[2017] AACR 32

RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP)
[2017] UKUT 105 (AAC))

Lady Carmichael **CSPIP/97/2016**
Judge Knowles QC **CSPIP/106/2016**
Judge Markus QC **CSPIP/385/2016**
9 March 2017 **CPIP/1599/2016**

Personal independence payment – assessment of activity – interpretation of "safely" in regulation 4(2A) and (4) – assessment of likelihood of harm - interpretation of "safety" for the purpose of supervision in Part 1 of Schedule 1

Each of the three appellants made claims for personal independence payments (PIP). RJ suffered from epilepsy and was at risk of seizures which could occur without warning. The Department for Work and Pensions decided she was not entitled to PIP. She appealed to the First-tier Tribunal (F-tT). The F-tT decided that she needed supervision to make a meal, assistance to manage therapy while she was suffering a seizure and in the hours after, and prompting or encouragement to shower. It also found that the risk of suffering a seizure meant she needed to be encouraged and accompanied to go out and so awarded her points for needing prompting to undertake a journey. Due to the infrequency of the seizures however, it found that she was conscious most of the time and could move around freely and so awarded her no points for mobility activity 2. She was awarded the daily living component but not the mobility component of the award. She appealed to the Upper Tribunal on the ground that the supervision requirements which applied to the relevant daily living activities applied equally to the mobility activities and the Secretary of State cross-appealed against the award for daily living activities 1 and 3. GMcL suffered from epilepsy, depression and anxiety, and was at risk of seizures which could occur at any time without warning. On his appeal to the F-tT against a decision refusing him PIP, the F-tT found that given the infrequency of the seizures he would not require supervision or assistance to carry out the relevant daily living and mobility activities for the majority of the time. CS was profoundly deaf and used cochlear implants which she was unable to wear in the bath. She claimed to require supervision because she would not hear a fire alarm while she was bathing, and that she needed someone with her when outside because she could not hear cars or warning noises, had poor road sense and had difficulty understanding instructions and timetables. The Secretary of State decided she was not entitled to PIP and she appealed to the F-tT. The F-tT found that there was only a remote possibility of a fire occurring while CS was in the bath and that was a minimal risk when assessing the safety of the activity. It found that, while she preferred to be accompanied when out for reassurance, using her hearing and vision she was able to be safe when following a route. The F-tT rejected CS's claims for points under activities 8 or 10. The principal issue before the three-judge panel of the Upper Tribunal was the interpretation of the word "safely" as defined in regulation 4(4), and of the word "safety" in the phrase "for the purpose of ensuring C's safety" in the definition of supervision in Part 1of Schedule 1 of the Social Security (Personal Independence Payment) Regulations 2013.

Held, allowing the appeals, that:

1. the meaning of "safety" in the definition of "supervision" in Part 1 of Schedule 1 of the PIP Regulations was to be approached consistently with "safely" in regulation 4(4)(a) (paragraph 27);

2. an assessment under paragraph 4(2A)(a) of the PIP Regulations that an activity cannot be carried out safely did not require that the occurrence of harm was "more likely than not", a tribunal must consider whether there was a real possibility that could not be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. Both the likelihood of the harm occurring and the severity of the consequences were relevant (paragraphs 33, 37 and 56);

3. if, for the majority of days, a claimant was unable to carry out an activity safely or required supervision to do so, then the relevant descriptor applied. That may be so even though the harmful event or the event which triggered the risk actually occurred on less than 50 per cent of the day (paragraphs 54 to 55);

4. the same approach applied to the assessment of a need for supervision (paragraph 56).

The Upper Tribunal set aside the First-tier Tribunal's decision and remitted the case for hearing before a differently constituted tribunal.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The decision of the Upper Tribunal **is to allow the appeals**.

The decisions of the First-tier Tribunals are set aside under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the appeals are remitted to be reconsidered by fresh tribunals in accordance with the following directions.

Directions

1. **These cases are remitted to be reconsidered by First-tier Tribunals, each comprising members who are not the same as those who made the decisions which have been set aside.**

2. **The parties should send to the relevant HMCTS offices within one month of the issue of this decision, any further evidence or submissions upon which they wish to rely.**

3. **The new tribunals will be looking at the claimants' circumstances at the times that the decisions under appeal were made. Any further evidence, to be relevant, should shed light on the position at those times.**

4. **The new First-tier Tribunals will consider all aspects of the appeals entirely afresh.**

These Directions may be supplemented by later directions given by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. Entitlement to personal independence payment (PIP) is determined by assessment of a claimant's ability to carry out specified daily living and mobility activities. A claimant is not to be assessed as able to carry out an activity unless she or he can do so safely. The central question in these appeals concerns the meaning of "safely" in this context, in particular the correct approach to the assessment of the likelihood of harm in the definition of "safely".

Legislative framework

2. Entitlement to PIP is governed by the Welfare Reform Act 2012. There are two components: daily living and mobility. By section 78 a person is entitled to the daily living component if their ability to carry out daily living activities is limited (standard rate) or severely limited (enhanced rate) by their physical or mental condition. Section 79 makes similar provision for entitlement to the mobility component if their ability to carry out mobility activities is limited or severely limited by their physical or mental condition. The Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) ("the Regulations"), made under section 80 of the 2012 Act, provide for determination of whether a person's ability to carry out daily living or mobility activities is limited or severely limited by their physical or mental condition.

3. The daily living and mobility activities which form the basis of assessment are set out in Schedule 1 to the Regulations. Each activity is subdivided into descriptors representing degrees of limitation in carrying out the activity, each of which attracts a specified number of points. The

greater the limitation, the higher the points. Regulations 5 and 6 provide that the scores for daily living and mobility activities are determined by adding the number of points awarded for each activity.

4. Regulation 4 provides for assessment of ability to carry out the activities, including the following:

> "(2) C's ability to carry out an activity is to be assessed –
>
> (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
>
> (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.
>
> (2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so –
>
> (a) safely;
>
> (b) to an acceptable standard;
>
> (c) repeatedly; and
>
> (d) within a reasonable time period.
>
> …
>
> (4) In this regulation –
>
> 'safely' means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity; …"

5. Regulation 7 provides that a descriptor applies only where it is satisfied on over 50 per cent of the days of the assessment period.

