IN THE UPPER TRIBUNAL **Appeal No.** CSE/197/2020
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

KN

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 24 June 2021

Decided after remote oral hearing on 16 March 2021

Representation:

Appellant: The appellant was represented by Jane Smith, welfare rights officer.

Respondent: The respondent was represented by Usman Tariq, advocate, instructed by the Office of the Advocate General.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 10 January 2020 under case number SC100/19/06633 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal, at an oral hearing.

REASONS FOR DECISION

Introduction

1. The 29 August 2019 decision of the Secretary of State under appeal to the First-tier Tribunal in this case was that the appellant "continued to be entitled to employment and support allowance with the work related activity component from 29 August 2019".

2. In giving its reasons for its decision of 10 January 2020 upholding that decision, the First-tier Tribunal ("the tribunal") explained why it rejected the argument made to it by the appellant's then representative that the appellant satisfied descriptor 8 in Schedule 3 to the Employment and Support Allowance Regulations 2008 ("the ESA Regs"). That descriptor is concerned with weekly loss of control of the bladder or bowel, or substantial leakage from a collecting device, sufficient to require the claimant to change themselves and change their clothing. Satisfaction of this descriptor would have meant the appellant had limited capability for work-related activity and continued to qualify for employment and support allowance ("ESA") with the support group component. No issues arise on this appeal about whether the tribunal erred in law in its approach to descriptor 8 in Schedule 3. The tribunal went on its reasons, however, to say the following:

> "The Appellant was represented by an experienced representative. No submissions were made for the Tribunal to consider regulation 35 and so this regulation was not considered by the Tribunal."

3. The important issue which arises to be decided on this appeal is whether the tribunal was entitled to take this approach or whether it erred in law in so doing. The short answer, expanded on fully below, is that the tribunal was not entitled to take this approach and erred materially in law in so doing. In essence, the tribunal erred in law by abrogating its legal obligation under section 12(8)(a) of the Social Security Act 1998 ("SSA") to consider all issues raised by the appeal and in treating the representative's stance (as the tribunal understood it to be) as relieving the tribunal of its duty under section 12(8)(a) to consider the issues raised by the appeal before it.

Relevant background

4. To understand why the tribunal erred in law it is necessary to first set out the relevant background to the decision that was under appeal to it.

5. The language of *continues* to be entitled to ESA quoted above from the Secretary of State's description of the decision under appeal in her appeal response to the tribunal provides a strong hint that the decision under appeal was a supersession of an awarding decision. What, however, was that awarding decision? The papers put before the tribunal by the Secretary of State with her appeal response revealed what that decision was. Admittedly this involved a small amount of detective work but such work ought to be familiar to First-tier Tribunals dealing with such ESA appeals.

6. The appeal papers reveal that in a decision dated 20 December 2018 the Secretary of State had concluded that the appellant continued to be entitled to ESA with the work-related activity component from 20 December 2018. This decision followed the appellant having been seen by a health care professional ("HCP") on 16 November 2018. However, that decision was then subject to 'mandatory reconsideration' following a request by the appellant on 15 January 2019. The Secretary of State in a decision dated 23 January 2019 revised her decision of 20

December 2018 and replaced it with a decision that the appellant had limited capability for work **and** was to be treated as having limited capability for work-related activity with effect from 20 December 2018. The appellant was therefore entitled to ESA with the support group component from that date. The basis for this revision decision was that the appellant satisfied regulation 35(2) of the ESA Regs. It was the decision of 20 December 2018 *as revised by the 23 January 2019 decision* which was superseded by the Secretary of State's decision of 29 August 2019.

7. Moreover, the terms of the supersession decision of 29 August 2019 shows that the Secretary of State's decision maker expressly gave consideration to whether the appellant continued to satisfy regulation 35(2) of the ESA Regs but decided that he did not.

8. The appeal papers which were put before the tribunal by the Secretary of State further reveal that on seeking mandatory reconsideration (i.e. revision) of the 29 August 2019 decision, the appellant argued that decision was wrong because he continued to satisfy regulation 35(2) of the ESA Regs. This is made most apparent by the mandatory reconsideration decision made by the Secretary of State's decision maker on 23 October 2019. It records, in the part setting out why mandatory reconsideration was sought by the appellant, "In a telephone call you also state that you feel you satisfy regulation 35". The body of the mandatory reconsideration decision (which as a matter of law and in the result was a decision refusing to revise the 29 August 2019 decision) shows that the Secretary of State's decision-maker gave quite detailed consideration to whether regulation 35(2) remained satisfied but concluded that it did not.

