IN THE UPPER TRIBUNAL **Case No.** CPIP/3528/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: This appeal to the Upper Tribunal is dismissed.

REASONS FOR DECISION

1. The claimant was born on 1 December 2000 and was, at the date of the decision of the Secretary of State which has led to this appeal to the Upper Tribunal, aged 16 years. She has permanent profound bilateral sensory-neural hearing loss. She was fitted with sequential cochlear implants in 2003 and 2010. As explained by her representative, the implants have two parts: a permanent implant in her cochlear and a removable external speech processor which picks up sound and transmits it electronically to the implant. According to one Amanda Doyle, a Specialist Teacher of the Deaf at the Specialist Inclusion Service provided by the claimant's local council, and who has provided a letter at the request of the claimant's family, she is able to "access the full range of speech sounds and is able to discriminate speech with the support of lip patterns, when wearing her processors and listening in a quiet environment. But without her processors, as is rather prosaically put by Ms Doyle, she would "only just be able to hear a jet engine when stood next to it". Aside from the hearing loss it is not said that the claimant has any disabling medical conditions either in relation to physical or mental health.

2. The claimant was in receipt of an award of disability living allowance (DLA) comprising the lower rate of the mobility component and the middle rate of the care component. But because of the process by which DLA is being replaced by personal independence payments (PIP) it became necessary for her to make a claim for PIP. She did so on 22 December 2016 and as part of the assessment process she attended what is sometimes referred to as a "face-to-face assessment" with a health professional. That health professional provided a report of 1 March 2017 (the same day the assessment took place) in which the view was expressed that she needed to use an aid or appliance to be able to hear (which would give her 2 points under daily living descriptor 7b) but that she did not have sufficient difficulty to enable her to score any other points in relation to either the daily living or the mobility component of PIP. On 18 March 2017 the Secretary of State decided that the claimant was only entitled to those 2 points and was not, therefore, entitled to PIP. A request for a mandatory reconsideration was made but the decision was not altered. So, the claimant appealed to the First-tier Tribunal (the tribunal).

3. The tribunal held an oral hearing of the appeal on 30 August 2017. The hearing was attended by the claimant and her parents. She gave oral evidence. According to what the tribunal had to say in its statement of reasons for decision (statement of reasons) she "was able to hear and converse with us".

4. The tribunal had a relatively large volume of paper evidence before it. That included the documentation which would have been before the Secretary of State when the most recent awarding decision concerning DLA had been made; a copy of the claimant's education, health and care plan of 9 April 2015; a copy of an annual review of that plan of 24 November 2016; a copy of the health professional's report referred to above; and a copy of a letter written on

the claimant's behalf by a Children and Families Support Officer at the National Deaf Children's Society which had been written for the purposes of the claimant's mandatory reconsideration request.

5. The tribunal concluded that the claimant was entitled to 4 points under daily living descriptor 7c (Needs communication support to be able to express or understand complex verbal information) but no other points in relation to either the daily living component or the mobility component of PIP. So, it dismissed the appeal. It was asked to produce its statement of reasons which was issued to the parties on 29 September 2017. It noted therein that the claimant had been attending a mainstream school and had had support from a classroom assistant until such time as that assistant had been made redundant. The plan and annual review documents were referred to. As to what was revealed by the plan and the review document the tribunal said this:

> " 4. The plan recorded that the appellant has the use of radio aids and cochlear implants in both ears although she preferred not to access these in most lessons which was an ongoing concern. Despite this, she had made significant progress, demonstrating confidence and an ability to communicate and interact with her peers and adults. She held the role of school Prefect and was described as a role model for younger pupils. It was noted that in this role she had shown an ability to interact and support younger pupils with their transitioning into High School. She was noted to be demonstrating greater independence in learning especially in those subjects that she was more confident in.
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> 5. In terms of her social, emotional and mental health, the plan noted that while she may have had occasional down days, the appellant's emotional and social resilience had built significantly over the previous 12 months giving her the ability to cope and manage much better her frustration and friendship issues. It was noted that her teachers had observed an increase in her confidence and maturity over the previous 12 months and her behaviour was very positive and conducive to learning. As an aside, I note this was reflected in her examination results in that despite the concerns over her lack of use of the implants in class, she passed 5 GCSE's and obtained an M2 award in dance and ITC. She was now in the school's 6th form and studying health and social care, ICT and travel and tourism at BTEC level."

