IN THE UPPER TRIBUNAL **Appeal No.** CUC/747/2020
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

ET

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 26 February 2021
Decided on consideration of the papers

Representation:
Appellant: The appellant represented herself.
Respondent: Decision Making and Appeals Section, Leeds.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 7 February 2020 under case number SC065/18/01321 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal, at an oral hearing.

REASONS FOR DECISION

Introduction

1. Two discrete grounds of appeal arise on this appeal. Both find their focus in the risk assessment contained in paragraph 4(1) of Schedule 8 to the Universal Credit Regulations 2013 ("the UC Regs") and its wording "there would be a substantial risk to the health of any person were the claimant found not to have limited capability for work". The statutory test under regulation 29(2)(b) of the Employment and Support Allowance Regulations 2008 is the same and the statutory predecessor of regulation 29(2)(b) – regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995 – was to the same effect. The statutory risk assessment embodied in paragraph 4(1) is therefore of long standing.

2. I sometimes refer below to the finding that a claimant does not have limited capability for work as a finding that they are 'fit for work'.

3. The first ground of appeal is about the First-tier Tribunal establishing whether a third party would in fact have been available to accompany the claimant initially to get to and from a place of work where that place of work is in a location that is unfamiliar to the claimant and where it has been found that the claimant cannot get to such an unfamiliar place without being accompanied by another person. This first ground is relatively straightforward.

4. The second ground of appeal is a little less straightforward. It concerns whether the risk assessment under paragraph 4(1) of Schedule 8 to the UC Regs includes travel to and from the Jobcentre and job interviews as well as travel to and from a place of work. Decisions of the Upper Tribunal give different answers to this question and the Upper Tribunal decision which says that travel to and from the Jobcentre and job interviews is excluded from the risk assessment relies on a Court of Appeal decision as supporting its decision.

5. I am satisfied on the arguments before me that the First-tier Tribunal erred in law in its decision of 7 February 2020 ("the tribunal") on both grounds of appeal and that its decision should be set aside as a result. In summary, I have concluded that the First-tier Tribunal in its findings under paragraph 4(1): (i) failed sufficiently to establish that another person would in fact be able to accompany the appellant on initial journeys to and from places of work in unfamiliar locations; and (ii) wrongly excluded journeys to and from the Jobcentre and job interviews in unfamiliar locations. The Secretary of State now supports the appeal being allowed on both grounds.

<u>First ground of appeal – third party accompaniment</u>

6. The first ground on which the appeal is allowed is that the tribunal failed adequately to address (in its fact-finding and reasoning) the basis on which it concluded, as part of its risk assessment under paragraph 4 of Schedule 8 to the UC Regs, that the appellant would in fact have been able in or after August 2018 (the date of the decision under appeal to the tribunal) to have with her the friend who drove her to Crewe or a family member when familiarising herself with an unfamiliar journey to a new job: per *PD v SSWP* (ESA) [2014] UKUT 148 (AAC). There are in my judgment no sufficient findings of fact made by the tribunal about the availability of the friend or a family member to accompany the appellant on such an unfamiliar journey (or journeys) in August 2018.

7. The tribunal had kept in place the six points the Secretary of State had determined the appellant met under descriptor 15c in Schedule 6 to the UC Regs, despite expressing its doubts about whether the appellant in fact met that descriptor

in August 2018. Descriptor 15c provides, like its employment and support allowance counterpart, that a person scores six points if she is unable to get to a specified place with which she is unfamiliar without being accompanied by another person.

8. Paragraph 4 of Schedule 8 to the UC Regs provides as follows:

> "**Risk to self or others**
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> **4.**-(1) The claimant is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work.
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> (2) This paragraph does not apply where the risk could be reduced by a significant amount by-
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> (a) reasonable adjustments being made in the claimant's workplace; or
>
> (b) the claimant taking medication to manage their condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the patient."

If paragraph 4(1) applies then by regulation 39(6) and Schedule 8 to the UC Regs the claimant is treated as having limited capability for work.