9. It is in this context that the appellant's appeal against the 29 August 2019 decision stands to be construed. That appeal states that the appellant disagrees "with the DWP's decision that I am not eligible to be placed in the Support Group". The grounds of the appeal on the appeal form ("Why you disagree with [the decision]") argue that the HCP was rushed at the assessment and dismissive of the appellant's responses. The grounds continue "I do not agree that the full extent of my condition has been taken into consideration. For example, [and the appellant then details his problems with incontinence]". Insofar as it may be relevant, I find nothing in the appellant's appeal that may be construed as him saying he did not want regulation 35(2) of the ESA Regs to be considered on his appeal.

10. The penultimate document in this contextual survey is the Secretary of State's written appeal response to the tribunal. I need not set out the detail of that written response here. Both parties accepted before me that it (quite fairly) addressed regulation 35(2) of the ESA Regs, as well as the descriptors in Schedule 3 to those regulations. The appeal response concludes, relevant to regulation 35(2), as follows:

> "The Decision Maker in their Mandatory Reconsideration decision dated 23-Oct-2019 fully addressed the question of different types of Work Related Activity available and how demanding that would be, so I respectfully refer the Tribunal to this decision."

11. The last relevant document in the papers before the tribunal is the appellant's then representative's written appeal submission to the tribunal, dated 19 December 2019. That written submission argued that the appellant met descriptor 8 in Schedule 3 to the ESA Regs. It made no submissions on regulation 35(2).

12. There is no written record of the oral hearing of the appeal before the tribunal on 10 January 2020. This is because the hearing was audio recorded and that recording constitutes the record of proceedings. Neither party asked me to obtain and listen to that recording, and I did not do so. I have decided this appeal on the basis that no enquiries were made of the appellant or his representative at the hearing about the applicability (or otherwise) of regulation 35(2) of the ESA Regs to the appeal. Had such enquiries been made then their result ought to have been explained in the reasons. I have therefore proceeded on the basis, as the tribunal's reasons indicate, that the tribunal considered that the appellant's representative's written submission was determinative of this issue.

Permission to appeal

13. The appellant sought permission to appeal on three grounds. These were, first, that the tribunal had failed to address regulation 35(2) of the ESA Regs. It was argued that even if this had not been raised as an issue on the appeal by the appellant, it was incumbent in this case for the tribunal to do so because the decision under appeal was a supersession of a decision that regulation 35(2) did apply. It was for the Secretary of State to show on the balance of probabilities that regulation 35(2) was no longer met and the tribunal therefore erred in not addressing this issue on the appeal. The second ground of appeal advanced was that the tribunal had erred in law in failing to explain why the previous award was no longer merited: per *R(M)1/96* and *VH v SSWP* (ESA) [2018] UKUT 290 (AAC). It was agued thirdly that the findings, upheld by the tribunal, that the appellant satisfied descriptor 15b in Schedule 2 to the ESA Regs (cannot get to a specific place with which the claimant is familiar on his or her own) and descriptor 16c in the same schedule (engaging in social contact with someone unfamiliar to the claimant is not possible for the majority of the time) ought additionally to have led the tribunal to consider regulation 35(2).

14. Permission to appeal was refused by the First-tier Tribunal but granted by me on the three grounds described above. I gave permission to appeal in addition because I considered the issues arising in this case merited further consideration by the Upper Tribunal. I suggested this may be an appropriate case for the Upper Tribunal to consider the interaction of section 12(8)(a) of the Social Security Act 1998 with the situation where 'an experienced representative' does not take a point in argument. I unpacked this further as follows in my grant of permission to appeal.

> "2. It is arguable that a proper understanding of the applicable law must begin with the terms of section 12(8)(a) of the Social Security Act 1998. This provides that "in deciding an appeal the First-tier Tribunal need not consider any issue that is not raised by the appeal". Removing the two negatives from this subsection shows that the First-tier Tribunal must consider an issue which **is** raised by the appeal: see *ET v Secretary of State for Work and Pensions* (PIP) [2017] UKUT 478 (AAC) at paragraph [3]. If an issue is raised by the appeal it is therefore

