DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This appeal by the Appellant succeeds.

Permission to appeal having been granted by Upper Tribunal Judge Wright on 5 August 2015, and in accordance with the provisions of section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I set aside the decision of the First-tier Tribunal sitting in Manchester on 31 March 2015 under reference SC946/13/08462 as that decision involved an error on a material point of law.

I have power to remake a decision under section 12(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007. It is appropriate for me to do so in this case rather than cause delay by directing a re-hearing.

Neither party has asked for an oral hearing. In my view the evidence and submissions are clear. I cannot see that the evidence and submissions as they currently stand would substantially change if oral representations were made. I have therefore concluded that I have sufficient evidence to make a decision on the papers before me without hearing further from the parties.

Having set aside the First-tier Tribunal's decision, I re-decide the appeal as follows:

The appeal against the decision of the Secretary of State dated 5 March 2013 is allowed. The decision of the Secretary of State is set aside.

The appellant should be placed into the support group for employment and support allowance purposes from and including 17 December 2012.

The issues in this case

1. The appellant challenges the correctness of a decision made by the First-tier Tribunal ('FTT') relating to employment and support allowance ('ESA') and the support group. In short, the appellant argues that the FTT misapplied the law by taking into account irrelevant circumstances and by failing to follow a previous direction.

2. The respondent (the Secretary of State) supports the appeal to this extent: the Secretary of State submits that the FTT erred in law by failing to comply with the obligations imposed by *IM v. Secretary of State for Work and Pensions*

[2014] UKUT 412 (AAC) *("IM").* Nonetheless the Secretary of State invites the Upper Tribunal to substitute its own decision to the effect that the claimant should not be placed into the support group.

My decision

3. For the reasons set out herein I allow this appeal. I find the FTT's approach to be in error of law. There is a consensus between the parties that the FTT has failed to comply with the obligations imposed by *IM*. This is in part because the Secretary of State failed to follow a previous direction given by the Upper Tribunal on 2 February 2015.

4. Further, I am persuaded by the evidence that at the time of the decision, 5 March 2013, there would have been a substantial risk to the claimant's mental health if he had been found not to have limited capability for work-related activity.

5. I therefore give my own decision that the claimant was entitled to be placed into the support group with effect from the date of the supersession request, namely from and including 17 December 2012.

Background and facts

6. This appeal has a protracted history. The appellant had been in receipt of incapacity benefit from 1 August 2000. His main disabling conditions were recorded as anxiety and depression; incontinence; tinnitus; dyspepsia; a hernia; and bladder cancer, which was in remission. His case was converted to ESA on 22 December 2011 following a medical assessment on 21 November 2011. The decision-maker decided that the appellant should be placed into the work-related activity group for ESA purposes. Although the early chronology of events is not entirely clear, it appears that the first ESA decision was made on 7 December 2011 and that an appeal against that decision was received on 27 June 2012. That matter then went to an appeal tribunal where the decision not to place the appellant into the support group was upheld.

7. On 12 December 2012 the appellant notified the Department that his health had deteriorated. This was a supersession request. His mental health, he maintained, had declined as a result of not being put into the support group: *'…my symptoms had settled and were being managed conservatively but now my symptoms have returned severely due to all the medical claims, interviews and letter writing and appeals I have had to do. My health is being harmed and significant distress is being experienced by me…'.*

8. He provided a letter from his GP, dated 15 May 2012, that confirmed marked anxiety symptoms, insomnia, tiredness and irritability. On 9 May 2012 he was placed on 50mg of Dosulepin (a tricyclic anti-depressant). That medication was subsequently increased in stages, first on 7 June 2012 to 75mg, and then on 14 August 2012 to 100mg. By 6 December 2012 his medication had been

increased to 150mg. The papers refer to this as being the highest dose available.

9. On 8 January 2013 the matter was referred to a healthcare professional (HCP) who, on 27 February 2013, compiled a medical report.

