IN THE UPPER TRIBUNAL **Appeal No. CE/1632/2020**
(ADMINISTRATIVE APPEALS CHAMBER)

On Appeal from the First-tier Tribunal (Social Entitlement Chamber) SC233/19/00512

BETWEEN

Appellant CT

and

Respondent THE SECRETARY OF STATE FOR WORK AND PENSIONS

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided on consideration of the papers: 4 June 2021

DECISION

The decision of the First-tier Tribunal sitting at South Shields dated 17 June 2020 under file reference SC233/19/00512 involves an error on a point of law. The appeal against that decision is allowed and the decision of the Tribunal is set aside.

The matter is remitted to a differently constituted tribunal for a complete rehearing.

The new tribunal must consider and make relevant findings as to whether or not the claimant had limited capability for work-related activity from and including 21 March 2019. In so doing the new tribunal should in particular have regard to the submissions of the claimant dated 2 October 2020 and the submissions of the Secretary of State dated 16 April 2021.

The new Tribunal is bound by the decision of the Upper Tribunal in ***IM v Secretary of State for Work and Pensions (ESA)*** [2014] UKUT 412 (AAC).

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

REASONS

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal sitting at South Shields on 17 June 2020.

2. I shall refer to the appellant hereafter as "the claimant". The respondent is the Secretary of State for Work and Pensions. I shall refer to her hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 17 June 2020 as "the Tribunal" and the tribunal to which I am remitting the matter as "the new tribunal".

3. The claimant appealed against the decision of 26 June 2019 that she was to be treated as having limited capability for work, but not limited capability for work-related activity, from and including 21 March 2019 (the award of employment and support allowance having commenced from and including 20 December 2018). She was awarded 18 points, 9 points for descriptor 15(b) and 9 points for descriptor 16(b). The decision was reconsidered, but not revised, on 25 July 2019.

4. The matter came finally before the Tribunal (Judge A N Moss and Mr V Kavadas) on 17 June 2020 when the claimant appeared by telephone and gave oral evidence. The appeal was refused. The Tribunal found that the claimant was to be treated as having limited capability for work, but not limited capability for work-related activity, from and including 21 March 2019. She was awarded 15 points, 9 points for descriptor 15(b) and 6 points for descriptor 16(c).

5. On 24 February 2021 I acceded to the claimant's application and granted her permission to appeal. In my judgment the claimant had shown an arguable case that the Tribunal erred in point of law for the reasons set out in her grounds of appeal.

Moreover, it was appropriate that the Upper Tribunal should have the opportunity to rule definitively on the issues raised by the claimant's appeal, in particular the contention of the First-tier Tribunal that it was not bound by ***IM v Secretary of State for Work and Pensions (ESA)*** [2014] UKUT 412 (AAC) and subsequent Upper Tribunal decisions regarding the interpretation of Regulation 35 of the Employment and Support Regulations 2008 ("the 2008 Regulations").

6. I therefore granted the claimant's application for permission to the appeal against the decision of the Tribunal sitting at South Shields dated 17 June 2020.

7. On 16 April 2021 the Secretary of State provided submissions and supported the appeal. On 30 April 2021 the claimant replied briefly to those submissions.

8. Neither party has not sought an oral hearing and I do not consider that it is necessary to hold one in order to resolve the matter.

The Secretary of State's Submission

9. The Secretary of State's first point was that the Tribunal's decision notice of 17 June 2020 was somewhat confusing, as it stated that the claimant was not entitled to employment and support allowance because the Tribunal's award did not amount to sufficient points for her to pass the threshold for an award. However, as paragraphs 41 and 42 of its statement of reasons demonstrated, the Tribunal clearly made an award of 9 points for descriptor 15(b) and 6 points for descriptor 16(c). Thus the award was 15 points in total, which was sufficient for the claimant to pass the test of having limited capability for work and for an award of employment and support allowance. That was clearly a slip (the slip was the insertion of the word "not" in paragraph 3 of the decision notice), but other important points had been raised in the Tribunal's assessment of regulation 35 of the 2008 Regulations and the claimant's ability to partake in work-related activity.