> arguable that a representative not addressing it would not remove the requirement on the First-tier Tribunal to consider that issue.
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> 3. The Secretary of State's appeal response to the First-tier Tribunal arguably proceeded on the basis either that the continued satisfaction of regulation 35(2) was an issue raised by the appeal or the Secretary of State was raising it herself as an issue on the appeal (see page C of that response and further paragraph 17 on pages I-K of that response). That approach was arguably consistent with the broad grounds of appeal found on page 2. It may be further supported by the fact that [the appellant's] previous ESA awarding decision was one that found he satisfied regulation 35(2) (see pages 119 and 122). That award was not time limited. It was that awarding decision which was then arguably superseded by the decision of 29 August 2019 that was under appeal to the First-tier Tribunal. In these circumstances, why was [the appellant] no longer satisfying regulation 35(2) not an issue raised by the appeal?
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> 4. The First-tier Tribunal took the view that regulation 35(2) did not need to be considered by it because [the appellant] "was represented by an experienced representative [and] no submissions were made for the Tribunal to consider regulation 35 and so this regulation was not considered". It is true that the representative's submission to the First-tier Tribunal (pages 155-156) did not raise regulation 35(2), though it did not expressly withdraw it from consideration either. However, was this sufficient to mean in the above circumstances that regulation 35(2) was not an issue raised by the appeal? Had not the Secretary of State in her appeal response put forward satisfaction of regulation 35(2) as an issue on the appeal?
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> 5. Assuming an issue is *prima facie* raised by the appeal, in what circumstances may it cease subsequently to be an issue on an appeal? And what clarity is required for an issue to cease being raised on the appeal, bearing in mind the inquisitorial, non-adversarial, nature of the First-tier Tribunal: see *Mongan v DSD* [2005] NICA 16 (*R3/05 (DLA)*).
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> 6. If regulation 35(2) was not an issue raised by the appeal, why was that so and how does this affect the adequacy of the First-tier Tribunal's explanation for not considering [it] as an issue on the appeal?"

The written arguments filed after the grant of permission

15. The Secretary of State supported the appeal being allowed in written submissions she filed after the grant of permission to appeal. These agreed with what I had said in giving permission to appeal about section 12(8)(a) of the Social Security Act 1998. The Secretary of State cited paragraph 27 of *Hooper v SSWP* [2007] EWCA Civ 495; *R(IB)4/07* in support. That paragraph reads.

> "Section 12(8)(a) refers to an issue raised by the appeal. I see no reason not to give the statute its plain and natural meaning. But in view of the way in which Mr Chamberlain suggests "raised by the appellant" should be interpreted, it seems to me that there is no real difference between "raised by the appeal" and "raised by the appellant" as interpreted by him. The starting point will always be the decision of the SSWP that the appellant is seeking to challenge. But it is clear that the fact that an issue is not identified by the appellant in his appeal notice or even during the oral argument does not mean that it is not 'raised by the appeal'".

16. The Secretary of State further argued that having previously satisfied regulation 35, the appellant should have been given an explanation for why he no longer did so. She argued, relying on paragraph 15 of *R(M)1/96*, that the tribunal was obliged to deal with this matter whether it was formally raised or not.

17. The appellant's representative filed a submission in reply which concurred in the result.

18. I was, however, concerned that the written submissions filed by the parties did not address all the key issues. I therefore directed an oral hearing of the appeal. I considered that an oral hearing was needed to more fully explore the issues I raised when giving permission to appeal. Those issues included the proper effect of 'a competent/experienced representative's submission' to the First-tier Tribunal, section 12(8)(a) of the Social Security Act 1998, the duty on both parties to co-operate with the First-tier Tribunal in furthering the 'overriding objective', and how caselaw such as CSIB/389/1998, CSIB/588/1998, CSDLA/336/2000 and CSIB/160/2000 was (a) to be read with caselaw such as *Mongan* and *Hooper* and (b) applies in an appeal like this one where the Secretary of State's written response to the appeal to the tribunal addressed relevant caselaw concerning regulation 35(2) of the ESA Regs and so may have raised satisfaction of regulation 35(2) as an issue on the appeal. I also said that I was unsure whether the parties' reliance on *R(M)1/96* was soundly based and asked to hear further argument on this. The concern I expressed was whether *R(M)1/96* had any application even if (as the Secretary of State's argument on *R(M)1/96* appeared to suggest) regulation 35(2) was <u>not</u> an issue raised by the appellant's appeal. I further stated that the alternative argument advanced by the appellant's representative, which concerned the tribunal making enquires of the 'experienced representative' about an issue not raised by the appeal might also need further consideration as I was not clear how that proposition applied on this appeal.

