DECISION OF THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

The Secretary of State's appeal to the Upper Tribunal is allowed. The decision of the Birmingham First-tier Tribunal dated 24 August 2015 involved an error on a point of law and is set aside. It is appropriate for the Upper Tribunal to "re-make" the decision on the claimant's appeal from the Secretary of State's decision dated 14 May 2015 (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii) and (4)). The decision as re-made is that the claimant's appeal is allowed and that she is entitled to the daily living component of personal independence payment at the enhanced rate for the period from 17 June 2015 to 16 June 2018, but not entitled to the mobility component from and including 17 June 2015.

REASONS FOR DECISION

1. This appeal raises difficult questions about the proper interpretation of the descriptors under two of the activities set out in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 ("the PIP Regulations"): activity 3 (managing therapy or monitoring a health condition) and activity 10 (making budgeting decisions) in the context of the conditions affecting the claimant including diabetes (not well controlled) and dyslexia. It illustrates once again the gaps left in the drafting of that Schedule, requiring a large expenditure of effort to render its provisions coherent and thus making it ineffective as a simple day-to-day test of disability needs to be applied by non-lawyers. A third activity, activity 2 under mobility activities (moving around), was initially in issue, but it is now conceded on behalf of the claimant that the First-tier Tribunal erred in law in awarding her any points on that activity. That is dealt with briefly in paragraphs 49 and 50 below.

2. There was an oral hearing of the appeal on 21 November 2016. The Secretary of State was represented by Mr Tim Buley of counsel, instructed by the Government Legal Department. The claimant was represented by Mr Andrew Parkinson of counsel, acting through the Free Representation Unit (FRU). I am grateful to both representatives for well-directed submissions.

The legislation

3. Part II of Schedule 1 to the PIP Regulations sets out in column 3, for each activity described in column 1, the points to be scored for each descriptor under that activity identified in column 2. Only the higher or highest score within each activity counts. Then the aggregate of the points for daily living activities determines whether the claimant qualifies for the daily living component and at what rate and the aggregate for mobility activities determines qualification for the mobility component and what rate.

4. Columns 2 and 3 under activity 3, with the column 1 description as above, are as follows:

> "a. Either –
> (i) does not receive medication or therapy or need to monitor a health

condition; or

(ii) can manage medication or therapy or monitor a health condition unaided.

0

b. Needs either –

(i) to use an aid or appliance to be able to manage medication; or

(ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.

1

c. Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week.

2

d. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week.

4

e. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 7 but no more than 14 hours a week.

6

f. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 14 hours a week.

8”

5. Columns 2 and 3 under activity 10, with the column 1 description as above, are as follows:

“a. Can manage complex budgeting decisions unaided. 0

b. Needs prompting or assistance to be able to make complex budgeting decisions.

2

c. Needs prompting or assistance to be able to make simple budgeting decisions.

4

d. Cannot make any budgeting decisions at all.

6”

6. The following definitions in Part 1 of Schedule 1 are relevant:

““assistance” means physical intervention by another person and does not include speech;

“complex budgeting decisions” means decisions involving—

(a) calculating household and personal budgets;

(b) managing and paying bills; and

(c) planning future purchases;

"manage medication or therapy" means take medication or undertake therapy, where a failure to do so is likely to result in a deterioration in C's health;
"medication" means medication to be taken at home which is prescribed or recommended by a registered—
(a) doctor;
(b) nurse; or
(c) pharmacist;
"monitor health" means—
(a) detect significant changes in C's health condition which are likely to lead to a deterioration in C's health; and
(b) take action advised by a—
(i) registered doctor;
(ii) registered nurse; or
(iii) health professional who is regulated by the Health Professions Council;
without which C's health is likely to deteriorate;
"prompting" means reminding, encouraging or explaining by another person;
"supervision" means the continuous presence of another person for the purpose of ensuring C's safety;
"simple budgeting decisions" means decisions involving—
(a) calculating the costs of goods; and
(b) calculating the change required after a purchase;
"therapy" means therapy to be undertaken at home which is prescribed or recommended by a—
(a) (i) registered doctor;
(ii) registered nurse; or
(iii) pharmacist; or
(b) health professional who is regulated by the Health Professions Council;"

The evidence before the tribunal of 24 August 2015

7. The claimant had been entitled to the lower rate of the mobility component of disability living allowance and the middle rate of the care component for the period from 6 July 2013 to 16 June 2015. In advance of the expiry of that award she was invited to make a claim for PIP, which she did. She and her partner completed a PIP2 (how your disability affects you) questionnaire that was apparently received on 7 April 2015. The questionnaire mentioned type 1 diabetes, dyslexia and depression and anxiety among her conditions. In relation to the diabetes, it was said that she had to have rapid insulin three or four times a day and a regular injection once a day. The partner said that he was constantly monitoring her blood sugar levels and encouraging her to eat as she could get tired and low due to the diabetes, depression and anxiety (page 18). He helped her with food and sugar intake as her dyslexia meant she could not judge how much insulin to take (page 20). He managed her medication because of her dyslexia (page 22). A chart showing blood sugar readings for February and March 2015, with four or sometimes five readings a day, was attached. On the questions about making decisions about money it had been ticked that the claimant needed someone else to help her understand how much things cost when she bought them or how much change she should get and to help

manage household budgets, pay bills or plan future purchases. The partner wrote that he managed all money and bills as the claimant could not, because of her dyslexia, and that she got very distressed if she tried to do it.

8. A health professional (type of profession unhelpfully not named) carried out a consultation at the claimant's home on 30 April 2015. The only scoring descriptors ticked on the report form were for needing prompting to be able to read or understand complex written information (activity 8: 2 points) and for needing prompting or assistance to be able to make complex budgeting decisions (activity 10: 2 points), in both cases because of her dyslexia. The recording of what the claimant had said about reading was rather inconsistent, including both that she did not have any difficulty reading and understanding letters and that she had difficulty reading, understanding and dealing appropriately with correspondence, as well as that she had difficulty reading and/or completing forms. On budgeting decisions she was recorded as having said that she struggled to understand bills and with complex finances. The health professional considered that the claimant could manage all elements of the treatment for her diabetes herself. Since the tribunal of 24 August 2015 preferred the evidence of the claimant and her partner to that of the health professional, as the Secretary of State accepts that it was entitled to do, I need go into no more detail about his report. In the request for mandatory reconsideration and the subsequent appeal the claimant's partner stated that the health professional did not get all the right information. In particular she had requested that the consultation be with a woman and was upset to find out just before the consultation that that was not the case.

