IN THE UPPER TRIBUNAL **Appeal Nos: CE/4887/2014**
CE/1910/2015

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

Appearances: The first appellant (KC) did not appear nor was she represented at the hearing.

Mr Michael Spencer, solicitor to the Child Poverty Action Group represented the second appellant (MC).

Ms Zoe Leventhal of counsel represented the respondent Secretary of State on both appeals.

DECISIONS

DECISION ON KC's APPEAL

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Newcastle-Upon-Tyne on 3 March 2014 under reference SC229/13/00988 involved an error on a material point of law and is set aside.

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

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

DIRECTIONS ON KC's APPEAL

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

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

(2) The appellant is reminded that the tribunal can only deal with her situation as it was down to 8 April 2013 and not any changes after that date.

(3) If the appellant has any further evidence that she wishes to put before the tribunal which is relevant to her health and functioning in April 2013, this should be sent to the First-tier Tribunal's office in Newcastle within six week of her being sent the further submissions of the Secretary of State directed under (4) below.

(4) Within one month of the date of issue of this decision the Secretary of State must provide the First-tier Tribunal with a fresh submission on the appeal in which, meeting his obligations under *IM*, he (a) sets out and identifies properly evidenced examples of the range of the most and least demanding types of work-related activities in the Newcastle area in April 2013 under the Jobcentre Plus Offer, (b) by reference to those examples and KC's health conditions and accepted limitations and any other relevant evidence, advises which of those activities KC might have been required to undertake under the Jobcentre Plus Offer, and (c) explains which of those activities identified under (a) the Secretary of State considered it would have been reasonable for KC to have undertaken in April 2013.

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

DECISION ON MC's APPEAL

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Newcastle-Upon-Tyne on 3 March 2015 under reference SC230/12/00462 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to allow MC's appeal from the Secretary of State's decision of 7 February 2012 and hold that he had limited capability for work and was to be treated as having limited capability for work-related activity, and as result is placed in the support group of employment and support allowance, with effect from 7 February 2012.

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

REASONS FOR DECISIONS

Introduction

1. These two appeals were heard together as they both involve the common issue of what the "*Jobcentre Plus Offer*" is and how it fits in to the assessment of risk required to be carried out by decision makers (be that Secretary of State decision makers or the First-tier Tribunal) under regulation 35(2) of the Employment and Support Allowance Regulations 2008 ("the ESA Regs) where that regulation is applicable.

2. Regulation 35(2) of the ESA Regs provides as follows:

> "35.-(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
> (b) by reason 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."

3. A keen reader of Upper Tribunal decisions concerning regulation 35(2) of the ESA Regs might wonder why any more needs to be said on regulation 35(2) following the three-judge panel of the Upper Tribunal's decision in *IM –v- SSWP* [2014] UKUT 412 (AAC); [2015] AACR 10. The answer lies in the species of work-related activity provided for under the *Jobcentre Plus Offer*, the existence of which only became in any sense obvious in the course of these appeals.

4. I will need to return to *IM* in more detail below, but to set the scene for what is set out below it is perhaps helpful to set out the holdings from the headnote to the reported version of *IM* at [2015] AACR 10 (the italicised emphasis is in the headnote).

> "a "substantial risk" in this context meant a risk that could not sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case;
> the Secretary of State's case (that in assessing risk under regulation 35(2) it was sufficient to identify some work-related activity that the claimant could reasonably be expected to do without a substantial risk t0 anyone's health) was rejected because, while it was not necessary to identify the activity in which a claimant would be required to engage, it was necessary to identify activities in which he or she *might* be required to engage because the risk of an inappropriate requirement being imposed on a claimant could not be ignored – particularly as any findings by a healthcare professional or tribunal that there were some activities that would give rise to an unacceptable risk were not communicated to those who required claimants to engage in work-related activities;
>
> the F-tT ought to be provided with information about all types of work-related activity in the area where the claimant lived, and this is so even if the Secretary of State considered that the claimant did not have limited capability for work, since the question whether the claimant had limited capability for work-related activity was bound to arise if the F-tT was minded to allow the claimant's appeal;
>
> however, being unable to carry out an activity does not necessarily imply that there will be a substantial risk to anyone's health if the claimant is required to engage in the activity and nor does the risk of being sanctioned;
>
> where a claimant had been found to have limited capability for work, the result of any work-focused interview or other consideration of whether a claimant should be required to engage in work-related activity should be provided to the F-tT."

5. I will address in more detail the relevant factual background to both appeals later in this decision, but highlight at the outset that both concern situations where the Secretary of State had decided that the claimant had limited capability for work-related activity under regulation 19 and Schedule 2 to the ESA Regs. What was therefore in issue on the appeals by both appellants against the Secretary of States' decisions was whether they satisfied a descriptor in Schedule 3 to the ESA Regs or satisfied regulation 35(2) of those regulations.

6. The first of the two appeals concerns a claimant living elsewhere within the European Union and having an award of employment and support allowance ("ESA") paid to her as an exportable benefit under Regulation (EC) No 883/2004. It was not disputed before me that the

correct starting point in such a case is that regulation 35(2) can apply even though the fact that the claimant is living outside the United Kingdom means that she would not in fact be required to undertake any work-related activity.

7. *BB-v-SSWP* (ESA) [2015] UKUT 545 (AAC) was a similar case, also involving an ESA claimant living in Spain. In that case the Secretary of State confirmed that "there are no arrangements to provide work-related activities in countries outside the UK" but argued that the regulation 35(2) test should be applied on a hypothetical basis ("what could happen if a claimant were required to undertake work-related activity, not what would happen") and submitted that:

> "[w]here the claimant lives outside the UK and elects to have a paper hearing (as in this case) the hearing is almost always going to take place in Newcastle. However if the claimant chooses to attend in person they can choose a venue suitable to them. Thus, in such cases the relevant WRA evidence will be from the Newcastle area, or the area in which the tribunal was that the claimant attended….it is envisaged that the hypothetical approach and the use of the WRA lists that I have detailed in this submission will be the approach that DWP decision makers take in such cases".

8. Upper Tribunal Judge Mitchell in his conclusions on the appeal in *BB* accepted the Secretary of State's argument. He said:

> "I acknowledge the conceptual difficulties raised by the application of regulation 35(2), given the existing authorities, in foreign cases such as this. The Secretary of State's proposed solution has the benefit of levelling, to an extent, the playing field. It reduces the chances of different reg. 35(2) outcomes solely by reason of a person's country of residence. If an appellant does not object, the First-tier Tribunal ought to adopt the course suggested by the Secretary of State. If the appellant does object, the Tribunal will need to decide for itself how to proceed taking into account the reasons for the objection and any submissions of the Secretary of State."

9. I take the same approach on the first appeal (concerning KC), not least because, perhaps understandably, none of the parties sought to argue against this approach. It is an approach which provides consistency across the ESA scheme and does not treat differently ESA claimants

living outside the United Kingdom simply because the Secretary of State has not taken, or is unable to take, any steps to make them undertake work-related activity in the country they are living in. Such steps would be likely to be difficult to implement effectively. And it is not in the interests of ESA claimants living abroad to argue against this pragmatic 'thought experiment' test, as any argument based on what in fact is required of them by way of work-related activity would be likely to lead to the conclusion that few if any of them could satisfy regulation 35(2) as there would be no work-related activity from which any risk could arise. Moreover, the 'thought experiment' thesis is not devoid of support in previous caselaw on regulation 35(2): see *NS –v- SSWP* (ESA) [2014] UKUT 149 (AAC) and *KB –v- SSWP* (ESA) [2015] UKUT 179 (AAC).

10. One further piece of introductory information is needed before turning to the relevant law and the facts of the two cases. Both cases concern entitlement to contributory ESA. I assume in the first appeal that this is because the view is taken that only contributory ESA and not income-related ESA may be exportable elsewhere in the EU under Regulation (EC) No 883/2014 (I stress this is just a working assumption on my part; I am not deciding that income-related ESA is or is not exportable.)

11. The legislative effect of section 1A of the Welfare Reform Act 2007 is that from 1 May 2012 contributory ESA is payable only for one year (or 365 days to be more precise) *unless* the claimant has, or can be treated under (inter alia) regulation 35(2) of the ESA Regs as having, limited capability for work-related activity. This applies regardless of whether claimant lives in Great Britain or abroad; though it may have a special relevance for those living elsewhere in the EU if it is only contributory ESA that may be exported within the EU. The prospective decision that the contributory ESA will expire in a year's time, or the decision made at the end of that year ceasing entitlement to ESA, can therefore lead to appeals in which, amongst other issues, whether regulation 35(2) is

met can arise: see *MC –v- SSWP* (ESA) [2014] UKUT 0125 (AAC) and *RS –v- SSWP* (ESA) [2014] UKUT 203 (AAC).

Relevant Law

Statutory provisions

12. The conditions of entitlement to ESA are set out in section 1 of the Welfare Reform Act 2007 ("the WRA"). One of the basic conditions there set out is that the claimant "**has limited capability for work**": per section 1(3)(a) WRA.

13. It is to be noted that under the WRA having, or being treated as having, limited capability for work-related activity is not a condition of entitlement to what is commonly referred to as the "support group" of ESA. (By section 24(4) of the WRA "a person is a member of the support group if he is a person in respect of whim it is determined that he has, or is to be treated as having, limited capability for work-related activity".) Rather, whether a person has, or is treated as having, limited capability for work-related activity is relevant to the *amount* of ESA payable, whether contributory or income-related (see sections 2(1)(b) and 4(2)(b) of the WRA), once the basic condition of entitlement of the claimant having limited capability for work has been established. ESA therefore does not constitute two benefits; nor does it call for two entitlement decisions to be made.

14. Further the effect of sections 1, 2 and 4 of the WRA is that a decision that a person has, or is treated as having, limited capability for work is also an affirmative decision that he or she does not have limited capability for work related activity: see *MN –v- SSWP* (ESA) [2013] UKUT 262 (AAC); [2014] AACR 6 and *DH -v-SSWP* [2013] UKUT 573 (AAC). This follows from the wording in sections 2(3)(b) and 4(5)(b) in the WRA which confer entitlement to the (amount of the) work-related activity component, respectively for the contributory and income-related allowances, if "**the claimant does not have limited capability for work-related activity**" (my underlining). As I set out in *DH*, this must

ordinarily call for the Secretary of State's decision maker to turn his mind both to whether any descriptor in Schedule 3 to the ESA Regs is met but also to whether regulation 35(2) of the ESA Regs is met.

15. Regulation 35 is, admittedly, concerned with treating a person as having limited capability for work-related activity and is empowered by section 22 and paragraph 9 of Schedule 2 to the WRA, the latter of which empowers regulations to be made for persons in prescribed circumstances to be treated as having limited capability of work-related activity. However, the effect of these provisions is that the person is treated *as having* limited capability for work-related activity. That, as I found in *DH*, is sufficient to bring adjudication on regulation 35(2) within the decision required by sections 2(3)(b) and 4(5)(b) of the WRA.

16. Section 8 of the WRA provides for (as its sub-heading describes) *Assessments relating to entitlement*. I need not set out its terms. Regulation 19 of the ESA Regs is made under section 8 and provided, in so far as is relevant, at the relevant times on both appeal as follows:

> "**Determination of limited capability for work**
> **19.**—(1) For the purposes of Part 1 of the [WRA], whether a claimant's capability for work is limited by the claimant's physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require the claimant to work is to be determined on the basis of a limited capability for work assessment of the claimant in accordance with this Part.
> (2) The limited capability for work assessment is an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.
> (3) Subject to paragraph (6), for the purposes of Part 1 of the Act a claimant has limited capability for work if, by adding the points listed in column (3) of Schedule 2 against any descriptor listed in that Schedule, the claimant obtains a total score of at least—
> (a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule;
> (b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule; or
> (c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule…"

17. I will not set out the terms of Schedule 2 to the ESA Regs as they applied at the material times in each of the appeals. I will instead simply refer to which parts of Schedule 2 each of the appellants met when I describe the background facts on their cases.

18. Having limited capability for work-related activity is dealt with in section 9 the WRA. Again, I will not set out the terms of this section. It is very similar to section 8, requiring an assessment of the claimant's capability for work-related activity. That assessment is then provided for in regulation 34 and Schedule 3 to the ESA Regs. Regulation 34(1) of the ESA Regs provided at the times material to both appeals as follows:

> "For the purposes of Part 1 of the [WRA], where, by reason of a claimant's physical or mental condition, at least one of the descriptors set out in Schedule 3 applies to the claimant, the claimant's capability for work-related activity will be limited and the limitation will be such that it is not reasonable to require that claimant to undertake such activity."

19. I will refer to relevant parts of Schedule 3 if and when necessary when discussing the facts of the two cases.

20. Section 12 of the WRA is concerned with work-focused interviews. Relevant to the underlying entitlement decisions on these two appeals, section 12 provided as follows:

> "**12 Work-focused interviews**
> (1) Regulations may make provision for or in connection with imposing on a person who is—
> (a) entitled to an employment and support allowance, and
> (b) not a member of the support group……..,
> a requirement to take part in one or more work-focused interviews as a condition of continuing to be entitled to the full amount payable to him in respect of the allowance apart from the regulations.
>
> (7) In this section, "work-focused interview" means an interview by the Secretary of State conducted for such purposes connected with getting the person interviewed into work, or keeping him in work, as may be prescribed."