19. Both parties then filed helpful written arguments for the oral hearing of the appeal. I do not set out the contents of those arguments here but refer to them in the course of the discussion below.

<u>Discussion and conclusion</u>

20. It was common ground before me, and I find in any event, that regulation 35(2) was an issue raised by the appeal. This is for a number of related reasons. First, the terms of the supersession decision under appeal to the tribunal expressly considered regulation 35(2) of the ESA Regs but considered it was no longer satisfied. An additional consideration here was that the onus was on the Secretary of State to show that the support group award of ESA was no longer satisfied, given she had superseded an awarding decision that had awarded the appellant ESA with the support group component, and that would include showing that regulation 35(2) was no longer met. Second, the terms of appellant's appeal, when read with the necessary and prior mandatory reconsideration request (see paragraphs 8 and 9 above), show in my judgment that the appellant was raising in his appeal that he continued to satisfy regulation 35(2). Third, though this may be no more than a reflection of the first reason, the Secretary of State in her appeal written response to

the tribunal was herself raising, as a party to the appeal, the issue of whether regulation 35(2) of the ESA Regs continued to be satisfied by the appellant. Fourth and in any event (although this was not a matter raised by me or addressed in argument before me), following paragraph [20] of *MN v SSWP* (ESA) [2013] UKUT 262 (AAC); [2014] AACR 6 and *DH v SSWP* (ESA) 573 (AAC (at paragraphs [5] and [7] in particular), the consequence of sections 2(3)(b) and 4(5)(b) of the Welfare Reform Act 2007, which give as a condition of entitlement to the work-related activity component of ESA "that the claimant does not have limited capability for work-related activity", means that an affirmative decision had to have been made in the decision under appeal that regulation 35(2) of the ESA was no longer satisfied.

21. The above analysis for identifying whether regulation 35(2) was an issue raised by the appellant's appeal is consistent with the more general analysis provided by the Court of Appeal in England and Wales in *Hooper v SSWP* [2007] EWCA Civ 495; *R(IB)4/07*. In paragraphs [25]-[28] in *Hooper* the Court of Appeal said the following (and it also set out the key paragraphs of the Court of Appeal in Northern Ireland in *Mongan v DSD*, to which reference is made further below):

> "25. What is meant by "an issue raised by the appeal"? In addressing this question, it is necessary to keep in mind that, as is common ground, the process before the tribunal is inquisitorial and not adversarial: see the comments at paragraphs 14, 56 and 61 in *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372 (also reported as *R 1/04* (SF)) in an analogous context. It seems that this question has not been the subject of decision by this court, but it was considered by the Northern Ireland Court of Appeal in *Mongan v Department of Social Development* [2005] NICA 16 (reported as *R 3/05* (DLA). That decision was concerned with the meaning of article 13(8)(a) of the Social Security (Northern Ireland) Order 1998 which is identical to section 12(8)(a) of the 1998 Act. The court gave valuable guidance as to what is meant by "an issue raised by the appeal". It is desirable that I should set it out in full:
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> > "[14] The terms of article 13(8)(a) of the 1998 Order make it clear that issues not raised by an appeal need not be considered by an appeal tribunal. The use of the phrase "raised by the appeal" should be noted. The use of these words would tend to suggest that the tribunal would not be absolved of the duty to consider relevant issues simply because they have been neglected by the appellant or her legal representatives and that it has a role to identify what issues are at stake on the appeal even if they have not been clearly or expressly articulated by the appellant. Such an approach would chime well with the inquisitorial nature of the proceedings before the tribunal.
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> > [15] It is now well established that appeal tribunal proceedings are inquisitorial in nature – see, for example the recent Decision of a Tribunal of Social Security Commissioners CIB/4751/2002, CDLA 4753/2002, CDLA 4939/2002 and CDLA 514/2002 [reported as *R(IB) 2/04*]. Mr McAlister relied on this decision, however, to support his contention that the tribunal was not required to consider matters that had not been raised by the parties to the proceedings. In that case it was held that 'raised by the appeal' should be interpreted to mean 'actually raised at or before the hearing by one of the parties'. In so far as the decision suggests that an appeal tribunal would not be competent to inquire into a matter that arose on an appeal simply because it was not expressly argued by one of the parties to the appeal, we could not agree with it. It appears to us that the plain meaning of the words of the statute, taken together with the inquisitorial nature of the appeal

hearing, demand a more proactive approach. If, for instance, it appeared to the tribunal from the evidence presented to it that an appellant might be entitled to a lower level of benefit than that claimed, its inquisitorial role would require a proper investigation of that possible entitlement.