6. The tribunal went on to note that the claimant had told it that she liked to dance, go out with friends, and had until recently been a cheerleader. It was said that she "did not like speaking to people she did not know because she was shy" and that she possessed a mobile telephone although she would only use it "for texting purposes".

7. The tribunal then noted the specific activities which had been placed in issue on behalf of the claimant. It accepted that she was entitled to 4 points under daily living descriptor 7c which is what had been contended on her behalf. Then, prior to embarking upon a specific assessment with respect to the activities and descriptors which remained in issue, it said this:

> " 11. We now turn to consider the activities that remain in issue. Before doing so, we should add that the descriptors have to be read together with regulation 4 and 7 of the PIP Regulations. That means that a claimant can only be taken as satisfying a descriptor or an activity if they are able to carry out the activity safely, to an acceptable standard, repeatedly, within a reasonable period of time on over 50% of the days of the required period. By regulation 4(2A)(4) 'safely' means 'in a manner unlikely to cause harm to C or another person, either during or after completion of the activity'; 'repeatedly' means as often as the activity being assessed is reasonably required to be completed; and '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'."

8. I will now look at what it had to say about the three activities in respect of which its reasoning has been challenged before the Upper Tribunal. As to activity 4 (washing and

bathing) it had been argued that the claimant required supervision because it was necessary for her to remove her cochlear implant processors when taking a bath or shower as, otherwise, they would become damaged. That meant she would not hear such as smoke alarms or warning shouts in the event of an emergency. It was said that, because of that, she would only shower or bath when another person was present. The tribunal dealt with that argument in this way:

> " 14. Washing and bathing - the appellant argues that she is vulnerable when taking a bath because she has to remove her hearing devices. This is because there may be a fire or other event which she would not be able to hear and therefore requires supervision whilst taking a bath or shower.
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> 15. In assessing whether a person can carry out an activity safely, particularly where it is alleged that a claimant requires supervision, we remind ourselves that a tribunal must consider whether there is a real possibility that cannot be ignored, of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant.
>
> 16. With this in mind, we do not think that there is a real possibility that cannot be ignored of harm occurring, either in the context of the cooking or the bathing activity. This is because the activity of cooking can be completed by watching what is cooking so that safety can be ensured through sight whilst any vulnerability during bathing can be kept to a minimum by limiting the time taken.
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> 17. Both in the cooking and washing and bathing activities, we disagree that the appellant needs supervision or assistance. Insofar as this involves issues of safety, we rely on the same comments. The general perception we have of the appellant based on the evidence is that she is independent and has not allowed her disability to stop her doing the things that others of her age without her disability are doing. This is immensely to her credit."

9. As to daily living descriptor 8 (Reading and understanding signs, symbols and words) it had been argued that the claimant needed prompting to enable her to read or understand complex written information. Daily living descriptor 8c was, accordingly, specified as being the applicable one. It was said that such prompting was needed in consequence of the claimant having "gaps in her learning and development due to her language delay". The tribunal said this:

> " 18. Reading - the appellant has obtained GCSEs and is currently in the 6th form and is able to use her phone to send text messages. It is fanciful to suggest that she merits any points for this activity."

10. Points have been sought on behalf of the claimant with respect to daily living activity 9 (Engaging with other people face-to face). It had been contended that she would require social support in order to be able to engage with other people so descriptor 9c was specified as being the applicable one. It was asserted that she found social situations difficult in consequence of her hearing loss and that resultant frustration would cause her to "withdraw socially". She had difficulties in coping with background noise in social situations because the cochlear implants would "amplify all sounds at the same level, making listening very difficult for her". This is what the tribunal had to say:

> " 19. Engaging with other people face-to-face. It was argued that the Secretary of State had failed properly to tackle the issue of whether the claimant needed 'social support' to be able to engage with other people, in particular with those she did not know well. We remind ourselves that 'social support' has an element of an active role, where the person providing the support is providing actual assistance in the engaging. In determining that the appellant did not merit any points for this activity, we took into account the nature and extent of the support, if any, that the appellant reasonably required in interacting with others and establishing relationships.

