Regulation 29 – Exceptional Circumstance

when should regulation 29 be considered and adequate reasons?

[2014] AACR 33 (unreported NS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0115 (AAC) – CE/2298/2013) involved an appeal in which opposing the appeal to the Upper Tribunal, the representative of the Secretary of State argued that it was not erroneous for the First-tier Tribunal simply to state that Regulation 29 was not applicable and that a First-tier Tribunal should not be faulted for merely stating in one line at the end of the statement of reasons that it was not applicable in the circumstances where there was no suggestion in the appeal papers that the claimant had raised Regulation 29 as an issue. In the view of the representative of the Secretary of State, there was not any evidence to suggest that there would be a substantial risk to the physical or mental health of any person if the claimant was found not to have limited capability for work and therefore the First-tier Tribunal was not bound to consider the application of Regulation 29.

The Upper Tribunal Judge reviewed a number authorities including – CSIB/8/97, CSE/223/2013, CSE/27/2013, CSE/37/2013, *RB v Secretary of State for Work and Pensions (ESA)* [2012] UKUT 431 (AAC) (Upper Tribunal Judge Ward), *PC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 1 (AAC) (Upper Tribunal Judge Gray), SP v Secretary of State for Work and Pensions (ESA) [2014] UKUT 10 (AAC) (Upper Tribunal Judge Gray) and DB v Secretary of State for Work and Pensions (ESA) [2014] UKUT 41 (AAC) (Upper Tribunal Judge Gray).

The Upper Tribunal Judge held:

"41. What is the effect of all these authorities? It seems to me that they are all saying that whether regulation 29(2)(b) requires to be considered depends on all the circumstances of the case. In so far as CSE/223/2013 and CSE/27/2013 may be saying otherwise, I disagree with them.

42. The Secretary of State's submissions to tribunals frequently makes passing reference to regulation 29, though seldom addresses it in any detail. If there has been a medical examination and report, that always refers to the applicability of exceptional circumstances, though, as Judge Gray pointed out in *SP v Secretary of State for Work and Pensions,* that takes the form of a restatement of the statutory test. It is an assertion since there are no supporting reasons. Very occasionally there are some supporting reasons in the healthcare professional's report. They may be enough to bring consideration of regulation 29(2)(b) into play.

43. Sometimes the terms of the decision under appeal, or the reconsideration of it, assert that regulation 29(2)(b) does not apply.

44. This is, of course, not entirely satisfactory. It places an additional burden on tribunals to decide when regulation 29(2)(b) is in issue and when they need to provide reasons for its not applying to a particular claimant.

45. It must also be remembered that regulation 29(2)(b) is not just about whether there is any work or type of work which a claimant can do without substantial risk to the mental or physical health of any person. It is about whether a substantial risk would arise from a claimant's being found not to have limited capability for work. In *IJ v Secretary of State for Work and Pensions (ESA)* [2010] UKUT 408 (AAC) Judge Mark observed:

> "10. Further, the test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker's allowance. That would involve his attending interviews, and going through all the other steps that would be needed to obtain and keep jobseeker's allowance. In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990's, is unlikely to find work quickly and would very possibly never find it. His GP's assessment that it is inconceivable that he would ever be able to earn his living may be right. The tribunal would then have to determine how this change from his being in receipt of incapacity benefit would affect the claimant's mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age. These factors were not considered by the tribunal, and indeed they did not elicit the information necessary to enable them to be considered, such as whether he had in fact applied for jobseeker's allowance and if not, how he was coping or would cope."

46. It will seldom be the case that the documents before a tribunal provide much detail about a claimant's educational and training background, which may well be relevant to issues raised by a full consideration of regulation 29(2)(b).

47. There will be some cases in which a tribunal need say nothing about regulation 29(2)(b). I give one clear example. Where a claimant is represented, claims only problems with physical functions, is found to score no points under Part 1 of Schedule 2 to the Employment and Support Allowance Regulations 2008, and where the representative does not put regulation 29(2)(b) in issue, a tribunal can safely leave out any mention of regulation 29(2)(b). However, in such a case a wise tribunal would seek confirmation from the representative that no issue is raised under regulation 29(2)(b) if they were to find that no points are scored under the Part 1 descriptors.

48. There will be some cases in which a tribunal must address regulation 29(2)(b). Clearly, if it is put in issue by a claimant, it must be fully and properly addressed. This will not require repetition of the findings of fact made in respect of the descriptors in Schedule 2, but that will be the obvious starting point for the explanation of why regulation 29(2)(b) does or does not apply.

49. In cases in which the descriptors relating to mental, cognitive and intellectual functions are in issue, it is more likely that regulation 29(2)(b) will be relevant. After all, in cases which come before the tribunal, more often than not the claimant's GP has issued a certificate that the claimant is incapable of work (though I accept that the GP may not be making that judgment against the Schedule 2 assessment). If the GP has submitted a letter in support of the claimant's appeal, that will often indicate why the GP considers that the claimant is incapable of work.

50. I would agree with the observation of Judge Ward in *RB v Secretary of State for Work and Pensions (ESA),* which I have quoted in paragraph 35 above, that the more narrowly focused the descriptors become, the more likely it is that the safety net provision of regulation 29(2)(b) will be in issue.

51. I do not consider that the level of detail required for proper reasons on the application of regulation 29(2)(b) is high. The more obvious it is that regulation 29(2)(b) does not apply, the easier it should be to give reasons why that is so.

52. What is frequently missing from brief statements that regulation 29(2)(b) does not apply is the addition of a statement as to why it does not apply. This is exemplified by the statement in the appeal before me, where the tribunal said:

> "Regulation 29 does not apply as the Tribunal was not satisfied that there was a substantial risk to the appellant or to any person if he were not found to have limited capability for work."

53. What is needed is for that sentence to end in a comma and to be followed by the word "because" and then a phrase or two explaining why regulation 29(2)(b) does not apply. After all, if the tribunal has done a proper job in considering regulation 29(2)(b) they must have considered why the regulation did not apply. Otherwise, this is a mere formulaic response to the issue. A tribunal which embarks upon a consideration of regulation 29(2)(b) must do a proper job of considering it.

54. However, that is rather to jump the gun. Was this a case in which the tribunal was required to consider regulation 29(2)(b) and to give reasons at the level I recommend in order to avoid erring in law?

55. The appellant was 54 at the date of the decision on the conversion process from entitlement to incapacity credits to entitlement to an employment and support allowance. She was unrepresented. She was suffering from progressive arthritis and what her GP describes as "acute depression", as well as some other ailments. There was evidence of on-going hospital investigations in relation to her arthritis at or around the time of the decision under appeal, and suggestions that it was getting worse.

56. The appellant's own assessment of the effects of her conditions is markedly at odds with the conclusions the tribunal reached. The tribunal concluded that the decision maker had wrongly assigned points on the mobilising descriptor. Furthermore regulation 29 is addressed in the Secretary of State's submission to the tribunal (see para.5.5 of that submission).

57. In my view, this was not a case in which a bare statement that regulation 29(2)(b) did not apply without any reasons for that conclusion was adequate. The tribunal, which had disagreed fundamentally with the appellant about the effects of her condition on her, needed to give reasons for its conclusion on the application of regulation 29(2)(b). It did not do so. In failing to do so, it erred in law. I set their decision aside for this reason. I remit the appeal for determination at an oral hearing before a differently constituted tribunal."

1. Judge of the Upper Tribunal Robin C A White 14.3.2014

regulation 29 – tribunal duty

PC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0001 (AAC) – CE/3043/2013 held:

"8. As to regulation 29 it is not necessary for a FTT [*First-tier Tribunal*] to consider regulation 29 as a matter of routine. It is not always disclosed upon the papers or by the oral evidence as being of potential applicability, but where the FTT considers it, and the judge says that they did in this case, it must be properly dealt with bearing in mind the criteria set out in the case of *Charlton-v-SSWP [2009]EWCA Civ 42* which are essentially that the tribunal -must establish what sort of work the appellant would be expected to do, and assess the level of risk in relation to the likely workplace and the journey to and from work. [*My insert*].

9. Where regulation 29 is a clear issue on the papers but the FTT does not consider it that may amount to an error of law, but there will be many cases where it simply does not arise, and the tribunal need not consider it."

1. Judge of the Upper Tribunal Gray 2.1.2014

tribunal duty to consider substantial risk – not raised by representative

CAF-v-Department for Social Development (ESA) – [2012] NICom 248 – C9/11-12(ESA) held:

"8. Regulation 29(2)(b) only applies to claimants who do not score sufficient points for descriptors under the limited capability for work assessment to satisfy that assessment. It provides that such a claimant is "to be treated as having limited capability for work" if he or she "suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work." In practical terms, the reference to "any person" includes the claimant himself or herself. That is very much the situation which applies in this case.

9. It is clear from the tribunal's record of proceedings that the claimant's representative did not put the application of regulation 29(2)(b) to the claimant specifically at issue before them. Rather, he concentrated in his submissions on two additional descriptors from the mental, cognitive and intellectual functions part of the limited capability for work assessment which he argued should be awarded to the claimant. However the tribunal had an inquisitorial or investigative function. Its jurisdiction in deciding the appeal was not restricted to a consideration of the contentions of the parties. The nature and application of the inquisitorial or investigative role of an appeal tribunal is authoritatively discussed by the Court of Appeal in Northern Ireland in Mongan v Department for Social Development, R3/05(DLA), paragraphs 14-18. In particular that function demands that issues "clearly apparent from the evidence" must be considered as is pointed out by Lord Chief Justice Kerr in paragraph 16. In paragraph 17 his Lordship goes on to say:

> "Whether an issue is sufficiently apparent from the evidence will depend on the particular circumstances of each case. Likewise, the question of how far the tribunal must go in exploring such an issue will depend on the specific facts of the case. The more obviously relevant an issue, the greater will be the need to investigate it."

Having regard to the quotation from the judgment of Lord Chief Justice Kerr in Mongan in paragraph 9 above, I am satisfied that the issue of the application of regulation 29(2)(b) was in this case one which was "clearly apparent from the evidence" and was indeed one which was "obviously relevant". I reach that conclusion on the basis of the claimant's personal circumstances briefly described in paragraph 2 [see below] above and also the contents of much of the written evidence referred to in paragraph 5 [see below] above. It was therefore the duty of the tribunal to consider and determine the above question. In failing to do so they materially erred in law." [*My inserts*].

At paragraph 2 and paragraph 5 of this decision it was stated only that the claimant had worked for British Airways as a senior cabin crew member for 20 years and that her employment had been terminated at or about the same time as her award of Employment and Support Allowance was made and that she had lodged written evidence with the appeal tribunal from the condition management programme, her general practitioner, her consultant psychiatrist, a chartered psychologist and her crew manager with British Airways.

1. Deputy Commissioner A J Gamble 9.1.2012

tribunal duty to consider substantial risk – in every appeal?

HA-v-Department for Social Development (ESA) – [2011] NICom 213 – C6/11-12(ESA) held:

"21. I would state, firstly that my conclusions with respect to an appeal tribunal's duty with respect to the potential applicability of regulation 27 of the Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995, as set out in *C5/08-09(IB)*, *C4/09-10(IB)* and *C24/10-11(IB)* are equally applicable to the appeal tribunal's duty with respect to the potential applicability of regulation 29 of the Employment and Support Allowance Regulations (Northern Ireland) 2008.

22. In the majority of the appeals involving ESA, the first task of the appeal tribunal will be to decide whether the decision-maker had grounds to supersede an earlier decision of the Department. The ground for supersession on which the decision-maker usually relies is to be found in regulation 6(2)(q) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, namely that since the decision the Department has received medical evidence from a healthcare professional approved by the Department, or made a determination that the claimant is to be treated as having limited capability for work in accordance with regulation 20, 25, 26 or 33(2) of the Employment and Support Allowance Regulations (Northern Ireland) 2008, as amended.

23. If the appeal tribunal decides that the decision-maker did have grounds to supersede an earlier decision of the Department, it must then go on to decide whether the appellant has limited capability for work in accordance with the work capability assessment.

24. If the appeal tribunal determines that the appellant does not have limited capability for work in accordance with the work capability assessment then it must then decide whether any of the exceptional circumstances set out in regulation 29 of the Employment and Support Allowance Regulations (Northern Ireland) 2008, as amended, apply to the appellant.

25. In the majority of cases in which an appeal tribunal is considering whether the appellant has limited capability for work in accordance with the work capability assessment, the further issues of whether he also satisfies the exceptional circumstances in regulation 29, will not be relevant. Nonetheless, it will be safest and best practice for appeal tribunals to note that the regulation was considered. Where a statement of reasons for the appeal tribunal's decision is requested it will also be safest and best practice to make a reference therein that the application of regulation 29 was considered but was discounted. That will not be an onerous duty for appeal tribunals. Where regulation 29 is not relevant a simple statement to that effect is sufficient.

26. In C5/08-09(IB), it was clear, on the facts of the case, that the issue of the possible application of regulation 27 was one of the issues that was raised by the appeal and was one which required to be addressed by the appeal tribunal. The appeal tribunal was in error of law in failing to address what was a real issue arising in the appeal."

See also GL-v-Department for Social Development (ESA) – [2011] NICom 231 – C12/11-12(ESA).

1. Chief Commissioner K Mullan 3.10.2011

no obligation for tribunal to consider substantial risk in every appeal

GL-v-Department for Social Development (ESA) – [2011] NICom 231 – C12/11–12(ESA) held:

"25. Even if I am wrong that the failure of the appeal tribunal to include a reference in the statement of reasons to the appeal tribunal's conclusions with respect to the potential application of regulation 29 does not render its decision as being in error of law, I would have been prepared to make a finding that none of the exceptional circumstances set out in regulation 29 apply in this case.

26. I would add this. Careful consideration has to be given to a submission that a decision of an appeal tribunal is in error of law because of a failure by the appeal tribunal to consider, in an appeal involving ESA, the regulation 29 exceptional circumstances provisions, and in appeals involving IB, the parallel regulation 27 provisions. That is not to dilute the extent of the duty on the appeal tribunal, in line with the direction given above, to consider the potential application of those provisions where there is a specific submission that one of the exceptional circumstances applies or the potential application is apparent from the evidence available to the appeal tribunal. I am of the view, however, that a routine submission that a simple omission to refer to the exceptional circumstances provisions, in the statement of reasons, in appeals where it is clear that those provisions would not apply, is not likely to succeed.

27. The only challenge to the appeal tribunal's decision was on the basis of its failure to consider the potential application of regulation 29 of the Employment and Support Allowance Regulations (Northern Ireland) 2008, as amended. I have decided that the decision of the appeal tribunal was not in error of law on the basis of that submitted ground."

See also HA-v-Department for Social Development (ESA) – [2011] NICom 213 – C6/11-12(ESA).

1. Chief Commissioner K Mullan 28.11.2011

substantial risk – when must it be considered?

JC v Secretary of State for Work and Pensions (IB) – [2012] UKUT 430 (AAC) – CIB/1057/2012 held:

"13. I have concluded that the tribunal did indeed err in law in relation to reg.27(b) and that in view of that error I should set the tribunal's decision aside and remit the matter to be hard [sic] by another tribunal. I shall therefore deal first with that ground of appeal.

14. The Secretary of State's submission to the tribunal contained a brief reference to reg. 27 in paragraph 5, but I accept that there was nothing in the submission to suggest to the tribunal that reg. 27 was in issue. The examining doctor advised that there were no exceptional circumstances. The claimant, who was unrepresented before the present appeal, understandably made no reference to it and it finds no mention in the tribunal's statement of reasons.

15. Against this background, the Secretary of State now submits that there is no duty on a tribunal to address reg. 27 unless it is clear to them on the evidence before them that any of the exceptions in the regulation is in issue, which was not the case here. The Secretary of State relies on Commissioner's Decision *CSIB/8/1997*. The claimant's advisers submit that not considering exceptional circumstances is an error of law and rely on the decision of Judge Sir Crispin Agnew of Lochnaw in *CIB/718/2011*.

16. It is not entirely clear what conditions the claimant in CSIB/8/1997 was suffering from and what problems they were said to cause him, but his ability to bend and kneel was obviously in issue, as was the effect of the pain he suffered and the variability of his condition. In that context, Mr. Commissioner May said, at paragraph 12:

> "The claimant was represented before the tribunal and there was no suggestion before them that regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995 applied in this case. That regulation deals with wholly exceptional circumstances and there is in my view no duty on a tribunal to address this regulation unless it is clear to them on the evidence before them that any of the exceptions set out therein is in issue. If such an exception is in issue then of course the tribunal require to address it. That was not the position here. The examining medical officer in his report at page 85 had considered the exceptions and by his answers to the questions put determined that they did not apply. The chairman's note of evidence does not disclose that the claimant asserted otherwise. I do not see that there is any substance in this ground of appeal… It would be detrimental to the efficacy of the whole scheme if in every case where a tribunal was satisfied that a claimant did not reach the requisite number of points to satisfy the All Work Test [now the personal capability assessment] it was regarded as necessary for a tribunal to address this regulation."

17. The judge in *CIB/718/2011* simply stated that it was an error of law for the tribunal not to have considered reg. 27(b). It is not clear whether that was intended to be a purely general proposition or one limited to the facts of the case, especially as the decision is short and the judge had already found another error of law. Further, paragraph 4 of the decision implies, although it does not expressly state, that the claimant in that case was unrepresented before the tribunal.

18. In my view, the true position lies somewhere between what might appear from either of those decisions read in isolation from any background context. I agree that tribunals are not under an obligation in all cases in which the claimant fails the personal capability assessment to consider whether reg. 27 applies. To take a common type of example, the outcome of the assessment may revolve round whether the claimant can walk for more or less than 200 metres without stopping or severe discomfort, can sit comfortably for more or less than 30 minutes without having to move because of discomfort and can never rise from sitting to standing without holding on or can sometimes do so. In the absence of something further, it is difficult to see that reg. 27(b) could possibly have any application and if a represented claimant does not put it in issue it is difficult to conceive of circumstances in which a tribunal would make an error of law by not expressly dealing with it in the statement of reasons.

19. By contrast, if there is undisputed evidence of a serious condition which falls only slightly short of entitling the claimant to incapacity benefit and the condition is inherently one which is capable of giving rise to risk of injury in a work environment there is likely to be an error of law if the tribunal does not consider reg. 27(b). That is particularly the case when the claimant is unrepresented, when there is obviously a much greater risk that a good point will go by default. This approach is, I think, largely consistent with *CSIB/8/1997*. The tribunal, exercising its inquisitorial function if necessary, should deal expressly with reg. 27(b) in any case in which by failing to deal with it the tribunal might be failing to deal with a point which is arguably open to the claimant on the evidence and which is capable of making a material difference to the outcome of the proceedings.

20. In the present case, it was accepted that the claimant suffered from episodes of unconsciousness of a degree of frequency which entitled him to 12 points. The examining doctor said that those episodes prevented him continuing safely with any activity. As set out in paragraph 7, there was evidence of injuries from falls and the physiotherapist at least expressed concern about the risk of injury. The claimant's previous work had been as a bricklayer foreman, so that his work environment might reasonably be supposed to be that of a construction site, as pointed out by Judge Ward. It is very understandable that the claimant may have been wholly unaware of the existence of reg. 27(b) and accordingly unable to put it in issue. In my view that is sufficient to have imposed on the tribunal an obligation to consider the applicability of reg. 27(b). It follows that there was an error of law on the part of the tribunal."

1. Judge of the Upper Tribunal E Ovey 31.10.2012

regulation 29 – when/in what circumstances should it be considered – where task can only be accomplished with pain regulation 29 may be relevant – adequate reasons

KB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0303 (AAC) – CE/4094/2013 analysed the reoccurring question of when/in what circumstances a First-tier Tribunal should consider regulation 29. In doing so the Upper Tribunal Judge gave support to the findings by Upper Tribunal Judge White in NS v Secretary of State for Work and Pensions – [2014] UKUT 0015 AAC which she said was "an excellent resume of recent decisions" on the subject.

The Upper Tribunal Judge held:

"9. I observe that in certain of the UT cases a distinction has been drawn by the judge in relation to the need to consider regulation 29 at all, as to whether the appellant was represented. Although here the appellant was represented, the tribunal judge in his statement of reasons says at paragraph 15 that the panel had noted that the *"submission appeared to have the wrong date of birth of Mr B and referred to him as a "her" for a significant portion of the document, however we proceeded on the basis that it did in fact refer to Mr KB."* (my anonymisation).
Bearing in mind those limitations, I consider that it was appropriate for an inquisitorial tribunal to make their own assessment as to whether or not regulation 29 may be in issue rather than relying on what was clearly an inadequate and possibly erroneous submission.

10. There were features in the case which may have made regulation 29 relevant. That is not to say that it will apply, but proper consideration should have been given to that regulation along Charlton principles. Those features were twofold. One was the mental health issues which were, putting to one side the inadequate submission, apparent in the computerised notes from the appellant's GP which were helpfully before the tribunal.

11. I have considered whether the findings in relation to the appellant's abilities under the mental health descriptors provide a sufficient backdrop for the observation that regulation 29 did not apply. I do not find in this case that they do. Whilst the findings that the appellant was able to perform the various descriptors are set out, the descriptors appear to have been considered in a vacuum, ignoring the medical evidence that at or about the relevant time, that is to say during the month of November, the decision having been made on November 23, the appellant approached his GP on five occasions in relation to mental health problems. On the first of those occasions the note stated that he had thought of suicide, but it was against his religion. There is no mention of that in the statement of reasons, paragraph 11 simply recording that the medical records only comprised September 2012 onwards without any reference to the content of the complaints and treatment recorded. In those circumstances the factual findings of the mental health descriptors are insufficient for the tribunal to make a judgement that regulation 29 did not apply, without more explanation.

12. There is a further complication in this case, which relates to the pain from which the appellant is said to suffer. Although not a matter raised in my original grant of permission to appeal, the aspect of descriptor satisfaction concerning whether an appellant is able to perform a task reliably and repeatedly seems to me to be insufficiently dealt with, and this has a knock-on effect in my assessment of the treatment of regulation 29. Where tasks can be accomplished, but perhaps not without pain, regulation 29 may have applicability. The issue needs therefore to be considered and adequately explained.

13. Clearly I make no observations as to whether or not regulation 29 is applicable, but it seems to me that in the circumstances of this case the FTT [*First-tier Tribunal*] needed to conduct the enquiry into that issue fully, because there were aspects of the evidence which raised genuine questions as to whether, without a finding of limited capability for work, there may be substantial risk of deterioration in the appellants [*sic*] physical or mental health, or a combination of the two. The sentence in the statement of reasons that the FTT *"considered whether there was a substantial risk that his condition would deteriorate were he found not to have limited capability for work. We found that Mr B does not fall into those exceptional circumstances."* is inadequate, being merely a restatement of the statutory test, and not an explanation to the appellant as to why that conclusion was reached in circumstances where regulation 29 might have application."

It was for these reasons that the decision of the First-tier Tribunal was set aside and the appeal remitted to a new First-tier Tribunal to consider afresh.

2. Judge of the Upper Tribunal Paula Gray 18.6.2014

regulation 29 – when considered?

AJ v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0208 (AAC) – CE/4405/2013 held:

"20. Virtually every appeal to the First-tier Tribunal against a decision by the Secretary of State that a claimant does not have limited capability for work raises the issue of whether regulation 29 applies. It is inherent in the decision and should at the very least be given some thought by the tribunal (except in obvious cases or where a competent representative of the claimant concedes that there is no dispute about it). In this case, of course, the First-tier Tribunal did give regulation 29 some thought, but not in any detail. A number of Upper Tribunal decisions have been cited to me on the amount of detail that is required. I do not propose to review them. I agree with the comments of Judge White in *NS v Secretary of State* [2014] UKUT 0115 (AAC), CE/2298/2013 that whether regulation 29(2)(b) requires to be considered depends on all the circumstances of the case (paragraph 41), that the more narrowly focussed the descriptors become the more likely it is that the "safety net provision" of regulation 29(2)(b) will be in issue (paragraph 50), and that if it is in issue then some reason must be given for any conclusion (paragraphs 52 and 53)."

2. Judge of the Upper Tribunal Levenson 8.5.2014

regulation 29 – representative responsibility to raise issue?

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

"8. (3) The fact that the claimant was not given the opportunity to deal with regulation 29 does not appear to me on the facts of this case to involve any error of law. He was represented by an experienced representative, who never raised the question, and even now there is no explanation of how there could be any substantial risk to the mental or physical health of any person, including the claimant, if he were found not to have limited capability for work."

2. Judge of the Upper Tribunal Michael Mark 17.10.2014

regulation 29 – not raised by representative…

EJ v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0551 (AAC) – CE/2174/2014 held:

"18. I did consider whether the representative's apparent failure to specifically raise the issue meant that the F-tT [*First-tier Tribunal*] was not obliged to address it. Indeed, I raised that in my grant of permission though neither party has sought to address the point further. Presumably, neither thought it necessary bearing in mind the measure of agreement about other matters. The record of proceedings does record that the representative indicated he would seek to rely, on the appellant's behalf, on four specific descriptors, but is silent about regulation 29. I think it is right to say, in general terms, that if a competent representative (as is the appellant's representative here) chooses not to raise regulation 29 then an F-tT will not, absent unusual circumstances, be obliged to address it. However, where an (*sic*) F-tT does choose to address it, even if not raised, it must do so properly and in those circumstances a failure of a representative to raise it will not mean that an otherwise inadequate analysis will suffice. In these circumstances, therefore, I would accept, even without a further specific point made by the respondent and which I shall address below, that the F-tT erred in its consideration of regulation 29." [*My insert*]

2. Judge of the Upper Tribunal M R Hemingway 10.12.2014

regulation 29 not raised – mental health…

SS v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0101 (AAC) – CE/4904/2013 held:

"4. The Secretary of State concedes that the First-tier Tribunal did not give adequate reasons for its decision in respect of regulation 29. In a case where regulation 29 was clearly not raised on the evidence, the bald statement that the conditions of the regulation were not satisfied might be sufficient but, given the finding that the claimant satisfied the terms of descriptor 15(b) due, … to her depression and anxiety, it seems to me that it was necessary to explain why there would not be a risk of her mental –

health deteriorating if she were required to go to work, which would inevitably be a risk if she were found not to have limited capability for work and might require her to get to work unaccompanied.
Descriptor 15(b) may be one of the few descriptors that almost inevitably raises the question whether regulation 29 applies if no other descriptor applies so as to take the claimant's score up to 15 points, although it obviously does not necessarily follow from a finding that descriptor 15(b) applies that regulation 29 also does so."

2. Judge of the Upper Tribunal Mark Rowland 2.3.2015

no mention of regulation 35…

CN v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0286 (AAC) – CE/2918/2013 held:

"33. The FTT [*First-tier Tribunal*] gave detailed consideration to the application of this regulation in the light of the evidence and concluded that it did not apply to the appellant. I find no fault with the FTT's reasoning as such. The difficulty is that the FTT did not draw the provisions of regulation 35(2) to the attention of the appellant. Nor was it mentioned in the Department's submission to the FTT. In those circumstances, the appellant did not know the issues that he was to address in order to satisfy regulation 35(2) and he did not have an opportunity to respond to the points that the FTT has relied upon in concluding that he did not satisfy the provision. I conclude that this was unfair to the appellant in that it was a breach of natural justice." [*My insert*]

2. Judge of the Upper Tribunal Kate Markus QC 18.6.2014

when need to consider regulation 29, schedule 3 and regulation 35

PM v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 188 (AAC) – CE/2191/2011 involved a case where the First-tier Tribunal, having given the claimant 21points under schedule 2 (part 1: physical disabilities and part 2: mental, cognitive and intellectual functions assessment), refused to consider either regulation 29 (exceptional circumstances) or regulation 35 (certain claimants to be treated as having limited capability for work-related activity). It did so on grounds that in its view there was no reason to consider regulation 29 because the claimant had already been sufficiently scored to meet the 'limited capability for work assessment', and no reason to consider regulation 35 because there was no evidence to suggest that 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'.

The Upper Tribunal Judge held:

"9. The grounds for this appeal are that the First-tier Tribunal went wrong in law in (a) not considering whether any of the Schedule 3 descriptors applied and (b) not sufficiently explaining why it did not consider that Regulation 35 applied. The Secretary of State does not support the appeal. The wording of the various descriptors applicable in this case is that which was in force down to 27 March 2011.

10. It is correct that the Tribunal did not in the Statement of Reasons in terms go on to consider whether any of the Schedule 3 descriptors applied, and neither had the Decision Notice contained any express decision about that (although there might be said to be an implicit decision that none of them did, because it was only if none of them did that Regulation 35 could have been relevant). A Tribunal which finds that the claimant does have LCW [*limited capability for work*] will generally need to go on to consider whether the claimant also has LCWRA [*limited capability for work-related activity*]. If it decides that he does not, it may or may not need to give any separate consideration, in the Statement of Reasons, to some or all of the Schedule 3 descriptors. It will generally not need to do so if (i) it is clear that the claimant does not contend that any of them are satisfied or (ii) its reasoning in relation to the Schedule 2 descriptors is sufficient to explain why it did not find that any of the Schedule 3 descriptors was satisfied. [*My inserts*]

11. In the present case only mental health activities were in issue. There were 3 activities in Schedule 3 relating to mental health: paras. 9 (learning or comprehension in the completion of tasks), 10 (personal action) and 11 (communication).

12. The Tribunal did not need to deal expressly with para. 9, because the claimant had not claimed that any of the descriptors relating to the equivalent activity in para. 12 of Schedule 2 were applicable.

13. However, as regards para. 10 of Schedule 3, the claimant had contended that para. 16(b) of the equivalent activity in Schedule 2 was applicable. That was equivalent to descriptor 10(b) in Schedule 3. As I have said, the Tribunal found that para. 16(d) of Schedule 2 applied. That had no direct equivalent in Schedule 3. The difference between para. 16(b) and (d) of Schedule 2 was merely that whereas 16(b) required that the claimant "cannot… initiate or sustain personal action without requiring daily verbal prompting given by another person in the claimant's presence", 16(d) substituted the word "frequent" for the word "daily". (It may also be relevant to note that 16(c) was in the same terms as 16(b), but with the word "daily" omitted and the words "for the majority of the time" added at the end). The fact that fewer points were scored for 16(d) than for 16(b) implies that in this context "frequent" was considered to be capable of being less often than "daily". Given that the Tribunal found that the claimant required "frequent" prompting, it is not obvious, in the absence of express explanation, why it did not also find that he required "daily" prompting. There is in my view nothing in the evidence which enables one to say what the Tribunal's reasoning in this respect must have been. In my view the Tribunal therefore went wrong in law in not expressly explaining this in the Statement of Reasons.

14. As regards para. 11 of Schedule 3, the claimant had claimed descriptor 21(b) in the equivalent activity in Schedule 2, which equated to para. 11(c) of Schedule 3. The First-tier Tribunal did not explain why it did not find that any of the descriptors in para. 21 of Schedule 2 were satisfied, and nor in my judgment is it obvious from the evidence what the explanation was. It follows that the Tribunal in my judgment therefore went wrong in law in not explaining why it did not find that para. 11(c) of Schedule 3 was satisfied.

15. Given my conclusions so far, it is not in my judgment necessary for me to decide whether the explanation which the Tribunal gave for finding that Regulation 35 was not satisfied was sufficient. I incline to the view (in agreement with the Secretary of State's submission in this appeal) that it was, but it is unnecessary for me to decide that.

16. The new tribunal will consider the appeal entirely afresh. It will not of course be bound to find that the Claimant had LCW, let alone LCWRA. The Claimant may therefore end up worse off than he was under the First-tier Tribunal's decision."

1. Judge of the Upper Tribunal Charles Turnbull 27.6.2012

regulation 35 – not raised by tribunal with appellant

CN v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0286 (AAC) – CE/2918/2012 held:

"Regulation 35

32. Having found that the appellant did not satisfy any of the Schedule 3 descriptors, the FTT [*First-tier Tribunal*] went on to consider whether regulation 35(2) of the 2008 Regulations applied. This provides:

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

33. The FTT gave detailed consideration to the application of this regulation in the light of the evidence and concluded that it did not apply to the appellant. I find no fault with the FTT's reasoning as such. The difficulty is that the FTT did not draw the provisions of regulation 35(2) to the attention of the appellant. Nor was it mentioned in the Department's submission to the FTT. In those circumstances, the appellant did not know the issues that he was to address in order to satisfy regulation 35(2) and he did not have an opportunity to respond to the points that the FTT has relied upon in concluding that he did not satisfy the provision. I conclude that this was unfair to the appellant in that it was a breach of natural justice." [*My insert*].

2. Judge of the Upper Tribunal K Markus QC 18.6.2014

regulation 35 – no mention in DWP submission/consideration of a domiciliary hearing

TC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0371 (AAC) – CE/4478/2013 set aside the decision of the First-tier Tribunal because in the view of the Upper Tribunal Judge the submission of the Secretary of State was incomplete because it did not sufficiently alert the claimant to regulation 35(2) and the First-tier Tribunal failed to use its powers, including the power to hold a domiciliary hearing, to remedy that deficiency.

The case concerned an unrepresented claimant who had stated on his enquiry form that he could not attend an oral hearing on account of his agoraphobia. Whilst the First-tier Tribunal decided that it was not necessary to hold an oral hearing (and proceeded with a paper hearing on grounds that it would be just to do so) it did not, in the view of the Upper Tribunal Judge, appear to have considered a domiciliary hearing despite a letter from the claimant's GP asking for a 'home medical'. Further, in the view of the Upper Tribunal Judge, in proceeding the First-tier Tribunal gave no directions or guidance on the evidence that might be relevant in the circumstances. It only obtained a copy of the claimant's GP's records.

In setting aside the decision of the First-tier Tribunal the Upper Tribunal Judge held:

"5. … How could he [*the claimant*] tell from the material provided by the Secretary of State, without any assistance from the tribunal, that issues relevant to regulation 35 could be considered? The tribunal has an inquisitorial approach, but how can it operate that if the claimant is never alerted to the scope of the appeal? Did the Secretary of State co-operate with the claimant and the tribunal as required by the overriding objective? Did the tribunal exercise its powers in a way that ensured effective participation in the proceedings, again as required by the overriding objective? Did the tribunal use its expertise appropriately, again as required by the overriding objective?... the overall effect at the time was that the claimant was left without any idea of an important legal provision that might be to his advantage or of the evidence that would help him to show that it applied."

2. Judge of the Upper Tribunal Edward Jacobs 14.8.2014

must be proper assessment under schedule 3 before regulation 35 considered…

KW v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0131 (AAC) – CE/4112/2014 involved a claimant with difficulties surrounding "anger problems" and "severe mood". The Upper Tribunal Judge held:

"8. In addition, in my judgment in a case such as this one in order to properly assess the application of regulation 35(2) a determination has to be made as to the extent to which the person met Schedule 2 at the date of the decision under appeal as that informs the factors to be taken into account in assessing the regulation 35(2) risk."

2. Judge of the Upper Tribunal Stewart Wright 19.3.2015

substantial risk – burden of proof on claimant

CIB/2767/2004 held:

"6. I am also asked to rule on what is to be taken into account by a tribunal applying regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995 SI 1995 No 311. This, now restored as a result of recent Court of Appeal authority, provides that a person who does not pass the personal capability assessment (PCA) may be treated as incapable of work if

> "he suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if he were found capable of work…"

Obviously there must be identified "some specific disease or bodily or mental disablement" which causes the substantial risk to be posed. The representative wishes me to abide by the ruling of Mr Commissioner Rowland in *CIB/3519/2002*. Mr Rowland is probably right in his paragraph 7 about the meaning of "substantial"; but his invocation of the other paragraphs of regulation 27 as guides to interpretation suggests that the interpretation should be rather narrow. Under the original as well as the amended form, the other paragraphs refer to more or less factual medical questions – presence of life-threatening or severe uncontrolled or uncontrollable disease, need for an identified major medical procedure within a short time.

7. The representative also wishes to bring into account the kind of job the claimant might be qualified to do, and Mr Deputy Commissioner Paines in *CIB/2320/2003* and Mr Commissioner Jacobs in *CIB/24/2004* indeed appear to enjoin this. Having carried out a PCA excluding any consideration of particular jobs, they then throw open the field under regulation 27(b) to a consideration of what jobs the claimant could reasonably be expected to do having regard (as in a jobseekers agreement) to his health, qualifications, skills and experience.

8. This of course places an evidential burden on the claimant, who is seeking to show that despite failing the PCA he should nonetheless not be asked to look for work. Evidence (in the present case, further evidence) about all the elements to be taken into account must be provided, together with full details about the alleged muscular spasms, what precipitates them, and how they might pose a substantial risk to the claimant's or anyone else's health. Why should it matter, in terms of the substantial risk of which the subparagraph speaks, if the claimant sometimes cannot sit down? It is not for tribunals to speculate on these things, it is for claimants to prove them on the balance of probabilities.

9. Finally, the representative urges that I must also direct the rehearing tribunal to take into account whatever the claimant says did actually happen to him on being found capable of work, not only what the decision maker might reasonably have thought would happen. I reject this submission. The rule is that events occurring after the date of the decision appealed against are not taken into account (s12(8)(b)), and I see no reason to depart from this. Large numbers of claimants argue that their health, physical or mental, has suffered through being found capable of work. But if the assertion is true, it must form the basis for a fresh claim."

1. Commissioner Christine Fellner 13.12.2004

regulation 29 – substantial risk

Charlton v Secretary of State for Work and Pensions [2009] EWCA Civ 42 (Court of Appeal – 6 February 2009) – reported as R(IB)2/09 – concerned an appellant who was aged 34 and had never worked. He suffered from "alcohol dependency syndrome". He had applied for benefit, based on incapacity for work due to alcoholism. On making his claim he was treated as though he was incapable of work until his Personal Capability Assessment was undertaken. In his IB50 questionnaire the appellant did not rely on any physical descriptors, nor did he report to having a mental health problem. He did, however, report "dizzy spells because of drink".

At the medical the doctor diagnosed "alcohol misuse as a condition which had started 20 years ago, dyspepsia, anxiety and depression". In the description of a typical day, the doctor recorded that the appellant "drank about ten cans a day, which he began to consume on rising. He used tranquillisers and cannabis every day and recorded that he had suffered a minor fire due to poor concentration a week before." The doctor also recorded that "the appellant managed to keep himself clean, dress himself, made 'ready meals' and managed to tidy up." The doctor then confirmed that the appellant "suffered no physical limitations" (as measured by the Personal Capability Assessment) but went on to award him two points in respect of his need to drink alcohol before mid-day and one point in respect of his fear or anxiety regarding work under the mental health test. Thus he failed to satisfy the Personal Capability Assessment since his score on grounds of mental health was well below the ten points required.

The doctor, by way of an electronically completed form found that the appellant "is not suffering from some specific disease or bodily or mental disablement and because of this there would not be a substantial risk to the mental or physical health of any person if they were found capable of work".

From the doctor's report the DWP determined that the appellant could not be treated as incapable of work under the PCA because he had not achieved the required points score.

Appeal Tribunal:

The appellant appealed to a Tribunal which increased the number of points awarded from three to five, which still fell below the necessary ten points they required under the mental health test. The tribunal made reference to Commissioner Jacobs's decision (*CIB/0026/ 2004*) as to the meaning of Regulation 27(b) but concluded that there was "no evidence that the appellant would be a substantial risk to the mental or physical health of any person if he were found capable of work".

Commissioners:

The appellant appealed to the Commissioners in case *CIB/143/2007* (Commissioner Williams). The Commissioner, having found that the appellant was suffering from a specific disease or disablement, namely alcohol dependency syndrome, went on to examine whether the disease identified gave rise to a substantial risk to the mental or physical health of any person if the appellant were found capable of work.

The Commissioner concluded that under regulation 27(b) the appellant had to show, on the balance of probabilities, that there would be a substantial risk to the mental or physical health of any person if they were found capable of work. The Commissioner held that the "assessment of the risk" must depend "to some extent" on "the kind of work that the claimant may be asked to do".

The Commissioner held that "it was necessary to show a link between the work and the risk. The probability of a substantial risk to the claimant or another person must arise because of a finding that the claimant is capable of work." The Commissioner held that risks which arose whether or not the claimant was found to be capable of work would not be relevant to regulation 27(b). Applying these principles, the Commissioner held that there would be no risk to the claimant's health if they were expected to work in the kind of work to which a person of no physical limitations, no qualifications, no skills and no experience might be directed.

The Commissioner held that was no link established on the evidence between the general risk to the appellant's health posed by his disease or disablement and the finding that he was no longer incapable of work. Such evidence as there was suggested that the risk to health may have reduced by going to work. The other risk was of the appellant injuring himself by carelessness. The Commissioner held that they have been shown no significant evidence to suggest that the appellant was any more at risk from accidents while at work than if he continued his existing lifestyle.

The Commissioner then considered whether there was any substantial risk to others and concluded there was not.

Court of Appeal:

The appellant appealed to the Court of Appeal, challenging the findings of *CIB/143/2007* on grounds that the Commissioner's interpretation of regulation 27(b) was wrong. It was argued that the correct approach was to require additional risks relating to work and the workplace to be established, over and above those risks arising from the appellant's medical condition in his life generally. The appellant argued that it was sufficient to demonstrate risks either to his own or to another's safety whether they might arise in a domestic setting or at work.

The Court of Appeal held:

"29. The correct interpretation of Regulation 27(b) lies in the context of that regulation within the scheme of the Statute and the Regulations. The test whether a claimant is incapable of work is that which is identified either in s.171B, 'the own occupation test', or the Personal Capability Assessment under s.171C. The need to consider whether to treat a person as incapable or capable of work under Regulation 27(b) only arises in circumstances where the statutory own occupation or Personal Capability Assessment tests have not been satisfied. The opening words of Regulation 27 underline the circumstance that the claimant has failed to satisfy either the own occupation test or the Personal Capability Assessment and, thus, is, apart from Regulation 27(b) capable of work: he is one who 'does not satisfy the all-work test'.

30. When a claimant has failed those tests, Regulation 27(b) requires, firstly, a decision whether the person suffers from some specific disease or bodily or mental disablement, which does not of itself cause such functional limitation as to justify a total score sufficient to warrant a finding of incapability. If he does suffer from such a condition, then a second decision is required as to whether by reason of such disease or disablement there would be a substantial risk to the mental or physical health of any person, if the claimant were found capable of work.

31. It must be recalled that by virtue of the statutory provisions in s.171 A, 171B and 171C, the claimant would have been found capable of work. The only inhibitions on such a finding are the opening words of Regulation 27 itself. Those words are in striking contrast to a provision such as Regulation 10 ... Regulation 27 only bites where the claimant has taken the Personal Capability Assessment test (when the own occupation test does not apply) and failed. The essential key to the correct interpretation of Regulation 27 is the very circumstance that it cannot apply before the claimant has been tested under the Personal Capability Assessment. Regulation 10 does not require a claimant to take such a test at all.

32. Regulation 27(b), unlike Regulation 10, is not a substitute for a Personal Capability Assessment but an additional route to a determination whether a claimant is incapable of work under Part XII of the Act. The words 'if found capable of work' underline the effect of s.171D which confers power to extend the category of those determined to be incapable of work. Reg 27(b) is designed to provide an additional test of incapability not a substitute test; the claimant may be deemed incapable despite the fact that he is capable of performing those everyday tests which, but for Regulation 27(b), would demonstrate that he is capable of work.

33. Once it is appreciated that Regulation 27(b) applies only when a claimant's functional abilities in the performance of everyday tasks have been established, it becomes clear that the risk to be assessed must arise as a consequence of work the claimant would be found capable of undertaking, but for Regulation 27. Were it not so, there would be no statutory purpose in requiring a claimant to have undergone an assessment before consideration of the effects of any disease or disablement on his or others' safety.

34. Regulation 27(b) may be satisfied where the very finding of capability might create a substantial risk to a claimant's health or to that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told – that the benefit claimed was being refused. Apart from that, probably rare, situation, the determination must be made in the context of the journey to or from work or in the workplace itself.

35. The Commissioner was correct to construe Regulation 27(b) as requiring a causative link. But I do question his apparent search for evidence of a greater risk at work than from his existing lifestyle generally … The question Regulation 27(b) poses is not whether there is a greater risk than that arising during the course of the performance of everyday tasks as tested by the Personal Capability Assessment. The descriptors specified in the Schedule test a claimant's functional limitations, both physical and mental, not the risks to which they might give rise. It is Regulation 27(b) which raises the question of whether a substantial risk arises from disease or disablement. But despite what I perceive to be an error in making a comparison which is not justified by the regulation, in the end the Commissioner does… ask and answer the correct question posed by the regulation, namely whether a substantial risk should be foreseen in the light of the work the claimant might be expected to perform in the workplace in which he might be expected to be. This gives rise to the second issue in the appeal: how the decision-maker is to identify the nature of claimant's work and workplace.

Assessment of the type of work for the purposes of Regulation 27(b)

36. Regulation 27(b) requires the decision-maker to assess risk in the context of the work or workplaces in which the claimant might find himself. The controversy between the claimant and the Secretary of State relates to the extent to which the decision-maker must identify the type of work which the claimant would perform on the hypothesis that he had been found capable of work.

37. The claimant contends that a decision-maker must identify what he describes as 'actual positions of employment' and must concentrate upon the job that the claimant will undertake, the nature of its duties and its location. Without such analysis a decision-maker will, so he contends, be unable properly to assess risk to safety both to himself and to others. The Commissioner's identification of the type of work the claimant might be expected to undertake is too vague and too broad.

38. The answer to this submission lies in the purpose of Regulation 27(b), that is to assess risk at work. In order to determine whether there is any health risk at work or in the workplace it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision-maker and, if there is an appeal, the Tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision-maker to particularise the nature of the work a claimant might undertake is likely to depend upon the claimant's background, experience and the type of disease or disablement in question. It is not possible and certainly not sensible to be more prescriptive. The most important consideration is to remember that the purpose of the enquiry is to assess risk to the claimant and to others arising from the work of which he is capable. No greater identification of the type of work is necessary other than that which is dictated by the need to assess risk arising from work or the workplace.

39. The correct approach has been identified by Deputy Commissioner Paines in *CIB/360/2007*:-

> "17. The degree of detail in which [the consequences of a finding that the claimant is capable of work] will need to be thought through will depend on the circumstances of the case… A tribunal will have enough general knowledge about work, and can elicit enough information about a claimant's background, to form a view on the range or types of work for which he is both suited as a matter of training or aptitude and which his disabilities do not render him incapable of performing. They will then need to decide whether, within that range, there is work that he could do without the degree of risk to health envisaged by regulation 27(b).
>
> 18. Regulation 27(b) requires one to start by identifying a disease or disablement; the next stage, it seems to me, is to consider the nature of any health risks posed by that disease or disablement in the context of workplaces that the claimant might find himself in, with a view to answering the question whether any such risk is substantial."

40. Unfortunately, that approach has not found favour with other commissioners. Commissioner Jacobs in *CIB/0026/2004* and Commissioner Parker in *CSIB/33/04* adopted an approach which required the decision-maker to consider the work which would be defined in a Jobseeker's Agreement should the claimant have made a claim to Jobseeker's Allowance.

41. Mr Drabble, on behalf of the claimant, supported that approach. He based that submission upon what he asserted to be the link between entitlement to Incapacity Benefit and entitlement to Jobseeker's Allowance. He drew attention to Regulation 17A. Under that Regulation:-

"A person should be treated as capable of work throughout any period in respect of which he claims a Jobseeker's Allowance, notwithstanding that it has been determined that…he is or is to be treated as incapable of work under Regulation…27 if…

(b) he is able to show that he has a reasonable prospect of obtaining employment."

42. It is unnecessary to divert the proper focus of this issue by an elaboration of the provisions in relation to Jobseeker's Allowance. It is sufficient to point out that entitlement to a Jobseeker's Allowance pursuant to the Jobseeker's Act 1995 and to the Jobseeker's Allowance Regulations 1996, requires a Jobseeker's Agreement to be made with the claimant providing the yardstick as to what is expected of the claimant in terms of his obligation actively to seek work. The contents of the Jobseeker's Agreement (pursuant to Regulation 31 of the Jobseeker's Allowance Regulations 1996) requires there to be any restrictions on the location or type of employment and a description of the type of employment which the claimant is seeking.

43. In my judgement the link which Mr Drabble seeks to establish is far too fragile to bear the weight which his argument imposes. There is no warrant within the wording or context of Regulation 27(b) for requiring a decision-maker to embark upon the almost impossible and certainly impractical task of imagining what hypothetical agreement might have been made should the claimant have applied for Jobseeker's Allowance

44. There are a number of reasons why a hypothetical Jobseeker's Agreement is not an appropriate guide to entitlement to incapacity benefit. A Jobseeker's Agreement sets out the minimum requirements as to the type of work for which a claimant must be available in order to retain entitlement to a Jobseeker's Allowance. In assessing risks arising from work or the workplace pursuant to Regulation 27(b) the decision-maker is not limited to the minimum requirements which might be specified in a Jobseeker's Agreement. The requirements in a Jobseeker's Agreement will include those restrictions upon availability sought by a claimant to Jobseeker's Allowance and considered reasonable by the Secretary of State. The decision-maker would have to imagine the terms of future hypothetical negotiations between the claimant and a Job Centre. For the purposes of Regulation 27(b) there is no basis for limiting the analysis of risk arising from work by reference to restrictions which might be suggested by a claimant and regarded to be reasonable by the Secretary of State.

45. For those reasons I would hold that those decisions which suggest that it is necessary to speculate as to the type of job which would have been set out in an hypothetical Jobseeker's Agreement were wrong. The correct approach is that which was identified by Deputy Commissioner Paines. The decision-maker must assess the range or type of work which a claimant is capable of performing sufficiently to assess the risk to health either to himself or to others.