10. In paragraphs 51-71 of the statement of reasons, the Tribunal explained what issues it had with the authorities on work-related ability i.e. ***IM*** and later Upper Tribunal decisions determining what was required of the Secretary of State and a Tribunal. Basically, the Tribunal decided that it disagreed with the higher authorities

and could not accept the list of work-related activity provided in its present form. The list supplied to the Tribunal was in its most recent version.

11. ***IM*** was decided by a three-judge panel on 18 September 2014. The decision required the Secretary of State to include evidence of all work-related activity in the claimant's area on the date of the decision, indicating what was the least and most demanding and to give a view as to what work-related activity she considered that the claimant was capable of undertaking without substantial risk. That information should be provided in all responses to the Tribunal involving appeals about whether the claimant had limited capability for work or limited capability for work-related activity. Although subsequent Upper Tribunal decisions had raised further issues regarding the list, the current one provided by the Secretary of State was generally deemed to be sufficient in its present form.

12. Thus, whilst the Tribunal might have raised some legitimate concerns in its assessment, the Secretary of State submitted that it was not for a First-Tier Tribunal to determine that it was not bound by the authority of ***IM*** and subsequent Upper Tribunal decisions.

13. She also questioned what the Tribunal had stated in paragraph 50 of the statement of reasons to the effect that the claimant was able to attend group therapy sessions "so there was no reason why she could not attend training courses". Aside from the fact that the Tribunal determined that the claimant had significant problems with social interaction and going out by the award which it made under Schedule 2, she questioned what it made of the decision in ***CSE/17/2014***, in which the Upper Tribunal Judge rejected any suggestion that the occupational therapy was of relevance on the grounds that it was medical treatment, which was not geared towards getting people back to work, unlike work-related activity.

14. As a final point, although the mere habitual consumption of alcohol did not inevitably mean that there would be a substantial risk under regulations 29 and 35 of the 2008 Regulations, it was necessary properly to assess the claimant's level of drinking. That was the conclusion in ***CE/1402/15*** (***SD v Secretary of State for Work***

and Pensions [2016] UKUT 100 (AAC), [2016] AACR 35) and earlier case law. Although that particular case was about drug abuse, it could equally apply to alcohol abuse and, with her references as to how to determine such abuse, Upper Tribunal Judge Knowles considered that mild substance abuse disorder would not bring that condition within the scope of regulations 19(5) or 29(2)(b) i.e. it would not be a specific disease or bodily or mental disablement, but it would if it were moderate or severe. In the instant case, the Tribunal did not ask the right questions, with the result that it did not establish whether the claimant's alcohol dependency was sufficient to bring her within the scope of the 2008 Regulations.

15. The Secretary of State therefore submitted that further findings of fact were necessary in order to determine the case correctly, the issue being whether the claimant satisfied the work capability assessment.

16. Accordingly she requested that the Upper Tribunal set aside the Tribunal's decision and remit the case to a new tribunal with appropriate directions for its determination.

<u>The Claimant's Submission</u>

17. The claimant agreed with the Secretary of State's submissions and the identified errors of law, but asked for the decision to be remade rather than for the case to be remitted so as to obviate the need for another hearing.

<u>Paragraph 50</u>

18. In paragraph 50 the Tribunal stated that

> "[The claimant] has been able to attend group therapy sessions so there was no reason why she could not attend training courses".

19. However, in ***CSE/17/2014*** Upper Tribunal Judge Bano stated that

> "7. The Secretary of State's representative has sought to uphold the tribunal's reasoning on the following basis:

> "… Although it is acknowledged that the claimant was "assisted" by occupational therapists whilst carrying out her tasks, it should be remembered that WRA is tailored to suit each claimant, and in view of this, the activities mentioned could still be accepted as WRA which suited the needs of the appellant. I therefore submit that the tribunal did not err in law by using the attendance at the Psychiatric Unit as evidence of the claimant's ability to cope with WRA and did not misinterpret the meaning of WRA."