21. Related to section 12, section 13 of the WRA deals with work-related activity that may be imposed on a claimant subject to a work-focused interview under section 12. Section 13(1) and (7) provided as follows in respect of both appeals:

> "**13 Work-related activity**
> (1) Regulations may make provision for or in connection with imposing on a person who is subject to a requirement imposed under section 12(1) a requirement to undertake work-related activity in accordance with regulations as a condition of continuing to be entitled to the full amount payable to him in respect of an employment and support allowance apart from the regulations.
>
> (7) In this Part, "work-related activity", in relation to a person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so."

In respect of the *KC* appeal only, section 13 was amended with effect from 3 December 2012 so as to add a subsection 8 to section 13. This provides that:

> "(8)The reference to activity in subsection (7) includes work experience or a work placement."

22. For completeness, from 1 June 2011 the Employment and Support Allowance (Work-Related Activity) Regulations 2011 provided, under regulation 3 of those regulations, at the times relevant to these appeals, that:

> "**Requirement to undertake work-related activity**
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> 3.—(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.
> (2) The requirements referred to in paragraph (1) are that the person–
> (a) is required to take part in, or has taken part in, one or more work-focused interviews pursuant to regulation 54 of the ESA Regulations;
> (b) is not a lone parent who is responsible for and a member of the same household as a child under the age of 5;
> (c) is not entitled to a carer's allowance; and
> (d) is not entitled to a carer premium under paragraph 8 of Schedule 4 to the ESA Regulations.
> (3) A requirement to undertake work-related activity ceases to have effect if the person becomes a member of the support group.

> (4) A requirement imposed under paragraph (1)–
> (a) must be reasonable in the view of the Secretary of State, having regard to the person's 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.
> (5) A person who is a lone parent and in any week is responsible for and a member of the same household as a child under the age of 13, may only be required to undertake work-related activity under paragraph (1) during the child's normal school hours."

There is no dispute that both appellants could be required to undertake work-related activity. Although it does not apply in these cases, regulation 9 of the same 2011 Regulations provides that decisions under may be made by an external provider to whom that function has been contracted out by the Secretary of State.

23. The key legislative provision in play on both appeals is regulation 35(2) of the ESA Regs. As noted above this is made under section 22 and paragraph 9(a) of Schedule 2 to the WRA. The latter provides that "Regulations may make provision…for a person to be treated as having, or as not having, limited capability for work-related activity". I have already set out the terms of regulation 35(2) of the ESA Regs in paragraph 2 above.

IM

24. Given its central importance to these two appeals, I consider it necessary to refer in some detail to what is said by the three-judge panel in *IM*. The parties before me accepted that they, and I, are bound by *IM*.

25. The decision in *IM* was given on 15 September 2014. It was thus made after the Secretary of States' decisions on each of these appeals and after the First-tier Tribunal's decision on KC's appeal in CE/4887/2014. It had, however, been decided just short of 6 months before the First-tier Tribunal's decision on MC's appeal in CE/1910/2015.

26. Having reviewed the relevant legislation, the three-judge panel said this by way of general commentary on regulation 35(2) and its place in the statutory scheme.

> "23. Regulation 35 is clearly intended to be a safety net to avoid some claimants facing the consequences or potential consequences of a conclusion that applying the points system based on functional tests a claimant is found not to have limited capability for work-related activity. ....[it] is based on the existence of a risk arising from those consequences.....
>
> 24. So the application of regulation 35(2) involves a risk assessment at the time or times that a decision under it falls to be made. As it has to be applied before the next stage of the process begins for a person found not to have limited capability for work-related activity the analysis of and decision on whether the defined risk exists involves the making of predictions of the likelihood of the claimant facing the possible consequences and of the possible results of him doing so.....
>
> 25. That process, and the predictions it involves, has to be made first by the Departmental decision-maker on behalf of the Secretary of State and later, if there is an appeal, by the First-tier Tribunal.
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> 26. ..... Possible results are that the claimant will be required by a provider to undertake one or more work-related activities (and so an activity which makes it more likely that the person will obtain or remain in work or be able to do so – see section 13(7)). Any such requirement must be reasonable.....The range of work-related activities is potentially wide but to fit with the definition in section 13(7) and regulation 4 of the 2011 Regulations it must be something that addresses the barrier of that claimant to work and makes it more likely that he will obtain or remain in work.
>
> 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.
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> 28. Equally, the decision-maker at the work-focused interview and a provider deciding what work-related activity a claimant should be required to do must act fairly and so reach a decision on a properly informed basis.
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> 29. The primary point on this appeal is the amount and detail of the information the regulation 35(2) decision-makers should have of the possible results of the work-focused interview.

> 31. …….. fairness would be promoted by the Secretary of State operating a "joined up" decision-making process in which such information is provided to the work-related activity decision-maker.
>
> 32. But we are concerned with what evidence and factors should be taken into account at the earlier stage when regulation 35(2) has to be applied and have to do so in the light of the present system and practice of the Secretary of State relating to the provision of information between decision-makers."

27. I note relevantly that the judges in *IM* recorded a key part of the Secretary of State's argument as follows (paragraph 47):

> "47.....He argues that, as was decided in *ML*, he cannot say in advance what a particular claimant might be required to do and so, if there is any work-related activity that a claimant can reasonably do, regulation 35(2) cannot apply. In Miss Olley's [his counsel's] skeleton argument, she says:
>
> > "53. The reason is that the Secretary of State is not, as at the date of the decision on LCWRA, in a position to know the specific WRA that would be required of the particular claimant. That level of detail will only become known once the provisions of the statutory framework have been worked through and an action plan arrived at under regulation 5 of the WRA Regulations. This is the case whether the claimant's contact is with the Job Centre Plus or a Work Programme provider.
> >
> > 54. In addition to that point, *which is a point of principle with reference to the statutory framework*, the decision-maker who has never met the claimant may be based in, say, Glasgow, and therefore have no idea what WRA is available in, for example, Plymouth and therefore simply cannot give specific evidence of what may eventually be required by way of WRA as set out in an action plan reached in conjunction with a personal adviser at the JCP or a Work Programme provider."

I would simply observe (viz concerns I raised in the history of these two appeals, which concerns are set out below), that it would appear from these passages that the three-judge panel in *IM* may have been made aware, at least to some extent, of the existence of the *Jobcentre Plus Offer*[1].

[1] Albeit not by that name, even though it had existed for ESA claimants under that name since June 2011. It is also fair to note that in the passages quoted in paragraph 26 above the focus is on work-related activity provided by a "provider", which as a matter of nomenclature the three-judge panel appear to have understood to mean a body outwith the Department for Work and Pensions: see paragraph 11 of *IM*.

28. In its conclusion, *IM* says the following about regulation 35(2).

> "86.....[The risk in issue is one that] cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.....
>
> 88. If the regulation 35(2) risk materialises it is plainly serious and so Parliament must have intended that this safety net was applied before a work-focused interview took place with appropriately detailed scrutiny of the position of the individual claimant.
>
> 89. So..... the decision-maker on its application has to provide himself with, or be provided with, sufficient information to enable him to properly assess whether the particular vulnerable claimant should be protected by the regulation 35(2) safety net.....
>
> 92. .....difficulty arises in cases where it is accepted that there would be a substantial risk to someone's health if the claimant were to be required to engage in some forms of work-related activity but not others.....[this] depends in such cases on taking a view on what work-related activity that particular claimant would or might be required to do.
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> 93. It is clear that regulation 35(2) has to be considered and applied before the work-focused interview takes place.....
>
> 95. .....the system and practice that the Secretary of State has devised for administering the legislation clearly fails to minimize the risk of a mistake being made in the decision on work-related activity, whether due to ignorance of material facts that have emerged in carrying out the work capability assessment or when making the regulation 35(2) decision or simply because a different view is taken of the risks involved.....
>
> 98. The risk of the regulation 35(2) risk materialising might be greatly reduced if a healthcare professional were required to give advice as to whether there was a substantial risk in relation to specific types of work-related activity, rather than work-related activity in general, and if this and the views of the regulation 35(2) decision-maker on it were shared with the person making the work-related activity decision under regulation 3 of the 2011 Regulations.....
>
> 99. The risk might be eliminated altogether if the practice was for a decision-maker making the decision under regulation 3 to make a decision in conformity with findings made by a decision-maker or the First-tier Tribunal when making a decision under regulation 35(2)....
>
> 100. .....it is for the Secretary of State to decide how the legislation is to be administered but, because regulation 35(2) is concerned with assessing risk in the real world having regard to whether the administrative process creates or eliminates relevant risks, the way the legislation is administered has a considerable bearing on how that provision is to be applied.

> 101. In our view the absence of any system for ensuring that relevant information obtained, and findings made, in the course of carrying out a work capability assessment and applying regulation 35(2) and the reasoning behind the decision made on regulation 35(2) are made available to a person considering whether a requirement to engage in work-related activity should be imposed on the claimant effectively destroys the Secretary of State's argument that only generalised information about some types of work-related activity need be taken into account by the regulation 35(2) decision-maker when considering the possible consequences of a particular claimant being found not to have limited capability for work-related activity. 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. In a few cases, the risks of an inappropriate requirement to engage in work-related activity being imposed will be too great to be ignored.

29. Having thus analysed what regulation 35(2) requires, *IM* then addresses what information should be provided to a First-tier Tribunal by the Secretary of State. Before setting out its conclusions on this issue I think it may be important to note that in *IM*'s case, unlike the two cases with which I am here concerned, the decision under appeal to the First-tier Tribunal had *not* found that the claimant in *IM* either scored the necessary 15 points under regulation 19 and Schedule 2 to the ESA Regs or satisfied regulation 29(2) of those regulations. On appeal the First-tier Tribunal found the claimant in *IM* did score 15 points under Schedule 2 but did not satisfy any descriptor in Schedule 3 to the ESA Regs, and so that tribunal had for the first time to decide whether regulation 35(2) was satisfied in the absence of any information from the Secretary of State about work-related activity. In what is set out below the three-judge panel in *IM* address both that type of appeal case and (in the last quoted paragraph (113)) appeals like the two that are before me.

> "**Information to be provided to the First-tier Tribunal**
>
> 102. The evidence that must be supplied to the First-tier Tribunal is determined by the factual issues that may arise. The Departmental decision-maker should have regard to the same factors as the First-tier Tribunal and so should often have obtained and considered the evidence that should be provided to the First-tier Tribunal. However, there are many cases such as the present where, on the Secretary of State's view of the facts, the claimant does not even have limited

capability for work and therefore it is unnecessary for him to consider whether the claimant has limited capability for work-related activity. He argues that it would be disproportionate to require him to make a submission in respect of regulation 35(2) whenever there is an appeal against a decision that a claimant does not have limited capability for work even though, of course, the question whether the claimant has, or should be treated as having, limited capability for work will inevitably arise if the claimant is successful in his or her challenge to the original decision

103. It is therefore useful to focus on what information is actually needed by the First-tier Tribunal in order to make a decision under regulation 35(2). It is also important to remember that the purpose of a response to an appeal in this sort of case, where a claimant is often unrepresented, is as much to tell the claimant what the potential issues are as to provide information to the First-tier Tribunal.

104. It will be apparent from what we have said above that, at least while the legislation is administered in the current fashion, the First-tier Tribunal needs to know not only what the least demanding types of work-related activity are but also what the most demanding types are in the area where the claimant lives……that information can come only from the Secretary of State.

105. ……we accept the Secretary of State's submission that, on an appeal in which regulation 35(2) is in issue, he cannot be expected to anticipate exactly what work-related activity a particular claimant would in fact be required to do. This is axiomatic.

106. But 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 it 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.

107. We understand that the types of work-related activity available may vary from provider to provider, but it should not be beyond the wit of the Department and providers to produce and maintain a list, perhaps for each of the regions into which the First-tier Tribunal is organised, of what is available in each area within the region. The relevant information could then be included in submissions in individual cases. The First-tier Tribunal would be able to assess the evidential force of such a submission.

108. We do not accept the Secretary of State's submission that it would be disproportionate to provide such evidence where there is an appeal against a decision to the effect that the claimant does not even have limited capability for work. As is acknowledged, if such an appeal is allowed, it will inevitably be necessary to consider whether the claimant has limited capability for work-related activity…… The First-tier Tribunal ought to be enabled to deal fairly with the new issue straightaway….. it is unfair on claimants, particularly those who choose to have their cases determined on paper, for the First-tier Tribunal to address an issue about which the claimants will generally

have been unaware and upon which they will have therefore not had an opportunity to comment……

109. In our view, it would not be difficult for the Secretary of State to make a submission explaining the law and to provide information about types of work-related activity In practice, if the Secretary of State considers that a claimant does not have limited capability for work, he will also consider that the claimant does not have limited capability for work-related activity. In the submission it would generally be sufficient to refer only to Schedule 3 and regulation 35; it will not be necessary to explain why the Secretary of State does not consider those provisions to be satisfied because that will be implicit in his response to the main issue on the appeal……It would then be necessary to set out only the descriptors relating to activities 15 and 16 together with regulation 35 and a list of the types of work-related activity available in the relevant area.

110. The issue under regulation 35(2) is not whether the claimant could carry out all forms of work-related activity or even whether he or she might inappropriately be sanctioned. Satisfaction of regulation 35(2) requires a substantial risk to health to be identified (in the sense of a risk that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case). Being unable to carry out an activity does not necessarily imply that there will be a substantial risk to anyone's health if the claimant is required to engage in the activity. Nor does the risk of being sanctioned. Therefore, it may be fairly obvious in most cases that the claimant does not have any realistic argument under regulation 35 and indeed, if made aware of the issues, the claimant may often accept that that is so. But 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.