46. Sufficient information may be elicited by reference to the claimant's completion of the initial questionnaire, questioning during his medical examination, or by any evidence he may choose to give on an appeal to the Tribunal. The process to be adopted by the decision-maker or Tribunal is to be regarded as inquisitorial and not adversarial. It is a process described by Diplock J in R v Medical Appeal Tribunal (North Midland Region ex-parte Hubble) 1958 2 QB 228 at 240 as a fact-gathering exercise in which there is no formal burden of proof on either side. There should be no difficulty provided the decision-maker or Tribunal recall that the essential question is whether there is an adequate range of work which the claimant could undertake without creating a substantial risk to himself or to others.

47. This conclusion is consistent with the practical application of these regulations. Any interpretation must bear in mind that the regulations are designed to provide a fair and effective system for assessing entitlement to incapacity benefit and to allied benefits when a claimant has passed the Personal Capability Assessment. It would not be possible to achieve the aim of those regulations were the decision-maker to be required to make findings of the particularity for which the claimant contends. The decision-maker, it must be recalled, will be provided only with the report of the doctor based upon the doctor's interview with the claimant and the claimant's completion of the questionnaire. It is quite impossible for the decision-maker to identify actual positions of employment or the nature of the duties and location of any job which the claimant might undertake, not least because the decision-maker may often be based in Belfast, or elsewhere, and can have no possible means of discovering employment circumstances throughout the country. The conclusion which requires no more than that the decision-maker or Tribunal assess the range of work of which the claimant is capable for the purposes of assessing risk to health has the merit of achieving the objective of the regulations.

48. Commissioner Williams found that the claimant was capable of performing the kind of work:-

"…to which a person with no physical limitations, no qualifications, no skills and no experience might be directed (§ 48) and that he could undertake straightforward and unstructured, unskilled work."

49. These findings are challenged by the claimant because they do not specify
with any particularity the type of work which the Commissioner had in mind. In my view, for the reasons I have given, the Commissioner was under no obligation to go any further than he did. This claimant had never worked, had no qualifications and no skills, but did not have any physical limitations. Provided the work was supervised and structured, the Commissioner found as a fact that the claimant could undertake that work without substantial risk to himself or to others. That factual assessment cannot be challenged in this appeal. Since the claimant has never worked and has no training it is an understandable and reasoned conclusion. Indeed, I suggest it would have been difficult, if not impossible, for the Commissioner to make any more detailed a finding. The essential conclusion is that he could do some work without risk to himself or to others. Such a conclusion is consistent with the obligation imposed by the Regulation to assess risk to the safety of the claimant and to others arising from work. For those reasons I would dismiss this appeal."

See also *Secretary of State for Work and Pensions v Cattrell* (Court of Appeal).

1. Lords Pill, Lloyd and Moses 6.2.2009

substantial risk and the Charlton decision

JW v Secretary of State for Work and Pensions (ESA) – [2011] UKUT 416 (AAC) – CE/343/2011 held:

"15. The Tribunal also erred by failing to follow Charlton and, as it is relevant to the way in which I have re-made the Tribunal's decision, I must explain why.

16. Charlton was concerned with regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995, under which the same legal issues arise as arose in this case. Moses LJ (with whom Pill and Lloyd LJJ agreed) held (at [35]) that the question posed by the regulation was:

> "… whether a substantial risk should be foreseen in the light of the work the claimant might be expected to perform in the workplace in which he might be expected to be".

That gave rise to the question of how the decision-maker was to identify the nature of claimant's work and workplace. Moses LJ answered that question as follows (at [39]):

> "The correct approach has been identified by Deputy Commissioner Paines in CIB/360/2007:-
>
> '17. The degree of detail in which [the consequences of a finding that the claimant is capable of work] will need to be thought through will depend on the circumstances of the case… A tribunal will have enough general knowledge about work, and can elicit enough information about a claimant's background, to form a view on the range or types of work for which he is both suited as a matter of training or aptitude and which his disabilities do not render him incapable of performing. They will then need to decide whether, within that range, there is work that he could do without the degree of risk to health envisaged by regulation 27(b).
>
> 18. Regulation 27(b) requires one to start by identifying a disease or disablement; the next stage, it seems to me, is to consider the nature of any health risks posed by that disease or disablement in the context of workplaces that the claimant might find himself in, with a view to answering the question whether any such risk is substantial.'"

17. There will be some cases in which it is possible to say that any type of work will give rise to a substantial risk to the health of the claimant or some other person. An example is provided by the recent decision of the Court of Appeal in *Cattrell v Secretary of State for Work and Pensions [2011] EWCA Civ 572*, in which a tribunal's decision that any working environment would constitute a substantial risk to the health of claimant with a rubber and latex allergy was ultimately upheld. Another example might be the common case of an alcoholic or other drug addict who is undertaking an intensive and structured programme of rehabilitation that he would be unable to finish if he were obliged to work or to be available for, and actively to seek, employment.

18. In such circumstances, it will be permissible for the Tribunal to conclude that a claimant falls within regulation 29(2)(b) without going through the process required by Charlton. However, I doubt whether there are any cases in which a Tribunal could decide that a claimant did not satisfy that regulation without first identifying both the work that he might be expected to perform and the workplace in which he might be expected to perform it. Even if I am wrong about that, this is not such a case.

19. The Tribunal should therefore have followed *CIB/360/2007* (as approved in Charlton) and:

(a) made findings as to the range or types of work for which the claimant was suited as a matter of training or aptitude and which his disabilities did not render him incapable of performing; and then
(b) decided whether, within that range, there was work that he could do without the degree of risk to health envisaged by regulation 29(2)(b).

It erred in law by failing to do so. For that reason also, the tribunal's decision must be set aside.

Reasons for the re-made decision

20. I make the following additional findings of fact:

(a) When he was aged ten, or thereabouts, the claimant was on the learning disability register maintained by the local authority.

(b) The only qualifications held by the claimant are GCSEs at Grades E and F.

(c) The claimant has no – or at any rate, little – experience of the world of work.

(d) As a matter of training and aptitude, the claimant is only suited to unskilled manual work.

(e) Except during the type of episode set out in numbered paragraph 2 of the Tribunal's statement of reasons (as quoted at paragraph 4) [*See below for what paragraph 4 contained*], the condition from which the claimant suffers would not prevent him from performing, at least, light to moderate manual work, such as working as a cleaner or caretaker or a canteen assistant, or as a porter, or from working on some factory assembly lines.

(f) However, on a balance of probabilities, even light manual work would lead to an increase in the frequency with which such episodes occur.

(g) The probability that such episodes would become more frequent constitutes a substantial risk to the claimant's health.

21. My reasoning is as follows:

(a) The Tribunal tactfully accepted the evidence of the claimant's mother that her son is "not academic". Unfortunately, I have had to go into greater detail on the point. The evidence underlying the finding of fact about the learning disability register comes from the claimant's GP. The other findings about the claimant's aptitude, experience and qualifications are based on the written submission made to the Tribunal by the claimant's representative. The representative works for an experienced and reputable firm of solicitors and may be presumed to be acting on instructions from her client, whom the Tribunal found to be a credible witness.

(b) I accept that the claimant's qualifications are a credit to him. His school did not expect him to do better than a Grade G at GCSE. He can therefore be justly proud of the effort he put into exceeding those expectations. However, when one looks at those qualifications from the point of view of a prospective employer, it is improbable that the claimant would be accepted for a job that needed any significant level of academic achievement or intellectual skills. The claimant and his mother are both realistic about this and accept that the claimant is only likely to obtain manual work. In my judgment, they are right to do so.

(c) I am satisfied that – if one ignores the probability that such work would increase the frequency of the exacerbations he suffers – the claimant could do the type of jobs I have identified. It is possible that he could also do heavier manual work but I do not need to consider that possibility in detail because I have concluded that even light manual work constitutes a substantial risk to the claimant's health.

(d) I have decided that the activity involved in light manual work would increase the frequency of the exacerbations from which the claimant suffers because:

(i) the evidence of the claimant is that, in his experience, activity has this effect. Again, the Tribunal found the claimant to be a credible witness;

(ii) the notes maintained by the GP practice with which the claimant is registered record that one of the doctors there specifically advised the claimant that working was likely to have that effect; and

(iii) the claimant's consultant nephrologist advised him to refrain from work until the investigations she was conducting were concluded. Given the claimant's desire to work, and the well-known beneficial effects that work has on the health of those who are able to do it, the only possible reason for such advice is that the consultant thought there was a real risk that working would make matters worse.

(e) The only evidence to the contrary is the report of the nurse who examined the claimant for the purposes of the work capability assessment. As the tribunal noted, the nurse was of the opinion that regulation 29 did not apply. So far as relevant she stated that there was "no evidence to suggest that the [claimant's] health problem … poses a substantial risk to anyone".

The reference to there being "no evidence" suggests that the nurse did not have access to the evidence from the GP and Consultant that were available to the Tribunal and are available to me. The alternatives are either:

(i) that the nurse did have access to those documents but did not consider them to be evidence (in which case, I disagree and hold that the evidence of the GP and Consultant outweigh her evidence); or

(ii) that my judgment as to what constitutes a substantial risk to a person's health differs from the nurse's.

(f) There is a limit to the extent to which it is possible to explain a judgment about what amounts to a substantial risk to a person's health. In deciding that the probable increase in the frequency of acute episodes amounts to such a risk, I have been particularly influenced by the excruciating levels of pain reported by the claimant, and which kidney stones are known to cause. I have also been influenced by the evidence of prolonged obstruction to the claimant's urinary flow.

22. It follows from my findings that the claimant falls to be treated as having limited capability for work by virtue of regulation 29(2)(b) and that he therefore continues to be entitled to ESA from the date it was stopped.

23. The next question I have to decide is the rate of entitlement, which in this case depends upon whether the claimant is entitled to the work-related activity component or the support component. He is only entitled to the support component if he satisfies one or more of the descriptors in Schedule 3 or falls within regulation 35 (quoted at paragraph 7 above). He does not:

(a) The wording of the continence descriptors in Schedule 3 is such that, if the claimant satisfied one of them, he would also have limited capability for work, and it is conceded that that is not the case.

(b) As far as regulation 35 is concerned, the claimant, happily, is not terminally ill. Neither is he receiving, or recovering from, chemotherapy. I can safely assume that he is not pregnant. Therefore regulation 35(1) is not satisfied.

(c) Undertaking work-related activity, as opposed to undertaking work, would not carry with it the same risk of increasing the frequency of the acute episodes and therefore regulation 35(2) is not satisfied either.

24. As the claimant is to be treated as having limited capability for work but is not entitled to the support component, he is entitled to the work-related activity component. An award of that component takes effect from the beginning of the fourteenth week of entitlement (see regulation 7(38) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999) which, in this case, falls on Monday 15 February 2010." [*My insert*].

Note: This appeal involved the case of a 17 year old claimant who suffered from a renal condition which had been under investigation for some time. According to the claimant's consultant nephrologist the condition manifested itself as "recurrent episodes of severe bilateral loin pain and suprapubic pain associated with frank haematuria [*i.e.,* blood in his urine]". Those episodes occurred "on a frequent basis (weekly)" and were of such severity that the claimant had required hospital admission to control the pain. In particular, the condition caused the claimant repeatedly to form kidney stones. Paragraph 4 of the decision of the Upper Tribunal Judge confirmed that the First-tier Tribunal had in its statement of reasons stated that it "found the appellant to be a credible witness" and that the claimant had explained that as an average he had "one week off a month" and if he "did anything he got pain" and that that pain was like "a knife in his back" and that he could take up to three to four days recovering after an attack, including up to two days to urinate.

1. Judge of the Upper Tribunal Richard Poynter 11.10.2011

regulation 29 and Equality Act

[2015] AACR 15 (unreported JS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0428 (AAC) – CE/3688/2013) held:

"44. I intend no disrespect to Ms Bibi [*representative for the claimant*] and Ms Apps [*representative for the Secretary of State*] by reducing their arguments to binary opposites: Ms Bibi… following *JB* [*meaning: JB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 518 (AAC) – CE/811/2013*] and contending that the First-tier Tribunal had to "make a finding as to the scope of the duty under section 20 and Schedule 8 of the [Equality Act] 2010 to the individual applicant" because regulation 29(2) refers to "reasonable adjustments" and because the "question of reasonable adjustments in employment and occupation under the EA 2010 can be determined by the DWP [*Department for Work and Pensions*], Atos and FTT" [*First-tier Tribunal*]; and Ms Apps for the Secretary of State arguing that the regulation 29(2)(b) risk analysis is "not an assessment of the application of the EA 2010". [*My inserts*]

45. I confess that I have not found the point necessarily an easy one to resolve. However, in the end I have come to the conclusion that the Secretary of State's argument is correct. Accordingly, I reject the submission of the appellant. In my judgment the assessment of risk under regulation 29(2)(b) of the ESA Regulations does not require or involve the decision-maker (be that the Secretary of State's delegate or the First-tier Tribunal) in making an assessment as to whether employers would owe a duty under the Equality Act 2010 to make reasonable adjustments in respect of the individual claimant whose case falls for decision, and in my judgment the tribunal erred in law in relying on the Equality Act 2010.

46. My reasons for arriving at this conclusion are incremental, and are set out below. In short, however, they may be grouped under the following broad headings:

(i) the Equality Act 2010 and employment and support allowance schemes have different statutory aims and materially different statutory contents;

(ii) an Equality Act 2010 test sits uneasily with *Charlton*;

(iii) the First-tier Tribunal is ill-equipped to make proper assessments under the Equality Act 2010; and

(iv) recourse to the Equality Act 2010 is unnecessary.

47. The statutory intendment is, perhaps, difficult to glean. As I said at the outset of this decision, regulation 29(2)(b) of the ESA Regulations says nothing about the Equality Act 2010 (or its predecessor, the Disability Discrimination Act 1995). Moreover, if as Judge Wikeley says in *AS* [meaning: *AS v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 587 (AAC) – CE/1470/2013*] the descriptors in the ESA Regulations are not to be divorced from the real world of work then obligations that may be owed by employers in that real world under the Equality Act 2010 may be said to be relevant to the ESA Regulations more generally. [*My insert*]

48. On the other hand, as I have already noted, regulation 29(2)(b) of the ESA Regulations (and its regulation 27b predecessor in the Incapacity for Work Regulations 1995) has never been made subject to prospective employers' duties under the Equality Act 2010 (or the Disability Discrimination Act 1995). This is so even when sub-paragraph (3) was added to it with its reference to "reasonable adjustments". Although this amendment falls after the date of the decision under appeal I do not consider I am precluded from having to regard to it as a guide to Parliamentary intention more generally. Whether or not it was affecting a change in the statutory test or merely seeking to make clearer the original intention, I consider it is instructive that even when using the language of "reasonable adjustments", which is a statutory phraseology rooted in the Disability Discrimination Act 1995 and the Equality Act 2010, the language was not linked to, and has been kept separate from, the Equality Act 2010. This it seems to me points to regulation 29(2)(b) being intended to embody a test separate to the tests under the Equality Act 2010.

49. This perspective is reinforced, in my judgment, when aspects of the Equality Act 2010, and employer's duties under it in particular, are considered.

50. First, the duties are not owed to the world at large or prospective employees at large. The duties, including the duty to make reasonable adjustments, only apply where there is an *interested* disabled person. That means either a person who has in fact applied for employment or has in fact notified the employer that he or she may apply for it, or is in fact an employee of the employer. However, these factual stages are not reached on the analysis required by regulation 29(2)(b). Employment and support allowance is in essence a benefit for those not in employment and not able to work: see regulation 40(1) of the ESA Regulations.

51. Moreover, as *Charlton* makes plain, regulation 29(2)(b) provides an additional test of "fitness for work", the risk to be assessed must arise as a consequence of work the claimant would be found capable of doing but for regulation 29(2)(b), and that risk must be assessed in the context of the work or workplaces in which the claimant *might* find him or herself and which is work that is suitable for the claimant. It thus embodies a forward looking test. This test is being applied at the date of the decision under appeal, and at that time almost by definition the claimant will not be in employment or applying for employment. By way of contrast the duties in respect of employers under the Equality Act 2010 arise in respect of actual employment the disabled person is already in, or has applied for or has said he or she will apply for. To apply such an "actual positions of employment" test in the context of regulation 29(2)(b) would run wholly contrary to the argument rejected by the Court of Appeal in *Charlton* (see its paragraph 37).

52. Second, the reasonable adjustments only apply under the Equality Act 2010 if the employer knows, or ought to know, that the job applicant or employee is a disabled person. However, the disabled person is under no obligation to tell the employer of his or her disability and generally the employer cannot ask the person if he or she is disabled (*per* section 60 of the Act). A supposition that reasonable adjustments would be made by an employer under the Equality Act 2010 when making the risk assessment under regulation 29(2)(b) of the ESA Regulations could cut across this statutory "right not to tell".

53. Third, the tests for assessing disability under the Welfare Reform Act 2007 and the Equality Act 2010 are different, and noticeably different in two particulars. First, alcohol or drug dependency does not count as an impairment under the Equality Act 2010 and so is not a disability which can call for any reasonable adjustments (in employment or elsewhere) under that statutory scheme; however the same conditions can count for the purposes of the Welfare Reform Act 2007: see *JG* [*meaning: JG v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 037 (AAC) – CSE/496/2012 reported as [2013] AACR 23*] above. Indeed, one of the most common applications of regulation 29(2)(b) concerns those with drug or alcohol dependencies (as *Charlton* examples). That shows that the test under regulation 29(2)(b) cannot equate with the duties in respect of employment under the Equality Act 2010. Second, the approach to prostheses or other aids is markedly different under the two schemes (see [31] above).

54. In addition, the test for "disability" under the Equality Act 2010 of a more than minor adverse effect lasting for 12 months in respect of a person's ability to carry out "normal day to day activities" may have some cross-over with the tests under the ESA Regulations (eg picking up a coin, turning pages in a book, and standing and sitting), but it is not the same test and will encompass different considerations (eg can the person get out of bed, or have a bath). It seems to me at the very least odd that the short wording of paragraph1(a) in Schedule 2 to the Welfare Reform Act 2007 and regulation 29(2)(b) of the ESA Regulations requires this different statutory test for disability, which arises under an entirely different enactment, to be applied and satisfied.

55. Fourth, an employer's duties under the Equality Act 2010 can have no application to the assessment of risk arising from the mere finding of "fitness to work" (*per Charlton*), and it is difficult to see how an employers' duties under section 39 of the Equality Act 2010 in respect of employment (including to make reasonable adjustments) would extend (*per Charlton*) to the journey to and from work. Ms Apps suggested that the duty might be found where the interested disabled person was unable to travel in crowds and at especially busy times, and the reasonable adjustment owed by the employer might be in changing the hours of work (so that the person can travel outside the rush hour). That may be so, however I struggle to see the basis on which the Equality Act 2010 would require an employer to provide a companion to travel with the disabled person to work (if, for example, the disabled person had scored nine points under activity 15 in Schedule 2 to the ESA Regulations: see *PD* in footnote 1 above).

56. Fifth, there is nothing in the Equality Act 2010 that vests any jurisdiction in the First-tier Tribunal to determine matters arising under that Act. As noted above, the jurisdiction to determine complaints as to alleged breaches of employers' duties under the Equality Act 2010 in respect of disabled people lies with the employment tribunal. Admittedly that jurisdiction is concerned with determining whether an employer has breached the Equality Act, whereas it may be argued that the regulation 29(2)(b) risk assessment is not concerned with deciding whether there has been such a breach and is only concerned with whether prospective employers *might* owe a duty to make reasonable adjustments. However, in the very detailed enactment that is the Equality Act 2010, where evident care has been taken to earmark those with adjudicatory responsibilities under the Act, it is noteworthy in my judgment that the Act says nothing, in respect of employers' duties, about employment and support allowance decision-makers.

57. It is also worth emphasising that the above jurisdiction exercised by the employment tribunal can properly be characterised as a specialist one. The jurisdiction exercised by the First-tier Tribunal on questions of entitlement to employment and support allowance is also specialist, but on its face it is not concerned with assessing when an employer will in fact owe a duty to make reasonable adjustments in respect of an individual disabled person.

58. This leads on to another point which I consider to be of significance and which arises under points (ii) and (iii) in [46] above. (Many of the points made in paragraphs [50]–[57] above are also relevant to the Equality Act 2010 tests sitting uneasily with *Charlton* and the First-tier Tribunal being ill-equipped to make assessments under the Equality Act 2010.) This is the point made by the Court of Appeal in *Charlton* about the test under regulation 29(2)(b) having to be applied practicably. Although I consider that, in line with some of the comments made by the three-judge panel in [73]–[74] of *SI* (above), the Secretary of State can and ought to be better equipped to obtain and provide advice as to how certain health conditions, or restrictions in functioning arising under Schedule 2 to the ESA Regulations, may in general impact on the risk to health of claimants with those conditions or restrictions from working, it be would likely to render impracticable a timeous decision on regulation – 29(2)(b) if the decision-

maker had to consider whether the claimant would be likely to be owed a duty by an employer or employers to make reasonable adjustments under the statutory machinery contained within the Equality Act 2010.

59. The final consideration which in my judgment militates against taking the Equality Act 2010 into account under regulation 29(2)(b) is simply that it is unnecessary to do so: the wording of regulation 29(2)(b), as interpreted by *Charlton*, allows for sufficient regard to be paid to actual steps that may reasonably be taken to reduce the risk to health.

60. The wording of the test under regulation 29(2)(b) of the ESA Regulations is:

> "… by reasons of [some specific disease or bodily or mental disablement which the claimant has], there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work."

In most cases, the words I have inserted in square brackets ought not to be in issue at the stage regulation 29(2)(b) is being considered as they should already have been satisfied on the assessment under regulation 19(2) and Schedule 2 to the ESA Regulations. (If not, see the penultimate paragraph below and *JG*.) There then needs to be a causative link between the disease or disablement and the risk.

61. In terms of assessing that risk, however, the test the decision-maker (here, the tribunal) has to apply – after consideration of any risk that might arise from the mere act of being found fit for work and the steps then needed to be taken to find work (*IJ v Secretary of State for Work and Pensions (IB)* [2010] UKUT 408 (AAC) – is (*per Charlton*) "whether a substantial risk should be foreseen in the light of the work the claimant might be expected to perform in the workplace in which he might be expected to be" or, put another way, (*per Charlton*) "whether there is an adequate range of work which the claimant could undertake without creating a substantial risk to himself or others". It seems to me that both forms of wording are wide enough and flexible enough to encompass reasonable steps that realistically on the evidence may be taken by, or in respect of, the claimant, including by prospective employers. But that does not require an assessment to be made of employers' duties under the Equality Act 2010.

62. However, the analysis must be specific to the individual claimant whose case is before the decision-maker or First-tier Tribunal. This has two aspects. Firstly, the analysis has to be of the range or types of work which the individual claimant is suited to do as a matter of training or aptitude and which his or her disabilities do not render him incapable of performing. Secondly, the analysis has to consider the disease(s) or disablement(s) of the individual claimant and the risk they would give rise to, on the balance of probabilities, if the claimant was travelling to and from, and working in, employments he or she was otherwise suited to do. Part of that risk assessment will involve consideration of the steps that, on the evidence and having regard to the individual claimant's health conditions and other circumstances, could reasonably and realistically be taken to avoid any substantial risk to health.

63. For example, in a *Cattrell* type case the relevant factors may be: what is the extent of the exposure needed to give rise to the anaphylactic shock?; how prevalent would such exposure be in the employments the claimant was otherwise suited to do?; if exposure occurred how likely was it that measures could be taken to avoid any substantial risk (eg by use of an epi-pen)?; how capable was the claimant of taking such preventative or reactive measures?; and, if unable to take such measures, who else could take the necessary measures in the workplace? Another example is the *PD* case referred to above ([2014] UKUT 148 (AAC)). On remission the First-tier Tribunal were directed to consider the practical availability of third party arrangements to get the claimant to and from work. The Secretary of State on the appeal before me expressly accepted that *PD* was correctly decided on this issue.

64. I should add that I do not consider that the decision in *PD*, with its focus on the specific journeys the particular claimant may in fact have to make to and from employment, cuts –against *Charlton* and its rejection of identifying actual or specific employments for a claimant. It has to be remembered that the argument before the court in *Charlton* was concerned with how much detail of the work the claimant may be employed in was necessary in order to assess properly the risk to health from his working; it was not concerned with the other factors then to be taken into account when assessing risk (less so was the Court of Appeal turning its mind to the journey to and from work). I interpret the Court of Appeal's "*decision-maker in Belfast*" remarks in [47] of *Charlton* as being directed to the issue before it (ie how detailed the jobs information has to be). Further, any wider application of those remarks would run up against the very real problem identified in *PD* of not properly assessing risk in respect of the individual claimant's circumstances. Moreover, such an approach would stand contrary to the view of Lord Justice Hughes in *Cattrell* that whether there is a substantial risk is a question of fact in each case.

65. *PD* does, however, highlight the problematic area of how mental health problems may be addressed in the workplace when assessing risk under regulation 29(2)(b). As Lord Justice Hughes's comments in *Cattrell* and Judge Gray's remarks in *AT* [*meaning: AT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 630 (AAC) – CE/3100/2013*] indicate, assessing risk, and the measures that may reasonably on the facts be available to alleviate it so as to stop it being substantial, in the *Charlton* range of work a claimant may be found suited to do *may* be reasonably straightforward in the case of physical disablements. For example, a person with lower back pain with some restriction on bending and an inability to sit or stand for over one hour, may be suited to work in an office that involves regular moving around the office and no heavy lifting. Or it may be said that even if the office work was less conducive it would not give rise to any substantial risk to health Footer 4

66. Reverting to mental health problems, however, one of the key difficulties in my experience is the lack of any, or any detailed, information that is put before the First-tier Tribunal on how particular mental conditions may impact on a person's ability to carry out a job he or she may otherwise be suited to do. In part this seems to flow from a reluctance on the part of the Secretary of State, and then some First-tier Tribunals (though not the tribunal here), to accept regulation 29(2)(b) as being an issue that arises on such appeals. However, unless and until the Secretary of State's decision addresses regulation 29(2)(b) and says why it is not met on the facts of the case and thus informs the claimant of a ground on which he may wish to appeal (see, again, *TC* in [11] above), and bearing in mind the view of Upper Tribunal Judge Ward in *RB v Secretary of State for Work and Pensions (ESA)* –

[2012] UKUT 431 (AAC) that "the more onerous the points-based regime becomes, the more cases are likely to require attention to be given to the terms of regulation 29, to which correct application by decision-makers and tribunals of *Charlton* will be vital", in my judgment the Secretary of State's decision-maker on receipt of an appeal against the decision and First-tier Tribunals hearing such appeals ought to be slow to form the view that regulation 29(2)(b) is not an issue raised by the appeal.

67. An example where regulation 29(2)(b) of the ESA Regulations might be found not to be an issue raised by the appeal is where the appellant is represented on the appeal by someone experienced in making such appeals and regulation 29(2)(b) is not taken as a ground of appeal. Examples of where it is raised as an issue on the appeal, even though it may not be expressly stated to be an issue, would in my judgment be likely to cover the terms of the appellant's appeal letter in this case (ie before the CAB's submission in which regulation 29(2)(b) was expressly taken), and the type of case in issue in *PD* (ie where the mental health problems have been decided (by the Secretary of State) as meaning that the person cannot get anywhere, or anywhere unfamiliar, on his own).

68. If regulation 29(2)(b) is an issue raised by the appeal, however, then it is an issue that must be addressed, and addressed properly on the facts of the individual case before the decision-maker. For the Secretary of State as decision-maker that duty arises under section 9(2) of the Social Security Act 1998 and rule 24(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685); for the First-tier Tribunal as decision-maker it arises under section 12(8)(a) of the Social Security Act 1998.

69. However, one of the key difficulties that First-tier Tribunals face, in my experience, is that the Secretary of State does not properly address in the appeal response, or any other document made available to the tribunal, the range of work that the claimant with his or her (mental) health problems could do without substantial risk to health. As was said by Lord Justice Hughes in *Cattrell* " [1] If the Secretary of State wishes to contend in a particular case there are clearly some jobs that the claimant can do, whether available in large numbers or in small numbers, it is of course open to him to attend either in person or in writing and to say so".

70. The degree of detail that the Secretary of State will need to provide will vary on the facts of each individual case. For example, where the Secretary of State's decision-maker has awarded six points for a claimant being unable to get anywhere unfamiliar on her own (descriptor 15(c) in Schedule 2 to the ESA Regulations) and/or six points for being unable for the majority of time to engage socially with unfamiliar people (descriptor 16(c)), the information provided by the Secretary of State would need to address the evidential basis for how these difficulties could be addressed in terms (*per PD*) of the journey to and from, and in, the workplace, and the likelihood of these steps being taken, whether by the claimant, family or friends of the claimant, or prospective employers.

71. Even where specific descriptors do not apply at the time of his decision, the Secretary of State could still assist the First-tier Tribunal by providing it with information on reasonable steps that could be taken by or in respect of most claimants to reduce the risk to them from working that addressed the less than 15 point scoring descriptors under Schedule 2. For example, and following *PD*, what steps could realistically and reasonably be taken in terms of working in respect of someone who cannot get anywhere without being accompanied?

72. I do not see why this cannot be done. Regulation 29(2)(b) is part of the Secretary of State's scheme and carries with it the need to make a claimant specific risk assessment. In a *Kerr v Department for Social Development* [2004] UKHL 23; R1/04(SF) world of co-operative decision-making, and where the Secretary of State can call on specialist disability employment advisers (see discussion in *SI v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 308 (AAC); [2015] AACR 5 [*Note: The actual case name for SI v SSWP is now PR v SSWP*], I do not see why he ought not to be in a position to advise the First-tier Tribunal on an appeal of the steps that could reasonably and realistically be taken on the facts of an individual claimant's case, in terms especially of the journey to and from work and their time in the workplace, so as to avoid substantial risk to their or another's health. If such advice is needed by the First-tier Tribunal to decide the appeal that is before it fairly and justly but it has not been provided by the Secretary of State, then he may need to be required to provide it in writing or by attending in person. [*My insert*]

73. I turn finally to the relevant Upper Tribunal case law. I do not consider that there is anything said in AT [*meaning: AT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0630 (AAC)* – CE/3100/2013] or SI that stands against my view of what falls to be taken into account under regulation 29(2)(b) of the ESA Regulations. Nothing Judge Gray says in [9] of *AT* is founded on her accepting as correct that employers' duties to the appellant under the Equality Act 2010 fell to be taken into account under regulation 29(2)(b). Further, the comments of the three-judge panel in *SI* were not concerned with regulation 29 or 35 of the ESA Regulations but rather with those found not to qualify for ESA (ie those then having to claim jobseeker's allowance).

74. However, I accept that in so far as it was necessary to his decision (which I do not think it was), [15] of Judge Mark's decision in *JB* is contrary to the view I have come to. However, I decline to follow it as I consider it was wrongly decided. It seems to me that I am entitled to take this course because: (i) the issue was not as fully argued before Judge Mark as it has been before me, (ii) what he said in [15] was not part of the *ratio* of his decision, and (iii) I consider the view he took is wrong.

75. The tribunal therefore erred in law (i) in its approach to the GP's [*General Practitioner*] evidence on significant deterioration in the appellant's health if she was found not to have limited capability for work, and (ii) in its taking account of the Equality Act 2010 when –assessing risk under regulation 29(2)(b) of the ESA Regulations, and its decision must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber). [*My insert*]

76. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether his appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence."

Footer 1: Hence the need to assess whether another person can travel with a person to and from work and perhaps remain with that person at work: *PD v Secretary of State for Work and Pensions* (ESA) [2014] UKUT 148 (AAC) [*CE/3848/2012*].

Footer 2: As found by the Court of Appeal in *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623; *R(IB)3/03*, to have been unlawfully omitted from regulation 27.

Footer 3: The appellant wished to argue that she also satisfied regulation 35(2) of the ESA Regulations. Little if no time was devoted to regulation 35 at the hearing before me and the evidence on its application seemed somewhat lacking. For example, what work-related activity may the appellant have been expected to undertake if she had met either Schedule 2 or regulation 29(2)(b)? The scope of regulation 35(2) is to be addressed in the imminent decision of a three-judge panel of the Upper Tribunal in *CE/3453/2013* [Editor's note: *IM v Secretary of State for Work and Pensions* (ESA) – [2014] UKUT 412 (AAC) – reported as [2015] AACR 10, decided 15 September 2014] and consideration of regulation 35(2) by the new First-tier Tribunal on this appeal may need to await that decision being issued. On the other hand, the Secretary of State wished to argue that the GP's letter of 18 March 2013 did not provide a sufficiently reasoned basis for regulation 29(2)(b) being satisfied as at 19 April 2012.

Footer 4: Even here, however, I would counsel against easy recourse to generalisations. Claimants do not often present with one neat health problem. Moreover, as *Cattrell* shows, even a seemingly remote risk might give rise to a substantial risk to health. The test here is in my view as Mr Commissioner Rowland (as he then was) put it in paragraph 7 of CIB/3519/2002. The word "substantial" does not just refer to the likelihood of the risk occurring. The "risk may be 'substantial' if the harm would be serious, even though it was unlikely to occur and, conversely, may not be 'substantial' if the harm would be insignificant, even though the likelihood of some such harm is great".

2. Judge of the Upper Tribunal Wright 18.9.2014

violence against inanimate objects…

JC v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 352 (AAC) – CE/1972/2013 and CE/3183/2013 held that in relation to Regulation 29, it was submitted by the claimant (in CE/3183/2013) that the First-tier Tribunal failed to properly take into account the evidence of his behaviour and that, if it had done so, it would or should have found that engaging in employment before his anger management issues had been resolved would have given rise to a substantial risk of injury to others, or indeed, to himself.

The Upper Tribunal (paragraph 59) held that the First-tier Tribunal was entitled to make the finding it did in the respect of the claimant's record of violence and on that basis hold that his claim under regulation 29 did not succeed. This was because the risk had to be sufficiently substantial to justify the claimant not being required to seek employment and the finding was that incidents of aggressive behaviour were occasional. Further, the evidence was that, insofar as he became violent, the violence was mainly directed against inanimate objects. The Upper Tribunal held that regulation 29(2)(b) was not met, particularly as the underlying statutory purposes envisage that employers would take steps to avoid the claimant becoming involved in the sort of confrontation that might trigger any such risk.

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

regulation 29 – findings of fact and supporting evidence

PH v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 502 (AAC) – CSE/603/2014 concerned a claimant who suffered with hypotension, depression and a frozen left shoulder. It had been held that he did not have limited capability for work. On appeal against this decision the First-tier Tribunal upheld that decision and held that regulation 29 of the Social Security (Employment and Support) Allowance Regulations did not apply to to him.

On the matter of Regulation 29 the Upper Tribunal Judge held:

"4. In considering regulation 29, the tribunal recited the terms of the regulation and, having found that there would be no substantial risk to the mental or physical health of any person if the claimant were not found to have limited capability for work, went on to say that "the risk would be significantly reduced by reasonable adjustments made in the workplace or by taking prescribed medication". However, the claimant is a welding engineer by profession, work which involves strenuous effort using both arms in the proximity of flames and very high temperatures. Even assuming that prior to his redundancy the claimant was employed in mainly supervisory roles, the tribunal's decision wholly fails to explain how a man who (according to the orthopaedic surgeon) cannot drive and who is unable to perform any bimanual tasks and who was found by the tribunal to have postural hypotension could safely be employed on an engineering site.

5. This was a case, which more than most, required the tribunal to apply the approach in Charlton of identifying the range or type of work which the claimant was capable of performing sufficiently to identify the risk to health to the claimant or to others of a finding that the claimant did not have limited capability for work. The difficult issues which may arise under regulation 29 will often require detailed findings of fact to be made by the tribunal, rather than mantra-like recitations of the terms of the legislation and unparticularised references to adjustments in the workplace. I therefore agree with the Secretary of State's representative that the tribunal did not deal properly with regulation 29 and that their decision is in error of law for that reason also."

2. Judge of the Upper Tribunal E A L Bano 22.10.2014

mental health – must assess risk not benefit from work (merely stating a 'variety of jobs' not sufficient)

CS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0550 (AAC) – CE/2291/2014 involved a case where the First-tier Tribunal held that regulation 29 did not apply. In its reasoning it held:

> "48. The Tribunal has considered the case of *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42. It has made the decision that the appellant suffers from a mental condition which does not, of itself, cause such functional limitation as to justify a total score warranting a finding of limited capability for work. It has further decided that because of the disablement there would not be a substantial risk to the mental or physical health of any person if the appellant were found capable of work having regard to the nature of the relevant work and workplace for the appellant. The appellant has not worked for many years. He was a welder. His GP has encouraged him to get out more and to integrate with people. It is medically proven that many people suffering from depression will benefit from being in the work place, which increases their contact with people and decreases their isolation. The Tribunal finds that the appellant may well be such a person. It finds that there are a variety of jobs, perhaps with some retraining, which he would be capable of undertaking."

The Upper Tribunal Judge held:

"10. The F-tT has provided a careful and well structured statement of reasons but there are difficulties with the above passage.

11. In this context, the F-tT did find that the appellant had mental health difficulties of a sufficient degree to enable him to score 6 points under descriptor 16(c) which is concerned with the ability to cope with social engagement. It is right to say that that finding did not enable the appellant to score 15 points, and thus qualify under the points scoring route so as to establish limited capability for work. The F-tT effectively says this at paragraph 48 of its statement of reasons which is quoted above. However, that was not the end of the matter or, at least, should not have been. The mere fact that a claimant does not score 15 points either on the basis of one descriptor or an accumulation of descriptors does not mean, of itself, that he does not meet the requirements of regulation 29(2)(b). Indeed, the recognition of mental health difficulties, and certainly though by ne (*sic*) means exclusively those sufficient to enable a claimant to score some points under the descriptors, is a relevant consideration when assessing whether the risk -envisaged under regulation 29(2)(b) is or is not established. Accordingly, it was incumbent upon the F-tT to give weight to its conclusion regarding mental health difficulties and its conclusion regarding the scoring of 6 points when conducting its overall assessment as to whether regulation 29 was or was not met. The F-tT has not done that here. That does, in my judgment, of itself, amount to an error of law.

12. Further, the F-tT appeared to give quite substantial weight to its view that many people suffering from depression benefit from being in a workplace and that this appellant may well be such a person.

13. The first point to make about that is that the F-tT did not explain its apparent conclusion that this appellant might well be a person who would benefit from being in the workplace. It seems to me that something like that cannot just be assumed and that, whilst some might benefit from being in a workplace, others may not and others may suffer, in terms of their mental health, as a result of it. So the F-tT failed to give sufficient reasons for that conclusion. More fundamentally, the F-tT appeared to lose sight of the fact that its task was to assess risk, within the context of regulation 29(2)(b) rather than benefit. In *CH v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 0011 (AAC) the Upper Tribunal, when talking about regulation 29(2)(b) said this:

> "10. As to the nature of the provision, it is concerned with risk, not benefit. The tribunal should have investigated and considered what risk, if any, would be involved in finding the claimant to be fit for work. Any benefit, assuming that it could properly be proved, might be relevant as evidence on risk or the lack of it, but that is all. The issue is risk. If a substantial risk is established, the provision applies. And it applies even if it is accompanied by some chance of improvement in the claimant's condition. It is not permissible to ignore that risk or to decide that it is a price worth paying for that eventual benefit."

14. The way the tribunal has expressed itself makes it seem as if it has either lost sight of the fact that it is assessing risk and only risk or that it has decided any such risk is a price worth paying for the benefit it has sought to identify.

15. The Upper Tribunal in *CH* went on to say:

> "13. The fact that regulation 29(2)(b) has to be applied as at the time of the Secretary of State's decision imposes a practical limit on the scope of the factors that a tribunal may properly take into account. I am not going to try to define precisely what that scope is. It will depend on the evidence available and the circumstances of the case. But whatever the scope, the ultimate or longer-term benefit that a claimant might derive from work is beyond it. Leaving aside the evidential difficulties of proving what benefits might accrue in the longer term, the tribunal should not take account of such remote matters. It should concern itself with the more immediate effects of finding that the claimant was capable of work."

16. Here, in the context of its regulation 29 assessment, the F-tT appeared to look forward to a future possibility of the applicant deriving a benefit from being in a workplace. In that sense it appeared to focus on a benefit which may accrue in the longer term whilst losing sight of the fact that it was required to assess matters, essentially the degree of risk, as at the date of decision. The F-tT did, therefore, again, err in law. I have seen many recent decisions where a tribunal has referred to the benefit of working and has seemingly attached much weight to it when assessing risk under regulation 29(2)(b) so it is important that tribunals do keep in mind, in this context, what is said in *CH*."

17. The F-tT did embark upon the exercise of considering what type or range of work the appellant might reasonably be expected to undertake. It was right to do that. However, it did not say very much about it. It did note that he [*the claimant*] had worked as a welder, seemingly many years ago and it concluded there would be a variety of jobs which he would be capable of undertaking though he might need some retraining. It did not, however, elaborate on the "variety of jobs" it thought he might be capable of undertaking. It is not apparent whether, for example, it had in mind welding jobs, clerical jobs or other types of employment. It did not (and this is related to the first error of law referred to above) factor in the mental health difficulties as a potentially limiting factor to that range of work. That part of a regulation 29 consideration can often be undertaken quite briefly but, here, the F-tT was too brief with the effect that it failed to adequately explain, with any degree of particularity at all, what the type or range of work it felt he would be capable of undertaking was. [*My insert*]

18. It does follow, therefore, despite the F-tT clearly approaching its task with diligence that it erred in a number of ways when considering regulation 29. This does mean that its decision has to be set aside."

2. Judge of the Upper Tribunal M R Hemingway 9.12.2014

regulation 29 – more likely to be relevant in cases involving mental health descriptors (reasons formulaic)

EJ v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0551 (AAC) – CE/2174/2014 involved a case where the First-tier Tribunal held that Regulation 29 did not apply. In its reasoning it held:

> "There was no evidence that the appellant was suffering from any specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the appellant were found not to have limited capability for work."

The Upper Tribunal Judge held:

"17. I have also concluded that the F-tT [*First-tier Tribunal*] erred in its consideration of regulation 29. What it had to say about that regulation was very brief and somewhat formulaic [*meaning: constituting or containing a set form of words*]. In this case the appellant had claimed to have both mental and physical health difficulties. The F-tT had accepted that she did score points in relation to descriptor 15(c) which meant it was satisfied she was unable to get to a specified place with which she was unfamiliar without being accompanied by another. Thus, it had acknowledged there were mental health problems such as to justify some point scoring under schedule 2 to the 2008 regulations. There is a very helpful consideration as to when it is necessary to address regulation 29 in a statement of reasons and to what extent it is necessary in *MS v Secretary of State for Work & Pensions* [2014] UKUT 0115 (AAC). It is said, therein, amongst other things, that regulation 29(2) (b) is more likely to be relevant in cases where the descriptors relating to mental, cognitive and intellectual functions are in issue. They were, of course, in issue here. Further, there is no consideration by the F-tT as to the range or type of work the appellant might reasonably be expected to do and, therefore, no consideration as to whether there would be the necessary degree of substantial risk stemming from undertaking such work. Thus, the approach set out in *Charlton v Secretary of State for Work & Pensions* [2009] EWCA Civ 42 has not been followed." [*My inserts*]

2. Judge of the Upper Tribunal M R Hemingway 10.12.2014

regulation 29 – ability to undertake journey to and from work

EJ v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0551 (AAC) – CE/2174/2014 held:

"19. The further specific point, made in the respondent's written submission and which was referred to, albeit briefly, in the grounds of appeal relates to the question of the journey to and from the workplace. It is certainly right to say that a consideration of the substantial risk in regulation 29(2)(b) would encompass not only risk in the workplace but wider matters including risk on the journey to and from work. Ms Walker's [*representative for the Secretary of State*] specific point, in this context, is that descriptor 15(c) was accepted as being met such that it was accepted the appellant was unable to get to a specified place with which she was unfamiliar without being accompanied. Ms Walker says that has relevance because of what is said in *PD v Secretary of State for Work & Pensions (ESA)* [2014] UKUT 0148 (AAC). [*My insert*]

20. In *PD* the Upper Tribunal was concerned with an appellant who, it was accepted, was unable to get to a specified place with which he was familiar without being accompanied by another person. Thus, he had greater difficulties, at least in that particular context, than did the appellant in this appeal. The Upper Tribunal concluded that, given the difficulties of the claimant before it, it was necessary to consider whether a third party might be able to assist in the journey to and from work in order to obviate any risk in undertaking such a journey. Evidence as to the availability or otherwise of a third party should, it was said, be considered by a tribunal. Other possible means of getting to and from work, such as using a motor car should also be investigated. As was pointed out in *PD* it is not unusual to come across people whose ability to get out of their domestic setting is much greater in a car than it is when relying on public transport.

21. There is, though, it seems to me, a significant difference between a claimant who is unable to get to a familiar place and one, as here, who is unable to get to an unfamiliar one but who can get to a familiar one. That said, it is reasonable to suppose that many new employees will be embarking on a journey which is, initially, unfamiliar to them when they start a new job. However, a practical difference is that an unfamiliar journey can very quickly become a familiar one so that, for example, if a third party were needed to accompany a new employee that might only be for a short, perhaps very short, initial period until the journey, by repetition, became familiar.

So, whilst a person in the position of this appellant might need some initial assistance from a third party that might, depending on the circumstances, be for a matter of just a few days or so and, in those circumstances, it would seem to be much more likely that someone would be on hand to afford that limited amount of assistance for a limited period of time. I do not say that the difficulties of a person who only meets descriptor 15(c), rather than a higher scoring one within the same activity, in getting to the workplace are to be discounted, I simply say it is far more likely that there will be a practical way of surmounting such difficulties so that the likelihood of regulation 29(2) (b) coming into play in such a situation is very much reduced though not extinguished. A prudent tribunal would be alert to the point but may not, depending upon the facts as found, have to say very much, if anything, to satisfactorily deal with the matter. In this case I would accept the F-tT erred in failing to address the matter at all but, in view of my setting aside the decision for the other reasons set out above, I do not have to consider whether that error was material."

2. Judge of the Upper Tribunal M R Hemingway 10.12.2014

risk due to anxiety if not accompanied to workplace…

SS v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0101 (AAC) – CE/4904/2013 held:

"5. As to my observation about *PD* [referring to: *PD v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 148 (AAC) – CE/3848/2012*], Ms Sue Suttenstall on behalf of the Secretary of State submits that, although the evidence before the First-tier Tribunal showed that there clearly were people who accompanied the claimant to appointments and on the occasions when she attended college, "the First-tier Tribunal not only failed to address the issue of the practicalities of the claimant being able to be accompanied to the workplace but also whether this help could be maintained". I agree, but would add that, if there was a risk of the help not being available or not being maintained, it would be necessary to consider whether that might give rise to a substantial risk to the claimant's health through, for instance, increased anxiety. What was said in *IM v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 412 (AAC) at [110] in the context of the risk of being found not to have limited capability for work-related activity applies equally to the risk of being found not to have limited capability for work: "Being unable to carry out an activity does not necessarily imply that there will be a substantial risk to anyone's health if the claimant is required to engage in the activity. Nor does the risk of being sanctioned." [*My insert*]

2. Judge of the Upper Tribunal Mark Rowland 2.3.2015

tribunal – requirement to state range and type of work?

[2014] AACR 34 (unreported JK v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 140 (AAC) – CSE/936/2013 involved a case where the claimant had been awarded no points under the limited capability for work assessment and it was decided that regulation 29 of the Employment and Support Allowance Regulations 2008 did not apply. The claimant appealed against this decision but his appeal was dismissed by the First-tier Tribunal. The claimant appealed to the Upper Tribunal on grounds that the First-tier Tribunal had not specified what type of work he could reasonably be expected to do without a substantial risk to his health (or the health of others) contrary to the decision of the Court of Appeal in Charlton v Secretary of State for Work and Pensions (reported as R(IB)2/09). The issue before the Upper Tribunal was whether the decision of First-tier Tribunal was erroneous in law because it failed to make specific findings on the range and type of work the claimant could do.

The Upper Tribunal Judge held:

"9. In this case the tribunal does not make any specific findings as to the range or type of work the claimant could do. There is nothing in the tribunal's statement or the grounds of appeal to demonstrate that the claimant's representative addressed the matter of the workplaces the claimant may find himself in or any exclusions from type or range of work that the claimant could do that he regarded as necessary for the tribunal's consideration. The tribunal did have evidence, which it recorded, as to the claimant's last employment. There was little else other than some limited restrictions set out in the evidence of the General Practitioner. When paragraphs 5, 6 and 7 of the tribunal's statement are read, it is apparent that the effects of the disablements accepted by the tribunal were limited. The tribunal does not record any submission or evidence placed before it of any substantial risk to his health or others if he were to be found capable of work. The grounds of appeal do not do so either. The Health Care Professional's opinion does not accept risk to health in the context of a record of the claimant's last employment. The General Practitioner offers no opinion on the risk of being found capable of work. It is difficult in these circumstances to see how the claimant could on any view have satisfied regulation 29. On the tribunal's findings it is obvious that a wide range of work would be open to him and there is no evidence of risk advanced in respect of any particular range of employment. In *Charlton* the Commissioner made the findings in fact referred to in paragraph 45 of the Court of Appeal's decision and found that this factual assessment could not be challenged on appeal. The range of work was very widely and unspecifically stated. The tribunal was hampered in this case because in respect of work it had little other than a finding as to his previous work to go on, which is not surprising given the vague way in which the claimant's representative presented his submission that regulation 29 "may" apply. In paragraph 4 of its statement the tribunal, to use the Court of Appeal's words in respect of the Commissioner's decision in *Charlton*, reached as a matter of fact, "The essential conclusion that he could do some work without risk to himself or others". That is not a conclusion with which I can interfere on appeal. In my view the grounds of appeal and support for them seek to advance the proposition that *Charlton* laid down a prescriptive formula and that, without specific findings as to the range and type of work the claimant could do, the tribunal erred in law. However in my view the Court of Appeal did not lay down as a matter of legal principle the findings in fact that required to be made. In that case in paragraph 49 it accepted that the very limited findings that were made satisfied the statutory obligation imposed by the regulation. Using the same process, for the reasons I have explained, I reach the same conclusion that the tribunal did so here. On that basis what it said was sufficient."