8. Although ESA work-related activity and a course of therapeutic occupational therapy in a psychiatric hospital might be said to share the aim of enabling people to undertake or resume paid employment, in my view in most cases any similarities between those two forms of intervention end there. Treatment in a psychiatric hospital is designed to overcome the often devastating effects of mental illness. Its purpose is therapeutic and it is carried out by qualified mental health professionals in a way which is designed to improve and not to harm the health of the patient. Work-related activity, on the other hand, is designed to overcome obstacles to gaining employment for people who may have no relevant health problems, and employment advisers are not required to have mental health qualifications or experience. I therefore reject the argument that the tribunal was entitled to find that work-related activity posed no substantial risk of harm to the claimant on the basis that she was already receiving occupational therapy in hospital.

9. A crucial consideration in this context is the regime of sanctions underpinning work-related activity, as explained by Judge Gray in *MT v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 0545 (AAC)-see paragraph 23. In assessing the risks to the mental health of a claimant from a finding that a claimant does not have limited capability for work-related activity, a tribunal may therefore have to consider the possible effects on a claimant of stress resulting from the element of compulsion which the 'conditionality' of work-related activity entails. Under regulation 3(4) of the Employment and Support Allowance Regulations 2011, a requirement of work-related activity must be reasonable, but as Judge Gray pointed out, there may be no opportunity for a claimant to challenge such a requirement until after a sanction has been imposed. For the reasons given by Judge Jacobs in relation to regulation 29 of the ESA regulations in *CH v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 0011 (AAC), any possible benefit to a claimant from engaging in work-related activity is irrelevant."

20. I accept the Secretary of State's submission in respect of paragraph 50 in the light of the decision of Judge Bano, to which the Tribunal did not refer.

21. The Tribunal was therefore wrong in law to have stated that the claimant was able to attend group therapy sessions "so there was no reason why she could not attend training courses".

SD

22. In paragraph 20 of the instant case the Tribunal said that

> "Medical records do not support a diagnosis of alcohol dependency. It is not one of the conditions referred to in the limited medical evidence supplied … The Tribunal decided the claimant is not alcohol dependent. She drinks too much, but that is not the same as alcohol dependency."

23. By contrast, in ***SD*** Upper Tribunal Judge Knowles QC stated that

> "30. The criteria for diagnosing alcohol dependence set out in paragraph 45 of JG relied on the factors listed in the category of Substance Dependence contained in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM IV). The diagnostic criteria are as follows:
>
> > *"A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same twelve month period:*
> >
> > *i) tolerance as defined by either of the following: (a) a need for markedly increased amounts of the substance to achieve intoxication or desired effect or (b) markedly diminished effect with continued use of the same amount of the substance;*
> >
> > *ii) withdrawal as manifested by either of the following: (a) the characteristic withdrawal syndrome for the substance or (b) the same (or a closely related substance) is taken to relieve or avoid withdrawal symptoms;*

iii) the substance is often taken in larger amounts over a longer period than was intended;

iv) there is a persistent desire or unsuccessful efforts to cut down or control substance use;

v) a great deal of time is spent in activities necessary to obtain the substance (eg visiting multiple doctors or driving long distances), use the substance (eg. chain-smoking), or recover from its effects;

vi) important social, occupational or recreational activities are given up or reduced because of substance use;

vii) the substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problems that is likely to have been caused or exacerbated by the substance (eg. current cocaine use despite recognition of cocaine-induced depression or continued drinking despite recognition that an ulcer was made worse by alcohol consumption).”

31. I note that the factors listed in the category of Substance Dependence in DSM-IV are not alcohol specific [see (vii) above for example] and thus, as a matter of logic, they must apply to other substances such as heroin and cocaine. I find that the constellation of markers set out in paragraph 45 is therefore equally applicable to drug dependence (such as that probably seen in this particular case).

32. The Respondent states that he “*has no argument with JG about how drug dependency may be determined and how it might constitute a bodily or mental disablement by way of reference to the descriptors of Schedule 2 of the ESA Regs 2008 and regulation 29(2)(b).*” I interpret this submission as support for my conclusion that the factors listed in paragraph 45 of JG by reference to DSM-IV are applicable to drug as well as alcohol dependence.

