IN THE UPPER TRIBUNAL **Case No.** CPIP/1781/2019
ADMINISTRATIVE APPEALS CHAMBER

Before Deputy Upper Tribunal Judge Rowland

Decision: The claimant's appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with permission granted by Upper Tribunal Judge Jacobs, against a decision of the First-tier Tribunal dated 27 March 2019. By that decision, it dismissed the claimant's appeal against a decision of the Secretary of State, dated 28 November 2016, terminating the claimant's entitlement to disability living allowance (the middle rate of the care component and the lower rate of the mobility component) on 27 December 2016 and disallowing the claimant's claim for personal independence payment from 28 December 2016. Neither party has sought an oral hearing before the Upper Tribunal and I am satisfied that I can properly determine this appeal without one.

The facts and the procedural history

2. The claimant suffers from paranoid schizophrenia and, although that has been substantially controlled by medication for several years, has a history of anxiety arising from the condition and of problems coping with stress. Of relevance to the present appeal are difficulties he has with recognising signs that he may be suffering from a relapse and difficulties he has in engaging with people and, in particular, forming and maintaining relationships. These give rise to questions about the proper interpretation of regulation 4(2A) of, and Schedule 1 to, the Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377).

3. The case has a long history. The Secretary of State's decision of 28 November 2016, disallowing the claimant's claim for personal independence payment, was reconsidered, but not revised (although the reasoning was different), on 16 March 2017. An appeal was allowed on 31 October 2017, when the claimant was awarded the standard rate of the daily living component of personal independence payment from 28 December 2016, but that decision was set aside by the First-tier Tribunal when the Secretary of State applied for permission to appeal. Unconventionally, the decision was set aside under rule 37(1)(d) of the First-tier Tribunal (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) on the ground that inadequate reasons had been given for the decision and that that was a procedural irregularity, rather than under section 9(4)(c) of the Tribunals, Courts and Enforcement Act 2008. In any event, the claimant did not challenge the setting aside at the time – indeed, he appears not to have been offered an opportunity to object to the setting aside, either before or after it took effect – and the appeal was reheard by a differently-constituted tribunal and dismissed. This time it was the claimant who sought permission to appeal. He was given permission by the First-tier Tribunal and the Upper Tribunal allowed his appeal (on file CPIP/1512/2018) and remitted the case for a third hearing before the First-tier Tribunal. On 27 March 2019, the First-tier Tribunal dismissed the claimant's appeal for a second time. However, because the claimant had not wanted to attend another hearing, even by telephone, it decided the case without one. The claimant again sought permission to appeal. Upper Tribunal Judge Jacobs gave permission and the case

now comes before me. The Secretary of State, who supported the claimant's last appeal, opposes this one.

4. The Secretary of State's first decision awarded 2 points under daily living descriptor 9(b) and 4 points under mobility descriptor 1(b) and his reconsideration decision awarded no points at all. The decisions of the First-tier Tribunal have been more consistent with each other. Each has awarded 1 point under daily living activity 3(b), and 4 points under daily living activity 9(c). However, the first awarded 4 points under daily living activity 10(c), whereas the second and third awarded only 2 points under descriptor 10(b). None has awarded any points in respect of mobility activities. 8 points are required to qualify for the standard rate of a component, which is why the only decision favourable to the claimant has been the first decision of the First-tier Tribunal.

5. The claimant is represented by Mr Joe Power of Kirklees Law Centre, who also represented the claimant in his previous appeal to the Upper Tribunal. Mr Power's principal grounds of appeal relate to daily living activity 9 but he also challenges the First-tier Tribunal's decision as regards daily living activity 3. I am grateful to both him and the Secretary of State's representative for the clarity and economy of their submissions.

6. Mr Power has not reiterated a point that he made in the previous appeal to the Upper Tribunal, which was that the setting aside of the first decision of the First-tier Tribunal was unlawful so that that decision stood. I consider that he was right not to. The setting aside does seem to have been procedurally unfair even if it was appropriate to act under rule 37(1)(d) of the 2008 Rules (which I doubt) and, as Mr Power submitted in the previous appeal, had the First-tier Tribunal relied on section 9(4)(c) of the 2007 Act, rule 40(4) would have operated to provide the claimant with an express right to make representations. However, not only would I consider it to be inappropriate to take the point when the Upper Tribunal in its last decision in these proceedings expressly declined to do so but also, if the setting aside were held to be unlawful, it would be necessary for the First-tier Tribunal or the Upper Tribunal to consider the merits of the Secretary of State's grounds of appeal against the first of the First-tier Tribunal's decisions and, at first sight, they look fairly strong. Although expressed as a challenge to the First-tier Tribunal's reasons, the subtext was that the First-tier Tribunal had probably misconstrued the term "simple budgeting decisions" in descriptor 10(c). If the reasoning left open a significant possibility of such an error having been made, the decision was rightly set aside, even if in an incorrect manner. I note that no challenge was made to the second decision of the First-tier Tribunal in relation to activity 10 and none has been made on the present appeal either. I will therefore say no more about this point.

