Schedule 2: Part One – Physical Disabilities

Activity 1 – Mobilising: Limited Capability for Work

mobilising – a two part test – cannot and cannot repeatedly

HD v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0072 (AAC) – CE/2293/2013 (paragraphs 4 to 6) confirms Activity 1 Mobilising is a two part test – cannot and cannot repeatedly. Although this decision was concerned with the claimant's ability to meet Activity 1 Mobilising of Schedule 3 (Limited Capability for Work-related Activity) the findings apply equally to Schedule 2 as both provisions are identical. See full write-up in Section 5.18 which deals with Schedule 3 – Activity 1 Mobilising.

1. Upper Tribunal Judge David Williams 12.2.2014

repeatedly – on level ground?

CS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0519 (AAC) – CE/551/2014 held:

"28. The appellant argues that the absence of the words "on level ground" in descriptor 1(a)(ii) means that when the test of repeatability applies, it is to be determined not in respect of level ground but in respect of "all conditions including stairs and the steep ramps that have to be negotiated normally by wheelchair users."

29. The Secretary of State's representative argues that sub-paragraph (ii) must be read as following on from sub-paragraph (i) and that the ability to repeat the limit of mobilisation is to be tested in respect of level ground. It was never intended that there should be any distinction between the requirements of the first and second sub-paragraphs.

30. The Secretary of State's representative must be right. Although any conceivable ambiguity could have been avoided by the insertion of the words "on level ground", I am satisfied that the only possible interpretation of the repeatability test is that it is on the same terms as the primary test. That is on level ground."

2. Judge of the Upper Tribunal C A White 19.11.2014

repeatedly mobilise

KB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0126 (AAC) – CE/2490/2013 involved an appeal against a decision of the Secretary of State dated 2.5.2012 that the claimant did not have limited capability for work. On appeal on the question of mobility the First-tier Tribunal awarded the claimant a total score of 6 points under Activity 1: mobilising, on grounds that although he walked a "significant distance" for his medical examination he would probably have had to stop on a number of occasions due to discomfort and his right shoulder could cause him problems with repeated use of a wheelchair over 100 yards.

The Upper Tribunal Judge held:

"5. The First-tier Tribunal clearly considered that descriptor 1(c)(i) was not satisfied because, even if the claimant could not walk as far as 100 metres, he could have propelled himself in a wheelchair for that distance. However, before deciding to award points under descriptor 1(d), it was necessary for the First-tier Tribunal to decide whether descriptor 1(c)(ii) was satisfied. The Secretary of State concedes as much. However, I agree with Mr Davé [*representative for the claimant*] that it was necessary to consider descriptor 1(a)(ii) as well. It seems to me that "repeatedly" must mean more than two or three times, at least in the context of paragraph 1(a). There will be a few people, of whom this claimant might possibly be one, who can manage over 100 metres in one go (and therefore implicitly in two or more goes) but who cannot reasonably be expected to manage a further distance of 50 metres within a reasonable timescale and who would therefore qualify for 15 points under descriptor 1(a)(ii) even if able repeatedly to mobilise a shorter distance.

6. The scheme of this legislation is clear. For each of descriptors 1(a), (c) and (d), two questions must be asked. First, can the claimant mobilise more than the relevant distance without stopping. If the answer is "no", the descriptor is satisfied. If the answer is "yes", the second limb must be considered and it must be asked whether the claimant can *repeatedly* mobilise the relevant distance. Again, if the answer is "no", the descriptor is satisfied. Only if the answer is "yes" to both questions is the descriptor not satisfied so that one must consider the next descriptor.

7. If the implication of paragraph 12 of the statement of reasons was that the claimant could not repeatedly propel himself in a wheelchair for more than 100 metres, the question arose as to how far the claimant could walk at a time, given that the First-tier Tribunal appear to have considered that he could walk a short distance repeatedly in order to manage a total of "well over 300 yards and nearer to half a mile". The First-tier Tribunal did not make any specific finding on that question but it is odd that it found only that he could use a wheelchair for a distance of over 100 metres if it thought that the claimant could walk that far in one go as well. If he could not walk more than that distance in one go, then he could not repeatedly walk that distance either, in which case at least 9 points should have been scored by virtue of descriptor 1(c)(ii).

That, I suspect, is what the First-tier Tribunal would have found had it asked itself the right question. However, its finding that the claimant "would probably have to stop a number of times due to discomfort" while walking to the medical examination left open the possibility that the distance that the claimant could walk each time (at least after the first couple of times) before having to stop was less than 50 metres, in which case 15 points would have been scored under descriptor 1(a)(ii), notwithstanding the claimant's ability to move over 100 metres in a wheelchair albeit without repetition."

1. Judge of the Upper Tribunal Mark Rowland 19.3.2014

repeatedly... within a reasonable timescale – no precise definition but something more than occasionally in the course of a day (work context?)

AS v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0587 (AAC) – CE/1470/2013 held:

"*The Appellant's argument*

15. The submissions of Mr Feirn for the Appellant can be summarised thus. The word "repeatedly" means "again and again, or over and over". The inclusion of the word "repeatedly" in the statutory test implies a higher level of repetition than was required for previous descriptors in the incapacity benefit and original ESA regime, which already included the notion of "reasonable regularity".

The mobilising descriptor has to be considered in the light of the nature of the work involved, relying on *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42 (reported as R(IB)2/09). The tribunal had to take a realistic approach; Mr Feirn put is [*sic*] in this way:

> "It is hard to visualise or comprehend that needing to take a 1 to 2 hour rest before the third attempted time of walking 50 metres (paragraph 29, statement of reasons) can be considered as doing an activity repeatedly. Especially when [considered] in the work environment, with all its economic pressures and requirement to perform tasks and activities as part of their employment."

The Secretary of State's argument

16. Mr David Kendall, who now acts for the Secretary of State in these proceedings, does not support the Appellant's appeal to the Upper Tribunal. He argues that the Court of Appeal's decision in *Charlton* is confined to the issue of what is now regulation 29 of the ESA Regulations, and does not assist with the interpretation of the various Schedule 2 descriptors. He accepts that the activities listed in Schedule 2 to the ESA Regulations have "a connection with the workplace" to the extent that they have been "drawn up to reflect the demands of the modern workplace and to take into account the development and availability of adaptive technology and to take into account the obligations of employers to make reasonable adjustments in order to accommodate people with long term disabilities". However, he submits that both the nature of any specific working environment and wider questions of employability are irrelevant. Furthermore, whether an activity can be performed "repeatedly... within a reasonable timescale" is, he says, a question of fact for the First-tier Tribunal. Mr Kendall concedes that in the present case the tribunal's findings "are perhaps on the margins envisaged by case law", but concludes that they were sustainable on the evidence and findings made.

The Upper Tribunal's analysis

<u>The work context</u>

17.I accept Mr Kendall's submission for the Secretary of State that the Court of Appeal's decision in *Charlton* does not assist in interpreting the particular descriptors in Schedule 2 to the ESA Regulations. It is only if a claimant fails to achieve 15 points under Schedule 2 that one turns to consider whether he or she falls within the exceptional circumstances rule embodied in regulation 29.

18. I also accept as correctly made Mr Kendall's concession that the various activities in Schedule 2 have "a connection with the workplace", albeit that the descriptors are not concerned with any one specific working environment and do not bring in wider questions of employability. This concession properly reflects the direction of policy travel as embodied in legislative change in this area. The first clue is in the change of name; Parliament has approved the shift from the "*personal* capability assessment" in the incapacity benefit scheme to the "*work* capability assessment" under the ESA regime. The second clue lies in the drafting of the various activities and individual descriptors, and in particular the amendments which took effect on March 28, 2011 (see further the Explanatory Memorandum to the draft 2011 Regulations, sent to the Social Security Advisory Committee on 13 August 2010). Thus the first three activities in the original Schedule 2 to the ESA Regulations – walking, standing and sitting, bending or kneeling – were seen as providing a high degree of overlap for e.g. wheelchair users, so providing an inaccurate assessment of an individual's true level of functional limitation in the workplace. This resulted in a radical re-writing of the first activity, transforming it from "walking" to "mobilising", the specific inclusion of the "work station" test in the second activity (standing and sitting) and the abolition of the third activity (bending or kneeling) as being both an unnecessary and undesirable requirement in the modern workplace.

19. It follows that the activities and descriptors in Schedule 2 do not exist in some sort of artificial or parallel universe, entirely divorced from the real world of work. They have to be applied on their own terms, but understood against the backdrop of the modern workplace. In deciding whether a particular descriptor is met, decision makers and tribunals may therefore find it helpful to consider the claimant's ability to undertake the activity in question in a range of different working contexts. However, claimants will not be awarded a defined descriptor simply because they can show that it would apply to them if they were employed to do a particular job in a specific type of working environment.

20. This is entirely consistent with the well-established principle that decision makers and tribunals must consider whether a claimant can perform a particular activity with a reasonable degree of repetition, sometimes referred to as "reasonable regularity" principle. This principle applies to the ESA scheme just as it did to the previous incapacity benefit regime. As Upper Tribunal Judge Turnbull has explained, "if the effect of performing the activity is likely to be to disable the claimant from performing it for a substantial period, that will need to be taken into account" (see *AF v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 61 at paragraph 11, approved and followed in *SAG v Department for Social Development (ESA)* [2012] AACR 6). Judge Nicholas Paines QC has described the principle in similar terms: "it is implicit in this that a description set out in a descriptor will not fit a claimant who can only perform the relevant task exceptionally or infrequently" (*AG v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 077 (at paragraph 18).

21. Within the legislative scheme as a whole, this principle only makes sense in the context of the needs of a modern workplace and the level of activity that an employer attuned to the requirements of disability discrimination law can reasonably expect. Plainly, the test is not about a high-pressure working environment, e.g. a call-centre with demanding targets or a factory production line with a fast-moving conveyor belt. Equally, however, the test is not about what the person can do in their own home and entirely in their own time and at their own pace, subject to no external constraints or pressures whatsoever. If reasonable regularity is judged by the latter criterion, then the test has ceased to be a test of "whether a claimant's capability for work is limited by the claimant's physical or mental condition" within regulation 19(1) of the ESA Regulations.

<u>The ability to mobilise a set distance "repeatedly... within a reasonable timescale"</u>

22. This takes one to a consideration of the specific test for the activity of mobilising in Schedule 2 to the ESA Regulations, as substituted by the 2011 Regulations (see paragraphs 2-4 above). The tribunal's findings of fact and reasoning are set out at paragraphs 11 and 12 above. In this context I should note two further matters.

23. First, it seems clear from the tribunal's statement of reasons that it confirmed the award of 9 points on the basis that the Appellant satisfied the terms of mobilising descriptor 1(c)(ii), and not 1(c)(i) (see the last sentence of paragraph 30 of the tribunal's reasons at paragraph 12 above). The Secretary of State's representative in this case has not sought to argue that because the Appellant could manage more than 100 metres on one occasion, he therefore could not qualify under descriptor 1(c) at all. I regard that implicit concession as rightly made.

24. Second, Mr Feirn, in his original submission to the tribunal, had argued that it was unrealistic to expect the Appellant to use a wheelchair, given that he had not been assessed for one and had problems with both his elbows and with the effects of diabetes. The tribunal did not make an express finding on this point. However, it is clear from the tribunal's treatment of regulation 29 that they considered that a wheelchair could be provided in the workplace "and a colleague designated to push him to the toilet if required" (at paragraph 51). Given the tribunal's overall reasoning and findings on the mobilising descriptor, it is implicit that the tribunal concluded that there would be times when the Appellant could not reasonably use a wheelchair unaided. I also proceed on that basis.

25. So what then is meant by an ability to mobilise a set distance "repeatedly... within a reasonable timescale"? An excellent starting point is the decision of Upper Tribunal Judge Jacobs in *AH v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 118 (AAC). That case turned in part on the proper meaning and application of activity 1 in Schedule 3 to the ESA Regulations (as amended). However, given that activity 1 in Schedule 3 and the mobilising descriptor 1(a) in Schedule 2 are defined in exactly the same terms, Judge Jacobs's analysis is clearly very much in point. Two points stand out.

26. The first point is the importance of focussing on the particular wording of the relevant activity and descriptor when considering the reasonable regularity principle.

> "13. The Secretary of State's representative has conceded that, subject to any particular provision within an activity or descriptor, the test is whether an activity can be undertaken repeatedly, reliably and safely. I accept that concession, which is consistent with the caselaw.
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> 14. In the case of Activity 1, there is a clear contrast in the language. Descriptor (a) applies if the claimant cannot mobilise for more than 50 metres without stopping, whereas descriptor (b) applies if the claimant can do so, but not 'repeatedly … within a reasonable timescale'. That makes it impossible to read the need for regularity into descriptor (a)."

27. Thus the very fact that limb (ii) of descriptors 1(a), (c) and (d) of Schedule expressly incorporates a "repeatedly … within a reasonable timescale" criterion means, by necessary implication, that this general principle does not qualify limb (i) of each of those descriptors. This approach is consistent with the history of the drafting of the new descriptors. The original plan was for descriptors simply defined in terms of an inability to "mobilise more than [50/100/200] metres on level ground without stopping or experiencing severe discomfort" (*Work Capability Assessment Internal Review*, October 2009, in Explanatory Memorandum to the 2011 Regulations, p.151). The qualifier "repeatedly" appeared only in the proposed 50 metre descriptor but not in those relating to 100 metres or 200 metres.

28. However. the subsequent *Addendum – Technical Review by Chief Medical Officer* (March 2010, Explanatory Memorandum, p.180) made three further recommendations, each of which was incorporated in the final version of the 2011 Regulations. The first was that "severe discomfort" was ambiguous and was to be replaced by "significant discomfort". I note here that the tribunal occasionally referred to "severe" rather than "significant" discomfort. While that mistaken usage is unfortunate, I am not sure that it amounts to an error of law in itself, in the light of the tribunal's overall analysis. The second was that exhaustion should be added to the statutory definition, to accommodate problems associated with fluctuating conditions. The third, tellingly for present purposes, was that:

> "An individual must also be able to repeat a task. If, after doing an activity once, an individual cannot repeat it within a reasonable time then they should be considered as unable to carry out the activity at all."

As a result, descriptors 1(a), 1(c) and 1(d) were subdivided, such that the original formulation of each descriptor was preserved in limb (i), whilst a new limb (ii) included the 'repeatedly … within a reasonable timescale' qualification to each relevant distance. For my part, unlike Mr Feirn, I do not regard this as importing a more demanding test than that of "reasonable regularity". I would simply regard the wording here as a legislative variant on that case law principle, but to the same effect.

29. The second point to be derived from *AH v Secretary of State for Work and Pensions (ESA)* (at paragraphs 18-22) is the importance, where the legislative text contains irreducible terms, of applying that statutory language without any gloss.

> "Analysis
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> 18. The words 'repeatedly', 'significant discomfort or exhaustion' and 'reasonable timescale' are normal words in everyday use. Like all words, they take their meaning from their context, or at least the context colours their meaning. I can, though, see no reason why they should have a different meaning just because they appear in Schedule 3. The purpose of that Schedule is to identify claimants who are not required to take part in work-related activity. But it does so by reference to the nature and extent of their disabilities, not by reference to work-related activity itself. The effect of coming within Schedule 3 may differ from the effect of coming within Schedule 2, but the criteria for classifying claimants are the same.
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> 19. I am not going to attempt to define what these words mean. That would be wrong. It would be the wrong approach to statutory interpretation and would trespass impermissibly into the role of the First-tier Tribunal. It is not for the Upper Tribunal to give more specific content to the law than the language used in the legislation. The Upper Tribunal will not decide that 'repeatedly' means five times, ten times or any other number. Nor will the Upper Tribunal decide that 'reasonable timescale' means five seconds, five minutes or any other time.
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> 20. The correct approach was explained by Lord Upjohn in *Customs and Excise Commissioners v Top Ten Promotions Ltd* [1969] 1 WLR 1163, at 1171:
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> > "It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look up examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament."
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> 21. The key to applying the words of Activity 1 lies in making findings of fact relevant to those words that are as specific as the evidence allows. And, if the claimant is present at the hearing, the tribunal should ensure that it obtains evidence that is sufficient to that purpose. Just to take one example: the tribunal should have probed Mr H's evidence that he 'could not repeatedly do 50 metres'. How far could he walk before stopping? What made him stop? How did he feel? How soon could he proceed? How often could he repeat that process? This was particularly important in this case, because of the content of Mr H's evidence to the tribunal. At least as it was recorded by the judge – the record of proceedings does not have to be verbatim – his evidence was expressed in the language of the Schedule. The tribunal had to obtain evidence that would allow it to assess Mr H's answers by reference to that language. It could not do that if the evidence repeated that language. The tribunal would at least need to know what Mr H meant by 'repeatedly', as he might not be using it in the same way as in Activity 1.
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> 22. I accept Mrs Mitchell's argument that the tribunal failed to make findings of fact on the terms of the Activity with sufficient detail to show whether or not it applied. For this reason, the tribunal's decision involved an error of law. I am not able to say that the tribunal came to the right decision, because the evidence is not sufficient to allow me to do so."

30. This analysis harks back to Lord Reid's famous observation in *Brutus v Cozens* [1973] AC 854 (at 861) that "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law." Similarly, Lord Hoffmann, in explaining the significance of those dicta, has noted that "many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning" (*Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 at paragraph 23). Thus Judge Jacobs's observations in *AH v Secretary of State for Work and Pensions (ESA)* stand in that same distinguished tradition.

31. In the appeal before Judge Jacobs the tribunal had failed to make relevant findings of fact. That criticism certainly cannot be levelled at the tribunal in the present case. Does that mean that its decision on those facts is immune from challenge? Was it just a question of fact for the tribunal? I think not. It is well established that there will be some cases where the tribunal's conclusion is outside the (fairly broad) bounds of reasonable judgement, i.e. it is beyond "the generous ambit within which a reasonable disagreement is possible" (*G v G* [1985] 1 WLR 647 at 652E *per* Lord Fraser of Tullybelton).

32. I agree with Judge Jacobs that it is not appropriate for the Upper Tribunal to seek to provide a precise definition of what is meant by "repeatedly" or "within a reasonable timescale". I note, however, that Mr Kendall accepts that this tribunal's findings "are perhaps on the margins envisaged by case law". In my view they lie outside those bounds. I agree with Mr Feirn's submission that the tests set out in the mobilising descriptors have to be seen in the context of the workplace, rather than in splendid isolation.

The tribunal fell into error by not considering the question of what was a "reasonable timescale" against the background of a working environment. What might well be a reasonable timescale for the Appellant at home would not necessarily be a reasonable timescale in the workplace. The consequence of the tribunal's approach was to rob the word "repeatedly" of any real meaning, as the tribunal's findings would equally well meet a statutory test predicated on the activity in question being performed only "occasionally ... in the course of a day". Whilst I am not prepared to draw a precise line, I am satisfied that on any reasonable analysis this tribunal's conclusion was the wrong side of the line. The ability to perform a function in a working environment "repeatedly ... within a reasonable timescale" must be something more than "occasionally ... in the course of a day"."

1. Judge of the Upper Tribunal Nicholas Wikeley 20.11.2013

mobilising – test significant discomfort not severe discomfort (significant discomfort – degree of discomfort which does not necessarily reach the threshold of severe discomfort)

CK-v-Department for Social Development (ESA) – [2013] NICom 28 – C17/12-13 (ESA) in assessing the claimant against Activity 1: Mobilising the tribunal found:

"Having considered all the evidence in the round, the Tribunal concluded that the Appellant's limitations in mobilising fell outside the scope of the relevant descriptors. It felt that he would be able to walk repeatedly in excess of 200 metres without severe discomfort or exhaustion; and if he were not able to walk, he would be able to mobilise by means of a manual wheelchair, the Tribunal being satisfied that any difficulties he might have with breathlessness or using his hands would not be sufficient to bring him within the relevant criteria".

On the issue of walking without "severe discomfort" the Commissioner observed that the term is a familiar one and appears both within the test relevant to the assessment for the high rate of the mobility component of Disability Living Allowance and within the pre-28 March 2011 version of the descriptors relevant to the activity of "Walking".

The Commissioner (at paragraph 11) held that since 28 March 2011 and the introduction of the "Mobilising" descriptor, the relevant descriptors now use the term "significant" discomfort and that in their view there is a qualitative difference between the concepts of "severe discomfort" and "significant discomfort".

The Commissioner (at paragraph 12) held that "It appears to me that "significant discomfort" denotes a degree of discomfort which does not necessarily reach the threshold of "severe discomfort". Each of the terms refers to something which is of its nature subjective to a claimant, and which is not clearly defined by legislation. Tribunals apply their relevant specialist experience to such questions. In resolving them, an element of judgment is required which could only be challenged to a Social Security Commissioner on the grounds that it was exercised unreasonably. However, by referring to a test of "severe discomfort" when the correct test involves "significant discomfort" there is an obvious implication that the tribunal has addressed its mind to the wrong question before exercising its judgment. I consider that the tribunal has made a material error of law as a consequence."

1. Commissioner O Stockman 17.4.2013

mobilising – stopping and pauses avoid significant discomfort/exhaustion and speed of walking (and relevance of DLA mobility component award)

GC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0117 (AAC) – CE/3377/2013 involved the case of a claimant who had been getting Income Support on grounds of incapacity for work and Disability Living Allowance (DLA) for both care and mobility needs. She was then refused Employment and Support Allowance (ESA) following conversion from Income Support.

The Healthcare Professional assessed her as having no problems with mobility (or continence) and the DWP awarded her no points under the 'limited capability for work' assessment. She appealed against this decision on various grounds, including that there had been an underestimation of her mobility problems caused by her breathing difficulties, arthritis and ankle injury. The decision was reconsidered but not changed.

On appeal the First-tier Tribunal allowed the appeal to the extent of deciding that the claimant scored 9 points under Schedule 2 to the Employment and Support Allowance Regulations 2008 in respect of mobilising, as she could not repeatedly mobilise more than 100 metres within a reasonable timescale, and 6 points in respect of continence, as she was at risk of a loss of control sufficient to require cleaning and a change of clothing. However, it found that none of the descriptors in schedule 3 applied to her. The effect of this decision was that the claimant was entitled to be put in the work-related activity group for the purposes of ESA, but not the support group.

The First-tier Tribunal accepted that the claimant's ability to move around was significantly limited, but did not consider it likely that her ability was so restricted as to leave her unable to walk 50 metres. It referred to her evidence of shopping and visiting the local library and stated:

"With the use of a walking stick to remove weight from her ankle and assist balance, and walking slowly it was likely that the appellant would be able to walk for 1-2 minutes on level ground without significant discomfort or exhaustion. With pauses, the appellant is likely to be able to do so repeatedly within a reasonable timescale and it is likely that this is in fact what the appellant does when out. The tribunal was satisfied that the appellant was able to walk over 50 metres and could do so repeatedly and within a reasonable timescale.

The tribunal was also satisfied that it was likely that the appellant, for the majority of the time, was able to walk over 100 metres without significant discomfort or exhaustion. However, it is not likely that she is able to walk more than 100 metres repeatedly within a reasonable timescale due to significant discomfort." [*My emphasis*].

Through her representative, the claimant sought permission to appeal to the Upper Tribunal in respect of the reasoning on mobilising. The representative picked up on the First-tier Tribunal's reference to pauses. The representative submitted that if the claimant had to stop or pause when walking a particular distance, she should satisfy the criterion of being unable to walk that distance and there should be no need to refer to the criterion of ability to walk the distance repeatedly and within a reasonable timescale. Further, the representative submitted that there was no record of the tribunal asking the claimant when she had to stop while walking, and repeated the claimant's evidence that all her walking was done in pain and severe discomfort.

The representative also highlighted the First-tier Tribunal's reference to the claimant walking slowly for one to two minutes, invoking the Disability and Carers Service's benchmark of 40 to 60 metres per minute as a slow walking speed and pointed out that, at a midpoint slow walking speed of 50 metres per minute, the claimant could only cover 50 metres if the lower end of the tribunal's estimated range of her walking time (i.e. one minute) was correct. It was therefore unclear why the tribunal had assessed her as able to walk 100 metres rather than 50 metres.

Finally the representative referred to the finding of an appeal tribunal in 1996 that the claimant was virtually unable to walk for the purposes of DLA, and pointed out that the claimant's condition had deteriorated since then.

Permission to appeal was granted by Judge Wright, who found these points arguable.

The Secretary of State did not support the appeal. His representative submitted that there was an inevitable element of subjectivity in the assessment of a claimant's likely walking distance and that the tribunal was entitled to reach the conclusion that it did. The Secretary of State's representative submitted that the First-tier Tribunal had deliberately referred to 'pauses', rather than to the claimant stopping, when it described her walking ability.

In relation to the claimant's award of DLA, the Secretary of State's representative accepted that the evidence underlying a DLA decision on inability to walk may be relevant to an ESA determination and that, on the face of it, the tribunal erred in law by not calling for the paperwork in relation to the DLA award. However, he submitted that the DLA records in fact showed that the claimant's last assessment for DLA had been in 2004, so that any evidence in relation to it was too out of date to be relevant.

He relied on a paragraph in Judge Jacobs's decision in *ML v Secretary of State for Work and Pensions* [2013] UKUT 174 (AAC) where Judge Jacobs said that the fact of an award of the higher rate of the mobility component of DLA was in itself only evidence that at some point in time a claimant had been assessed as qualifying for that rate of the mobility component and that without more information it was impossible to relate the award to the descriptors for mobilising in the limited capability for work assessment, concluding that "it is the evidence that matters, not the award".

The Upper Tribunal Judge held that he would deal firstly with the conclusion of the First-tier Tribunal on mobilising under the 'limited capability for work' assessment and secondly with the relevance of the award of Disability Living Allowance.

On the issue of mobilising the Upper Tribunal Judge held:

"17. The relevant descriptors in the limited capability for work assessment are worded as follows (the definition of the activity was amended in January 2013, but that is not material to this case):

(a) Cannot either

(i) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or

(ii) repeatedly mobilise more than 50 metres within a reasonable timescale because of significant discomfort or exhaustion.

(That descriptor attracts 15 points.)

(b) Cannot either

(i) mobilise more than 100 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or

(ii) repeatedly mobilise more than 100 metres within a reasonable timescale because of significant discomfort or exhaustion.

(That descriptor attracts 9 points.)

(d) Cannot either

(i) mobilise more than 200 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or

(ii) repeatedly mobilise more than 200 metres within a reasonable timescale because of significant discomfort or exhaustion.

(That descriptor attracts 6 points.)

18. The limited capability for work-related activity assessment in schedule 3 to the Regulations contains a single descriptor for mobilising, worded identically to (a) above. It follows that a claimant who satisfies (a) above will be assessed as having both limited capability for work and limited capability for work-related activity and will be placed in the support group; a claimant who satisfies (b) or (d) above will not be assessed as having limited capability for work unless (as the tribunal found here) they score sufficient points under other schedule 2 descriptors. They will not be assessed as having limited capability for work-related activity under schedule 3 unless they meet another schedule 3 descriptor.

19. In my judgment the tribunal correctly understood the relationship between parts (i) and (ii) of each descriptor in schedule 2: a claimant meets the descriptor if either they cannot mobilise as described in part (i) of the descriptor or they cannot repeatedly mobilise as described in part (ii): see *HD v Secretary of State for Work and Pensions* [2014] UKUT 72 (AAC). The alternative interpretation, to the effect that a claimant only met the descriptor if they could do neither of those things, would render part (ii) of each descriptor otiose [*meaning: serving no ptactical* [*sic*] *purpose*].