33. If I am wrong about the above, the Respondent has made submissions about the changes wrought by DSM-5 to the clinical criteria for substance dependence. However he has not said how these changes might impact upon the finding in JG that a diagnosis of alcohol dependence – and I suggest, drug dependence – brought that condition within rule 19(5) – and by extension, Rule 29(2)(b) - of the Regulations.

34. DSM-IV has now been superseded by DSM-5 with effect from 18 May 2013. In DSM-5, substance related/addictive

disorders are divided into two groups: substance use disorders and substance induced disorders.

35. Substance use disorder in DSM-5 combines the DSM-IV categories of substance abuse and substance dependence into a single disorder measured on a spectrum from mild to severe. Each specific substance is addressed as a separate use disorder such as alcohol use disorder, opioid use disorder or stimulant use disorder. Whereas a diagnosis of substance abuse previously required only one symptom to be present in the previous twelve months, mild substance use disorder in DSM-5 requires two to three symptoms from a list of 11. In DSM-IV the distinction between abuse and dependence was based on the concept of abuse as a mild or early phase and dependence as the more severe manifestation. The revised criterion of substance use disorder is said to better match the symptoms that patients experience.

36. Substance induced disorders include intoxication, withdrawal, substance induced psychosis and substance induced neuro-cognitive disorders.

37. The diagnostic criteria for opioid use disorder (heroin being an opioid) are as follows:

> "*a problematic pattern of opioid use leading to clinically significant impairment or distress as manifested by at least two of the following occurring within a 12 month period:*
>
> *i) opioids are often taken in larger amounts or over a longer period than was intended;*
>
> *ii) a persistent desire or unsuccessful attempts to cut down or control opiate use;*
>
> *iii) a great deal of time is spent in activities necessary to obtain the opioid, use the opioid or recover from its effects;*
>
> *iv) craving or a strong desire to use opioids;*
>
> *v) recurrent opioid use resulting in a failure to fulfil major role obligations at work, school or home;*
>
> *vi) continued opioid use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the use of opioids;*

> *vii) important social, occupational or recreational activities are given up or their engagement is reduced because of opioid use;*
>
> *viii) recurrent opioid use in situations in which it is physically hazardous;*
>
> *ix) continued opioid use despite knowledge of having a persistent or recurrent physical of psychological problem that is likely to have been caused or exacerbated by the substance;*
>
> *x) tolerance as defined by either a need for markedly increased amounts of opioids to achieve intoxication/desired effect or a markedly diminished effect with continued use of the same amount of opioid;*
>
> *xi) and withdrawal as manifested by either the characteristic opioid withdrawal syndrome or opioids (or a closely related substance) being taken to relieve or avoid withdrawal symptoms."*

38. Severity is specified as follows: mild substance use disorder is the presence of 2-3 of the above symptoms; moderate is the presence of 4-5 symptoms; and severe is the presence of six or more symptoms.

39. The category of opioid induced disorders includes opioid intoxication, opioid withdrawal; opioid induced anxiety disorder and opioid induced depressive disorder.

40. JG concluded that a diagnosis of alcohol dependence or alcohol dependency syndrome plainly brought that condition within regulation 19(5) of the Regulations [paragraph 48]. The position now is rather more complex given the adjustments made by DSM-5 to the category of substance related disorders.

41. I have come to the conclusion that a diagnosis of mild substance abuse disorder in accordance with DSM-5 would not bring that condition within regulation 19(5) or 29(2)(b) of the Regulations. I consider that, in order to fall within the ambit of the relevant regulations, the substance abuse disorder must fall within either the moderate or severe categories. My reasons for so concluding are as follows.