> 20. The evidence shows that the appellant has little difficulty in engaging with others including those who she does not know. There was little or no evidence of any active support being provided to the appellant from her friends when interacting with others and establishing relationships. All indications were that she was able to do this herself although she gained confidence in her ability to do so when in their company. The education and health care plan shows she has a 100% attendance record at school which shows that she is not withdrawn or reclusive, a point further confirmed by the plan when it noted that she demonstrated confidence and an ability to communicate and interact with her peers and adults alike. She was a Prefect and described as role model for the younger students, has been a cheerleader, a dancer and a member of the football team, all of which shows her ability to engage socially on her own and with those who are not known to her. We noted additionally that she socialises with her friends, travelling on the bus, going into town to buy clothes and having sleepovers where she may listen to music with them. This shows that the appellant is completely comfortable in a social environment, is able to make friends and lead a normal social life which but for her hearing disability, would be hard to distinguish from that of a 16 year old without her disability. She does not satisfy activity 9c, the descriptor claimed, because she is able to engage with others more than adequately on her own."

11. The claimant, through her representatives at the National Deaf Children's Society, asked for permission to appeal to the Upper Tribunal. There were three grounds of appeal one of which related to daily living activity 4; one of which related to daily living activity 8; and one of which related to daily living activity 9. To paraphrase, they were as follows:

" Ground 1 - The tribunal had been required to apply the content of regulation 4(2A) of the Social Security (Personal Independence Payment) Regulations 2013 when considering whether the claimant required supervision to keep her safe, when washing and bathing. It also had to apply the definition of 'safely' as contained in regulation 4(4). It seems to have accepted the need for her to remove her processors when taking a bath or shower and that she would not be able to hear sounds having done so. The test it had to apply in the context of safety and supervision had been set out by a 3 Judge Panel of the Upper Tribunal in *RJ, GMcL and CS v SSWP; SSWP v RJ [2017] UKUT 0105 (AAC)* so the tribunal had to ask itself whether there was a real possibility that could not be ignored of harm occurring having regard to the nature and gravity of the feared harm in the particular case. So, both the likelihood of the harm occurring and the severity of the consequences if it did occur were relevant considerations. In RJ the 3 Judge Panel had been concerned with more than one claimant. But one of them was a profoundly deaf young woman with cochlear implants (she was known as CS). The Upper Tribunal had said of her:

> 'CS had to remove her cochlear implant processes in order to bathe. Without the implants she was profoundly deaf and, she said, would not have been aware of a fire, burglary or other unexpected emergency which would normally be detected by sound. Thus it was necessary for someone to be present in the house in order to alert her should such an event occur. On our analysis of regulation 4 and 'supervision', these facts would indicate that she needed supervision to bathe'.

The circumstances of CS and the circumstances with respect to this claimant were essentially the same. So, without making any factual findings of relevance which would go against the

claimant, the tribunal in this appeal was 'not able to assert that the Upper Tribunal's analysis of regulation 4 and (supervision) do not apply to [the claimant]'. Further, the need for supervision would not be reduced by the claimant cutting short her bathing or shower time because the salient point in a case such as this was that whilst there might be a low likelihood of events leading to risk occurring, if those events did occur then serious harm might be caused. That position was not affected, or not significantly, by curtailment of bathing or shower time. Further, limiting such time might mean the activity was no longer being performed "to an acceptable standard" see regulation 4(2A)(b) and further still, the point about her being independent did not undermine the need for supervision.

Ground 2 - The tribunal's consideration of activity 8 had been cursory and adequate reasons as to why descriptor 8c did not apply had not been provided. There was documentary evidence confirming that the claimant had difficulties in understanding and using language and such had not been considered.

