IN THE UPPER TRIBUNAL **Appeal No: CE/1689/2018**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant claimant.

The decision of the First-tier Tribunal sitting at Fox Court on 14 December 2017 under reference SC242/17/06981 involved an error on a material point of law and is set aside.

The Upper Tribunal re-decides the appeal and substitutes its own decision for that of the First-tier Tribunal. The substituted decision of the Upper Tribunal is to set aside the Secretary of State's decision of 30 March 2017 and replace it with a decision that the appellant had limited capability for work and is treated as having limited capability for work-related activity, and so is entitled to employment and support allowance with the support component, with effect from 30 March 2017.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals Courts and Enforcement Act 2007.

Representation: Simon Howells of Southwark Law Centre for the appellant.

Julia Smyth of counsel for the Secretary of State for Work and Pensions instructed by the Government Legal Service.

REASONS FOR DECISION

Introduction

1. This in some respects is a companion to my decision in *RP v SSWP* (ESA) [2020] UKUT 148 (AAC), although the issue that arises in this appeal under regulation 35(2) of the Employment and Support Allowance Regulations 2008 ("the ESA Regs") is different.

2. The issue in this appeal is the (equally) long-standing one of the Secretary of State's failure to provide accurate lists of work-related activity to First-tier Tribunals where regulation 35(2) of the ESA Regs either may be or is in fact in issue.

3. The decision in this appeal may therefore be seen as part of a trilogy of decisions on the above issue, beginning with the Upper Tribunal's decision in *IM v SSWP* [2014] UKUT 412 (AAC); [2015] AACR, followed by my earlier decision in *KC and MC v SSWP* (ESA) [2017] UKUT 94 (AAC) and ending with this decision. It is sincerely hoped that this decision will mark the end of the Upper Tribunal needing to examine the adequacy of the information the Secretary of State provides to First-tier Tribunals in appeals in which regulation 35(2) of the ESA Regs (or its Universal Credit counterpart) may be in issue.

Factual Background

4. The appellant at the material time suffered, amongst other things, from a depressive disorder resulting in severe chronic depression and anxiety, post-traumatic stress disorder and chronic diarrhoea. The Secretary of State's decision under appeal to the First-tier Tribunal in this case was dated 30 March 2017. The decision as described in the Secretary of State's appeal response to the First-tier Tribunal was to the effect that the appellant was *no longer assessed as having limited capability for work*. Thus, on its face this was a supersession decision

made in respect of the most recent decision awarding the appellant employment and support allowance ("ESA").

5. However, as in the *RP* case referred to above, the history of the appellant's entitlement to ESA set out in the appeal response and the documents supplied with it lacked any clarity. Reference was made to the 30 March 2017 decision superseding an awarding decision dated 24 July 2012 but page eight of the appeal response spoke in terms of the awarding decision being dated 30 July 2010, and a yet further date was given of a First-tier Tribunal having put the appellant into the 'support group' of ESA in November 2013. (The decision in *RP* addresses from when accurate and complete 'adjudication histories' ought to have started appearing in Secretary of State appeal responses in these types of ESA appeals.)

6. Of more moment for this appeal, the list of 'work-related activity' provided with the appeal response following *IM* was "Soft Skills from the District Provision Tool List". This list did not, as it ought to have shown following *IM*, set out the most onerous forms of work-related activity available in the appellant's area in March 2017. Perhaps the most notable for being absent was any reference to a 'work placement': per section 13(8) of the Welfare Reform Act 2007.

7. The appeal was allowed by the First-tier Tribunal in a decision dated 14 December 2017 ("the tribunal"), but only to the extent that it found the appellant continued to have limited capability for work from 30 March 2017. The tribunal scored the appellant at 24 points under Schedule 2 to the ESA Regs. Those points included six points for the appellant being unable to get to an unfamiliar place on his own and six points for his being unable, for the majority of the time, to engage socially with those unfamiliar to him. However, the tribunal determined that the appellant did not have (or, more accurately, no longer had) limited capability for work-related activity from the end of March 2017 because no descriptor in Schedule 3 to the ESA Regs applied as at that date and

nor did he satisfy regulation 35(2) of the ESA Regs on that date. On this very last issue the tribunal said the following in its decision notice.

> "The Tribunal considered the list of available work-related activities and found on a balance of probability that the appellant would not be capable of participating in group activities. The appellant would have problems participating in group activities but could participate [on a] one to one basis either face to face or over the telephone."

8. The tribunal expanded on this reasoning in its statement of reasons for decision where it said the following about, or of relevance to, regulation 35(2) of the ESA Regs.