7. Activity 9 and its descriptors are set out in Part 2 of Schedule 1 to the 2013 Regulations –

Column 1 *Activity*	*Column 2* *Descriptors*	*Column 3* *Points*
9. Engaging with other people face to face.	a. Can engage with other people unaided.	0
	b. Needs prompting to be able to engage with other people.	2

c. Needs social support to be able to engage with other people.	4
d. Cannot engage with other people due to such engagement causing either – (i) overwhelming psychological distress to the claimant; or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	8

8. The First-tier Tribunal considered descriptor 9(d) but decided that neither head (i) nor head (ii) was satisfied. However, it awarded 4 points under descriptor 9(c). Having referred to the evidence, it said –

> "37. Whilst having regard to the medical evidence, [the claimant's] own descriptions of his limitations, both in his written submissions and the evidence he gave at the hearings suggest that he did not suffer from *overwhelming* psychological distress (our emphasis) i.e. such distress that would, for most of the time, prevent him from engaging with other people. He was able, most of the time, to manage his stress in social engagement by having support from his family. [The claimant] did engage with others including his occasional students; his family on a daily basis; the HCP (accompanied by his mother); the GP and other medical professionals; his friends; people at the local shop; a neighbour; people who approached him when he was out with his mother. He was able to engage at both Tribunal hearings (accompanied by his mother). [The claimant] reported that his condition was always at the back of his mind and he found it hard to feel relaxed in people's company (page 234). Whilst we accept that he found it hard to relax, this does not amount to *overwhelming* psychological distress as required by the descriptor.
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> 38. We were not satisfied that engagement with other people would cause [the claimant] to exhibit behaviour which would result in a substantial risk of harm to himself or others. The medical evidence reported that [the claimant] may frighten people with angry comments and be manic during an episode (page 120) but [the claimant's] condition had been stable since 2007 and therefore any such behaviour was not most of the time. We therefore were not satisfied that [the claimant] met the requirements of descriptor 9(d).
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> 39. We were however satisfied that for most of the time [the claimant] needed the support from his mother or other family members when engaging with people. [The claimant] was consistent throughout the bundle that he was more at ease when supported in social engagement. The medical evidence supported this need for support. The support is provided by his mother and sister and we were satisfied that in this case that support comprised social support as defined as they were well versed in his condition and his needs for support in engaging.
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> 40. We considered whether, with social support, [the claimant] could safely engage socially. We noted that he had a lower threshold for stress but also noted that [his] condition had been stable since 2007 and that he had been engaging socially throughout this time (albeit with the support of his family). We therefore considered that he could safely engage socially with the support of his family.
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> 41. We considered whether his social engagement, for most of the time, was to an acceptable standard. Relationships vary in duration (from fleeting to life-long), nature

> (acquaintanceship, business, friendship, partnership, sexual) and intensity. The descriptor is concerned with skills relevant to relationships in general rather than with a particular type of relationship. [The claimant] had established friendships and relationships with a variety of people, although we accepted medical evidence that he had not been able to sustain an intimate relationship (not defined). The descriptor refers to 'engaging with other people', and in our view, was wider and more general than the ability to sustain an intimate relationship (as commonly understood). The evidence of relationships he had established, suggested that, for most of the time, he was able, with social support, to engage with people to an acceptable standard."

9. In paragraphs 40 and 41, the First-tier Tribunal plainly had regulation 4(2A) and (4) of the 2013 Regulations in mind. Those paragraphs provide –

> "(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."
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> "(4) In this regulation—
> (a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
> (b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and
> (c) "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity."

10. Mr Power takes two main points in relation to activity 9 – firstly that the First-tier Tribunal erred in paragraph 37 of its reasoning on the question of overwhelming psychological distress and secondly that it erred in its application of regulation 4(2A). As I shall explain, these issues are linked.

Activity 9 – overwhelming psychological distress

11. As regards the first of those issues, Mr Power submits that the First-tier Tribunal erred in its consideration of head (i) of descriptor 9(d). He first argues that the First-tier Tribunal "got its analysis the wrong way round" because it was not correct to consider what level of distress would result in the claimant not engaging with other people and the tribunal should have considered what level of engagement with others would result in overwhelming distress. I do not accept that submission for two reasons. First, while it is obviously the case that the descriptor is expressed in terms of "engagement causing … overwhelming psychological distress", it is also expressed in terms of an inability to engage with other people "due to such engagement causing [such] distress" and it therefore equally obviously contemplates the possibility of such a person not engaging with other people so as to avoid the distress. There is an element of "the chicken and the egg – which came first?" about descriptor 9(d) but this may be a reflection of my second point. This is that the First-tier Tribunal's decision must be read as a whole and a tribunal is quite entitled to infer from the fact that a claimant actually carries out an activity reasonably often that he or she can do so without undue pain, distress or other discomfort. That is not a necessary inference, but it is a permissible one. The other side of the coin is that not carrying out an activity may be an