9. The Secretary of State's decision on 14 May 2015 was that the claimant was not entitled to PIP because she only scored four points on daily living activities (below the necessary eight for the standard rate) and none on mobility activities. In the written submission to the First-tier Tribunal on the appeal the Secretary of State accepted that the claimant satisfied the conditions for those four points as identified by the health professional. In relation to activity 10, although elsewhere it had been noted that the claimant had no cognitive impairment, it was accepted that she struggled to understand bills due to her dyslexia and would require help with prompting and assistance to make a complex budgeting decision. The claimant appealed.

The decision of the tribunal of 24 August 2015

10. No oral hearing was requested. The tribunal decided to proceed without a hearing and allowed the claimant's appeal, deciding that she was entitled to the daily living component of PIP at the enhanced rate for the period from 17 June 2015 to 16 June 2018 and to the mobility component at the standard rate for the same period. The tribunal adopted the four points accepted by the Secretary of State for daily living activities and in addition awarded four points for needing prompting to be able to take nutrition (activity 2(d)), four points for needing supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week (activity 3(d)), and two points for needing prompting to be able to engage with other people (activity 9(b)). That made a total of 14, in excess of the 12 needed for qualification for the enhanced rate. It put the two points under

activity 8 (reading and understanding signs, symbols and words) on the ground of needing to use an aid or appliance, but I consider that that was a slip for the ground of needing prompting to be able to read or understand complex written information (descriptor 8(c)), which was what had been accepted by the Secretary of State on the basis of the health professional's report. The tribunal also awarded eight points under mobility activity 2(c) (can stand and then move unaided more than 20 metres but no more than 50 metres).

11. The tribunal said this in its statement of reasons by way of general findings of fact:

> "5. [The claimant] has type 1 diabetes which is not well controlled. She requires a rapid insulin injection 3 or 4 times a day as well as a daily long lasting injection of insulin. In addition [the claimant] requires regular blood sugar glucose checks throughout the day. The [claimant] lives with her partner and their two young children. Her partner takes the children to school. [The claimant's] partner monitors her blood sugar levels and assists her in her complicated routine of balancing her food, sugar and insulin intake which is made more difficult for the [claimant] because of her dyslexia. [The claimant] is accompanied when she goes out usually by her partner who monitors her and looks out for signs of her becoming unwell. This can come on quickly and unpredictably because of the nature of her diabetes."

12. On managing therapy or monitoring a health condition the tribunal said this in paragraph 12:

> "[The claimant] has a complicated regime of insulin to try to control her diabetes; regular blood sugar checks are also required throughout the day. The tribunal accepted the evidence of [the claimant's] partner that he has to constantly monitor her blood sugar levels and that because of her dyslexia she needs additional help with her medication and the juggling of food to manage her condition. The appellant's GP states that although she sees a specialist and engages with the diabetic nurse regularly she is often ill and could become poorly quickly requiring hospital admission. The tribunal, using in particular its medical expertise, relied also on the record (not challenged by the DWP) kept by the appellant of her blood glucose readings which demonstrated to the tribunal very uncontrolled diabetes which was in turn consistent with the type of medication she was taking for diabetes. The tribunal also noted that in the record of the PIP consultation there was an inconsistency in respect of what the healthcare professional reported [the claimant] to have said. It was reported both as the appellant saying that she could manage her medication, and that she could not. The tribunal preferred the evidence of [the claimant] and her partner, supported by the medical evidence and the tribunal's own understanding of diabetes, that [the claimant] has difficulty monitoring her diabetes and managing her insulin regime and that the unpredictability and frequency of becoming unwell means that [the claimant] satisfies this descriptor for at least 50% of the days of the required period. 4 points were awarded."

13. On making budgeting decisions, the tribunal said this in paragraph 18:

> "The DWP awarded two points for this activity and the tribunal agreed with this. The evidence that [the claimant] is [dyslexic] suggests that [she] would require prompting or assistance to be able to make complex budgeting decisions."

14. On moving around, the tribunal said this in paragraph 20:

> "Relying on its expertise as a tribunal and in particular the medical expertise regarding the unstable and unpredictable nature of the appellant's diabetes combined with the evidence that [the claimant] is often unwell, the tribunal was satisfied that the appellant can stand and then move more than 20 metres but not more than 50 metres without having assistance and that for [the claimant] to move further than this she would require supervision to ensure her safety. For those same reasons, the tribunal found that this descriptor was satisfied for at least 50% of the days of the required period and awarded 8 points."

15. There is no need to set out the findings on the other activities with which the Secretary of State takes no issue on the appeal to the Upper Tribunal.

The appeal to the Upper Tribunal

16. The Secretary of State was given permission to appeal to the Upper Tribunal by a salaried First-tier Tribunal judge on 17 December 2015 (although it appears that the initial issue of that ruling, at least to the Secretary of State, may have got lost, as the notice of appeal was not lodged until 11 March 2016). Written submissions were directed by Upper Tribunal Judge Lloyd-Davies, which I regard as an implicit grant of extension of time for the lodging of the notice of appeal, if such an extension was necessary. On completion of the written submissions the case was referred to me and I directed an oral hearing as some difficult questions and some existing case law had not been explored. Some time then elapsed while representation of the claimant through FRU was arranged and unsuccessful efforts were made assemble a number of other similar cases for hearing at the same time.

17. I deal with the three activities put in issue by the Secretary of State's appeal in turn, although there is some overlap in terms of the general approach to be taken to Schedule 1 to the PIP Regulations.