42. A DSM-IV diagnosis of alcohol dependency required three or more symptoms from the list occurring at any time in the same 12 month period. It is clear that all of the factors listed in

> DSM-IV are incorporated into the factors for substance abuse disorder listed in paragraph 37. The presence of three or more factors in a twelve month period from the DSM-5 list would establish a diagnosis of mild substance use disorder. However a DSM-5 diagnosis of substance use disorder equivalent to DSM-IV substance dependency requires, in my view, the presence of, at least 4-5 symptoms from the eleven listed, thus bringing it within the moderately severe category of substance use disorder. This is because the distinction between abuse and dependence In DSM-IV was based on the concept of substance abuse as a mild or early phase and substance dependence as the more severe manifestation.
>
> 43. In conclusion, my comments about the changes occasioned by DSM-5 to the reasoning in JG with respect to substance dependence support the reasoning in JG by which I am bound."

24. Again I accept the Secretary of State's submission in, relation to the treatment of alcohol. In the instant case, the Tribunal did not ask the right questions, with the result that it did not establish whether the claimant's alcohol dependency was sufficient to bring her within the scope of the 2008 Regulations.

25. Mild substance abuse disorder would not bring that condition within the scope of the 2008 Regulations, but it would if it were moderate or severe. It is therefore necessary properly to assess the claimant's level of drinking in accordance with the criteria set out in the decision in ***SD***.

26. For the reasons identified by the Secretary of State in relation to paragraph 50 and the decision in ***SD***, I am satisfied that the Tribunal made errors of law which were material to the decision and for that reason the decision of the Tribunal should be set aside.

27. Although the claimant submitted that the decision should be remade rather than remitted for further rehearing, no substantive reasons were advanced in support of that submission

28. This is very much a fact-sensitive case and I am satisfied that it is proper to remit the case to be reheard rather than myself remaking the decision without the benefit of the claimant having the opportunity to give evidence.

Precedent

29. So far so uncontroversial: the case would not otherwise call for report or comment, turning as it does on its own particular facts.

30. However, the Tribunal also stated in paragraphs 51 to 71 of the statement of reasons

> "51. The Upper Tribunal decision of IM required the Secretary of State to produce a list of the least and most demanding types of Work Related Activity in a claimant's area. It was not stated what the claimant's area was or how it was to be decided. It was also clear from IM this list was wholly objective in nature. It could be nothing else. That is, it is of general application and applies to every claimant irrespective of their circumstances. IM assumed there would be evidence of ranked work related activities in the DWP's possession. There was nothing within IM which suggested such a list did in fact exist. Such a list would have been provided if it had existed. Further how any of the work related activities were or could have been categorised as least or more demanding is not explained in IM or subsequent decision.
>
> 52. If the Secretary of State was to have such an objective list then there would have to be clear facts, evidence and research to explain how work related activities were assessed as more or least demanding. Also that evidence must show why each activity could objectively be classified as least or more demanding. It would also have to show why the particular circumstances of the individual were irrelevant to their ranking. No such evidence was disclosed in IM. No such facts, evidence or research has been provided in any subsequent Upper Tribunal decisions involving consideration of the list produced by the Secretary of State. All that has been provided in subsequent cases is a list seemingly created as a direct consequence of IM rather than as a consequence of fact based research and evidence independent of IM.
>
> 53. This history of the Upper Tribunal decision shoes the contents of the list has changed over time. The lists have been criticised in these decisions. What the subsequent cases in effect reveal is the immense difficulty the Secretary of State has in justifying the existence let alone content of this list.
>
> 54. What this suggests is the lists were created as a consequence of IM and not the result of fact and evidence based reasoned research.

55. Decisions since IM have criticised the lists. But the criticisms are based on the acceptance the existence of and content of the list being credible and reliable.

56. Any analysis of the activities categorised as least and most demanding on pages 93 and 94 clearly indicates there is no obvious rational logical reasoned basis for any of the activities being placed in any of the groups they are in. Why, for example, is getting up and dressed by a certain time each day and keeping a log to chart the progress regarded as easy but finding out possible transport routes, trying them out and keeping a log to chart progress medium, but looking at the expert patient programme on line and list reasons why it could benefit you regarded as hard. Why is registering with and/or visiting the local library medium difficulty but making a list of hobbies and things you enjoy doing or things you used to enjoy doing easy.

57. It is impossible to discern any logical or evidence based reason for the categorisation of any the activities let alone an explanation as to why one is more or less demanding than another. In essence, the list of ranked activities makes absolutely no sense.

