DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Paula Gray

DECISION

CE/5625/2014 (YA)

This appeal by the claimant succeeds.

Permission to appeal having been given by me on 4 November 2016 in accordance with the provisions of section 12(2) (a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and rule 40(3) of the Tribunals Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal sitting at Enfield and made on 14 October 2014 under reference SC 921/14/00755 and remake it as follows:

The appellant has limited capability for work related activities, regulation 35 (2) (b) Employment and Support Allowance Regulations 2008 applying to him. He enters the support group from 7 January 2014.

CE/4662/2014 (SA)

The appeal by the claimant is dismissed. Under section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 if I find that the making of a decision involved the making of an error on a point of law **I may, but need not,** set aside the decision of the First-tier Tribunal.

The decision of the Sutton Tribunal made on 6 June 2014 under number SC 168/13/02663 involves an error on a point of law, however I decline to interfere with the decision and it stands.

REASONS

Background

1. This decision concerns two appeals. I will refer to the appellants by their initials. Both appeals concerned applications for Employment and Support Allowance (ESA) and all references are the Employment and Support Allowance Regulations 2008 unless otherwise stated. There is no connection between the appellants or the appeals, but they raise similar questions and I joined them to be considered together at an oral hearing. The relevant date in each is the date of the decision in respect of the Work Capability Assessment. For YA

this was 7 January 2014; for SA 2 May 2013. It is at that date when issues of capability and risk crystallise, the provisions of section 12 (8) (2) Social Security Act 1998 preventing circumstances not obtaining at the date of decision being taken into account, although subsequent evidence may be relevant if it sheds light on what the position was likely to have been at that time: *R (DLA) 2/01; R (DLA) 3/01*. .

2. YA was aged 46 at the relevant date. He suffers from epilepsy and post-traumatic stress disorder. He was awarded fifteen points under activity 10 of schedule 2 to the regulations by the Secretary of State's decision maker. The chosen descriptor reads

b. At least once a week, as an involuntary episode of lost or altered consciousness resulting in significantly disrupted awareness or concentration.

3. It was common ground that he suffered loss or altered consciousness when he had an epileptic fit.
4. SA was aged 30 at the relevant date in her case. She suffers from shoulder, neck and back pain. The decision maker awarded her nine points under schedule 2 activity 1 (c) (cannot mobilise more than 100 m) and six points under activity 2(c) (cannot remain at a workstation from more than an hour). She thus scored the fifteen points necessary to satisfy the test for limited capability for work.
5. So in each of the cases the Secretary of State accepted that the claimant had limited capability for work, and placed them in the Work Related Activity Group. In that group they were expected to engage in work related activities as directed, and liable to sanction for failing to do so. Both argued on appeal that the nature of the functional difficulties caused by their medical problems meant that they should be placed in the Support Group. In that group they are not mandated to engage in activity to prepare for work, but can choose to do so.

The FTT

6. YA's appeal was heard on 14/10/14, and SA's appeal finally heard on 6/6/14, an earlier decision having been set aside by a District Tribunal Judge due to a procedural irregularity. The Secretary of State's decision was confirmed in each appeal, the appellants remaining in the Work Related Activity Group. SA has since then been placed in the Support Group and in relation to her the period I am considering is only that prior to 13/5/2016.
7. In each case an application for permission to appeal to the Upper Tribunal was refused by a District Tribunal Judge. I granted permission to appeal in both cases. I made direction for submissions, linked the cases and finally directed an oral hearing due to the complexity of the issues raised.

The issues

8. No issues as to eligibility into the Support Group by satisfaction of any of the Schedule 3 descriptors has been pursued before me. Both appeals concern what is said to be legally flawed approach by each of

the FTT's in their interpretation of regulation 35 (2) (b). Regulation 35 provides that certain claimants be treated as having limited capability for work-related activity, that is to say will not be required to engage in such activity, if-

(a) the claimant suffers from some specific disease or bodily or mental disablement; and

(b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

9. A substantial risk has been defined as a risk which cannot safely be ignored having regard to the gravity of the harm in the particular case (*IM v Secretary of State for Work and Pensions (ESA) [2014] UKUT 412 (AAC) (IM)* [65])
10. There was no argument in these cases that there may be a risk to the health of anyone other than each appellant by their being found not to have limited capability for work related activities.
11. I asked for assistance in relation to a number of questions which applied in one or other case, and sometimes to both. They were borne out of various legal difficulties in the interpretation of regulation 35, in particular matters arising from the three-judge panel decision in *IM-v-Secretary of State for Work and Pensions [2014] 0412 (AAC)* as to the lack of information passed to external work providers about a claimant's medical condition which might have a bearing on any risk from engaging in such activities. The other main aspect was as to the place of another person, a friend or relative, who might accompany the claimant in order to either enhance their safety where there was a risk of, for YA, an epileptic fit, or, for example in the case of an agoraphobic claimant accompany them on journeys to diffuse their anxiety.
12. There were other issues I canvassed but which fell away in the light of the submissions or which I have not had to decide upon in view of my resolution of the main issues.