20. It is true that the interpretation preferred by Judge Williams and the Secretary of State in *HD*, and by myself, arguably makes part (i) of the descriptor superfluous: since inability to mobilise over the stipulated distance repeatedly satisfies the descriptor, it would be possible in each case to go straight to that issue, without troubling to consider whether a claimant can mobilise over the distance once; nevertheless, the existence of part (i) provides a convenient route to finding the descriptor met in the case of a claimant who cannot mobilise over the stipulated distance at all.

21. I do not consider that part (i) of each descriptor draws any distinction between 'stopping' and 'pauses'; if a person has to interrupt their mobilising within the stipulated distance in order to avoid significant discomfort or exhaustion, they meet part (i) of the descriptor without regard to whether the interruption is better described as stopping or a pause.

22. My reading of the decision is that the tribunal correctly understood this. Their reference to pauses was in the context of mobilising repeatedly within a reasonable timescale (part (ii) of the descriptor). I read the second sentence that I have quoted from their decision as meaning that the claimant could walk for one to two minutes, pause, and then carry on for a further one to two minutes.

23. The implications of part (ii) of each descriptor will no doubt be further developed in case-law. Given that the assessment is designed to gauge the claimant's ability to meet the demands of a workplace, I respectfully agree with Judge Wikeley (*AS v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 0587 (AAC)) that the schedule has in mind a claimant's ability to meet the demands of a job in which they might be required to mobilise from place to place on a number of occasions during the working day. A claimant who was able to make the journey once but was not able to repeat it within a 'reasonable timescale' would meet the descriptor. What is a 'reasonable' timescale will need to be assessed case by case, but it is shorter than the 'several hours' rejected by Judge Wikeley.

24. In the present case the tribunal found that the claimant could repeat a distance of 50 metres after a 'pause', a word that suggests that she could repeat the distance for a second time not long after completing it the first time. That would amount to repetition of the distance 'within a reasonable timescale', so I do not consider that the tribunal's reasoning can be faulted in that respect.

25. What does, however, trouble me is the way in which the tribunal translated their estimate of the claimant's walking time – one to two minutes – into an estimate of walking distance. I am concerned as to whether they gave an adequate statement of the reasons for their conclusion on the statutory question of distance – in other words, an explanation that enables the reader to understand why their (*sic*) reached their conclusion that the claimant could repeatedly mobilise for 50 metres, albeit not for 100 metres.

26. I agree with the claimant's representative that the reader would reasonably interpret their reference to 'walking slowly' as walking at a pace of 40 to 60 metres per minute. The tribunal expressed the walking time as a range of between one and two minutes. While only 60 seconds separate the top end of that range from the bottom end, its top end is twice as long as the bottom end.

27. If (for the sake of argument) the tribunal had expressed their conclusion on walking time as (say) 'about 1½ minutes', the reader would readily understand that they were estimating a walking distance of between 60 metres (at 40 metres per minute) and 90 metres (at 60 metres per minute). But they did not; their use of a time estimate of one to two minutes translates into a distance range of between 40 metres (assuming one minute's walking at 40 metres/minute) and 120 metres (assuming two minutes' walking at 60 metres/minute). They do not offer any view on any walking time between one and two minutes that they regard as average or typical for the claimant.

28. I am therefore forced to conclude that in this respect the tribunal's extremely through (*sic*) and careful decision is not supported by an adequate statement of reasons.

29. I must therefore set the decision aside. I am not qualified to decide the appeal myself, since I have not seen or heard directly from the claimant and do not possess the additional medical and disability expertise that First-tier Tribunals in ESA cases have. I must therefore remit the case to a freshly constituted tribunal for redetermination."

On the issue of the award of Disability Living Allowance the Upper Tribunal Judge held:

"30. In view of the decision that I have reached above, this issue will not affect how I dispose of the appeal to the Upper Tribunal. However, I need to deal with it since it could be relevant to the way the new tribunal should approach the case.

31. The tribunal were aware of the award of the higher rate of the mobility component of DLA to the claimant in 1996. The 1996 tribunal's statement of reasons was in the papers. The tribunal did not investigate the reasons for the continuing DLA award, saying that the 1996 tribunal had been 'dealing with the situation as at the date of that decision and based upon the evidence relevant at that time'.

32.The Secretary of State has suggested that the tribunal erred in law in not adjourning the proceedings and calling for the papers relating to the award of DLA (although the error was not material, given the staleness of the evidence that would have been produced). In reply, the claimant's representative does not directly ally herself with that suggestion; she submits that the DLA award, which she says was made indefinite in 2004, supported the claimant's case on the ESA mobilising descriptor given that the claimant's condition had deteriorated since then.

33. Different Upper Tribunal judges have taken different positions on this question. I have referred above to Judge Jacobs's decision in *ML*. By contrast, in *MI v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 0447 (AAC) Judge Williams decided that, at least in the circumstances of that case, a tribunal had erred in not calling for DLA papers. In my view it cannot be said that the law either always or never requires a tribunal to adjourn and call for DLA papers in circumstances of the present sort. Everything depends on the precise facts of the case.

34. Tribunals are often faced with cases in which categories of information that might be helpful to the tribunal are not in their papers. For example, they may or may not have a claimant's GP records; the claimant may have been to a specialist for treatment, but the papers do not contain any report from the specialist; the claimant may not have been examined on behalf of the DWP by an examining medical practitioner; or, as here, an ability similar to the ability at issue before the tribunal may have been adjudicated on for the purposes of another social security benefit, but the papers are not before the tribunal. Other examples can no doubt be proffered. In all these situations, it seems to me, the tribunal has a discretion, to be exercised judicially, as to whether they adjourn with a view to obtaining the further material.

35. In exercising that discretion, the tribunal will balance the competing factors, which include: the wishes of the claimant, particularly if represented; the delay to the proceedings before it; the amplitude of the evidence already before it; the likely relevance or helpfulness, so far as it can be judged, of the missing material, etc.

36. In the present case the tribunal knew that the higher rate of the mobility component of DLA had been awarded by a tribunal in 1996 and that the award continued. The decision that they were reaching on ESA was on the face of it inconsistent with the DLA award. However, they had reasonably ample material on the ESA claim, including an examining doctor's report. It cannot in my judgment be said that no reasonable tribunal in the circumstances of the present case could have failed to adjourn.

37. I therefore do not direct the new tribunal to obtain such further DLA papers as may exist, over and above the computer prints already supplied by the Secretary of State. But, especially given that there will be a period of time before the case can be re-listed, it is open to the Secretary of State to obtain and lodge any such papers if so advised. It is also open to the claimant to apply to the First-tier Tribunal for a direction that that be done, but I leave any such application to be dealt with by the First-tier Tribunal."

See also DB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0471 (AAC) – CE/1690/2014

1. Judge of the Upper Tribunal Nicholas Paines QC 14.3.2014

without stopping – without pausing…

DB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0471 (AAC) – CE/1690/2014 involved an appeal where the First-tire Tribunal had found that the claimant scored 9 points on the mobilising limited capability for work descriptors in Schedule 2 to the 2008 Regulations with the result that he was not to be treated as having limited capability for work. The claimant had claimed to score 15 points for mobilising under Schedule 2, and his evidence included evidence that he had been found to be virtually unable to walk by another tribunal, which had awarded him the higher rate of the mobility component of Disability Living Allowance. The tribunal accepted that the claimant did have considerable difficulties in mobilising but concluded that "the best choice - for the majority of the time - was activity 1(c), where there was an inability to mobilise 100 meters [sic] on level ground without stopping in order to avoid significant discomfort or exhaustion; or an inability to repeatedly mobilise 100 metres within a reasonable timescale because of significant discomfort or exhaustion." The statement of reasons for the decision of the First-tier Tribunal continued:

"4…… The Tribunal observed and found that the Appellant did (making use of a walking stick) have an awkward gait – because he walked on the edge of his rotated, left foot – he nevertheless progressed quite quickly and would cover 30 metres in about as many seconds. At that point, he would pause for a few seconds and then continue at the same, quite fast pace. In the Tribunal's evaluation, such a pause does not amount to a 'stop' and it would expect that he would be able to achieve a hundred metres within 2 minutes. At that point, he would need to rest for more than a pause. The Tribunal considered that would have been reasonably typical of the way the Appellant mobilised at the date of the decision under appeal (although there was an attempt to use a prescribed splint some months later to correct the foot drop). The Tribunal deliberated on what is the conceptual or practical difference between a 'pause' and a 'stop' and considered that a pause is an act involved in pacing an activity, whereas a 'stop' creates a break in the activity. In the Appellant's case, he does not need to need to break until he achieves about 100 metres. It also considered that finding Activity 1(c) was not inconsistent with and (*sic*) award of the mobility component of DLA, where case law has suggested that being unable to achieve around 70 metres at a reasonable pace without severe discomfort might meet the criteria for such an award."

The Upper Tribunal Judge held that the First-tier Tribunal was wrong in law in the way it distinguished a "pause" from a "stop". The Upper Tribunal Judge held:

"4. I agree with the Secretary of State that the tribunal was wrong in law in the way it distinguished a pause from a stop. The descriptor is concerned with the distance a person can mobilise "without stopping". The simple question for the tribunal is "at what point does the claimant need to stop in order to avoid significant discomfort or exhaustion?" For this purpose, it does not matter if he has to stop for a few seconds or for several minutes - see also as to this *GC v SSWP* [2014] UKUT 117 (AAC) at paragraph 21 where Judge Paines QC stated "I do not consider that part (i) of each descriptor draws any distinction between 'stopping' and 'pauses'; if a person has to interrupt their mobilising within the stipulated distance in order to avoid significant discomfort or exhaustion, they meet part (i) of the descriptor without regard to whether the interruption is better described as stopping or a pause."

5. On its findings of fact, therefore, the proper conclusion for the tribunal to have come to was that the claimant would stop for a few seconds after 30 metres. The tribunal then failed to make any finding, as it should have, as to why he stopped for those few seconds. If it concluded that he needed to stop to avoid significant discomfort or exhaustion, or would have needed to stop for that reason after no more than 50 metres, the appropriate conclusion would appear to have been that the claimant could not mobilise on foot for more than 50 metres without stopping for that reason."

The Upper Tribunal Judge then went on to point out that even if this were the true extent of the claimant's walking ability there was still a need to assess his ability to mobilise using a manual wheelchair. The Upper Tribunal Judge held:

"6. That, however, does not automatically score points under the first descriptor. Even if it was the case that the claimant could not mobilise on foot to that extent, the tribunal would also need to consider whether he could reasonably use a manual wheelchair, and if so, how far he could mobilise on level ground in that wheelchair. Given that the claimant did not appear to have a problem with the use of his arms, and his back problem was with his lumbar spine, I am unclear from the decision why he could not have mobilised in a wheelchair, and the tribunal's statement of reasons makes no reference to this."

It was for these reasons that the decision of the First-tier Tribunal was held to be in error of law and set aside by the Upper Tribunal Judge and remitted for rehearing by a new tribunal.

See also GC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0117 (AAC) – CE/3377/2013 and RA v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 432 (AAC) – CE/3146/2011.

2. Judge of the Upper Tribunal Michael Mark 17.10.2014

mobilise – use of wheelchair

[2015] AACR 5 (unreported PR v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0308 (AAC) – CE/327/2013 and CE/509/2013) examined the factors and circumstances to be taken into account when deciding the correct approach to 'mobilising' within activity 1. Up to this point there had been a number of case law decisions with conflicting and different answers. The decision examined whether it was reasonable to expect a claimant to use a wheelchair if they did not actually have one. It also examined whether it was only the claimant's physical and mental condition that was relevant to the assessment or whether other matters were relevant such as the claimant's home environment and ability to acquire a wheelchair.

The decision analysed the existing case law and conflicting decisions. It also set out the primary and secondary legislation surrounding the operation of the work capability assessment and, in particular, highlighted the difference in wording between Regulation 19 [*of the Employment and Support Allowance Regulations 2008*] and Schedule 2 - Activity 1 [*of the Employment and Support Allowance Regulations 2008*] in respect of the approach to the use of aids and appliances. Regulation 19 provides that the claimant's ability to perform any activity is to be assessed as if they were 'wearing any prosthesis' with which they are fitted or wear or using any aid or appliance which is 'normally' worn or used. Whereas Schedule 2 – Activity 1 looks to assess the claimant's ability to mobilise unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can 'reasonably' be used.

Against this background the decision in conclusion (at paragraph 2) held "… , in principle, all circumstances of the individual claimant are to be taken into account but that, in practice, the underlying purpose of the work capability assessment, the circumstances that should exist in the modern workplace and the availability of manual wheelchairs will mean that in most cases the home environment of a claimant is unlikely to be important and it would be possible for the Secretary of State to ensure that the availability of manual wheelchairs is also not a live issue."

The decision provided:

"67. For all these reasons, we are satisfied that, in principle, all circumstances should be taken into account when considering whether a person can reasonably use a manual wheelchair or other aid.

Application

68. Nonetheless, the impact of those circumstances in answering the question whether the use of a manual wheelchair or other aid (including a powered wheelchair) is reasonable will be guided by the underlying purposes of the work capability assessment and the legislation governing ESA.

69. It is clear from such documents as the Explanatory Memorandum to the draft 2011 Regulations to which we have already referred and which was considered by Judge Wikeley in *AS* [*AS v Secretary of State for Work and Pensions (ESA)* – [2013] UKUT 587 (AAC) – CE/1470/2013], that the work capability assessment is intended to be a functional assessment based on an approach that a health condition or disability should not automatically be regarded as a barrier to work and which seeks to determine the ability of a claimant to work by considering the impact of his or her health conditions and disabilities on his or her ability to carry out a range of activities which have been formulated having regard to developments in healthcare and the modern workplace.

70. We therefore agree with Judge Wikeley's statement in *AS* [*AS v Secretary of State for Work and Pensions (ESA)* – [2013] UKUT 587 (AAC) – CE/1470/2013] that "the activities and descriptors in Schedule 2 do not exist in some sort of artificial or parallel universe, entirely divorced from the real world of work" and we also agree that they are to be applied by reference to "the modern workplace" and "an employer attuned to the requirements of disability discrimination law". This latter point has been reinforced by the reference in the new regulation 29(3)(a) [*of the Employment and Support Allowance Regulations 2008*] to reasonable adjustments being made in the workplace, although that was introduced after the date relevant to the present cases and would anyway be of only indirect relevance to the construction of Schedule 2.

71. As we have also mentioned, the ESA legislation should be construed and applied so as to avoid or minimise the risk that any claimant would fall into a gap between ESA and JSA. It seems to us that this requires "joined up thinking" that should provide an important guide to determining when, on an in all the circumstances approach, it is reasonable to assess the ability of a particular claimant to mobilise on the basis that he uses a manual wheelchair or other aid.
This is because it highlights whether it is reasonable for difficulties that the claimant has in mobilising to act in his or her case as a barrier to work in the modern workplace.

72. That the application of the legislation does not always succeed in preventing claimants from falling into a gap is apparent from two documents provided to us by Mr Serjeant (the second claimant's representative). They were excerpts from a report by the Work and Pensions Committee of the House of Commons *"The role of Jobcentre plus in the reformed welfare system"* (28 January 2014) and a DWP research report *"Unsuccessful Employment and Support Allowance claims – qualitative research"* by Helen Barnes, Joy Oakley, Helen Stevens and Paul Sissons. At paragraph 5.2.2 of the latter report, it is stated;

> *Boundary issues between ESA and JSA*
>
> There are clearly some people who fail to qualify for ESA who may nevertheless find it difficult to establish a JSA claim, and comply with the requirement to be actively seeking work due to health reasons. There is a potential for these people to fall into a gap between the two benefit regimes. If the threshold for ESA excludes some people with ongoing, but still work-limiting, health issues the findings of this research suggest that there needs to be more recognition of such health issues within the JSA regime. This should be made more explicit, so that people feel able to discuss their health conditions without fears that this will prejudice their JSA claim. At the same time, it is important to ensure that personal advisors for JSA customers are equipped to help and support customers with health issues to find suitable work.
>
> *Support for health issues in JSA claims*
>
> People who were claiming JSA and had ongoing health issues generally reported that they were not receiving support with these. Although some people had discussed health issues and had these incorporated into a Jobseeker's Agreement, more generally, JSA customers tended to be wary of raising the subject in case it cast doubt on their availability for work. There may be a need for these issues to be addressed more proactively by Jobcentre Plus advisors, so that more effective return to work support can be provided to customers with work-limiting health conditions."

73. That the Secretary of State has not attempted to demonstrate to us or other tribunals that, where a claimant is assessed for ESA purposes as able to mobilise only if using a manual wheelchair, barriers that there might be to gaining access to parts of the job market requiring wheelchair use can in practice be overcome suggests that there is not the joined-up thinking we consider necessary. If disability employment advisors were providing support to such people, we would have expected there to be a ready response to the questions raised by claimants and tribunals. Moreover, the flow of information needs to be two-way and it appears that, at least until recently, disability employment advisers have not been informed of the basis upon which claimants have been found not to have limited capability for work. For instance, people assessed as able to mobilise more than one of the statutory distances only if using a wheelchair are not drawn to the attention of disability employment advisers in order that those who do not actually have a wheelchair may be given the advice and assistance necessary to enable them to take up employment in which such mobility might be required. We acknowledge that a person with limited mobility who does not have a wheelchair might be able to find employment for which a wheelchair would not be required (because it might not be necessary to be able to mobilise to an extent only possible for that claimant with a wheelchair), but it is unfair and inconsistent with the statutory scheme for a person not to be able to seek work in as wide a field of employment as is suggested by a work capability assessment. The amendment of Activity 1 has, in our judgment, as an aspect of the general duty to act fairly placed a duty on the Secretary of State to ensure that disability employment advisers are adequately equipped to give appropriate advice to those found not to qualify for ESA as a result of the amendment.

74. Many of the practical problems raised by such claimants are likely to be soluble, given the modern workplace and an employer who is conscious of his or her obligations under the Equality Act 2010. Where that is so and it is considered that a work capability assessment should be carried out on the basis that the claimant could reasonably use a manual wheelchair (or other aid), disability employment advisers clearly also have a role to play in advising as to the solution. Thus, for instance, where a claimant argues that he or she could not reasonably be expected to use a manual wheelchair at work because it could not be taken home, it might be pointed out that, unlike a guide dog, a manual wheelchair used in the workplace does not have to be taken home after work and the solution to the problem might be to make arrangements for a manual wheelchair to remain in the workplace.

If ESA were disallowed on that basis, a disability employment adviser might advise as to how a prospective employer could be asked about making such arrangements. There is then no unfairness, although it might also be worth considering whether, if a disability employment adviser considers that a person who has failed a work capability assessment is in reality unemployable, he or she ought to be able refer the person for reassessment on an accelerated basis, with an explanation that will be before the person carrying out the reassessment.

75. Against this background, we can give the following more specific guidance to the application of Activity 1 to claimants who do not normally use manual wheelchairs.

76. First, because the work capability assessment is not to be divorced from the real world of work and the claimant does not actually have an employer, the test must be applied on the basis that the notional employer from whom the claimant might obtain employment has a modern workplace and is prepared to make reasonable adjustments in order to enable the claimant to be employed. To that extent the test is a thought-experiment like the "cooking test" [*referring to the 'cooking test' of Disability Living Allowance*].

77. Secondly, as the Secretary of State concedes, all medical considerations will need to be taken into account. This includes "attendant consequences, such as muscle wasting" identified by Judge Gray in *TB* [*TB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 408 (AAC) – CE/3315/2012*] which, we observe, are matters beyond the current "physical and mental condition" mentioned in section 1(4)(a) of the 2007 Act [meaning: Welfare Reform Act 2007] and regulation 19(1) of the ESA Regulations [meaning: *of the Employment and Support Allowance Regulations 2008*] and the current "specific bodily disease" and "specific mental disease" mentioned in regulation 19(5). However, we draw attention to the view of the First-tier Tribunal in the second case before us that "there would not be any detriment to the appellant's health if she were to utilise a wheelchair for a significant portion of the day" because "she would still have the remaining portion of the day in which she could utilise her limbs and continue with ensuring the circulation of blood". Also, while we agree with Judge Williams in *AR* [AR v *Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0417 (AAC) – CE/3737/2012*] that all aspects of wheelchair use need to be taken into account, we would point out that a person unable to get in and out of a wheelchair unaided is unlikely to need to score points under Activity 1 because he or she would probably score 15 points under Activity 2 (standing and sitting) on the ground that he or she "[c]annot move between one seated position and another seated position next to one another without receiving physical assistance from another person".

78. Thirdly, the home environment is potentially relevant but, for the reason suggested in paragraph 74 above, an inability to use a manual wheelchair at home or to store it there due to the physical layout of the home is unlikely to be as important as was suggested in *DM* [*DM v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 376 (AAC) – CSE/151/2012*] and *NT* [*NT v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 360 (AAC)].

79. Fourthly, the availability of manual wheelchairs is a question of fact, to be proved by evidence although the First-tier Tribunal is entitled to use its own knowledge. No Upper Tribunal judge has adopted Mr Commissioner Stockman's emphasis in *MG* [*MG v Department for Social Development – [2013] NICom 369 – C1/12-13(ESA)*] on NHS assessments. Whatever may be the position in Northern Ireland, there are powerful arguments for not requiring there to be an NHS assessment before it is considered reasonable for a claimant to use a manual (or powered) wheelchair in Great Britain. This is not simply a matter of practicality, although we are inclined to agree with the Secretary of State that requiring such an assessment would be impractical, but is because such an assessment is not required by the legislation and, at least in England, the criteria for providing wheelchairs through the NHS or local authorities vary from area to area and are generally wholly unrelated to the issues raised by the ESA Regulations. No doubt any assessment would be valuable evidence, but it is not necessary to obtain one if one does not already exist. Moreover, there are other ways of obtaining manual wheelchairs. Judge Mark referred in *BG* [*BG v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0504 (AAC) – CE/869/2013*] to the "relative cheapness" of manual wheelchairs and to their availability from charities where reasonably required. They can also often be rented at a modest cost that might be met out of earnings, although this may not be possible everywhere.

80. However, it seems to us that the Access to Work scheme operated by Jobcentres may well make it unnecessary to consider in each case whether a claimant would be able to obtain a manual wheelchair. If the Secretary of State is able to say that any claimant otherwise unable to obtain a manual wheelchair will be enabled to obtain one through the Access to Work scheme (or some other scheme) if a manual wheelchair is required to enable the claimant to take up an offer of employment, the question of the availability of manual wheelchairs will, for most if not all claimants, cease to be an issue in ESA cases. The Secretary of State has not mentioned the Access to Work scheme to us but, if he has the sort of joined-up approach to assisting people with disabilities into work that we consider he should have, he ought to be able to provide short evidence-based guidance to decision-makers and submissions to the First-tier Tribunal to the effect that the Access to Work scheme or a similar scheme will act as such a safety net. If, on the other hand, he is unable to show that such a scheme will fill in any gaps in the availability of manual wheelchairs, the question whether a claimant could obtain a manual wheelchair will remain a live one in ESA cases, that the Secretary of State's decision-makers and submission-writers will need to address in each case. As the Secretary of State controls the Access to Work scheme, the matter is in his hands.

81. Fifthly and more generally, it will be clear from what we have already said that it is necessary for the Secretary of State to anticipate or at least answer objections that claimants who do not use manual wheelchairs or other aids might make to being expected to consider using one. Thus reasons for decisions or submissions to the First-tier Tribunal need to show why the decision that the use of an aid is reasonable for that claimant accords with and promotes the underlying purposes of the legislation governing entitlement to ESA. They would also indicate to the claimant, those concerned with JSA and the First-tier Tribunal why it was thought that the particular claimant's capability for work should be assessed on the basis that he used the relevant aid or appliance. Naturally, those reasons and the manner in which they are provided will be case and aid or appliance specific. Some (e.g. medical issues) will appear in and can be given by the provision of or by reference to the Health Care Professional's report. Other reasoning could no doubt be based on generic and published evidence based material.

82. It is initially for the Secretary of State to make the relevant decisions on the application of the Activities set out in Schedule 2 to a particular claimant and in our view his duty to act fairly, and the joined up thinking that requires, mean that initially it is also for him to determine how and when the reasoning that underlies those decisions is to be appropriately provided to the claimant, the JSA decision makers and First-tier Tribunals. However, he might think that properly showing claimants how their concerns can be overcome might promote more positive thinking on their part. We invite the Secretary of State to consider giving guidance to decision makers on the ways in which they should do this."

In conclusion to the present cases the decision held:

"83. In the present cases, the First-tier Tribunal has assumed in each case that the claimant could obtain a manual wheelchair. They may have been right but it seems to us that there is force in the Secretary of State's initial submissions in these appeals which effectively and in our view correctly acknowledge that the claimants were, in substance, unfairly required to prove a negative on an issue that had not been addressed in the Secretary of State's submission. It is necessary in both cases to consider use of a manual wheelchair because in the first case it is common ground that the claimant could not walk more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion and in the second case we accept the submissions of both parties that the First-tier Tribunal failed to consider the extent to which the claimant could "repeatedly" mobilise by means of walking. We therefore allow both of these appeals and remit the cases to the First-tier Tribunal. If the Secretary of State continues to oppose the appeals, he should make a further submission, supported by appropriate evidence, setting out why he asserts that, on the in all the circumstances approach set out above, it is reasonable for that claimant to be assessed under Activity 1 on the basis that she uses a manual wheelchair and, in particular, how that claimant might have acquired and so have been in a position to use such a wheelchair at work at the time of the Secretary of State's decisions (see section 12(8)(b) of the Social Security Act 1998). It will then be for the claimants to consider whether they wish to continue with their appeals." [*My inserts*].

2. President of the Administrative Appeals Chamber of the Upper Tribunal Mr Justice Charles Chamber, Chamber President of the General Regulatory Chamber of the First-tier Tribunal Nicholas Warren and Judge of the Upper Tribunal Mark Rowland 30.7.2014

Access to Work – provision of wheelchairs…

CS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0519 (AAC) – CE/551/2014 held:

"40. The parties were invited to make observations on the possible effect on this appeal of the decision in SI v Secretary of State for Work and Pensions (ESA) [2014] UKUT 308 (AAC) [*see note below*]. Though it is not relevant on the facts of this appeal since the appellant has his own wheelchair, the Secretary of State has made some observations on the Access to Work Scheme. I think it will be helpful to record what I have been told about the scheme here.

41. In SI v Secretary of State for Work and Pensions (ESA), the Upper Tribunal had this to say about the scheme:

> 80. However, it seems to us that the Access to Work scheme operated by Jobcentres may well make it unnecessary to consider in each case whether a claimant would be able to obtain a manual wheelchair. If the Secretary of State is able to say that any claimant otherwise unable to obtain a manual wheelchair will be enabled to obtain one through the Access to Work scheme (or some other scheme) if a manual wheelchair is required to enable the claimant to take up an offer of employment, the question of the availability of manual wheelchairs will, for most if not all claimants, cease to be an issue in ESA cases. The Secretary of State has not mentioned the Access to Work scheme to us but, if he has the sort of joined-up approach to assisting people with disabilities into work that we consider he should have, he ought to be able to provide short evidence-based guidance to decision-makers and submissions to the First-tier Tribunal to the effect that the Access to Work scheme or a similar scheme will act as such a safety net. If, on the other hand, he is unable to show that such a scheme will fill in any gaps in the availability of manual wheelchairs, the question whether a claimant could obtain a manual wheelchair will remain a live one in ESA cases, that the Secretary of State's decision-makers and submission-writers will need to address in each case. As the Secretary of State controls the Access to Work scheme, the matter is in his hands.