Activity 3 (managing therapy or monitoring a health condition)

18. When directing the oral hearing I drew attention to the decision of Upper Tribunal Judge Ward in *PC v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 622 (AAC). There, the claimant qualified for one point under descriptor 3(b)(i) by virtue of needing an aid to organise her medication. She also had to apply an emollient cream or moisturiser to stop her eczema getting worse and apparently needed help with certain parts of her body because of a lack of flexibility. The question was whether she could qualify for two points instead of one under descriptor 3(c) on the basis that this was assistance to be able to manage therapy or was limited to descriptor 3(b)(ii) and assistance to be able to manage medication. If limited to

the latter, she could not improve on her existing one point. The Secretary of State in that case referred to the definitions in the Oxford English Dictionary (2nd edition, revised 2005) of "medication" as "a drug or other form of medicine that is used to treat or prevent disease" and "therapy" as "treatment intended to relieve or heal a disorder". He then submitted that the terms of activity 3 drew a clear distinction between medication and therapy, such that if the assistance was with the taking of medicine it could not be with the undertaking of therapy and that the emollient cream was medication.

19. Judge Ward took the view that the dictionary definitions illustrated how the application of the cream could fall within either category and continued:

> "13. These matters suggest that the boundary is not a hard-edged one: a parallel is to be found in the law relating to special educational needs where whether something is educational or non-educational provision is, in general, a matter for the specialist tribunal of fact, and there is a 'shared territory' of provision (see *London Borough of Bromley v Special Educational Needs Tribunal* [1999] ELR 260 at 295).
>
> 14. This is therefore not a matter on which I consider there is much guidance on the law that the Upper Tribunal can usefully provide. The First-tier Tribunal, with the composition to which I have earlier alluded, is far better placed to consider the statutory wording, including the definitions set out above, and to decide whether a particular treatment falls within either definition and if so, which. If they address the point, and their decision is appropriately reasoned, I consider it unlikely that an appellate court or tribunal would seek to interfere with the categorisation by the specialist tribunal."

Since the First-tier Tribunal had failed to engage with the issues raised by the use of the emollient cream at all, the judge found that there had been a material error of law in that respect and the matter was included in what had to be considered by a new tribunal on remittal.

The submissions

20. Mr Buley for the Secretary of State submitted that *PC* was wrongly decided. He stressed that there was a clear distinction in the terms of activity 3 between the relatively precise concepts of managing medication or monitoring a health condition and the concept of therapy that he said was intended and necessary to the structure of the descriptors. The argument of law was that in that context the broad dictionary definition of "therapy", which could cover all cases of taking medication, could not be adopted. The concept had to exclude the management of medication and at least some aspects of the monitoring of a health condition. If it did not, and the managing of medication was regarded as falling with the scope of descriptors 3(c) – (f), then descriptor 3(b)(ii) could never have any practical application in cases of the management of medication because all such cases falling within its scope would fall at least under descriptor 3(c) and score at least 2 points. That consequence could not have been intended. Mr Buley also submitted that Judge Ward's approach would undesirably leave

open the possibility of different tribunals or decision-makers deciding substantially identical cases differently, not as the result of the acceptable variation in judgment about the application of some test in terms of reasonableness or good cause or the like, but as a result of a difference of opinion about the scope of the meaning of fundamental terms within activity 3. He said that issue was not analogous to that in the *Bromley* case. The concluding point was that, even if those submissions were not accepted, the tribunal of 24 August 2015 had made an error of law by failing to give adequate reasons for its conclusion that the claimant satisfied descriptor 3(d) and in particular for why the test of needing assistance for more than three and a half hours per week was met.

21. Mr Parkinson's initial submission for the claimant was that the decision in *PC* was right, that there was ample material before the tribunal of 24 August 2015 on which it could, using its specialist expertise, conclude that the assistance with the claimant's complicated regime was therapy and that the assistance that it accepted was provided and needed would take more than half an hour a day. In the circumstance that the tribunal had applied what he said was the right approach in law, especially since the Secretary of State's written submission to the tribunal (page G) appeared to accept that the claimant was undertaking therapy but submitted that assistance was only occasionally needed during exacerbations, it was not necessary for the tribunal to say anything about why that approach was right in law. Then the extent of the assistance needed, including the time involved per week, was self-evident from its findings of fact. In the course of the oral hearing Mr Parkinson also adopted some of the arguments mentioned below.

Discussion – the Secretary of State's submissions

22. I do not accept the Secretary of State's submissions on the interpretation of activity 3. I agree in substance about the unsatisfactory nature of the decision in *PC*. It seems to me that the decision leaves uncertain and open to different views in individual cases not merely the scope of therapy, but the way in which the descriptors for activity 3 fit together. Whether or not the circumstances of the *Bromley* case were analogous (on which difference between the representatives I need not express any opinion), that sort of result is one that should be adopted only if there is absolutely no other choice. However, I am not persuaded that the proper interpretation is as put forward for the Secretary of State.

23. First, there is a weakness in Mr Buley's argument that appears when monitoring a health condition is considered. In his skeleton argument, he put it that therapy in descriptors 3(c) – (f) had to exclude both managing medication and monitoring a health condition. However, at the oral hearing he acknowledged the effect of the second part of the definition of "monitor health" in Part 1 of Schedule 1. In my judgment, although the precise term "monitor health" does not appear anywhere in Part 2 of Schedule 1, the definition in Part 1 must be regarded as relating to "monitoring a health condition". Then it is not enough for there to be detection of significant changes in the claimant's health (by which must be meant detection of whether or not there is a significant change). There must also be the taking of action (by which must be meant the ability and willingness to take action when needed as well as the actual taking of action) without which the claimant's health is likely to deteriorate, as advised by a

doctor, nurse or health professional. As Judge Ward showed in paragraph 10 of *PC*, the classes of health professional who are regulated by the Health Professions Council and so fall within that part of the definition include a very wide range indeed, many of whom would only be in a position to advise about what in the ordinary use of the word would be called therapy and certainly could not advise about, let alone prescribe, medication. In any event, it seems plain that the action that might need to be taken in the event of a significant change for the worse in a claimant's health condition could often involve "treatment intended to relieve or heal a disorder" that does not involve any medication. Equally, many forms of therapy within its ordinary meaning must involve some monitoring of the claimant's health condition in the sense of paragraph (a) of the definition of "monitor health" and a willingness to take action in accordance with the recommendations for therapy aimed at avoiding a deterioration in the sense of paragraph (b). It would seem extraordinary if the existence of such an overlap excluded the application of descriptors 3(c) – (f), no matter how time-consuming the supervision, prompting or assistance needed was, leaving the claimant only to the possibility of one point under descriptor 3(b)(ii). Even if one said that the application of those descriptors was excluded only to the extent that the therapy involved monitoring of a health condition, that would seem to involve an artificial and impractical fragmentation of a holistic process. Mr Buley did not resolve those difficulties, which in fairness I did not put to him at the oral hearing. I have to return to the substance of the problem in paragraph 27 below in explaining what I consider to be the correct position.