indication that a claimant would suffer undue pain, distress or other discomfort if the activity were to be carried out. Given a choice, most people, most of the time, avoid undue pain, distress or other discomfort, although people who have disabilities may be forced to balance the desirability of carrying out an exercise against pain, distress or other discomfort that will arise from it more often than other people do. Moreover, it seems to me that the legislation is predicated upon there being interaction, or a vicious circle, between the engagement with other people and the psychological distress – the engagement causes distress which in turn affects the quality of further engagement and raises the question whether it can be undertaken to the required standard. The reality, I suggest, is that if engaging, or the prospect of engaging, with other people is in practice accompanied by significant psychological distress (as that term is defined in Part 1 of Schedule 1 to the 2013 Regulations), the causal connections will be inferred.

12. Mr Power also submits that the First-tier Tribunal applied too narrow an interpretation of the word "overwhelming" and that it "should be interpreted as describing the impact on the sufferer over a long period of time". He points to evidence that the claimant's life had been, as he put it, "blighted" by his illness and he submits that the First-tier Tribunal failed to make adequate findings of fact on this issue. The Secretary of State, responded to that argument by referring to *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC); [2018] AACR 12 at [48], where a three-judge panel (of which, as it happens, I was a member) said that the threshold was a very high one, and by submitting that it had been held there that being anxious, worried or emotional was not sufficient to meet that threshold. Mr Power has replied to the effect that the approach in that case was not correct and submits in particular that that decision suggests that the distress must be a momentary bout of anxiety or panic which is very severe.

13. I do not consider that either party's analysis of that decision is entirely correct. What was actually said at [48] was –

> "48. Although it will be apparent that we also do not agree with all the reasoning in *DA* and *HL*, we nonetheless, consider that it was correctly decided in both cases that the claimants did not satisfy descriptors 1d and 1f as a result of their anxiety. In cases where claimants suffer from severe anxiety, descriptors 1d and 1f must be applied in the light of descriptors 1b and 1e with due regard being had to the use of the term "overwhelming psychological distress". Only if a claimant is suffering from overwhelming psychological distress will anxiety be a cause of the claimant being unable to follow the route of a journey. Although regulation 4(2A) applies so that the question is whether, if unaccompanied, the claimant can follow a route safely, to an acceptable standard, repeatedly and within a reasonable time period, the fact that a claimant suffers psychological distress that is less than overwhelming does not mean that the claimant is not following the route safely and to an acceptable standard. The threshold is a very high one. Thus, the facts that the claimant was "anxious" and "worried" in *DA* and was "emotional" in *HL* were not sufficient for those claimants to satisfy the terms of descriptors 1d or 1f because they could in fact complete journeys unaccompanied without being overwhelmed. In *RC*, further findings were required."

14. It is quite clear that, in the penultimate sentence, the three-judge panel was saying only that it had been correctly held in *DA v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 344 (AAC) and *HL v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 694 (AAC) that, *on the facts of the particular cases*, the respective claimants did not satisfy the threshold. It is also quite clear, from both the third sentence and the last sentence (because *RC v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 386

(AAC) was another case where the claimant suffered from anxiety), that the three-judge panel did not hold that anxiety, which as a matter of ordinary language means much the same as anxiousness even if the medical term is more tightly defined, could not amount to, or give rise to, overwhelming psychological distress.

15. Nor did the three-judge panel say, as Mr Power suggests, that such distress had to be due to a momentary bout of anxiety or panic and, if that was the impression conveyed, that is only due to the context in which the issue arose in that case. Chronic psychological distress caused by engaging with other people, or that would be caused by such engagement were it to be undertaken, could also be overwhelming. Indeed, the definition of "psychological distress" in Part 1 of Schedule 1 to the 2013 Regulations includes "distress related to an enduring mental health condition".

16. Furthermore, although the three-judge panel did say that the threshold was a very high one, that is a relative term and should not be regarded as a gloss on the statutory words. All that the three-judge panel's decision requires is that proper weight should be given to the statutory word "overwhelming". On the other hand, in the context of descriptor 9(d), it seems to me that distress that is sufficient to prevent a claimant from being able to engage with other people face-to-face must be considered to have been overwhelming – an analysis that might equally well apply to the descriptors that were in issue in *MH v Secretary of State for Work and Pensions* and, indeed, is perhaps hinted at in the paragraph of that decision cited above. Again, there is an element of circularity in this analysis, but I will explain below why it is particularly necessary in the context of activity 9.