42. In the submission to me, the Secretary of State's representative says:

> 9. The UT [*Upper Tribunal*] judges [in SI v Secretary of State for Work and Pensions (ESA)] referred to the Access to Work Scheme as a possible source of assistance with a manual wheelchair. However, that is not the case. The Access to Work Scheme is intended to support the additional costs of employing a disabled person, and helps over 30,000 disabled people to take up and remain in employment every year, providing support such as specialist aids and equipment, as well as help with travel to work. In order to obtain help under the Scheme, a person would need to satisfy the eligibility criteria. In summary, these are that the person must:
>
> - have a disability (as defined in the Equality Act 2010), or long-term health condition; and
> - be in or about to start employment or go to a job interview;
> - live and work in Great Britain;
> - have no other support available;
> - not be entitled to an incapacity benefit.
>
> Where a person satisfies the criteria, the DWP disability employment adviser would work with the claimant and the employer to determine how the person's disability can be supported in the workplace, including any reasonable -

adjustments the employment might have in place. The Scheme would not normally be used to fund purchase of a manual wheelchair, as it is expected that this would be provided by the appropriate wheelchair services in the area … However, it could fund the extra costs of a specialist wheelchair if appropriate. Where assistance with travel to work is required, and no other method of transport is available, the Scheme might assist with the cost of taxis. It is my submission this would go some way towards enabling a claimant with mobilising difficulties to look for and start work." [*My inserts*]

Note: SI v Secretary of State for Work and Pensions (ESA) is now known as PR v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0308 (AAC) – CE/327/2013 and CE/509/2013 – reported as [2015] AACR 5.

2. Judge of the Upper Tribunal C A White 19.11.2014

reasonably be expected to use wheelchair (and substantial risk)

BG v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0504 (AAC) – CE/869/2013 held:

"13. If the new tribunal concludes that the claimant scores no points in relation to mobilising because he can repeatedly walk over 200 metres, the question of wheelchair use may not arise. It will, however, need to be considered if he would otherwise score points on that descriptor. Conflicting views as to the proper approach have been put forward by various Upper Tribunal Judges in recent decisions, which are summarised by Judge Williams in *AR v SSWP*, [2013] UKUT 417. My own interpretation of the descriptor, differs from Judge Williams and broadly agrees with Judge White in *AB v SSWP CE/4267/2012* and Judge Gamble in *DM v SSWP*, [2012] UKUT 376.

14. The context of the work (*sic*) capability for work test is an attempt to assess who is going to be able to undertake work of some sort. For that being able to mobilise in fact rather than in theory is important. It does not make sense to say that somebody has or does not have limited capacity for work based on a hypothetical ability to mobilise with an aid that he or she does not have and cannot for practical reasons obtain and use. I disagree therefore with Judge Williams that the test is a freestanding one independent of the question whether the claimant can in fact reasonable [*sic*] be expected to have access to a wheelchair on a daily basis. It is not a notional test or thought experiment such as the cooking test in DLA where it is immaterial whether a person needs to cook or not or has the equipment or not.

15. The test in my judgment is whether the aid, the wheelchair, can reasonably be used by this claimant in his daily life. The use includes not merely mobilising once for any particular distance, but being able repeatedly to mobilise and to do so not just on one day but over a period of time. A claimant cannot reasonably use a wheelchair without having access to one, and I do not see how his ability to store one and to get to and from it can be disregarded in determining whether he can reasonably be expected to use it, in the same way as his ability to get in and out of it unaided would be relevant. It is even possible that inability to afford a wheelchair may be relevant, although it is would not normally be so given their relative cheapness and their availability from the NHS and charities where reasonably required.

16. I would add that even if I am wrong as to this, in assessing the impact on the claimant for the purposes of regulation 29 of his being found not to have limited capacity for work, he must plainly be taken as he is, and not with some aid that in real life he does not have and cannot reasonably be expected to obtain. If, for example, a claimant lives alone at the bottom of a hill with no way of getting to the only bus stop, which is at the top of it, then that is something that the tribunal must take into account in determining the effect on him of not having limited capability for work. The issue in that respect is not simply what work might he do, but what would happen to him in terms of seeking, obtaining and retaining jobseeker's allowance, or not being able to do so, and taking the necessary steps to seek work *IJ v SSWP*, [2010] UKUT 408 (AAC); *CF v SSWP*, [2012] UKUT 29 (AAC)."

1. Judge of the Upper Tribunal Michael Mark 11.10.2013

use of wheelchair – normal/reasonable use?

PL v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0448 (AAC) – CE/95/2013 examined the approach to be taken to 'mobilising' and use of a wheelchair. The Upper Tribunal Judge making reference to his earlier decision – AR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 417 (AAC) – CE/3737/12 held:

"7. As my decision in AR states, the tribunal is required to apply two tests when considering use of a wheelchair in mobilising: whether this is normal and whether this is reasonable. There is no assertion anywhere in the papers before the tribunal that the appellant has ever used a wheelchair, so the answer to that question is clear. But that must be its starting point from which then to consider whether it is reasonable. The failure of the tribunal to consider this point of itself puts its decision in question.

8. This is therefore a case where the only mention of the use of a wheelchair to assist mobilising is to be found in the statement of reasons. On that basis, I have no hesitation in agreeing with both parties that the decision is inadequate. In paragraph [6], the only paragraph in which use of a wheelchair is considered, the tribunal finds that the appellant has full upper body and limb function and controlled asthma. It then finds that he can sit for at least half an hour

"… and on that basis he could repeatedly mobilise, utilise a manual self propelled wheelchair repeatedly for in excess of 200 metres within a reasonable timescale before the onset of significant discomfort or exhaustion"

9. I agree with both parties that that is not an adequate explanation of the tribunal decision when nothing else in the tribunal record supports it. The tribunal appears to have considered three issues: lower limb problems of the appellant; any upper limb problems; and respiratory problems. As discussed in AR, consideration must be given to all bodily functions involved in using a wheelchair – and particularly repeated use of it – and not just sitting in it. And there must be evidence for findings. Merely noting from (contested) ESA85 evidence that there are no upper limb limitations is not adequate. These do not test the functions necessary repeatedly to turn a wheel on a wheelchair manually. And there need to be findings about rising from sitting or similar evidence that the appellant can get into and out of a wheelchair unaided and that he or she can handle it as part of the process of using it to mobilise unaided."

1. Judge of the Upper Tribunal David Williams 10.9.2013

use of wheelchair

MI v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0447 (AAC) – CE/108/2013 held:

"5. Even if the tribunal had accepted that the appellant was virtually unable to walk on that evidence, it still had to consider use of a wheelchair as that was put in issue by the Secretary of State. I dealt with the interpretation and application of the mobility descriptor and the use of a wheelchair in my recent decision *AR v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 417 (AAC). I adopt that decision here and do not repeat it. In so doing, I do not accept the submission for the appellant about, for example, purchasing a wheelchair. However, the submission for the Secretary of State in this case followed a different approach to that on which I commented in AR and I must consider it further.

6. This is another appeal where there is no mention in the ESA50 by the appellant that he has ever used a wheelchair. Nor is there any specific mention in the ESA85, where the use of crutches is mentioned. But the decision of the decision maker acting for the Secretary of State does raise the point in stating that:

"He was not breathless on examination and no evidence of significant restriction of upper limbs, he would be able to mobilise using a self propelled wheelchair."

Use of a wheelchair is also noted at the end of the record of proceedings, where the representative is recorded as submitting:

"Mobilising and wheelchair – would it be reasonable to buy own or would expect NHS to buy. Only do if needed in and out. He can get around inside."

So it was clearly relevant to the tribunal's decision.

7. The tribunal dealt with use of a wheelchair as follows:

"[8] We found he would be able to self propel a manual wheelchair without assistance. He has no serious condition affecting his upper limbs as he agreed at assessment. All upper limb findings on examination were normal …"

There is nothing further in the tribunal record on this issue.

8. The appellant's representative subjects this to an extended challenge, not least by reference to the decision of Judge Gamble in *DM v Secretary of State for Work and Pensions* [2012] UKUT 376 (AAC) to which I referred in *AR*.

9. In contrast to the submission of the Secretary of State put forward in *AR*, the submission for the Secretary of State is put on a much narrower basis here. It starts by accepting, as was accepted in *AR*, that the decision of Judge Levenson in *RP v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 449 (AAC) is correct. This requires the application of regulation 19(4) of the Employment and Support Allowance Regulations 2008 to each of the descriptors. I agree. The Secretary of State submits that that requires the tribunal to consider three issues: does the appellant normally use a wheelchair? If not, has it been prescribed or recommended? If not, is it reasonable to expect that one would normally be used by people in the same situation as the appellant? Again, I agree.

10. It is the third of those tests that applies here. The only comment for the Secretary of State on the tribunal's reasoning about that third test is:

"In terms of considering whether or not the person could reasonably use a wheelchair, the HCP must consider their upper limb function and cardio-respiratory status. The examination revealed no problems with upper limb movements. There was no mention of problems with cardiac, respiratory or vascular functions and there was no obvious loss of power in either arm."

The implication is that this is an adequate basis for the First-tier Tribunal decision. I disagree.

11. I do so because, as I emphasised in *AR*, the test of "mobilising unaided … with a wheelchair" is a functional test involving not only sitting in it but also getting into and out of it and handling it. The starting point is whether the appellant in fact mobilises with a wheelchair. The tribunal makes not [*sic*] comment on that, although it should have done so to explore both the first and second tests set out above. Instead it turned without consideration of those points directly to its view of what was reasonable. In this case the standard ESA85 report records as medical evidence of upper limb use: "client has no problems with these activities" (that is, of course, the specific functions tested by other descriptors and I assume is based on the ESA50).

There is no indication on the face of the ESA85 that the practitioner considered other forms of upper limb use, such as repeatedly turning a wheel. The only relevant informal observation is that the appellant had slight difficulty rising from sitting while the medical evidence about lower back records that the appellant declined to crouch down and stand up and could bend forward to touch knees.

12. It is plain that the tribunal dealt with the question of mobilising with a wheelchair inadequately. While it was, for reasons I explained in *AR*, not relevant to consider if the appellant could afford to buy a wheelchair, it was appropriate to consider any medical advice and the full functioning necessary to mobilise with a manual wheelchair and to make factual findings about those functions. I do not agree with the Secretary of State's representative that the ESA85 report in the form seen here provided adequate findings in this case. This is because (a) the consideration of upper limb functioning did not include all relevant functions and (b) other relevant aspects of functioning, such as getting into and out of a chair, were not clear on the ESA85 evidence and were not separately considered by the tribunal. I allow the appeal on this ground also."

1. Judge of the Upper Tribunal David Williams 10.9.2013

use of wheelchair – reasonable

TB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0408 (AAC) – CE/3315/2012 involved an appeal where in the view of the Upper Tribunal Judge the statement of reasons for the First-tier Tribunal failed to deal with the critical issue of whether either a wheelchair or crutches could reasonably be used.

The Upper Tribunal Judge held:

"14. In relation to the mobilising issue the appellant's representative cites a general lack of fact finding and the absence of an explanation as to how the accepted problems with standing and sitting might impact upon the use of a wheelchair or crutches.

15. The Secretary of State's submission is predicated upon the premise that in the absence of upper limb or cardio-respiratory problems wheelchair use is de facto [*meaning: in fact – whether by right or not*] reasonable. It argues that despite the somewhat minimalist approach to fact-finding (my paraphrase) the decision of the FTT is correct and sustainable. So far as the mobilising descriptor is concerned the submission explains the principles used in shaping the Decision Makers Guidelines, which were made upon the basis of the decision of Upper Tribunal Judge Levenson in *RP-v-SSWP(ESA)* [2011] UKUT (AAC) (*CE/1217/2011*) which set out an approach to the application of regulation 19(4). The submission does not mention other decisions, that of Upper Tribunal Judge Gamble (Scotland) *DM-v-SSWP* [2012] UKUT 376 (AAC) and that of Commissioner Stockman (Northern Ireland) in *MG-v-Department of Social Development* [2013]NI Com 349, of persuasive authority before the FTT in England, although I should say that whilst Commissioner Stockman's decision predates the submission it may have not have been issued until after the submission was filed.

16. Neither party has asked for an oral hearing of the appeal and I consider that I am able to deal fairly with the matter on the basis of the papers before me.

Interpreting the law

17. The starting point is *RP-v-SSWP*. It concerned the use, not of a wheelchair but of a walking stick, and it analysed and explained regulation 19(4) in practical terms.

18. The activity under scrutiny in *RP-v-SSWP* was standing and sitting (standing being the problem described) under the form of the activity and related descriptors in use prior to March 2011. That has no reference to the use of aids or appliances in the heading, thus regulation 19(4) (set out above) applies to import the 'normally worn or used' test into any assessment of capability. Regulation 19(4), however, adds nothing to the consideration of wheelchair use under Activity 1 since under the activity heading a finding is required as to whether a manual wheelchair or other such aid "can reasonably be used" thus the "normally worn or used" test as explained by Judge Levenson is otiose [*meaning: serving no practical purpose or result*]. In that conclusion I differ from the approach taken by Commissioner Stockman in *MG-v-Department for Social Development* as to the applicability of regulation 19(4), which he summarises at paragraph 28 and explains further at paragraph 43. [*My insert*].

19. Nonetheless the dicta of Judge Levenson is of some assistance in applying the reasonableness test under activity 1 since the question of whether a manual wheelchair or other aid can reasonably be used may turn upon the issues he identified at paragraph 16 where he says:

"*if a particular type of aid or appliance has been prescribed or recommended by a person with appropriate expertise, the claimant must be assessed as though they were using it unless it would be unreasonable to use it*."

20. Although referring to the differently worded obligation in regulation 19(4) the principle would apply to the issue of reasonableness in activity 1 where an aid or appliance has been medically advised.

21. However Judge Levenson goes on to say in that paragraph "*if the claimant does not use a particular type of aid or appliance and one has not been prescribed or recommended, then the decision-maker or First-tier Tribunal is entitled to take the view that the claimant should be assessed as if using one, but only if one is normally used by people in that situation acting reasonably in all the circumstances and it would be reasonable for the claimant to do the same*." (my emphasis)

22. I see the reference to such aid or appliance being considered only if one is normally used by people in that situation as limiting the scope of the activity heading which must be included in any assessment under the mobilising descriptors. I would restate Judge Levenson's approach to omit the "normally used' reference.

23. My amended approach to Activity 1 (and also to Activity 7 (Communication) which refers to "using any aid it is reasonable to expect them to use") becomes:

"*if the claimant does not use a particular type of aid or appliance and one has not been prescribed or recommended, then the decision-maker or First-tier Tribunal is entitled to take the view that the claimant should be assessed as if using one only if such an aid can reasonably be used by the claimant…*"

24. I pause before completing that sentence to comment that that in practice there may be very little between the two approaches. Where such an aid is normally used by people in the position of the claimant is likely to be a good guide as to whether such use is reasonable, but 'normally used' cannot be part of the criteria where 'can reasonably be used' is prescribed in the activity heading. To that extent I qualify the applicability of *RP-v-SSWP* to activities 1 and 7 of Schedule 2.

25. I now complete the sentence "*...reasonableness of use being considered in terms of the effect such use would have upon their medical condition*." I will contextualise that qualification.

26. Initially it must be understood that it is for the Secretary of State to establish that the manual wheelchair or other aid can reasonably be used, and to do so it is insufficient simply to rely on the fact that the person has no, or minimal, upper limb or cardio-respiratory problems; that may mean that they can propel a wheelchair, but it does not establish that one can reasonably be used. Common sense dictates that if a person cannot physically propel themselves in a manual wheelchair then the reasonableness issue is irrelevant.

27. Although each case must be looked upon individually, it will be easier for the Secretary of State to show that it is reasonable to use an aid such as a walking stick than a wheelchair. In my judgement there is a qualitative difference in expecting someone to use spectacles to aid seeing or a walking stick to aid walking, and the use of a wheelchair to mobilise. A wheelchair replaces walking; there are attendant consequences, for example muscle wasting, and the threshold for whether its use is reasonable must be higher than that of a simple manually used aid which could be discarded without residual physical consequence.
I endorse the general view of Commissioner Stockman as to it being difficult to conclude that a wheelchair can reasonably be used without the person having been referred by their clinicians for a wheelchair assessment. (MG-v-Department of Social Development paragraph 45.) The converse will not always apply. Where an appellant has been positively assessed for a wheelchair but is unwilling to adopt its use the question arises as to how the issue of reasonableness may be considered. In my judgement the FTT, using the expertise on the panel, is best placed to determine in the light of the medical issues whether there may be personal adverse effects upon their ongoing health conditions or recovery which make wheelchair (or indeed other prescribed aid) use unreasonable. The Secretary of State, when considering the issue at an earlier stage may call upon the medical advisors it has available to offer an opinion on the facts of the case, and any case specific advice should form part of the evidence before the FTT.

28. To individualise the reasonableness of use question in terms of personal medical conditions is not to advocate consideration as to the practicalities of manual wheelchair use in each individual case. There is a body of authority in relation to the functional descriptors under IB, followed in ESA, to the effect at they are designed to test particular aspects of function, and are therefore, if not hypothetical at least constrained in their application. As an example the case of *GS-v-SSWP (ESA)* [2010] UKUT (AAC) in which Upper Tribunal Judge Jacobs, building on his decision in *R(IB)2/03*, said about the descriptors under the activity manual dexterity

> "*The descriptor tests the claimant's anatomical functions that would be involved in fastening or unfastening buttons. They include pinch grip, co-ordination of finger movements, and flexibility of the finger joints. The reference to small buttons identifies the size and shape of the object to which those functions are applied. The First-tier Tribunal should focus on the claimant's functional ability to perform the particular aspect of the activity covered by a descriptor. By doing that, it will avoid the myriad questions that otherwise appear to arise on descriptors. Is the ability to use a tap tested with wet or dry hands? What sort of surface is the £1 coin resting on? How smooth or thick are the pages of the book? And so on and so on...*"

29. That decision has been generally followed and specifically imported to the ESA context. The case law is set out by Commissioner Stockman in paragraph 36 of *MG-v-Department for Social Development*. I follow that line of authority; accordingly I respectfully disagree with the decision of Upper Tribunal Judge Gamble in *DM-v-SSWP* [*meaning: CSE/151/ 2012 – [2012] UKUT 376 (AAC)*] that personal circumstances such as living in an unsuitable building should be considered in the test of whether a manual wheelchair can reasonably be used. For these reasons I limit specific consideration of the test that I promulgate as to whether a wheelchair or other aid can reasonably be used to the medical impact, which will involve consideration of the potential physical and mental consequences for a claimant or appellant." [*My insert*].

See also AR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0417 (AAC) – CE/3737/2012 which (at paragraph 37) does not support the view held at paragraph 29 that in assessing whether or not a claimant can reasonably be expected to use a wheelchair the enquiry should be limited to medical questions.

1. Judge of the Upper Tribunal P A Gray 22.8.2013

use of wheelchair

AR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0417 (AAC) – CE/3737/2012 provides comprehensive analysis of Activity 1: mobilising and in doing so reviews a number of authorities which have dealt with the issue or surrounding issues.

The appeal itself involved the case of a claimant who suffered from the on-going effects of an accident in which one of his ankles was severely injured and in consequence he had had surgery on it on a number of occasions. One of the six descriptors put at issue in the consideration of his appeal was his ability to mobilise. The reasoning of the First-tier Tribunal for refusing the appeal dealt with the issue of mobilising in its written statement of reasons as follows:

"[16] The test in relation to mobilising considers the use of any reasonable mobilising aid. [R] [*the claimant*] can and does use a wheelchair on occasions and he can get in and out of one. He would have sufficient strength to self propel a manual wheelchair as he has no problems with his upper limbs. He did not report breathlessness on stairs or walking so it is not accepted that asthma would cause breathlessness when propelling himself in a wheelchair (as submitted by the representative).

[17] He would be able to mobilise significantly further than 200 metres before needing to stop due to significant discomfort or exhaustion bearing in mind the fact that at present he can walk to and from his local shop and use stairs and go up and down the aisles of a supermarket on foot. He also confirmed at the tribunal that he should be able to self-propel and there would be no reason why he could not.

[19] As minimal exertion is required to self propel a wheelchair the tribunal also decide that [R] would be able to repeatedly mobilise further than 50, 100 and the minimum scoring descriptor of 200 metres without stopping…"

The Upper Tribunal Judge held:

"7. The new elements in this test are the change from a reference to "cannot walk" to "cannot ... mobilise" and the description of the activity being tested. The activity was previously:

> "Walking on level ground with a walking stick or other aid if such aid is normally used."

… . Aside from the change to "mobilisation" there is the specific addition of a manual wheelchair as an aid and a change from considering aids **normally** used to aids that can **reasonably** be used. There is also express reference to the ability to mobilise "unaided by another person". The omission of the reference to level ground in the activity is merely a drafting revision as the limitation to level ground is now in the descriptors.

8. Schedule 2 takes effect under regulation 19 of the Employment and Support Allowance Regulations 2008. That regulation did not change in 2011. As the Secretary of State submitted in this appeal, the key provision in that regulation relevant here is regulation 19(4). This carries forward a provision first inserted in the equivalent provision in the Social Security (Incapacity for Work)(General) Regulations 1995 from 1997. The current wording from 2008 is:

> "In assessing the extent of a claimant's capability to perform any activity listed in Part 1 of Schedule 2, the claimant is to be assessed as if wearing any prosthesis with which the claimant is fitted or, as the case may be, wearing or using any aid or appliance which is normally worn or used."

9. This was the subject of consideration by Judge Levenson in the Upper Tribunal in *RP v Secretary of State for Work and Pensions* (ESA) [2011] UKUT 449 (AAC), a case concerning the use of a walking stick. He considered that:

> "16. It seems to me that the correct approach to regulation 19(4) is as follows. If the claimant in fact normally uses a particular type of aid or appliance, then he or she must be assessed as though they were using it. If a particular type of aid or appliance has been prescribed or recommended by a person with appropriate expertise, the claimant must be assessed as though they were using it unless it would be unreasonable to use it. If the claimant does not use a particular type of aid or appliance and one has not been prescribed or recommended, then the decision maker or First-tier Tribunal is entitled to take the view that the claimant should be assessed as if using one, but only if one is normally used by people in that situation acting reasonably in all the circumstances and it would be reasonable for the claimant to do the same. However, I do not agree with the Secretary of State that in this latter case there does not have to be any explanation of how the aid or appliance could help the particular claimant and that the advantages are obvious. The degree of detail is a matter for the tribunal on the facts of each particular case, but in my view, in the absence of actual use or prescription, there does need to be some explanation."

10. The Secretary of State fully accepts that decision and submits in this appeal that it is the key to a proper understanding of the new mobilisation descriptor. I agree that it is a key. Indeed, this also explains the clear purpose behind the introduction of wheelchairs to the activity and the change from a test of walking to a test of mobilisation. Read strictly, someone could qualify under the former descriptor because he or she could not walk notwithstanding that he or she used a wheelchair successfully on a regular basis – using a wheelchair is not walking. With modern technology, an otherwise immobile person can become mobile in the right circumstances with a manual wheelchair. Now that serious efforts are being made under compulsion of law (the Disability Discrimination Acts and the Equality Act 2010) to make buildings "wheelchair friendly" and stepped entries to buildings are being removed this is increasingly relevant.

11. There are in my view two complications in the changes to descriptor 1 in Schedule 2. The first is that the activity to be tested has been altered from the wording normally ...used" in regulation 19 to "can reasonably be used" without any change in regulation 19. But regulation 19 still applies. So the actual test to be applied is now a double one: what is normally used and what is reasonably to be used. Whether something is normally used is simply a question of fact. Equally, if someone does normally use a manual wheelchair then plainly it is reasonable for him or her to do so. The problem arises where an individual does not normally use a manual wheelchair but there is evidence to suggest that he or she could do so. When does it become reasonable that one should be used? The second, which I return to below, is the interaction between descriptor 1 and the other descriptors in the Schedule now that wheelchair use is expressly to be considered. There has been, in my view, a failure to think through thoroughly how use of a wheelchair should be integrated into Schedule 2 and into the process of testing the descriptors in the Schedule in individual cases.

Evidence of the appellant's mobilising

12. As a result of the second of those complications, there are practical problems in a case such as this in the way both claimants and those conducting medical examinations are asked to report about it. The key questions in the ESA50 sent to claimants ask about "moving around" defining "moving" as:

> "including the use of aids such as a manual wheelchair, crutches or a walking stick, if you usually use one, but without the help of another person."

No question is directly asked about whether a wheelchair could be used by the claimant if it is not normally used. In other words, the question does not reflect the new descriptor. R [*the claimant*] made no comment about reasonable use in his replies to these questions, nor was he asked to do so. The representatives are to be commended in raising the subject with R [*the claimant*] ahead of the hearing.

13. Nor as far as I can see does the standardised electronic formatting of the ESA85 computer generated report require that (*sic*) the health care professional using it to pay any attention to the reasonable use of a wheelchair where one is not actually being used. Having said that, the nurse who completed the report about R [*the claimant*] did deal specifically with the kind of wheelchair R [*the claimant*] used sometimes. The specific mentions about mobilising in that report are:

> "Fractured and dislocated the ankle ... had had multiple surgeries on the problem ... states has been told will require further surgery in the future ...now has arthritis in the area ... under a specialist review ... pain in the area is constant and is made worse by walking."

Under "description of a typical day" it is reported that:

> "states when he goes shopping will use a trolley to support him will mobilise up and down stairs from his flat slowly, taking one step at a time... states when he goes shopping, will use a trolley to support him, when his ankle is bad he uses a wheelchair available at the supermarket. States wheelchair is electric. … states has still got crutches at home and will use them if the pain in his ankle is bad."

The automatic transfer of comments within the ESA85 repeats the latter comments, but not the other comments, later in the report. The only relevant comment on clinical examination is of severe arthritis and swelling of the left ankle. The usual informal observation about the claimant walking into the examination room is that he did so with an abnormal gait. In the personalised summary statement it concludes:

> "His lower limb function was consistent with his ankle difficulties, however, his upper limb function was normal, and he could use appropriate aids to help him mobilise."

The conclusion for the description about mobilising was that none of the descriptors applied.

14. Given the evidence it was plainly right for both Citizens Advice and the First-tier Tribunal to consider whether the appellant's ability to mobilise in this appeal included the use of a manual wheelchair. It is not a case, unlike others I have seen, where the question of the use of a wheelchair appears to have been mentioned in an appeal for the first time at the tribunal hearing. See for example *EW v Secretary of State for Work and Pensions [2013] UKUT 228* where the First-tier Tribunal had no submissions and very limited relevant evidence before it for a decision about non-walking mobilisation.

"*if such aid can reasonably be used*"

15. The tribunal's reasoning, to which the representative took strong exception, is set out above. It puts directly in point in this appeal the proper interpretation of the test "if such aid can reasonably be used". As the submission for the Secretary of State notes, this has led to some divergence of focus in decisions of tribunals [*sic*] The extent to which different focuses are open on the wording of the activity is illustrated by two recent decisions to which I drew the attention of the parties in directions in this appeal. The Upper Tribunal in Scotland first had issues about wheelchair use put to it. In the first of a series of similar decisions from Scottish UT judges, Judge Gamble decided that the approach was a wide one. In *DM v Secretary of State for Work and Pensions* [2012] UKUT 376 Judge Gamble stated that the test of reasonableness was

> "one requiring a broad exercise of ... independent judgment to all the factors that are relevant in each individual case. Those factors should not be restricted to a consideration of the claimant's physical ability to use a wheelchair."

16. By contrast, in Northern Ireland Commissioner Stockman took a narrower view:

> "the reasonableness or otherwise of using an aid should be judged purely in the context of its potential use to enhance functional ability."

17. London-based Upper Tribunal judges have since been faced with similar questions in a number of appeals. The Secretary of State drew my attention to some in the submission in this case and others have since been published.