2. Judge of the Upper Tribunal May QC 11.2.2014

regulation 29 – home working (the 'workplace')…

SM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0241 (AAC) – CE/4739/2013 held:

"5. Mr Mick Hampton, who now acts for the Secretary of State in these proceedings before the Upper Tribunal, supports the appeal from the decision of the FTT on the regulation 29 point. In summary, he argues as follows.

6. First, the tribunal made no real findings as to the claimant's previous employment or any type of employment he could do. Second, the tribunal did not adequately address the evidence before it as to the risks posed by increased stress. Third, the tribunal's analysis elided issues under regulations 29 and 35. Fourth, Mr Hampton argues that *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42 (reported as *R(IB)2/09*), in his words, "does not envisage home-working per se to be something to consider when looking at the range of jobs a tribunal might be looking at". He accordingly suggests that the appeal is allowed, the tribunal's decision set aside and the matter is remitted (or sent back) for re-hearing to a new tribunal.

7. I agree with Mr Hampton and Ms Davies-Khan [*representative on behalf of the claimant*] that the tribunal erred in its treatment of regulation 29 and its application to the facts of this case. As Mr Hampton notes, there are jobs which allow for some home-working. This practice is more common in today's post-Fordist economy than it used to be but it is still not the norm. Typically it is a matter which is entirely subject to the discretion (or whim) of the employer. The fact that the Court of Appeal in Charlton held that the statutory test has to be applied "in the context of the journey to or from work or in the workplace itself" (at paragraph [34] per Moses LJ, emphasis added) is in itself instructive. [*My insert*]

8. To say that a claimant cannot take advantage of regulation 29(2)(b) because they could always be able to do a job working from home would simply be to deprive the statutory provision of any real purpose for large numbers of claimants. Such an interpretation would defeat the statutory purpose of providing a degree of protection for exceptionally vulnerable individuals, especially for those suffering from mental health problems. The tribunal therefore went wrong in law by relying on the possible prospect of a job with home-working.

9. My interpretation of regulation 29 is confirmed by a statutory amendment to regulation 29 which by coincidence took effect on the very day that the Secretary of State's decision was taken in the present case. As from 28 January 2013, regulation 29(2)(b) does not apply where the risk "could be reduced by a significant amount by … reasonable adjustments being made in the claimant's workplace" (regulation 29(3)(a)), as inserted by the Employment and Support Allowance (Amendment) Regulations 2012 (SI 2012/3096), regulation 3(6)). The ESA legislation does not define what is meant by the "claimant's workplace", but it seems to me the language used is consistent with the Court of Appeal's understanding in Charlton, which envisages the claimant travelling from home to a workplace.

10. This usage is also consistent with the meaning associated with "workplace" in other statutory contexts. Two examples will suffice. First, in revenue law, a workplace "in relation to an employment, means a place at which the employee's attendance is necessary in the performance of the duties of the employment" (Income Tax (Earnings and Pensions) Act 2003, section 339(1)). Second, under health and safety legislation, a "workplace" means any premises or part of premises which are not domestic premises and are made available to a person as a place of work (Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004), regulation 2(1)).

11. Last but not least, the construction advanced above is implicit in the reasoning of Judge Ward in *PD v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 0148 (AAC). Judge Ward identified the central issue in that appeal as being the impact of regulation 29 "on persons who by reason of mental ill-health have an impaired ability to get to places, such as a hypothetical workplace" (at paragraph 1). If claimants could not avail themselves of regulation 29 simply because they could get a home-working job, then the whole premise of Judge Ward's analysis was flawed. I do not accept that it was.

12. I therefore conclude that the tribunal's decision involves an error of law because of its failure to consider regulation 29 properly. Because of that error of law, I do not need to resolve the other grounds of appeal further."

See also CL v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0375 (AAC) – CE/0534/2015.

2. Judge of the Upper Tribunal Nicholas Wikely 22.5.2014

home working (and relying on being accompanied by friend…)?

CL v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0375 (AAC) – CE/0534/2015 examined the relevance of home working to the application of regulation 29(2)(b) and regulation 35(2).

The Upper Tribunal Judge held that he considered home working was potentially relevant to both regulation 29(2)(b) and regulation 35(2) but in practice he thought it is unlikely to be relevant to regulation 29(2)(b), but may be relevant to regulation 35(2), depending on the type of work-related activity appropriate to the claimant.

In the present case the First-tier Tribunal had found:

"45. We accept that in relation to Regulation 29 we should not be looking at someone's ability to work from home. Clearly job searches, signing on, and most types of work require a person to leave the house.

46. In our view this is different to Regulation 35 where activities can be carried out from home particularly as any activity [the claimant] is required to undertake must take into account her health problems and the functional difficulties this causes her. In our view she could undertake work related activity at home. There is no reason why the job centre cannot write to her at home or call her on the phone to inform her of what work related activity they would like her to undertake at home (such as online training, or discussing what equipment/help she would need to enable her to work or what treatment would help her).

47. Even if we are wrong about undertaking work related activities from home although we find she could not travel outside home unaccompanied she does have a friend who accompanies here to the town centre shops and supermarket (page 53). In our view there is no reason why this friend could not accompany her to her work related activity. We accept that her friend may well not be in a position to accompany her on a daily basis to work related activity but her friend's availability can be taken into account when determining the frequency of any work related activity. Further as [the claimant] becomes used to going to a particular place there is no reason why she could not go alone as she did to see Dr Osman (page 100) and as she does to the chemists and doctors (page 53) although any work related activity may need to be at the same venue.

48. As such, we accept that there are certain work-related activities that she would not be able to take part in (such as work experience and mandatory work placements) and there may be a significant risk to her health if she is expected to go outside her home on her own to unfamiliar places but there are other activities that she could take part in."

The claimant's representative applied for permission to appeal to the Upper Tribunal, arguing that the tribunal had gone wrong in respect of home working and regulation 35, and by relying on the presence of her friend to accompany her.

On the approach to Regulation 29 the Upper Tribunal Judge held:

"11. I respectfully agree with Judge Wikeley's decision on the facts of SM [*referring to SM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0241 (AAC) – CE/4739/2013*]. I would not, though, go so far as to decide that there is an absolute prohibition on considering home working under regulation 29. I am not sure that Judge Wikeley intended to quite so far. If he did, I would qualify it only slightly. [*My insert*]

12. As far as I recall, the issue of travel to work had never arisen as a separate issue in dispute before *Charlton*. I would not attribute to paragraph 34 [*see note below*] in that case an absolute prohibition on taking home working into account. It is possible that the only type of work for which the claimant is suitable might be in an industry where home working is possible, even encouraged. That may be rare, but I do not read what the Court said as excluding that possibility. As I have said, home working was not an issue before the Court. What it said in paragraph 34 [*see note below*] followed from the way that its decision on the issue in dispute would apply in the overwhelming majority of cases. But the Court was not called upon to be prescriptive that home working could not be considered if appropriate.

13. As to regulation 29(3)(a), this does not in terms deal with the work that a decision-maker or tribunal may take into account. It merely makes provision for reasonable adjustments when work is done in a workplace.

14. Turning to the facts of this case, I accept the Secretary of State's submission that the tribunal was right to disregard home working."

Note: Charlton – paragraph 34 held: Regulation 27(b) [*now regulation 29(2)(b)*] may be satisfied where the very finding of capability might create a substantial risk to a claimant's health or to that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused. Apart from that, probably rare, situation, the determination must be made in the context of the journey to or from work or in the workplace itself. [*My insert*]

On the approach to Regulation 35 the Upper Tribunal Judge held:

"16. I accept the Secretary of State's submission that the tribunal was in error of law by failing to apply *IM* [*referring to [2015] AACR 10 unreported IM v Secretary of State for Work and pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013*]. That decision had only just become available when the tribunal heard the claimant's appeal, so it is probable that the presiding judge was unaware of it."

The Secretary of State's representative argued that the tribunal had gone wrong in law by failing to approach the case in accordance with [*referring to* [2015] AACR 10 (unreported IM v Secretary of State for Work and pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013) by not establishing the type of work-related activity the claimant could be expected to undertake.

In final analysis the Upper Tribunal Judge held:

"17. Although the tribunal's analysis was flawed by being unaware of IM [*referring to [2015] AACR 10 unreported IM v Secretary of State for Work and pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013*], its general approach that home working could be relevant to the application of regulation 35 was correct. That provision has to be applied to the work-related activity that is appropriate for the claimant. The claimant's ability to travel to unfamiliar places is a factor that may affect the activity that is identified as appropriate. And, in so far as that activity does not involve travel, any difficulties that might otherwise arise in the course of travel to and from her home do not arise. I accept the Secretary of State's submission to that effect."

See also SM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0241 (AAC) – CE/4739/2013. EH v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0473 (AAC) – CE/2522/2013 on the issue of third party assistance.

2. Judge of the Upper Tribunal Edward Jacobs 2.7.2015

regulation 29 – risks to mental health…

MF v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0523 (AAC) – CE/171/2014 held:

"6. The appeal is supported on the ground that the tribunal failed to give any proper explanation as to why it considered that regulation 29 did not assist the claimant. It was submitted to the tribunal that if the claimant was not found to have limited capability for work, he would be left with no alternative but to sign on as a jobseeker to maintain himself, and would be directed to undertake mandatory jobseeking activities, including activities such as unpaid work in stressful environments. Given the fluctuating nature of his condition, it was submitted that the claimant would not be able to comply with these, possibly inappropriate, demands reliably and would become a target for sanctions, leaving him destitute. He would also be obliged to accept any work that could be found for him, again leaving him at risk."

2. Judge of the Upper Tribunal Michael Mark 1.10.2014

regulation 29 – journey to and from work…

CC v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0062 (AAC) – CE/2772/2014 held:

"22. Mr Hampton [*representative for the Secretary of State*] reiterates his doubt as to whether the Appellant should properly have scored any points under activity 8 [*navigation and maintaining safety*]. However, assuming that at least descriptor 8(c) applied, Mr Hampton accepts that the FTT [*First-tier Tribunal*] needed to provide a convincing answer as to why it then felt there would be no substantial risk to the Appellant's health on the journey to and from work. The FTT's finding in the context of regulation 29 that the Appellant could "get about safely and see right in front of him at a short distance" was not obviously, without further explanation, consistent with its decision to award 9 points for descriptor 8(c). I agree this amounts to an error of law." [*My inserts*]

2. Judge of the Upper Tribunal Nicholas Wikeley 5.2.2015

wrong to simply rely on reasonable adjustments in workplace/risk assessment…

SB v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0088 (AAC) – CE/3001/2014 held:

"3. Following an oral hearing in Leeds on 27 November 2014 I gave permission to appeal, identifying non-exhaustively five possible grounds. The first was:

> "1. Did the tribunal err in relation to reg 29(2)(b) by taking into account the actions of "an employer complying with his statutory duties"? See, in relation to the form of the regulation prior to its amendment, subject to transitional provisions, from 28 January 2013, JS v Secretary of State for Work and Pensions (ESA) [2014] UKUT 0428. The words quoted would seem to be an intended reference to the Equality Act 2010, which is not necessarily any more relevant under the post 2013 amendment than it was before."

4. The amendment effected to regulation 29 is to the effect that "paragraph (2)(b) [of reg 29] does not apply where the risk could be reduced by a significant amount by – (a) reasonable adjustments being made in the claimant's workplace."

5. The Secretary of State submitted, in support of the appeal, that:

> "In *JS v SSWP* (ESA) [2014] UKUT 0428(AAC) Judge Wright held that:
>
> - it is not sufficient for the First-tier Tribunal (FtT) to assume that because the Equality Act 2010 will require an employer not to discriminate against and make reasonable adjustments in the work place to accommodate a disabled person, there will be no risk arising from the person being found fit for work;
>
> - the assessment of risk under regulation 29(2)(b) of the ESA Regs 2008 however does not require or involve the SSWP or FtT in making an assessment as to whether employers would owe a duty under the Equality Act to make reasonable adjustments in respect of the individual claimant (specifically disagreeing with Judge Mark in *JB v SSWP* (ESA) [2013] UKUT 0518 AAC).
>
> 3. In practical terms, this means that in assessing reg 29 risk, SSWP [*Secretary of State for Work and Pensions*] must make a claimant specific risk assessment – including what steps could reasonably and realistically be taken on the facts of the specific case to avoid substantial risk – but that this does not require evidence of what a potential employer would or might so by way of reasonable adjustments in compliance with his Equality Act duties." [*My insert*]

6. I consider that this concession is properly made. I do not need to deal with any other error on a point of law that the tribunal may have made."

Note: JS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0428(AAC) – CE/3688/2013 has been reported as [2015] AACR 15.

2. Judge of the Upper Tribunal C G Ward 23.2.2015

requirement to identify range of work and consider effects of medication

KG v Secretary of State for Work and Pensions (ESA) – CE/1208/2014 held:

"11. The Tribunal's approach to Regulation 29 was in error of law.

12. The correct approach to Regulation 29 was set out by the Court of Appeal in Charlton v SSWP [2009] EWCA Civ 42:

> "it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision maker, and, if there is an appeal, the Tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision maker to particularise the nature of work a claimant might undertake is likely to depend on the claimant's background, experience and the type of disease or disablement in question."

13. In this case, it is necessary to particularise the nature of work which the Appellant might undertake to a significant extent. The type of work which the Appellant could do is far from self-evident because of the complex interaction between his conditions, and the effect of medication. The tribunal accepted that he had significant difficulties in mobilising, that he was in pain, he could not stand for an hour or sit for an hour (although could combine the two), and that he suffered drowsiness from medication. Those factors would clearly curtail the types of work for which the Appellant was suitable. Further, the risk of bleeding from haemophilia may exclude certain types of work, and the risk of infecting others from hepatitis may exclude other types of work. This required detailed consideration by the tribunal before moving on to consider the substantial risk test. The tribunal did not consider what type of work the Appellant might be suitable for at all."

2. Judge of the Upper Tribunal Brunner 31.7.2014

requirement to consider journey to work – claimant could drive

KG v Secretary of State for Work and Pensions (ESA) – CE/1208/2014 held:

"15. The tribunal did not address substantial risk in terms of the journey to and from work, as well as in the workplace. Although the tribunal had noted that the claimant could, and sometimes did, drive, this is not the same as considering what risks might attach to a repeated journey to a workplace for someone with the Appellant's conditions."

2. Judge of the Upper Tribunal Brunner 31.7.2014

JobCentre working with mental health professionals to ensure no risk to health (decision stayed)?

TF v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0248 (AAC) – CE/2801/2013 involved a case where a claimant in receipt of Contributory Employment and Support Allowance was, on appeal, held to have limited capability for work but no limited capability for work-related activity. In order to continue to receive Contributory Employment and Support Allowance beyond broadly 12 months she needed to establish that she had limited capability for work-related activity and then entitlement to the support component.

The First-tier Tribunal found that as the claimant was not in the support group she would be required to attend work-focussed interviews and also be expected to undertake certain work-related activity. However, in the opinion of the First-tier Tribunal the staff at the Job Centre were fully qualified professionals and they would work with the specialist services that were already involved in her care in order to carefully rehabilitate her to the position whereby she could re-enter the employment market. With this careful support there would not be a substantial risk to her or anybody else's health if she were found not to have limited capability for work-related activity.

The Upper Tribunal Judge held:

"6. I gave permission to appeal, as it seemed to me arguable that there was no evidence on which the tribunal could make the finding quoted above. Of course, the teamwork between the Jobcentre staff and the medical professionals involved in her care, which the tribunal clearly regarded as essential, was what the appellant wanted, too. But the question is whether the tribunal was entitled to assume that it would happen.

7. While this case has been running, the DWP published a paper *"The disability and health employment strategy: the discussion so far"* (DWP, December 2013 Cm 8763). That sets out, more fully than I have ever seen in tribunal papers, the various forms of help that may be available to people with a disability or a health condition who have to engage with the Jobcentre.

8. Prompted by that, I asked a number of questions of the Secretary of State's representative, Mr Walker, for whose constructive response I am grateful. Dealing first with the bustling Jobcentre problem, he wrote that:

"For those with problems as in the present case, appointments can be arranged for times when the Jobcentre is known to be less busy, private interview rooms can be arranged, and the claimant can always choose to be accompanied by a family member, friend or support worker."

9. As regards the various types of help mentioned in the paper cited above about which I asked, he told me that at the relevant Jobcentre at the relevant time:

"claimants can be referred to a Work Psychologist and Disability Employment Consultant (formerly known as a DEA) where appropriate. This Jobcentre does not have a designated Mental Health and Wellbeing Partnership Manager but support is available via the Social Justice Partnership Manager, where appropriate."

I do not know what a "Social Justice Partnership Manager" does: the role is not, so far as I can see, described in the part of the DWP paper being considered. The role of the Mental Health and Wellbeing Partnership Manager (where there is one) is, according to the paper, to "work to build links between local health and wellbeing services and support advisers working with people with health conditions." On the face of it, this appears to correspond with what the appellant was hoping could be done to assist her.

10. Mr Walker points out that:

"the Government paper referred to is mainly focussed on future proposals, as opposed to current delivery. However …some of this support is already available in certain Jobcentres, although at the moment, that position may not be replicated in Jobcentres nationally."

11. From the point of view of a tribunal having to decide whether, for the purposes of regulation 35, "there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity", there are a number of problems:

(a) provision is not available across all Jobcentres, thus it may be very difficult, if not impossible, to make assumptions about the provision that would be available for any particular claimant;

(b) some aspects remain ill-defined, for instance how far a Social Justice Partnership Manager can do what the more specialist-sounding Mental Health and Wellbeing Partnership Manager could achieve in relation to liaising with mental health professionals;

(c) even where there is suitable provision, accessing it appears to be via a generalist Jobcentre adviser performing a "gatekeeper" role, which raises the question of whether a tribunal is entitled to assume that the gatekeeper role will be performed so as to enable a claimant to access the provision he or she reasonably requires; and

(d) it is not clear on the material before me that claimants and those advising them are provided with the sort of information that would enable them to request to avail themselves of the provision that is on offer.
In the present case, for instance, the appellant says she was never offered either a private interview room or (another alternative in some cases) telephone based interviews.

12. These are quite significant issues concerning the structures for helping people back into work that are a key part of the stated intention of employment and support allowance. They overlap with those understood to be at issue in the case CE/3453/2013 McK v SSWP, [*known as IM v SSWP not Mck v SSWP – reported as [2015] AACR 10*] in which a three judge panel has held a hearing and in which further submissions are understood to be awaited. A single judge generally has to defer to the authority of a three judge panel, which, moreover, has been and is in a position to receive more detailed argument than is available to me without an oral hearing (which the appellant does not want). While I consider that the First-tier Tribunal in the present case was in error of law in proceeding, without evidence, to make the finding … above, I am far from clear that it is necessary or appropriate to set its decision aside at this stage, which might well lead, among other things, to requiring the appellant to go through a further First-tier Tribunal and to re-opening the question of whether she had limited capability for work (never mind limited capability for work-related activity). It is preferable therefore to stay the present case until the three judge panel in CE/3453/2013 shall have given its decision, which may have the effect of indicating whether any useful purpose will be served by setting the tribunal's decision aside in the present case. I regret that that will mean waiting a little while longer for the present case to be resolved." [*My insert*]

2. Judge of the Upper Tribunal C G Ward 29.5.2014

Ill-health retirement and regulation 29…

LD v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0131 (AAC) – CE/2964/2013 involved the case of a claimant who on appeal had been awarded 0 points under the limited capability for work assessment. On the matter of regulation 29 the First-tier Tribunal held:

"Although the Appellant did not pursue Regulation 29(2)(b) the Tribunal considered whether there was a risk to the Appellant's (or anybody else's) health in a finding that she was fit for work. We bear in mind that the Appellant's needs will be taken into consideration by an employer. Appropriate aids and appliances will be provided. In consideration of all the information provided the Tribunal was satisfied that the Appellant could undertake any supervised low skilled, non-manual or light manual, non-demanding job, taking into account the appellant's overall condition. Such jobs are available in a range of organisations including, but not limited to supermarket chains or call centres."

The Upper Tribunal Judge held:

"5. I have set the tribunal's decision aside, on two grounds, only the first of which is supported by the Secretary of State. That is that nowhere does the tribunal appear to have considered the impact of pain upon the claimant and in particular upon her ability to perform the activities covered by the various descriptors reliably and repeatedly.

6. The second ground arises in relation to the tribunal's failure to engage with all the evidence in relation to regulation 29 and/or to have regard to the terms of the National Health Service Pension Scheme Regulations 1995 SI 1995 No.300 ("the 1995 Regulations").

7. The terms on which a public sector employee can get ill health retirement are a matter of law. With effect from 6 March 1995 it was the 1995 Regulations that applied. (Before then it was SI 1980 No 362). If the claimant's retirement in 1995 was after that date, it was governed by regulation E2, which then provided:

> "(1) A member who retires from pensionable employment because of physical or mental infirmity that makes him permanently incapable of efficiently – discharging the duties of that employment shall be entitled to a pension under this regulation if he has at least 2 years' qualifying service or qualifies for a pension under regulation E1 (normal retirement pension)."

(The Secretary of State's submission to the Upper Tribunal refers to a two tier system of ill-health retirement but that has only been in operation since 1 April 2008 when regulation E2A of the 1995 Regulations was introduced.)

8. On the evidence the claimant did not have carpal tunnel syndrome then and the problem was her back. The pension would not have been awarded without an occupational health specialist doctor having been satisfied that this test was met. Substantial amounts of money that would otherwise not have been paid turned on it – the payment of a pension from age 40 to retirement age – so it may be thought unlikely that scrutiny was other than thorough. If she was permanently incapable of efficiently being a secretary in 1995 and her condition had, if anything, got worse, to assert that she could perform even a non-manual job, never mind a light manual one in my view required the tribunal to engage with this evidence and explain what it made of it, if it was sufficiently to discharge its duty to give reasons.

9. I of course accept that there is no automatic correlation between the conditions of entitlement for an ill-health retirement pension from the NHS and those for employment and support allowance. I entirely accept that in applying regulation 29(2)(b) the tribunal had to apply the relevant caselaw – principally *Charlton*. The Secretary of State submits that:

> "There is no element of that consideration that requires an assessment of the claimant's comparative capability between the date of the decision under appeal and the date of an assessment of capability for a different purpose, under different rules, some 17 years earlier."

The point is that applying *Charlton* has to be done in the light of all the available evidence, of which the early retirement was part. True it is, rather as in the case of the relevance of DLA [*Disability Living Allowance*] assessments for ESA [*Employment and Support Allowance*] purposes, that the evidence behind the assessment would be more use than the mere fact of the assessment (cf. *ML v SSWP* [2013] UKUT 174 (AAC); [2013] AACR 33) and there was and is no indication that that was likely to be available. Nonetheless, that does not make the fact of the assessment of no probative value. The reason why an assessment done as long as 17 years previously was capable of having some on-going relevance was because according to its terms, it had to address the claimant's permanent incapability for doing a particular type of job. There was no indication of any change for the better, if anything the opposite. If then the tribunal was going to say that actually the claimant was capable of doing a job similar in its physical demands to the one she had had to retire from, or even one that was a little heavier, it needed to explain why, in the light of all the evidence. That it failed to do. [*My inserts*]

10. I do not need to deal with any other error on a point of law that the tribunal may have made. Any that were made will be subsumed by the rehearing."

2. Judge of the Upper Tribunal C G Ward 20.3.2014

regulation 29 – impaired ability to get to workplace – mental health

PD v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0148 (AAC) – CE/3848/2012 examined the impact of regulation 29 on persons who, by reason of mental health, have an impaired ability to get to places such as a hypothetical workplace.

Schedule 2: Activity 15 – Getting About:

(a)	Cannot get to any specified place with which the claimant is familiar.	15
(b)	Is unable to get to a specified place with which the claimant is familiar, without being accompanied by another person.	9
(c)	Is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person.	6

(d) None of the above apply. 0

In the present case the decision-maker awarded 6 points to the claimant under 15(c).

However, on appeal, the First-tier Tribunal awarded him 9 points under 15(b) on grounds that it accepted that he was unable to get to a specified place with which he was familiar without being accompanied. Because the claimant's overall point score was less than 15 points the First-tier Tribunal went on to assess the claimant under regulation 29. It found that one of the consequences of being held not to have 'limited capability for work' was that he would need to attend a Jobcentre every two weeks and comply with the other conditions likely to be required under a Jobseeker's Agreement. However, in its view "if he was accompanied, he would not have significant difficulty coping." The other aspect the First-tier Tribunal examined with some care was the type of work the claimant could be expected to do. In relation to this the First-tier Tribunal held that he "would not be able to work in a position based on contact with members of the public but once he got to know fellow employees he could relate to them well. He would need to be driven to work but, once he got used to his place of work and fellow employees, he could remain at a workplace on his own." Therefore, the First-tier Tribunal found that he would be able safely to perform work such as static night-time security work involving little public contact and so regulation 29 did not apply to him.

The Upper Tribunal Judge held:

"9. No criticism is made of the tribunal's analysis on this point [*referring to its findings in relation to regulation 29*] save for its reliance on work which the claimant would need to be driven to and, initially, helped to remain at. The tribunal made no findings as to whether and how such help could be provided. [*My insert*].

10. It is common ground (and was in any event stated by the Court of Appeal) that the decision in Charlton, though on the predecessor legislation relating to incapacity benefit, is equally applicable to regulation 29. Moses LJ, giving the judgment of the Court, explained at [33] that the regulation was concerned with the assessment of a risk which arose as a consequence of work the claimant would be found capable of undertaking but for the impact of the regulation. Passing over a scenario which Moses LJ regarded as "probably rare", he indicated at [34] that "the determination must be made in the context of the journey to or from work or in the workplace itself." (*Charlton* was not however a case in which the question of the journey to work specifically arose.) That the provision is concerned with risk (and not with whether there is a longer-term claimed therapeutic advantage) was emphasised by Judge Jacobs in *CH v Secretary of State for Work and Pensions* (ESA) [2014] UKUT 011 (AAC).

11. The main issue in *Charlton* was to decide on the correct approach to the type of work for the purposes of the regulation. At [38], Moses LJ answered it as follows:

> "The answer to this submission lies in the purpose of Regulation 27(b), that is to assess risk at work. In order to determine whether there is any health risk at work or in the workplace it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision-maker and, if there is an appeal, the Tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision-maker to particularise the nature of the work a claimant might undertake is likely to depend upon the claimant's background, experience and the type of disease or disablement in question. It is not possible and certainly not sensible to be more prescriptive. The most important consideration is to remember that the purpose of the enquiry is to assess risk to the claimant and to others arising from the work of which he is capable. No greater identification of the type of work is necessary other than that which is dictated by the need to assess risk arising from work or the workplace."

He preferred that conclusion to the alternative being put forward, which was that the type of work fell to be determined by reference to what would have been set out in the hypothetical jobseeker's agreement. In so concluding he observed at [47]:

> "This conclusion is consistent with the practical application of these regulations. Any interpretation must bear in mind that the regulations are designed to provide a fair and effective system for assessing entitlement to incapacity benefit and to allied benefits when a claimant has passed the Personal Capability Assessment. It would not be possible to achieve the aim of those regulations were the decision-maker to be required to make findings of the particularity for which the claimant contends. The decision-maker, it must be recalled, will be provided only with the report of the doctor based upon the doctor's interview with the claimant and the claimant's completion of the questionnaire. It is quite impossible for the decision-maker to identify actual positions of employment or the nature of the duties and location of any job which the claimant might undertake, not least because the decision-maker may often be based in Belfast, or elsewhere, and can have no possible means of discovering employment circumstances throughout the country. The conclusion which requires no more than that the decision-maker or Tribunal assess the range of work of which the claimant is capable for the purposes of assessing risk to health has the merit of achieving the objective of the regulations."

12. It can be seen from the two passages I have quoted at some length that there are two aims being pursued in *Charlton* – the assessment of risk (because the descriptors do not do so) and the limitation of the field of enquiry for practical administrative reasons, meaning that the assessment of risk is carried out on a basis that is less than complete.

13. In the present case, the tribunal had identified the type of work it considered the claimant could do and was satisfied that this would not lead to a substantial risk to his health. Principally so far as the journey to work was concerned, but also for an initial period at work, the conclusion reached was, however, dependent on the involvement of a third party.

14. Speaking generally, there are several different potential third parties. A claimant may have friends or family who are in a position to assist (or they may not). It is conceivable that help could be provided through a scheme such as the DWP's "Access to Work" scheme (see https://www.gov.uk/access-to-work/eligibility, accessed on 28 March 2014), though the position is not entirely clear on the criteria as they presently stand.

It is conceivable that an individual employer in a particular line of work might provide transport (but it is accepted by both sides that nothing in the Equality Act 2010 would require him to do so as a reasonable adjustment in response to the claimant's disability).

15. As noted, *Charlton* expressly mandates consideration of risk in the context of the journey to work. The decision implies that there may be persons whose condition is such that the journey to work could cause significant risk to health when the work itself would not but who have failed to amass 15 points. That is a scenario I am finding hard to imagine so far as physical elements are concerned: perhaps where a serious allergy was present – but even then, one would expect the same difficulties to present themselves at work unless the workplace was in a controlled environment. Far more likely in my judgment to have been in the contemplation of the Court of Appeal is the person whose mental health problems cause difficulties with the journey to work.

16. Faced with a claimant who is unable to get to a familiar place unless accompanied, how is the tribunal to apply regulation 29? Given that the inability to get to a familiar place unless accompanied caries 9 points, rather than the necessary 15 to get to the threshold, it is clear that the legislative intention is not that such an inability, without more, is to be equated to having limited capability for work. The tribunal may wish to explore types of work which the person could do from home. Even if the traditional fields for such activity have declined, information technology must bring with it a number of such opportunities for some people. But if such work is not appropriate to the particular claimant, the tribunal will have to conduct the assessment of risk, which is the primary purpose of regulation 29, as best it can in relation to the sort of range of work mandated by *Charlton*, outside the home. If someone has been found to be unable to do something, I find it hard to see how it might be possible to hold that there would be no substantial risk to their health on an assumption that they were effectively made to do that which had been found to be impossible for them (i.e. go to work unaccompanied), though I do not intend to lay that down as a proposition of law. Far more likely is it that what is required is an evaluation of their circumstances when making the hypothetical journey, in particular in relation to being accompanied, in order to see whether the conditions could be satisfied which would alleviate or avoid the risk to health.

17. This is consistent with the nature of evaluating risk. Regulation 29 operates as something of a safety valve, protecting individuals from substantial risk to their health that would otherwise arise. Save in the relatively rare cases where the risk is to others rather than the claimant, the focus accordingly is on an individual claimant and on the risk to that claimant, albeit, as regards type of work, subject to the limitation imposed by *Charlton* on the degree of digging down required. If one were to ask a doctor about the risk to his or her patient, perhaps particularly in the field of mental health, one would expect that view to take into account surrounding circumstances. It would be an artificial exercise to try to assess risk on an assumption that support which was in fact being provided was not.

18. To the extent that the twin aims in *Charlton* of assessing risk and promoting administrative convenience create a tension when it comes to assessing the impact of the journey to work, I prefer to give weight to the more accurate assessment of risk to the individual. I have commented at paragraph 7 of *RB v Secretary of State for Work and Pensions* (ESA) [2012] UKUT 431(AAC) on how the tightening of the descriptors makes regulation 29 all the more likely to be relevant. That is true both in relation to the change of the descriptors between incapacity benefit (with which Charlton was concerned) and ESA and then by the various subsequent amendments to the ESA descriptors themselves.

19. Mr Tabori [*claimant representative*] referred me to various pre-legislative materials in order to urge upon me the inappropriateness of an interpretation of regulation 29 which might have the effect of taking the third party out of the labour market such as, he submits, one allowing the availability of lifts to be taken into account. The potential sources of third party help (see [14]) are such that it would not necessarily involve removing from the labour market someone who might otherwise be in it. In any event, it is to the Act, Regulations and caselaw that I must look and I can find nothing in them which supports Mr Tabori's submission on this aspect. [*My insert*]

20. In *MT v Secretary of State for Work and Pensions* (ESA) [2013] UKUT 0545 (AAC), Judge Gray had to deal with the not dissimilar question of whether regulation 35(2)(b), which imposes a similar test to regulation 29 but in relation to the ability to participate in "work related activity" fell to be examined taking into account the possibility of the claimant in that case taking a third party with her to work-related activities. At paragraph 34 she observed:

> "I do need to deal however with the observation of the FTT in its statement of reasons that the appellant could take another person with her to any work-related activities. It may be that the Secretary of State would be facilitative in any matter which helped a claimant engage so as to improve their ultimate prospects of retaining work. I do not know. Whether or not that is so, is not relevant. As a matter of law any work-related activity which could only be accomplished because of the presence of another person must be looked upon as not being an activity that the claimant can carry out. The issue under regulation 35 (2) (b) as to whether there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity cannot be assessed as if the claimant under consideration had somebody else by their side. There will be claimants who have a need for the personal reassurance of another person, but who do not have anybody available to perform that role. Even if they did, it would not be reasonable for such an assessment to be made on the basis of reliance on another's goodwill. Legal tests cannot depend upon that. Where an appellant who is found to have limited capability for work-related activities another person, and it may (or may not, I do not know) be possible for them to do so, but the capacity to engage only with that assistance cannot be part of the test of capability."

21. To the extent that the passage quoted is saying that it is incorrect to conduct the assessment required by regulation 35 "as if" a third party were present, I respectfully agree, if by that is meant without consideration of whether the third party's presence would be made out in fact. It is possible to read Judge Gray's remarks as going further than that, notably where she writes "as a matter of law any work-related activity which could only be accomplished because of the presence of another person must be looked upon as not being an activity that the claimant can carry out". That, with respect, seems to be asking what I regard as the wrong question. The issue, it seems to me, is not whether or not it counts as the claimant doing the activity, but about the risks which ensue if he or she does.

22. Accordingly, my starting point is that where there is appropriate evidence (as to which see below) third party help could be taken into account.

23. There are undeniably going to be practical difficulties for the DWP in arguing that a person with 9 points for descriptor 15(b) can nonetheless, by being accompanied, get to work, and for tribunals in adjudicating on the issue. The *Charlton* exercise does not require consideration of actual positions of employment or the location of any job a claimant might undertake. Common experience of giving or receiving a lift from someone suggests that the availability of a person to accompany someone may in practice be highly dependent on practical factors: How far? What time of day? Same time each day or varying? All of those are questions which might arise if the question had to be asked in the context of an actual job, but, as *Charlton* makes clear, it does not. It may be difficult to get clear evidence about whether someone would be available to help when the circumstances are hypothetical.

24. Then there may be the question of the availability of a car to consider: it is not unusual to come across people whose ability to get out of their domestic setting is much greater in the private realm of a vehicle belonging to them or to a trusted person than it is when public transport has to be relied upon. Some people will live in places where public transport is unlikely to be a practical solution anyway. Where a car is needed, it will not necessarily be available, particularly if it is sometimes used by others.

25. It will, further, be important that any arrangements to enable a person to get to a workplace appear capable of being maintained.

26. Nonetheless, and difficult though it may be, I consider that such a line of argument is open to the Department. There will be cases, for instance where a partner is not working, there is no one else at home who uses the car and where the evidence shows a pattern of the partner driving the claimant to wherever s/he wants or needs to go, that it may be open to a tribunal to infer that such help would similarly be available to get a claimant to the *Charlton*-mandated hypothetical workplace. If a scheme such as Access to Work were available on a sufficiently reliable basis, it is hard to see why it should not be taken into account.
Such are ultimately conclusions of fact and not matters on which I need say more, except to observe that this may be, par excellence, a field in which tribunals can look to the principles of *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372:

> "62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
>
> 63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision *CIS/5321/1998*, "a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself."

27. What is difficult in relation to transport is yet harder in relating to accompaniment within the workplace. Such a setup would be highly unusual, even if only to help with the first few days. I did not hear argument on whether that, unlike the provision of transport, could constitute a reasonable adjustment for Equality Act purposes. I leave the general questions about reliance on that Act to be considered in *CE/3688/2013 [reported as* [*2015] AACR 15*], in which an oral hearing is due on 28 April 2014. [*My insert*]

28. In my view, therefore, it is open to a tribunal to conclude that the risk to the health of a claimant may be mitigated by the availability of strategies to enable him to get to work, including through the assistance of a third party. Such a conclusion would, though, have to be based on proper, evidence-based findings of fact."

2. Judge of the Upper Tribunal C G Ward 31.3.2014

operation of regulation 29 and 35 – mental health

SD v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0240 (AAC) – CE/4305/2013 involved a case of a claimant who suffered depression, anxiety, paranoia and heard voices and hallucinated. In relation to regulation 29 and 35 the First-tier Tribunal found:

> "We followed the guidance in the case of *Charlton*. Although [the claimant] has never worked, except for some work experience, we found that there was work she could do. The work could be unskilled, in a small work environment and, perhaps, with suitable training. She has no physical problems. As to the general effect upon her mental health, there is now an understanding that work or work search would not harm a person suffering from depression at a relatively mild level, as we found [the claimant] to be. On the contrary, purposeful daily activity is more likely to be helpful to this condition. There was nothing so unusual in [the claimant's] position that led us to the conclusion that it would be harmful to her. or (*sic*) anybody else's health if she were found not to have limited capability for work. Accordingly, neither Regulations 29 nor 35 applied."

The Upper Tribunal Judge held that this reasoning was based upon the findings of the First-tier Tribunal that the claimant "only suffering from mild depression" and that this in itself was an error of law because the First-tier Tribunal had failed to give adequate reasons for this conclusion.

In readmitting the appeal the Upper Tribunal Judge held:

"10. If at the new hearing the claimant still fails to score at least 15 points in respect of the Schedule 2 descriptors, the new tribunal will again need to consider whether regulation 29(2)(b) applies on the basis of the findings of fact that it makes. In this respect, it should bear in mind that *Charlton* was concerned to consider how a tribunal should assess the type of work that a claimant might do. The issue before it was how prescriptive the decision maker or tribunal should be in assessing the type of work for which the claimant was suitable. It held that Deputy Commissioner Paines was correct in CIB/360/2007 in deciding that all that needed to be considered was what range or types of work a claimant was suited for as a matter of training or aptitude and which his disabilities did not render him incapable of performing and then to decide whether, within that range there was work that he could do without the degree without the degree of risk to health envisaged by regulation 27(b) of the incapacity benefit regulations, which was under scrutiny in that case. It rejected the approach of other Commissioners which required the decision maker to consider the work which would be defined in a Jobseeker's Agreement should the claimant make a claim for jobseeker's allowance (see paras 36 to 46 of that decision). It was not concerned in that case with a claim that there may be some other risk to the health of the claimant from being found not to have limited capacity for work other than risk from having to do work.

11. In paragraph 34 of his judgment, Moses LJ made it clear that regulation 27(b) may be satisfied where the very finding of capability might create a substantial risk to a claimant's health or to that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused. Other examples have arisen in other cases. In *IJ v SSWP*, [2010] UKUT 408 (AAC) I stated:

> "the test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker's allowance. That would involve his [*sic*] attending interviews, and going through all the other steps that would be needed to obtain and keep jobseeker's allowance. In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990's, is unlikely to find work quickly and would very possibly never find it. His GP's assessment that it is inconceivable that he would ever be able to earn his living may be right.
>
> The tribunal would then have to determine how this change from his being in receipt of incapacity benefit would affect the claimant's mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age. These factors were not considered by the tribunal, and indeed they did not elicit the information necessary to enable them to be considered, such as whether he had in fact applied for jobseeker's allowance and if not, how he was coping or would cope." [*My insert*]

12. As I have pointed out elsewhere, that approach was applied to regulation 29 by Judge Parker in *CF v SSWP* [2012] UKUT 408, and is in my judgment the proper approach to regulation 29, following the wording of the regulation. It is also supported by the decision of Mrs. Commissioner Parker, as she then was, in CSIB/719/2006 at paragraph 11 when in considering the risk she said that it "must arise from the broad results of a claimant being found fit for work and is not confined to the risks arising directly from the tasks with a claimant's job description." Most recently it was also cited with approval by Judge White at paragraph 45 of *NS v SSWP* [2014] UKUT 115 (AAC).

13. Depending on the findings of the new tribunal as to the mental health of the claimant at the date of the decision, it is possible that it could conclude that her prospects of getting or keeping any employment were slim or non-existent. In such circumstances there may be no substantial risk to her health from any work which she might theoretically do, but there could still be a substantial risk to her health, whether because of the loss of the income support which she previously enjoyed with nothing to replace it, or because she may damage her health attempting to obtain and retain jobseeker's allowance. There is presently a lack of evidence on these issues should they arise and this is something which the claimant's partner and her representative may wish to address.

14. If she scores 15 points or more on the descriptors, or if the tribunal considers that regulation 29(2)(b) assists her, the tribunal will then need to consider regulation 35. To enable it to do this the Secretary of State should provide evidence of what work-related activities the claimant might be asked to undertake. For the reasons I gave in *JS v SSWP* [2013] UKUT 635 (AAC), a work-focused interview is not a work-related activity but a precursor to such activities.

15. In *AP v SSWP*, [2014] UKUT 35 (AAC), I reviewed the conflicting authorities as to what evidence was required from the Secretary of State as follows:

> "The scope of regulation 35(2) and the evidence required
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> 23. In order to consider whether, by reason of any disease or bodily or there would be a substantial risk to the mental or physical health of the claimant if she had been found in February 2012 not to have limited capability for work-related activity, it is necessary to consider the effect on her of that finding had it been made. This necessarily involves consideration of what would have been expected to happen in that event.

24. That is a matter as to which the Secretary of State ought to have provided some evidence. The scope of the evidence required must depend on the facts of the case. In some cases, it will be apparent that there is no such risk and no point is taken as to it. Where a claimant has mental health problems and there is clearly an issue as to the risk for the tribunal to consider if it accepts her evidence, then in my judgment the Secretary of State has a duty to the tribunal under regulation 2(4) of the Tribunal Procedure (First-tier Tribunal) (SEC) Regulations 2008 to provide evidence to the tribunal as to what steps would have been taken at the time and subsequently if the decision of the decision maker had been that the claimant qualified for ESA but did not have limited capability for work-related activity.

25. I appreciate that ahead of the decision of the tribunal, at least where the original decision was, as here, that the claimant did not have limited capability for work, the Secretary of State could not know exactly what the tribunal might find. Nevertheless, the psychotherapist's report was sent to the tribunal by letter of 26 October 2012 and was presumably copied to the decision maker shortly thereafter, and many months before the hearing. No attempt was made to reply to it or to provide any evidence in relation to regulation 35(2). In particular, there was no attempt to provide any evidence as to the steps that the Secretary of State considered would have been appropriate to deal with the claimant's perceived need for coping skills and support networks or as to the quality and qualifications of the personnel who would be dealing with her. Nor was any indication given whether she would have been dealt with throughout by one person or, if not, how many people would have been involved in contact with her, or in what circumstances and where that would have happened following a decision in February 2012.

26. There is no automatic requirement that a claimant who is found not to have limited capability for work-related activity should attend a work-focused interview and then undertake work-related activities of any kind. It is, of course, possible that the Secretary of State, or those acting for him, could have decided that, on the basis of the evidence, it was not appropriate, if the claimant was found to have limited capability for work to require the claimant to attend any work-focused interview or to become engaged in any work-related activity until there was further expert mental health evidence that that was appropriate. That is a matter as to which the Secretary of State could have adduced evidence. It is also possible that as at February 2012, no such discretion was ever exercised and there was a policy of immediately summoning claimants for such interviews followed by a ritual of work-related activities which did not take adequate account of their mental health problems.

27. In *AH v SSWP*, [2013] UKUT 118 (AAC), Judge Jacobs held that, except in a case where only general evidence would be enough, the tribunal needed specific evidence of the type of activity that the claimant might be expected to undertake. In *ML v SSWP*, [2013] UKUT 174, he observed at paragraph 15 that

> "Despite having dealt with numerous cases involving the support group, I still have no idea of what work-related activities involves beyond the general formulaic statements such as those I have quoted from the Secretary of State's argument. I accept that it is not possible to say in advance what precisely would be expected of any particular claimant. However, it must be possible to give a sufficient indication of what is involved in order to allow a claimant to provide evidence and argument, and to allow a tribunal to make a decision."

28. These decisions of Judge Jacobs were given in March and April 2013, before the hearing under appeal. Yet in the present case, not even general formulaic statements have been provided. Even in CE/3468/2012, upon which the Secretary of State now relies, Judge White stated that there must be some identification of the type of work-related activity which the claimant could safely undertake, and that that may be no more than an initial consultation over the phone, although, as I pointed out in *JS v SSWP*, [[2013] UKUT 635 (AAC), the initial work-focused interview is not a work-related activity.

29. I also note that while the Secretary of State has sought to rely on Judge White's decision and on another decision which follows it, he has failed to draw attention to the decision of Judge Gray in *MT v SSWP*, [2013] UKUT 545, which expressly disagrees with the decision of Judge White, for what is to me the very good reason that the work-related activity which the claimant could safely engage in may not be the same as the work-related activity which he or she would have been required to engage in if found not to have limited capability for work-related activity. The ability of an employee at a jobcentre accurately to assess at what would probably be a very short interview what is right for a claimant with serious mental health problems must also be open to question. In assessing the effect of an adverse finding the tribunal must take into account not some theoretical possibility but the likely result based on evidence of what would happen or have happened at the relevant time.

30. Judge Gray also points out that the tribunal must look at the position as it was at the date of the decision and at the work-related activities which this claimant might have been required to undertake following a decision to that effect. That must plainly be right. The tribunal cannot be concerned with the claimant's ability to deal with work-related activity at the date of the hearing, in this case 15 months later by which time a claimant's mental condition could have changed significantly."

16. On this basis, to enable the tribunal properly to consider the application of regulation 35 if the claimant is found by the new tribunal to have limited capability for work, the Secretary of State should provide to the tribunal evidence of the work-related activities which this claimant might have been required to undertake at, or rather following, the date of the decision had that decision been that she was to be treated as having limited capability for work but not for work-related activity. He should identify specific activities and not rely on the formulaic statements decried by Judge Jacobs."

2. Judge of the Upper Tribunal Michael Mark 23.5.2014

regulation 35 – the correct approach

[2015] AACR 10 (unreported IM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013) involved the case of a claimant who had, in the conversion from Incapacity Benefit to Employment and Support Allowance, been held by a decision of a First-tier Tribunal to meet the conditions for 'limited capability for work' but not 'limited capability for work-related activity'. The claimant appealed, submitting that the First-tier Tribunal erred in its approach to regulation 35(2). A direction was made that the appeal should be heard by a Three-Judge Panel due to the differing views of Upper Tribunal Judges on the approach to regulation 35(2).

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

The Three-Judge Panel made clear (paragraph 8) that whether a claimant has limited capability for work-related activity is important not only in terms of the amount of Employment and Support Allowance payable ('work-related activity component' vs. 'support component') but also because for those without limited capability for work-related activity, entitlement to Employment and Support Allowance may be made conditional on them taking part in 'work-focused interviews' and 'work-related activity'. The Three-Judge Panel (at paragraph 8) also acknowledged that failure without 'good cause' to take part in a work-focused interview or work-related activity would lead to a form of benefit sanction.

The Three-Judge Panel confirmed (paragraph 9) that section 13(7) of the Welfare Reform Act 2007 provides that the purpose of work-related activity is to 'make it more likely' that the claimant 'will be able to obtain or remain in work or be able to do so'. It also confirmed that by virtue of section 55 of the Welfare Reform Act 2012, since 3rd December 2012 (and therefore after the date material to the present case) work-related activity could include 'work experience' or a 'work placement'.

The Three-Judge Panel confirmed (paragraph 17) that regulations 3(4) of the Employment and Support Allowance (Work-Related Activity) Regulations 2011 provide that a requirement to impose work-related activity must be 'reasonable' in the view of the Secretary of State, having regard a person's circumstances and may not require that person to 'apply for a job or undertake work' (whether as an employee or otherwise) or undergo 'medical treatment'.

The Three-Judge Panel confirmed (paragraph 17) that the Secretary of State, in imposing a condition of work-related activity may in accordance with section 15 of the Welfare Reform Act, confirm in the work-related activity direction whether the activity to be undertaken is to be regarded as work-related activity and/or whether it is the only activity to be regarded as work-related activity.

The Three-Judge Panel confirmed (paragraph 17) that in accordance with regulation 4 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011, the Secretary of State may only impose the requirement of work-related activity upon a person where it is considered that they have a 'barrier to work' which they have 'refused' to address and that it is a 'prerequisite' to the person's ability to obtain or remain in work'.

The Three-Judge Panel confirmed (paragraph 17) that regulation 5 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011 provides that the Secretary of State must notify a person of a requirement to undertake work-related activity by including the requirement in a written 'action plan' and that the action plan must specify the nature of the work-related activity they are required to undertake and any other information the Secretary of State considers appropriate.

The Three-Judge Panel held:

"23. Regulation 35 is clearly intended to be a safety net to avoid some claimants facing the consequences or potential consequences of a conclusion that applying the points system based on functional tests a claimant is found not to have limited capability for work-related activity. So far as is relevant here, regulation 35(2)) is based on the existence of a risk arising from those consequences. Some of the possible consequences of being found not to have limited capability for work-related activity are founded on decisions that have to be made by the Secretary of State and others on decisions made by providers.

24. So the application of regulation 35(2) involves a risk assessment at the time or times that a decision under it falls to be made. As it has to be applied before the next stage of the process begins for a person found not to have limited capability for work-related activity the analysis of and decision on whether the defined risk exists involves the making of predictions of the likelihood of the claimant facing the possible consequences and of the possible results of him doing so. This process and so the making of the predictions it involves have to take place before the relevant claimant faces the relevant consequences.

25. That process, and the predictions it involves, has to be made first by the Departmental decision-maker on behalf of the Secretary of State and later, if there is an appeal, by the First-tier Tribunal.