10. The healthcare professional identified three main medical conditions: anxiety and depression; bladder incontinence; and tinnitus in both ears. In terms of physical function the healthcare professional did not find any significant disability. For these purposes I accept the HCP's findings in this regard.

11. The difficulties recorded relate to the appellant's mental, cognitive and intellectual function. In that regard the HCP found that the appellant was unable to get to a specified place with which he was familiar without being accompanied by another person and that engagement in social contact with someone unfamiliar to the claimant was not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the appellant.

12. Following the HCP's report a decision was made on 5 March 2013 that the appellant should remain in the work related activity group. He scored 9 points for getting about (15(b)) and 6 points for coping socially (16(c)). I cannot find a copy of the relevant decision in the papers before me.

13. On 25 June 2013 the appellant appealed that decision.

14. The appeal was heard first before a tribunal sitting in Manchester on 3 October 2013. That tribunal upheld the Secretary of State's decision.

15. Thereafter, Upper Tribunal Judge Mitchell gave permission to appeal the FTT's decision. The Secretary of State supported the appeal. The Secretary of State concurred with the Upper Tribunal judge's observation that there was evidence before the FTT from the claimant's GP to suggest the claimant's mental health had deteriorated. It was submitted that this needed to be addressed by the FTT when considering substantial risk under regulation 35(2).

16. In remitting the matter to the FTT on 2 February 2015, Judge Mitchell directed that the Secretary of State should supply a written submission setting out the various types of work-related activity ('WRA') that the claimant living in his geographical area in March 2013 might have been required to do, identifying with reasons any that it was submitted the appellant would not realistically have been expected to do. (This approach was consistent with *IM*, which had been decided on 15 September 2014.)

17. It is now common ground that that direction was not complied with. The Secretary of State did however provide a supplementary submission that stated: '*I cannot provide guidance as to the types of work-related activity that would be available in the Altrincham area in 2013. But advisers do have the*

freedom to determine, in consultation with Mr L. what WRA is appropriate and reasonable. It is vital that when agreeing work-related activity that Mr L. circumstances are taken into account; including physical or mental health and any learning or cognitive issues. This would also apply to what activities it would not be realistically have been expected to undertake'.

18. The submission went on to state that WRA must be appropriate, personal to the customer and aimed at improving access to opportunities in the labour market; and it outlined the relevant steps the first-tier agency would take to achieve this.

19. On receipt of that submission the appellant provided evidence of his own, including part of an incapacity benefit medical report dated 5 December 2005 which set out the points he had scored and a summary of his condition at that time.

20. The matter was relisted for a rehearing on 31 March 2015. On that occasion the tribunal found that while the appellant had anxiety and depression, the nature and extent of the resulting limitations were insufficient to satisfy the test for the support group. A statement of reasons for that decision was prepared on 27 April 2015.

The granting of permission to appeal

21. On 5 August 2015 Upper Tribunal Judge Wright gave permission to appeal. In granting permission to appeal Judge Wright stated as follows:

> 1. I give permission to appeal because it is arguable that the Secretary of State failed to comply with the obligations imposed by *IM v SSWP* [2014] UKUT 412 (AAC), in not providing details of the work-related activity available in the Altrincham area in March 2013, and the tribunal therefore arguably erred in law in allowing the appeal to proceed on that basis despite *IM*.
> 2. Furthermore, it is arguable that, in the absence of the required information as to work-related activity, the tribunal erred in law in not finding that Mr L. satisfied regulation 35(2) as at March 2013 given its inability to be satisfied that no possible work-related activity which he might then have had to undertake could have given rise to a substantial risk to his health: see *IM* at paragraphs 85 and 110 – 112.
> 3. Yet further, and in the alternative, it is well arguable the tribunal's reasoning in respect of Mr L.'s ability to get to work-related activity safely was materially deficient. The relevant context was that Mr L. was unable to get to even familiar places on his own (see page 79). He needed to be accompanied by his wife (paragraph 25 of statement of reasons on page 207). The tribunal in its regulation 35(2) analysis purported to apply by analogy *PD v SSWP* (ESA) [2014] UKUT 0148 (AAC). What it very arguably fails to explain, however is how Mr L.'s wife would as a matter of fact have been able to accompany him to work focused interviews and his programme of work related activity given she works part-time.
> *4.* Moreover, it arguably was not appropriate or consistent with *IM* for the tribunal to refer these issues back to the Secretary of State and the work provider(s) to

