UA-2023-001867-PIP

Neutral Citation Number: [2026] UKUT 50 (AAC)
Appeal Nos. UA-2023-001867-PIP and UA-2024-001067-PIP

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between

(1) AH
(2) AK

Appellants

- v -

The Secretary of State for Work and Pensions

Respondent

Before: the Hon. Mrs Justice Heather Williams DBE, Upper Tribunal Judge Stout and Upper Tribunal Judge Butler

Hearing date: 18 November 2025
Mode of hearing: Hybrid

Representation:
Appellant (1): Matthew Fraser and Claudia Hyde of counsel, instructed by Kester Disability Rights
Appellant (2): Represented himself
Respondent: Denis Edwards of counsel, instructed by the Government Legal Department

On appeal from (in the case of AH):
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Judge/Panel: Judge FO Anthony, Ms K Turquoise, Dr CR Grainger
Tribunal Case No: SC015/22/00623
Digital Case No.: 1658-9124-6681-4281
Tribunal Venue: Derby
Decision Date: 13 December 2022

On appeal from (in the case of AK):
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Judge/Panel: Judge B Cossar, Mrs B Cole, Dr S Tewari
Tribunal Case No: SC285/24/00709
Tribunal Venue: Birmingham
Decision Date: 29 April 2024

SUMMARY OF DECISION

PERSONAL INDEPENDENCE PAYMENT – MOBILITY ACTIVITIES (43)

The two appeals were listed to be heard together by a three-judge panel of the Upper Tribunal because they raise questions of law of special difficulty or important points of principle or practice regarding the interpretation and application of the descriptors concerned with mobility activity 1 in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/277) ("the 2013 Regulations"). In particular, the appeals raise questions regarding the way that regulation 4(2A) and regulation 7(2) of the 2013 Regulations are to be applied to these descriptors and the relationship between mobility descriptor 1.e and 1.f.

The three-judge panel's conclusions in relation to these issues are summarised at [119] of the decision.

The three-judge panel decides that the mobility activity 1 descriptors should be considered in the following order: 1.a, 1.b, 1.c, 1.d, 1.f and then 1.e. Descriptor 1.e is to be considered last because it involves the greatest degree of functional limitation. The panel holds that regulation 4(2A) does apply to all of the mobility activity 1 descriptors, that its application to the "cannot do" descriptors 1.d and 1.f entails a two-part inquiry, as set out at [80-84] of the decision and that it should not be applied in a restrictive way that results in a cohort of claimants who experience psychological distress falling between descriptors 1.f and 1.e. The panel explains that it is not possible for a claimant to satisfy both descriptor 1.f and 1.e; and the entirety of the claimant's conditions should be taken into account when the applicability of descriptor 1.f is assessed.

The panel also identifies the correct approach to applying regulation 7(2). This requires the decision-maker to consider in relation to each day of the required period, whether it is likely that the claimant would have met the descriptor if they were being assessed on this day and (where relevant, such as for descriptors 1.d and 1.f) if they had available to them the assistance contemplated by the descriptor at that time. What the claimant has actually done during the required period in terms of the activity in question will be relevant evidence when the regulation 7(2) test is being applied but is not determinative. Where the claimant has not undertaken the activity or has done so to a lesser extent than would be expected, the reasons for this will need to be examined in order to decide whether this is because of the functional effects of their medical condition(s).

The three-judge panel allows AH's appeal on the basis of the First-tier Tribunal's errors of law identified at [123 and 125] of the decision. The panel allows AK's appeal on the basis of the First-tier Tribunal's errors of law identified at [129] of the decision. The decisions of the First-tier Tribunals are set aside and the cases remitted to the First-tier Tribunal to be determined in accordance with the law set out in this decision.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.

DECISION

The decision of the Upper Tribunal is to allow the appeals. The decision of the First-tier Tribunal in each appeal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals Courts and Enforcement Act 2007, we set those decisions aside and remit the cases to be reconsidered by fresh tribunals in accordance with the following directions.

DIRECTIONS

1. **The appeals in both cases are each remitted to the First-tier Tribunal to be heard at (separate) oral hearings in accordance with the law set out in this decision.**

2. **In each case, the new First-tier Tribunal should not involve the tribunal judge, medically qualified tribunal member or disability qualified tribunal member previously involved: (a) in AH's case in determining her appeal on 13 December 2022, and (b) in AK's case in determining his appeal on 29 April 2024.**

3. **In relation to AK, the First-tier Tribunal has a closed period of jurisdiction from 07 June 2021 until 01 May 2024 inclusive. This is because on 16 September 2024, the Secretary of State superseded AK's PIP award with effect from 02 May 2024, awarding AK mobility descriptor 1.e (10 points) and mobility descriptor 2.b (4 points). AK was therefore awarded the enhanced rate of the PIP mobility component from 02 May 2024 onwards.**

4. **The new First-tier Tribunal must not take into account circumstances that did not apply at the date of the original decisions by the Secretary of State under appeal (06 April 2022 for AH and 29 November 2021 for AK). Later evidence can be considered if it relates to the circumstances at the time of that decision: see *R(DLA) 2/01* and *R(DLA) 3/01*.**

5. **The First-tier Tribunal hearing each remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome from the previous tribunal.**

6. **Copies of this decision, the relevant decisions about permission to appeal and the written submissions provided by each party before the Upper Tribunal, shall be added to the relevant bundle for those parties, to be placed before the First-tier Tribunal hearing the relevant remitted appeal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber.

REASONS FOR DECISION

Introduction

1. These two appeals were listed to be heard together by a three-judge panel of the Upper Tribunal because they raise questions of law of special difficulty or important points of principle or practice regarding the interpretation and application of the descriptors concerned with mobility activity 1 of personal independence payment ("PIP") under Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/277) ("the 2013 Regulations").

2. When convening the three-judge panel, the Chamber President's Directions Notice identified the following specific issues for consideration:

   a. How the requirements in regulation 4(2A) of the 2013 Regulations that a person is to be assessed as satisfying a descriptor only if they can do so "safely" and "to an acceptable standard" are to be applied to the mobility activity 1 descriptors in the context of persons who can follow the route of a familiar or unfamiliar journey if accompanied but suffer psychological and / or physical symptoms while or after doing so. This includes considering what was relevantly decided on this issue by the three-judge panel in ***MH v SSWP (PIP)*** [2016] UKUT 531 (AAC), [2018] AACR 12 ("***MH***");

   b. How the requirements in regulation 4(2A) do, or might, apply generally in the context of mobility activity descriptor 1.f (and potentially 1.e), given this descriptor assesses what a person "cannot" do and regulation 4(2A) imposes a requirement that a person is to be assessed as satisfying a descriptor only if they can do so safely, to an acceptable standard, repeatedly and within a reasonable time period;

   c. Having regard to regulation 7(1)(a) and (2) of the 2013 Regulations, whether a person's ability to plan and follow journeys is assessed by reference to what they actually do on the majority of days in the period being assessed or by reference to what *would* happen *if* they were asked to perform that activity on the majority of days; and

   d. Having regard to regulation 7(1)(b) of the 2013 Regulations, whether the appropriate descriptor for a person who satisfies mobility descriptor 1.e because they suffer overwhelming psychological distress when undertaking any journey, would be mobility descriptor 1.f if they are able to satisfy mobility descriptor 1.f on grounds other than overwhelming psychological distress (e.g., due to visual impairment).

3. The structure of our decision is as follows:-

AH's appeal: factual background and the First-tier Tribunal's decision

4. AH applied for PIP on 24 January 2022. AH declared conditions of anxiety and depression, panic attacks, back problems and fainting. In her PIP2 questionnaire she said she did not really leave her home and, if she did so, she usually had someone with her, as "I don't go without support".

5. Acting on behalf of the Secretary of State, the Department for Work and Pensions ("DWP") decided not to invite AH for a medical assessment to assess her entitlement to PIP, instead assessing her on the basis of the documentary evidence it held, including from her GP, and based on what was said in a telephone call to AH's friend who was acting as her informal representative. AH's GP confirmed her medical conditions and indicated that they significantly affected AH's ability to plan and follow (familiar and unfamiliar) journeys, so that she was not able to undertake these independently. Her friend said during the telephone interview that, whilst she encouraged AH to leave her home daily, at best she did so once a week because of the anxiety and distress this caused her. When they went for a walk, AH would hyperventilate, experience heart palpitations and shaking and it could take her 2 – 3 hours to calm down after returning home.

6. In relation to PIP mobility activity 1 (Planning and following a journey), a healthcare professional advising DWP recommended that, given the level of symptoms reported when AH went out (which was always accompanied), AH met the high threshold for overwhelming psychological distress, and it was likely she could not reliably undertake any journey as it caused her overwhelming psychological distress. The healthcare professional recommended awarding AH mobility descriptor 1.e (Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant).

7. On 06 April 2022, having received advice from the healthcare professional, a DWP decision-maker decided to award AH 13 points for PIP daily living activities (descriptors 1.d, 3.b, 4.c, 6.c, 9.c and 10.b) and 10 points for PIP daily living activities (mobility descriptor 1.e). DWP therefore awarded AH the enhanced rate of the daily living component of PIP and the standard rate of the mobility component of PIP from 24 January 2022 to 31 March 2025 inclusive.

8. AH requested mandatory reconsideration of DWP's decision, contending she should have been awarded descriptor 1.f (12 points) in relation to mobility. She submitted additional documentation including a statement from her friend, clarifying that when she referred to AH as "agoraphobic" during the telephone call, she was not suggesting that AH had a formal diagnosis to that effect. She said AH was only able to leave her house when accompanied, that it took a lot of coaxing before she agreed to go out and that AH was completely exhausted when she returned home. DWP's decision remained unchanged and AH lodged an appeal with the First-tier Tribunal on 27 July 2022. At this point AH was represented by Kester Disability Rights. AH's SSCS1 appeal form confirmed she accepted the award of 13 points in respect of daily living activities but challenged the award of 10 points for mobility activities. The appeal form argued AH was not housebound and could get out with support.

9. AH had asked for her appeal to be determined on the papers. On 13 October 2022, a First-tier Tribunal (the "AH Tribunal") decided AH's appeal on the basis of the paper evidence. It refused AH's appeal and confirmed DWP's decision, issuing a Statement of Reasons for its decision on 14 April 2023.

10. The AH Tribunal summarised the documentary evidence at [8] – [12] of its Statement of Reasons. At [13] the Tribunal stated that in order for AH to score points for mobility descriptors 1.d and 1.f she would need to demonstrate the passive presence of another person would be sufficient on the facts to reduce her psychological distress below a level where it was overwhelming (citing ***AA v SSWP (PIP)*** [2018] UKUT 339 (AAC) ("***AA***")).

11. At [14] of its Statement of Reasons, the AH Tribunal wrote:

> *"We accept the appellant rarely goes out. We accept that when she does, she is accompanied and that she experiences symptoms which include hyperventilating, heart palpitations, legs shaking and wobbling; an inability to breath [sic] and physically vomiting due to panic. The facts indicate that*

> *the presence of another person does not reduce the degree of psychological distress to below the threshold of it being overwhelming or to prevent it arising. We find from the evidence before us that the appellant experiences a range of symptoms which plainly reaches the threshold of "overwhelming psychological distress" when she is required to undertake any journey. The facts indicate that even though the appellant is accompanied for all journeys, the presence of another person makes no difference in terms of reducing the degree of psychological distress or to prevent it arising in the first place. We conclude from this that the appellant cannot undertake any journey, safely, reliably, within a reasonable time period and to an acceptable standard for over 50% of the days in the required period because it would cause overwhelming psychological distress to her. This is why the award of descriptor 1e is appropriate and this is why the appeal has been dismissed*."

12. On 05 December 2023, a salaried First-tier Tribunal Judge granted AH permission to appeal to the Upper Tribunal on the basis that her representative's appeal grounds were arguable in terms of whether mobility descriptor 1.e or 1.f should have been applied. The salaried Tribunal Judge added:

> "*The distinction between these two descriptors is often hard for tribunals to apply, and this is a case where the representative should have the opportunity to argue the point further at the Upper Tribunal*."

13. AH applied to the Upper Tribunal on 19 December 2023. Her appeal grounds were, in summary, that:

    (a) AH needed assistance to leave her home on any day she needed to make a journey, and the First-tier Tribunal had failed to address the evidence that AH was going out when support was available;

    (b) The Tribunal had taken a similar position to that taken by the Secretary of State in ***RF v Secretary of State for Work and Pensions*** [2017] EWHC 3375 (Admin) ("***RF***"). This position failed to take the enabling approach Ministers had stated was the intention behind PIP;

    (c) AH was not housebound and could undertake a familiar journey with the support of another person but could only do so on any given day with support;

    (d) Insufficient reasons had been given for dismissing AH's appeal given the evidence was that she could undertake journeys with suitable support; and

    (e) In relying on evidence from AH's friend who had mentioned agoraphobia, the First-tier Tribunal had relied on non-expert evidence. AH's treating medical professionals had not mentioned this condition. Furthermore, AH's GP had stated she could not manage a familiar or unfamiliar journey independently but had not stated AH could not do it at all.

14. There was a delay in AH's application being referred to a judge in the Upper Tribunal. On 28 August 2024, Upper Tribunal Judge Butler made directions in respect of the appeal. Judge Butler identified another potential error of law, namely that the First-tier Tribunal had arguably misapplied Upper Tribunal Judge Hemingway's analysis in ***AA***. Judge Butler also made directions for the parties to address other matters linked to the decision of the three-judge panel of ***MH*** and to address how regulation 7(1) falls to be applied in the context of mobility descriptors 1.d, 1.e and 1.f of Schedule 1 to the 2013 Regulations.

AK's appeal: factual background and the First-tier Tribunal's decision

15. AK made a claim for PIP on 07 June 2021. In his PIP2 questionnaire, AK declared conditions including anxiety, depression, severe eczema and loss of sight in his right eye. DWP asked AK to participate in a medical assessment with a healthcare professional on 18 November 2021, which took place by telephone. The healthcare professional recorded that AK had also lost the sight in his left eye, around 2 weeks before the assessment took place. The healthcare professional recommended awarding AK no points for any PIP activities. On 29 November 2021, having received that advice, DWP awarded AK no points for any PIP activities. DWP maintained its position on mandatory reconsideration, on 02 March 2022 (incorrectly written on the letter as 02 March 2021).