26. Inevitably, an aspect of the decision making at that stage is an assessment of what will happen at and as a result of that claimant's work-focused interview. Possible results are that the claimant will be required by a provider to undertake one or more work-related activities (and so an activity which makes it more likely that the person will obtain or remain in wok or be able to do so – see section 13(7)). Any such requirement must be reasonable and can be limited pursuant to section 15(1)(a) to a defined activity if the Secretary of State concludes that the claimant has a barrier to work which he has refused to address and the specified activity is a prerequisite to the person's ability to obtain work. A claimant who does not undertake the specified work-

related activity will face a reduction in his employment and support allowance unless he can show good cause for his failure… [*regulations 3 to 8 Employment and Support Allowance (Work-Related Activity) Regulations 2011*]. The range of work related activities is potentially wide but to fit with the definition in section 13(7) and regulation 4 of the 2011 Regulations [*Employment and Support Allowance (Work-Related Activity) Regulations 2011*] it must be something that addresses the barrier of that claimant to work and makes it more likely that he will obtain or remain in work. [*My inserts*]

27. Both the Departmental decision-maker and the First-tier Tribunal must act fairly in applying regulation 35(2) and to do that they must reach their decisions on a properly informed analysis of the relevant factors. Inevitably that will involve them considering the impact of the possible consequences of the claimant attending a work-related interview [*should probably read 'work-focused interview'*] and so of him being required by a provider to undertake a work-related activity as a result. [*My insert*]

28. Equally, the decision-maker at the work-focused interview and a provider deciding what work-related activity a claimant should be required to do must act fairly and so reach a decision on a properly informed basis.

29. The primary point on this appeal is the amount and detail of the information the regulation 35(2) decision-makers should have of the possible results of the work-focused interview.

30. Relevant to that point and a fair approach to decision making under regulation 35(2) on a properly informed basis is the amount of information that the decision-maker at the work-focused interview or the provider will have of the factors taken into account and the reasoning of the decision-maker who has made a decision under regulations 34 and 35 of the 2008 Regulations [*Employment and Support Allowance Regulations 2008*]. This is because that information will inform him or her at that later stage of the evidence and reasoning of the earlier decision making relating to the disabilities and capabilities of the claimant and why regulation 35(2) was not applied. Clearly the more that later decision-maker knows about the earlier decisions that have resulted in the work-focused interview the more likely it is that he will not make a decision that causes the risk set out in regulation 35(2) to arise or materialise. [*My insert*]

31. Accordingly, fairness would be promoted by the Secretary of State operating a "joined up" decision making process in which such information is provided to the work-related activity decision-maker.

32. But we are concerned with what evidence and factors should be taken into account at the earlier stage when regulation 35(2) has to be applied and have to do so in the light of the present system and practice of the Secretary of State relating to the provision of information between decision-makers."

In reaching its decision the Three-Judge Panel thought it helpful to make the following 'general comments':

"21. First, even under the original version of Schedule 2 to the 2008 Regulations, the test for limited capability for work was generally more stringent than the test for incapacity for work under earlier legislation. Both Schedule 2 and Schedule 3 to the 2008 Regulations were, for most claimants, made even more stringent from 28 March 2011. It is therefore not surprising that a substantial proportion of awards of the former benefits do not qualify for conversion and that a greater proportion of employment and support allowance cases generally have turned on regulations 29(2)(b) and 35(2). Moreover, as being found to have limited capability for work-related activity has become more important for claimants – because now it affects not only the amount of benefit to which they might be entitled but also whether they must engage in work-related activity (which is itself becoming more rigorous) and, if they are entitled to the contributory allowance, the period for which that allowance is payable – an increasing number of claimants rely on regulation 35(2) in their appeals. Experience shows that the most contentious cases are those where claimants suffer from a significant degree of mental ill health.

22. Secondly, it is apparent that the 2007 Act is directed to the individual claimant, defines limited capability for work and limited capability for work-related activity and then prescribes that the approach to be taken by the person deciding whether a particular claimant has limited capability for work, limited capability for work-related activity (as so defined) is to be determined in the way set out by the Secretary of State in the Regulations. Those Regulations also set out the consequences and potential consequences for a claimant of the decisions made, including the decision on whether or not he has limited capability for work-related activity."

2. Mr Justice Charles President of the UT(AAC) and Nicholas Warren President of the FtT(GRC) and Judge of the Upper Tribunal Mark Rowland 15.9.2014

regulation 35 – substantial risk…

[2015] AACR 10 (unreported IM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013), having reviewed AH v Secretary of State for Work and Pensions (Upper Tribunal Judge Jacobs), MN v Secretary of State for Work and Pensions (Judge Wright) and AK v Secretary of State for Work and Pensions (Upper Tribunal Judge White) and MT v Secretary of State for Work and Pensions (Upper Tribunal Judge Gray), the Three-Judge Panel held:

"63. In the light of the arguments, it is necessary for us to go back to the beginning and consider the language of regulation 35(2) and the Court of Appeal's decision in *Charlton*, which is of course binding on us and is relied upon in most of the decisions we have mentioned and also by the Secretary of State in this appeal.

64. The issue raised by regulation 35(2) is whether "there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity".

65. As was pointed out in *R. v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, "substantial" is a word that means different things in different contexts. However, it was in our view correctly common ground before us that a "substantial risk" in this context means a risk:

> *"that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case"*

(this borrows the words used by Lord Nicholls of Birkenhead in *Re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 585 when considering the meaning of the words "likely to suffer significant harm" in section 31(2)(a) of the Children Act 1989).

66. The harm is identified by regulation 35(2)(b) with the result that it applies only where, by reason of "some specific disease or bodily or mental disablement" from which the claimant is suffering, there would be a substantial risk to the "mental or physical health" of any person if the claimant were found not to have limited capability for work-related activity.

67. Regulation 35(2) also identifies the relevant cause of that harm and the trigger of the risk that having regard to its nature and gravity cannot sensibly be ignored. That trigger is that the person is found not to have limited capability for work-related activity. As we have mentioned earlier this finding gives rise to a progression of consequences and possible consequences starting with a work-focused interview, followed by its result, followed by possible sanctions.

68. As pointed out in *AH,* it is therefore clear that the application of regulation 35(2) involves a consideration of both its elements and thus whether that progression of possible consequences might by reason of the claimant's disease or disablement result in that substantial risk.

69. The first stage is to consider the impact of the work-focused interview. The next is to consider its possible results.

70. Its result could be that the Secretary of State or the provider applying the 2011 Regulations decides that it would not be reasonable to require the claimant to undertake a work-related activity, or that he should not be required to do so for the reasons set out in paragraph 59 of the Secretary of State's skeleton argument.

71. If it was known that that would be the result of the work-focused interview in a given case it is likely that this would greatly reduce the chances that the risk specified in regulation 35(2) would exist in that case. But at the decision making stage under regulation 35(2) this cannot usually be known and can only be predicted.

72. Equally, the result of the work-focused interview could be that the claimant was required to undertake work-related activity pursuant to an action plan. The purpose of a work-related activity is defined but there is no list of what is and what is not work-related activity and further what is available may vary from area to area. Again this result cannot usually be known at the time the regulation 35(2) decision is made and so can only be predicted.

73. The difficulty relating to the identification of the work-related activity that a claimant may be required to do leads into the disagreement that has arisen between Upper Tribunal judges, which is whether a claimant fails to satisfy regulation 35(2) if there is *any* work-related activity in which he or she could engage without a substantial risk to anyone's health, even if engaging in other work-related activity would give rise to such a risk and it is not known whether the work-related activity that it is thought he could do without such risk arising is available in his area or to him and no assessment has been made of the actual range of work-related activity that the claimant might be required to undertake.

74. If the result of the work-focused interview is that the claimant is required to undertake work-related activity, the next stage in the trigger to the risk is the impact of either carrying it out or challenging it. Either could lead to the risk set out in regulation 35(2) being satisfied.

75. All this shows that the regulation 35(2) decision-maker must do some "crystal ball gazing" to assess the outcomes of the work-focused interview that are to be taken into account in the given case. The underlying problem being that the work-focused interview comes later in the application of the statutory scheme and the decisions made on what work-related activity a claimant should be required to undertake are taken by different a decision-maker.

76. The Secretary of State's argument is based heavily on the two stage approach to adjudication that he has established, which he submits is required by the legislation and is also required, or at least permitted, by *Charlton*. We do not agree.

77. First, the fact that the regulation 35(2) decision necessarily comes first in most cases, and so what the claimant will actually be required to undertake in the future cannot be known when it is made, does not indicate that predictions should not be made in applying this safety net provision to a particular claimant. Rather, the very nature of this safety net and its place in the legislation is a powerful indicator that predictions specific to the claimant should be made to protect vulnerable claimants.

78. In our view the Secretary of State reads more into *Charlton* than is warranted and his argument shows that he is putting a limited and we consider incorrect interpretation on *AH*.

79. We accept that *Charlton* sets out a general approach to the assessment of a risk that can be applied by analogy but it is nonetheless relevant to consider the factual background against which the Court of Appeal gave its decision applying that approach.

80. The appeal to the Court of Appeal in that case was brought by the claimant against a decision of a Social Security Commissioner who had set aside a decision of an appeal tribunal to the effect that there would not be a substantial risk to the mental or physical health of any person if the claimant were found capable of work but had then substituted his own decision to the same effect. The claimant suffered from alcohol dependency syndrome. He had not scored any points under the physical health descriptors in the predecessor of a work capability assessment but the appeal tribunal had awarded him five points in respect of mental health descriptors (when nine would have been necessary for a finding of incapacity for work). The Commissioner therefore had to consider whether the forerunner of regulation 29(2)(b) of the 2008 Regulations ("Regulation 27(b)") applied. However, the only risk to any person's health that the Commissioner found was the risk that would arise due to carelessness on the claimant's part. There had been evidence of a minor fire at the claimant's home, caused by his carelessness. In relation to the risk to the claimant himself if he were found not to be incapable of work, the Commissioner considered that there was "no significant evidence to suggest that C is any more at risk from accidents while at work than if he continues his existing lifestyle". In relation to the risk to others, he first rejected the possibility that the claimant would work in any caring activity and then said –

> "More probable, as I have suggested, is a context of straightforward and structured unskilled work. I also take into account the description of C that arises from the Personal Capability Assessment. In such a context, there is a risk of incidents caused by C's carelessness. I assess the risk to others from such carelessness, while undoubtedly present, is not likely to be substantial in the kind of work setting that C might be expected to enter. Indeed, as with the risk to himself, it may be that the risk he presents to others in a work setting is less than the risk to others that he presents in a domestic context. The one example of an incident of carelessness at home is potentially less of a risk in a work setting – where there will be management structures and fire and similar safety features in place – than at home. In my view, it has not been established that the risk to others presented by C if he [were] found capable of work is probably a substantial risk."

81. Moses LJ, with whom the other members of the Court agreed, questioned the Commissioner's "apparent search for evidence of a greater risk at work than from his existing lifestyle generally" but considered any such error to be immaterial since the Commissioner had ultimately asked himself the correct question.

82. Moses LJ then considered the issue that is of more relevance to the present case. He said –

> "36. Regulation 27(b) requires the decision-maker to assess risk in the context of the work or workplaces in which the claimant might find himself.
> The controversy between the claimant and the Secretary of State relates to the extent to which the decision-maker must identify the type of work which the claimant would perform on the hypothesis that he had been found capable of work.
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> 37. The claimant contends that a decision-maker must identify what he describes as "actual positions of employment" and must concentrate upon the job that the claimant will undertake, the nature of its duties and its location. Without such analysis a decision-maker will, so he contends, be unable properly to assess risk to safety both to himself and to others. The Commissioner's identification of the type of work the claimant might be expected to undertake is too vague and too broad.
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> 38. The answer to this submission lies in the purpose of Regulation 27(b), that is to assess risk at work. In order to determine whether there is any health risk at work or in the workplace it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision-maker and, if there is an appeal, the Tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision-maker to particularise the nature of the work a claimant might undertake is likely to depend upon the claimant's background, experience and the type of disease or disablement in question. It is not possible and certainly not sensible to be more prescriptive. The most important consideration is to remember that the purpose of the enquiry is to assess risk to the claimant and to others arising from the work of which he is capable. No greater identification of the type of work is necessary other than that which is dictated by the need to assess risk arising from work or the workplace.
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> 39. The correct approach has been identified by Deputy Commissioner Paines in CIB/360/2007:-
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> > '17. The degree of detail in which [the consequences of a finding that the claimant is capable of work] will need to be thought through will depend on the circumstances of the case… A tribunal will have enough general knowledge about work, and can elicit enough information about a claimant's background, to form a view on the range or types of work for which he is both suited as a matter of training or aptitude and which his disabilities do not render him incapable of performing. They will then need to decide whether, within that range, there is work that he could do without the degree of risk to health envisaged by regulation 27(b).
> >
> > 18. Regulation 27(b) requires one to start by identifying a disease or disablement; the next stage, it seems to me, is to consider the nature of any health risks posed by that disease or disablement in the context of workplaces that the claimant might find himself in, with a view to answering the question whether any such risk is substantial.'
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> 40. Unfortunately, that approach has not found favour with other commissioners. Commissioner Jacobs in CIB/26/2004 and Commissioner Parker in CSIB/33/04 adopted an approach which required the decision-maker to consider the work which would be defined in a Jobseeker's Agreement should the claimant have made a claim to Jobseeker's Allowance.
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> 41. Mr Drabble, on behalf of the claimant, supported that approach. He based that submission upon what he asserted to be the link between entitlement to Incapacity Benefit and entitlement to Jobseeker's Allowance. He drew attention to Regulation 17A. Under that Regulation:-

> 'A person should be treated as capable of work throughout any period in respect of which he claims a Jobseeker's Allowance, notwithstanding that it has been determined that…he is or is to be treated as incapable of work under Regulation…27 if…
>
> (b) he is able to show that he has a reasonable prospect of obtaining employment.'
>
> 42. It is unnecessary to divert the proper focus of this issue by an elaboration of the provisions in relation to Jobseeker's Allowance. It is sufficient to point out that entitlement to a Jobseeker's Allowance pursuant to the Jobseeker's Act 1995 and to the Jobseeker's Allowance Regulations 1996, requires a Jobseeker's Agreement to be made with the claimant providing the yardstick as to what is expected of the claimant in terms of his obligation actively to seek work. The contents of the Jobseeker's Agreement (pursuant to Regulation 31 of the Jobseeker's Allowance Regulations 1996) requires there to be any restrictions on the location or type of employment and a description of the type of employment which the claimant is seeking.
>
> 43. In my judgement the link which Mr Drabble seeks to establish is far too fragile to bear the weight which his argument imposes. There is no warrant within the wording or context of Regulation 27(b) for requiring a decision-maker to embark upon the almost impossible and certainly impractical task of imagining what hypothetical agreement might have been made should the claimant have applied for Jobseeker's Allowance."

83. The general approach endorsed and applied by the Court of Appeal has regard to practicalities and focuses on the purpose of the provision. Importantly (and transposing the risk trigger to this case), Moses LJ expressly endorses at paragraph 39 the point that the degree of detail in which the identification of the consequences of being found not to have limited capability for work-related activity will need to be thought through will depend on the circumstances of the case and at paragraph 38 Moses LJ indicates that the extent of the identification is limited and dictated by the need to assess the risk. This accords with what he said at paragraph [46], namely that "the essential question is whether there is an adequate range of work which the claimant could undertake without creating a substantial risk to himself or to others."

84. Applying that approach, the Court of Appeal's decision in *Charlton* is, we would respectfully suggest, unsurprising in the circumstances of that case. Identifying "actual positions of employment" with the precision suggested was plainly not only impractical but also unnecessary where the claimant had claimed there to be a substantial risk in only vague terms and there was clearly a broad category of work that he could reasonably be expected to seek. It was unnecessary to consider restrictions that the claimant might have imposed on his availability for employment for reasons other than substantial risks to anyone's health. An appreciation that the question whether a claimant could work without substantial risks to the health of himself or others was relevant both to incapacity benefit and jobseeker's allowance and might need to be answered in the same way by decision-makers dealing with both benefits if a claimant was not to be left without entitlement to either benefit may have been a reason for Commissioners referring to jobseeker's agreements in incapacity benefit decisions (see, more recently, *SI v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 308 (AAC) at paragraph 57), but it was only ever going to be in the most marginal case that there would have been any risk of a claimant falling between the two benefits. Mr Charlton does not appear to have been able to explain why considering what might have been contained in a jobseeker's agreement would have better enabled the Commissioner in his particular case to answer the statutory question whether there would be a substantial risk to a person's physical or mental health if he were to be found capable of work. Thus, for instance, it appears not to have been suggested that a jobseeker's agreement might realistically have required Mr Charlton to seek work beyond the broad type of work identified by the Commissioner as being work he could reasonably be expected to do without a substantial risk to anyone's health. This is reflected in the formulation of the "essential question" at the end of paragraph [46]. However, it is apparent that that will not be the only essential question that arises in other cases, because Moses LJ had also said –

> "34. Regulation 27(b) may be satisfied where the very finding of capability might create a substantial risk to a claimant's health or to that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused. Apart from that, probably rare, situation, the determination must be made in the context of the journey to or from work or in the workplace itself."

85. An equivalent approach to that taken by the Court of Appeal in *Charlton* can be taken where regulation 35(2) is in issue and the Secretary of State or the First-tier Tribunal is satisfied that neither a work-focused interview nor any of the types of work-related activity that any claimant could be required to do would give rise to a substantial risk to the mental or physical health of any person if the claimant were to be required to engage in them. There is no need in such a case to decide what particular work-related activity the particular claimant *would* in fact be required to do. Nor, obviously, is there any difficulty in a case where it is accepted that, even though the claimant does not meet the terms of any of the descriptors in Schedule 3 to the 2008 Regulations, the claimant could not carry out any form of work-related activity without there being a substantial risk to someone's health. (We agree with Judge Jacobs in *NS v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 149 (AAC) and Upper Tribunal Judge Bano in *CMcC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 176 (AAC) that, where there is no work-related activity in which the claimant could engage without a substantial risk to someone's health, the fact that the Secretary of State could not reasonably require the claimant to engage in work-related activity under regulation 3 of the 2011 does not mean that the condition of regulation 35(2) is not met. That would undermine the purpose of regulation 35(2).)

86. But we do not agree that *Charlton* founds directly or by analogy the argument that in other circumstances – *i.e.*, cases where a claimant could safely be required to engage in some forms of work-related activity but not others – the regulation 35(2) decision-maker does not have to consider what work-related activities the particular claimant *might* be required to undertake and the consequences of him being required to do so.

This is because the purpose of the regulation is to provide a safety net for a particular claimant by recognising that in the case of some claimants (and probably a limited number of them) (a) if they are found not to have limited capability for work-related activity and so have to engage in the next stage of the system this could cause harm to the mental or physical health of that claimant or others, and (b) that the risk cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.

87. Accordingly, the regulation is directed to the vulnerable and to preventing such harm being caused to them or by them to others by treating them as not having the capability for work-related activity and so putting them in the support group and exempting them from having to undergo a work-focused interview and being the subject of a requirement to undertake work-related activity.

88. If the regulation 35(2) risk materialises it is plainly serious and so Parliament must have intended that this safety net was applied before a work-focused interview took place with appropriately detailed scrutiny of the position of the individual claimant.

89. So, returning to the general approach approved and applied in *Charlton,* to fulfil the underlying purpose of regulation 35(2) and thus the need to assess the regulation 35(2) risk the decision-maker on its application has to provide himself with, or be provided with, sufficient information to enable him to properly assess whether the particular vulnerable claimant should be protected by the regulation 35(2) safety net.

90. To do that, it is necessary to make predictions about the consequences for the individual claimant if he is found not to have limited capability for work-related activity.

91. This reflects the general approach to fair and so properly informed decision making about the assessment of a risk that we have referred to earlier without reference to the authorities in this area.

92. As we have indicated, difficulty arises in cases where it is accepted that there would be a substantial risk to someone's health if the claimant were to be required to engage in some forms of work-related activity but not others. So it is helpful to address what the approach of the regulation 35(2) decision-maker should be in such cases, Whether [*sic*] there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity depends in such cases on taking a view on what work-related activity that particular claimant would or might be required to do.

93. It is clear that regulation 35(2) has to be considered and applied before the work-focused interview takes place. Yet the Secretary of State argues that because the question what any particular claimant could reasonably be required to do is not to be determined until the work-focused interview has taken place, what he would or might be required to do at that later stage can and should only be considered and taken into account by the regulation 35(2) decision-maker by reference to what any claimant might be required to do and thus he should not speculate or make assumptions about what the particular claimant would or might be required to do. .

94. In support of his approach the Secretary of State submits that it cannot be presumed that he or a provider will act unreasonably in requiring, under regulation 3 of the 2011 Regulations, a claimant to undertake work-related activity. We accept that, but it does not follow that at the regulation 35(2) stage it should be presumed that the work-related activity decision-maker would never make a decision that would trigger the regulation 35(2) risk. Were that to be presumed, all the regulation 35(2) decision-maker would have to consider is the impact of attending the work-focused interview. Like Upper Tribunal Judge White in *AK* we do not accept that – and, indeed, it was not submitted to us that – regulation 35(2) will only be engaged and satisfied by reference to being required to take part in and taking part in a work-focused interview.

95. In any event, it would be inconsistent with the pragmatic approach taken in *Charlton* to ignore the risk that an inappropriate decision that triggers the regulation 35(2) risk might be made following the work-focused interview. This is particularly so when the system and practice that the Secretary of State has devised for administering the legislation clearly fails to minimize the risk of a mistake being made in the decision on work-related activity, whether due to ignorance of material facts that have emerged in carrying out the work capability assessment or when making the regulation 35(2) decision or simply because a different view is taken of the risks involved.

96. It is one thing for the Secretary of State to presume when making a decision under regulation 35(2) that his decision-maker or a provider will take a similar view of the case when regulation 3 is being applied, particularly if such risk as there would be to a person's health if the claimant were to be required to engage in work-related activity was fairly obvious. Even so, the fact that he has not made provision for the evidence upon which the regulation 35(2) decision was made and its reasoning to be provided to the later decision-maker greatly increases the risk that he will not reach the same conclusion and so undermines the presumption.

97. It is another thing to expect the First-Tier Tribunal, having reversed a decision of the Secretary of State to the effect that a claimant does not even have limited capability for work, to presume that the Secretary of State or a provider will share its view of the case when regulation 3 comes to be applied. Particularly where the possible risk is to the claimant's mental health, the risk may not be obvious and, where the Secretary of State has failed to appreciate the risk following a work capability assessment, the fact that the risk is not obvious will have been well illustrated. The First-tier Tribunal will have applied a reasoning process based on evidence and experience and if asked will have provided a statement of reasons. So far as we are aware there is no procedure in place to ensure that the work-related activity decision-maker is provided with information about the evidence relied on by, and the reasoning of, the First-tier Tribunal or gets a copy of such a statement of reasons.

98. The risk of the regulation 35(2) risk materialising might be greatly reduced if a healthcare professional were required to give advice as to whether there was a substantial risk in relation to specific types of work-related activity, rather than work-related activity in general, and if this and the views of the regulation 35(2) decision-maker on it were shared with the person making the work-related activity decision under regulation 3 of the 2011 Regulations. (If there were then an appeal, it could perhaps be arranged that the First-tier Tribunal making a decision under regulation 35(2) would record on its decision notice findings (and perhaps brief reasons) as to any forms to work-related activity that he or she considered would give rise to a substantial risk to someone's health if the claimant were to engage in them and then for those findings could be passed to the person making the decision under regulation 3.)

99. The risk might be eliminated altogether if the practice was for a decision-maker making the decision under regulation 3 to make a decision in conformity with findings made by a decision-maker or the First-tier Tribunal when making a decision under regulation 35(2). (Section 17(2) of the Social Security Act 1998 carries the clear implication that a finding of fact embodied in a decision is binding for the purposes of another decision only if regulations so provide, so that it could only be guaranteed that a decision under regulation 3 would be made in conformity with a decision under regulation 35(2) (at least to the extent of not making a decision less favourable to a claimant) if the Secretary of State were to make that a matter of practice.) But it seems to us that such a practice would probably be inappropriate because of the possibility that information derived from a work-focused interview or subsequent contact with a claimant might suggest either that the findings lying behind the regulation 35(2) decision were based on a mistake or error or have simply ceased to be valid through a change of circumstances and it would be cumbersome to require the regulation 35(2) decision to be revised or superseded if a new decision would be to the same effect even though on different findings. (Of course, if the new information was such as to require it to be determined that regulation 35(2) was satisfied, then there should be a revision or supersession.)

100. As we have already mentioned, it is for the Secretary of State to decide how the legislation is to be administered but, because regulation 35(2) is concerned with assessing risk in the real world having regard to whether the administrative process creates or eliminates relevant risks, the way the legislation is administered has a considerable bearing on how that provision is to be applied.

101. In our view the absence of any system for ensuring that relevant information obtained, and findings made, in the course of carrying out a work capability assessment and applying regulation 35(2) and the reasoning behind the decision made on regulation 35(2) are made available to a person considering whether a requirement to engage in work-related activity should be imposed on the claimant effectively destroys the Secretary of State's argument that only generalised information about some types of work-related activity need be taken into account by the regulation 35(2) decision-maker when considering the possible consequences of a particular claimant being found not to have limited capability for work-related activity. The purpose underlying regulation 35(2) requires that those applying it make predictions about the consequences to the particular claimant of him being found not to have limited capability for work-related activity. In a few cases, the risks of an inappropriate requirement to engage in work-related activity being imposed will be too great to be ignored."

2. Mr Justice Charles President of the UT(AAC) and Nicholas Warren President of the FtT(GRC) and Judge of the Upper Tribunal Mark Rowland 15.9.2014

regulation 35 – information to be supplied to tribunal…

[2015] AACR 10 (unreported IM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013) held:

"102. The evidence that must be supplied to the First-tier Tribunal is determined by the factual issues that may arise. The Departmental decision-maker should have regard to the same factors as the First-tier Tribunal and so should often have obtained and considered the evidence that should be provided to the First-tier Tribunal. However, there are many cases such as the present where, on the Secretary of State's view of the facts, the claimant does not even have limited capability for work and therefore it is unnecessary for him to consider whether the claimant has limited capability for work-related activity. He argues that it would be disproportionate to require him to make a submission in respect of regulation 35(2) whenever there is an appeal against a decision that a claimant does not have limited capability for work even though, of course, the question whether the claimant has, or should be treated as having, limited capability for work will inevitably arise if the claimant is successful in his or her challenge to the original decision.

103. It is therefore useful to focus on what information is actually needed by the First-tier Tribunal in order to make a decision under regulation 35(2). It is also important to remember that the purpose of a response to an appeal in this sort of case, where a claimant is often unrepresented, is as much to tell the claimant what the potential issues are as to provide information to the First-tier Tribunal.

104. It will be apparent from what we have said above that, at least while the legislation is administered in the current fashion, the First-tier Tribunal needs to know not only what the least demanding types of work-related activity are but also what the most demanding types are in the area where the claimant lives. As Judge Jacobs pointed out in *AH*, that information can come only from the Secretary of State.

105. As indicated above, we accept the Secretary of State's submission that, on an appeal in which regulation 35(2) is in issue, he cannot be expected to anticipate exactly what work-related activity a particular claimant would in fact be required to do. This is axiomatic [*sic*] [*meaning: self-evident, unquestionable, undeniable*] [*My insert*]

106. But what the Secretary of State can and should provide is evidence of the types of work-related activity available in each area and by reference thereto what the particular claimant may be required to undertake and those which he considers it would be reasonable for the provider to require the claimant to undertake. The First-tier Tribunal would then be in a position to assess the relevant risks.

107. We understand that the types of work-related activity available may vary from provider to provider, but it should not be beyond the wit of the Department and providers to produce and maintain a list, perhaps for each of the regions into which the First-tier Tribunal is organised, of what is available in each area within the region. The relevant information could then be included in submissions in individual cases. The First-tier Tribunal would be able to assess the evidential force of such a submission.

108. We do not accept the Secretary of State's submission that it would be disproportionate to provide such evidence where there is an appeal against a decision to the effect that the claimant does not even have limited capability for work. As is acknowledged, if such an appeal is allowed, it will inevitably be necessary to consider whether the claimant has limited capability for work-related activity. We accept the Secretary of State's argument that the First-tier Tribunal could in principle either adjourn or effectively remit the case to the Secretary of State to determine the new issue (see R(IS)2/08). However, that would be an unnecessary complication in the overwhelming majority of cases, inevitably producing both delay and expense. The First-tier Tribunal ought to be enabled to deal fairly with the new issue straightaway. It usually does deal with that issue now. It will be aware of the Schedule 3 descriptors and regulation 35 and it can often rely on its own knowledge of work-related activity. However, its knowledge may be incomplete or out-of-date, as is alleged in the present case, and, anyway, it is unfair on claimants, particularly those who choose to have their cases determined on paper, for the First-tier Tribunal to address an issue about which the claimants will generally have been unaware and upon which they will have therefore not had an opportunity to comment. This can result in appeals to the Upper Tribunal being allowed even though a claimant's ultimate prospects of success may be fairly low.

109. In our view, it would not be difficult for the Secretary of State to make a submission explaining the law and to provide information about types of work-related activity. In practice, if the Secretary of State considers that a claimant does not have limited capability for work, he will also consider that the claimant does not have limited capability for work-related activity. In the submission it would generally be sufficient to refer only to Schedule 3 and regulation 35; it will not be necessary to explain why the Secretary of State does not consider those provisions to be satisfied because that will be implicit in his response to the main issue on the appeal. In relation to Schedule 3, it could be stated that none of the descriptors relating to the first 14 of the activities in Schedule 3 will be satisfied unless the claimant has scored 15 points under any of descriptors 1(a), 2(a), 3(a), 4(a), 5(a), 6(a), 7(a), 9(a), 11(a), 12(a), 13(a), 14(a), 16(a) and 17(a) in Schedule 2. It would then be necessary to set out only the descriptors relating to activities 15 and 16 together with regulation 35 and a list of the types of work-related activity available in the relevant area.

110. The issue under regulation 35(2) is not whether the claimant could carry out all forms of work-related activity or even whether he or she might inappropriately be sanctioned. Satisfaction of regulation 35(2) requires a substantial risk to health to be identified (in the sense of a risk that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case). Being unable to carry out an activity does not necessarily imply that there will be a substantial risk to anyone's health if the claimant is required to engage in the activity. Nor does the risk of being sanctioned. Therefore, it may be fairly obvious in most cases that the claimant does not have any realistic argument under regulation 35 and indeed, if made aware of the issues, the claimant may often accept that that is so. But where there turns out to be a serious argument in relation to regulation 35, the provision of the basic information about the more demanding types of work-related activity would enable the First-tier Tribunal to make the necessary predictions by reference to possible outcomes for the particular claimant.

111. In some cases the First-tier Tribunal may be able to conclude that the regulation 35(2) risk does not exist because it is sufficiently obvious that the claimant will not be required to do anything by the work-related activity decision-maker that will cause such a risk to materialise. That will certainly be so where the First-tier Tribunal is satisfied that none of the types of work-related activity available in the relevant area would give rise to a substantial risk to anyone's health if the claimant were required to undertake it.

112. However, we suspect that the present failure to pass on information to the work-related activity decision-maker will mean that in some other cases the First-tier Tribunal will be unable to make predictions with sufficient confidence to conclude that the regulation 35(2) risk does not exist and so will be entitled to decide that if the claimant engaging in any of the forms of work-related activity that might be imposed on a claimant in the relevant area would give rise to the regulation 35(2) risk the claimant must be treated as having limited capability for work-related activity.

113. The position may be slightly different where the Secretary of State accepts that the claimant does have limited capability for work for two reasons. First, the Secretary of State can be expected to make a more focused submission as to why regulation 35(2) does not apply given the accepted disablement of the claimant. Secondly, in at least some of those cases a work-focused interview will have been carried out and the provider may have considered whether the claimant should be required to carry out work-related activity before the appeal is heard by the First-tier Tribunal. Information about the outcome of such consideration of the claimant's case is likely to be relevant to the First-tier Tribunal and reduce the element of prediction required and so ought to be provided to the first-tier tribunal where possible. Thus, in *CMcC*, Judge Bano was able to take account of an employment adviser's abandonment of any meaningful form of work-related activity out of concern for the claimant's health as a reason for finding that regulation 35(2) should have been found to apply in her case. In other cases, the effect of evidence may be to show that the provider is well aware of the claimant's state of health and is unlikely to overlook risks. This suggests that the provision of information should be a two-way process. It should be remembered that s12(8)(b) of the Social Security Act 1998 applies to the application of such evidence and so it should only be taken into account so far as it is relevant to the position at the time of the decision of the Secretary of State."

risk analysis – range of work-related activity must be identified

CE/1002/2014 involved the case of a claimant who suffered with poor mental health. It was argued that the claimant should be treated as having limited capability for work-related activity on grounds that there would be a substantial risk to her health by being subjected to work-related activity. Before the First-tier Tribunal the claimant's representative argued that as part of any work-related activity the claimant could be expected to take part in the Work Programme and this would give rise to a substantial risk. However, despite the First-tier Tribunal's statement of reasons being of a "very high quality" the First-tier Tribunal failed to deal fully with this point. In dismissing the claimant's appeal the First-tier Tribunal decided that the claimant could cope with work-related activity in the form of telephone interviews, co-operating in the creation of action plans and "potentially other activity" if requirements to take part in those activities were "reasonably" imposed.

In granting permission to appeal to the Upper Tribunal, the Upper Tribunal Judge held that the First-tier Tribunal may have erred in law "by failing to explain why it rejected the representative's contention that the claimant would be expected to take part in the Work Programme". The Secretary of State's representative responded by arguing that upon reference to NS v Secretary of State of Work and Pensions ([2014] UKUT 0149 (AAC) – CE/2207/2012), a decision of Upper Tribunal Judge Edward Jacobs, the First-tier Tribunal was not required to consider the specific details of the Work Programme. In the view of the Secretary of State's representative all that was required was whether there would be a substantial risk to health should the claimant be found capable of work-related activity.

The Upper Tribunal Judge held:

"12. *NS* held that "the range and type of work-related activity which a claimant is capable of performing and might be expected to undertake" needed to be identified and the regulation 35(2) risk analysis performed in relation to the activity so identified. There is nothing in *NS* that absolves a Tribunal of its obligation to deal with the arguments put forward by the parties. If a party argues that a certain range of work-related activity would be required, that needs to be deal (*sic*) with. *NS* may have affected the precision with which the Tribunal's conclusions need to be expressed but it did not affect the long-standing duty on a Tribunal to deal with the arguments put to it."

The Upper Tribunal Judge (paragraph 14) held that the Secretary of State's representative was really arguing that there was only one conclusion that a rational First-tier Tribunal could have arrived at in this case – that regulation 35(2) did not apply. The Upper Tribunal Judge held that they did not agree with that view. In the view of the Upper Tribunal Judge, the answer to the question turned on the range of work-related activity the claimant might be expected to perform and in this case the answer to that was not sufficiently clear.

In the view of the Upper Tribunal Judge (paragraph 14), the finding on work-related activity by the First-tier Tribunal were "far apart" – compare attending a course on CV writing to a attending a course on IT skills – in terms of the potential for imposing stress. This led them to conclude that the finding was not based on an informed understanding of the work-related activity that the claimant might have been expected to undertake.

2. Judge of the Upper Tribunal E Mitchell 11.12.2014

work-related activity – will take into account mental health?

GB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0200 (AAC) – CE/4153/2013 involved an appeal where the First-tier Tribunal, in relation to regulation 29(2)(b), held that the claimant had a serious mental health condition which resulted in her having difficulty engaging in social contact with people she was not familiar with and whilst it was unable to award more than 6 points on the evidence under Schedule 2, it was – satisfied by the information from her General Practitioner that she would find it extremely stressful to attend the Job Centre and to carry out the requirements of a jobseeker's agreement. On this basis the First-tier Tribunal found that she would be unlikely to cope if she was required to look for work and that there would be a substantial risk of her serious mental health problems becoming even worse. However, in relation to regulation 35(2), it held that the DWP would act reasonably when requesting her to take part in work-related activity and would take into account her mental health when deciding what activity it was appropriate to require her to undertake. The First-tier Tribunal said that it saw work-related activity as being activity which is intended to support a person in becoming well enough to work and which should be of benefit to them.

The Upper Tribunal Judge held:

"6. The difficulty highlighted in *IM* [*meaning: the Three-Judge panel decision in IM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013 reported as [2015] AACR 10*] is that, because the results of work capability assessments are not routinely passed to providers who determine what work-related activity a claimant should be required to do, there may a risk of a provider requiring a person with, say, mental health problems to perform unsuitable work-related activity, due to the provider's ignorance of the those problems or their extent. This difficulty is liable to be exacerbated if, as in both *IM* and the present case, the claimant is, or is likely to be, unable to engage in social contact with the provider and so explain her difficulties herself. [*My insert*]

7. Thus, in the present case, the First-tier Tribunal's finding that "the Respondent will … take into account the Appellant's mental health" appears unwarranted or, at best, not supported by adequate reasoning. If there was a significant risk of the claimant being required to engage in work-related activity that would be as stressful as being required "to attend a Job Centre and to carry out the requirements of a jobseeker's agreement", which the First-tier Tribunal had found would give rise to a substantial risk to her mental health, the First-tier Tribunal would have been required to find that regulation 35(2) was satisfied in the claimant's case.

risk from work-related activity – what if not possible to impose WRA?

KB v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0179 (AAC) – CE/1767/2013 examined the question of whether it was permissible to apply regulation 35 in the case of a claimant who is in receipt of (including a "name only" award of) Carer's Allowance seeing as they may not be subjected to undertake work-related activity.

Regulation 3 of the Employment and Support Allowance (Work-Related Activity) Regulations 2011:

"(1) The Secretary of State may require a person who satisfies the requirements in paragraph (2) to undertake work-related activity as a condition of continuing to be entitled to the full amount of employment and support allowance payable to that person.

(2) The requirements referred to in paragraph (1) are that the person:

(a) is required to take part in, or has taken part in, one or more work-focused interviews pursuant to regulation 54 of the ESA Regulations;

(b) is not a lone parent who is responsible for and a member of the same household as a child under the age of 5;

(c) is not entitled to a carer's allowance; and

(d) is not entitled to a carer premium under paragraph 8 of Schedule 4 to the ESA Regulations.

(3) A requirement to undertake work-related activity ceases to have effect if the person becomes a member of the support group.

(4) A requirement imposed under paragraph (1):

(a) must be reasonable in the view of the Secretary of State, having regard to the person's circumstances; and

(b) may not require the person to:

(i) apply for a job or undertake work, whether as an employee or otherwise; or

(ii) undergo medical treatment.

(5) A person who is a lone parent and in any week is responsible for and a member of the same household as a child under the age of 13, may only be required to undertake work-related activity under paragraph (1) during the child's normal school hours."

The Upper Tribunal Judge held:

"11. Regulation 35 is, in general, about the assessment of risk to an individual, for the reasons explained by the panel in *IM* [meaning: *the Three-Judge panel decision in IM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013 reported as [2015] AACR 10*]. For that reason, the decision required evidence to be provided of the sort of work-related activity that was available in a person's area at the relevant time and in which it was thought s/he could engage without risk to health.

12. Regulation 35, though, is concerned with the calibration of a person's disability for purposes such as those referred to in [10], by reference to the possible consequences if work-related activity were to be imposed. That that is the nature and purpose of reg 35 is implicit in the comments of the panel at [85] of *IM* that:

> "We agree with Judge Jacobs in *NS v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 149 (AAC) and Upper Tribunal Judge Bano in *CMcC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 176 (AAC) that, where there is no work-related activity in which the claimant could engage without a substantial risk to someone's health, the fact that the Secretary of State could not reasonably require the claimant to engage in work-related activity under regulation 3 of the 2011 [Regulations] does not mean that the condition of regulation 35(2) is not met. That would undermine the purpose of regulation 35(2)."

13. From that it is clear that the legal impossibility of imposing work-related activity does not prevent consideration for the purposes of reg 35(2) of what risks would ensue if a requirement for work-related activity nonetheless hypothetically were to be imposed. In the cases cited in *IM,* the legal impossibility arose because of reg 3(4)(b). I see no reason to differentiate the situation of those on whom it is not possible to impose work-related activity because they are entitled to carer's allowance, nor indeed because they fall within the categories in sub-paragraphs (b) or (d) of paragraph (2) of that regulation and, as noted, the Secretary of State has not attempted to persuade me that there is. It follows that while evidence in accordance with *IM* still needs to be provided, what is required of the tribunal to which this case is remitted is to conduct a thought experiment as to what the consequences for this claimant would be if such work-related activity were to be required of her (even though it legally cannot be)."

2. Judge of the Upper Tribunal Michael Mark 23.8.2013

assessment of risk – to any person not just claimant…

MH v Secretary of State for Work and Pensions (ESA) – [2015] UKUT 0142 (AAC) – CSE/385/2014 held:

"10. I consider the tribunal erred in law in its treatment of regulation 35 as it proceeded to assess the question of risk based on its own knowledge of the type of the work related activity the claimant would be expected to do and that such knowledge was not an adequate substitute for the evidence envisaged to be provided by the Secretary of State by *IM* [*meaning: the Three-Judge panel decision in IM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0412 (AAC) – CE/3453/2013 reported as [2015] AACR 10*]. In addition the tribunal's assessment of risk was restricted to that of the claimant herself. However the regulation refers to substantial risk to "any person". Such errors of law in the circumstances of this appeal are not material. As I have explained above the tribunal did not need to go on to consider the question of risk in the context of work related activities as the claimant had not established that any risk arose as a consequence of her debilitating condition. The claimant therefore had no realistic argument under regulation 35. To reiterate the comments made in paragraph 110 of *IM* it is only where it turns out that there is a serious argument in relation to regulation 35 that the provision of information from the Secretary of State need (*sic*) be considered."

2. Judge of the Upper Tribunal J T Lunney 9.12.2014

regulation 35 – risk to health of child

KD v Secretary of State (Work and Pensions) (ESA) – [2014] UKUT 0107 (AAC) – CE/2073/2013 involved the case of claimant whose physical disability was exacerbated by the depression for which she was receiving treatment to the extent that her ability to tolerate certain behaviour in others was very much reduced. That lack of tolerance had resulted in "erratic and aggressive" behaviour towards her son, who was aged about 2 at the time. It was decided that she had 'limited capability for work' but not 'limited capability for work-related activity'. At the time the appellant was said by the Upper Tribunal Judge to be "living in circumstances which were difficult".

She lived together with her son and her own mother and as the Upper Tribunal Judge acknowledged, whilst there was some advantage to the arrangement in that her mother could assist with childcare during the part of the day when she was not at work, the overall situation was not an easy one and it was likely to have exacerbated the claimant's feelings of intolerance.

The Upper Tribunal Judge (at paragraph 23) held that they could "take the behaviour of the appellant towards her son into account in relation to answering the question whether there was likely to be a substantial risk to the physical or mental health of any person if the appellant were found not to have limited capability for work related activities." In doing so they held that regulation 35(2)(b) applied to the claimant for the following reasons:

"33. The appellant's evidence as to her difficulties and in particular in relation to her son has been highly consistent. I find it unlikely that such evidence, which is self-critical of her as a mother, would be made up.

34. The appellant's difficulties relate not only to her problems with her son, but to her problems with others. Her intolerance of what she perceives to be the failings of others is a feature. This would impact adversely on others if she was called to engage in work related activities where she came into contact with other people, which is likely.

35. There is likely to be an impact upon her son, because stress and anxiety affects [*sic*] her ability to tolerate the normal difficulties that a young child presents, and her reaction is both erratic and aggressive. In order to thrive young children need stability in approach. Whilst occasional instability is unlikely to result in substantial risk, more sustained behaviour of that type is. There was a substantial risk at the material time that if required to engage in work-related activities her stresses would increase, her tolerance decrease, and that her son's health would suffer.

36. It was overwhelmingly likely that her own recovery from the anxiety and depression with which she is beset would be impeded or actively harmed by the work-related activity requirement, however apparently benign.

37. I do not accept that because of [*sic*] the legislation provides that work-related activity be reasonable, that it can not [*sic*] therefore cause substantial risk to the health of a person. To accept that premise is to render both regulation 35(2) and the sanction regime which deals with failure to engage in work-related activities without good cause nugatory [*meaning: of no value or importance*]. Whilst it is not, of course, the case that the Secretary of State will consciously impose requirements which are unlawful, there it [*sic*] may be disagreement between an appellant and a work adviser resulting in a sanction decision; that may be resolved by the appeal process in favour of the appellant on the basis that the work-related activity directed was not, in the circumstances, reasonable. The possibility of that outcome militates [*meaning: cancels out*] against the argument that the Secretary of State is unable to impose a work-related activity requirement which is unreasonable." [*My inserts*].

1. Judge of the Upper Tribunal PA Gray 6.3.2014

must assess both risk to the claimant and the limits on the work able to undertake – mental health

IJ v Secretary of State for Work and Pensions (IB) – [2010] UKUT 408 (AAC) – CIB/1219/2010 concerned a case where the claimant suffered "anxiety and depression, alcohol dependency, social phobia and asthma". Having successfully navigated an earlier appeal against the decision of the DWP in March 2007 that he could not meet the requirement of the Personal Capability Assessment he was again subjected to a Personal Capability Assessment in December 2008.

On this occasion he was again examined by a Healthcare Professional who found that he scored only 5 points in respect of the mental descriptors, and confirmed that in her opinion there would not be a substantial risk to anybody's physical or mental health if he were to be found capable of work. The claimant appealed against the DWP decision that he was not incapable of work.

At the appeal hearing the claimant was represented and gave oral evidence. The tribunal awarded him an 8 points score under the mental descriptors. In doing so it held that there would not be a substantial risk to his (or any other person's) mental or physical health.

The Upper Tribunal Judge held that that it appeared to him that the tribunal was in error of law in concluding that the claimant was capable of work without addressing the question of whether regulation 27(b) applied. In his view the correct approach to that test was laid down by the Court of Appeal in Charlton v Secretary of State.

The Upper Tribunal Judge held:

"9. There was,… , no investigation by the tribunal about the claimant's background to form a view on the range or types of work for which he was both suited as a matter of training or aptitude and which his disabilities did not render him incapable of performing. As a result there was no decision as to whether, within that range there was work he could do without the degree of risk to health envisaged by regulation 27(b). In making that assessment the tribunal would have to take into account both the risk to the claimant as a result of his mental health problems and also the limits on the work he could do because of them, including any alcohol dependency he was found to have.

10. Further, the test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker's allowance. That would involve his attending interviews, and going through all the other steps that would be needed to obtain and keep jobseeker's allowance. In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990's, is unlikely to find work quickly and would very possibly never find it. His GP's assessment that it is inconceivable that he would ever be able to earn his living may be right. The tribunal would then have to determine how this change from his being in receipt of incapacity benefit would affect the claimant's mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age. These factors were not considered by the tribunal, and indeed they did not elicit the information necessary to enable them to be considered, such as whether he had in fact applied for jobseeker's allowance and if not, how he was coping or would cope.

11. It does not appear to me that the ability of this claimant to cope, possibly with considerable difficulty, with his present lifestyle, leads to the conclusion that he would cope with all the additional difficulties and changes required as a result of being found capable of work.

12. I therefore conclude that the tribunal was in error of law, and its decision must be set aside."

1. Judge of the Upper Tribunal Michael Mark 5.11.2010

substantial risk

CIB/0026/2004 held:

"30. The application of regulation 27(b) is triggered by two factors. The first trigger is that there 'would be a substantial risk' to the health of any person. The second trigger is that the risk must arise from the claimant being 'found capable of work'. Both of these triggers appear to give rise to difficulties of interpretation.

31. The person whose health is at risk need not be the claimant. It might be another person working with the claimant or even a customer or member of the public. But in the context of this case, it is likely that only the claimant would be affected.

32. For the first trigger, the claimant has to show that there 'would' be a substantial risk. That raises the issue: in the context of what work might the risk arise? It cannot be that the risk must arise regardless of what work the claimant did. That would render it redundant, because there is almost always going to be some work that a claimant could do without risk. Nor can it be sufficient that the risk would arise only in particular types of work that the claimant would never otherwise do. That would makes its scope too wide, because there will often be types of work that a particular claimant cannot do without risk.

33. For the second trigger, the risk must arise from the claimant being 'found capable of work'. The provision does not say that the risk must arise from the claimant working. But it surely makes little or no sense to limit it to the rare cases where the decision on capacity for work would itself cause the risk to the claimant's health.

34. It is possible to make sense of the apparent difficulties with these triggers by reading them together. The emphasis in the second trigger on the claimant being found capable of work puts the emphasis on the consequence of that decision. The capacity for work decision will in practice usually require the claimant to make a claim for a jobseeker's allowance. In order to qualify for that benefit, the claimant must be subject to a jobseeker's agreement. That agreement will set out the work that the claimant must seek in order to retain entitlement to the allowance. That work is defined taking into account the claimant's health, qualifications, skills and experience.

35. Set in that context, the trigger factors must be interpreted as follows. The risk must be assessed in relation to the type of work for which the claimant would otherwise be required to be available. That retains the emphasis on the effect of the claimant being found capable of work. It confines within a sensible scope the range of work that must be taken into account when assessing the risk to the claimant's health. And it makes a sensible relationship between the conditions governing entitlement to benefit for those incapable for work and for those seeking work. It prevents claimants relying on regulation 27(b) when there is work that they could do without risk to their health. But it allows claimants to rely on the provision when the work they would otherwise be required to seek would put their health, or someone else's, at substantial risk.

36. This does not mean a return to the previous law on invalidity benefit, under which capacity for work was determined by reference to specific job descriptions suggested by the adjudication officer. It involves a wider consideration than that. It involves a consideration of the risk to health involved in the general type of work that the claimant is otherwise qualified, experienced or skilled to undertake."

See also Charlton v Secretary of State for Work and Pensions (Court of Appeal).