6. The activities in issue in these appeals are daily living activities 1 (preparing food), 3 (managing therapy) and 4 (washing and bathing), and both mobility activities. These are:

Daily living activities

Column 1 ***Activity***	***Column 2*** ***Descriptors***	***Column 3*** ***Points***
1. Preparing food.	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2

Column 1 ***Activity***	***Column 2*** ***Descriptors***	***Column 3*** ***Points***
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8
3. Managing therapy or monitoring a health condition.	a. Either – (i) does not receive medication or therapy or need to monitor a health condition; or (ii) can manage medication or therapy or monitor a health condition unaided.	0
	b. Needs either – (i) to use an aid or appliance to be able to manage medication; or (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.	1
	c. Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week.	2
	d. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week.	4
	e. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 7 but no more than 14 hours a week.	6
	f. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 14 hours a week.	8
4. Washing and bathing.	a. Can wash and bathe unaided.	0
	b. Needs to use an aid or appliance to be able to wash or bathe.	2

Column 1 ***Activity***	***Column 2*** ***Descriptors***	***Column 3*** ***Points***
	c. Needs supervision or prompting to be able to wash or bathe.	2
	d. Needs assistance to be able to wash either their hair or body below the waist.	2
	e. Needs assistance to be able to get in or out of a bath or shower.	3
	f. Needs assistance to be able to wash their body between the shoulders and waist.	4
	g. Cannot wash and bathe at all and needs another person to wash their entire body.	8

Mobility Activities

Column 1 ***Activity***	***Column 2*** ***Descriptors***	***Column 3*** ***Points***
1. Planning and following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4
	c. Cannot plan the route of a journey.	8
	d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10
	f. Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12

Column 1 ***Activity***	***Column 2*** ***Descriptors***	***Column 3*** ***Points***
2. Moving around.	a. Can stand and then move more than 200 metres, either aided or unaided.	0
	b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.	4
	c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
	d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.	10
	e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
	f. Cannot, either aided or unaided, – (i) stand; or (ii) move more than 1 metre.	12

7. Each of the daily living activities which arise in these appeals includes a descriptor that relates to a need for supervision, but there are also supervision descriptors within activities 2 (taking nutrition) and 5 (managing toilet needs or incontinence). Our analysis as to supervision, below, applies equally to those other descriptors. Paragraph 1 of Part 1 of the Schedule provides definitions of terms contained in the Schedule including that "supervision" means:

> "the continuous presence of another person for the purpose of ensuring C's safety"

Background facts

RJ

8. At the date of the Secretary of State's decision on 20 July 2015, RJ was 20 years old. She suffered from epilepsy with, at that time, seizures occurring less than once a week. The seizures were unpredictable and she had no warning of them. If a seizure occurred, depending on where she was and what she was doing, she would be at risk of harm. The possible harm could be serious particularly if a seizure occurred when she was cooking a meal, eating or drinking, or bathing. In her PIP claim she stated that "every day is a potential seizure day". The Secretary of State awarded her two points for daily living descriptor 1c and none for the mobility activities, and so she was not entitled to PIP.

9. On appeal the First-tier Tribunal awarded four points for daily living descriptor 1e. It found that most of the time RJ could physically cook a meal but did not do so for fear of having a seizure and its consequences. However, given the infrequency of her seizures, the tribunal found that most of the time she would have been able to make a simple meal provided someone was on hand to supervise and assist. In relation to activity 3, the tribunal found that RJ's mother and boyfriend provided assistance to RJ while she was suffering a seizure and in the hours

thereafter and that this amounted to therapy which was required for no more than 3.5 hours a week, attracting two points for descriptor 3c. RJ did not bathe because of the risks involved, and the tribunal found that she needed to be prompted and encouraged to shower, attracting two points for descriptor 4c. The total of eight points meant she was entitled to the daily living component at the standard rate. The tribunal found that, "due to the genuine risk that she may at any time suffer a seizure, she lost confidence in going out alone and required to be encouraged to go out and to be accompanied when she did so", so that mobility descriptor 1b applied (four points). However, due to the infrequency of the seizures, most of the time she was conscious and able to move around so that she was not entitled to any points under mobility activity 2. Thus she was not entitled to the mobility component.

10. RJ appealed to the Upper Tribunal. She contended that the tribunal's decision that she required supervision when preparing a meal applied equally to mobility activity 1. She contended that, by reason of the phrase "without another person", descriptor 1f applied where supervision was needed. She also submitted that the tribunal should have found that she needed supervision rather than prompting to wash and bathe, but accepted that this would have made no difference to the points awarded for activity 4. The First-tier Tribunal gave permission to appeal on 11 February 2016. By cross-appeal, with the permission of the Upper Tribunal, the Secretary of State submitted that the First-tier Tribunal erred in finding that daily living descriptor 1e rather than 1d applied, and in awarding points for descriptor 3c.

GMcL

11. GMcL suffered from epilepsy, depression and anxiety. His PIP claim was based principally on the risk and consequences of seizures. On 11 August 2015 the Secretary of State decided that he was not entitled to PIP: he was awarded two points for daily living descriptor 1c and four points for mobility descriptor 1b.

12. The First-tier Tribunal decided that GMcL did not always get warning of a seizure but that the seizures were infrequent. Therefore it decided that the supervision or assistance descriptors in the daily living activities relied upon by GMcL were not satisfied for the majority of the time. In relation to mobility activity 1 the tribunal also found that, although GMcL did not go out unaccompanied because of fear of suffering a seizure, the assistance was not reasonably required given the infrequency of the seizures. The First-tier Tribunal gave GMcL permission to appeal in relation to the application of regulations 4 and 7 and the question of supervision.

CS

13. CS is profoundly deaf and has coeliac disease. She has a cochlear implant in each ear but also relies upon lip reading. At the time of the Secretary of State's decision which is the subject of this appeal (19 August 2015) she was 17 years old. By that decision she was awarded two points for daily living descriptor 7b and none for the mobility activities. In her appeal to the First-tier Tribunal she claimed that her deafness affected her abilities in respect of daily living activities 7, 8, 9 and 10. She also said that, as she was unable to wear the implants in the bath, she needed supervision because she would not hear an alarm in the event of fire and so descriptor 4c applied. In addition, she claimed that she found it hard to cross roads as she could not hear cars or warning noises well, had poor road sense and had difficulty understanding instructions and timetables, and that she needed someone with her in case she got lost. She claimed to satisfy mobility descriptor 1d.

14. The First-tier Tribunal confirmed the Secretary of State's decision. It awarded her two points for daily living descriptor 1b, and four for descriptor 7c. The tribunal awarded no points for activity 4 (washing and bathing). It found that there was only a remote possibility of a burglary or fire occurring while she was in the bath, and was "therefore of minimal risk when

assessing the safety of the activity". The tribunal awarded no mobility points, finding that CS preferred to be accompanied for reassurance and that, using her hearing and vision, she was able to be safe when following a route. In giving permission to appeal the First-tier Tribunal said that the Upper Tribunal's guidance was sought "on whether a person who is profoundly deaf (and, in the instant case, has to remove her implant in order to bath) and who has no other relevant disability is able to bath unsupervised".

Three-judge panel

15. On 17 June 2016 the President of the Administrative Appeals Chamber of the Upper Tribunal directed that the cases of RJ and GMcL be determined by a three-judge panel, given the divergence of view between Upper Tribunal judges in previous case law to which we refer in more detail below. On 14 September 2016 Judge Knowles QC directed that the case of CS be heard along with the other two appeals.