16. AK lodged an appeal with the First-tier Tribunal on 05 April 2022. On 19 May 2022, DWP decided to revise its decision dated 29 November 2021, and to award AK 13 points for daily living activities (descriptors 1.e, 3.b, 4.c, 6.c, 9.b and 10.b) and 10 points for mobility activities (descriptor 1.e). As the revised decision was more favourable to AK, DWP lapsed his appeal under regulation 52 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013.

17. On 05 March 2023, AK lodged an appeal with the First-tier Tribunal. The SSCS1 appeal form listed the 19 May 2022 decision as the one under appeal. AK indicated he was challenging DWP's decision about the PIP mobility component. On 07 December 2023, a salaried Tribunal Judge directed that AK's appeal was valid and should proceed, since it was brought within 13 months of the date of DWP's revision decision dated 19 May 2022.

18. On 29 April 2024, a First-tier Tribunal (the "AK Tribunal") heard AK's appeal by telephone. The AK Tribunal refused AK's appeal and confirmed DWP's decision.

19. The AK Tribunal set out some of its findings of fact at [7] of its Statement of Reasons, dated 20 June 2024. AK was 49 years old at the date of DWP's decision. He was treated by his GP but, although he had undergone counselling five years earlier, he was receiving no specialist input at the time of his claim. His GP explained, in a letter dated 25 January 2024, that AK had failed to engage because of his mental health difficulties, not because he did not require treatment, and that he had severe anxiety and an adjustment disorder. The GP described AK's mental health problems as long-standing, indicating they had increased as

his eyesight had deteriorated. AK had started to lose his vision in 2021, first in his right eye (which was worse) and then in his left, although he could see outlines and shapes.

20. The AK Tribunal wrote at [10] of its Statement of Reasons: "*The law provides that where a person satisfies descriptor 1e, the Tribunal should not go on to consider 1f.*". The AK Tribunal described AK as having provided conflicting evidence about whether or not he went outside. At [11] to [16] of the Statement of Reasons, the AK Tribunal recorded evidence given in the appeal bundle or during the appeal about whether AK was going out and what happened if he did (or tried).

21. At [17] of the Statement of Reasons, the AK Tribunal explained it found that, by the date of DWP's decision, AK's mental health was so bad, exacerbated by his fear of catching Covid and his anxiety caused by his eyesight loss, that he did not go out save on very rare occasions. At [18] of the Statement of Reasons, the AK Tribunal stated that, taking a holistic approach to mobility activity 1, the considerable weight of the evidence showed AK could not undertake any journey at the date of decision due to his anxiety. The AK Tribunal found as a fact that the level of AK's anxiety about leaving his house was so great that it did amount to overwhelming psychological distress. The AK Tribunal therefore decided that the correct descriptor to award AK for mobility activity 1 was descriptor 1.e (10 points).

22. AK disputed the AK Tribunal's decision to award him mobility descriptor 1.e instead of descriptor 1.f. On 01 August 2024, having been refused permission to appeal by the First-tier Tribunal, AK renewed his application to the Upper Tribunal. On 19 September 2024, Upper Tribunal Judge Stout granted AK permission to appeal, identifying the following specific appeal grounds, but not limiting the grant of permission:

    (a) At [10] of the Statement of Reasons, the AK Tribunal may have misdirected itself in law by stating that the law provides that where a person satisfies descriptor 1.e the Tribunal should not go on to consider 1.f. The AK Tribunal may have relied on paragraph 41 of ***MH*** for this legal proposition and failed to appreciate that the decision in ***MH*** only precluded relying on overwhelming psychological distress to satisfy descriptor 1.f *as well as* 1.e. The Upper Tribunal had left open the possibility that someone could satisfy descriptor 1.f on the basis of other factors such as physical limitations and under regulation 7(1)(b), be awarded the higher scoring descriptor (1.f) (see paragraph 42 of ***MH***); and,

    (b) The AK Tribunal had arguably erred in law by failing to consider whether AK satisfied descriptor 1.f independently of the overwhelming psychological distress he suffers. If, as a result of his eyesight, AK was unable without assistance to follow the route of a familiar journey safely, to an acceptable standard and within a reasonable time period, it was arguable he should have scored 12 points and been entitled to the enhanced rate of the PIP mobility component.

The issues between the parties

23. The Secretary of State supported AH's appeal on one ground only, which was that it considered the AH Tribunal had made a material error of law in how it applied the Upper Tribunal's decision in ***AA*** to her case. The Secretary of State argued that the AH Tribunal had interpreted ***AA*** as requiring a person to demonstrate the passive presence of another person is required to undertake a familiar or unfamiliar journey. The Secretary of State's position was that there is nothing in ***AA*** to suggest it is limited to the passive support of another person being relevant to an award of points under PIP mobility activity 1.

24. The Secretary of State did not support AH's appeal on the other grounds, namely whether the AH Tribunal was correct in law to conclude that the appropriate descriptor for her was 1.e. The Secretary of State argued that, on the basis of the evidence before the AH Tribunal, the DWP was entitled to find that even when AH went out accompanied, she still suffered overwhelming psychological distress and there remained a risk of her fainting. The Secretary of State's position was that, even if hypothetical support would enable AH to make journeys on more days than she did, it could not be said, applying regulation 4(2a), that she could do so safely or to an acceptable standard.

25. The Secretary of State did not support AK's appeal on any of the appeal grounds granted. The Secretary of State's position was that, in practical terms, AK was not actually undertaking any journey at all on the majority of days because of a mental health condition. As AK was not following the route of a familiar journey to begin with, he would not be facing any particular restrictions until such a time as he could leave his house on any given day. The Secretary of State's position was that it could not sensibly be said that descriptor 1.f was engaged when AK was not actually following the route of a familiar journey, as he could not undertake any journey on the majority of days.

26. At the hearing, counsel for AH and counsel for the Secretary of State appeared to agree regulation 4(2A) should be applied both to deciding whether a claimant cannot follow the route of a journey without another person, and also to whether having another person means they are able to follow the route to the standards required by regulation 4(2A). In further submissions following the hearing, however, the Secretary of State clarified his position as being that regulation 4(2A) is normally only applicable when considering the "can do" descriptors and that, if the claimant is not able to fulfil the "can do" descriptors to the requisite regulation 4(2A) standard, then a "cannot do" descriptor will be applicable, in respect of which "it is not necessary to ask in relation to most of the activities whether a claimant cannot do the "cannot do" descriptor safely etc., such that they cannot do the activity at all".

Hearing before the Upper Tribunal

27. Having directed that the appeals should be heard together with a three-judge panel convened, we held a hearing on 18 November 2025. The mode of hearing used was hybrid. This was so that AK could take part remotely, by telephone, at his request, and reflecting reasonable adjustments we made to allow him to participate effectively, taking into account the effect of his medical conditions on him. The other parties were represented by counsel, appearing in person, at the Upper Tribunal's central London venue.

28. We made other adjustments to allow AK to participate effectively in the hearing. The nature of AK's visual impairment meant he could not make use of written text in the same way as the other parties. Our adjustments included that, before the hearing, AK's submissions were dictated orally to a staff member at the Upper Tribunal who transcribed them (see pages 46 to 47 of UT bundle). Other adjustments included that, during the hearing, each person speaking identified themselves as they started to speak, for AK's benefit. Any question by the tribunal panel that referred to a passage in a document, also involved the judge reading out the whole passage for AK's benefit.

29. We checked with AK that these adjustments were suitable for him, and he confirmed they were. We asked AK if he had other adjustments to request (he did not).

30. Prior to the hearing, we directed our clerk to send the parties a copy of ***LAG (by her appointee LB) v SSWP*** [2025] UKUT 357 (AAC) ("***LAG***") and invited the parties to address it. It was a recently published decision of Upper Tribunal Judge Stout dealing with regulation 7 of the 2013 Regulations.

31. On the morning of the hearing, we directed our clerk to send the parties copies of the following decisions for discussion at the hearing: ***SSWP v AM*** [2015] UKUT 0215 (AAC) ("***AM***"), ***AB v SSWP*** [2017] UKUT 0217 (AAC) ("***AB***") and ***JT v SSWP (PIP)*** [2020] 186 (AAC) ("***JT***"). These were Upper Tribunal decisions that had considered how regulation 4(2A) should be applied in the context of a "cannot do" descriptor for PIP activity 9 (Engaging with other people face to face).

32. Although the parties had not included these cases in the agreed bundle of relevant authorities, we considered them potentially relevant to the issues in the appeals. We gave the parties additional time before starting the hearing to read and consider the authorities. At the outset of the hearing, the Chamber President indicated to the parties that, if requested, we would consider allowing them to make additional written submissions on these cases.

33. At the end of the hearing, Mr Edwards, counsel for the Secretary of State, asked for the opportunity to make written submissions on these authorities and on an additional matter. We gave Mr Edwards 14 days to provide written submissions, and 7 days for the other parties to reply. All the parties responded. We have read and taken into account their written submissions.

34. We are grateful to AK, and to counsel representing AH and the Secretary of State for their submissions, and responses to our questions at the hearing. We found the parties' willingness to explore the issues raised by our questions to be constructive and helpful.

Legal framework

Relevant legislation

35. The provisions creating PIP, setting out the entitlement conditions for it, and providing regulation-making powers to be able to implement it, are contained in sections 77 to 95 of the Welfare Reform Act 2012. Relevant sections for the purpose of these appeals are:

> **79 Mobility component**
> (1) A person is entitled to the mobility component at the standard rate if—
> (a) the person is of or over the age prescribed for the purposes of this subsection;
> (b) the person's ability to carry out mobility activities is limited by the person's physical or mental condition; and
> (c) the person meets the required period condition.
>
> (2) A person is entitled to the mobility component at the enhanced rate if—
> (a) the person is of or over the age prescribed for the purposes of this subsection;
> (b) the person's ability to carry out mobility activities is severely limited by the person's physical or mental condition; and
> (c) the person meets the required period condition.
>
> (3) In this section, in relation to the mobility component—
> (a) "the standard rate" means such weekly rate as may be prescribed;
> (b) "the enhanced rate" means such weekly rate as may be prescribed.
>
> (4) In this Part "mobility activities" means such activities as may be prescribed for the purposes of this section.
>
> (5) See sections 80 and 81 for provision about determining—
> (a) whether the requirements of subsection (1)(b) or (2)(b) above are met;
> (b) whether a person meets "the required period condition" for the purposes of subsection (1)(c) or (2)(c) above.
>
> (6) This section is subject to the provisions of this Part, or regulations under it, relating to entitlement to the mobility component (see in particular sections 82 and 83).
>
> (7) Regulations may provide that a person is not entitled to the mobility component for a period (even though the requirements in subsection (1) or

(2) are met) in prescribed circumstances where the person's condition is such that during all or most of the period the person is unlikely to benefit from enhanced mobility.

80 Ability to carry out daily living activities or mobility activities

(1) For the purposes of this Part, the following questions are to be determined in accordance with regulations—

(a) whether a person's ability to carry out daily living activities is limited by the person's physical or mental condition;

(b) whether a person's ability to carry out daily living activities is severely limited by the person's physical or mental condition;

(c) whether a person's ability to carry out mobility activities is limited by the person's physical or mental condition;

(d) whether a person's ability to carry out mobility activities is severely limited by the person's physical or mental condition.

(2) Regulations must make provision for determining, for the purposes of each of sections 78(1) and (2) and 79(1) and (2), whether a person meets "the required period condition" (see further section 81).

...

81 Required period condition: further provision

(1) Regulations under section 80(2) must provide for the question of whether a person meets "the required period condition" for the purposes of section 78(1) or (2) or 79(1) or (2) to be determined by reference to—

(a) whether, as respects every time in the previous 3 months, it is likely that if the relevant ability had been assessed at that time that ability would have been determined to be limited or (as the case may be) severely limited by the person's physical or mental condition; and

(b) whether, as respects every time in the next 9 months, it is likely that if the relevant ability were to be assessed at that time that ability would be determined to be limited or (as the case may be) severely limited by the person's physical or mental condition.

(2) In subsection (1) "the relevant ability" means—

(a) in relation to section 78(1) or (2), the person's ability to carry out daily living activities;

(b) in relation to section 79(1) or (2), the person's ability to carry out mobility activities.

(3) In subsection (1)—

(a) "assessed" means assessed in accordance with regulations under section 80;

(b) "the previous 3 months" means the 3 months ending with the prescribed date;

(c) "the next 9 months" means the 9 months beginning with the day after that date.

(4) Regulations under section 80(2) may provide that in prescribed cases the question of whether a person meets "the required period condition" for the purposes of section 78(1) or (2) or 79(1) or (2)—
(a) is not to be determined in accordance with the provision made by virtue of subsections (1) to (3) above;
(b) is to be determined in accordance with provision made in relation to those cases by the regulations.

36. The regulation-making powers in the 2012 Act were used to make the 2013 Regulations. Relevant provisions in the 2013 Regulations are as follows:

Interpretation
2. In these Regulations-
"C" means a person who has made a claim for, or as the case may be, is entitled to personal independence payment.

Assessment of ability to carry out activities
4.—(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.

(2) C's ability to carry out an activity is to be assessed –
(a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
(b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—
(a) safely;
(b) to an acceptable standard;
(c) repeatedly; and
(d) within a reasonable time period.

(3) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

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

limits that person's ability to carry out the activity in question would normally take to complete that activity.

Scoring for mobility activities

6.—(1) The score C obtains in relation to mobility activities is determined by adding together the number of points (if any) awarded for each activity listed in column 1 of the table in Part 3 of Schedule 1 ("the mobility activities table").

(2) For the purpose of paragraph (1), the number of points awarded to C for each activity listed in column 1 of the mobility activities table is the number shown in column 3 of the table against whichever of the descriptors set out in column 2 of the table for the activity applies to C under regulation 7.

(3) Where C has undergone an assessment, C has —

(a) limited ability to carry out mobility activities where C obtains a score of at least 8 points in relation to mobility activities; and

(b) severely limited ability to carry out mobility activities where C obtains a score of at least 12 points in relation to mobility activities.