18. In *AS v Secretary of State for Work and Pensions* [2012] UKUT 334 (AAC), Judge Lane expressly adopted the views of Judge Levenson in RP about regulation 19(4), and applied it to the use of aids generally in a way that is relevant here. The test put by Judge Lane is:

> "If the claimant does not use a particular kind of aid or appliance and one has not been prescribed or recommended, then the decision maker or FTT is entitled to take the view that the claimant should be assessed as if using one, but only if one is normally used by people in that situation acting reasonably in all the circumstances and it would be reasonable for the claimant to do the same."

That test is not wheelchair-specific because the case did not concern the use of wheelchairs. However, it serves to emphasise that the use of wheelchairs is not a standard solution to mobility difficulties but one of the ways in which aids may resolve or assist with difficulties.

19. In *CSE/17/2012* Judge Jupp followed the same approach as Judge Lane but without reference to the earlier case. Judge Levenson's test was again approved in a context where the First-tier Tribunal found that a claimant was both able to walk and to use a manual wheelchair. However, the immediate relevance of a wheelchair in that case was limited to the question whether the appellant could sit for any length of time.

20. More recently the brief decision of Judge Rowland in *JC v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 219 (AAC) covers similar ground. In that case a First-tier Tribunal ignored the appellant's medical evidence about the undesirability of the appellant using a wheelchair because of the need for her to be kept independently mobile as much as possible. In doing so it erred in law. Judge Rowland notes that if evidence of this kind were available in earlier decisions they may have been reconcilable on the facts.

21. Another recent decision is that of Judge White in *AB v Secretary of State for Work and Pensions*, *CE/4267/2012*. He was considering an appeal from a decision of a First-tier Tribunal that decided that a wheelchair could be used by the appellant without, apparently, asking the appellant about it and without receiving any evidence about any wheelchair use by the appellant. In discussing the mobilisation descriptor, Judge White commented on the decision of Judge Gamble in DM:

> "[12] The issue of the reasonableness of the use of a walking aid or manual wheelchair was first considered in *DM v SSWP (ESA)* [2012] UKUT 376. I agree that the matter of reasonableness requires a broad exercise of judgment in relation to a variety of factors. These will in my view always include (a) whether the use of the aid or wheelchair has been suggested or recommended (or indeed not recommended) by health care professionals, and why; (b) whether the claimant's health is such that he or she could use a walking stick or other aid or propel a manual wheelchair; (c) whether the claimant has access to a walking stick, or wheelchair, or other walking aid; and (d) whether, in the case of the use of a wheelchair, the claimant's living environment makes the use of a manual wheelchair practically feasible. For example, the situation of a person living on the upper floor of a block of flats without a lift is very different from that of a person living in a bungalow without any steps leading to it.
>
> [13] There may be different considerations in relation to the walking aid under consideration if one is not already used by a claimant. The particular aid in issue must be identified. For example, it may be relatively easy to acquire and use a walking stick, but much more difficult to acquire and make effective use of a wheelchair. The claimant's living environment may be largely irrelevant in the case of using a walking stick, but highly relevant in the case of using a manual wheelchair. In determining whether a particular walking aid or manual wheelchair can reasonably be used, many factors are likely to be relevant, and a tribunal should take account of all the circumstances of the case in coming to a judgment on the question of reasonableness. I do not provide an exhaustive list of the circumstances which might be relevant, since that might be more hindrance than help in exercising this judgment in individual cases by suggesting some sort of comprehensive list of relevant circumstances. But I do indicate in paragraph 12 above what I consider to be the very minimum considerations for an adequate decision."

22. In the most recent decision issued on the point, Judge Gray in *TB v Secretary of State for Work and Pensions* [2013] UKUT 0408 (AAC) took a different view:

> "[29] The case law is set out by Commissioner Stockman in paragraph 36 of *MG v Department for Social Development*. I follow that line of authority: accordingly I respectfully disagree with the decision of Upper Tribunal Judge Gamble in *DM v Secretary of State for Work and Pensions* that personal circumstances such as living in an unsuitable building should be considered in the test of whether a manual wheelchair can reasonably be used. For these reasons I limit specific consideration of the test that I promulgate as to whether a wheelchair or other aid can reasonably be used to the medical impact, which will involve consideration of the potential physical and mental consequences for a claimant or appellant."

Analysis of the decision

23. The difference of the focus of Commissioner Stockman in *MG v Department for Social Development* from that of Judge Gamble in *DM v Secretary of State for Work and Pensions* should be viewed against the decisions that have followed. They plainly do not stand in isolation. I add as a note to the citation from the decision of Judge Gray that Commissioner Stockman looked in detail in his decision at the decision of Judge Levenson in *RP v Secretary of State for Work and Pensions* and then at the reasoning of Judge Gamble in *DM v Secretary of State for Work and Pensions*. He then took into account the reasoning of (then) Commissioner Jacobs in *R(IB)2/03* about the need for a functional analysis of descriptors and the subsequent broader jurisprudence carrying that view forward to the analysis of descriptors for employment and support allowance.

24. I do not consider it necessary to engage in a further detailed analysis of those two decisions in what is and must be essentially a question of fact. Judge Gamble commented in DM that "I must stress that the application of the text of the activity must always be on an individual basis." As Judge Rowland suggests, the difference of approach in those decisions may be a reflection of specific evidence. It is a difference that is in my view less than the resulting individual decisions (which, as in all cases, must reflect the evidence in the specific appeals) suggests. The detailed discussion in the decision in MG starts in the same way as the other decisions cited above with a discussion of regulation 19 and the decision of Judge Levenson. Where the decision (and that of Judge Gray) parts company with the others is in the basis for the conclusion that in that case that the tribunal did not err in law in its finding that the appellant had no relevant restriction in his ability to mobilise when his reasonable ability to use a wheelchair was taken into account. In particular, as Commissioner Stockman identifies from paragraph [37] of his decision, there is a concern about how far the application of this descriptor involves a departure from a purely functional analysis. But what functions are to be analysed?

25. The consideration of a "purely functional" approach to disability testing for benefit purposes has been seen as part of this general area of the law since Lord Hoffman, giving the opinion of the House of Lords in *Moyna v Secretary of State for Work and Pensions* [2003] UKUT 44, stated that the purpose of the "cooking test" in section 72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992:

> "is not to ascertain whether the applicant can survive, or enjoy a reasonable diet, without assistance. It is a notional test, a thought-experiment, to calibrate the severity of the disability. It does not matter whether the applicant actually needs to cook. As the form DLA 1 said, "try to imagine how much help you would need if you tried to do this." No doubt some people (disabled or otherwise) do need to cook or prefer to do so, although home cooking seems to be fighting a losing battle against convenience foods and ready-cooked meals. Not for nothing is the notional meal contemplated by the cooking test described in the authorities as "traditional". ...On the other hand, even if a person needs to cook and has the motor skills to do so, he may still need assistance; to obtain the ingredients which the test assumes him to have, or because he is culinarily incompetent. So in my view the Court of Appeal was wrong to lay such emphasis upon the fact that unless the applicant could cook more or less every day, she would not enjoy a reasonable quality of life."

26. The "cooking test" is a free-standing test the context of which is, as Lord Hoffman spelt out in that paragraph, the award of a specific amount of benefit. Further, the test is that someone is so severely disabled that he or she "cannot prepare a cooked main meal for himself". Drawing a comparison with the current issue, I have seen no discussion anywhere in the jurisprudence about the "cooking test" that looks at whether the claimant actually has, or has access to, a kitchen or a traditional cooker or a microwave or a slotted spoon or a perching stool or any of the other accompaniments discussed in claims for that allowance. The approach is that if the claimant had these aids then whether he or she could use them and use them safely. The question quoted from the DLA1 by Lord Hoffman is, with respect, in my view, the nub of the matter.

27. In *R(IB)2/03* (a decision taken some time before the House of Lords decided *Moyna*) Judge Jacobs contrasted a functional analysis of a descriptor in the then version of Schedule 2 with a linguistic analysis. The specific descriptor was that of rising from sitting in an upright chair with a back but no arms without the help of another person. He adopted a functional analysis and did so on the basis of authority.

28. How does that approach apply to the mobilisation descriptors? As Judge Jacobs observed, they are a series of descriptors by which to judge the application of one of a series of activities to an individual claimant to see if the general test in regulation 19 of the Employment and Support Allowance Regulations 2008 are met. And, as Judge Wikeley emphasised in *MC v Secretary of State for Work and Pensions* [2012] UKUT 324 (AAC) (a decision in descriptor 2, sitting and standing at a workplace), the wording of each descriptor must be considered both within the framework of regulation 19 and in its context.

29. All the decisions cited have the common ground that the mobilisation test is an actual test, not a hypothetical test. But I suggest that the equivalent question to that in the DLA1 that Lord Hoffman endorsed should be the central approach here in cases of doubt. If the claimant had a manual wheelchair could he or she reasonably use it? I therefore reject the broadening of the test to look at issues such as whether the appellant could afford to buy a wheelchair.

29. Much of the difference between the decisions since the initial broad decision of Judge Gamble arises from aspects of the factual evidence in the individual cases. That presents two evidential problems. The first, as Judge Rowland commented, is in the available evidence about medical, and in particular orthopaedic, assessments about the use of a wheelchair. This is something on which Commissioner Stockman details the Northern Irish approach in MG. I do not know if that approach is followed elsewhere in the United Kingdom, but clearly it will be important in some cases to know the local approach.

30. The other, on which I have commented above, is the absence of evidence in individual employment and support allowance cases about the reasonableness of wheelchair use.

As noted, the ESA50 does not specifically demand such information. Nor does the ESA85 computer format appear to do so. So there are cases where a tribunal has no actual evidence of the reasonableness of wheelchair use. If the Secretary of State has not raised the point and there is no oral hearing then any tribunal that ventures into this territory will have difficulty in showing the evidence on which the decision is based.

31. Another difference that emerges from the above decisions is one on which I have seen little discussion. It is the implicit view taken by different appellants and tribunals about what is involved in using a wheelchair. This arises from what is in my view a weakness in the drafting of the Schedule. The test analysed meticulously by Judge Jacobs in R(IB)2/03 was a clear and specific test (rising from sitting) that stood alone from the other descriptors. That does not apply here.

32. I must therefore turn to the precise test with both linguistic and functional points in mind. It is, first, important to bear in mind that the test is now "mobilising unaided by another person". So the essential test is whether a claimant can use a manual wheelchair without assistance from anyone else. As noted above, the reference to the activity being unaided is new and presumably must therefore in part be there because of the addition of the use of a wheelchair.

33. The second issue is: what activity is being tested? The test is "mobilising … with … a … manual wheelchair". That is to be tested by the various descriptors, including "cannot … mobilise more than 50 metres …" No attention appears to have been paid in this to what "mobilise" means. Some have taken the view that this is a test of someone already in a wheelchair. The First-tier Tribunal in this case took the view that it must also involve considering whether the individual can get into and out of the wheelchair. That in my view is correct. The test, literally, is "mobilising … with" not "mobilising… in". Walking is not tested in practice by notionally putting claimants in the middle of a vast open level plain and asking them to walk in one direction until they have to stop. It is tested by asking how far they can walk from their front doors. Often that gives rise to discussions about steps. But that is dealt with by another descriptor for mobility. There is no other descriptor for getting in and out of a wheelchair but that must happen as an inherent part of mobilising with a wheelchair. So that must be part of this test both functionally and linguistically.

34. Behind this is a broader issue on which there is disagreement. A person using a wheelchair unaided needs not only to get into it and out of it but also handle it when not in it. That is of course not a serious problem with most other mobility aids such as walking sticks. Modern aids of that sort, including zimmer [*sic*] frames, are very light and robust and easy to handle and lift. That is not so of many manual wheelchairs, particularly the standard issue wheelchairs available in some areas. Does "mobilising … with … a … manual wheelchair" involve handling it while not in it? What, for example, is the relevance of the fact that someone lives upstairs with no lift or ground level storage available?

33. It is this issue that causes particular problems with the consideration of mobilising using a wheelchair and on which there has been disagreement. It arises, I suggest, because of the way the reference to wheelchairs has been grafted into Schedule 2 without any obvious guidance from the context in the schedule to the various physical activities, let alone other issues, involved in using a manual wheelchair. These simply do not arise when assessing ability to walk unaided by a person with or without a stick. An individual's ability to walk is to be tested on level ground. But that is in part because if he or she can walk but cannot mount or descend two steps unaided then there is a separate descriptor dealing with that. The underlying assumption when the physical descriptors in Schedule 2 were identified is that this descriptor tests lower limb abilities. Other descriptors test other abilities. That assumption does not work with wheelchair use.

34. Use of a manual wheelchair assumes, I suggest, inability to use lower limbs and then goes on to test far more than that. In doing so the descriptors overlap with several other descriptors in a way the walking test does not and in a way that the current drafting of Schedule 2 as a whole leaves unclear. For example, the Schedule used to contain the test of rising from sitting. That was the subject of the analysis in *R(IB)2/03*. That test has gone. But it has not gone if use of a wheelchair is being considered because it must be considered whether someone can get into and out of such a chair unaided. Other examples are the descriptors for picking up and moving objects. Considering the use of a wheelchair by someone already in it involves testing upper limb capacity in a way that is not dealt with at all under the descriptors for "picking up and moving or transferring by the use of the upper body or limbs" or "manual dexterity". They do not extend to the issue of picking up and moving a manual wheelchair or controlling a manual wheelchair. But how else does someone handle a manual wheelchair without assistance from another person? And how can someone mobilise using a wheelchair if they cannot handle it before or while getting into it?

35. The only guidance in the drafting of this activity is that it must be considered if "such aid can reasonably be used". Continuing for the moment with a functional analysis, can a claimant reasonably be expected to use a wheelchair to mobilise (including getting into it and out of it) without the aid of another person if he or she cannot reasonably be expected to handle the wheelchair whilst preparing to get into it, or after getting out of it?

36. On any analysis, reasonable use of a wheelchair must involve several aspects of bodily functional ability aside from the lower limbs. But the standard forms ESA50 and ESA85 used for assessing whether a person does or does not meet the descriptors for Schedule 2 do not deal with those issues. That is perhaps not surprising because the tests in Schedule 2 itself do not deal elsewhere with, for example, upper limb use of a wheelchair or the necessary lung and related capacities (both expressly put in issue in this case).

37. Some decisions, starting with that of Judge Gamble, have started with the test of reasonableness and argued that this is to be determined in all the circumstances. This must, it is argued in this case, include noting that R [*the claimant*] lives upstairs and has nowhere to store the wheelchair downstairs. Judge Gray expressly rejected that approach in *TB v Secretary of State for Work and Pensions*. "Personal circumstances such as living in an unsuitable building" are not part of the test for reasonable use of a wheelchair. She puts it thus (at paragraph [29]): "I limit specific consideration of the test … to the medical impact, which will involve consideration of the potential physical and mental consequences for a claimant…"

38. I agree with Judge Gray to the extent that putting an "all the circumstances" test into this descriptor carried the danger of testing the context too widely. I disagree with her in what appears to be a constrained view of the "medical consequences", which I take to include mental health issues as well as physical issues. I agree with that. But it has to be asked in every case whether this particular claimant can reasonably mobilise with a manual wheelchair without the assistance of any other person as a practical question. That is not a hypothetical question involving the appellant being placed in the wheelchair and expected to stay there. And it cannot be resolved by a few observations of a claimant without any reference to the actual requirements of wheelchair use by her or him. The user has to be able to get into it and out of it unaided and has to be able to deal unaided with the other aspects inherent in using a wheelchair to mobilise. That involves looking broadly at the whole physical and mental functional ability of the claimant and not merely at lower limb use.

39. It follows that if the use of a wheelchair is put in issue, then the Secretary of State must be prepared to show the evidence to explain why it is put in issue. If, for the reasons discussed in this decision, that has not happened then a tribunal dealing with the issue must consider carefully whether there is any evidence about wheelchair use. If there is no such evidence, then it must be prepared to embark on a consideration of each of the physical and mental aspects of using a wheelchair to mobilise that are inherent in such use so that its decision is evidence based. That cannot be confined to extrapolation from the other descriptors. Nor in many cases with a tribunal be able simply to rely on the findings in the ESA85. It requires specific evidence and specific findings.

Application to this case

40. I have set out above the consideration given by the tribunal to the use of a wheelchair by R [*the claimant*]. There is in this case evidence of wheelchair use (the powered wheelchair at the supermarket). This was raised with the appellant both by his representative and at the hearing. It considered not only the appellant being in the chair but getting into it and out of it. It found that there were no relevant upper limb or breathing problems and he confirmed he could self-propel. It is also relevant that the tribunal found, on the appellant's own evidence, that he could drive a car (which meant he could get into and out of it) and walk 30 metres across the road to the local store. In other words he was not totally immobilised when not in a wheelchair.

41. The representative took issue with the tribunal finding because, it was represented, "we are talking about an NHS or Red Cross wheelchair which are not only heavy but difficult to manoeuvre, let alone propel". Further, the appellant "has not undertaken any serious physical activity in the last 4 years (since he injured his ankle)… he is 9 stone overweight and asthmatic …" Those are essentially issues of fact. The appellant had attended the hearing so the tribunal clearly had the chance to take those points on board. And, indeed, the tribunal expressly dealt with breathlessness.

42. The Secretary of State supported the appeal by reference to a range of factors. In particular, R [*the claimant*] lives in a flat with 12 steps to it. There is no evidence that a wheelchair is available to R [*the claimant*]. He has nowhere to store the wheelchair and he would have financial problems getting one.

43. The danger with this wide approach is that it not only goes beyond any functional analysis of the function of using a wheelchair when the claimant is in it. It also goes beyond what needs to be determined to see whether a claimant can reasonably be expected to use a wheelchair to mobilise. The logic behind these comments would involve a means test to see whether it was reasonable to expect a claimant to buy one, and perhaps even that it was reasonable to expect a claimant to move so that storage is available at ground level for a wheelchair. That goes beyond the scope of regulation 19 and indeed employment and support allowance as a whole. I do not therefore accept the submission of the Secretary of State as made. It goes too wide.

44. I conclude that the tribunal in this case did apply the descriptor correctly. It had reason to consider the use by R [*the claimant*] of a wheelchair to mobilise and it had express evidence about wheelchair use before it. It saw the appellant and discussed this with him. It was able to rely on his direct evidence about wheelchair use. In so doing, it focussed on the difference between use of a manual wheelchair and use of an electric wheelchair. It considered not only whether he could use a wheelchair when in it but whether he could get into and out of it. It considered that the only significant physical limitation to the appellant from this perspective was the deformity and pain in his ankle. As part of that, it considered that the appellant did have some limited walking ability and that he could use a car, and that again was based on his evidence. And it took into account, so far as I can see, each point about wheelchair use put expressly to it for decision, namely the chronic asthma, diabetes and weight issues. The one point on which I would agree with the representative is in the comment by the tribunal at paragraph [19] that "minimum exertion is required to self propel a wheelchair". I am not entirely surprised at the comment made by the representative about whether any of the panel had actually tried to use a Red Cross wheelchair. But I do not regard that comment as undermining the decision of the tribunal to such an extent as to constitute a material error.

45. I therefore dismiss the appeal on this point." [*My inserts*].

Note: The paragraph numbering in this decision is as set out above. There are two paragraphs numbered 29.

1. Judge of the Upper Tribunal David Williams 29.8.2013

use of wheelchair

NT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0360 (AAC) – CE/56/2013 held:

"10. An Upper Tribunal judge has granted permission to appeal because the tribunal in its decision has not shown that it considered the reasoning in the Scottish case *CSE/151/2012* [2012] UKUT 376 (AAC).

In that case, a copy of which has been sent to the claimant, and a copy which will be put before the new tribunal, Upper Tribunal Judge Gamble considered that the tribunal had erred in law by finding that a claimant could reasonably be expected to use a wheelchair when it had not specifically enquired as to whether it would medically and otherwise be considered suitable for him. The present claimant was not using a wheelchair. Upper Tribunal Judge Gamble was concerned with questions such as whether a wheelchair would be medically advisable, whether the claimant's home would be suitable for use of a wheelchair indoors, or otherwise practicable in view of the claimant's living arrangements. However, I must admit to some doubts about this approach. The medical advisability of using a wheelchair seems to me to be a therapeutic question, whereas the test in the regulations is arguably one of practicability, either outdoors or in the work place. There are many with mobility disorders who do not use a wheelchair indoors, but do so outdoors. The distances in question in the schedule far exceed the likely dimensions of even the most spacious home, so it would seem reasonable to consider these questions either outdoors or in the workplace.

11. Although Judge Gamble's decision has been widely cited and approved, I am not sure that it reflects the intentions of the legislature. Where legislation fails to make its meaning clear, judges and other decision makers in applying the principles of statutory interpretation may, without error, end up with divergent ideas on the application of the legislative test. However, my understanding of the test set out in the legislation is whether a manual wheelchair or other such aid can reasonably be used, not whether the claimant's doctor or consultant would recommend its use for him. The words of the actual provision in the regulations are few and sparse and do not indicate if the words 'can reasonably be used' are to be considered in the context of a work day, in which case a level surface indoors other than the home would be what was in contemplation, or whether it relates to therapeutic considerations. Whether in fact the claimant would be able to use a wheelchair does not in my view involve consideration of whether it could be used indoors in his home, but it would involve consideration of whether the claimant has a hallway, garage or other secure space in which a wheelchair could be kept available for trips outside the home; on this Judge Gamble and I are not far apart."

See also CSE/151/2012 – [2012] UKUT 376 (AAC) and MG v Department for Social Development (ESA) – C1/12-13(ESA) – [2013] NICom 359 and RP v Secretary of State for Work and Pensions – [2011] UKUT 449 (AAC) – CE/1217/2011.

See also TB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0408 (AAC) – CE/3315/2012, a decision of Upper Tribunal Judge PA Gray which disagreed with the decision of Upper Tribunal Judge Gamble in CSE/151/2012 (also known as DM-v-SSWP) on the aspect that the claimant's personal circumstances such as living in an unsuitable building should be considered in the test of whether a manual wheelchair can reasonably be used.

1. Judge of the Upper Tribunal A Ramsay 26.7.2013

use of wheelchair

CSE/151/2012 – [2012] UKUT 376 (AAC) (also known as DM v Secretary of State for Work and Pensions) held:

"6. The issue in these proceedings is whether the tribunal erred in law in their approach to the application of the text of activity 1 of the limited capability for work assessment enacted in schedule 2 to the Employment and Support Allowance Regulations 2008, as that text stood from and including 28 March 2011. The statutory text in question reads as follows:

> "Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used."

7. The tribunal deal with this matter in paragraph 4 of their statement of reasons on document 78. That paragraph reads as follows:

> "4. In relation to the physical health descriptors, the tribunal were asked to consider descriptor 1, which is mobilising and descriptor 2, which is standing and sitting. In relation to mobilising, the test is whether the appellant could mobilise unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used. The medical examination shows no problems with the appellant's upper body and limbs. The letter from NHS Greater Glasgow and Clyde did not suggest any problem with the appellant's upper body and limbs. The tribunal found that in the event that the appellant could not walk that she would be able to mobilise using a wheelchair and that the use of such a wheelchair would be reasonable. The appellant stated that she did not have the upper body strength to propel a manual wheelchair but the tribunal did not accept her evidence regarding this. There is no evidence to support this claim that she has any problems with her upper body. The appellant therefore would be able to mobilise. The appellant does have an impairment in the left ankle, this is confirmed on the medical examination and also in the letter from the NHS. She was able to walk 20 metres using 2 crutches, this was normally to the examination room, it may well be that the appellant could not using crutches, walk the distances contained within the descriptor but the test is not whether she can walk that distance but whether she can mobilise and she could do so reasonably using a wheelchair. She is therefore not entitled to any points under descriptor 1."

8. The claimant's grounds of appeal stated on document 81 are to the effect that the tribunal erred in law "by making insufficient findings of fact" in relation to the application of activity 1. Her representative elaborates that general submission in considerable detail on document 82 as follows:

> "We consider the tribunal have erred in law by not finding facts in relation to the following pertinent questions –

1. Whether it has been suggested to the appellant by medical personnel that it would have been suitable/reasonable for her to use a wheelchair given her condition/rehabilitation needs at that point in time (i.e. whether it was medically suitable for her to use a wheelchair with respect to her ongoing recovery). The use of crutches may have been a necessary part of the appellant's rehabilitation programme and undermined by wheelchair use. No questions appear to have been asked of the appellant about whether it had been suggested she could use a wheelchair instead of crutches by medical personnel and whether this was medically suitable.

2. Whether the appellant would, in reality, have access to a wheelchair given the nature of her condition and availability of wheelchairs by local providers. That is, would a wheelchair, in reality, be available to her?

3. The appellant lives in an upstairs tenement flat. No questions were asked as to whether a wheelchair would be practical/suitable for her from the point of view of her living arrangements."

The Secretary of State's submission writer in paragraph 1 of his submission on document 108 states:

"I agree entirely with the grounds of appeal".

9. I hold that the claimant's grounds of appeal are well founded. The proper approach of a tribunal applying the statutory text of activity 1 (reproduced in paragraph 6 above) is to treat the matter of reasonableness as one requiring a broad exercise of their independent judgement to all the factors which are relevant in each individual case. Those factors should not be restricted to a consideration of a claimant's physical ability to use a manual wheelchair. I consider that paragraph 4 of the tribunal's statement of reasons, reproduced in paragraph 7 above indicates that the tribunal thus restricted their consideration of the issue and accordingly erred in law. They should have explicitly considered at least the three issues expressly raised by the claimant's representative in his grounds of appeal quoted in paragraph 8 above as well as the physical ability of the claimant. All of those three matters were, in my judgement, highly relevant to the application of activity 1 in the claimant's situation. Indeed, in almost every case where the question of whether it is reasonable for a claimant to use a manual wheelchair arises those issues (or similar ones) should be considered. However, I must stress that the application of the text of the activity must always be on an individual basis.

10. I exercise my discretion in the claimant's favour and set the tribunal's decision aside on the basis of the error of law identified in paragraph 9 above. It is inappropriate for me to remake it because that requires a fresh factfinding [*sic*] exercise much better carried out by a tribunal with medical as well as purely legal expertise. I thus remit the case for redetermination by such tribunal in accordance with the directions contained in paragraph 11 below."

Note: This case is sometimes referred to as 'DM v Secretary of State for Work and Pensions' (abbreviated 'DM v SSWP'). However, the decision shows no such case name. Note also that on the Tribunals Judiciary website the appellant is identified as 'M' not 'DM'.

See also MG v Department for Social Development (ESA) – C1/12-13(ESA) – [2013] NICom 359 and RP v Secretary of State for Work and Pensions – [2011] UKUT 449 (AAC) – CE/1217/2011. See also TB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0408 (AAC) – CE/3315/2012, a decision of Upper Tribunal Judge PA Gray which disagreed with Upper Tribunal Judge Gamble in this decision on the aspect that the claimant's personal circumstances e.g. such as living in an unsuitable building should be considered in the test of whether a manual wheelchair can reasonably be used. See also NT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0360 (AAC) – CE/56/2013.

1. Judge of the Upper Tribunal A J Gamble 1.6.2012

medical advice to refrain from use of wheelchair

JC v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0219 (AAC) – CE/2419/2012 held:

"5. … In particular, Dr Ryan commented on the pain the claimant suffered when moving about and pointed out that the claimant did not have a wheelchair and that "I would find it inappropriate for [the claimant] to use a wheelchair because I wish her to try to keep her mobility as much as possible". (On this issue, I draw attention to *DM v SSWP (ESA)* [2012] UKUT 376 (AAC) and *MG v DSD (ESA)* [2013] NICom 8, which may well be reconcilable on the basis that an assessment of the type contemplated in the latter case would no doubt have taken into account the impracticality of using a wheelchair mentioned in the earlier one.)…"

1. Judge of the Upper Tribunal Mark Rowland 2.5.2013

mobilising – use of wheelchair (and consideration of other aids)

EW v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0228 (AAC) – CE/3431/2012 held:

"11. The third issue is about the use of a wheelchair to assist mobilising. As I note below, the tribunal appears in this case to have gone straight to consideration of this in its reasons without making any finding about the extent to which the appellant could mobilise without use of a wheelchair.