58. This lack of rationality to the list is further compounded when real life enters the equation. Whether something is more or less demanding varies from one individual to another. It can be nothing else. Everyday life clearly shows what one person might find difficult might be easy to another and vice versa. The same applies in relation to the Work Related Activity list. Whether an activity is going to be more or less demanding will be entirely dependent upon the circumstances of the individual. Yet the Secretary of State and Tribunal according to IM and other cases have no regard to reality. 2 generalised examples may help make the point. There will be countless other examples which will easily show how impossible it is to objectively explain why one activity is more or less onerous than another.

59. For example, take somebody who has been in work for 30 years, doing a responsible job who then has a breakdown as a consequence of bullying and stress at work. Experience indicates the type of mental health problem they are likely to have will give them difficulties in dealing with other people. Therefore, asking that person to get on a bus to go into town on their own could be very difficult. However if you ask them to sit down and write out a CV the chances are they would have no problem in doing so.

60. On the other hand, somebody who has not worked in many years, if ever, has poor educational standards, might have difficulty with dyslexia and low mood is likely to have significant problems creating a CB. They will have no experience or skills to rely on. Creating a CV is not something they are used to. It is likely to be a daunting task. However, they may have very little problem in getting on a bus and going into town.

61. Further, it is difficult to see why some of the activities have any relevance at all to the application of Regulation 35. Somebody will be referred to English for Speakers of Other Languages because their first language is not English. That is not something that arises out of any physical or mental condition. It arises because of where they lived. Further, someone whose English is their first language would find and [sic] ESOL course not only easy but pointless. Why is learning a new language easy?

62. Having to attend a basic skills course in English and maths is likely to be because of poor schooling rather than any physical or mental impairment. Further, for example, someone who had been at work in an office for 30 years is probably going to find it insulting to be asked to attend a basic English and maths course because they do not need it and it would be easy.

63. As a consequence, what the Secretary of State and, the Tribunal who is standing in the shoes of the Secretary of State, is being asked to do, is impossible. The Tribunal is being asked to assess an individual against a wholly objective list of ranked activities that is frankly impossible to evidentially and factually justify.

64. There is nothing within the legislation which requires the Secretary of State to create such an objective list. It can never have been the intention of Parliament to create a situation whereby entitlement to the benefit is to be determined on the basis of an artificially created and unjustifiable ranked list of objective activities which have no factual evidence or research basis.

65. Further, it also misses the point of Work Related Activity as defined in Section 13(7).

66. It is perfectly clear from the information at page 95-97, the first stage will be for the Department to find out what the barriers to work are for that person taking into account the individual's circumstances. The difficulties associated with that

individual in being able to apply for work and keep it or put them in a position where they can begin to apply for work will come out at the discussion at the Job Centre. It is not going to be a question of asking somebody to do something that is more or less demanding. It is going to be a question of trying to identify what the problems are and focusing the Work Related Activity on that issue. For example if they have difficulties with reading and writing the Work Related Activity will relate to that. There will be no point in asking that person to get a bus into town, for example, when they can do that anyway. There would be no point in sending them on an ESOL course if English is their first language.
67. Consequently, it means the concept of an objective list of least and most demanding Work Related Activity if fundamentally flawed. It is meaningless. Neither the Secretary of State nor the Tribunal can assess an individual against such activities because it is impossible to objectively place any of the activities in any category. All that can said [sic] is they are an activity. Relevant ones will be selected for that individual depending on that person's circumstances. It cannot be and is not a question of one activity being objectively more or less demanding than another.

68. As a consequence, the Tribunal, and Secretary of State, is being asked to apply Regulation 35 in a way which is impossible. Therefore, the Tribunal does not consider itself bound by IM and subsequent Upper Tribunal decisions regarding the interpretation of Regulation 35.

69. Further, as it is impossible for there to be an objective list of least and most demanding activities the appellant cannot be assessed against such a list. What the Tribunal is being asked to do is impossible.