Scoring: further provision

7.—(1) The descriptor which applies to C in relation to each activity in the tables referred to in regulations 5 and 6 is—

(a) where one descriptor is satisfied on over 50% of the days of the required period, that descriptor;

(b) where two or more descriptors are each satisfied on over 50% of the days of the required period, the descriptor which scores the higher or highest number of points; and

(c) where no descriptor is satisfied on over 50% of the days of the required period but two or more descriptors (other than a descriptor which scores 0 points) are satisfied for periods which, when added together, amount to over 50% of the days of the required period–

(i) the descriptor which is satisfied for the greater or greatest proportion of days of the required period; or,

(ii) where both or all descriptors are satisfied for the same proportion, the descriptor which scores the higher or highest number of points.

(2) For the purposes of paragraph (1), a descriptor is satisfied on a day in the required period if it is likely that, if C had been assessed on that day, C would have satisfied that descriptor.

(3) In paragraphs (1) and (2), "required period" means—

(a) in the case where entitlement to personal independence payment falls to be determined, the period of 3 months ending with the prescribed date together with—

(i) in relation to a claim after an interval for the purpose of regulation 15, the period of 9 months beginning with the date on which that claim is made;

(ii) in relation to any other claim, the period of 9 months beginning with the day after the prescribed date.

(b) in the case where personal independence payment has been awarded to C—

(i) during the period of 3 months following a determination of entitlement under a claim for the purpose of regulation 15 [or 15A], the period of 3 months ending with the prescribed date together with, for each day of the award, the period of 9 months beginning with the day after that date;

(ii) in any other case, for each day of the award, the period of 3 months ending with that date together with the period of 9 months beginning with the day after that date.

SCHEDULE 1
PERSONAL INDEPENDENCE PAYMENT ASSESSMENT
PART 1
INTERPRETATION

1. In this Schedule, —

"aided" means with –
(a) the use of an aid or appliance; or
(b) supervision, prompting or assistance;

"assistance" means physical intervention by another person and does not include speech;

"assistance dog" means a dog trained to guide or assist a person with a sensory impairment

"orientation aid" means a specialist aid designed to assist disabled people to follow a route safely

"prompting" means reminding, encouraging or explaining by another person;

"psychological distress" means distress related to an enduring mental health condition or an intellectual or cognitive impairment;

PART 3
MOBILITY ACTIVITIES

Col. 1 Activity	*Col. 2 Descriptors*	*Col. 3 Points*
1. Planning and following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4

	c. Cannot plan the route of a journey.	8
	d. Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10
	f. Cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12

37. In considering the application and effect of regulation 4(2A) of the 2013 Regulations, we have focused on how it applies to the descriptors in mobility activity 1. Counsel for AH and the Secretary of State agreed that mobility activity 1 represents a unique PIP activity in that it is the only one where the descriptor that reflects the greatest level of restriction in undertaking the activity (descriptor 1.e) is not the highest scoring descriptor, which is, instead descriptor 1.f. The rationale for this was explained in ***MH*** ([59] below).

38. However, we recognise our analysis may have potential relevance to some other PIP activities where the final descriptor is also drafted by reference to what a claimant "cannot" do. We have therefore set out all twelve PIP activities and their descriptors in Annex A to this decision in case it is helpful for those reading this decision to be able to refer to them.

Relevant case law

Regulation 4(2A) of the 2013 Regulations

39. After they were made, but before they came into force, the 2013 Regulations were amended by the Social Security (Personal Independence Payment) (Amendment) Regulations 2013 (S.I. 2013/455). The amendments included new paragraphs (2A) and (4) in regulation 4 of the 2013 Regulations.

40. The Government held a public consultation (with draft regulations) about how it proposed to implement PIP before making the 2013 Regulations themselves. Consultees expressed concern that, while the Government acknowledged the test for PIP would assess a person's ability to carry out a PIP activity safely, repeatedly, to an acceptable standard and in a reasonable timescale, this approach would only be set out in DWP guidance to decision-makers. The Government accepted that, given their importance to the overall assessment, these considerations should be included as requirements in the body of the 2013

Regulations rather than in guidance. It therefore amended the 2013 Regulations before they came into force, to include them.

41. In ***AM***, Upper Tribunal Judge Mark dealt with the Secretary of State's appeal from a First-tier Tribunal decision that had awarded, among other descriptors, descriptor 9.d, scoring 8 points, for PIP activity 9 (Engaging with other people face to face), on the basis AM could not engage with other people due to such engagement causing either (i) overwhelming psychological distress to the claimant or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person. The Secretary of State argued AM should have been awarded no higher than descriptor 9.b (2 points) for requiring prompting to engage with other people.

42. At [12] of his decision, Judge Mark addressed how one might apply the requirements of regulation 4(2A) of the 2013 Regulations to descriptor 9.d, which is drafted in terms of what a claimant cannot do, rather than what they can do:

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

43. Judge Mark's analysis was considered again, in the context of PIP activity 9 by Deputy Upper Tribunal Judge Ovey in ***AB***. Judge Ovey explained her reading of Judge Mark's analysis. Having set out at [38] of her decision the commentary on Judge Mark's decision that had been given in Social Security Legislation (the leading publisher of commentary on social security legislation), Judge Ovey stated:

> "I read the decision slightly differently. Bearing in mind Judge Mark's conclusion in paragraph 12 as mentioned in the preceding paragraph of this decision, it seems to me that he was not dispensing with the requirement that the claimant's inability had to be causally connected with overwhelming psychological distress or the risk of substantial harm, but was deciding that if such distress or risk was shown, the claimant did not have to establish, in order to satisfy descriptor 9(d), that otherwise he could have engaged socially safely, to an acceptable standard, repeatedly and within a reasonable time period. In practice, the claimant limited substantially his engagement with other people and so avoided the risk of substantial harm

which would have been caused by greater engagement. In that sense, he could not engage socially because of the risk of substantial harm".

44. Judge Ovey went on to state:

> "40. An example may help to illustrate the point. Activity 6 is the activity of dressing and undressing and the descriptors extend from descriptor 6(a), "Can dress and undress unaided" to descriptor 6(f), "Cannot dress or undress at all". It makes perfectly good sense to apply reg. 4(2A) to all the descriptors which are satisfied if the claimant positively can dress and undress either unaided or with specified help, but it makes no sense to seek to apply it to descriptor 6(f).
>
> 41. Returning to activity 9, as I said in paragraph 36 above, reg. 4(2A) works perfectly satisfactorily in relation to descriptors 9(a), 9(b) and 9(c), which are all concerned with what the claimant can do. It does not work satisfactorily when applied to descriptor 9(d) as a means of excluding a claimant from that descriptor. It will necessarily also have excluded the claimant from the other activity 9 descriptors, with the effect that such a claimant would not be catered for in relation to activity 9. In principle that does not seem to me to accord with the intention of the Regulations and as a matter of practical outcome, it would mean that effectively the same scores were achieved by a claimant who engages well and happily with other people, satisfying descriptor 9(a), and by a claimant whose interactions with others are inappropriate, who does not understand body language and who cannot establish relationships, but who, as a consequence of the application of reg. 4(2A), does not satisfy any point-scoring descriptor. There is no obvious justification for such an outcome.
>
> 42. I recognise that even if reg. 4(2A) is put to one side, the claimant still has to show that the inability to engage with other people is caused by overwhelming psychological distress or risk-generating behaviour. It seems to me that descriptor 9(d) implicitly envisages that the claimant makes or has made efforts to engage with other people but those efforts have proved unsuccessful either because the claimant's consequent psychological distress is so great that he cannot continue, at least on more than 50% of the days in the required period and so as to achieve a reg. 4(2A) level, or because the claimant's behaviour gives rise to a substantial risk of harm. If the claimant is able to overcome the obstacles to engagement with the assistance of social support, even if he experiences psychological distress in doing so, he will satisfy descriptor 9(c). It is therefore relevant to ask what it is that prevents a claimant, if provided with social support, from engaging with other people to the standard required by reg. 4(2A)."

45. Judge Ovey's analysis was, in turn, discussed by Deputy Upper Tribunal Judge Rowland in ***JT***. Judge Rowland was, at this time, a former salaried Upper Tribunal Judge, who had sat as part of the three-judge panel in ***MH***. Judge Rowland considered the meaning and application of PIP descriptor 9.d, and how the

requirement to consider a claimant's ability to carry out a PIP activity against the criteria in regulation 4(2A) would apply to it.

46. Judge Rowland referred to submissions that the appellant's representative (Mr Power) and the Secretary of State's representative had made about how descriptor 9.d should be interpreted and applied. At [13] of his decision, Judge Rowland identified the parties' arguments about [48] of ***MH*** (see [60] below), indicating that he did "not consider that either party's analysis of that decision [***MH***] is entirely correct".

47. Judge Rowland continued:

> "14. It is quite clear that, in the penultimate sentence, the three-judge panel was saying only that it had been correctly held in *DA v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 344 (AAC) and *HL v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 694 (AAC) that, on the facts of the particular cases, the respective claimants did not satisfy the threshold. It is also quite clear, from both the third sentence and the last sentence (because *RC v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 386 (AAC) was another case where the claimant suffered from anxiety), that the three-judge panel did not hold that anxiety, which as a matter of ordinary language means much the same as anxiousness even if the medical term is more tightly defined, could not amount to, or give rise to, overwhelming psychological distress.
>
> 15. Nor did the three-judge panel say, as Mr Power suggests, that such distress had to be due to a momentary bout of anxiety or panic and, if that was the impression conveyed, that is only due to the context in which the issue arose in that case. Chronic psychological distress caused by engaging with other people, or that would be caused by such engagement were it to be undertaken, could also be overwhelming. Indeed, the definition of "psychological distress" in Part 1 of Schedule 1 to the 2013 Regulations includes "distress related to an enduring mental health condition".
>
> 16. Furthermore, although the three-judge panel did say that the threshold was a very high one, that is a relative term and should not be regarded as a gloss on the statutory words. All that the three-judge panel's decision requires is that proper weight should be given to the statutory word "overwhelming". On the other hand, in the context of descriptor 9(d), it seems to me that distress that is sufficient to prevent a claimant from being able to engage with other people face-to-face must be considered to have been overwhelming – an analysis that might equally well apply to the descriptors that were in issue in *MH v Secretary of State for Work and Pensions* and, indeed, is perhaps hinted at in the paragraph of that decision cited above. Again, there is an element of circularity in this analysis, but I will explain below why it is particularly necessary in the context of activity 9.

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

48. Judge Rowland then provided his analysis of how the relationship between Activity 9 and regulation 4(2A) should be approached, stating:

> "19. I turn, then, to the relevance of regulation 4(2A), which Mr Power submits was inadequately considered by the First-tier Tribunal. The relationship between regulation 4(2A) and daily living activity 9 is not as simple as might appear at first sight. Paragraphs (2A) and (4) of regulation 4 were inserted into the 2013 Regulations by the Social Security (Personal Independence Payment) (Amendment) Regulations 2013 (SI 2013/455) and come into force at the same time as the original Regulations. As paragraph 8.2 of the Explanatory Memorandum to the amending Regulations explains, it had been intended initially that what is now provided in regulation 4(2A) and (4) should be in guidance rather than the legislation, but there was a lot of pressure for it to be included in the Regulations and the Government gave way. However, perhaps because it was drafted separately and originally as guidance where linguistic precision may perhaps be less important, the language of regulation 4(2A) does not always fit well with the Schedule to which it must be applied. Its general purpose seems obvious enough – to make it clear that the descriptors are not to be construed more strictly than is reasonable – but there are difficulties in applying it literally to some descriptors. Indeed, it is arguable that regulation 4(2A) nearly always has to be given a less than literal interpretation, even though it is clear enough what it is intended to mean in broad terms.
>
> 20. The word "activity" in regulation 4(2A) obviously means the activity mentioned in a descriptor listed in Column 2 of Schedule 1, rather than the activity listed in Column 1. Although these are the same in relation to activity 9, since "engage with other people" must clearly be read as "engage with other people face to face", that is not always so...
>
> 21. Moreover, the word "can", in the clause "only if C can do so", cannot refer to the ability to satisfy a descriptor, since the descriptor is often in the form of "needs …", but must in such cases refer to the ability to carry out the activity mentioned in the descriptor. Where the descriptor is in the form "cannot …", the clause must refer to the inability to carry out the activity

mentioned in the descriptor, rather than the ability to do so, (and the word "only" is then inappropriate). This is because those descriptors beginning "cannot …" must be construed consistently with the other descriptors, which, in activity 9, refer to help that the claimant needs so that he "can" do the same activity.

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

49. Judge Rowland quoted [12] of ***AM*** (set out at [42] of our decision above) and Judge Ovey's analysis at [39], [41] and [42] of ***AB*** (see [43-44] of our decision above). He continued:

"28. Judge Mark and Judge Ovey were both exercised by the logical possibility that regulation 4(2A) might have the effect that a claimant was excluded from each of descriptors 9(a), 9(b) and 9(c), despite also being excluded from descriptor 9(d) because neither head (i) nor head (ii) of that descriptor applied to his or her case. Neither judge appears to have regarded that as an intended outcome, but I am not sure that either entirely solved the apparent dilemma.

29. For my part, it seems important to recognise that regulation 4(2A) does not impose absolute standards, save in regulation 4(2A)(d) in respect of which the definition of "reasonable time period" in regulation 4(4)(c) is more prescriptive. It is not entirely clear to me how appropriate regulation 4(2A)(d) is in the context of activity 9 but the point does not arise for specific determination on this appeal. As regards the other subparagraphs, there are elements of judgment involved and the reality of the position of the individual claimant concerned must, I suggest, be taken into account when considering what is safe, acceptable or reasonable. So too, must the terms of descriptor 9(d). Judge Mark suggested that that descriptor has to be taken to refer to "such engagement as [the claimant] may be capable of" without suffering "overwhelming psychological distress" or exhibiting "behaviour which would result in a substantial risk of harm to the claimant or another person". However, if that is so for descriptor 9(d), it must also be true for descriptors 9(a), 9(b) and 9(c). Moreover, I do not consider that this would be to disapply regulation 4(2A), as Judge Ovey suggested; rather it would be to describe how regulation 4(2A) is to be applied in the context of this activity. (This is, I accept, only a semantic difference, as is my suggesting how regulation 4(2) generally applies to "cannot …" descriptors (see paragraph 21 above), in preference to Judge Ovey's view that it does not apply to such descriptors at all.)

30. One has to bear in mind that activity 9 was included in the Regulations before regulation 4(2A) and might perhaps have been drafted differently had

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

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

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

50. At [34], Judge Rowland observed that the Secretary of State may not have fully addressed his mind to whether it was possible for none of the descriptors in activity 9 to apply. If he had, he might have included as part of descriptor 9.a (0 points) an inability to engage with other people for reasons other than those in descriptor 9.d.