24. Second, in my judgment, Mr Buley's approach (leaving aside any special problems relating to monitoring a health condition and looking only at managing medication) throws up a significant anomaly that cannot have been intended. It is a consequence of his approach, that he did not shrink from acknowledging, that no matter for how many hours a day a claimant needs supervision, prompting or assistance with managing medication, there can never be qualification by virtue of that supervision etc to more than one point under descriptor 3(b)(ii). Suppose a case where a claimant needs to take medication every two hours throughout the day and night and needs prompting each time a dose is due and some assistance with taking the medication. On the Secretary of State's view that cannot amount to prompting and assistance with therapy, so that the claimant is restricted to one point. By contrast, a claimant who needs no medication, but needs some brief assistance with setting up equipment for the claimant to use on her own for therapy (see the TENS machine setting up dealt with in *RH v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 622 (AAC)) or needs prompting to start such therapy, will at the least score two points under descriptor 3(c). In my judgment, such a result is anomalous even at that level of needs in giving a person with a lower level of need more points than someone with a higher level of need. The anomaly becomes greater as one changes the example to increase the amount of supervision etc needed over the managing of medication or if one takes circumstances like those of the present case, where the claimant's partner needed to assist both with the management of medication (i.e. the taking of medication) and with the monitoring of the claimant's health condition. Either form of assistance would have brought the claimant within descriptor 3(b)(ii), but she was on Mr Buley's approach limited to one point.

Discussion – alternative interpretation A

25. At the oral hearing I suggested for consideration a proposition that one should avoid such an anomalous result if it was at all possible to interpret the words of the descriptors within any particular activity so as to do so and that such a process might involve a strained interpretation of some provision(s). I also suggested as an example of such a process an interpretation of descriptor 3(b)(ii) so that it did not apply if supervision, prompting or assistance was needed for both managing medication and monitoring a health condition and only applied if it was needed for one only of those alternatives. It also would not apply if the supervision etc was needed for elements of what would ordinarily be regarded as therapy that went beyond either managing medication or monitoring a health condition. In both those circumstances where descriptor 3(b)(ii) would not apply, the case would potentially fall within the therapy provisions in descriptors 3(c) – (f), depending on how far the supervision etc related to something that could properly be called undertaking therapy and with the scale of points depending on the time for which the supervision etc was needed. All elements of therapy in its ordinary meaning could then be considered, including any taking of medication or monitoring of a health condition. If the need for supervision etc was limited to one or other of those alternatives in descriptor 3(b)(ii), then in order to allow the descriptor to have any practical application the application of descriptors 3(c) – (f) would be excluded.

26. Mr Parkinson adopted those suggestions quite enthusiastically, as they would of course cover the circumstances of the present case and allow the claimant into descriptor 3(d) (subject to adequate reasons having been given). Mr Buley, while not rejecting the general proposition as such, submitted that it could not be allowed to subvert the plain words of the descriptors or create new anomalies. He submitted that the suggested example was "a strain too far" and that it would involve giving therapy two different meanings within the same provision: sometimes it would exclude the management of medicine and the monitoring of a health condition, sometimes it would not. That was a result that should not be produced by a mere process of interpretation.

27. In my judgment the general proposition suggested above is sound, provided that it is not treated as more than a starting point in the interpretation process. It is supported by the result of the decision of Judge Hemingway in *JP v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 529 (AAC), recently followed and applied by Judge Markus QC in *AP v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 501 (AAC). The problem there was to do with mobility activity 2 and in particular descriptor 2(c) (can stand and then move unaided more than 20 metres but no more than 50 metres: 8 points). I return to that descriptor in paragraphs 49 and 50 below. The problem arose because of the terms of the two lower descriptors giving no points where the claimant can stand and then move more than 200 metres either aided or unaided and four points where the claimant can stand and then move more than 50 metres, but no more than 200 metres, either aided or unaided. Indeed, the higher descriptors also use the term "aided or unaided". The anomaly identified by the judge was that descriptor 2(c) was apparently satisfied if a claimant could walk for 50 metres on their own and could then only continue, although apparently for any distance, if aided (i.e. with the use of an aid or appliance or with supervision, prompting or assistance), whereas a claimant who

had to be aided from the beginning was limited to zero or four points if able to walk more than 50 metres, depending on which of descriptor 2(a) or 2(b) applied. The judge took the view that when descriptor 2(c) was put into the context of the way that the distance limits were used in all the other descriptors, it had to be interpreted as being restricted to claimants who could walk more than 20 metres but no more than 50 metres unaided, but then no further even if aided. Judge Hemingway did not invoke any general principle in reaching his conclusion, but concentrated on the particular structure of the descriptors under mobility activity 2 and the need to produce a coherent and logical structure. However, I consider that his reasoning, as endorsed by Judge Markus, is consistent with the general proposition suggested above, as one example of coherence and a logical progression through the descriptors with, allowing for some rough edges, a general correspondence between increasing actual need and the number of points awarded.

