Higher Rate Mobility Component: Severely Mentally Impaired

severe impairment of intelligence – case law summary

MP v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0426 (AAC) – CDLA/1034/2014 held:

"16. Case law has established that autism or autistic spectrum disorder constitutes "arrested development or incomplete physical development of the brain" [see *CDLA/1678/1997*]. In the case of *M (A Child) v Chief Adjudication Officer* reported as *R(DLA)1/00*, the Court of Appeal held that, contrary to the reasoning in *CDLA/1678/1997*, an intelligence test should not be regarded as a definitive measure of whether a child has a severe impairment of intelligence. An intelligence test is a useful starting point to assess a claimant's "useful intelligence" but should not be conclusive – other evidence will be required. Lord Justice Simon Brown stated that:

> '…in most cases, no doubt, the measurement of IQ will be the best available method of measuring intelligence. But amongst the dictionary definitions of intelligence one finds reference not merely to the functions of understanding and intellect but also to the qualities of insight and sagacity. It seems to me that in the case of an autistic child those qualities may well be lacking and, to the extent that they are, there will be a functional impairment which overlaps both limbs of the regulation i.e. both intelligence and social functioning…'

17. Thus *R(DLA)1/00* is authority for the proposition that evidence about a person's insight and sagacity can satisfy both the test of severe impairment of intelligence and severe impairment of social functioning required by regulation 12(5).

18. Sagacity can be defined as the quality of being wise or of having good judgment. What does that mean in practice? Upper Tribunal Judge Bano held in paragraph 4 of *CDLA/2414/2012* that regulation 12(5) required:

> '…an evaluation of a claimant's "useful intelligence" including what the Court of Appeal in R(DLA) 1/00 called "insight and sagacity". Mrs Dean, on behalf of the Secretary of State has in my view helpfully and accurately equated those qualities to "the ability to function in real-life situations", and I agree with her that in order to assess that ability the tribunal ought to have taken into account the very considerable body of evidence in this case concerning the claimant's lack of sense of danger…'

I note that the above case law was applied in paragraphs 77-81 of the recent case of *NMcM v Secretary of State for Work and Pensions* (DLA) [2014] UKUT 312 (AAC)."

11. Judge of the Upper Tribunal Gwynneth Knowles QC 19.9.2014

brain fully developed – 30 years of age – not so

NMcM v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0312 (AAC) – CDLA/1079/2012 examined R(DLA)2/96 which has long been recognised as authority for the proposition that the human brain is fully developed before an adult reaches the age of 30. On that basis it has been consistently held that a person who suffers from what would otherwise be regarded as "a state of arrested development or incomplete physical development of the brain" does not qualify under the severe mental impairment rules if that condition first occurs after the age of 30 (e.g. as a result of traumatic brain injury). In the light of the expert evidence reviewed in the present case the Upper Tribunal Judge held that the age 30 cut-off rule is no longer good law and R(DLA)2/96 should no longer be followed in that respect.

The case concerned that of a claimant who had suffered a severe brain injury following a road traffic accident which occurred when he was aged 32. At appeal the First-tier Tribunal held that the claimant could not qualify for the higher rate of mobility component on grounds of "severe mental impairment" because R(DLA)2/96 was authority for the brain being fully developed by the time a person reaches the age of 30.

In preparation for the appeal the Secretary of State commissioned an expert evidence report entitled "Human Brain Development: When does the human brain stop developing?" This report was prepared by Professor Sarah-Jayne Blakemore, Royal Society Research Fellow and Professor of Cognitive Neuroscience at University College London. The report held "the question as to when the brain stops developing is in some way unanswerable" and that the best that could be said is that "the brain will have ceased developing, in terms of experience-expectant changes in grey matter and white matter, by the thirties and early forties in most people" but that "neuroplasticity, the way the brain adapts to changing environmental stimuli, is a baseline state that happens whenever learning takes place and has no age limit." This was contrary to the evidence on which R(DLA)2/06 was based.

The Upper Tribunal Judge held:

"25. As Mr Heath [*representative for the Secretary of State*] noted, for the past two decades R(DLA) 2/96 has been recognised as the leading case law authority on the meaning of the first half of regulation 12(5), namely whether a person 'suffers from a state of arrested development or incomplete physical development of the brain'. As such, it was the basis for the HCP's original and rather dismissive response to the inquiry from the decision maker in the Appellant's case. Mr Heath helpfully sought to derive three main propositions of law from the reasoning in Mr Commissioner Rice's decision.

26. Proposition 1 was that where an adult acquires new skills (e.g. learning a foreign language or learning to play a musical instrument), this involves the exercise of the functions of the brain, rather than the further development of the brain (*R(DLA)2/96* at paragraphs 8-10).

27. Proposition 2, which was the main point highlighted by the head-note to the decision, was that the brain attained full development in each individual before the age of 30 (*R(DLA)2/96* at paragraph 10). At one point the Commissioner concluded, preferring the evidence of Professor Taylor to Dr Rosser, that the human brain reached its full development 'in most cases in the late twenties' (paragraph 10, line 11). Later in the same paragraph, however, the same finding was put in absolute and categorical terms: "the brain attained full development in the case of each individual by a specified time which was invariably before the age of 30. There could be no question of any further development" (*R(DLA)2/96*, paragraph 10, lines 19-20, emphasis added).

28. Proposition 3 was that if a child's brain had failed to grow in the proper way, and this could be physically seen, this constituted 'incomplete physical development' within regulation 12(5). However, where there was apparently nothing physically wrong with the brain, but its functioning was nevertheless deficient in some way, then that amounted to 'arrested development' (see *R(DLA)2/96*, paragraph 11). I return to this point in the context of the second ground of appeal.

29. The second authority relied upon by the Tribunal in the present appeal was *CDLA/1678/1997*, another decision of Mr Commissioner Rice, which concerned a child with autism. In that case the Commissioner accepted that the claimant suffered from "a state of arrested development or incomplete physical development of the brain" within regulation 12(5) (at paragraph 7), but concluded on the facts that the child did not suffer severe impairment of intelligence (at paragraph 12). It follows that *CDLA/1678/1997* was not actually relevant to the instant case, and need not be considered further.

Professor Blakemore's expert report and propositions 1 and 2

30. Professor Blakemore is on any reckoning pre-eminent in her field of scientific research. She has published over 95 papers in peer-reviewed scientific journals, which have been cited over 10,000 times. She is Leader of the Developmental Cognitive Neuroscience Group at the UCL Institute of Cognitive Neuroscience and Editor-in-Chief of the learned journal Developmental Cognitive Neuroscience. It is unnecessary to refer to her formal qualifications and prizes of distinction; both Mr Heath and Mr Newington-Bridges [*claimant representative*] were more than content to accept her report as authoritative and expert on the current state of knowledge as to the development of the brain. There are inevitably dangers in seeking to distil the main messages from Professor Blakemore's detailed 16-page report for the purposes of this decision, but Mr Newington-Bridges has helpfully summarised her key findings as follows (skeleton argument, paragraph 42). I did not understand Mr Heath to suggest that this was otherwise than a fair summary of this complex area of knowledge:

> '(a) Advances in brain imaging technology, in particular magnetic resonance imaging, have allowed neuroscientists to examine the human brain at all ages to track developmental changes in the brain's structure [para 3];
>
> (b) This has revealed that development does not stop in childhood as had previously been thought, but continues throughout adolescence and well into adulthood [para 3];
>
> (c) Several brain regions continue developing into adulthood most of which are situated in the cortex. The prefrontal cortex, temporal cortex and parietal cortex all undergo protracted development [para 4];
>
> (d) White matter volume throughout the brain increases during the first four decades of life [para 4];
>
> (e) A further finding of MRI studies is that grey matter – which contains a mix of cell bodies, blood vessels and connections between cells/synapses (i.e. physical matter) declines during childhood and adolescence and in fact that declines continue into adulthood and only level off between the late twenties and up to 50 years [para 6]. This finding is explained later in the report in which Professor Blakemore states that changes in the number of synapses throughout development probably, at least, in some part, underlie the pattern of change in grey matter volume [para 9];
>
> (f) Experience-expectant plasticity may be defined as the readiness of the brain to respond to sensory input from the environment during development e.g. the readiness of a young child to be exposed to sounds and thereby to learn a language [para 10];
>
> (g) Sensitive periods of development in this respect may be due to synaptic reorganization: which synapses are strengthened and which are pruned depends on environmental input [para 10];
>
> (h) It is possible that this experience-expectant process might continue into adolescence for certain functions and certain brain areas. However, this is not to say that the brain is incapable of change in adulthood. The question of when the brain stops developing is misleading because the brain does not cease being capable of change [para 11];
>
> (i) The plasticity that occurs into adulthood is known as experience-dependant plasticity e.g. learning to play a musical instrument or to play tennis later in life would involve experience-dependant plasticity. There is no age limit to this type of learning [para 11].'

31. It is perhaps best if I quote Professor Blakemore's conclusion in her own words:

> '15. Neuroscience research carried out in the past 15 years indicates that the human brain undergoes protracted development until at least the third decade of life. Different brain regions develop at different rates and cease developing at different ages.

> The precise age at which an individual's brains stops developing probably depends on multiple factors, including genetic and environmental influences, and the question as to when the brain stops developing is in some way unanswerable. However, my understanding of the extent literature leads me to conclude that the brain will have ceased developing, in terms of experience-expectant changes in grey matter and white matter, by the thirties or early forties in most people. It might be useful to consider the age at which brain development ceases as a broad age range rather than a specific number of years. Moreover, we do not know how this relatively protected brain development corresponds to functional development in terms of cognition and behaviour. Even though brain development seems to level off at some point, neuroplasticity, the way the brain adapts to changing environmental stimuli, is a baseline state that happens whenever learning takes place and has no age limit.'

The implications of Professor Blakemore's expert report for *R(DLA)2/96*

Introduction

32. It is clear that on any reading Professor Blakemore's expert report requires a reappraisal of the findings in *R(DLA)2/96*. This should not come as any surprise. In *R(DLA)2/96* itself Mr Commissioner Rice had recorded the view of one of the experts that "this whole area of medicine was at the very frontiers of knowledge" (at paragraph 8). But as Professor Blakemore now observes:

> '3. Until about 15 years ago it was assumed that the vast majority of brain development takes place during the first few years of life. Up until that point, scientists did not have the technology to look inside the living, developing human brain. In the past decade, however, mainly due to advances in brain imaging technologies, in particular magnetic resonance imaging (MRI), neuroscientists have started to examine the living human brain at all ages in order to track developmental changes in the brain's structure...'

33. So where does this leave the first two of the three propositions of law derived by Mr Heath from *R(DLA)2/96* (leaving the third to be considered further below in the context of the second ground of appeal)?

Proposition 1: new skills involve the exercise not the development of the brain

34. Proposition 1 from *R(DLA)2/96* was that where an adult acquires new skills this involves the exercise of the functions of the brain, rather than the further development of the brain. In doing so Mr Commissioner Rice had preferred the view of Professor Taylor, namely that at most the brain may have changed (some skills might be acquired whilst others discarded) but did not as such develop, over that of Dr Rosser (at paragraphs 8-10). Mr Newington-Bridges and Mr Heath were agreed that Mr Commissioner Rice's analysis could no longer stand in the light of Professor Blakemore's evidence. According to her expert report, the human brain retains a degree of experience-dependent plasticity throughout adulthood:

> 'learning to play tennis, a musical instrument, or new computer software are examples of tasks that require experience-dependent plasticity. There is no age limit to this kind of learning ...' (paragraph 11).

35. Professor Blakemore gives the following instructive example in her report, arising out of the unique skill-set of London taxi-drivers, known as 'The Knowledge', to demonstrate that this may involve physical development of the brain well into adulthood (footnote 22 referred to the research paper by E. Maguire et al., 'Navigation-related structural change in the hippocampi of taxi drivers', Proc. Natl. Acad. Sci. U.S.A. (2000) 97: 4398-4403):

> '12. It is important to point out that experience-dependent plasticity is a baseline state – it is occurring all the time in the brain, whenever a new memory is laid down or a new face is seen. An example of experience-dependent plasticity is found in the hippocampus, which is a structure deep inside the brain that is essential for spatial navigation and spatial memory. Researchers have compared the hippocampus in London taxi-drivers, whose spatial memory of the lay-out of London has to be extremely advanced, with that of non-taxi drivers. The posterior hippocampus was significantly larger in taxi drivers and its size was related to the number of years the person had been driving taxis, suggesting that its size depends on the degree to which an individual uses their spatial memory.22 In summary, experience-dependent plasticity occurs throughout life and occurs wherever you learn something new.'

36. In the light of Professor Blakemore's expert evidence I am satisfied that whereas Proposition 1 in *R(DLA)2/96* may have reflected the consensus of scientific understanding at the time that case was decided (July 1995), the position is very different now. Where an adult learns new skills, this may involve the physical development and not merely the exercise of the brain. However, as Mr Heath rightly observed, the validity or otherwise of Proposition 1 in *R(DLA)2/96* is not a "make or break point" for the decision in the case currently under appeal. That depends very much on Proposition 2.

Proposition 2: the brain attains full development before the age of 30

37. Proposition 2 from *R(DLA)2/96* was that the brain attained full development in each individual before the age of 30. Depending on which passage in paragraph 10 of *R(DLA)2/96* was given greater emphasis, this was stated in qualified or absolute terms. Mr Newington-Bridges and Mr Heath correspondingly differed in their submissions. Mr Newington-Bridges pointed to Professor Blakemore's evidence that the physical volume of the brain is changing at least into the fourth decade of life, and perhaps into the 50s, with an increase in white matter and a decrease in grey matter. As a result, Proposition 2 could no longer stand in the light of contemporary scientific knowledge. It followed that the simple fact that the Appellant had suffered his injuries at the age of 32 did not prevent him from suffering from a state of arrested development or incomplete physical development of the brain within the meaning of regulation 12(5). Mr Heath argued for a more nuanced interpretation than in *R(DLA)2/96*.

He argued that Mr Commissioner Rice's finding that the brain had reached full development "in most cases in the late twenties" was an oversimplification, and that a larger age range applied. However, he accepted that Mr Commissioner Rice's conclusion that the brain "invariably" attained full development before the age of 30 could not stand in the light of Professor Blakemore's evidence.

38. The difference between the two representatives' arguments is perhaps one of emphasis. On balance, however, I prefer Mr Newington-Bridges's submissions on this point. Professor Blakemore's expert evidence demonstrates that the basis for the decision in *R(DLA)2/96* simply cannot stand in the light of modern medical and scientific understanding. As this case itself demonstrates only too well, the reality is that for the past two decades R(DLA) 2/96 has been treated as authority for the proposition that the brain reaches its full development by the age of 30. That 'headline' proposition, which underlies the age 30 cut-off rule, is simply wrong in the light of Professor Blakemore's report. Her evidence also gives no real support for the more qualified proposition that the adult brain has reached full development 'in most cases in the late twenties'. For example, as regards white matter – which contains axons, the long fibres attached to neurons (brain cells) along which electrical signals pass – 'white matter volume appears to stop increasing at some point in the thirties or early forties' (paragraph 5). On the other hand, the volume of grey matter – which contains a mix of cell bodies, blood vessels and synapses (connections between cells) – is at its peak during childhood and decreases during adolescence, a decline that 'levels off at some point in adulthood between the late twenties and up to 50 years' (paragraph 6). In addition, I must not lose sight of Professor Blakemore's evidence about the brain's experience-dependant plasticity in the context of Proposition 1 above – namely that 'the question of when the human brain stops developing is misleading because the brain does not cease being capable of change at any age' (paragraph 11).

39. I am in no doubt that the conclusions above would have come as a great surprise to those responsible for drafting regulation 12(5) of the 1991 Regulations. At that time, as Professor Blakemore acknowledged, it was simply assumed that the vast majority of brain development takes place during the first few years of life. As I wrote in the textbook The Law of Social Security (Wikeley, Ogus and Barendt, 5th edition, 2002, p.689, omitting footnote):

> 'The original intention behind this formulation [regulation 12(5)] was to limit entitlement to claimants who were severely mentally impaired from birth or from early childhood, on the basis that the human brain is not fully developed until the age of about five years old. It was therefore envisaged that it would cover a child aged four who was severely disabled as a result of falling out of a tree or an attack of meningitis, but not a teenager injured as a result of a motorcycle accident'.

40. Mr Commissioner Rice's decision in *R(DLA)2/96* accordingly represented a considerable increase in the potential age range for those seeking to establish entitlement to the higher rate mobility component under the SMI rules. The age 30 cut-off rule was based on the best scientific evidence available at the time. Two decades on, the phrase 'a state of arrested development or incomplete physical development of the brain' has to be construed in the light of today's expert evidence. Modern scientific knowledge demonstrates that there is no age 30 cut-off rule. According to Professor Blakemore, 'the question as to when the brain stops developing is in some way unanswerable'. The best we can say, on the basis of her expert evidence, is that 'the brain will have ceased developing, in terms of experience-expectant changes in grey matter and white matter, by the thirties or early forties in most people' but that 'neuroplasticity, the way the brain adapts to changing environmental stimuli, is a baseline state that happens whenever learning takes place and has no age limit.'

41. This obviously poses a real and possibly insuperable challenge for tribunals when seeking to apply the terms of regulation 12(5) to the circumstances of a particular case. It may not be unreasonable to say that experience-dependent plasticity occurs at the margins, and so a tribunal may reasonably focus on physical development of the brain in terms of white and grey matter. Obviously it will be wholly unrealistic to identify the specific age at which such changes cease in a particular individual, as the evidence will simply not be available. However, a tribunal is entitled to apply the balance of probabilities. On that basis, given that the Appellant in the present case was aged 32 at the time of his accident, and that falls very much towards the bottom end of the age range identified by Professor Blakemore's evidence, then for myself I agree with Mr Newington-Bridges that it would be reasonable to say that the Appellant's brain had not completely developed. Ultimately, however, this is a question of fact for the new Tribunal. For present purposes it is sufficient to record my view that R(DLA) 2/96 should not be followed in so far as it holds or implies that regulation 12(5) embodies the age 30 cut-off rule.

42. Thus the Tribunal, in concluding that the Appellant was absolutely barred by virtue of his age from meeting the regulation 12(5) test, erred in law. The first ground of appeal is therefore made out." [*My inserts*]

11. Judge of the Upper Tribunal Nicholas Wikeley 8.7.2014

severely mentally impaired – application of regulation 12(6)

Secretary of State for Work and Pensions v MG (DLA) – [2012] UKUT 429 (AAC) – CDLA/943/2011 held that the decision of the First-tier Tribunal was erroneous in law because when awarding the higher rate mobility component it did so exclusively (not just principally) focusing on the claimant's behaviour when "out and about", rather than whenever he was awake. It was held that *R(DLA)7/02* (Commissioner Turnbull) should be followed. In R(DLA)7/02 it was (paragraph 19) held:

> "... it seems to me that the requirement in Regs. 12(6)(b) and (c) that the claimant must need watching over, for the purpose of restraining potentially disruptive behaviour, 'whenever he is awake' indicates that the watching over must be required at home just as much as outside it, and must be required whether or not the claimant is 'seeking to take advantage of the faculty of mobility.' It is plainly not sufficient if the claimant only requires watching over when outside the home. I accept that it may be difficult to see that reg. 12(6) really falls within the scope of the rationale behind the other heads of entitlement to the mobility component (whether at the higher or lower rate). But that cannot justify giving Reg. 12(6) a meaning other than that which it plainly has."

As part of the process of giving the new First-tier Tribunal directions the Judge of the Upper Tribunal gave the following guidance:

"19. The first and most obvious point is that the new FTT [*First-tier Tribunal*], in considering whether M displays disruptive behaviour within the meaning of section 73(3)(b) of the 1992 Act and regulation 12(6), must have regard to his behaviour both indoors and outdoors. As regulation 12(6(c) requires, the issue of unpredictability must be such that the presence of another watching over him must be "whenever he is awake" and so wherever he is awake. [*My insert*]

20. The second general point is that the three sub-conditions in regulation 12(6) are separate but cumulative and take their colour from each other (see *CDLA/2470/2006* at paragraph 13).

21. In his further submissions Mr Stagg [claimant re*presentative*] invited me to address a series of questions for the guidance of the new tribunal. In the light of both his arguments and those of Mr Heath [*representative for Secretary of State*], I give the new tribunal the following further guidance, given that these questions are almost certainly going to have to be addressed at the re-hearing. [*My inserts*]

What does "extreme" signify in the context of regulation 12(6)(a)?

22. Mr Deputy Commissioner Bano described the word 'extreme' as 'an ordinary English word, connoting behaviour which is wholly out of the ordinary' (*CDLA/2054/1998* at paragraph 7a). Although the rest of that passage, which concerned the 'indoors/out of doors' point has been disapproved in *R(DLA)7/02*, I am not sure that this definition of 'extreme' can be usefully improved upon very much. However, as Mr Commissioner Rowland observed in *CDLA/2470/ 2006*, reading the sub-conditions cumulatively, 'extreme' behaviour is 'of a type that regularly requires a substantial degree of intervention and physical restraint' (at paragraph 13). In other words, the behaviour must be extremely disruptive. Furthermore, the disruptive behaviour must result from the severe mental impairment: 'insofar as such problems are primarily a manifestation of a claimant's age rather than of such mental impairment, they are irrelevant to entitlement' (*CSDLA/202/2007* at paragraph 11).

This is ultimately a question of fact for the tribunal, involving 'a large element of judgment' (*CDLA/2167/2010* at paragraph 8).

What does 'regularly' mean in the context of regulation 12(6)(b)?