16. Each of the claimants was separately represented at the hearing before us: RJ by Mr Leigh, a trainee solicitor; GMcL by Mr Clark, a welfare rights officer; and CS by Mr Fraser, counsel. The Secretary of State in all the appeals was represented by Mr Komorowski, counsel. All the representatives had provided skeleton arguments prior to the hearing and addressed us orally. We are very grateful to each of them for their assistance.

Previous Upper Tribunal case law

17. As identified in the Chamber President's directions above, there are three previous decisions of the Upper Tribunal which are of particular relevance.

18. In *CE v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 643 the claimant had epilepsy. The First-tier Tribunal found that, as a result of the fits which the claimant suffered and their after-effects, the claimant was unable to prepare and cook food so that descriptor 1f applied. Amongst other conclusions, the tribunal decided that the claimant was unable to prepare and cook a meal safely in accordance with regulation 4(4). There was a "remote but dire" risk to the claimant, in that the claimant would be at risk when cooking because of the possibility of a daytime seizure occurring without warning. Upper Tribunal Judge Hemingway decided that the tribunal had erred in its approach to regulation 4(4). In his judgment, a remote risk of serious harm in carrying out an activity did not make it unsafe. The key passages in his reasons are the following:

> "29. It seems to me that the F-tT's approach would certainly make a great deal of sense if the word 'safely' had not been defined. That is because it seems logical to suppose the word, unclarified by a definition, would require a consideration not only of the likelihood of a risk occurring but also of the potential harm which might be caused. If an event was unlikely to occur whilst a task was being performed but, if it did, might result in only relatively trivial injury at worst, then it might be thought that task could safely be undertaken but not so if the nature of the harm caused would be substantial. However, the word is defined as noted above and in the way set out above. That definition focuses upon the <u>likelihood</u> of harm being caused as opposed to the gravity of any harm if it is caused. Thus, on the face of it, a narrow definition has been adopted which would not regard something as being unsafe even if the consequences might be very serious or even fatal. This begs the question as to whether that can be taken to have been the intention of Parliament.
>
> 30. I have looked at the explanatory note to the second draft of the assessment regulations for personal independence payments which was published in November 2011. At paragraph 7.5 there appear these words:

> **Risk and Safety**
> 7.5 When considering whether an activity can be undertaken safely it is important to consider the risk of a serious adverse incident occurring. However, the risk that a serious adverse event may occur due to impairments is insufficient – there has to be evidence that if the activity was undertaken, the adverse event is likely to occur.

31. Then, in the Government's response to the consultation on the Personal Independence Payment assessment criteria and regulations, published on 13 December 2012 there appear these words:

> **Risk and safety**
> 4.13 As explained above, we believe that, in order for a descriptor to be deemed to apply to an individual, that individual must be able to complete the activity as described safely. We propose that, to determine whether an individual is capable of carrying out an activity safely, consideration should be given to whether they are at risk of a serious adverse event occurring. If it is decided there is a high risk of such an event occurring, the individual would not be considered able to complete the activity safely at the level described and should be assessed against other descriptors reflecting higher levels of need.
>
> **Comments and government response**
> 4.14 Various respondents suggested that our definition of 'safety' was too strict, they questioned the reference in the second draft of the criteria that there has to be 'evidence' that if the activity was undertaken, the adverse event is likely to occur. We did not intend that individuals should have to provide evidence but simply that it must be likely that the adverse event would happen. However, the use of 'evidence' has clearly concerned people so we have removed it. The definition of safely has now been changed to: 'when considering whether an activity can be undertaken safely it is important to consider the risk of a serious adverse event occurring. However, the risk that a serious adverse event may occur due to impairments is not sufficient – the adverse event must be likely to occur if the activity was undertaken'. We believe that this strikes the right balance.

32. Finally, in terms of the content of such materials, it is worth noting that the above definition has found its way into the PIP Assessment Guide which is intended for those healthcare professionals who carry out face to face medical consultations with persons claiming a personal independence payment.

33. None of the above is binding. It is, though, relevant to the ascertainment of the legislative intention. It seems to me abundantly clear that the intention is to relate the concept of safety to the likelihood of an event occurring. Hence, the intention is that a claimant will not succeed in the event of there being a dire risk which is not likely to occur. That legislative intention is clearly reflected in the actual definition. The focus of decision makers and tribunals, therefore, must be on the likelihood of an event occurring not the degree of harm likely to be caused if it does. That means the F-tT erred in embarking upon a consideration encompassing remoteness of risk and the potential seriousness of the harm which might be caused. It was simply required to focus upon the likelihood or otherwise of an adverse event occurring. I appreciate that this interpretation might be thought, from some perspectives, to be unfortunate but that cannot be a

consideration for me. Parliament's intention is clear and that intention is achieved by the wording of the appropriate definition."

19. The issue was next considered by Judge West in CPIP/3006/2015. The claimant in that appeal was diabetic and suffered infrequent hypoglycaemic fits. He rarely required intervention by another person but he claimed to need constant supervision to manage his medication, particularly at night, because of the risk of having a reaction while he was asleep, entering a diabetic coma and dying. Judge West agreed with Judge Hemingway in *CE*. He said:

> "the risk that a serious adverse event may occur due to impairments is insufficient for an award of points under the descriptor; there has to be evidence that, if the activity was undertaken, the adverse event is *likely* to occur …"

20. Both Judge Hemingway and Judge West distinguished between the approach to what can be done "safely" for the purpose of PIP, and the approach to the assessment of a person's need for supervision in relation to the disability benefits which PIP is replacing: disability living allowance (DLA) and attendance allowance (AA). A condition of entitlement to those benefits is that a person is so severely disabled physically or mentally that he or she requires "continual supervision throughout the day [or night, in the case of AA] in order to avoid substantial danger to himself or others". In *Moran v Secretary of State for Social Services* (unreported) 13 March 1987 the Court of Appeal held, in relation to those conditions, that supervision could be precautionary and anticipatory and that, where a person was at risk of seizure, "the relative frequency or infrequency of the attacks is immaterial so long as the risk of 'substantial' danger is not so remote a possibility that it ought reasonably to be disregarded." Judge West said that "supervision" for the purpose of PIP must be assessed in accordance with Judge Hemingway's decision rather than as decided in *Moran*.