28. Things are much more difficult in relation to the example of an interpretation of descriptor 3(b)(ii) suggested in paragraph 25 above. There are obvious attractions in it and it would provide a solution in the circumstances of the present case. In my view, the points made by Mr Buley do not undermine its validity. It is not unduly straining the words of the descriptor to say that it applies only when one of its alternatives operates alone and without any combination with the other or with other kinds of supervision etc within the scope of activity 3. Nor does it involve giving "therapy" two meanings within activity 3. The term would have its broad ordinary meaning, but the ability to apply any of descriptors 3(c) – (f) would be excluded where the therapy being undertaken consisted only of either managing medication or monitoring a health condition. The problem discussed in paragraph 23 above, arising from the position that the undertaking of many forms of therapy will involve a monitoring of a health condition, does not arise under the example. That is so even allowing for the part of the definition of monitoring a health condition to do with taking action (including as I have suggested ability and willingness to take action). Such action can only in that particular context mean action that would need to be taken after a significant change in the claimant's health condition likely to cause a deterioration in health has been detected, being action without which the claimant's health would be likely to deteriorate. Although anyone undertaking therapy or a person administering therapy to a claimant would no doubt need to keep alert for any significant change for the worse, the primary aim of the therapy and any action involved in it would be to improve the claimant's health or at least keep it on an even keel. Thus, there would, almost in the essential nature of the concept of undertaking therapy, be something involved going beyond the mere monitoring of a health condition in the terms of the statutory definition, so that descriptor 3(b)(ii) would not be applicable. There would then be nothing to stand in the way of the application of descriptors 3(c) – (f) as appropriate to the circumstances.

29. However, two problems can be identified with the working of the example, one rather more technical than the other. The more technical problem is how descriptor 3(b)(i) fits in. It can in my view never have been intended that qualification under that descriptor by needing to use an aid or appliance to be able to manage medication was to exclude the awarding of points under descriptors 3(c) – (f), because it is not concerned with supervision, prompting and

assistance at all. To that extent, descriptors 3(c) – (f), drafted so as to be mutually exclusive between them, apply concurrently with descriptor 3(b), with the higher number of points available if one of the descriptors 3(c) – (f) applies being the score for activity 3. Within descriptor 3(b) itself it has to be accepted that if the conditions of (i) and (ii) are both satisfied, only one point can be scored. The example being discussed requires descriptors 3(c) – (f) in effect not to be applied concurrently with descriptor 3(b)(ii), but as if the provisions were mutually exclusive, qualification for descriptor 3(b)(ii) in accordance with the interpretation being adopted under the example excluding the application of descriptors 3(c) – (f). Can the provision in descriptor 3 properly be treated as in part operating concurrently with descriptors 3(c) – (f) and in part mutually exclusive of those descriptors? The result is not elegant, but I do not see why that should not be the case. Descriptor 3(b) attempts to compress a number of rules within it and I think it legitimate on separating out the operation of those rules to consider the effect of the rule about the use of an aid or appliance in (i) separately from the effect of the rule about supervision etc in (ii).

30. The second, and more fundamental, problem is that the example being discussed does not completely remove the anomaly identified in paragraph 24 above of the progression of points through the descriptors being out of step with the progression in the extent of need. I return to the case supposed there of a claimant who needs to take medication every two hours throughout the day and night and needs prompting each time a dose is due and some assistance with taking the medication. If that is all that the claimant needs, then on the interpretation being discussed the claimant will qualify only for one point under descriptor 3(b)(ii) although the time and inconvenience involved in providing the prompting and assistance may be greater than in descriptor 3(d) or (e), let alone (c). Or take the case of the circumstances considered in *Secretary of State for Work and Pensions v IM (PIP)* [2015] UKUT 680 (AAC) (I take nothing from what was said about therapy in that decision because much of it was based on another decision (CPIP/1882/2015) which has since been set aside and where the appeal is to be reheard by the Upper Tribunal). In *IM* the claimant suffered from a condition that could cause the tissues of his throat to swell and cut off his air supply. If he got a warning that that was about to happen, he could use an epipen to administer adrenaline but also needed medical assistance. Often he got no warning and therefore needed someone else to administer the adrenaline. On the face of it what was being done by the claimant himself and any other person with him was no more than a monitoring of his health condition as defined, despite the fact that the action taken at home by the claimant or others on the onset of an episode might in the ordinary use of language be described as therapy. Thus, despite the extent of the need for supervision etc and the life-threatening consequences of its absence, the claimant would on the example being discussed be restricted to one point under descriptor 3(b)(ii). It might be arguable that where the action taken within the definition of monitoring to avoid a likely deterioration in health takes the form of medication, with which supervision etc is needed, both parts of descriptor 3(b)(ii) are satisfied, so that it would not apply and the therapy descriptors could be considered. But there will be other cases of very time-consuming monitoring where such an escape route is not open.

Discussion – alternative interpretation B

31. Because of the existence of those problems, consideration should be given to another possible interpretation. This would be to say that descriptor 3(b)(ii) operates concurrently with descriptors 3(c) – (f) in the same way as descriptor 3(b)(i). Thus, to take the first case discussed in the previous paragraph, the claimant would not only qualify under descriptor 3(b)(ii), but also under 3(c) at the least on the basis that the regime of medication constituted therapy that was being undertaken (as treatment intended to relieve or heal whatever the disorder was), so would score 2 points or more, depending on the time taken in prompting and assistance. Similarly, on the facts as they appeared in *IM*, even though there might only be supervision etc in the managing of therapy when action was taken by someone else, not while merely standing by ready to act if needed, as suggested by the judge in that case, the claimant would again qualify for at least 2 points depending on the time taken. The judge there appeared to have been operating on this alternative interpretation of the descriptors, because he remitted the case for consideration of whether and which of descriptors 3(c) – (f) could apply, even though descriptor 3(b)(ii) plainly applied. The points raised in the present case had not though been raised in *IM*, where there had been no oral hearing. Interpretation B could be said to be consistent with the description of activity 3 in column 1 of Schedule 1 – managing therapy or monitoring a health condition – with no specific mention of managing medication. That might suggest that managing medication is a sub-set of managing therapy, but the use of such shorthand in an overall description is probably just as consistent with the other interpretations.

32. The problem with this alternative interpretation is, of course, that raised by Mr Buley, that the result would be that descriptor 3(b)(ii) could never have any practical application so far as managing medication is concerned and it would undermine what he describes as the clear and fundamental intention to restrict at least some cases of the management of medication and of the monitoring of health to one point. It seems to me that that was the consideration that led Judge Ward to the result reached in *PC*, although it was not brought to the surface in the decision. He must have been assuming that descriptors 3(b)(ii) and 3(c) – (f) operated concurrently, otherwise he would not have considered it necessary to distinguish between medication and therapy in the particular circumstances of each case. Then "therapy" could not simply be allowed to have its broad dictionary meaning, because that would prevent descriptor 3(b)(ii) having any practical application, so leading into the quicksand of attempting to distinguish between taking medication and therapy.