23. The claimant' (*sic*) extreme behaviour need not occur constantly, continuously or all the time. That would be to set the threshold for eligibility too high. Rather, it must be such that it 'regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property'. The word 'regularly' is a protean one, so taking its meaning from its context. The Commissioner in CDLA/2470/ 2006 commented that 'such a degree of intervention and restraint is likely to be required on a significant proportion of occasions when the claimant walks moderate distances outdoors'. I agree with that observation as far as it goes.

24. I do not agree with Mr Stagg's further submission that this means that regularity under regulation 12(6)(b) can be met by such incidents occurring just outdoors. Such an analysis seems to me to be inconsistent with *R(DLA)7/02*. Rather, that sort of intervention to deal with extreme disruptive behaviour will also need to be required sufficiently often indoors as well such that, taken overall, one can say that it is required 'regularly' or 'in the ordinary course of events' (see *CDLA/2054/1998* at paragraph 7d). When the claimant is outdoors, the need for intervention in the proximity of traffic is the obvious example. The indoors intervention may take any number of different forms: in *MMcG v Department for Social Development (DLA)* the claimant had to be stopped from jumping off the top step of the household stairs. Other examples – and they are no more than that – might be the need for physical restraint to stop the claimant trying to put his fingers in electrical sockets or to stop him damaging internal doors, walls or household furniture when frustrated. As Mr Deputy Commissioner (now Judge) Warren noted in *CDLA/17611/1996*, the requirements of regulation 12(6) 'fall to be answered in respect of the claimant's condition generally and not with any special emphasis on behaviour when walking out of doors' (at paragraph 11). However, I also agree with Judge Mark's helpful formulation that 'Interventions may be regular if they are frequent in one context but infrequent, or even rare, in another context provided that looked at overall there is a regular requirement to intervene and physically restrain the claimant' (Secretary of *State for Work and Pensions v DM (DLA)* [2010] UKUT 318 (AAC) at paragraph 9).

What does 'physically restrain' signify in the context of regulation 12(6)(b)?

25. The 'regularity' requirement under regulation 12(6)(b) is for 'another person to intervene and physically restrain' the claimant. In *CDLA/2470/2006* Mr Commissioner Rowland qualified that expression by the comment 'i.e. something much more than merely taking the person by the arm'. I note that the facts of that case concerned a young man with Down's Syndrome who was aged 16 at the date of the tribunal hearing. However, more recently Judge Mesher expressed the view that the Commissioner in *CDLA/2470/2006* was not intending 'to lay down any hard and fast rule of general application' (*CDLA/2167/2010* at paragraph 15). Judge Mesher found that on the facts of that case the tribunal was entitled to conclude that 'what was needed was a very firm grip to stop U from rushing off towards whatever caught his attention and that that constituted physical restraint to prevent injury' (also at paragraph 15). In *CDLA/2617/2010* the boy U was aged 11 at the date of the FTT hearing.

26. I agree with Mr Stagg's further submission that the nature of the intervention and physical restraint required to satisfy regulation 12(6)(c) will be fact and context-specific. Obviously a strapping 16-year-old may require a considerably higher level of physical restraint than a slight 5-year-old. A firm grip on the arm of such a 5-year-old may well be sufficient to avert danger, whereas it may have no effect at all on a 16-year-old who may have the strength of an adult. I therefore agree with Judge Mesher in CDLA/2617/2010 that Mr Commissioner Rowland should not be read as imposing some categorical rule by way of the illustration given on the facts of that case.

What does 'watching over' mean in the context of regulation 12(6)(c)?

27. The new tribunal should bear in mind the guidance in the leading case of R(DLA)9/02. As Mr Commissioner (now Judge) May noted there, the test is 'specifically restrictive' and the carer must be both 'present' and 'watching over': 'It does not seem to me these conditions can be fulfilled when the claimant's bedroom door is closed and he is on one side of it and the carer on the other' (at paragraph 12). Both Mr Heath and Mr Stagg agreed, as I do, that this proposition is subject to a de minimis rider, so that for example 'very short intervals without watching over' e.g. for a carer's 'comfort break' (but not, for example, a leisurely cup of tea and a prolonged respite break in the garden whilst the claimant is inside) can be ignored for this purpose (see *CDLA/2714/2009* at paragraph 10, cited in *JH v Secretary of State for Work and Pensions* (DLA) [2010] UKUT 456 (AAC) at paragraph 11).

28. Since the oral hearing of this appeal, Judge Mark has issued his decision in *AH v Secretary of State for Work and Pensions (DLA)* [2012] UKUT 387 (AAC). Judge Mark held that 'requires' in regulation 12(6)(c) means 'reasonably requires' (at paragraph 16). That seems to be uncontroversial. Judge Mark also expressed the view that if the carer is present close enough to hear what the claimant is doing and so to intervene if necessary, and is either looking in with sufficient regularity or (conceivably) observing the claimant on CCTV, then the fact that the claimant's bedroom door is shut does not inevitably mean that the carer is not present and watching over the claimant whenever he is awake (at paragraphs 14 and 19). This is at the very least a significant gloss on the Commissioner's ruling in *R(DLA)9/02*, although Judge Mark sought support from the observations in *CDLA/2167/2010* (at paragraph 13). I considered whether to seek further submissions from both representatives on this issue in the light of the newly available decision. I decided not to, given that the question was not central to this appeal and the case has gone on long enough already.

29. I simply make the following observation. It seems to me that there is some force in Judge Mark's qualification. Obviously the statutory language must take its ordinary meaning from its context, in the absence of any indication to the contrary. 'Watching' means observing, being on the lookout, keeping someone or something in sight, or keeping vigil. However, 'watching over' may carry a slightly different nuance in meaning, of exercising protective care over someone or something. After all, regulation 12(6)(b) does say 'watching over' and not 'looking at'. It is arguable that the Commissioner in *R(DLA)9/02* may have elided the meanings of 'watching over' and 'watching' (see e.g. at paragraph 12). That is not to say that the meaning of 'watching over' can be stretched like a piece of elastic, not least as it is coupled with the restrictive requirement that the carer be 'present'. That, of course, is ultimately a question of fact for the first instance tribunal.

What is the significance of a 'structured environment' in the context of regulation 12(6)(c)?

30. As noted at paragraph 18 above, the submissions of Mr Heath and Mr Stagg were principally concerned with the significance of the claimant's behaviour within a "structured environment" for the purpose of the regulation 12(6) conditions. Both advocates recognised that there appeared to be a divergence of opinion in the case law on this issue.

31. Mr Heath's argument was that if the claimant was subject to a 'structured environment', whether e.g. at home or at school, such that he did not become extremely disruptive, then by definition regulation 12(6) was not satisfied. He relied in particular on the following passage of Mr Commissioner Turnbull's reported decision in R(DLA)2/07:

> '14. The first finding of importance for this purpose was that 'he is not disruptive at school, where it is structured and safe.' That finding clearly came from the evidence given by the claimant's mother to that effect before the Tribunal (p.166 of the case papers). The claimant's mother has since confirmed its correctness (see p.195: 'He is well behaved at school due to the extreme structure and teacher/children ratio').
>
> 15. Now it is no doubt the case that while the claimant is at school there is always an adult 'watching over' him. It may be (although this is unclear) that it is the presence and active interest of a teacher which results in the claimant not being disruptive at school – i.e. that he would become disruptive if left alone there or if left unsupervised with other children. But that is in my judgment not sufficient to satisfy Reg. 12(6)(c). Limb (c) of Reg. 12(6) is in my judgment only satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant if and when he starts actually to become disruptive. Giving a fair reading to Reg. 12(6)(c) in the context of Reg. 12(6) as a whole, I think the clear meaning is that the 'watching over' must be necessary in order that the person watching (or, I suppose, someone who can be summoned immediately by the person watching) can intervene when the claimant actually does become disruptive. If the structured regime of the school is of itself sufficient to prevent the claimant becoming disruptive, Reg. 12(6)(c) is in my judgment not satisfied. I reach that conclusion for three main reasons. First, that is simply how the provision strikes me. Secondly, the presence of limb (b), referring to physical restraint, before limb (c), leads naturally to the meaning that the presence must be necessary in order actually to deal with unpredictable disruptive behaviour, and not merely (by presence short of physical restraint) to avoid it. Thirdly, Reg. 12(6) can only apply if the claimant does in fact regularly require physical restraint. That means that if a particular claimant were, by supervision short of physical restraint, prevented from ever being disruptive, or from being disruptive on a regular basis, Reg. 12(6) would plainly not be satisfied.
>
> 16. The same consequence in my judgment flows from the Tribunal's findings that at home he only becomes disruptive if his mother leaves the room, or her attention is diverted away from him, or he does not get his own way. (The correctness of that finding has in my view again since been confirmed by the long letter from the claimant's mother at pages 195 to 197 of the case papers). Reg.12(6)(c), again read in the context of Reg.12(6) as a whole, requires that the claimant's disruptive behaviour is so unpredictable that another person is required to be present at all times in order to deal with the claimant should he become disruptive. It is not sufficient that the presence and active interest of the claimant's mother at home is sufficient to prevent disruptive behaviour occurring at all.'

32. Mr Stagg, in contrast, relied on Judge Levenson's unreported decision in *LM v Secretary of State for Work and Pensions* [2008] UKUT 24 (AAC) (also known as *CDLA/2955/2006*). Referring to Mr Commissioner Turnbull's discussion, in paragraph 15 of *R(DLA)7/02*, of regulation 12(6)(c), Judge Levenson stated as follows (at paragraph 10):

'... The Commissioner held that it is not enough if the presence of an adult prevents the claimant from becoming disruptive. In my opinion this is to confuse 12(6)(b) and 12(6)(c). The point about (c) is the unpredictability, not the intervention. If there is no actual requirement to intervene then (b) is not satisfied. Thus, if a claimant is sometimes in an environment that is so well controlled that intervention is unnecessary, but at other times is in an environment where intervention is regularly required, it is still possible for the claimant to fall within section 73(3).'

33. In Secretary of *State for Work and Pensions v DM (DLA)* [2010] UKUT 318 (AAC) Judge Mark then sought to square that circle by both following paragraph 15 of *R(DLA)7/02* and recognising Judge Levenson's point in *LM v Secretary of State for Work and Pensions* that one must not confuse the requirements of regulation 12(6)(b) with those of regulation 12(6)(c). Judge Mark concluded as follows (at paragraph 10):

'10. If, however, the structured environment is such that there is no real risk of unpredictable violence or not such a risk as to make it reasonable for somebody to be present and watching over him whenever he is awake, then he cannot be said to need another person to be present and watching over him because of his unpredictable disruptive behaviour. If, in practice, he is regularly left alone in his room for lengthy periods while awake, or is not watched over at school because of his unpredictable disruptive behaviour, then that would suggest that his behaviour is not unpredictable, or at least is not unpredictable to such an extent as to require another person to be present and watching over him whenever he is awake.'

34. In *JH v Secretary of State for Work and Pensions (DLA)* [2010] UKUT 456 (AAC) Judge May QC nailed his colours firmly to the mast of *R(DLA)2/07* in preference to *LM v Secretary of State for Work and Pensions* (at paragraph 14). Similarly, in *CDLA/1498/2011* Judge Turnbull, remitting an appeal for re-hearing, directed the new tribunal in the following uncompromising terms (at paragraph 10):

'10. I refer the new tribunal to what I said in paras. 15 and 16 of R(DLA) 7/02. I held that reg. 12(6)(c) is only satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant if and when he actually starts to become disruptive, and therefore that if the structured regime of the school is of itself sufficient to prevent the claimant becoming disruptive, reg. 12(6)(c) is not satisfied. In so far as Judge Levenson departed from that in CDLA/2955/2008, I direct the new tribunal not to follow Judge Levenson's decision.'

35. However, Judge Levenson's observations in *LM v Secretary of State for Work and Pensions* received support from Judge Mesher in *CDLA/2167/2010* at paragraph 13:

'… Although the report confirmed that U had dangerous tendencies or behaviour problems, the problems were stated mainly in terms of wandering off indoors or outdoors and eating inappropriate items, leading to a need for supervision. It was arguable that in that environment U did not require the quality of close watching over necessary to satisfy regulation 12(6)(c). That is so even if (as I tend to think is right) the approach of paragraph 10 of decision CDLA/2955/2008 (Mr Commissioner Levenson) is preferred to that in paragraph 15 of R(DLA)7/02 (Mr Commissioner Turnbull) that if 'the structured regime of the school is of itself sufficient to prevent the claimant becoming disruptive, [regulation 12(6)(c)] is in my judgment not satisfied'. Judge Levenson's view was that that was to confuse the conditions in sub-paragraphs (b) and (c), which should be kept separate, as seems also to have been the view of Judge Mark in *Secretary of State for Work and Pensions v DM (DLA)* [2010] UKUT 318 (AAC).'

36. In sum, the case law undoubtedly reveals a divergence of views. Despite Judge Mark's valiant effort in *Secretary of State for Work and Pensions v DM (DLA)* I am not sure those authorities can be satisfactorily reconciled. This is demonstrated by the fact that in *CDLA/1498/ 2011* (at paragraph 10) Judge Turnbull regarded Judge Mark as having adopted the same approach to regulation 12(6)(c) as he had done in *R(DLA)7/02*, while in *CDLA/2167/2010* Judge Mesher found support in Judge Mark's decision for the view expressed by Judge Levenson in LM v Secretary of State for Work and Pensions. Certainly in his recent decision in *AH v Secretary of State for Work and Pensions (DLA)* Judge Mark regarded himself as following Judge Levenson's approach (at paragraph 9).

37. Which view should the new First-tier Tribunal prefer? The principles governing precedent in the former Commissioners' jurisdiction were laid down in *R(I)12/75* (at paragraphs 19-21) and have been adapted for the new tribunal regime in *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) (at paragraphs 36 & 37). As a general rule a First-tier Tribunal should follow a reported decision of the Upper Tribunal (or previously of the Commissioners) in preference to an unreported decision, if only because a reported decision is one that necessarily commands the general assent of the majority of relevant judges. However, that presumption does not apply if the reported decision has been carefully considered in a later unreported decision but not followed (see *R1/00(FC)*).

38. For myself I prefer what I understand to be the approach of Judges Levenson, Mesher and Mark. In my view an undue focus on labels such as 'structured regimes' or 'structured environments' runs the risk of losing sight of the plain statutory language. It also obscures the need for the tribunal's careful fact-finding. In practice there is a diverse range of 'structured environments' in both mainstream and special needs schools. What the tribunal must do in applying regulation 12(6)(c) is to start by establishing the predictability or otherwise of the extreme disruptive behaviour. At one extreme, is it solely triggered by readily identifiable factors (e.g. traffic, sudden noise or being denied access to a particular activity)? If so, it may be predictable. Or, at the other extreme, is the behaviour typically random, such that, as it was put in *CDLA/2470/2006*, the carers are 'in a permanent state of apprehension as to what he will do whenever he is out of sight' (at paragraph 11). If so, it may be unpredictable. This will then require consideration of both what happens and what is reasonably required on a regular basis, and whether that amounts to requiring 'another person to be present and watching over him whenever he is awake.' Thus the nature, degree and intensity of the supervision involved all need to be examined.

39. It may be significant that on the facts of *R(DLA)7/02* the child in question attended a specialist autistic unit attached to a mainstream school. It may well be that on those facts it was always going to be difficult to meet the necessary statutory criteria. However, for the most severely disabled and vulnerable young people in some special needs schools, I would not agree with the observation in *R(DLA)7/02* that regulation 12(6)(c) is not satisfied if 'the structured regime of the school is of itself sufficient to prevent the claimant becoming disruptive' (at paragraph 15). It all depends on the nature of the type of supervision that is reasonably required."

See also CDLA/943/2011and MMcG-v-Department for Social Development (DLA) – [2012] NICom 292 – C5/12-13(DLA).

10. Judge of the Upper Tribunal Nicholas Wikeley 15.11.2012

no requirement to be severely mentally disabled

CA v Secretary of State for Work and Pensions (DLA) – [2013] UKUT 0168 (AAC) – CDLA/1074/2012 and CDLA/1071/2012 involved a case where, in relation to the question of the claimant's entitlement to the lower rate of the mobility component of Disability Living Allowance, the First-tier Tribunal, in refusing the appeal, held "we did not accept that he [the claimant] was severely mentally disabled". On this issue the Upper Tribunal Judge held:

"32. The tribunal's approach proceeds as though there were two categories of people, those who are 'severely disabled' and those who are not. But that is not how the legislation works. There are degrees of disablement, and the statute does not simply ask whether a claimant is to be described as 'severely disabled' but rather whether they are 'so severely' disabled as to require various degrees of attention or supervision or to be unable to take advantage of the faculty of walking in unfamiliar places outdoors. The statutory questions are ones of degree and cannot be satisfactorily answered simply by labelling a claimant as being or not being 'severely disabled'."

11. Judge of the Upper Tribunal Nicholas Paines QC 28.3.2013

severe mental impairment – the correct approach

DM v Secretary of State for Work and Pensions (DLA) – [2015] UKUT 0087 (AAC) – CDLA/3944/2012 held:

"41. The new First-tier Tribunal will need to consider the evidence afresh and make its own findings of fact having applied the proper legal tests at each stage. The new tribunal will be aware that the Appellant will only satisfy the SMI rules and thereby qualify for the higher rate mobility component of DLA if she meets each of the three conditions set out in section 73(3)(a)-(c) of the SSCBA 1992 (see [4]-[6] above). The Appellant is already entitled to the highest rate of the care component of DLA under her existing award, and so the third condition is not in issue. Accordingly the new tribunal will need to focus on the first and second conditions.

The first condition: severe mental impairment

42. The new tribunal must first establish whether or not the Appellant "is severely mentally impaired" for the purpose of section 73(3)(a). This is not the same as asking whether or not she is seriously mentally ill. Rather, the expression "severely mentally impaired" is exclusively and exhaustively defined by regulation 12(5). It may help to see this as a three stage test.

Stage 1: does the Appellant suffer from "a state of arrested development or incomplete physical development of the brain"?

43. The meaning of this statutory expression was explored in NMcM v Secretary of State for Work and Pensions (DLA) (see [1] above). In that decision I held that the "age 30 cut-off rule" – namely that a person could not qualify under the SMI rules if their severe mental impairment first manifested itself after the age of 30 – was no longer good law, and so declined to follow the decision of Commissioner Rice in reported decision R(DLA) 2/96 in that regard. That particular issue does not arise in the present appeal, as the Appellant's difficulties arose well before the age of 30.

44. On the basis of the case law, it would appear to be open to the new tribunal to conclude that the Appellant does indeed suffer from a state of arrested development of the brain. In another case, R(DLA) 3/98, involving a claimant aged 60 who had suffered from schizophrenia since the age of 16, Commissioner Rice concluded that the first limb of regulation 12(5) was satisfied. This was on the basis of expert medical evidence which had confirmed that some forms of schizophrenia were constitutional (rather than environmental) in origin, and that a significant proportion of sufferers experienced neuro-developmental damage.

45. The formal diagnosis of schizophrenia in R(DLA) 3/98 was at an age a few years earlier than the present case, but that does not seem to me to be a material distinction on the facts. Mr Heath, in the course of oral argument, suggested there was no clear evidence in the present case to show whether the Appellant's schizophrenia was constitutional or environmental in origin. However, as previously noted, the Appellant's husband explained that no brain scan had ever been conducted, so far as he was aware. He also referred to a family history of schizophrenia, a factor which had not previously emerged in the appeal (in part because of the lack of fact-finding at first instance).

46. In R(DLA) 3/98 Commissioner Rice concluded that the claimant "experienced schizophrenia at a very early age, her condition has been unremitting throughout her life, and she has displayed all the features associated with schizophrenia in its severe form" (at [14]). As such, the claimant there was found to suffer from arrested development of the brain. By the same token, it seems to me perfectly open to the new tribunal to conclude that in the present case likewise the Appellant suffers from a state of arrested development of the brain. That question has to be resolved on the balance of probabilities. Clearly Dr J's evidence is to the contrary, but the new tribunal must not lose sight of the point that Dr J is expressing an opinion, based on his understanding of the terminology, and not making a statement of fact which is in any way binding on the tribunal.

Stage 2: does the Appellant have severe impairment of intelligence and social functioning?

47. The previous tribunal reached the unanimous conclusion that the Appellant had a severe impairment of intelligence and social functioning. However, it made no primary findings of fact that supported that overall conclusion. The new tribunal will have to remedy that omission.

48. The new tribunal must accordingly approach this aspect of regulation 12(5) afresh and make its own findings of fact based on the evidence it receives. Although it is entirely a matter for the assessment by the new tribunal, it may have little difficulty, on the evidence so far, in concluding that the Appellant suffers from severe impairment of social functioning. The requirement to show severe impairment of intelligence may be more problematic. The fact that the Appellant attended a normal (not special) school and can read (but does not enjoy reading) might imply that this aspect of the test is not met. Likewise, the Appellant's husband told me how she loved music, and while she could not manage an MP3 player, she could operate an old-style Walkman. That might suggest an impairment of intelligence rather than a severe impairment of intelligence.