17. For the moment, it is sufficient to note that it is only if equally rigorous approaches are taken to the word "cannot" and the phrase "overwhelming psychological distress" in the descriptors that the legislation works. The word "overwhelming" would therefore be tautologous if "cannot" were to be read literally. However, as regulation 4(2A) has the effect that the word "cannot" is not to be read too literally, at least in cases in which psychological distress or potentially harmful behaviour limit a claimant's ability to engage with other people, the word "overwhelming" serves to modify or explain that word as much as it describes the "distress". In other words, one cannot separate the issue of whether psychological distress is overwhelming from the question whether the claimant "cannot" carry out the relevant activity.

18. It is convenient also to mention here that Mr Power, rather tentatively, suggested that descriptor 9(d) should be considered without taking into account the support the claimant received from his family, which the First-tier Tribunal found to amount to "social support". This argument fails to have regard to the structure of activity 9. In its context, descriptor 9(d) must be read in contrast to the three earlier descriptors and so "cannot …" must be read as "cannot, even with prompting or social support, …".

Activity 9 – its relationship with regulation 4(2A)

19. I turn, then, to the relevance of regulation 4(2A), which Mr Power submits was inadequately considered by the First-tier Tribunal. The relationship between regulation 4(2A) and daily living activity 9 is not as simple as might appear at first sight. Paragraphs (2A) and (4) of regulation 4 were inserted into the 2013 Regulations by the Social Security (Personal Independence Payment) (Amendment) Regulations 2013 (SI 2013/455) and come into force at the same time as the original Regulations. As paragraph 8.2 of the

Explanatory Memorandum to the amending Regulations explains, it had been intended initially that what is now provided in regulation 4(2A) and (4) should be in guidance rather than the legislation, but there was a lot of pressure for it to be included in the Regulations and the Government gave way. However, perhaps because it was drafted separately and originally as guidance where linguistic precision may perhaps be less important, the language of regulation 4(2A) does not always fit well with the Schedule to which it must be applied. Its general purpose seems obvious enough – to make it clear that the descriptors are not to be construed more strictly than is reasonable – but there are difficulties in applying it literally to some descriptors. Indeed, it is arguable that regulation 4(2A) nearly always has to be given a less than literal interpretation, even though it is clear enough what it is intended to mean in broad terms.

20. The word "activity" in regulation 4(2A) obviously means the activity mentioned in a descriptor listed in Column 2 of Schedule 1, rather than the activity listed in Column 1. Although these are the same in relation to activity 9, since "engage with other people" must clearly be read as "engage with other people face to face", that is not always so. In daily living activity 1, for instance, the activity listed in column 1 is "preparing food", whereas the activities mentioned in the descriptors are, variously, preparing and cooking a simple meal, preparing a simple meal, cooking a simple meal, cooking a simple meal using a conventional oven and cooking a simple meal using a microwave.

21. Moreover, the word "can", in the clause "only if C can do so", cannot refer to the ability to satisfy a descriptor, since the descriptor is often in the form of "needs …", but must in such cases refer to the ability to carry out the activity mentioned in the descriptor. Where the descriptor is in the form "cannot …", the clause must refer to the inability to carry out the activity mentioned in the descriptor, rather than the ability to do so, (and the word "only" is then inappropriate). This is because those descriptors beginning "cannot …" must be construed consistently with the other descriptors, which, in activity 9, refer to help that the claimant needs so that he "can" do the same activity.

22. However, descriptor 9(d) is different from most of the other "cannot …" descriptors in Part 2 of Schedule 1 because it is limited in its scope by heads (i) and (ii). This has given rise to at least three decisions in which the Upper Tribunal has considered how regulation 4(2A) is to be applied in relation to activity 9.

23. In *Secretary of State for Work and Pensions v AM (PIP)* [2015] UKUT 215 (AAC), Upper Tribunal Judge Mark said –

> 12. The difficulty with this is that if the engagement is to be safe and to an acceptable standard, it is difficult to see how it would result in a substantial risk of harm to the claimant or another person. It is also difficult to see how it could apply to somebody who is unable to engage to an acceptable standard at all. There is no descriptor which awards points for such a total inability to engage as qualified by regulations 4 and 7. Even if the claimant in such a case suffered overwhelming psychological distress in attempting to engage to the extent to which he or she was capable of doing so, if the engagement of which that person was capable was not to an acceptable standard, they could never score points under this descriptor. On balance it appears to me that it is necessary to construe descriptor 9d as referring to such engagement as he may be capable of but for such overwhelming distress or the relevant risks from such behaviour.

24. It was to that decision that Upper Tribunal Judge Ovey was referring when she said in *AB v Secretary of State for Work and Pensions* [2017] UKUT 217 (AAC) –

> "39. Although Judge Mark did not express himself in this way, this seems to me to be in effect a decision that reg. 4(2A) does not apply to descriptor 9(d), which is satisfied if the claimant cannot do something rather than if the claimant can do it, whether or not with some form of help. In my view, that is the correct approach. …."