9. The tribunal's consideration of paragraph 4(1) (paragraph 4(2) did not have any application) in the context of the award of the six points it had kept in place under descriptor 15c was as follows.

> "[The appellant] would be able to get to and from work. As noted above, she had been able to and about in London so would be expected to make her way safely to a local place of work by public transport, if necessary. <u>If she should have difficulty in making the journey initially because it was unfamiliar to her, she would be able to take a trial run to familiarise herself with the route, for example, with her friend who drove her to Crewe station or the tribunal venue or with a family member</u>." (my underlining added for emphasis)

10. I would accept that as a matter of law this conclusion was potentially one the tribunal could make: see the *PD* case referred to above. However, the evidential basis for the finding that the friend or family member would in fact have been available to accompany the claimant on any unfamiliar route in or after August 2018 is not explored by the tribunal nor is it otherwise evident. It appears an assumption made by the tribunal rather than a finding of fact properly based, and explained, on the evidence before the tribunal. I should add that I do not consider it was permissible for the tribunal to have couched its consideration here in terms of it only being a contingent possibility of the appellant having difficulty with an unfamiliar journey. Having kept in place the determination that descriptor 15c was satisfied, the tribunal had to proceed on the basis that the appellant **was** unable to get to an unfamiliar place without being accompanied: 'if' did not come into it.

11. What crucially is missing from the tribunal's analysis is the enquiry that Upper Tribunal Judge Hemingway refers to in paragraphs [23]-[24] of his decision in *MP v SSWP* (ESA) [2016] UKUT 502 (AAC). Although that decision concerned the journey to and from work-related activities, its analysis applies equally in my view to the journey to and from work.

> "23. Here, though, the tribunal did not enquire into the question of availability of the third party support in the form of the claimant's husband. Rather, it simply appears to have assumed that that support would be available. One can understand why it might have so assumed because there was evidence before it that the claimant received a good deal of assistance from her husband. It noted at paragraph 6 of its Statement of Reasons that when she ventured out of doors "she is accompanied by her husband". It noted that he was "retired from work" and may have inferred from that that he would generally be available. Mr Hampton sought to persuade me that the tribunal had been entitled to assume the availability of assistance from the husband bearing in mind that there were indications that he would accompany her to various locations such as, for example, her GP's surgery. However, I have reached a view that it was incumbent upon the tribunal to make proper enquiry as to the matter using its inquisitorial function. It had an opportunity to do so because it did have the claimant and her husband before it at the oral hearing. Whilst it had evidence that he would accompany her to various places, which might well suggest that he might be able to accompany her to work-related activity venues, it did not necessarily follow that he would always be available to do that or that he would be willing to do it at all. It did not follow that he would be available to or as a separate matter willing to assist with initial participation in work-related activity such as, to adopt the example given by the tribunal, group discussion.
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> 24. Of course, even if the husband had told it that he would not assist the tribunal was not required to believe him. But it ought properly to have enquired into the issue and made findings about it before relying upon the anticipated assistance for its conclusion as to risk. It did, therefore, err in law and in a way which was material in that it might have had an impact upon the outcome. Its decision is set aside."
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> And see to similar effect paragraph 13 of Judge Hemingway's more recent decision in CE/2611/2019.

12. It follows from the above caselaw, and as the Secretary of State submits, that even if there is evidence of a claimant having been accompanied in making unfamiliar journeys on other occasions, that evidence is not determinative of such accompaniment being available in fact on the journey to and from work (or the Jobcentre – see below) at the material time in issue on an appeal. The First-tier Tribunal needs to explore the likelihood of the appellant being accompanied on an unfamiliar journey to, say, a place of work at the time relevant to the risk assessment required by paragraph 4(1) of Schedule 8 to the UC Regs. In this appeal that could have been done with the appellant at the oral hearing, but the record of proceedings does not show any such enquiry was made on this appeal. That failing amounted to a material error of law.