49. In this context it must be noted that in R(DLA) 3/98 Commissioner Rice concluded that, although the claimant there suffered from arrested development of the brain as a result of her schizophrenia, there was no evidence that she suffered from impairment of intelligence, let alone severe impairment of intelligence, and the claim foundered on that basis (at [16]). However, this conclusion was reached on the absence of any evidence to suggest the claimant's intelligence was three standard deviations from the norm (an IQ of 55 or less). But it is now recognised that a crude measure of intelligence is not the proper test. As I explained in NMcM v Secretary of State for Work and Pensions (DLA) at [79]-[82]:

> '79. In this context the Court of Appeal's decision in M (a child) v Chief Adjudication Officer (reported as R(DLA) 1/00) is authority for two propositions. The first is that a claimant must establish both severe impairment of intelligence and severe impairment of social functioning. The second is that a standard IQ intelligence test alone should not be regarded as a definitive measure of whether an individual has severe impairment of intelligence. This overruled earlier Commissioners' case law to the effect that only people with an IQ of 55 or below were regarded as having severely impaired intelligence (e.g. CDLA/1698/1997). According to Simon Brown LJ, giving the leading judgment in the Court of Appeal in M (a child), 'amongst the dictionary definitions of intelligence one finds reference not merely to the functions of understanding and intellect but also to the qualities of insight and sagacity'. Thus: 'I conclude that whilst in every case the claimant's IQ as conventionally tested is likely to be the essential starting point for considering the impairment of intelligence, and whilst it is perfectly reasonable to take an IQ of 55 or less as the prima facie touchstone of severe impairment, that test and that score will not invariably prove decisive. Rather it should be recognised that an IQ result may give a misleading impression of the claimant's useful intelligence and that in some cases at least an impairment of social functioning will shade into an impairment of intelligence. Tribunals and Commissioners will accordingly need to admit and consider evidence other than a mere IQ score.'
>
> 80. I note also that in CD v Secretary of State for Work and Pensions [2013] UKUT 068 (AAC), Judge Bano held that regulation 12(5) requires:
>
> > 'an evaluation of a claimant's 'useful intelligence', including what the Court of Appeal in R(DLA) 2/00 called 'insight and sagacity'. Mrs Dean, on behalf of the Secretary of State has in my view helpfully and accurately equated those qualities to "the ability to function in real-life situations", and I agree with her that in order to assess that ability the tribunal ought to have taken into account the very considerable body of evidence in this case concerning the claimant's lack of sense of danger.'
>
> 81. In the present case, although it is a matter for the new Tribunal, there appears to be ample evidence of the Appellant's lack of any sense of danger in real-life situations. For example, his GP reported that he had 'absolutely no appreciation of danger and seems oblivious of injury when he sustains it' (letter dated 18 November 2009). Thus the simple fact that the Appellant can read and do crosswords does not necessarily preclude him from suffering from severe impairment of intelligence and social functioning, looking at both those matters in the round.'

50. If both limbs of regulation 12(5) are met, there is still a further third step in the analysis which must be addressed.

Stage 3: is the necessary causal connection established between Stages 1 and 2?

51. The third stage in the process of establishing whether regulation 12(5) is made out on the facts of any given case is to assess whether the 'state of arrested development or incomplete physical development of the brain' from which the Appellant suffers is a condition 'which results in severe impairment of intelligence and social functioning.' It follows that there must be a causal connection between the two limbs of regulation 12(5). This question of causation is ultimately a factual issue for the First-tier Tribunal to determine.

52. In the particular circumstances of the present case, if the new tribunal is satisfied on the evidence both that the Appellant suffers from both a state of arrested (or incomplete physical) development of the brain and a "severe impairment of intelligence and social functioning", then the necessary causal connection signified by the requirement that the former "results in" the latter may be readily established.

53. However, this link may not always be quite so straightforward. This is particularly so if an adult claimant has both intelligence and social functioning within the normal range, as a result of the entirely unexceptional development of his brain, but then suffers a catastrophic destruction of his brain's capabilities wrought by some external agency (e.g. physical trauma through an accident or through contracting some serious illness). The claimant may well be of an age where some further development of the brain would normally be expected (based on the expert scientific evidence reviewed in *NMcM v Secretary of State for Work and Pensions (DLA)*). However, even if such a claimant now has severe impairment of intelligence and social functioning, it does not necessarily follow that the state of arrested development 'results in' such severe impairment. In such a case the severe impairment of intelligence and social functioning is arguably not the result of the arrested development of the brain (i.e. the lack of any further marginal development of the brain as might have continued to take place, but for the catastrophic accident or illness), but rather the consequence of the destruction of an already existing capability. In terms of applying this causation test it may therefore be important to distinguish between functional or cognitive impairments that arrest further development and those which remove capacity that is already well developed.

54. This requires a small but potentially significant correction to the guidance provided to the new tribunal in *NMcM v Secretary of State for Work and Pensions (DLA)*). The first sentence at [78] of that decision is incorrect in as much as it involves an elision of the statutory test. It is not the severe mental impairment which must result in "severe impairment of intelligence and social functioning", as stated there. Rather, it is the "state of arrested development or incomplete physical development of the brain" which must result in "severe impairment of intelligence and social functioning." Whilst that may impose an insuperable problem on the facts for claimants in the position of the appellant in *NMcM v Secretary of State for Work and Pensions (DLA)*, the causation link itself is unlikely to be a significant difficulty for the Appellant in the present appeal."

11. Judge of the Upper Tribunal Nicholas Wikeley 12.2.2015

severe mental impairment

DS v Secretary of State for Work and Pensions (DLA) – [2010] UKUT 201 (AAC) – CDLA/280/2010 concerned a claimant ('D'), who had a learning disability and had had a series of DLA awards since a young age, all for the higher rate of the care component and the lower rate of the mobility component.

The evidence showed that D's learning difficulties presented significant and challenging problems both for D and D's immediate family. At the age of 18, following a renewal claim, a decision maker determined that the claimant was not entitled to an award of either the care component or mobility component. This decision was appealed by the claimant's mother. Eventually, following a third appeal hearing (the first two tribunal hearings being adjourned or set aside) the claimant was awarded the higher rate care component and the higher rate mobility component by a First-tier Tribunal. The Secretary of State appealed against this decision.

The Secretary of State argued that the First-tier Tribunal had erred in law by (1) making an award of higher rate mobility on the "severe mental impairment" criteria where the medical evidence did not support such an award; (2) failing to give adequate reasons for their decision to award higher rate mobility; (3) relying on the evidence of claimant's mother when that evidence was contradictory and (4) failing to give adequate reasons for their decision to award the highest rate care component.

The Upper Tribunal Judge allowed the Secretary of State's appeal only because the tribunal did not find sufficient facts or give adequate reasons for their decision to make an award of the highest rate mobility component of DLA based on the "severe mental impairment" criteria.

The First-tier Tribunal, having made some extensive findings about D's behaviour and the problems involved, especially in managing aggression (including several examples of problematic behaviour and incidents of violence), reasoned and concluded as follows:

> "The higher rate of the mobility component was passported. On the balance of the evidence put, the Appellant had incomplete development of the brain since birth. There was severe impairment of intelligence, applying the broad test in M v. Chief Adjudication Officer and taking into account factors such as likely IQ, insight and sagacity. There was also severe impairment of social functioning"; and
>
> "On a broad view and in the Tribunal's experience the evidence of loss of function established a severe mental disability giving rise to a requirement for continual supervision throughout the day and for someone to be awake at night for a prolonged period in order to avoid substantial danger to the Appellant and others. The Appellant had in particular daily and unpredictable outbursts of aggressive, disinhibited and bizarre behaviour the substantial danger being the real threat of causing injury to himself or others. The history, loss of mental function and social behaviour indicated that the Appellant had incomplete development of the brain leading to severe impairment of intelligence and severe impairment of social function."

In the view of the Upper Tribunal Judge this was insufficient to support and explain an award of the higher rate mobility component on the basis of the 'severe mental impairment' criteria.

The Judge of the Upper Tribunal held:

"22. …The severe mental impairment test is an extremely demanding one. It is governed by sections 73(1)(c) and 73(3) of the Social Security Contributions and Benefits Act 1992. Section 73(3) states that:

> '(3) A person falls within this subsection if -
> (a) he is severely mentally impaired; and
> (b) he displays severe behavioural problems; and
> (c) he satisfies both the conditions mentioned in section 72(1)(b) and
> (c) above.'

23. The condition in section 73(3)(c) means that a claimant will only meet this test if they also meet the day and night time care tests and so qualify for the highest rate care component. The other two conditions, as outlined in paragraphs (a) and (b), are defined further by regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/ 2890).

The condition in section 73(3)(a): severe mental impairment

24. According to regulation 12(5) of the 1991 Regulations, a person is 'severely mentally impaired' if he 'suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning.' As the tribunal rightly identified, the leading case is the decision of the Court of Appeal in M (a child) v Chief Adjudication Officer [*Court of Appeal*], also reported as R(DLA)1/00, involving a 9 year old autistic child.

The Court of Appeal held that a claimant must establish both severe impairment of intelligence and severe impairment of social function in order to come within regulation 12(5). The Court also held that while the claimant's IQ, as conventionally tested, is likely to be the essential starting point for considering the impairment of intelligence, and whilst it is reasonable to take an IQ of 55 or less as the prima facie touchstone of severe impairment, that test and that score will not invariably prove decisive and other evidence must be admitted and considered.

25. In the present case the tribunal was, in my view, entirely justified in reaching the conclusion that as a matter of fact D displayed 'severe impairment of intelligence and social functioning'. True, there was no IQ evidence before the tribunal, but M (a child) v Chief Adjudication Officer [*Court of Appeal*] demonstrates the importance of taking a holistic approach. However, the Court of Appeal in that case was solely concerned with the construction of the statutory expression 'severe impairment of intelligence and social functioning'. The Court was not directly concerned with the preceding statutory phrase, namely that the person concerned 'suffers from a state of arrested development or incomplete physical development of the brain', which results in such severe impairment.

26. In Social Security Commissioner's decision CDLA/1545/2004, the appeal concerned a young man ('L') with Tourette Syndrome who exhibited extremely disruptive behaviour including aggression, destructiveness and self injury. The issue was whether he met the test for severe mental impairment. According to Mr Commissioner (now Judge) Williams, 'With regard to the application of regulation 12(5), the question is whether L is severely mentally impaired as defined. This must essentially be a medical question' (at paragraph 18). Similarly in CDLA/2288/2007, a case involving an autistic claimant, Mr Commissioner (now Judge) Jacobs indicated that it would be difficult to "make such a finding other than by reasoning from a recognised medical condition" (at paragraph 11).

27. In my judgment the tribunal in the present case failed to address that issue in sufficient depth. The tribunal certainly summarised D's troubled educational history. They noted the GP's evidence that D had a 'moderate learning difficulty' and that tests in 2003 had not identified any genetic syndrome. Whilst a definitive medical diagnosis may not be necessary in all cases for a finding of 'a state of arrested development or incomplete physical development of the brain', the question remains ultimately a medical issue, as the authorities above indicate. In the absence of clear medical evidence, the tribunal here needed to go further in exploring the evidence to satisfy itself that the opening words of regulation 12(5) were indeed met. Despite the delays that had already occurred, it may also have been appropriate to consider adjourning to obtain further evidence on the point, not least as it had not been raised at any earlier stage in the case.

28. It is entirely possible that the non-medical evidence in the present case pointed towards a finding of 'a state of arrested development or incomplete physical development of the brain'. For example, the tribunal agreed in their Statement of Reasons with the mother's assessment that D's mental age was that of an 8 year old. Given that the brain does not reach maturity until adulthood (see for example R(DLA)2/96), this might have been consistent with a finding of 'arrested development or incomplete physical development of the brain'. However, the mother was by definition not giving an expert opinion on the medical issue, but a lay opinion based on her own day to day experience.

29. The tribunal also needed to consider all the relevant evidence in the case, given the absence of expert evidence on this particular point. In particular, the tribunal made no findings about the level of D's literacy, an important indicator in the absence of IQ scores. In her letter of appeal D's mother had said that he had difficulty reading and writing and 'he neither can fill in forms or even read them'. She also stated in the renewal claim form that 'he has difficulty reading any letters and he cannot write a letter'. Later in the same document she stated that 'he can only read and write a little'. The EMP [*Examining Medical Practitioner*] confirmed D 'cannot read or write very well', but noted that he used a computer.

The condition in section 73(3)(b): severe behavioural problems

30. The severe mental impairment criteria are cumulative. So if the test of severe mental impairment under regulation 12(5) is met, the tribunal will then have to consider whether D 'displays severe behavioural problems'. This is also a demanding test, as shown by regulation 12(6), which states that a person meets the test 'if he exhibits disruptive behaviour which -

(a) is extreme,

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.'

31. In the present case the tribunal certainly heard evidence of extreme disruptive behaviour on D's part. The EMP [*Examining Medical Practitioner*] had reported that there was 'frequent loss of control. He gets into fights, pushes and smashes things regularly'. The tribunal's findings of fact certainly justified a conclusion that the condition in regulation 12(6)(a) was met. As Mr Commissioner Williams observed in CDLA/1545/2004, 'Unlike regulation 12(5), the issue in regulation 12(6) is not one essentially of medical expertise but of weighing all the evidence' (at paragraph 18). It follows that the evidence of D's mother and other family members was highly relevant.

32. However, it is not obvious that the further condition in regulation 12(6)(b) was necessarily satisfied. True, in the context of getting around, the EMP [*Examining Medical Practitioner*] reported that D 'needs someone with him as he tends to get into fights, loses temper easily and [acts] inappropriately'. The EMP [*Examining Medical Practitioner*] also reported more generally that he 'can still fly off the handle and loses temper; occurs daily. Anything can trigger off, e.g. his being refused something. D kicks, throws and breaks things.' However, the tribunal did not make a specific finding that D regularly required another person 'to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property'. In fact the mother's evidence was that the only way to calm him down was to give in to him. Indeed, it is not clear if there was any evidence that as a matter of fact D regularly required another person to intervene by way of actual physical restraint. In fact, his size and strength might make that impossible in practice.

33. It is also not clear that the remaining condition in regulation 12(6)(c) was necessarily satisfied. The claimant's extreme disruptive behaviour must be 'so unpredictable that he requires another person to be present and watching over him whenever he is awake'. This is a high threshold to meet, beyond the level of involvement required for an award of the care component on the basis of the day time supervision test. For example, in R(DLA) 9/02, Mr Commissioner (now Judge) May QC held that a tribunal, which had made a finding of fact that the claimant was allowed to use his room with the door closed to afford him privacy, was entitled to conclude that the claimant did not require another person to be present and watching over him. The Commissioner concluded (at paragraph 11):

> 'I find it difficult to accept the asserted proposition… that in respect of watching over all that was required was for the carer be awake and available to intervene but not that the carer required to be actually watching the claimant all the time. I say that because the statutory provision appears to me to be specifically restrictive and the words used are both 'present' and 'watching over'. It does not seem to me these conditions can be fulfilled when the claimant's bedroom door is closed and he is on one side of it and the carer on the other.'

34. The strictness of regulation 12(6)(c) was also stressed by Mr Commissioner (now Judge) Turnbull in R(DLA)7/02 (at paragraph 16), where he stressed that it 'requires that the claimant's disruptive behaviour is so unpredictable that another person is required to be present at all times in order to deal with the claimant should he become disruptive' (original emphasis).

35. The tribunal did not make specific findings of fact on this issue. Given the guidance in R(DLA)7/02 and R(DLA)9/02, the tribunal needed to make explicit findings about D's daily routine and in particular how often he was left by himself in a room, even if others were in the house. The tribunal had found that he was sometimes 'of necessity' left alone in the house for up to 2 hours, relying on the mother's oral evidence at the tribunal. However, the tribunal made no findings as to whether this happened once a year, once a month or at some other interval. The tribunal did not refer to her earlier telephoned comment (as recorded in an office note) that 'he can be left alone at home for a couple of hours watching TV, he is told not to touch appliances as he leaves them on but can be safely left alone'. In addition, they made no clear findings as to how D spent his time when there were others at home with him - did he really have someone literally both 'present and watching over him' at all times?

36. In this context I note that in the DLA renewal claim pack D's mother had indicated that D did not need help washing, bathing or dressing. The case for care was put in terms of general overall supervision rather than attention and help with bodily needs. The EMP [*Examining Medical Practitioner*] reported that D was 'able to attend to himself at the toilet; needs encouraging to shave'. However, if D can go to the toilet, have a bath or shower and shave himself unaccompanied (albeit he may well need reminding to shave), and if he can watch TV or play on a computer in a room by himself, it is difficult to see how he 'requires another person to be present and watching over him whenever he is awake' within the terms of regulation 12(6)(c). The new tribunal will need to explore those sorts of issues.

The condition in section 73(3)(c): highest rate care

37. Even if both regulations 12(5) and 12(6) are satisfied, that is not the end of the matter. The severe mental impairment criteria also require that the claimant satisfy the conditions of entitlement for receiving the highest rate care component of DLA – in other words, both the day and night time care tests must be met…" [*My inserts*].

9. Judge of the Upper Tribunal Nicholas Wikeley 14.6.2010

brain fully developed by late twenties/age 30…

R(DLA)2/96 (unreported CDLA/165/1994) held that the "current state of the medical authorities" indicated that the brain was fully developed before a person reached the age of 30. In essence upon this view a person could not in effect be said to suffer from an "arrested or incomplete physical development of the brain" if the condition affecting the brain/brain injury onset after the age of 30. This authority was reached following expert evidence provided by Dr. Rossor (MA, MB, B Chir, MRCP, MD and FRCP and consultant in neurology at the National Hospital for Neurology and Neurosurgery, Queen Square, London, at St. Mary's Hospital, Paddington and the West London Ophthalmic Hospital) and Professor Taylor (MB, BS, MD, MSc, FRCP, FRC Psych. and DPM (London) and formerly a consultant in development medicine and clinical lecturer in psychiatry in the University of Oxford, a professor of Child and Adolescent Psychiatry in the University of Manchester (and latterly Head of its School of Psychiatry and Behavioural Sciences), and was currently visiting professor of Paediatric Neuropsychiatry at the Institute of Child Health and Great Ormond Street Hospital NHS Trust.

The Commissioner held:

"7. … Dr. Rossor accepted that, in the case of each individual, there was a time when the brain achieved its maximum size and weight, and that in that sense there was no further development. However, he contended that the neural network of the brain continued to be remodelled throughout life. Although cells once lost could not be replaced, this was not true of "processes" and connections (synapses) which were physical links between one cell and another. Although cells could not be replaced, these processes and connections could in some instances be renewed. However, in the case of someone suffering from Alzheimer's disease, such replacement was no longer possible.

8. I asked Dr. Rossor whether this remodelling of the processes and connections was really a repair of the brain rather than a development. Dr. Rossor found difficulty with the question, and emphasised that this whole area of medicine was at the very frontiers of knowledge, and that it was difficult to be dogmatic. However, Dr. Rossor went on to point out that, throughout life, the brain was subject to alterations (to use a neutral word) which were capable of physical identification. He gave as an example the case of someone who decided to take up the learning of a language.

The acquisition of this skill would be reflected in a change to the brain structure. I would at this point mention that when the matter was put to Professor Taylor, the latter was somewhat sceptical that any such change could ever be physically observed. In particular, he found it difficult to see how any change, if there was one, as the result of learning a language could be identified. In his view, the brain was always the subject matter of change in the sense that we were always acquiring more knowledge, although simultaneously we were losing it. Life would be intolerable if we remembered every single thing. We were constantly jettisoning information as well as taking it on. He doubted that the brain had an infinite capacity for absorption of facts, although it had a most remarkable capacity in this respect. The brain changed but did not develop.

9. I asked Dr. Rossor whether the changes in the brain reflecting the acquisitions of new skills really represented the exercise of the brain, not its development. Using Dr. Rossor's own analogy set out in his report, I asked whether the acquisition of a new skill was analogous to providing a computer with new software. Although more information was disseminated as a result, the computer itself i.e. the hardware, remained unchanged. The computer was merely used to better effect. It did not become a better computer. Again Dr. Rossor found this question extremely difficult to answer and was very hesitant, but in the end he felt that acquisition of a new skill was rather more the development of the brain than its mere exercise.

10. On the matters that I had raised with Dr. Rossor, Professor Taylor's approach was wholly different. As regards the remodelling of processes and connections, he pointed out that such activity might not necessarily improve the brain. The new processes and connections might not link the correct cells, with detrimental effect on the functioning of the brain. Sometimes a deficiency might be made good, but there was no guarantee that this would necessarily be the case but in any event there was no development of the brain. As regards the changes in the brain reflecting the acquisition of new skills, in so far as they could be identified at all, and Professor Taylor seemed to me to be expressing some scepticism in this direction, they were not developments. In Professor Taylor's view the human brain, like all parts of the human anatomy, reached by a certain age, in most cases in the late twenties, its full development, and thereafter regrettably it must, like all physical attributes, deteriorate. Man was an animal, and biologically he was programmed to reach full development in all physical respects, and then to reproduce his own species and safeguard his young until they themselves were able to look after themselves. Admittedly, in the case of man he also enjoyed a rich cultural life which by his abilities he had brought into existence. This distinguished him from all other animals. However, he was still essentially a biological being, who at a certain point in time reached physical maturity. Therefore the brain attained full development in the case of each individual by a specified time which was invariably before the age of 30. There could be no question of any further development. The best that could be hoped for was that the inevitable deterioration with declining years would not significantly impair the overall functionality of the brain. Unfortunately, in the case of sufferers from Alzheimer's disease the deterioration was disastrous, with a consequential loss of the quality of life."

See also NMcM v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0312 (AAC) – CDLA/1079/2012 which held that in light of more recent scientific evidence R(DLA)2/96 (CDLA/165/1994 unreported) should no longer be followed in so far as the decision holds or implies that the brain is fully developed before an adult reaches the age of 30.