Ground 3 - As to activity 9, the education, health and care plan annual review revealed ongoing difficulties with respect to engagement with others. There was further evidence of such difficulties confirmed in the letter written by the Specialist Teacher of the Deaf (see above). The tribunal, in seeking to justify its conclusions with respect to daily living activity 9, had undertaken only a partial and selective consideration of the evidence."

12. Permission to appeal was refused by a District Tribunal Judge on 13 November 2017. She thought there might be arguable merit in Ground 1 but not Ground 2 or Ground 3. She pointed out that, since only 2 points had ever been claimed under daily living activity 4, even if that ground were to ultimately succeed it would not lead to the establishment of entitlement to PIP. So, any such error that there might have been could not have been material.

13. The claimant's representative renewed the application with the Upper Tribunal. The same grounds were relied upon but some additional comments were made. As to daily living activity 8, the author of the grounds saw support for her arguments in the decision of the Upper Tribunal in *SSWP v SH (PIP) [2017] UKUT 301 (AAC)* due to its having been stressed in that decision that tribunals were required to consider all relevant evidence not merely oral evidence given at a hearing. It had also stressed that tribunals have an inquisitorial function. Here, the tribunal had failed not only to consider documentary evidence suggesting difficulty with reading and understanding but it had compounded that through failing to ask the claimant any questions about such problems. It was also pointed out that the test for daily living descriptor 8c does not relate to the ability to obtain GCSEs or send text messages. As to activity 9, once again, it was said that the tribunal had erred through failing to note evidence in the education, health and care plan which suggested difficulties in engagement with others. Whilst the tribunal appeared to have accepted her oral evidence about engagement it was argued that given the claimant's young age 'and the natural diffidence many young people her age would feel' the tribunal had a particular responsibility to weigh

her oral evidence with the written evidence. It was also asserted that, whilst the tribunal had focused only upon descriptor 9c, it had failed to go on to consider, as an alternative, 9b.

14 I granted permission to appeal and, at that point, made some preliminary observations. I suggested that, contrary to what I thought might be being argued on behalf of the claimant, *RJ* could not be regarded as authority for the proposition that anyone who is profoundly deaf and has to take out cochlear implants when taking a bath or shower will automatically score points under daily living descriptor 4c. I noted that the tribunal's explanation as to its views on activity 8 was "quite terse" but, given that the definitions of basic written information and complex written information are undemanding, I wondered whether it had been required to say any more than it did. As to activity 9, I suggested that ordinarily where a tribunal is rejecting a contention that a particular descriptor linked to a particular activity applies, it ought to go on to consider whether any lower scoring descriptor linked to the same activity might apply. But I raised the possibility that the tribunal's findings might have been sufficient to preclude any possible award under 9b anyway. I directed submissions from the parties.

15. The Secretary of State's representative has provided a written submission of 14 March 2018 in which it is made clear that the claimant's appeal is not supported. As to activity 8, it is argued that given the undemanding definitions what the tribunal had had to say was adequate and that, on the evidence, the claimant could not have succeeded anyway. As to daily living activity 9, the tribunal had undertaken a holistic assessment and had reached findings and conclusions open to it. As to daily living activity 4, if the tribunal's reasoning had been erroneous that would only have raised the possibility of the award of two additional points under descriptor 4c which would not have been sufficient to establish entitlement so any error there might have been could not possibly have been material.

16. In her reply to the Secretary of State, the claimant's representative made it clear she was not seeking to argue that it followed from *RJ* that anyone who is profoundly deaf and has to remove cochlear implant processors to bathe would automatically qualify for points under daily living descriptor 4c. But, it was wrong to expect a claimant to limit the time they would spend washing or bathing in order to reduce risk. Anyway, the tribunal had to and did not properly consider the severity of the consequences if an unexpected emergency occurred. As to daily living activity 8, the tribunal had not properly weighed the evidence before it. It was important to note that the claimant had been assessed as having a "hearing age of eight years and nine months". The tribunal, here, had been "dismissive". As to activity 9 the previous arguments were maintained.