resolve: the tribunal's obligation was to carry out the regulation 35(2) risk assessment on the appeal. It is also difficult to square the tribunal's analysis here with the view of the Upper Tribunal in *IM* about the failure to pass on to the external work providers relevant information such as a person's inability to get anywhere outside on their own: see, for example, paragraphs 59 – 62 and 101 of *IM*.

22. The Secretary of State supports the first of these 4 points, and invites me to set aside the decision on that basis. The appellant, understandably, supports all four and elaborates upon the same in further written submissions.

23. It is against the above background that this matter comes before me.

The relevant law

24. Regulation 35(2) of the Employment and Support Allowance Regulations 2008 (SI No 794) ("the ESA Regs") provides as follows:

> (2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if—
>
> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
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> (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

25. Work-related activity is defined in section 13(7) of the Welfare Reform Act 2007 (WRA) as: '*activity which makes it more likely that the person will obtain or remain in work or be able to do so*'.

26. Section 2(5) of the WRA provides:

> (5) For the purposes of this part, a person has limited capability for work related activity if
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> (a) his capability for work related activity is limited by his physical or mental condition, and
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> (b) the limitation is such that it is not reasonable to require him to undertake such activity.

27. The 2011 Employment and Support Allowance Regulations make further provision:

> **3 Requirement to undertake work-related activity**
>
> (1) the Secretary of State may require a person who satisfies the requirements in paragraph (2) to undertake work-related activity as a condition of continuing to be entitled to the full amount of employment and support allowance payable to that person.
>
> (4) a requirement imposed under paragraph (1) –

(a) must be reasonable in the view of the Secretary of State, having regard to the person circumstances; and
(b) may not require the person to –
(i) apply for a job or undertake work, whether as an employee or otherwise; or
(ii) undergo medical treatment.

My decision – discussion on the obligation imposed by *IM*

28. For the reasons explained by the panel in *IM*, regulation 35(2) is, in general, about the assessment of risk to an individual. As the panel in *IM* observed:

> "101. …The purpose underlying regulation 35(2) requires that those applying it make predictions about the consequences to the particular claimant of him being found not to have limited capability for work-related activity..."

29. Paragraph 106 of *IM* adds:

> "…what the Secretary of State can and should provide is evidence of the types of work related activity available in each area and by reference thereto what the particular claimant may be required to undertake and those which he considers would be reasonable for the provider to require the claimant to undertake. The First-tier Tribunal would then be in a position to assess the relevant risks."

30. Para 110 of *IM* states further:

> "…where there turns out to be a serious argument in relation to regulation 35, the provision of the basic information about the more demanding types of work related activity would enable the First-tier Tribunal to make the necessary predictions by reference to possible outcomes for the particular claimant".

31. It is therefore not just the type of work-related activities that are required. There also needs to be some reference to what the decision-maker considers would be reasonable for the work-related activity provider to require the claimant to undertake.

32. It is also consistent with the approach in *IM* to expect the Secretary of State to give some form of explanation for *why* he does not anticipate a substantial risk where a decision has been made in relation to regulation 35. Indeed it appears to me the explanation as to *why*, against a background of recognised significant difficulties, may be crucial to both the claimant's and the tribunal's understanding of the decision.

33. Whilst subsequent to *IM* the Secretary of State has begun providing evidence of the type of work related activity available in each area, the experience of this Tribunal, and that of the FTT below, has often been a somewhat guarded approach by the DWP to commenting upon what the particular claimant may

be required to undertake and which activities the Secretary of State considers would be reasonable for the provider to require the claimant to undertake. I return to that difficulty in the general observations I make at the end of this decision.