Second ground of appeal – journeys to and from the Jobcentre and job interviews

13. The second ground of appeal concerns whether the tribunal erred in law in focusing too narrowly on travelling to and from work in an unfamiliar location under paragraph 4(1) of Schedule 8 to the UC Regs. Should it also have considered the appellant's ability to get to and from job interviews in unfamiliar locations and her attendance at the Jobcentre, if in an unfamiliar location?

14. In giving permission to appeal I indicated it was arguable that the tribunal had also erred on this ground. I suggested that the view that the risk assessment under paragraph 4(1) involved consideration of issues wider than (travel to and from) work seemed to be the clear effect of the reported Upper Tribunal decision *NS v SSWP* (ESA) [2014] 115 (AAC); [2014] AACR 33 at paragraph 45. There Upper Tribunal Judge White set out that:

> "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 (IB)* [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 1990s, 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.""

The headnote to the AACR report of *NS* would appear to indicate that the above is part of its *ratio*. The relevant part of the headnote reads as follows.

> "2. the test contained within regulation 29(2)(b) was whether a substantial risk arose from a claimant being found not to have limited capability for work. The proper approach to applying that test required an assessment of those risks arising from the loss of benefit and needing to seek work, as well as assessing

the risks arising from any work the claimant might undertake: *IJ v Secretary of State for Work and Pensions (IB)* [2010] UKUT 408 (AAC) (paragraph 45);"

15. The Secretary of State in her first submission on the appeal to the Upper Tribunal did not support the appeal being allowed on this second ground, though she was somewhat equivocal in her opposition to this ground of appeal. She argued in her first submission as follows.

> "4. However, having regard to the second of UT Judge Wright's reasons for granting permission to appeal, I do have some difficulty reconciling what UT Judge White has written in paragraph 45 of *NS v SSWP* (ESA) [2014] UKUT 115 (AAC) AACR 33 with what the higher authority of *Charlton* states in paragraph 34 of that decision.
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> 5. Following *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42 [R(IB) 2/09], the determination of "substantial risk", as referred to in regulation 27(2)(b) (reinstated version) of the Social Security (Incapacity for Work) (General) Regulations 1995 and its equivalent in regulation 29(2)(b) of the Employment and Support Allowance Regulations 2008, should be made primarily in the context of the journey to and from work and in the workplace itself. One might also consider the possible, albeit rare, chance of there being a "substantial risk" to the claimant's health on being told benefit has been refused.
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> 6. The final consideration referred to above is laid down in paragraph 34 of *Charlton* and reads as follows:
>
> > "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."
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> 7. In paragraph 45 of *NS v SSWP* (ESA) [2014] UKUT 115 (AAC) AACR 33, UT Judge White approves of UT Judge Mark's analysis in *IJ v SSWP* (ESA) [2010] UKUT 408 (AAC) as to the scope of what paragraph 34 of *Charlton* requires. It may be somewhat late in the day to argue against what Judge Mark states, but I do feel it goes far beyond what their lordships had in mind in paragraph 34.
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> 8. *IJ* states that consideration should be given to effect on a claimant of having to seek work, attend interviews, visit a Jobcentre etc. However, I would argue that what their lordships had in mind was the much more immediate effect on a claimant of being told that his benefit was disallowed rather than any potential long-term difficulties described by Judge Mark. Given that a good deal of claimants who have been disallowed benefit are likely to find themselves in the situation that Judge Mark describes, it is highly unlikely that this is the kind of "rare" situation envisaged by their lordships. In my opinion, paragraph 34 clearly states that it is "the very finding of capability" and a claimant's reaction to that which, if extreme and thus significant, may bring him within the bounds of regulation 27/29. It would be quite natural for a claimant to be disappointed and concerned by any adverse decision, but, from my experience, evidence of extreme reactions to such is quite rare."