She held that regulation 4(2A) does not apply to any of the "cannot …" descriptors and she continued –

> "41. Returning to activity 9, as I said in paragraph 36 above, reg. 4(2A) works perfectly satisfactorily in relation to descriptors 9(a), 9(b) and 9(c), which are all concerned with what the claimant can do. It does not work satisfactorily when applied to descriptor 9(d) as a means of excluding a claimant from that descriptor. It will necessarily also have excluded the claimant from the other activity 9 descriptors, with the effect that such a claimant would not be catered for in relation to activity 9. In principle that does not seem to me to accord with the intention of the Regulations and as a matter of practical outcome, it would mean that effectively the same scores were achieved by a claimant who engages well and happily with other people, satisfying descriptor 9(a), and by a claimant whose interactions with others are inappropriate, who does not understand body language and who cannot establish relationships, but who, as a consequence of the application of reg. 4(2A), does not satisfy any point-scoring descriptor. There is no obvious justification for such an outcome.
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> 42. I recognise that even if reg. 4(2A) is put to one side, the claimant still has to show that the inability to engage with other people is caused by overwhelming psychological distress or risk-generating behaviour. It seems to me that descriptor 9(d) implicitly envisages that the claimant makes or has made efforts to engage with other people but those efforts have proved unsuccessful either because the claimant's consequent psychological distress is so great that he cannot continue, at least on more than 50% of the days in the required period and so as to achieve a reg. 4(2A) level, or because the claimant's behaviour gives rise to a substantial risk of harm. If the claimant is able to overcome the obstacles to engagement with the assistance of social support, even if he experiences psychological distress in doing so, he will satisfy descriptor 9(c). It is therefore relevant to ask what it is that prevents a claimant, if provided with social support, from engaging with other people to the standard required by reg. 4(2A)."

25. In the light of those cases, Upper Tribunal Judge Poole QC said in *SM v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 292 (AAC) –

> "12. In my opinion, and subject to the requirements of Regulation 7 dealt with in the next paragraph, descriptor 9d should be found to apply in any of the following situations:
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> 12.1 where engagement (in the way envisaged in the definition of "engage socially") causes overwhelming psychological distress to the claimant (9(d)(i));
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> 12.2 where engagement may cause the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person (9(d)(ii)). It was found in SSWP v AM [2015] UKUT 215 (AAC) that if a claimant is limiting their engagement with others substantially to avoid the risk of substantial harm, that may mean they cannot engage socially;
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> 12.3 where, even with social support, the claimant would not be able to engage with other people "safely" or "to an acceptable standard", because the claimant might not

> be able to engage in a manner unlikely to cause harm to the claimant or to another person, either during or after completion of the activity (Regulation 4(2A)). (*SSWP v AM* [2015 UKUT 215 (AAC) at paragraphs 12, 17-19; cp *AB v SSWP* [2017] UKUT 217 (AAC)).
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> 13. It is also necessary to bear in mind Regulation 7(1) of the PIP Regulations, which may have the effect of extending the situations in which descriptor 9d applies. Descriptor 9d should be chosen where any of the ways 9d may be satisfied set out in the previous paragraph apply for over 50% of the days in the required period (Regulation 7(1)((b)). But descriptor 9d must also be chosen even if, on some days, 9c applies rather than 9d, if either of the following are satisfied:
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> > 13.1 both 9c and 9d apply for over 50% of the days in the required period;
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> > 13.2 neither 9c nor 9d apply of themselves for over 50% of the days in the required period, but when the periods they apply are added together the result is over 50%, and 9d is satisfied for the same or more days in the required period than 9c."

26. Mr Power understandably relies on paragraph 12.3 of that decision, but I respectfully fail to see what paragraph 12.3 adds to paragraph 12.2 and, more importantly, what it could properly add to paragraphs 12.1 and 12.2.

27. Whatever else it may do, regulation 4(2A) cannot conceivably have the effect that a person whose ability to engage with other people with social support falls short of the standards imposed by that regulation does not fall within the scope of descriptor 9(c) but instead falls within the scope of descriptor 9(d), even if neither head (i) nor head (ii) of the latter descriptor applies. Neither Judge Mark in *Secretary of State for Work and Pensions v AM* nor Judge Ovey in *AB v Secretary of State for Work and Pensions (PIP)* went as far as suggesting that it can have that effect.

28. Judge Mark and Judge Ovey were both exercised by the logical possibility that regulation 4(2A) might have the effect that a claimant was excluded from each of descriptors 9(a), 9(b) and 9(c), despite also being excluded from descriptor 9(d) because neither head (i) not head (ii) of that descriptor applied to his or her case. Neither judge appears to have regarded that as an intended outcome, but I am not sure that either entirely solved the apparent dilemma.