[16] Mr McAlister suggested that even if the tribunal had a duty to consider issues not explicitly raised, this was a limited responsibility and he referred to an unreported decision C5/03-04(IB) in which Commissioner Brown held that the tribunal was not required 'to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it'. We accept that there must be limits to the tribunal's responsibility to identify and examine issues that have not been expressly raised and we agree with the observation of Commissioner Brown. But as she said in a later passage in the same case, issues 'clearly apparent from the evidence' must be considered.

[17] Whether an issue is sufficiently apparent from the evidence will depend on the particular circumstances of each case. Likewise, the question of how far the tribunal must go in exploring such an issue will depend on the specific facts of the case. The more obviously relevant an issue, the greater will be the need to investigate it. An extensive inquiry into the issue will not invariably be required. Indeed, a perfunctory examination of the issue may often suffice. It appears to us, however, that where a higher rate of benefit is claimed and the facts presented to the tribunal suggest that an appellant might well be entitled to a lower rate, it will normally be necessary to examine that issue, whether or not it has been raised by the appellant or her legal representatives.

[18] In carrying out their inquisitorial function, the tribunal should have regard to whether the party has the benefit of legal representation. It need hardly be said that close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation. Where an appellant is legally represented the tribunal is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve it of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party."

26. Mr Cox submits that we should adopt this guidance without qualification. Mr Chamberlain accepts the guidance with one qualification. He submits that "not raised by the appeal" means "not raised by the appellant". He says that an injunction to the tribunal that it need not consider issues not raised by the appeal would be otiose, since issues not raised by the appeal are irrelevant and should not be considered in any event. But Mr Chamberlain concedes that the tribunal should adopt a broad, generous and non-legalistic approach to deciding whether an issue has been raised by the appellant. Thus, it may be sufficient for the appellant to appeal against a decision without stating the grounds relied on, provided that he or she places before the tribunal sufficient facts for the issue to be clear.

27. Section 12(8)(a) refers to an issue raised by the appeal. I see no reason not to give the statute its plain and natural meaning. But in view of the way in which Mr Chamberlain suggests "raised by the appellant" should be interpreted, it seems to me that there is no real difference between "raised by the appeal" and "raised by the appellant" as interpreted by him. The starting point will always be the decision of the SSWP that the appellant is seeking to challenge. But it is clear that the fact that an issue is not identified by the appellant in his appeal notice or even during the oral argument does not mean that it is not "raised by the appeal".

28. I would endorse the valuable guidance given in *Mongan*. The essential question is whether an issue is "clearly apparent from the evidence" (paragraph 15 in

> *Mongan*). Whether an issue is sufficiently apparent will depend on the particular circumstances of the case. This means that the tribunal must apply its knowledge of the law to the facts established by it, and it is not limited in its consideration of the facts by the arguments advanced by the appellant. I adopt the observations of this court in *R v Secretary of State for the Home Department ex parte Robinson* [1998] 1 QB 929 at page 945 E–F in the context of appeals in asylum cases. But the tribunal is not required to investigate an issue that has not been the subject of argument by the appellant if, regardless of what facts are found, the issue would have no prospects of success."

22. Strictly speaking, as a judge exercising the Upper Tribunal's jurisdiction in Scotland, neither *Hooper* nor *Mongan* are binding on me (see *SSWP v Deane* [2010] EWCA Civ 699; [2010] AACR 42 at paragraphs [26]-[27]). However, in my judgment both decisions are plainly correct and, in case there is any doubt, the effect of my decision on this appeal is to make the propositions in those two decisions binding on First-tier Tribunals exercising jurisdiction under section 12 of the SSA in Scotland.

23. As the Court of Appeal identified in paragraph [27] of *Hooper*, the starting point is the decision of the Secretary of State that the appellant is seeking to challenge. For the reasons given above, in this case that was a decision that the appellant no longer had limited capability for work-related activity because he no longer satisfied regulation 35(2) of the ESA Regs. And both the appellant by the terms of his appeal as properly construed in context and the Secretary of State raised in her written appeal response raised the continued satisfaction as an issue to be considered on the appeal.