10. Commissioner D G Rice 20.7.1995

meaning: incomplete physical development and arrested development

R(DLA)2/96 (unreported CDLA/165/1994) held:

"11. I now return to consideration of the words of regulation 12(5). Manifestly, the qualification therein contained was meant to limit the benefit to certain classes of persons. Those classes are those who suffer from arrested development or incomplete physical development of the brain. I invited Mr. Varley [*Department of Social Security representative*] to say what those terms were supposed to mean to medical men, and having consulted Professor Taylor he informed me that where a child's brain failed to grow in the proper way, and this could be physically seen, then there was an 'incomplete physical development'. Where, however on examination of a child's brain there was nothing which appeared to be physically wrong with it, but the function of the brain was nevertheless deficient, then it was said that there was an 'arrested development'. What was missing was not apparent physically, but the consequences of the deficiency were only too apparent (this analysis was subsequently confirmed by Professor Taylor in his oral evidence)". [*My insert and emphasis*].

10. Commissioner D G Rice 20.7.1995

arrested development or incomplete physical development of the brain

MMcG-v-Department for Social Development (DLA) – [2012] NICom 292 – C5/12-13(DLA) held:

"43. Arrested development or incomplete physical development of the brain

44. The significance of the tribunal's finding that no firm diagnosis of autism had been made relates to CDLA/1678/1997, a decision of GB Commissioner Rice. In that appeal the Commissioner had heard expert evidence to the effect that autism had a physical cause in the form of a disorder of the brain. This conclusion has been subsequently relied upon by Scottish Commissioner Parker in *CSDLA/202/2007* and by Commissioner Jacobs in CDLA/2288/2007 where he states that "if a tribunal finds that the claimant has autism (…) it must accept that that was caused by arrested development or incomplete physical development of the brain". The finding of Commissioner Rice was not disputed by the Department before the Court of Appeal in England and Wales in *M (a child) v Chief Adjudication Officer* (reported as *R(DLA)1/00*). Finally, the same principle has been accepted in this jurisdiction by Chief Commissioner Mullan in *KH-v-Department for Social Development (DLA)* [2011] NICom 200 (at paragraph 20). Therefore a diagnosis of autism is widely accepted in Commissioner and court jurisprudence as evidence of arrested development or incomplete physical development of the brain.

45. However, the lack of such a diagnosis does not necessarily lead to the converse finding. In this case there was a diagnosis of autistic spectrum disorder. While embracing a broader range of conditions than autism alone, the question which should have been addressed was whether the diagnosis of autistic spectrum disorder was evidence of arrested development or incomplete physical development of the brain.

46. In *CDLA/2288/2007* Commissioner Jacobs says at paragraphs 11 and 12:

> '11. In theory, the issue for a tribunal is whether the claimant has arrested development or incomplete physical development of the brain and it is not necessary to reach any conclusion on diagnosis. However, in practice, I do not know how a tribunal could make such a finding other than by reasoning from a recognised medical condition.
>
> 12. A tribunal may or may not have a firm diagnosis of autism. If it does not have a firm diagnosis, it may decide from other evidence on the balance of probabilities as Mr Deputy Commissioner Mark did in *CDLA/1520/2005*. If it has a firm diagnosis, it may decide from other evidence available to it that the diagnosis is wrong. That would be a brave decision to take, because the tribunal would not have the full information on which the diagnosis has been made. But it is a possibility.'

47. The tribunal was therefore in error of law to decide that the child was not suffering from arrested development or incomplete physical development of the brain on the basis of the absence of a diagnosis of autism. It was required as a matter of law to decide the question on the basis of the evidence before it, which included a firm diagnosis of autistic spectrum disorder based on the input of a wide range of relevant experts.

48. It appears to me that, whereas entitlement on the basis of section 73(1)(c) can commence as early as age three, there are inherent difficulties in diagnosing a condition such as autism at such a young age. This is because the diagnosis of autism is made on the basis of behaviour. The Disability Handbook (second edition), compiled by Dr.Aylward, Dr Dewis and Dr Henderson for the use of DLA decision-makers, indicates that abnormal social interaction, absent or abnormal language and communication, and restricted stereotyped and repetitive ranges of interests and activities are central to the diagnosis. Early development (up to two years) may appear normal.

49. It also seems likely that it may take parents of a child with possible autism some time to recognise or acknowledge developmental differences with their child's peers. It may then take further time to obtain referral for appropriate professional assessment and for that assessment to be carried out. Therefore diagnosis may well not be available at the earliest point at which entitlement to the component can arise, namely at age three.

50. In this case, the diagnosis of autistic spectrum disorder was made on 8 June 2010. The decision under appeal was made on 16 November 2008. Article 13(8)(b) of the Social Security Order (NI) 1998 precludes a tribunal from taking into account any circumstances not obtaining at the date the decision appealed against was made. However, the diagnosis of 8 June 2010, although post-dating the decision, was evidence of circumstances obtaining at 16 November 2008, namely that B suffered from autistic spectrum disorder at that date. The date of diagnosis did not therefore prevent it from being taken into account by the tribunal.

51. Autistic spectrum disorder as a term covers the whole range of autism and asperger's syndrome (a mild form of autism). As this is the case, it appears to me that it would be open to a tribunal to find on the balance of probabilities that any condition properly considered as an autistic spectrum disorder has an organic basis. This is because all forms of autism, under the general evidence accepted in *CDLA/1678/1997*, have a physical cause. It was similarly stated by the Disability Handbook that autism has an organic basis, though often no organic pathology can be demonstrated.

52. The classification of a condition within the range of autistic spectrum disorder varies according to the nature of the behavioural traits associated with the condition, not by the cause of the condition. B, having been diagnosed as suffering from an autistic spectrum disorder, suffers from a form of autism. On this basis, I consider that the principle accepted in *CDLA/1678/1997* applies to B and, therefore, that he satisfies the condition that he suffers from a state of arrested development or incomplete physical development of the brain."

10. Commissioner O Stockman 7.6.2012

severely mentally impaired – meaning arrested/incomplete development of the brain

SC v Secretary of State for Work and Pensions (DLA) – [2010] UKUT 76 (AAC) – CDLA/1621/2009 held:

"28. The meaning of severely mentally impaired is found in regulation 12(5), … The First-tier Tribunal found that there was no evidence of 'arrested or incomplete development of the brain'. However, this is a common but mistaken paraphrase of regulation 12(5), which refers to 'arrested development' or 'incomplete physical development of the brain'. There are two aspects to this error. One is that a distinction is drawn between arrested development generally (not limited to the brain, although there must still be a physical cause) and incomplete physical development of the brain. The other is that 'arrested development' does not mean arrested physical development (otherwise the regulation would say so, as it says 'incomplete physical development').
Thus, regulation 12(5) can apply to a person who has arrested emotional or functional development which has a physical cause even if that cause is not related to the development of the brain…"

9. Judge of the Upper Tribunal H Levenson 11.3.2010

severely mentally impaired

CDLA/1545/2004 summarised the case law position surrounding the definitions of 12(5) severely mentally impaired and 12(6) severe behavioural problems. It held:

"12. Regulation 12(5) and (6) tend to be considered together, and have been considered in a number of cases. In R(DLA)7/02, decided by Commissioner Turnbull in April 2001, the need to make clear findings on each of these points was stressed. The case mainly concerned regulation 12(6). On the facts, the claimant only needed watching over for part of the time, and the Commissioner found that the conditions were not met. He cited CDLA/2054/1998 as authority for the view that 'extreme' is an ordinary English word. But he did not accept the further view of that Commissioner that it was the behaviour when walking that needed to be considered. Commissioner Turnbull considered that it was the claimant's behaviour whenever awake that was relevant. In CDLA/996/2002 I emphasised that 'there is nothing in section 73 requiring any specific mobility aspects to claim the mobility component under subsection (3), despite its name.' In that case the tribunal found that the claimant was severely mentally retarded. R(DLA) 9/02 also emphasised that it was continual watching over that was necessary. It was a case involving Asbergers syndrome and autism. There were similar facts also in CDLA/3244/2001, and a similar decision.

13. R(DLA)1/00 contains the report of the Court of Appeal decision in *M (a child) v Chief Adjudication Officer* on regulation 12(5). This confirmed that the tests of severe impairment of intelligence and severe impairment of social function are separate tests, and that severe impairment of intelligence is not to be measured purely by a specific level of IQ. That was a case of autism. R(DLA)3/98 explored the entitlement of someone suffering from schizophrenia, but where there was no severe impairment of intelligence. Finally, CDLA/3215/2001 concerned a case of a child with autistic spectrum disorder. In that case the Commissioner found, after detailed consideration of the decision in R(DLA)7/02, that a young claimant who had no sense of danger 'lacks such a fundamental aspect of basic human intelligence that is (*sic*) must be the case (certainly here) that his intelligence is severely impaired.'"

The Commissioner (paragraph 18) added that whilst satisfaction of regulation 12(5) was essentially a medical question and depended primarily on medical evidence, regulation 12(6) was not one essentially of medical expertise but of weighing all the evidence.

7. Commissioner David Williams 2.9.2004

severe mental impairment – good non-verbal problem solving skills

MP v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0426 (AAC) – CDLA/1034/2014 involved a case of a child described as having both significant problems with social communication at home and school and severe delay in his speech and language skills. The First-tier Tribunal refused an award of higher rate mobility component because it held that the child did not have a severe impairment of his intelligence. On the issue of the child's level of intelligence the First-tier Tribunal held:

> "*…it might be considered somewhat difficult to apply the concepts of sagacity and insight to any normal five year old let alone one with [the Appellant's] difficulties. However the tribunal noted that [the Appellant] appears to appreciate TV programmes, likes being read to, works quietly in a structured environment, likes to indulge in his chosen form of play. He also has good non-verbal problem solving skills…*"

The Upper Tribunal Judge held:

"22. In giving permission to appeal. (*sic*) Upper Tribunal Judge Mitchell pointed out that the phrase "good non-verbal problem solving skills" appeared to have been taken out of context. The Joint Assessment Report from which that phrase was taken describes those particular skills as "in the below average range" when compared to the Appellant's peer group. Those skills were much better than both the Appellant's understanding of language and expressive language skills which scored in the very low range (less than 1% and less than 2% respectively). The Secretary of State accepts that the tribunal quoted evidence without putting it into context and thereby arguably had its analysis of the Appellant's intelligence skewed.

23. The flaw in the tribunal's approach was not just to take evidence about one aspect of the Appellant's cognitive functioning out of context but also to disregard consideration of the other aspects of his cognitive functioning which arguably gave cause for greater concern about his overall intelligence. Additionally I note that the Joint Assessment Report was undertaken when the Appellant was 3 years and 11 months old. That was in November 2011, some 11 months before the decision date. Without explanation, the tribunal ignored other more recent material which was arguably germane to the issue of the Appellant's intelligence such as evidence from his school in May 2013 [bundle page 137] and his statement of special educational needs dated 23 May 2012 [bundle page 109]."

11. Judge of the Upper Tribunal Gwynneth Knowles QC 19.9.2014

severe mental impairment – relevance of poor language skills

MP v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0426 (AAC) – CDLA/1034/2014 involved a case of a child described as having both significant problems with social communication at home and school and severe delay in his speech and language skills. In giving permission to appeal Upper Tribunal Judge Mitchell observed that the tribunal appeared to have assumed that the child's poor language skills could not in themselves be evidence of impaired intelligence. In its statement of reasons, the First-tier Tribunal had stated:

"*It was quite clear that [the Appellant] had severe delay in his language especially. This may quite likely lead to some impairment of intelligence, but was it severe?*"

At paragraph 25 the Upper Tribunal Judge held (and agreed by the Secretary of State) that this reasoning appeared to "put the cart before the horse" since the child's poor language/communication skills may be caused by the impairment of his intelligence. In the view of the Upper Tribunal Judge the First-tier Tribunal Judge the First-tier Tribunal's failure to address the child's communication skills in its reasons renders its findings and conclusions inadequate."

11. Judge of the Upper Tribunal Gwynneth Knowles QC 19.9.2014

severely mentally impaired – schizophrenia and Alzheimer's disease

CDLA/393/1994(*1/96) concerned a claimant who was schizophrenic. The issue was whether she could show that she was "severely mentally impaired" as defined in subsection 3(a) of Section 73 of the SSCB Act 1992 – "suffers from a state of arrested development or incomplete physical development of the brain". The Commissioner referred the case to a new tribunal and asked them to follow the guidance he had provided in CDLA/156/1994 (reported as R(DLA)2/96).

The Commissioner held:

"5. The new tribunal will follow the guidance provided in CDLA/156/1994 [*reported as R(DLA)2/96*]. In that case the claimant was suffering from Alzheimer's disease and the medical evidence satisfied me that the claimant's condition had effect after the brain had reached its maturity. Accordingly, there could be no question of the claimant's suffering from a state of arrested development or incomplete physical development of the brain. The sufferer in that case was well advanced in years, as indeed are normally all sufferers from Alzheimer's disease. It held that the brain did not continue to develop through life, but, that at an unidentifiable time in a person's life it reached a state of maturity, after which there was no further development, and the experts accepted that the age when this occurred was certainly never later than 30".

6. In the present instance, the condition from which the claimant suffers, namely schizophrenia, started in 1981, when they were aged 23/24. This is less than 30. Of course, in CDLA/156/94 [*reported as R(DLA)2/96*] it was unnecessary to investigate exactly at what age the brain did reach maturity – presumably within limits it would vary from case to case – as the claimant was over 30, and normally all suffers from Alzheimer's disease are likewise over that age. Here however, the position is important.

7. Accordingly, the new tribunal will have to consider whether the claimant's brain, as at the time when their condition first arose, had reached full development. The onus will be on the claimant to show that she falls within regulation 12(5), and as a result she will have to show that by 1981 her brain had not reached full development."

8. Moreover, if she succeeds, she will also have to show that the 'arrested development or incomplete physical development of the brain' resulted, in their case, in 'severe impairment of both intelligence and social functioning'." [*My inserts*].

See also NMcM v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0312 (AAC) – CDLA/1079/2012 which held that in light of more recent scientific evidence CDLA/156/1994 [reported as R(DLA)2/96] should no longer be followed in so far as the decision holds or implies that the brain is fully developed before an adult reaches the age of 30.

1. Commissioner D G Rice 3.1.1996

severely mentally impaired – Alzheimer's disease

CDLA/816/2003 concerned the case of a 62-year-old woman who was "very severely affected by Alzheimer's disease".

At appeal the tribunal refused to award higher rate mobility on the grounds that she was not "unable or virtually unable to walk out of doors due to physical disability" and could not qualify under section 73(3) as she did not "display severe behavioural problems".

Section 73(3) provides:

(3) A person falls within this subsection if:

(a) he is severely mentally impaired; and

(b) he displays severe behavioural problems; and

(c) he satisfies both the conditions mentioned in section 72(1)(b) and (c) [i.e. meets the conditions for the highest rate of the care component].

Section 73(6) provides that regulations shall specify the cases that fall within subsection (3)(a) and (b).

Regulation 12(5) and (6) of the Social Security (Disability Living Allowance) Regulations 1991 provides:

(5) A person falls within subsection (3)(a) of section 73 of the Act (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning.

(6) A person falls within subsection (3)(b) of section 73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which--

(a) is extreme,

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.

The claimant's representative "described the only question in the case as being the determination of 'severe mental impairment' and argued that Mr Commissioner Rice took a medically wrong view of Alzheimer's disease and of the normal development of the brain in R(DLA)2/96." It was submitted that there was evidence that the brain continued to create neurons throughout adult life, so that the onset of Alzheimer's disease could be considered as arresting the development of the brain. A copy of a student research paper from the internet was provided.

The appeal to the Commissioner against the tribunal's decision questioned the correctness of R(DLA)2/96 and the failure of the appeal tribunal to take account of the effect of the Human Rights Act 1998. The Commissioner held that he need not consider either the legal or medical correctness of R(DLA)2/96 or the possible application of the Human Rights Act 1998 because even if the tribunal were held to have erred in relation to regulation 12 (5) its conclusion that the claimant did not fall within regulation 12 (6) was enough to enable the decision to go against them.

The Commissioner held:

"14. The behaviour described… does not in my judgement come within the ordinary meaning of disruptive behaviour. That carries with it a sense of behaviour that either causes disorder or an interruption of the continuity of some activity. It seems to me that entails something that actively causes disruption, going beyond a mere need for other people to organise their lives so as to be able to take care of the person properly. However, the picture given of the claimant by her husband is essentially passive, of someone who, left to herself, would not be able to carry out the most basic activities of daily living and so needed supervision all the time. But that aspect of her behaviour was not disruptive. The aspects of her behaviour that got closest to being disruptive were that she got anxious when talking to imaginary people and might wander off if left alone. But the anxiety was not described as involving anything disruptive to others, rather than merely in its nature being distressing to experience or watch. Wandering off might be disruptive behaviour, but in the present case I get the impression that the problems were more that if left to herself the claimant would simply sit and do nothing until instructed otherwise. But if wandering off might have been a problem if left alone out of doors, I have no doubt that that behaviour could not be described as "extreme" within regulation 12(6)(a).

15. Nor was there any evidence of any requirement, let alone a regular requirement, for anyone to intervene and physically restrain the claimant to prevent her causing injury or damage to property. The picture given by the evidence was that gentle persuasion, encouragement or guidance was all that was needed. And in my view the restraint must be needed to prevent injury or damage to property being fairly directly caused by the disruptive behaviour. I do not think that the dangers to which the claimant here might have been exposed if she had wandered off on her own out of doors would bring her within the scope of regulation 12(6)(b). Finally, even if I were wrong about all of that and it was accepted that the claimant needed another person to be present and watching over her whenever she was awake, in my view her behaviour was not unpredictable so as to come within regulation 12(6)(c).

16. Accordingly, I have no doubt that, even if the claimant were accepted as severely mentally impaired for the purposes of section 73(3)(a) of the Contributions and Benefits Act, she could not as at May 2002 have been awarded the higher rate of the mobility component because she did not satisfy the condition of displaying disruptive behaviour under section 73(3)(b)..."

It was (paragraph 16) argued "That the appeal tribunal, not having set out any such process of reasoning as above, had not given adequate reasons for its conclusion on regulation 12(6) and that the claimant and her husband should be given the opportunity of producing more evidence on the issue at a rehearing by a new appeal tribunal. A fact-sensitive assessment was required and the appeal tribunal had not shown that it had carried one out" The Commissioner however held that he could not accept that submission. He said that "On the uncontested evidence put to the appeal tribunal, the conclusion against the claimant on regulation 12(6) followed so clearly that the appeal tribunal's decision is not to be disturbed on a point of law merely because it did no more than state the conclusion."

On the question of the relevance of the Human Rights Act the Commissioner concluded:

"17. Can the Human Rights Act 1998 alter the consequence that the appeal against the appeal tribunal's decision of 17 September 2002 should be dismissed? Despite Mr Khubber's [*claimant representative*] valiant attempts to persuade that it should, I cannot agree with him. His main Human Rights Act submission was aimed at the terms of regulation 12(5) of the DLA Regulations on 'severely mentally impaired', if interpreted in accordance with R(DLA)2/96. He argued that the claimant was plainly severely mentally impaired on any ordinary meaning of those words and that the terms of regulation 12(5) discriminated against those, like sufferers from Alzheimer's disease, whose mental impairment came on in later life, contrary to Article 14 of the European Convention on Human Rights in conjunction with Article 8 or Article 1 of Protocol 1.

There was said to be an unfair and unjustifiable discrimination between those who were severely mentally impaired by some disruption of the physical development of the brain up to the age of about 25 and those whose physical brain functions were impaired later in life. However, even if I were to accept that argument and as a consequence interpret regulation 12(5) so as to cover the claimant in this case, I do not see how that could get the claimant any closer to satisfying the conditions in regulation 12(6). [*My insert*]

18. Mr Khubber submitted that there was a connection between regulation 12(5) and 12(6) and that, if sufferers from Alzheimer's disease were brought within regulation 12(5), that would have a knock-on effect on how the fact-sensitive assessment under regulation 12(6) was carried out. If R(DLA)2/96 were to continue to rule, such sufferers were simply excluded from consideration under regulation 12(6).
He did not assert that the specified conditions in regulation 12(6) could directly be attacked as unjustifiably discriminatory contrary to Article 14, but said that I ought to decide whether sufferers from Alzheimer's disease were properly to be brought within regulation 12(5) through the effect of the Human Rights Act 1998 before deciding how regulation 12(6) worked. I am afraid that, however Mr Khubber sought to formulate those points, I do not follow their logic. The assessment under regulation 12(6) is indeed fact-specific, but it requires an assessment of the effects of the claimant's condition whether or not that condition falls within regulation 12(5). There is no need to ask the questions under regulation 12(5) before those under regulation 12(6). The answers to the questions under regulation 12(6) are independent of any effect of the Human Rights Act on the terms of the questions to be asked under regulation 12(5)."

For these reasons the Commissioner held that the claimant's appeal must be dismissed.

Finally, the Commissioner (paragraph 20) was asked that if he were to dismiss the appeal he should "nevertheless reach and express a judgement on his Human Rights Act arguments on regulation 12(5), as they might be important in other cases where the conditions in regulation 12(6) were satisfied." The Commissioner (paragraph 20) declined to do so providing that "It would not be helpful to anyone for me to express any opinions on those arguments in a case in which they cannot affect the outcome. Whatever I said would not be authoritative and thus could be no guide to appeal tribunals, claimants or their advisers about what might be decided by a Commissioner when the point of law comes up directly for decision."