12. The tribunal commented at some length in its reasons about whether it was appropriate to consider the use by the appellant of aids she did not use. It made a number of assumptions about the availability of aids for her without any record of discussion at the hearing. It then found that as there were no significant upper limb restrictions and that as the appellant was able to sit for reasonable periods of time there was "no reason why she could not mobilise in a manual wheelchair". However, it added that there "is some longstanding difficulty and she may struggle to repeatedly do it more than 200 metres".

13. The appellant's representative comments on this that "this is simply inadequate and fails to address the many issues regarding wheelchair use which is why there is a formal wheelchair assessment unit at [the local hospital] combining physios, psychologists, clinicians. This was raised at the tribunal and has been ignored."

14. The test in paragraph 1 of the revised Schedule 2 refers to:

> "Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used."

15. When I granted permission to appeal on this issue I pointed out that the proper interpretation of this test had been considered recently by Upper Tribunal Gamble in *M v Secretary of State for Work and Pensions* [2012] UKUT 376 (AAC).
Judge Gamble emphasised in this decision that the matter of reasonableness was "one requiring a broad exercise of their independent judgment to all the factors that are relevant in each individual case. Those factors should not be restricted to a consideration of a claimant's physical ability to use a manual wheelchair." Judge Gamble allowed the appeal for that reason.

16. I directed a submission from the Secretary of State's representative on this point. In response, the Secretary of State supported the appeal. In the view of the Secretary of State the tribunal should have first found if the appellant normally used an aid or appliance. If not, the next issue is whether any aid or appliance that had been prescribed or advised for use. The Secretary of State then suggested that the tribunal should consider if the wheelchair or other appliance would help the appellant, and if so whether there was a reasonable excuse why one was not being used. In the view of the Secretary of State the tribunal had failed adequately to consider all the relevant issues. For that reason the Secretary of State supported the appeal and requested that the appeal be sent for rehearing by the First-tier Tribunal.

17. Since then a Northern Ireland Social Security Commissioner has considered the same test as it applies in Northern Ireland, but in a factually different situation. The decision of Commissioner Stockman is *MG v Department for Social Development* [2013] NICom 359. Although both parties to the case supported the decision of Judge Gamble as adopting the correct approach to the descriptor, Commissioner Stockman identifies a problem with that approach on the ground that in his view it departs from a purely functional analysis. He comments (at paragraph [40]):

> "it seems to me that the reasonableness or otherwise of using an aid should be judged purely in the context of its potential use to enhance functional ability … the basic question should be whether [*sic*] would be reasonable to use an otherwise appropriate aid in order to enhance function."

The Commissioner then cautions against taking too wide a range of aspects of wheelchair use into account. I have added copies of his decision to the papers and direct the First-tier Tribunal to consider it alongside the decision of Judge Gamble in deciding this case. I do not consider it appropriate to engage in further analysis of the differences of approach of the two decisions in this case because on either test this tribunal erred in dealing with the matter inadequately. A fuller consideration of the descriptor in this case requires evidence I cannot see in these papers.

18. The tribunal should approach this descriptor, as any descriptor, on the basis of the evidence before it. I emphasise this because of the absence of relevant evidence in the record of decision in this case and a lack of factual findings. In particular I can see no finding made by the tribunal about the extent to which, if at all, the appellant can walk with or without aids. For example, would crutches or a walking or zimmer frame (perhaps with an added seat) be available and suitable to assist? It appears to have gone ahead to consider the use of a wheelchair without first deciding if in its view aids are reasonably needed by the appellant for mobility."

1. Judge of the Upper Tribunal David Williams 9.5.2013

use of wheelchair or other aid – reasonableness

MG-v-Department for Social Development (ESA) – [2013] NICom 359 – C1/12-13(ESA) examined mobilising and the use of a wheelchair or other aid.

The statement of reasons for the decision of the tribunal addressed the issue of mobilising over several passages but in the view of Commissioner Stockman the key passages were:

> "13. The activity refers to walking with a stick or other aid if such aid is normally used. This means it is normally used by people acting reasonably. We reflected on what this could mean. A simple example of the appropriate use of aids is someone with defective vision which can be corrected with glasses. In such a situation, it would be reasonable to assess a person based upon their corrected vision. A similar consideration can be applied to a person with poor hearing who would benefit from a hearing aid. The person may not wish to use such aids but we must consider the reasonableness of use of aids if they improve function.

14. The appellant has a shortened right leg. He told us he uses his crutch in his left hand. Generally, the advice would be to use the crutch to support the damaged site, namely the right side. However, the appellant says that he prefers to use the left side and it may be this is what works for him. However, he did say he had a problem using the crutch in his left hand because of his left wrist injury. The Department had formed the view that he could manage more than 100m but less than 200m with a crutch. We would agree with this rather than the shorter distances mentioned by the appellant. However, it was our view given that the descriptor refers to using such aids as can reasonably be used his mobility would be unrestricted if he resorted to using a wheelchair. We can appreciate that the appellant may not wish to use a wheelchair or he may feel it is not necessary. However, the question is one of reasonableness. We can see no reason why a wheelchair could not be used by him as he has adequate upper body function notwithstanding his wrist and shoulder problem. The latter was not presenting such restrictions as would not compromise locomotion affected through turning the wheels on the wheelchair by hand. Consequently, we removed the six points which had been awarded".

The appellant's representative (Ms Loughrey of Law Centre (NI)) argued that the tribunal had erred in law in finding that the appellant did not satisfy any of the "mobilising" descriptors on the basis that he could reasonably use a wheelchair on the grounds:

- he does not actually use or possess a wheelchair
- he has not been recommended or assessed for wheelchair provision under the National Health Service (NHS) by an Occupational Therapist (OT)
- he has significant physical problems with his wrist and shoulder which mean that he cannot reasonably be expected to use a wheelchair.

The appellant's representative (Ms Loughrey of Law Centre (NI)) also made reference to the NHS Regional Eligibility Criteria applying in Northern Ireland for the provision of wheelchairs which limited the supply to service users who needed them for use permanently or for longer than six months. It confirmed that provision was conditional upon the wheelchair user's home environment or other essential environments being suitable (or having the potential to be made suitable) and was subject to the wheelchair being used safely and effectively. Also in the case of a standard self-propelling wheelchair, the wheelchair user is required to have limited or no walking ability and the physical ability to self-propel the wheelchair independently and safely.

The Department for Social Development representative (Mr McKendry) responded with reference to *RP v Secretary of State for Work and Pensions – [2011] UKUT 449 (AAC) – CE/1217/2011*, a decision of Upper Tribunal Judge Levenson, stating that the tribunal failed in its inquisitorial role in terms of assessing the reasonableness of the appellant using a wheelchair, but added that there was enough evidence to assess that the appellant was physically capable of using a manual wheelchair. Further, he added that nevertheless the tribunal should have made further enquiries into practical issues such as whether the appellant would be able to afford a wheelchair, whether the appellant's home would have to be adapted and whether he would have suitable space to store a wheelchair in his home. In doing so he submitted that the decision of the tribunal erred in law.

The Upper Tribunal Judge held:

"19. Prior to 28 March 2011, the first activity in Schedule 2 was headed "Walking with a walking stick or other aid if such aid is normally used". The first activity, from that date, reads "Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used".

20. One difference between the two headings is the shift from a consideration of ability to "walk" to ability to "mobilise". Arising from this, there is a requirement to consider the possible use of a manual wheelchair. Whereas an aid such as a walking stick would have been taken into consideration under the previous form of the first activity, the term "walk" precluded consideration of wheelchairs. Now, claimants who normally use a wheelchair will not necessarily satisfy the new descriptors.

21. A second difference is the requirement to consider a manual wheelchair or other aid which "can reasonably be used". Commissioner and Upper Tribunal decisions on the previous IB and ESA regimes, such as *CIB/14499/1996* and *RP v SSWP*, have implied a condition of reasonableness into the consideration of the use of an aid or appliance. Therefore, the extent to which this new feature of the legislative scheme might represent a difference from previous interpretations needs to be addressed.

22. The core question which I have to decide is whether the tribunal in the present case has erred in law by finding that the appellant had no relevant restriction when his reasonable ability to use a wheelchair was taken into account.

Regulation 19(4) ESA Regulations and RP v SSWP

23. The requirement to conduct the assessment of an appellant's ability or inability to perform specific activities prescribed in Schedule 2 arises from regulation 19 of the ESA Regulations. Regulation 19(4) of the ESA Regulations requires a claimant to be assessed as if "using any aid or appliance which is normally worn or used". This is different from the previous IB scheme at regulation 25(2) of the Social Security (Incapacity for Work) (General) Regulations (NI) 1995, which from 1997 required the claimant to be assessed as if wearing "any aid or appliance which he normally wears or uses".

24. The Schedule 2 descriptors for ESA have to be approached on the basis of aids or appliances which the claimant might not personally use, but are normally worn or used by persons with the same or a similar disablement. This means that the potential use of an aid or appliance must be addressed even if a claimant does not actually use one.

25. It was in this context that Judge Levenson considered the operation of regulation 19(4) in *RP v SSWP*. That case concerned a claimant who did not normally use a crutch or a stick, but was assessed by the First-tier Tribunal as if he did when it was considering the "Standing" descriptor. Judge Levenson said:

> "16. It seems to me that the correct approach to regulation 19(4) is as follows. If the claimant in fact normally uses a particular type of aid or appliance, then he or she must be assessed as though they were using it. If a particular type of aid or appliance has been prescribed or recommended by a person with appropriate expertise, the claimant must be assessed as though they were using it unless it would be unreasonable to use it. If the claimant does not use a particular type of aid or appliance and one has not been prescribed or recommended, then the decision maker or First-tier Tribunal is entitled to take the view that the claimant should be assessed as if using one, but only if one is normally used by people in that situation acting reasonably in all the circumstances and it would be reasonable for the claimant to do the same. However, I do not agree with the Secretary of State that in this latter case there does not have to be any explanation of how the aid or appliance could help the particular claimant and that the advantages are obvious. The degree of detail is a matter for the tribunal on the facts of each particular case, but in my view, in the absence of actual use or prescription, there does need to be some explanation."

26. Both the appellant and the respondent submit that I should take guidance from the principles set out in *RP v SSWP*.

27. From the discussion in *RP v SSWP* of his earlier decision in CIB/14499/1996, it seems to me that Judge Levenson was concerned with the mischief which would result if a claimant could wilfully choose not to use a suitable aid in order to satisfy a particular descriptor when that aid had been prescribed. Yet he was also clear that it was open to a tribunal in a suitable case, based upon sufficient evidence and giving appropriate reasons, to find that an aid which had not been prescribed could be taken into account. In the context of regulation 19(4), I broadly agree with the approach adopted by Judge Levenson.

28. Judge Levenson's guidance on the interpretation of regulation 19(4) has application to all the activities within Schedule 2, including in particular those for which use of an aid is expressly contemplated by the activity heading – namely mobilising, understanding communication, navigation and bowel and bladder control. Whereas the latter two use the term "normally used", the headings to the former two expressly import conditions of reasonableness.

29. It is long established that the heading to each activity is integral to understanding the scope of the descriptors within it, as stated by Commissioner Brown in *C2/98(IB)* and Chief Commissioner Martin in *C31/98(IB)*. Whereas those cases applied to IB, they are equally applicable to ESA. Therefore the heading to the "Mobilising" activity informs the construction of the descriptors within that activity. In so far as it relates to the use of a walking stick, manual wheelchair or other aid "if such aid can reasonably be used", it amounts to an express qualification of regulation 19(4) and creates an additional test which has to be applied as part of the LCWA when the activity of "Mobilising" is considered. The heading to the "Mobilising" activity effectively makes express provision for the conditions implied by Judge Levenson in *RP v SSWP*. It does not appear to me that it materially alters the relevant considerations which a decision-maker has to address.

30. *RP v SSWP* establishes that when addressing the issue of whether a wheelchair can reasonably be used within the terms of the heading to the "Mobilising" activity, the first question is whether a wheelchair is normally used by the claimant. If so, the functional assessment of the claimant's ability to mobilise ought to proceed on the basis that he or she normally and reasonably uses a wheelchair. Equally, if the claimant has been referred for assessment, and an appropriate professional has recommended the use of a wheelchair, it seems to me that any functional assessment of the claimant's ability to mobilise should proceed on the basis that he or she can reasonably use a wheelchair. An appellant in such a case might seek to challenge the assessment, or to rely on a change of circumstances, in order to show that he or she cannot reasonably use a manual wheelchair. Notwithstanding that possibility, use of a wheelchair in each case would prima facie be normal and reasonable.

31. This is a case where the appellant normally uses an aid – a walking stick – but not a wheelchair. It is not a case where a wheelchair has been prescribed or recommended to him by a person with appropriate expertise. If applying Judge Levenson's decision in *RP v SSWP*, and for the purposes of regulation 19(4), the appellant otherwise should only be assessed as using a wheelchair if:

a) one is normally used by people in that situation acting reasonably in all the circumstances; and

b) it would be reasonable for the claimant to do the same.

32. An issue which requires further consideration is what factors need to be taken into account in considering whether use of a manual wheelchair is reasonable. The Department agrees with the approach of Judge Levenson and has issued guidance in consequence of Judge Levenson's decision in DMG Memo Vol 8/44. Guidance in this context of course is merely that. It reflects the Department's interpretation of the law and it is not binding on tribunals in any way. The guidance advises on the practical application of the principles set out by Judge Levenson. It suggests that the decision-maker should have regard to questions such as whether the aid or appliance is affordable, whether the claimant is able to use and store the aid or appliance and whether the claimant is physically able to use the aid or appliance. In the present case, the appellant and the Department submit that the guidance is correct. They also find support for the Department's approach in the decision of Judge Gamble in *DM v SSWP*, referred to above.

DM v SSWP

33. In DM v SSWP, Upper Tribunal Judge Gamble addressed the same activity of "Mobilising" which is in issue in this case. The claimant had sustained an injury to her left foot and ankle following a fall from height. The claimant was able to walk short distances using two crutches. The First-tier tribunal found that the claimant might well not be able to walk the distances in the descriptors using her two crutches, but held that she could mobilise those distances using a wheelchair.

34. The claimant appealed on the basis (i) that it had not been suggested by medical personnel that she could use a wheelchair and that this might be medically unsuitable in terms of her rehabilitation programme; (ii) that a wheelchair was not available to her in reality from local providers; (iii) that as she lived in an upstairs tenement flat, the question of the practicality of wheelchair use should have been considered in terms of her living arrangements. The Secretary of State's written submission agreed with the grounds submitted by the claimant.

35. In the light of the concession by the Secretary of State, Judge Gamble accepted that the proper approach of a tribunal applying the 'Mobilising' activity is to treat the matter of reasonableness as one requiring a broad exercise of their independent judgment to all the factors which are relevant in each individual case. He held that those factors should not be restricted to a consideration of a claimant's physical ability to use a manual wheelchair. He accepted that the tribunal should have explicitly considered the three matters raised by the claimant in her grounds of appeal above, as well as the physical ability of the claimant. Judge Gamble stressed that the application of the text of the activity must always be on an individual basis.

36. Both Ms Loughrey and Mr McKendry submit that the approach adopted by Judge Gamble in *DM v SSWP* was the correct one. Nevertheless, it seems to me that there is some tension between the approach of Judge Gamble and established jurisprudence addressing the nature of the LCWA and its predecessors. For example, Commissioner Jacobs, in reported Great Britain Commissioner's decision R(IB)2/03, when addressing the "rising from sitting" activity under the former personal capability assessment (PCA) for the purposes of IB, applied a functional analysis of the descriptor. He held that the PCA was designed to test in a systematic, analytical way the claimant's various physical disabilities. Later, as Upper Tribunal Judge Jacobs, in *GS v Secretary of State for Work and Pensions* [2010] UKUT 244, he has said that the analysis previously applied by him to the test for IB in *R(IB)2/03* applied equally in the case of ESA. His statement in *GS v SSWP* to this effect was approved by Upper Tribunal Judge Lane in *LF v Secretary of State for Work and Pensions* [2010] UKUT 352. In this jurisdiction Chief Commissioner Mullan has approved the same approach at paragraph 25 of *GF -v- Department for Social Development (ESA)* [2011] NICom 160. I also agree with this approach.

37. The difficulty I perceive with the approach suggested by *DM v SSWP* is that it departs from a purely functional analysis. If one assesses the activity of "Mobilising" in a way which considers an individual's domestic circumstances, such as whether he or she lives in an upstairs flat, then an assessment of two people with identical functional disability could lead to different outcomes. A person living on the ground floor might not satisfy any descriptors within the activity, on the basis that it would be reasonable to use a wheelchair, whereas her upstairs neighbour with an identical functional disability might. This is possible because the approach which focuses on an individual's domestic circumstances departs from testing the physical disablement on the basis of a purely functional analysis.

38. In GS v SSWP, Judge Jacobs was addressing the "Manual dexterity" activity in its pre 28 March 2011 version, and in particular the issue of whether an individual could "do up/undo small buttons, such as shirt or blouse buttons" in the now repealed descriptor. His words address that issue, but illustrate the problem well:

> "13. It follows that the tribunal was wrong to consider the practicalities of dressing, the type of shirt and so on. Even the Secretary of State's representative, having submitted that a functional analysis was appropriate, was tempted into this type of speculation. It is important to appreciate the context. The ultimate purpose of the descriptors is to test a person's capability for work. They test the claimant's manual dexterity for work-related purposes. They do not test the claimant's ability to self-care. The reference to shirts and blouses is for the purpose of illustration. They are not words of definition or limitation.
>
> 14. The proper approach to the interpretation and application of descriptor 6(f) is this. The descriptor tests the claimant's anatomical functions that would be involved in fastening or unfastening buttons. They include pinch grip, co-ordination of finger movements, and flexibility of the finger joints. The reference to small buttons identifies the size and shape of the object to which those functions are applied. The First-tier Tribunal should focus on the claimant's functional ability to perform the particular aspect of the activity covered by a descriptor. By doing that, it will avoid the myriad questions that otherwise appear to arise on descriptors. Is the ability to use a tap tested with wet or dry hands? What sort of surface is the £1 coin resting on? How smooth or thick are the pages of the book? And so on and so on."

39. Judge Jacobs was not dealing with the question of whether an aid or appliance might reasonably be used. However, it seems to me that Judge Jacobs was correct to focus on the claimant's functional ability to perform the particular activity. It further seems to me that, when, in regulation 19(4), the legislation requires consideration to be given to use of an aid or appliance in assessing the extent of a claimant's capability to perform any of the physical activities in Part I of Schedule 2, this must also be a functional assessment. A decision-maker must focus purely on the extent to which a claimant can, for example, mobilise using his walking stick.

40. Similarly, it seems to me that the reasonableness or otherwise of using an aid should be judged purely in the context of its potential use to enhance functional ability. Matters which go beyond functional ability cannot be relevant to the question of whether wheelchair use is reasonable in the context of the "Mobilising" descriptor. The basic question should be whether it would be reasonable to use an otherwise appropriate aid in order to enhance function.

41. I consider that questions such as whether the doorway to the appellant's home is wide enough to accommodate a wheelchair, or whether there are steps to his front door, or whether he has adequate storage space for a wheelchair, cannot be directly relevant to functional assessment for particular descriptors. Therefore, I must respectfully disagree with Judge Gamble in *DM v SSWP* to the extent that he accepts that a tribunal will err in law by failing to ask questions as to whether a wheelchair would be practical or suitable from the point of view of the claimant's living arrangements. It also follows that I consider that the Department's guidance to that effect cannot be correct.

When is a wheelchair normally and reasonably used?

42. However, I recognise that this approach throws up its own questions. The tribunal in the present case said that "we can see no reason why a wheelchair could not be used by him…". Indeed, I imagine that very many people with a lower limb disablement limiting mobility, however slight or temporary, can mobilise a sufficient distance in a wheelchair as to exclude themselves from satisfying any descriptor under the activity of "Mobilising". Such a broad group might include claimants whose use of a wheelchair would be entirely disproportionate to the degree of their functional disablement, or claimants who would be medically advised to use alternative walking aids for therapeutic reasons, or claimants with temporary conditions. However, is that what the legislation requires? When assessing functional ability, just because there is no reason why he or she cannot use a wheelchair, should a decision-maker conclude that use of a wheelchair by a claimant is reasonable?

43. I consider that, in addressing this question, it is important to recall that, while the heading to the "Mobilising" descriptor expressly introduces the condition that a wheelchair can reasonably be used, regulation 19(4) continues to require that a wheelchair is normally used. Referring to the use of aids and appliances in general, Judge Levenson in *RP v SSWP* added the qualification "by people in that situation acting reasonably in all the circumstances". I consider that this qualification is better expressed, in the context of "Mobilising", in terms of whether a wheelchair would normally be used by a person with the appellant's degree of walking disablement in order to enhance his or her ability to mobilise. It seems to me that by focusing on the question of whether a wheelchair could reasonably be used by the appellant, the tribunal has omitted to address the question of whether a wheelchair would normally be used by a person with the appellant's particular disabilities.

44. How then, in the absence of actual or recommended use, is the question of whether a wheelchair would normally be used by a claimant to be assessed? In answering that question, it seems to me that the system of eligibility for public provision of wheelchairs must remain a central factor. In general, people who normally need to use a wheelchair will be assessed for one and if appropriate will have this item provided without charge by the NHS. In the context of a relatively specialised aid such as a manual wheelchair, it seems appropriate to construe the requirement of reasonableness in the heading to the activity of "Mobilising" with this aspect of government policy in mind.

45. Typically, an individual will be referred for assessment for eligibility for wheelchair provision by their doctor, a hospital consultant or an OT. Such a referral will take place against a background of appropriate therapeutic assessment, with regard to the level of the relevant mobility difficulties and the individual's needs. Under the NHS in Northern Ireland, a comprehensive assessment by an OT will take place for all wheelchair requests. I consider that it would be difficult to conclude that a wheelchair would be normally used by a claimant with a particular degree of disability without the benefit of such an assessment.

46. In this case, the tribunal has not addressed the question of whether it would be normal for an individual with the claimant's particular mobility limitations – namely ability to walk up to 200 metres using a stick – to be referred for wheelchair use. The NHS Regional Eligibility Criteria specify that a candidate for a wheelchair should have "limited or no walking ability". Professional assessment against the relevant criteria is carried out in order to determine whether an individual should use a wheelchair. Therefore, it is a question requiring a level of specialist expertise. I acknowledge that a general practitioner may be involved in referring patients for assessment for wheelchair use. Accordingly, many medically qualified members (MQM) of the tribunal are likely to have experience of this. However, I consider that it would only be in the clearest of cases that an MQM's opinion might be relied on to settle this question in the absence of evidence from a relevant professional accustomed to making the assessment. Nevertheless, if there is clear evidence that an appropriate candidate for wheelchair provision has unreasonably declined a referral for assessment, it may be an appropriate instance for determining that the claimant could reasonably use a wheelchair.

47. As observed above, I consider that difficulties with the home environment should not affect the question of whether it is reasonable for a claimant to mobilise using a wheelchair. However, I also recognise that consideration of such practicalities is a central part of the assessment for wheelchair provision. Where a wheelchair has been recommended by an appropriate professional under the NHS, practical assistance such as disabled facilities grants of up to £25,000 may have to be provided to adapt the wheelchair user's home environment. The decision on wheelchair provision addresses both the level of need and the reasonable consequences of providing one. If it is normal and reasonable for a person to use a wheelchair, having regard to all relevant matters, one will be provided and the associated costs will be met from the public purse. The practical questions arising as in *DM v SSWP* should not therefore need to be addressed as, where a wheelchair would normally and can reasonably be used, the appropriate adaptations of the potential user's home environment will follow.

48. The tribunal in the present case held that there was no reason why a wheelchair could not be used by the appellant. However, it seems to me that the tribunal erred in its approach by failing to engage properly with the question of whether the appellant was someone who would normally use a wheelchair. It has dealt with the question of the reasonableness of using a wheelchair in isolation of this question. As a result, I consider that the tribunal has erred in law by finding that the appellant had no relevant restriction in the activity of "Mobilising" when his reasonable ability to use a wheelchair was taken into account.

Physical restrictions on mobilising in a wheelchair

49. I further consider that the question of the appellant's physical ability to mobilise using a wheelchair is not a condition of the reasonableness of whether he could use one. Rather it is a matter to be assessed once it is accepted that he could reasonably use a wheelchair.

This is because the scoring scheme for descriptors within the activity varies according to the distance which the appellant can mobilise. Where wheelchair use is reasonable, a decision-maker has to assess the likely distance over which a claimant could propel a wheelchair, bearing in mind benchmarks of 50, 100 or 200 metres. The only cause for variation in terms of the distance achievable, it seems to me, would be any physical condition which would compromise the ability to self-propel manually. If a physical restriction was to be viewed as rendering it unreasonable for a claimant to use a wheelchair per se [*meaning: in itself*], then there would be no point in legislating for nuances in terms of the distance a claimant could mobilise using a wheelchair. [*My insert*].

50. The LCWA provides for medical examination of upper limb function. However, the descriptors on which the healthcare professional gives an opinion are not necessarily helpful for assessing upper limb function in the context of manually propelling a wheelchair. Moreover, upper limb function is only one factor which might restrict wheelchair use. Other factors might include respiratory conditions, cardiac conditions or neurological conditions. As pointed out above, the Regional Eligibility Criteria for provision of a wheelchair require that a wheelchair user must be physically able to self-propel the wheelchair independently and safely.

51. In the present case the appellant points to evidence from the healthcare professional which indicates a slight tenderness over the left lateral epicondyle, consistent with a tennis elbow, and swelling in the left wrist. These are factors which might affect his ability to mobilise. However, the pro forma report from the healthcare professional nowhere addresses or assesses the likely ability of the appellant to self-propel.

52. The tribunal found that the upper limb restrictions of the appellant would not compromise locomotion effected through turning the wheels on a wheelchair by hand. There was no reference to a finding on distance in this context. It is therefore not clear to me whether the tribunal was addressing the simple motion of turning a wheelchair wheel, or whether the physical effort of propelling a wheelchair with the appellant's body weight over a distance of up to 200 metres was fully taken into account.

53. Where, although this was not such a case, the Department seeks to rely on a submission that an appellant can self-propel in a manual wheelchair over a particular distance, it seems to me that the Department should have evidence of this. The current report obtained for the purposes of the LCWA does not directly address the issue through its examination of, for example, upper limb function. Yet, where a tribunal is left to decide such matters in the absence of evidence, its conclusions are inevitably speculative in nature and potentially unsound. By Article 20(3) of the Social Security (NI) Order 1998, a tribunal may not carry out a physical examination of an appellant or require him or her to undergo a physical test. However, this is not a licence to make findings on physical ability in the absence of examination or evidence.

54. Any decision given in the absence of evidence is arguably irrational. I consider that the tribunal did not have sufficient evidence to make the findings of fact which are required to address the question of how far the appellant could mobilise in a wheelchair. Therefore, if I am wrong in my analysis of the application of regulation 19(4) and the "Mobilising" activity, I consider that the tribunal has materially erred in law in this respect also.