21. The meaning of "safely" in regulation 4(4) and of supervision was considered again by Upper Tribunal Judge Bano in *SB v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 219 (AAC). In that case, the claimant experienced infrequent non-epileptic seizures and claimed that she could not cook, wash and bathe, or dress and undress safely. The Secretary of State submitted that, as the claimant experienced around two seizures a week, applying regulation 7 it could not be said that the claimant was unable to undertake the activity safely nor that she needed supervision on over 50 per cent of days. Judge Bano agreed with Judge Hemingway's construction of regulation 4 in *CE*. However, in his view it did not follow that a finding that a claimant can prepare food "safely" for the purposes of that regulation meant that the claimant did not need supervision in accordance with descriptor 1e. In that respect he departed from the previous two Upper Tribunal decisions. His reasoning was as follows:

> "9. Activities 6, 7, 8, 9 and 10 (dressing and undressing, communicating verbally, reading and understanding signs, symbols and words, engaging with people face to face and making budgeting decisions) are activities which, in the normal way, do not give rise to any risk of harm. However for claimants with some physical or mental conditions, activities which are normally innocuous may present hazards; for example, a claimant with severely impaired limb function may risk falling while getting dressed or undressed. In such cases, the effect of regulations 4 and 7 of the 2013 PIP Regulations is that the claimant can only be held to be unable to carry out the activity in question if the claimant cannot perform the activity without a likelihood of harm (to the claimant or to another person) on more than 50 per cent of the days of the required period, as defined in regulations 7, 14 and 15 of the 2013 PIP Regulations. Since regulation 4 of the Regulations is concerned with the likelihood of harm and not its seriousness, a claimant may be able to show that he or she is unable to carry out an activity safely, even if the

seriousness of the harm likely to result from carrying out the activity is insufficient to justify supervision.

10. On the other hand, Activities 1, 2 3, 4, 5 (preparing food, taking nutrition, managing therapy or monitoring a health condition, washing and bathing, and managing toilet needs or incontinence) are all activities where supervision may be needed, either to enable a claimant to carry out the activity at all, or to prevent a claimant from coming to serious harm if supervision is not provided, and those activities include descriptors relating to a need for supervision. In the case of Activity 1, preparing and cooking food presents risks even to people without any relevant physical or mental medical conditions because of the need to use sharp knives, the presence of boiling water, the risk of fire and the other hazards associated with cooking. In some cases, a claimant may be able to satisfy descriptor 1f (cannot prepare and cook food) on the basis that he or she cannot carry out the activity safely under regulation 4 of the 2013 PIP Regulations, for example, if the claimant has dermatitis or urticaria brought on each time the claimant comes into contact with raw food. In such cases, provided that the consequences of carrying out an activity are sufficiently serious to amount to 'harm', a claimant may be found to be unable to carry out an activity under regulation 4 on the basis that he or she cannot carry out the activity safely, even if the consequences of doing so are not so serious as to create a need for supervision.

11. In *CE* the tribunal had applied descriptor 1f on the basis of what was held to be an erroneous construction of regulation 4 of the 2013 PIP Regulations, but descriptor 1e was not specifically considered. I regard it as inconceivable that the legislation intended that claimants who might be at risk of serious harm if left to prepare and cook a meal unsupervised, such as those with epilepsy and similar conditions, could only qualify for points under Activity 1 if they could establish that they were likely to come to some form of harm, serious or otherwise, on more than half the days in the required period. Regulation 4 applies to all activities, but only some activities include descriptors relating to a need for supervision. In my judgment, where there is such a descriptor the question of whether a claimant needs supervision to carry out the activity concerned must be considered separately from whether the claimant can carry out the activity 'safely' under regulation 4 of the 2013 PIP regulations, since otherwise the inclusion of a 'supervision' descriptor in the activities where they occur would serve no useful purpose. Regulation 4 and 'supervision' descriptors may in many cases raise common or overlapping issues of fact, but they are in my view analytically and conceptually distinct.

12. The terms 'needs' and 'requires' (with the implication of the word 'reasonably') in relation to supervision used in the 2013 PIP Regulations and in section 72(1)(b) of the Social Security Contributions and Benefits Act 1992 respectively seem to me to connote more or less the same degree of necessity. Although there is of course no requirement in the 2013 PIP Regulations for supervision to be continual, in deciding whether a claimant needs supervision in order to carry out a task safely, I therefore see no reason to depart from the well-established approach taken in disability living allowance cases for deciding whether supervision is reasonably required, including the making of an assessment where necessary of the possible seriousness of the consequences if supervision is not provided – see *R(A) 2/89.*"

The parties' submissions

22. Mr Clark and Mr Leigh for GMcL and RJ respectively argued that Judge Hemingway's interpretation of "safely" was wrong but that, even if it was correct, Judge Bano's approach to supervision was also correct. In his skeleton argument Mr Fraser for CS had reluctantly

conceded that Judge Hemingway had been correct but that Judge Bano's approach to supervision should be followed. At the outset of the hearing we said that we were not persuaded that Mr Fraser's concession as to the correctness of the decision in *CE* was properly made. Mr Fraser gratefully took the opportunity to retract his concession and make submissions on all issues. In the course of the hearing, he withdrew his support for Judge Bano's approach to supervision.

23. Mr Komorowski for the Secretary of State stood by *CE* and Judge West's application of it to supervision, and said that Judge Bano was wrong to say that the need for supervision must be considered separately from whether a claimant can carry out an activity safely.

24. Mr Komoroswki very properly drew our attention to two decisions as to the meaning of "likely" in other contexts – *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 and *Wallis v Bristol Water plc* [2009] EWHC 3432 (Admin); [2010] PTSR 1986, which we refer to in more detail below – and he submitted that those cases could be distinguished and the decisions confined to their particular statutory contexts. He contended that in regulation 4(4) of the PIP Regulations "likely" means "more likely than not" and so a claimant can carry out an activity safely unless it is more likely than not that, in doing so, she or he will suffer harm. He did not rely on regulation 7, which only comes into play once it has been determined that a descriptor applies, and is concerned with the frequency with which a descriptor applies.

Discussion

The relationship between the definitions of "safely" and of "supervision"

25. These appeals raise questions of interpretation of "safely" as defined in regulation 4(4)(a) and in the phrase "for the purpose of ensuring C's safety" in the definition of "supervision" in Part I of Schedule 1. Judge Hemingway considered only the former, the latter not arising for consideration in *CE*. Judge West decided that the approach in *CE* also applied to supervision. But Judge Bano's view was that the approach to the two phrases was different.

26. The definition of "safely" in regulation 4(4)(a) is expressly confined to that regulation. The Schedule does not define "safety" as used in the definition of "supervision". Nonetheless, there is a statutory link between the scoring of the daily living activities and the nature of assessment as required by regulation 4 which demands that the two terms are approached consistently, as follows. Entitlement to either component of PIP arises where a person's ability to carry out the daily living or mobility activities is limited or severely limited by their physical or mental condition (sections 78 and 79 of the Welfare Reform Act 2012). That is to be determined in accordance with the PIP Regulations (section 80). Whether ability is limited or severely limited depends on a claimant scoring the requisite number of points under Schedule 1 (regulation 5(3). The score is determined by adding the number of points awarded for the highest scoring descriptor which applies in relation to each activity, on over 50 per cent of the days (regulation 5(1) and (2) and regulation 7(1)). Each descriptor requires an assessment of the claimant's ability to perform the activity in the manner described, and that is to be assessed according to regulation 4. It follows from this that regulation 4 applies to the assessment of each and every descriptor including, therefore, the need for supervision.