111. In some cases the First-tier Tribunal may be able to conclude that the regulation 35(2) risk does not exist because it is sufficiently obvious that the claimant will not be required to do anything by the work-related activity decision-maker that will cause such a risk to materialise. That will certainly be so where the First-tier Tribunal is satisfied that none of the types of work-related activity available in the relevant area would give rise to a substantial risk to anyone's health if the claimant were required to undertake it.

112. However, we suspect that the present failure to pass on information to the work-related activity decision-maker will mean that in some other cases the First-tier Tribunal will be unable to make predictions with sufficient confidence to conclude that the regulation 35(2) risk does not exist and so will be entitled to decide that if the claimant engaging in any of the forms of work-related activity that might be imposed on a claimant in the relevant area would give rise to the regulation 35(2) risk the claimant must be treated as having limited capability for work-related activity.

> 113. The position may be slightly different where the Secretary of State accepts that the claimant does have limited capability for work for two reasons. First, the Secretary of State can be expected to make a more focused submission as to why regulation 35(2) does not apply given the accepted disablement of the claimant. Secondly, in at least some of those cases a work-focused interview will have been carried out and the provider may have considered whether the claimant should be required to carry out work-related activity before the appeal is heard by the First-tier Tribunal. Information about the outcome of such consideration of the claimant's case is likely to be relevant to the First-tier Tribunal and reduce the element of prediction required and so ought to be provided to the first-tier tribunal where possible……".

30. By way of an addendum to *IM*, in *GB –v SSWP* (ESA) [2015] UKUT 0200 (AAC), Upper Tribunal Judge Rowland (who was one of the judges in *IM*) said:

> "6. The difficulty highlighted in *IM* is that, because the results of work capability assessments are not routinely passed to providers who determine what work-related activity a claimant should be required to do, there may a risk of a provider requiring a person with, say, mental health problems to perform unsuitable work-related activity, due to the provider's ignorance of those problems or their extent. This difficulty is liable to be exacerbated if, as in both *IM* and the present case, the claimant is, or is likely to be, unable to engage in social contact with the provider and so explain her difficulties herself.
>
> 7. Thus, in the present case, the First-tier Tribunal's finding that "the Respondent will … take into account the Appellant's mental health" appears unwarranted or, at best, not supported by adequate reasoning. If there was a significant risk of the claimant being required to engage in work-related activity that would be as stressful as being required "to attend a Job Centre and to carry out the requirements of a jobseeker's agreement", which the First-tier Tribunal had found would give rise to a substantial risk to her mental health, the First-tier Tribunal would have been required to find that regulation 35(2) was satisfied in the claimant's case."

Relevant Factual Background

31. I set out below the relevant factual background to both cases, with especial emphasis on KC's case, in order to show the shifting nature of the Secretary of State's approach to regulation 35 on both appeals, as this is an issue I return to later.

KC

32. The appellant KC has at all material times lived in Spain. On 8 April 2013 the Secretary of State decided that she was entitled to contribution-based ESA from 21 May 2013. This was on the basis that she had limited capability for work but not limited capability for work-related activity. As a result of this decision, on 24 April 2013 the Secretary of State sent the appellant a letter informing her that as she was not in the support group (i.e. she did not have, or could be treated as having, limited capability for work-related activity), her contributory ESA would be limited to 365 days. It would appear that it was this second letter that led the appellant to make a late appeal, on 26 June 2013, against the decision of 8 April 2013.

33. The 8 April 2013 decision had converted the appellant's entitlement to incapacity benefit, which she had had since 25 July 1998, to ESA. Nothing in this appeal turns on the legal process of converting entitlement to incapacity benefit, itself a contributory benefit, to contribution-based ESA. It is an important background consideration, however, that incapacity benefit was not subject to any limit of 365 days entitlement. It is therefore not surprising that the appellant reacted as she did to the letter of 24 April 2013 telling her that her contributory ESA would expire after 365 days. However as a matter of law that restriction could only be lifted if the appellant on appeal could have the 8 April 2013 decision overturned and replaced with one that she had, or could be treated as having, limited capability for work-related activity. Hence the relevance of regulation 35(2) of the ESA Regs to the appeal and this further appeal.

34. The decision of 8 April 2013 was based primarily on an ESA-N-50 *Limited capability for work questionnaire* KC had completed and an ESA-N-54C *Medical report form* which a doctor in Spain had completed either during or after having seen KC.

35. In the *questionnaire* KC referred to having osteoarthritis and that this made her very irritable, stressed and depressed. The areas on the form where she indicated she had difficulties were under the "mental, cognitive and intellectual functions". She said that she had a variable ability to cope with change, she sometimes was not able to engage socially with either people she knew or with strangers, and that she occasionally behaved in a way which upset other people. A part of the *questionnaire* allowed the claimant's GP to make a statement, and here KC's GP in Spain diagnosed her as having depression, anxiety, osteoarthritis and the menopause, the first of which would all require "lifelong treatment".

36. The *Medical report form* is similar to the ESA85 reports provided to the Secretary of State by health care professionals in cases where the claimant lives in Great Britain. The doctor who completed the report agreed with the above diagnoses. He assessed KC as: (i) having problems with standing or sitting at a workstation for more than 30 minutes; (ii) being unable to pick up and move a one litre carton of liquid; (iii) not being able to use a pen or pencil to make a meaningful mark; (iv) being unable to cope with minor unplanned changes; (v) being unable to get to a familiar place without being accompanied by another person; (vi) not being able for majority of the time to engage in social contact with unfamiliar people; and (vii) having frequent uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace.

37. The doctor also assessed KC as satisfying regulation 29(2)(b) of the ESA Regs, meaning that she was suffering "from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if [she] were found not to have limited capability for work". (The *Medical report form* actually used the wording "…if they were to be found capable of work", but it is not suggested that the wording on the form was not intended to cover regulation 29(2)(b).) The doctor also advised on the form that a return to work was unlikely for at least 2 years.

38. The Secretary of State's decision maker accepted all of the point scoring assessments as referred to in paragraph 35 above save for the last one, where he decided that the unreasonable behaviour only occurred occasionally (as KC had claimed on the questionnaire). KC therefore scored a total of 54 points under Schedule 2 to the ESA Regs for what was then descriptors 2(b), 4(b), 5(c), 14(c), 15(c), 16(c) and 17(c). As KC therefore satisfied the minimum points score of 15 under regulation 19 of the ESA Regs, under that regulation she **had** limited capability for work and therefore the deeming or treating provisions of regulation 29(2)(b) of the ESA Regs had no application. The decision maker also seemingly accepted that KC should not be referred for a further assessment under regulation 19 of the ESA Regs for two years or a period close to two years. (The date used on the decision of 8 April 2013 is "Further referral due on 13/3/15"). In addition, it was decided that KC did not have, and could not be treated as having limited capability for work- related activity. The points she had scored under Schedule 2 to the ESA Regs on their face did not merit any award of 15 points being made under the descriptors in Schedule 3 to the ESA Regs.

39. It is appropriate to observe, however, that nothing in the decision of 8 April 2013 indicates any conscious grappling by the decision-maker as to why regulation 35(2) of the ESA Regs was not met, even though for the reasons given in paragraphs 14-15 above such a decision was, as a matter of law, part of the 8 April 2013 decision.

40. KC then appealed against the decision after she had had the letter of 24 April 2013 telling her that her contributory ESA entitlement was limited to 365 days. On any analysis her appeal was concerned with her contributory ESA being taken away (after the 365 days). It therefore raised in my view both why she did not satisfy any descriptor in Schedule 3 to the ESA Regs and why regulation 35(2) was not

satisfied[2]. It is fair to observe that the Secretary of State's appeal response on the appeal focused only on Schedule 3 and did not even make reference to regulation 35(2). Even prior to *IM* that was a material failure: see *ML –v- SSWP* (ESA) [2013] UKUT 174 (AAC); [2013] AACR 33 and *MN –v- SSWP* (ESA) [2013] UKUT 262 (AAC); [2014] AACR 6.

41. The appeal was heard and decided by the First-tier Tribunal on 3 March 2014. By this time both *ML* and *MN* had been decided, though the tribunal took no steps to have the Secretary of State provide it with the work-related activity the appellant might have been expected to undertake. The appellant did not attend the hearing, which was not surprising given she lived in southern Spain. The appeal was refused. The tribunal said the following in its reason of relevance to regulation 35(2) of the ESA Regs:

> "It was unlikely [because she lived in Spain] that she would be required to undertake any work-related activity other than perhaps an occasional telephone call from the respondent's Department.
>
> The Tribunal noted the points awarded by the respondent and concluded that none of the activities which gave rise to those points would restrict the appellant in terms of work related activities because those activities would have to take into account the limitations recognised by the respondent….
>
> The Tribunal also concluded that in view of the fact the [doctor] had spoken to the appellant as well as examined her that his opinion could be accepted in terms of Regulation 35 because he had indicated that Regulation 29 applied to her."

42. In giving the appellant permission to appeal I said:

> "In the light of [the appellant's] accepted problems coping with change, getting about outside, coping with social situations, and her behaviour with other people, and given the Upper Tribunal's decision in *IM –v- SSWP* [2014] UKUT 412 (AAC), it is well arguable the tribunal erred materially in law in (a) not identifying what work related activity [the appellant] might have been required to undergo in

[2] See paragraph 7 of *DH –v- SSWP* (ESA) [2013] UKUT 0573 (AAC). The contrary was not argued before me and the First-tier Tribunal plainly considered that satisfaction of regulation 35(2) was in issue on the appeal.

> Spain and (b) not explaining adequately how she could safely undertake such activities."

43. In his submissions supporting the appeal the Secretary of State conceded that the First-tier Tribunal had no evidence of any work-related activity nor what the Secretary of State considered (per *IM*) the claimant was capable of, and had thereby erred materially in law.

44. In directions I made on that submission I said:

> "I do not consider the response of the Secretary of State to be complete. This is because it fails to provide any evidence of what the notional work-related activity which [the appellant] would have been expected to undertake in April 2013 would have amounted to. Nor does it address and explain how [the appellant] would have safely undertaken such activities notwithstanding her difficulties coping with change, going out on her own, engaging socially with strangers and behaving appropriately with other people….. In such a situation the Secretary of State "can be expected to make a more focused submission as to why regulation 35(2) does not apply given the accepted disablement of the claimant": per paragraph 113 of *IM*.
>
> In the context of my determining whether it would be appropriate for me to remit this appeal to another First-tier Tribunal to be decided, when it seems most unlikely that the appellant would attend any hearing before the First-tier Tribunal, I consider both of the above need to be provided to the Upper Tribunal. That is (i) the notional work–related activity [the appellant] would have to judged as being required to undertake in April 2013, and (ii) a focused argument explaining why so doing would not have given rise to a substantial risk to her or another person's health notwithstanding the significant mental health problems accepted and identified…..
>
> I also remind the Secretary of State of paragraph 115 of *IM*, where the three judge panel said:
>
> > "115…where the present practice of the Secretary of State has the effect that the relevant predictions cannot be made with sufficient certainty, the underlying purpose of regulation 35(2) is best served and promoted by a finding that regulation 35(2) applies rather than by leaving the vulnerable claimant to take the risk of a decision that causes the regulation 35(2) risk to materialise or would do so if not successfully challenged."
>
> Given the significant mental health problems the Secretary of State accepts [the appellant] was having in April 2013, why ought the Upper Tribunal not find that regulation 35(2) applied in April 2013?"

45. This led, rightly, to a further response from the Secretary of State. In this he provided the work programme provider lists of work-related activity in the Newcastle area from the two relevant providers for that area - Avanta and Ingeus – and went on to say: "this is the list that would have been provided to the Tribunal if it had not pre-dated *IM*, and would have given them an idea of the kind of provision available." The response continued:

> "However, were the claimant to actually live in Newcastle, or anywhere else in the UK, this is not the list that would have been used. There was a two year prognosis....which means that the claimant would be seen by the work coach as part of the Jobcentre Plus Offer. This is a series of interventions that are carried out by adopting a flexible approach to supporting claimant's individual needs. The Jobcentre Plus Offer consists of four elements:
>
> Core interventions which must be undertaken,
> Flexible interventions, the frequency and duration of which is decided by the Advisor,
> Access to flexible menu of back to work support, and
> Access to Flexible Support Fund.
>
> This is not available as a list of activities, but being largely discretionary, and not involving visits to external training providers, can take place in Job Centres or by telephone as appropriate……
>
> Were the claimant to be required to undertake work-related activity at the jobcentre, this could be done at home to obviate the need to go outdoors unaccompanied, or meet with people with whom she might behave inappropriately.
>
> Although the claimant would not be able to undertake the majority of the activities on the list aimed at who are closer to the labour market, she would be able to undertake some of the activities. Activities as highlighted in bold on the list. While the most demanding would be attending health and well-being workshops at the providers' premises, one of the least demanding items on the list is referral to Richmond Fellowship for claimants with mental health or learning difficulties for bespoke guidance and action planning and activity support. This is clearly something that could be planned with the claimant's functional restrictions in mind."

On the basis of this last quoted paragraph, the Secretary of State submitted that there was work-related activity notionally available that KC could have undertaken without substantial risk to her or anyone else's health.