Regulation 7 of the 2013 Regulations

51. Regulation 6 of the 2013 Regulations explains how a claimant will be scored against the descriptors in relation to the mobility activities (and regulation 5 makes similar provision in relation to the daily living activities). Regulation 7 makes further provision for scoring both types of activity, to be read in conjunction with regulations 5 and 6. Regulation 7(1)(a) to (c) identify that the period of time in the required period that must be satisfied by one descriptor, or more than one descriptor at once, is "over 50% of the days of the required period". The phrase "required period" is defined in regulation 7(3) and identifies a period of three months ending with the prescribed date and a further period of 9 months beginning with the day after the prescribed date. Where a new claim for PIP has been made, the prescribed date for many claimants will be the date of claim.

52. In ***LAG***, the Upper Tribunal held that the First-tier Tribunal had made three errors of law in concluding that the claimant did not satisfy descriptor 9.d of PIP activity 9 on a majority of days. The claimant had a diagnosis of Emotionally Unstable Personality Disorder and there was evidence that she avoided social engagement in order to avoid confrontational situations (having been involved in some confrontational social situations involving violence in the past). One of the First-tier Tribunal's errors had been to proceed on the basis that, as the claimant had not in fact exhibited behaviour that posed a substantial risk of harm to herself or others on a majority of days in question, descriptor 9.d was not satisfied. Upper Tribunal Judge Stout emphasised that, if a claimant was not carrying out the relevant activity as often as it would be reasonable to do so, the decision-maker needed to consider the reason for this. In this context, Judge Stout observed at [21]:

> "…The combined effect of regulations 4(2A) and 7 is that the descriptors need to be considered on the basis that a claimant is carrying out the activities as often as is reasonable for them to be carried out and if, the claimant is not carrying out the activities as often as is reasonable, the Tribunal needs to consider why the claimant is not doing so. If it is because of the claimant's disability, then the Tribunal needs to consider whether the descriptor would apply on the majority of days if the claimant did in fact carry out the activity as often as was reasonable."

53. In reaching this analysis, Judge Stout drew on principles established in earlier decisions of the Upper Tribunal. She stated at [22] to [23] of her decision:

> "22. "These principles are well explained in two decisions of Judge Hemingway. The first is *TR v SSWP* [2016] AAC 23 where Judge Hemingway held as follows (emphasis added):
>
> > *30. I would certainly accept Ms Pepper's contention that* ***if a descriptor does apply at any point during a 24 hour period that must be a direct consequence of a claimant's physical or mental***

***condition**. That follows logically from the wording of section 78(1)(a) and section 79(1)(b) of the Welfare Reform Act 2012...*

...

32. Following the above reasoning, therefore, it seems to me that for a descriptor to apply, on a given day, then the inability to perform the task or function must be of some significance, that is to say something which is more than trifling or, put another way, something which has some tangible impact upon a claimant's activity and functioning during a day but not more than that. So, by way of illustration, to use the example given in the PIP Assessment Guide, if a person were to take his painkilling medication at the start of the day and it was to take effect quickly, so that his normal daily routine would not be inhibited in any way, then the relevant descriptors, in this context perhaps those relating to functions such as dressing, washing and toileting, would not be satisfied such that no points would be scored. If, however, the medication did not start to work for a period such as to delay his going about his daily business then it would be satisfied. Such a claimant, having taken his medication, could not be expected to await embarking upon his washing, dressing and toileting for a significant period for his medication to take effect. This, again, would seem to be in accordance with the overall legislative intention and seems to me to be consistent with the Government's response.

33. It may be, though, that with respect to at least some of the descriptors there will be a little more to consider. ***With respect to matters such as washing, dressing and toileting these are functions which, in general, will obviously need to be performed at some point during each 24 hour period. The position with respect to venturing out-of doors, for example, might be somewhat different. A person might, for example, simply have a lifestyle as a matter of choice not linked to disability which does not involve venturing out-of-doors during periods of dusk or darkness at all. So, in such a case, there may have to be a factual enquiry as to whether it is the disabilities or something else which is preventing such an activity...*** *Nevertheless, there are many reasons why a person might want to venture out after dark perhaps, dependent upon taste, to attend night school classes, or to visit the theatre, restaurants or perhaps even public houses. These activities might not be pursued every day and might indeed be pursued only rarely but if a person is effectively debarred from following the route of an unfamiliar journey or a familiar one without another person, an assistance dog or an orientation aid, which is in part what this appellant is contending, during the hours of dusk or darkness, then that person would not have to show, for the descriptor to be satisfied, that they would wish to undertake such a journey every day or anything like that but would only have to show that the particular disability which*

> *impacts upon them is sufficient to mean that that option is not, without the necessary assistance, available to them such that their lifestyle is restricted to more than a trivial extent.*
>
> ***34. The key to all of this is the definition of repeatedly. In the examples above, it cannot properly be said that a claimant is able to wash, dress and attend to his or her toileting as often as the relevant activities are reasonably required to be completed if he or she is obliged to wait for a disruptive period of time until painkillers take effect. It cannot properly be said that a claimant is able to follow the route of a journey repeatedly if he or she cannot do so for a part of each day such that the claimant is obliged to live a restricted lifestyle***.

23. In the second decision, ***GG v SSWP (PIP)*** [2016] UKUT 0194 (AAC), Judge Hemingway explained the proper approach as follows at [7] (emphasis):

> *"7....The mere fact that a claimant might be sufficiently motivated to perform a task when there is specific or unusual impetus to do so does not, of itself, inform as to the overall position and the generality of the situation. So, it is not appropriate to limit the scope of the enquiry to such days. True an ability to perform a task without prompting when there is particular pressure to do so might be indicative of a claimant simply exercising a choice not to perform such a task on impetus absent days but that will not necessarily follow.* ***What has to be undertaken is a more general and all-encompassing consideration. So, there needs to be an assessment, in such cases, of why it is that, on days when a claimant does not perform certain tasks, he/she does not do so. If it is because, without any specific impetus, he/she is not motivated to do so as a result of health difficulties and that such days exist for more than 50% of the time in the relevant assessment period, then absent other pertinent considerations, the relevant descriptor or descriptors will apply****. That was not this tribunal's approach, and I conclude that, in consequence, it did err in law.""*

PIP Mobility Activity 1 (Planning and following a journey)

54. In ***MH***, a three-judge panel of the Upper Tribunal was convened to consider the meaning and application of mobility descriptors 1.b, 1.d, 1.e and 1.f. One of the specific issues for consideration was whether a claimant could be awarded any of these descriptors that did not specifically refer to "overwhelming psychological distress", where their ability to plan and / or follow the route of a journey was argued to be affected by psychological distress.

55. The three-judge panel was convened because there had been a difference of opinion amongst judges in the Upper Tribunal about the effect of some of the descriptors for mobility activity 1 in ***DA v SSWP (PIP) [2015]*** UKUT 344 (AAC), ***RC v SSWP (PIP) [2015]*** UKUT 386 (AAC) and ***HL v SSWP (PIP) [2015]*** UKUT 694 (AAC).

56. The three-judge panel considered three appeals. In Mr H's case, the First-tier Tribunal had found he was unable to undertake any journey because it would cause him overwhelming distress (descriptor 1(e)). He appealed on the ground that the overwhelming distress he would suffer if he went out meant that he could not follow the route of a familiar journey without another person and so he should be awarded the higher points of descriptor 1.f. In the second case, the claimant, Ms C, who suffered from severe anxiety, was not awarded any points in respect of the mobility descriptors. She argued that the First-tier Tribunal had erred in not having regard to its finding that she satisfied daily living descriptor 9.b (needs prompting to be able to engage with others), as this was relevant to her ability to seek directions when she was lost and thus to mobility descriptor 1.d. In the third case, the First-tier Tribunal found that the claimant, Mrs D, who suffered from depression and physical impairments and had not been out of her house unaccompanied for four years, could not follow the route of a familiar journey without another person and so satisfied descriptor 1.f. The Secretary of State appealed on the ground that the descriptor was concerned only with an ability to navigate, rather than with a broader need for supervision.

57. The three-judge panel quoted extensively from the Government's formal response to the PIP consultation process (see [40] above), holding at [34] that, although the starting point must be the wording used in the relevant descriptors, the response could properly be used as an aid to the construction of the 2013 Regulations because it represented the considered view of the Secretary of State after account had been taken of the representations made by consultees and immediately before he, as legislator, made those Regulations. The following paragraphs of this consultation response are of potential relevance to the present appeals:

> "6.13 This activity has received numerous comments in relation to the wording 'overwhelming psychological distress', with particular reference to why we proposed to award more points for needing support to undertake journeys to familiar locations than where someone cannot undertake journeys because of overwhelming psychological distress. We believe that individuals who are unable to leave their homes as a result of overwhelming psychological distress will face additional costs and barriers and that therefore a high level of points should be awarded in recognition of these extra costs. However, we believe that individuals who can leave their homes but require considerable support to do so, such as needing constant supervision or to take more journeys by taxi, may face even higher extra costs and barriers, and that this reflects a higher overall level of need. We

> therefore consider it appropriate to award them higher priority in the benefit.
>
> 6.14 Concern was raised that the activity takes insufficient account of the impact of mental health conditions on mobility. We do not consider this the case. Individuals could potentially score in a number of descriptors in the activity if they cannot go outside to commence journeys because of their condition or need prompting or another person to accompany them to make a journey.
>
> ...
>
> 6.17 Some clarity was requested about why pain and fatigue are not included in this activity. While pain and fatigue are considered in all activities because claimants need to be able to reliably complete the activity, they are less relevant to this activity. This activity is concerned with whether an individual is able to plan the steps of a journey and then follow those steps, looking primarily at sensory, mental, cognitive and intellectual ability. It is not about the physical acts involved, such as standing and walking, so pain and fatigue do not feature as much in this activity. Where they do, this will be taken into account."

58. Some of the issues resolved by the three-judge panel in ***MH*** are common ground for the purposes of the present appeals. First, the meaning of "follow the route of a journey" in descriptors 1.d and 1.f includes the ability to navigate, but it is not limited to that; a person's need to be supervised in order to make their way along a route safely is also important ([36]-[37]). However, a claimant's inability to communicate with people to help find her way if lost is irrelevant to whether she can follow the route of a journey ([38]). Secondly, the different terminology used in descriptors 1.b and 1.e (on the one hand) and 1.d and 1.f (on the other), does not indicate they are concerned with mutually exclusive issues so that "overwhelming distress" is relevant only to descriptors 1.b and 1.e and not to descriptors 1.d and 1.f ([35]). The different language is simply because descriptors 1.d and 1.f are intended to apply to a broader category of people, including those who are visually impaired and so have difficulty with navigation, whereas descriptors 1.b and 1.e apply only to those liable to suffer from overwhelming psychological distress if they go outside unaccompanied or at all ([35]). The three-judge panel also addressed the inter-relationship between mobility activity 1 and mobility activity 2, which we do not need to consider in the present appeals.

59. Having reached the conclusions we have just summarised, the three-judge panel went on to address "[t]he relationship between mobility descriptor 1e and mobility descriptor 1f", stating:

> "41. This was an issue first raised by Upper Tribunal Judge Rowland in Mr H's case where the question arises whether the fact that he is unable to undertake any journey because it would cause overwhelming psychological

> distress and so scores 10 points under descriptor 1e implies that the overwhelming psychological distress from which he would suffer if he did undertake a journey is to be ignored for the purpose of descriptor 1f. Regulation 7(1)(b) has the general effect that, if a claimant satisfies two or more descriptors, the descriptor which scores the higher or highest number of points is the one to be applied. Nonetheless, it seems to us that descriptors 1e and 1f cannot sensibly each be read in isolation from each other and that the legislation contemplates that, where descriptor 1e is satisfied because the claimant needs to avoid overwhelming psychological distress by not undertaking any journey, the claimant will not undertake journeys so that the need for consideration of descriptor 1f due to such severe anxiety while on a journey will not arise. Otherwise, descriptor 1e would be otiose, since the implication of descriptor 1e being satisfied is that the claimant will suffer overwhelming distress if he or she goes out and so cannot, within the terms of regulation 4(2A), follow the route of a familiar journey without another person or, indeed, even with another person. We note that, in *RC*, the Judge considered it "extraordinary" that the permanently housebound should score fewer points than those who can sometimes go out, but, as was pointed out in a footnote in *HL*, the Government's reasoning is to be found in paragraph 6.13 of the consultation response. We are satisfied that proper effect can be given to the legislation only if, in a case where descriptor 1e is satisfied, overwhelming psychological distress is not taken into account under descriptor 1f.
>
> 42. Ms Scolding went further and submitted that, in a case where descriptor 1e is satisfied, descriptor 1f should not be considered at all even if the claimant is, say, blind and so might satisfy descriptor 1f on grounds other than overwhelming psychological distress. We are doubtful about that submission, because the case for regarding the applicability of descriptor 1f as limited by the fact that descriptor 1e is satisfied is weaker than it is where the only ground upon which descriptor 1f might be satisfied is a need for encouragement to avoid overwhelming psychological distress and the submission therefore arguably fails to give adequate effect to regulation 7(1)(b). However, this issue does not arise in any of the present cases and we prefer to leave it to be decided in a case where it does arise."

60. Next, the three-judge panel considered "[t]he relationship between mobility descriptor 1b and mobility descriptors 1d and 1f". At [44] the panel recognised that descriptors 1.d and 1.f might be satisfied by a person liable to suffer from overwhelming psychological distress when out walking, as a person who is accompanied may be encouraged to overcome their distress whereas a person who is unaccompanied may not. The three-judge panel continued:

> "48. Although it will be apparent that we also do not agree with all the reasoning in *DA* and *HL*, we nonetheless, consider that it was correctly decided in both cases that the claimants did not satisfy descriptors 1d and 1f as a result of their anxiety. In cases where claimants suffer from severe anxiety, descriptors 1d and 1f must be applied in the light of descriptors 1b

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

61. In the course of addressing the relationship between mobility activity 1 and mobility activity 2 at [52], the three-judge panel confirmed the view it had expressed at [41] that "overwhelming psychological distress is not to be taken into account under descriptor 1.f where descriptor 1.e is satisfied". We discuss [41], [42] and [48] of ***MH*** when we set out our analysis below.