> "15. The [appellant's] doctor has said [he] cannot get to a place which is unfamiliar to him without being accompanied by another person. The [appellant] confirmed this in his evidence as did his representative in his submissions. Based on the totality of the evidence the Tribunal find on a balance of probability that the [appellant] is unable to get to a specified place with which he is unfamiliar due to his mental health condition for the majority of the time without being accompanied by another person. He is fearful of other people and being attacked. He gave evidence that he will go to his doctor on his own and to the local shops, preferably when there are less people around. He said he would get lost if he had to go on his own to a place he did not know. This was not disputed by the appellant.
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> 16. The [appellant] stated he had problems engaging on his own with people as he is fearful of them. He said in evidence he could not speak with people that he did not know on his own. Based on the totality of the evidence together with the submissions on his behalf the Tribunal find that for the majority of the time engagement in social contact with someone unfamiliar to the [appellant] is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the individual. This was not disputed by the [appellant].
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> 17. The [appellant] stated that every day he tries to stay away from people as they see him as a threat. At the medical assessment the [appellant] denied any acts of aggression or violence on his part towards others. He said that the main problem was that people saw him as a threat and though that due to his appearance he may be a terrorist. His doctor has confirmed that he is withdrawn but not aggressive, disinhibited or inappropriate. His chronic depression and anxiety makes him want to stay away from people but his behaviour has not been described as inappropriate either by himself or by his medical professionals. Based on [the] totality of the evidence the Tribunal find on a balance of probability that the [appellant for the majority of the time behaves appropriately with other people.

> 18. Based on the above findings the Tribunal find that the [appellant] has limited capability for work from 30/03/17.
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> 19.....The Tribunal went on to consider if the [appellant] had limited capability for work-related activity. The Tribunal considered any problems getting to and from a place if he was told to attend somewhere regularly and find that once he is shown the way and knows how to get there he will be able to get to a work place activity as he himself has shown by going on his own by taxi to the medical assessment. He may need to be accompanied on the first few occasions but thereafter he should be able to travel on his own as he does to his Doctor and the local shops. At document 11 in the bundle there is a list of the types of work related activity available in [his] area. The [appellant] was asked to consider them and said he would be able to do some of the activities such as carrying out research at the library but would prefer to go when there were not too many people around. The Southwark North Assessment and Liaison team recommended him to one support and to receive motivational work to support him, to prioritise his responsibilities and engage in meaningful activity. Based on the evidence before the Tribunal, the fact that the [appellant]'s mental health is managed by medication and his GP for the majority of the time the [appellant] will be able to participate in the majority of soft skills provided in his area. Account needs to be taken of the fact he does not like crowds and is likely to function better and feel more at ease on a one to one basis."

I deal with the other relevant background below.

Relevant law

9. One of the basic conditions of entitlement to ESA is that a claimant must have 'limited capability for work for work': per section 1(3)(a) of the Welfare Reform Act 2007 ("WRA"). A person with limited capability for work will be entitled to an increased amount of ESA if he or she has, or can be treated as having, 'limited capability for work-related activity' and so comes within what is called the 'support group' under the ESA scheme.

10. Given the terms of regulation 35(2) of the ESA Regs, it is necessary to identify and understand what amounts to "work-related activity". Regulation 35(2) contains a deeming provision as it provides for claimants who meet its terms to be treated as having limited capability for work-related activity even though they do not have limited capability for work-related activity under the regulations made pursuant to section 9 of the WRA. Regulation 35(2), which is made

under section 22 and paragraph 9(a) in Schedule 2 to the WRA, provides as follows:

> "35.— (2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if—
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> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
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> (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity."

11. The phrase "work-related activity" is defined in section 13(7) of the WRA as follows:

> "'work-related activity', in relation to a person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so".

By section 13(8) of the WRA "work-related activity" includes "work experience or a work placement".

12. As I explained in *RP*, the predictive risk assessment called for by regulation 35(2)(b) requires consideration to be given to the 'work-related activity' the claimant may be required to undertake under the conditionality provisions found in sections 12-14 of the WRA. The conditionality steps identified in those sections include the claimant: (i) attending one of more work-focused interviews (section 12(1)); (ii) undertaking work-related activity (s.13(1)) (see to similar effect *AH v SSWP* (ESA) [2013] UKUT 118 (AAC); [2013] AACR 32), and (iii) being provided with an "action plan" where either (i) or (ii) applies (section 14(1) and (2)).

13. The requirement to undertake work-related activity is addressed in regulation 3 of the 2011 WRA Regs, which sets out that:

> "3.—(1) The Secretary of State may require a person who satisfies the requirements in paragraph (2) to undertake work-related activity as a condition of continuing to be entitled to the full amount of employment and support allowance payable to that person.
> (2) The requirements referred to in paragraph (1) are that the person—
> (a) is required to take part in, or has taken part in, one or more work-focused interviews pursuant to regulation 54 of the ESA Regulations;
> (b) is not a lone parent who is responsible for and a member of the same household as a child under the age of 3;
> (c) is not entitled to a carer's allowance; and
> (d) is not entitled to a carer premium under paragraph 8 of Schedule 4 to the ESA Regulations.
> (3) A requirement to undertake work-related activity ceases to have effect if the person becomes a member of the support group.
> (4) A requirement imposed under paragraph (1)—
> (a) must be reasonable in the view of the Secretary of State, having regard to the person's circumstances; and
> (b) may not require the person to—
> (i) apply for a job or undertake work, whether as an employee or otherwise; or
> (ii) undergo medical treatment.
> (5) A person who is a lone parent and in any week is responsible for and a member of the same household as a child under the age of 13, may only be required to undertake work-related activity under paragraph (1) during the child's normal school hours."

