IN THE UPPER TRIBUNAL **Case No** CE/3139/2015
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Cardiff on 18 May 2015 under reference SC188/14/02229 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the tribunal's decision in the following terms:

> The claimant's appeal against the decision dated 8 September 2014 is allowed. The claimant has limited capability for work-related activity and is to be placed in the support group.

REASONS FOR DECISION

1. The claimant had been awarded employment and support allowance ("ESA") from 8 July 2009 and, at least latterly, had it appears been placed in the support group as having limited capability for work related activity ("LCWRA"). She is partially sighted. She has no hearing difficulty.

2. Following re-assessment, it was decided on 8 September 2014 that she had limited capability for work but not LCWRA and so was no longer eligible for the support group. This was a case which fell under the ESA Regulations as amended by the Employment and Support Allowance (Amendment) Regulations 2012/3096 ("the 2012 Regulations").

3. The First-tier Tribunal concluded that she met descriptor 8(a) in schedule 2 - "Unable to navigate around familiar surroundings, without being accompanied by another person, due to sensory impairment." The Citizens Advice Bureau, for the claimant, had suggested that she also met descriptor 7(a) of schedule 2 and, importantly for present purposes, descriptor 7 of schedule 3, which as they stand (and stood at the material time) stipulated "cannot understand a simple message, such as the location of a fire escape due to sensory impairment." The relevant activity is:

> "Understanding communication by:
> (i) verbal means (such as hearing or lip reading) alone,
> (ii) non-verbal means (such as reading 16 point print or Braille) alone, or
> (iii) a combination of (i) and (ii),
> using any aid that is normally, or could reasonably be, used, unaided by another person."

4. The tribunal set out its position thus:

> "It was the Tribunal's view when considering the terms of the descriptor that although this could be satisfied by a mixture of hearing and visual problems, this is not required by the descriptor which refers to verbal

> means alone, non-verbal means alone, or a combination. It was accordingly the Tribunal's view that [the claimant] did not satisfy this descriptor in Schedule 2 or Schedule 3."

It is not altogether easy to discern the tribunal's reasoning; indeed, in fairness to them, in common with Upper Tribunal Judge Turnbull in CE/2942/2013 and Upper Tribunal Judge Markus QC in AT and VC v SSWP (ESA) [2015] UKUT 0445(AAC) I find it hard to envisage circumstances in which the "combination" route could become relevant. What though is indisputable on the facts found is that the claimant does not have a hearing problem, so I conclude that the tribunal's view was that because it was possible for her to understand a simple message which was spoken to her (even if she could not read such a message), that was sufficient to disqualify her from the relevant descriptor.

5. In the light of the decision in AT on the previous version of these descriptors and the judge's obiter observations there about the version which is in issue in the present proceedings, I gave permission to appeal.

6. The Secretary of State supports the appeal and argues that it should be remitted. The claimant's representative has made a "no comment" response.

7. Activity 7 in its previous versions has been a source of some difficulty. Previous decisions were reviewed by Judge Markus in AT at [13]. The judge had the advantage of an oral hearing at which all parties were appropriately represented and had the benefit of a witness statement from a Dr Bolton, a senior official at the DWP, which was unchallenged.

8. In attempting to summarise AT, I risk failing to do justice to the judge's careful reasoning, but in essence she concluded that there was a continuity of policy approach, to which in the circumstances of the case before her it was permissible to have regard, which extended from the ESA Regulations as originally made, through the version introduced by the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity)(Amendment) Regulations 2011/228 ("the 2011 Regulations"), to the version introduced by the 2012 Regulations. The intention throughout was that either the requisite degree of impairment of hearing, or of sight, should suffice to enable a claimant to score the points; it was not necessary that both faculties be impaired. On that basis, she felt able to conclude that despite its difficulties of drafting, activity 7 in the version before her (the version introduced by the 2011 Regulations) could be interpreted so as to accord with that policy intention.

9. At [38] and [39] Judge Markus had drawn attention to some of the difficulties in applying the schedule 2 activities in the context of regulation 19(2) of the ESA Regulations, on which the schedule depends for effect. In relation to what she termed "Version 3" i.e. the version introduced by the 2012 Regulations, she made the following comments:

> "50. Unfortunately the statutory wording of Version 3 … is not much of an improvement on the previous wording. Despite the use of the connector "or" and the addition of "alone" after (i) and (ii), as with Version 2 the meaning seems to be different depending on whether the activity is read with the words "is capable of" or "is incapable of" in regulation 19(2).
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> 51. Despite this it is clear from Dr Bolton's evidence that the word "alone" was inserted after each of (i) and (ii) with the intention of making clear that it is sufficient if a person is unable to understand a message by either verbal or non-verbal means. The purpose of Version 3 was to clarify what had been the intention of this provision since it was originally enacted. It is clear that the legislative intention has been the same throughout the life of these provisions.
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> 52... [T]here is a clear statement of policy at page 99 of the [current WCA] Handbook … which reinforces the Secretary of State's case as to the intention of the activity.
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> 53. I am also satisfied that activity 7 in Schedule 3 was intended to correspond with the highest descriptor in activity 7 of Schedule 2. In Version 2 the activities are not the same but the highest descriptor for activity 7 in Schedule 2 is the same as the descriptor in Schedule 3. The activities and descriptors in Version 3 are the same. I am satisfied that the differences in the wording of the descriptors in Version 2 of the two Schedules is not intended to reflect a difference in substance. The 2009 review, which led to Version 2, explained at page 30 that there should be correlation between the highest scoring Schedule 2 descriptors and the Schedule 3 criteria. The Explanatory Memorandum to the 2012 regulations applied to the amendments to both Schedules. And the letter from Dr Gunneyeon of 20 September 2012 makes it clear that Versions 2 and 3 are intended to carry the same meaning. Accordingly, I conclude that activity 7 in Schedule 3 as in force at the date of the decisions in these appeals (Version 2) applied to a claimant who was unable to communicate by either verbal means or non-verbal means and it was not necessary for the claimant to be unable to communicate by both means.
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> 54. As I said at the beginning of this part of my decision, these appeals are concerned only with the interpretation of Version 2 of activity 7. However, it is apparent from my conclusions that the legislative intent has remained constant throughout the history of the provisions and so my reasoning also applies to Version 3."

10. Neither party dissents from what is said there and I respectfully adopt it in relation to the meaning to be given to activity 7 in relation to "Version 3" - the version introduced by the 2012 Regulations.

11. That just leaves the disposal of the case. Although arguing that the case should be remitted on the basis that further findings of fact are necessary,

according to the Secretary of State's submission "the facts to be found are whether the claimant satisfies the Work Capability Assessment". However, it has never been in dispute that the claimant satisfies the Work Capability Assessment, and I conclude that this part of the submission is derived from inadvertent use of a pro forma part of the submission document and therefore place little weight on it.

12. It seems entirely appropriate to make further findings of fact. As the Secretary of State notes, there is clear evidence from the claimant's optometrist that she is unable to read 16 point type. That evidence is undisputed and I find accordingly.

13. I conclude that the claimant fulfils, via limb (ii) of the definition of activity 7 in schedule 3, the corresponding descriptor, and so qualifies for the support group.

CG Ward
Judge of the Upper Tribunal
19 May 2016