1. Commissioner Edward Jacobs 11.3.2004

regulation 29 – when should it be considered (ME/chronic fatigue syndrome)?

SP v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0010 (AAC) – CE/1650/2013 held:

"10. The papers appeared to raise the issue of regulation 29. I said erroneously in my decision as to permission to appeal that the tribunal had not indicated that they considered the applicability of regulation 29. In fact it was considered, albeit briefly, in paragraph 28. The regulation was referred to, with the comment that *"the evidence did not support such a finding. There was no evidence that Ms Proctor was suffering from a life-threatening disease or that there would be a substantial risk to must* [*sic*] *Proctor or others due to a specific disease or physical or mental disablement that Ms Proctor was suffering from."* That is simply to repeat the words of the regulation, and does not explain either the tribunal's approach or its reasons for that conclusion.

11. The Secretary of State considered the regulation 29 point in his submission. It was conceded that the statement of reasons dealt inadequately with the issue, but the submission states that the healthcare professional considered that there was no substantial risk. As to that the evidence is on page 49. The comment by the healthcare professional is no more than a restatement of the statutory test. That is the criticism which I make of the tribunal's treatment. The Secretary of State's submission then puts forward another factual analysis of the evidence, and the point seems to be being made that because there was evidence that might have led the FTT to the conclusion that regulation 29 was not applicable their failure adequately to deal with the issue was immaterial. It is not for me to say what the tribunal could or should have made of the evidence on that point; since the tribunal had considered regulation 29 the appellant was entitled to their view on the matter, and she had the right to know why it was that regulation 29 did not apply to her. As I said at paragraph 8 of *CE/3043/2013*

> "As to regulation 29 it is not necessary for a FTT to consider regulation 29 as a matter of routine. It is not always disclosed upon the papers or by the oral evidence as being of potential applicability, but where the FTT considers it, and the judge says that they did in this case, it must be properly dealt with bearing in mind the criteria set out in the case of Charlton -v- SSWP [2009]EWCA Civ 42 which are essentially that the tribunal must establish what sort of work the appellant would be expected to do, and assess the level of risk in relation to the likely workplace and the journey to and from work. "

12. If there is nothing at all to raise that regulation in the papers it may be that any error of law in dealing with it is not, in those circumstances, material. That is not, however, the position in this case. There is mention in the full statement of the appellant's being investigated for ME/chronic fatigue syndrome. Her letter of appeal speaks of the extreme variability of her condition, and problems with anxiety, stamina and fatigue. It must be remembered that the FTT found her evidence to be credible, going as far as to say that she gave a *"clear account of her condition and how it affected her."* These matters taken together would seem to have required a regulation 29 consideration."

The Upper Tribunal Judge held that the inadequacy of the regulation 29 consideration amounted to a material error of law.

1. Judge of the Upper Tribunal Gray 3.1.2014

regulation 29 – risk as a result of being found capable of work

GS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0016 (AAC) – CE/2304/2013 held:

"14. In *IJ v SSWP*, [2010] UKUT 408 (AAC), I considered the equivalent provision in regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995 (the Incapacity Benefit Regulations), where the relevant question was whether by reason of some disease or disablement "there would be a substantial risk to the mental or physical health of any person if he were found capable of work." In this respect I stated at paragraph 10:

> "the test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker's allowance.

That would involve his attending interviews, and going through all the other steps that would be needed to obtain and keep jobseeker's allowance. In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990's [*sic*], is unlikely to find work quickly and would very possibly never find it. His GP's assessment that it is inconceivable that he would ever be able to earn his living may be right. The tribunal would then have to determine how this change from his being in receipt of incapacity benefit would affect the claimant's mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age.

These factors were not considered by the tribunal, and indeed they did not elicit the information necessary to enable them to be considered, such as whether he had in fact applied for jobseeker's allowance and if not, how he was coping or would cope."

15. That approach was applied to regulation 29 by Judge Parker in *CF v SSWP* [2012] UKUT 408, and is in my judgment the proper approach to regulation 29, following the wording of the regulation. It is also supported by the decision of Mrs. Commissioner Parker, as she then was, in CSIB/719/2006 at paragraph 11 when in considering the risk she said that it "must arise from the broad results of a claimant being found fit for work and is not confined to the risks arising directly from the tasks with a claimant's job description."

1. Judge of the Upper Tribunal Michael Mark 15.1.2014

regulation 29 – what is a substantial risk?

GS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0016 (AAC) – CE/2304/2013 held:

"22. … The question of what was a substantial risk was considered in cases relating to regulation 27 of the Incapacity Benefit Regulations. As pointed out by Mr. Commissioner Rowland (as he then was) in *CIB/3519/2002*, "a risk may be substantial if the harm would be serious, even though it was unlikely to occur and conversely, may not be 'substantial' if the harm would be insignificant, even though the likelihood of some such harm is great." I note that in *CIB/2767/2004*, Mrs. Commissioner Fellner, while describing these observations as probably right, drew attention to the context of regulation 27 which, like regulation 29 of the 2008 Regulations, was headed exceptional circumstances and was also concerned with life-threatening diseases. In *CIB/1064/2006*, Deputy Commissioner Ovey, as she then was, indicated that to be substantial the risk did not have to be life-threatening but that regard had to be had "to both likelihood of occurrence and degree of harm."

1. Judge of the Upper Tribunal Michael Mark 15.1.2014

regulation 29 – substantial risk – loss of stability (Secretary of State should refrain from requirement for claimant to attend future medical examinations)

GS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0016 (AAC) – CE/2304/2013 concerned the case of a claimant who had suffered from Bipolar Affective Disorder (BAD) since 1999. It examined the application of regulation 29(2)(b).

The Upper Tribunal Judge held:

"23. It appears to me that on any basis there was a substantial risk to the health of the claimant if she was found not to have limited capability for work. The risk was the loss of the stability she had attained over the previous 3 years with the real possibility of a further breakdown leading to her admittance to hospital as had occurred twice in 2009. The risk was evidenced by the fact that her mental health had deteriorated significantly following the decision, with no other explanation being suggested for that deterioration. It was a deterioration which had led to her needing both counselling and more significantly the intervention of the community psychiatric nurse. These problems were still ongoing at the date of the tribunal hearing and indeed the counsellor had asked if the hearing was really necessary because of the stress and anxiety it was causing the claimant. While tribunal hearings inevitably cause stress and anxiety to most claimants, they do not all require counselling and the assistance of a community psychiatric nurse. That risk does in my judgment constitute a substantial risk to the claimant's health. The harm if that were to occur would be significant. Indeed even the symptoms which emerged during the period between the date of the decision and the tribunal hearing cannot properly be described as insignificant.

24. On the occasion of the tribunal hearing the claimant coped, or appeared to cope, well and answered all questions without difficulty and prompting, as the tribunal found. That does not detract from the other evidence. A person with BAD is not manic or depressive all the time and can conceal depressive symptoms if required for a short period."

In finding that regulation 29(2)(b) and regulation 35(2)(b) applied the Upper Tribunal Judge held "In [*sic*] would also observe that I would discourage the Secretary of State from continuing to require this lady to attend further examinations by approved disability analysts which have no real prospect of enabling a decision maker to form any sensible view of the state of her BAD or of the potential for a worsening in her condition if she is found not to have limited capability for work or work related activities".

1. Judge of the Upper Tribunal Michael Mark 15.1.2014

range of work…

RU v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0077 (AAC) – CE/2286/2013 held:

"8. I can understand that the fit note may have been of little assistance in relation to the descriptors, but the tribunal in my view needed to consider what the very issue of the certificate implied about the impact of the conditions, taken as a whole, on the claimant's ability to work. The tribunal was required by *Charlton* to determine the range or type of work the claimant could do without the sort of risk which would be caught by regulation 29. It did not do so and that was an error of law.

9. It is clear from her work history, language difficulties and other factors that the claimant does not enjoy every advantage on the labour market, so it is not self-evident that there is such a type. And if, as seems likely, the most promising line of work is some sort of light manual occupation, such as the supermarket work she had previously done, then the tribunal needed to make findings as to her capability of doing it without significant risk to her health. We are told that she cannot use her right hand. It is likely to be relevant to anyone doing a light manual job whether (if such is the case) if they are unable to use one hand, it is their dominant hand or not. Taking a practical approach, then, there were insufficient findings to support the most likely answer to the question that the tribunal might have given."

1. Judge of the Upper Tribunal C G Ward 14.2.2014

regulation 29(2)(b) – risk to claimant not benefit to claimant (and timeline)

CH v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0011 (AAC) – CE/3627/2013 held:

"6. The tribunal made a number of errors of law in the course of its short reasons on regulation 29.

7. First, the tribunal failed to deal with the case put by the CAB [*Citizens Advice Bureau*]. That case was based on the risk to the claimant's physical health and the supporting medical evidence related to his physical condition. The tribunal should have given reasons to show how it dealt with the case put to it and the evidence on which it relied. [*My insert*]

8. Second, the tribunal had no evidence on the claimant's mental state. The CAB had not argued that there was a risk to his mental health. Despite this, the tribunal made a finding on the value of work to the claimant. It did so without the benefit of any evidence on the therapeutic value of work and after only a brief acquaintance in a judicial setting. It was not appropriate in those circumstances for the tribunal to take upon itself the task of assessing what was ultimately a medical judgment on treatment for a condition that the claimant's own GP [*General Practitioner*] had not identified. [*My insert*]

9. Third and most fundamentally, the tribunal failed to understand the nature of regulation 29(2)(b) and the timescale within which it had to be applied.

10. As to the nature of the provision, it is concerned with risk, not benefit. The tribunal should have investigated and considered what risk, if any, would be involved in finding the claimant to be fit for work. Any benefit, assuming that it could properly be proved, might be relevant as evidence on risk or the lack of it, but that is all. The issue is risk. If a substantial risk is established, the provision applies. And it applies even if it is accompanied by some chance of improvement in the claimant's condition. It is not permissible to ignore that risk or to decide that it is a price worth paying for that eventual benefit.

11. As to the timescale, regulation 29(2)(b) refers to the claimant being *found* not to have limited capability for work. That occurs at the time of the Secretary of State's decision. That decision has to look to the future in the sense that it is concerned with the effect of the finding and the decision of the Court of Appeal in *Charlton v Secretary of State for Work and Pensions* (reported as *R(IB)2/09*) widened the scope of the enquiry to take account of how the claimant would function in work, which requires the tribunal to decide on the risk that would accompany a return to work.

12. Although the decision looks to the future, it has to made as at the time of the Secretary of State's decision. This is the effect of section 8(2) of the Social Security Act 1998, which provides that the claim does not subsist beyond the time when it is decided.* This is reinforced by section 12(8)(a) of that Act, which provides that a tribunal may not take account of circumstances not obtaining at the time of the decision.

* The claimant had not made a claim in this case, but regulation 16(3) of the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No 2) Regulations 2010 (SI No 1907) provides that, for the purposes of section 8, 'the conversion decision is to be treated as if it were a decision as to a person's entitlement to an employment and support allowance which had been made on a claim.'

13. The fact that regulation 29(2)(b) has to be applied as at the time of the Secretary of State's decision imposes a practical limit on the scope of the factors that a tribunal may properly take into account. I am not going to try to define precisely what that scope is. It will depend on the evidence available and the circumstances of the case. But whatever the scope, the ultimate or longer-term benefit that a claimant might derive from work is beyond it. Leaving aside the evidentiary difficulties of proving what benefits might accrue in the longer term, the tribunal should not take account of such remote matters. It should concern itself with the more immediate effects of finding that the claimant was capable of work."

See also CS v The Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0550 (AAC) – CE/2291/2014 which supports the findings of this decision.

1. Judge of the Upper Tribunal Edward Jacobs 13.1.2014

regulation 29(2)(b) – getting to work and taking medication (non-compliant)

JM v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0022 (AAC) – CE/1537/2013 concerned the case of a claimant who suffered from paranoid psychosis which had led to him being in receipt of Employment and Support Allowance. The Upper Tribunal Judge found him to have 'limited capability for work' or 'limited capability for work-related activity'. The Upper Tribunal Judge therefore held that what they had to say in relation to the approach of the First-tier Tribunal to the "subsidiary issue" of regulation 29 was "obiter" [*meaning: made or said in passing*]. Nonetheless, the Upper Tribunal Judge went on to provide the following comment on the issue of assessing whether the appellant had limited capability for work under regulation 29(2)(b) noting that the First-tier Tribunal in this case had failed to fully consider the criteria set out in the case of *Charlton v Secretary of State for Work and Pensions (Court of Appeal)* in relation to difficulties both at work and getting to work.

The Upper Tribunal Judge held:

"27. The particular and somewhat unusual issue which arose in this case was in relation to the journey to and from work. Where the tribunal has found that someone goes to some significant lengths to avoid people on public transport there should there [*sic*] be specific consideration of how they might get to work, and such considerations would involve looking at the practicalities of the work they had decided that the appellant might perform being available within the appellant's locality, that is reasonably accessible by bicycle. If it was not there would need to be specific findings made as to whether the journey on public transport might constitute a substantial risk to the physical or mental health of any person, given the appellants [*sic*] accepted difficulties dealing with random members of the public.

28. In addition to this there was what appeared to be a finding at paragraph 23 that the appellant was non-compliant with his medication; although the sentence does not directly correlate to the regulation 29 issue it is in the paragraph that discusses that regulation. If the FTT was saying that compliance with medication would ameliorate [*meaning: make something better*] the risk, if any, to the health of the appellant or others there should have been a finding as to whether the non-compliance was an aspect of the appellant's mental health condition or whether it was something within his control, the question being whether he was choosing not to comply with his regime of medication.

29. Since this decision there has been a change in regulation 29, and this is raised in the submission of the Secretary of State. From 28 January 2013 the relevant parts of the regulation read:

> "(2)Subject to paragraph 3 this paragraph applies if…
>
> (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person is the claimant was found not to have limited capability for work.
>
> (3) paragraph (2)(b) does not apply where the risk could be reduced why [*sic*] a significant amount by –
>
> (a) reasonable adjustments being made in the claimant's workplace; or
>
> (b) the claimant taking medication to manage the claimant's conditions where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant."

30. It seems to me that, although I do not have to decide this issue for a decision in this case which was prior to that amendment, subparagraph (b) makes little difference, because if a condition was resolved by taking medication to the extent that there was not substantial risk, whether pre or post the amendment, the non-functional descriptor would not apply; if a condition may be resolved or alleviated to the extent that risk was reduced to below substantial risk by medication which was not taken regulation 29 (2) (b) would not apply where the non-compliance was through election, but may where the condition itself generated the non-compliance. This issue may, but will by no means always be, a problem for those with mental health conditions irrespective of whether the consideration is pre or post the amended version of regulation 29."

1. Judge of the Upper Tribunal Gray 20.1.2014

scope of regulation 35(2) – evidence required

AP v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0035 (AAC) – CE/3144/2013 held:

"23. In order to consider whether, by reason of any disease or bodily or [*sic*] there would be a substantial risk to the mental or physical health of the claimant if she had been found in February 2012 not to have limited capability for work-related activity, it is necessary to consider the effect on her of that finding had it been made. This necessarily involves consideration of what would have been expected to happen in that event.

24. That is a matter as to which the Secretary of State ought to have provided some evidence. The scope of the evidence required must depend on the facts of the case. In some cases, it will be apparent that there is no such risk and no point is taken as to it. Where a claimant has mental health problems and there is clearly an issue as to the risk for the tribunal to consider if it accepts her evidence, then in my judgment the Secretary of State has a duty to the tribunal under regulation 2(4) of the Tribunal Procedure (First-tier Tribunal) (SEC) Regulations 2008 to provide evidence to the tribunal as to what steps would have been taken at the time and subsequently if the decision of the decision maker had been that the claimant qualified for ESA but did not have limited capability for work-related activity.

25. I appreciate that ahead of the decision of the tribunal, at least where the original decision was, as here, that the claimant did not have limited capability for work, the Secretary of State could not know exactly what the tribunal might find. Nevertheless, the psychotherapist's report was sent to the tribunal by letter of 26 October 2012 and was presumably copied to the decision maker shortly thereafter, and many months before the hearing. No attempt was made to reply to it or to provide any evidence in relation to regulation 35(2). In particular, there was no attempt to provide any evidence as to the steps that the Secretary of State considered would have been appropriate to deal with the claimant's perceived need for coping skills and support networks or as to the quality and qualifications of the personnel who would be dealing with her. Nor was any indication given whether she would have been dealt with throughout by one person or, if not, how many people would have been involved in contact with her, or in what circumstances and where that would have happened following a decision in February 2012.

26. There is no automatic requirement that a claimant who is found not to have limited capability for work-related activity should attend a work-focused interview and then undertake work-related activities of any kind. It is, of course, possible that the Secretary of State, or those acting for him, could have decided that, on the basis of the evidence, it was not appropriate, if the claimant was found to have limited capability for work to require the claimant to attend any work-focused interview or to become engaged in any work-related activity until there was further expert mental health evidence that that was appropriate. That is a matter as to which the Secretary of State could have adduced evidence. It is also possible that as at February 2012, no such discretion was ever exercised and there was a policy of immediately summoning claimants for such interviews followed by a ritual of work-related activities which did not take adequate account of their mental health problems.

27. In *AH v SSWP*, [2013] UKUT 118 (AAC), Judge Jacobs held that, except in a case where only general evidence would be enough, the tribunal needed specific evidence of the type of activity that the claimant might be expected to undertake. In *ML v SSWP*, [2013] UKUT 174, he observed at paragraph 15 that:

> "Despite having dealt with numerous cases involving the support group, I still have no idea of what work-related activities involves beyond the general formulaic statements such as those I have quoted from the Secretary of State's argument. I accept that it is not possible to say in advance what precisely would be expected of any particular claimant. However, it must be possible to give a sufficient indication of what is involved in order to allow a claimant to provide evidence and argument, and to allow a tribunal to make a decision."

28. These decisions of Judge Jacobs were given in March and April 2013, before the hearing under appeal. Yet in the present case, not even general formulaic statements have been provided. Even in *CE/3468/2012*, upon which the Secretary of State now relies, Judge White stated that there must be some identification of the type of work-related activity which the claimant could safely undertake, and that that may be no more than an initial consultation over the phone, although, as I pointed out in *JS v SSWP*, [[2013] [*sic*] UKUT 635 (AAC), the initial work-focused interview is not a work-related activity.

29. I also note that while the Secretary of State has sought to rely on Judge White's decision and on another decision which follows it, he has failed to draw attention to the decision of Judge Gray in *MT v SSWP*, [2013] UKUT 545, which expressly disagrees with the decision of Judge White, for what is to me the very good reason that the work-related activity which the claimant could safely engage in may not be the same as the work-related activity which he or she would have been required to engage in if found not to have limited capability for work-related activity. The ability of an employee at a jobcentre accurately to assess at what would probably be a very short interview what is right for a claimant with serious mental health problems must also be open to question. In assessing the effect of an adverse finding the tribunal must take into account not some theoretical possibility but the likely result based on evidence of what would happen or have happened at the relevant time.

30. Judge Gray also points out that the tribunal must look at the position as it was at the date of the decision and at the work-related activities which this claimant might have been required to undertake following a decision to that effect. That must plainly be right. The tribunal cannot be concerned with the claimant's ability to deal with work-related activity at the date of the hearing, in this case 15 months later by which time a claimant's mental condition could have changed significantly.

31. I do not share the optimism of the tribunal under appeal, lacking as it does any evidential basis that the staff at the local jobcentre are, or were at the relevant time, fully qualified or that they would work with the specialist services that were already involved in order to carefully rehabilitate the claimant. There is no evidence as to training or qualifications of the staff at the jobcentre. There is no evidence that one single suitably qualified employee would have been allocated to work with the claimant, despite her problems relating to people with whom she was unfamiliar, or that the staff at the jobcentre would work with her NHS psychotherapist, [*sic*] It is now submitted on behalf of the Secretary of State on this appeal that by taking part in work-related activity the claimant would be placed in such a "coping skills and support network" described by the psychotherapist which would hopefully help the claimant back into work.

32. While this is by way of submission as to what would happen now, and not by way of evidence as to what would have happened in and after February 2012, the submission is presumably made on instructions and reflects an approach of the DWP which would have been in place at that time. There is no suggestion that there has been any approach to the psychotherapist or anybody else to ascertain what she envisaged when she stated that "coping skills and support networks will first have to be put into place".

The representative appears to have assumed that the psychotherapist was referring to "a coping skills and support network" when she appears to me to have been referring to the claimant acquiring coping skills and having the support of an appropriate network (which she did not describe further). The representative also appears to have assumed an ability and readiness on the part of the local jobcentre staff, with adequate time and resources, to deal with the matter in the largely unparticularised manner contemplated by the psychotherapist.

33. In my judgment this, coupled with the absence of any real evidence, demonstrates the inability of the DWP to understand the needs of this claimant if she were found not to have limited capability for work. There is nothing in these representations, or in the reported approach of the DWP and Secretary of State in other cases, to suggest to me that, if I were to remit this matter to a new tribunal, there would be any evidence from the Secretary of State which could properly persuade the new tribunal that the local jobcentre would be able to deal with the matter in the way suggested. While there was, and is, the right to request reconsideration of a work-related activity action plan by the Secretary of State, and provision for showing good cause, within a strict time limit, for not undertaking an activity, inter alia on mental health grounds, and a right of appeal against the relevant decisions of the Secretary of State, all of this, if needed, would clearly pose a substantial risk to the mental health of the claimant at the time in the light of the evidence before me including in particular that of the psychotherapist.

34. I conclude that it is more likely than not that, in and after February 2012, the likely approach of the DWP to the claimant, if she were found not to have limited capability for work-related activity, would have posed a substantial risk to her mental health at a time which was plainly a crisis time for her. I do not consider that it would have taken proper account of her mental health needs as described by the psychotherapist, which I accept. I do not consider that, on the balance of probabilities it would have involved contact with the NHS psychotherapist treating her and a working out of a suitable programme for her, or that the local jobcentre would have had the time, facilities or staff to carry out such a programme or to provide any necessary support network. Nor do I have any evidence to suggest that she would always have been seen by the same person at the jobcentre, despite her problems dealing with people unfamiliar to her. I consider it more likely than not that she would have been seen by different people and that any work-related activity would have been unsuitable for her because of these factors.

35. All of this would have created stressful situations for the claimant and I accept the evidence of the psychotherapist that this would aggravate her depression. I am satisfied that although that evidence is in relation to her condition in September 2012, it would equally have applied in February 2012 when she was already receiving professional help with her mental problems.

36. I therefore conclude that this is a case in which I should substitute my own decision and that no useful purpose would be served by remitting the case to a new tribunal adding to the already excessive burdens being borne by the First-tier Tribunal." [*My insert*].

1. Judge of the Upper Tribunal Michael Mark 24.1.2014

regulation 35 – work-related activity – permanently unable to work?

GS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0016 (AAC) – CE/2304/2013 held:

"26. … If the problem is that work-related activities may lead to a deterioration in the claimant's health, this must be addressed by reference to what those activities may be and when they may be required. If the claimant is permanently unable to work for health reasons then she cannot even be required to attend a work focused interview, which is a pre-condition for being required to engage in work-related activities, and she could not in any event be required to engage in work-related activities because these are defined by s.13(7) of the Welfare Reform Act 2007 as activities which make it more likely that the claimant will obtain or remain in work or be able to do so (*JS v SSWP, [2013] UKUT 635 (AAC)*). If, on the other hand there is a prospect of her condition improving to the extent where she may ultimately be able to do some work, then there may come a time when a work-focused interview and some work-related activities may be of benefit for her. For so long as she cannot properly be required to engage in work-related activities it is difficult to see why the fact that she is found not to have limited capability for such activities should lead to a substantial risk to her health (*JS v SSWP*), at least provided that she receives re-assurance on the point from the Secretary of State and does not feel under constant threat from him." [*My emphasis*].

1. Judge of the Upper Tribunal Michael Mark 15.1.2014

evidence of work-related activity – what is likely to happen

RV v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0056 (AAC) – CE/2827/2013 involved a "conversion" case – a case where the claimant is being transferred from Incapacity Benefit to Employment and Support Allowance. The First-tier Tribunal concluded that the claimant qualified for an award of Employment and Support Allowance because there would be a substantial risk to her physical health if she were found not to have 'limited capability for work' but that there would not be such a risk if she were found not to have 'limited capability for work-related activity'. The claimant's appeal to the Upper Tribunal was against the latter finding.

The Upper Tribunal Judge held:

"4. The claimant has serious problems with her legs including deep vein thromboses. The tribunal found that she needed to keep her legs elevated for a reasonable proportion of the day and this would not be possible if she were engaging in the process of job seeking, which would be the outcome if she were found not to have limited capability for work.

It did not, however, consider that she had limited capability for work-related activity because it considered that any activity she may be required to undertake would not occur regularly and would be tailored to her abilities. It would not therefore pose a substantial risk to her health.

5. There was no evidence before the tribunal as to what work-related activities the claimant may be required to undertake. The question had not arisen on the basis of the decision maker's decision in May 2012 and, as usual, the submissions of the decision maker failed adequately to address the question. The tribunal found, so far as I can see without any evidence, that the number of compulsory appointments in relation to work-related activity were at most 6 over 6 months. It also expressed its satisfaction that the DWP would make suitable arrangements for telephone contact or home meetings and that it was reasonable for her condition not to be affected by one appointment a month. She would not need to travel with any regularity to the jobcentre and she could negotiate her work-related activity with the DWP. She had the cognitive ability to do this.

6. Permission to appeal to the Upper Tribunal was given on the basis that the tribunal arguably erred in law by coming to conclusions as to what would be required of the claimant in relation to the activities that might be required of her under regulation 35 of the Employment and Support Allowance Regulations 2008 (the 2008 Regulations) without any evidence from the Secretary of State on the issue and without indicating where their information/evidence came from.

7. The Secretary of State has responded on this appeal, as so often in these cases, by setting out the approach which an adviser is supposed to take in considering a claimant's circumstances and the various hypothetical steps which a claimant could be required to take by way of work-related activities. That approach is unacceptable. It assumes that relatively unskilled employees at the jobcentre, or whoever else the Secretary of State delegates the task to, can be relied on in every case to ensure that the work-focused interview and any work-related activities can be devised perfectly and without risk to the health of the claimant.

8. Regulation 35(2) of the 2008 Regulations provides that a claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) (that is does not satisfy any of the descriptors in Schedule 3 to the 2008 Regulations) is to be treated as having limited capability for work-related activity if (a) s/he suffers from some specific disease or bodily or mental disablement and (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

9. "Any person" in this context includes the claimant herself. If the Secretary of State were able to say simply that this is the ideal picture and the tribunal must assume that all will be well, as his representative seeks to say on this appeal, it is difficult to see how there could ever be a substantial risk to a claimant's health if found not to have limited capability for work-related activity. As I pointed out in *JS v SSWP* [2013] UKUT 635, there are cases where a claimant cannot properly be required to have a work-focused interview or to carry out work-related activities because these are designed to get a person back to work, but for health reasons the claimant has been found permanently unable to work. In any event the provisions for these interviews and activities state that the Secretary of State *may* require the claimant to attend the work-focused interview and carry out the activities. It is a discretionary power and it is open to those exercising those functions to decide that there should not even be an interview, or, if one is held, to conclude that it would not be appropriate to require a claimant to undertake any work-related activity.

10. The real question is what is likely to happen at the relevant jobcentre in the case of the claimant in question. While it is true that the decision maker cannot provide evidence as to what will be decided in the case of the claimant who is appealing, at least where there has initially been a finding that he or she does not have limited capability for work, I can see no reason why the decision maker cannot provide evidence as to what would have happened immediately following the date of the decision on the basis of the actual practice in that area at that time with claimants with similar problems. This is particularly needed with claimants with mental health problems when in many cases DWP staff are unlikely to have the expertise or time to assess such problems adequately. The appropriate time for providing such evidence may be after the tribunal has decided if the claimant has limited capacity for work, as that evidence can then be based on the facts found by the tribunal and the whole of the evidence before the tribunal.

11. In the present case, the tribunal was right to look to assess the actual impact on the claimant of being found not to have limited capability for work-related activity. In the absence of any proper submissions from the decision maker on the point, it seems to me that it could rely on its own knowledge, if adequate, provided that it told the claimant what that knowledge was and gave her an opportunity of commenting on it, possibly allowing her an adjournment to deal with it if it was not something that she could be expected to deal –with immediately. It is not clear from either the statement of reasons or the record of the proceedings that this was done.

12. However, it is also the case that the risk to the claimant's health if found not to have limited capability for work arose because it found that if she sought a job she would compromise her ability to comply with medical advice to keep her legs elevated for a reasonable proportion of the day. There was no evidence that the claimant would not be able to attend an interview and do at least some very limited activities, if required, and still keep her legs elevated for as long as needed.

13. For an adviser to require the claimant to disregard medical advice designed to protect her from further deep vein thromboses would be plainly and obviously wrong, and it appears to me that the tribunal in the present case was entitled to conclude that this would not happen.

14. I further take note that if I were to set aside this decision and look at the claimant's own evidence of what did happen, that evidence was that the adviser took one look at her and decided that there were no work-related activities that she should be required to undertake and that she should have been placed in the support group. While that was nearly a year after the date of the decision in May 2012, I see no reason to suppose that there would have been a different approach at that time. As a result it appears clear that there was no substantial risk to the health of the claimant if she was found not to have limited capability for work-related activity.

15. One of the problems in this and many other cases, illustrated by the apparent approach of the adviser at the jobcentre, is that there are many people with health problems such that they are not fit for work and are not fit to undertake most if not all work-related activities, yet they do not fall within the very limited categories of those whom the 2008 Regulations provide do not have limited capability for work-related activity. Section 2(5) of the Welfare Reform Act provides that a person has limited capability for work-related activity if (a) his capability for work-related activity is limited by is physical or mental condition; and (b) the limitation is such that it is not reasonable to require him to undertake such activity. By section (1) of that Act, however, whether it is not reasonable to require a person to undertake such activity is to be determined in accordance with regulations. The 2008 Regulations make provision as to how the question is to be determined, and result in some cases where it is not, in ordinary language, reasonable to require somebody to undertake work-related activity falling outside the scope of the Regulations. If a person does fall outside the scope of regulation 34 and Schedule 3, then if, on the evidence, in practice that person will not, or cannot, be required to do anything because it would be unreasonable to require him or her to do that thing, then it becomes very difficult to see how their physical health can be put at risk by being found not to have limited capability for work-related activity. The claimant's mental health is not in issue here."

1. Judge of the Upper Tribunal Michael Mark 4.2.2014

work-related activity – assessing risk…

EH v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0473 (AAC) – CE/2522/2013, having reviewed the way in which work-focused interviews and work-related activities are dealt with in practice and considering and citing earlier case law (namely – IM v SSWP (reported as [2015] AACR 10] and Charlton v SSWP (Court of Appeal) (reported as R(IB)2/09)), the Upper Tribunal Judge held:

"21. It is clear from the passages I have cited that regulation 35 is concerned with the risk to the claimant or others of being found to have limited capability for work. It is not a sweeping up provision to catch the most serious cases not falling within Schedule 3.

22. With hindsight in the light of that decision, in addition to its other errors, the tribunal was also in error of law in not adjourning to obtain the information there referred to from the Secretary of State as to the type of work-related activity in the area including Stalybridge, where the claimant lives. In addition, to enable the tribunal to assess the risk in the present case to the claimant, the Secretary of State should also provide evidence of any general practical limitations on the extent to which work related activity is required in the area, so that, for example, a practical decision not to ask anybody over 55 to undertake work-related activity would be relevant to the question of risk, the claimant having been born in 1956. If the practical position on the ground in the area is that it is clear at the date of the decision that the claimant would not be required to do anything, then the risk from doing anything would be averted just as much as if the work-related activities in the area did not include anything potentially harmful to a particular claimant. If, however, the practical position on the ground is that there are potentially dangerous activities that a claimant might be required to undertake even though she should not be required to undertake them, then the tribunal must assess the risk of this and the possible consequences that might ensue."

2. Judge of the Upper Tribunal Michael Mark 16.10.2014

third party assistance…

EH v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0473 (AAC) – CE/2522/2013 held:

"23. The decision of the panel [*referring the Three-Judge Panel in IM v* SSWP – *reported as [2015] AACR 10*] also appears to resolve the conflict between Judge Ward and Judge Gray referred to in the direction of Judge Lane in the present case as to the extent to which the ability of the claimant to call on a third party for assistance is relevant. It is for the tribunal to seek evidence and make findings as to the likely extent to which a third party may be available and to assess overall in the light of that evidence whether there is a substantial risk to the health, in this case, of the claimant from anything she may, seen as at the date of the decision, be required to do, rightly or wrongly, by those acting in relation to work-related activity for the DWP [*Department for Work and Pensions*]. Depending on the evidence, the risk assessment may be on the basis that the claimant will always have the support of the third party or that she will rarely have that support or that it will commonly but not always be available and possibly may become unavailable unexpectedly." [*My inserts*]

2. Judge of the Upper Tribunal Michael Mark 16.10.2014

regulation 29 – risk not from last workplace but workplaces generally

AF-v-Department for Social Development (ESA) – [2013] NICom 75 – C8/13-14(ESA) held:

"23. Mr Morrow [*representative on behalf of the claimant*] submitted that the tribunal did not address potential exceptional circumstances within regulation 29 of the ESA Regulations correctly. He submitted that there would be harm to the applicant's eyesight if she went back to her usual occupation in the months following her eye surgery. A difficulty with this submission, however, is the lack of evidence to this effect. The sick notes supplied by the applicant in support of her claim for ESA were not before the tribunal or me. As far as I can gauge, however, these at best indicated that the applicant should refrain from her usual work involving intensive reading for up to eight weeks after each operation on her eyes. The ESA50 questionnaire completed by the applicant suggested that her final hospital attendance had been 15 September 2011.

The decision under appeal was made on 4 November 2011. Conceivably, therefore, she might have been under medical advice at that time to refrain from her usual occupation.

24. Another consideration relates to the scope of regulation 29. The predecessor provision in regulation 27 of the Social Security (Incapacity for Work) Regulations 1995 (IFW) was considered by the Court of Appeal in England and Wales in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42. This case was further considered by Chief Commissioner Mullan in *AH v Department for Social Development* [2012] NI Com 343. Chief Commissioner Mullan approved and applied the approach adopted by the Court of Appeal of England and Wales in *Charlton* - technically a persuasive authority only - in Northern Ireland.

25. As submitted by Mr Toner [*representative on behalf of the Department for Social Development*], the provision considered in *Charlton* was regulation 27(b) of the IFW Regulations, which addressed the question of whether "he suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if he were found capable of work". This is slightly different from regulation 29 of the ESA Regulations which addresses the question of whether the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work". Nevertheless, I am not sure that much turns on the difference in the wording of the two paragraphs.

26. What *Charlton* does make clear, is that the risk anticipated must be considered not in the context of the claimant's last workplace, but in workplaces generally where she might find herself. *Charlton* requires the decision-maker or tribunal to assess the range of work of which the claimant is capable for the purposes of assessing risk to health. However, the process of adjudication as indicated by Baroness Hale at paragraph 61-62 of *Kerr v. Department for Social Development* [2004] UKHL 23 (also reported as an annex to R1/04(SF)), is inquisitorial rather than adversarial. In determining entitlement to benefit, both the claimant and the Department must play their part. The height of the case submitted by the applicant is that she would have needed to refrain from her usual occupation for a period post-surgery. However, this advice would have related to the particular intensive reading necessary for her usual occupation and it is clear that the advice was for a finite period of weeks. Furthermore, there was no evidence that the same advice would have applied to the range of alternative occupations that would have been open to her which did not involve close reading.

27. In the absence of specific evidence raising the issue of a possible substantial risk to the applicant's physical health were she found not to have limited capability for work, I cannot accept that the tribunal can be faulted for not exploring this issue in greater depth. I do not consider that it has materially erred in law by not identifying the types of work which the applicant could perform without substantial risk to her physical health." [*My inserts*].

1. Commissioner O Stockman 19.12.2014 (This should probably read 19.12.2013)

limited capability for work vs. limited capability for work-related activity – sanctions

TMcG v Secretary of State for Work and Pensions – [2012] UKUT 411 (AAC) – CE/2893/2012 held:

"13. … a person who does not score 15 points on the medical assessment may still be treated as having limited capability for work, and so in the 'work-related activity group', if one of the exceptional circumstances in regulation 29 applies. However, if the person meets one of the exceptional circumstances set out in regulation 35, then he or she is treated as having limited capability for work-related activity and being in the 'support group'.

14. At the outset of the ESA regime, a claimant in the support group enjoyed two major benefits over the individual in the work-related activity group – access to a higher rate of weekly benefit and being exempt from the mandatory requirement to engage in "work-related activity", a term left undefined by legislation, which in practice meant occasional work-focused interviews.

15. However, recent changes have increased the advantages of being placed in the support group over the work-related activity group. First, the "conditionality" provisions (including sanctions) affecting the work-related activity group were increased with effect from 1 June 2011, extending the scope of work-related activity beyond work-focused interviews to include e.g. work experience and other schemes (see the Employment and Support Allowance (Work-Related Activity) Regulations 2011 (SI 2011/1349)). Secondly, the 365-day time limit on entitlement to contributory ESA, introduced with effect from 1 May 2012, does not apply to those claimants in the support group (section 1A(5) of the Welfare Reform Act 2007 as amended by the Welfare Reform Act 2012, section 51(1)).

…

17… In addition, as noted above, work-related activity may well involve more than simply occasional attendance at work-focussed interviews…"

1. Judge of the Upper Tribunal Nicholas Wikeley 12.11.2012

DWP must show what work-related activity claimant can do

DH v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0573 (AAC) – CE/587/2013 held:

"16. Moreover, it is no answer to this to argue, as the Secretary of State seeks to argue in his submissions on this appeal, that, given what the appellant could do, it was not unreasonable for the tribunal to conclude that she was able to undertake "some form of [work-related activity]". This is the wrong way to view the test, as Upper Tribunal Judge Gray has said in *MT-v-SSWP* (ESA) [2013] UKUT 0545 (AAC). The Secretary of State has already affirmatively decided that the appellant does not have limited capability for work-related activity, within that he has decided that there is work-related activity in which she can safely engage despite her severe anxiety problems, and, per *Kerr*, only he knows what work-related activity is in fact. In these circumstances it was from [*sic*] him to prove his case by saying what the specific work-related activity was that the appellant could safely engage in, and for the tribunal on the appeal to be satisfied as to the same."

1. Judge of the Upper Tribunal S M Wright 13.11.2013

substantial risk – safe not to work in some jobs – not the test

CIB/1995/1997 and CIB/2198/1997 held:

"24. The adjudication officer submits that the tribunal should have considered whether the claimant was to be treated as incapable of work under regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995. On the wording of the regulation, the decision is to be made by a doctor approved by the Secretary of State. However, as a result of the decision of the Divisional Court in *R. v. Secretary of State for Social Security, ex parte Moule*, given on 12th September 1996, that part of the regulation was ultra vires [*meaning: beyond one's leagal power or authority*] and the decision could be made by an adjudication officer or, on appeal or a reference, by a tribunal. [*My insert*].

25. The basis for this submission is that the claimant stated that it would not be safe for him to carry out work such as manually operating a machine or using sharp instruments. This falls short of suggesting that it would be a substantial risk to his health for him to work. It is the case that it might not be safe for him to work in some jobs, but that is not the test. The test is whether any work would pose a substantial risk to his health. There are undoubtedly jobs in which he could work safely despite his medication and disabilities.

26. The possible application of regulation 27 was not expressly raised by or on behalf of the claimant and the evidence before the tribunal was not sufficient to raise the issue. There is no error of law on this count."

Note: The Employment and Support Allowance equivalent to Regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995 is regulation 30 of the Employment and Support Allowance Regulations 2008.

1. Commissioner Edward Jacobs 8.10.1999

substantial risk – anxiety and depression

CW v Secretary of State for Work and Pensions (ESA) – [2011] UKUT 386 (AAC) – CE/428/2011 held:

"42. Finally, I turn to consider reg. 29. As I have said in paragraph 14 above, it was argued in the representative's letter that there would be the possibility of a substantial risk to the claimant's health if he were found not to have limited capability for work. Reference was made to the decision of Mr. Commissioner Williams in *Charlton v. Secretary of State for Work and Pensions*, upheld by the Court of Appeal in [2009] EWCA Civ 42.

43. Reg. 29 requires first that the claimant should be shown to be suffering from a specific disease or bodily or mental disablement. Misuse of drugs, as such, is not in my view a specific disease or bodily or mental disablement, although it may give rise to both physical and mental illnesses. It is not suggested that the claimant's incontinence or asthma give rise to a substantial risk to his health if he is found not to have limited capability for work. The question is thus whether his accepted anxiety and depression do so. The principle of *Charlton* is that if reg. 29 is to apply, the risk must arise as a consequence of the work the claimant might be found capable of doing, and that in order to make a decision on reg. 29 the decision-maker must assess the range of work the claimant might do as far as is necessary to decide whether there would be likely to be a substantial risk to his health (or, if appropriate) the health of others if he undertook that work. In *Charlton* itself it was found that the Commissioner had made adequate findings by finding that the claimant was capable of performing the kind of work to which a person with no physical limitations, no qualifications, no skills and no experience might be directed and that he could undertake straightforward and structured, unskilled work.

44. The claimant in *Charlton* suffered from alcohol dependency, used tranquillisers and cannabis every day, had recorded dizzy spells and had recently caused a minor fire through lack of concentration. He did, however, manage to keep himself clean, dress himself, cook ready meals and tidy up. He lived with his grandmother.

45. The claimant here has had some experience working as a factory hand. On his own evidence he can manage to get up, use the bathroom, get dressed and usually to cook at least snacks. As I have said, it is not suggested that he suffers from relevant physical limitations. In my view he would be capable of performing the sort of straightforward and structured unskilled work as the claimant in *Charlton*. Accordingly, he does not fall within reg. 29."

1. Judge of the Upper Tribunal E Ovey 21.9.2011

substantial risk

CSIB/33/2004 held:

"36. While I acknowledge that Mr Commissioner Jacobs' [*referring to the analysis of Commissioner Jacobs in CIB/0026/2004 – paragraphs 30 to 36*] analysis makes sense of a difficult regulation, it nevertheless creates some problems of its own. A claimant whose IB [*Incapacity Benefit*] is refused may have claimed jobseeker's allowance (JSA) pending the IB appeal; alternatively, he or she may have claimed income support (IS), (despite a 'benefit penalty' unless certain circumstances are applicable), or have claimed no other benefit.

37. If a claim for JSA has been made, a claimant must have suggested some employment which there is a reasonable prospect of securing having regard to his or her skills, qualifications and experience. A JSA claimant may, however, place restrictions, if these are reasonable in the light of the claimant's physical or mental condition, irrespective of the effect these restrictions have on the reasonable prospect of obtaining work, provided there are none which cannot be so justified. It is a complex process.

38. In this kind of case, the task of the IB tribunal is to elicit the kind of work which the JobCentre has accepted as that for which the claimant must be both available and actively seeking, as set out in the "Jobseeker's Agreement". The claimant then has to satisfy the IB tribunal that even such work nevertheless raises the necessary 'substantial risk'. It is important to keep in mind that the question only arises following a determination that a claimant is not incapable of work in accordance with the PCA, nor does he or she fall under regulation 10 where their condition is expressly acknowledged as sufficiently severe.

39. So far as those who have not made a JSA claim are concerned, the tribunal (which through its chairman possesses the necessary expertise in the conditions of entitlement to JSA) will have to consider all the evidence and relevant law to determine the likely content of a jobseeker's agreement to which a claimant would be subject had a successful JSA claim been made and then ask if the type of job set out in the hypothetical agreement raises the specified risk. The problems are not insuperable but it does illustrate the difficult interface between the IB and JSA rules when applying regulation 27(b).

40. Finally, I judge that Mr Kinghorn [*the claimant's representative*] is right to emphasise that the risk must arise from the broad results of a claimant being found capable of work and is not confined to the risks arising directly from the tasks within a claimant's job description. Thus, for example, if a claimant sustains the relevant risk because she has to get up quickly in the morning to go to work, rather than pace herself as would be the situation if no such necessity arose, this is a pertinent factor for consideration. Likewise, Mr Brodie [*the representative of the Secretary for Work and Pensions*] accepted that any apprehension sustained by a claimant with mental disablement at the prospect of having to look for work, is pertinent. But there must be a causal link between being 'found capable of work' and an ensuing 'substantial risk to the mental or physical health of any person if [the claimant] were found capable of work'. If the situation of risk is exactly the same whether or not the claimant is exposed to the rigours of work, regulation 27(b) has no application."

At paragraph 35 the decision held ". Mr Commissioner Jacobs did not discuss the adjective "substantial" in the above case [*referring to the decision of Commissioner Jacobs in CIB/0026/2004*] but, as Mr Commissioner Rowland said at paragraph 7 of *CIB/3519/2002*, it is essentially a question of fact for a tribunal whether the claimant's condition is sufficiently serious and:-

> "… a risk may be 'substantial' if the harm would be serious, even though it was unlikely to occur and, conversely, may not be 'substantial' if the harm would be insignificant, even though the likelihood of some such harm is great."

Balancing the factors relevant to the nature of the risk in this way is similar to the test used in disability living allowance for supervision needs which are referable to 'substantial danger'. Mr Brodie [*the representative of the Secretary for Work and Pensions*] and Mr Kinghorn [*the claimant's representative*] accepted, as do I, that it reflects the right approach." [*My inserts*].

1. Commissioner L T Parker 18.5.2004

stabilisation is different from freedom from symptoms – might stabilisation survive the stress of work?

R(IB)1/08 (unreported CIB/2619/2007) held:

"26. Ms Wise for the Secretary of State accepted at the oral hearing that the appeal tribunal's stated reasons on regulation 27 of the 1995 Regulations [*meaning: Regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995*] and the test of substantial risk to the mental or physical health of any person if the claimant were found capable of work were inadequate. I agree. In the light of the oral evidence from the claimant about the very limited amount of work she actually did and what she thought she would be capable of, plus the appeal tribunal's acceptance that she was unable to cope with changes in daily routine and her evidence of the effects of stress on her, something more than what was in essence a statement of a conclusion was needed. Apart from a reference to its findings on the mental health descriptors, all that the appeal tribunal mentioned was that the claimant was well stabilised on medication. That did not grapple with the crucial question, leaving aside that stabilisation is different from freedom from symptoms, of whether that stabilisation was likely to survive the stresses of work of the sort that the claimant might be required to look for under the jobseeker's allowance regime. And I have already accepted that the appeal tribunal went wrong on descriptor CPf (scared or anxious that work would bring back or worsen illness). There was an error of law on an issue that could have led to an overall decision in the claimant's favour."

1.Commissioner J Mesher 3.4.2008

substantial risk – looking to the future – what would be the claimant's situation in the event they took up work?

RC v Secretary of State for Work and Pensions (IB) – [2012] UKUT 30 (AAC) – CSIB/580/2011 held:

"*Regulation 27(b) (Reinstated)*

10. I do not accept that the tribunal failed to make sufficient findings about the range or type of work of which the claimant was capable. The tribunal found that the appellant could work as a general labourer; the representative's contention, "that a heroin addict with ankylosing spondylitis would have no realistic prospect of obtaining work as a general labourer", is flawed given the tribunal's premise that the latter condition caused no functional impairment whatsoever. This was enough to justify the conclusion that there is work which would not give rise to any substantial risk, backed up by the information that he had been a general labourer in the past and when he was also a heroin addict. Whether the representative or the Secretary of State is right that assembly line work is barred because of drug testing, or possible, there was a sufficient underpinning of an inference that regulation 27(b) was not satisfied by the finding in respect to his capacity as a general labourer.

11. There is no suggestion, expressed or implied, in the tribunal's reasoning, that a perceived ability for the claimant to come off heroin was in itself a bar to satisfaction under regulation 27(b); the primary plank of its reasoning was that, because in the past he had worked, despite being a heroin addict, with no indication that this gave rise to any substantial risk, that therefore this remained the probable position as a heroin addict at the relevant date. The representative is correct that the application of relevant statutory criteria must be considered as at the date of the decision under appeal. However, the main issue under regulation 27(b) is whether there is work which the claimant could safely perform; insofar as a claimant is necessarily not working at the date of the decision under appeal, this inevitably looks to the future. Consequently, it is rational for a tribunal to consider what would, or could, be the claimant's situation in the event he took up work. Once the tribunal decided that, because the claimant had been able to stop taking heroin in the past there was no reason why he could not do so again, this inevitably affects the range of jobs potentially open to him when looking forward from the date of the relevant decision.

12. A tribunal frequently uses several factors as material from which to draw conclusions; having regard to the tribunal's reasoning overall, there was no error when including future prospects because one is looking at the expected health consequences of a claimant returning to the workplace. Taking account of the future, to this limited degree only, can assist a claimant's case just as much as go against it; to use an illustration I gave at paragraph 40 of *CSIB/33/2004*:

> "Thus, for example, if a claimant sustains the relevant risk because she has to get up quickly in the morning to go to work, rather than pace herself as would be the situation if no such necessity arose, this is a pertinent factor for consideration"

Such a claimant might have no equivalent risk while not working but such a risk could arise in the changed circumstances of having to get quickly to a job.

The latter could only arise after the date of the relevant decision but is nevertheless a pertinent factor in the assessment of 'substantial risk'."