14. Finally, regulation 5 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011 ("the 2011 WRA Regs") provides that:

> "5—(1) The Secretary of State must notify a person of a requirement to undertake work-related activity by including the requirement in a written action plan given to the person.
> (2) The action plan must specify—
> (a) the work-related activity which the person is required to undertake; and
> (b) any other information that the Secretary of State considers appropriate."

Discussion and Conclusion

Some preliminary observations

15. It is apparent from the tribunal's reasoning that the foundation of its conclusion that regulation 35(2) of the ESA Regs was not met by the appellant was the 'soft skills' of work-related activities and the appellant's ability to participate in the majority of them. As shall be

seen, the First-tier Tribunal was misled in so concluding because the 'soft skills' of work-related activities was a not a true reflection of the extent of the work-related activities claimants may have been expected to undertake in March 2017. Perhaps most critically (and worryingly), the list being of *soft* skills, it did not contain the more, or most, onerous forms of work-related activities.

16. However, even assuming in the tribunal's favour that the list of work-related activities which was before it was complete and accurately showed the most and least onerous forms of work-related activity, the tribunal's reasoning can still be criticised on the basis that it did not sufficiently address the likelihood of the appellant having to participate in the minority of the soft skills activities which, on the face of it, the tribunal considered the appellant could *not* do (without substantial risk to health).

17. Furthermore, the tribunal's reliance in paragraph nineteen of its reasoning on the appellant's ability to learn to get to places of work-related activity and being accompanied in that period of learning failed to take into account the likelihood of the appellant being able to have a companion to accompany him on the first few instances when he was required to undertake work-related activities that required him to travel: see *PD v SSWP* (ESA) [2016] UKUT 148 (AAC), *MP v SSWP* (ESA) [2016] UKUT 502 (AAC) and *KN v SSWP* (ESA) [2016] UKUT 521 (AAC).

18. Both these failings in the tribunal's reasoning amount to material errors of law. However, the tribunal also erred more fundamentally in law in proceeding on the basis that all relevant forms of work-related activity appeared in the 'soft skills' list put before it by the Secretary of State. The tribunal may have considered that it was entitled to rely on the Secretary of State to provide it with an accurate and complete list, but the terms of section 13(8) of the WRA ought to have led it to question this assumption given the absence of work placements from the list. As the Secretary of State now concedes, the tribunal was

materially misled by her failure to put before it an accurate and complete list evidencing the most (and least) onerous forms of work-related activity the appellant may have been required to undertake in March 2017.

Soft skills lists

19. Unearthing why the tribunal was only provided with the 'soft skills' list of work related activities and so was materially misled has been a somewhat (and unnecessarily) drawn out process.

20. The appellant – who throughout these Upper Tribunal proceedings has been well represented by Simon Howells of Southwark Law Centre – sought and was granted permission to appeal against the tribunal's decision on a variety of grounds. These included a ground that the tribunal had failed to satisfy itself that it had a complete and accurate list of work-related activity before it. The Secretary of State then sought to support the appeal in very short order, including on the ground of appeal just identified, and asked for it to be remitted to a new First-tier Tribunal. I refused to accede to this request, a request which noticeably was not supported by the appellant, and commented as follows:

> "The submission the Secretary of State has filed on this appeal cannot sensibly be described as the "full submission on this appeal addressing all the points raised in the grounds of appeal" I directed the Secretary of State to make. The submission, for example, leaves me wholly unclear as to the status of the ['soft skills' work-related activity list] or what any new First-tier Tribunal (to whom the Secretary of State seeks the appeal to be remitted) is to do with that evidence. The Secretary of State accepts in her submission that she failed to provide all the information on work-related activity that she was required to provide. Why was that? And perhaps more importantly in a case where she seeks remission, what is that evidence and why has it still not been provided?"

21. These directions led to a further submission being made by the Secretary of State. In this submission, dated 21 December 2018, the following of relevance was said:

"2……I accept that the Secretary of State has failed to comply with the provisions of *IM* by not indicating what might be the least-demanding and most-demanding work-related activity (WRA) that the claimant might have been required to undertake from the [soft skills list].

3. It should be pointed out, however, that at the date of the decision under appeal i.e. 30/3/17 the list provided was the only one available for operations staff to submit to the First-tier Tribunal (FtT). An updated list was available from May 2017 and this did provide details of what might be considered the least-demanding and most-demanding WRA that the claimant might have been required to undertake. This list also acknowledged that the clamant may be required to undertake work placements and external courses under the Jobcentre Plus Offer. Further enhancements were made in a third list…, which was issued with DMG Memo 1/18 issued in January 2018.