27. The way in which this works can be illustrated by considering daily living activity 1. Each of the descriptors addresses a person's ability to prepare and cook a simple meal. At one end of the spectrum is ability to do so unaided; at the other end is inability to do so even with support; and in-between is ability to do so with various degrees of support or limitation. The bottom line for each of these descriptors other than 1f (absolute inability) is that a claimant will not satisfy a descriptor unless they can prepare food, in the manner prescribed in the descriptor, assessed in accordance with regulation 4(2A). That is the position whether they are assessed as able to prepare food unaided or with any of the support or limitations listed in descriptors 1b–e.

Thus a person cannot be assessed as needing supervision to prepare food unless, with supervision, they can prepare food safely, to an acceptable standard, repeatedly and within a reasonable time period and so, amongst other things, they must be able to prepare food in a manner unlikely to cause harm to C or another person in accordance with regulation 4(4). Inserting the definition of "supervision", the question to be asked is this: can the claimant, with the continuous presence of another person for the purpose of ensuring the claimant's safety, prepare food in a manner unlikely to cause harm to the claimant or another person? It would make no sense to approach the first part of that question (whether they need the continuous presence of another to ensure their safety) in a different manner to the second part (whether, with such a person, they are likely to cause harm to someone).

28. This analysis shows why Judge Bano was wrong in *SB* to treat the application of regulation 4 and the assessment of the need for "supervision" as being distinct. On his approach, even though a person needs supervision because preparation of food involves a remote risk of serious harm, they would be assessed as able to prepare food safely without supervision because the risk of harm occurring is unlikely. The result is illogical.

29. We respectfully disagree with Judge Bano's view that, unless the need for supervision is considered separately, the inclusion of the supervision descriptors would serve no useful purpose. If a claimant can safely prepare and cook a meal as long as they have supervision as defined, then they score four points under activity 1. If the supervision descriptor were not included, that claimant would be assessed as unable to prepare and cook food because they cannot do so safely, and so would score eight points. So the inclusion of the supervision descriptor allows for a more finely-tuned assessment of degrees of ability. Moreover, unlike the requirement for supervision, regulation 4(4)(a) is concerned not only with the safety of the claimant but with the safety of others.

30. Our conclusion as to the symmetry between "safely" in regulation 4(4)(a) and "safety" for the purpose of supervision provides a foundation for our analysis below as to the meaning of those terms.

The meaning of "safely"

31. Judge Hemingway's decision was that the concept of safety is related to the likelihood of an event occurring and not the nature of the risk or harm should the event occur. He did not seek to define "likely" but, taking account of the background material to which he referred, contrasted it with what "may" occur. The implication of his decision is that "likely" means "more likely than not". Neither Judge Hemingway, nor the other two judges who agreed with him in this regard, considered that "likely" can carry a range of meanings depending on the context and, in particular, they did not take into account the judgments in *In re H* or *Wallis*.

32. *In re H* concerned one of the threshold criteria for making a care order in section 31(2) of the Children Act 1989, namely "that the child concerned is suffering, or is likely to suffer, significant harm" if the care order is not made. The House of Lords held that this did not mean that the court had to be satisfied that harm was more likely than not but it did have to be satisfied that there was a real possibility of harm. Lord Nicholls, with whom the majority agreed, explained the position as follows at 584F–585G:

> "In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?

> In section 31(2) Parliament has stated the prerequisites which must exist before the court has power to make a care order. These prerequisites mark the boundary line drawn by Parliament between the differing interests. On one side are the interests of parents in caring for their own child, a course which prima facie is also in the interests of the child. On the other side there will be circumstances in which the interests of the child may dictate a need for his care to be entrusted to others. In section 31(2) Parliament has stated the minimum conditions which must be present before the court can look more widely at all the circumstances and decide whether the child's welfare requires that a local authority shall receive the child into their care and have parental responsibility for him. The court must be satisfied that the child is already suffering significant harm. Or the court must be satisfied that, looking ahead, although the child may not yet be suffering such harm, he or she is likely to do so in the future. The court may make a care order if, but only if, it is satisfied in one or other of these respects.
>
> In this context Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this were the correct reading of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm.
>
> The difficulty with this interpretation of section 31(2)(a) is that it would draw the boundary line at an altogether inapposite point. What is in issue is the prospect, or risk, of the child suffering significant harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less than 50-50 as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant harm as distinct from a real possibility. It is otherwise if there is no real possibility. It is eminently understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not.
>
> In my view, therefore, the context shows that in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

33. *Wallis v Bristol Water plc* [2010] PTSR 1986 was an appeal by way of case stated from the justices' conviction of the defendant of an offence of having a water fitting connected "in such a manner that it causes or is likely to cause" contamination of water, contrary to regulations made under the Water Act 2003. The justices took into account that, while the probability of an event causing contamination from any individual installation was not great, the consequences of such an event could be catastrophic to public health. The Divisional Court followed the decision in *In re H* and held that "likely" was being used in the relevant regulations in the sense of "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm to public health in the particular case" ([18]). Lord Justice Dyson said that the regulation was made to provide health protections against contamination of water, and found that it was inherently unlikely that the legislative intent would have been to limit the prohibition in the regulations to cases where it was more probable than not that contamination would occur ([25]).

34. Mr Komorowski sought to distinguish those cases on the basis that there a finding of likely harm would lead directly to the outcome to which the legislation was directed: placing a child in care or a conviction. Similarly in *Moran*, a finding of a need for continuous supervision in order to avoid substantial danger would have led directly to entitlement to DLA. He argued that there was no such direct relationship between a finding of likely harm and the outcome under the PIP Regulations, namely entitlement to benefit, because such a finding may not attract sufficient points to lead to an award. He said that this showed that, unlike the legislation in play in *In re H* and *Wallis*, the PIP Regulations might not be properly described as adopting a precautionary approach to risk: even if a claimant is awarded points on the basis of the risk to them in carrying out an activity, they may not qualify for benefit.

35. We consider that the premise underpinning Mr Komorowski's distinction is flawed. A care order might but does not automatically follow from a finding of likely harm: it remains for the court to exercise its discretion whether to make such an order. Likewise, an award of PIP might but does not necessarily follow from a finding of likely harm under regulation 4(4).

36. We also disagree with Mr Komorowski's submission that the approach to "likely" in *In Re H* should be confined to the particular statutory context of child protection legislation. That the principle applies in other contexts is illustrated by the decision in *Wallis*. In both cases the courts were concerned that "likely" should not be interpreted so as to frustrate Parliament's intention, whether that is to afford protection to children who are at risk of harm or to protect public health from potential significant harm. Similarly the aim of regulation 4(2A)(a) is to protect people from harm being caused by individuals undertaking daily living or mobility activities. That aim would be frustrated if individuals were expected to carry out activities where there is a real possibility of harm but where the risk falls short of being more likely than not. The fact that "harm" is not qualified in the definition in regulation 4(4)(a), and "unlikely" is not explained in terms of degree, supports an approach which involves consideration of both the nature or degree of the harm and the extent of the risk. Finally, if the Secretary of State had intended otherwise and that "likely" should mean "more likely than not" regardless of the seriousness of the consequent harm, that could have been made clear.