17. Before I go on to explain why I have decided to dismiss this appeal to the Upper Tribunal, it may be helpful to set out certain of the legal provisions of relevance.

18. Regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013 relevantly provides as follows:

> " 4. (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 -
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> (a) safely;
>
> (b) to an acceptable standard;
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> (c) repeatedly; and

> (d) within a reasonable time period. …
>
> (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
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> (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."

19. Daily living activity 4c, the one which it is argued applies to the claimant, reads "needs supervision or prompting to be able to wash or bath". Daily living activity 8c, the one which it is argued applies to the claimant, reads "needs prompting to be able to read or understand complex written information". As to daily living activity 9, descriptor 9b reads "needs prompting to be able to engage with other people" and 9c reads "needs social support to be able to engage with other people". All of those, save for 9c, carry 2 points. 9c carries 4 points.

20. There are then some relevant definitions contained within Schedule 1 to the Social Security (Personal Independence Payments) Regulations 2013. The relevant ones are as follows:

> "Basic written information" means signs, symbols and dates written or printed standard sized text in C's native language;
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> "bathe" includes get into or out of an unadapted bath or shower;
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> "complex written information" means more than one sentence of written or printed standard sized text in C's native language;
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> "engage socially" means -
>
> (a) interact with others in a contextually and socially appropriate manner;
>
> (b) understand body language;
>
> (c) establish relationships;
>
> "prompting" means reminding, encouraging, or explaining by another person;
>
> "read" includes read signs, symbols and words but does not include read Braille;
>
> "social support" means support from a person trained or experienced in assisting people to engage in social situations;
>
> "supervision" means the continuous presence of another person for the purpose of ensuring C's safety.

21. I shall not deal with the grounds in the order in which they appear above. I shall deal with Ground 2, then Ground 3 and then Ground 1.

22. As to Ground 2, as will be noted from the above, the definition of basic written information is very undemanding and the definition of complex written information is little more so. Those definitions, of course, have been set out above. Their undemanding nature was remarked upon in *SSWP v GJ [2016] UKUT 0008 (AAC)* and more recently in *SSWP v SH (PIP) [2017] UKUT 301 (AAC)*, a case upon which the claimant's representative, in a different context, seeks to rely.

23. What the tribunal had to say at paragraph 18 of its statement of reasons was, undoubtedly, brief. But brevity, of itself, is not objectionable and the statement of reasons does have to be read as a whole. As to that, the tribunal had noted that in general terms the claimant had been making significant educational progress. She had passed five GCSE examinations and had obtained and was pursuing additional qualifications (see paragraphs 4 and 5 of the statement of reasons). That sort of information was hardly irrelevant. Clearly the tribunal thought that her ability to do all of that sat unhappily with the contentions being made upon her behalf in the context of the relevant activity.

24. It is true that a reading of the education, health and care plan annual review does reveal difficulties with respect to the claimant's understanding and use of language. The representative points out that the assessment of the claimant's "hearing age" places her just above the level where a student might benefit from an oral language modifier. But I suppose without seeking to decide the point for myself it may be thought that being placed above that standard at all might persuasively suggest an ability to reach the very low thresholds required under activity 8. There are, in fact, some other observations in that document that demonstrate that the claimant has a degree of difficulty with reading and understanding. For example, at page 26 of the appeal bundle there is an indication that the claimant has difficulty with verbal and written communication "when working with more complex sentence structures". It is true that the tribunal did not expressly refer to those particular aspects of the evidence but, nevertheless, it is also true that it clearly did read and clearly did have in mind the content of the plan and the review documents. It had clearly read them. Perhaps, for the purposes of doing a more complete job, the tribunal could have asked the claimant some questions about her reading ability. Perhaps it could have made fuller references to the documentary evidence than it did. But the claimant had passed examinations seemingly not of an undemanding nature and it is really very difficult indeed, absent some specific and detailed explanation as to how she could have that, to square those achievements with the claimed inability to read and understand complex written information as defined.