4. ……the Department's policy in relation to WRA is a national one, and, following *IM*'s criticism of existing procedures, DMG Memo 17/15 set out what should be provided in appeal submissions. It confirmed that the DM should provide the FtT with examples of the least-demanding and most-demanding WRA. In response to further concerns raised in *KC and MC*….revised and expanded guidance was set out in DMG Memo 1/18. However, given the length of time that it takes appeals to make their way through to the UT and the difficulty there has been in ensuring a consistent approach in what evidence to provide to FtT's, it is perhaps not surprising that appeals being considered now still have at issue the old-style WRA list. I should also stress that there is no policy not to provide details of what might considered to be the most-demanding WRA available.

5…….I cannot say why the [Secretary of State's] original appeal submission did not entirely follow the guidance given in DMG Memo 17/15, and, although there was partial compliance with *IM* in the production of a list, it is acknowledged that this list was not complete and the more-demanding types of WRA that the claimant might be required to do under the JCP offer needed the kind of detail given in subsequent lists.

6…….when a claimant is placed in the work-related activity group, a leaflet containing some details of the type of WRA they might be required to do…is sent to them at either the decision stage or the mandatory reconsideration stage. I have been made aware, however, that compliance varies from district to district and the process is currently under review.

7……..it is acknowledged that the ['soft skills' list] did not have sufficient detail of the most-demanding WRA that the claimant might have been required to undertake, and, thus the FtT was not in a position to properly determine whether or not the claimant satisfied the requirements of regulation 35)(2)….it cannot be determined why the [Secretary of State's] original submission did not provide what it should have, because, whatever faults it did have, the instructions given in DMG Memo 17/15 did stipulate that an appeal submission should provide a full list of WRA available and details of which types of WRA the [Secretary of State] felt were the least-demanding and

> most-demanding. Of course, it would be counter-productive to remit this appeal back to a new tribunal with just the same list…….It would be expected that the list issued with DMG Memo 1/18 (already incorporated in the bundle [as part of the appellant's grounds of appeal]) would be placed before any new FtT. It has not been provided before because it was not available to the writer of the original submission, and [tribunal's] failure to pick up on the deficiencies in the [Secretary of State's] original submission and in the original list meant that the [Secretary of State] was not provided with the opportunity to rectify these matters. It was only when the appeal arrived at the [Upper Tribunal] that these deficiencies came to light, and the [Secretary of State's] [earlier] submission….acknowledged those errors and requested that the UT Judge remit the case to a new FtT with appropriate directions for determination.
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> 8……..as only the least-demanding [WRA] were provided, the FtT failed to consider the claimant's ability to carry out the most-demanding activities which had the potential to affect the outcome of the appeal."

22. The appellant's response to this further submission, through Mr Howells, was somewhat lukewarm. He pointed out that even if the soft skills list was 'the only one available' in March 2017, an updated (and better) list had been in place since May 2017 and the response to the appeal to the First-tier Tribunal had been issued in August 2017, so it remained unclear why the wrong list (even on the Secretary of State's own case) had still been used. Mr Howells in addition provided evidence that his Law Centre had "continued to receive appeal responses that omitted the full list of work-related activity until May 2018" and had still to see a case, by March 2019, "in which the Secretary of State has given any indication of which work-related activity she considers it would be reasonable for the appellant to undertake". He also raised what he described as a greater concern that no list of any kind was being provided in the equivalent Universal Credit appeals.

23. Referring to paragraph 7 of the Secretary of State's further submission, the appellant argued that the submission here left out of account the duty imposed on the Secretary of State under rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal (Social Entitlement Chamber) Rules 2008 to provide all documents in her possession relevant to the appeal with her response to the appeal. By August 2017 those

documents should have included the updated list of work-related activity.

24. The appellant therefore sought an oral hearing of the appeal to the Upper Tribunal to try and better elicit the answers to the 'gaps' in the Secretary of State's case. In particular, the appellant wanted answered the question why the palpably wrong list of work-related activity had been presented on his appeal as being the correct list. In the absence of an explanation being provided, the appellant posited that the inference could arise that a conscious decision must have been taken to provide only a list comprising of the less demanding activities.