34. For these purposes I can do no better than repeat the dicta expressed in *IM*:

> 27. Both the Departmental decision-maker and the First-tier Tribunal must act fairly in applying regulation 35(2) and to do that they must reach their decisions on a properly informed analysis of the relevant factors. Inevitably that will involve them considering the impact of the possible consequences of the claimant attending a work-related interview and so of him being required by a provider to undertake a work-related activity as a result.

35. As UT Judge Wright in *DH v SSWP (ESA)* [2013] UKUT 0573 (AAC) (decided prior to *IM*) explained:

> 17. It may be relatively easy for the Secretary of State to discharge this onus, if I can call it that, in cases where a claimant has scored 15 points for the physical descriptors. However, it is where the 15 points have been scored for the mental descriptors that the issue may be more difficult and nuanced. For example, if a claimant cannot go anywhere outside on her own due to acute anxiety, cannot call on any regular outdoor companion, doesn't have a computer and either doesn't have or finds it difficult to use a phone, how is she to be able to engage in a face to face interview at the jobcentre, get help writing her curriculum vitae or participate in basic literacy or numeracy courses (page 68)? This is not to suggest that there is no work-related activity such a person could safely do, but merely to highlight that the identification of that work-related activity will take care and thought.

36. The above tends to reflect the position in the instant matter. The healthcare professional advised that the appellant was unable to get to a specified place with which the claimant was familiar without being accompanied and that engagement in social contact with someone unfamiliar to the claimant was not possible for the majority of the time. There was evidence that the appellant had long term, chronic, anxiety and mental health issues. A decision had been made that the appellant had limited capability for work.

37. The disputed decision therefore required consideration of what work related activity the appellant could safely do by reference to the work-related activities in his area.

38. It is for this reason that this appeal must succeed. The more general, un-particularised assertions made by the Secretary of State to the FTT in this matter were inadequate in a case where the appellant could be considered a vulnerable adult by virtue of his mental health. There was a serious argument in relation to regulation 35, and so the obligation provided by paragraph 106 of *IM* arose. Although the FTT attempted valiantly to work around that

deficiency, in my view its decision did not sufficiently circumvent the requirements of *IM*.

39. I should add that this is not an obligation that will arise in every case. It is the potential vulnerability of the appellant which is likely to be central to such considerations. In other cases a broader, more liberal, approach may be appropriate. This follows from paragraph 117 of *IM* where it was stated:

> 117. …, the First-tier Tribunal is entitled to use its own knowledge, if it is confident that it is up-to-date and complete as to the more demanding types of work-related activity, or it may adjourn to obtain the necessary evidence or it may decide that it can properly determine the case one way or the other without the evidence. It depends on the circumstances and, in particular, on how vulnerable the claimant is.

40. Such an approach is also supported by the Upper Tribunal decision of *MH v SSWP* [2015] UKUT 142 (AAC) where a tribunal was found to have erred by assessing the question of risk based on its own knowledge of the types of work-related activity the claimant would be expected to do, where that knowledge would not be an adequate substitute for the evidence envisaged by *IM*. I would nonetheless underline the caveat expressed in *MH* at paragraph 10:

> "….the tribunal did not need to go on to consider the question of risk in the context of work related activities as the claimant had not established that any risk arose as a consequence of her debilitating condition. The claimant therefore had no realistic argument under regulation 35. To reiterate the comments made in paragraph 110 of *IM* it is only where it turns out that there is a serious argument in relation to regulation 35 that the provision of information from the Secretary of State need be considered."

41. Having succeeded on the first ground identified by Judge Wright I do not need to go further in deciding the other points raised.

42. For completeness, however, I should explain that the appellant had in his initial grounds of appeal also contested the FTT's findings in relation to certain activities set out in schedule 2 of the ESA Regulations. Judge Wright did not grant permission on that ground, but solely in relation to regulation 35. For that reason I do not need to address those arguments, save to say that having considered the case in general I have found the FTT's reasoning to be perfectly adequate in that regard.