55. For that reason and the reasons given above, I allow the appeal and set aside the decision of the tribunal.

Disposal

56. I have given consideration to whether I should remit the appeal to a newly constituted tribunal or to whether I should make the decision which the tribunal should have given. Having regard to the particular facts and findings, I conclude that this is a case in which I can give the decision the tribunal should have given without making fresh or further findings of fact.

57. In the present case, the tribunal found that the appellant could have unrestricted mobility "if he resorted to using a wheelchair", awarding no points on this basis. I have concluded that the tribunal erred in finding that the appellant's functional ability should be assessed on the basis that he can normally and reasonably use a wheelchair.

58. However, the tribunal had found that the appellant could mobilise more than 100 metres but fewer than 200 metres using a stick, which would result in a score of six points for descriptor 1.d. The tribunal further found that the appellant satisfied descriptor 2.b in the activity of "Standing and Sitting", resulting in a score of nine points. I accept these findings. The combined score amounts to 15 points for physical health descriptors, which is sufficient to satisfy the requirements of regulation 19(3)(a) of the ESA Regulations.

59. I therefore allow the appeal and find that the appellant satisfies the LCWA from and including 8 October 2011."

Note: In this case CSE/151/2012 – [2012] UKUT 376 (AAC) is referred to as 'DM v Secretary of State for Work and Pensions' (abbreviated 'DM v SSWP'). However, a print out of the decision shows no case name and on the Tribunals Judiciary website the appellant is referred to as 'M' not 'DM'.

See also RP v Secretary of State for Work and Pensions – [2012] UKUT 376 (AAC) – CSE/151/2012 – [2011] UKUT 449 (AAC) – CE/1217/2011 and AR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0417 (AAC) – CE/3737/2012.

1. Commissioner O Stockman 29.1.2013

use of wheelchair – normal/reasonable use?

PL v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0448 (AAC) – CE/95/2013 examined the approach to be taken to 'mobilising' and use of a wheelchair. The Upper Tribunal Judge making reference to his earlier decision – AR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 417 (AAC) – CE/3737/12 held:

"7. As my decision in AR states, the tribunal is required to apply two tests when considering use of a wheelchair in mobilising: whether this is normal and whether this is reasonable. There is no assertion anywhere in the papers before the tribunal that the appellant has ever used a wheelchair, so the answer to that question is clear. But that must be its starting point from which then to consider whether it is reasonable. The failure of the tribunal to consider this point of itself puts its decision in question.

8. This is therefore a case where the only mention of the use of a wheelchair to assist mobilising is to be found in the statement of reasons. On that basis, I have no hesitation in agreeing with both parties that the decision is inadequate. In paragraph [6], the only paragraph in which use of a wheelchair is considered, the tribunal finds that the appellant has full upper body and limb function and controlled asthma. It then finds that he can sit for at least half an hour

> "… and on that basis he could repeatedly mobilise, utilise a manual self propelled wheelchair repeatedly for in excess of 200 metres within a reasonable timescale before the onset of significant discomfort or exhaustion"

9. I agree with both parties that that is not an adequate explanation of the tribunal decision when nothing else in the tribunal record supports it. The tribunal appears to have considered three issues: lower limb problems of the appellant; any upper limb problems; and respiratory problems. As discussed in AR, consideration must be given to all bodily functions involved in using a wheelchair – and particularly repeated use of it – and not just sitting in it. And there must be evidence for findings. Merely noting from (contested) ESA85 evidence that there are no upper limb limitations is not adequate. These do not test the functions necessary repeatedly to turn a wheel on a wheelchair manually. And there need to be findings about rising from sitting or similar evidence that the appellant can get into and out of a wheelchair unaided and that he or she can handle it as part of the process of using it to mobilise unaided."

1. Judge of the Upper Tribunal David Williams 10.9.2013

use of wheelchair

MI v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0447 (AAC) – CE/108/2013 held:

"5. Even if the tribunal had accepted that the appellant was virtually unable to walk on that evidence, it still had to consider use of a wheelchair as that was put in issue by the Secretary of State. I dealt with the interpretation and application of the mobility descriptor and the use of a wheelchair in my recent decision *AR v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 417 (AAC). I adopt that decision here and do not repeat it. In so doing, I do not accept the submission for the appellant about, for example, purchasing a wheelchair. However, the submission for the Secretary of State in this case followed a different approach to that on which I commented in AR and I must consider it further.

6. This is another appeal where there is no mention in the ESA50 by the appellant that he has ever used a wheelchair. Nor is there any specific mention in the ESA85, where the use of crutches is mentioned. But the decision of the decision maker acting for the Secretary of State does raise the point in stating that:

> "He was not breathless on examination and no evidence of significant restriction of upper limbs, he would be able to mobilise using a self propelled wheelchair."

Use of a wheelchair is also noted at the end of the record of proceedings, where the representative is recorded as submitting:

> "Mobilising and wheelchair – would it be reasonable to buy own or would expect NHS to buy. Only do if needed in and out. He can get around inside."

So it was clearly relevant to the tribunal's decision.

7. The tribunal dealt with use of a wheelchair as follows:

> "[8] We found he would be able to self propel a manual wheelchair without assistance. He has no serious condition affecting his upper limbs as he agreed at assessment. All upper limb findings on examination were normal …"

There is nothing further in the tribunal record on this issue.

8. The appellant's representative subjects this to an extended challenge, not least by reference to the decision of Judge Gamble in *DM v Secretary of State for Work and Pensions* [2012] UKUT 376 (AAC) to which I referred in *AR*.

9. In contrast to the submission of the Secretary of State put forward in *AR*, the submission for the Secretary of State is put on a much narrower basis here. It starts by accepting, as was accepted in *AR*, that the decision of Judge Levenson in *RP v Secretary of State for Work and Pensions (ESA)* [2011] UKUT 449 (AAC) is correct. This requires the application of regulation 19(4) of the Employment and Support Allowance Regulations 2008 to each of the descriptors. I agree.

The Secretary of State submits that that requires the tribunal to consider three issues: does the appellant normally use a wheelchair? If not, has it been prescribed or recommended? If not, is it reasonable to expect that one would normally be used by people in the same situation as the appellant? Again, I agree.

10. It is the third of those tests that applies here. The only comment for the Secretary of State on the tribunal's reasoning about that third test is:

> "In terms of considering whether or not the person could reasonably use a wheelchair, the HCP must consider their upper limb function and cardio-respiratory status. The examination revealed no problems with upper limb movements. There was no mention of problems with cardiac, respiratory or vascular functions and there was no obvious loss of power in either arm."

The implication is that this is an adequate basis for the First-tier Tribunal decision. I disagree.

11. I do so because, as I emphasised in *AR*, the test of "mobilising unaided … with a wheelchair" is a functional test involving not only sitting in it but also getting into and out of it and handling it. The starting point is whether the appellant in fact mobilises with a wheelchair. The tribunal makes not [*sic*] comment on that, although it should have done so to explore both the first and second tests set out above. Instead it turned without consideration of those points directly to its view of what was reasonable. In this case the standard ESA85 report records as medical evidence of upper limb use: "client has no problems with these activities" (that is, of course, the specific functions tested by other descriptors and I assume is based on the ESA50). There is no indication on the face of the ESA85 that the practitioner considered other forms of upper limb use, such as repeatedly turning a wheel. The only relevant informal observation is that the appellant had slight difficulty rising from sitting while the medical evidence about lower back records that the appellant declined to crouch down and stand up and could bend forward to touch knees.

12. It is plain that the tribunal dealt with the question of mobilising with a wheelchair inadequately. While it was, for reasons I explained in *AR*, not relevant to consider if the appellant could afford to buy a wheelchair, it was appropriate to consider any medical advice and the full functioning necessary to mobilise with a manual wheelchair and to make factual findings about those functions. I do not agree with the Secretary of State's representative that the ESA85 report in the form seen here provided adequate findings in this case. This is because (a) the consideration of upper limb functioning did not include all relevant functions and (b) other relevant aspects of functioning, such as getting into and out of a chair, were not clear on the ESA85 evidence and were not separately considered by the tribunal. I allow the appeal on this ground also."

1. Judge of the Upper Tribunal David Williams 10.9.2013

use of wheelchair reasonable

TB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0408 (AAC) – CE/3315/2012 involved an appeal where in the view of the Upper Tribunal Judge the statement of reasons for the First-tier Tribunal failed to deal with the critical issue of whether either a wheelchair or crutches could reasonably be used.

The Upper Tribunal Judge held:

"14. In relation to the mobilising issue the appellant's representative cites a general lack of fact finding and the absence of an explanation as to how the accepted problems with standing and sitting might impact upon the use of a wheelchair or crutches.

15. The Secretary of State's submission is predicated upon the premise that in the absence of upper limb or cardio-respiratory problems wheelchair use is de facto [*meaning: in fact – whether by right or not*] reasonable. It argues that despite the somewhat minimalist approach to fact-finding (my paraphrase) the decision of the FTT [*First-tier Tribunal*] is correct and sustainable. So far as the mobilising descriptor is concerned the submission explains the principles used in shaping the Decision Makers Guidelines, which were made upon the basis of the decision of Upper Tribunal Judge Levenson in *RP-v-SSWP(ESA)* [2011] UKUT (AAC) (*CE/1217/2011*) which set out an approach to the application of regulation 19(4). The submission does not mention other decisions, that of Upper Tribunal Judge Gamble (Scotland) *DM-v-SSWP* [2012] UKUT 376 (AAC) and that of Commissioner Stockman (Northern Ireland) in *MG-v-Department of Social Development* [2013]NI Com 349, of persuasive authority before the FTT in England, although I should say that whilst Commissioner Stockman's decision predates the submission it may have not have been issued until after the submission was filed. [*My inserts*]

16. Neither party has asked for an oral hearing of the appeal and I consider that I am able to deal fairly with the matter on the basis of the papers before me.

Interpreting the law

17. The starting point is *RP-v-SSWP*. It concerned the use, not of a wheelchair but of a walking stick, and it analysed and explained regulation 19(4) in practical terms.

18. The activity under scrutiny in *RP-v-SSWP* was standing and sitting (standing being the problem described) under the form of the activity and related descriptors in use prior to March 2011. That has no reference to the use of aids or appliances in the heading, thus regulation 19(4) (set out above) applies to import the 'normally worn or used' test into any assessment of capability. Regulation 19(4), however, adds nothing to the consideration of wheelchair use under Activity 1 since under the activity heading a finding is required as to whether a manual wheelchair or other such aid "can reasonably be used" thus the "normally worn or used" test as explained by Judge Levenson is otiose [*meaning: serving no practical purpose or result*]. In that conclusion I differ -

from the approach taken by Commissioner Stockman in *MG-v-Department for Social Development* as to the applicability of regulation 19(4), which he summarises at paragraph 28 and explains further at paragraph 43. [*My insert*].

19. Nonetheless the dicta of Judge Levenson is of some assistance in applying the reasonableness test under activity 1 since the question of whether a manual wheelchair or other aid can reasonably be used may turn upon the issues he identified at paragraph 16 where he says:

> "if a particular type of aid or appliance has been prescribed or recommended by a person with appropriate expertise, the claimant must be assessed as though they were using it unless it would be unreasonable to use it."

20. Although referring to the differently worded obligation in regulation 19(4) the principle would apply to the issue of reasonableness in activity 1 where an aid or appliance has been medically advised.

21. However Judge Levenson goes on to say in that paragraph "*if the claimant does not use a particular type of aid or appliance and one has not been prescribed or recommended, then the decision-maker or First-tier Tribunal is entitled to take the view that the claimant should be assessed as if using one, but only if one is normally used by people in that situation acting reasonably in all the circumstances and it would be reasonable for the claimant to do the same*." (my emphasis)

22. I see the reference to such aid or appliance being considered only if one is normally used by people in that situation as limiting the scope of the activity heading which must be included in any assessment under the mobilising descriptors. I would restate Judge Levenson's approach to omit the "normally used" reference.

23. My amended approach to Activity 1 (and also to Activity 7 (Communication) which refers to "using any aid it is reasonable to expect them to use") becomes:

> "*if the claimant does not use a particular type of aid or appliance and one has not been prescribed or recommended, then the decision-maker or First-tier Tribunal is entitled to take the view that the claimant should be assessed as if using one only if such an aid can reasonably be used by the claimant…*"

24. I pause before completing that sentence to comment that that in practice there may be very little between the two approaches. Where such an aid is normally used by people in the position of the claimant is likely to be a good guide as to whether such use is reasonable, but 'normally used' cannot be part of the criteria where 'can reasonably be used' is prescribed in the activity heading. To that extent I qualify the applicability of RP-v- SSWP to activities 1 and 7 of Schedule 2.

25. I now complete the sentence "*…reasonableness of use being considered in terms of the effect such use would have upon their medical condition*." I will contextualise that qualification.

26. Initially it must be understood that it is for the Secretary of State to establish that the manual wheelchair or other aid can reasonably be used, and to do so it is insufficient simply to rely on the fact that the person has no, or minimal, upper limb or cardio-respiratory problems; that may mean that they can propel a wheelchair, but it does not establish that one can reasonably be used. Common sense dictates that if a person cannot physically propel themselves in a manual wheelchair then the reasonableness issue is irrelevant.

27. Although each case must be looked upon individually, it will be easier for the Secretary of State to show that it is reasonable to use an aid such as a walking stick than a wheelchair. In my judgement there is a qualitative difference in expecting someone to use spectacles to aid seeing or a walking stick to aid walking, and the use of a wheelchair to mobilise. A wheelchair replaces walking; there are attendant consequences, for example muscle wasting, and the threshold for whether its use is reasonable must be higher than that of a simple manually used aid which could be discarded without residual physical consequence. I endorse the general view of Commissioner Stockman as to it being difficult to conclude that a wheelchair can reasonably be used without the person having been referred by their clinicians for a wheelchair assessment. (MG-v-Department of Social Development paragraph 45.) The converse will not always apply. Where an appellant has been positively assessed for a wheelchair but is unwilling to adopt its use the question arises as to how the issue of reasonableness may be considered. In my judgement the FTT, using the expertise on the panel, is best placed to determine in the light of the medical issues whether there may be personal adverse effects upon their ongoing health conditions or recovery which make wheelchair (or indeed other prescribed aid) use unreasonable. The Secretary of State, when considering the issue at an earlier stage may call upon the medical advisors it has available to offer an opinion on the facts of the case, and any case specific advice should form part of the evidence before the FTT.

28. To individualise the reasonableness of use question in terms of personal medical conditions is not to advocate consideration as to the practicalities of manual wheelchair use in each individual case. There is a body of authority in relation to the functional descriptors under IB, followed in ESA, to the effect at they are designed to test particular aspects of function, and are therefore, if not hypothetical at least constrained in their application. As an example the case of *GS-v-SSWP (ESA)* [2010] UKUT (AAC) in which Upper Tribunal Judge Jacobs, building on his decision in *R(IB)2/03*, said about the descriptors under the activity manual dexterity

> "*The descriptor tests the claimant's anatomical functions that would be involved in fastening or unfastening buttons. They include pinch grip, co-ordination of finger movements, and flexibility of the finger joints. The reference to small buttons identifies the size and shape of the object to which those functions are applied. The First-tier Tribunal should focus on the claimant's functional ability to perform the particular aspect of the activity covered by a descriptor. By doing that, it will avoid the myriad questions that otherwise appear to arise on descriptors.*

Is the ability to use a tap tested with wet or dry hands? What sort of surface is the £1 coin resting on? How smooth or thick are the pages of the book? And so on and so on..."

29. That decision has been generally followed and specifically imported to the ESA context. The case law is set out by Commissioner Stockman in paragraph 36 of *MG-v-Department for Social Development*. I follow that line of authority; accordingly I respectfully disagree with the decision of Upper Tribunal Judge Gamble in *DM-v-SSWP* [*meaning: CSE/151/ 2012 – [2012] UKUT 376 (AAC)*] that personal circumstances such as living in an unsuitable building should be considered in the test of whether a manual wheelchair can reasonably be used. For these reasons I limit specific consideration of the test that I promulgate as to whether a wheelchair or other aid can reasonably be used to the medical impact, which will involve consideration of the potential physical and mental consequences for a claimant or appellant." [*My insert*].

See also AR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0417 (AAC) – CE/3737/2012 which (at paragraph 37) does not support the view held at paragraph 29 that in assessing whether or not a claimant can reasonably be expected to use a wheelchair the enquiry should be limited to medical questions.

1. Judge of the Upper Tribunal P A Gray 22.8.2013

use of wheelchair

NT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0360 (AAC) – CE/56/2013 held:

"10. An Upper Tribunal judge has granted permission to appeal because the tribunal in its decision has not shown that it considered the reasoning in the Scottish case *CSE/151/2012* [2012] UKUT 376 (AAC). In that case, a copy of which has been sent to the claimant, and a copy which will be put before the new tribunal, Upper Tribunal Judge Gamble considered that the tribunal had erred in law by finding that a claimant could reasonably be expected to use a wheelchair when it had not specifically enquired as to whether it would medically and otherwise be considered suitable for him. The present claimant was not using a wheelchair. Upper Tribunal Judge Gamble was concerned with questions such as whether a wheelchair would be medically advisable, whether the claimant's home would be suitable for use of a wheelchair indoors, or otherwise practicable in view of the claimant's living arrangements. However, I must admit to some doubts about this approach. The medical advisability of using a wheelchair seems to me to be a therapeutic question, whereas the test in the regulations is arguably one of practicability, either outdoors or in the work place. There are many with mobility disorders who do not use a wheelchair indoors, but do so outdoors. The distances in question in the schedule far exceed the likely dimensions of even the most spacious home, so it would seem reasonable to consider these questions either outdoors or in the workplace.

11. Although Judge Gamble's decision has been widely cited and approved, I am not sure that it reflects the intentions of the legislature. Where legislation fails to make its meaning clear, judges and other decision makers in applying the principles of statutory interpretation may, without error, end up with divergent ideas on the application of the legislative test. However, my understanding of the test set out in the legislation is whether a manual wheelchair or other such aid can reasonably be used, not whether the claimant's doctor or consultant would recommend its use for him. The words of the actual provision in the regulations are few and sparse and do not indicate if the words 'can reasonably be used' are to be considered in the context of a work day, in which case a level surface indoors other than the home would be what was in contemplation, or whether it relates to therapeutic considerations. Whether in fact the claimant would be able to use a wheelchair does not in my view involve consideration of whether it could be used indoors in his home, but it would involve consideration of whether the claimant has a hallway, garage or other secure space in which a wheelchair could be kept available for trips outside the home; on this Judge Gamble and I are not far apart."

See also CSE/151/2012 – [2012] UKUT 376 (AAC) and MG v Department for Social Development (ESA) – C1/12-13(ESA) – [2013] NICom 359 and RP v Secretary of State for Work and Pensions – [2011] UKUT 449 (AAC) – CE/1217/2011. See also TB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0408 (AAC) – CE/3315/2012, a decision of Upper Tribunal Judge PA Gray which disagreed with the decision of Upper Tribunal Judge Gamble in CSE/151/2012 (also known as DM-v-SSWP) on the aspect that the claimant's personal circumstances such as living in an unsuitable building should be considered in the test of whether a manual wheelchair can reasonably be used.

1. Judge of the Upper Tribunal A Ramsay 26.7.2013

use of wheelchair

CSE/151/2012 – [2012] UKUT 376 (AAC) (Also known as DM v SSWP) held:

"6. The issue in these proceedings is whether the tribunal erred in law in their approach to the application of the text of activity 1 of the limited capability for work assessment enacted in schedule 2 to the Employment and Support Allowance Regulations 2008, as that text stood from and including 28 March 2011. The statutory text in question reads as follows:

"Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used."

7. The tribunal deal with this matter in paragraph 4 of their statement of reasons on document 78. That paragraph reads as follows:

"4. In relation to the physical health descriptors, the tribunal were asked to consider descriptor 1, which is mobilising and descriptor 2, which is standing and sitting. In relation to mobilising, the test is whether the appellant could mobilise unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used. The medical examination shows no problems with the appellant's upper body and limbs. The letter from NHS Greater Glasgow and Clyde did not suggest any problem with the appellant's upper body and limbs. The tribunal found that in the event that the appellant could not walk that she would be able to mobilise using a wheelchair and that the use of such a wheelchair would be reasonable. The appellant stated that she did not have the upper body strength to propel a manual wheelchair but the tribunal did not accept her evidence regarding this. There is no evidence to support this claim that she has any problems with her upper body. The appellant therefore would be able to mobilise. The appellant does have an impairment in the left ankle, this is confirmed on the medical examination and also in the letter from the NHS. She was able to walk 20 metres using 2 crutches, this was normally to the examination room, it may well be that the appellant could not using crutches, walk the distances contained within the descriptor but the test is not whether she can walk that distance but whether she can mobilise and she could do so reasonably using a wheelchair. She is therefore not entitled to any points under descriptor 1."

8. The claimant's grounds of appeal stated on document 81 are to the effect that the tribunal erred in law "by making insufficient findings of fact" in relation to the application of activity 1. Her representative elaborates that general submission in considerable detail on document 82 as follows:

"We consider the tribunal have erred in law by not finding facts in relation to the following pertinent questions –

1. Whether it has been suggested to the appellant by medical personnel that it would have been suitable/reasonable for her to use a wheelchair given her condition/rehabilitation needs at that point in time (i.e. whether it was medically suitable for her to use a wheelchair with respect to her ongoing recovery). The use of crutches may have been a necessary part of the appellant's rehabilitation programme and undermined by wheelchair use. No questions appear to have been asked of the appellant about whether it had been suggested she could use a wheelchair instead of crutches by medical personnel and whether this was medically suitable.

2. Whether the appellant would, in reality, have access to a wheelchair given the nature of her condition and availability of wheelchairs by local providers. That is, would a wheelchair, in reality, be available to her?

3. The appellant lives in an upstairs tenement flat. No questions were asked as to whether a wheelchair would be practical/suitable for her from the point of view of her living arrangements."

The Secretary of State's submission writer in paragraph 1 of his submission on document 108 states:

"I agree entirely with the grounds of appeal".

9. I hold that the claimant's grounds of appeal are well founded. The proper approach of a tribunal applying the statutory text of activity 1 (reproduced in paragraph 6 above) is to treat the matter of reasonableness as one requiring a broad exercise of their independent judgement to all the factors which are relevant in each individual case. Those factors should not be restricted to a consideration of a claimant's physical ability to use a manual wheelchair. I consider that paragraph 4 of the tribunal's statement of reasons, reproduced in paragraph 7 above indicates that the tribunal thus restricted their consideration of the issue and accordingly erred in law. They should have explicitly considered at least the three issues expressly raised by the claimant's representative in his grounds of appeal quoted in paragraph 8 above as well as the physical ability of the claimant. All of those three matters were, in my judgement, highly relevant to the application of activity 1 in the claimant's situation. Indeed, in almost every case where the question of whether it is reasonable for a claimant to use a manual wheelchair arises those issues (or similar ones) should be considered. However, I must stress that the application of the text of the activity must always be on an individual basis.

10. I exercise my discretion in the claimant's favour and set the tribunal's decision aside on the basis of the error of law identified in paragraph 9 above. It is inappropriate for me to remake it because that requires a fresh factfinding [*sic*] exercise much better carried out by a tribunal with medical as well as purely legal expertise. I thus remit the case for redetermination by such tribunal in accordance with the directions contained in paragraph 11 below."

Note: This case is sometimes referred to as 'DM v Secretary of State for Work and Pensions' (abbreviated 'DM v SSWP'). However, the decision shows no case name and on the Tribunals Judiciary website the appellant is identified as 'M' not 'DM'.

See also MG v Department for Social Development (ESA) – C1/12-13(ESA) – [2013] NICom 359 and RP v Secretary of State for Work and Pensions – [2011] UKUT 449 (AAC) – CE/1217/2011. See also TB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0408 (AAC) – CE/3315/2012, a decision of Upper Tribunal Judge PA Gray which disagreed with Upper Tribunal Judge Gamble in this decision on the aspect that the claimant's personal circumstances e.g. such as living in an unsuitable building should be considered in the test of whether a manual wheelchair can reasonably be used.
See also NT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0360 (AAC) – CE/56/2013.

1. Judge of the Upper Tribunal A J Gamble 1.6.2012

medical advice to refrain from use of wheelchair

JC v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0219 (AAC) – CE/2419/2012 held:

"5. … In particular, Dr Ryan commented on the pain the claimant suffered when moving about and pointed out that the claimant did not have a wheelchair and that "I would find it inappropriate for [the claimant] to use a wheelchair because I wish her to try to keep her mobility as much as possible". (On this issue, I draw attention to *DM v SSWP (ESA)* [2012] UKUT 376 (AAC) and *MG v DSD (ESA)* [2013] NICom 8, which may well be reconcilable on the basis that an assessment of the type contemplated in the latter case would no doubt have taken into account the impracticality of using a wheelchair mentioned in the earlier one.)…"

1. Judge of the Upper Tribunal Mark Rowland 2.5.2013

mobilising – use of wheelchair (and consideration of other aids)

EW v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0228 (AAC) – CE/3431/2012 held:

"11. The third issue is about the use of a wheelchair to assist mobilising. As I note below, the tribunal appears in this case to have gone straight to consideration of this in its reasons without making any finding about the extent to which the appellant could mobilise without use of a wheelchair.

12. The tribunal commented at some length in its reasons about whether it was appropriate to consider the use by the appellant of aids she did not use. It made a number of assumptions about the availability of aids for her without any record of discussion at the hearing. It then found that as there were no significant upper limb restrictions and that as the appellant was able to sit for reasonable periods of time there was "no reason why she could not mobilise in a manual wheelchair". However, it added that there "is some longstanding difficulty and she may struggle to repeatedly do it more than 200 metres".

13. The appellant's representative comments on this that "this is simply inadequate and fails to address the many issues regarding wheelchair use which is why there is a formal wheelchair assessment unit at [the local hospital] combining physios, psychologists, clinicians. This was raised at the tribunal and has been ignored."

14. The test in paragraph 1 of the revised Schedule 2 refers to:

> "Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used."

15. When I granted permission to appeal on this issue I pointed out that the proper interpretation of this test had been considered recently by Upper Tribunal Gamble in *M v Secretary of State for Work and Pensions* [2012] UKUT 376 (AAC). Judge Gamble emphasised in this decision that the matter of reasonableness was "one requiring a broad exercise of their independent judgment to all the factors that are relevant in each individual case. Those factors should not be restricted to a consideration of a claimant's physical ability to use a manual wheelchair." Judge Gamble allowed the appeal for that reason.

16. I directed a submission from the Secretary of State's representative on this point. In response, the Secretary of State supported the appeal. In the view of the Secretary of State the tribunal should have first found if the appellant normally used an aid or appliance. If not, the next issue is whether any aid or appliance that had been prescribed or advised for use. The Secretary of State then suggested that the tribunal should consider if the wheelchair or other appliance would help the appellant, and if so whether there was a reasonable excuse why one was not being used. In the view of the Secretary of State the tribunal had failed adequately to consider all the relevant issues. For that reason the Secretary of State supported the appeal and requested that the appeal be sent for rehearing by the First-tier Tribunal.

17. Since then a Northern Ireland Social Security Commissioner has considered the same test as it applies in Northern Ireland, but in a factually different situation. The decision of Commissioner Stockman is *MG v Department for Social Development* [2013] NICom 359. Although both parties to the case supported the decision of Judge Gamble as adopting the correct approach to the descriptor, Commissioner Stockman identifies a problem with that approach on the ground that in his view it departs from a purely functional analysis. He comments (at paragraph [40]):

> "it seems to me that the reasonableness or otherwise of using an aid should be judged purely in the context of its potential use to enhance functional ability … the basic question should be whether [*sic*] would be reasonable to use an otherwise appropriate aid in order to enhance function."