70. What is going to happen is that the appellant will be interviewed at the Job Centre, the barriers to work assessed and appropriate activities recommended. Consideration will be given during the interview to a work placement or experience depending on their circumstances. The jobcentre will know what activities they have in their area and will be able to apply them to the needs of the person before them.

71. As a consequence of the above and the absence of any medical evidence to explain why being asked to undertake Work Related Activities would create a substantial risk to her health or to somebody else's the Tribunal concludes Regulation 35 has not been satisfied."

31. The statement that the First-tier Tribunal is not bound by ***IM*** and other decisions of the Upper Tribunal is entirely erroneous. The Upper Tribunal's rulings on points of law are binding on the First-tier Tribunal. They may be distinguished in the appropriate case, but they cannot be ignored. It is neither appropriate nor acceptable for the First-tier Tribunal to state that it is not bound by ***IM*** and subsequent Upper Tribunal decisions regarding the interpretation of Regulation 35, or indeed by any other Upper Tribunal decisions with which it does not happen to agree.

32. S.3(5) of the Tribunals, Courts and Enforcement Act 2007 provides that:

> "The Upper Tribunal is to be a superior court of record."

33. The late Laws LJ explained in ***R(Cart) v Upper Tribunal*** [2009] EWHC 3052 (Admin), [2012] 2 WLR 1012 at [75] (with emphasis added) that

> "The second postscript recalls my observation (paragraph 41) that the expression "superior court of record" denotes characteristics which Parliament by means of ss.1(3) and 3(5) may be taken to have attributed to SIAC and UT. One such characteristic is that SIAC and UT will be presumed to act within their powers until the contrary is shown (see the discussion above of the first distinction). ***A second attribute of a superior court of record appears to be that its decisions have effect as precedents for lower tribunals.*** This is no doubt because of the record it keeps. (Originally, a court of record was one whose acts and proceedings were enrolled in parchment.) Thirdly, such a court has power to punish for contempt: see for example *Ex parte Fernandez* (1861) 10 CB (NS) 28 *per* Byles J at 57-58. Thus my conclusion that ss.1(3) and 3(5) do not have effect to exclude the supervisory jurisdiction by no means deprives the subsections of content."

34. That position was reiterated by the Senior President of Tribunals, Sir Ernest Ryder, in **BPP Holdings v. HMRC** [2016] EWCA Civ 121, [2016] 1 WLR 1915 at [25] (again with emphasis added)

> "It is also worth recollecting that although the UT's appellate jurisdiction derives from the power under section 11 of the Tribunals, Courts and Enforcement Act 2007 ['TCEA 2007'] to hear an appeal on any point of law arising out of a decision

> made by the FtT, by section 25(1)(a) of that Act the UT has in England and Wales the same powers, rights, privileges and authority as the High Court. ***Furthermore, by section 3(5) of that Act the UT is a superior court of record. The UT's rulings on points of law are binding on the FtT*** and it is both the practice of and a power inherent in that court to give appropriate guidance. If there is any doubt about that it is resolved by reference to section 25(3)(b) TCEA 2007 which expressly states that the powers, rights, privileges and authority conferred by section 25(1) shall not be taken "to be limited by anything in the Tribunal Procedure Rules other than an express limitation". There is no relevant express limitation."

35. Those statements should not occasion any surprise. As Lord Eldon LC said as long ago as 1818 in ***Gordon v. Marjoribanks*** (1818) 6 Dow 87 at p.112 about the doctrine of precedent

> "As to an observation made with respect to the case of the Feoffees of Heriot's Hospital, that the judgment of this House in that case was one to be obeyed, not to be followed, I must take the liberty to say that this would be a course which, if pursued, would call for some attention. For, although every Court may say, that if a case varies in facts and circumstances, it is at liberty to found upon these different circumstances; I do not recollect that it ever fell from a Judge in this country, that he would obey the judgment of this House in the particular case, but not follow it in others. That is not a doctrine to which we are accustomed."