The issue of further remittal

43. Ordinarily it would be appropriate at this stage to remit this matter to another FTT to consider this appeal afresh. That is particularly so where medical issues are involved that may require the specialist expertise of the FTT.

44. However, this is the second time that this matter has been before the Upper Tribunal, the first occasion having led to a previous remittal in February 2015.

45. I have therefore decided to substitute my own decision. I have sufficient evidence and submissions to do so. The force of the respective arguments and information available would be unlikely to change if I was to remit this matter for a third hearing.

46. In so deciding I have regard to the period of time that has elapsed (some 3 years since the original decision), the potential delay that a remittal would create, and the potential prejudice that may arise for both parties, particularly the appellant, in attempting to address issues and collate evidence in respect of matters that occurred historically; in circumstances where original evidence (the capability for work questionnaire, ESA50) has been lost by the Department. I also have regard to the fact that both parties invite me to re-decide this appeal on the papers, albeit each proffering different outcomes.

Decision on the substantive appeal

47. For the reasons set out below I am persuaded by the evidence that at the time of the decision, 5 March 2013, there would have been a substantial risk to the claimant's mental health if he had been found not to have limited capability for work-related activity.

48. I therefore give my own decision that the claimant was entitled to be placed into the support group with effect from the date of the supersession request, namely from and including 17 December 2012.

The competing arguments

49. Within the papers before me are arguments advanced by both sides relevant to the issue of whether the appellant would be able to perform work-related activity and the issue of substantial risk.

50. The appellant, in summary, argues that in terms of his mental, cognitive and intellectual function, the HCP has already determined that at the relevant time he was unable to get to a specified place with which he was familiar without being accompanied by another person and that engagement in social contact with someone unfamiliar to him was not possible for the majority of the time due to the difficulty he had relating to others and the significant distress experienced by him. To précis, he asks rhetorically: '*with such incapacities, what work-related activity can I do?'*

51. The appellant points towards the HCP's report which records him as being agitated and irritable and that he avoids strangers. He asserts that any form filling would make him more irritable; and directs the tribunal's attention to the relevant features of the clinical examination, which include that he appeared to be trembling; with increased sweating; seemed agitated; poor eye contact; and spoke very little during the course of the assessment. He also places some reliance on a previous incapacity report that confirmed severe

anxiety and depression, with a conclusion that his condition was unlikely to change in the longer term.

52. Conversely, the Secretary of State submits that the appellant has never had any thoughts or plans of self-harm. It was recorded by the HCP that he looked well; had normal facial expression and adequate rapport; and spoke at a normal rate. He was said to be orientated in time, place and person and had good insight into his illness. He drove a car regularly short distances on his own to pick up his wife after work three days a week; he would also drive to the supermarket and sometimes to his daughter's house; this was said to be around 1000 miles a year. Further, there is evidence in the bundle that suggests he would occasionally go to the shops with his wife; he interacted with his grandchildren; and in or around May 2013 went on holiday to Turkey and in September 2013 on holiday to Bulgaria. He had been to a retirement party for a neighbour in the summer of 2013; and a friend visited him about once a month. He had prepared and written all of the various letters and handwritten documents setting out the basis of the appeal.

53. More generally, the Secretary of State's original submission summarised the Department's overall position:

> *The purpose of work-related activities is to address and identify barriers to becoming work ready that is considered a prerequisite to the claimant moving towards finding work…. Work-related activity must also be reasonable, having regard to the claimant circumstances, in particular the claimant's health or medical condition. Work-related activity must not require the claimant to seek, apply for or undertake work. Whilst it is not in doubt, therefore that Mr L. does have health conditions that affect day-to-day living, there is no evidence to suggest that these limit his functional abilities sufficiently to meet the support group criteria as set out in schedule 3 and regulation 35 of the Employment and Support Allowance Regulations.*

Why I find the appellant should be placed into the support group

54. I am looking at circumstances obtaining at 5 March 2013 when the decision under appeal was taken. The Secretary of State accepted that the appellant had limited capability for work at that time. I must consider whether that limited capability goes further, by reference to regulation 35(2).