25. In the circumstances I have concluded that the tribunal was not required to say any more than it did. I accept, of course, as the claimant's representative submits, that the test is not an ability to pass examinations or an ability to read or send text messages. But the tribunal was not saying that it was. What the tribunal was saying was that those particular considerations, especially the ability to pass examinations, were highly relevant to the test it had to apply. It was right about that. Perhaps it did not have to use the term "fanciful" if that is thought to be unduly dismissive. But on the material before it, it is very difficult to see how it could have come to any other conclusion than that no points could be scored under activity 8. Against the evidential background its reasoning was adequate and was clearly open to it. So, I reject this ground of appeal.

26. Turning then to Ground 3, the tribunal did not, as is suggested on behalf of the claimant, simply rely upon her oral evidence when assessing her ability to engage with other people on a face-to-face basis. Indeed, it had the care plan documentation in mind when

noting the view expressed therein that she had "made progress in demonstrating confidence and an ability to communicate and interact with her peers and adults" (see paragraph 4 of the statement of reasons). It similarly had such documentation in mind when noting that her emotional and social resilience had "built significantly over the previous 12 months" (see paragraph 5 of the statement of reasons).

27. The tribunal clearly did attach weight to the claimant's oral evidence concerning her interaction with others at school and with her friends (see paragraph 7 of the Statement of Reasons). It was entitled to do that. But that does not mean it took her oral evidence into account to the exclusion of all other evidence. Its assessment was, in my judgment, much more rounded than that. So whilst I agree that the tribunal was not permitted to take account only of the oral evidence, I am satisfied that it did not fall into that trap.

28. It was argued that the tribunal had ignored evidence of what was described as "a range of measures" which it was said had been set up to support the claimant to engage with others. It is true that there was provision in the education, health and care plan and the review document for her to meet regularly with a key worker and for steps to be taken to "raise her emotional resilience and develop her social skills". It is true that one of her targets in the review document was that she should "develop her emotional resilience and her friendship skills to successfully manage relationships with her peers. But, whilst the tribunal did not specifically refer to that content in the documentation before it, it was not required to refer to each and every facet of each and every item of evidence before it. It was entitled to, and did, take an overview of the evidence both oral and written. I did wonder whether, given the claimant's oral evidence to it as set out in the statement of reasons that she did not like "speaking to people I don't know" because she is "quite shy", it might have erred in failing to probe that. The record of proceedings suggests it did not do so. But the claimant had herself offered shyness rather than something more as an explanation and there was no significant evidence before it of any anxiety related medical condition. In those circumstances I have decided that, whilst it would have been open to it to have probed the matter further and whilst I am sure some tribunals would have done so, it was not, as a matter of law, required to. Nor was it required to treat her evidence with the circumspection suggested in the grounds. There was, so far as I can tell, nothing about her evidence which suggested it might have been unsafe and the record of proceedings does not suggest any difficulty in her understanding questions put to her nor in her giving appropriate answers.

29. It had been asserted before the tribunal that daily living descriptor 9c applied. The tribunal, on one reading of the statement of reasons, had focused upon that single descriptor within activity 9 only. Of course, having decided that that descriptor did not apply there was no realistic possibility of its deciding that a higher scoring one might. But, on the face of it, there might have been such a possibility with respect to a lower scoring one. The only possible candidate here was daily living descriptor 9b. The tribunal's consideration of the issues and its statement of reasons would have been more complete had it specifically addressed 9b. But I am satisfied, given its clear findings that points could not possibly have been scored under 9b. The tribunal had concluded that the claimant was "able to engage with others more than adequately on her own". Its findings effectively precluded the application of 9b. So, it was not an error of law for the tribunal to fail to specifically state it was finding that that descriptor did not apply.

30. That is really the end of this appeal because, as the Secretary of State's representative has correctly pointed out, the appeal cannot succeed under Ground 1 alone because all that

has been sought with respect to activity 4 is 2 points under 4c. Even the actual award of those 2 points would not enable the claimant to reach the requisite 8 point threshold for the standard rate of the daily living component. But, nevertheless, the claimant's representative has clearly spent much time on this ground and I think it is right that I say something about it albeit that what I do say, in light of the above, is no more than a none binding expression of opinion.