37. In summary our analysis supports the conclusion that, having regard to the purpose behind regulation 4(4)(a), "likely" (being the converse of the term used in the definition, "unlikely") is to be read in the manner defined in *In Re H* and *Wallis*.

Background materials

38. As we have said, none of the judges in the three Upper Tribunal decisions to which we have referred considered the above case law or the possibility that "likely" could carry a range of different meanings. Judge Hemingway relied solely on the Government's statements, in the consultation documents and accompanying explanatory notes issued by the DWP prior to producing the final draft of the PIP Regulations, as evidencing the legislative intention. The submissions of all parties in the present appeals have drawn heavily on the same documents.

39. Although we do not find that the words of the regulation are obscure, for the reasons which we have already explained, it may nonetheless be proper to have regard to legislative history in order to ascertain and give effect to Parliament's intention: *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8]. We therefore consider whether the legislative history assists here in the interpretation of the regulations.

40. Mr Komorowski urged us to take the same approach as taken by Judge Hemingway at [30] to [33] of his decision, which we have set out above. He said that the passages cited by Judge Hemingway showed that likelihood is contrasted with mere risk which is insufficient, and that this showed that "likely" does not have the same meaning as in *In re H*. On the other hand,

Mr Fraser submitted that, although the passages distinguish between what "may" and what is "likely to" occur, they do not indicate a requirement of "more likely than not".

41. While they have proved to be of considerable assistance in construing some provisions of the PIP Regulations (see for instance the recent decision of the three-judge panel in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC)), the background materials available to us do not assist in the interpretation of regulation 4(4)(a). They leave considerable doubt as to what was meant by "safely" and "likely", for reasons which we now explain.

42. First, we respectfully disagree with Judge Hemingway that the position is clear from paragraphs 4.13 and 4.14 of the December 2012 Consultation Response. The reference to a "high risk" of an event occurring rather begs the question which the House of Lords addressed in *In re H* as to the basis on which risk is to be assessed. Moreover, in saying that a risk that an event "may" occur is not sufficient but a risk that it is "likely to" occur is, the government may have been doing no more than contrasting situations where there is "no real possibility" of the event occurring and those where there is a "real possibility". This is reinforced by the example given at paragraph 4.3 of the December 2012 Consultation Response: "if an individual can complete a particular descriptor, and regularly does so during their daily life, but they cannot satisfy it safely, they would not be deemed able to complete it." This more naturally reflects the circumstances of someone who generally performs an activity without harm materialising than someone who is at risk of the harm occurring most of the time.

43. Second, it is apparent that the Department had not properly grappled with the correlation between the meaning of "safely" in relation to the general assessment criteria (those which were subsequently enacted in regulation 4(2A)(a)) and "safety" in the definition of supervision. This failure manifests a lack of clarity in the government's approach to the concepts and so the documents do not provide a clear indication of legislative intention.

44. The need for supervision was introduced in the second draft of the regulations, with substantially the same definition as in the final regulations. The explanatory note to the second draft explained the definition at paragraph 4.21:

> "A lot of the feedback we received questioned why the initial proposals did not reflect the need for supervision to ensure an individual's safety while carrying out activities. We have recognised and addressed this in the second draft of the criteria. The descriptors now take account of whether an individual requires 'supervision' from another person – defined as their continuous presence throughout the task to prevent a potentially dangerous incident occurring. This approach is very similar to that currently taken in Disability Living Allowance."

45. At paragraph 7.11 the explanatory note stated that

> "There must be evidence that any risk would be likely to occur in the absence of such supervision."

46. The note does not say what is meant by "likely", but the reference to the approach taken in DLA must mean as it is explained in DLA case law, which includes the important decision of the Court of Appeal in *Moran*. This merits restating here: "the relative frequency or infrequency of the attacks is immaterial so long as the risk of 'substantial' danger is not so remote a possibility that it ought reasonably to be disregarded." We observe in passing that Judge West's conclusion as to the approach to supervision is not supported by the government's clear statement of intention in this respect.

47. In contrast the statements in the background documents as to the intended meaning of "safely" and "likely" harm in relation to "risk and safety" are far from clear. The passage at paragraph 7.5 relating to "Risk and Safety", to which Judge Hemingway referred, used a similar phrase to that in paragraph 7.11:

> "there has to be evidence that if the activity was undertaken, the adverse event is likely to occur".

48. However, Judge Hemingway's understanding of "likely" as used in that passage is very different from the meaning ascribed to it in relation to the need for supervision in the light of DLA case law. One can draw either of two conclusions from this. Either Judge Hemingway's understanding was incorrect, or the consultation document has used a similar phrase in the same document with two very different meanings. If the latter, the document failed to appreciate that this was the case and failed to acknowledge the logical difficulty of approaching the issue of safety in a different way in the two provisions (as to which see [25]–[30] above).

49. The same apparently different approaches to "risk and safety" and to "supervision" were repeated in the December 2012 consultation response. As to the former, we refer to the passages at 4.13 and 4.14 cited by Judge Hemingway. As to the latter, the government simply said it did not propose to change the definition (paragraph 4.30). In this context, it is also instructive to note the government commentary on the draft of activity 1 at paragraph 5.9:

> "Safety is always taken into account throughout the assessment by considering whether an activity can be completed 'reliably'. We have also taken into account whether individuals need to be supervised or assisted to be able to complete the activity safely. In this way we believe that we have taken adequate account of safety within this activity".

50. "Reliably" here includes "safely" (see paragraph 4.9 of the document). This passage reveals no appreciation of the apparent inconsistency between the approach to risk and safety for the purpose of that assessment and the stated intention that the need for supervision was to be determined in accordance with the approach set out in DLA case law.

51. The government's failure to appreciate these issues can also be seen in the Consultation Document on the draft of the final regulations, published in January 2012, which included a number of case studies to illustrate the application of the proposed criteria. In case study 5, it was said that Mary would be assessed as unable safely to use a cooker because of the risk of injury from seizures which occurred on average three times a month. This case study illustrated an approach to the assessment of what can be done safely which was akin to the DLA approach to supervision. However nowhere in this document nor in the response to the consultation can one find any recognition of the potential inconsistency between that and the approach to "risk and safety".

52. Mr Komorowski also relied on a press release issued by the DWP in January 2013 announcing the proposal to amend the Regulations in order to add regulations 4(2A) and 4(4). The Minister for Disabled people, Esther McVey, was quoted as follows:

> "Our intention has always been the same - we want to target support at those who need it most. We have always said that we will not just look at whether individuals can carry out activities but also the manner in which they do so.
>
> I know that disabled people and their representatives feel strongly that this important concept is set out in law and I am happy to do this."