55. In a case such as this the application of regulation 35(2) becomes a balancing exercise, looking forward in a hypothetical or predictive sense to determine if a substantial risk to health would more likely than not arise.

56. Having reviewed the papers, I am satisfied that at the date of the decision one could predict a substantial risk. His GP describes a chronic history of anxiety and stress. I accept his GP's assertion that the appellant was suffering with insomnia, tiredness and irritability. There is evidence to suggest this reflects a long-term pattern. Furthermore, the appellant has been consistent throughout

in this regard. I accept his description of low mood, anxiety, panic attacks, sleep problems, social phobia, poor concentration, irritability, compulsive behaviour and agitation on a daily basis, exacerbated by paperwork. Such an assertion has not properly been challenged by the Department and is consistent with both the symptomology of chronic anxiety and depression, and the increased levels of medication that the appellant was given in 2012.

57. I further find that there is some tension in the HCP's report between the conclusion (on the one hand) that the appellant '*looked well, had adequate rapport, normal facial expression and spoke at a normal rate*' and (on the other hand) the description of him sat trembling and sweating and having some difficulty coping at interview (even with his wife present). I resolve that tension in favour of the appellant. On one view the more positive statements made by the HCP appear to contradict statements made elsewhere and do not sit comfortably with the HCP's summary that the anxiety and depression had become worse and "*required him to take a third line antidepressant at maximum dosage; his mental state on examination was consistent with his typical day history and current treatment, and although no functional limitation is likely in his understanding and focus, significant functional limitation is likely to his getting about to familiar places alone and socialising with unfamiliar people as a result of his mental condition*".

58. In my view the HCP's rejection of regulation 35 is simply inadequate. The reason given is stated as: "*No thoughts of self-harm; no pads worn; no digital hearing aids worn*". I cannot say on such a thin explanation, even considering the report as a whole, that the HCP properly applied his mind to the full extent of the test. I am without the actual decision-maker's decision, so cannot comment on whether that went further in terms of regulation 35.

59. The test is not simply whether a claimant has thoughts of self-harm. That of course could be a relevant factor in any number of cases, but the test is more widely drawn than that: would there be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity?

60. The most compelling evidence in my view appears to be that, over a relatively short period of time, the appellant's level of anxiety and depression had increased considerably. The evidence from his GP suggests that the appellant had been through a period of recovery until '*the recent claims and medical he had had to do for the benefits agency*' caused his symptoms to return severely, leading to him being placed gradually onto the maximum dosage of his antidepressant and being given regular appointments with his GP.

61. For these purposes I am entitled to assume that the increased dosage of this medication was designed to overcome the effects of the appellant's deteriorating mental health. Its purpose appears to have been to alleviate and improve, not harm, the health of the appellant. But, with chronic mental health issues it appears to me a tribunal must still be cautious. Employment advisers are not required to have mental health qualifications or experience. Adopting

sentiments expressed by UT Judge Bano in CSE/17/2014, it does not necessarily follow that work-related activity poses no substantial risk of harm to a claimant simply because s/he is receiving treatment or is on medication. The risk potentially still exists that work-related activity would magnify any given appellants mental health condition. This will always be a matter of judgement for the tribunal. It will not always follow. Nonetheless the tribunal should be alive to the possibility that it might if the evidence and facts of the case so dictate.

62. The work-related activities now provided by the Secretary of State in the instant appeal include telephone reviews; IT skills training; using the Internet; universal job match; job search; one-to-one appointments; CV building; coffee mornings; confidence, self-esteem and motivation workshops; group sessions; meetings by telephone; and completing tasks online.