62. The three-judge panel dismissed Mr H's appeal on the basis that, as descriptor 1.e was satisfied in his case, he could not have scored points under descriptor 1.f ([55]). Ms C's appeal was allowed and her case remitted as the First-tier Tribunal had erred in considering that descriptor 1.d did not apply to those who need someone with them in an unfamiliar place because of their anxiety ([58]). The Secretary of State's appeal was dismissed in Mrs D's case as, on the First-tier Tribunal's findings, she satisfied descriptor 1.f ([59]).

63. In ***AA***, Upper Tribunal Judge Hemingway considered the position where a claimant could undertake some, but not all, familiar journeys and whether the presence of another person for descriptors 1.d and 1.f required the person to take an active role. Judge Hemingway also considered what a Tribunal has to address by way of explanation in circumstances where it decides that mobility descriptor 1.b applies but mobility descriptors 1.d and 1.f do not.

64. Judge Hemingway addressed how a person potentially meeting mobility descriptor 1.b would fall to be assessed under the other mobility 1 descriptors once they had left their home. Having done so, Judge Hemingway turned to what the person accompanying a person on a journey might need to do. He explained:

> "19. There is then the question of whether or not the other person as referred to in mobility descriptors 1d and 1f is required to be active (and of course if that person was prompting that would amount to being active) for points to be scored. The tribunal clearly thought there was such a requirement although it did not explain why it believed that to be the case. Prompting, which is referred to in mobility descriptor 1b but not in any other descriptor linked to that activity, is defined within Schedule 1, Part 1 of the Social

> Security (Personal Independence Payment) Regulations 2013 as "reminding, encouraging or explaining by another person". The term supervision, which is not used in mobility activity 1 but appears in other activities/descriptors, is defined as "the continuous presence of another person for the purpose of ensuring C's safety" ... The definition for assistance, again not appearing in mobility activity 1 but appearing in other activities/descriptors, is "physical intervention by another person and does not include speech" ... But neither of those descriptors, on a literal reading, require anything more than presence. What is being posited is what the claimant could or could not achieve simply "without another person, an assistance dog or an orientation aid". Clearly it is the "without another person" wording which is relevant here. The literal wording does not require any form of prompting, assistance, supervision or other type of active involvement with the claimant. So, I agree with the Secretary of State's representative that so long as it can be demonstrated that the passive presence of another person is sufficient, on the facts, to avoid overwhelming psychological distress being experienced by a claimant when attempting to follow the route of a journey, then points may be scored under the two relevant descriptors. The tribunal was in error in thinking and deciding otherwise."

65. At [20] and [21] of his decision, Judge Hemingway considered the question of what would happen if a claimant could undertake *some* familiar journeys without another person. He concluded that an occasional ability to undertake a journey would not impact upon the regulation 7 assessment (explaining that the reference to "any journey" in descriptors 1.b and 1.e is simply there to indicate that no distinction is drawn here between familiar and unfamiliar journeys). He also emphasised that the test is general in nature; it does not contemplate consideration of particular journeys, rather, a broad assessment of the claimant's ability to undertake familiar journeys is required, so that an ability to undertake a very limited number of specific journeys would not preclude them from establishing an entitlement to points under descriptor 1.f.

66. The appeal grounds for AH relied on the decision of the Administrative Court in ***RF***. This was a claim for judicial review of paragraph 2(4) of the Social Security (Personal Independence Payment) Regulations 2017 (S.I. 2017/194) ("the 2017 Regulations"). This paragraph of the 2017 Regulations amended the wording of mobility activity 1 descriptors c, d and f so as to provide that those descriptors only applied where the claimant could not do the planning or following of the route as stated in those descriptors "for reasons other than psychological distress". The aim of the amendment had been to make clear that "psychological distress" was only relevant to descriptors b and e. As Mostyn J explained at [28]-[29] of his judgment, the amendment was introduced because the Secretary of State in ***MH*** had failed to persuade the Upper Tribunal that a claimant suffering from psychological distress could not satisfy descriptors c, d and f and had sought to insure against unsuccessfully appealing the Upper Tribunal's decision in that case by amending the regulations to expressly reflect the interpretation the Secretary of State had advanced in ***MH***. Mostyn J held that the amendment

regulations were unlawful on various grounds, including that they were unlawfully discriminatory as having a disproportionate impact on those who suffer psychological distress. He quashed them, and the Secretary of State did not seek to make any further relevant amendments to mobility activity 1 of the 2013 Regulations.

67. Although it is helpful to understand this aspect of the legislative history of the regulation with which we are concerned, at the hearing before us, Mr Fraser confirmed that he only relies on ***RF*** for what is says about the policy intentions behind PIP. This includes that the purpose of PIP was to allow the Government to provide cash support to help overcome barriers preventing disabled people from participating fully in everyday life, and that support would be targeted at those disabled people who face the greatest challenges to living independent lives (see [5] of ***RF***).

Analysis

68. We will first consider the correct approach to applying the descriptors for mobility activity 1, including addressing the issues identified at [2] of this decision, before coming on to address AH's and AK's specific grounds of appeal.

<u>The mobility activity 1 descriptors and the application of regulation 4(2A)</u>

The order of the descriptors

69. As we have already noted, the mobility activity 1 descriptors are unique in that the descriptor which reflects a claimant's greatest level of restriction in carrying out the relevant activity (descriptor 1.e) is not the highest scoring descriptor (which is descriptor 1.f). As the three-judge panel identified in ***MH***, the reason for this was identified at [6.13] of the Government's consultation response, namely those who are only able to follow the route of a familiar journey with support may face higher additional costs than claimants who are unable to leave their homes as a result of overwhelming psychological distress ([57 and 59] above). Whilst this rationale is clear, the unusual structure of mobility activity 1 means that if the decision-maker simply works their way up through the descriptors in alphabetical order (in the way that is done for the other daily living and mobility activities), this risks giving insufficient attention to circumstances that are capable of coming within descriptor 1.f.

70. As the decision-maker's task is to assess the claimant's functional capacity by reference to the descriptors and to identify the descriptor/s that accurately reflect the restrictions upon what the person is able to do as a result of their physical and/or mental health condition/s, it is logical for the assessment to proceed stage-by-stage through the various descriptors for the particular activity in the sequence that reflects an increasing level of limitation.

71. Accordingly, in any given case, consideration of the applicability of the descriptors in mobility activity 1 should be approached in the following order: 1.a, 1.b, 1.c,

1.d, 1.f and then 1.e. As we will come on to explain, not only is this the logical path to adopt, consistent with the decision-maker's task, but it also provides a workable means of applying regulation 4(2A) in a manner that respects the structure of these descriptors, the wording of regulation 4(2A) and the underlying purpose of PIP and the 2013 Regulations. We address the extent to which this represents a departure from the three-judge panel's reasoning at [41]-[42] in ***MH*** at [93 and 102-106] below. At the hearing, both Mr Fraser and Mr Edwards agreed with our suggested order of approaching the mobility activity 1 descriptors. In post-hearing submissions, Mr Edwards departed from this position, suggesting that descriptor 1.e should be considered before descriptor 1.f. The basis of his submission was the paragraphs of ***MH*** that we discuss below.

How regulation 4(2A) applies

72. The terms of regulation 4(2A) indicate that the criteria it specifies in (a) – (d) are to be applied, "Where C's ability to carry out an activity is assessed". This wording does not distinguish between descriptors that refer to what a claimant "can do" and those that, in terms, look to what a claimant "cannot do"; in both instances the First-tier Tribunal will be assessing the claimant's ability to carry out the activity in question. On the face of it, therefore, regulation 4(2A) requires that the criteria at (a) – (d) must be applied where a descriptor looks to what a claimant "cannot do" as well as to what a claimant "can do".

73. Leaving aside for a moment the particular issues of interpretation posed by mobility descriptor 1.f, we note that, in relation to the other activities of daily living and mobility that include a "cannot do" descriptor, they are for the most part confined to the descriptor for that activity reflecting the most severe level of functional restriction. This is not, however, the case for daily living activity 1 (preparing food), where two out of the six descriptors are "cannot do" descriptors, and mobility activity 1, where four out of the six descriptors are "cannot do" descriptors.

74. A consideration of some of the "cannot do" descriptors illustrates the importance of applying regulation 4(2A). For example, mobility descriptor 1.c is "Cannot plan the route of a journey". If the regulation 4(2A) criteria do not apply to this descriptor because it is phrased in the negative, the prescribed 8 points would only be awarded where the claimant was literally unable to plan a journey in any shape or form, rather than where a claimant could not do so safely, to an acceptable standard, repeatedly and within a reasonable time period. We do not consider that the former can have been the legislative intention, given the enabling purpose of PIP ([69] above), and the fact that, on the face of it, regulation 4(2A) must be applied to all descriptors.

75. Similarly, descriptor 1.c of the daily living activities refers to someone who "Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave". If regulation 4(2A) has no application to the first part of this inquiry, then the descriptor would have a narrow reach, excluding, for example, those who could literally cook some form of simple meal using a conventional

cooker, however poor the outcome and however long it took them to do so. Again, we do not consider this could have been the legislative intention; rather, the regulation 4(2A) criteria are to be applied to the question of whether the claimant can cook a simple meal using a conventional cooker. Whilst we stress that we have not had the benefit of specific submissions on descriptor 1.c of the daily living activities, it appears to us that the remaining words of this descriptor indicate that a two-part inquiry is involved, analogous to that we identify in relation to mobility descriptors 1.d and 1.f at [80-84] below.

76. Accordingly, for the reasons we have just explained, we reject Mr Edwards' submission that regulation 4(2A) does not apply to the "cannot do" descriptors and his suggestion that there is no need for it to do so. We do, however, agree with him that, where the activity category in question simply involves proceeding through a series of "can do" descriptors, concluding with a "cannot do" descriptor which reflects the most limited degree of functionality, it may not be necessary to consider the regulation 4(2A) criteria in detail, as it should follow from an assessment that the claimant does not meet any of the "can do" descriptors, that the "cannot do" descriptor, which attracts the highest award of points, will apply. However, as we have already shown, not all of the daily living activities or the mobility activities adopt this relatively straightforward structure and in those cases the two-part inquiry we identify below will need to be applied. We also note that, although this aspect was not discussed in detail in that case, the three-judge panel in ***MH*** proceeded on the basis that regulation 4(2A) applied to the mobility activity 1 "cannot" descriptors: see the terms of [41] and [48] (at [59-60] above).

77. By way of further example, as will be apparent from our earlier review of ***AM***, ***AB*** and ***JT***, a specific difficulty arose in relation to the interpretation of descriptor 9.d for activity 9 of the daily living activities because, although this descriptor involved the greatest restriction on functionality (and the highest points), it only applied in the circumstances specified in sub-paragraphs (i) and (ii), potentially giving rise to a gap between the scope of this descriptor and that of descriptor 9.c. We do not suggest that there is a direct read across from the way that regulation 4(2A) applies to descriptor 9.d to the way it applies to the mobility activity 1 descriptors, given the different wording, structure and context. Nonetheless, we have derived some assistance from Judge Rowland's analysis in ***JT***. In particular, after considering the divergent opinions expressed, we respectfully agree with his view, in preference to that of Judge Ovey in ***AB***, as to whether regulation 4(2A) applies at all to "cannot do" descriptors.

78. Furthermore, we agree with Judge Rowland's observations at [19]-[21] of this decision ([48] above), that: (i) the general purpose of regulation 4(2A) is to make clear that descriptors are not to be construed more strictly than is reasonable; (ii) the language of regulation 4(2A) does not always fit easily with the Schedule to which it must be applied (in all likelihood, for the reason he identifies) and may have to be given a less than literal interpretation; and (iii) where the descriptor is in the form "cannot", the word "can" in "only if C can do so" in regulation 4(2A) must refer to the inability to carry out the activity mentioned in the descriptor. For the avoidance of doubt, whilst we have also set out [29]-[32] of his decision for

completeness, we regard the way that Judge Rowland construed the application of regulation 4(2A) to descriptor 9.d as specific to the particular wording and context and we do not suggest that this indicates how the regulation is to be applied to mobility activity 1.

79. We record that in his post-hearing submissions, Mr Edwards contended that Judge Rowland was wrong in ***JT*** to attach significance to regulation 4(2A) being a late addition to the 2013 Regulations. We see nothing improper, however, in bearing in mind that regulation 4(2A) was added at a relatively late stage after the wording of the other provisions had been decided upon, if and to the extent that, a literal application of regulation 4(2A) appears to introduce unexpected or unintended consequences. Nor is it quite correct to say, as Mr Edwards contended in those submissions, that regulation 4(2A) was in the original version of the 2013 Regulations as made. The original version of the 2013 Regulations was made on 25 February 2013, to come into force in accordance with regulation 1(2). It did not contain regulation 4(2A) or 4(4). The amending regulations introducing those provisions were made two days later, on 27 February 2013. Both sets of regulations came into force on 08 April 2013.

80. We turn to the application of regulation 4(2A) to descriptors 1.d and 1.f of mobility activity 1. The structure of the mobility activity 1 descriptors and the wording of these particular descriptors indicates that a two-part inquiry is required. Descriptor 1.d will potentially apply if the claimant cannot follow the route of an unfamiliar journey safely, to an acceptable standard, repeatedly and within a reasonable time period. We have already discussed certain "cannot" descriptors that do not reflect the most functionally restricted ability for the particular activity ([74] – [75] above). To treat descriptor 1.d as only potentially applicable where a claimant is literally unable to follow the route of an unfamiliar journey at all, as opposed to incorporating circumstances where they cannot do so in accordance with the regulation 4(2A) criteria, would unduly narrow the potential reach of this descriptor in a way that cannot have been the legislative intention. However, we refer to descriptor 1.d "potentially" applying, as there is then a second part of the inquiry: if it is determined that the claimant cannot follow the route of an unfamiliar journey safely, to an acceptable standard, repeatedly and within a reasonable time period when unaided, then the decision-maker must go on to consider what the position is if the claimant is accompanied by "another person, assistance dog or orientation aid". The decision-maker, including the First-tier Tribunal standing in the shoes of the Secretary of State must ask whether, with that help, the claimant can follow the route of an unfamiliar journey safely, to an acceptable standard, repeatedly and within a reasonable time period.