53. This statement takes matters no further, but Mr Komorowski relied on the sentence immediately following the quote: "The addition to the regulations formalises the current wording

included in the draft PIP guidance". The problem for him is that this sentence is not a statement by a government spokesperson but simply an explanation from the press office. And in any event the content of the statement could only assist him if we accepted that the government's intention was manifest in the consultation materials as he contended, but we do not.

Regulation 7

54. Before leaving this part of the discussion, we say something about regulation 7. There was some suggestion in both *SB* and in CPIP/3006/2015 that regulation 7 informed the construction of regulation 4(2A). The tribunals in RJ's and GMcL's appeals applied regulation 7 and, in the light of the relative infrequency of their seizures, found that those claimants were not unable to carry out the relevant activities either at all or without supervision in accordance with regulation 4(2A), for over 50 per cent of the days. It is not clear whether and how the First-tier Tribunal applied regulation 7 in CS's case.

55. As is clear from our analysis, regulation 7 has no part to play in the construction of regulation 4(2A) and (4). Indeed Mr Komorowski did not rely on regulation 7 in response to these appeals. He correctly accepted that if, for the majority of days, a claimant is unable to carry out an activity safely or requires supervision to do so, then the relevant descriptor applies. On a correct analysis, as we have determined, that may be so even though the harmful event or the event which triggers the risk actually occurs on less than 50 per cent of the days.

Safety and supervision: overall conclusion

56. In conclusion, the meaning of "safely" in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision.

Safety and supervision: conclusions on the individual appeals

Daily living activities

RJ

57. RJ did not challenge the First-tier Tribunal's finding that daily living descriptor 1e applied. In the light of our conclusion as to the approach to safety and supervision, the finding was correct. We note in passing that the tribunal decided that descriptor 1f did not apply because of the infrequency of the seizures. It follows from our analysis that infrequency would not necessarily rule out the application of descriptor 1f but, as the tribunal found that on the facts RJ could prepare a meal with supervision, any such error was immaterial.

58. The First-tier Tribunal found that daily living descriptor 3d applied. RJ's mother and boyfriend had been trained to provide assistance to RJ while she was suffering from a seizure and "her seizures were relatively infrequent and most of the time this would take no more than 3.5 hours per week". The Secretary of State submitted that, in the light of the infrequency of seizures at the time, RJ could not be said to require assistance with therapy for the majority of weeks in the required period.

59. Our conclusion is that, on the basis of the First-tier Tribunal's uncontested findings of fact that (a) at the relevant time RJ's seizures occurred infrequently and (b) she needed assistance only on the occasions that she suffered a seizure, the tribunal was in error because that assistance was not required for over 50 per cent of days (regulation 7). Regulation 4(2A) is simply irrelevant to the application of any descriptor under activity 3 because on the case as presented to the First-tier Tribunal there was no suggestion that RJ needed supervision, prompting or assistance regarding medication or therapy nor that there was any other issue of risk in relation to medication or therapy in between the seizures.

60. The First-tier Tribunal awarded two points for washing and bathing on the basis that RJ needed both prompting to use the shower because of her reluctance to do so and supervision to use it to ensure her safety in the light of her unpredictable seizures. This is consistent with the correct approach to the need for supervision.

61. It follows that we dismiss RJ's appeal relating to daily living activities 1 and 4, and allow the Secretary of State's appeal on the ground relating to activity 3 only.

GMcL

62. The First-tier Tribunal erred in deciding that no supervision or assistance descriptors in the daily living activities applied because of the infrequency of the seizures. The tribunal failed to address safety and the need for supervision correctly, as explained in this decision. Moreover, the tribunal wrongly applied regulation 7 in deciding whether supervision or assistance was required.

CS

63. CS had to remove her cochlear implant processors in order to bathe. Without the implants she was profoundly deaf and, she said, would not have been aware of a fire, burglary or other unexpected emergency which would normally be detected by sound. Thus it was necessary for someone to be present in the house in order to alert her should such an event occur. On our analysis of regulation 4 and "supervision", these facts would indicate that she needed supervision to bathe.

64. The Secretary of State's original position had been that CS's ability to bathe was not limited by her physical condition (her deafness), but that the risk arose from the nature of the implants because they could not be used while bathing. He said that, if CS was right, it would mean that the same risk would apply to a profoundly deaf person who did not use implants and logically would mean that the risk would exist during other activities, not just bathing. Mr Komorowski abandoned this position during the hearing. Nonetheless, we consider that it is helpful briefly to explain why it was incorrect.

65. The starting point is the language of the Regulations. The question is whether a person can carry out the activity, with or without such assistance as is included in a particular descriptor, safely. There is nothing in the statutory language to suggest that a risk should be specific to the activity in question. There are many conditions which give rise to general risks and may, therefore, put a person at risk in performing a number of activities.

66. In *Secretary of State for Work and Pensions v IM (PIP)* [2015] UKUT 680 the claimant suffered from angioedema. He suffered frequent attacks which could be life threatening, often without warning, and would pass out so that someone else would need to administer is emergency medication. One of the issues on appeal was whether a person who cannot do anything safely without supervision scores points for supervision descriptors where the activity does not present a greater risk than when the person is doing nothing. Upper Tribunal Judge Jacobs addressed the issue as follows:

> "18. As I understand it, the judge is asking whether the risk that can be taken into account for preparing food or planning and following a journey must be a risk specifically related to that activity. The answer is: no. A risk that gives rise to a need for supervision need not be a risk that is unique to a particular activity or to the activities in Schedule 1 generally. It is sufficient if it is a general risk, even one that applies when the claimant is doing nothing, provided that the requirements of a particular descriptor are satisfied.
>
> 19. Take preparing food, Activity 1. The tribunal found that the claimant satisfied descriptor e, which carries 4 points:
>
> Needs supervision or assistance to either prepare or cook a simple meal.
>
> The issue for the tribunal was whether the claimant had a need for supervision when cooking. If he did, it did not matter whether that need was specifically related to that activity or was a general one that would affect other activities and even exist when the claimant was doing nothing at all. The descriptor was satisfied. This is so whether the other activities affected are within the scope of personal independence payment or not. Many conditions have an effect beyond the particular activities in Schedule 1 and, perhaps, generally. It would be anomalous to exclude them from the scope of personal independence payment.
>
> 20. The same applies for all activities, including planning and following journeys."

67. Before he abandoned his position, Mr Komorowski argued that this passage paid no regard to the words "in a manner" in regulation 4. However, at the hearing he accepted our observation that those words simply focus the assessment on the way in which a claimant performs the activity in question. In the light of that he abandoned the Secretary of State's position. Therefore we need say nothing more about it other than that, with respect, we agree with Judge Jacobs. That provides a complete answer to Mr Komorowski's abandoned objection.