46. In my view that submission was incomplete and raised further questions. I set out my concerns in a further set of directions as follows:

> "3. In his response of 24 June 2015 the Secretary of State states that because [KC] had a prognosis of two years (i.e. the HCP had said that a return to work was not likely for at least 2 years), the "*IM* local work provider lists", if I can call them that, would not have applied to her if she was in Great Britain. Instead she would have been seen by a job coach as part of the *Jobcentre Plus Offer*.
>
> 4. The latter is a separate category of people potentially subject to regulation 35(2), and is a new category as far as the Upper Tribunal is concerned. It did not feature, as far as I can tell, before the three judge panel in *IM*. It may have its basis in Memo DMG 17/15 dating from June of this year or it may have been a category before then. The statutory basis, if there is one, for this category of people is not explained. From DMG 17/15 and another case before the Upper Tribunal, it would seem that the threshold for not going down the "*IM* local work provider lists" route is if the claimant has a prognosis of 12 months or more. Ignoring claimants elsewhere in the EU (such as [KC]) for the moment, that threshold and the different context to the reg 35(2) risk assessment test to that addressed in *IM* is likely to affect a very substantial number of people to whom regulation 35(2) may apply. Given this, it seems at the least a little odd that it is introduced by way of a side reference in this appeal.
>
> 5. An explanation for the last point may be that *Jobcentre Plus Offer* route was not in place at the time of the decision under appeal in this case, that being 8 April 2013, and also was not in place at the relevant decision date in *IM*. However, the Secretary of State's latest submission proceeds on the basis that it was. Is this the case and if so why was this important information not revealed in *IM*?
>
> 6. The Secretary of State's argument that the *Jobcentre Plus Offer* route does not apply to [KC] (or all others getting contributory ESA elsewhere in the EU) seems to me to be misconceived. My previous directions sought details of the *IM* like work provider work-related activities for those elsewhere in the EU simply because I was not aware that a different set of activities to those considered in *IM* might apply to those in Great Britain. The logic of the Secretary of State's argument, however, arguably must be for [KC] to be placed as near as is possible to the position of an equivalent person in Newcastle or elsewhere in Great Britain. If so, that must mean a person subject to the *Jobcentre Plus Offer*, if it was in place in April 2013 for ESA claimants found to satisfy Schedule 2 or regulation 29 for 12 or more months.
>
> 7. If [KC] would have been subject to the *Jobcentre Plus Offer* had she been living in, say, Newcastle in April 2013, then consistent with *IM* far more detail than has so far been given needs to be provided by the Secretary of State as to: (i) the detail of the activities she might have been expected to undertake in April 2013 under the *Jobcentre Plus Offer*; (ii) the least and most demanding activities she may have been

expected to undertake; and, (iii) why regulation 35(2) would not apply notwithstanding her accepted disablement as identified by her Schedule 2 points score? Why this detail is needed is because (per para. [110] of *IM*) "**where there turns out to be a serious argument in relation to regulation 35 [as in KC's] case], 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**".

8. The information so far provided does not allow the First-tier Tribunal (or the Upper Tribunal if it was to remake the decision) to carry out this predictive exercise. The Secretary of State's case seems to be akin to arguing that this route is so flexible that no substantial harm will ever arise. Would that not then mean, however, that no-one with a prognosis of 12 months or more could ever satisfy regulation 35(2) regardless of how severely limited their (mental) functioning was under Schedule 2? And would that not be contrary to the purpose of regulation 35(2): per para, [85] of *IM*? Putting this point another way, does regulation 35(2) not arguably require there to be work-related activity that may give rise to a substantial risk to health, and therefore do the activities not need to bear some relationship to work and so cannot be such that regulation 35(2) can never apply?

9. The *Jobcentre Plus Offer* elements although referred to by their headings give no detail of what they may entail. Given *IM* and the need for the First-tier Tribunal (or Upper Tribunal) to make predictions as to risk to health, that detail must be provided (if such elements would have applied to [KC] in April 2013). What is also needed is an accurate explanation of the structure within the DWP and Jobcentre Plus in April 2013 as to how [KC] would have been referred to a "work coach" and the systems, if there were such, in place that would have informed that coach of [KC]'s health problems and restrictions on functioning as shown by her Schedule 2 score.

10. On the other hand if the *Jobcentre Plus Offer* route would not have applied in April 2013 (because it then did not exist as an option), then the lists of work-related activity provided by providers put forward in the latest submission of the Secretary of State would seem also to be deficient. Firstly, it is unclear if this is a complete list of work-related activities ranging from the least to most onerous. It seems it may not be because what are highlighted as being activities [KC] could safely undertake seem to be the headings for all the activities that then follow, yet it is accepted that there are some of the activities she could not have done. Second, and relatedly, the lists do not identify the least and most onerous activities [KC] might have been expected to undertake in or shortly after April 2013. Third, it is not clear that these are lists of activities which were in place in April 2013. Fourth, there is no proper analysis of how [KC] with her limitations of functions (especially mental functions) as revealed by her points score on page 65 would safely be able to undertake work-related activity. For example, if she cannot get anywhere unfamiliar on her own, how would she get to a work-provider's premises in Newcastle safely? A further issue arises as to why the Secretary of State downgraded the activity 17 assessment made by the HCP from 17(b) to 17(c), i.e. what was the evidential basis for it not being frequent episodes?

> 11. All of the above points must be addressed in a detailed further submission from the Secretary State, including the following:
>
> (i) from when did the Jobcentre Plus Offer route apply in respect of regulation 35(2) work-related activity to ESA claimants with a prognosis of 12 months or more?;
>
> (ii) if this did apply in April 2013, the issues raised and evidence sought in paragraphs 7 and 8 need to be addressed and the evidence provided, and it needs to be explained why this important evidence was not put forward in *IM*;
>
> (iii) or if the Jobcentre Plus Offer route of work-related activity was not in fact available in April 2013, the issues raised and evidence sought in paragraph 9 need to be addressed and the evidence provided."

47. The Secretary of State's response to this direction clarified that the correct theoretical or hypothetical comparator for the regulation 35(2) risk assessment in KC's case was with the *Jobcentre Plus Offer*. He argued that the three-judge panel in *IM* had been made aware of the two routes by which claimants placed in the work-related activity group might be required to undertake work-related activity, although he conceded the words *Jobcentre Plus Offer* were not used in submissions made in *IM*.

48. The Secretary of State in this submission provided a detailed explanation of the *Jobcentre Plus Offer*, which I see to summarise the key parts of here. (Further detail is provided in paragraph 116(a) and (b) below.) The key distinction lay between being referred to an external work programme provider ("WP provider") and being placed under the *Jobcentre Plus Offer*.

- the trigger for a claimant found to have limited capability for work (i.e. a person who scored at least 15 points under Schedule 2 to the ESA Regs), or was treated as so having (e.g. under regulation 29(2) of the ESA Regs), was the prognosis for when they should be reassessed. From June 2011 to April 2013 if the prognosis was for more than 6 months then the *Jobcentre Plus Offer* would apply; if the prognosis was for less than 6 months then referral to the WP provider would apply. By April 2013 this prognosis criteria for the *Jobcentre Plus Offer* applying moved to more than 12 months. The *Jobcentre Plus Offer* would also apply, however, in any case where

the claimant with limited capability for work was awarded contributory ESA.

- the *Jobcentre Plus Offer* had therefore been in place for ESA claimants from June 2011.

- it comprised four elements for ESA claimants: **core mandatory interventions**, which must be undertaken (covering discussions with a "work coach[3]" at the Jobcentre to clarify conditions of entitlement, identify barriers to work and agree appropriate work-related activity); **flexible interventions** (comprising periodic work-focused interviews and undertaking work-related activity (the frequency, duration and content of which is determined by the work coach, in discussion with the claimant, by assessing the support the claimant needs to address their barriers to work)); **access to a flexible menu of back to work support** (offered at discretion of work coach to provide customised support that best suits needs of the claimant (e.g. health-related support and skills provision); and **access to the flexible support fund**.

- the service offered to claimants under the *Jobcentre Plus Offer* can be adapted according to their individual circumstances (e.g. in exceptional circumstances claimants can be offered telephone interviews)

- an action plan is prepared by the work coach to record the work-related activity required to support the claimant in overcoming existing barriers to a future return to work. This would start at the first work-focused interview ("WFI"). All claimants with limited capability for work who are required to take part in a WFI are sent a letter 'inviting' them to attend the mandatory interview, and the letter tells them, inter alia, that they can bring someone with them to the interview. Work coaches actively involve the claimant in drafting the action plan to secure their commitment. If a claimant feels the work-related activity they have been asked to undertake is unreasonable and this cannot be resolved with their work coach, they can request a formal reconsideration of the action plan.

- the process involves moving the claimant from less demanding work-related activity towards more demanding tasks. As part of that journey, work coaches have at their disposal a database of work-related activity provision within their area, maintained by each Jobcentre Plus District, known as the District Provision Tool. This lists all the available provision and support in different categories. The majority of the provision listed in the District Provision Tool requires the work coach to refer the claimant to an external provider, though some less demanding work-related activity need

[3] The term "Work Coach" seems to be interchangeable with the term "Adviser" in some of the guidance.

not require referral. The District Provision Tool has around 30,000 pages.

- as the information on the District Provision Tool is updated daily but has no facility for storing out of date provision, it was not possible to say exactly what was available in April 2013, but it was unlikely to have differed greatly.

49. Based on this information about the *Jobcentre Plus Offer*, the Secretary of State argued that, notwithstanding paragraph 107 of *IM*, there were significant practical difficulties which prevented him from producing a complete list of the work-related activity available through the *Jobcentre Plus Offer*. It would, he argued, be impossible in practice to provide a complete list of the available provision at any one time. Accordingly, he had adopted a pragmatic approach of providing the First-tier Tribunal with a small number of examples of the least and most demanding activities which it is considered the claimant could undertake without risk. This accorded with the law as *IM* did not require details of all the work-related provision which potentially could be imposed to be provided. Further, the flexibility of the *Jobcentre Plus Offer* did not rob regulation 35(2) of any effective application as a claimant with very fragile mental health might be at substantial risk from even the lowest level of work-related activity under the *Jobcentre Plus Offer*, such as getting up at a regular time every day.

50. The Secretary of State stated that guidance has been in place since at least April 2013 for the work coaches to ensure that they are aware that the work-related activity agreed with claimants is appropriate and reasonable taking into account the claimant's circumstances and is not anything that could put the claimant's health at risk or is contrary to their religious beliefs. Importantly, however, he accepted that although work coaches can request a summary of the basis on which the claimant was found to have limited capability for work, this was not required nor was it done as a matter of course. This last point would seem, unfortunately, to echo the situation in *IM*, where the three-judge panel accepted (paragraph 59) that "none of the findings made by a

healthcare professional on a work capability assessment or of reasoning of the decision maker ….. on the application of regulation 35(2) is currently passed to a work programme provider; they effectively start afresh, save that they are alerted without particulars of a vulnerability", for which they then commented (paragraphs 60 and 62):

> "…this is a troubling approach that fails to have proper regard to the underlying purpose of regulation 35(2) to provide a safety net for vulnerable claimants. It seems to us that a failure to pass on relevant information about an identified risk is contrary to any principles of risk-management, whether the recipient is to be bound by the information or not.
>
> ….it would not be surprising if [this] approach……to the application of regulation 35(2) was a significant factor in a vulnerable claimant falling through its safety net and so suffering harm."

51. In then making directions for an oral hearing of the appeal, I said that issues I was likely to wish to explore were:

(i) Why the Upper Tribunal, First-tier Tribunal and his own decision makers have not been informed or been made aware by the Secretary of State of the *Jobcentre Plus Offer*? ……. the *Jobcentre Plus Offer* has been in place for ESA claimants since June 2011. The Secretary of State's appeal response to the First-tier Tribunal in this case….makes reference neither to regulation 35(2) of the ESA Regs nor to the *Jobcentre Plus Offer*. Moreover, the "worksheet" on pages 64-66 would not appear to show that the decision maker had any regard to regulation 35(2). Arguably these omissions were material errors, especially following *IM*. More concerning, however, is that even in the post-*IM* world after I gave permission to appeal the Secretary of State's representative's submissions gave no clue as to even the existence of the *Jobcentre Plus Offer*. It would seem also that even in appeals recently decided by the Upper Tribunal concerning regulation 35(2) in which the *Jobcentre Plus Offer*, as far as I can see, must have been the correct work-related activity route falling for consideration, the existence and relevance of the *Jobcentre Plus Offer* was not made clear to the Upper Tribunal judges……. If this is the case for the more focused level of the Upper Tribunal, what information about the *Jobcentre Plus Offer* has been made available to ESA decision makers and First-tier Tribunals deciding whether regulation 35(2) has been met on individual cases since June 2011?

(ii) Given the above, given the reference in the most recent submission on this appeal about the vast scale of information held under the *Jobcentre Plus Offer* and given the reference in that submission to a continuing 'information gap' between work-related activity provider and regulation 35(2) decision-maker…….on what basis since June 2011 have:

(a) the regulation 35(2) decision makers been able to take account of the least and most onerous programmes likely to be made available under the Jobcentre Plus Offer; and

(b) the Jobcentre 'work coaches' in fact been able to inform themselves of the particular disabilities and functional restrictions individual claimants have been found to have by the decision-maker? In other words, how since June 2011 has proper, joined-up decision making been made possible? (Or has it?)