81. The same two-part inquiry applies in relation to descriptor 1.f. The decision-maker must first consider whether the claimant cannot follow the route of a familiar journey safely, to an acceptable standard, repeatedly and within a reasonable time period, if unaided. If this is answered in the negative, so that the claimant *can* follow the route of a familiar journey safely and otherwise in accordance with the regulation 4(2A) criteria when unaided, then descriptor 1.f will have no application. If the claimant cannot do this, the decision-maker moves on to the

second part of the inquiry, assessing whether the claimant can, if they are accompanied by "another person, an assistance dog or an orientation aid", follow the route of a familiar journey safely, to an acceptable standard, repeatedly and within a reasonable time period. If they can, descriptor 1.f applies; if not, it does not.

82. In other words, descriptors 1.d and 1.f are aimed at those who cannot follow the route of an unfamiliar / familiar journey safely, to an acceptable standard, repeatedly and within a reasonable time period *unless* they have the benefit of one of the forms of assistance referred to in those descriptors. If the person in question is unable to undertake these activities to the regulation 4(2A) standard *even with* the prescribed forms of assistance then the decision-maker will need to proceed to consider whether descriptor 1.e applies.

83. We have concluded that the regulation 4(2A) criteria are to be applied to *both* aspects of descriptors 1.d and 1.f in the way we have just described, for the following reasons. If the regulation 4(2A) criteria were only to be applied to the first part of descriptor 1.f (assessing whether the claimant cannot follow the route of a familiar journey to a regulation 4(2A) standard when unaided), then descriptor 1.e would be otiose for those suffering from psychological distress, as every claimant suffering from certain levels of psychological distress would satisfy descriptor 1.f on the basis that they cannot follow the route of a familiar journey to the regulation 4(2A) standard even if accompanied. However, applying the regulation 4(2A) standard also to the second aspect of descriptor 1.f means that a person who, with another person, assistance dog or orientation aid, is still unable to follow the route of a familiar journey to the regulation 4(2A) standard does not satisfy descriptor 1.f and so consideration must be given to descriptor 1.e.

84. Our approach is thus consistent with [6.13] of the Government's consultation response. That paragraph explains that the enhanced rate of PIP awarded where a claimant scores the 12 points given for descriptor 1.f is intended to apply where claimants may incur the additional costs of undertaking familiar journeys with assistance. It makes little sense, in terms of the legislative purpose, for this highest scoring descriptor to apply to those who are unable to undertake such activity safely and in accordance with the other regulation 4(2A) criteria or, indeed, undertake it at all.

<u>The relationship between mobility descriptors 1.e and 1.f</u>

85. As we explained at [71] above, mobility descriptor 1.e only arises if descriptor 1.f has been considered and the decision reached that the claimant cannot follow the route of a familiar journey to a regulation 4(2A) standard even when aided by one of the forms of assistance set out in that descriptor.

86. Mobility descriptor 1.e applies where a claimant "cannot undertake any journey because it would cause overwhelming psychological distress". "Psychological

distress" is defined in Part 1 of Schedule 1, but the 2013 Regulations do not include a definition of "overwhelming". This word was deliberately included for a reason. Judge Rowland observed at [16] in ***JT*** that ***MH*** makes clear that proper weight must be afforded to the inclusion of this word, which indicates that a high threshold applies ([45] above). We agree with this and with his observation in the same paragraph, that distress that is sufficient to *prevent* a claimant from undertaking journeys, must be considered to be "overwhelming".

87. It is important, however, that mobility descriptors 1.f and 1.e are not interpreted in such a way as to create a cohort of claimants who fall between descriptors 1.f and 1.e and so score points under neither descriptor. It cannot have been the legislative intention that there would be a group of claimants who suffer from psychological distress to such a degree that they do not meet descriptor 1.f because they are assessed as unable to follow the route of a familiar journey to the regulation 4(2A) standard even when assisted, yet nonetheless are assessed as not meeting the terms of descriptor 1.e, as they do go out to a degree and their psychological distress is not considered "overwhelming". This unintended outcome is avoided if regulation 4(2A) is applied to descriptor 1.f in a purposive and expansive way. In this regard, we note that, whilst the meanings of "safely", "repeatedly" and "reasonable time period" are set out in regulation 4(4) of the 2013 Regulations, "to an acceptable standard" is not defined. We consider this phrase should be applied in a way that, so far as is reasonably possible, avoids leaving a gap of the kind we have identified between descriptors 1.f and 1.e.

88. This issue also potentially arises in relation to the daily living activities that have a "cannot do" descriptor as the highest-scoring descriptor where it includes a need to consider what the claimant can do with support (i.e. daily living activity 5), or cannot do for themselves so that they need another person to do so (daily living activities 2 and 4). In relation to those activities, if the claimant cannot do activity 5 to the regulation 4(2A) standard even with support or someone else is not able to perform daily living activities 2 and 4 for the person to the regulation 4(2A) standard, the risk is that the claimant falls outside the descriptors altogether and scores fewer (or, even, zero) points, even though such a claimant will have the highest degree of limitation and may need the highest level of support. In relation to mobility activity 1, the risk is more likely to be that the claimant will be found to satisfy mobility descriptor 1.e rather than 1.f, but it still potentially affects the overall outcome because it results in the claimant being awarded a lower number of points overall for the mobility activities.

89. We are not here concerned with the other mobility and daily living activities, but we agree with Mr Fraser in this case that this potential outcome underscores the importance of applying regulation 4(2A) to descriptor 1.f in a way that is consistent with the underlying legislative purpose. That purpose is to enable people to receive the support they require and to participate as fully as possible in everyday life. What constitutes "an acceptable standard" is a matter for the objective assessment of the Tribunal but, to accord with the legislative purpose, the claimant's ability to perform the activity needs to be assessed by reference to the standard that is (objectively) acceptable for a person limited by their medical

conditions. It is not to be assessed by reference to the standard that might be acceptable to a non-disabled person, or otherwise in a way that negates the limiting effects of the claimant's medical conditions. The Tribunal needs to recognise there may be a range of different ways of performing the activity rather than one single way of carrying it out. The standard should be applied respecting the autonomy of a claimant to make decisions about the activities they want to carry out with appropriate support. Evidence that a claimant carries out the activity and / or wants to do so, whether they repeat it and what level of support they receive (or would require), will all be relevant to the overall assessment. In some instances, a claimant may require a very substantial level of support or intervention, but this is consistent with [6.13] of the government's formal response to the PIP consultation. As it states:: "*However, we believe that individuals who can leave their homes but require considerable support to do so, such as needing constant supervision or to take more journeys by taxi, may face even higher extra costs and barriers, and that this reflects a higher overall level of need*."

90. As far as possible, the legislation should be construed in a way that avoids, in the context of a specific PIP activity, people with potentially more severe needs than those envisaged by the descriptors failing to attain any points, as there is nothing to suggest that this is the legislative intention. See, also, the government's publicly stated position at [89] above. We recognise that the question whether the claimant's psychological distress is "overwhelming" and the question whether they can undertake a journey to the regulation 4(2A) standard involve two distinct concepts. In practice, however, where psychological distress is involved, regulation 4(2A) should be applied to mobility descriptor 1.f by only regarding a claimant as <u>not</u> able to undertake a familiar journey with support to an "acceptable standard" if they suffer overwhelming psychological distress (properly applying the high threshold to that assessment). This is consistent with a proper construction of the legislation and the legislative purpose. It both avoids creating an unintended gap between descriptors 1.f and 1.e and promotes a claimant's participation in everyday life.

91. Applying regulation 4(2A) to descriptor 1.f in a way that avoids creating a gap between the reach of this descriptor and the scope of descriptor 1.e in relation to those suffering from psychological distress, also involves giving full effect to the wording of descriptor 1.e and to the high bar that, as we have noted, has to be satisfied for this descriptor to apply. However, given regulation 4(2A) also must be applied to descriptor 1.e (as well as to descriptors 1.d and 1.f, as discussed above), we do not go so far as to say that descriptor 1.e will *only* apply when a person's psychological distress is so severe that it literally precludes them from leaving their home and undertaking any kind of journey at all. Applying the approach we have discussed above, descriptor 1.e will apply if a claimant cannot undertake any journey "safely", "repeatedly", within a "reasonable time period" and to "an acceptable standard" without suffering overwhelming psychological distress. Where, for example, a claimant is able to undertake a journey if they make such frequent stops that it takes them more than twice the maximum period described in regulation 4(4)(c) and therefore does not satisfy regulation 4(2A)(d), but would be psychologically overwhelmed if they performed it within a

reasonable time period as defined in regulation 4(4)(c), they will satisfy descriptor 1.e. Likewise, someone who can make one journey, but cannot, applying regulation 4(2A)(c) and (4)(b) repeat that journey "as often as is reasonably required" without suffering overwhelming psychological distress, will also satisfy descriptor 1.e.

92. The circumstances of Mr H, the first appeal in ***MH***, provides a helpful example of a case where descriptor 1.f did not apply and descriptor 1.e was the correct categorisation. In ***MH***, Mr H accepted that descriptor 1.e applied to his circumstances but unsuccessfully argued that 1.f should apply too ([56 and 62] above). Mr H suffered from severe depression, anxiety and agoraphobia. He only went out to a very limited degree; when it was quiet venturing to the end of his drive and across the road (a distance of about 20 metres) to put out food for the foxes. Given the requisite broad assessment of whether a claimant can undertake familiar journeys (***AA*** at ([65] above), it is clear that whilst Mr H was not literally housebound, as a result of overwhelming psychological distress, he was not able to follow the route a familiar journey to a regulation 4(2A) standard, even with assistance.

93. Whilst we consider aspects of the analysis in ***MH*** in more detail from [102] below, we take the opportunity to indicate at this juncture that we respectfully disagree with the fourth sentence of [48] of that decision ([60] above), insofar as it appears to suggest that psychological distress is only relevant to descriptors 1.d and 1.f if its impact would be to overwhelm the claimant if they were unaccompanied. That is not what either of these descriptors say and we have explained the two-part inquiry that is to be applied to them ([80-82] above). A claimant who, as a result of their psychological condition, cannot follow the route of a familiar journey to an acceptable standard, repeatedly and within a reasonable time period when they are unaccompanied, may experience psychological distress at a level that is properly described as overwhelming so as to fall within descriptor 1.e. This may be the situation even where the claimant completes the journey rather than, for example, turning back or failing to attempt it at all. However, this does not necessarily follow and an inquiry into all the circumstances of what does (or would) happen, and why, is required.

94. The central point the three-judge panel was emphasising at [48] was that they agreed with the outcomes of the earlier ***DA*** and ***HL*** appeals, that the claimants' level of anxiety in those cases was not such as to bring them within descriptors 1.d or 1.f. To the extent that the panel went further and expressed a view that psychological distress is only relevant to consider where it is, in itself, overwhelming, we respectfully disagree.

95. We emphasise that, when considering whether a claimant who suffers from psychological distress is, with assistance, able to follow the route of a familiar journey to a regulation 4(2A) standard, *occasional* episodes of overwhelming psychological distress when they leave their home or attempt to do so, will not exclude the application of descriptor 1.f, as the question is whether they can meet the standard repeatedly.

96. Furthermore, as stated above, the Government's consultation response recognised descriptor 1.f may apply in circumstances where the claimant requires "considerable support" in order to follow the route of a familiar journey ([89] above).

97. Of course, there will be cases where it is quite clear that the claimant is unable to undertake familiar journeys to a regulation 4(2A) standard, even with assistance, in particular where their mental health conditions render them completely housebound. In these circumstances, the decision-maker will have no difficulty in concluding that descriptor 1.f does not apply, but it will still be correct to consider this descriptor before proceeding to consider descriptor 1.e.

98. We emphasise that each case will involve a careful fact-sensitive inquiry, including, for example, where the person does not go out, establishing why this is the case and what they would be able to do in terms of undertaking a journey if they did have assistance. Furthermore, as we address when we turn to regulation 7(2) below, consideration of what the claimant could do with the assistance of another person, is not limited to the assistance that is actually available to them. Therefore, evidence about whether a claimant was going out and following the route of journeys at the date of the Secretary of State's entitlement decision will need to be considered but may not determine (or even indicate) what they would have been able to achieve with the right level of assistance.

99. Given the wording of the relevant descriptors and the scheme of mobility activity 1, we do not consider that it is possible for a claimant to satisfy *both* descriptors 1.f and 1.e. If a claimant *cannot* follow the route of a familiar journey safely, to an acceptable standard, repeatedly and within a reasonable time period without assistance, but *can* do so with the stipulated forms of assistance, descriptor 1.f applies. It follows from this conclusion that they are not someone who cannot undertake any journey because it would cause them overwhelming psychological distress. In other words, if descriptor 1.f applies, descriptor 1.e will not apply. Conversely, if descriptor 1.f does not apply because the claimant *cannot* follow the route of a familiar journey safely, to an acceptable standard, repeatedly and within a reasonable time period, even with assistance, due to the level of their psychological distress, it is very likely that descriptor 1.e will apply.

100. We acknowledge AK's argument that regulation 7(1)(b) and (c) address situations where two or more descriptors *are satisfied* in respect of the same activity. Having considered those provisions carefully, we consider they do not identify, nor assist with identifying, when this can be the case, which will, in turn, depend upon the nature and extent of the particular descriptors. Still less do regulations 7(1)(b) and (c) contemplate that it must be possible to satisfy more than one descriptor in relation to any or all of the Schedule 1 activities.

Claimants with conditions additional to psychological distress

101. For reasons we have explained, the structure and content of mobility activity 1 requires the decision-maker to decide upon the applicability of mobility descriptor 1.f before going on to consider 1.e (in a case of psychological distress) if descriptor 1.f does not apply. Approaching mobility activity 1 in this way underscores that the entirety of the claimant's conditions should be taken into account when the applicability of descriptor 1.f is assessed. Accordingly, for example, if a claimant suffers from a mental health condition that gives rise to psychological distress when leaving their home and a visual impairment, the overall effect of *both* of these conditions will be relevant in assessing if they can follow the route of a familiar journey safely, to an acceptable standard, repeatedly and within a reasonable time period unaided and, if not, whether they can do this with the forms of assistance referred to in descriptor 1.f. We can see no basis for leaving any of the claimant's conditions out of account for the purposes of applying descriptor 1.f and there is nothing in the wording of the descriptor that indicates or suggests it would be appropriate to do so. Indeed, we consider it would be entirely artificial and contrary to the purpose of PIP to, in effect, ignore the reality of a claimant's situation and make an assessment based on only part of the conditions that in practice may limit their ability to undertake this activity.

