by activity 1 and descriptor 1(b) in Schedule 2 to the ESA Regs means active aid and does not cover passively standing by waiting to intervene if help were to become needed. It seems to me that this flows both (a) from the word "aid" as a verb, which has clear connotations of actively providing help to the other person rather than just standing by, as well as (b) the aid given by another person which would usually be necessary to help a claimant to carry out an activity when their incapability to do so is a mental restriction. Reassuring and cajoling the claimant so as to aid them to surmount their acute anxiety about using stairs will involve talking to them and perhaps hand movements rather than just standing behind or in front of them doing and saying nothing. The latter is not, in my judgment, another person providing aid to the claimant.

48. Reverting then to this appeal, on the evidence as it appears in the papers the above construction of descriptor 1(b) and the words "unaided by another" therein may appear to have little relevance or application given (a) the lack of evidence of the appellant having any mental illness or disablement in August 2012 and (b) his reference to only needing someone to stand behind him when he had to use stairs. However the issue of the appellant's use of stairs was not addressed at all by the tribunal. Furthermore, the support worker's evidence (admittedly from November 2014) does refer to the appellant suffering from anxiety and depression as a result of his long-stranding bowel problem and so *may* evidence mental health problem which were in place in August 2012. (However, it is to be noted that the GP's ESA113 form completed in June 2012, but based on an apparent last visit by the appellant to the GP practice in August 2011, makes no mention of anxiety or depression.)

49. In all the circumstances, and as the appeal is being remitted for a rehearing in any event, the new First-tier Tribunal will need to investigate as best it can on the evidence available to it (which

hopefully will include the appellant's oral evidence from his attending the hearing before the First-tier Tribunal), and make findings of fact upon whether due to physical or mental disablement the appellant was unable to mount or descend two steps unaided by another person. In so doing the new First-tier Tribunal must adopt the construction of "unaided by another person" as held above.

50. Given, the material errors of law set out above, the tribunal's decision of 22 August 2013 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber) at a hearing and in accordance with views as to the law as expressed above. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the new First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

51. The appellant will have noted that I have directed an oral hearing of this appeal. I cannot direct, let alone compel, him to attend such a hearing, but it is likely to assist the tribunal to decide his appeal - and how his health was as far back as August 2012 and how he then was in terms of his ability to mobilise, go up or down two steps, and how his bowel problems were then affecting him - if he is able to attend such a hearing. He would be able to have a family member (such as his father, who went with him to the medical assessment in Wolverhampton on 30 July 2012) or his support worker to accompany him to the hearing, if that would assist.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 8th February 2016