Third party assistance: the case law in brief

13. Upper Tribunal Judge Ward had considered that issue in *PD-v- SSWP (ESA)[2014] UK UT 148 (AAC) (PD),* a case concerning the application of regulation 29 (2) (b) of the regulations, which is a mirror provision but in respect of a person having limited capability for work rather than limited capability for work-related activities. The Court of Appeal in the case of *SSWP –v-Charlton [2009] EWCA 31* in relation to similarly worded legislation then current determined, inter alia, that considerations of risk at work should include the journey to and from work. The journey was necessarily hypothetical, because any work which the claimant could reasonably be expected to do given his

experience and functional ability was under consideration. Judge Ward concluded that the risk to the health of the claimant may be mitigated by the availability of strategies to enable him to get to work, including through the assistance of a third party. He emphasised that such a conclusion would be case specific, and placed emphasis on the need for it to be based on proper evidence of fact. [28]

14. I had made an *obiter*, or by the way observation in the case of *MT v Secretary of State for Work and Pensions (ESA) [2013] UKUT 545 (AAC)* to the effect that it would be wrong to consider whether a legal test was satisfied based upon the possible availability of a third party. In *PD* Judge Ward drew the distinction between basing legal tests on the presence of others, which he agreed was illegitimate, and making a risk assessment on that basis.

The hearing before me

15. Neither appellant attended the oral hearing, which was, of course, confined to issues of law. Both were represented by Ms Daly of the Free Representation Unit (FRU). The Secretary of State was represented by Ms Wilkinson. I am grateful to both counsel for their written submissions and their considerable assistance at the hearing. I hope that I am able to do justice to their comprehensive arguments by summarising them as follows.

The appellants' positions

16. On behalf of the appellants Ms Daly outlined their respective factual and legal positions as follows.

YA

17. The FTT had found the following facts relevant to YA's epilepsy.

(i) Despite taking prescribed medication (carbamazepine) twice daily he had fits four or five times per month, and sometimes twice a week. They might occur by day or night.

(ii) Prior to a fit he felt shaky: sometimes he had three or four seconds warning, and sometimes one minute.

(iii) He had not suffered a serious injury due to a seizure since his arrival in the UK in 2001.

18. The evidence of YA at the hearing was that he did not go out unaccompanied and his wife or a family member would be close at hand when he was at home due to safety issues arising out of his epilepsy.

19. The appeal in relation to YA was solely in relation to the application of the test under regulation 35 (2) and safety issues. The Secretary of State's argument as to the lack of severity of the epilepsy, based on the dosage of prescribed medication was unsustainable, but was in fact not the issue in considering whether or not the FTT had made an error of law. The FTT finding was of weekly seizures with little or no warning; the error was in finding that this did not create a substantial risk so that regulation 35 (2) applied, or that such a risk could be mitigated by the presence of another person.

20. It was argued that if to satisfy the test of risk under regulation 35 (2) he needed someone to (at least) accompany him to and from each activity and that it was not reasonable to expect somebody attending work-related activities to constantly have a companion with them either at the activity or on the journeys. Further, to take this into account where assistance was available but not in other cases would lead to unpredictability in the legal position, effectively applying a different test to someone with the same disability in the light of their personal circumstances.
21. Alternatively it was submitted that such a companion did not mitigate the risk to the appellant of seizures and consequential injury; indeed the acceptance of the need for a third party's presence demonstrated that there was a substantial risk, and therefore the regulation was satisfied.
22. YA had in fact taken part in Work-Related Activity. Following his Work Focused Interview at the job centre he had been directed to attend English language and literacy classes (English not being his first language). It was argued that the FTT could not assume that was the only activity that would be required him; indeed it was pointed out that during the currency of the appeal before me the Secretary of State had provided evidence of the Work Related Activity in contemplation at the date of the decision, and this was an extensive list, therefore consideration could not be confined to the only required activity. However, because a safety issue arose on the journey the range of potential Work-Related Activity was not of particular importance because substantial risk was present whenever YA was required to leave home to attend an activity of any type.