31. What is said in Ground 1, to some extent, is simply a setting out of the approach it is said a tribunal should take to questions of safety and supervision. But the tribunal did take the approach the claimant's representative says it should have done.

32. The tribunal correctly identified, at paragraph 11 of its statement of reasons, that it was required to take into account the content of regulation 4 of the Social Security (Personal Independence Payment) Regulations 2013. It set out the definition of the term "safely" as contained in regulation 4(4). At paragraph 15 of its statement of reasons it correctly set out the test which it was clarified in *RJ*, has to be applied. It said it had reminded itself that "a tribunal must consider whether there is a real possibility that cannot be ignored, of harm occurring, having regard to the nature and gravity of the feared harm in the particular case".

33. In RJ, to repeat, the 3 Judge Panel said:

> "63. CS had to remove her cochlear implant processors in order to bathe. Without the implants she was profoundly deaf and, she said, would not have been aware of a fire, burglary or other unexpected emergency which would normally be detected by sound. Thus it was necessary for someone to be present in the house in order to alert her should an event occur. On our analysis of regulation 4 and "supervision", these facts would indicate that she needed supervision to bathe. Then the 3 Judge Panel went on to say this:

But it had then said:

> "68. It follows that CS's appeal succeeds on this ground. Despite our observation that, on the facts asserted by CS and summarised at [63] above, descriptor 4c would seem to apply, we do not remake the decision. It is appropriate that a tribunal determines on the facts the nature and degree of risk to CS while bathing in accordance with the approach which we have set out ..."

34. It had seemed to me from the grounds, that the claimant's representative was seeking to argue that it had been decided in *RJ* that a person in the position of the claimant who had to take out her processors whilst bathing and who would not in consequence of that have any useful hearing, would necessarily satisfy the requirements under daily living descriptor 4c. But had that been the argument I would have been unable to accept it. If the 3 Judge Panel had been so deciding then it would have been unnecessary for it to remit and there would have been no need for any further consideration <u>on the facts</u>, as to the nature and degree of risk. But, as noted above, the claimant's representative helpfully clarified that that was not her argument. But if it was not, then it seems to me that that leaves very little left of the ground as originally put. That is because the tribunal did follow the approach set out in *RJ* notwithstanding that despite the similarities between this claimant and CS it came to a different view. Indeed, such might not be so surprising. It seems to me that in weighing the nature and degree of risk as well as the remoteness of that risk, there is at least some scope for first-tier tribunals to legitimately differ in cases where the facts might be virtually identical. That is because the assessment of the safety issue will be one of judgment.

35. Having said the above, the tribunal did say, in its statement of reasons (paragraph 16) that the claimant would be able to minimise any risk by limiting the time taken to bathe or

shower. In looking at paragraph 16 that seems to be the basis or at least the primary basis upon which it came to its conclusion that descriptor 4c did not apply. Was it entitled to do that? It seems to me that it was not. In *EG v SSWP (PIP) [2017] UKUT 101 (AAC)* it was decided that a claimant was to be assessed on the basis of what he/she would wish to do and should not be expected to effectively circumscribe his/her activities. I agree with that view. The tribunal, in this case, was required to assess risk on the basis of how the claimant might choose to behave when bathing or taking a shower and not to require her to limit the time taken merely to avoid the risk the extent of which it was assessing. So, to that extent, it seems to me that the tribunal did err in law. It may not have made any difference to the outcome because the likelihood of an untoward event occurring was low anyway and perhaps not much reduced even if the claimant were to circumscribe her bath and shower time. The matter which gave rise to concern was the consequences if certain circumstances did arise. But it was an error and, to that extent, I am in agreement with the claimant's representative. But given that it could only have led to entitlement to two additional daily living points it was not material.

36. So, the claimant's appeal to the Upper Tribunal fails. Finally, I would wish to thank each representative for the careful and helpful written submissions they have each provided.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated **24 July 2018**