29. For my part, it seems important to recognise that regulation 4(2A) does not impose absolute standards, save in regulation 4(2A)(d) in respect of which the definition of "reasonable time period" in regulation 4(4)(c) is more prescriptive. It is not entirely clear to me how appropriate regulation 4(2A)(d) is in the context of activity 9 but the point does not arise for specific determination on this appeal. As regards the other subparagraphs, there are elements of judgment involved and the reality of the position of the individual claimant concerned must, I suggest, be taken into account when considering what is safe, acceptable or reasonable. So too, must the terms of descriptor 9(d). Judge Mark suggested that that descriptor has to be taken to refer to "such engagement as [the claimant] may be capable of" without suffering "overwhelming psychological distress" or exhibiting "behaviour which would result in a substantial risk of harm to the claimant or another person". However, if that is so for descriptor 9(d), it must also be true for descriptors 9(a), 9(b) and 9(c). Moreover, I do not consider that this would be to disapply regulation 4(2A), as Judge Ovey suggested; rather it would be to describe how regulation

4(2A) is to be applied in the context of this activity. (This is, I accept, only a semantic difference, as is my suggesting how regulation 4(2) generally applies to "cannot …" descriptors (see paragraph 21 above), in preference to Judge Ovey's view that it does not apply to such descriptors at all.)

30. One has to bear in mind that activity 9 was included in the Regulations before regulation 4(2A) and might perhaps have been drafted differently had it been otherwise. As I have already said, there is an element of "the chicken and the egg" about descriptor 9(d). This is particularly so when it is read with regulation 4(2A), and it is that that gives rise to the difficulties identified by Judge Mark. In my view, the provisions can only be reconciled if it is accepted that heads (i) and (ii) affect the way in which regulation 4(2A) applies.

31. As I have also already said, a person cannot satisfy the terms of descriptor 9(d) and so qualify for 8 points in respect of activity 9 unless the reason for not being able to engage with other people to the appropriate standard is that either head (i) or head (ii) of that descriptor applies. Two important points flow from this. One, of course, is that the descriptor implies that there could be other reasons for a person not being able to engage with other people. The second, which is the key point as far as this appeal is concerned, is that, because such other reasons are irrelevant to the question whether descriptor 9(d) is satisfied, consideration of regulation 4(2A) in relation to those other reasons cannot assist a claimant to satisfy that descriptor. If regulation 4(2A) might have the effect that, even with social support, a claimant cannot be regarded as capable of engaging with other people for reasons other than those to be found in heads (i) and (ii) of descriptor 9(d), that can only be to the disadvantage of the claimant because, as Judge Mark and Judge Ovey both recognised, it has the effect that none of the descriptors in activity 9 can apply.

32. It is, in my judgment, inconceivable that it was intended that regulation 4(2A) should have the effect that a claimant, whose ability to engage with other people is limited by psychological distress but who derives assistance from social support, should be excluded from both descriptor 9(c) and descriptor 9(d). This is why, in a case where head (i) of descriptor 9(d) is in issue, I consider that one cannot separate the question whether psychological distress is overwhelming from the question whether the claimant "cannot" engage with other people. Distress that has the effect that a claimant cannot engage with other people, having regard to the factors mentioned in regulation 4(2A), must be regarded as overwhelming and, equally, distress that is not overwhelming cannot, if regulation 4(2A) is properly applied, have the effect that a claimant cannot engage with other people. A similar analysis theoretically applies when head (ii) of descriptor 9(d) is in issue but, as that head is more obviously consistent with regulation 4(2A)(a), there is not the same potential tension between the provisions. In either case, there can be no gap between descriptor 9(c) and descriptor (9d) into which a claimant may fall.

33. Because the First-tier Tribunal accepted that descriptor 9(c) applied to the claimant in this case and the Secretary of State does not challenge that finding, it is not strictly necessary for me to consider the circumstances in which none of the descriptors in activity 9 might apply and, perhaps partly for that reason but also because Mr Power only developed this part of his case in his reply to the Secretary of State's response to the appeal, I have not received argument from the Secretary of State on this issue. However, I have two observations.

34. The first is simply that the Secretary of State may not fully have addressed his mind to the possibility of none of the descriptors applying because, if he had, he might have included within descriptor 9(a), scoring no points, an inability to engage with other people for reasons other than those in descriptor 9(d).