102. It follows that we respectfully disagree with some of the three-judge panel's observations in [41]-[42] of ***MH*** ([59] above). As we have already explained, the central issues in ***MH*** concerned the meaning of "follow the route of a journey" and the question of whether descriptors 1.d and 1.f can apply where the claimant's impaired ability arises from psychological distress. In the present appeals, the parties did not doubt the correctness of the conclusions that the three-judge panel reached on those issues (the Respondent no longer contending that psychological conditions are irrelevant for the purposes of some mobility 1 descriptors) and we agree with those conclusions. We also do not doubt the correctness of the decisions made in the three ***MH*** appeals.

103. Where we diverge from the analysis in ***MH***, is in relation to the assumption by that panel that descriptor 1.e should be considered *before* descriptor 1.f (presumably because, as we have noted earlier, the alphabetical sequence is usually followed in assessing the descriptors that apply under for a particular activity). That this was the three-judge panel's view is evident from [41] and [52] of ***MH***, where it was said in terms that if descriptor 1.e is satisfied (due to overwhelming psychological distress), the need to consider 1.f will not arise. Adopting this approach led the three-judge panel to say that once descriptor 1.e was satisfied, the claimant's psychological distress should not be taken into account for the purposes of descriptor 1.f. In turn, this gave rise to a perceived problem of interpretation, which the panel in ***MH*** went on to discuss in [42] as to what would be the position if a claimant who came within descriptor 1.e as a result of their overwhelming psychological distress, also suffered from a separate condition, such as a visual impairment. In response, the panel tentatively suggested it might be considered separately for the purposes of descriptor 1.f.

104. However, we consider it would be wholly artificial to assess the applicability of descriptor 1.f (the claimant's ability to follow a familiar route) by reference to their physical condition only, such as blindness, if it had already been decided that in reality the claimant in question could not undertake any journey to a regulation 4(2A) standard because of their overwhelming psychological distress (descriptor 1.e). Moreover, to find that descriptor 1.f applied in these circumstances would not be in keeping with the legislative purpose, as the enhanced rate of the mobility component paid to enable a claimant to follow the route of a journey with assistance, would be received by claimants who were in practice unable to leave their homes at all due to their overwhelming psychological conditions. Equally, we see no reason why the claimant's psychological condition should not be taken into account for the purposes of descriptor 1.f; it would be unrealistic and arbitrary not to do so. Given this descriptor involves a greater degree of functional ability than what is addressed in descriptor 1.e, it should be considered first.

105. If descriptor 1.f is considered before 1.e as we have set out at [71] above, these difficulties simply do not arise and there is no need or warrant for limiting the claimant's conditions that are taken into account for the purposes of the descriptor 1.f assessment. Indeed, the fact that our preferred sequence for approaching the mobility 1 descriptors avoids the difficulty identified in ***MH*** altogether, in itself provides further support for its correctness.

106. In reaching our conclusion we have borne in mind Mr Edwards' submission that where a claimant suffers from overwhelming psychological distress, their non-psychological condition, such as visual impairment, is only to be taken into account for the purposes of descriptor 1.f if it is the *primary* reason why they cannot follow the route of a familiar journey unaided. We reject this contention because it is predicated on the correctness of the analysis at [41]-[42] of ***MH***, which we do not accept for the reasons we have just explained. We also reject it, first, because there is no legislative basis for confining the matters that the decision-maker takes into account for the purposes of descriptor 1.f in this proposed way and, secondly, because it is illogical; if a person cannot go out because they suffer from overwhelming psychological distress, it is very unlikely that it could be found that the primary reason they cannot go out without assistance is because of a physical condition.

<u>Claimants with conditions unrelated to psychological distress</u>

107. As we raised with the parties at the hearing, we were also concerned to explore whether our proposed approach to the mobility 1 descriptors and regulation 4(2A), gives rise to an unintended gap in terms of the points that will be awarded to claimants whose ability to follow the route of a familiar journey is impacted by a condition that is unrelated to psychological distress, so that there is no question of descriptor 1.e applying if it is decided that they cannot follow the route of a familiar journey safely, to an acceptable standard, repeatedly and within a reasonable time period even with the forms of assistance referred to in descriptor 1.f.

108. However, on reflection, we do not consider this is a scenario that is likely to arise to any significant extent. If the claimant's condition is physical, so that (for example) even with assistance they cannot complete the journey within a reasonable time, they may well score points under mobility activity 2; mobility activity 1 is not about the physical acts involved in standing or walking: see [6.17] of the Government's consultation response ([57] above). If the claimant's condition restricts their cognitive, intellectual or sensory ability, then in most cases they will be able to follow the route of a familiar journey to the regulation 4(2A) standard with the assistance contemplated by descriptor 1.f. Further, consistent with the observations we made earlier when discussing the relationship between descriptors 1.f and 1.e, we consider the way that regulation 4(2A) is applied to descriptor 1.f in cases not involving psychological distress, should take account of the fact that the claimant may have no other activity 1 descriptor to come within if descriptor 1.f does not apply. An example might be a claimant who has a cognitive or intellectual impairment that removes their inhibition or safety awareness about going out into traffic, where the question will be whether their being accompanied will mitigate the risks to a sufficient extent to meet the regulation 4(2A) criteria. In this context (as we did when discussing the relationship between descriptors 1.f and 1.e) we also emphasise that the Government's consultation response contemplated that a person coming within descriptor 1.f might require a "considerable" level of support to be able to follow the route of a journey.

Application of regulations 7(1) and (2)

109. By way of reminder, when the three-judge panel was convened, the following issue was identified as arising in respect of regulation 7(1) and (2) of the 2013 Regulations: whether a person's ability to plan and follow journeys is assessed by reference to what they actually do on the majority of days in the period being assessed or by reference to what *would* happen *if* they were asked to perform the activity on the majority of days. For the reasons set out in this part of our decision, we conclude that the latter represents the correct approach.

110. Regulation 7(2) provides that for the purposes of regulation 7(1) (determining whether a descriptor is satisfied on over 50% of the days of the required period), a descriptor is satisfied "on a day in the required period if it is likely that, *if C had been assessed on that day, C would have satisfied that descriptor*".

111. As is apparent from this wording, the test applied by regulation 7(2) does not ask the decision-maker to arrive at the answer by calculating how many days the claimant has actually undertaken the activity in question during the required period. As we return to below, what the claimant has actually been able to do as regards this activity is likely to afford pertinent *evidence* that will help the decision-maker in assessing whether the descriptor is satisfied on over 50% of the days in the required period, but it is not determinative, as the test itself does not look simply to what the claimant has actually done, nor how frequently they have done it. Rather, the test asks the decision-maker to consider in relation to each of the days in the required period, whether it is likely that the claimant would have met

the descriptor if they were being assessed on this day and (where relevant) they had available to them the assistance contemplated in the relevant descriptor. The decision-maker thereby determines whether the descriptor applies on over 50% of the days in question. A conclusion that the test would only be met in relation to some of these days is more likely, although not necessarily, to be reached in circumstances where the claimant experiences fluctuating effects from their medical condition(s).

112. The distinction between the two approaches can be illustrated by the following example. For the last few months before the prescribed date, Claimant A, who suffers from distress and anxiety, has gone out to the local shops every Saturday accompanied by a friend, but has not otherwise left their home. The fact that, in practice, they have only left their home one day a week is relevant evidence but not conclusive for regulation 7(2) purposes. The decision-maker does not simply assume that because the claimant only went out one day a week, descriptor 1.f would not be met on more than 50% of the days in the relevant period. Rather, when applying mobility descriptor 1.f (and the two-part regulation 4(2A) inquiry we have identified above), the decision-maker must ask in relation to any given day in the required period, if they were assessed on this day, would the claimant be unable to follow the route of a familiar journey to a regulation 4(2A) standard if unaided and, if so, whether they would be able to do this to a regulation 4(2A) standard if they had the assistance contemplated by descriptor 1.f.

113. We consider that the wording of section 81 of the Welfare Reform Act 2012 ([35] above) affords some further support for our interpretation of the regulation 7(2) test, given it refers to the initial part of the required period condition being determined by reference to whether "it is likely that *if the relevant ability had been assessed at that time* that ability would have been determined to be" limited or severely limited. Furthermore, the DWP decision-maker (as opposed to when the decision-maker is the First-tier Tribunal), is not be confined to examining the past and thus what has actually happened in terms of the claimant's activities, as the required period will also encompass the nine months after the claim was made ([53] above).

114. Mr Edwards submitted that the regulation 7(2) test is to be approached by reference only to the particular support that is available in practice to the particular claimant. He said that otherwise the "on over 50% of the days" requirement prescribed by regulation 7(1)(a) would not be reflected in the assessment. We do not accept this. Whether the descriptor is met on over 50% of the days in the required period or not is to be calculated by application of the regulation 7(2) test. The regulation 7(2) test looks to whether the descriptor is satisfied on any given day in the required period and assessing this involves applying the wording of the descriptor to each such day. The wording of descriptor 1.f (to take that example) involves considering whether the claimant can follow the route of a familiar journey to a regulation 4(2A) standard *if they have* the specified assistance. Furthermore, we do not accept that adopting the approach we have identified involves altering the use of "is" in regulation 7(1) and (2) to "might", as Mr Edwards suggested in his post-hearing submissions.

115. As we have already recognised, information about what the claimant has actually done during the required period in terms of planning and following the route of journeys will be relevant evidence to consider when applying the test created by regulation 7(2) to the mobility activity 1 descriptors, but care needs to be taken with this material. Employing the example that we used in [112] above, there may be various reasons why Claimant A has only gone out one day a week in the recent past, so that this behaviour will not necessarily indicate anything meaningful about the functional limitations that arise from their mental health condition: for instance, they may have been in the process of recovering from a relatively short-term physical condition, or their friend may only be available on Saturdays. Accordingly, where a claimant has not undertaken the activity to the extent that would be expected (i.e. the extent that it is reasonable to do so), the decision-maker will need to examine the reasons for this and, in particular, whether or not it is because of the functional effects of the claimant's medical condition(s), when considering what inferences can be safely drawn from the inactivity. This point was emphasised by Judge Stout in ***LAG*** and by Judge Hemingway in the two decisions that she cited ([52-53] above).

116. We consider that Mr Edwards' post-hearing submissions misunderstand [21] of ***LAG***. Contrary to his contention, Judge Stout was not there suggesting that the decision-maker should do anything other than assess the claimant's actual functional capacity to undertake the activity in question. Her reference to the need to consider what it would be reasonable for the claimant to do was in the context of addressing the inferences that the decision-maker can safely draw where a claimant has not in practice undertaken the activity or has only done so to a limited extent, as we explained at [52] above.

Summary of the correct approach

117. In this section we draw together the main points from our earlier analysis, with a view to assisting First-tier Tribunals with the future application of the mobility activity 1 descriptors, particularly descriptors 1.e and 1.f; an area which we understand has caused difficulty in the past (see the grant of permission in AH's case at [12] above).

118. Before doing so, it may be helpful for us also to list the following aspects that the decision-maker will need to bear in mind and which we summarised earlier in the Legal framework section of our decision:

    a. The requirement that the descriptor or more than one descriptor must be satisfied on over 50% of the days of the required period: [51] above;
    b. The meaning of "follow the route of a journey" in descriptors 1.d and 1.f: [58] above;
    c. Psychological distress experienced by a claimant may be relevant to all of the mobility activity 1 descriptors, not simply to descriptors 1.b and 1.e which refer in terms to "overwhelming psychological distress": [58] above;

d. The assistance provided by another person that is contemplated by descriptors 1.d and 1.f may be considerable [57], but need not take the form of active help or encouragement, passive presence may suffice: [64] above;
e. An occasional inability to undertake a journey will not impact on the regulation 7 assessment: [65] above; and
f. The mobility activity 1 descriptors involve a broad assessment of the claimant's ability to plan or undertake the journeys referred to, rather than simply a focus on particular journeys that they actually undertake [65] above.

119. In summary, we have concluded as follows:

a. The descriptors for mobility activity 1 should be approached in the following order: 1.a, 1.b, 1.c, 1.d, 1.f and then 1.e: [69-71 and 101] above;
b. The regulation 4(2A) criteria are to be applied to the "cannot" mobility activity 1 descriptors, as well as to the "can" descriptors: [72-84] above;
c. The application of regulation 4(2A) to mobility descriptors 1.d and 1.f involves a two-part inquiry, in order to ensure that the descriptor is applied to those cannot follow the route of an unfamiliar / familiar journey to a regulation 4(2A) standard unless they have the assistance referred to in the descriptor: [80-83] above;
d. Accordingly, this involves first asking whether the claimant *cannot* follow the route of an unfamiliar / familiar journey to a regulation 4(2A) standard *without* the assistance referred to in the descriptor. If the claimant *can* do this unaided, then their ability to carry out the activity is not sufficiently limited for them to come within the descriptor. If they *cannot* do so *unaided* then, the second question is whether the claimant can follow the route of an unfamiliar / familiar journey to a regulation 4(2A) standard if they are accompanied by "another person, assistance dog or orientation aid": [80-81] above;
e. Consideration of mobility descriptor 1.e only arises if descriptor 1.f has been addressed and the conclusion reached that the claimant cannot follow the route of a familiar journey to a regulation 4(2A) standard even when in receipt of the assistance referred to in the descriptor: [85] above;
f. Whether the regulation 4(2A) standard is met involves an objective assessment but must be understood and applied in the context of the legislative purpose of enabling people with medical conditions that limit their ability to perform the activity, to receive the support they require and to participate as fully as possible in everyday life. Applying the assessment of "to an acceptable standard" involves a range of factors set out in more detail at [89]. Nor should regulation 4(2A) be applied so as to give rise to a cohort of claimants who fall between descriptors 1.e and 1.f and so score points under neither: [85-91] above. This applies in all cases, not just those involving psychological distress;
g. In applying descriptor 1.e, proper weight must be given to the use of the statutory word "overwhelming", which indicates a high threshold [86] above;

h. Each case will involve a fact-sensitive inquiry, bearing in mind the points we highlighted at [95-98] above;
i. Given the wording of these descriptors and the scheme of mobility activity 1, it is not possible for a claimant to satisfy both descriptors 1.e and 1.f [99] above;
j. The entirety of the claimant's conditions, including psychological and physical conditions, should be taken into account when the applicability of descriptor 1.f is assessed [101-102] above;
k. The test in regulation 7(2) does not ask what the claimant has done in practice, rather it asks the decision-maker to consider in relation to each day of the required period, whether it is likely that the claimant would have met the descriptor if they were being assessed on this day and (where relevant) if they had available to them the assistance contemplated by the descriptor in question at that time [109-116] above; and
l. What the claimant has actually done during the required period in terms of the activity under consideration will be relevant evidence to take into account when applying the regulation 7(2) test, but is not determinative. Where the claimant has not undertaken the activity or has only done so to a lesser extent than would be expected, the reasons for this will need to be examined in order to decide whether this is because of the functional effects of their medical condition(s) [109-116] above.