(iii) Does the decision in *IM* proceed on a false basis as to the nature of work-related activity providers all being external to the DWP?

(iv) Despite the submission now made about the impracticability and cost of producing a complete list of all work-related activities available under the *Jobcentre Plus Offer* to the First-tier Tribunal, if this information was or ought to have been before the decision maker when the regulation 35(2) decision was made, ought that self-same information not be put before the First-tier Tribunal: per rule 24(2)(e) and (4)(b) of the TPR? Alternatively, what information has the Department been providing to the First-tier Tribunal since June 2011 about the *Jobcentre Plus Offer* under its pragmatic approach, and why has that information not featured until recently on this appeal..?

(v) Another issue which might arise is why, even in what was thought to be the orthodox *IM* type cases involving external work related activity providers, at First-tier Tribunal level and even at Upper Tribunal level the Secretary of State is not identifying the most and least onerous work-related activity the claimant might reasonably be expected to undertake but is instead just providing an undifferentiated list of work-related activity? Paragraph 6 on page 105 and the list on pages 106 to 109 in this appeal might provide an example of this. If it is a complete list, where is the most demanding WRA identified in the list and where is the least demanding? What is highlighted in bold just seems to be the overall sub-headings. This issue might be relevant here in terms of exploring the adequacy of the *Jobcentre Plus Offer* information in fact made, or proposed to be made, to First-tier Tribunals."

MC

52. The second appeal concerns MC, who at all material times has lived in Newcastle. The Secretary of State's decision under appeal to the First-tier Tribunal in MC's case dates from 7 February 2012. It found that MC continued to have limited capability for work, and so remained entitled to contributory ESA.

53. It would appear that MC's contributory ESA award then ended on 1 May 2012. Whether this was pursuant to section 1A of the Welfare Reform Act 2007 coming into effect is unclear and was not the subject

of any argument before me. It would appear, however, that this may have been the basis for the contributory ESA award ending. MC had first claimed and been awarded ESA from 23 August 2010 and had been first found to have limited capability of work from 22 November 2010, and as by section 1A(6) of the Welfare Reform Act 2007 periods on contributory ESA falling before that section came into effect count towards the 365 days of maximum entitlement to contributory ESA, MC would have had 365 days of entitlement to contributory ESA by 1 May 2012.

54. Part of MC's description of his "illnesses or disabilities" in the form ESA 50 had been that he "over the last year and a half or so [had] been suffering from overwhelming feelings of stress, anxiety, depression and very poor concentration". He described that he had some difficulty with certain relevant physical functions, and also identified problems with awareness of everyday hazards, initiating actions, coping with change, going out and coping with social situations. He was then assessed by a health care professional and the results recorded in the ESA85 form. She found that due to his depression and anxiety he could not, due to impaired mental function, reliably initiate or complete two personal actions for the majority of the time and also that he was unable to get to an unfamiliar place on his own. No other scoring Schedule 2 descriptors were satisfied however, in her view, nor was regulation 29(2)(b). The HCP advised that a return to work was unlikely for two years. (It seems accepted that this form of wording amounted to the prognosis that he should not be assessed for (at least) more than 12 months.)

55. No record of the Secretary of State's decision made following the ESA85 report appears in the papers. Assuming that the decision accepted the views of the HCP, the score would have been 9 points for descriptor 13b and 6 points for descriptor 15c in Schedule 2 to the ESA Regs.

56. In his appeal MC said that he wished to appeal against his placement into the work related activity group and not the support group as he felt, amongst other things, that his very high levels of anxiety and stress and very poor concentration affected him on a day to day basis. Again, as with KC, there can be no real argument that even by this appeal letter MC's satisfaction of regulation 35(2) was an issue raised by the appeal. The Secretary of State's appeal response to the First-tier Tribunal sought to explain why no Schedule 3 descriptor was met but did not provide any explanation for why regulation 35(2) was not met.

57. MC attended the First-tier Tribunal on 11 June 2012 with his wife. The First-tier Tribunal had before it a written submission from Gateshead CAB on behalf of MC in which it argued, inter alia, that he had had problems going out and coping with social situations and undertaking work-related activity was therefore likely to heighten his anxiety. It continued:

> "While he may be able to deal with this on a one off basis to attend a particular appointment, usually while accompanied by another person, he would not be able to sustain this for a long period or be able to undertake many of the other activities that people in the work related activity group are asked to do."

It also argued that he should meet either or both of the descriptors for "coping with change" and "coping with social engagement" in Schedule 3 to the ESA Regs.

58. The First-tier Tribunal dismissed MC's appeal. The Upper Tribunal gave MC permission to appeal. The appeal was supported by the Secretary of State, but he invited the Upper Tribunal to arrive at the same decision on the facts. Upper Tribunal Judge White allowed the appeal on 15 November 2013 but declined to re-decide it himself. He said that since the information he had before him suggested that MC had not been required to undertake any work related activities, the Secretary of State should in a fresh appeal response to the First-tier Tribunal (a) address how (if at all) this affected the application of

regulation 35(2), and (b) "provide sensible examples of the sort of work related activity which might be required of an appellant in the sort of circumstances which this appellant presents".

59. The rehearing of the appeal was then held up until after *IM* had been decided. It was heard on 3 March 2015 by another First-tier Tribunal ("the tribunal"). MC did not attend this hearing and asked for it to be decided in his absence. He was no longer represented. In a letter dated 12 January 2015 he had sought to explain to the tribunal why he could not have cope with work-related activity in February 2012. He said, inter alia, that his high anxiety, stress and depression were totally overwhelming, and:

> "if anything did happen that I may need to do e.g. attend a physio appointment or doctor's appointment my anxieties and emotions would rise and I would work myself and my nerves up to such a level that I would have to increase my medication to deal with this, and an example of this would be I would have to take an extra diazepam and other medication, and by taking this extra medication would only in affect put me in a drug like state, and this would also leave me with long periods of heightened anxieties and stresses to get over the situation that had occurred."

60. The Secretary of State in an attempt to meet Judge White's direction provided the tribunal with a *List of the work-related activity for the North East Provider delivery locations* together with DWP guidance on "How to determine if a clamant is 'mandatory' or 'voluntary' with regard to Job Centre Plus Offer, Work Related Activity and Work Programme". The latter dated from 21 October 2014. It showed, in short, that a person getting ESA on the basis of having limited capability for work would be mandated to undertake work related activity under the *Jobcentre Plus Offer*, and not with an external provider, if they were either in receipt of contribution-based ESA or their prognosis was for more than 12 months.

61. The tribunal dismissed MC's appeal. It found that MC did not meet either the coping with change or coping with social engagement descriptors in Schedule 3 to the ESA Regs. It did not consider whether

any other schedule 2 scoring descriptor applied to MC as part of its consideration of regulation 35(2). That was an error: see *KW –v- SSWP* (ESA) [2015] UKUT 131 (AAC). The fact that Judge White had referred the appeal back for Schedule 3 and regulation 35 to be reconsidered did not in my judgement preclude the extent of MC's qualifying under Schedule 2 being reconsidered: in my judgment it was a necessary part of the proper consideration of regulation 35(2) on the facts of this case. The tribunal rejected an argument made by the Secretary of State that MC ceasing to be entitled to contributory ESA from 1 May 2012 was relevant to the risk assessment to be made under regulation 35(2)[4], because that was not a circumstance obtaining at the date of the 7 February 2012 decision under appeal to it: per section 12(8)(b) of the Social Security Act. It then said the following in its statement of reasons about regulation 35(2):

> "It remains the case that both in its supplementary submission and through the presenting officer…., the department has only been able to provide a general list of activities which any person in [MC]'s position might be asked to carry out…….the tribunal does not accept that engaging in all types of work-related activity is likely to heighten [MC]'s anxiety….The tribunal understands…that [the DWP's policy is that] where, as in this case, an HCP advises that a return to work is unlikely for at least 2 years, a Claimant would not be referred to the Work Programme and be required to undertake work related activity involving attendance at several interviews, training courses or other activities which might involve travelling or interacting with other people. The Tribunals accepts [this statement of policy].....In considering the list of possible activities under the Work Programme,….MC would in any event be able to manage many of the activities listed….including all 1:1 interventions – training, attendance at job station, work with computers etc…from all of the evidence referred to above, in particular concerning [MC]'s ability to meet and relate confidently with doctors, including doctors not known to him, that at the date in question he was to cope adequately with one to one interactions and was capable of engaging in work-related activities not involving group activities. Under the [above] policy MC will not be

[4] The Secretary of State's argument here appeared to be that once the contributory ESA ended MC could not be required to undertake any work-related activity under regulation 3(1) of the Employment and Support Allowance (Work-Related Activity) Regulations 2011 because that regulation uses the language of requiring to undertake the work-related activity as a condition of being entitled to the "full amount" of ESA payable, which would not apply once any amount of contributory ESA had ceased to be payable and no amount of income-related ESA was payable. Even assuming that that factual circumstance did arise at the date of the decision under appeal (which it did not here), it is difficult to see how this argument could succeed in the light of *KB –v- SSWP* (ESA) [2015] UKUT 179 (AAC) and the "thought experiment" thesis it approves (see paragraph 9 above). No such argument was pursued before me.

> required to engage in group activities….the balance of evidence is that taking into account the Department's policy, [MC's] mental health will not therefore be placed at substantial risk if found capable of work-related activity."

62. I gave MC permission to appeal and raised in the grant of permission to appeal a number of questions about (a) whether MC fell under the *Jobcentre Plus Offer* and (b) the adequacy of the *List of the work-related activity for the North East Provider delivery locations* in terms of paragraphs 104 and 106 of *IM* and the need to identify the least and most onerous activities a claimant might be required to undertake and those which the Secretary of State considered it would be reasonable for an external provider to require such a claimant to undertake. I also asked whether the tribunal's reasoning provided an adequate explanation of how MC would be able to work safely with computers given his problems with initiating actions, or attend at a jobcentre or training on his own without substantial risk to his health given his inability to get anywhere unfamiliar on his own.

63. The Secretary of State filed a submission not supporting the appeal. This submission explained that ESA claimants "with a prognosis period of more than 12 months, and those awarded contributory ESA (who do not ask to get help from the [Work Programme]), will usually receive support from the adviser (known as work coach)…..under the *Jobcentre Plus Offer*". The submission confirmed that the *Jobcentre Plus Offer* had been in place for ESA claimants from June 2011. It then provided a similar description of what the *Offer* contained and involved as I have already described in relation to the KC case above. The submission conceded that the *List of the work-related activity for the North East Provider delivery locations* put before the tribunal did not apply to MC. The submission provided two examples of the work related activity available in MC's area under the *Jobcentre Plus Offer*. The first was a telephone helpline for those with anxiety and stress issues, the second was informal one to one support for those experiencing mental health problems. The submission put these forward as evidencing work-

related activity which would be suitable for MC without substantial risk, rather than as evidencing the most and demanding work-related activity in the Newcastle area in February 2012 which any ESA claimant under the *Jobcentre Plus Offer* might have been expected to undertake.

64. I then made directions for the appeal to be the subject of an oral hearing and heard at the same time as KC's appeal. I raised the same issues for consideration as I had raised in KC (see paragraph 51 above).

65. I understand that MC has satisfied the support group criteria since May 2015, and therefore has had his contributory ESA restored from that date.

Discussion and conclusion

66. It is now not disputed between the parties that the tribunals' decisions in both appeals were erroneous in material point of law for failing to have any adequate or relevant evidence before them about the work-related activity under the *Jobcentre Plus Offer* that either appellant might have been expected to undertake at the time relevant to them.

67. In what I say below I address first why I have arrived at differing remedies on the two appeals. I then set out what I consider as a matter of law is the correct approach to how such *Jobcentre Plus Offer* cases should be decided under regulation 35(2) of the ESA Regs. Lastly, I apply that approach to MC's case.

Remedy – KC's case

68. As noted in paragraph 43 above, the Secretary of State has already conceded that the tribunal's decision in KC's case was erroneous in material point of law and should be set aside. KC without the benefit of legal advice has, understandably, found the legal arguments in these Upper Tribunal appeal proceedings, to use her own words, "total

jargon", and she did not appear before me. She has not, however, objected to the appeal being reheard by a completely new First-tier Tribunal and it may be that she could find some way of participating in that hearing short of actually attending a hearing in Newcastle (or elsewhere in England): she might for example be able to participate at the hearing over the telephone.

69. I am also mindful that even after *IM* and the June 2015 guidance implementing it (see below), the Secretary of State has still to provide the evidence required by the law as found by *IM* of the most and least demanding types of work-related activity available under the *Jobcentre Plus Offer* in Newcastle in April 2013. That evidential deficit **must** be made good. Once it has, KC should be in a more informed position as to what might have been required of her, in terms of work-related activity, in April 2013 and thus be able to set out what difficulties she may have had in April 2013 in undertaking such work-related activity had she then been living in Newcastle.

70. Unlike MC's case, I do not consider I am in a position to decide the regulation 35(2) issue on the basis of the evidence and the arguments before me. MC has had the benefit of being legally represented before me and has been able to put forward why he should be found to have satisfied regulation 35(2) in February 2012, whereas KC was not able to do so and the evidence in her case, certainly in terms of regulation 35(2) is less focused than in MC's case. KC's appeal will therefore need to be decided afresh by a new First-tier Tribunal. In so doing it will need to have regard to this decision in general and more particularly what is said below about the *IM* requirements in a *Jobcentre Plus Offer* case.