35. My second observation is that, for most activities, a claimant's inability to carry out the activity demonstrates a need for someone else to do it for him or her and a descriptor giving a score of a certain number of points will cover all such cases. However, in relation of engagement with other people, the meaning of which can be derived from the definition of "engage socially" in Part 1 of Schedule 1 to the 2013 Regulations (see *Secretary of State for Work and Pensions v MM* [2019] UKSC 34; [2019] AACR 26 at [14]), one is concerned with a claimant's ability to interact with other people and to establish relationships. Social support can assist a person to do that but, if a person still cannot engage with other people satisfactorily even with social support, someone else engaging with people on the claimant's behalf is not a substitute because another person cannot build a relationship for the claimant. Personal independence payment is not concerned with assessing the relative severity of disablement in the abstract; it is concerned only with assessing the extent to which a person needs help from an aid, appliance or another person in order to carry out day-to-day activities. Clearly, descriptor 9(d) is based on a view that a claimant who cannot engage with other people because it causes him or her to suffer overwhelming psychological distress or to exhibit behaviour which would result in a substantial risk of harm to either the claimant or another person requires more help than a person who can engage with other people but needs prompting or social support to be able to do so. But the absence of any point-scoring descriptor for claimants unable to engage with other people for other reasons, if deliberate, may suggest that the view is taken that such claimants do not need any help with engaging with other people at all, presumably simply because such help would not actually be of any use to them. If that is right, it supports the approach taken by Judge Mark and suggests that, unless engaging with other people causes overwhelming psychological distress or the exhibition by the claimant of potentially harmful behaviour so that the claimant falls within descriptor 9(d), the claimant ought to be regarded as capable of "such engagement as he may be capable of" and regulation 4(2A) should be applied accordingly so that only those who are literally incapable of engaging with other people do not fall within any of descriptors 9(a), 9(b) or 9(c). It may be that this is how the legislation tends to be applied in practice and that the apparent gap in activity 9 does not cause problems because claimants who might fall into it score sufficient points under other activities for it not to matter.

36. In any event, the circumstances in which a person may be found not to be capable of engaging with other people other than where descriptor 9(d) applies must be taken to be limited. However, regulation 4(2A) has a role to play when it is being decided whether descriptor 9(d) does apply and also whether a person needs prompting or social support to be able to engage with other people so that either descriptor 9(b) or descriptor 9(c) applies rather than descriptor 9(a).

Activity 9 – the First-tier Tribunal's reasoning

37. The claimant in the present case is not in danger of falling into a gap. The issue is simply whether the First-tier Tribunal's reasoning, as set out in paragraph 8 above, is sufficient to show why descriptor 9(c) applied rather than descriptor 9(d).

38. For the reasons I have given, the First-tier Tribunal was right to link the question whether the psychological distress from which the claimant suffered was overwhelming with the question whether he could engage with other people if he had social support. It should have taken regulation 4(2A) into account as part of that exercise, rather than afterwards, because, if neither head (i) nor head (ii) applied, regulation 4(2A) could not assist the claimant and factors that were not due to the claimant's distress or potentially harmful behaviour would not be relevant. However, that error of analysis did not make any difference to the result in this case.

39. The judgements involved in finding that a person is precluded from engaging with other people due to overwhelming psychological distress or potentially harmful behaviour are such that the Upper Tribunal is unlikely to interfere with a decision of the First-tier Tribunal unless its reasoning suggests that it has either failed to apply the correct statutory test or has failed to have regard to the evidence.

40. What has concerned me most in this case is that, although the First-tier Tribunal clearly had regulation 4(2A)(a) and (b) in mind in paragraphs 40 and 41 of its statement of reasons, it did not specifically address regulation 4(2A)(c) and (d) which were potentially relevant to the question whether the psychological distress suffered by the claimant had the effect that he could not engage with other people. This, I think, is the point that Mr Power is making when he refers to the First-tier Tribunal's reasoning in paragraph 41. He accepts that activity 9 is concerned with developing relationships in general, citing *DV v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 244 (AAC), and that the issue of intimacy was not relevant. (The First-tier Tribunal may have thought it necessary to make that point lbecause the claimant had arguably raised the issue in a statement he provided to it.) However, he points out in his reply to the Secretary of State's response to the appeal that the evidence in paragraph 22 of the statement of reasons, to which the Secretary of State refers, was of "occasional" tutoring and of two friends whom he saw "occasionally". This is so, and the First-tier Tribunal acknowledged that the claimant's students were "occasional" in paragraph 37 of the statement of reasons. But the other instances of engaging with other people to which the First-tier Tribunal referred were not so described and, while some of them may have been occasional by their nature, it seems to me that the First-tier Tribunal was entitled to find that the overall effect of the evidence was to show that the claimant had been able to engage with other people repeatedly and within a reasonable time period at the material time. The question, though, is whether it erred in law in not making clear that it actually did so.