25. In giving directions for an oral hearing to be held I said the following of relevance:

> "6. It would assist if those acting for the appellant could indicate…… whether any part of his argument is likely to turn on whether any, some or all of the "soft skills" on page 11 can as a matter of law constitute "work-related activity" under section 13(7) of the Welfare Reform Act 2008. It is appreciated that the Secretary of State's case may now be that the list on page 11 is an incomplete list of the work-related activity available at the relevant time. If that is so, one of the issues that will need exploring at the oral hearing was why such a deficient list was being used (and perhaps routinely used in some other appeals), by the Secretary of State in respect of an appeal made and then decided over three years after *IM v SSWP* (ESA) [2014] UKUT 412 (AAC); [2015] AACR 10 had been decided and over ten months after *KC and MC v SSWP* (ESA) [2017] UKUT 94 (AAC) had been decided. The possibility that First-tier Tribunals were routinely misled is a serious issue. However, even if matters may now have been 'put right' as to the correct list of work-related activity, an argument may still arise whether the 'soft skills' activities should appear at all on a list of work-related activity if they cannot in law constitute work-related activity. It is in this context that clarification is sought from those acting for the appellant as to whether any such argument is likely to arise in this appeal. It is possible that the argument will arise in other appeals currently before the Upper Tribunal.
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> 7. I have indicated above what the Secretary of State's case 'may' now be about the list on page 11. However, paragraph 2 of her response of 21 December 2018….could be read as meaning that the list on page 11 **was** a complete list of the work-related activity that was available in the appellant's area in March 2017, with the fault being confined to the failure to indicate *from* that list what the most and least demanding activities on it were. That in fact is what paragraph 2 on page 277 says. This will need to be clarified at or before the hearing. The context of the rest of the Secretary of State's response…., and in particular what

is said in paragraphs 5 and 8 of the response, may indicate that she was accepting that the list on page 11 was incomplete. That would be consistent with section 13(8) of the Welfare Reform Act 2007 including work placements and work experience in 'work-related activity'. If, however, the argument is as in paragraph 2 – that is, that the list on page 11 was a complete list of the work-related activity in fact available in the appellant's area in March 2017 - then that arguably would provide a different focus for any argument as to whether the activities on page 11 constituted work-related activity under section 13(7).

8. A further issue may then arise as to whether the 'complete' list on pages 187-188 evidences the work-related activity (and the least and most onerous) that was in fact available in [the appellant's] area in March 2017, given it was a list that was not seemingly compiled until 2018.

9. (I should note at this stage that I have had sight of the arguments filed to date by the Secretary of State in CE/3375/2017 and CE/1083/2018. Both cases involve work-related activity lists very similar to the list on page 11 in this appeal and where the relevant ESA decisions under appeal were made on dates straddling the date of the decision in this case (24 October 2016 and 10 October 2017 respectively). However, as far as I can see, it is not part of the Secretary of State's case in either of those appeals that the work-related activity lists provided were incomplete. It *appears* (and I do not wish to trespass on those appeals as they are with another Upper Tribunal judge) that the argument made in those appeals is that the lists were tailored for the individual appellants' needs. Whether that was the case in fact and whether that is consistent with the requirements following *IM* and *KC and MC*, and indeed paragraph 17 of DMG 17/15 (see paragraph 10 below), may be an issue on those appeals. But the Secretary of State, I am sure, will wish to ensure that her submissions on [this] appeal are consistent with those she is making in the two appeals in CE/3375/2017 and CE/1083/2018.)

10 Putting the above issues and arguments to one side, as I have said one issue the Upper Tribunal will wish to explore at the hearing of this appeal is the basis upon which the appeal response writer in [this] case relied on what was an obviously deficient work-related activity list. What guidance or instruction was the appeal response writer expected to work to when providing a First-tier Tribunal with the appeal response and all relevant evidence in or around June 2017? And, if different, what was the guidance or instruction in place in December 2017 (so as, if applicable, to enable corrective action to have taken place in respect of work-related activity list before [this] appeal was decided)? If the relevant guidance was confined to DMG 17/15 at the time the appeal response was written in or around June 2017, paragraph 17 of that document (ignoring the **Note** at the end of it) provided that in an appeal such as [this one]:

> "The appeal response should include a list of <u>all types of WRA</u> provided through the Work Programme in the claimant's area. There is no need to identify which is the most and least demanding." (my underlining added for emphasis).

> It may be thought difficult to see how page 11 in this appeal complied with this requirement.
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> 11. A related issue that is likely to need exploring at the hearing may be why, notwithstanding the emphasised part of paragraph 17 of DMG 17/15 shown immediately above (a document which was seeking in 2015 to implement the *IM* decision), by the March 2017 the Secretary of State only had the (deficient) list on page 11 which she could make available to, presumably, health care professionals conducting assessments, her own decision makers and First-tier Tribunals. I note it is not disputed between the parties that there was no policy in place to only make the least onerous work-related activity available. However, I would have thought the appellant is at least entitled to know why such a misleading list was used in his case and seemingly was being habitually used in many other ESA appeals. If not evidence of a policy, what was the basis for what seems to have been a reasonably consistent practice of allowing misleading evidence to be put forward?
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> 12. Another area that may usefully need to be explored at the hearing of this appeal is what the position was in March 2017 in terms of information being communicated about [the appellant's] health and other needs and the Schedule 2 limitations he was found to have in respect of that date to the work coach and those who may otherwise have been responsible for arranging work-related activity for him in March 2017. Paragraphs 50 and 102 of *KC and MC* and the 'communication steps' therein described for 2017 may be relevant here. Also of relevance may be the 'claimant action plans' and 'ES49 forms' discussed in the two appeals referred to in paragraph 9 above, though that may have been in the context of external work-related activity providers and not the Jobcentre Plus Offer."