1. Judge of the Upper Tribunal L T Parker 20.1.2012

regulation 29(2)(b) – descriptor 15 getting about and 16 coping with social engagement

AP v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0293 (AAC) – CE/3857/2012 held:

"15. The second ground on which I gave permission to appeal was that the First-tier Tribunal might have gone wrong in law in failing to consider whether reg. 29(2)(b) of the Employment and Support Allowance Regulations 2008 applied. In my judgment a decision maker or tribunal will almost inevitably need to consider reg. 29(2)(b) in a situation where descriptor 15(b) (worth 9 points) is the only one which is found to be satisfied. Inability, for mental reasons, to get to a specified place with which the claimant is familiar without being accompanied inevitably raises the question what the effect on the claimant's mental health would be if he or she were found not to have limited capability for work. The same is true of 16(b), and probably also 15(c) and 16(c). The First-tier Tribunal therefore in my judgment also went wrong in law in this respect…"

1. Judge of the Upper Tribunal Charles Turnbull 25.6.2013

requirement to consider regulation 29(2)(b) and 35(2)(b)

LB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0352 (AAC) – CE/4000/2012 held:

"23. The tribunal considered without reasons that they could see no substantial risk to the mental health of [*sic*] physical health of the claimant if he were found not to have limited capability for work. There are cases where such a sweeping statement will be justified without more, but the tribunal does need to consider the effect on the claimant in the particular case of being found not to have limited capability for work, bearing in mind both the work the claimant might be found fit to do (*Charlton v Secretary of State*, [2009] EWCA Civ. 42) and the effect on him of being found fit for work. This was a 62 year old man, who had broken down and wept at both medical assessments and before the tribunal, who had a social phobia as accepted by the tribunal, and whose fluoxetine prescription had been doubled at some point between March 2011 (p.39) and his completion of the second form ESA50 in November 2011 (pp.101-102).

Relevant considerations include the effect on his mental state of his loss of benefit and the possible need for him to seek work, possibly without any real prospect of success, and apply for, and retain, jobseeker's allowance or, in relation to regulation 35 to carry out work-related activity in accordance with the sort of action plan which ought to be prepared by the Secretary of State and notified to him pursuant to regulation 5 of the Employment and Support Allowance Regulations 2011 (see *IJ v Secretary of State*, [2010] UKUT 408 (AAC) and *CF v Secretary of State*, [2012 UKUT 229 (AAC)).

24. I am unable to understand how the tribunal came to its conclusion that it could see no substantial risk to the claimant's mental health if he were to be found not to have limited capability for work or indeed limited capability for work-related activity, which would depend on what was required of him by way of work-related activity and its effect on his mental state.

25. On that account also the tribunal was in error of law…"

1. Judge of the Upper Tribunal Michael Mark 19.7.2013

substantial risk – relationship between regulation 29 and regulation 35

JS v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0635 (AAC) – CE/1652/2013 involved a case where the First-tier Tribunal had accepted evidence that there would be a substantial risk to the claimant's health if he were found capable of work and that he was therefore to be treated as having limited capability for work by virtue of regulation 29(2)(b) of the Employment and Support Allowance Regulations 2008 Regulations. In relation to the similar provision in regulation 35(2) of the Employment and Support Allowance Regulations 2008 the First-tier Tribunal found:

"The Tribunal considered what work related activity the appellant might be expected to carry out. There is an absence in the Regulations of a definition of a work related activity. However, the Tribunal did not consider that there would be a substantial risk to the appellant's health caused by work related activity because that is likely to be a matter of attending interviews to consider his situation and what work he might be able to do. Furthermore if the appellant at a particular time were asked to attend for work related activity whilst suffering from a chest infection would be able to rearrange such activity [sic]. As a result the Tribunal did not consider that the appellant satisfied Regulation 35."

Regulation 35 of the Employment and Support Allowance Regulations 2008 provides:

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

Permission to appeal against the decision of the First-tier Tribunal was given because guidance was sought from the Upper Tribunal with regard to the interrelation of regulations 29 and 35 of the 2008 Regulations.

The Upper Tribunal Judge held:

"6. Regulation 29 requires a person to be treated as having limited capability for work in certain specified circumstances. One of them is in substantially the same terms as regulation 35(2) except that the issue to be addressed by the decision maker or tribunal is the risk arising if the claimant were found not to have limited capability for work.

7. It is self-evident that the consequences of being found not to have limited capability for work are not the same as being found not to have limited capability for work-related activity. A person who is found not to have limited capability for work is likely to need to obtain jobseeker's allowance if he or she is in need of benefits and must then take the steps necessary to seek work. This can of itself have adverse consequences on the health of a claimant, particularly those with mental health problems (see *IJ v* SSWP, [2010] UKUT 408 (AAC) and *CF v SSWP* [2012] UKUT 29 (AAC). There are also the consequences to be considered if work is obtained, as discussed by the Court of Appeal in *Charlton v SSWP*, [2009] EWCA Civ 42.

8. It is plain that a person who is in poor health and unduly prone to infections may be at extra risk of infection in the workplace. It was consideration of that risk which led the tribunal in the present case to conclude that the claimant should be treated as having limited capability for work.

9. With regard to the risk to health of being found not to have limited capability for work-related activity, it is also necessary for the tribunal to consider the consequences of such a finding in the individual case. The tribunal in the present case observed that this is not made easier by the absence of any definition of work-related activity. In fact there is a very broad definition which in this case is of assistance as appears below.

The legislation

10. In order to consider the consequences of not being found to have limited capability for work-related activity, it is necessary to consider the statutory and regulatory provisions for somebody in that position.

11. The statutory provisions are contained in sections 9 to 16A of the Welfare Reform Act 2007 (the 2007 Act), although section 16A, relating to hardship payments, only came into force on 26 November 2012. So far as that section is concerned, it illustrates that previously there will have been cases of hardship where the reduced amount payable by way of ESA where a person was not treated as incapable of work-related activity, and any risk of that hardship affecting a claimant's health had to be taken into account under regulation 35(2). Such cases will be less frequent in the light of the amendment to the 2007 Act and to the 2008 Regulations but will, no doubt, still occur.

12. With regard to the provisions in force at the time of the decision under appeal to the tribunal, section 9(1) of the 2007 Act provides that "whether a person's capability for work-related activity is limited by his physical or mental condition, and if it is, whether the limitation is such that it is not reasonable to require him to undertake such activity shall be determined in accordance with regulations." The remaining provisions of section 9 set out the provisions which can be included in the regulations. Section 11 provides for regulations in respect of work-related health-focused assessments by approved health care professionals of persons entitled to ESA but who are not in the support group. The support group is defined in section 24(4) as those who have, or are treated as having, limited capability for work-related activity. Regulations had been made for such assessments but the assessments were suspended in July 2010 and the regulations themselves were later repealed with effect from 1 June 2011.

13. Section 12(1) provides for regulations concerning work-focused interviews, defined in section 12(7) as interviews by the Secretary of State conducted for such purposes connected with getting the person interviewed into work, or keeping him in work, as may be prescribed.

14. It is only when one comes to section 13 that one arrives at work-related activity. Section 13(1) provides as follows:

> "Regulations may make provision for or in connection with imposing on a person who is subject to a requirement imposed under section 12(1) a requirement to undertake work-related activity in accordance with regulations as a condition of continuing to be entitled to the full amount payable to him in respect of an employment and support allowance apart from the regulations."

15. Work-related activity is defined in section 13(7) in relation to any person as "activity which makes it more likely that the person will obtain or remain in work or be able to do so". At the date of the decision under appeal there was no further definition, but section 13(8) expressly includes as an activity work experience or a work placement. I observe that even with this express inclusion, the activity must be one which makes it more likely that the person will obtain or remain in work or be able to do so, so that if a person is patently not going to be able to obtain work at any stage, it is difficult to see how they could be required to carry out work-related activities. So too, where somebody is already in a suitable apprenticeship or other unpaid work with a view to gaining work experience, the Secretary of State may sometimes find it difficult to show that requiring them to give up that work and undertake other work makes it more likely that they will obtain work or be able to do so.

16. What is also plain is that the initial work-focused interview cannot be a work-related activity, as work-related activities can only be required after that initial interview has occurred or been required. The work-focused health assessment would also appear to be separate from the work-related activities both because it is dealt with separately and because it is an assessment and would not appear of itself to make it more likely that a claimant will obtain or remain in work or make that more likely.

17. Section 14 imposes a duty on the Secretary of State in prescribed circumstances to provide a person who is required to take part in a work-focused interview under section 12(1) with an action plan. Section 14(3) includes provision for action plans for persons who are required to take part in work-related activity to contain particulars of the necessary activities. The requirement for an action plan does not therefore mean that a person with an action plan necessarily has to take part in work-related activities, any more than a person who undergoes a work-focused interview has to take part in work-related activity afterwards.

18. Section 15 of the 2007 Act empowers the Secretary of State in prescribed circumstances to give directions as to what is and what is not to be regarded as a work-related activity. Any such direction must be reasonable, must be included in a written action plan and may be varied or revoked subsequently. Finally, section 16 provides for the Secretary of State to contract out the conduct of interviews, the provision of action plans and the giving of directions under sections 12, 14 and 15 of the Act.

19. Provisions as to work-focused interviews are contained in regulations 54 to 62 of the 2008 Regulations. Not everybody can be required to take part in a work-focused interview. I note that regulation 59 provides for the deferral of such an interview if it would not, at the time it was due to take place, have been of assistance to the claimant or if it was not appropriate in the circumstances. What is clear is that the tribunal was in error in treating such interviews as work-related activity.

20. Work-related activities are now dealt with by the Employment and Support Allowance Regulations 2011 (the 2011 Regulations). Under regulation 3, the Secretary of State may require certain persons to undertake work-related activity as a condition of continuing to be entitled to the full amount of ESA payable to him. In order for it to apply to the claimant in this case he must have been required to take part in, or have taken part in, one or more work-focused interviews pursuant to regulation 54 of the 2008 Regulations. Regulation 3(4) provides that the requirement must be reasonable having regard to the claimant's circumstances and must not require him to apply for a job or undertake work or undergo medical treatment. It must also, in my judgment, be, in the words of section 13 of the 2007 Act an "activity which makes it more likely that the person will obtain or remain in work or be able to do so".

21. There are therefore two preconditions before any work-related activity can be called for. First there must have been a requirement for the claimant to attend a work-focused interview. The Secretary of State has a discretion as to whether to impose such a requirement. Secondly, following such a requirement being imposed the Secretary of State has a further discretion as to whether to require the claimant to undertake such activity.

22. If and when those preconditions are satisfied, regulation 5 of the 2011 Regulations provides that the Secretary of State must notify the claimant of the requirement to undertake work-related activity by including the requirement in a written action plan given to the claimant. This must specify the work-related activity which he has to undertake.
The requirement can be disapplied by regulation 6 if it would be unreasonable to require it at a particular time, and regulation 7 provides for a claimant to seek reconsideration of the action plan.

The case law

23. There are a number of recent decisions of the Upper Tribunal requiring the Secretary of State to provide sufficient information about work-related activity for the claimant to present a case and for the tribunal to make an informed decision. In many cases, without establishing the range of work-related activity there is nothing against which to assess the regulation 35(2) risk (see *AH v SSWP*, [2013] UKUT 118 (AAC) (Judge Jacobs); CE/3477/ 2012 (Judge Wright) [*reported as [2014 AACR 6]*]; *MT v SSWP*, [2013] 545 (AAC) (Judge Gray); and my own decision in *AP v SSWP*, [2013] 553 (AAC)). There are considerable difficulties in many of those cases in obtaining adequate information from the Secretary of State in that (1) it is often the case on an otherwise successful appeal that the Secretary of State is relying on an assessment of the claimant's problems very different from those found by the tribunal; (2) work-focused interviews may not take place until after the appeal process has completed; and (3) until such an interview is required or has occurred, the Secretary of State cannot require the claimant to undertake any work-related activity – he is under no obligation to prepare an action plan and it may be premature to prepare such a plan, although this should not prevent him from providing the tribunal, as part of the appeal process, with the best evidence he can where regulation 35 is likely to be in issue as to the sort of work-related activity he, or his contractor, has in mind for the claimant.

24. Where the decision maker has decided that the claimant is entitled to ESA, the decision maker has been under a duty to consider regulation 35 and can be expected to provide reasons for the decision and the evidence on which it was based, although even in those cases the decision maker may have taken a different view of the claimant's health problems from those found by the tribunal. Where, as here, the decision under appeal is that a claimant is not entitled to ESA at all, there will have been no need for the decision maker to consider regulation 35, and there can have been no work-focused interview.

25. In *AP v SSWP*, I drew attention to the duty of the Secretary of State under regulation 2(4) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 to assist the tribunal in furthering the overriding objective and to assist the tribunal generally and under rule 24 of those rules to provide copies of all relevant documents in the possession of the decision maker. However, with the contracting out of interviews and decisions on action plans, the relevant documents may not be with the decision maker and it may be necessary for the tribunal to give directions to the Secretary of State to produce documents, or provide evidence relevant to regulation 35 issues either before the hearing or when their relevance becomes apparent during it. In appropriate cases a tribunal can determine that the claimant is entitled to ESA and give brief reasons for that decision and adjourn the question whether regulation 35(2) applies with directions for further evidence.

26. As pointed out by Judge Jacobs in *AH v SSWP*, [2013] UKUT 118 (AAC), at paragraph 31, however, there are cases where it is apparent that regulation 35(2) cannot apply.

Conclusion

27. In my judgment this is a case where it is apparent that regulation 35(2) cannot assist the claimant. On the basis of the tribunal's finding as to his health problems, there would seem to be no real possibility of his resuming work and it is difficult to see how any interview could come within the definition of work-focused interview in section 12(7) of the 2007 Act since, due to his ill health, there would seem to be no prospect of his getting into work. For the same reason, there would not seem to be any work-related activity that the claimant could be required to do, in that, because of his health problems, there would be no activity which would make it even arguably more likely that he would be able to obtain work.

28. It follows that, on the basis of the tribunal's findings of fact, there are no work-focused interviews or work-related activities that the Secretary of State could lawfully require the claimant to attend or undertake and that, in the absence of any other issue, there is no risk to his health as a result of not being found to have limited capability for work-related activity. Accordingly he does not fall within regulation 35(2).

29. I also note that the effect of regulation 54(2) and (3) is that the claimant could only have been required to take part in a work-focused interview so long as he had not reached the age at which a woman of the same age would attain pensionable age. The claimant reached that age on 6 March 2013. I do not know whether he has been asked to attend a work-focused interview since the date of the tribunal's decision, or, if so, when that was. Nor do I know the practice as to work-focused interviews or the time scale within which they normally take place with a claimant of his age. In the present case, of course, he could not have been required to attend any such interview before his successful appeal to the tribunal on 9 January 2013 and could not be required to undertake work-related activities, even if there were such activities that applied to him, after 6 March 2013. While that may not affect the legal position, which must be looked at as at the date of the decision of the Secretary of State, for practical purposes such issues are now academic." [*My insert*].

1. Judge of the Upper Tribunal Michael Mark 17.12.2013

daughter terminally ill – substantial risk must be by reason of a condition the claimant has

HR v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 055 (AAC) – CE/2834/2012 held:

"15. …, I accept that on any reckoning having the misfortune to have a child with terminal cancer is, in plain English, an exceptional circumstance. However, that is just the rubric or heading to regulation 29. In order to qualify under regulation 29(2)(b), the claimant must have a condition which means that there would be a substantial risk to the mental or physical health of any person if they were found capable of work or work-related activity. There was no evidence on which the FTT could conclude that the Appellant herself would be at any such substantial risk. One may well speculate, of course, that there might be a substantial risk to the daughter's mental or physical health, but again there was no evidence to that effect… The Appellant's own evidence from the examining doctor's report was that she visited her daughter regularly and spent about 2 hours a day with her. There is, of course, no reason why that level of input could not also be maintained when claiming jobseeker's allowance, or indeed when in either part- or full-time work.

16. The reality is that ESA is not designed to cover a difficult case such as this. If the daughter was in receipt of the middle or highest rate of the care component of disability living allowance (DLA), then of course a claim by the Appellant for carer's allowance might be appropriate. That may or may not still be the case today."

1. Judge of the Upper Tribunal Nicholas Wikeley 28.1.2013

regulation 35(2)(b) automatic where regulation 29(2)(b) applies?

[2013] AACR 33 (unreported ML v Secretary of State for Work and Pensions – [2013] UKUT 0174 (AAC) – CE/3261/2012) examined the issue of whether a claimant who satisfies regulation 29(2)(b) thereby satisfies regulation 35(2)(b).

The Upper Tribunal Judge held that the answer to this was: no. The Upper Tribunal Judge held that the application of regulation 35 does not automatically follow from that of regulation 29. In his view it all depends on the nature of the claimant's condition and of the work-related activity that the claimant would be expected to undertake.

The Upper Tribunal Judge held:

"12. The Secretary of State's representative has not supported the appeal. He has submitted that the aims of regulations 29(2)(b) and 35(2)(b) are different. The former is concerned with the effects of work; the latter is concerned with the effects of work-related activity. The work-related activity would be steps 'to identify and overcome any barriers preventing a return to work'. By her own evidence, Mrs L [*the appellant*] was able to drive for short periods, self-care, dress, do some basic cooking, shop for clothes, reads books, watches television, uses a mobile phone, manage banks and post offices although not supermarkets. Given that evidence, she would be able to attend a meeting with an adviser and undertake some suitable work-related activity. Further than this it was impossible to go, because 'a tribunal is unable to define that work related activity any further as that is the role of the Jobcentre Plus personal adviser, in conjunction with the claimant.'

13. As to the passage I quoted from the *Handbook*, the representative says that this is guidance only and that 'it is not correct to assume that simply satisfying one NFD [means: non-functional descriptor = regulations 29(2)(b) and 35(2)(b)] means that another of similar wording is also satisfied.'

E. Conclusions – regulation 35

14. I accept the argument that the passage from the *Handbook* is at best guidance and incorrect. Regulations 29 and 35 use similar wording, but they do so for different purposes. The claimant's condition is a constant for both provisions. But the activities to which the provisions apply differ. The former is concerned with the risk of work; the latter is concerned with the risk of work-related activity. There is no reason why the former should automatically be determinative of the latter. This will depend on: (i) the nature of the claimant's condition; (ii) its effects; and (iii) the nature of the work-related activity. It may be that the condition will give rise to the same risk whether the claimant undertakes work or work-related activity. Or it may give rise to different risks. Or it may give rise to risk in respect of one but not the other.

15. Despite having dealt with numerous cases involving the support group, I still have no idea of what work-related activities involves beyond the general, formulaic statements such as those I have quoted from the Secretary of State's argument. I accept that it is not possible to say in advance what precisely would be expected of any particular claimant. However, it must be possible to give a sufficient indication of what is involved in order to allow a claimant to provide evidence and argument, and to allow a tribunal to make a decision. The decision whether or not a claimant satisfies the conditions for the support group carries the right of appeal to the First-tier Tribunal under section 12 of the Social Security Act 1998. It is not one of those decisions that are excluded from the right of appeal. The existence of a statutory right of appeal requires that it must be effective. It cannot be effective without the necessary information for claimants to participate in the appeal and for the tribunal to make a decision. [*My emphasis*]

16. In this case, there was sufficient information for the tribunal to make a decision. Whatever work-related activity may involve, Mrs L should be able to undertake it. She is able to travel and even to drive herself short distances. She was able to attend and endure an interview and examination with the health care professional, which lasted for 51 minutes. She is able to attend to her own basic needs, to manage short trips, and to attend to her business in shops, her bank and the post office. I accept the Secretary of State's submission to that effect.

17. Although Mrs L had not put her case in quite this way, it would be fair to state it like this. The tribunal has accepted that I am not able to sustain sufficient activity to be capable of work and my condition is not going to improve, so what is the point of making me undertake activity to prepare me for work of which I will never be capable?

The answer is that the law is not structured in that way. There are claimants who are not capable of work and never will be capable of work but whose condition and disabilities are not such that they can satisfy the conditions for the support group. To put it another way, the support group is not for those who will never be capable of work. It is for a narrower category. That may explain why, by Mrs L's report, her Jobcentre Plus adviser has not asked her to undertake any work-related activity."

1. Upper Tribunal Judge Edward Jacobs 8.4.2013 (Corrected 18.4.2013)

substantial risk – regulation 35 – range or type of work-related activity which a claimant is capable of performing/might be expected to undertake must be established to sufficiently to assess the risk to health either to himself or to others

[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 regulation 35 – relating to work-related activity.

Regulation 35:

(2) A person who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if –

(a) the claimant suffers from some specific disease or bodily or mental disablement; and

(b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

This paragraph is similar to regulation 29(2), which applies to the effect of work. It is also equivalent to regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995.

The decision held:

"24. The Court of Appeal considered regulation 27(b) in *Charlton v Secretary of State for Work and Pensions* reported as *R(IB)2/09*. Moses LJ said that, although the case concerned incapacity benefit,

> "4. … the question of interpretation remains relevant to the regulations made under the new scheme introduced by the Welfare Reform Act 2007."

In other words, it remained relevant to employment and support allowance. It is directly relevant to regulation 29(2), which differs from regulation 27(b) only in the change of terminology appropriate to employment and support allowance. But to what extent, if at all, is it relevant to regulation 35(2)? In order to answer that, it is necessary to see what the Court decided.

25. The Court first decided that the paragraph applied to the effect of work and not just, as its language suggested, to the effect of being found capable of work. In other words, the paragraph applied not only to the immediate effect of the decision that the claimant was no longer entitled to incapacity benefit, but also to consequence of having to seek and then undertake work, including travel to work. That conclusion is equally applicable to both regulation 29(2) and regulation 35(2).

26. The Court then explained how to identify the type of work that had to be taken into account:

> "45. … The decision-maker must assess the range or type of work which a claimant is capable of performing sufficiently to assess the risk to health either to himself or to others."

Obviously, that is not directly applicable to regulation 35(2), which does not envisage the claimant working. However, the Court's reasoning can be applied by analogy to the work-related activity. Translating the language of the judgment into terms of work-related activity comes to this:

> The decision-maker must assess the range or type of work-related activity which a claimant is capable of performing and might be expected to undertake sufficiently to assess the risk to health either to himself or to others.

27. The evidence is the key to applying that paragraph. It consists of two elements and there must be appropriate evidence relevant to each element. The elements are the nature of the work-related activity and the claimant's health.

28. The evidence on the work-related activity can only come from the Secretary of State. The only mention of this in the file that I have found is in paragraph 7 of the Secretary of State's submission to the First-tier Tribunal:

> The purpose of being in the Work Related Activity Group is to take the first steps into looking at the barriers to future work and seeing if there are any ways to overcome these, including any reasonable adjustments that would need to be made to any work place, work station or job role. Mr H… would receive support throughout this from the Health and Disability Employment Advisor and it is not considered that this would cause a substantial risk to his mental or physical health. In form ESA113, [his GP] suggests voluntary work would actually aid Mr H…'s mental state.

…

31. The nature of the claimant's disabilities will determine the nature of the evidence that the tribunal needs in order to decide whether regulation 35(2) applies. Broadly, there are two possibilities. In some cases, the tribunal will need only general information in order to decide that a particular claimant does or does not satisfy section 35(2). For example: a claimant whose only disability is restricted mobility should have no difficult in attending an interview or an appropriate course. In other cases, the tribunal will need evidence on the specific nature of the activity that the claimant would have to undertake."

See also [2014] AACR 6 (unreported MN v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0262 (AAC) – CE/3477/2012) and MT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0545 (AAC) – CE/973/2013.

1. Judge of the Upper Tribunal Edward Jacobs 5.3.2013

regulation 29 – needed mother with her when meeting new people

LM v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0552 (AAC) – CE/4125/2012 held:

"20. I note that the tribunal refers to the claimant generally needing her mother with her when she meets new people. There is no evidence of her meeting new people without her mother. Nor does she appear to have met any new people around the time of the decision or to have engaged in social contact with anyone before they become familiar to her. In any event, if she did meet any new people around this time, they would appear to have been professionals, who because of their professional expertise would have been expected, as Judge Ward [referring to the decision of Judge Ward *in AR v Secretary of State for Work and Pensions – [2013] UKUT 0446 (AAC) – CE/4183/2012*] points out, to understand and allow for the claimant's problems in this respect. [*My insert*]

21. As the tribunal dealt with matters on the papers, I see no reason why I should not substitute my own decision for that of the tribunal. For the reasons already given, I am satisfied that the claimant scores 6 points on descriptor 15(c) and 9 points on descriptor 16(b). She therefore scores a total of 15 points and is to be treated as having limited capability for work.

22. I would add that if, as the tribunal appears to have assumed, the claimant would have needed to seek work if found not to have limited capability for it, I have some difficulty in identifying what work might have been sought and how this claimant might have been expected to cope with seeking such work, apparently accompanied all the time by her mother, and dealing with interviews by unfamiliar people. The question does not arise, however, both because she has now scored 15 points and because, as a lone parent having children under the age of 5, she would qualify for income support under regulation 4ZA of, and paragraph 1 of Schedule 1B to, the Income Support Regulations 1987 and would not need to look to obtain jobseeker's allowance."

2. Judge of the Upper Tribunal Michael Mark 8.11.2013

DWP obligation to provide evidence of what is involved in work-related activity

MT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0545 (AAC) – CE/973/2013 involved a case where for the purposes of Employment and Support Allowance the Secretary of State, whilst accepting that the claimant continued to have 'limited capability for work', held that she did not have 'limited capability for work-related activity'. This decision was made following the obtaining of a medical report which found that sufficient points had been scored under the mental health descriptors to satisfy Schedule 2 (for limited capability for work) but that it was thought that none of the descriptors under Schedule 3 (for limited capability for work-related activity) applied and that there would not be a substantial risk to the mental or physical health of any person if she was found capable of work-related activity.

The claimant appealed against this decision. At her appeal she was represented by Mr Pugh, a welfare rights officer from the Southway Housing Trust. Because there was no contention that any of the descriptors in Schedule 3 were satisfied, the only issue before the First-tier Tribunal was whether or not regulation 35(2) of the Employment and Support Allowance Regulations 2008 applied.

> 35(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work related activity if –
>
> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
>
> (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person is the claimant were found not to have limited capability for work related activity.
>
> Regulation 34(1) relates to the satisfaction of one of the descriptors in schedule 3 of the Employment and Support Allowance regulations, which demonstrates limited capability for work-related activity, and confirms entry into the support group.

It was the decision of the First-tier Tribunal that Regulation 35 could not be satisfied. The First-tier Tribunal decision held:

> "If the appellant were to be found not to have limited capability for work related activity, she may be required to attend for occasional interviews and comply with any reasonable requirement made of her in that context. Any requirements would be tailored to her individual needs with a view to helping her move closer to work, and the demands, which would be made on her, would neither be frequent nor onerous"; and

> "as previously stated, if the appellant were to be found not to have limited capability for work-related activity she might be required to attend for occasional interviews and comply with any reasonable requirement is made of her in that context. Demands would therefore be neither frequent nor onerous. It seems to us, that there would be nothing to prevent her taking another adult with her when required to attend interviews if necessary".

The claimant appealed against the decision of the First-tier Tribunal to the Upper Tribunal. The claimant's representative argued that the appellant's behaviour should be considered in relation to work-related activity in a similar way that it is considered in relation to work under regulation 29.

The Upper Tribunal Judge granted permission to appeal and directed the Secretary of State to address the question of whether the First-tier Tribunal had sufficient evidence before it to justify its finding.

The Secretary of State did not support the appeal. It was their view that what the Tribunal did was refer indirectly to the terms of regulation 55 of the Employment and Support Allowance Regulations 2008 which set out the purpose of the work-focused interview and Regulation 3 of the Employment and Support Allowance Regulations (Work-Related Activity) Regulations 2011 which specify that work-related activity must be reasonable with regard to the circumstances of the claimant.

The Secretary of State refuted the contention that similar arguments may be advanced in relation to regulation 35 as those within the regulation 29 parameters, pointing out that the consideration must concern not difficulties at work or on the journey to and from work, but with work-related activities. It was the view of the Secretary of State that the problem was that as in this case it is very hard for a First-tier Tribunal to know what work-related activities may be expected of an appellant.

The Upper Tribunal Judge (at paragraph 7) noted what had been held in *[2013] AACR 32 (unreported AH v Secretary of State for Work and Pensions – [2013] UKUT 0118 (AAC) – CE/1750/2012)* (a decision of Upper Tribunal Judge Jacobs) that the Secretary of State must provide sufficient information about work-related activity for the claimant to present a case and the tribunal to make an informed decision. In this case there was no information as to what work related activity was in general, or might be for this appellant.

The Upper Tribunal Judge (at paragraph 10) held that he found support for the contention that the regulation 29 and 35 issues overlap, or at least that the considerations in respect of each are not mutually exclusive, in *[2013] AACR 32 (unreported AH v Secretary of State for Work and Pensions – [2013] UKUT 0118 (AAC) – CE/1750/2012)* (a decision of Upper Tribunal Judge Jacobs) in which the applicability of the test of the Court of Appeal in the case of *Charlton v Secretary of State for Work and Pensions* reported as R(IB)2/09 was discussed in relation to regulation 35. The decision held:

"25. … In other words, the paragraph applied not only to the immediate effect of the decision that the claimant was no longer entitled to incapacity benefit, but also to consequence of having to seek and then undertake work, including travel to work. That conclusion is equally applicable to both regulation 29(2) and regulation 35(2).

26. The Court then explained how to identify the type of work that had to be taken into account:

> "45. … The decision-maker must assess the range or type of work which a claimant is capable of performing sufficiently to assess the risk to health either to himself or to others."

Obviously, that is not directly applicable to regulation 35(2), which does not envisage the claimant working. However, the Court's reasoning can be applied by analogy to the work-related activity. Translating the language of the judgment into terms of work-related activity comes to this:

> The decision-maker must assess the range or type of work-related activity which a claimant is capable of performing and might be expected to undertake sufficiently to assess the risk to health either to himself or to others."

The Upper Tribunal Judge (at paragraph 11) held that in consequence they accepted the view that an assessment by the First-tier Tribunal of the range or type of work-related activity as set out by Judge Jacobs must be conducted on the basis of evidence.

The essence of the submission by the Secretary of State was that there was nothing in the regulations that specified what work-related activity a claimant may be required to undertake, and that lack of specificity allowed a flexible approach to be taken when considering what work-related activity a claimant might be capable of undertaking.

The Upper Tribunal Judge held:

"14. Whilst acknowledging the practicality of that view going forward, because people's conditions and abilities may change, I am less sympathetic to the argument that the work-related activities the appellant might have been expected to engage in at the time of the decision under appeal cannot be stated. An integral part of the decision under appeal is that the appellant does not come within the provisions of regulation 35(2), not having limited capability for work-related activity. Put another way they are able to engage in work-related activity. In order to exercise his judgement and make that decision the Secretary of State must have had some work related activity in contemplation. Upper Tribunal Judge Wright in *MN v Secretary of State for Work and Pensions* [2013] UKUT 262 (AAC) considered the position of the Secretary of State in that regard at paragraph 20, saying:

> "I fail to see why this amounts to an unusual or onerous burden given that the Secretary of State had already made a decision to the effect that the appellant did not come within regulation 35(2) and so must have addressed these matters already.

> This, it seems to me, must be the consequence of sections 2(3)(b) and 4(5)(b) of the Welfare Reform Act 2007 in this context (i.e. where the limited capability for work decision has in fact been made – SSWP-v-PT (ESA) UKUT 317 (AAC); [2012] AACR 17 addressing a differing context), which give as a condition of entitlement to the work-related activity component of ESA "that the claimant does not have limited capability for work-related activity", and that condition in this context can only in my judgment be satisfied by an affirmative decision to that effect."

15. As to whether the tribunal could examine what the appellant had in fact been required to do by way of work-related activities, the tribunal, as a matter of law, must look at the position as it was at the date of the decision under appeal. Section 12 (8) (b) Social Security Act 1998 provides that the tribunal "*shall not take into account any circumstances not obtaining at the time when the decision appeals against was made*." It is possible that what the appellant has been required to do pending appeal may shed light on the sort of activities that were in the contemplation of the Secretary of State at the date of the decision under appeal, however the practice seems to vary from case to case, perhaps from area to area, and in some cases no engagement is required pending appeal. Presumably that circumstance would not be reflective of the position at the date of decision. In order for the appellant's experience since the date of the decision to be of use to the FTT there would need to be to be a statement in the response of the Secretary of State as to whether the approach to work-related activities taken pending appeal in this particular case reflected what would have been the activities in contemplation by the Secretary of State at the date of decision. This may go some way towards providing the evidence required for the tribunal, but it would not be sufficient in every case. For example the appellant may have no wish to attend at an oral hearing to give evidence as to what had been expected of them pending appeal."

Supported by DH v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0573 (AAC) – CE/587/2013 (Upper Tribunal Judge S M Wright).

See also [2013] AACR 32 (unreported AH v Secretary of State for Work and Pensions – [2013] UKUT 0118 (AAC) – CE/1750/2012) and AK v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0435 (AAC) – CE/3916/2012.

1. Judge of the Upper Tribunal P A Gray 5.11.2013

regulation 35 – tribunal – no information on what is meant by work-related activity

PF v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0634 (AAC) – CE/2527/2013 held:

"9. There was no information in the decision as to what was meant by work-related activities; there had been none apparently before the HCP [*Healthcare Professional*], and she mentioned none. There was none before the FTT [*First-tier Tribunal*]. In those –circumstances there is a question mark over the basis of the decisions taken in relation to regulation 35 (2).

10. Since granting permission to appeal in this case I have made a decision on similar issues in the case *MT-v-SSWP 2013 UKUT 545 AAC.* In that decision I deal with both the context and the importance of regulation 35 (2) (b) of the Employment and Support Allowance Regulations 2008 and the legal duty on the Secretary of State to provide some details as to what work related activities a given appellant might be called upon to engage in prior to a decision of the First-Tier Tribunal (FTT) on the applicability of that regulation.
I also deal with the practical difficulties of a FTT speculating upon such activities in the absence of evidence, and suggest approaches which a FTT may adopt to avoid the generally unsatisfactory path of adjourning the case once it is in front of a tribunal which is able to decide the issue. That decision will accompany this decision for the benefit of the panel that is to rehear the case.

11. The submission of the Secretary of State on this, my second point, is that consideration of regulation 35 (2) does not involve a detailed *Charlton* type enquiry, that case having concerned Incapacity Benefit rather than Employment and Support Allowance, and that it dealt with regulation 27 of the applicable Incapacity Benefit Regulations, which were repeated in regulation 29 of the ESA regulations, and nor regulation 35. This approach ignores the comments of Upper Tribunal Judge Jacobs in *AH v SWP [2013] UKUT 118 (AAC)* in which he discusses the applicability of the test of the Court of Appeal in the case of *Charlton v Secretary of State for Work and Pensions* reported as *R(IB) 2/09* in relation to regulation 35. He said at paragraphs 25 and 26

> "In other words, the paragraph applied not only to the immediate effect of the decision that the claimant was no longer entitled to incapacity benefit, but also to consequence of having to seek and then undertake work, including travel to work. That conclusion is equally applicable to both regulation 29(2) and regulation 35(2)."
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> 26. The Court then explained how to identify the type of work that had to be taken into account:
>
> > 45. … The decision-maker must assess the range or type of work which a claimant is capable of performing sufficiently to assess the risk to health either to himself or to others.
> >
> > Obviously, that is not directly applicable to regulation 35(2), which does not envisage the claimant working. However, the Court's reasoning can be applied by analogy to the work-related activity. Translating the language of the judgment into terms of work-related activity comes to this:
> >
> > The decision-maker must assess the range or type of work-related activity which a claimant is capable of performing and might be expected to undertake sufficiently to assess the risk to health either to himself or to others".

12. As to the extent of the regulation 35 enquiry, building on my decision *MT-v-SSWP,* and pertinently in relation to this case, Upper Tribunal Judge Bano in *GH-v-SSWP CSE/634/13* at paragraph 9

> "Although the nature of the fact-finding exercise required by regulation 35 differs from that required to decide whether the claimant satisfies any of the Schedule 3 descriptors, in that regulation 35 is concerned with the assessment of risk rather than functional impairment, in many cases the tribunal's factual investigation when considering regulation 35 will need to be no less detailed than when considering the descriptors. In the case of claimants with mental health conditions, it may be necessary to investigate in particular whether undertaking work-related activity would conflict with any medical advice which a claimant has been given."

13. Of course any regulation 35 (2) enquiry will only be necessary if no schedule 3 descriptor is applicable. As to that issue regard should be hard to the first and third point that I make concerning the adequacy of the FTT's explanation [*sic*] in relation to their acceptance and rejection of certain evidence. The submission of the Secretary of State does not, I feel, entirely take on my point in relation to the first matter. The question is not whether the FTT is able to rely on the HCP report; they are entitled to accept whatever evidence they feel is most persuasive, however in doing so there may be a need for explanation. The wholehearted way in which the report appears to have been accepted in this case flies in the face of the ultimate conclusion of the tribunal, which was against the opinion of the HCP. They agreed with the revision decision maker that 18 points were merited, whereas the HCP had felt that just 6 points were merited on the same evidence. It is not impossible for that conclusion to be arrived at, but it needs some explanation, and in particular it needs to disentangle the factual evidence which was accepted from the opinion which was clearly not. That leads fairly neatly onto my point 3, in which I felt that there was a lack of explanation of the rejection of the evidence from the appellant's psychiatrist. The FTT simply accepted the HCP's evidence over and above that of the psychiatrist without explanation. This is despite their apparent rejection of that person's opinion on the extent of the functional disablement. Where evidence of opinion is put forward, key to the evidential value of that opinion is the source of it. The level and extent of the expertise must be of central relevance in relation to the evaluation of opinion evidence. To accept, for example, on a contested legal point, the opinion of a law student, rather than that of their professor in the absence of a compelling explanation would be irrational. Here on a psychiatric issue the opinion of a registered physiotherapist was preferred to that of a psychiatrist. This situation may be more powerful than my example in that the physiotherapist is unlikely to have any experience at all in the field of psychiatry. If, unusually, they had such experience then that should have been stated because it would have been of importance.

14. I need say no more about my final point in granting permission to appeal. Judge Parker's decision is attached to the submission of the Secretary of State, which will be in front of the fresh panel." [*My inserts*].

1. Judge of the Upper Tribunal P A Gray 12.12.2013

what if there is no evidence of work-related activity – regulation 35

MT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0545 (AAC) – CE/973/2013 held that the Secretary of State was obliged to provide evidence of work-related activity where regulation 35 was in question.

See the separate write-up on this. The Upper Tribunal Judge then addressed the question of there being no information before the First-tier Tribunal. The decision held:

"*What if, as in this case, the information is not before the FTT?*

26. Was this FTT able to make an assumption as to what work-related activities would be required of this appellant?

27. My answer to that question, and therefore the crux of my decision in this appeal, is no. The identification of certain limited activities in which the appellant may be able to engage and the use of those findings to found a decision that regulation 35(2) is not satisfied creates a situation whereby because the appellant is judged to be capable of carrying out some work related activities they are put into a position where there may be an assumption by an adviser that they could carry out any work related activity that was directed, with the consequent sanction risk. That seems to me to perpetuate the mischief that regulation 35 is there to alleviate. The requirement within the regulations that the work-related activity be "reasonable" does not cure the defect, because the issue of reasonableness is for the adviser, and there is no direct challenge to that judgement.

28. In this case and in general, what is to be done if the FTT is faced with the problem of either no information or generalised information such as that set out in the Secretary of State's submission in CE/3916/2012? The FTT may yet be able to fairly and justly deal with the appeal without adjourning for case specific information, an approach that would if – replicated in sufficient numbers prolong the process to the detriment of appellants and cause logistical difficulties both for the DWP and HMCTS.

Is there a solution for the FTT?

29. The options seem to me to be twofold. Each will result in subtly different legal outcomes.

30. The FTT could make a decision that in the absence of specific evidence of what would be required of this particular appellant by way of engagement in work related activity the Secretary of State has not shown that, at the date of the decision and appeal, they did not have limited capability for work-related activities. The provisions of regulation 35(2)(b) then apply. The Secretary of State could supersede that decision under regulation 6(2) of the Social Security and Child Support Decisions and Appeals Regulations 1999, the grounds being either a change of circumstances under 6(2)(a)(i) or error of material fact, 6(2)(c)(i), or, after a three-month period under regulation 35(5) of the Employment and Support Allowance Regulations. Either decision would provoke an appeal, in which an issue will again be as to what work-related activities can be accomplished without substantial risk. Under rule 24(2)(e) of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 the Secretary of State must in that appeal set out his opposition to the appellant's case, stating the grounds. (*MN v Secretary of State for Work and Pensions [2013] UKUT 262 (AAC)*

31. There are advantages in this approach for appellants over that of adjourning. The current legal proceedings are concluded, generally of itself a relief. If the Secretary of State decides to supersede there is the protection of the appeals process, but he may not choose to supersede the tribunal decision; the way through to engagement in work related activities may be negotiated with the skills and good sense of an adviser without the element of compulsion that can cause considerable stress, particularly to those who must have significant functional impairment having been already found to have limited capability for work. In the words of Lords Neuberger and Toulson delivering the judgement of the court in *R on the application of Reilly and another -v- Secretary Of State for Work and Pensions 2013 UKSC 68 at paragraph 64, (*in the context of those without any limitations as to their capacity to work) *"For the individual, the discontinuance or threat of discontinuance of jobseeker's allowance may self-evidently cause significant misery and suffering"*

32. The alternative is really the obverse of that, and deals with what I see as the problem which may arise from the approach set out in CE/3916/2012. The tribunal could make a decision stating in terms what work-related activities would not result in a substantial risk to the health of the appellant, also stating that more onerous commitments would be likely to result in substantial risk to the health of the appellant, or where relevant, of any other person. That differs from the decision of the FTT in this case, where the basis of their finding was that the appellant would only be asked to perform non-onerous activities, and that she could do. Would that decision, with such 'conditional' findings, bind the Secretary of State? It would be tribunal decision that contained specific findings of fact which the Secretary of State would need to make a fresh decision to overcome. This would be a supersession decision as above, and would carry rights of appeal; once again there would be an onus [*meaning: duty or responsibility*] on the Secretary of State to provide information as set out previously. For practical purposes following the appeal I would envisage a tribunal decision framed in those terms as carrying weight in the same way that, I understand, occurs where on appeal to a FTT the decision is that there is not limited capability for work, but some points are scored. The findings of the FTT in relation to specific descriptors being applicable are taken into account by the job centre in the drafting of the job seeker's agreement and in relation to the expectation to apply for specific jobs. It would seem reasonable for the findings of a tribunal as to which work-related activities or types of work-related activity an appellant could be expected to engage in without a substantial risk to their health or the health of others to be similarly acknowledged. [*My insert*].

33. I am not suggesting, of course, any sort of formulaic decision making. The approach in every case will be dictated by its own particular facts and circumstances; however I adumbrate these options as possible approaches each of which may avoid either adjourning for further information or making a decision on assumptions in the absence of evidence which resulted in withholding the element of protection envisaged for the very vulnerable under regulation 35."

See also the write-up on the requirement on the Secretary of State to provide evidence of work-related activity.

1. Judge of the Upper Tribunal P A Gray 5.11.2013

only DWP know what is involved in work-related activity – what if decision did not involve regulation 35 but does now before tribunal?

DH v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0573 (AAC) – CE/587/2013 held:

"16. Moreover, it is no answer to this to argue, as the Secretary of State seeks to argue in his submissions on this appeal, that, given what the appellant could do, it was not unreasonable for the tribunal to conclude that she was able to undertake "some form of [work-related activity]". This is the wrong way to view the test, as Upper Tribunal Judge Gray has said in *MT-v-SSWP* (ESA) [2013] UKUT 0545 (AAC). The Secretary of State has already affirmatively decided that the appellant does not have limited capability for work-related activity, within that he has decided that there is work-related activity in which she can safely engage despite her severe anxiety problems, and, per *Kerr*, only he knows what work-related activity is in fact. In these circumstances it was from him to prove his case by saying what the specific work-related activity was that the appellant could safely engage in, and for the tribunal on the appeal to be satisfied as to the same.

17. It may be relatively easy for the Secretary of State to discharge this onus [*meaning: duty or responsibility*], if I can call it that, in cases where a claimant has scored 15 points for the physical descriptors. However, it is where the 15 points have been scored for the mental descriptors that the issue may be more difficult and nuanced. For example, if a claimant cannot [*sic*] anywhere outside on her own due to acute anxiety, cannot call on any regular outdoor companion, doesn't have a computer and either doesn't have or finds it difficult to use a phone, how is she to be able to engage in a face to face interview at the jobcentre, get help writing her curriculum vitae or participate in basic literacy or numeracy courses (page 68)? This is not to suggest that thee [*sic*] is no work-related activity such a person could safely do, but merely to highlight that the identification of that work-related activity will take care and thought. [*My insert*].

18. Different considerations may well arise where a First-tier Tribunal is dealing with an appeal where the decision under appeal is one that the appellant does not have limited capability for work and the First-tier Tribunal decides that she does. In that situation Schedule 3 and regulation 35(2) of the ESA Regs may only become an issue at the hearing of the appeal. Further, the continuing absence of presenting officers for the Secretary of State at such hearings will mean that the respondent is not in a position to submit to the tribunal the work-related activity that the appellant – now with his Schedule 2 descriptor(s) – would have been capable of engaging in at the relevant time without substantial risk to anyone's health. However, even here I can see no reason why the Secretary of State in his written appeal response is unable to provide the First-tier Tribunal with information as to what work-related activity he considers people generally may safely be able to do taking account of the each of the Schedule 2 descriptors or a combination of them. For example, what work-related activity a person who cannot go out on their own can do without substantial risk to their health."

1. Judge of the Upper Tribunal S M Wright 13.11.2013

the importance of regulation 35

MT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0545 (AAC) – CE/973/2013 held:

"24. Any claimant may, if they wish, engage in work related activities. In most cases it will be to the benefit of a claimant to discuss ways to improve their chances of ultimately obtaining employment and often participation in activities which reflect expectations at work will be helpful to establish the extent to which a person can cope with those expectations or where their limitations lie. These issues may then be addressed. Difficulties may arise, however, where there is disagreement between the claimant and the adviser as to what activities they may safely be able to engage in, and at that stage there is no dispute resolution mechanism. The disagreement could end with a claimant being sanctioned. Only at that stage would there be the prospect of an appeal to establish whether there had been reasonable cause for any refusal to engage in work-related activities. From 3 December 2012 the sanction is 100% of the personal allowance, currently £71.70 a week, leaving the claimant only with the work-related component of £28.45 a week. The sanction continues for each week that there is non-compliance with the requirement, and there is an additional fixed term of between one and four weeks depending upon whether there has been a previous sanction. If the claimant chose to pursue a work-related activity about which they felt uncomfortable to avoid the threat of sanction, there may be a risk to health.

25. Regulation 35 provides protection to an unusually vulnerable claimant against those circumstances occurring. Within that protective cloak a claimant can agree to engage in certain activities but cannot be compelled to do so; conditionality does not apply. I would emphasise that this issue relates to a very small group of vulnerable people, essentially comprising those with significant mental health problems or learning difficulties. They are those who are the least likely to be able to challenge any sanctions."

1. Judge of the Upper Tribunal P A Gray 5.11.2013

work-related activity – what is involved?

AK v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0435 (AAC) – CE/3916/2012 involved a case where the Upper Tribunal Judge, in giving permission to appeal, stated that where they considered that the appellant might have grounds it stated that the First-tier Tribunal erred in law was, so far as they could see, in the fact that there was no evidence at all before the tribunal of what work-related activity the claimant might be required to undertake. The Upper Tribunal Judge observed that in the absence of such evidence, the First-tier Tribunal's assumption that it might involve "interviews, retraining or therapy" was an implicit finding of fact about what work-related activity involved and was unsupported by evidence.

The Upper Tribunal Judge held that the need to determine accurately what might be involved in work-related activity was not an academic question without practical importance. They held that upon the findings of the First-tier Tribunal the claimant was concerned that there might be types of "retraining" or "therapy" which may have been beyond her physical limitations. On the other hand, it may be that the work-related activity which the DWP would actually require would fall short of this, in which case it is conceivable that the claimant might be able to manage it. The point, in the view of the Upper Tribunal Judge, was that it is necessary to determine the content of the work-related activity, one way or the other, based on evidence.

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

The Upper Tribunal Judge charged with determining the case held that they noted that in [2013] AACR 32 (unreported AH v Secretary of State for Work and Pensions – [2013] UKUT 0118 (AAC) – CE/1750/2012) Upper Tribunal Judge Jacobs (at paragraph 26) held that in relation to work-related activity there must be some evidence relating to the two elements that are key to applying regulation 35(2). Those elements are (1) the range or type of work-related activity that might be required of a claimant, and (2) the risk to the health of a claimant which this might entail.

Against this background the Upper Tribunal Judge held:

"11. A number of difficulties arise both for decision makers and tribunals in relation to setting out what work-related activity comprises. This is because there is an initial consultation with a personal adviser in the Department at which activities appropriate to all the claimant's circumstances, including his or her state of health, will be assigned. At the point at which a determination is being made about whether a claimant has limited capability for work-related activity, no such initial consultation has taken place. There will inevitably be a degree of speculation about what those activities might be.

12. At the very least, work-related activity will involve a consultation with a personal adviser, which I have been told in other cases may be by telephone. I have also been told that there is no problem about a person being accompanied to this consultation by a friend for moral support.

13. Furthermore, in the case of First-tier Tribunals, there is generally no representative of the Secretary of State present, and so no one who can respond to questions about what might conceivably be appropriate for the appellant. It would further clog up the adjudication system if, every time a tribunal reached the point at which they were required to consider regulation 35(2), there had to be an adjournment with directions for a submission to be prepared on behalf of the Secretary of State.