SA

23. SA had not been required to engage in work-related activity.
24. Her functional problems were linked to chronic pain. The Secretary of State's original decision, confirmed by the FTT, was that due to pain she scored sufficient points under the descriptors relating to mobilising and remaining at a workstation that she had limited capability for work. The FTT had indicated some activities that she could engage in without risk, and said, wrongly, Ms Daly argued, that she was able to appeal if other matters were required of her.
25. There was some significance, she said, in the range of available work-related activities for SA.

The respondent's position

26. As to YA Ms Wilkinson argued that as the FTT knew he had been directed to attend particular work related activity there was no deficiency of what might constitute work related activities in his case as there had been in *IM.* On the issue of whether the FTT had adequately considered the risk to the appellant of undertaking work-related activity it was lawful to limit its consideration to the risk element of the activity he had been required to attend. She relied on paragraph

113 of *IM* as to information as to the outcome of the work focused interview being relevant in order to reduce the element of prediction required. In this case the element of prediction was, she said, zero.

27. The findings of the FTT that the appellant had not suffered serious injury from a fit in 13 years and that he had warning of a fit suggested little risk.

28. She supported the finding of the FTT that the appellant did in fact travel by bus and could walk to the bus stop, and could therefore travel to work related activity without posing a substantial risk to his health. In any event she supported the proposition that his wife would be able to accompany him, following *PD*, the evidence being that he was accompanied by his wife if he went out in case he had a fit.

29. In relation to SA Ms Wilkinson's submission identified four main areas:

(i) The *IM* point: was the FTT's assessment of the work-related activities the appellants had been asked to undertake adequate in the light of *IM*?

(ii) The pain point: is the exacerbation of intractable pain a risk that needs to be considered?

(iii) The Equality Act point: what is the relevance of the duty to make reasonable adjustments within a regulation 35 assessment?

(iv) The appeal point: does the appellant have a right of appeal if a provider requires her to undertake work related activity of a type which contradicts the findings of the FTT or upper Tribunal?

30. She argued that the FTT approach was in conformity with paragraph 117 of *IM*, that is to say the FTT was entitled to use its own knowledge as to the more demanding types of work related activity, or it could determine the case properly without that evidence the appellant not being sufficiently vulnerable to engage the regulation, no specific risk to her health having been identified from her medical evidence.

31. Alternatively, if there was an error of law in the FTT approach, she submitted that since a list of work-related activities in the appellant's area which she could be required to undertake had now been provided, in the absence of medical evidence supporting a finding of any specific substantial risk to health caused by her pain, the Upper Tribunal could remake the decision, but should conclude, as did the FTT, that regulation 35 (2) was not applicable.

My consideration of the issues

Risk assessment under regulation 35(2)

32. Usually the conditions which result in considerations as to whether there is a substantial risk to the health of a claimant are those in the

sphere of mental health. Epilepsy is a notable exception to that, and chronic (in the medical sense of longstanding) intractable pain may be a physical condition to which serious thought should be given by an FTT as to whether such a risk is present given the mentally debilitating effects of dealing with constant pain.

33. I am told by Ms Wilkinson that in cases of epilepsy uniquely, with the claimant's consent the existence of that condition is disclosed. She was not able to tell me from when that practice was adopted, nor the extent of the information communicated; as Judge Wright said in *JS-v-SSWP (ESA) [2014] UKUT 428 (AAC) (JS)* , in his footnote at page 30 "claimants do not often present with one neat health problem" . Epilepsy in particular may be a co-morbid condition in those with learning difficulties, which may create additional or other risks but there is no indication before me as to whether that condition would also be communicated.

34. I note the comments in *IM* that the Secretary of State was looking at changes to be made to the provision of information to work related activity providers. It may be, and Ms Wilkinson was not able to obtain firm instructions on this during the hearing, that the particular arrangements made regarding epilepsy were the start of those changes. It would be wrong of me to comment upon the legal effect of those arrangements where I do not need to do so in order to decide the case; if more widespread changes are occurring they will be better considered as a whole and when they can be fully explained.

35. As to whether a risk is substantial, in relation to the work related activities themselves this must in some measure depend upon the nature of, and the facilities at the activity in contemplation. The various external providers are without doubt organisations which comply with health and safety legislation. The concern arises because they are not informed as to the medical conditions or risk factors of those referred to them: in *XT-v-SSWP [2015] (ESA) UKUT 581(AAC*) I called this "the knowledge gap". Whereas a risk may be able to be reduced to a less than substantial level if the provider was briefed about it, if they are not it may remain. A claimant may be able to explain their problems to the provider who might then properly assess risk, but there may be circumstances such as there were in *XT* where the claimant had significant mental health problems in relation to coping with pressure and the extent of the condition, which was not obvious, in the absence of documentary back up from the department or medical sources may not be truly understood. Upper Tribunal Judge Rowland, a member of the three judge panel in *IM*, explained in *GB-v-SSWP(ESA) [2015 UKUT 200 (AAC)*

6. The difficulty highlighted in IM is that, because the results of work capability assessments are not routinely passed to providers who determine what work-related activity a claimant should be required to do, there may a risk of a provider requiring a

person with, say, mental health problems to perform unsuitable work-related activity, due to the provider's ignorance of the those problems or their extent. This difficulty is liable to be exacerbated if, as in both IM and the present case, the claimant is, or is likely to be, unable to engage in social contact with the provider and so explain her difficulties herself.