24. Therefore, however it is analysed, and even disregarding the fourth consideration identified in paragraph 20 above, whether the appellant continued to satisfy regulation 35(2) was plainly an issue raised by his appeal to the tribunal. The terms of section 12(8)(a) of the SSA – "In deciding an appeal…the First-tier Tribunal need not consider any issue that is not raised by the appeal" – required the tribunal to consider whether the appellant continued to satisfy regulation 35(2) of the ESA Regs. As I said in *ET v SSWP* (PIP) [2017] UKUT 478 (AAC), properly read the language of section 12(8)(a) means a Fist-tier Tribunal must consider an issued that is raised by the appeal. This, it seems to me, is the same conclusion as arrived at by Tribunal of Commissioners in *R(IS)2/08* where, at paragraph [47], they said the following.

> "47. Section 12(8)(a) of the 1998 Act does not provide a complete answer. It provides that, in deciding an appeal, a tribunal need not consider any issue that is not raised by the appeal. The implication is that a tribunal must consider every issue that is raised by the appeal and, as a tribunal has an inquisitorial or investigative function, that includes any issue that is "clearly apparent from the evidence" (*Mongan v Department for Social Development* [2005] NICA 16 (reported as R3/05 (DLA)). Therefore, what a tribunal must not do is ignore an issue that is clearly apparent from the evidence. However, it does not follow that the tribunal must make a decision on every issue raised by the appeal if there is a more appropriate way of dealing with one or more issues."

I should add that the closing sentence in paragraph [47] of *R(IS)2/08* was relevant to the appeal in that case but it was not argued to have any relevance on this appeal nor do I consider it to have any relevance. The Secretary of State of State had decided that the appellant no longer met regulation 35(2) (nor did he satisfy any descriptor in Schedule 3 to the ESA Regs) and that meant he was no longer entitled to ESA with the support group component. I can see no basis on which the tribunal could decide the appeal without deciding whether the appellant continued to satisfy regulation 35(2) of the ESA Regs once it had decided that the appellant did not satisfy any descriptor in Schedule 3.

25. However, the tribunal by its reasoning expressly declined to consider regulation 35(2). It said "regulation [35(2)] was not considered" and it did so because it considered "no submissions were made [by the appellant's experienced representative] for the Tribunal to consider regulation 35(2)". That approach was fundamentally wrong because if an issue is raised by an appeal then it must be considered. The legal obligation on the First-tier Tribunal to consider an issue raised by the appeal cannot be removed by silence from the parties to the appeal on such an issue or even where a representative positively declines to argue it as an issue. The First-tier Tribunal in appeals concerning entitlement to social security benefits exercises an inquisitorial jurisdiction and not an adversarial one. That jurisdiction is not, in the context of section 12(8)(a) of the SSA, determined by, or dependant on, whether the appellant is represented by an experienced or competent representative. The *extent* of the First-tier Tribunal's consideration of an issue raised by the appeal may depend on the evidence and arguments made (or not made) by the parties to the appeal. But as I have said immediately above, I find it very difficult to see any basis on which the tribunal, if it had considered regulation 35(2), could lawfully have not made any decision on whether regulation 35(2) continued to be satisfied once it had decided that the appellant did not come within a schedule 3 descriptor.

26. In fairness to the tribunal, in declining even to consider regulation 35(2) it may have had in mind caselaw that might, outwith section 12(8)(a) of the SSA, seem to support its approach and it may indeed have been acting pursuant to such caselaw. There are four cases in which the 'experienced/competent representative' thesis was developed. Importantly, all but one of them was decided before the SSA had come into effect for particular benefit concerned. Moreover, even in the case where the Secretary of State's decision was made after the SSA had come into effect, no analysis was undertaken in the social security commissioner's decision of how the 'experienced representative' thesis could play out in the section 12(8)(a) arena. (The language of 'must consider an issue raised by the appeal' not previously having been used in legislation governing social security appeals.). And all four decisions predate *Mongan* and *Hooper*.