14. Where appeals are made to tribunals and regulation 35 might well be in issue, these difficulties would be obviated if the submission to the tribunal provided some examples of typical types of work-related activity. That would give tribunals something beyond speculation to work with. If it was plainly the case that the appellant could undertake some of those activities safely, then the conditions in regulation 35(2) would not be met. If the examples were carefully considered, I suspect the circumstances presented by most claimants could be judged without the need for either speculation or an adjournment.
15. This is what the Secretary of State has said to me on this issue:

> 4.3 … . I would highlight the point that there are no specific descriptors in regulations that describe what WRA a claimant may be required to undertake. This allows a flexible approach to be taken when considering what WRA a claimant might be capable of undertaking.
>
> 4.4 When drawing up the action plan with the claimant, the adviser takes into account the claimant's circumstances including physical or mental health and any learning or cognitive issues, to ensure requirements are reasonable and appropriate for that individual and help overcome a specific barrier to moving closer to employment—work related activities could include:
>
> - CV writing
> - confidence building course
> - basic skills
> - participate in basic literacy or numeracy courses
> - participating in English language training
> - work experience
> - mandatory work placements for community benefit.
>
> 4.5 This list is not exhaustive; there are other activities claimants may be required to undertake which would be discussed with the advisor to ensure it is flexible and tailored to an individual's circumstances. Flexibility is essential in tailoring the right support for each claimant and this would need to be maintained as what works for one claimant may not be suitable for another. Judge Jacobs in CE/3261/2012 [*reported as [2013] AACR 33*] paragraph 15 acknowledged that it was not possible to say in advance what precisely would be expected of any particular claimant in relation to what WRA they might be able to undertake. The Judge also accepted in his decision CE/1750/2012 [*reported as [2013] AACR 32*] at paragraph 31 that the nature of the claimant's disabilities would determine evidence needed for a Tribunal to decide whether or not they satisfied the criteria in regulation 35(2). [*My insert*].

16. Plainly at the very least a claimant required to undertake work-related activity must have a consultation with a personal adviser in the Department. But the test cannot be that regulation 35(2) will only be satisfied where a person lacks the capability to have such a consultation. There must be very few people (such as those with very significant mental health problems) for whom this minimal requirement would present a substantial risk to their health or that of others.

17. I have seen some submissions which get close to adopting the position set out in the previous paragraph. Nor can it be right simply to assert that a personal adviser would never require activity beyond the capability of the claimant, and that in some cases very little activity would be required. It does seem to me that there must be some illustrative examples of what work-related activity involves. If a claimant can show that they could not safely undertake any of those activities which might well be appropriate to them, then it seems to me that they will have satisfied regulation 35.

18. Where no evidence is available, then I see nothing inappropriate in a tribunal indicating some typical examples of work-related activity that are within their knowledge and showing that a claimant can safely undertake those activities.

19. Indeed this appears to be the position adopted by the Secretary of State in this appeal:

> 4.5 … . It is my contention that in this particular case the evidence within the appeal bundle and the claimant's verbal evidence were sufficient and specific enough for the Tribunal to make the decision that the claimant did not satisfy the criteria for regulation 35(2).

20. In her final observations to me, the appellant takes issue with much of what the Secretary of State says. In particular, she argues that a decision under regulation 35(2) should not be based on assumptions but on particular activities which might be regarded as appropriate to her.

21. I have not found this an easy decision to make. Even taking the examples which are now put before me by the Secretary of State of typical work-related activity, it is plain that most of them would be unlikely to be appropriate for this appellant. Some are patently inappropriate, such as basic skills courses, literacy and numeracy courses and English language training.

22. However, I do not consider that the illustrative examples used by the tribunal are inappropriate or far-fetched. The tribunal's findings of fact indicate that the appellant can attend and participate in a tribunal hearing, can sit for limited periods, and can write. Typical work-related activity such as interviews or retraining (perhaps with a view to some sort of part-time work from home) might well involve these things and could be accomplished without substantial risk to the appellant's health. No issue arises relating to risks to the health of anyone else.

23. In all the circumstances of this case, I have concluded that the tribunal was left with no realistic option but to speculate on the sort of work-related activities that might be required. Their speculation has generated sensible examples and they have concluded that these can safely be undertaken by the appellant.

24. There is therefore no error of law in the tribunal's decision, and I dismiss this appeal."

See also [2014] AACR 6 (unreported MN v Secretary of State for Work & Pensions (ESA) – [2013] UKUT 0262 (AAC) – CE/3477/2012) and [2013] AACR 32 (unreported AH v Secretary of State for Work and Pensions – [2013] UKUT 0118 (AAC) – CE/1750/2012) and MT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0545 (AAC) – CE/973/2013.

1. Judge of the Upper Tribunal Robin C A White 9.8.2013

considerations – regulation 35

HS v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0591 (AAC) – CE/1882/2013 (at paragraph 8) held:

"The conclusion of the tribunal was that regulation 35 did not apply, but neither was there any indication as to what considerations the tribunal had given to what work-related activities might be demanded of the appellant, nor did they explain why the non-functional descriptor did not apply. It was not enough to rely on the finding that none of the mental health descriptors in schedule 3 applied to her; if any of them had the tribunal would not have been considering the non-functional descriptor at all. Accordingly more reasoning than this was required."

1. Judge of the Upper Tribunal P A Gray 5.11.2013

what is involved in work-related activity – DWP obligation

[2014] AACR 6 (unreported MN v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0262 (AAC) – CE/3477/2012) held:

"12. The critical error of law in the tribunal's decision is the failure of the tribunal to give adequate reasons as to why it found that some four weeks after her operation there was no substantial risk to the appellant's (or another's) health in her engaging in work-related activity. I am satisfied from consideration of the record of proceedings that – as the Secretary of State agrees – the tribunal failed in its questioning of the appellant to focus on how she was in or around November 2011, or at least it failed to explain adequately how and why the evidence it took from the appellant was relevant to her situation in November 2011.

13. There is, however, a related but equally important error and that concerns the failure of the tribunal to identify, to use the words of Upper Tribunal Jacobs in paragraph [26] of *AH-v-SSWP* [2013] UKUT 118 (AAC) "the range or type of work-related activity which [the appellant] was capable of performing and might be expected to undertake sufficiently to assess the risk to health either to h[er]self or to others", applying *Charlton-v-SSWP* (R(IB)2/09) to regulation 35(2) of the ESA Regs. I respectfully adopt and agree with all that Judge Jacobs says in *AH*. That error was fundamental because without establishing that range of work-related activity there was nothing against which to assess the regulation 35(2) risk.

14. However, the tribunal was not aided in this task by the failure of the Secretary of State to provide it with any useful information as to what work-related activity was for the appellant in November 2011 which she was capable of engaging in, or undertaking, without substantial risk to herself or others. All the Secretary of State told the tribunal about the application of regulation 35(2) of the ESA Regs to the appellant's case is contained in paragraphs 5 and 6 of Section 5: The response of his appeal response. Neither paragraph, however, explains what work-related activity in fact is, either generally or for this particular appellant. Consideration of the evidence before the tribunal did not explain what work-related activity was either: the form ESA85A merely repeats the key words of regulation 35(2) of the ESA Regs. And, as I have said earlier, the actual decision is nowhere to be seen.

15. The Secretary of State's omission of this highly relevant information from the information he put before the tribunal was a mistake and a serious breach of his duties to that tribunal. As Judge Jacobs pointed out in paragraph [28] of *AH*, the evidence on work-related activity can only come from the Secretary of State. I also agree, subject to one slight caveat, [*meaning: a warning or proviso of specific stipulations, conditions or limitations*] with what Judge Jacobs said at paragraph [15] of *ML-v-SSWP* [2013] UKUT 174 (AAC):

> "Despite having dealt with numerous cases involving the support group, I still have no idea of what work-related activities involves beyond the general, formulaic statements such as those I have quoted from the Secretary of State's argument. I accept that it is not possible to say in advance what precisely would be expected of any particular claimant. However, it must be possible to give a sufficient indication of what is involved in order to allow a claimant to provide evidence and argument, and to allow a tribunal to make a decision. The decision whether or not a claimant satisfies the conditions for the support group carries the right of appeal to the First-tier Tribunal under section 12 of the Social Security Act 1998. It is not one of those decisions that are excluded from the right of appeal. The existence of a statutory right of appeal requires that it must be effective. It cannot be effective without the necessary information for claimants to participate in the appeal and for the tribunal to make a decision".

16. My caveat is based on two considerations. First, it may well be that in most cases a general indication of what is involved in work-related activity may suffice to meet the *Charlton*/*AH* test of "the range or type of work-related activity which [the appellant] is capable of performing and might be expected to undertake" so as to allow the First-tier Tribunal to assess (a) whether the –

appellant is capable of performing those activities, and (b) if he is, any risks associated with his so doing. However, in particular cases more specific information may be required. For example, what might be thought of as a standard work-related activity of attending an interview at a Jobcentre might not be an activity that a severely agoraphobic and anxious person who has scored 15 points under descriptors 15(b) and 16(c) of Schedule 2 to the ESA Regs is capable of undertaking, and more tailored work-related activity may be needed.

17. The second consideration arises from the fact that on this appeal the appellant had expressly raised as a ground of appeal whether she came within regulation 35(2) of the ESA Regs (see point (12) in her letter of appeal on page 10), and the Secretary of State had accepted this was an issue raised by the appeal (as he had addressed regulation 35(2), however inadequately, in his appeal response). In these circumstances rule 24(2)(e) of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008 (the "TPR") placed the Secretary of State under a mandatory obligation to say whether he opposed the appellant's case on regulation 35(2) and, as he did, state "any grounds for such opposition which are not set out in documents which are before the Tribunal".

18. As I have noted already, none of the documents before the tribunal addressed work-related activity either in a general sense contemplated by Judge Jacobs in *ML* above or in the more specific sense of the work-related activity the Secretary of State contended the appellant was capable of performing and might be expected to undertake. Nor do the documents state the grounds why the Secretary of State considered the appellant's (or another's) health would not be at substantial risk if she undertook such activity (an omission which follows as a matter of logic from the fact that no work-related activity had been identified to measure the health risk against).

19. In these circumstances rule 24(2)(e) of the TPR in my judgment obliged the Secretary of State to set out, in the written appeal response, his case on why the appellant did not come within regulation 35(2) of the ESA Regs, and his failure to do so in any meaningful way was a serious breach of his obligations under the TPR. By "set out his case" I mean state his grounds for opposing the appellant coming within regulation 35(2), and that must, as far as I can see, per *Charlton*, *AH* and *ML*, have required him to:

(a) set out the range or type of work-related activity which the appellant was capable of performing and might have been expected to undertake, and

(b) explain why, on the evidence of the appellant's situation some three weeks after her gall bladder had been removed, there would be no substantial risk to the appellant's (or another's) health if she were found not to have limited capability for work-related activity.

To this extent the information ought to relate to the specific appellant, and it ought to be information provided in advance (contra to paragraph 15 of ML), in the sense of being contained in the Secretary of State's written response on the appeal.

20. I fail to see why this amounts to an unusual or onerous burden given that the Secretary of State had already made a decision to the effect that the appellant did not come within regulation 35(2) and so must have addressed these matters already. This, it seems to me, must be the consequence of sections 2(3)(b) and 4(5)(b) of the Welfare Reform Act 2007 in this context (i.e. where the limited capability for work decision has in fact been made – *SSWP-v-PT* (ESA) UKUT 317 (AAC); [2012] AACR 17 addressing a differing context), which give as a condition of entitlement to the work-related activity component of ESA "that the claimant does not have limited capability for work-related activity", and that condition in this context can only in my judgment be satisfied by an affirmative decision to that effect.

21. Of course none of this discussion on rule 24 of the TPR concerns, directly, whether the appeal tribunal erred in law. However, I have addressed it in some detail because: (a) from the Upper Tribunal's perspective from cases which come before it, it (and regulation 35(2) of the ESA Regs and "work-related activity" more generally) is an issue of general importance; (b) this decision may provide helpful guidance for the content of the Secretary of State's appeal responses in future cases; (c) it is necessary to explain direction (4) above; and (d) it provides a further perspective on where the tribunal went wrong in law.

22. Turning back to the tribunal, I have some considerable sympathy with the predicament it found itself in at the hearing given the absence of any useful information from the Secretary of State on work-related activity under regulation 35(2) of the ESA Regs. But it was not obliged to decide the case there and then on 21.06.12. Given what I have said above, it may have been that the most sensible course was to have adjourned the hearing so as to be provided with a supplementary response from the Secretary of State that properly addressed work-related activity and why there would be no substantial risk to the appellant from her engaging in such activity as at 10 November 2011. Having chosen not to do that, however, and chosen to decide the appeal, it was incumbent on the tribunal to consider properly and determine all of the relevant regulation 35(2) issues, and the tribunal (through its reasoning) failed to do that here.

23. It is for all these reasons that the tribunal's decision dated 21.06.12 must be set aside…" [*My insert*].

1. Judge of the Upper Tribunal S M Wright 22.5.2013

work-related activity – DWP must provide copy of action plan to tribunal

JH v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0269 (AAC) – CE/3883/2012 held:

"24. A further question, raised by the judge giving permission to appeal is whether the tribunal should have made findings as to the work related activity that the particular claimant would be required to undertake in reaching a conclusion in relation to the application of regulation 35. If a person is found not to have limited capability for work-related activity, he will be required to undertake such activity. At the date of the decision, the decision maker may not know exactly what that will involve, although the Secretary of State will then need to notify the claimant of a requirement to undertake work-related activity by including the requirement in a written action plan given to the person, which must specify the work-related activity which the person is required to undertake and any other appropriate information (see regulation 5 of the Employment and Support Allowance Regulations 2011, in force from 1 June 2011). Work-related activity is defined in section 13(7) of the Welfare Reform Act 2007, in relation to a person, as activity which makes it more likely that the person will obtain or remain in work or be able to do so.

25. It appears to me that, except to the extent that the written action plan takes into account matters which occur after the date of the decision, it is evidence of the sort of work-related activity which the claimant can have been expected to undertake at the date of the decision, and that to enable the tribunal properly to consider the application of regulation 35, a copy of that plan ought to be provided by the Secretary of State to the tribunal. That was not done in the present case.

26. The new tribunal should be provided by the Secretary of State with a copy of that plan and of any other information as to the work-related activities that the claimant is expected to undertake so as to enable the new tribunal properly to consider regulation 35. The question whether the claimant has undertaken those activities and, if so, with what effect, may also be relevant insofar as it sheds light on the risk, judged as at the date of the decision, to the mental or physical health of any person of the claimant being found not to have limited capability for work-related activity."

See also AP v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0553 (AAC) – CE/698/2013 which is another decision of Upper Tribunal Judge Michael Mark on this theme. See Stop Press regarding Three-Judge Panel hearing on this theme.

1. Judge of the Upper Tribunal Michael Mark 5.6.2013

substantial risk – must be causal link between work and risk

Secretary of State for Work and Pensions v Cattrell – Court of Appeal – [2011] EWCA Civ 572 (reported as [2011] AACR 35 – unreported CIB/256/2009) held:

"27. I come back to ground 4, the *Charlton* case. In paragraph 3 of his skeleton the Secretary of State said that the reason for bringing this appeal was:

> "To reinstate the importance of the test in *Charlton* which the Secretary of State argued was not followed by the Upper Tribunal."

The actual dispute in *Charlton* was within a very narrow compass. Fairly obviously, before regulation 27 can bite there has to be shown a causal connection between the claimant's work and the risk of injury that it is claimed will follow from the claimant doing that work. The Commissioner in that case held that no link had been demonstrated. The claimant in that case had never worked, but the Commissioner held that he could if required to do so undertake some very basic manual work. That, the Commissioner found, would not cause a substantial risk to his health. The claimant appealed on the basis that the Commissioner should have been more specific as to the nature of the work involved. The Court of Appeal said that the Commissioner had done enough; his reasoning had been sufficient, and it was in that context that the Court of Appeal quoted with approval the approach of Deputy Commissioner Paines QC in an earlier case set out in [39] of the judgment of Moses LJ, in which the Commissioner said that regulation 27(b) requires one to start by identifying the disease or disablement. The next stage is to consider the nature of any health risks posed by that disease or disablement in the context of the places that that claimant might find himself in, with a view to asking whether any such risk is substantial.

28. The Secretary of State says in our case that the tribunal did not ask any question about what work the claimant might undertake, but, on the basis of the finding that no work was safe for the claimant, passed straight to the conclusion that if she worked she would be at –risk. But far from ignoring the approach required by Charlton, the Upper Tribunal in fact addressed this point in a passage I have already read:

> "While in the normal course a tribunal is required to identify 'range or types of work' that a claimant can undertake, in the present case the tribunal has accepted the claimant's evidence that the Job Centre 'could see no prospect of her getting work that would be reliably safe for her' and that in practice there was no suitable work."

29. What he said therefore was, I respect *Charlton* but I do not need – indeed it would be supererogatory – to go through the formula that Commissioner Paines set out, because we know (there is a finding of fact) that there is no work at all safe for this lady, so it would be beating the air to hypothesise some work and then ask myself whether she would be reasonably safe in doing that work.

30. The Secretary of State's real complaint under this ground is not, I think, that *Charlton* was not respected but that the lower tribunal was wrong in relying on the evidence that it did in finding that no work was safe for the claimant to do. The lower tribunal's approach might be criticised, other tribunals might have gone into it a lot more fully, or alternatively might not have accepted as sufficient the evidence – truthful evidence as they found – that was given to them by the claimant, but I cannot say that the lower tribunal was simply not entitled to reach the conclusion that it did, much less that it made an error of law in reaching that conclusion, and even less that there is some important point of principle involved in what the lower tribunal did or did not find.

This matter of course could have been debated in the Upper Tribunal if the Secretary of State had made this complaint in his application to that court; he did not do so. It is therefore not possible in my view for this court to take the matter further."

1. Lords Hughes, Patten LJJ and Sir Richard Buxton 29.3.2011

substantial risk – when is *Charlton* not relevant

Secretary of State for Work and Pensions v Cattrell – Court of Appeal – [2011] EWCA Civ 572 (reported as [2011] AACR 35 – unreported CIB/256/2009) held:

"36. …, it is clear to me beyond argument that the First-tier Tribunal found as a fact that there was no work which did not carry a substantial risk to the claimant's physical health. If that is the fact then the question of examining the range of possible employment as is ordinarily necessary under *Charlton v Secretary of State for Work and Pensions* does not arise."

1. Lords Hughes, Patten LJJ and Sir Richard Buxton 29.3.2011

substantial risk – must identify risk

Secretary of State for Work and Pensions v Cattrell – Court of Appeal – [2011] EWCA Civ 572 (reported as [2011] AACR 35 – unreported CIB/256/2009) held:

"41. In all cases which come before it the tribunal must identify the risk; that is to say it must look at the probability of the suggested adverse occurrence and the gravity of that occurrence if it should occur, and it must say whether there is no underlying work which the claimant otherwise could do which would not carry a substantial risk to her health. If the Secretary of State wishes to contend in a particular case there are clearly some jobs that the claimant can do, whether available in large numbers or in small numbers, it is of course open to him to attend either in person or in writing and to say so."

1. Lords Hughes, Patten LJJ and Sir Richard Buxton 29.3.2011

consideration of substantial risk – objective assessment

MW v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 31 (AAC) – CE/1619/2011 held:

"3. The question of "substantial risk" is an objective one; therefore, on that aspect, with respect to physical health, the claimant's subjective views and personal belief system are unlikely to be pertinent. Nevertheless, insofar as a claimant argues that a system of alternative treatment is, or is not, medically efficacious, the tribunal must give her a chance to consider its own differing appraisal, if it holds such. However, whether a finding of limited capability to [*sic*] work would post substantial risk to her mental as distinct from physical health may raise different questions: while the determination of the point is still an objective one, what are the subjective beliefs of a claimant must form part of the background to the question whether, looked at objectively, she might suffer a significant deterioration in mental health, faced with the thought that, in work, she could not follow out her preferred therapeutic regime. The tribunal erred in concentrating only on a reaction mentally to the distressing news of a cancer diagnosis or on whether the state of her cancer was at the relevant date physically harmful. It ought also to have applied an objective test in consideration of the question whether, in all her circumstances, the prospect of having to give up her daily time-consuming regime which she believed was the right and only way to combat her cancer, could constitute the necessary substantial risk."

1. Judge of the Upper Tribunal L T Parker 20.1.2012

substantial risk – award of DLA – continual supervision

NA (by ST) v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 428 (AAC) – CE/1880/2012 held:

"3. I have set the tribunal's decision aside, because the tribunal failed to deal adequately with the submission that regulation 29 should be applied. This was an error in particular in the light of the relatively recent decision by the DWP that the claimant needed continual day-time supervision, with which the tribunal did not deal at all. If the DLA decision was to be relied upon, questions would then arise of what range or type of work the claimant could do and yet receive the supervision necessary to avoid substantial danger to himself or others. If the DLA decision was not to be relied upon, the tribunal needed to say so and explain why. The tribunal either failed to deal with the issue, or, if it did deal with it, it failed to give a sufficient account of its reasoning to enable the losing party to understand why he was unsuccessful on that issue."

1. Judge of the Upper Tribunal C G Ward 8.11.2012

regulation 35 – lone parent with child under 5

LM v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0552 (AAC) – CE/4125/2012 held:

"23. Finally, as none of the descriptors in Schedule 3 apply, I turn to the question whether by reason of the claimant's mental health problems there would be a substantial risk to her mental or physical health if she were found not to have limited capability for work-related activity (regulation 35 of the 2008 Regulations). Work-related activities are provided for in regulation 3 of the Employment and Support Allowance Regulations 2011, but, by virtue of regulation 3(2)(b), they do not apply to the claimant as she is a lone parent with a child under 5 who is a member of the same household and for whom she is responsible.

24. If therefore the claimant is found not to have limited capability for work-related activity, as at the date of the decision and indeed up to and beyond the present time, she would still not be required to undertake that activity. In those circumstances, I can see no risk to her mental health at the date of the decision if she is found not to have such limited capacity."

1. Judge of the Upper Tribunal Michael Mark 8.11.2013

substantial risk

CSIB/223/2005 held:

"9. Mr Bartos' [*Advocate, instructed by Mr Crilly, Solicitor, of the Office of the Solicitor to the Advocate General*] submission was to the effect that I should direct the freshly constituted tribunal to approach the application of regulation 27(b) in the manner set out by Mr Commissioner Jacobs (*CIB/26/2004*).

10. Arising out of that submission, I asked him to make submissions as to how that approach to the statutory provision squared with the question asked of the examining medical practitioner, which in this case is recorded at page 47 and does not put the interpretative gloss on the statutory provision that Mr Bartos said it ought to have. The second matter I wished him to address me on was the issue of what terms in relation to health were likely to be incorporated into a jobseeker's agreement.

11. Mr Bartos in answer to the second question which I posed to him, referred me to regulations 31(c) and (d) and 13(3) of the Jobseekers Allowance Regulations 1996. Regulation 31 deals with the contents of a jobseeker's agreement. These provide:

> '31. The prescribed requirements for a jobseeker's agreement are that it shall contain the following information –
> …
> (c) any restrictions on the claimant's availability for employment, including restrictions on the location or type of employment in accordance with regulations 5, 8, 13 and 17;
>
> (d) a description of the type of employment which the claimant was seeking …'.
>
> Regulation 13(3) provides:
>
> '(3) A person may restrict his availability in any way providing the restrictions are reasonable in the light of his physical or mental condition'.

12. Mr Bartos then went on to submit that for the purposes of regulation 27(b) of the Social Security (Incapacity for Work)(General) Regulations 1995, the tribunal would not require to specify or consider what type of employment a claimant could do that would require to go into a jobseeker's agreement. He said that for the purposes of regulation 27(b) the assessment was somewhat broader than was required for the purposes of a jobseeker's agreement. His position was that to enable them to apply the regulation, the tribunal would require to ask the claimant:

> 'If you did not satisfy the requirement under the assessment, what sort of work could you do?'

It was his position that if the answer to that question was in the negative, it was difficult to see how the claimant could have discharged the onus [*meaning: duty or responsibility*] of bringing himself within the exception. If the claimant answered in the affirmative, that he was capable of doing some work, the tribunal would then have to determine the range of work and carry out an assessment as to whether he could do the work. It was his position that *CIB/4357/2004* was an example of how this operated in practice.

13. Mr Bartos also submitted that the fact that the question asked of the examining medical practitioner in his report form, did not place the interpretative gloss of the statutory provision which he said existed along the lines set out by Mr Commissioner Jacobs was not material. It simply meant that the tribunal had to assess the evidence as it was.

14. In the event I favour the approach to regulation 27(b) set out by Miss Docherty in her submission and accept it, I direct the tribunal to apply the regulation strictly in the terms in which it is written and in the manner set out in paragraph 7. It is clear from the approach set out in paragraph 7 that the tribunal will have a simple, crisp and direct issue to determine. The question as to whether, if the tribunal find that there was a risk to the claimant's health it was substantial, is a jury question for them on which they must make a reasonable judgement. I have made the direction I have for the following reasons. It is quite clear to me that Parliament intended regulation 27(b) to be applied in the restrictive way that the language of the paragraph provides. Unlike Mr Commissioner Jacobs in paragraph 33 of his decision, I can see the sense of the limitation and I am prepared to accept that Parliament meant what it said. The regulation is headed "Exceptional circumstances" and the other circumstances contained in (a), (c) and (d) demonstrate severe and exceptional conditions. I consider that Mr Commissioner Jacobs has sought to broaden the scope of the regulation beyond what it says. It is quite clear from evidence which exists in this case that it is possible to apply the regulation on the basis that it means what it says and that it is not in the terms in which it is written without content or meaning.

Further, it is also clear that in cases where a person has not passed the personal capability assessment and does not fall within the statutory exceptions contained in regulation 27 that, in respect of a jobseeker's agreement, health can be a material factor in the framing and constitution of such an agreement. The circumstances in this case following the claimant's application for jobseeker's allowance following his unsuccessful appeal to the tribunal, as outlined to me by Miss Docherty, demonstrate that claimants who neither satisfy the personal capability assessment and do not fall within the exceptions of regulation 27 can have such disabilities they have taken into account when a jobseeker's agreement is sought to be framed and constituted. I am at a loss to see how tribunals can properly apply the legislation in the context set out by Mr Commissioner Jacobs and by Mr Bartos in his submission. How a tribunal is to determine what range of work that must be taken into account when assessing the risk to the claimant's health is beyond me in the absence as in this case of an evidential basis to do so. I do not consider the questions that Mr Bartos posed were particularly helpful as in most cases the reply from the claimant would be likely to be 'I am unfit for work'. It further appears to me that if the interpretative gloss set out by Mr Commissioner Jacobs was to be applied, then the question posed to the examining medical practitioner would be incomplete as it makes no reference to the broader interpretation set out by him. It is these considerations which cause me to frame the direction I have given to the fresh tribunal in the manner I have. The fresh tribunal will note that the claimant has succeeded in a fresh claim for incapacity benefit. They should seek submissions on the effect that that may have on the decision which they are required to take." [*My inserts*].

See also Charlton v Secretary of State for Work and Pensions (Court of Appeal).

1. Commissioner D J May 19.8.2005

substantial risk – positive attitude

JW v Secretary of State for Work and Pensions (ESA) – [2011] UKUT 416 (AAC) – CE/343/2011 involved the case of a 17 year old boy who suffered from a renal condition. According to his consultant nephrologist, the condition manifested itself as "recurrent episodes of severe bilateral loin pain and suprapubic pain associated with frank haematuria [i.e., blood in his urine]". It was said that those episodes occurred "on a frequent basis (weekly)" and were of such severity that the claimant had required hospital admission to control the pain. The condition, in particular, caused the claimant repeatedly to form kidney stones.

The Upper Tribunal Judge held:

"10. I can quite understand the Tribunal's obvious desire to reinforce the claimant's positive attitude, to affirm the efforts he had made in the past to move forward in life and to encourage him to continue those efforts. But giving that type of positive reinforcement is not a substitute for giving adequate reasons for the Tribunal's decision on the issue that was in dispute. The only reasoning on that particular issue appears in the final bullet point quoted at paragraph 4 above and involves a *non sequitur* [*meaning: a conclusion or statement that does not logically follow from the previous argement or statement*]: the conclusion expressed in the final sentence, namely that there is no substantial risk to the claimant's health, does not follow from the assertions made in the preceding sentence about his positive approach to life.

11. Whether there would be a substantial risk to a person's health in any specified circumstances is a judgment of fact and degree. If the potential risk is to a claimant's mental health, then the claimant's mental attitude to the circumstances may be relevant in evaluating whether the risk exists and, if so, whether it is substantial. I have in mind the type of case discussed by the Court of Appeal in Charlton at [34] where:

> "the very finding of capability might create a substantial risk to a claimant's health …, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused"

12. In this case, however, no issue arises about the claimant's mental health. Rather, he asserts that there is a substantial risk to his physical health. That assertion may or not be correct. But, if it is correct – if the substantial risk does exist – then that fact is not altered by the claimant's attitude to it.

13. To be specific, the claimant's submission to the Tribunal was that he was only capable of manual work, and that undertaking such work was likely to trigger the type of episode described… It is no answer to that submission to say that, if so, the claimant will embrace the situation with a positive mental attitude and do everything in his power to make the best of it.

14. No other reasons are given for the Tribunal's decision in relation to regulation 29(2)(b). It follows that the Tribunal's reasons as a whole are inadequate and its decision must be set aside."

1. Judge of the Upper Tribunal Richard Poynter 11.10.2011

substantial risk

CIB/3519/2002 held:

"7. ... I do not accept Mr Robinson's suggestion [*representative of the Secretary of State*] that the word "substantial" refers only to the likelihood of the risk occurring. In my view, a risk may be "substantial" if the harm would be serious, even though it was unlikely to occur and, conversely, may not be "substantial" if the harm would be insignificant, even though the likelihood of some such harm is great…" [*My insert*].

See also CIB/1064/2006.

1. Commissioner Mark Rowland 16.62003

substantial risk – general type of work

KH v Secretary of State for Work and Pensions – [2012] UKUT 225 (AAC) – CE/1757/2011 held:

"13. In *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42, R(IB)2/09 (on appeal from *CIB/0143/2007*) the Court of Appeal considered the application for the purposes of incapacity benefit of the equivalent wording to that of regulation 29(2)(b), making it clear that the same approach applies for the purposes of ESA (which has replaced incapacity benefit) (paragraph 4). The provision is to be understood in the context of the general type of work that the claimant would otherwise be likely to be able to do, depending on background, experience, and the type of disease or disablement in question. "It is not possible and certainly not sensible to (*sic*) more prescriptive" (Lord Justice Moses at paragraph 38)."

1. Judge of the Upper Tribunal Howard Levenson 27.6.2012

substantial risk – need for alcoholic drink before going to work

KH v Secretary of State for Work and Pensions – [2012] UKUT 225 (AAC) – CE/1757/2011 held:

"18. The third and final ground relates to regulation 29(2)(b) (the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work). The First-tier Tribunal considered this in the context of attempts at self-harm. In respect of alcohol it stated (paragraph 18) "the alcohol problem would not be a risk because on the evidence of the appellant he can function with the amount he consumes for example before he goes out".

19. Both parties deal with this latter issue but neither really addresses it clearly. It seems to me that if a claimant has to drink significant amounts of alcohol before going out, even to the pub, and 3½ cans of alcohol before facing the First-tier Tribunal then it is incumbent on the First-tier Tribunal to consider whether and how much alcohol he might need to drink before going to work, on the way to work, and while at work, in order to actually work. Significant amounts on a daily basis might well pose a substantial risk to his own health and also (depending on the nature of the work) to the health of others. The First-tier Tribunal was in error in not giving proper consideration to this issue. The new panel must do this."

1. Judge of the Upper Tribunal Howard Levenson 27.6.2012

substantial risk

CIB/1064/2006 involved the case of a man who suffered with dermatitis and a hearing loss with tinnitus. The claimant was dismissed from his former employment as a chauffeur due to long-term sickness.

The claimant stated in his IB50 questionnaire that whenever he used his hands for a job they swelled and itched very badly and that the effect could last for days or weeks. The only relief was to use a cream which could not be used continuously but only once or twice a month.

The tribunal awarded a point score of 10 due to the claimant's hearing problems and went on to conclude that regulation 27 – substantial risk to health – applied because there would be a substantial risk that the claimant's health (i.e. his dermatitis would worsen) if he were found capable of work within the general type of work which he was otherwise qualified or skilled to undertake.

The DWP obtained a written statement of reasons for the decision of the Tribunal. The DWP, appealing against the FtT decision, argued that there was no evidence that there would be a substantial risk to the claimant's health if he were found capable of work.

The Upper Tribunal Judge held:

"18. In the Commissioner's decision *CIB/3519/2002*, the claimant suffered from a prostate condition which affected his control of his bladder. The Commissioner decided that the case should be remitted for a further hearing and the claimant's representative argued that the tribunal should consider whether regulation 27 applied. The Secretary of State contended that the claimant's condition was not sufficiently serious. The Commissioner obviously had some sympathy for that contention, but said it was essentially a matter of fact for the new tribunal. He went on to say:

> "I do not accept [the representative's] contention that "substantial" refers only to the likelihood of the risk occurring. In my view, a risk may be "substantial" if the harm would be serious, even though it was unlikely to occur and, conversely, may not be "substantial" if the harm would be insignificant, even though the likelihood of some such harm is great."

This approach was described as "probably right" in the Commissioner's decision *CIB/2767/2004*, although with the caveat [*meaning: a warning or proviso of specific stipulations, conditions or limitations*] that the other paragraphs of regulation 27, which refer to life-threatening or potentially life-threatening conditions and to impending major therapeutic procedures, suggest that the interpretation of the regulation should be rather narrow. [*My insert*].

19. Other authorities are concerned with the link between the physical or mental condition and the substantial risk which will result from a finding that the claimant is capable of work. In this category are the decisions referred to by the tribunal, namely, *CIB/26/2004* and *CSIB/33/2004*. These require consideration of the type of work the claimant might be asked to do and whether or not to do work of that kind would involve a substantial risk of the kind discussed.

20. From those authorities, I conclude that I must consider whether there is evidence that a job of the kind which it is likely the claimant would be required to be available for would result in consequences for his health which, although not necessarily life-threatening, would be substantial having regard to both likelihood of occurrence and degree of harm.

21. In my view, there is evidence which is capable of supporting the tribunal's decision. In the questionnaire the claimant said that when he used his hands for any job they swelled up and itched very severely. His appeal was on the ground that if he had to repeat activities of the kind specified in the personal capability assessment in the way he would have to do in normal work, his dermatitis would flare up. His doctor said that friction leads to flare ups. The examining doctor said that removal from the working environment had resulted in improvement. The claimant gave evidence of deterioration in his condition even so, and said that his hands were especially bad and could be swollen and very painful. The claimant's previous employment had been as a chauffeur and he had lost it because of his dermatitis. His tinnitus was increasing and was especially bad in traffic. He said in his questionnaire that he was dyslexic. In those circumstances, I take the view that it was open to the tribunal to make findings of fact broadly to the following effect:

(1) the work for which the claimant would be required to be available would be manual;

(2) any such work would be very likely to give rise to a flare up of the dermatitis affecting his hands, making them swollen and very painful;

(3) any such work involving driving in traffic might worsen further his tinnitus.

Such findings of fact would be capable of supporting a decision that the degree of harm involved in the risks identified was such that, taking into account the likelihood of their occurrence, they were substantial and the requirements of regulation 27 were satisfied. I should add that in my view the Secretary of State has taken somewhat out of context the tribunal's finding about the claimant's ability to carry a 2.5 kg bag of potatoes, which was not made against the background of the claimant's having gone back to work and (potentially) precipitated a flare-up of his dermatitis making his hands swollen and very painful. In any event, that particular finding must be seen in the light of all the other findings about the claimant's condition.

22. With some reluctance, I have come to the conclusion that the tribunal did not make sufficient findings of fact about the type of job which the claimant might be expected to be available for and the harm which they thought would result from the claimant's doing such a job, and did not give adequate reasons for the conclusion that the risk would be substantial. It is not clear to me whether the tribunal were proceeding on the basis that the claimant could only be expected to be available for jobs in the general area of driving vehicles (and if so, why), whether they took into account the degree and length of pain suffered by the claimant when his dermatitis flares up (and if so, what they thought the degree and length of time was), or whether they understood "substantial risk" in the sense explained above. The tribunal also failed to explain what significance they attached to the fact that the claimant in *ex parte Moule* was suffering from psoriasis; as I have indicated above, the decision of the Divisional Court was certainly not a decision that evidence that a claimant's psoriasis was likely to worsen if he was found capable of work enabled him to satisfy the requirements of regulation 27. The issue whether the claimant was within the regulation remained undetermined. For those reasons, I take the view that the tribunal erred in law.

23. As I said at the outset of this decision, much depends on the facts of the case and it would be inappropriate for me to substitute my own decision on the basis of the material before me, which does not fully address the facts which I have concluded are relevant. That being so, I do not need to consider whether the claimant could nevertheless succeed on the basis of satisfying the personal capability assessment. My decision does not preclude his trying to persuade the new tribunal that he does score the necessary points, although he must bear in mind that the tribunal will be looking at his condition in July 2005 and cannot take into account circumstances which did not then exist."

1. Judge of the Upper Tribunal E Ovey 14.7.2005

ability to journey to and from Job Centre relevant

KB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0152 (AAC) – CSE/22/2013 held:

"19. The above is expressed in very similar terms to regulation 29(2) (b) of the regulations; except that the latter requires "a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work", whereas the former is about "a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work–related activity".

Analagous considerations therefore apply to both, except that participating in work-related activity (which at present is restricted to taking part in work-focused interviews) is patently narrower than undertaking work. In *Charlton v. Secretary of State for Work and Pensions* [2009] EWCA Civ 42, the Court of Appeal at paragraph 34 of its decision said that regulation 29(2)(b) might be satisfied:

> "Where the very finding of capability might create a substantial risk to a claimant's health or that of others, for example when a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused. Apart from that, probably rare, situation, the determination must be made in the context of the journey to or from work or in the work place itself".

It follows that in the same way it is necessary, under regulation 35, to make the evaluation of substantial risk, not just an exercise limited to the ability to cope with the work related interview at the Job Centre, but also "in the context of the journey to or from" such an interview. This point has particular relevance to a claimant arguing under activity 13 of Schedule 3. The tribunal therefore went wrong in applying too narrow a statutory test, saying only "he should be able to cope with a work related interview at the Jobcentre"."

1. Judge of the Upper Tribunal L T Parker 26.2.2013

substantial risk – wages enhance ability to buy drugs

MB v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 228 (AAC) – CE/2796/2011 involved a case where the claimant's representative argued that regulation 29(2)(b) applied because a wage packet would have increased the money the claimant had available for the purchase of illegal drugs and that in itself would have created a substantial risk to his health.

Following reference to *Charlton v Secretary of State for Work* (Court of Appeal) – reported as R(IB)2/09 – the Upper Tribunal Judge summarised the parties position as follows:

The Secretary of State's representative made two arguments. First, he argued that the risk to a claimant's health must arise from the journey to work or from the nature of the work involved. Any risk from having additional money to spend on drugs is too remote. Second, he argues that the First-tier Tribunal failed to identify the type of work to which the claimant might be suited. It is on this ground that he supported the appeal.

The claimant's representative analysed *Charlton* differently, arguing that: (i) regulation 29 should be given its maximum scope; (ii) it does not mention the workplace; (iii) *Charlton* was concerned with a different issue; (iv) the regulation should be applied to the claimant's circumstances either as a jobseeker or a worker; (v) it should cover any risk that is linked to the decision that he no longer has capability for work.

It was against this backdrop that the Upper Tribunal Judge held:

"12. It is convenient to follow the Secretary of State's approach and consider the scope and the application of regulation 29(2)(b) separately.

The scope of regulation 29(2)(b)

13. I accept the argument for the Secretary of State and reject the argument for Mr B. [*the claimant*].

14. I accept that the issue in *Charlton* was different from the issue in this case. I must, though, accept the authority of, and reasoning in, that decision. The Court decided that the words 'if the claimant were found not to have limited capability for work' were not the causal trigger for the risk to the claimant's health. Rather, they were the condition precedent to the operation of the provision. It also decided that the trigger for the risk had to be found in the work the claimant would be undertaking. It had to arise from: (i) the decision that the claimant had capability for work; (ii) the work that the claimant might do; or (iii) travelling to and from work. (i) will be rare.

15. The argument for Mr B [*the claimant*] is that the wages he would receive for the work would put more money in his pocket than he would spend on drugs. That is not a risk that arises from the work. The work is merely the circumstance that gives rise to it. It would not arise if his wages were so low that he would have been better off on benefit. Nor would it arise if the street price for the drugs increased in line with his income so that he could not afford any more drugs than previously. In other words, the risk arises from the comparative value of Mr B's [*the claimant*] benefit and the wages he might receive relative to the price of drugs.

16. The First-tier Tribunal did not express itself in that way. But its decision was consistent with that result. It did not go wrong in law on the scope of regulation 29(2)(b).

The application of regulation 29(2)(b)

17. I reject the Secretary of State's argument that the tribunal went wrong by failing to make findings on the type of work that Mr B [*The claimant*] might do. It is true that the tribunal did not make those findings. But that was not necessary. Mr B's [*the claimant*] only argument was that the wages he received would allow him to buy more drugs. Once that argument was rejected, there was no basis on which he could benefit from regulation 29.
The duty to make findings on work arises in order to judge the effect that that work might have on the health of the claimant or someone else. In this case, Mr B's [*the claimant*] argument was not related to any particular type of work; it applied to all work that he might do. In those circumstances, there was no need to differentiate between types of work and the duty did not arise.

Conclusion

18. As I have rejected the argument for Mr B [*the claimant*] and the support for the appeal from the Secretary of State's representative, I must dismiss the appeal. I do, though, express my appreciation for the quality of the argument I have received from both representatives." [*My inserts*].

1. Judge of the Upper Tribunal Edward Jacobs 3.7.2012

substantial risk – unable to return to existing employment

AJ v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0279 (AAC) – CE/282/2012 held:

"9. I consider that the tribunal materially erred in law in relation to regulation 29(2)(b) of the ESA Regs but not in relation to the "forced to give up her existing job" argument. In my judgment the critical issue about the existing job was that the appellant was not able to return to it at the date of the decision under appeal (though she had returned to it by the time of the appeal hearing in August 2011). It is the tribunal's failure to explore why she was unable to return to her job at the relevant time in assessing the *Charlton* "range and type of jobs" she was then capable of doing that amounts to a material error of law.

10. The decision under appeal to the tribunal is dated 29.07.10. That provides the focus in time as to when the regulation 29(2)(b) substantial risk stood to be assessed. At that point in time it was some 3 weeks afters [*sic*] after the appellant had had a day operation to release her right golfer's elbow and for carpal tunnel decompression on her right wrist/arm... The appellant, importantly, is right handed. In her evidence to the tribunal the appellant said the operation was not a success. The advice given after the operation was that she was to engage in no heavy lifting for three weeks and she was to be reviewed by the hospital in three weeks time… She was also at that time employed by the West Midlands Police Force as a cleaner. However the evidence was that she was unable to carry out that job at the time of the decision.

11. A submission was made to the tribunal that the type and range of work the appellant was capable of doing was heavily restricted as she was 3 weeks and one day after surgery (page 90). The "type and range of work" comes from *Charlton-v-SSWP* [2009] EWCA Civ 42; R(IB)2/09 at paragraphs 38 and 39:

> "38. In order to determine whether there is any health risk at work or in the workplace it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision-maker and, if there is an appeal, the Tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision-maker to particularise the nature of the work a claimant might undertake is likely to depend upon the claimant's background, experience and the type of disease or disablement in question. It is not possible and certainly not sensible to be more prescriptive. The most important consideration is to remember that the purpose of the enquiry is to assess risk to the claimant and to others arising from the work of which he is capable. No greater identification of the type of work is necessary other than that which is dictated by the need to assess risk arising from work or the workplace.
>
> 39. The correct approach has been identified by Deputy Commissioner Paines in CIB/360/2007:-
>
> > '17. The degree of detail in which [the consequences of a finding that the claimant is capable of work] will need to be thought through will depend on the circumstances of the case… A tribunal will have enough general knowledge about work, and can elicit enough information about a claimant's background, to form a view on the range or types of work for which he is both suited as a matter of training or aptitude and which his disabilities do not render him incapable of performing. They will then need to decide whether, within that range, there is work that he could do without the degree of risk to health envisaged by regulation 27(b).
> >
> > 18. Regulation 27(b) requires one to start by identifying a disease or disablement; the next stage, it seems to me, is to consider the nature of any health risks posed by that disease or disablement in the context of workplaces that the claimant might find himself in, with a view to answering the question whether any such risk is substantial.'"

12. Of course, as is made clear earlier in *Charlton*, the starting point for the application of regulation 29(2)(b) of the ESA Regs is that the person is capable of work, or does not have limited capability for work, (i.e. he or she has failed to score 15 points under Schedule 2 to the ESA Regs); with regulation 29(2)(b) then looking at the type or range of work the person is capable of performing so as to assess risk.

13. In this appeal there was, in my judgment, one critical piece of relevant evidence that the tribunal erred in law in not exploring, namely why the appellant was unable to return to work again as a cleaner for the police force. On any analysis that was the type of job the appellant was as a matter of her aptitudes and training capable of performing. However, she was not performing it at the date of the decision under appeal to the tribunal. Why she was not performing it is unclear. It is unclear because the tribunal did not explore this issue. But the reasons why the appellant was not then performing the job were plainly relevant to the *Charlton* risk assessment. For example, and these are no more than examples, if the appellant was not then doing the job because the police had in place a temporary cleaner whose contract still had a month to run and they did not want to have the appellant back at the same time, that may have little or nothing relevant to say about risk in terms of the appellant carrying out such a job. On then [*sic*] other hand, if the police had made its own assessment and found that the appellant needed until, say, the end of August 2010 before she could safely work as a cleaner then that would have been very relevant to regulation 29(2)(b) risk assessment. That may then have ruled out dexterous manual work as relevant work and would have needed the tribunal to look elsewhere for work the appellant was suited [*sic*] both as a matter of training and aptitude.

14. It is in this sense, and only in this sense, that on this case the appellant's job being held open for her was relevant. I have no doubt, as Mr Cooper [*representative for the Secretary State*] argued, that the tribunal had the *Charlton* test to the forefront of its mind. However, it was the reasoned out application of that test which was lacking here. Given the evidence that the appellant could not do her regular job, I do not consider it was sufficient for the tribunal to say it "did not accept that there was not an adequate range of work which [the appellant] could undertake without creating a substantial risk to herself or others". The evidence about the existing job gave rise to an inference that the appellant may not have been able at the time to do the job(s) for which she was suited and for that reason required further investigation.

15. I do not accept, however, that the potential loss of the appellant's job with the police force if she was forced to look for other work she was suited to do by reason of being found capable of work has any other relevance under regulation 29(2)(b) of the ESA Regs, at least on the facts of this case (and, I would imagine, on the facts of most cases). As I understand the argument here – and in fairness to Mr Poole [representative of appellant] he was neither the author of the argument nor did he press it with any real vigour at the hearing before me – it is that the potential loss of a job a person already has (with its source of income and status the job gives a person) is a "risk" that regulation 29(2)(b) covers. I do not see this.

16. For a start the risk – per *Charlton* – relates to jobs a person is suited to do and is capable of doing: see, also, *MB-v-SSWP* (ESA) [2012] UKUT 228 (AAC). If a person for the moment can no longer do his or her existing job without substantial risk but is able and is suited to do another type of job without risk then regulation 29(2)(b) of the ESA Regs is not met. To this extent regulation 29(2)(b) of the ESA Regs does not preclude the "forced to give up the existing job" consequence, nor does anything else in the statutory scheme governing employment and support allowance. However, given the tribunal's failure to investigate adequately whether there was any substantial risk to the appellant from her carrying out her cleaning job for the police at the end of July 2010, it is impossible at this stage to make any meaningful assessment of whether the appellant couldn't safely do that job but could another job and thus may have been forced to give up her existing job.

17. Secondly, even if there is a realistic potential scenario where a person may lose his or her existing job which they are not then capable of doing safely but there are other jobs to which they are suited and which they can do safely (and, I emphasise, that this is not established on the facts here and I find it difficult to envisage concrete scenarios where such a circumstance may realistically arise, which makes the analysis here somewhat speculative and tentative), the relevant question that still has to be asked is whether because of the person's specific disease or bodily or mental disablement there would be a substantial risk to her (or another's) physical or mental health if she were found capable of work. On the face of it that requires that there is an evidenced substantial risk to health caused by the person's disease or bodily or mental disablement. Save perhaps for the rare case where a person with mental health problems would have those problems exacerbated by having to give up special tailored, supported employment that he cannot safely for the moment do (and even in this case it is very difficult to see what other employment he would be suited to and which he could do safely), the potential loss of employment, it seems to me, would too remote to count. I am mindful, also, that there was no evidence put before the tribunal showing any risk to health of the appellant arsing from the potential loss of her job.

18. It is for all these reasons that the tribunal's decision dated 19.08.11 must be set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber)…"

1. Judge of the Upper Tribunal S M Wright 7.6.2013

substantial risk – assess range of work the claimant might be expected to do

RB v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 431 (AAC) – CE/691/2012 involved the case of a 50 year old claimant who previously worked as a landscape gardener but was presently awaiting operations for knee replacement to one or possibly both knees. The appeal was dealt with on the papers and the First-tier Tribunal upheld the decision of the Secretary of State to award 0 points. As regards exceptional circumstances, it merely observed that:

> "Finally, the Tribunal concluded that there was no evidence to suggest that any of the exceptional circumstances applied such as to justify an award on circumstances where the points based requirement was not met."

The Upper Tribunal Judge held:

"5. The decision of the Court of Appeal in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42; R(IB)2/09 identifies the correct approach (though the references are to the predecessor legislation to employment and support allowance, the principle is the same):

> "39. The correct approach has been identified by Deputy Commissioner Paines in CIB/360/2007:-
>
> '17. The degree of detail in which [the consequences of a finding that the claimant is capable of work] will need to be thought through will depend on the circumstances of the case… A tribunal will have enough general knowledge about work, and can elicit enough information about a claimant's background, to form a view on the range or types of work for which he is both suited as a matter of training or aptitude and which his disabilities do not render him incapable of performing. They will then need to decide whether, within that range, there is work that he could do without the degree of risk to health envisaged by regulation 27(b).

18. Regulation 27(b) requires one to start by identifying a disease or disablement; the next stage, it seems to me, is to consider the nature of any health risks posed by that disease or disablement in the context of workplaces that the claimant might find himself in, with a view to answering the question whether any such risk is substantial.'"