36. The original decision of the Secretary of State is necessarily predictive in relation to regulation 35 as the decision precedes the Work Focused Interview at which information is taken in order to tailor work related activities to the particular claimant. Prior to that interview, (which is not part of any work related activity itself: *(JS-v-SSWP (ESA) [2013] UKUT 635 (AAC)*) the decision-maker may, following *IM*, have some knowledge of the type of work related activity available in a particular area but that must be generalised information, the purpose of the Work Focussed Interview being to narrow that field for a particular claimant.

37. By the time the matter reaches a FTT there may be evidence which will be useful in an assessment of risk at the date of decision when it crystallised. In *IM* the information directed was required in order to reduce the element of prediction by the FTT although the panel pointed out that "*s 12(8)(b) of the Social Security Act 1998 applies to the application of such evidence and so it should only be taken into account so far as it is relevant to the position at the time of the decision of the Secretary of State" [113].*

38. So the FTT is looking back at the appellant's health condition as it was at the date of the decision under appeal, but perhaps with the benefit of hindsight.

Should the FTT consider what has in fact been required of the appellant?

39. The judgment in *IM* [69] said that the FTT must consider the impact of the work focused interview and then its possible results, evidence as to those matters reducing the speculative element and informing the assessment.

40. It is permissible to consider things that have happened since the date of decision if they throw light on what the position was at that time. That is not taking into account circumstances not obtaining at that critical date in violation of section 12 (8) (b)[1]. It is looking at what an appellant has been asked to do, how well they have coped with those demands, or that they have communicated their difficulties and whether or not they have been understood in order to answer the question "what does that more recent history tell us about the

[1] Social Security Act 1998 section 12 (8) (b) "in deciding on appeal under this section, the first Tier Tribunal … Shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

appellant's condition at the date of decision and any regulation 35(2) risk then?".

41. It was said in *IM*

113. … the effect of evidence may be to show that the provider is well aware of the claimant's state of health and is unlikely to overlook risks. This suggests that the provision of information should be a two-way process.

42. The way that appellants have responded and been responded to may inform the assessment because that knowledge feeds directly into the statutory question whether there is likely to be a substantial risk to their health if they are found not to have limited capability for WRA; the fact that they have been able to do all that was demanded of them without apparent difficulty is informative, as would be any deterioration in their mental health which related to the pressures of those demands: in either circumstance the result is of assistance as to the extent of the vulnerability at the relevant time, although in practice the evidence will probably be more nuanced.

43. I say above 'perhaps with the benefit of hindsight'. Where, as happened in the case of SA, a claimant was not required to attend work-related activity the FTT will not have that benefit unless it is clear that not to require attendance was due to a recognition of real vulnerability, which, in the absence of a change of circumstances might assist as to the level of risk at the critical date. I consider that position below. Otherwise the FTT will be considering risk based upon the more demanding activities that might be required of the appellant in accordance with the list that they should have post *IM*.

44. It should be remembered that the purpose of the *IM* list of potential work-related activity was not simply to inform the tribunal of what the appellant might be required to do; it was also for the benefit of the appellant so in putting their case to the FTT they might mount an informed argument that they would be at substantial risk if required to take part in the more demanding activities identified by the Secretary of State. An important question where there may be a risk from a requirement to participate is whether an appellant putting those points to a work provider would reduce the risk to one which was less than substantial. That may depend upon the appellant's ability to convey the true level of their disability. Learning difficulties, language problems or a difficulty accepted by the FTT but which may seem improbable in the absence of supporting evidence will need to be considered.

45. Where pending appeal the requirement to participate is not made that may be due to the practice where the appellant lives or it may be a decision following a work focussed interview that a particular appellant may be at risk if required to engage in work related activities. If there

was evidence of an individual approach on that basis, and in the absence of deterioration, that may be suggestive of the position at the date of the decision. The approach of Upper Tribunal Judge Bano in *CMcC-v-SSWP [2015] AACR 9*, (*CMcC)* approved in *IM* concerned case notes of an action plan made in relation to a spell of work related activity prior to the decision under appeal, during which the employment advisor had in May 2012 'abandoned any meaningful form of work related activity out of concern for the claimant's health' [11]. That informed the position at the later date of the decision under appeal, taken on 27 February 2013.