68. It follows that CS's appeal succeeds on this ground. Despite our observation that, on the facts asserted by CS and summarised at [63] above, descriptor 4c would seem to apply, we do not re-make the decision. It is appropriate that a tribunal determines on the facts the nature and degree of risk to CS while bathing in accordance with the approach which we have set out. Moreover, as we conclude below, the appeal in relation to activity 10 must be determined by another tribunal in any event. It would over-complicate matters and possibly cause difficulties for the next First-tier Tribunal if this tribunal were to determine some aspects of the appeal and remit others.

Mobility activities

69. Regulation 4 applies to the assessment of a person's ability to carry out all activities and therefore our analysis of regulation 4(2A)(a) and 4(4)(a) applies to the assessment of a person's ability to carry out the mobility activities.

70. After the hearing of these appeals in the Upper Tribunal, another three-judge panel of the Upper Tribunal issued its decision in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC). That appeal concerned the approach to the mobility descriptors, particularly mobility activity 1. At [37] the Upper Tribunal said that, applying regulation 4(2A)(a), a person who cannot walk along a pavement or cross a road safely by himself because he is at risk of having a fit and so needs supervision to do so, is unable safely to follow a route and satisfies descriptor 1f. We consider that the same analysis applies to a claimant who is unable to follow a route safely because he or she is unaware of dangers due to a sensory or cognitive impairment.

71. The Upper Tribunal in *MH* also decided that mobility activity 2 will not apply unless a claimant is physically unable to stand and then move. The physical limitations may emanate from a mental health or a physical condition but not where descriptor 1e is satisfied by reason of the same mental condition ([51] and [52]).

72. We turn now to the individual appeals in relation to the mobility activities.

73. The First-tier Tribunal awarded four points to RJ under mobility descriptor 1b. In this appeal Mr Leigh submitted that, having found that there was a "genuine risk that she may at any time suffer a seizure", the tribunal erred in focussing on her loss of confidence in going out as a result of the risk rather than the risk itself. He argued that, just as RJ required supervision in order to prepare a meal, she required supervision when going outside in order to keep safe. That meant that mobility descriptor 1f applied. Alternatively, if she could not walk any distance safely because of the risk of a seizure, then that may mean that she could not move for any of the prescribed distances in mobility activity 2. In GMcL's case, the tribunal awarded four points for mobility descriptor 1b. The tribunal found that he did not go out alone for fear of suffering a seizure, but in the light of the infrequency of seizures the tribunal did not consider that he reasonably required the assistance of another person outdoors and so did not award points for descriptor 1f.

74. It follows from our analysis that, in the cases of RJ and GMcL, the tribunals erred in law in failing to consider whether mobility descriptor 1f applied as a result of the risk of suffering a seizure. No issue could arise on these facts as to mobility activity 2.

75. CS had claimed to satisfy mobility descriptor 1d but the First-tier Tribunal disagreed. The tribunal found as a fact that CS was able to undertake the activities involved in making familiar and unfamiliar journeys safely and without the assistance of another person. CS did not appeal against that aspect of the determination. Despite that, Mr Komorowski accepted that, if the claimants succeeded in their submissions as to regulation 4(2A) and 4(4)(a), CS's appeal as to mobility should also be remitted to the First-tier Tribunal.

76. Our view on the evidence before us, and in the light of the First-tier Tribunal's findings of fact in CS's case, is that mobility descriptors 1d or f are unlikely to have been applicable. When out, CS could wear her implants and so could hear. However, as we are remitting CS's appeal to the First-tier Tribunal, whether a mobility descriptor applies will depend upon that tribunal's findings of fact.

Other issues in CS's appeal

Reading

77. CS challenged the tribunal's decision not to award any points for activity 8 (reading) or activity 10 (making budgeting decisions).

78. Mr Fraser submitted that the tribunal erred in deciding that descriptor 8c did not apply. Schedule 1 defines "complex written information" as "more than one sentence of written or printed standard sized text in C's native language". Mr Fraser argued that the tribunal erred because it took into account that CS had successfully completed a level 2 diploma and had commenced a level 3 diploma in animal management. However it failed to take into account evidence sent to the tribunal shortly before the hearing to the effect that CS needed a reader for her exams because of poor reading ability and that she required 25 per cent extra time to complete her exams.

79. We are prepared to assume for present purposes that the tribunal omitted to take into account that evidence. The tribunal listed the evidence which it took into account, but did not include the above document. However, we do not consider that there was any possibility that this

material could have led to a different outcome. The document in question provided little detail. In contrast, the documents which the tribunal took into account included detailed assessments showing that CS required a reader in exams involving listening, not reading, in particular because of the difficulty lip-reading a stranger. In any event, difficulty in reading exam papers does not of itself evidence inability to read to the modest standard required by descriptor 8c. The evidence did not suggest that CS was unable to read to the required standard

80. Nevertheless, as we are remitting the appeal to the First-tier Tribunal to determine afresh, it is of course open to CS to provide that tribunal with further evidence and submissions in support of her claim to points under activity 8.

Budgeting

81. CS also appeals against the First-tier Tribunal's failure to award her points for descriptor 10b. The definition of "complex budgeting decisions" is

> "decisions involving –
>
> (a) calculating household and personal budgets;
>
> (b) managing and paying bills; and
>
> (c) planning future purchases;"

82. The relevant parts of the First-tier Tribunal's reasons on this activity were:

> "9. …Some of [CS]'s evidence the Tribunal did not find credible, in particular that a person at her numerical age, without a mental health condition is unable to offer the correct change or check her change when purchasing a ticket.
>
> …
>
> 20….[CS]'s academic achievements evidence a functional level of maths. She is able to use a bank card and check her account. [CS] is able to budget within the definition of this activity. No points scored."

83. We remind ourselves of the need to exercise considerable caution before interfering with a First-tier Tribunal's assessment of the credibility of a witness. However, in the present case the ATOS healthcare professional had assessed CS as being unable to calculate change (page 85 of the CS bundle). There is no indication in the tribunal's reasons as to what the tribunal made of that highly relevant evidence and why, in the light of it, it rejected the evidence of CS.

84. Moreover, even if CS was able to offer and check her change when making a purchase, that would not of itself demonstrate her ability to make all of the decisions listed in the definition of "complex budgeting decisions". Nor would the ability to use a bank card necessarily do so. In any event, we note that CS's evidence at the tribunal was that she could use a bank card with the help of her mother (page 129) so it is not clear on what evidential basis the tribunal found that CS could use a bank card without assistance. The tribunal's reasons for deciding that descriptor 10b did not apply were inadequate and, indeed, we are left with considerable doubt as to whether the tribunal had in mind the substance of the statutory definition. We should make it clear, however, that we are not making any finding that descriptor 10b did apply. CS did not suffer from a cognitive difficulty and it is not clear why her deafness would limit her ability in relation to budgeting decisions. That is a matter for the next tribunal to decide.

Disposal

85. All of the appeals and the cross-appeal are allowed. The cases are remitted to different tribunals for rehearing.