36. Furthermore, as Lord Hailsham LC said in ***Cassell & Co Ltd v. Broome*** [1972] AC 1027 at p.1054

> "Moreover, it is necessary to say something of the direction to judges of first instance to ignore *Rookes v. Barnard* as "unworkable". As will be seen when I come to examine *Rookes v. Barnard* in the latter part of this opinion, I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided "*per incuriam*" or "unworkable" they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and if it were open to the Court of Appeal to do so it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to

> take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.
>
> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Company* [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom."

37. To the same effect is the speech of Lord Simon of Glaisdale in ***Miliangos v. George Frank (Textiles) Ltd*** [1976] AC 443 at p. 472

> "Since the Court of Appeal is absolutely bound by a decision of the House of Lords ... it would be surprising if the meaning and application of the maxim 'cessante ratione' were really that accepted by the majority of the Court of Appeal in ***Schorsch Meier*** ... For as such it would enable any court in the land to disclaim any authority of any higher court on the ground that the reason which had led to such higher court's formulation of the rule of law was no longer relevant. A rule rooted in history could be reversed because history is the bunk of the past. Indeed, taken literally, there is no ground for limiting 'lex' to judge-made law … It would be easy to compile a bulky anthology of authoritative citations to show that those courts of law which are bound by the rule of precedent are not free to disregard an established rule of law because they conceive that another of their own devising might be more reasonable …"

38. Lord Cross of Chelsea spoke to the same effect in ***Miliangos*** at p. 496

> "It is not for any inferior court - be it a county court or a division of the Court of Appeal presided over by Lord Denning - to review decisions of this House. Such a review can only be undertaken by this House itself under the declaration of 1966."

39. In summary, and to paraphrase Lord Hailsham, when the First-tier Tribunal in the instant case described the decision in ***IM*** as being unworkable, it really only meant that it did not agree with it. It is not, however, open to the First-tier Tribunal to give gratuitous advice to judges of first instance to ignore decisions of the Upper Tribunal in this way. Benefit claimants would not know where they stood. On the view of precedent adopted by the First-tier Tribunal, none could reach finality short of the Court of Appeal and, in the meantime, the task of their professional advisers of advising them as to their rights would be impossible. Whatever the merits, chaos would reign until the dispute was settled by the Court of Appeal, and, in legal matters, particularly one such as this, some degree of certainty is at least as valuable a part of justice as perfection.

40. The new Tribunal is therefore bound by the decision of the Upper Tribunal in ***IM v Secretary of State for Work and Pensions (ESA)*** [2014] UKUT 412 (AAC). So is every other First-tier Tribunal.

Conclusion

41. In the circumstances I do not need to consider whether the Tribunal made any other errors of law.

42. I therefore allow the appeal and set aside the decision of the Tribunal. I remit the matter to a new tribunal which should conduct a complete rehearing of the matter.

43. I must stress that the fact that this appeal to the Upper Tribunal has succeeded should not be taken as any indication as to the outcome of the rehearing by the new tribunal. It is quite possible that the new tribunal may end up effectively coming to the same decision as the previous Tribunal, namely that the claimant had limited

capability for work, but not limited capability for work-related activity, from and including 21 March 2019.

44. Alternatively, it is possible that the new tribunal might take a different view of the facts from that of the Tribunal and reach the conclusion that in fact the claimant had limited capability for work-related activity from and including 21 March 2019.

45. It is for the new tribunal itself to decide which of these alternative options open to it applies, depending on the view it takes of the facts and providing it makes proper findings of fact and gives adequate reasons. It would not be appropriate for me to express any opinion either way on the merits of the appeal.

46. The following directions apply to the hearing before the new tribunal:

(1) The new tribunal should not involve any member who was a member of the Tribunal involved in the hearing of the appeal.

(2) The new tribunal must consider and make relevant findings as to whether or not the claimant had limited capability for work-related activity from and including 21 March 2019. In so doing the new tribunal should in particular have regard to the submissions of the claimant dated 2 October 2020 and the submissions of the Secretary of State dated 16 April 2021.

(3) The new Tribunal is bound by the decision of the Upper Tribunal in ***IM v Secretary of State for Work and Pensions (ESA)*** [2014] UKUT 412 (AAC).

Mark West
Judge of the Upper Tribunal

Signed on the original on 4 June 2021