46. An action plan is likely to be particularly instructive. It might be congruent with those activities in which the FTT felt that the appellant could safely engage; on the other hand it might detail expected activities which were outside those in which the FTT felt the appellant could participate without substantial risk. It may also indicate to the FTT what the claimant was able to explain to the work advisor about their condition and limitations.

47. Work related activity requirements since the decision under appeal should be considered, but they cannot be the whole story. Without evidence on the point the FTT must avoid the assumption that if the appellant has been asked to prepare a CV, or conduct a telephone interview from home they will not be required to do anything more onerous. The purpose of such activity, after all, is to build skills and overcome barriers to work which will generally be an incremental process, but evidence of how someone coped with what was demanded of them will be informative of how they would be likely to cope with further activities which built upon those initially demanded.

48. So what an appellant has been required to do by way of work-related activities and how they have managed may well inform the tribunal, subject to the qualifications that I mention; it may not wholly answer the statutory question but will provide a better platform for the risk assessment; the more information the less speculative the process.

The Equality Act 2010

49. Ms Wilkinson submits that the provisions of section 29 (6) of the Equality Act 2010 (EA) (as explained in *MM & DM-v-SSWP [2015] UKUT (AAC))* place a duty upon the Secretary of State in carrying out the public function of administering the Work Capability Assessment to make reasonable adjustments to accommodate disabled persons where the operation of the scheme placed them at a substantial disadvantage in comparison to claimants without mental health problems, and have a place in obviating regulation 35 (2) risk. There is no suggestion that means regulation 35(2) could never apply, or that it is a substitution for that risk assessment, but it was said to be a relevant consideration. On the facts in the case of SA it was said that

the FTT was entitled to consider whether, if the respondent was routinely failing to offer telephone interviews (as the statement of reasons implied) the Secretary of State would be under an EA duty to offer them. Accordingly it was not a material error of law for the FTT to have taken potential reasonable adjustments which the respondent might make into account as part of the regulation 35 risk assessment.

50. *JS*[2] was decided under reg 29 and prior to the amendment of that regulation to include consideration of reasonable adjustments. The essence of the decision was that the EA duty was on an employer; it arose only in the context of an employer-employee relationship and at the behest of the employee. It is difficult to read across from that case to the reg 35 situation where the position is governed by regulation 3 of the Employment and Support Allowance Regulations 2011, which sets out the requirement to undertake work related activity, and provides, at 3(4)(a) that such a requirement

(a) must be reasonable, in the opinion of the Secretary of State, having regard to the person's circumstances…

51. I do not think that the EA duty referred to adds a great deal to this. The regulation 35 process is an assessment of risk in the real world having regard to whether the administrative process creates or eliminates relevant risks: *IM* at [100]. In *IM* despite the regulation 3 duty set out above, the clear account of the Secretary of State to the three judge panel was that the provision of work-related activities was generally outsourced, and those providing the activities were not told of the sort of difficulties which might inform a risk assessment. The failure to pass on relevant information as to an identified risk was described at paragraph 60 of IM as "contrary to any principles of risk management". It is difficult to understand how the EA duty prayed in aid could ameliorate the regulation 35 (2) risk given the way in which the scheme is operated, or was at the relevant dates. The list provided to me of work related activity said to be similar to that which would have been in place when the decisions were made in these cases makes it clear that face-to-face contact was expected rather than telephone interviews. Ms Wilkinson argues that there would nonetheless be an EA duty on the Secretary of State to provide for telephone interviews. For the Secretary of State to be able to rely in any material way on the EA duty under section 29 (6) overriding the apparent lack of reference to the possibility of telephone contact would be to render the provision of lists pursuant to *IM* an academic exercise. I do not accept that.
52. Further, and without it being necessary for me to rehearse the points made by Upper Tribunal Judge Wright in *JS*, I reiterate his remarks as to the difficulty that breach of the EA duty is not justiciable before the FTT the Social Entitlement Chamber. *MM & DM,* referred to by Ms

[2] Ibid [33]

Wilkinson, came before Mr. Justice Charles, Upper Tribunal AAC Chamber President sitting with two Upper Tribunal Judges by way of a transfer of Judicial Review proceedings from the High Court and not under the statutory appeals process.

53. The overarching problem remains the questionable level of information provided to the work provider; without a transparent communication process there can be little confidence in there being in place strategies to reduce or eliminate risk despite the statutory duty under section 29(6) EA to act in a way that does not disadvantage those with mental health problems. At [94] the judgment in *IM* points out that whilst there must be no assumption that the work provider will act unreasonably neither can there be a corresponding assumption that he will never make a decision that would trigger a regulation 35(2) risk; that is still the position despite section 29 (6) EA.