71. Before parting with KC's appeal I should deal with one other matter. This concerns how her meeting descriptor 16c in Schedule 2 to the ESA Regs might affect risk under regulation 35(2). The Secretary of State has at one stage argued (the end of paragraph 28 in his submission of 21 September 2016 (on page 120)), that "in CE/1323/15, the UT Judge did

not accept that being distressed with unfamiliar people equated to substantial risk if the claimant were found to have LCW [for the purposes of regulation 29(2) of the ESA Regs] and…..a similar principle applies in the con text of [regulation 35(2)]". In my judgment considerable care needs to be taken with this line of argument.

72. The Secretary of State's argument here seems to found on paragraph 23 of CE/1323/2015, which says the following of relevance:

> "…it does not seem to me to be a disconnect to award six points for descriptor 16(c)……and at the same time find there was no risk to the health of the claimant or others if he were to be found not to have limited capability for work. Significant distress does not equate to a substantial risk to the claimant's mental health." (underlining added by me)

73. If these underlined words are ruling that as a matter of law satisfaction of descriptor 16(c) can never give rise to a substantial risk to a claimant's mental health, I respectfully disagree. This in the end will be an issue of fact, but depending on the fragility of a claimant's mental it may be that on the facts being required to look for work and be in work, or, as here, engage in work-related activity, would give rise to significant distress for a claimant through them having to engage with people unfamiliar to them and that distress would then give rise to a substantial risk to their (fragile) mental health. That as I have said is an issue of fact and judgment to be assessed properly by the First-tier Tribunal, and reasoned out in an adequate manner. It is not, however, in my judgment equating "significant distress" with "substantial risk". What it is doing is assessing the causative effect that the significant distress *might* have on a claimant's (mental) health as a result of them being awarded the 6 points for descriptor 16(c); and the First-tier Tribunal to whom this appeal is remitted should direct themselves accordingly when deciding KC's appeal. I do not, moreover, read anything in paragraph 122 of *IM* as undermining this analysis as it was rejecting an argument that satisfaction of paragraph 16(c) in Schedule 2 had the effect that regulation 35(2) was automatically met.

Remedy – MC's case

74. At the outset of the hearing before me the Secretary of State, through Ms Leventhal, conceded that the tribunal in MC's case had erred materially in law in terms of the adequacy of its approach to regulation 35(2) and its decision should therefore be set aside. The dispute concerned what remedy I should afford MC.

75. Ms Leventhal invited me either to remit MC's appeal to be re-decided by a new First-tier Tribunal or to re-decide the first instance myself. She candidly admitted, however, that I did not have the "full suite of information" before me on, inter alia, what the least and most demanding types of work-related activity available in the Newcastle area were under the *Jobcentre Plus Offer* in February 2012. She asked that if I was to decide MC's case myself, the Secretary of State should be given seven days from the hearing date before me to supply a further submission that would set out the evidence of work-related activity required by *IM*.

76. Mr Spencer, for MC, invited me to either decide the first instance appeal myself in MC's favour on regulation 35(2) on the evidence before me or remit the appeal to a new First-tier Tribunal for a fresh decision on whether MC satisfied either descriptor 12 (coping with change) or descriptor 13 (coping with social engagement) in Schedule 3 to the ESA Regs. He would have developed an objection the Secretary of State having seven days to supply evidence of the *Jobcentre Plus Offer* work-related activity available in Newcastle in February 2012 had I not indicated to him that I was not willing to give the Secretary of State any more time.

77. As I have decided the appeal entirely in MC's favour under regulation 35(2), I say no more about the arguments addressed to me on descriptors 12 and 13 in Schedule 3. I will set out below my decision on regulation 35(2), and why I did not give the Secretary of State any more time to evidence the work-related activity under the *Jobcentre Plus*

Offer relevant to MC's case, once I have addressed the issues of principle concerning regulation 35(2), *IM* and the *Jobcentre Plus Offer*.

IM and the Jobcentre Plus Offer

78. I turn now to address what was, and is, needed for a proper consideration of regulation 35(2) in these two appeals in the context of the *Jobcentre Plus Offer*.

79. I remind myself that the two appeals in issue here both involved decisions made by the Secretary of State that the appellants had limited capability for work as they satisfied the 15 points needed under regulation 19 and Schedule 2 to the ESA Regs. They are not, therefore, cases where the Secretary of State decided that the claimant did not even have limited capability for work, as was the case in *IM*.

80. As a matter of legal principle, the effect of a binding decision of a higher court or tribunal on the law is to state the law as it has always been: per *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 AC 680 at paragraphs 4-7 and 34. The Secretary of State does not dispute this principle nor its effect that *IM* sets out the law as it ought to have been applied in relevant cases before *IM* was decided on 15 September 2014. Given the failure of the Secretary of State to appraise either himself or the First-tier Tribunal of the work-related activity available at the relevant time in a claimant's area, it is likely that many of those cases will have been decided on a wrong legal basis; though whether First-tier Tribunal decisions falling within this time period were materially erroneous in law would depend upon whether there was any likelihood of risk in those cases: see paragraph 85 of *IM*.

81. Ms Leventhal for the Secretary of State in effect conceded this point and indeed accepted, I think, that the same may also apply for the period up until *IM* had "bedded-in" within the DWP; that is up until June 2015 when post-*IM* guidance was made available to DWP decision makers. In short she bluntly accepted, I think, that ESA decision

making and appeal responses provided to First-tier Tribunals before June 2015 were very unlikely to be *IM*-compliant, and that was (at least part of) the reason for conceding on both of these appeals that the First-tier Tribunal decisions were erroneous on material point of law.

82. Consideration therefore has to turn to what *IM* requires and, to a lesser extent, whether the Secretary of State's post-*IM* guidance is compliant with that decision. This consideration is a necessary part of my decision on both of these appeals as it underpins the basis of how the BC appeal should be decided by me and how the new First-tier Tribunal should approach deciding MC's appeal.

83. A useful focus for this consideration is the DWP's post-*IM* guidance. Plainly this does not bind any statutory decision maker, be that Secretary of State decision makers or First-tier Tribunals. It has, however, presumably influenced the content of ESA appeal response put before First-tier Tribunals since June 2015 and if that guidance does not accurately distil what *IM* requires then it may need to be changed.

Memo DMG 17/15

84. The guidance is found in Memo DMG 17/15 and Memo ADM 7/16. Both are the same in material respects. The latter dates from March 2016 and is guidance which relates to ESA under Universal Credit. I only address what is set in the relevant parts of DMG 17/15. As I understand it, it is guidance which remains in place.

85. DMG 17/15 gives guidance on "considering substantial risk in the context of whether a claimant should be treated as having [limited capability for work-related activity]" and "[i]n particular, what evidence of WRA is required to determine this question", given the Upper Tribunal's decisions in *AH*, *ML* and *IM*. It is expressed to be provided for DWP staff dealing with requests for mandatory reconsideration and preparing appeal responses for the First-tier Tribunal. Quite why it is not considered necessary reading for decision makers making the initial decisions on

limited capability for work and limited capability for work related activity is left unclear.

86. The guidance accepts that where a claimant is found to have, or is treated as having, limited capability for work, the decision maker is required to decide whether or not the claimant has, or can be treated as having, limited capability for work-related activity. This includes giving consideration to whether regulation 35(2) is satisfied where none of the Schedule 3 descriptors are found to apply. (This part of DMG 17/15 appears under a sub-heading titled **BACKGROUND**, so the concern I have just raised in the closing sentence to paragraph 85 may in part be misplaced.) The decision in *IM* is then summarised in paragraph 12 of DMG 17/15. This summary sets out, for example, at 12.3 and 12.4 that:

> "12.3. the FtT should be provided with evidence about all the types of WRA available in the claimant's area, whether provided by the Secretary of State or Work Programme providers, including the least and most demanding types, together with information about what the claimant might be required to undertake from that list
>
> 12.4. this evidence is required in appeal responses about whether the claimant has LCW as well as those about whether they have LCWRA, so that the FtT can consider risk in cases where they find that the claimant has LCW, but does not satisfy any LCWRA descriptor".

Save for my disagreeing with the proposition that *IM* requires that the Secretary of State provides evidence of "all" (in the sense of each and every) type of work-related activity available in a claimant's area to a First-tier Tribunal - paragraph 106 of *IM* refers only to providing evidence of the "the types of work-related activity available in each area" and as an evidential criterion in my view what is needed (per *Charlton* [2009] EWCA Civ 42; *RIB)2/09*) is accurate evidence showing the range of work-related activity available in the claimant's area at the relevant time[5] – this seems to me an accurate summary.

[5] I accept that the headnote to *IM* does use the phrase "all types" in identifying the work-related activity to be provided to the tribunal (see paragraph 4 above), but the reasons for the decision in *IM* do not use the word "all". The explanation for this in my view is that the "all" is being used in concert with "types" and is *not* quantifying but is qualifying the latter, and thus

87. In my judgment, the guidance becomes less accurate, however, when it seeks to address what should happen in an appeal response addressing an appeal against a decision that a claimant does not even have limited capability for work. In this situation DMG 17/15 says:

> "16 Where a claimant is found not to have LCW, the appeal response should refer to the LCWRA provisions, but need not explain why it is considered that those provisions do not apply. This is because it will be implicit that they do not from the decision or response on why it is considered that the claimant does not have LCW.
>
> 17 The appeal response should include a list of all types of WRA provided through the Work Programme in the claimant's area. <u>There is no need to identify which is the most and least demanding</u>.
>
> Note: The guidance at paragraphs 16 – 17 does not apply to decisions made following mandatory reconsideration where the claimant is found not to have LCW." (my underlining added for emphasis)

I confess to not understanding what is meant by the "Note" at the end of this part of the guidance.

88. Although I appreciate that neither of the appeals before me concerns a case where the appellant is challenging a decision that they do not even have limited capability for work (the "LCW" in the above quotation), it is the words I have underlined which I find troubling and which in my judgment are inconsistent with *IM* and are wrong[6]. To start with, even in DMG 17/15's own terms, the underlined words contradict what that guidance says in its paragraph 12.4 about what *IM* requires. What is of more force, however, is that although I can see that the words I have underlined in the guidance might be thought to be justified given the

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is being used to ensure that the most and least demanding types of work-related activity are evidenced. This accords with this particular part of the headnote in *IM* providing a summary of paragraphs 102 to 109 of the reasoning, as those paragraphs do not use the word "all" but do require the most and least demanding types of work-related activity to be put before the First-tier Tribunal (see paragraph 29 above).

[6] However, from two Secretary of State appeal responses that I have seen which were made after DM 17/15 was put in place, it would seem that this part of the guidance may not be being followed by decision makers. The two appeal responses were written on appeals concerning whether the appellants even had limited capability for work and concerned different DWP offices, but both said that following *IM* the response had to contain a list of the types of work-related activity in the area and that list "should specify how demanding the activity is considered to be".

terms of paragraph 109 of *IM* (see paragraph 29 above) if that paragraph is read in isolation, when paragraph 109 is read in context the justification falls away.

89. The final sentence in paragraph 109 of *IM* still requires a list of the types of work-related activity to be provided to the First-tier Tribunal. Those types will include the most and least demanding work-related activity. That follows not only from what I have said in footnote five immediately above but also from the last sentence in paragraph 109's place in the analysis which precedes and succeeds it. Paragraph 104 of *IM* sets out what information is needed by a First-tier Tribunal "in order to make a decision under regulation 35(2)" (paragraph 103), and as paragraph 104 explains that information is "not only what the least demanding types of work-related activity are but also what the most demanding types are". Paragraph 108 of *IM* then sets out a clear rejection of the Secretary of State's argument, made in paragraph 102, that it would be disproportionate to provide such evidence where there is an appeal against a decision that the claimant does not even have limited capability for work. This is because if such an appeal is allowed it will be necessary to consider whether the claimant has, or can be treated as having (per regulation 35), limited capability for work-related activity. It is in this context that the three-judge panel makes the remarks which it then does in paragraph 109.

90. The argument against the above underlined words in DMG 17/15, and in favour or providing evidence of the most and least demanding types of work-related activity, is settled, in my judgment, by the concluding words of paragraph 110 in *IM* – "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" – and the contrast then made in paragraph 113 of *IM* with appeals where the Secretary of State has already decided that the claimant has limited capability for work. All of

this points clearly, in my judgment, to *IM* deciding that the Secretary of State must provide evidence in or with the appeal response of the most and least demanding work-related activity even in appeals against decisions that the claimant does not have limited capability for work.

91. I would add that the same would seem to apply to paragraph 106 of *IM* and its requirement for the Secretary of State, together with the evidence of the least and most demanding types of work-related activity in the area relevant to the appellant, evidence of submissions "by reference to [that evidence, about] what the particular claimant may be required to undertake and those which he considers it would be reasonable for the provider to require the claimant to undertake". This would seem to follow from the same process of reasoning in paragraphs 89-90 above. Arguably the words "on an appeal in which regulation 35(2) is in issue" in paragraph 105 of *IM* were not intended to limit the words which then follow in paragraphs 106 to appeals where the appellant has been found by the Secretary of State to have limited capability for work and the appeal is only about limited capability for work related activity. Such a reading would seem to be inconsistent both with paragraph 113 of *IM* and the three-judge panel's general concern to ensure that if an appeal is allowed on limited capability for work the First-tier Tribunal has sufficient information to undertake the risk assessment mandated by regulation 35(2).