The "substantial risk" thus had to be assessed in the context of the range or type of work a claimant might be expected to do, but did not require the consideration of hypothetical jobseeker's agreements or specific job descriptions.

6. As the Secretary of State accepts, there is no indication in the statement of reasons that the First-tier Tribunal gave any consideration to the range of work the claimant might be expected to do. Given his work background and his impaired knees, the answer was not self-evident.

7. It is an obvious point but nonetheless worth making that the more onerous the points-based regime becomes, the more cases are likely to require attention to be given to the terms of regulation 29, to which correct application by decision makers and tribunals of *Charlton* will be vital.

8. I do not need to deal with any other error on a point of law that the tribunal may have made. Any that were made will be subsumed by the rehearing."

1. Judge of the Upper Tribunal C G Ward 30.10.2012

regulation 35 – work-related activity – what is involved?

AP v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0553 (AAC) – CE/698/2013 involved a case where the claimant suffered from mental health problems. The DWP had decided that she had limited capability for work but not limited capability for work-related activity as she did not satisfy any of the descriptors in Schedule 3 to the Employment and Support Allowance Regulations 2008. The issue under appeal before the First-tier Tribunal was therefore whether by reason of the claimant's mental health problems there would be a substantial risk to her mental or physical health if she were found not to have limited capability for work-related activity. There was no suggestion in the case of any risk to anybody else.

According to the Upper Tribunal Judge, the difficulty faced by the First-tier Tribunal was that although the DWP had determined that the claimant did not have limited capacity for work-related activity there was not a "shred of evidence" from the Secretary of State as to what work-related activity the claimant was expected to undertake, or indeed if she was expected to undertake any work-related activity. Instead the DWP's submissions to the First-tier Tribunal were concerned only in the most general terms with the provisions of regulations 34 and 35 of and Schedule 3 to the 2008 Regulations.

The Upper Tribunal Judge held:

"11. As pointed out by Judge Jacobs in *AH v SSWP*, [2013] UKUT 118 (AAC), at paragraph 31, to which the Secretary of State has also referred on this appeal, there are cases where it is apparent that regulation 35(2) cannot apply. But as he also pointed out, there are other cases where the tribunal will need evidence on the specific nature of the activity that the claimant will have to undertake. Given the mental problems the claimant suffers from and in the light of all the evidence including that referred to above, this is plainly a case where proper evidence directed to the activities which this claimant was being, or would be, required to undertake had to be provided by the Secretary of State. The tribunal was in error of law in basing a decision in favour of the Secretary of State on assumptions which were necessary because of his failure in breach of his duty to the tribunal, to provide the necessary information. This is particularly the case when the claimant is unrepresented, unable to attend a hearing, and mentally ill.

12. That duty arose both because of the direction of 1 August 2012 and because of his general duty under regulation 2(4) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 (the Procedure Rules) to help the tribunal to further the overriding objective and to co-operate with the tribunal generally. This must include stating what has been decided in relation to work-related activities and producing a copy of the written action plan prepared in accordance with regulation 5 of the 2011 Regulations or explaining why it cannot be provided – for example because it has been decided that it would not be appropriate at present for the claimant to engage in a work-focussed interview or work-related activities.

13. In addition the Secretary of State has a duty under rule 24(4) of those Rules to provide to the tribunal copies of all documents relevant to the case in the decision maker's possession. That should include any documents relating to possible work-related activities which the claimant may be required to carry out. I appreciate that responsibility for considering work-related activities may rest elsewhere than with the decision maker but when, as here, regulation 35(2) is clearly in issue, I do not see how the decision maker can properly have come to a decision relating to it without considering the proposed approach to work-related activities.

14. By failing to require the Secretary of State to provide the necessary information and documents, and then proceeding in their absence, the tribunal was in error of law and I set aside its decision and remit the matter to be reheard by a new tribunal. Before the matter is reheard, a tribunal judge should issue clear directions for the Secretary of State to provide a witness statement explaining what was decided and when as to whether and if so when the claimant should be required to attend a work-focussed interview or work-focussed interviews and as to how and where such interviews should be conducted and as to what, if any, other work-related activities the claimant has been or may be required to undertake. The direction should also require the production of the written action plan and other relevant documents or that their absence should be explained if they do not exist. If the directions are not properly complied with, the tribunal judge should consider whether it is appropriate in dealing fairly and justly with the matter to issue an unless order, pursuant to regulation 8 of the Procedure Rules."

See also JH v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0269 (AAC) – CE/3883/2012 which is another decision on this theme by Upper Tribunal Judge Michael Mark.

1. Judge of the Upper Tribunal Michael Mark 8.11.2013

substantial risk – more vital?

RB v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 431 (AAC) – CE/691/2012 held:

"7. It is an obvious point but nonetheless worth making that the more onerous the points-based regime becomes, the more cases are likely to require attention to be given to the terms of regulation 29, to which correct application by decision makers and tribunals of *Charlton* will be vital."

1. Judge of the Upper Tribunal C G Ward 30.10.2012

regulation 35 where limited capability for work established

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. [*My insert*]

Whilst exploring a potential error of law in the decision of the First-tier Tribunal in relation to its approach to mobilising, the Upper Tribunal Judge held:

"14. However, there is in my view a more important reason why the claimant's appeal should be allowed, and that goes back to the words used by the claimant in his letter of appeal which I reproduced at paragraph (8) above, namely:

> "… I would not be able to hold down a regular job as some days I am unable to even leave my house due to the severity of my ailments …"

This put squarely at issue the exceptional circumstances provision. As the tribunal found that the claimant did satisfy Schedule 2 and obtained sufficient points from descriptors, it did not then need to consider regulation 29(2)(b) ESA Regulations. However, having found that the claimant did not satisfy any Schedule 3 activities, it was then, given the specific terms of the letter of appeal, incumbent on it to consider whether the claimant should be treated as having limited capability for work related activity. Regulation 35(2)(b) provides that a claimant is to be treated as having limited capability for work related activity if by reason of his disease or 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.

15. It seems to me that the significance of the exceptional circumstances provisions is that they enable a tribunal to look at the individual claimant as a whole person or system of interrelated functions and abilities. The sum of the disabilities may exceed their individual parts. In some circumstances it is not enough to measure the ability to engage in each activity in turn, and then exclude limitations insufficient to score points. The activities in the schedule examine the ability to perform an isolated function. For example, the person who, as the tribunal found the claimant could, can mobilise more than 50 metres, can use the keypad on a telephone, and turn the pages of a book, will not get the relevant points which enable that person to be found to have limited capability for work related activity. While consideration of the individual activities does not permit a decision maker or tribunal to take account of limitations below the score threshold, this is what regulations 29(2)(b) and 35(2)(b) permit. They permit account to be taken not only of a claimant's physical and mental attributes, but also the extent of what might be extreme variability. Regulation 34(2) ESA Regulations encapsulates the 'reasonable regularity' test established in previous case law, but it may not be sufficient to cope with what might be extreme variability, which may not occur regularly. An example might be where a claimant is subject to infrequent, but not rare, periods of severe exacerbation.

16. In the claimant's case he clearly put in contention not only the severity and unpredictability of his conditions, but surely also the extent to which interrelated disablements would limit him. In his appeal letter he related this to being capable of work. But depending upon what those tasks are, the same is likely to apply to work related activity.

17. I am not in a position to make my own findings of fact sufficient to enable me to substitute my own decision for that of the tribunal, and for that reason this matter must go back to a different tribunal for rehearing. While all matters are at large before the new tribunal, it will need to consider not only the activities put in issue, but also regulation 35(2)(b) ESA Regulations. However, the Secretary of State will need to produce for the benefit of the next tribunal an account of the type of work-related activity that the claimant would be required to engage in. Without this the tribunal will not be [*sic*] answer the question whether not being found to have limited capability for work related activity would be a substantial risk to the claimant's mental or physical health."

1. Judge of the Upper Tribunal A Ramsay 25.7.2013

substantial risk – sleep apnoea

CE/1548/2011 involved a case where the claimant suffered from sleep apnoea, a condition that interrupted his breathing when he was asleep. Whilst the claimant was not necessarily aware that this was happening, it did disrupt his sleep and reduce its effectiveness. The result is that the claimant was tired and prone to falling asleep during the day.

The issue under consideration was whether the claimant could by reason of his condition bring himself within the exceptional circumstances/substantial risk provision.

The Upper Tribunal Judge held:

"11. The effects of some conditions affect a person's capability for work, but do not fit into Schedule 2. Regulation 29(2) caters for these:

> (1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.
>
> (2) This paragraph applies if –
>
> …
>
> (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

12. This has to be applied in accordance with the decision of the Court of Appeal in *Charlton v Secretary of State for Work and Pensions* reported as *R(IB)2/09*. The reasoning in that case applies to employment and support allowance: see paragraph 14.

13. Mr B does not come within regulation 29(2). He does have a specific disease. But there are many jobs that Mr B could do where his tiredness would not put either himself or anyone else at risk. I have to take account of his travel to and from work. It seems that he is still driving. That is surprising if he is falling asleep at the wheel. Be that as it may, his condition would not affect his ability to use public transport. As to the work itself, it would not be sensible for him to work at height, to drive or to operate machinery. He has experience as a legal researcher and he has undertaken a computer course. With that background, he should be able to undertake clerical or office work, which would not involve any risk to himself or others."

See also write-up on sleep apnoea and remaining conscious during waking moments.

1. Judge of the Upper Tribunal Edward Jacobs 11.5.2012

Equality Act 2010 and disability

JB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0518 (AAC) – CE/811/2013 concerned a claimant who suffered with epilepsy, asthma, generalised arthritis, vertigo and depression.

He had also stated that he was recovering from a stroke. He was found by the DWP to score no points in relation to the descriptors in Schedule 2 to the Employment and Support Allowance Regulations 2008 (the 2008 Regulations) and that finding was upheld by the First-tier Tribunal on appeal.

The First-tier Tribunal considered whether the claimant could be treated as having limited capability for work under regulation 29 – substantial risk to his mental or physical health if he were found not to have limited capability for work. It found that despite his disabilities he would be able to manage the demands of basic unskilled non-manual work, such as basic administration work in an office or shop. They considered that this might be work involving the use of a till and could be for 16 hours a week or more, and he would be able to manage the journey to and from such work. The First-tier Tribunal also found that he was able to use public transport.

There was no direct challenge to any of the above reasoning/findings, but the First-tier Tribunal went on as follows:

> "The tribunal noted that any employer would be bound by the terms of the Equality Act to make reasonable adjustments to accommodate the impact of [the claimant's] difficulties. This could be, for example, adapted seating or more frequent breaks. The tribunal did not consider that in this context the risks to his physical or mental health would be substantial should he be found fit for work."

An application for permission to appeal against the decision of the First-tier Tribunal was made sighting an alleged error of law upon this final sentence. It was said that it was factually incorrect to say that any employer would be so bound because the claimant's level of disability as determined by the tribunal would not allow him to meet the criteria of the Equality Act 2010 (the 2010 Act), so as to place such an obligation on an employer.
The Upper Tribunal Judge held:

"7. No explanation is offered as to why A's disabilities, as found by the tribunal, are not such as to impose on an employer an obligation imposed by the 2010 Act in relation to disabled persons.

A person has a disability for the purposes of the 2010 Act if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on that person's abilities to carry out normal day-to-day activities (see s.6(1) of the 2010 Act). The effect of an impairment is long-term under paragraph 2(1) of the First Schedule to the 2010 Act if it has lasted for at least 12 months and is likely to last either for a further 12 months or for the remainder of a person's life. As far as I am able to judge, all the claimant's problems, with the possible exception of his recovery from a stroke, fall into that category.

8. Under paragraph 5(1) of Schedule 1, an impairment is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities if measures were being taken to treat or correct it and but for that it would be likely to have that effect. Under paragraph 5(2), "measures" includes medical treatment and the use of a prosthesis or other aid.

9. The medication identified by the approved disability analyst included medication for epilepsy at high dosage, medication for dizziness, medication for asthma and mild and moderate painkillers, which would seem to be for the arthritis.

10. The claimant had been in receipt of incapacity benefit since 1996 and there was evidence that his epilepsy and asthma were lifelong. His depression was over 20 years old and he had in the past overdosed. There was no evidence as to how long he had had the generalised arthritis or the vertigo.

11. The tribunal accepted that the claimant had problems walking but could repeatedly and regularly mobilise for 200 metres, taking his time and stopping after about that distance. An inability because of physical impairment to walk more than 200 metres at a time, whether because of arthritis or asthma or a combination of both, does appear to me to be a substantial and long-term adverse effect of those conditions or one of them, although it may not be one that required any special provision by an employer in connection with the sort of job which the tribunal found the claimant could do.

12. The references by the tribunal to adaptive seating or more frequent breaks do appear to suggest that the tribunal had in mind problems sitting and standing at work despite its findings that the claimant could remain at a work station for over an hour without having to move away. It is right that there is no clear finding that the claimant had any impairment which involved any substantial and long-term effect on his ability to sit and stand at a work station. However, if there was no such problem, then he would be able to do the work identified by the tribunal without having to invoke the provisions of the 2010 Act. It appears to me that the tribunal was saying no more than that any long-term problems the claimant might have had in doing the work because of his physical condition could be overcome by reasonable adjustments in this respect.

13. I am unable to see any merit in this ground of appeal. Even now, the claimant has failed to explain what it would be that might pose a serious risk to his health because of the supposed absence of any duty to make reasonable adjustments, and I am unable to see any evidence of any such possibility that the tribunal should have investigated.

14. It is then said that if the tribunal had found that the claimant fell within section 6 and Schedule 1 of the 2010 Act, this was totally inconsistent with the award of no points under Schedule 2 to the 2008 Regulations. I disagree. In my judgment it is plain that a person can have physical and mental impairments which have a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities without any of them being so serious that he scored points under the Schedule 2 descriptors. This is illustrated by the fact that the descriptors have now become so tight that many people with long term disabilities which easily qualified them for incapacity benefit do not qualify them for ESA.

15. In relation to a further point made on behalf of the claimant in reply to the submissions of the Secretary of State, it appears to me that the tribunal is bound, if relevant to an issue before it, to make a determination as to whether a person would be owed a duty by a potential or actual employer under the 2010 Act. In particular, if the existence of such a duty is a prerequisite for there being no substantial risk to a claimant's mental or physical health for the purposes of regulation 29, then plainly a finding must be made as to that duty.

16. In the present case, it appears to me that the tribunal may more accurately have found that there was no evidence of any such risk if the claimant was found not to have limited capability for work, but that if there was any long-term disability so serious as otherwise to pose such a risk, then the employer would be under a duty to make reasonable adjustments under section 20 of the 2010 Act. However, it does not appear to me that, on the basis of the unchallenged findings of fact by the tribunal, it could have come to any decision other than to dismiss the appeal and it does not appear to me that there was any relevant error of law in its reasons."

See also [2015] AACR 15 (unreported JS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0428(AAC) – CE/3688/2013) and AT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0630 (AAC) – CE/3100/2013.

1. Judge of the Upper Tribunal Michael Mark 17.10.2013

regulation 29 and the Equality Act

AT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0630 (AAC) – CE/3100/2013 involved the case of a claimant who had mental health problems and a history of serious alcohol abuse and drug misuse (including heroin).

The Upper Tribunal Judge held:

"9. Of considerable importance in this case, bearing in mind the diagnoses, is the potential application of regulation 29. In this the tribunal's reasoning was wrong. At paragraph 19 of the statement of reasons it is explained that FTT had regard to the type of employment which the appellant may be capable of undertaking.

There is then something of a quantum leap from that comment into a generalised assertion that the Equality Act 2010, including as it does provisions concerning "disability discrimination" in the workplace, can be relied upon to prevent the risk to health envisaged by regulation 29. With respect, if that might be the position in relation to physical disablement, and I do not decide that important point upon which I have not had argument, to assume that because there is a duty on an employer to make reasonable adjustments there cannot be a substantial risk to health due to stress related matters for somebody with significant addiction or mental health problems, is to misunderstand the provisions of both sets of legislation."

See also [2015] AACR 15 (unreported JS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0428(AAC) – CE/3688/2013) and JB v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0518 (AAC) – CE/811/2013.

2. Judge of the Upper Tribunal P A Gray 13.12.2013

jobs the claimant could do – call centre?

AT v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0630 (AAC) – CE/3100/2013 involved the case of a claimant who had mental health problems and a history of serious alcohol abuse and drug misuse (including heroin).

The Upper Tribunal Judge held:

"10. Also stated in the paragraph which dealt with regulation 29, is the assertion that there were a number of manual jobs which the appellant could do under supervision, including a job at a call centre. From decisions I have seen there appears to be a common misconception that working in a call centre is a benign, stress-free occupation. On the contrary such work is generally highly target driven, and whilst it may be suitable for those with physical health problems for whom being settled in one place is an advantage over more peripatetic occupations it cannot be seen as invariably suitable for all those with disabilities."

1. Judge of the Upper Tribunal P A Gray 13.12.2013

substantial risk – journey to or from work

CF v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 29 (AAC) – CSE/360/2011 held:

"12. The proper approach to the test under regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995, which has the same wording as regulation 29(2)(b) ESAR, was set out by Moses L J, with whom the other members of the Court of Appeal agreed, at paragraph 38 of *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42:

> " … In order to determine whether there is any health risk at work or in the work place it is necessary to make some assessment of the type of work for which the claimant is suitable. The doctor, the decision-maker and, if there is an appeal, the Tribunal, should be able to elicit sufficient information for that purpose. The extent to which it is necessary for a decision-maker to particularise the nature of the work a claimant might undertake is likely to depend upon the claimant's background, experience and the type of disease or disablement in question …"

Additionally, as recognised by the Court of Appeal in *Charlton,* the causal link between a finding of limited capability for work and a substantial risk to health can arise not simply in –the nature of the claimant's work and work place but also having regard to the necessary journey to or from work."

1. Judge of the Upper Tribunal L T Parker 20.1.2012

substantial risk – previous work history and present skills relevant

CF v Secretary of State for Work and Pensions (ESA) – [2012] UKUT 29 (AAC) – CSE/360/2011 held:

"13. Firstly, in the present case therefore, there is a question whether there might be a significant deterioration in the claimant's mental health on being told that benefit was refused; anger and upset is insufficient. A tribunal has next to consider whether and what is the range of work the claimant could do without a substantial risk to her health. This involves a consideration, not just of work which her qualification and skills (or lack of them) enable her to do, but also having regard to work of a type which her health allows yet without substantial risk to that health or to the health of others. As it was well put by Upper Tribunal Judge Mark at paragraphs 9 and 10 of I J v Secretary of State for Work and Pensions (IB) [2010] UKUT 408 (AAC) (a case lodged by Mr Little):

> "9. There was, however, no investigation by the tribunal about the claimant's background to form a view on the range or types of work for which he was both suited as a matter of training or aptitude and which his disabilities did not render him incapable of performing. As a result there was no decision as to whether within that range there was work he could do without the degree of risk to health envisaged by regulation 27(b). In making that assessment the tribunal would have to take into account both the risk to the claimant as a result of his mental health problems and also the limits on the work he could do because of them, including any alcohol dependency he was found to have.
>
> 10. Further, the test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker's allowance.

That would involve his attending interviews, and going through all the other steps that would be needed to obtain and keep jobseeker's allowance. In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990's is unlikely to find work quickly and would very possibly never find it. His GP's assessment that it is inconceivable that he would ever be able to earn his living may be right. The tribunal would then have to determine how this change from his being in receipt of incapacity benefit would affect the claimant's mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age. These factors were not considered by the tribunal, and indeed they did not elicit the information necessary to enable them to be considered, such as whether he had in fact applied for jobseeker's allowance and if not, how he was coping or would cope."

14. In the present case, even if the claimant satisfied descriptor 20(f), unless she succeeds under other descriptors, her total pointage does not reach the threshold. But a consideration of regulation 29(2)(b) only ever comes into play where a claimant does not have such a functional limitation as to justify a score reaching the necessary threshold of fifteen points under schedule 2. However, because one is, nevertheless, taking account of her disabilities, both in determining the limits on the work she could reasonably do because of her impairment, as well as in evaluating the direct risk to herself and others in work as a result of them, what, if any, descriptors a claimant satisfies is important to determination of the test under regulation 29(2)(b).

15. In the present case, therefore, whether the claimant does or does not satisfy particular mental health descriptors, and depending on which descriptors those are, will play a part in the analysis under regulation 29(2)(b). A new tribunal will also have to consider the claimant's previous work history and her present skills, alongside her mental state, in order to determine if there is a range of work she could do without the degree of risk to health envisaged by regulation 29(b)(2)…."

1. Judge of the Upper Tribunal L T Parker 20.1.2012

substantial risk – inadequate reasons

PJR-v-Department for Social Development (ESA) – [2013] NICom 16 – C14/12-13(ESA) held:

"10. In her ESA50 questionnaire the applicant had described a relationship between her present health and her past employment where she says "I am a chronic alcoholic and have been for many years – I have tried rehab, psychotherapy, hypnotherapy. This has all been due to a severe stress from my job in London – very high powered. This led to severe depression, lack of self-esteem, panic, anxiety and a suicide attempt". She said "I have tried to go back to work often and broke down each time" and "I have tried to go back to work here on numerous occasions, however it has proved too much for me and I've ended up on the edge again. Going back to work would be the end of me". She reports a "serious suicide attempt" in July 2003.

11. Against that background, Mr Toner for the Department [*Department for Social Development*] submits that the tribunal has failed in its inquisitorial duty in that regulation 29 issues have been raised by the applicant but not dealt with…

12. The application of regulation 29 has sufficient similarity to the test in the previous legislation governing incapacity benefit (IB) that the decision of the Court of Appeal in England and Wales in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42 has relevance. There, Moses LJ said in relation to the equivalent IB test:

'46. Sufficient information may be elicited by reference to the claimant's completion of the initial questionnaire, questioning during his medical examination, or by any evidence he may choose to give on an appeal to the Tribunal. The process to be adopted by the decision-maker or Tribunal is to be regarded as inquisitorial and not adversarial. It is a process described by Diplock J in R v Medical Appeal Tribunal (North Midland Region ex-parte Hubble) 1958 2 QB 228 at 240 as a fact-gathering exercise in which there is no formal burden of proof on either side. There should be no difficulty provided the decision-maker or Tribunal recall that the essential question is whether there is an adequate range of work which the claimant could undertake without creating a substantial risk to himself or to others.'

13. I have considerable sympathy with the position of the tribunal who had to deal with the appeal on the papers alone, without the applicant present to substantiate the written claims she had made.
However, I accept that Mr Toner is correct to say that the tribunal failed to address regulation 29, which was clearly before it. It was incumbent on the tribunal to determine whether there was an adequate range of work which the applicant could do without creating a substantial risk to herself or to others. Although I grant leave to appeal, I do not consider that it is appropriate to proceed to determine the appeal.

14. As each of the parties submits that the decision of the appeal tribunal is erroneous in point of law, I consider that it is appropriate to set aside the decision of the appeal tribunal under Article 15(7) of the Social Security (NI) Order 1998 and to remit the appeal to a newly constituted tribunal with directions…."

1. Commissioner O Stockman 19.2.2013

date of evidence postdate of decision

GC v Secretary of State for Work and Pensions (ESA) – [2013] UKUT 0271 (AAC) – CE/3334/2012 examined the application of regulation 29 and section 12(8)(b).

Regulation 29 (Exceptional circumstances) of the Employment and Support Allowance Regulations 2008 provides:

(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) This paragraph applies if –

(a) the claimant is suffering from a life threatening disease in relation to which –

(i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and

(ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; …

Section 12(8)(b) of the Social Security Act 1998 provides:

(8) In deciding an appeal under this section, an appeal tribunal
…

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

The claimant had been getting Incapacity Benefit and was being migrated on the Employment and Support Allowance. He had cancer of the bladder and was receiving treatment for this. His doctor had submitted medical evidence confirming that the claimant's cancer was in remission and asymptomatic [*meaning: a patient is a carrier for a disease or infection*]. At his medical in June 2011 the claimant informed the Healthcare Professional that he was due to have another cystoscopy the following month and that he experienced pain when urinating. In September 2009 he was found not to have limited capability for work and appealed.

At his appeal hearing the claimant's representative argued that only regulation 29(1)(a) was applicable. The representative provided evidence from the claimant's surgeon which confirmed that following cystoscopies in December 2011 and February 2012, the cancer was still prevalent around the neck of the bladder. The surgeon advised removal of the bladder and the fitting of a stoma.

The First-tier Tribunal dismissed the claimant's appeal. The First-tier Tribunal's full statement of reasons explained the essence of its decision in the following terms:

- bladder cancer is a life-threatening disease
- Mr C's cancer has not been cured, but that does not mean that it is uncontrolled or uncontrollable
- there was no evidence of cancer following the December cystoscopy, but it was found in February
- it may have been present but not evident earlier
- the surgeon said that a new tumour had developed
- in August 2011 (the date of the Secretary of State's decision), the prevailing medical view was that the cancer was under control
- it only became uncontrolled after the new tumour developed

The claimant's representative argued that the decision of the First-tier Tribunal was erroneous because the letter from the claimant's surgeon, although written after the date of the decision under appeal, was evidence that the cancer had been uncontrolled at that time. The representative argued that under R(DLA)3/01, the use of the evidence from the claimant's surgeon was consistent with section 12(8)(b) – although the evidence had been provided later it could be used to show the claimant as having the particular condition at the time of the decision.

The Secretary of State's representative did not support the appeal. They argued that the evidence shows that the claimant's cancer was controlled in August 2011 but that control subsequently ceased to be effective.

In reply, the claimant's representative argued that either the cancer was seemingly under control but was not, or it was uncontrolled because it 'came back'.

The decision held:

"10. There are two ways to approach this case. Both produce the same result: the tribunal did not make an error of law.

11. The first approach focusses on the proper role of the First-tier Tribunal. It is responsible for finding the facts. The Upper Tribunal will only find an error of law in respect of those facts if the First-tier Tribunal's analysis of the evidence was irrational or the judge has failed to explain the tribunal's decision adequately. As part of that process, the Upper Tribunal respects the role of the specialist medical member of the panel that heard this appeal. In this case, that role is evident from the nature of the evidence.

The difference between the parties' arguments ultimately depends on the facts, which in turn depend on the analysis of the evidence. The tribunal's reasons do not appear to me to disclose any irrationality on their face, whether or not I take account of the medical member's involvement. Indeed, the claimant's representative has not argued that they are. Accepting the tribunal's findings, as I must, its decision on the law is unassailable. Mr C's [*the claimant*] cancer was under control until after the decision was made.

12. The second approach focusses [*sic*] on the circumstance to which section 12(8)(b) applies. In most disability and incapacity cases, this will refer to a medical condition or a particular disability. To take a random example from the current version of Schedule 2 to the 2008 Regulations, a circumstance might be whether the claimant can 'pick up and move a 0.5 litre carton full of liquid'. In such a case, it makes sense to say that later evidence shows that the claimant could not perform that activity at the time of the decision. And that is entirely consistent with the requirements of both the Schedule and section 12(8)(b). Regulation 29(1)(a)(i) is different. It does not refer to the claimant having a disease that is uncontrolled or uncontrollable. It refers to the need for medical evidence that that is so. In applying section 12(8)(b), the relevant circumstance is the existence of the evidence of the state of the claimant's condition. In Mr C's case, the evidence that his cancer had returned and required surgery did not exist until after the Secretary of State made the decision under appeal. In such a case, it makes no sense to say that later evidence shows that there was evidence at the time of the decision. Such talk is entirely inconsistent with the requirements of section 29(1)(a), as it renders the requirement for contemporaneous evidence redundant. On this analysis also, the tribunal's decision on the law is unassailable. There was no evidence that Mr C's cancer was uncontrolled or uncontrollable until after the decision was made.

13. For either or both of those reasons, I must dismiss the tribunal." [*My inserts*].

1. Judge of the Upper Tribunal Edward Jacobs 10.6.2013

Med3 – First-tier Tribunal duty to consider regulation 29

RU v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0077 (AAC) – CE/2286/2013 held:

"6. In my judgment, if the claimant's GP was advising his or her patient to refrain from work for 6 months by a Med 3 issued more or less contemporaneously with the decision under appeal, it was incumbent on the tribunal to consider the implications of that. The work capability assessment is an artificial construct, which looks at certain activities only, and there is no necessary correlation between a doctor's views as to what the patient can manage and the outcome of the WCA applied to that person, or vice versa. Regulation 29 has the function of a safety valve addressing that lack of correlation, protecting claimants (and others) from the effect of determinations which in the circumstances set out in that regulation would otherwise result in substantial risk to health.

7. The tribunal only briefly addressed the fit note "which listed the appellant's conditions, but did not refer in any detail to any functional restrictions caused by those conditions, except in headline form to walking difficulties and an inability to use her right hand."

8. I can understand that the fit note may have been of little assistance in relation to the descriptors, but the tribunal in my view needed to consider what the very issue of the certificate implied about the impact of the conditions, taken as a whole, on the claimant's ability to work. The tribunal was required by *Charlton* to determine the range or type of work the claimant could do without the sort of risk which would be caught by regulation 29. It did not do so and that was an error of law."

1. Judge of the Upper Tribunal C G Ward 14.2.2014

regulation 29 – relevance of Med 3 certificate

SP v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0278 (AAC) – CE/4095/2013 involved the case of a claimant born in 1964 who had been on Income Support on grounds of incapacity for a considerable time due to having suffered depression for many years. Her ESA50 had been completed by her housing support provider because she had limited reading and writing abilities. It contained a description of how her condition had affected her. Despite her health problems it appeared that in three weeks out of every four she was able to spend three mornings a week sorting clothes on a voluntary basis for her (charitable) housing provider and shortly before the date of decision, she had taken up a job for one hour a day in a launderette.

It was the decision of the First-tier Tribunal to uphold the decision of the DWP (following a medical examination) that awarded the claimant 0 points under the 'limited capability for work' assessment under schedule 2. The claimant appealed against this decision.

The Upper Tribunal examined whether the First-tier Tribunal had erred in law by failing to explain how it reached its conclusion on Regulation 29 in the face of a Med 3 certificate from the claimant's GP providing that the claimant was not fit for work and a letter dated 12th January 2012 (sent 'To whom it may concern') which said:

> "I am writing to confirm that [the claimant] has suffered from depression and has been on treatment for this for at least the last 11 years. Although her condition is stable she does describe that her mood remains low with poor sleep, appetite and concentration. She does have a small part-time job which she enjoys but feels unable mentally to cope with full-time work and fears that this would aggravate her mental health. I hope that you can be supportive of her situation."

The First-tier Tribunal made no reference in its decision to the Med 3 or the supporting letter from her GP.

The Upper Tribunal Judge distinguished this case from the case in RU v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0077 (AAC) – CE/2286/2013 where the Upper Tribunal Judge held that the content of the Med 3 in that case was such as to require the tribunal to consider regulation 29 when the point had not otherwise been raised. In the present case, the First-tier Tribunal had considered regulation 29. The issue therefore became whether the First-tier Tribunal had a duty to consider all the material evidence in regard to regulation 29 and to make necessary findings and to give sufficient reasons for its decision.

The Upper Tribunal Judge held:

"13. There is no reason to suppose that the Med 3 in this case, coming as it did a short while after the date of decision, was anything other than indicative of the claimant's circumstances at the date of decision also, given the long-running nature of her condition. So on the face of it, here was the claimant's medical adviser advising her that she was not fit for work because of her depression. The statement of reasons says nothing about how well the GP knew the claimant, or whether the GP knew about the claimant's recent work in the launderette or the voluntary work that she could manage most (though not all) weeks.
However, we know from the letter of 12 January 2012 that the GP did at least know about the former and despite knowing about it, was still prepared to advise the claimant she was not fit for work. The following boxes [*referring to the tick boxes on the Med 3 form*] on the form appear more suited to someone who is on sick-leave from an existing employment, but they would certainly have provided an opportunity for a doctor who felt that a patient might be fit for work within limits to have said so (as the relevant legislation requires – see below) and that opportunity was not taken either.

14. Form Med 3 has a statutory underpinning, via the Social Security (Medical Evidence) Regulations 1976/615 as amended by SI 2010/137. Schedule 1 contains a number of rules governing their issue. By rule 4, "a doctor's statement must be based on an assessment made by that doctor". An indication as to the "assessment" required is provided by rule 5(b): the statement is required to contain "the date of the assessment (whether by consultation or consideration of a report as the case may be) on which the doctor's statement is based." By rule 7: "Where a doctor considers that a patient may be fit for work the doctor shall state the reasons for that advice and where this is considered appropriate, the arrangements which the patient might make, with their employer's agreement, to return to work." On the face of it therefore, the GP's view would have been given following a consultation or consideration of a report and specifically did not treat this as a borderline case.

15. Regulation 29 of the Employment and Support Allowance Regulations 2008/794, as it stood at the material time, required the tribunal to consider whether:

> "the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work."

16. Because of the operation of reg.30 of those Regulations pending an appeal, most appellants will be submitting Forms Med 3. To address the Secretary of State's submission, I am not suggesting for one moment that what is written in the Med 3 must be conclusive of a regulation 29 question. Clearly it may be possible to reconcile that a doctor has provided advice to a patient in a Med 3 with the specific legislative test under reg 29 of a "substantial risk" to health not being met. But to do that will in my view require the implications of the certificate to be addressed and facts to be found to the extent that it is possible to do so. Otherwise a claimant may be understandably baffled, saying: "you're telling me I can work without substantial risk to my health yet my own doctor is advising me not to work. How can that be squared?" That was not done here and accordingly, the decision was in error of law for (at least) insufficient reasons.

17. I would however not set aside the decision on this ground. The evidence also contains the letter of 12 January 2012 mentioned above. It indicates the claimant's condition was stable on medication. Such reservations in relation to work as are expressed are attributed to reservations about "full-time work" on the part of the claimant. The GP does not express a professional view that the claimant could not cope, much less that there would be substantial risk to her health, but requests a supportive approach to her situation. With the help of this letter, one can understand how the Med 3 came to be given in the light of the claimant's reservations, but in circumstances such as to negative any implication that there might be "substantial risk"."

It was the decision of the Upper Tribunal Judge that the decision of the First-tier Tribunal involved the making of an error of law but was in its outcome correct. Accordingly the Upper Tribunal Judge exercised their discretion not to set it aside.

2. Judge of the Upper Tribunal CG Ward 13.6.2014

regulation 35 – never work again – relevance of work-related activity

NS v Secretary of State for Work and Pensions (ESA) – [2014] UKUT 0149 (AAC) – CE/2207/2012 examined the issue of how Regulation 35(2) applied in the case of a claimant who could "never work again" or if there was "no work-related activity that could be (reasonably) required" of them.

The case in question concerned a 59 year old man who suffered from arthritis and had been diagnosed with Brugada Syndrome – a serious heart condition which can cause fainting and episodes of an abnormally rapid heart rhythm. An assessment of the claimant's capability for work was undertaken in 2011. In his ESA50 the claimant had, in the physical function section, indicated problems with mobilising, standing and reaching.

In the mental, intellectual and cognitive functions section he had indicated problems with awareness of hazards, initiating actions, coping with social situations and behaving appropriately with other people. The healthcare professional who interviewed and examined him found that he had no disability relevant to the work capability assessment.

This led to his award of Employment and Support Allowance being terminated from 11.10.2011. At the First-tier Tribunal the claimant presented a letter (dated 1.4.2011) from his GP to his employer setting out his medical history and the problems the claimant encountered when he tried to return to work. The GP stated that it was "very clear" to them that the claimant could not return to work as the "stress" was "detrimental to his recovery and long term health". In the view of the Upper Tribunal Judge, the contents and context of this letter related to the actual work the claimant had been doing. However, in the letter it was also stated that the GP could not "really see him returning to employment, either under conditions of normal duties or otherwise". In the view of the Upper Tribunal Judge this was a general statement that the claimant would not be able to return to any form of work.
Upon appeal the First-tier Tribunal allowed the claimant's appeal against the decision that he was not entitled to Employment and Support Allowance. The First-tier Tribunal held that regulation 29(2)(b) applied. On regulation 29(2)(b) the decision of the First-tier Tribunal held:

> "… there would be a substantial risk to [the claimant's] physical health if he were found fit even for a wider range of jobs of which he would be capable because working more closely with equipment gives rise to added risk to his heart due to the risk of interference with his heartbeat and also because [he] gets short of breath with exertion and stress."

It was stated that this reasoning did not apply to regulation 35, which applies to the support group:

> "… because we found that the level of activity which [he] enjoys in everyday life would be no greater if required to attend work focused interviews. [He] can and does go out, including to shops and appointments and to places that make him anxious, ie to places that have equipment, which he says could interfere with his defibrillator such as shops. There is not an increased or substantial risk in the minimum level of activity required by the Secretary of State, whether through phone calls, form filling or attending appointments with them. [The claimant] is not entitled to the support component."

The claimant sought leave to appeal to the Upper Tribunal. Upper Tribunal Judge Jacobs gave permission. In doing so he explained the parameters of the appeal as:

> "4. The case raises in stark form the scope of regulation 35 in circumstances where there is no work that the claimant could do. Is that sufficient to satisfy regulation 35?
>
> 5. What is the legal position in such a case? Are Schedule 3 and regulation 35 merely a test of a level of disability at which claimants receive a higher rate of payment and remain entitled to contribution-based employment and support allowance for longer than a year? Or are they intended to catch all those who realistically could not work, even if they do not satisfy Schedule 2 or regulation 29?
>
> 6. Regulation 35 does seem to assume that there is some work-related activity that a claimant could undertake. Is there any provision to cover the possibility that there is none?"

After some analysis of the Employment and Support Allowance legislation (both primary and secondary) including Regulation 29 and Regulation 35 of the Employment and Support Allowance Regulations 2008 and Regulation 3 of the Employment and Support Allowance (Work-related Activity) Regulations 2011 the Upper Tribunal Judge held:

"D. How the tribunal went wrong in law

17. I can deal with this issue briefly. I accept Mr Jones' [*representative for the claimant*] argument that the tribunal failed to take sufficient account of the claimant's mental health. He does, of course, have physical problems. However, his reaction to his condition and to the operation of his defibrillator has caused considerable stress that has, in some ways, proved more disabling that the condition itself. The tribunal did not show by its reasoning that it had considered this aspect of the case fully and its actual reasoning seems to have concentrated on what he could do physically rather than the mental effects. That is certainly true of the tribunal's approach to regulation 29, which I have quoted in paragraph 5. [*My insert*].

E. Analysis of regulation 35(2)

18. As there will be a rehearing, I have to direct the tribunal on the significance of the evidence that (i) there may be no work that the claimant could do and (ii) there may be no work-related activity that could realistically be identified for the claimant. As I have said, the evidence on both those points is not entirely clear. The tribunal at the rehearing will have to consider that evidence, together with any other evidence produced, and make its own assessment.
Charlton

19. If regulation 35(2) were read literally, it would only apply if the risk arose from the very act of finding the claimant not to have limited capability for work-related activity. That might happen occasionally, but it would render the provision largely ineffective. The same problem arises with regulation 29(2)(b) and its predecessor, regulation 27 of the Social Security (Incapacity for Work) (General) Regulations 1995. The Court of Appeal dealt with this issue in respect of regulation 27 in *Charlton v Secretary of State for Work and Pensions* reported as R(IB)2/09. The court decided that the regulation had a wider scope:

"45. … The decision-maker must assess the range or type of work which a claimant is capable of performing sufficiently to assess the risk to health either to himself or to others."

This was the approach that Mr Deputy Commissioner Paines had been taking. The Court considered my approach, which had been to direct tribunals to consider the work that would be defined in a jobseeker's agreement if the claimant were to apply for a jobseeker's allowance. The Court rejected this, saying:

"43. … There is no warrant within the wording or context of regulation 27(b) for requiring a decision-maker to embark upon the almost impossible task of imagining what hypothetical agreement might have been made should the claimant have applied for a jobseeker's allowance."

20. Although the Court was dealing with regulation 27, it was aware of the employment and support allowance legislation and said:

"4. Employment and support allowance has replaced incapacity benefit for new claimants. The previous scheme is the one which is relevant to this appeal but the question of interpretation remains relevant to the regulations made under the new scheme introduced by the Welfare Reform Act 2007."

The court clearly had regulation 29 in mind. It is not clear whether it considered regulation 35, but I dealt with that in *AH v Secretary of State for Work and Pensions* [2013] UKUT 0118 (AAC). I decided that the approach in *Charlton* had to be modified to read:

"The decision-maker must assess the range or type of work-related activity which a claimant is capable of performing and might be expected to undertake sufficiently to assess the risk to health either to himself or to others."

21. This has produced problems at the appeal stage, because work-related activity involves two discretions: (i) the Secretary of State's discretion whether or not to impose a requirement to undertake work-related activity; and (ii) the Secretary of State's discretion on the type of activity that is required. This appears to create at least two conundrums.

The first conundrum

22. One conundrum was identified by Judge Mark in JS v Secretary of State [2013] UKUT 0635 (AAC) and GS v Secretary of State [2014] UKUT 0016 (AAC): if there is no work that the claimant could ever do, regulation 35(2) can never apply, because no work-related activity would make it (to quote section 13(7)) 'more likely that the person will obtain or remain in work or be able to do so.'

23. Ms Wilkinson [*representative for the Secretary of State*] argued that Judge Mark's analysis 'cannot be right because it would mean that the most vulnerable, who will not work again and for whom any WRA [work-related activity] will pose a substantial risk to their health, will have no chance of being assessed for SG [support group] under the extra protections of Regulation 35 because, by definition, there is no WRA they can do and thus there can be no substantial risk to their health …' [*My insert*].

24. In order to resolve this conundrum, Miss Wilkinson relied on section 13(7), which only requires that the activity should make it 'more likely' that the claimant will be able to obtain work. Pressed on when a person who could never work again might satisfy this requirement, she suggested a change of circumstances, such as a new form of treatment or medication. This argument does not work. For a start, it requires a tribunal to make contradictory findings of fact that (i) the claimant will never be able to work again, but (ii) this may change later. If finding (i) is correct, the tribunal cannot make finding (ii). But if finding (ii) is correct, the tribunal cannot make finding (i). The correct finding would be that there is *at present* no work that the claimant could do. This would not be sufficient to avoid the conundrum, as it would leave unresolved the issue whether regulation 35(2) applied for the time being.

25. Regulation 35 may have to operate before any consideration has been given to the sort of work-related activity that might otherwise be appropriate for or required of a claimant. This is particularly likely during the appeal process. The provision has to be interpreted to operate effectively at that stage. It may also have to operate once consideration has been given. It must operate effectively in both contexts.

26. The stage at which regulation 35(2) may have to operate explains why it is framed as a hypothesis. It requires the tribunal to identify the possible consequences of a particular postulate (the *if* bit). If a possible consequence would be a substantial risk to health, the provision is satisfied and the claimant qualifies for the support group. As I have already said, the postulate cannot be read literally. The tribunal does not simply have to postulate the claimant being found not to have limited capability for work-related activity. It also has to postulate the claimant actually undertaking such activity.

27. It does not have to identify that activity with precision. That is a separate stage that will only be reached if the tribunal decides that the claimant does not qualify for the support group. If and when that stage is reached, it is a matter for the Secretary of State, not the tribunal. The tribunal's task is preliminary to and necessarily more speculative and more general than the actual application of regulation 3 of the 2011 Regulations. The tribunal has to apply the hypothesis embodied in regulation 35(2). In doing so, it cannot deny the postulate. That, with respect to Judge Mark, is what he did. He denied that the postulate (the *if* bit) could ever apply in certain circumstances. But that is the very foundation of the provision. It is what the tribunal is required to accept. It cannot reject the basis of the hypothesis that forms the structure of regulation 35(2).

28. In doing so, the tribunal has to limit itself to applying regulation 35(2) and avoid trespassing into the Secretary of State's decision-making under regulation 3 of the 2011 Regulations [*Meaning: Employment and Support Allowance (Work-related Activity) Regulations 2011*]. Expecting anything more would involve making the mistake that the Court of Appeal in *Charlton* said I had been making. To adapt the language of the Court, it would require the tribunal to embark upon the almost impossible task of imagining what hypothetical requirement, if any, the Secretary of State might have imposed should the issue have had to be decided. The way to remain properly within the tribunal's jurisdiction lies in the level of generality at which the tribunal has to consider work-related activity. Ms Wilkinson accepted that my decision in *AH* was correct.

What the tribunal has to do is to identify in a general way 'the range and type of work-related activity which a claimant is capable of performing and might be expected to undertake' (to quote *AH*); and it must do so regardless of whether the Secretary of State would actually require the claimant to undertake any activity and regardless of whether any such activity would have any effect on the claimant's ability to 'obtain or remain in work' (to quote section 13(7)). [*My insert*].

29. Ms Wilkinson also accepted that the approach I had taken in *ML* and *AH* properly identified the range of approaches that tribunals should take. In *AH*, I decided:

"31. The nature of the claimant's disabilities will determine the nature of the evidence that the tribunal needs in order to decide whether regulation 35(2) applies. Broadly, there are two possibilities. In some cases, the tribunal will need only general information in order to decide that a particular claimant does or does not satisfy section 35(2). For example: a claimant whose only disability is restricted mobility should have no difficult in attending an interview or an appropriate course. In other cases, the tribunal will need evidence on the specific nature of the activity that the claimant would have to undertake."

ML is an example of the first possibility:

"16. … In this case, there was sufficient information for the tribunal to make a decision. Whatever work-related activity may involve, Mrs L should be able to undertake it. She is able to travel and even to drive herself short distances. She was able to attend and endure an interview and examination with the health care professional, which lasted for 51 minutes. She is able to attend to her own basic needs, to manage short trips, and to attend to her business in shops, her bank and the post office."

The second conundrum

30. This analysis also provides the solution to another conundrum, which is: it would be unreasonable (under section 2(5)(b) and regulation 3(4)(a) of the 2011 Regulations) to impose any work-related activity that would give rise to a risk of substantial harm, so regulation 35(2) can never apply. One way to avoid this conundrum would be to say that the meaning of the 2008 Regulations cannot be affected by the later 2011 Regulations. So the introduction of the requirement of reasonableness in 2011 could not affect the interpretation of regulation 35(2). This argument does not work, because it assumes that there was no requirement of reasonableness before the 2011 Regulations. I do not accept that. The Upper Tribunal would surely have read the original legislation as requiring this anyway. As Lord Hoffmann said in *Walker v Centaur Clothes Group Ltd* [2000] 1 WLR 799 at 805:

"It is not unusual for Parliament to say expressly what the courts would have inferred anyway."

31. There is, though, a way to resolve this conundrum. Regulation 35(2) confers a right on a claimant: a right to be treated as having limited capability for work-related activity. The risk of substantial harm is both the condition precedent for that right and the rationale for the existence of the right. It is inappropriate for the existence and enforcement of such a protective right to depend on the exercise of a discretion. This is not a complete solution, as there is a further step that is required.

32. The solution to the first conundrum identifies the nature of regulation 35(2) and the time when it may have to apply, which indicate the nature of the consideration involved. The consideration has to operate at a relatively general level that does not trespass into the role of the Secretary of State. This also explains why it is not appropriate to undertake a precise analysis of the reasonableness of the activity.

Cases to which regulation 35(2) does not apply

33. My analysis prevents the exclusion of some cases from the scope of regulation 35(2). It does not, though, bring every case in which Schedule 3 is not satisfied within that provision. There remains the possibility that a claimant is seriously disabled but does not satisfy the conditions for the support group on account of the way the legislation is structured. There could, for example, be a claimant who will realistically never be able to work, but whose disabilities are not sufficient to satisfy any of the activities in Schedule 3 and for whom work-related activity may not pose a substantial risk. That is the inevitable consequence of the nature of the test. It depends on whether the activity would give rise to a substantial risk, not on whether it would confer a benefit: see my decision in *CH v Secretary of State for Work and Pensions* [2014] UKUT 0011 (AAC). As I explained in *ML v Secretary of State for Work and Pensions* [2013] UKUT 0174 (AAC):

"17. … There are claimants who are not capable of work and never will be capable of work but whose condition and disabilities are not such that they can satisfy the conditions for the support group. To put it another way, the support group is not for those who will never be capable of work. It is for a narrower category."

CSE/0017/2014

I was just finalising my decision when Judge Bano drew my attention to this decision, which he had recently given in Scotland. It is unfortunate that I was not aware of it sooner, because he has reached the same conclusion as I have but has expressed it much more clearly and succinctly:

"12… If regulation 35(2) is to have any real meaning, it is not open to a tribunal to find that work-related activity does not present a risk of harm to a claimant on the basis that the claimant will not actually be required to undertake any meaningful activity if it turns out to be harmful. I therefore consider that the action of the employment adviser of effectively bringing the claimant's action plan to an end out of concern for her health was evidence which the tribunal should have taken into account when evaluating the risk of harm to the claimant if she were not found to have limited capability for work-related activity.""

In reaching the above decision the Upper Tribunal Judge held that he needed to give mention to two subsequent events. The Upper Tribunal Judge covered them by stating:

"7. After the tribunal's decision, the claimant was interviewed. He has given an account of what was said, which I do not think can be taken literally. It is understandable that he was not attuned to the technical language being used and its significance. I take his account as saying that the adviser said that there was no activity that could be required of him given his health. It may be possible to provide an accurate statement from the Department's records for the rehearing. Whatever the advice given, it may be relevant under section 12(8)(b) of the Social Security Act 1998 as indicating the claimant's condition at the date of the decision under appeal (*R(DLA)2* and *3/01*). I say may be because there is evidence that the claimant's condition worsened shortly after the Secretary of State's decision (page 104).

8. In April 2013, there was a further assessment of the claimant's capability for work, following which the Secretary of State superseded the tribunal's decision. The claimant has exercised his right of appeal against that decision, but it has not yet been decided."

See also CE/1002/2014.

2. Judge of the Upper Tribunal Edward Jacobs 1.4.2014