7. Commissioner J Mesher 26.8.2005

severe impairment of intelligence not unless IQ below 55 (schizophrenia)

R(DLA)3/98 (CDLA/8353/1995*72/97 unreported) concerned a person who developed schizophrenia at the age of 16. The Commissioner (at paragraph 15) held "Dr Measey said that, from a medical standpoint, a person could not be said to be suffering from severe impairment of intelligence, unless he was intellectually 3 standard deviations below the norm. A deviation was 15%."… "Dr Measey stated that it was not a characteristic of sufferers from schizophrenia that their intelligence was below norm…".

See also M (a child) – Court of Appeal reported as R(DLA)1/00.

3. Commissioner D G Rice 7.8.1997

severe impairment of intelligence – not purely IQ of 55

M (a child) v Chief Adjudication Officer (Court of Appeal – reported as R(DLA)1/00) was an appeal against CDLA/6219/1997 (Commissioner D G Rice) which held that to show "severe impairment of intelligence" the claimant had to show that he/she had an IQ of 55 or less, and if there was no evidence to this effect then it was unnecessary to consider whether he/she suffered "severe impairment of social functioning".

It was submitted on behalf of the claimant firstly, that it was wrong to construe the expression "severe impairment of intelligence and social functioning" as implying two distinct requirements. Instead the provision should be read as a whole, the word "and" being conjunctive and thus requiring a single composite assessment of the impairment both of "intelligence and social functioning".

Secondly, that even if that were wrong, then nevertheless it was wrong, particularly in the case of an autistic claimant, to decide whether a claimant suffered "severe impairment of intelligence" solely on reference to the findings of an IQ test. Conversely, the DWP argued that it would be wrong to regard both intelligence and social functioning as composite otherwise it would involve reading "and" as "or".

Issue One: After some deliberation the Court of Appeal supported the DWP's contended construction. The Court of Appeal held that the two elements of intelligence and social functioning, certainly in the great majority of cases, would be widely "disparate" (See below). The Court of Appeal gave the example of a claimant with Down's Syndrome who might have a very low IQ but suffer little if any social dysfunction. The Court of Appeal recognised the difficulties in such a case. How would one decide whether the extensive impairment of one function, taken with the limited impairment of the other, is sufficient overall to categorise the impairment of both as severe? The Court of Appeal held that, in short, the appellant's approach, if not actually unworkable, would clearly be very difficult to apply.

Issue Two: The Court of Appeal held that in most cases, no doubt, the measurement of IQ will be the best available method of measuring intelligence. However, amongst the dictionary definitions of intelligence one finds reference not merely to the functions of understanding and intellect but also to the qualities of "insight and sagacity" (see below). The Court of Appeal held that "… in the case of an autistic child those qualities may well be lacking and to the extent that they are there will be a functional impairment which overlaps both limbs of the regulation i.e. both intelligence and social functioning".

The Court of Appeal (Lord Justice Simon Brown) held "As Uta Frith explains in her 1989 publication 'Autism - Explaining the Enigma', there is a real difference between 'test intelligence' and 'world intelligence'. IQ tests are purposely constructed so as to be as independent of social context as possible. Some people have difficulty in solving problems in tests for their own sake outside a real-life context; they, therefore, score badly in IQ tests. Autistics, however, at least in certain tests, score unusually highly just because they are being tested outside the real-life context. Their success in IQ tests, in short, is not a true indication of what one may call their useful intelligence and it is surely the impairment of the claimant's useful intelligence to which the regulation is directed.

In these circumstances it seems to me wrong to regard the limitation on the claimant's social functioning as 'wholly irrelevant', as the Commissioner [*referring to CDLA/6219/1997 – Commissioner D G Rice*] here did. In explaining why, despite her view of his IQ, Dr. Cameron [*A child psychiatrist provided for the purpose of the hearing of CDLA/6219/1997 by the DWP*] nevertheless regarded the appellant as severely mentally impaired, she referred to the severe limits on his "social capacity". In my judgment the Commissioner (and, indeed, the Disability Appeal Tribunal before him) should have had regard to that evidence in deciding whether the applicant's intelligence was severely impaired within the meaning of this legislation. The Commissioner was not, of course, bound to accept Dr. Cameron's view. He should not, however, simply have ignored it as irrelevant. [*My inserts*].

Had the maker of the regulations wished to define 'severe impairment of intelligence' exclusively by reference to an IQ score, he could easily have done so - see, for example, Regulation 12(2) which requires 100% loss of vision to satisfy the condition of blindness and 80% loss of hearing to satisfy the condition of deafness. I conclude that whilst in every case the claimant's IQ as conventionally tested is likely to be the essential starting point for considering the impairment of intelligence, and whilst it is perfectly reasonable to take an IQ of 55 or less as the prima facie touchstone of severe impairment, that test and that score will not invariably prove decisive.

Rather it should be recognised that an IQ result may give a misleading impression of the claimant's useful intelligence and that in some cases at least an impairment of social functioning will shade into an impairment of intelligence. Tribunals and Commissioners will accordingly need to admit and consider evidence other than a mere IQ score."

Note: "disparate" – meaning: essentially different in kind, without comparison or relation/things so unlike that there is no basis for their comparison; and "sagacity" meaning: – practical wisdom, the ability to reason and deliberate, soundness of judgement and shrewdness.

In CDLA/6219/1997 Commissioner D G Rice referred to his decision in CDLA/8353/1995 (R(DLA)3/98 reported) in which he accepted that from a medical standpoint, a person could not be said to be suffering from a severe impairment of intelligence unless he/she were intellectually "three standard deviations" below the norm. A deviation was 15%. Under the accepted system the average IQ is 100. 72% of the population fall within the range 85-115. Those who have an IQ of 85 are one standard deviation below the norm, those with an IQ of 70 are two standards below; and those with an IQ of 55 are three standards below. It was said that the intelligence of sufferers from autism might vary considerably from one case to another. Out of 10,000 children, 94 might be suffering from autism to some degree, four of them would experience the condition in its severe form, with consequential severe learning difficulties, whilst the other 90 might suffer only moderately or mildly. Those that fell within the latter category would normally have an IQ of between 80 and 90. It follows from these statistics that more than 90% of sufferers from autism have an IQ above 55, and as a result do not have a severe impairment of intelligence.

See also CDLA/2288/2007.

10. Lords Simon Brown, Otton and Mummery LJJ 29.10.99

severely mentally impaired – no requirement to compare child with child of same age

CD v Secretary of State for Work and Pensions (DLA) – [2013] UKUT 068 (AAC) – CDLA/2414/2012 involved a case of an autistic boy. Following an award of the highest rate of care component of Disability Living Allowance, a supersession request was made seeking the higher rate mobility component. The application was refused and the claimant, acting through his mother and appointee, appealed against that decision.

The case for the higher rate mobility component which was put to the First-tier Tribunal was that the claimant satisfied the conditions of entitlement by being both severely mentally impaired and displaying severe behavioural problems. Whilst the First-tier Tribunal accepted that the boy "suffered from a state of arrested development or incomplete physical development of the brain", it found that this did not result in "severe impairment of intelligence and social functioning" because in its view: "in comparing [the claimant] to a normal child of his age it was not probable that …he had severely impaired intelligence and social functioning". The tribunal also found that the boy needed physical restraint, but not for most of the time.

The appeal to the Upper Tribunal against the decision of the First-tier Tribunal was made on the grounds that in considering regulation 12(5) the tribunal had misdirected itself in comparing the claimant to a normal child of the same age, and also in failing to make sufficient findings of fact in relation to the claimant's sense of danger in deciding the extent to which his intelligence was impaired.
The Upper Tribunal Judge held:

"4. I am satisfied that the appeal must be allowed for the reasons given in my grant of permission. Regulation 12(5) does not require a comparison between a claimant and a child of the same age, but does require an evaluation of a claimant's 'useful intelligence', including what the Court of Appeal in R(DLA)2/00 called 'insight and sagacity'. Mrs Dean, on behalf of the Secretary of State has in my view helpfully and accurately equated those qualities to 'the ability to function in real-life situations', and I agree with her that in order to assess that ability the tribunal ought to have taken into account the very considerable body of evidence in this case concerning the claimant's lack of sense of danger."

It was for this reason the Upper Tribunal Judge held that the decision of the First-tier Tribunal was erroneous in law and should be set aside. The Upper Tribunal Judge held that because the case involved medical issues it ought to be remitted to the First-tier Tribunal for a complete rehearing. The Upper Tribunal held that the new tribunal should apply the guidance in the recent decision in Secretary of State for Work and Pensions v MG (DLA)[2012]UKUT 429 (AAC) and in applying regulation 12(6) should note in particular that the claimant's behaviour indoors as well as outdoors should be taken into account (paragraph 13 of SSWP v MG).

11. Judge of the Upper Tribunal E A L Bano 1.2.2013

severely mentally impaired – severe impairment of intelligence/social functioning

CDLA/12148/1996 (paragraph 9) held, with reference to CDLA/156/94 (reported as R(DLA)2/96) and CDLA/393/1994, that "the only basis on which it can be said that a claimant suffers from a state of arrested development of the brain is by consideration of possible manifestations of such arrested development" and that this was "not simply a question of scientific diagnosis".

The Deputy Commissioner (paragraph 9) held that where a tribunal are satisfied that the "state of arrested development of the brain" is satisfied it "must then go on to consider whether this results in severe impairment of intelligence and social functioning." The Commissioner stated that the words "intelligence" and "social functioning" are "ordinary words of the English language which have no technical meaning" providing that it was for a tribunal to decide whether there was a severe impairment of them.

The Deputy Commissioner (paragraph 9) held "… I do not accept the suggestion of the adjudication officer now concerned with this matter that a person will only have severe impairment of intelligence if they suffer from severe learning difficulties and have difficulty with speech and communication and their reading and writing skills are absent or very poor. No doubt people with such difficulties might well be said to have severe impairment of intelligence, but they are not to be taken as defining characteristics. Similarly, in my opinion the adjudication officer now concerned with the matter is wrong to suggest that a person with severe impairment of social functioning would require assistance with basic functions such as going to the toilet, bathing, feeding and getting dressed. Social functioning refers to the ability of a person to function in society and to relate to other people…".

See also M (a child) (Court of Appeal – reported as R(DLA)1/00).

3. Deputy Commissioner H Levenson 7.11.1997

severe impairment of intelligence and social functioning

MMcG-v-Department for Social Development (DLA) – [2012] NICom 292 – C5/12-13 (DLA) held:

"53. Turning to the second aspect of the second condition, the tribunal had to consider whether the condition led to severe impairment of intelligence and social functioning. The Court of Appeal in England and Wales held in M (a child), reported as R(DLA)1/00, that these were two separate conditions rather than a conjoined test which should be approached as a composite question.

54. Nevertheless, in approaching the issue of severe impairment of intelligence, the court held that a tribunal would not be bound by the assessment of IQ alone. The court acknowledged the decision of GB Commissioner Rice in CDLA/8353/1995 [*reported R(DLA)3/98*], in which he had found that a person could not be said to be suffering from severe impairment of intelligence unless he had an IQ of 55 of below. While the court accepted that this was a useful starting point, an IQ test score would not necessarily prove decisive. A high IQ score could well give a misleading impression of a claimant's useful intelligence, as opposed to test intelligence. [*My insert*]

55. Simon Brown LJ said in M (a child) [*Court of Appeal – reported as R(DLA)1/00*] that:

> 'Autistics, however, at least in certain tests, score unusually highly just because they are being tested outside the real-life context. Their success in IQ tests, in short, is not a true indication of what one might call their useful intelligence and it is surely the impairment of the claimant's useful intelligence to which the regulation is directed'.

56. The Court of Appeal in England and Wales held that regard should be had to the limits of a claimant's 'social capacity' in deciding whether a claimant's intelligence was severely impaired within the meaning of the legislation. The consequence of this, reasoned the Court of Appeal, was that, in some cases, an impairment of social functioning will shade into an impairment of intelligence. They were not therefore entirely distinct concepts in all cases.

57. The evidence of the educational psychologist on social functioning was unambiguously to the effect that B had significant problems in the areas of communication, socialization and rigidity of thought. Many of his self-help skills were very significantly delayed, including toileting, washing, feeding and dressing. However, the evidence regarding impairment of intelligence was to the effect that B had non-verbal intelligence well above average range. He displayed excellent visual perceptual skills but with significantly weaker verbal skills.

58. There was no formal assessment of IQ in B's case, but the tribunal had placed weight on the advice of Dr Kelly, medical officer to the Department, who had given an opinion on the basis of other reports that B did not have severe learning difficulties and that his cognitive ability would appear to be average to above average.

59. In the light of the approach of the Court of Appeal of England and Wales in M (a child), I consider that the tribunal, in placing weight on the cognitive ability of B in an artificial testing context, has not approached the question of impairment of intelligence correctly. For example, B was assessed as having the ability to 'reel off scripts from his DVDs but much of his daily language was echolalic (ie repeating what has just been said to him) and he never carried on simple conversations about past experiences. He employed a very systematic problem-solving approach while doing object assembly and displayed very good fine motor skills in drawing.
However, he would only ever drink from a baby's bottle with the top of the teat cut off. Thus his language and fine motor skills were not practically and usefully applied.

60. By focusing on the issue of cognitive ability in isolation of its real-life application, I consider that the tribunal has not addressed the question of "useful intelligence" fully in accordance with relevant authority."

10. Commissioner O Stockman 7.6.2012

language difficulties – relevance of social functioning

MP v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0426 (AAC) – CDLA/1034/2014 involved a case of a child described as having both significant problems with social communication at home and school and severe delay in his speech and language skills.

The First-tier Tribunal refused an award of higher rate mobility component. In its reasoning it held that:

"*…Severe impaired social functioning must also be demonstrated if he is to be entitled to higher rate mobility on SMI grounds. Although Michael does not seem to be as integrated socially as a child of his age without his difficulties, he does have a friend, can get on with adults he knows including his family and teachers, and the teachers do not report significant anti-social activity…*"

In granting permission to appeal Upper Tribunal Judge Mitchell invited consideration of whether the child's language difficulties should have been taken into account when assessing the impairment of social functioning because effective social contact was reliant on communication. Upper Tribunal Judge Mitchell also wondered whether the assessment of social functioning required consideration to be given to a person's ability to get on with people who are not familiar to him.

On these issues the Upper Tribunal Judge held:

"28. In his submission the Secretary of State opines it to be arguable that a child who is not completely socially isolated, who can behave appropriately in structured settings, and can understand and respond to adult command and direction, shows a degree of social functioning that could indeed be called less than severe. He draws attention to the fact that the majority of the time is spent by the Appellant in the structured environment of home and school and thus behaviour in that setting should weigh heavily in the tribunal's assessment. Nevertheless he accepts that the tribunal's failure to at least consider the Appellant's functioning outside highly structured environments was a material flaw in its reasoning.

29. I note that the Secretary of State's submission does not really answer the first question posed by Upper Tribunal Judge Mitchell: should the Appellant's language difficulties have been taken into account when assessing the impairment of his social functioning? I hold that they should have been in the light of the case law set out in paragraphs 16-18 above. The emphasis in *R(DLA)1/00* and CD [*see 'note' below*] on '*the ability to function in real life situations*' or '*useful intelligence*' invites active consideration of a person's language difficulties when considering their social functioning for the purposes of regulation 12(5). [*My insert*]

30. In this case, although this will be a matter for the new tribunal, there is ample evidence that the Appellant's language difficulties impacted significantly on his social functioning. A speech and language therapy report dated 6 September 2013 stated that his 'comprehension of language was severely delayed. He needs all instructions and information presented to him in small chunks. When he does not understand what has been said, he rarely asks for clarification. He needs significant time to process what has been said… in structured situations, such as describing pictures, [he] is able to use simple language. However in everyday situations, such as general conversation, he finds it much harder to communicate. He will answer simple questions but needs to be given significant time to respond. However he is rarely able to maintain a conversation. [He] has significant difficulties in interacting with others…' [bundle page 147]. This material, though later than the decision date, accords with the thrust of what is said in other more contemporaneous reports. It is also relevant to the tribunal's decision making given that one might have expected the Appellant's language abilities to have improved after nearly a year of full-time school with significant specialist input.

31. Turning to the question of whether the Appellant's social functioning outside a highly structured environment should be considered, I agree with the Secretary of State that it should have been. Again, applying the concepts of an ability to function in real-life situations and useful intelligence, real life – even for a child of the Appellant's age - is likely to require the ability to function not just in a protected school or home environment but also on the street or out of doors.
In this context I note ample evidence that the Appellant's functioning is more disruptive, uncontrollable and uncooperative in these less structured settings."

Note: It is not known what decision is being referred to by 'CD' in paragraph 29. However, at paragraphs 16 to 18 it was held:

"16. Case law has established that autism or autistic spectrum disorder constitutes 'arrested development or incomplete physical development of the brain' [see *CDLA/1678/1997*]. In the case of *M (A Child) v Chief Adjudication Officer* reported as *R(DLA)1/00*, the Court of Appeal held that, contrary to the reasoning in *CDLA/1678/1997*, an intelligence test should not be regarded as a definitive measure of whether a child has a severe impairment of intelligence. An intelligence test is a useful starting point to assess a claimant's "useful intelligence" but should not be conclusive – other evidence will be required. Lord Justice Simon Brown stated that:

'…in most cases, no doubt, the measurement of IQ will be the best available method of measuring intelligence. But amongst the dictionary definitions of intelligence one finds reference not merely to the functions of understanding and intellect but also to the qualities of insight and sagacity. It seems to me that in the case of an autistic child those qualities may well be lacking and, to the extent that they are, there will be a functional impairment which overlaps both limbs of the regulation i.e. both intelligence and social functioning…'

17. Thus *R(DLA)1/00* is authority for the proposition that evidence about a person's insight and sagacity can satisfy both the test of severe impairment of intelligence and severe impairment of social functioning required by regulation 12(5).

18. Sagacity can be defined as the quality of being wise or of having good judgment. What does that mean in practice? Upper Tribunal Judge Bano held in paragraph 4 of *CDLA/2414/2012* that regulation 12(5) required:

'…an evaluation of a claimant's 'useful intelligence' including what the Court of Appeal in R(DLA) 1/00 called 'insight and sagacity'. Mrs Dean, on behalf of the Secretary of State has in my view helpfully and accurately equated those qualities to "the ability to function in real-life situations", and I agree with her that in order to assess that ability the tribunal ought to have taken into account the very considerable body of evidence in this case concerning the claimant's lack of sense of danger…'

I note that the above case law was applied in paragraphs 77-81 of the recent case of *NMcM v Secretary of State for Work and Pensions (DLA)* [2014] UKUT 312 (AAC)."

11. Judge of the Upper Tribunal Gwynneth Knowles QC 19.9.2014

severe mental impairment – relevance of child's ability to socialise with strangers

MP v Secretary of State for Work and Pensions (DLA) – [2014] UKUT 0426 (AAC) – CDLA/1034/2014 involved a case of a child described as having both significant problems with social communication at home and school and severe delay in his speech and language skills. One question under consideration by the Upper Tribunal Judge was whether the child's ability to socialise with people he did not know should have been a factor for the First-tier Tribunal to consider. The representative of the Secretary of State rightly, in the view of the Upper Tribunal Judge, drew attention to the fact that many children, including those without a disability, are reluctant to engage with strangers (either adults or peers) and so it was difficult to know whether socialising with strangers is a significant contributor to an assessment of the severity of a child's functioning.

On this issue the Upper Tribunal Judge held:

"33. I am satisfied that exclusion of how a person interacts with strangers is inconsistent with the assessment of an ability to function in real-life situations even in a case concerning a child. Though subsection (4A) imposes conditions on the award of the lower rate of the mobility component to a child – namely that when guidance and supervision is required, it must be substantially more than would be required for a child of that age of normal physical and mental development – there is no provision in the relevant regulations which requires regard to be had to a person's age in the assessment of either intelligence or social functioning for the purpose of entitlement to benefit pursuant to section 73(3) [see paragraph 13 above]. Many persons who might satisfy the conditions in regulation 12(5) will live in highly circumscribed circumstances which limit their interaction with strangers. This does not mean that their ability to do so should be disregarded though this will be one matter amongst others for a tribunal to consider when assessing the extent to which social functioning is impaired."

11. Judge of the Upper Tribunal Gwynneth Knowles QC 19.9.2014

severe impairment of intelligence

CDLA/3215/2001 concerned the case of a young child. The tribunal found that the claimant suffered from a state of arrested development or incomplete physical development of the brain and that this resulted in a severe impairment of social functioning but it did not find that there was any severe impairment of intelligence. The tribunal supported this view with evidence of the child's ability to undertake activities which included rudimentary mathematics, playing football, putting together jigsaw puzzles and models and following films, videos and stories which it found demonstrated "useful intelligence" in a 5 year old.

The Commissioner (paragraph 14) held that what the tribunal however, failed to take into account or deal with was evidence of the child's "total lack of any sense of danger and inability to calculate risk". On this point the Commissioner (paragraph 15) held "… In my view the tribunal was in error of law in failing to take account of this strand of the case or, if it did so, in failing to explain why it still concluded that there was no severe impairment of intelligence. There is adequate, uncontradicted, evidence on which I can substitute my own decision and it is expedient that I do so. It seems to me that a child who has no sense of dangers (as contrasted with a child who has the ability to take risks deliberately and decides to do so) lacks such a fundamental aspect of basic human intelligence that it must be the case (certainly here) that his intelligence is severely impaired."