92. An interesting question may then arise as to what is needed from the Secretary of State to show "what the particular claimant may be required to undertake" and what he considers "it would be reasonable for the provider to require the claimant to undertake" in a context where the Secretary of State's view is that the claimant does not even have limited capability for work, but it is not a question which requires an answer on these appeals.

93. Coming back to these appeals and what needs to be in an appeal response in an appeal where the appellant has been found to have limited capability for work and the appeal is about whether the appellant meets any of the tests (regulation 35 included) concerning limited capability for work-related activity ("LCWRA" in the guidance), DMG 17/15 continues:

> "18 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 WRA available in the claimant's area
> 2.1 which is the most and least demanding WRA on the list for the particular claimant **and**
> 2.2 which types of WRA it is considered that the claimant could be expected to undertake without substantial risk.
>
> Note: See paragraphs 30 – 33 for which list to consider, and include in appeal responses.
>
> 19 The DM should also consider, where available, evidence of
>
> 1. any WfIs attended, or WRA undertaken, **and**
>
> 2. if any, the effect of the WfI or WRA on the claimant's health
>
> since the claimant was placed in the WRAG. This could be by production of the JCP action plan in appeal responses. Information about how the claimant has coped with WfIs and WRA 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."

Paragraphs 30—41 then set out:

> "30 The DM should consider whether the claimant should be treated as having LCWRA using the appropriate list of WRA by area. In cases where it is determined that the claimant does not have, and cannot be treated as having, LCW, this will be the list of WRA provided through the Work Programme.
>
> 31 Where the claimant is found to have, or is treated as having, LCW, the list to use depends on
>
> 1. whether the claimant would in practice be required to undertake WRA (see paragraphs 39 – 40) **and**

2. when it is considered that the claimant should be referred for a subsequent WCA .....).

32 Where the circumstances in paragraphs 39 – 40 apply, that is, where the claimant would not be required to undertake WRA, the list of WRA provided through the Jobcentre Plus Offer should be used, irrespective of when the claimant would be referred for a subsequent WCA.

33 In cases where the claimant would be required to undertake WRA, and the period before referral for a further WCA is

1. 12 months or less, the list of WRA provided through the Work Programme or

2. more than 12 months, the list for Jobcentre Plus Offer

should normally be used.

34 Although the lists do not include information as to when a particular type of WRA became available, the types of WRA on either list have not changed significantly since the requirement for ESA claimants to undertake WRA was introduced on 1.6.11.

35 It should be noted that the Jobcentre Plus Offer list includes

1. WRA where a referral to a provider is required and

2. discretionary WRA.

36 The DM should provide the FtT with examples of the most and least demanding WRA which it is considered the claimant could undertake (see paragraph 37), rather than the whole list. The response to the FtT should explain that it is not practical to produce the whole list due to size constraints.

37 The DM should then consider what types of WRA that the claimant could undertake without risk, and which may be appropriate to help them become work-ready, given any information the DM has about the claimant's work history and skills. This could be obtained from the ESA claim information, the questionnaire (form ESA50), the HCP report where there was a face-to-face assessment, and any other information which may be available.

38 The DM is not required to consider whether the types of WRA on the list of what is available in the claimant's area, and that would be appropriate for that claimant, could be provided on the date of the decision, for example due to operational delivery issues. Nor is this necessarily the same as the WRA which the claimant might eventually be required to undertake.

39 Not all claimants who are placed in the WRAG are required to take part in a WfI, or to undertake WRA..... For example, a claimant who is entitled to CA or CP cannot be required to undertake WRA.

> 40 There may be claimants who could be required to undertake WRA, but for whom it would not be appropriate. For example, a claimant who has a contract of employment, and who is absent from work while recovering from medical treatment, may not be required to attend a WfI1, or to undertake WRA2. This is because the only thing preventing a return to work is the need to recover from the treatment.
>
> 41 The DM should disregard the fact that the individual claimant may be exempt from the requirement to undertake WRA, or would not in practice be required to undertake WRA, when considering whether there is a substantial risk if the claimant were found not to have LCWRA. The test is a hypothetical test, and should still be considered accordingly by reference to the lists of what WRA is available."

94. Save for the use of the word "could" in paragraph 36 in this guidance, there is in my judgment much to commend in these parts of DMG 17/15 and I consider it accurately reflects what *IM* requires in terms of evidence and submission in Secretary of State appeal responses in these types of appeals. It may be seen as ironic, however, that its actual application in appeal responses is not something I can comment on in either of these appeals.

95. I take it that those in receipt of contributory ESA who are living elsewhere in the European Union fall within either paragraph 39 or paragraph 40 in this guidance (because there is no work-related activity they can in fact undertake), and therefore under paragraph 32 of the guidance the *Jobcentre Plus Offer* applies to them. The demarcation between those subject to this range of work-related activity and those under an external provider is not, however, required by any part of the statutory scheme. It would be open to the Secretary of State to bring all those found to have limited capability for work and who are not exempt from engaging in work-related activity (see regulation 3 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011) within the *Jobcentre Plus Offer*, or have them all dealt with by external providers. What DMG 17/15 and the submissions referred to in paragraphs 48 and 63 above do explain, however, is the category of claimants who are, at least for the moment (and have been since 2011), subject to the *Jobcentre Plus Offer* in terms of undertaking work-related activity.

96. What is less clear, and unhappily is still not clear, is what in fact a Secretary of State appeal response crafted in line with the above guidance would typically say about (a) the most and least demanding work-related activity available under the *Jobcentre Plus Offer* in, here, Newcastle at the relevant decision date; (b) what work-related activity the appellant *might* be required to undertake; and (c) the activities the Secretary of State decision-maker/appeal response writer considers it would be reasonable for the Work Coach or Adviser to require the appellant to undertake.

97. The history of the shifting sands of the Secretary of State's approach to regulation 35(2) in these two appeals is, I accept, in one sense irrelevant given the Secretary of State's concession that these two appeals have to be considered entirely afresh. However where that history is important is in revealing how difficult it has been for First-tier Tribunals and the Upper Tribunal to properly decide regulation 35(2) appeals *because of* the Secretary of State's long-standing failure to put the correct evidence and argument before those tribunals: including on the hearing before me in 2016 on both of these appeals.

98. I do not wish to overly labour this history, but at times elements of it has bordered on the farcical. For example, in one case the Upper Tribunal was dealing with a submission from the Secretary of State which argued that it could not advise what the *Jobcentre Plus Offer* contained because it was locked in a safe or cupboard. Further, in the *BB* decision referred to in paragraph 7 above I remain of the view (see paragraph 51(i) above), despite Ms Leventhal's submissions for the Secretary of State, that the Upper Tribunal was not told about the *Jobcentre Plus Offer* when it ought to have been. *BB* was decided by the Upper Tribunal towards the end of September 2015, so after DMG17/15 was in place. (Another similar case was decided in November 2015.) I reject Ms Leventhal's argument that it did not involve the *Jobcentre Plus Offer* because the prognosis (i.e. the time before the next referral for a work capability assessment) was 12 months or less. This may well be true but ignores the fact that the case concerned contributory ESA

for a person elsewhere in the EU, which on the Secretary of State's consistent position meant it was a *Jobcentre Plus Offer* case. (The same applies to the case decided by the Upper Tribunal in November 2015.)

99. I accept that in *BB* at least (as in part on these two appeals as well) the Secretary of State's written submission to Upper Tribunal pre-dated DMG 17/15. However, as that guidance is just codifying that which I am told on these two appeals has been the case since 2011, I would have expected the legal submissions to the Upper Tribunal to have addressed the *Jobcentre Plus Offer* (as the correct work-related activity route), and not made erroneous references to external work-related activity providers' undifferentiated lists of work-related activity.

100. The other factor relied on by Ms Leventhal was that it is the DWP's "International Group" (IG) which deals with benefit entitlement for people living abroad and the IG was not trained on how to access the *Jobcentre Plus Offer*/*District Provision Tool* until July 2015. I do not see why that is a relevant consideration for the lawful operation by the Secretary of State of the statutory scheme. As I said as far back as May 2013 in paragraph 20 of *MN –v- SSWP* (ESA) [2013] UKUT 262 (AAC); [2014] AACR 6, in these types of cases the Secretary of State has already made a decision that the appellants did not satisfy regulation 35(2) and so must have already satisfied himself that there was no substantial risk to the particular claimant's (or another's) health from the claimant engaging in work-related activity under the *Jobcentre Plus Offer*.

101. There is lastly, on this issue, the approach taken on these two appeals, in neither of which, even though they were effectively listed for argument and an oral hearing as test cases on the *Jobcentre Plus Offer*, has any evidence of the most demanding or least demanding work-related activity been put before me. The evidence about what the *Jobcentre Plus Offer* involves which I have summarised in paragraph 48 above is a useful start; and as *IM* makes plain the predictive risk assessment that regulation 35(2) calls for has to be addressed by way of

evidence. However, even that evidence does not set out the most and least demanding types of work-related activity. Moreover, the penultimate bullet point in paragraph 48 above indicates that the majority (and the more demanding) of work-related is still required to be carried to out under the auspices of an external provider.

102. Additionally, and importantly, as paragraph 50 above shows the information gap that so troubled the three-judge panel in *IM* still exists, or existed up to September 2016, even within the internal aspects of the *Jobcentre Plus Offer*. I was provided with information from the Secretary of State after the oral hearing before me about how he might bridge this gap. This was as follows:

> "....in light of [paragraphs 58-60] of *IM*, the Department has been exploring the practical processes by which information from claimants' [work capability assessments] can be shared with Jobcentre Plus work coaches and Work Programme providers. A process has been trialled involving decision makers specifically recording relevant information from the [work capability assessment] information to assist work coaches in determining [work-related activity]. Following the [work-focused interview], work coaches then add further relevant information and this would be emailed to the appropriate Work Programme provider to assist it to tailor its support to the claimant. [Details are being finalised, and our intention is to roll out this process with work coaches in September 2016 and with Work Programme providers sometime in 2017.]"

This progress is to be welcomed, but if I may be permitted to say so it seems to be a terribly long time to do something quite simple (the prompt in *IM* came in 2014) in respect of people who are likely to have significant health problems and may well be very vulnerable.

103. I regret to say that the overall impression is that information about the *Jobcentre Plus Offer* has had to be dragged out of the DWP, not necessarily because it was holding it back but, perhaps more worryingly, because it was unknown to large sections of the DWP in relation to regulation 35(2) of the ESA Regs. In other words, the rational and joined-up decision making which *IM* implored, and which I asked about in the directions set out in paragraph 51(ii) above, would seem not to have been in place at all before June 2015 in respect of

regulation 35(2) and the *Jobcentre Plus Offer*, and may still not be fully in place in early 2017 in terms of providing the Schedule 2 scores and other relevant information to the external work providers. And, of course, none of it was in place, albeit that the *Jobcentre Plus offer* existed as a matter of fact, but probably unknown to most if not all ESA decision makers within the DWP, at the time of the Secretary of State's decisions on both of these appeals.

Defective external work provider lists

104. All of this is perhaps unsurprising given that the reaction of the Secretary of State to his *IM* responsibilities in relation to the provision of evidence of the most and least demanding work-related activity provided by external providers has not been of the highest order in many cases, as is evidenced by these appeals: see paragraph 51(v) above.

105. I appreciate that it is now common ground that neither of these appeals involves such evidence. However, rectifying the problems with external work providers' lists of the least and most demanding work-related activity might usefully inform the 'lists' to be provided in *Jobcentre Plus Offer* cases, and so on KC's cases when it is re-decided.

106. In my judgment the lists provided to the First-tier Tribunal need not only to contain but also identify the most and least demanding work-related activity available at the relevant time in the claimant's area. This applies as much to the *Jobcentre Plus Offer* list as it does to the external work provider list. Just as importantly, the list and the identification within it has to come before any submission about what a claimant might be required to undertake and that which the Secretary of State considers it would be reasonable for the work coach or external provider to require that claimant to undertake. For the reasons given above, it need not set out every single instance or type of work-related activity that was available at the relevant time. But it must be a properly representative list of the range of work-related activity,

encompassing the most demanding and the least demanding activities available.

107. The list is at this stage "claimant blind": that is, it is a list compiled, and kept regularly updated, without reference to any individual claimant and his or her disabilities. This follows in my view from the wording of paragraphs 104 and 106 of *IM* and paragraph 3 of its headnote and the need to have evidenced the work-related activity that a claimant *might* be required to undertake. At this stage the list is not calibrated in terms of the individual claimant's abilities and limitations. It is a list which on an objective measurement sets out the most demanding and least demanding work-related activity for claimants generally. Put another way, subject to its being updated, it will the same list for the relevant area for all claimants within that area.

108. The work-related activity lists on these two appeals, in common I have to say with other appeals I have seen, do not identify the most and least demanding of the work-related activities listed. They are also not very informative in some instances or contextual. For example, the list in RC's case – albeit one which appeared common to all claimants – made no attempt to identify what were the most and least demanding activities. I understand that there is a limit to what the Secretary of State can do, but he can (and ought to) order the list in such a way that identifies explicitly the most and least demanding activities: for example, by listing them under sub-headings or listing from most demanding at the top of the page down to least demanding at the bottom. In RC's case "assistance with securing work placements" appears about half way down the list, which has "pilates" near the top of the list and "interview skills" and "cold-calling" at the list's end. Unless this list has an entirely random ordering, this suggests that securing a work placement is considered less demanding than gaining interview skills, which at first blush certainly is not obvious.