Discussion - conclusion and summary

33. The upshot is that no potential interpretation is without its problems. The least worse has to be chosen. I doing so I am acutely aware that other cases will throw up circumstances and difficulties that I have not thought of and which may not be catered for in a ruling made in the context of the circumstances of the present case. But that is so whatever interpretation I adopt. On balance I have concluded that what I have labelled alternative interpretation A (paragraphs 25 – 30 above) does the least damage to the intended structure of the descriptors under activity 3. It maintains some practical operation for the whole of descriptor 3(b)(ii) and substantially reduces the anomaly of claimants with more needs qualifying for fewer points than claimants with fewer needs.

34. The essence of alternative interpretation A, in line with what is said in paragraph 25 above, is that descriptor 3(b)(ii) does not apply if supervision, prompting or assistance is needed for both managing medication and monitoring a health condition and only applies if it is needed for one only of those alternatives. It also does not apply if the supervision etc is needed for elements of what would ordinarily be regarded as therapy that go beyond either managing medication or monitoring a health condition within the meaning of descriptor 3(b)(ii). In both those circumstances in which descriptor 3(b)(ii) does not apply, the case would potentially fall within the therapy provisions in descriptors 3(c) – (f), depending on how far the supervision etc relates to something that can properly be called undertaking therapy and with the scale of points depending on the time for which the supervision etc is needed. All elements of therapy in its ordinary meaning could then be considered, including any taking of medication or monitoring of a health condition. If the need for supervision etc is limited to one or other of those alternatives in descriptor 3(b)(ii), then in order to allow the descriptor to have any practical application the application of descriptors 3(c) – (f) would be excluded.

Application to the decision of the tribunal of 24 August 2015

35. The tribunal of 24 August 2015 found as facts, and was entitled on its evaluation of the evidence to find, that the claimant's partner had to constantly monitor her blood sugar levels, help with medication and juggle food to manage her condition. Thus the circumstances were such that supervision etc was needed with both managing medication and monitoring the claimant's health condition, as well as in the juggling of the nature of the claimant's food and drink intake to aid the management of blood sugar levels. On the view that I have taken of the proper interpretation of the descriptors under activity 3, descriptor 3(b)(ii) could not then apply and the tribunal was required to consider, as it did, descriptors 3(c) – (f). There was ample material before the tribunal on which it could conclude that descriptor 3(d) was satisfied, requiring supervision etc to be needed for an average of at least half an hour a day.

36. Mr Buley raised two further issues about the tribunal's conclusion, in the event that I did not agree with him on the basic interpretation of activity 3. The first was that the tribunal had not been entitled to regard the juggling of the claimant's food and drink intake as part of therapy within descriptor 3(d), so that time spent by the claimant's partner in prompting and assistance related to that could not count when assessing which of descriptors 3(c) – (f) could apply. He said that that was catered for under activity 2 (taking nutrition), where the claimant's qualification for four points for needing prompting to take nutrition was not disputed. I do not agree. In my judgment, even if there was some overlap between activities 2 and 3, that would not prevent the ordinary meaning of "therapy" operating within activity 3. Attention to the nature and timing of the intake of food and drink is well-known to be part of the regime that people with diabetes need to adopt and thus within the ordinary meaning of therapy. Nor do I think that there is a great deal of overlap, because activity 2 is basically concerned with the physical and mental acts needed to eat and drink, not with the nutritional quality of what is being eaten or drunk. That has very recently been confirmed in the decision

in *MM and BJ v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 490. That decision was not referred to at or before the oral hearing, but as it merely confirms the view that I had already reached it is not necessary to give the parties an opportunity to comment on it.

37. Mr Buley's second point was that on any basis the tribunal's reasons for decision were inadequate in failing to explain why it considered that the case fell within descriptor 3(d) rather than 3(c) and in failing to record any conclusion about how much time per week the claimant's partner's relevant supervision, prompting and assistance took. Mr Parkinson submitted that there were sufficient findings of fact about what the partner had to do to make it self-evident that descriptor 3(d) was satisfied and the parties could have been in no doubt why the tribunal concluded that it was. The point is somewhat academic because, whatever the result, the tribunal's decision has to be set aside in its entirety because of its misinterpretation of mobility activity 2 and on re-making the decision there is no difficulty in my adopting the tribunal's findings of fact and spelling matters out slightly more. The matter is very evenly balanced in the circumstances. Because of the importance of the very precise conditions as to time over a week contained in descriptors 3(c) – (f), it must be right in general that tribunals should make findings about how long each instance of relevant supervision, prompting and assistance takes and how often, so that the aggregate can be related to the appropriate descriptor. If forced to a conclusion I would say that the tribunal here just fell the wrong side of the line in not tying up its findings and conclusions.

38. For reasons explained below, I am substituting a decision on the claimant's appeal against the Secretary of State's decision of 14 May 2015 rather than remitting that appeal to a new tribunal for rehearing. In doing so, it follows from the conclusions of law above on the meaning and scope of therapy and the findings of fact made by the tribunal of 24 August 2015, which I accept and adopt, that the claimant qualifies for descriptor 3(d) and the award of four points. Although the claimant and her partner have never, including in the PIP2 questionnaire, been asked directly about the time involved in the assistance and prompting given by her partner, the evidence about the number of times a day it was needed and the substance of what was involved (remembering that it includes the juggling of food and drink input) points clearly towards the three and a half hours a week threshold being reached, but not the seven hours threshold.

Activity 10 (making budgeting decisions)

39. If it had been crucial to the setting aside or otherwise of the decision of the tribunal of 24 August 2015 whether there was an error of law in its award of two points under this descriptor, I would have been inclined to answer no. That is because those points were awarded in the decision under appeal and the Secretary of State raised no question about the appropriateness of that award in the written submission to the tribunal. Thus the issue was one that was not raised by the appeal and it was not clearly apparent from the evidence (on my provisional view of the law) that it needed to be considered, so that under section 12(8)(b) of the Social Security Act 1998 the tribunal was not required to consider it. I would then have been inclined to regard the tribunal's brief reasons in paragraph 18 of its statement of reasons

as an explanation of why it had decided not to use its discretion to consider the issue, rather than as the fuller reasons that would have been given, as it did give on issues in dispute, if the issue had properly been considered. However, the tribunal's decision has to be set aside in its entirety because of the error of law in the award of the mobility component of PIP and the Secretary of State has raised the issue of activity 10 in relation either to a decision to be substituted by the Upper Tribunal or to a rehearing by a new tribunal. Therefore, the proper interpretation of the descriptors under activity 10 has now to be considered.