26. The appellant did not seek to make any argument, in response to these directions, that the activities on the soft skills list could not as a matter of law constitute work-related activities under section 13(7) of the WRA. He accepted that activities such as setting an alarm clock, getting out of bed and leaving the house could for certain people (e.g. those with long-standing and deep-seated illnesses such as severe anxiety) constitute, as part of a continuum, activities that enabled a person to obtain work in the longer term. However, he suggested that it would be necessary to show at any given time that the activities were rationally connected to a process of making the claimant able to obtain work. This point was not therefore in issue before me and accordingly I say no more about it.

27. The Secretary of State accepted in response to the above directions that, whatever the position in terms of the suitable work-related activity which may be set for an individual claimant by his or her "Work Coach", at the material time on this appeal (and since December 2012 (when subsection (8) was added to section 13 of the WRA)), the *IM* compliant list of all types of work-related activity in which the appellant might have been required to engage in March 2017 ought to have included work placements and other forms of more onerous activities. The 'soft skills' list provided to the tribunal was not such a list and the tribunal had been misled into thinking that it was.

28. The submissions made at and after the oral hearing before me, as well as the evidence in the detailed witness statement filed on behalf of the Secretary of State by Ms Louise Everett, a Senior Civil Servant at the DWP, allow me to say the following in addition about the deficient work-related activity list put before the tribunal in this appeal. Some of what is set out below will be familiar from the *RP* case.

29. The evidence sought to place the genesis of the work-related activities lists provided to First-tier Tribunals in the context of the setting of work-related activity more generally. As I explained in *RP* there have been two discrete processes for setting work-related activity. The first was under the "Work Programme", in which third party organisations were involved in setting work-related activity. However, all new referrals to the Work Programme ended by April 2017. The second is under the "Jobcentre Plus Offer". This is a package of support available from Jobcentre Plus and has been in place for ESA claimants since June 2011.

30. Under the Jobcentre Plus Offer the Work Coach sets work-related activity for an individual ESA claimant. The Secretary of State's evidence is that "[t]he aim is for the Work Coach to apply an individualised approach to the setting of [work-related activity], tailored to the claimant". To facilitate this "personalised approach" the Work Coach has access to

the "District Provision Tool". This contains a large number of different work-related activities. The Secretary of State's evidence was that she recognises that a number of ESA claimants may have been out of work for long periods of time "and need to reconnect with society generally".

> "In these circumstances, the Work Coach will set what are often referred to as "soft skills" activities, intended to build confidence and motivation and thereby help the claimant to move closer to the labour market."

31. Further, "Operational Guidance" in place since 12 September 2016 instructs that the ESA85 report of the healthcare professional should be shared with the Work Coach where the claimant has been placed in the work-related activity group (i.e. has been found to have limited capability for work but does not have limited capability for work-related activity). In addition, even though work-related activity may often be outsourced to an external provider, the Work Coach retains control of what work-related activity the individual claimant may be required to do.

32. As for work experience and work placements, Ms Everett's evidence was as follows (omitting two footnotes):

> "55. Work experience and work placements are additional measures that Work Coaches can use to help ESA claimants move closer to the labour market. Work experience and work placements provide an opportunity for claimants to experience a structured work environment to learn new skills, increase their confidence and employability. They can also help claimants address barriers to work such as lack of work experience and confidence issues due to their limited capability for work.
>
> 56. All ESA claimants have access to work experience on an entirely voluntary basis. ESA claimants can never be mandated to undertake a work experience position and no sanctions can be applied for a failure to attend or participate. ESA claimants can only be referred to work experience if the claimant agrees that it would be helpful.
>
> 57. For most ESA claimants work placements are also available on a voluntary basis however, ESA claimants in the WRAG [work-related activity group] can be mandated to attend a work placement if it is agreed that a referral would be appropriate, eg. if the claimant has a barrier to work which they refuse to address, but which could be addressed by a work placement. Mandatory referrals to work

> placements must always be recorded within the individual's Action Plan and failure to attend or participate without good cause may attract a sanction.
>
> 58. Work placements for ESA claimants must be of benefit to the community over and above the benefit of providing a placement to the individual. As with work experience, work placements must be reasonable and appropriate to the claimant's personal circumstances. This is a supportive measure and claimants will only be asked to do this if they are not voluntarily taking steps to overcome barriers to moving closer to the labour market."