The Commissioner then cautions against taking too wide a range of aspects of wheelchair use into account. I have added copies of his decision to the papers and direct the First-tier Tribunal to consider it alongside the decision of Judge Gamble in deciding this case. I do not consider it appropriate to engage in further analysis of the differences of approach of the two decisions in this case because on either test this tribunal erred in dealing with the matter inadequately. A fuller consideration of the descriptor in this case requires evidence I cannot see in these papers.

18. The tribunal should approach this descriptor, as any descriptor, on the basis of the evidence before it. I emphasise this because of the absence of relevant evidence in the record of decision in this case and a lack of factual findings. In particular I can see no finding made by the tribunal about the extent to which, if at all, the appellant can walk with or without aids. For example, would crutches or a walking or zimmer frame (perhaps with an added seat) be available and suitable to assist? It appears to have gone ahead to consider the use of a wheelchair without first deciding if in its view aids are reasonably needed by the appellant for mobility."

1. Judge of the Upper Tribunal David Williams 9.5.2013

use of wheelchair or other aid – reasonableness

MG-v-Department for Social Development (ESA) – [2013] NICom 359 – C1/12-13(ESA) examined mobilising and the use of a wheelchair or other aid. The statement of reasons for the decision of the tribunal addressed the issue of mobilising over several passages but in the view of Commissioner Stockman the key passages were:

> "13. The activity refers to walking with a stick or other aid if such aid is normally used. This means it is normally used by people acting reasonably. We reflected on what this could mean. A simple example of the appropriate use of aids is someone with defective vision which can be corrected with glasses. In such a situation, it would be reasonable to assess a person based upon their corrected vision. A similar consideration can be applied to a person with poor hearing who would benefit from a hearing aid. The person may not wish to use such aids but we must consider the reasonableness of use of aids if they improve function.
>
> 14. The appellant has a shortened right leg. He told us he uses his crutch in his left hand. Generally, the advice would be to use the crutch to support the damaged site, namely the right side. However, the appellant says that he prefers to use the left side and it may be this is what works for him. However, he did say he had a problem using the crutch in his left hand because of his left wrist injury. The Department had formed the view that he could manage more than 100m but less than 200m with a crutch. We would agree with this rather than the shorter distances mentioned by the appellant. However, it was our view given that the descriptor refers to using such aids as can reasonably be used his mobility would be unrestricted if he resorted to using a wheelchair. We can appreciate that the appellant may not wish to use a wheelchair or he may feel it is not necessary. However, the question is one of reasonableness. We can see no reason why a wheelchair could not be used by him as he has adequate upper body function notwithstanding his wrist and shoulder problem. The latter was not presenting such restrictions as would not compromise locomotion affected through turning the wheels on the wheelchair by hand. Consequently, we removed the six points which had been awarded".

The appellant's representative (Ms Loughrey of Law Centre (NI)) argued that the tribunal had erred in law in finding that the appellant did not satisfy any of the "mobilising" descriptors on the basis that he could reasonably use a wheelchair on the grounds:

- he does not actually use or possess a wheelchair
- he has not been recommended or assessed for wheelchair provision under the National Health Service (NHS) by an Occupational Therapist (OT)
- he has significant physical problems with his wrist and shoulder which mean that he cannot reasonably be expected to use a wheelchair.

The appellant's representative (Ms Loughrey of Law Centre (NI)) also made reference to the NHS Regional Eligibility Criteria applying in Northern Ireland for the provision of wheelchairs which limited the supply to service users who needed them for use permanently or for longer than six months. It confirmed that provision was conditional upon the wheelchair user's home environment or other essential environments being suitable (or having the potential to be made suitable) and was subject to the wheelchair being used safely and effectively. Also in the case of a standard self-propelling wheelchair, the wheelchair user is required to have limited or no walking ability and the physical ability to self-propel the wheelchair independently and safely.

The Department for Social Development representative (Mr McKendry) responded with reference to *RP v Secretary of State for Work and Pensions – [2011] UKUT 449 (AAC) – CE/1217/2011*, a decision of Upper Tribunal Judge Levenson, stating that the tribunal failed in its inquisitorial role in terms of assessing the reasonableness of the appellant using a wheelchair, but added that there was enough evidence to assess that the appellant was physically capable of using a manual wheelchair. Further, he added that nevertheless the tribunal should have made further enquiries into practical issues such as whether the appellant would be able to afford a wheelchair, whether the appellant's home would have to be adapted and whether he would have suitable space to store a wheelchair in his home. In doing so he submitted that the decision of the tribunal erred in law.

The Upper Tribunal Judge held:

"19. Prior to 28 March 2011, the first activity in Schedule 2 was headed "Walking with a walking stick or other aid if such aid is normally used". The first activity, from that date, reads "Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used".

20. One difference between the two headings is the shift from a consideration of ability to "walk" to ability to "mobilise". Arising from this, there is a requirement to consider the possible use of a manual wheelchair. Whereas an aid such as a walking stick would have been taken into consideration under the previous form of the first activity, the term "walk" precluded consideration of wheelchairs. Now, claimants who normally use a wheelchair will not necessarily satisfy the new descriptors.

21. A second difference is the requirement to consider a manual wheelchair or other aid which "can reasonably be used". Commissioner and Upper Tribunal decisions on the previous IB and ESA regimes, such as *CIB/14499/1996* and *RP v SSWP*, have implied a condition of reasonableness into the consideration of the use of an aid or appliance. Therefore, the extent to which this new feature of the legislative scheme might represent a difference from previous interpretations needs to be addressed.

22. The core question which I have to decide is whether the tribunal in the present case has erred in law by finding that the appellant had no relevant restriction when his reasonable ability to use a wheelchair was taken into account.

Regulation 19(4) ESA Regulations and RP v SSWP

23. The requirement to conduct the assessment of an appellant's ability or inability to perform specific activities prescribed in Schedule 2 arises from regulation 19 of the ESA Regulations. Regulation 19(4) of the ESA Regulations requires a claimant to be assessed as if "using any aid or appliance which is normally worn or used". This is different from the previous IB scheme at regulation 25(2) of the Social Security (Incapacity for Work) (General) Regulations (NI) 1995, which from 1997 required the claimant to be assessed as if wearing "any aid or appliance which he normally wears or uses".

24. The Schedule 2 descriptors for ESA have to be approached on the basis of aids or appliances which the claimant might not personally use, but are normally worn or used by persons with the same or a similar disablement. This means that the potential use of an aid or appliance must be addressed even if a claimant does not actually use one.

25. It was in this context that Judge Levenson considered the operation of regulation 19(4) in *RP v SSWP*. That case concerned a claimant who did not normally use a crutch or a stick, but was assessed by the First-tier Tribunal as if he did when it was considering the "Standing" descriptor. Judge Levenson said:

> "16. It seems to me that the correct approach to regulation 19(4) is as follows. If the claimant in fact normally uses a particular type of aid or appliance, then he or she must be assessed as though they were using it. If a particular type of aid or appliance has been prescribed or recommended by a person with appropriate expertise, the claimant must be assessed as though they were using it unless it would be unreasonable to use it. If the claimant does not use a particular type of aid or appliance and one has not been prescribed or recommended, then the decision maker or First-tier Tribunal is entitled to take the view that the claimant should be assessed as if using one, but only if one is normally used by people in that situation acting reasonably in all the circumstances and it would be reasonable for the claimant to do the same. However, I do not agree with the Secretary of State that in this latter case there does not have to be any explanation of how the aid or appliance could help the particular claimant and that the advantages are obvious. The degree of detail is a matter for the tribunal on the facts of each particular case, but in my view, in the absence of actual use or prescription, there does need to be some explanation."

26. Both the appellant and the respondent submit that I should take guidance from the principles set out in *RP v SSWP*.

27. From the discussion in *RP v SSWP* of his earlier decision in CIB/14499/1996, it seems to me that Judge Levenson was concerned with the mischief which would result if a claimant could wilfully choose not to use a suitable aid in order to satisfy a particular descriptor when that aid had been prescribed. Yet he was also clear that it was open to a tribunal in a suitable case, based upon sufficient evidence and giving appropriate reasons, to find that an aid which had not been prescribed could be taken into account. In the context of regulation 19(4), I broadly agree with the approach adopted by Judge Levenson.

28. Judge Levenson's guidance on the interpretation of regulation 19(4) has application to all the activities within Schedule 2, including in particular those for which use of an aid is expressly contemplated by the activity heading – namely mobilising, understanding communication, navigation and bowel and bladder control. Whereas the latter two use the term "normally used", the headings to the former two expressly import conditions of reasonableness.

29. It is long established that the heading to each activity is integral to understanding the scope of the descriptors within it, as stated by Commissioner Brown in *C2/98(IB)* and Chief Commissioner Martin in *C31/98(IB)*. Whereas those cases applied to IB, they are equally applicable to ESA. Therefore the heading to the "Mobilising" activity informs the construction of the descriptors within that activity. In so far as it relates to the use of a walking stick, manual wheelchair or other aid "if such aid can reasonably be used", it amounts to an express qualification of regulation 19(4) and creates an additional test which has to be applied as part of the LCWA when the activity of "Mobilising" is considered. The heading to the "Mobilising" activity effectively makes express provision for the conditions implied by Judge Levenson in *RP v SSWP*. It does not appear to me that it materially alters the relevant considerations which a decision-maker has to address.

30. *RP v SSWP* establishes that when addressing the issue of whether a wheelchair can reasonably be used within the terms of the heading to the "Mobilising" activity, the first question is whether a wheelchair is normally used by the claimant. If so, the functional assessment of the claimant's ability to mobilise ought to proceed on the basis that he or she normally and reasonably uses a wheelchair. Equally, if the claimant has been referred for assessment, and an appropriate professional has recommended the use of a wheelchair, it seems to me that any functional assessment of the claimant's ability to mobilise should proceed on the basis that he or she can reasonably use a wheelchair. An appellant in such a case might seek to challenge the assessment, or to rely on a change of circumstances, in order to show that he or she cannot reasonably use a manual wheelchair. Notwithstanding that possibility, use of a wheelchair in each case would prima facie be normal and reasonable.

31. This is a case where the appellant normally uses an aid – a walking stick – but not a wheelchair. It is not a case where a wheelchair has been prescribed or recommended to him by a person with appropriate expertise. If applying Judge Levenson's decision in *RP v SSWP*, and for the purposes of regulation 19(4), the appellant otherwise should only be assessed as using a wheelchair if:

(a) one is normally used by people in that situation acting reasonably in all the circumstances; and

(b) it would be reasonable for the claimant to do the same.

32. An issue which requires further consideration is what factors need to be taken into account in considering whether use of a manual wheelchair is reasonable. The Department agrees with the approach of Judge Levenson and has issued guidance in consequence of Judge Levenson's decision in DMG Memo Vol 8/44. Guidance in this context of course is merely that. It reflects the Department's interpretation of the law and it is not binding on tribunals in any way. The guidance advises on the practical application of the principles set out by Judge Levenson. It suggests that the decision-maker should have regard to questions such as whether the aid or appliance is affordable, whether the claimant is able to use and store the aid or appliance and whether the claimant is physically able to use the aid or appliance. In the present case, the appellant and the Department submit that the guidance is correct. They also find support for the Department's approach in the decision of Judge Gamble in *DM v SSWP*, referred to above.

DM v SSWP

33. In DM v SSWP, Upper Tribunal Judge Gamble addressed the same activity of "Mobilising" which is in issue in this case. The claimant had sustained an injury to her left foot and ankle following a fall from height. The claimant was able to walk short distances using two crutches. The First-tier tribunal found that the claimant might well not be able to walk the distances in the descriptors using her two crutches, but held that she could mobilise those distances using a wheelchair.

34. The claimant appealed on the basis (i) that it had not been suggested by medical personnel that she could use a wheelchair and that this might be medically unsuitable in terms of her rehabilitation programme; (ii) that a wheelchair was not available to her in reality from local providers; (iii) that as she lived in an upstairs tenement flat, the question of the practicality of wheelchair use should have been considered in terms of her living arrangements. The Secretary of State's written submission agreed with the grounds submitted by the claimant.

35. In the light of the concession by the Secretary of State, Judge Gamble accepted that the proper approach of a tribunal applying the 'Mobilising' activity is to treat the matter of reasonableness as one requiring a broad exercise of their independent judgment to all the factors which are relevant in each individual case. He held that those factors should not be restricted to a consideration of a claimant's physical ability to use a manual wheelchair. He accepted that the tribunal should have explicitly considered the three matters raised by the claimant in her grounds of appeal above, as well as the physical ability of the claimant. Judge Gamble stressed that the application of the text of the activity must always be on an individual basis.

36. Both Ms Loughrey and Mr McKendry submit that the approach adopted by Judge Gamble in *DM v SSWP* was the correct one. Nevertheless, it seems to me that there is some tension between the approach of Judge Gamble and established jurisprudence addressing the nature of the LCWA and its predecessors. For example, Commissioner Jacobs, in reported Great Britain Commissioner's decision R(IB)2/03, when addressing the "rising from sitting" activity under the former personal capability assessment (PCA) for the purposes of IB, applied a functional analysis of the descriptor. He held that the PCA was designed to test in a systematic, analytical way the claimant's various physical disabilities. Later, as Upper Tribunal Judge Jacobs, in *GS v Secretary of State for Work and Pensions* [2010] UKUT 244, he has said that the analysis previously applied by him to the test for IB in *R(IB)2/03* applied equally in the case of ESA. His statement in *GS v SSWP* to this effect was approved by Upper Tribunal Judge Lane in *LF v Secretary of State for Work and Pensions* [2010] UKUT 352. In this jurisdiction Chief Commissioner Mullan has approved the same approach at paragraph 25 of *GF-v- Department for Social Development (ESA)* [2011] NICom 160. I also agree with this approach.

37. The difficulty I perceive with the approach suggested by *DM v SSWP* is that it departs from a purely functional analysis. If one assesses the activity of "Mobilising" in a way which considers an individual's domestic circumstances, such as whether he or she lives in an upstairs flat, then an assessment of two people with identical functional disability could lead to different outcomes. A person living on the ground floor might not satisfy any descriptors within the activity, on the basis that it would be reasonable to use a wheelchair, whereas her upstairs neighbour with an identical functional disability might. This is possible because the approach which focuses on an individual's domestic circumstances departs from testing the physical disablement on the basis of a purely functional analysis.

38. In GS v SSWP, Judge Jacobs was addressing the "Manual dexterity" activity in its pre 28 March 2011 version, and in particular the issue of whether an individual could "do up/undo small buttons, such as shirt or blouse buttons" in the now repealed descriptor. His words address that issue, but illustrate the problem well:

> "13. It follows that the tribunal was wrong to consider the practicalities of dressing, the type of shirt and so on. Even the Secretary of State's representative, having submitted that a functional analysis was appropriate, was tempted into this type of speculation. It is important to appreciate the context. The ultimate purpose of the descriptors is to test a person's capability for work. They test the claimant's manual dexterity for work-related purposes. They do not test the claimant's ability to self-care. The reference to shirts and blouses is for the purpose of illustration. They are not words of definition or limitation.
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> 14. The proper approach to the interpretation and application of descriptor 6(f) is this. The descriptor tests the claimant's anatomical functions that would be involved in fastening or unfastening buttons. They include pinch grip, co-ordination of finger movements, and flexibility of the finger joints. The reference to small buttons identifies the size and shape of the object to which those functions are applied. The First-tier Tribunal should focus on the claimant's functional ability to perform the particular aspect of the activity covered by a descriptor. By doing that, it will avoid the myriad questions that otherwise appear to arise on descriptors. Is the ability to use a tap tested with wet or dry hands? What sort of surface is the £1 coin resting on? How smooth or thick are the pages of the book? And so on and so on."

39. Judge Jacobs was not dealing with the question of whether an aid or appliance might reasonably be used. However, it seems to me that Judge Jacobs was correct to focus on the claimant's functional ability to perform the particular activity. It further seems to me that, when, in regulation 19(4), the legislation requires consideration to be given to use of an aid or appliance in assessing the extent of a claimant's capability to perform any of the physical activities in Part I of Schedule 2, this must also be a functional assessment. A decision-maker must focus purely on the extent to which a claimant can, for example, mobilise using his walking stick.

40. Similarly, it seems to me that the reasonableness or otherwise of using an aid should be judged purely in the context of its potential use to enhance functional ability. Matters which go beyond functional ability cannot be relevant to the question of whether wheelchair use is reasonable in the context of the "Mobilising" descriptor. The basic question should be whether it would be reasonable to use an otherwise appropriate aid in order to enhance function.

41. I consider that questions such as whether the doorway to the appellant's home is wide enough to accommodate a wheelchair, or whether there are steps to his front door, or whether he has adequate storage space for a wheelchair, cannot be directly relevant to functional assessment for particular descriptors. Therefore, I must respectfully disagree with Judge Gamble in *DM v SSWP* to the extent that he accepts that a tribunal will err in law by failing to ask questions as to whether a wheelchair would be practical or suitable from the point of view of the claimant's living arrangements. It also follows that I consider that the Department's guidance to that effect cannot be correct.

When is a wheelchair normally and reasonably used?

42. However, I recognise that this approach throws up its own questions. The tribunal in the present case said that "we can see no reason why a wheelchair could not be used by him…". Indeed, I imagine that very many people with a lower limb disablement limiting mobility, however slight or temporary, can mobilise a sufficient distance in a wheelchair as to exclude themselves from satisfying any descriptor under the activity of "Mobilising". Such a broad group might include claimants whose use of a wheelchair would be entirely disproportionate to the degree of their functional disablement, or claimants who would be medically advised to use alternative walking aids for therapeutic reasons, or claimants with temporary conditions. However, is that what the legislation requires? When assessing functional ability, just because there is no reason why he or she cannot use a wheelchair, should a decision-maker conclude that use of a wheelchair by a claimant is reasonable?

43. I consider that, in addressing this question, it is important to recall that, while the heading to the "Mobilising" descriptor expressly introduces the condition that a wheelchair can reasonably be used, regulation 19(4) continues to require that a wheelchair is normally used. Referring to the use of aids and appliances in general, Judge Levenson in *RP v SSWP* added the qualification "by people in that situation acting reasonably in all the circumstances". I consider that this qualification is better expressed, in the context of "Mobilising", in terms of whether a wheelchair would normally be used by a person with the appellant's degree of walking disablement in order to enhance his or her ability to mobilise. It seems to me that by focusing on the question of whether a wheelchair could reasonably be used by the appellant, the tribunal has omitted to address the question of whether a wheelchair would normally be used by a person with the appellant's particular disabilities.

44. How then, in the absence of actual or recommended use, is the question of whether a wheelchair would normally be used by a claimant to be assessed? In answering that question, it seems to me that the system of eligibility for public provision of wheelchairs must remain a central factor. In general, people who normally need to use a wheelchair will be assessed for one and if appropriate will have this item provided without charge by the NHS. In the context of a relatively specialised aid such as a manual wheelchair, it seems appropriate to construe the requirement of reasonableness in the heading to the activity of "Mobilising" with this aspect of government policy in mind.

45. Typically, an individual will be referred for assessment for eligibility for wheelchair provision by their doctor, a hospital consultant or an OT. Such a referral will take place against a background of appropriate therapeutic assessment, with regard to the level of the relevant mobility difficulties and the individual's needs. Under the NHS in Northern Ireland, a comprehensive assessment by an OT will take place for all wheelchair requests. I consider that it would be difficult to conclude that a wheelchair would be normally used by a claimant with a particular degree of disability without the benefit of such an assessment.

46. In this case, the tribunal has not addressed the question of whether it would be normal for an individual with the claimant's particular mobility limitations – namely ability to walk up to 200 metres using a stick – to be referred for wheelchair use. The NHS Regional Eligibility Criteria specify that a candidate for a wheelchair should have "limited or no walking ability". Professional assessment against the relevant criteria is carried out in order to determine whether an individual should use a wheelchair. Therefore, it is a question requiring a level of specialist expertise. I acknowledge that a general practitioner may be involved in referring patients for assessment for wheelchair use. Accordingly, many medically qualified members (MQM) of the tribunal are likely to have experience of this. However, I consider that it would only be in the clearest of cases that an MQM's opinion might be relied on to settle this question in the absence of evidence from a relevant professional accustomed to making the assessment. Nevertheless, if there is clear evidence that an appropriate candidate for wheelchair provision has unreasonably declined a referral for assessment, it may be an appropriate instance for determining that the claimant could reasonably use a wheelchair.

47. As observed above, I consider that difficulties with the home environment should not affect the question of whether it is reasonable for a claimant to mobilise using a wheelchair. However, I also recognise that consideration of such practicalities is a central part of the assessment for wheelchair provision. Where a wheelchair has been recommended by an appropriate professional under the NHS, practical assistance such as disabled facilities grants of up to £25,000 may have to be provided to adapt the wheelchair user's home environment. The decision on wheelchair provision addresses both the level of need and the reasonable consequences of providing one. If it is normal and reasonable for a person to use a wheelchair, having regard to all relevant matters, one will be provided and the associated costs will be met from the public purse.

The practical questions arising as in *DM v SSWP* should not therefore need to be addressed as, where a wheelchair would normally and can reasonably be used, the appropriate adaptations of the potential user's home environment will follow.

48. The tribunal in the present case held that there was no reason why a wheelchair could not be used by the appellant. However, it seems to me that the tribunal erred in its approach by failing to engage properly with the question of whether the appellant was someone who would normally use a wheelchair. It has dealt with the question of the reasonableness of using a wheelchair in isolation of this question. As a result, I consider that the tribunal has erred in law by finding that the appellant had no relevant restriction in the activity of "Mobilising" when his reasonable ability to use a wheelchair was taken into account.
Physical restrictions on mobilising in a wheelchair

49. I further consider that the question of the appellant's physical ability to mobilise using a wheelchair is not a condition of the reasonableness of whether he could use one. Rather it is a matter to be assessed once it is accepted that he could reasonably use a wheelchair. This is because the scoring scheme for descriptors within the activity varies according to the distance which the appellant can mobilise. Where wheelchair use is reasonable, a decision-maker has to assess the likely distance over which a claimant could propel a wheelchair, bearing in mind benchmarks of 50, 100 or 200 metres. The only cause for variation in terms of the distance achievable, it seems to me, would be any physical condition which would compromise the ability to self-propel manually. If a physical restriction was to be viewed as rendering it unreasonable for a claimant to use a wheelchair per se [*meaning: in itself*], then there would be no point in legislating for nuances in terms of the distance a claimant could mobilise using a wheelchair. [*My insert*].

50. The LCWA provides for medical examination of upper limb function. However, the descriptors on which the healthcare professional gives an opinion are not necessarily helpful for assessing upper limb function in the context of manually propelling a wheelchair. Moreover, upper limb function is only one factor which might restrict wheelchair use. Other factors might include respiratory conditions, cardiac conditions or neurological conditions. As pointed out above, the Regional Eligibility Criteria for provision of a wheelchair require that a wheelchair user must be physically able to self-propel the wheelchair independently and safely.

51. In the present case the appellant points to evidence from the healthcare professional which indicates a slight tenderness over the left lateral epicondyle, consistent with a tennis elbow, and swelling in the left wrist. These are factors which might affect his ability to mobilise. However, the pro forma report from the healthcare professional nowhere addresses or assesses the likely ability of the appellant to self-propel.

52. The tribunal found that the upper limb restrictions of the appellant would not compromise locomotion effected through turning the wheels on a wheelchair by hand. There was no reference to a finding on distance in this context. It is therefore not clear to me whether the tribunal was addressing the simple motion of turning a wheelchair wheel, or whether the physical effort of propelling a wheelchair with the appellant's body weight over a distance of up to 200 metres was fully taken into account.

53. Where, although this was not such a case, the Department seeks to rely on a submission that an appellant can self-propel in a manual wheelchair over a particular distance, it seems to me that the Department should have evidence of this. The current report obtained for the purposes of the LCWA does not directly address the issue through its examination of, for example, upper limb function. Yet, where a tribunal is left to decide such matters in the absence of evidence, its conclusions are inevitably speculative in nature and potentially unsound. By Article 20(3) of the Social Security (NI) Order 1998, a tribunal may not carry out a physical examination of an appellant or require him or her to undergo a physical test. However, this is not a licence to make findings on physical ability in the absence of examination or evidence.

54. Any decision given in the absence of evidence is arguably irrational. I consider that the tribunal did not have sufficient evidence to make the findings of fact which are required to address the question of how far the appellant could mobilise in a wheelchair. Therefore, if I am wrong in my analysis of the application of regulation 19(4) and the "Mobilising" activity, I consider that the tribunal has materially erred in law in this respect also.

55. For that reason and the reasons given above, I allow the appeal and set aside the decision of the tribunal.

Disposal

56. I have given consideration to whether I should remit the appeal to a newly constituted tribunal or to whether I should make the decision which the tribunal should have given. Having regard to the particular facts and findings, I conclude that this is a case in which I can give the decision the tribunal should have given without making fresh or further findings of fact.

57. In the present case, the tribunal found that the appellant could have unrestricted mobility "if he resorted to using a wheelchair", awarding no points on this basis. I have concluded that the tribunal erred in finding that the appellant's functional ability should be assessed on the basis that he can normally and reasonably use a wheelchair.

58. However, the tribunal had found that the appellant could mobilise more than 100 metres but fewer than 200 metres using a stick, which would result in a score of six points for descriptor 1.d. The tribunal further found that the appellant satisfied descriptor 2.b in the activity of "Standing and Sitting", resulting in a score of nine points. I accept these findings.
The combined score amounts to 15 points for physical health descriptors, which is sufficient to satisfy the requirements of regulation 19(3)(a) of the ESA Regulations.

59. I therefore allow the appeal and find that the appellant satisfies the LCWA from and including 8 October 2011."

Note: In this case CSE/151/2012 – [2012] UKUT 376 (AAC) is referred to as 'DM v Secretary of State for Work and Pensions' (abbreviated 'DM v SSWP'). However, a print out of the decision shows no case name and on the Tribunals Judiciary website the appellant is referred to as 'M' not 'DM'.

See also RP v Secretary of State for Work and Pensions – [2012] UKUT 376 (AAC) – CSE/151/2012 – [2011] UKUT 449 (AAC) – CE/1217/2011 and AR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0417 (AAC) – CE/3737/2012.

1. Commissioner O Stockman 29.1.2013

use of Google maps – not simply a question of distance – relevance of award of DLA higher rate mobility component

IB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0359 (AAC) – CE/261/2013 involved a case where the claimant was in his early forties and had for many years suffered with severe psoriatic arthropathy. He had had both knees replaced, and was due to have a shoulder joint replaced. In addition, he had undergone an arthrodesis [*meaning:* fussing the bones] of at least one ankle and fusion of some bones in his feet. His hands, in particular, were deformed by the arthropathy, as was illustrated in some of the photographs which were supplied in connection with his appeal. According to the Upper Tribunal Judge there was no doubt that the claimant was at the more severe end of the range of disability associated with his condition.

The claimant had been in receipt of Incapacity Benefit for a number of years. His case was then considered for conversion to an award of Employment and Support Allowance. Following the completion of an ESA50 questionnaire and a medical assessment with a Healthcare Professional he was found not to have limited capability for work.

At his appeal, on the issue of mobilising, the First-tier Tribunal tried to establish how far the claimant could walk, and then used Google maps to help it estimate the distance he described in oral evidence. It considered the distance indicated by the claimant was in excess of 200 metres and so awarded no points on mobilising. However, the First-tier Tribunal awarded sufficient points from other areas to hold that he had limited capability for work. The First-tier Tribunal found that none of the Schedule 3 descriptors were satisfied which, as far as mobilising was concerned, that was no surprise as it had not accepted the extent of limitation argued in relation to mobility.