Third Party Assistance

54. Ms Daly's argument that the need to create a "level playing field" for claimants precludes consideration of any third party assistance that may not be available to all may well have a place in relation to the satisfaction of the descriptors, the nuts and bolts of the statutory test, although I do not need to decide that issue: I am looking only at the position in relation to the application of regulation 35 (2). Under the schedule 2 and 3 assessments for ESA physical and mental health problems are delineated and specific functions are examined, but regulation 35, like regulation 29 is a personal assessment. Regulation 29 risk considerations as to likely work settings are informed by the claimant's own work experience or qualifications. Regulation 35 considerations involve a rounded look at a person's ability and fragility. Within the risk assessment knowledge of actual circumstances may change the level of risk. I do therefore accept that this may include consideration of third-party assistance; however the circumstances need to be closely investigated and assessed prior to a finding that such assistance is reasonably available. Whilst some limited support should not be ignored, the tribunal considering the matter must not underestimate the hurdles that exist in making a finding that risk may be sufficiently reduced by reliance on a third-party. As Judge Ward said in *PD [28]*
"Such a conclusion would, though, have to be based on proper, evidence-based findings of fact." Doing that poses difficulties for a number of reasons.

55. Although, post *IM*, the FTT is given a list of potential work-related activities there is no indication of the extent to which a person will be mandated to attend; there is in general no indication of where the activities take place other than some which it is said may be home-based, and it cannot be assumed without evidence that only home-based activities will be offered.

56. Where the information does not permit the clear findings of fact that Judge Ward required in *PD*, which under regulation 35 would include some indication of the frequency with which assistance would be required in order to make a judgment as to whether or not it was reasonably available, it will be difficult to consider such help as mitigating risk.

57. I have seen it said that a partner always goes out with the claimant, the implication being that it will be reasonable for the partner to accompany them to all required work-related activities, but family needs or social outings can be arranged around other commitments, and even those who are not working may have regular or occasional family matters to deal with. Work-related activities may encompass a few hours including travel, or where the person could be left at the activity perhaps significant travel to and from the work-related activity at the beginning and the end. In many cases this would be demonstrably unreasonable given the practicalities of the school run and other child focused activities, but it may be thought that such an open-ended and potentially arduous commitment is of itself unreasonable. I note that regulation 3(5) Employment and Support Allowance Regulations 2011 provides that a parent who is a lone parent responsible for a child under 13 may only be required to undertake work-related activity during the child's normal school hours. If, in relation to a couple, the claimant's partner was needed to attend WRA with him there is no similar qualification, which may bear on the question of reasonableness. The cost of travel by a second person may be a factor, although perhaps one with which a work adviser could assist in a practical way.

58. I acknowledge that there may be some circumstances, those in *PD* being perhaps the most realistic, where a degree of help for a limited period might be reasonable; what should not be assumed is regular and open ended input from another person.

My decisions

59. I am asked to make decisions in each of these cases, and I feel that I am able to do so, and should if I fairly can, because of the time that elapsed since the date of the decision. I say if I fairly can. The expertise of the FTT, in particular its medical expertise, is generally necessary for the making of relevant findings; however here the findings of the tribunals were adequate for me to consider the relevant risk assessments on the basis of them. I am invited, if I cannot support the FTT findings as to risk, to make findings myself, and I do so.

YA

60. The Secretary of State's decision maker clearly appreciated that YA would have problems due to the regularity of his fits: the decision was made to award 15 points under the relevant schedule 2 activity despite the opinion of the healthcare professional that just 6 points were merited.
61. There is the possibility that the work activity provider, if they knew of the appellant's epilepsy and the frequency of fits, might decide that it was not reasonable to require him to attend work related activity at all, but I bear in mind [85] of *IM* where it was said that to argue that because there was no work-related activity in which the claimant could engage without a substantial risk to someone's health the Secretary of State could not reasonably require the claimant to engage in work-related activity under regulation 3 of the 2011 and therefore regulation 35(2) is not satisfied would undermine the purpose of the provision.

62. It is important to differentiate the risk that YA is subject to daily because of his medical condition, which is the risk of injury caused by falling during a fit, and the risk which is being examined under regulation 35, which is because of the finding that the person does not have limited capability for work-related activities, although actual engagement in such activities must be contemplated. *(NS-v-SSWP (ESA) [2014] UKUT 149 (AAC) [26]).* That risk may relate directly to some or all of the work-related activities, the journey to and from them (applying *Charlton* to regulation 35 as per *AH-v-SSWP (ESA) [2013] UKUT 118 (AAC) [2013 AACR 32*) or to the risk of deterioration in health due to increased anxiety caused by having to engage in the process.