27. The first case is *CSIB/389/98* where in paragraphs [6]-[7] Mr Commissioner May QC said:-

> "6. Mr Orr in his submission rather departed from the grounds of appeal and directed my attention to the activity of manual dexterity. It was his position that manual

> dexterity was an activity which was clearly in issue before the tribunal. He referred to the original application at page 6, the incapacity for work questionnaire at page 34 and page 44, the BAMS report at the clinical history on page 56 and the BAMS doctor's acceptance that there was a problem with manual dexterity in respect that he records that there was pain in the claimant's fingers on movement. He also referred me to page 111 which contained the claimant's grounds of appeal to the tribunal in which the claimant also made reference to this activity. He readily accepted that when the case came before the tribunal the record of proceedings discloses that the activity of manual dexterity was not put in issue by the claimant's representative. Indeed it is apparent that it was descriptors 2(c), 8(d) and 9(d) which were concentrated upon. It was however his position that the tribunal erred in law because they did not address the activity of manual dexterity in reaching their decision. He referred me in that connection to paragraph 31 of CIS/3299/97….
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> 7. ……..I fully accept that the role of the presenting officer on behalf of the adjudication officer resembles that of an *amici curiae* and that the tribunal have to bear in mind that theirs in an inquisitorial jurisdiction and not an adversarial one……. However if a claimant is represented, as was the position here, by a welfare rights officer employed by a responsible local authority the tribunal is entitled to rely upon such a representative taking up the issue and points he considers to be proper, adequate and necessary for the determination of his client's appeal. They are entitled to take the view that the claimant's representative knows what case he is proposing to make on behalf of his client. To hold otherwise would put an impossible burden upon tribunals who are expected to conduct a substantial number of appeals at each sitting.

28. Commissioner May returned to this theme in *CSIB/588/98*. In paragraph [13] of that decision he said:-

> "13. I adhere to the views which I expressed in [*CSIB/588/98*] that case. Where the claimant is represented by a responsible representative I am satisfied that it is not incumbent upon the tribunal to take the presentation of the claimant's case out of the hands of the representative in order to conduct it for themselves. The representative was specifically asked if he wished to make further submissions and chose not to do so. In these circumstances I do not consider that it can successfully be asserted that the tribunal erred in law by not investigating the matter with the claimant herself over the head of the representative whom she appointed to represent her at the hearing."

And he restated that view in *CSDLA/336/2000*, where at paragraph [15] he said:

> "15. I do not accept that the tribunal erred in law by virtue of an asserted failure to exercise their inquisitorial jurisdiction. Indeed in my view on the circumstances of the case that they had no duty to do so. As a matter of general principle I adhere to the views I expressed in *CSIB/389/98* and *CSIB/588/98* in relation to the extent of that jurisdiction. In particular I adhere to the views I expressed in paragraph 7 of *CSIB/389/98*….. It has to be remembered that the nature of a tribunal hearing is summary. The normal workload of a tribunal is 8 appeals in a day 4 in each session. Mr Orr told me that in respect of the claimant's appeal there were two other appeals scheduled in the morning session. In respect of disability living allowance cases it also must be remembered that tribunals are frequently required to make decisions in cases on a number of elements of both the care and mobility components for which

> there are different tests. In the light of these modern and prevailing circumstances I do not consider that a tribunal can be expected in respect of matters which emerge in evidence for the first time before them when the claimant is represented by a responsible representative, to enquire further when the representative chooses not and makes no issue in respect of the evidence in submissions. Mr Orr as well as Miss Charteris accepted that there must be limits to the inquisitorial jurisdiction. In my view in the circumstances of the case the limits were reached…… I would also underline that in any form of inquest where a person is represented by a responsible representative that representative can be expected to guide those who are holding the inquest as to the areas in issue following the evidence. To hold otherwise would be corrosive of the whole system of appeals to the tribunal and the Commissioner."

29. The last decision in which the 'experienced representative''s role affected the extent of the then social security appeal tribunal's enquiries is *CSIB/160/2000*. This was also a decision of Commissioner May. In this decision he said:

> "In this case there was an oral hearing of the claimant's appeal. The claimant was represented and it was made quite clear to the tribunal which of the mental descriptors where in issue before them. I refer in that connection to the record of proceedings recorded at page 74 which sets out the mental health descriptors said to apply. In my view the tribunal as the claimant was represented was entitled to accept that the representative knew the case which is sought to be made and in particular which descriptors are sought to be established by the claimant. The tribunal applied the facts to the descriptors contended for. It was not necessary for them to explore descriptors which were not contended for by the representative. To determine otherwise would place an unnecessary burden on tribunals."