40. However, on the view that I have taken on activity 3, which entails adopting the four points awarded by the tribunal of 24 August 2015 when re-making the decision, the claimant reaches the threshold for the enhanced rate of the daily living component on the aggregate of those points and those for activities that are not in dispute. The Upper Tribunal can therefore substitute a decision in her favour while not awarding her any points under activity 10. In view of the time that has elapsed since the claim for PIP was made and the fact that payment of the benefit awarded by the tribunal of 24 August 2015 was suspended pending the outcome of the Secretary of State's appeal to the Upper Tribunal, I consider it better to substitute the decision in her favour on the daily living component than to pursue arguments that might eventually be resolved in her favour but would not give her any additional benefit. To pursue those arguments in full might require further submissions to the Upper Tribunal and probably a remission of the case to a new tribunal for rehearing. I do not think that the further delay entailed in all that is justified or that the claimant would be prejudiced in the long term by not having the additional points under activity 10 included in my decision. So in my substituted decision I shall proceed on the basis that there is not currently sufficient evidence to justify an award of points under activity 10, but I set out below the submissions that have been made in the present case and a provisional view of some questions that may need to be resolved in some other case on some other day where the answers are essential to the outcome.

41. The primary submission for the Secretary of State was that, as it was put in paragraph 32 of Mr Buley's skeleton argument:

> "On its true construction, and indeed on the face of its clear language, descriptor 10(b) covers situations where a person needs help with decision-making itself. The mere fact that a person may need help with reading a document because of dyslexia (or, for that matter, blindness or illiteracy) is irrelevant in principle to this descriptor. The FTT therefore erred in the approach that it took."

Problems with vision were said to be catered for in activity 8, under which the claimant had been awarded points, so that to award points under activity 10 as well would be making an unjustified double provision. Mr Buley also submitted that, in view of that necessary interpretation, the definition of "assistance" in Part 1 of Schedule 1, in terms of physical intervention and excluding speech, could not apply to activity 10, because the context otherwise required. Physical intervention could not have any relevance to the making of a decision itself and the exclusion of speech would exclude just the types of help that the activity was aimed at. Moreover, the use of the words "to be able to" did not indicate that the

gathering of information to put the claimant in a position to make a decision was relevant. The words merely emphasised that it was the making of a decision by the claimant herself that was in issue.

42. Mr Buley relied on the decision of Judge Markus QC in CPIP/1650/2015, where the First-tier Tribunal had accepted that the claimant could not, because of his reduced vision, correctly count money and struggled to read bills, but awarded no points under activity 10. The judge said in paragraph 6:

> "I agree with the Secretary of State's submissions as to the first ground of appeal. The appellant's reduced vision was properly reflected in the FTT's decision that he satisfied activity 8b. Reduced vision does not impact on making budgeting decisions as defined in Schedule 1. The fact that a person's limited sight might make it difficult for them to see price tags in shops or count out change may mean that they require someone else to provide them with the information necessary to make decisions but it does not of itself give rise to difficulty in making the decisions based on the necessary information."

He might also have relied on the decision of Judge White in *RB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 393 (AAC), which has the advantage of being available on the AAC's website. There the claimant suffered from a number of physical ailments and in so far as he related those to making budgeting decisions it was in terms of the pain he was in on some days preventing him managing his bills. The judge held, after referring to a couple of previous decisions, that the primary focus of activity 10 was on the cognitive or intellectual function of making budgeting decisions. While there was nothing in the words of the descriptors to exclude the taking into account of difficulties flowing only from physical disabilities, it would only be in the most extreme and obvious circumstances that they could be relevant to the making of budgeting decisions. The claimant's physical disabilities in *RB* were a very long way from that threshold.

43. Mr Parkinson for the claimant focused on the words "to be able to" and submitted that activity 10 covered assistance or prompting that was needed to put the claimant in a position to be able to make either complex or simple budgeting decisions. He relied on the decision in *RH* (see paragraph 24 above) on the TENS machine. There the claimant's wife needed to spend 10 minutes to set up the machine at the beginning of each session and two minutes at the end to remove it. The First-tier Tribunal had refused to make an award of points under activity 3 on the ground that that was not assistance with the management of the therapy, which only took place once the machine was fitted and started working. Judge Agnew of Lochnaw QC held, with the support in substance of the Secretary of State, that the assistance allowed the claimant to manage his therapy and so counted. Mr Parkinson submitted that the approach of the Secretary of State here to activity 10 was inconsistent with that in *RH* and accordingly wrong. He also suggested that the Secretary of State's position would produce anomalous consequences, such that a claimant suffering from depression who lacked motivation to make decisions but who, once prompted, was able to make the choices necessary to a decision would be denied any points.

44. In reply, Mr Buley denied that such an anomalous consequence would follow, apparently accepting that prompting within the terms of activity 10 would then have been needed. When asked what the position might be of a claimant who did not merely need help with reading documents initially, but needed reminding of their contents during the decision-making process or of a claimant who became distressed (as the claimant here was said to become) or flustered or confused when trying to make decisions in such circumstances, he submitted first that the Upper Tribunal should not seek to decide on circumstances outside those of the present case. He did though suggest, in the light of the evidence that the claimant suffered from anxiety and depression, that if the case were remitted it was possible that further evidence might come forward to supplement the very brief statement by the claimant's partner about distress (see paragraph 7 above) that could bring her within the terms of descriptor 10(b).