63. In relation to the daily risk the undisputed evidence showed that YA took regular steps to mitigate that by being accompanied, in particular when out. Whilst this is self-serving he has been highly consistent in saying that; it appears from his account set out in the report of the healthcare professional (to which appointment he was accompanied by his daughter) and the findings of the FTT on the basis of his oral evidence to that effect. It is plausible in light of the frequency of the fits and the facts found (in the statement of reasons at [8]) that warning of a fit was limited to 'sometimes 3 or 4 seconds' or 'sometimes one minute'. If out walking this may not be sufficiently useful warning to get to a place of safety on the ground. The general risk to YA is likely to be greater if crossing roads and so forth than indoors, although with such frequency of fits risk at some level will always be present.
64. In my judgment if such a risk is ever present but routine actions minimise it, it may yet be a substantial risk factor under the criteria in regulation 35 if assistance to ameliorate it is not in place during attendance at work related activity, and if relevant as here, on the journey to and from such activity.

65. As set out above Ms Wilkinson told me of the provision for disclosure of epilepsy to work providers with the consent of the claimant. She was

not able to assist as to when that had come into effect. There is no indication that YA was asked to give his consent to such disclosure, and I am not persuaded that such a scheme was in general operation at the date of the decision in his case. In the event despite that interesting development it is not necessary for me to decide this case on "the knowledge gap" principle; the determinative issue is the risk to YA on the journey to and from any activities that he may be required to attend.

66. It seems to me likely that the presence of a third party would reduce the risk factor in respect of travel to and from required activities in respect of YA to less than substantial; I am persuaded that his lack of injury despite regular fits with little if any useful warning is due to the routine presence of another person. This situation is not temporary. The crux of the issue in his case therefore depends upon the question of third-party assistance.

67. I consider an open ended commitment to travel to and from work related activities in order to undertake those activities freed of substantial risk to the appellant to be unreasonable and unworkable even within this family where YA's wife does not work, or did not at the relevant time. It seems to me likely that the current arrangements for his being accompanied take into account family convenience; the ability to pick and choose times for trips out is unlikely to be as flexible with mandated work-related activity.

68. Judge Ward made observations as to the importance of third party arrangements appearing capable of being maintained [25] and Upper Tribunal Judge Rowland has observed that the risk of additional anxiety in worrying about that could be a feature of the risk assessment. He said in *SS v Secretary of State for Work and Pensions (ESA) [2015] UKUT 0101 (AAC)* at [5]

if there was a risk of the help not being available or not being maintained, it would be necessary to consider whether that might give rise to a substantial risk to the claimant's health through, for instance, increased anxiety.

69. Although the risk argued in relation to the regulation 35(2) considerations for YA related only to his epilepsy, the first paragraph of the response to the FTT states that the original ESA award was on the basis of (inter alia) epilepsy and PTSD (post-traumatic stress disorder, said to be consequent upon torture in his country of origin). Whilst YA lives daily with the natural anxiety of an epileptic fit that may cause him injury or other difficulty, the pressure of expectation in relation to the attendance of work-related activities which he can only get to without substantial risk by being accompanied is of itself a risk to his mental health given the pre-existing fragility.

70. As to the argument that work-related activity could have been confined to the appellant's home, as a matter of fact he was required to attend English classes away from his home, and I take that into account.

71. Accordingly I find that as of the date of the decision under appeal there was a substantial risk to the appellant's health through not being found to have limited capability for work related activities and he enters the Support Group under regulation 35(2).

SA

72. The FTT determination was not *IM* compatible. Under Ms Wilkinson's Route 2 (based on paragraph 117 of *IM*) the FTT needs to be confident that its information is up-to-date and complete as to the more demanding types of work related activity. Here the activities in contemplation as set out in the statement of reasons related to preparing a CV, obtaining references and telephone advice and counselling with no suggestion that this encompassed a range of activities including the more demanding; rather it is a reflection of those types of activity to which the FTT thought she may be suited.

73. Ms Wilkinson's Route 3 was that the FTT could properly determine the case one way or another without the evidence as to the range of available activities. I do not accept the breadth of her analysis of *IM* in this regard. In my judgement it envisages the situation where the FTT's findings as to an appellant's level of disability suggest that they either could participate in any work related activity that might be demanded of them without substantial risk, or in none; the findings of the FTT in this case did not reflect that.