6. Commissioner H Levenson 9.4.2002

evidence – severely mentally impaired

CDLA/2470/2006 held:

"9. Turning to the question whether the claimant is severely mentally impaired and displays severe behavioural problems, I have no doubt that the first of those conditions is satisfied, despite the lack of detailed medical evidence specifically addressed to the criteria set out in regulation 12(5) of the 1991 Regulations. The diagnosis of Down's Syndrome and the description of the claimant's behaviour is adequate evidence in this case…"

8. Commissioner Mark Rowland 19.7.2007

severe behavioural problems – actual words of regulation must be considered

SC v Secretary of State for Work and Pensions (DLA) – [2010] UKUT 76 (AAC) – CDLA/1621/2009 held:

"30. The meaning of severely behavioural problems is found in regulation 12(6),… The First-tier Tribunal found that, although the claimant's behaviour is regarded as challenging and unpredictable, regulation 12(6) was not satisfied:

'Reference is made by headmistress to a requirement for 'close supervision' not permanent one to one supervision and appellant is taught in a 'small group' of unidentified size by some four teachers'.

31. However, regulation 12(6) does not require that there be one to one permanent supervision. The regulation sets out what is required and the First-tier Tribunal does not same (sic) to have considered fully the actual words of the regulation."

9. Judge of the Upper Tribunal H Levenson 11.3.2010

severely mentally impaired – severe behavioural problems

CDLA/2470/2006 held:

"9. Turning to the question whether the claimant is severely mentally impaired and displays severe behavioural problems, I have no doubt that the first of those conditions is satisfied, despite the lack of detailed medical evidence specifically addressed to the criteria set out in regulation 12(5) of the 1991 Regulations. The diagnosis of Down's Syndrome and the description of the claimant's behaviour is adequate evidence in this case. The question whether the claimant displays severe behavioural problems is more problematic. Regulation 12(6) provides -

"A person falls within subsection 12(3) of section 73 of the Act (severe behavioural problems) if he exhibits disruptive behaviour which –

(a) is extreme,

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property, and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake."

It was held in R(DLA)7/02 that this paragraph requires consideration of the claimant's behaviour 'at home just as much as outside it'.

10. I respectfully agree, not least because there is usually no good reason why a claimant's behaviour when walking outdoors should be markedly different in degree from his or her overall behaviour and looking at the whole picture is likely to give a better idea of the degree of intervention really required on account of the severe mental impairment as opposed to other factors. (Although there is no explicit provision to the effect that the severe behavioural problems must stem from the severe mental impairment, it seems to me that that is implicit in the legislation.)

11. It is convenient to look at the three subparagraphs of regulation 12(6) in reverse order. I am inclined to accept the submission made by the claimant's parents that he fell within the scope of regulation 12(6)(c). It is true that, as the Secretary of State points out, the claimant is allowed to do some things by himself at home, but it is also clear that his parents are in a permanent state of apprehension as to what will he will do whenever he is out of sight. I am not convinced that the very strict approach taken to regulation 12(6)(c) by the tribunal with whose decision the Commissioner declined to interfere in R(DLA)9/02 is not liable to deprive section 12(3) of the Act of any practical effect.

12. Turning to regulation 12(6)(b), there is evidence that the claimant does, on occasions, behave aggressively and there is also evidence that he behaves recklessly and I am quite prepared to accept that he sometimes needs physical restraint on both accounts. The word 'regularly' is capable of having a variety of meanings. It can mean the same as 'frequently' and even then it is all a matter of degree. A weekly occurrence can be regular in some contexts. I can well understand why the claimant's parents argue that he falls within the scope of regulation 12(6)(b) if that is read in isolation.

13. However, regulation 12(6)(b) has to be read with regulation 12(6)(a) and in the context of the whole scheme of entitlement to the mobility component. It might be argued that regulation 12(6)(a) does not add a great deal to the other subparagraphs and that the legislation should be read as though it said 'is so extreme that it regularly requires…'. On the other hand, more substance is accorded to subparagraph (a) if the word 'extreme' is taken to indicate that the behaviour is of a type that regularly requires a substantial degree of intervention and physical restraint - i.e., something much more than merely taking the person by the arm - and that is the construction I prefer. More importantly, it seems to me that the existence of the right to the higher rate of the mobility component under section 12(3) of the 1992 Act makes sense only if such a degree of intervention and restraint is likely to be required on a significant proportion of occasions when the claimant walks moderate distances outdoors. In my judgement, the word 'regularly' in regulation 12(6)(b) must be understood in that sense. (Here, the position is also complicated by the fact that the claimant's mobility is limited by his asthma. It seems to me to follow from R(DLA)7/02 that the fact that the claimant's behaviour may be worse when walking because of the discomfort caused by his asthma must be ignored for the purposes of regulation 12(6) or at least be regarded as something to be taken into account only in considering the extent of his behavioural problems over the whole day.)

14. As I have already said, the evidence in this case is that there are substantial periods of each day when the claimant is quite well behaved. Moreover, even when he is not, he often does not require physical restraint and, when he sits down and refuses to walk, the intervention required to get him to move may be the opposite of 'restraint' and will not necessarily be required 'to prevent him causing physical injury to himself or another, or damage to property'. There is really no evidence that his behaviour is generally or regularly 'extreme' and I am very doubtful that he even falls within the scope of regulation 12(6)(b). The occasions when he actually requires physical restraint to avoid injury or damage are probably not sufficiently frequent for that to be regarded as a regular requirement but the occasions when his behaviour is 'extreme' are fortunately even rarer, notwithstanding that eternal vigilance is required and caring for the claimant must be very wearing for his parents.

15. Accordingly, I am satisfied that the claimant is not entitled to the higher rate of the mobility component. I reach this conclusion with some regret but ultimately the needs of the claimant are predominately for attention and supervision and those are not relevant to the higher rate of the mobility component save in truly exceptional cases."

See also MMcG-v-Department for Social Development (DLA) – [2012] NICom 292 – C5/12-13 (DLA) and Secretary of State for Work and Pensions v MG (DLA) – [2012] UKUT 429 (AAC) – CDLA/943/2011.

8. Commissioner Mark Rowland 19.7.2007

behaviour

MMcG-v-Department for Social Development (DLA) – [2012] NICom 292 – C5/12-13 (DLA) held:

"61. The tribunal had evidence before it in the form of statements from B's appointee and expert reports from a range of sources including a community paediatrician. The tribunal based its view of B's behaviour on two particular reports – one from an OT and one from B's GP.

62. Mr Lafferty and Mr Collins were in agreement that the tribunal had not addressed the detailed evidence of B's appointee as regards his behaviour. They were also in agreement that the evidence of the community paediatrician did not differ from that of the appointee and that it could be viewed as supporting that evidence.

63. The tribunal found on the basis of the OT report that B did not have any behavioural problems. However, I think that it is more accurate to say that the report did not comment on B's behaviour, being largely concerned with functional skills. The tribunal also appears to give weight to the GP's comment that B is "walking safely". However, this comment also appears to be based on functional ability.

64. Other reports indicate a variety of behavioural problems. For example, the educational psychologist reported that upon accidentally banging his head, B became very agitated and began banging his head again and again. This observed behaviour corroborated the appointee's account of numerous similar events.

65. The community paediatrician indicated further that B had no sense of danger. She reported that after learning to jump from the bottom step on a set of household stairs, B later tried to jump from the top step. This was clearly based on an event which the appointee had described. However, the community paediatrician gave support to the credibility of this account. In addition to that event, B was described by the appointee as having tried to jump down an escalator in Foyleside shopping centre. He was described as regularly throwing himself off equipment in the play park. He was described as reacting to noise or to frustration by dangerous behaviour such as running into the road.

66. Other relevant matters included B's observance of rigid behaviour patterns and tantrum-type outbursts when these were disturbed.

67. I accept the submissions of Mr Lafferty and of Mr Collins that the tribunal did not fully address the evidence of the appointee, and of experts such as the community paediatrician and the educational psychologist, in making its decision. If it was the case simply that the tribunal preferred the evidence of the OT and GP over the appointee and the other professionals, although not expressing that as part of the reasons for its decision, I do not consider that it was entitled to do so. In the light of all the other evidence, I believe that the evidence of the OT and GP can only reasonably be read as confined to B's functional ability, and I agree with the submissions of the parties that the tribunal has erred in law."

See also CDLA/2470/2006 and Secretary of State for Work and Pensions v MG (DLA) – [2012] UKUT 429 (AAC) – CDLA/943/2011.

10. Commissioner O Stockman 7.6.2012

severely mentally impaired – severe behavioural problems and physical restraint test

CDLA/2054/1998 concerned a claimant with a severe learning disability "as a result of a chromosomal defect". It dealt with and provided confirmation on a number of important points. The Deputy Commissioner held that:

- "the tribunal had erred in law in holding that, by taking hold of the claimant's arm, ("to stop him causing further complications"), the claimant's carer did not 'physically restrain' him" within the meaning of the regulations.

- "severely mentally impaired" as per the regulatory test "will often be beyond reach of the spoken word and may need to be prevented from doing or coming to harm by physical contact, though without the need for significant force. It is the need for restraint by such physical contact which is, in my view, the spring-board of entitlement, and I consider that physical contact which is necessary and effective to prevent a claimant from causing injury, or damage to property, amounts to physical restraint, irrespective of the degree of force which is needed to achieve that result".

- "the tribunal had erred in law in holding that the claimant's disruptive behaviour was not unpredictable because his carer could predict that such behaviour would happen when the claimant became frustrated and could not get his own way concluding the fact that disruptive behaviour is generally preceded by a claimant becoming frustrated will not make such a presence any less necessary if the occasions when the claimant becomes frustrated cannot themselves be predicted".

In referring the case back to a new tribunal the Deputy Commissioner (at paragraph 7) held that the new tribunal should note the following guidance:

"a) the word 'extreme' is an ordinary English word, connoting behaviour which is wholly out of the ordinary. However, the claim is for the mobility component of disability living allowance and it is the claimant's behaviour when taking advantage of the faculty of mobility, generally outside the home environment, which needs to be considered;

b) the word 'regularly' required the tribunal to consider how often physical intervention is required, with a view to deciding whether the claimant's condition is such as to require intervention and physical restraint (in the sense described above) in the ordinary course of events;

c) 'requires' means 'reasonably requires' – see R(A)3/86 and Mallinson v Secretary of State for Social Services [1994]1WLR630. There is no requirement that physical injury or damage to property would inevitably result without physical intervention, but the purpose of providing for such intervention must be to prevent such injury or damage from occurring;

d) 'watching over' required that the carer be awake and available to intervene, but the carer does not have to be actually watching the claimant all the time. The tribunal in this case found that two carers could not watch over three residents, but I see no reason why a single carer cannot 'watch over' more than one person, provided that the carer remains in a position to intervene when necessary."

4. Deputy Commissioner E A L Bano 22.3.199

extremely disruptive – meaning

TV v Secretary of State for Work and Pensions (DLA) – [2013] UKUT 0364 (AAC) – CDLA/1044/2013 held:

"*Extremely disruptive*

21. The Oxford Dictionary definition of 'disruptive' is that it is something that disrupts. Disruption is "disturbance or problems which interrupt an event, activity, or process." That does not in my view require disruptive behaviour to be violent or physically aggressive. Talking in a school class is disruptive to the class as is fog to an airport timetable. There is no required issue of violence in that term. The relevance of injury or damage arises from elsewhere in regulation 12(6) and the paragraph must of course be read as a whole. My conclusion is that "disruptive behaviour" is to be treated as an ordinary English term, but that it is to be given its full meaning. If it disrupts, it is disruptive. If it disturbs or causes problems that interrupt what would otherwise happen, it disrupts. That being so, in my view a tribunal should consider all relevant disruptive behaviour to see if the total behaviour patterns of the individual meet the requirements of that paragraph."

11. Judge of the Upper Tribunal David Williams 30.7.2013

severe behavioural problems – test not confined to when walking out of doors

CDLA/17611/1996 held that the tribunal had erred in law because when considering the "severe behavioural problems" provision it did so in relation solely to the claimant's behaviour when walking out of doors. The Deputy Commissioner (paragraph 11) held that the questions posed by regulation 12 paragraph (6) "fall to be answered in respect of the claimant's condition generally and not with any special emphasis on behaviour when walking out of doors."

3. Deputy Commissioner N J Warren 16.3.1998

severely mentally impaired – watching over – not just outside the home

R(DLA)7/02 (CDLA/6701/1999*53/01 unreported) (paragraph 18) approved the definition given to the term "extreme" by then Deputy Commissioner E A L Bano in CDLA/2054/1998 (paragraph 7a) – connotes "behaviour which is wholly out of the ordinary" and elaborated:

"19. "However, it seems to me that the requirement in Regs 12(6)(b) and (c) that the claimant must need watching over, for the purpose of restraining potentially disruptive behaviour, 'whenever he is awake' indicates that the watching over must be required at home just as much as outside it, and must be required whether or not the claimant is 'seeking to take advantage of the faculty of mobility.' It is plainly not sufficient if the claimant only required watching over when outside the home…"

This view was supported by CDLA/3244/2001 (Commissioner Fellner).

5. Commissioner Charles Turnbull 6.4.2001

severely mentally impaired – regularly requires

CDLA/3244/2001 concerned the case of a young man who exhibited extreme disruptive behaviour at home but not (on the evidence) when in a controlled environment eg, school/day centre. On the interpretation of "regularly" (in the sense of "regularly requires") the Commissioner held:

"9… Unlike the tribunal, I should be inclined to say that I am satisfied that the restraint in the present case is required 'regularly', in the *Chambers* sense of 'at regular intervals in… time', and also in the sense of 'not casually or intermittently or irregularly' favoured by the Commissioner in R(U)2/88. Neither of these definitions seems to require any defined quantum of intervention, whether by amount or by time. I do not find helpful in the present context either the *Chambers* sense of 'governed by or according to the ordinary course of things' or the formulation 'in the ordinary course of events', because both these seem to beg the question of what the ordinary course of events actually is, that being what the tribunal has to decide".

The Commissioner (paragraph 12) held that the claimant's claim ultimately failed because, even accepting that his disruptive behaviour was extreme and required regular intervention (in order to prevent him causing physical injury to himself or another, or damage to property), it was not "so unpredictable" that he required another person to watch over them "whenever he (the claimant) is awake". The Commissioner (paragraph 12) held that the claimant's disruptive behaviour was at home and that there was no history of any need for restraint when at school or day centre.

6. Commissioner Christine Fellner 2.5.2002

severe mental impairment – severe behaviour (intervention and unpredictability)

[2008] UKUT 24 (AAC) – CDLA/2955/2008 held:

"10. Ms Parker Aranha [*representative for the Secretary of State*] did not accept that the claimant satisfies these conditions (referring to Regulation 12(6) (a), (b) and (c) of the Social Security (Disability Living Allowance) Regulations 1991), all of which must be met for entitlement to higher rate mobility component on this special basis. She referred to the Commissioner's decision in R(DLA)7/02 which stated in paragraph 15 that 12(6)(c) is 'only satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant if and when he actually starts to become disruptive'. The Commissioner held that it is not enough if the presence of an adult prevents the claimant from becoming disruptive. In my opinion this is to confuse 12(6)(b) and 12(6)(c). The point about (c) is the unpredictability, not the intervention. If there is no actual requirement to intervene then (b) is not satisfied. Thus, if a claimant is sometimes in an environment that is so well controlled that intervention is unnecessary, but at other times is in an environment where intervention is regularly required, it is still possible for the claimant to fall within section 73(3)." [*My insert*]

The decision also (paragraph 19) held that section 73(3) of the 1992 Act does not require that the "disruptive behaviour, or intervention and restraint, are non-stop."

Note: This decision is titled CDLA/2955/2006 but it is understood that it should read CDLA/2955/2008. CDLA/2955/2006 is a decision of Judge Turnbull.

See also Secretary of State for Work and Pensions v DM (DLA) – [2010] UKUT 318 (AAC) – CDLA/765/2010.

9. Judge of the Upper Tribunal Howard Levenson 27.11.2008

severe mental impairment – severe behaviour (intervention and unpredictability)

Secretary of State for Work and Pensions v DM (DLA) – [2010] UKUT 318 (AAC) – CDLA/765/2010 concerned the case of a young boy with autism. There was no dispute that the boy was entitled to the higher rate of the care component. What was at issue before the tribunal was whether the boy was entitled to the higher rate mobility component on grounds of severe behavioural problems.

Regulation 12(6) sets out the three criteria which must be satisfied for a claimant to fall within this provision. The behaviour must be disruptive and extreme, it must regularly require another person to intervene and physically restrain him in order to prevent the claimant causing physical injury to himself or another, or damage to property, and it must be so unpredictable that the claimant requires another person to be present and watching over him whenever he is awake.

The decision held:

"6. The Secretary of State's representative has drawn attention to R(DLA)7/02, where it was pointed out that the claimant must need watching over, for the purpose of restraining potentially disruptive behaviour whenever he is awake – that is both at home and when elsewhere, such as at school - and whether or not in connection with walking. As pointed out in paragraphs 15 and 16 of that decision, it is not sufficient if either the structured regime of the school or the presence and active interest of the mother at home is sufficient to prevent disruptive behaviour. The representative has also drawn attention to R(DLA)9/02 where it was pointed out that the carer had to be both present and watching over the claimant, and that that was not the case if the claimant's bedroom door was closed and he was on one side of it and the carer was on the other.

7. The claimant's representative has, however, drawn attention to the recent decision of Judge Levenson in [2008] UKUT 24 (AAC), where, in paragraph 10, he stated as follows:

> 'Ms Parker Aranha [the representative of the Secretary of State] did not accept that the claimant satisfies these conditions, all of which must be met for entitlement to higher rate mobility component on this special basis. She referred to the Commissioner's decision in R(DLA)7/02 which stated in paragraph 15 that 12(6)(c) is 'only satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant if and when he actually starts to become disruptive'. The Commissioner held that it is not enough if the presence of an adult prevents the claimant from becoming disruptive. In my opinion this is to confuse 12(6)(b) and 12(6)(c).

The point about (c) is the unpredictability, not the intervention. If there is no actual requirement to intervene then (b) is not satisfied. Thus, if a claimant is sometimes in an environment that is so well controlled that intervention is unnecessary, but at other times is in an environment where intervention is regularly required, it is still possible for the claimant to fall within section 73(3).'

8. In that case, there was evidence on which Judge Levenson relied that the claimant required constant supervision in all circumstances because of her disruptive behaviour. He held that the fact that there were circumstances in which there was no need to intervene and physically restrain her because of the structured environment in which she was did not mean that she did not need to be watched over there whenever she was awake because of the unpredictability of her behaviour.

9. I fully accept that one must not confuse the requirements of 12(6)(b) with those of 12(6)(c). There must be a regular need actually to intervene and physically restrain the claimant to prevent him causing physical injury to himself or another, or damage to property, to satisfy 12(6)(b). There must be unpredictable disruptive behaviour requiring another person to be present and watching over him whenever he is awake to satisfy 12(6)(c). The issues for the tribunal to address in this case for the purpose of 12(6)(b) are that of regularity, physical restraint and physical injury or damage to property. The issues for the tribunal to address for the purpose of 12(6)(c) are unpredictability of disruptive behaviour giving rise to the need for a person to be present and watching over him whenever he is awake. Interventions may be regular if they are frequent in one context but infrequent, or even rare, in another context provided that looked at overall there is a regular requirement to intervene and physically restrain the claimant.

10. If, however, the structured environment is such that there is no real risk of unpredictable violence or not such a risk as to make it reasonable for somebody to be present and watching over him whenever he is awake, then he cannot be said to need another person to be present and watching over him because of his unpredictable disruptive behaviour. If, in practice, he is regularly left alone in his room for lengthy periods while awake, or is not watched over at school because of his unpredictable disruptive behaviour, then that would suggest that his behaviour is not unpredictable, or at least is not unpredictable to such an extent as to require another person to be present and watching over him whenever he is awake."

9. Judge of the Upper Tribunal Michael Mark 31.8.2010

severely mentally impaired – watching over

R(DLA)7/02 (CDLA/6701/1999*53/01 unreported) held:

"15. … Limb (c) of Reg 12(6) is in my judgement only satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant **if and when he starts actually to become disruptive**. Giving a fair reading to Reg 12(6)(c) in the context of Reg 12(6) as a whole, I think the clear meaning is that the 'watching over' must be necessary in order that the person watching (or, I suppose, someone who can be summoned immediately by the person watching) can intervene when the claimant actually does become disruptive. If the structured regime of the school is of itself sufficient to prevent the claimant becoming disruptive, Reg 12(6)(b) is in my judgement not satisfied. I reach that conclusion for three main reasons. First, that is simply how the provision strikes me. Secondly, the presence of limb (b), referring to physical restraint, before limb (c), leads naturally to the meaning that the presence must be necessary in order actually to deal with unpredictable disruptive behaviour, and not merely (by presence short of physical restraint) to avoid it. Thirdly, Reg 12(6) can only apply if the claimant does in fact regularly require physical restraint. That means that if a particular claimant were, by supervision short of physical restraint, prevented from ever being disruptive, or from being disruptive on a regular basis, Reg 12(6) would plainly not be satisfied."

5. Commissioner Charles Turnbull 6.4.2001

severely mentally impaired – watching over whenever awake

JH v Secretary of State for Work and Pensions (DLA) – [2010] UKUT 456 (AAC) – CSDLA/356/2010 concerned the Secretary of State's appeal against the decision of a First-tier Tribunal to award a sixteen year-old child the higher rate mobility component for an indefinite period. The Judge of the Upper Tribunal dismissed the Secretary of State's first grounds for appeal which surrounded the tribunal's findings on whether or not there was a severe impairment of intelligence. The decision held that this was a jury question and providing it did not fall outside the realms of reasonable judgement (Lord Hoffman – Moyna), which it did not, it could not be disturbed. However, the Judge of the Upper Tribunal supported the second ground of appeal which argued that the tribunal had failed to apply properly the test of 12(6)(c) – the claimants behaviour is "so unpredictable that he requires another person to be present and watching over him whenever he is awake".