30. I would be prepared to accept that certain of the remarks made in these decisions may still have some useful application in cases to be decided by First-tier Tribunals where that tribunal is seeking to establish whether an issue is 'clearly apparent from the evidence'. In that respect a representative's role in the appeal proceedings before the First-tier Tribunal may remain relevant. However, beyond that, and it seems to me that cases such as *Mongan* now provide all the necessary legal guidance in this regard in any event, I can see no continuing relevance for the above four decisions. In addition, insofar as the language used in some of the decisions - for example, "taking up the issue and points [the representative] considers to be proper, adequate and necessary for the determination of his client's appeal", "[w]here the claimant is represented by a responsible representative I am satisfied that it is not incumbent upon the tribunal to take the presentation of the claimant's case out of the hands of the representative in order to conduct it for themselves" and "where a person is represented by a responsible representative that representative can be expected to guide those who are holding the inquest as to the areas in issue following the evidence" (my underlining added for emphasis - may be thought to limit or add a gloss to the section 12(8)(a) SSA duty to consider any issue which **is** raised by the appeal, they do not and cannot limit section 12(8)(a) and should be disregarded in that respect. As I have stressed above, a representative cannot remove from the First-tier Tribunal's consideration an issue which is raised by the appeal.

31. I agree with the Secretary of State that the role of the First-tier Tribunal under section 12(8)(a) of the SSA has been settled by the Court of Appeal in Northern Ireland in *Mongan*. Further, as the decisions in *Mongan* and *Hooper* now 'cover the field' in respect of section 12(8)(a) and the role of representatives in that respect, any need to have regard to the four decisions of Commissioner May cited above should no longer be needed. Indeed, given the scope for some of the language used in those decisions to be seen to conflict with section 12(8)(a) and *Mongan*, as perhaps evidenced by the wrong approach the tribunal took in this appeal, I would go further and suggest the decisions should no longer be cited or followed.

32. Although the key passages from *Mongan* have already been set out in the judgment from *Hooper* set out above, in my judgment it is worth re-emphasising the key passages from *Mongan* on what in Great Britain is section 12(8)(a) of the SSA and how a First-tier Tribunal should approach the question of whether an issue is raised by the appeal where a representative is involved. I stress, however, that in this case regulation 35(2) was (plainly) an issue raised by the appeal and the representative's stance on that point (whatever it may or may not have been) was therefore simply irrelevant. The tribunal was therefore wrong to treat the representative's inaction on regulation 35(2) as being relevant and was manifestly wrong to treat the representative's stance as being determinative of that point.

33. The key relevant passages from *Mongan* are in paragraphs [14] and [18] where the court states that:

> "14……the tribunal would not be absolved of the duty to consider relevant issues simply because they have been neglected by the appellant or her legal representatives and that it has a role to identify what issues are at stake on the appeal even if they have not been clearly or expressly articulated by the appellant. Such an approach would chime well with the inquisitorial nature of the proceedings before the tribunal.
>
> 18. In carrying out their inquisitorial function, the tribunal should have regard to whether the party has the benefit of legal representation. It need hardly be said that close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation. Where an appellant is legally represented the tribunal is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve it of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party."

34. What the Northern Irish Court of Appeal said above in *Mongan* stands in stark contrast to how the tribunal (wrongly) directed itself as to the law in this case. It was plainly wrong for the tribunal in this appeal to decline to consider whether the appellant continued to satisfy regulation 35(2) of the ESA Regs. This appeal, however, was not in my judgment even really about (per *Mongan*) regulation 35(2) being a *potentially* relevant matter on which it might look to the representative for assistance and elucidation. For the reasons summarised in paragraph 20 above, regulation 35(2) was obviously an issue raised by the appeal.

35. Given the basis on which I have decided this appeal - that is, whether the appellant continued to satisfy regulation 35(2) of the ESA Regs **was** an issue raised by the appeal – I do not need to determine the other grounds on which I gave permission to appeal. I qualify this, however, in two respects. First, if regulation 35(2) had not been an issue raised by the appeal then I struggle to see why *R(M)1/96* would have any relevance. The rationale underlying *R(M)1/96* is concerned with providing an adequate explanation for why a *different* decision has been arrived at. But if we are in the arena of regulation 35(2) not being an issue raised by the appeal, I find it difficult to identify why any explanation would be needed for why that regulation was not, or was no longer, met. The second qualification is simply to emphasise that in its consideration of whether appellant continued to satisfy regulation 35(2) of the ESA Regs on 29 August 2019, the new First-tier Tribunal will need to keep in mind and address the appellant's satisfaction of descriptors 15b and 16c in Schedule 2 to the ESA Regs on and from 29 August 2019.

36. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

37. The appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether his appeal will succeed on the facts before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Stewart Wright
Judge of the Upper Tribunal
Signed on the original on 24 June 2021