41. On balance, I am satisfied that its decision is not wrong in law. The overall tenor of the First-tier Tribunal's findings and reasoning is to the effect that the distress suffered by the claimant had not been sufficient to prevent him from engaging with other people to any significant extent. No specific point had been raised by the claimant as to his ability to engage with people repeatedly or within a reasonable time period and the evidence did not directly address those issues. The mere fact that engaging with some, or even all, other people is occasional does not necessarily mean that more frequent engagement is precluded by distress. The claimant's decision not to attend the hearing, even though the Upper Tribunal had indicated that there were gaps in the evidence, meant that the First-tier

Tribunal could not ask him questions to supplement the evidence. An adjournment to obtain further written evidence was unlikely to be productive or proportionate, given the history of the case, the evidence that the First-tier Tribunal already had and the opportunity the claimant had had to provide further evidence. Evidence is seldom perfect and, as is often the case, the First-tier Tribunal had to make do with the evidence available to it. Given that evidence, it seems most unlikely that consideration of regulation 4(2A)(c) and (d) could have affected the outcome. It would undoubtedly have been better had the First-tier Tribunal specifically referred to both regulation 4(2A)(c) and (d) in its statement of reasons but I am not persuaded that its failure to do so renders its decision wrong in law in this particular case.

42. For all these reasons, I am satisfied that the First-tier Tribunal did not err in law in its consideration of daily living activity 9.

Activity 3

43. The issue raised by Mr Power in relation to daily living activity 3 is a much narrower one. The Secretary of State does not dispute that activity 3 had to be considered in its form prior to amendment on 16 March 2017 and had to be considered in the light of *Secretary of State for Work and Pensions v LB (PIP)* [2016] UKUT 530 (AAC), upon which Mr Power relies. Not the least of the reasons for applying the legislation as in force at the time of the Secretary of State's decision is the prohibition in section 12(8)(b) of the Social Security Act 1998 on having regard to circumstances not obtaining at the date of the Secretary of State's decision, which must include a prohibition on having regard to subsequent legislative amendments unless they are plainly retrospective in their effect. Accordingly, it is unnecessary to consider Mr Power's submissions as to the legality of the Regulations making the amendments in 2017.

44. The relevant descriptors, as unamended, are as follows –

Column 1 *Activity*	*Column 2* *Descriptors*	*Column 3* *Points*
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

45. As to the continuing relevance of *LB*, I considered this in *KM v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 296 (AAC) at [6], [7] and [10] and, at [18] and [19], I analysed *LB* in the following terms –

> "18. First, it was held that descriptor 3(b)(ii) did not apply where a claimant required supervision, prompting or assistance to be able both to manage medication and to monitor a health condition, although it obviously applied where supervision, prompting or assistance was needed to enable a claimant either to manage medication or to monitor a health condition. Therefore, it being accepted that descriptors 3(c) to 3(f) could not apply in any case where the therapy amounted only to supervision, prompting or support satisfying descriptor 3(b)(ii), because that would have had the effect of making descriptor 3(b)(ii) otiose, it was held that one of descriptors 3(c) to 3(f) might apply where the therapy amounted to no more than taking medication and monitoring a health condition. ….
>
> 19. Secondly, it was held in *LB* that it did not matter as a point of statutory construction that there may have been an overlap between the descriptors within the activity, as long as the higher scoring descriptor described a greater need than the lower-scoring one, because regulation 7(1)(b) had the effect that only the higher scoring one counted. Therefore, it was held, managing therapy for the purposes of any of descriptors 3(c) to 3(f) might include actions that would amount to managing medication or monitoring a health condition for the purposes of descriptor 3(b)(ii). This part of the reasoning is more likely to be relevant to the present case. Thus, there is no reason why, say, prompting to enable the claimant to manage medication or to monitor a health condition should not be taken into account as part of prompting to enable her to manage therapy. This is consistent with the approach taken in relation to mobility activity 1 in a decision of a three-judge panel, *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC) at [45] - [46], given on the same day as *LB*. …."

46. The point made by Mr Power is that the fact that supervision, prompting or assistance falls within descriptor 3(b)(ii) does not mean that it cannot also fall within any of descriptors 3(c) to 3(f) and so those other descriptors may need to be considered even if descriptor 3(b)(ii) is found to be satisfied. I agree with that as a general proposition and it is consistent with the reasoning in *LB*. Mr Power then argues that, whereas supervision, prompting or assistance with managing medication is likely to be relatively transient, such help with monitoring a health condition might be continuous throughout the day, every day. That may be so, although I express no view as to whether it was so in this particular case, but it does not help resolve the questions of statutory construction considered in *LB*. As the Secretary of State submits, it was clearly held in *LB* that descriptors 3(c) to 3(f) could not apply where the "therapy" amounted only to supervision, prompting or assistance for *either* manging medication or monitoring a health condition. It could apply where such help was required with *both* managing medication and monitoring a health condition, as those

terms are defined in the legislation, but in this case the First-tier Tribunal held, consistently with the evidence, that the claimant did not need help with managing his medication and there was no evidence of a requirement for supervision, prompting or assistance to manage other therapy. I am therefore satisfied that the First-tier Tribunal did not err in law in its consideration of activity 3.

47. Accordingly, I am satisfied that this appeal must be dismissed.

Mark Rowland
29 May 2020