74. I agree with the conclusion of Upper Tribunal Judge Rowley in *CE/3886/2014* [12] that where there was 'no serious argument' that regulation 35 (2) applied it was not a material error to fail to consider it according to *IM* principles (indeed I made a similar point in *DB-v-SSWP (ESA) [2016] UKUT 493 (AAC) [21]).* That was the position on the facts found in Judge Rowley's case, in which the appellant suffered pain for which she had been advised to take paracetamol. Here the terms of the statement of reasons indicates not that the appellant could engage in any activity without substantial risk, but that there was a highly qualified range of such activities.

75. I question Ms Wilkinson's proposition that medical evidence is required to support a finding of "any specific substantial risk to health caused by the appellant's pain". There is judicial authority over many years to the effect that the uncorroborated evidence of an appellant on such issues can be accepted: I refer only to *R (I) 2/51* at [7] and *R (SB) 33/85* at

[14]. If the level of pain is accepted it is for the FTT to conduct the risk assessment, and it may do so without medical evidence. I note also the burden of proof on the Secretary of State to show in a given case that the exceptional circumstances do not apply; I appreciate that there will be cases, for example where on the Secretary of State's evidence no points were scored, that in practice a tribunal may place an evidential burden on an appellant under the principles set out in *Kerr-v- Department for Social Development [2004] UKHL 23*, however this case was less clear-cut than that, and in any event she had provided medical evidence. I disagree that the medical evidence from between November 2013 and April 2015 is not relevant because it post-dated the reconsideration decision of 21 June 2013, thus offending against section 12 (8) (b) Social Security Act 1998. I have already mentioned that evidence may be relevant if it sheds light on the position at the date of the decision *(R (DLA) 2/01; R (DLA) 3/01);* that is the original decision under appeal, not a later revision or 'reconsideration': *(R(CS)1/03).*

76. As to the alleged similarities with Judge Rowley's case it is generally unhelpful to compare cases on a factual basis, but in any event I do not see a useful comparison of the position in that case where the appellant was taking paracetamol only, and that in this case, in which the appellant was under a pain clinic and was prescribed significant pain relief including morphine patches; there is likely to be a fundamental difference in the ability to tolerate pain which is medically expected to be kept under control by over-the-counter pain relief and pain for which opiates are thought necessary by treating clinicians. I find it probable given the evidence of her clinical treatment that SA's levels of pain are such that they regularly interfere with her ability to function including the executive functions of concentration, planning and organisation. It is therefore likely that she will suffer anxiety to the extent that there is a substantial risk to her health if pressure is put upon her to comply with more demanding activities than those contemplated by the FTT, namely telephone interviews and basic CV/ reference related administration. The list with which I am now provided indicates that the range of activities that she might have been required to engage in is more demanding than that.

77. However, I do not accept that this pressure would have been put upon SA, because her ability to communicate the nature of her difficulties to the workplace activity provider, who is likely to act reasonably given proper information about those difficulties, would mitigate any substantial risk to her health. Her pain is physical in origin and there is no indication that she has diagnosed mental health problems, communication difficulties or would otherwise be unable to explain her problems. This is in contrast to YA, a Turkish speaker, who, following a WFI was directed to attend WRA outside his home. Given the risk he

would be at whilst travelling alone it is reasonable to conclude that he was not able to communicate the extent of his problems and the risk to his health that was involved; if he had been able to do so the demand would not have been made.

78. In respect of SA regulation 35 (2) did not, at the date of the decision with which I am dealing, apply to her. Her subsequent placement in the Support Group is likely to have been due to later deterioration in her condition.

79. I agree with Ms Wilkinson that there is no right of appeal in relation to the actual requirement to attend a particular work related activity. In *IM*, at [11] some of the processes of the Work Capability Assessment regime were explained.

Where functions are contracted out, the body carrying out the functions is known in Departmental jargon as a "provider". The functions that may not be contracted out include those in respect of which there is a right of appeal to the First-tier Tribunal, by virtue of section 12 of the Social Security Act 1998. There is no right of appeal against decisions simply requiring a person to take part in a work-focused interview or to engage in work-related activity.

80. The FTT's erroneous comment that the appellant would have a right of appeal in relation to a determination that she engage in particular types of work-related activities becomes immaterial given my view on the errors of the tribunal's overall approach to the question of risk. Although I find that regulation 35 (2) does not apply in her case, the remarks of the FTT on the appeal point do reinforce my view that it was not satisfied that she would not be at substantial risk in relation to the full range of such activities as might be demanded of her.

81. I leave the FTT decision intact despite its errors, because my conclusion is the same. It would be futile for me to set aside the decision, only to remake it in similar terms.

Upper Tribunal Judge Paula Gray

Signed on the original on 2 February 2017