45. There seem to me to be two levels of question arising on those submissions. The first is the broad question whether activity 10 is limited to assistance and prompting with decision-making itself, or, as it could be put, making the choices involved in reaching a decision, rather than assistance and prompting to put the claimant into a position to make decisions. In my view the previous Upper Tribunal decisions cited do not dictate a resolution one way or the other. None followed an oral hearing. The decision in CPIP/1650/2015 was not considered by its author to be of sufficient interest in other cases to be put on the AAC website. The decision in *RB* was not considered in the representatives' submissions. There does seem to me a difference of approach in principle between the position put forward for the Secretary of State here and in *RH*. I would not for myself find decisive in any direction either the oddity that, if the Secretary of State is right, the definition of "assistance" for limited purposes of Schedule 1 to the PIP Regulations cannot apply or the fact that similar elements of the claimant's condition might give rise to qualification for points under both activity 10 and activity 8. I could reach a conclusion on the broad question of interpretation, but in my judgment it is preferable for that to be done in an appeal where the outcome will be essential to the outcome in terms of eligibility for the daily living component of PIP or a particular rate of that component.

46. The second level of question, which arises in particular if the Secretary of State is right about the broad question, but is also connected to the nature of the limits imposed on that assumption, is to do with the effect of a need for prompting or assistance after the initial assistance with reading documents (see paragraph 44 above).

47. In my view, it is arguable that someone without anything that would be called a cognitive or intellectual impairment can be found to have needs of this kind that fall within activity 10 even if the Secretary of State is right in general. A starting point is that section 78(1)(a) of the Welfare Reform Act 2012 on the daily living component makes the test of qualification whether a claimant's activities are limited by their "physical or mental condition". The same test applies for the mobility component in section 79(1)(b) and it is taken forward into the PIP Regulations. There is no requirement that a claimant be suffering from any physical or mental disablement or disorder or disease, although it is common to slip into the use of such language. The statutory word is "condition". It is arguable therefore that if a consequence of some aspect of a claimant's physical or mental condition that is well within the range of normality and would not commonly be described

as a disablement contributes to some need within the scope of the activities in Schedule 1 to the PIP Regulations, that need must be taken into account. Take an example of a person who is blind and cannot read Braille. It is often said that if such a person has no cognitive impairment they have no problem in making the choices involved in a decision if documents can be read out loud to them by someone else. For many, that will indeed be the case. But what if the person, with no cognitive impairment as such, finds it difficult to have accurate and confident recall and retention of the details of documents and has to have them read out again or be reminded of the details of their contents or, say, of comparative figures? Or what, as raised in paragraph 44, if a claimant becomes distressed or flustered or confused in the effort to recall and retain information without being able to refer to written documents and needs prompting? If there is evidence to support such findings, it is arguable that a descriptor within article 10 can be satisfied, bearing in mind that presumably it is satisfied on any day on which the claimant would need the assistance and prompting if they wished to make any budgeting decisions, whether they actually have such decisions to make or not. The counter-argument might be that if all that the other person is doing is repeating the initial reading out of documents, it is merely a further putting of the claimant into a position to make the choices involved in a decision and so does not count under article 10.

48. Those difficult questions would require further examination before they could be decided in the present case and would be better decided in a case not just where the answer is essential to the outcome, but where there have been some relatively clear findings of fact.

Mobility activity 2 (moving around)

49. There has already been discussion of two of the relevant Upper Tribunal decisions in paragraph 27 above. Mr Buley's submission for the Secretary of State, once a blip in his skeleton argument had been corrected, was that, for the reasons given by Judge Hemingway in *JP*, as approved and followed by Judge Markus QC in *AP*, mobility descriptor 2(c) had to be interpreted as applying only where, after reaching the limit of moving unaided at somewhere between 20 and 50 metres, the claimant could not move further even when aided. Accordingly, the tribunal of 24 November 2015 erred in law in concluding that the claimant here satisfied descriptor 2(c) when it had found that she could move beyond 50 metres with aid in the form of supervision. Mr Buley submitted that the decision of Judge Mitchell in *KL v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 612 (AAC), made very shortly after *JP* and without knowledge of that decision (and where there had not been any argument on the point) was not to be followed. Mr Parkinson for the claimant had already in his skeleton argument conceded that the tribunal had erred in law in its conclusion on descriptor 2(c), apparently on the basis of the decision in *JP*. As neither representative was aware of Judge Markus's decision in *AP* until shortly before the start of the oral hearing, I gave Mr Parkinson a short time after the hearing to consider whether he wished to maintain the concession or, after considering what had been said in *KL* as well as in *AP*, to make an argument that the reasoning in *JP* was wrong and should not be followed. His reply was to maintain the concession.

50. I too find the reasoning in *JP* and *AP* cogent and follow it in the present case. I have already in paragraph 27 above adopted the underlying approach in relation to daily living activity 3. It follows that the tribunal of 24 August 2015 erred in law in finding mobility descriptor 2(c)

satisfied. There is no dispute that on its findings of fact, the claimant could not have scored any points under descriptor 2, so should not have been awarded the mobility component.

Conclusion and substituted decision

51. For the reasons given in paragraphs 49 and 50 above, the decision of the tribunal of 24 August 2015 must be set aside as involving an error of law. That error can simply be corrected in a substituted decision to the effect that the claimant is not entitled to the mobility component from and including 17 June 2015. I have explained in paragraph 40 above why a substituted decision is appropriate on the daily living component also. There is no dispute that there the claimant qualifies for four points under descriptor 2(d) (needs prompting to be able to take nutrition); two points under descriptor 8(c) (needs prompting to be able to read or understand complex written information); and two points under descriptor 9(b) (needs prompting to be able to engage with other people). In addition, I have concluded in paragraph 38 above that the claimant qualifies for four points under descriptor 3(d) (needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week). That makes a total of 12 points, sufficient for entitlement to the enhanced rate of the daily living component. For the reasons given in paragraph 40 above, I then proceed on the basis that there is not enough evidence before the Upper Tribunal to award the claimant any points under activity 10 (making budgeting decisions). I see no reason to depart from the view taken by the tribunal of 24 August 2015 that an award for a period of three years is appropriate in the circumstances. Accordingly, the Upper Tribunal's substituted decision on the appeal against the Secretary of State's decision of 14 May 2015 is as set out at the beginning of this document.

(Signed on original): J Mesher
Judge of the Upper Tribunal

Date: 28 November 2016