63. In the instant matter I find that the appellant's health would be at further risk if he was found capable of the above types of work-related activity. Taking a broad view, I have concluded that he could not reasonably be expected to perform the activities set out on the list at a time when his condition was in a fluctuating, if not deteriorating, state and in the light of the HCP's view that "*significant functional limitation is likely in his getting about familiar places alone and socialising with unfamiliar people as a result of his mental condition"*.

64. The Secretary of State asks me to say that he could do telephone reviews, enhanced IT skills, and attend one-to-one appointments at times that were compatible with his wife's working pattern. On the facts of this matter and on the papers, I am not prepared to do that. In terms of prediction, I cannot say that for the majority of the time there would not be a risk that such actions would compound or exacerbate the appellant's already chronic health condition. I adopt the view of UT Judge Ward in *PD v SSWP (ESA)* [2014] UKUT 0148 (AAC) (para 21) in the sense that it is not doing the activity that is the question or what counts, but it is the risk that ensues if he did those activities.

65. Is the potential risk to the appellant or 'any person' substantial? *IM* defines substantial risk in the following way:

> "65. As is pointed out in *R v Monopolies and Mergers Commission*, ex parte *South Yorkshire Transport Ltd* [1993 1 WLR23, "substantial" is a word that means different things in different contexts. However, it was our view correctly common ground before us that a "substantial risk" in this context means a risk:
>
> *"that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case"*

66. I cannot sensibly ignore the nature and gravity of the appellant's long-term mental health condition, his inability to cope at interviews, in social situations,

or his difficulties getting about. I cannot sensibly ignore that a substantial further deterioration of his health would more likely than not occur if he were not placed into the support group. The appellant's GP's letter establishes that risk.

67. I am therefore satisfied a substantial risk arises.

Other issues raised by the Secretary of State

68. Would it be correct in this matter to place reliance on the provision that the appellant would not be asked to do any work related activity that would be unreasonable in terms of his health? Under regulation 3(4) of the Employment and Support Allowance Regulations 2011, a requirement of work-related activity is that it must be reasonable with regard to the claimant's circumstances.

69. In this appeal, due to the appellant's apparent mental state, the FTT below added to the decision notice a note to the effect that the '*DWP and any provider should take into account the difficulty the appellant has in attending places on his own'*.

70. I have reservations about relying upon the 'reasonable regard' requirement in a mental health case such as this, bearing in mind the Upper Tribunal's comments in *IM* about the failure to pass on to the external work providers relevant information such as a person's inability to get anywhere outside on their own: see, for example, paragraphs 59 – 62 and 101 of *IM*. I further have in mind UT Judge Gray's comments in *XT v Secretary of State for Work and Pensions* (ESA) [2015] UKUT 0581 (AAC) (at paragraph 9), where she noted that the decision was predicated upon the assumption that the reservations of the tribunal in this regard would be communicated to the provider of work related activity – which in itself implied the tribunal had identified an activity or activities that would pose a substantial risk to health.

71. The Secretary of State further submits that the appellant's wife could take him to appointments. As was discussed in *PD* (paragraph 27), it is not unreasonable to have somebody accompany the appellant and perhaps once they have done a short journey to expect them to do that journey themselves. Risks may be mitigated by strategies. A tribunal is entitled to conclude there is a risk, but that the appellant is able to mitigate the risk by taking reasonable steps. Where third-party assistance is being considered it follows this will require appropriate findings of fact being made about the availability of that third-party assistance: *EH v Secretary of State* [2014] UKUT 0473 AAC.

72. Here the appellant has provided further evidence that states his wife would not take him and that she works for most of the week. As Judge Wright suggested at the permission stage, there is a deficit of information in terms of how the appellant's wife would have been able to accompany the appellant on his programme of work-related activity given she works part-time. Further, as

there appears to be a link between deterioration in the appellant's mental health and contact with unfamiliar persons, I cannot assume that the appellant would cope as long as another adult attended with him. I therefore find that the balance falls on the side of the appellant on this issue, and that in the instant matter being accompanied would not obviate the risk posed in regulation 35.