16. This was not the first appeal, at least of which I was aware, in which the Secretary of State had sought to qualify, or argue against, *NS* and *IJ* being applied by the First-tier Tribunal in its consideration of any substantial risk arising from an appellant being found 'fit for work'. It is plainly an important issue on which the First-tier Tribunal needs to be properly directed as to the correct applicable law. I was also aware that the Secretary of State had subsequently resiled from the above argument in another appeal before me. I therefore made the following further directions on this appeal.

> "3. The Secretary of State has in another appeal to the Upper Tribunal involving a different claimant (CE/371/2020) since resiled from her opposition to what is the second ground of appeal identified in this case (as set out in paragraph 3 of my reason for giving permission to appeal of 16 June 2020). However, on the basis of the submissions at present in this appeal, the Secretary of State's opposition to the second ground of appeal remains in place. That is very arguably in conflict with the stance she has adopted in CE/371/2020.
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> 4. In these circumstances, I direct that the Secretary of State should make a further written submission on this appeal within one month of this direction being sent to the parties to the appeal, in which she should clarify whether she still opposes this appeal being allowed on the second ground of appeal, and explains if she does maintain that opposition why that is so given her stance in CE/371/2020."

17. The Secretary of State's response was as candid as it was succinct. It was:

> "1. This submission is made in response to the direction of Upper Tribunal (UT) Judge Wright dated 5/11/20.
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> 2. As with CE/371/20, the Secretary of State now wishes to resile from her position taken in CUC/747/20 that she did not support the second reason why Judge Wright granted permission to appeal in his notice of 16/6/20.
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> 3. The Secretary of State now feels that the argument she made in the submission of 24/9/20 is not sustainable and that she wishes to withdraw that part of her submission.
>
> 4. The Secretary of State apologises to the UT Judge for having wasted his time and to the claimant for delaying her appeal."

18. In the circumstances there is now no opposition to the appeal being allowed on ground two as well. However, I consider that it would be unsatisfactory for me to find in favour of the second ground of appeal simply because the Secretary of State does not wish to sustain any argument against it. In fact, the Secretary of State's position takes her further than not making argument against the second ground of appeal. Her position, in respect of the social security schemes she is responsible for administering, is now to support the appeal being allowed on the second ground of appeal on the basis that the argument against that ground of appeal is 'unsustainable'. That does not necessarily mean the second ground of appeal is correct in law, but it provides no material support for dismissing the second ground of appeal. On the other hand, in my judgment it would also be unsatisfactory not to rule

on the second ground of appeal in circumstances where the First-tier Tribunal is entitled to look for guidance from the Upper Tribunal on the scope of the enquiry required by the risk assessment to be made under paragraph 4 of Schedule 8 to the UC Regs. More importantly, the new First-tier Tribunal to which this appeal is being remitted needs to be directed correctly as to the law on whether the scope of the enquiry under the said paragraph 4 is limited to the journey to and from a place of work. And that direction as to the correct law follows on from my deciding whether the tribunal erred in law under the second ground of appeal. In addition, it is arguably unsatisfactory that the Upper Tribunal caselaw on the issue with which the second ground of appeal is concerned has not resolved potential conflicts in the caselaw.

19. I consider my inquisitorial jurisdiction allows me to determine the second ground of appeal even though no argument is now being maintained against it. Argument was initially made against the second ground of appeal succeeding and that argument was, as I see it, essentially based on the reasoning of Upper Tribunal Judge Lane in *MW v SSWP* (ESA) [2015] UKUT 665 (AAC). Those arguments provide a sufficient basis for me to test the second ground of appeal and decide whether it is made out.

20. The relevant parts in *MW* are paragraphs [8]-[17] and are worth setting out in full because they set out most of the key paragraphs from the Court of Appeal's decision in *Charlton* and also show the basis on which Judge Lane founded on *Charlton* to conclude that travel to and from the Jobcentre and job interviews was excluded from consideration under the statutory risk assessment now found in paragraph 4(1) of Schedule 8 to UC Regs. (It was regulation 29(2)(b) of the Employment and Support Allowance Regulations 2008 which was in issue in *MW*, but the conclusion in *MW*, if correct, applies equally in my view to paragraph 4(1).)