The claimant's representative appealed against this decision, objecting to the use of Google maps in the circumstances, and arguing that the tribunal had applied the wrong test to the activity of mobilising as it not taken into account the ability to repeatedly mobilise more than 50 metres within a reasonable time scale because of significant discomfort or exhaustion.

The Upper Tribunal Judge held:

"11. A salaried judge granted permission to appeal on the question of whether it had been appropriate for the tribunal to use Google maps in the way that it did. Though the Secretary of State supports the appeal, it is not on this basis. The Secretary of State supports the appeal on the basis that the tribunal had failed to explain why it decided that most of the time the claimant could walk a distance of about 75 metres, given that the record of proceedings showed that the claimant said he could travel to the junction at the end of the road and then needed to stop, whereas the shop to which the tribunal took the measurements was further on. The record of proceedings shows that the claimant said that he stopped when he needed to. However, so far as using Google maps was concerned, the Secretary of State accepted that this was not completely accurate, but nonetheless suggested it did give a good indication of the distance between two points.

12. The representative appears to have put some weight on the fact that the claimant had an award of DLA higher mobility component and seemed to believe that this supported making a finding in the claimant's favour concerning mobilising more than 50 metres. However, this is the wrong test. The mobility component of DLA takes into account whether or not a person can mobilise on foot in such a way that he is either unable or virtually unable to walk. Activity 1 in the Schedule 2 and Schedule 3 is in some ways more demanding, because it takes into account whether or not a claimant can mobilise a certain distance using a wheelchair if he is not able to walk that distance. It is a completely different test and both for that reason, and because it can unnecessarily put a claimant's DLA entitlement at risk, should not be used to support an argument that activity 1 is satisfied.

13. I see no objection to a tribunal using Google maps, or any scaled map, to give it a general indication of the area within which a claimant regularly mobilises. A claimant's own assessment of the distances involved in traversing their own locality on foot is, in my experience, generally unreliable. While most people have an idea of how long it takes to walk to a certain place known to them, very few are able to give an accurate estimate of the distance involved. However, even having established the physical parameters within which a claimant mobilises does not answer the question posed by the legislation, which is whether mobilisation for more than 50 metres can be achieved without stopping to avoid significant discomfort or exhaustion. Even where a claimant is able to do this, the question is whether that activity can be repeated within a reasonable timescale. If a person is unable to do so because of significant discomfort or exhaustion, then he or she becomes entitled to the relevant points. Accordingly, while having a general idea of the area over which mobilisation takes place is helpful, the duty of the tribunal to satisfy itself as to the question posed by the legislation remains, and is not answered by looking at a map to see the distances over which mobilisation is achieved."

In final analysis the Upper Tribunal Judge set aside the decision of the First-tier Tribunal because it had failed to consider the position of the claimant against regulation 35(2)(b). This provides that a claimant is to be treated as having 'limited capability for work-related activity' if by reason of his disablement there would be a substantial risk to the mental or physical health of any person if the claimant was found not to have limited capability for work related activity. In the claimant's letter of appeal he stated that he would "not be able to hold down a regular job" as some days he was unable to even leave his home due to the severity of his ailments. In the view of the Upper Tribunal Judge this warranted investigation. See separate write-up on this point.

See also [2013] AACR 33 and HI v Secretary of State for Work and Pensions – [2014] UKUT 0238 (AAC) – CE/0146/2014.

1. Judge of the Upper Tribunal A Ramsay 25.7.2013

mobilising – DLA higher rate mobility award – what relevance?

[2013] AACR 33 (unreported ML v Secretary of State for Work and Pensions – [2013] UKUT 0174 (AAC) – CE/3261/2012) held:

"18. Finally, I need to deal with Mrs L's [*the appellant*] argument on her award of the mobility component of disability living allowance at the higher rate. This is evidence that, at the time of the award of disability living allowance, Mrs L had limited mobility sufficient to qualify for the mobility component at the higher rate. However, without more information it is impossible to relate it to the specific terms of the activity of mobilising in Schedule 2. That would require more evidence about how her mobility was restricted and at what point it would give rise to significant discomfort or exhaustion. And if that evidence is necessary, the question arises: what value does the fact that the claimant has an award of the mobility component add to her case? It is possible that in many, if not most, cases the answer will be: little or nothing. In other words, it is the evidence that matters, not the award." [*My insert*].

See also [2013] AACR 33 and HI v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0238 (AAC) – CE/0146/2014.

1. Judge of the Upper Tribunal Edward Jacobs 8.4.2013 (corrected 18.4.2013)

mobilising – relevance of award of DLA mobilitycomponent/care component?

DF v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0129 (AAC) – CE/4188/2013 held:

"2. I have set the tribunal's decision aside, because in her letter of appeal against the DWP's decision of 30 August 2012 that she did not have limited capability for work, the claimant had written (among other things) that:

"Last year I attended a tribunal, in Wakefield, for disability living allowance. I was awarded, for the third time (since 2006), high rate mobility and middle rate care, until 2016."

Despite this having been put so firmly in issue, the DWP's submission provided no details of the DLA awards. This was so, despite the obligation under rule 24(4) of the First-tier Tribunal's rules of procedure to provide "copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise." The claimant attended the hearing with a supporter, but without representation. The tribunal's reasons were silent as to DLA and I can find nothing in the record of proceedings to suggest that the issue was discussed.

3. The claimant was awarded 0 points by both the decision maker and the tribunal. She had, however, reported difficulties in relation to areas which included mobility and various activities of daily living that were affected by her physical and mental conditions.

4. What, if anything, was the relevance of the DLA award? In *ML v SSWP* [2013] UKUT 174 (AAC); [2013] AACR 33 Judge Jacobs said:

> "18. Finally, I need to deal with Mrs L's argument on her award of the mobility component of disability living allowance at the higher rate. This is evidence that, at the time of the award of disability living allowance, Mrs L had limited mobility sufficient to qualify for the mobility component at the higher rate. However, without more information it is impossible to relate it to the specific terms of the activity of mobilising in Schedule 2. That would require more evidence about how her mobility was restricted and at what point it would give rise to significant discomfort or exhaustion. And if that evidence is necessary, the question arises: what value does the fact that the claimant has an award of the mobility component add to her case? It is possible that in many, if not most, cases the answer will be: little or nothing. In other words, it is the evidence that matters, not the award."

5. I respectfully agree with Judge Jacobs that the mere fact of an award of the higher rate of the mobility component of DLA may not necessarily tell one much about whether the ESA mobility descriptors are fulfilled. To take one obvious example, the ESA descriptor includes consideration of ability to mobilise using a wheelchair, whereas the higher rate of mobility component does not. But I do not read Judge Jacobs' remarks as providing any encouragement that the award of DLA can simply be disregarded; rather, as he says, it is the evidence that matters, not the award. In my view the existence of the award is a catalyst for consideration of the potential relevance of the evidence behind it. The significance of the decision is in my view correctly summarised in the headnote in the reported version:

> "The fact that the appellant had an award of DLA of the higher rate mobility component cannot of itself be directly related to the mobilising activity in Schedule 2; more evidence was needed about how her mobility was restricted and at what point it gave rise to significant discomfort or exhaustion (paragraph 18)."

6. In the present case, the claimant's letter of appeal was enough to show (a) that she had been thought to have mobility difficulties and supervision or attention needs sufficient to meet the conditions for the respective DLA components; (b) that this had been so on three occasions, so was not based on a one-off decision (which might have been unduly generous); (c) that the third such award had been made by a tribunal, which will have been persuaded to do so on evidence; and that (d) the tribunal, which -

had in 2011 made an award lasting until 2016 had not had significant concerns that the claimant's condition was not liable to continue for a reasonable period.

7. The evidence behind those awards, particularly the third of them, was potentially relevant and insofar as it was still available, ought to have been produced. Under rule 24 the DWP ought to have included it and, when it failed to do so, the tribunal ought to have directed its provision and taken it into account in its decision.

8. In a submission in the present appeal, the Secretary of State's representative said:

> "13. In 2013 UKUT 174 (AAC) the claimant had the higher rate mobility component of DLA. The Judge held that it is the evidence that matters, not the award and that in many, if not most, cases the award of the mobility component is of little or no value to a claimant's ESA case.
>
> 14. However, the claimant had also been awarded the middle rate care component of DLA. The care component is for those needing help with bodily functions or with those needing supervision. It is not known on what basis this award was made. This presented the tribunal with conflicting evidence. On the one hand the evidence suggested that the claimant was able to perform activities of daily living and in contrast she gave evidence that she had been awarded the care component of DLA. The tribunal made no findings in relation to the DLA at all and in this respect, I submit that the tribunal erred in law."

9. I read the submission-writer's remarks that "it is not known on what basis the award was made" as being directed to the state of the evidence before the First-tier Tribunal, not as saying that nothing is or can be known about the basis of the award, for instance from interrogation of the DWP's computer records.

10. The concession at the end is well made. The evidence which had led to a relatively recent award of the care component might, even though there is again no direct correlation between the tests for the two benefits, have been material to whether ESA descriptors were fulfilled. But I consider that in paragraph 13 the submission was too ready to dismiss the significance of the DLA insofar as it related to mobility component, on a mistaken reading of the *ML* decision. In relation to both components, the evidence behind the DLA award was capable of proving material to what the ESA tribunal had to decide."

See also JC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0257 (AAC) – CE/54/2014.

1. Judge of the Upper Tribunal C G Ward 20.3.2014

mobilising – ability to walk around supermarket…

JC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0257 (AAC) – CE/54/2014 held:

"2. First, and perhaps most critically, the tribunal failed to make adequate findings of fact on the mobilising descriptor and failed to explain adequately why the appellants walking around Tesco's using a trolley stood against him meeting any mobilising descriptor. As Judge Jacobs put it in *AH-v-SSWP* [2013] UKUT 0118 (AAC); [2013] AACR 32, at paragraph 21:

> "The key to applying the words of Activity 1 lies in making findings of fact relevant to [the words set out in activity 1] that are as specific as the evidence allows. And, if the claimant is present at the hearing, the tribunal should ensure that it obtains evidence that is sufficient to that purpose. Just to take one example: the tribunal should have probed Mr H's evidence that he "could not repeatedly do 50 metres". How far could he walk before stopping? What made him stop? How did he feel? How soon could he proceed? How often could he repeat that process? This was particularly important in this case, because of the content of Mr H's evidence to the tribunal."

That investigation and analysis was not carried by the tribunal here, and that deficit amounts to a material error of law. For example, there is no evidence the tribunal investigated with the appellant how far he walked in the Tesco's store before he stopped, and if he stopped why he did so. Even for the fully able bodied walking around a supermarket shopping is very often not uninterrupted as the act of shopping requires stopping to get items off shelves. In addition, as the Secretary of State helpfully points out, there is no evidence the tribunal considered the scan results (pages 71-72) and whether the degenerative changes they show might account for problems mobilising."

See separate write-up on relevance of an award of Disability Living Allowance higher rate mobility component.

2. Judge of the Upper Tribunal S. M. Wright 5.6.2014

mobilising – use of Google maps

HI v Secretary of State for Work and Pensions – [2014] UKUT 0238 (AAC) – CE/0146/2014 held:

"C. The appeal to the First-tier Tribunal

4. The claimant exercised her right of appeal to the First-tier Tribunal with the assistance of a welfare rights advisor from her local authority. He provided a written submission. The argument for mobilising repeated the claimant's evidence and argued further that she could not use a wheelchair in view of the osteoarthritis in her neck and upper body.

5. In evidence to the tribunal, the claimant said that she had an indefinite award of disability living allowance, which included that mobility component at the higher rate. She said the walk to Morrison's would take a normal person 10 minutes, but took her 30 or 45 minutes (both figures appear in the record of proceedings), with four or five stops on the way. She walked there, but took a taxi back. She used the trolley for support and sat periodically. Her GP's surgery was next door to her home.

6. The tribunal dismissed the appeal, although it scored her six points for getting about (activity 15(c)). In the tribunal's written reasons, the presiding judge devoted seven paragraphs to mobilising. I need only quote paragraph 12:

> She confirmed to the HCP that she walks to Morrison's supermarket in town and this is not far from where she lives. Once there she is able to walk around the supermarket to do her shopping. Google maps shows that the distance she is walking is 2.3 km. In her oral evidence she said that she could do this walk in 30 minutes with 4 stops. The appellant states that the distance is 200 metres, which according to Google maps is a significant understatement. She is, therefore, walking more than 200 metres at a time, and doing so repeatedly in order to complete the distance.

I can see nothing in the record of proceedings to suggest that the tribunal put this point about the distance to the supermarket to the claimant.

D. The appeal to the Upper Tribunal

7. The claimant's representative applied on her behalf for permission to appeal on the ground that the tribunal had overestimated the distance to the supermarket; he produced an aerial photograph in support. I gave permission to appeal, saying:

> The grounds of appeal raise an issue that comes up regularly about the use of evidence obtained by the tribunal. To what extent is this permissible? In what circumstances can it properly be taken into account? In particular, should it be put to the parties for comment? If it was obtained before the hearing, should it not have been put to the claimant at least to check its accuracy? It must have been obtained in advance. Otherwise, it could not have been taken into account when the tribunal made its decision.

The Secretary of State has supported the appeal and the claimant's representative has submitted a 'no further comments' reply.

E. Analysis

Obtaining the evidence

8. The first question is: was the tribunal entitled to obtain the evidence from Google maps?

9. The tribunal did not say how this information came to be before it, but it must have come from one of the members of the tribunal on their own initiative. The claimant did not provide it; nor did she invite the tribunal to check for themselves. As I have said, the use of Google maps to check distances in employment and support allowance and disability living allowance appeals has become a feature of appeals recently.

10. I can see no objection to what the tribunal did either in principle or on the authorities. As far as principle is concerned, tribunals are entitled to make use of their local knowledge: *The King v Tribunal of Appeal under the Housing Act 1919* [1920] KB 334 at 341. They are also entitled to make use, by way of judicial notice, of general knowledge that can be obtained from reference sources. Given the availability of information from online sources like Google maps, I can see no reason why a tribunal should not use this to supplement or check evidence of distance, which it is notoriously difficult to judge.

11. As far as authority is concerned, the courts have allowed tribunals to make use of information that they have obtained for themselves. In *R v City of Westminster Assessment Committee, ex parte Grosvenor House (Park Lane) Ltd* [1941] 1 KB 53, the Court of Appeal did not criticise a tribunal for making use of a report on the effect of war on valuation. And in *Busmer v Secretary of State for Defence* [2004] EWHC 29 (Admin), Newman J did not criticise a member of a Pensions Appeal Tribunal for undertaking research into the source documents for some of the evidence that was put before the tribunal. The courts criticised the way the tribunals had handled that evidence, but that is a separate matter.

12. The Secretary of State's representative has cited *JB v Secretary of State for Work and Pensions* [2009] UKUT 61 (AAC), in which the chairman of an appeal tribunal had personally contacted a GP's surgery during a hearing in order to check on the authenticity of documents. Upper Tribunal Judge Wikeley decided that the chairman had acted improperly and that the hearing had been unfair:

> 16. There are, however, limits to the inquisitorial function of tribunals. It is one thing for a tribunal to instigate inquiries as part of its inquisitorial role (in contradistinction to the adversarial approach traditionally, but less so today, associated with the courts). It is quite another thing for one member of a tribunal actively to collect evidence relating to the appeal, which moreover was presumably not heard directly by the medical member of the tribunal. The chairman in this case stepped over the line – she stopped being a judge and became both an investigator and a witness.
> …
>
> 20. The function of tribunals is therefore to decide the appeals on the evidence put before them, not on the evidence collected by them on the day of the hearing and not put to the claimant. In the present case the failure to put the evidence gathered from the GP's surgery by telephone to the appellant for comment compounded the tribunal chairman's error. The case was being decided, in part at least, on evidence that had simply not been disclosed to the appellant. …

Judge Wikeley went on to consider how the tribunal should have dealt with its concerns about the authenticity of the documents. The possibilities he considered show that the error lay not in the tribunal's desire to investigate further, but rather in the manner in which that was done.

13. I consider that that decision is distinguishable. There is a difference in principle between consulting an online source of information to check the accuracy of information that is notoriously unreliable and undertaking a personal interrogation of a third party in order to check whether the claimant has presented forged evidence.
Using the evidence

14. The second question is: what conditions governed the use of information obtained by the tribunal?

15. It is a basic requirement that tribunal proceedings must be fair. That is dictated by the principles of natural justice and by the Convention right to a fair hearing. It is inherent in the nature of the judicial exercise that evidence should be put before the parties so that they may have a chance to comment on it. I do not know the rights and wrongs of this case. But assuming that the aerial photograph that has been produced shows the claimant's home and the supermarket to which she referred, the tribunal's estimate of 2.3 kilometres was grossly wrong. Putting its view to the claimant would have allowed the tribunal to ensure that it had correctly understood the evidence (it may have had a different branch of the supermarket in mind) and correctly interpreted the information it had obtained (it may have been using the wrong scale).

16. The tribunal failed to put the material it had obtained to the claimant for comment. That was an error of law.

17. In order to avoid any misunderstanding, in this case the claimant was present at the hearing. I have not had to consider how the tribunal should have proceeded if this had been a paper hearing. I have not decided that the tribunal should have adjourned, but at the very least the experience of this case shows that tribunals need to take the greatest care before relying on information obtained in this way.

Was the mistake material?

18. The presiding judge refused permission to appeal, saying that the tribunal's decision would have been the same even if the whole of paragraph 12 were removed from its reasons for decision. That may be correct. But if it is, the tribunal's reasons do not say so. There is also this consideration. The claimant said the distance was 200 metres, whereas the tribunal found that it was 2.3 kilometres. Although the tribunal described the claimant's view as 'a significant understatement', the difference was so great that it is possible that it influenced the tribunal's assessment of the remainder of the claimant's evidence. In those circumstances, I have set aside the tribunal's decision and directed a rehearing."

See also See also [2013] AACR 33 and IB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0359 (AAC) – CE/261/2013.

2. Judge of the Upper Tribunal Edward Jacobs 27.5.2014

Work Capability Assessment Case Law Pack – Second Edition (June 2015)

Schedule 3

Activity 1 – Mobilising: Limited Capability for Work-related Activity

mobilising – LCWRA

[2013] AACR 32 (unreported AH v Secretary of State for Work and Pensions – [2013] UKUT 0118 (AAC) – CE/1750/2012) dealt with a number of points including Activity 1: Mobilising in Schedule 3.

1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used.	Cannot either: (a) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (b) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion.

This is in identical terms to descriptor (a) of Activity 1 in Schedule 2, where it carries 15 points, which alone is sufficient to show that a claimant has limited capability for work.

The decision held:

"14. In the case of Activity 1, there is a clear contrast in the language. Descriptor (a) applies if the claimant cannot mobilise for more than 50 metres without stopping, whereas descriptor (b) applies if the claimant can do so, but not 'repeatedly … within a reasonable timescale'. That makes it impossible to read the need for regularity into descriptor (a).

Regulation 34(2) is also relevant:

> (2) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.

…

"18. The words 'repeatedly', 'significant discomfort or exhaustion' and 'reasonable timescale' are normal words in everyday use. Like all words, they take their meaning from their context, or at least the context colours their meaning. I can, though, see no reason why they should have a different meaning just because they appear in Schedule 3. The purpose of that Schedule is to identify claimants who are not required to take part in work-related activity. But it does so by reference to the nature and extent of their disabilities, not by reference to work-related activity itself. The effect of coming within Schedule 3 may differ from the effect of coming within Schedule 2, but the criteria for classifying claimants are the same.

19. I am not going to attempt to define what these words mean. That would be wrong. It would be the wrong approach to statutory interpretation and would trespass impermissibly into the role of the First-tier Tribunal. It is not for the Upper Tribunal to give more specific content to the law than the language used in the legislation. The Upper Tribunal will not decide that 'repeatedly' means five times, ten times or any other number. Nor will the Upper Tribunal decide that 'reasonable timescale' means five seconds, five minutes or any other time.

20. The correct approach was explained by Lord Upjohn in *Customs and Excise Commissioners v Top Ten Promotions Ltd* [1969] 1 WLR 1163, at 1171:

> "It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look up examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament."

21. The key to applying the words of Activity 1 lies in making findings of fact relevant to those words that are as specific as the evidence allows. And, if the claimant is present at the hearing, the tribunal should ensure that it obtains evidence that is sufficient to that purpose. Just to take one example: the tribunal should have probed Mr H's [*the claimant*] evidence that he 'could not repeatedly do 50 metres'. How far could he walk before stopping? What made him stop? How did he feel? How soon could he proceed? How often could he repeat that process? This was particularly important in this case, because of the content of Mr H's evidence to the tribunal. At least as it was recorded by the judge – the record of proceedings does not have to be verbatim – his evidence was expressed in the language of the Schedule. The tribunal had to obtain evidence that would allow it to assess Mr H's answers by reference to that language. It could not do that if the evidence repeated that language. The tribunal would at least need to know what Mr H meant by 'repeatedly', as he might not be using it in the same way as in Activity 1."

1. Judge of the Upper Tribunal Edward Jacobs 5.3.2013

mobilising – two part test

HD v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0072 (AAC) – CE/2293/2013 examined whether there were two parts to Activity 1 within schedule 3 – cannot and/or cannot repeatedly.

1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used.	Cannot either: (a) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (b) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion.

The decision held:

"4. When this case came before me as an application the representative now acting for the appellant argued that this descriptor contained two tests, not one, and that the tribunal had not dealt with the double test accurately. I commented in granting permission to appeal as follows. I also drew attention to the reports that led to the current drafting of the provision, but do not repeat them here.

"13. … it is clearly arguable that descriptor 1 contains two tests not one. In other words, it is not enough that a person can mobilise 50 metres without having to stop. She or he must also be able to do that repeatedly within a reasonable timescale. That is the point being made by the appellant here.
…

15. My provisional view is that the "cannot either" … "or" wording is properly interpreted as meaning "one or the other of (a) and (b)". In other words, a claimant who can satisfy the Secretary of State or a tribunal that he or she cannot mobilise to the level of one or other of (a) and (b) is entitled to be regarded as meeting the descriptor as a whole even if he or she can mobilise to the extent that the other is met. I invite the views of the Secretary of State on this.

16. I draw that view in part from the logic of the language and in part from the comments in the attached report. Dictionaries show that "either … or" is inherently ambiguous. The Shorter Oxford Dictionary reflects the ambiguity by noting that "either" can mean each of two or sometimes both of two. Chambers Dictionary makes the point even more sharply: "the one or the other; one of two; each of two, the one and the other".

17. The context of the descriptor in Schedule 3 is of no assistance to this, as there is no other similarly worded descriptor. In Schedule 2 the "either… or" wording is used in paragraph 2, but in my view the context there is sharply different. The Upper Tribunal has decided (and I have agreed with this in decisions) that there standing and sitting can be looked at cumulatively. But that is in the context of meeting an overall test of remaining at a work station for a specific period.

18. In this descriptor the two measures of mobility cannot be combined to meet the distance set. The "either (a) or (b)" approach suggests that descriptor 1 properly requires both 1(a) and 1(b) to be tested where relevant. If so, a claimant who can both mobilise 50 metres without stopping and can repeatedly cover the distance, even if stopping, within a reasonable timescale is outwith Schedule 3, but a claimant who cannot do both is within it."

5. In response to my direction that the Secretary of State indicate his view on this, the officer representing the Secretary of State agreed with the view expressed at paragraph 15. The officer added the submission that in his submission this was consistent with the decision of Judge Wikeley in MC v SSWP (ESA) [2012] UKUT 324 (AAC), [2013] AACR 13 about the use of "either … or" with regard to standing and sitting (the decision to which I referred indirectly) despite my comments.

6. Having noted that, I agree with the appellant's representative that for the appellant to be found not to be in the support group, the First-tier Tribunal must decide both that she is able to mobilise 50 metres and that she can do so repeatedly within a reasonable time. Unless in the view of the tribunal the evidence shows that she can do both, then she should be in the support group."

Note: DG v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0100 (AAC) – CE/3466/2012 (Judge S M Wright – 26.2.2014) held (at paragraph 57) "I had completed this decision when Upper Tribunal Judge Williams issued his decision in *HD v SSWP* (ESA) [2014] UKUT 0072 (AAC) on 12 February 2014. This decision concerns activity 1 in Schedule 3 to the ESA Regs and the "cannot either… or" between (a) (mobilise more than 50 metres…) and (b) (repeatedly mobilise 50 metres…) in the qualifying descriptor therein. Judge Williams takes a different view as to the "or" in this context, and in effect reads it disjunctively so that a person will meet Schedule 3 on mobilising if he either [sic] "cannot mobilise more than 50 metres without stopping…" or "he cannot repeatedly mobilise 50 metres within a reasonable timescale…". I can see the sense of that reading of "or" within that context. However, it does not persuade me that the contrary reading of "cannot… or…" in activity 5(d) in Schedule 2 to the ESA [sic] is wrong. I have not sought yet further submissions on *HD* from the parties because (i) its different reading of "or" seems explicable in its own particular contact, and (ii) to do so would yet further delay the making of this decision"

See also GC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0117 (AAC) – CE/3377/2013.

1. Judge of the Upper Tribunal David Williams 12.2.2014

mobilising – LCWRA

AC v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0229 (AAC) – CE/3186/2012 examined whether the decision of the First-tier Tribunal was erroneous because the claimant was not placed into the 'support group' (by virtue of Schedule 3: Mobilising) and whether the DWP was correct in making Incapacity Benefit vs. Employment and Support Allowance conversion decisions.

The appellant had been in receipt of benefits for many years because her poor health rendered her incapable of work. These benefits were then converted to Employment and Support Allowance.

On the 'support group' question the Upper Tribunal Judge held:

"2. I need not go into detail concerning the appellants [*sic*] various health problems. These are described in two medical reports from her GP at pages 32 and 36 of the evidence bundle. The appellant has always stated that she has difficulty walking. In a DWP questionnaire, she said that she was unable to manage the distance of 50 metres without stopping. She added that it was rare for her to go out on her own. If she left the house she preferred to lean on someone and mainly went out with her daughter for hospital appointments. She uses a stick.

3. At the hearing, the appellant explained that she sometimes went to the pharmacy directly across the road. She could also manage to walk alone with her stick from her GP's car park to the surgery. In a long detailed letter, her GP states:-

> "She is unable to walk without some support and cannot walk far (approx 50 metres) before she needs to stop due to the pain and discomfort and the more that she tries to extend this distance the more painful it becomes and the more exhausted she becomes."

Since 1994 she has been in receipt of DLA higher rate mobility component on the ground that she is virtually unable to walk without severe discomfort. This award has been reassessed several times.

4. I am satisfied by this evidence that the appellant cannot mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort. Nor could she repeatedly mobilise 50 metres within a reasonable time scale because of significant discomfort. She thus comes within the first of the categories of Schedule 3, that of mobilising unaided.

5. The Secretary of State was represented at the hearing by Mr Cooper. He declined an offer to cross examine the appellant and was content, after hearing the oral evidence, to offer no submission contrary to my conclusion. The appellant's daughter asked me to consider other categories in Schedule 3 and Mr Cooper drew my attention to the probable application, on other evidence which I heard, of Regulation 35(2). I think it likely that the appellant additionally qualifies for the support group on other grounds but I need not explore those possibilities for the purposes of this decision. I should however say something more about how this case came to be before the Upper Tribunal."

See separate write-up on the secondary issue of the DWP's authority to make Incapacity Benefit vs. Employment and Support Allowance conversion decisions without awarding any points score.

1. Judge of the Upper Tribunal Nicholas Warren 8.3.2013