109. The lack of any differentiation in this list does not assist anyone. It may suggest that *any* form of work-related activity might be imposed on a claimant. And it does not inspire confidence that the Secretary of State's decision maker was aware what the most and least demanding work related activities were. Nor do I consider that the submission from the local office to the First-tier Tribunal on pages 187-188 of the RC bundle assists the Secretary of State's case on this issue as it is concerned with what I have described as the second stage under paragraph 112 below, and in any event the submission on its face does not address the list that later appears in RC's case, which is the list I have described above. Further, for the reasons given at the end of paragraph 63 above, and expanded on in paragraph 113 below, the *Jobcentre Plus Offer* work-related activity subsequently put forward by the Secretary of State to the Upper Tribunal was not *IM* compliant.

110. Similar criticisms apply to the list in the KC appeal. This was a list put before the Upper Tribunal. The Secretary of State's submission which accompanied it said (the text is as in the original):

> "[a]lthough the claimant could not undertake the majority of the activities on the list aimed at claimants who are closer to the labour market, she would be able to undertake some of the activities. activities as highlighted in bold on the list. While the most demanding would be attending health and well-being workshops at the providers' premises, one of the least demanding items on the list is referral to Richmond Fellowship for claimants with mental health or learning difficulties for bespoke guidance and action planning and activity support."

There are two problems with this submission. First, as all of the sub-headings were seemingly highlighted in bold, everything on the list was highlighted, but in a way which did not identify what were the most and least demanding activities. Second, even though this did not come across on the list for the reason just given, the Secretary of State was wrongly highlighting only the least and most demanding activities that he considered KC could do rather than what I have said above is needed, namely the most and least demanding activities generally.

DMG 17/15 and "could"

111. This brings me to the concern about the use of the word "could" in paragraph 36 of DMG 17/15. Its problem, in my judgment, is a potential elision of the two stages which *IM* requires. The first stage is evidence of the range of work-related activities available in the particular appellant's area, with the most and least demanding activities properly identified. As I have stressed above, at this stage the list is appellant blind and so is not compiled with the particular appellant in mind, beyond being the relevant list for the area in which that appellant lives.

112. The second stage is where the Secretary of State's appeal response writer has regard to the particular appellant's disabilities and limitations (as, in part, identified through the appellant's schedule 2 points score or satisfaction of regulation 29(2) of the ESA Regs (or any similar deeming provision)), as well as other evidence about how that information might have been made available to the work coach and how otherwise the work coach might have been able to be appraised of the particular appellant's background, situation and limitations, and based on this explains in the appeal response, per paragraph 26 of *AH*, what range of work-related activities from the above list the individual appellant was capable of performing and might have been expected to undertake, and (insofar as different) those activities which he considers it would have been reasonable for the work coach or external provider to have required the individual appellant to undertake. I have used the past tense here deliberately (e.g. "it would have been"), as the focus on any appeal is with the situation at the time of the decision under appeal: per section 12(8)(b) Social Security Act 1998.

113. This elision is aptly demonstrated by the only focused evidence put before me as to the work-related activity under the Jobcentre Plus offer which the Secretary of State said MC "could" undertake. This is referred to at the end of paragraph 63 above. The evidence and submission there made were put forward in October 2015, so well after DMG/17/15. As I indicate in paragraph, this evidence is <u>not</u> *IM*

compliant because it does not first set out accurate examples of the most demanding and least demanding work-related activities available under the *Jobcentre Plus Offer* in Newcastle in February 2012. It jumps straight to identifying from the undisclosed list the activities which MS could in the Secretary of State's view undertake without risk. It thus repeats the argument rejected by the three-judge panel in *IM* that identification of any work-related activity which the appellant could have safely done will suffice, and it denies the tribunal dealing with the first instance appeal with evidence it neds to assess risk, namely evidence of the mist and least demanding work-related activity in the area relevant to the claimant at the date of the decision under appeal.

114. In my judgment the above considerations suggest that the word "could" in paragraph 36 in DMG 17/15 ought to be replaced with the phrase "might be required to", but as it is his guidance ultimately this is a matter for the Secretary of State. The legal requirements post-*IM* are in my judgment as I have described them above, and it those requirements that ought to be followed. I should record in respect of this criticism of DMG/17/15 that the Secretary of State submitted after the hearing that his view was that the amending the wording from "could be required to undertake" to "might be required to undertake":

> "is not strictly required because it does not materially change the meaning of [paragraph 36]. However, now that it has been pointed [out] that there is the potential for a different interpretation, the [Secretary of State] intends to amend the Memo to ensure it is more explicitly accurate in its reflection of the intention in IM."

Other evidence

115. As *IM* emphasises, the above evidence and the submissions on it are required so as to enable the First-tier Tribunal to assess the relevant risks of the appellant being found not to have limited capability for work-related activity. The evidence is not, however, limited to a list identifying the most and least demanding work-related activity in the appellant's area at the relevant time, as I have tried to indicate. The evidence can include the explanation about the *Jobcentre Plus Offer* set

out in paragraph 48 above, assuming it was relevant at the date of the decision under appeal, as well as evidence of the information gap referred to in paragraph 50 above and the steps taken to bridge it discussed in paragraph 102 above. But all this is evidence that needs to be put before the First-tier Tribunal deciding an appeal in which regulation 35(2) is in issue.

116. In this respect it is only fair that I set out as best as I am able to relevant other evidence which was put before me by the Secretary of State. I was provided with the following evidence.

(a) Work coaches are trained to provide all four elements of the *Jobcentre Plus Offer*. They have access to the District Provision Tool in order to "deliver the package of personalised advice and support available to claimants". DWP Operational Instructions for work coaches on the *Jobcentre Plus Offer* has been in place since April 2013, though the earliest version the Secretary of State could refer me to was from November 2013[7]. This stresses, inter alia, work coaches "will need a comprehensive understanding of how to manage a range of claimant needs" and that ESA claimants' abilities to return to work will vary considerably from those who are ready to return to work to those who may be a fair distance from the labour market and whose goal is to prepare for a time when work is appropriate. Flexible interventions are work focused interviews aimed at moving claimants closer to the labour market or into work. These interviews should be with the same work coach and can take place face-to-face or over the telephone. Mandatory ESA claimants (i.e. those not exempt from engaging in work-related activity under regulation 3 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011), must have at least two flexible interventions a year. The Operational Instructions state that it is important that work coaches have an understanding of how the claimant's personal circumstances limit their capability for work. (Though, as we have seen, until perhaps very recently this did not include the reasons why the claimant had been found to have limited capability for work.)

(b) These flexible interventions should be used to discuss the support available to ESA claimants and agree which would be suitable to help ESA claimants return to work when they are able. The support on offer can differ and work coaches should use the District Provision Tool when conducting these discussions. ESA claimants have access to, inter alia, work clubs, the work programme, skills conditionality, health related support, work trials and volunteering. It is expected that ESA claimants who are not exempt from work-related activity will

[7] It is not clear whether this is a publicly available document.

> undertake some work-related activity. If, however, the claimant feels that the work-related activity they have been asked to complete is inappropriate or unreasonable, they can request reconsideration, and this must be done by a different work coach and the reconsideration decision notified in writing.
>
> (c) Turning away from work coaches, the Work Capability Handbook, which is made available to health care professionals and is also accessed by decision-makers, has had its Appendix 7 updated since January 2016. This is to seek to ensure that health care professionals (and Secretary of State decision-makers) "have sufficient information to make sure their recommendations on regulation 35 are properly informed". Annex 7 addresses work-related activity and *to an extent* further summarises that which I have summarised in (a) and (b) immediately above.

117. I do not have the space here to set out all that is said in either the DWP Operational Instructions for work coaches or Appendix 7 to the WCA Handbook. If the Secretary of State wishes to rely on either in individual appeals then he may need to supply them, or a fair summary of them, with his appeal response on the appeal. I will, however, make three observations. First, Appendix 7 to the WCA Handbook does not advise the HCP that the extent to which the individual claimant satisfies Schedule 2 to the ESA Regs or regulation 29 of the same regulations is *not* passed on to the work coach. Second, the (admittedly non-exhaustive) examples of work-related activity given in Appendix 7 to the WCA Handbook do not appear to include what might be thought to be the more demanding work-related activity an ESA claimant might be asked to undertake. For example, it refers to meeting by telephone, setting up an email account and researching local transport routes, but not undertaking work experience or cold calling. Third, although this may well have changed since February 2012, the ESA85 in MC's case does not show any detailed or personalised consideration given to the work-related activity he could safely undertake.

118. It is on the above basis that the Secretary of State's evidence and submissions should be made to First-tier Tribunals and should dictate how he puts together the further submissions required on KC''s

remitted appeal. It also informs my decision on MC's appeal, to which I now turn.

MC's appeal

119. As I have already noted above, I refused to give the Secretary of State any more time after the hearing before me to provide me with *IM* compliant evidence as to the range of most and least demanding work-related activity available in the Newcastle area under the *Jobcentre Plus Offer* in February 2012. I refused in short because in my judgment the Secretary of State had had more than enough time to supply such evidence even if time only ran from DMG 17/15 being in place in June 2015. The hearing before me took place well after that date. Moreover, even if my directions had not stated that I wished to re-decide MC's (or KC's) first instance appeal myself, what the directions did say about wanting to be informed about the type and quality of the information provided to the First-tier Tribunal by the Secretary of State since June 2011 on appeals concerned with regulation 35(2) (see paragraph 51(iv) above), should have been sufficient to alert the Secretary of State that such information was needed by the date of the hearing. (He had also had prior warning about the need to proactively supply such information in paragraph 52 of *IM*). And even if none of this had concentrated his mind on supplying the evidence, CPAG's skeleton argument filed two weeks before the hearing, in which it was argued that the Upper Tribunal should decide that MC satisfied regulation 35(2) in February 2012, ought to have done so.

120. I turn lastly, and briefly, to explain why I have decided that MC did on the evidence satisfy regulation 35(2) of the ESA Regs in February 2012. A number of features are important to bear in mind; features which may also be relevant for appeals still to be decided. First there is no list before me of the most and least demanding work-related activity under the *Jobcentre Plus Offer* in the Newcastle area in February 2012. Second, on his own case about the need for DMG 17/15 , and as the history of these two appeals demonstrates, even though the *Jobcentre*

Plus Offer may have been in place from June 2011, there is little or no evidence of it being operated in relation to ESA and potential regulation 35(2) cases before June 2015. Third, the information gap that was a matter of considerable concern in *IM*, was fully in place in February 2012, remained in place in respect of information communicated to work coaches until at least September 2016 and may well still remain in place in respect of external work provider in 2017, whether or not those providers have claimants immediately referred to them for work-related activity or have them referred by work coaches under the *Jobcentre Plus Offer*. Fourth, on the evidence before me it seems that guidance was possibly not in place before April 2013 directing work coaches to explicitly ensure that the work-related activity a claimant was required to carry out was appropriate and reasonable. All of which suggests to me that there was very little, if any, "joined up thinking" in place in February 2012 limiting the possibility of MC being referred to inappropriate work-related activity.

121. As to the facts of MC's health and the degree of his limitations, I am troubled that the tribunal did not seek to assess the full extent of his mental health problems in terms of scoring descriptors under Schedule 2 to the ESA Regs. I am further concerned that it did not address his evidence about engaging in work-related activity which I have summarised in paragraph 59 above. That evidence has not been questioned before me. I accept it as an accurate description of how RC was in February 2012 and how we would have then reacted to any untoward pressure. It is consistent with the rest of his evidence he has given in the documents about his heightened anxiety. Moreover, I do not consider either First-tier Tribunal which decided the appeal below properly grappled with this evidence, or undermined it, in the context of (i) MC's accepted inability to go to unfamiliar places on his own, and (ii) the elements of compulsion in mandatory work-related activity. As Upper Tribunal Judge Bano put it in paragraph 9 of *CMc –v- SSWP* [2014] UKUT 176 (AAC); [2015] AACR 9:

> "In assessing the risks to the mental health of a claimant from a finding that a claimant does not have limited capability for work-related activity, a tribunal may therefore have to consider the possible effects on a claimant of stress resulting from the element of compulsion which the "conditionality" of work-related activity entails."

122. I accept in this context that the tribunal whose decision I have set aside was right to conclude (albeit implicitly) that (at the least) it would have been inappropriate, and give rise to a substantial risk to MC's mental health, for him to attend mandatory work-related activities in groups in February 2012. Given this and my views as to the vulnerability of MC at the relevant time and the lack of any properly evidenced system for ensuring claimants with mental health problems would be appropriately treated throughout the *Jobcentre Plus Offer* process, I conclude, guided by paragraphs 112, 115 and 117 of *IM*, that I cannot be confident that MC would not have been referred to inappropriate work-related activity in February 2012. It is for these reasons that I have found him to satisfy regulation 35(2) as at February 2012.

Overall Conclusion

123. For the reasons set out above, both appeals are allowed and the tribunals' decisions of 3 March 2014 and 3 March 2015 are set aside. The appeal in KC's case is remitted to an entirely freshly constituted First-tier Tribunal to be re-decided at an oral hearing. Prior to that hearing the Secretary of State must supply the First-tier Tribunal with the submission directed in paragraph (4) of the directions on KC's appeal as set out above. I have re-decided MC's appeal in the terms set out above.

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

Dated 10th February 2017