33. In terms of decision-making on substantial risk under regulation 35(2) of the ESA Regs, the Secretary of State's evidence was that at the initial stage of decision-making (e.g. deciding an ESA claim after an assessment) the decision maker would be "guided by the content of the ESA85 or ESA85A" plus any other evidence submitted as part of the work capability assessment process. In other words, the Secretary of State through her decision makers does not have any regard to any work-related activities the claimant might be required to undertake. That consideration is only given "later on in the [decision-making] process" by the decision maker at the 'mandatory reconsideration' stage of a First-tier Tribunal on appeal. It is only at these later stages, and in effect only if the claimant seeks to challenge the decision on appeal, that, according to the Secretary of State's evidence, the "decision-making can also be informed by the objective, generic Jobcentre Plus Offer list of least and most demanding work-related activity [found in the Appendix to DMG Memo 01/18]". That evidence continues:

> "121. The [decision maker] and/or [First-tier Tribunal] should also consider, where available, evidence of any [work-focused interviews] attended, or [work-related activity] undertaken, and if any, the effect of [either] on the claimant's health since the claimant was placed in the [work-related activity group] (e.g. by consideration the claimant's Action Plan)."

34. Although my jurisdiction only concerns the First-tier Tribunal, and I acknowledge that that tribunal stands in the shoes of the decision maker and determines all relevant entitlement matters entirely afresh on an appeal, it seems to me very well arguable that this form of

adjudication is the wrong way around. On the face of it, it means that the full consideration of risk under regulation 35(2) required by the *IM* and *KC and MC* cases only applies to those claimants who appeal the work-capability assessment decision and does not apply to the many claimants who do not appeal. Moreover, it would seem to me to require First-tier Tribunals considering appeals in which regulation 35(2) of the ESA Regs is in issue to focus especially on the mandatory reconsideration stage of the Secretary of State's decision-making.

35. The evidence of Ms Everett also went into some detail in respect of the guidance given in Appendices 6 and 7 of the Work Capability Assessment Handbook to Health Care Professionals conducting work capability assessments on behalf of the Secretary of State. This is in addition to the guidance provided in DMG Memo 01/18. It was said in Ms Everett's evidence that these appendices provided the health care professional with examples of work-related activities. However, this evidence was criticised by Mr Howells for the appellant on the basis that the examples of work-related activities did not include the most onerous forms of activities. The Secretary of State did wish to further argue this point (though she did not argue that Mr Howells was wrong), arguing instead that these were not matters for determination by the Upper Tribunal and were policy matters for her.

36. In the circumstances, I say no more on the accuracy or otherwise of the guidance given to 'HCPs'. However, I would suggest that if the Secretary of State wishes to rely on it as part of the evidence relevant to the (lack of) any substantial risk to health under regulation 35(2), she should set out the relevant passages of the Work Capability Assessment Handbook to which the individual health care professional in the case under appeal had regard in the mandatory reconsideration notice and the appeal response to the First-tier Tribunal.

37. Turning then to the work-related activities lists, Ms Everett's evidence charts how the "soft skills" list came to be the list of work-related activities which was habitually (if not always) provided by the Secretary of State to First-tier Tribunals. Detailing this is largely now an academic exercise given the practice is supposed to have ceased[1] and given that the Secretary of State accepts that this was always an inaccurate list, lacking as it did the more and most onerous forms of available work-related activity (including work placements).

38. The explanation provided is that after the decision in *IM* appeal writers in the "Dispute Resolution Team" of the DWP developed a process to determine what evidence of work-related activity should be considered at the mandatory reconsideration and appeals stages. The consequence of this for those claimants under the 'Jobcentre Plus Offer' was that the "soft skills" list alone was to be considered. Why it was determined to be an appropriate list is not explained. Nor is it explained why it continued to be provided as an accurate list to First-tier Tribunals even after the instructions to decision-makers in DMG 17/15 came into effect from June 2015. DMG 17/15 was in place well before *KC and MC* was decided, but as that decision sets out even DMG 17/15, at paragraph 12.3, required decision makers to provide First-tier Tribunals with the least and most onerous types of work-related activity, and given the terms of section 13(8) of the WRA on no rational analysis could the 'soft skills' list have been considered to do this.

39. Be that as it may, Ms Everett's evidence is that it was the process of adjusting guidance to the Secretary of State's decision-makers after *KC and MC* was decided which led to the representative list of available work-related activity being changed. The first stage of this was in May 2017 when an updated list was made available to decision makers to

[1] I should note, however, that in the course of writing this decision I came across another appeal to the Upper Tribunal (reference CE/248/2020) in which the "soft skills" list was still being advanced by the Secretary of State to a First-tier Tribunal as accurate evidence of all available work-related activity in an appeal made to the First-tier Tribunal in January 2019. This is a full year after DMG Memo 01/18 had apparently removed the 'soft skills' list from that which should be being advanced in such appeals.

replace the "soft skills" list. This included work placements at a community hub as a form of available work-related activity, though at this stage the activities were not categorised as 'easy', 'medium' or 'hard' in terms of their onerousness.

40. Further work was then done on this 2017 list to categorise the activities within it under the terms referred to immediately above and include them in updated guidance. This appeared in January 2018 in Memo DMG 1/18. It was the Secretary of State's position before me, which was not disputed, that this Memo DMG 1/18 list is a representative list of the least and most demanding types of work-related activity. It is therefore clear that it is this list, and this list alone, that ought to have appeared as evidence of the available work-related activity in appeals since at least January 2018.