73. The other matters raised or alluded to by the Secretary of State essentially come down to the view the tribunal takes of the evidence. Such factors as being able to drive short distances, deal with appeal paperwork and even go on holiday may be of compelling relevance to the overall picture in terms of both mental well-being and substantial risk, but when asked to deal with an appeal on the papers some 3 years after the event those considerations become somewhat diluted. I cannot say how long it took or what assistance the appellant had in dealing with his appeal paperwork. I cannot say that driving short distances on familiar routes would mean that the appellant could cope with one-to-one interviews or attending work programme providers. I cannot say that the holidays in themselves (which came after the date of the decision), have enormous bearing without further information about how the appellant coped. The absence of the ESA 50 has also left an evidential gap.

74. The appellant essentially states that the above activities were done with the support of his wife, and not in a stressful environment such as the Job Centre or at a work programme provider. In my view, though relevant, in this case these factors in themselves do not overcome the HCP's acceptance that the appellant was on an antidepressant at a maximum dosage; in an apparent trembling and agitated state, and had significant functional limitation in getting about in familiar places alone and socialising with unfamiliar people as a result of his mental condition.

75. Taking all of the above into account, I allow this appeal. In my view the balance comes down in favour of the appellant on this occasion.

General observations

76. It may be helpful if I add certain observations to my decision in this matter. Firstly, the force of this appeal has been decided on its individual merits. This case very much revolves on its own facts and they are somewhat clouded by the passage of time and the loss of relevant evidence. It is not without some hesitation that I have come to the decision I have. Any tribunal would be slow to ignore the findings of two previous tribunals in this regard, both of whom had the advantage of meeting the appellant.

77. Secondly, I note that this case began before *IM* was decided. In its latest guidance (Memo ADM 7/16) the DWP encourages its decision makers ['DM's] to make better and more informed decisions in relation to regulation 35 and limited capability for work-related activity ['LCRWA']:

> 23. Where the issue is whether the claimant has, or should be treated as having, LCWRA, the DM should explain
>
> 1. why it is considered that no LCWRA descriptors (limited to those put at issue by the claimant if identified) apply **and**
>
> 2. by reference to the list of types of work preparation available in the claimant's area
>
> **2.1** which is the most and least demanding work preparation on the list for the particular claimant **and**
>
> **2.2** which types of work preparation it is considered that the claimant could be expected to undertake without substantial risk.

78. It adds:

> 24 The DM should also consider, where available, evidence of
>
> 1. any WFIs [work-focussed interviews] attended, or work preparation action undertaken, **and**
>
> 2. if any, the effect of the WFI or work preparation action on the claimant's health
>
> since the claimant was found to have LCW but not LCWRA. This could be by production of the claimant commitment in appeal responses. Any information held about how the claimant has coped with WFIs and work preparation action may be relevant when assessing whether any risk to the claimant's or anyone else's health is likely, and if so, whether it is substantial.

79. While I have not heard submissions upon the point and make no observations on the above guidance more generally, it appears to me that going forward such an approach would benefit both the FTT and, more importantly, the appellant in understanding the issues in the case (adopting the analysis given in paragraph 31-33 above).

80. I might go further. If the Secretary of State can provide a tribunal with the types of work-related activity available in each area after the DM's decision is made, then it does not appear to me to be overly onerous on the DWP to provide HCP's with similar information before the decision is made, assuming that is not happening already. The HCP should then be able to provide a more reasoned statement in relation to regulation 35(2) in appropriate cases; and in turn the decision-maker could make a more informed decision in terms of predicative risk or otherwise, without that function being essentially passed onto the FTT.

Conclusion

81. As a result I must set aside the tribunal's decision and substitute my own. The decision of the FTT to dismiss this appeal was in error of law.

82. I substitute my own decision accordingly as set out in the Preamble above.

M Sutherland Williams

Judge of the Upper Tribunal

Signed on the original on 18 March 2016