AH's appeal

120. As we indicated at [23] above, the Secretary of State supported AH's appeal solely on the ground relating to the application of ***AA*** to her case. We agree that the AH Tribunal did err in this respect at [13] of its Statement of Reasons ([10] above). As we set out at [64] above, Judge Hemingway in ***AA*** decided that the assistance contemplated by these descriptors was not confined to active help and could include passive presence, but he did not decide that a claimant must show that passive presence would be sufficient to enable her to follow the route of a journey without suffering overwhelming psychological distress, as the AH Tribunal appeared to think. As Mr Edwards accepted, this error was material in terms of the AH's Tribunal's reasoning.

121. Having addressed the uncontentious issue, we turn to the disputed errors. We have summarised AH's own grounds of appeal at [13] above. In his oral submissions, Mr Fraser emphasised that the AH Tribunal had failed to reflect the high threshold connoted by "*overwhelming* psychological distress" in finding that descriptor 1.e applied and had failed to properly address what AH could have been able to do with the assistance contemplated by descriptor 1.f. Her GP had said she was unable to undertake unfamiliar and familiar journeys independently, but had not said that she was unable to undertake them at all.

122. Mr Edwards submitted that the evidence before the AH Tribunal clearly indicated that AH could not go out and follow the route of a familiar journey on the majority of days because of her overwhelming psychological distress; that the Tribunal

was right to base its conclusion on the support that was actually available to AH in practice; and it was right not to engage in hypothetical scenarios. In both his oral submissions and post-hearing submissions, Mr Edwards contended that AH could not leave her home to a safe standard on the majority of days (although it was unclear to us how this fitted with his contention that regulation 4(2A) did not apply to the "cannot" descriptors). In his post-hearing submissions, Mr Edwards also argued that, because AH was not undertaking journeys on the majority of days, she did not incur the additional costs contemplated by the award of 12 points for descriptor 1.f.

123. We have set out the key passage in the AH's Tribunal's Statement of Reasons at [11] above. The Tribunal was right to apply regulation 4(2A) to its consideration of descriptor 1.f, for the reasons we have indicated. However, we conclude that in determining that AH met mobility descriptor 1.e and not descriptor 1.f, the AH Tribunal erred in law in a number of respects additional to the ***AA*** error we have already identified, namely:

    a. The Tribunal appears to have conflated its consideration of descriptor 1.f and 1.e, rather than assessing the applicability of descriptor 1.f first and doing so in a way that reflected the scope of this descriptor;
    b. The Tribunal adopted an unduly expansive approach to "overwhelming" in concluding that AH's "overwhelming psychological distress" was such that she could not undertake any journey to the regulation 4(2A) standard or, at least, the Tribunal failed to give adequate reasons to support its conclusion that descriptor 1.e applied to her. AH was regularly going out and, whilst it is clear that she suffered significant psychological distress as a result, it is unclear why the AH Tribunal found this to be "overwhelming", given the evidence indicated that she would continue to go out and do so regularly. We have identified the high threshold imported by the inclusion of "overwhelming" and explained the need to interpret the scope of descriptor 1.f in a purposive way at [86-91] above;
    c. The Tribunal treated psychological distress that was short of "overwhelming" as sufficient to place AH in the territory of descriptor 1.e rather than 1.f because (as it found) the presence of her friend did not ameliorate her distress. This is apparent from the Tribunal's indications that the presence of another did not reduce AH's psychological distress to "below the threshold of it being overwhelming *or to prevent it arising*" and that "the presence of another person *makes no difference in terms of reducing the degree of psychological distress or to prevent it from arising in the first place*" (emphasis added);
    d. The Tribunal confined its consideration to what AH had been able to do with the support her friend had provided, rather than applying the regulation 7(2) test we have identified at [109-116] above of what she would have been able to do if support had been available on the majority of days. The Tribunal also did not address the level of assistance provided to AH and whether a different level of assistance might have made a difference. We add, in light of Mr Edwards' submissions that the purpose of PIP is to enable people to do what they can safely, and only

to give financial support in those circumstances, that the 2013 Regulations do not contemplate the claimant needing to demonstrate how they would in fact spend an enhanced level of PIP, if it was awarded and no authority was cited to us that supports Mr Edwards' submission in this regard.

124. Accordingly, it follows that we accept the grounds of appeal which we summarised at (a), (c) and (d) of [13] above (as amplified by Mr Fraser in his oral submissions).

125. Although this was not a point specifically raised by Mr Fraser, we also consider that, in a case of this nature, the AH Tribunal should have offered an oral hearing, with appropriate reasonable adjustments, and/or directed AH to have the opportunity to provide further written evidence, so as to enable it to make the kind of detailed and fact-sensitive findings we have contemplated in our discussion above. There was limited direct evidence in the appeal about the effects of AH's medical condition(s) on her, including because the PIP medical assessment was paper-based and did not involve a healthcare professional speaking to her directly. Whilst no party objected to the matter being decided without a hearing, as the AH Tribunal recorded at [5] of its Statement of Reasons, it remained incumbent on the Tribunal to consider whether it was able fairly and justly to proceed to make a decision without holding a hearing (rules 2 and 27 of the Tribunal Procedure (First-Tier) (Social Entitlement Chamber) Rules 2008). In the circumstances we have described, it is difficult to see how it was fair and just to determine the appeal with such limited evidence before the AH Tribunal about the nuanced issues it needed to resolve. Nor did the AH Tribunal provide an adequate explanation in its Statement of Reasons for why it decided it was fair and just to go ahead.

126. We indicate for completeness that we do not consider that AH's contention regarding ***RF*** amounts to a well-founded ground of appeal in itself (and in oral submissions, Mr Fraser accepted that this was a background, context point). Furthermore, we do not consider that there is anything in the suggestion that the AH Tribunal impermissibly treated aspects of the account given by AH's friend ([5 and 8] above) as equivalent to expert evidence.

<u>AK's appeal</u>

127. We set out at [22] above, the grounds upon which Judge Stout granted permission to appeal. She did not limit the grant of permission to these grounds and AK raised additional arguments. AK disputed that he met mobility descriptor 1.e as he did go out "here and there". He said that, in any event, as the AK Tribunal found he met mobility descriptor 1.e, it logically followed that he also met descriptor 1.f. He suggested that this was confirmed by regulation 7(1) which in terms envisaged more than one descriptor being met. Moreover, in his case, he needed someone to guide him or a navigation aid because of his visual impairment.

128. We have already rejected Mr Edwards' submission that AK's visual impairment was only relevant for the purposes of descriptor 1.f if it was the *primary* reason he could not follow the route of a familiar journey ([106] above). Mr Edwards submitted that, in light of the evidence before it, the AK Tribunal was right to find that, due to his overwhelming psychological distress, AK rarely went out. He said the Statement of Reasons showed that the AK Tribunal had carefully explored the limits of what AK could and could not do. He emphasised that AK only left his home on a minority of days and (as he had also submitted in relation to AH) it was not for the Tribunal to hypothesise.

129. We conclude that the AK Tribunal erred in law in the following respects:

    a. The Tribunal wrongly approached mobility activity 1 on the basis that descriptor 1.e was to be considered *before* descriptor 1.f, so that if it found descriptor 1.e applied, it should not go on to consider descriptor 1.f. We have explained the correct approach at [69-71 and 101] above. We do not accept Mr Edwards' argument that, in practice, descriptor 1.f was considered; the AK Tribunal indicated in terms to the contrary at [10] of its Statement of Reasons ([20] above). Furthermore, any implicit consideration that it subsequently gave to descriptor 1.f was tainted by its failure to consider the descriptors in the correct sequence and in light of a proper appreciation of the reach of descriptor 1.f; and
    b. As we have explained in relation to the AH Tribunal, the AK Tribunal wrongly confined its consideration to what AK had actually done in practice in terms of going out, rather than applying the correct test in regulation 7(2) that we have identified at [109-116] above.

130. As we have explained, when descriptor 1.f is considered, the entirety of AK's physical and mental health conditions will be relevant in deciding whether this descriptor is met: [101-106] above.

131. We do not accept AK's submission that it follows from the AK Tribunal's finding that he met descriptor 1.e that he also met descriptor 1.f. We have explained this at [99] above. Nor does it necessarily follow that, if the effects of AK's visual impairment meant he needed accompanying or a navigation aid to follow the route of a journey, the appropriate descriptor would be 1.f irrespective of whether he was able to undertake the route of any journey.

Conclusion

132. We have addressed each of the specific issues that we identified at [2] above in the Analysis section of this decision. For convenience, we have included a summary of our conclusions on these issues (with cross-referencing to the material passages) at [119] above.

133. We have decided that the AH Tribunal erred in law for the reasons identified at [123 and 125] above. We have decided that the AK Tribunal erred in law for the reasons identified at [129] above. Accordingly, both decisions are set aside.

134. In both cases further fact-finding is required in relation to the applicability or otherwise of mobility descriptor 1.f and, accordingly, we remit both cases to the First-tier Tribunal for re-determination in accordance with the law set out in our decision. In this regard, we draw particular attention to our summary of the correct approach at [118-119] above and to the Directions we have made.

The Hon. Mrs Justice Heather Williams DBE
Upper Tribunal Judge Stout
Upper Tribunal Judge Butler

Authorised by the Judges for issue on 28 January 2026

Annex A: Part 2 and Part 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013

PART 2
DAILY LIVING ACTIVITIES

Col. 1 Activity	***Col. 2 Descriptors***	***Col. 3 Points***
1. Preparing food.	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8
2. Taking nutrition.	a. Can take nutrition unaided.	0
	b. Needs – (i) to use an aid or appliance to be able to take nutrition; or (ii) supervision to be able to take nutrition; or (iii) assistance to be able to cut up food.	2
	c. Needs a therapeutic source to be able to take nutrition.	2
	d. Needs prompting to be able to take nutrition.	4
	e. Needs assistance to be able to manage a therapeutic source to take nutrition.	6
	f. Cannot convey food and drink to their mouth and needs another person to do so.	10

3. Managing therapy or monitoring a health condition.	a. Either – (i) does not receive medication or therapy or need to monitor a health condition; or (ii) can manage medication or therapy or monitor a health condition unaided.	0
	b. Needs any one or more of the following – (i) to use an aid or appliance to be able to manage medication; (ii) supervision, prompting or assistance to be able to manage medication (iii) supervision, prompting or assistance to be able to monitor a health condition.	1
	c. Needs supervision, prompting or assistance to be able to manage therapy that takes no more than 3.5 hours a week.	2
	d. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours a week.	4
	e. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 7 but no more than 14 hours a week.	6
	f. Needs supervision, prompting or assistance to be able to manage therapy that takes more than 14 hours a week.	8
4. Washing and bathing.	a. Can wash and bathe unaided.	0
	b. Needs to use an aid or appliance to be able to wash or bathe.	2
	c. Needs supervision or prompting to be able to wash or bathe.	2
	d. Needs assistance to be able to wash either their hair or body below the waist.	2

	e. Needs assistance to be able to get in or out of a bath or shower.	3
	f. Needs assistance to be able to wash their body between the shoulders and waist.	4
	g. Cannot wash and bathe at all and needs another person to wash their entire body.	8
5. Managing toilet needs or incontinence.	a. Can manage toilet needs or incontinence unaided.	0
	b. Needs to use an aid or appliance to be able to manage toilet needs or incontinence.	2
	c. Needs supervision or prompting to be able to manage toilet needs.	2
	d. Needs assistance to be able to manage toilet needs.	4
	e. Needs assistance to be able to manage incontinence of either bladder or bowel.	6
	f. Needs assistance to be able to manage incontinence of both bladder and bowel.	8
6. Dressing and undressing.	a. Can dress and undress unaided.	0
	b. Needs to use an aid or appliance to be able to dress or undress.	2
	c. Needs either - (i) prompting to be able to dress, undress or determine appropriate circumstances for remaining clothed; or (ii) prompting or assistance to be able to select appropriate clothing.	2
	d. Needs assistance to be able to dress or undress their lower body.	2
	e. Needs assistance to be able to dress or undress their upper body.	4
	f. Cannot dress or undress at all.	8

7. Communicating verbally.	a. Can express and understand verbal information unaided.	0
	b. Needs to use an aid or appliance to be able to speak or hear.	2
	c. Needs communication support to be able to express or understand complex verbal information.	4
	d. Needs communication support to be able to express or understand basic verbal information.	8
	e. Cannot express or understand verbal information at all even with communication support.	12
8. Reading and understanding signs, symbols and words.	a. Can read and understand basic and complex written information either unaided or using spectacles or contact lenses.	0
	b. Needs to use an aid or appliance, other than spectacles or contact lenses, to be able to read or understand either basic or complex written information.	2
	c. Needs prompting to be able to read or understand complex written information.	2
	d. Needs prompting to be able to read or understand basic written information.	4
	e. Cannot read or understand signs, symbols or words at all.	8
9. Engaging with other people face to face.	a. Can engage with other people unaided.	0
	b. Needs prompting to be able to engage with other people.	2
	c. Needs social support to be able to engage with other people.	4
	d. Cannot engage with other people due to such engagement causing either –	8

	(i) overwhelming psychological distress to the claimant; or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	
10. Making budgeting decisions.	a. Can manage complex budgeting decisions unaided.	0
	b. Needs prompting or assistance to be able to make complex budgeting decisions.	2
	c. Needs prompting or assistance to be able to make simple budgeting decisions.	4
	d. Cannot make any budgeting decisions at all.	6

PART 3
MOBILITY ACTIVITIES

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

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