41. Why then was the 'soft skills' list used in this appeal? The Secretary of State's decision under appeal was dated 30 March 2017, but as we know from paragraph 33 above this would not have involved any consideration of risks arising from any specific forms of work-related activity. The more critical stage in this respect is, on the Secretary of State's own case and in terms of my appellate jurisdiction, the date the Secretary of State's response to the appeal to the First-tier Tribunal was written. This was in August 2017. By that point in time the May 2017 list, including work placements, ought to have been before all decision makers. The Secretary of State in her written submission on the appeal could only say the following about why the appeal response writer did not use the correct list.

> "Unfortunately, the Department is unable to conclusively confirm why the soft skills was wrongly issued in this case. Remedial action was taken to re-issue and upskill appeal response writers in January 2018. As set out above, the Department is reviewing all stayed cases to see if there are other cases where this has occurred and consider whether any further action is necessary."

42. The 'soft skills' list, therefore, ought not in fact have appeared in any ESA work capability appeal after January 2018, and in any event was irrelevant as accurate lists of the most and least onerous types of available work-related activity even before that date. In consequence, First-tier Tribunals will need to investigate with conspicuous care any work capability assessment appeals in which the 'soft skills' list is put forward as evidence of the available work-related activity.

43. I should emphasise in concluding these wider considerations that nothing in this decision disturbs anything said in either *IM* or *KC and MC* about the correct approach to making the predictive assessment of risk required by regulation 35(2) of the ESA Regs.

The decision in this appeal

44. For the reasons given above the tribunal's decision must be set aside. There was no dispute in the end between the parties as to what action I should take having set the tribunal's decision aside. The Secretary of State agreed that I could decide that regulation 35(2) of the ESA Regs was satisfied in March 2017. She relied on paragraph 115 of the decision in *IM* in this respect. That paragraph says:

> "115……in our view, where the present practice of the Secretary of State has the effect that the relevant predictions cannot be made with sufficient certainty, the underlying purpose of regulation 35(2) is best served and promoted by a finding that regulation 35(2) applies rather than by leaving the vulnerable claimant to take the risk of a decision that causes the regulation 35(2) risk to materialise or would do so if not successfully challenged."

45. Guided by this approach, I am satisfied on the evidence before me relevant to the date of the decision under appeal in March 2017 that regulation 35(2) was satisfied. I say this for the following, cumulative reasons.

46. First, the starting point is that the appellant had an award of ESA with the support component in place prior to the March 2017 supersession decision of the Secretary of State. I therefore need to be satisfied on the

evidence that that support group award was no longer made out. I also take account of the fact that from on or about June 2017 the appellant was found again to satisfy one of the support group criteria on a subsequent claim made by him for Universal Credit and this award continued until at least March 2019. In terms of the "circumstances obtaining" as at March 2017 (per section 12(8)(b) of the Social Security Act 1998), to find the appellant did not merit an award of ESA with the support group component I would in effect be deciding, in general terms, that the appellant had had very a temporary improvement in his mental health as at March 2017. As a generality, such a proposition is not made out on the evidence (see, for example, the GP's letter on page 133).

47. Second, although the appellant had been in the support group since November 2013 and so could not have been subject to any work-related activity requirements prior to March 2017, the obvious errors made by the decision maker in the March 2017 decision, the reconsideration decision and the appeal response does not provide me with any sufficient reassurance that the circumstances were such that he would not have been wrongly referred to work-related activity that would have given rise to a substantia risk to his mental health. I bear particularly in mind here that even on the less onerous work-related activities put before the tribunal, it was satisfied on the face of it that the appellant could not engage in a minority of those less onerous activities (those being the group activities) without substantial risk to his mental health.

48. Third, at no stage in these proceedings has the Secretary of State sought to argue or put before me argument or evidence about which of the work-related activities on the correct list she considers the appellant could reasonably have undertaken in March 2017. Absent such an indication, and guided here especially by paragraph 115 of *IM*, I do not see why I should not draw against the Secretary of State the inference that her position is either:

(i) that it would be reasonable (and safe) for the appellant to undertake all the work-related activities on the list, which would be flatly contrary to the tribunal's concerns about group activities. The fact I have set aside the tribunal's decision for error of law does not mean I must reject all of its findings as well (see *Sarkar –v-SSHD* [2014] EWCA Civ 195) and no-one argued the contrary before me. The finding about the appellant being unable to take part in group activities was in my view soundly based on the evidence before the tribunal and its conclusion as to the Schedule 2 descriptors the appellant met; or

(ii) he reasonably could not safely undertake any of them, which must mean regulation 35(2) is met: see *NS v SSWP* (ESA) [2014] UKUT 149 (AAC).

49. It is for all these reasons that I have allowed the appeal in the terms set out above.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

Dated 29th June 2020
(The above is the date this decision was made. It may however take some time to be issued given the current Covid-19 medical emergency and the limited staffing of the UTAAC's office in London.)