The Upper Tribunal Judge held:

"9. The manner in which the tribunal approached paragraph 12(6)(c) was as follows:

'10. The Tribunal considered the arguments put forward by the Department and in particular Mr Rogers' view on the test contained in the Social Security Disability Living Allowance Regulations 1991, Regulation 12 6(a), (b) and (c). It appeared to be accepted by all parties that 12 6 (a) & (b) were applicable. Mr Rogers' arguments however related to 12 6(c) in which the behaviour is so unpredictable that it requires another person to be present and watching over him while he is awake. In Mr Rogers' submission there was no scope for flexibility. The presence of another person to watch over was an essential element. In his view the person supervising [the claimant] would have to be with him at all times when awake. He argued that Commissioner's decision R(DLA)7/02 would only be satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant and if and when he actually starts to become disruptive.

11. The Tribunal considered this argument and the definition of the word 'presence'. Chambers Free English Dictionary defines it as 'a situation or activity demonstrating influence or power in a place'. Mr Rogers argued that to satisfy the test there must be someone present in the room with [the claimant] at all times. The Tribunal felt however that the supervision system and structure set by [the claimant's] family demonstrated a controlled influence over [the claimant], sufficient to satisfy the test.

12. The Tribunal also considered the comments of Commissioner Levingson [*sic*] C (DLA) 2955/2008 [*sic*], in paragraph 10 Commissioner Levingson [sic] considered the comments contained in R(DLA)7/02 and suggested that in his view there was a potential confusion from 12 6(b) and 12 6(c) of the DLA Regulations 1991. In his view the point about 12 6(c) is 'the unpredictability not the intervention'. Thus if a claimant is sometimes in an environment so well controlled intervention is unnecessary and that other times an environment where intervention is regularly required it is still possible for the claimant to fall within Section 73 of the Act.

13. The views of Commissioner Levingson [*sic*] were given weight by the Tribunal. They considered this definition relevant to [the claimant's] circumstances. The evidence implied that [the claimant] was not aware of common dangers to a level of appropriate of his age and that he had dangerous tendencies. It went on to state on page 105 that 'when [the claimant] experiences confusion, frustration, fear or anxiety he will often panic and this can cause him to physically resist any intervention'. The family have dealt with this within the basis of the family and have introduced CCTV security systems to watch and supervise [the claimant's] behaviour within the environs of the house. In addition, in the home they have a routine for supervising his behaviour.'

10. The Upper Tribunal Judge [Levinson] (*sic*) in CDLA/2955/2006 awarded the higher rate of the mobility component on the particular facts of the case. He said:

'10. Ms Parker Aranha did not accept that the claimant satisfies these conditions, all of which must be met for entitlement to higher rate mobility component on this special basis. She referred to the Commissioner's decision in R(DLA)7/02 which stated in paragraph 15 that 12(6)(c) is 'only satisfied if the constant presence of an adult is necessary in order to intervene and deal with the claimant if and when he actually starts to become disruptive'.

The Commissioner held that it is not enough if the presence of an adult prevents the claimant from becoming disruptive. In my opinion this is to confuse 12(6)(b) and 12(6)(c). The point about (c) is the unpredictability, not the intervention. If there is no actual requirement to intervene, then (b) is not satisfied. Thus, if a claimant is sometimes in an environment that is so well controlled that intervention is unnecessary, but at other times is in an environment where intervention is regularly required, it is still possible for the claimant to fall within section 73(3).'

He then went on to say:
……

'16. The specific error of the tribunal to which I wish to draw attention relates to misunderstanding of the evidence. The record of proceedings has the claimant's mother telling the tribunal as follows (page 138):

'She sleeps in my room. Husband downstairs…Gets up in the night for toilet & goes downstairs & music goes on & TV goes on. No sense of timing…she might go back down and back up'.

17. However, the statement of reasons (page 146) reads as follows:

'She does spend time without supervision at home, for instance during the night she may go downstairs and put the television on or music on…Her parents are aware of this but stay in bed …'.

18. The tribunal did not seem to appreciate that the claimant's father is downstairs when the claimant comes down and that he appears to [sic] on hand to supervise as necessary."

Conclusions:

19. From the totality of the evidence it seems to me that, taking a broad view, from a date at least six months prior to 6th November 2006 the claimant satisfied all the conditions of entitlement set out in section 73(3) of the 1992 Act, which does not require that disruptive behaviour, or intervention and restraint, are non-stop.'

These paragraphs and the other evidence in that case set out in paragraphs 11 to 15 of the decision, including that the claimant there behaved appropriately towards the psychiatrist and the tribunal and there were no reported problems at school demonstrates the factual basis upon which he made the award of the allowance in that case.

11. It is apparent that the tribunal did not have cited to it my decision in R(DLA)9/02 nor did the Upper Tribunal Judge [Levinson] (*sic*) make reference to it in his decision. In paragraph 12 of my decision I said:

'12. I find it difficult to accept the asserted proposition contained in the letter of 30 November 2000 that in respect of watching over all that was required was for the carer to be awake and available to intervene but not that the carer required to be actually watching the claimant all the time. I say that because the statutory provision appears to me to be specifically restrictive and the words used are both 'present' and 'watching over'. It does not seem to me these conditions can be fulfilled when the claimant's bedroom door is closed and he is on one side of it and the carer on the other.'

That view is supported by the Upper Tribunal Judge [Turnbull] in CDLA/2714/2009 where in paragraph 10 he said:

'Two points are, I think, clear. First, that the words 'present and watching over' are not necessarily satisfied by what would amount to "supervision" in relation to middle rate care. The concept of continual supervision throughout the day is of course used by s. 72 of the 1992 Act in relation to the middle rate of the care component, and the use of the words 'present and watching over', rather than of the concept of supervision, seems to me to indicate that a greater degree of presence and alertness is necessary. Secondly, that the watching must be continuous ('whenever he is awake'), so that it can be predicated that the claimant will be safe, without being watched over, for any significant period of time during the day, the requirement is not satisfied. Very short intervals without watching over (i.e. the few minutes when it is necessary , for the Claimant's father to go to the toilet) can of course be ignored as de minimis.'

12. Mr Creally [*representative for the claimant*] pointed out that the Upper Tribunal Judge in CDLA/2955/2006 makes no specific mention of the particular statutory provision. It was also his submission that the factual basis in that case was somewhat different to the present case and he referred me to paragraph 16 to 18 of the decision, which are quoted above. [*My insert*]

On the other hand, in the written submission by Miss Leishman, which she reiterated before me, it is said:

'15. Given that all parties accept he requires this outdoors and we are potentially just looking at [the claimant's] circumstances whilst indoors I am referring to the argument indoors only. In [the claimant's] case his parents sit in a different room sometimes and it is this area which is contested by Mr Rogers. The tribunal have considered this point and have taken account of the fact that there is CCTV in place around the home and baby monitors set up which mean [the claimant] is not in the same position as was outlined in the decisions highlighted. [The claimant] is watched all the time. His behaviour is so unpredictable he cannot be afforded the luxury of privacy at any time. At para. 12 of the Statement of Reasons the tribunal considered the definition of 'present' and used the Chambers Free English Dictionary definition when applying it's reasoning, finding 'presence' to mean 'a situation or activity demonstrating influence or power in a place'. The Tribunal found that the system set up in [the claimant's] home demonstrated a controlled influence over [the claimant], sufficiently to satisfy the test.'

However, as Mr Creally pointed out the evidence in relation to close circuit television appeared to apply only to outside the claimant's home where it is noted in the record of proceedings:

'Always know where he is – lock all doors – Have CTV outside – surrounding the house – has escaped before,… Could be kept in a room by himself. Baby monitors – 3.30am before he sleeps. Old cottage – 3 bedroom hard to sleep – Brother his bedroom next door.'

Mr Creally also pointed out that in the claim pack at page 67 it is noted

'He shuts himself in his room and will neither come out or join a game with us or allow him in to play with him.'

It was also said:

'[The claimant] manages to survive on very little sleep. He must have his lights on his televisions on at all times. He falls asleep with the tv (*sic*) on and the lights on and if we try to switch them off he seems to sense it and wakens up to put them back on again.'

13. The Upper Tribunal judge in CDLA/2955/2006 was correct to point out that the claimant's behaviour has to be unpredictable for the requirement for presence and watching over by another person whenever he is awake to be satisfied.

14. However, I cannot accept that the requirement for presence and watching over whenever the claimant is awake is somehow obviated or unnecessary in a well-controlled environment which seems to be the thrust of what was said by Mr Levinson. (*sic*) He is suggesting a test which is less stringent than the terms of the legislation import and the view of Mr Turnbull and myself as to its application. In these circumstances I decline to follow what is said by Mr Levinson (*sic*).

15. In this case even if there is unpredictability in behaviour, if the claimant can be left for substantial periods on his own this would tend to support a conclusion that unpredictability was not such as to give rise to the requirement. There was evidence in relation to baby monitors being placed in his room which suggests that presence and watching over in the sense suggested by myself in R(DLA)9/02 was not required. In my view the tribunal erred in law by misinterpreting the legislation. 'A routine for supervising his behaviour' as disclosed in the evidence was not, in my view, sufficient for the purposes of regulation 12(6)(c). They erred in law by not following what is said in R(DLA)9/02, though I accept that it was not cited to them."

The Secretary of State's appeal was allowed. The Judge of the Upper Tribunal refused the request to remit the case to a fresh tribunal holding that upon the findings of fact he was able to given the decision himself.

Note: It is understood that CDLA/2955/2006 should read CDLA/2955/2008. CDLA/2955/2006 is a decision of Judge Turnbull. CDLA/2955/2008 is a decision of Judge Levenson.

See also R(DLA)9/02 and AH v Secretary of State for Work and Pensions (DLA) – [2012] UKUT 387 (AAC) – CDLA/965/2012.

9. Judge of the Upper Tribunal D J May QC 10.12.2010

severely mentally impaired – position when sometimes left alone

AH v Secretary of State for Work and Pensions (DLA) – [2012] UKUT 387 (AAC) – CDLA/965/2012 concerned whether a young child was entitled to the highest rate of the mobility component on grounds that she satisfied the 'severely mentally impaired' test – section 73(3) of the Social Security Contributions and Benefits Act 1992 and regulation 12(5) and (6) of the Social Security (Disability Living Allowance) Regulations 1991.

The only issue before the tribunal (and before the Upper Tribunal) was whether the claimant displayed severe behavioural problems as specified in regulation 12(6). This sets out three criteria. The behaviour:

- must be disruptive and extreme,
- must regularly require another person to intervene and physically restrain her in order to prevent her causing physical injury to herself or another, or damage to property, and
- must be so unpredictable that she requires another person to be present and watching over her whenever she is awake.

The First-tier Tribunal accepted that the claimant displayed behavioural problems, but not that they were severe within the meaning of regulation 12. The statement of reasons explained that this was because it was clear that the claimant could be left alone at some times during the day when she was awake.

The evidence said to be in support of this was that there was a sensory room in the claimant's bedroom in the house in which she lived with her grandparents which contained a bubble tube to help calm her down and a padded area, with padding on the floor and walls and she was left alone in this room whilst her grandparents were either downstairs or in another bedroom within earshot.

In seeking permission to appeal against the decision of the First-tier Tribunal it was contended on behalf of the claimant that the periods when her bedroom door was closed were so short that they could be considered as *de minimis*. It was also contended that the layout of the house was such that the grandparents remained able to supervise the claimant and monitor her activities closely when she was in the bedroom as they could hear what she was doing.

The decision held:

"7. In giving permission to appeal the Upper Tribunal Judge asked if the tribunal had conflated limbs (b) and (c) of regulation 12(6). Also, as regards regulation 12(6)(c), he asked if R(DLA)9/02 should be followed or if the doubts expressed in CDLA/2470/2006 were justified.

8. In R(DLA)7/02, it was held that the claimant must need watching over, for the purpose of restraining potentially disruptive behaviour whenever she is awake and whether or not in connection with walking. It was pointed out in paragraphs 15 and 16 of that decision that it is not sufficient if either the structured regime of the school or the presence and active interest of the mother at home is sufficient to prevent disruptive behaviour. This approach was criticised by Judge Levenson in LM v Secretary of State, [2008] UKUT 24 (AAC), where he stated at paragraph 10 that:

> 'In my opinion this is to confuse 12(6)(b) and 12(6)(c). The point about (c) is the unpredictability, not the intervention. If there is no actual requirement to intervene then (b) is not satisfied. Thus, if a claimant is sometimes in an environment that is so well controlled that intervention is unnecessary, but at other times is in an environment where intervention is regularly required, it is still possible for the claimant to fall within section 73(3).'

9. This approach was followed by me in Secretary of State v DM, [2010] UKUT 318 (AAC), where I stated at paragraphs 8 to 10:

> '8. In that case, there was evidence on which Judge Levenson relied that the claimant required constant supervision in all circumstances because of her disruptive behaviour. He held that the fact that there were circumstances in which there was no need to intervene and physically restrain her because of the structured environment in which she was did not mean that she did not need to be watched over there whenever she was awake because of the unpredictability of her behaviour.
>
> 9. I fully accept that one must not confuse the requirements of 12(6)(b) with those of 12(6)(c). There must be a regular need actually to intervene and physically restrain the claimant to prevent him causing physical injury to himself or another, or damage to property, to satisfy 12(6)(b). There be unpredictable disruptive behaviour requiring another person to be present and watching over him whenever he is awake to satisfy 12(6)(c). The issues for the tribunal to address in this case for the purpose of 12(6)(b) are that of regularity, physical restraint and physical injury or damage to property. The issues for the tribunal to address for the purpose of 12(6)(c) are unpredictability of disruptive behaviour giving rise to the need for a person to be present and watching over him whenever he is awake. Interventions may be regular if they are frequent in one context but infrequent, or even rare, in another context provided that looked at overall there is a regular requirement to intervene and physically restrain the claimant.
>
> 10. If, however, the structured environment is such that there is no real risk of unpredictable violence or not such a risk as to make it reasonable for somebody to be present and watching over him whenever he is awake, then he cannot be said to need another person to be present and watching over him because of his unpredictable disruptive behaviour. If, in practice, he is regularly left alone in his room for lengthy periods while awake, or is not watched over at school because of his unpredictable disruptive behaviour, then that would suggest that his behaviour is not unpredictable, or at least is not unpredictable to such an extent as to require another person to be present and watching over him whenever he is awake.'

10. On the other hand, in *JH v Secretary of State*, [2010] UKUT 456 (AAC), Judge May QC, as he had then become, disagreed with Mr. Commissioner Levenson as follows:

> '11. It is apparent that the tribunal did not have cited to it my decision in R(DLA) 9/02 nor did the Upper Tribunal Judge [Levinson][sic] make reference to it in his decision. In paragraph 12 of my decision I said:
>
> '12. I find it difficult to accept the asserted proposition contained in the letter of 30 November 2000 that in respect of watching over all that was required was for the carer to be awake and available to intervene but not that the carer required to be actually watching the claimant all the time. I say that because the statutory provision appears to me to be specifically restrictive and the words used are both 'present' and 'watching over'. It does not seem to me these conditions can be fulfilled when the claimant's bedroom door is closed and he is on one side of it and the carer on the other.'
>
> That view is supported by the Upper Tribunal Judge [Turnbull] in CDLA/2714/2009 where in paragraph 10 he said:
>
> > 'Two points are, I think, clear. First, that the words 'present and watching over' are not necessarily satisfied by what would amount to 'supervision' in relation to middle rate care. The concept of continual supervision throughout the day is of course used by s. 72 of the 1992 Act in relation to the middle rate of the care component, and the use of the words 'present and watching over', rather than of the concept of supervision, seems to me to indicate that a greater degree of presence and alertness is necessary. Secondly, that the watching must be continuous ('whenever he is awake'), so that it can be predicted that the claimant will be safe, without being watched over, for any significant period of time during the day, the requirement is not satisfied. Very short intervals without watching over (i.e. the few minutes when it is necessary for the Claimant's father to go to the toilet) can of course be ignored as *de minimis*.'

11. Judge May went on to say in paragraphs 13 to 15:

> '13. The Upper Tribunal judge in CDLA/2955/2006 was correct to point out that the claimant's behaviour has to be unpredictable for the requirement for presence and watching over by another person whenever he is awake to be satisfied.
>
> 14. However, I cannot accept that the requirement for presence and watching over whenever the claimant is awake is somehow obviated or unnecessary in a well-controlled environment which seems to be the thrust of what was said by Mr Levinson. He is suggesting a test which is less stringent than the terms of the legislation import and the view of Mr Turnbull and myself as to its application. In these circumstances I decline to follow what is said by Mr Levinson (*sic*).
>
> 15. In this case even if there is unpredictability in behaviour, if the claimant can be left for substantial periods on his own this would tend to support a conclusion that unpredictability was not such as to give rise to the requirement. There was evidence in relation to baby monitors being placed in his room which suggests that presence and watching over in the sense suggested by myself in R(DLA)9/02 was not required. In my view the tribunal erred in law by misinterpreting the legislation. 'A routine for supervising his behaviour' as disclosed in the evidence was not, in my view, sufficient for the purposes of regulation 12(6)(c). They erred in law by not following what is said in R (DLA)9/02, though I accept that it was not cited to them.'

12. I do not read Mr. Commissioner Levenson as finding that the requirement for presence and watching over is obviated in a well controlled environment, as Judge May suggests. The point that I understand him to be making, as explained in the passage from my decision in *Secretary of State v DM*, cited above, is that while there must be there must be a regular need for intervention as required by regulation 12(6)(b), there can be periods each day in a well-controlled environment where, although the claimant needs somebody present and watching over him or her because of the unpredictability of his or her disruptive behaviour, a need for actual intervention may be small.

13. In R(DLA)9/02, it was held that the carer had to be both present and watching over the claimant, and that that was not the case if the claimant's bedroom door was closed and he was on one side of it and the carer was on the other. In that case, the claimant was in sheltered accommodation. He had his own room. At night one member of staff would be awake all night. The claimant would be checked on every 1.5 to 2 hours each night. He would regularly get up and would cause damage both inside and out of his room. It was the norm for him to cause trouble in one form or another 4 or 5 times a night. However, he was allowed to use his room with the door closed to afford him privacy. It was this last finding that was said by Mr. Commissioner May QC, as he then was, to be the crucial finding, and was the basis on which the tribunal determined that the claimant did not require another person to be present and watching over him whenever he was awake, and the conclusion which the tribunal had reached that the claimant did not require another person to be present and watching over him whenever he was awake was a conclusion on the finding of fact which they were entitled to reach on the evidence before them.

14. Mr. Commissioner May further stated at paragraph 12 of his decision that it did not seem to him that a carer could be said to be present and watching over a claimant when the claimant's bedroom door was closed and the claimant was on one side of it and the carer was on the other. It appears to me that he may not have had in mind CCTV when expressing his views as to the effect of a shut door, there having been no CCTV in that case. I can see no reason why the person present and watching over a claimant should not do so in the adjoining room, if they can see and hear what is going on using CCTV or similar electronic means and are in a position to intervene promptly if needed. 15. Although that decision was reported and thus must have commanded the broad support of a majority of commissioners at the time, some doubts have been raised since. In CDLA/2470/2006, Mr. Commissioner Rowland observed in paragraph 11 that he was inclined to accept the submission made by the claimant's parents that he fell within regulation 12(6)(c). He accepted that the claimant in that case was allowed to do some things by himself at home, but, he said, 'it is also clear that his parents are in a permanent state of apprehension as to what he will do whenever he is out of sight. I am not convinced that the very strict approach taken to regulation 12(6)(c) by the tribunal with whose decision the Commissioner declined to interfere in R(DLA)9/02 is not liable to deprive section 12(3) of the Act [presumably a mistaken reference to section 73(3) of the Social Security Contributions and Benefits Act 1992] of any practical effect.'

16. In my judgment, the wording of regulation 12(6)(c) is clear to the extent that it must be shown that the disruptive behaviour of the claimant must be 'so unpredictable that he requires another person to be present and watching over him whenever he is awake'. However, it appears to me that, as in the provisions of section 72 of the Social Security and Benefits Act 1992, 'requires' means reasonably requires. What the claimant reasonably requires may be more or less than he or she gets. To take an extreme example, a claimant who is kept in a straight jacket, or who is administered large quantities of an inappropriate sedative while awake in the evening, may as a result not require in the evening another person to be present and watching over them because of unpredictable disruptive behaviour. That would not normally be an appropriate way of treating that claimant, although it may on occasions be needed if a carer was not available. So too, although a claimant may be very disruptive and in other respects fall within regulation 12(6)(c), there may be nobody available for part of the day to be present and watch over him or her.

17. In CDLA/2470/2006, it could be that the parents of the claimant had no option, because for example of other demands from other children, but to take a chance and leave the claimant at times with nobody present and watching over him, even though as a result they were in a permanent state of apprehension. In such a case the claimant would still require to have somebody present and watching over him, but there was simply nobody available to do it.

18. So too, in the present case, while the claimant was living with her grandparents, their evidence was that she slept only 4 hours a night on average (roughly between 2am and 6am – see p.88 of the file) and one of them had to be up and watching over her the rest of the time. In school holidays, this involved what were described as 20 hour shifts. When the claimant was staying with her mother, she was not allowed to close the bedroom door (p.186). The grandfather was working and the grandmother was in poor health – she stated that she had had a stroke in 2007 and 2 further strokes in June 2011 (p.174) and also suffered from arthritis. The latter strokes were after the date of the decision but it is plain that throughout both grandparents have been under immense strain. The community nurse described the health of both grandparents as poor and the grandmother as having an arthritic condition with increasing levels of pain (pp.151-152). The claimant's behaviour in her bedroom was unpredictable as it was elsewhere. The grandmother's evidence referred to the bedroom floor having been damaged by the claimant and ready to snap (p.182), and the need to provide a padded floor and padded walls also shows that the claimant was liable to become violent in her bedroom. The evidence of the claimant's violence and need for restraint is also summarised at p.170 by her representative.

19. The grandmother's evidence was that the claimant wanted her bedroom shut for privacy but the grandmother would be in an adjacent room where she could hear what the claimant was doing and would keep popping around the door to see what she was up to (p.186). While I accept that, as held in R(DLA)9/02, a person cannot generally be present and watching over another person if they are not in the same room and the door of the claimants' room is shut, it appears to me that it is a question of fact for the tribunal whether the grandmother's being in the adjoining room within earshot and popping around the bedroom door frequently to see what she was up to was sufficient to amount to being present and watching over her. The tribunal, however, made no findings as to the frequency of such visits and appears to have proceeded on the basis that if the bedroom door was shut, even though the grandmother was within earshot and popped in to see what the claimant was up to, this could not amount to being present and watching over her. It appears to me that looking in with sufficient regularity and being present within earshot at all times would satisfy regulation 12(6)(c). What is sufficient regularity would be a matter for the tribunal but on this occasion the tribunal made no findings as to it and was therefore in error of law.

20. The tribunal also made no findings as to what the claimant reasonably required by reason of her unpredictable behaviour when at home with her grandparents, bearing in mind that the immense demands which she appears to have placed on them, and their limited physical resources, may have meant that while she required a greater degree of somebody's presence and watching over, they were unable to provide all that was required. On that account as well, the tribunal was therefore in error of law.

21. There does not appear to me to have been any issue as to the accuracy of the grandparents' evidence in this case. While I agree with the tribunal that the claimant's conduct when out riding could not have been extreme disruptive behaviour for the reasons it gave, there is no requirement that all disruptive behaviour should be extreme, or that the behaviour on those occasions should require intervention and physical restraint. Overall the description of the claimant's behaviour includes regular disruptive behaviour which was extreme. She is described as going into meltdown, screaming, kicking and lashing out at anybody (p.99) and having to be restrained (eg, pp.149-50), as having little understanding of danger (eg pp.110, 125), as becoming destructive when frustrated, albeit less frequently (p.129), as having many variables in everyday life that cannot be controlled. She had damaged her bedroom floor and the grandparents were clearly very anxious as to what she might be doing when her door was shut. Her grandmother would check regularly, although the exact frequency was unclear from the evidence.

22. It appears to me that the frequency with which the grandmother would pop in to check what was going on when the claimant was in the bedroom could well be sufficient, given that she was always within earshot, to amount to being present and watching over her, and that in any event, given the claimant's destructive tendencies, her lack of appreciation of danger, and the unpredictability of her disruptive behaviour, she did reasonably require to be watched over by somebody present whenever she was awake even if at times the grandparents felt unable to do so, and allowed the door of her bedroom to be shut while listening from close by and looking in from time to time to see what she was doing.

23. I therefore conclude that this is a case in which I can substitute my own decision for that of the tribunal by allowing the appeal and setting aside the decision of the decision maker dated 3 December 2010 and substituting my own decision that the claimant is entitled to the higher rate of the mobility component and the highest rate of the care component of disability living allowance from 30 January 2011 to 29 January 2015 (both dates inclusive)."

See also R(DLA)9/02 and JH v Secretary of State for Work and Pensions (DLA) – [2012] UKUT 387 (AAC) – CDLA/356/2010.

10. Judge of the Upper Tribunal Michael Mark 12.10.2012

severely mentally impaired – accommodation adapted

R(DLA)9/02 (CDLA/5437/1999 unreported) involved a case where the claimant lived in sheltered accommodation for autistic adults. The claimant's room had special adaptations – it was stripped of all dangers, all furniture was bolted to the walls, there were safety electric plugs, reduced water flow in the taps and bars on the windows to prevent climbing out. The claimant was allowed to stay in his room for short periods and was checked frequently during such periods (day or night). It was acknowledged that if the claimant lived in private accommodation then, due to his unpredictable mood swings/violent outbursts, it would be necessary for them to be watched 24 hours a day. In dismissing the claimant's appeal the tribunal found that he did not need another person to be present and watching over him whenever he was awake because the evidence showed that he could use his room with the door closed.

The appeal to Commissioners was based on the injustice that the claimant was denied a right to benefit simply because he lived in accommodation that was adapted for his needs.

The Commissioner, in dismissing the claimant's appeal, held that the tribunal reached a conclusion it was entitled to do based on the findings of fact. The Commissioner added that the "present" and "watching over" provisions were "specifically restrictive" and did not seem to be met when the claimant was in his room with the door closed with him on the one side and his carer on the other.

See also JH v Secretary of State for Work and Pensions (DLA) – [2010] UKUT 456 (AAC) – CSDLA/356/2010 and AH v Secretary of State for Work and Pensions (DLA) – [2012] UKUT 387 (AAC) – CDLA/965/2012.

6. Commissioner D J May QC 4.4.2001

severely mentally impaired – autism: whether physical cause (arrested/incomplete development of brain)/resulting in severe impairment of intelligence and social functioning

CDLA/1678/97(*21/98) examined the question of whether a child with autism could satisfy the "severely mentally impaired" provision.

The Commissioner first questioned whether autism stemmed from "a state of arrested or incomplete development of the brain" (had a physical cause). He was satisfied that the medical evidence showed that it did stating that "it was presently accepted that the condition had a physical cause, in that it was a disorder of brain development. The biological cause might be discoverable by investigation. For example, it might arise out of a chromosome abnormality, or a genetic disorder or a biochemical disorder. However, sometimes no physical cause could be detected, in which event the condition was described as idiopathic (unknown in origin). Nevertheless, although, in a particular case, the condition might be idiopathic... there would still be a physical origin connected with development of the brain; there would simply be an inability to identify it".

The Commissioner then questioned whether autism results in "severe impairment of intelligence and social functioning". On reference to R(DLA)3/98 the Commissioner proceeded to deal with the "intelligence" factor. In R(DLA)3/98 the Commissioner concluded from the medical evidence that a person may not be said to have "severe impairment of intelligence" unless they have an IQ of less than 55. Using this yardstick, together with evidence on the day which suggested that more than 90% of sufferers from autism have an IQ above 55 and evidence which put this particular child in this category, the Commissioner ruled against the claimant. The Commissioner said that in view of this finding it was unnecessary for them to consider the "social functioning" question.

On the latter point of "social functioning" CDLA/57/2003 (Commissioner Powell – 9.6.2003) held that CDLA/1678/97 "had become a somewhat shaky foundation" in view of what had been held in M (a child) v Chief Adjudication Officer (Court of Appeal – reported as R(DLA)1/00). The Commissioner said that the tribunal were wrong to rely on CDLA/1678/97 without considering it in conjunction with M (a child) v Chief Adjudication Officer and indicating in it's decision that it had done so.

See also M (a child) v Chief Adjudication Officer (Court of Appeal), CDLA/2288/2007 and CSDLA/202/2007.

3. Commissioner D G Rice 23.3.1998

autism – severe impairment of intelligence and social functioning

CSDLA/202/2007 held:

"9. On regulation 12(5) the leading case is R(DLA)1/00 [*M (a child) v Chief Adjudication Officer (Court of Appeal) – reported as R(DLA)1/00*], in which the point was not disputed that sufferers from autism satisfy the condition of 'arrested development or incomplete physical development of the brain'.

The Court of Appeal also confirmed that 'severe impairment of intelligence and social functioning' denotes two distinct requirements, rather than a single composite assessment. However, in the case of an autistic child, where the condition inherently involves a lack of appreciation of social context, the court recognised that such limitations on the child's social functioning could be relevant to whether their intelligence was severely impaired within the meaning of the regulations. The conclusion was that an IQ score of 55 or less is the essential starting point for a consideration that severe impairment may exist, but can in some cases give a misleading impression of the claimant's useful intelligence where their poor social functioning shades into an impairment of intelligence. A tribunal must therefore first consider the claimant's likely IQ and then broaden the scope of its consideration to the evidence as a whole in order to be satisfied that the child has severe impairment both of intelligence and of social functioning. In other words, the intelligence score is evidentially relevant but not conclusive, and factors such as 'insight and sagacity' are also relevant to whether a severe impairment both of intelligence and of social functioning has been established in the particular circumstances of a case.

With a three year old, establishing these matters is clearly going to be difficult. The new tribunal would be assisted by another report from the consultant paediatrician directed to the specific points." [*My insert*].

See also M (a child) v Chief Adjudication Officer (Court of Appeal).

8. Commissioner L T Parker 8.6.2007

ADHD – not severely mentally impaired

CDLA/5153/97(*39/99) concerned a child with attention deficit hyperactivity disorder (ADHD) who exhibited "extremely destructive behaviour". It was not disputed that they qualified for the higher rate care component and lower rate mobility. What was at issue was whether they could satisfy the higher rate mobility conditions under the "severely mentally impaired" provision. After hearing expert witnesses (Dr Ian McKinlay – Senior Lecturer in Child Health and former Consultant Paediatric Neurologist and Dr G A Redding Consultant Child and Family Psychiatrist) the Commissioner held:

"18. On this evidence it is in my judgement impossible to say that Michael has been shown to be suffering from a state of arrested development or incomplete physical development of the brain, within the meaning of reg 12(5) cited above as explained by the Commissioner in case CDLA/156/94 [*reported as R(DLA)2/96*]. This is because it is not possible in the present state of medical knowledge to attribute the condition to one of those two state or to identify Michael as suffering from either of them: unlike a child with a condition such as autism which the Commissioner was able to accept as a "disorder of brain development" in case CDLA/1678/97. It may become possible to make such an attribution for ADHD in the future, with the advances in scanning techniques and genetic knowledge for which Professor Barkley hopes: but it is not so now." [*My insert*].

4. Commissioner P L Howell QC 5.5.1999

incomplete physical/arrested development of the brain – standards of evidence?

TV v Secretary of State for Work and Pensions (DLA) – [2013] UKUT 0364 (AAC) – CDLA/1044/2013 involved a case where the First-tier Tribunal had held that "From the information we were given … she appears to have met the normal development milestones until nursery … there was in our view no evidence available to show that she was suffering from a state of arrested development or incomplete physical development of the brain, although she clearly has severe impairment of intelligence and social functioning."

The Upper Tribunal Judge held that the issue of whether the child suffered from an incomplete physical development of the brain or arrested development of the brain needed to be tested by reference to the evidence and the background of the science involved. The Upper Tribunal held that this was "fairly stated" in general terms in the Decision Makers Guide (DMG) published by the Department for Work and Pensions. In the view of the Upper Tribunal Judge this reflected past decisions of the Upper Tribunal and Social Security Commissioners as several of those cases reported and adopted expert advice about brain development. The relevant paragraphs of the guidance were considered to be:

61352 The disabilities counting towards severely mentally impaired are defined as

1. incomplete physical development of the brain – where a person's brain has failed to grow properly and this can be seen and assessed

2. arrested development of the brain -where a person's brain is not functioning properly but no physical deficiency is apparent.

61353 A person's brain is fully developed when it reaches its maximum weight and size. This is accepted to be by the late 20's and invariably before the age of 30.

61354 A person cannot satisfy the severely mentally impaired condition unless it can be established that the cause of the mental impairment (for example accident, disease, injury) happened before the person's brain was fully developed. Degenerative diseases such as Alzheimer's disease that begin after the brain is fully developed do not satisfy the severely mentally impaired condition. Difficult cases should be referred to Medical Services for advice.

The Upper Tribunal Judge held:

"11. I have quoted that guidance because the appellant's father (unusually but perhaps wisely) quoted it to the Department when disputing the refusal to increase the award. This is plainly a difficult case in the light of the above evidence. There is no indication, despite that hint, that it was referred by the decision maker to Medical Services.

12. That guidance supports the view that the statement of the tribunal is plainly wrong in law in concluding, on this evidence, that there is "no evidence" of arrested development and relying on the child's development to nursery age to establish this. Brain development plainly does not stop then. There is a genuine difficulty here in that the experts – the consultant; the general practitioner; the experts consulted in connection with the child's special educational needs - have been unable to put an exact label on the appellant's problems. But they all find that the child's skills and development age is significantly behind her chronological age. That is evidence suggesting that there is arrested development of something, and I can see nothing significant suggesting that this does not include development of the brain. In those circumstances it is in my view appropriate to remember that entitlement is determined in disability living allowance on probabilities. Is it more likely than not that this child is suffering, on all this evidence, from arrested development of the brain?

13. There is a genuine danger in cases such as this of pitching the standard of proof too high. For example, in this case the only way of going beyond the current knowledge (or lack of it) is to consider obtaining expert medical evidence about the cause of the appellant's accepted severe impairment of intelligence and social functioning. There must be a cause or causes or that would not be the case. This is the approach taken by a number of social security commissioners and tribunal judges in past cases. But this is not a case of establishing as a matter of evidence whether or not a known cause can in fact be regarded as arrested development of the brain. If that expert concludes of the appellant, as others have, that the cause is partly unknown, what is gained? The case must still be decided on probabilities. This is in my view a case where a tribunal should remember that its decisions are to be taken within the framework of rule 2 of the Tribunal Rules. In particular, what is the proportionate way of dealing with this case fairly and justly? In my view, it is to recognise that the tribunal already has all the expert evidence it is likely to acquire without disproportionate expenditure and delay and that it must take its decision on that evidence."

11. Judge of the Upper Tribunal David Williams 30.7.2013

severe behavioural problems

DM v Secretary of State for Work and Pensions (DLA) – [2015] UKUT 0087 (AAC) – CDLA/3944/2012 held:

"*The second condition: severe behavioural problems*

55. The second condition under the SMI rules is satisfied if the Appellant "displays severe behavioural problems" within the terms of SSCBA 1992, section 73(1)(c) and (3)(b) and regulation 12(6) (see [5] above). The original tribunal was unanimous that the Appellant qualified under regulation 12(6). However, the only findings of fact it made in this regard were that the Appellant had set fire to her mother's flat, experienced command hallucinations that told her to perform negative and destructive actions, had self-harmed and had thrown a cup of tea at a helper at the day centre she attended. This is an insufficient basis on which to find that regulation 12(6) was indeed met. The fire incident was about 30 years ago. The Appellant's 2012 care plan confirms "high risk of self harm without support from husband" but does not indicate when the last such attempt was made. It also confirms the incident with the cup of tea, but again gives no date. However, the mental health team's evidence was that command hallucinations were a daily event, but were managed with support and intervention from the Appellant's husband.

56. The new tribunal will have to take evidence and make careful findings of fact as to the nature and frequency of the Appellant's disruptive behaviour. On the basis of what is on file and what the Appellant's husband told me at the oral hearing, the new tribunal may have little difficulty in concluding that, when it occurs, the Appellant's disruptive behaviour (e.g. in cars and on public transport) is extreme within regulation 12(6)(a). However, the tribunal will also have to be satisfied that the precise terms of both regulation 12(6)(b) and (c) are met.

57. As regards the requirement in regulation 12(6)(b), the new tribunal may also need little persuasion to conclude that the Appellant's extreme behaviour is such that it requires another person (typically her husband) to intervene and physically restrain her, whether in order to prevent her causing physical injury to herself or another, or damage to property. The crunch point is likely to be whether this requirement arises "regularly". This is ultimately a question of fact. In this context I draw the new tribunal's attention to my guidance on this point in Secretary of State for Work and Pensions v MG (DLA) [2012] UKUT 429 (AAC) at [23] and [24] (an appeal in which Mr Heath again appeared for the Secretary of State and Mr Stagg appeared for the claimant, who happened to be a child):

> 'What does 'regularly' mean in the context of regulation 12(6)(b)?
>
> 23. The claimant' extreme behaviour need not occur constantly, continuously or all the time. That would be to set the threshold for eligibility too high. Rather, it must be such that it 'regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property'. The word 'regularly' is a protean one, so taking its meaning from its context. The Commissioner in *CDLA/2470/2006* commented that 'such a degree of intervention and restraint is likely to be required on a significant proportion of occasions when the claimant walks moderate distances outdoors'. I agree with that observation as far as it goes.
>
> 24. I do not agree with Mr Stagg's further submission that this means that regularity under regulation 12(6)(b) can be met by such incidents occurring just outdoors. Such an analysis seems to me to be inconsistent with *R(DLA)7/02*. Rather, that sort of intervention to deal with extreme disruptive behaviour will also need to be required sufficiently often indoors as well such that, taken overall, one can say that it is required "regularly" or "in the ordinary course of events" (see *CDLA/2054/1998* at [7d]). When the claimant is outdoors, the need for intervention in the proximity of traffic is the obvious example. The indoors intervention may take any number of different forms: in *MMcG v Department for Social Development (DLA)* the claimant had to be stopped from jumping off the top step of the household stairs. Other examples – and they are no more than that – might be the need for physical restraint to stop the claimant trying to put his fingers in electrical sockets or to stop him damaging internal doors, walls or household furniture when frustrated. As Mr Deputy Commissioner (now Judge) Warren noted in *CDLA/17611/1996*, the requirements of regulation 12(6) "fall to be answered in respect of the claimant's condition generally and not with any special emphasis on behaviour when walking out of doors" (at [11]). However, I also agree with Judge Mark's helpful formulation that "Interventions may be regular if they are frequent in one context but infrequent, or even rare, in another context provided that looked at overall there is a regular requirement to intervene and physically restrain the claimant" (*Secretary of State for Work and Pensions v DM (DLA)* [2010] UKUT 318 (AAC) at [9]).'

58. Even if the regularity requirement in regulation 12(6)(b) is satisfied, the Appellant's extreme disruptive behaviour must also be such that it 'is so unpredictable that [she] requires another person to be present and watching over [her] whenever [she] is awake' within regulation 12(6)(c).

This again is a demanding test, and sets the threshold higher than the degree of continual supervision needed for the DLA care component. I refer again to my guidance in Secretary of State for Work and Pensions v MG (DLA) [2012] UKUT 429 (AAC) (at [27]-[29]):

> *'What does 'watching over' mean in the context of regulation 12(6)(c)?*
>
> 27. The new tribunal should bear in mind the guidance in the leading case of *R(DLA)9/02*. As Mr Commissioner (now Judge) May noted there, the test is 'specifically restrictive' and the carer must be both 'present' and 'watching over': 'It does not seem to me these conditions can be fulfilled when the claimant's bedroom door is closed and he is on one side of it and the carer on the other' (at [12]). Both Mr Heath and Mr Stagg agreed, as I do, that this proposition is subject to a de minimis rider, so that for example 'very short intervals without watching over' e.g. for a carer's 'comfort break' (but not, for example, a leisurely cup of tea and a prolonged respite break in the garden whilst the claimant is inside) can be ignored for this purpose (see *CDLA/2714/2009* at [10], cited in *JH v Secretary of State for Work and Pensions (DLA)* [2010] UKUT 456 (AAC) at [11]).
>
> 28. Since the oral hearing of this appeal, Judge Mark has issued his decision in *AH v Secretary of State for Work and Pensions (DLA)* [2012] UKUT 387 (AAC). Judge Mark held that 'requires' in regulation 12(6)(c) means 'reasonably requires' (at [16]). That seems to be uncontroversial. Judge Mark also expressed the view that if the carer is present close enough to hear what the claimant is doing and so to intervene if necessary, and is either looking in with sufficient regularity or (conceivably) observing the claimant on CCTV, then the fact that the claimant's bedroom door is shut does not inevitably mean that the carer is not present and watching over the claimant whenever he is awake (at [14] and [19]). This is at the very least a significant gloss on the Commissioner's ruling in *R(DLA)9/02*, although Judge Mark sought support from the observations in *CDLA/2167/2010* (at [13]). I considered whether to seek further submissions from both representatives on this issue in the light of the newly available decision. I decided not to, given that the question was not central to this appeal and the case has gone on long enough already.
>
> 29. I simply make the following observation. It seems to me that there is some force in Judge Mark's qualification. Obviously the statutory language must take its ordinary meaning from its context, in the absence of any indication to the contrary. 'Watching' means observing, being on the lookout, keeping someone or something in sight, or keeping vigil. However, 'watching over' may carry a slightly different nuance in meaning, of exercising protective care over someone or something. After all, regulation 12(6)(b) does say 'watching over' and not 'looking at'. It is arguable that the Commissioner in *R(DLA)9/02* may have elided the meanings of 'watching over' and 'watching' (see e.g. at [12]). That is not to say that the meaning of 'watching over' can be stretched like a piece of elastic, not least as it is coupled with the restrictive requirement that the carer be 'present'. That, of course, is ultimately a question of fact for the first instance tribunal.'

59. From the account that the Appellant's husband gave me, the tribunal may well find that he is with his wife at all times (unless either she is at the day centre or he has a respite break arranged through social services). He described his role as '24/7', and I do not doubt that it is. He gave as an example that even when he was having a bath, his wife puts the loo seat lid down and sits in the bathroom with him. However, the new tribunal will need to satisfy itself that he is present and watching over her whenever she is awake because of the unpredictability of her extremely disruptive behaviour and not, for example, because she is anxious when alone and simply needs continual reassurance."

11. Judge of the Upper Tribunal Nicholas Wikeley 12.2.2015