21. However, before setting out the relevant extract from *MW*, it is in my judgment important to appreciate that the key parts of the Court of Appeal's judgment in respect of the second ground of appeal before me are in paragraphs [28]-[35]. Paragraphs [38]-[44] of the judgment are concerned with the separate and consequential issue of how to assess the *type of work* under regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995, the Court of Appeal having first concluded (in paragraphs [28]-[35]) that risks in relation to work do fall within the scope of regulation 27(b).

22. The relevant paragraphs in *MW* are as follows:

> "8. The risk must arise *by reason of* the specific disease or bodily or mental disablement from which the appellant suffers and it must arise from the claimant being found not to have limited capability for work. The connection between the risk and the decision is decided by the Court of Appeal in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42. *Charlton* concerned regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995, which was the predecessor of regulation 29(2)(b).

> '27 A person who does not satisfy the all work test shall be treated as incapable of work if in the opinion of a doctor approved by the Secretary of State
>
> (b) 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'

The Court of Appeal confirmed in Charlton that the same principles were to be applied to both regulations. It would be idle to suggest that this was not the case.

9. Judge Mark's remarks in paragraph 17 of *GS v Secretary of State for Work and Pensions* [2014] UKUT 0016 (AAC) are, in my opinion, in conflict with *Charlton* and cannot be sustained. Those remarks hark back to Judge Mark's opinion in *IJ v Secretary of State for Work and Pensions* [2010] UKUT 0408 (AAC) at [10] and [11]. For ease of reference, I recite these paragraphs in full:

> **[17 – *GS*]** So too, in the present case, the Tribunal needed to assess whether there was a deterioration in the claimant's health following the decision, the extent of the deterioration and the extent to which it was as a result of her being found not to have ltd capability for work. This includes the stress from an appeal, successful or otherwise, the stress of dealing with the Jobcentre and possible interviews, the prospects of employment, and the ways in which it is said that the claimant's mental health can be kept stabilised bearing in mind, if the evidence is accepted, that it appears to have deteriorated even without seeking or obtaining work and without both the pressures of work and the additional pressures on daily life if she did spend part of it working…'
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> **[10–*IG*]** 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."
>
> 10 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.

10. To show why these paragraphs are not correct, we must look at the two questions the Court of Appeal posed in *Charlton* for Tribunals to consider in relation to regulation 29(2)(b) and its reasoning.

> "30 'When a claimant has failed those tests, regulation 29(2)(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.
>
> /…
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> 33. Once it is appreciated that regulation 29(2)(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 29(2)(b)*. 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 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*. [italics added]
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> 35. The Commissioner was correct to construe Regulation 27(b) as requiring a causative link....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 (in § 49) 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.
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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.

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).
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> 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 judgment 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."

11. It is noted that the Court of Appeal in Charlton thought it possible, *although probably rare*, that the very finding of capability for work might cause a significant deterioration in a claimant's health. Apart from that rarity, the Court of Appeal states firmly that the risk to be assessed must arise *as a consequence of work the claimant would be found capable of undertaking, but for regulation 29*.

12. In *MB v Secretary of State for Work and Pensions* (ESA) [2012] UKUT 228 (AAC) with which I respectfully agree, Judge Jacobs stated that *Charlton*

> '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.

13. In *MB* the risk argued before the Tribunal was that if B, a drug addict, had to work, it would put more money in his pocket which he would spend on drugs. Judge Jacobs rejected this argument:

> 'That is not a risk that arises from the work. The work is merely the circumstance that gives rise to it.'

14. *Charlton* and *MB v Secretary of State for Work and Pensions* establish that there must be a *causal link between the risk and the work* (or travel to and from work) *the claimant would be found capable of undertaking, but for regulation 29(2)(b)*. The Court of Appeal shows that the links in that causal chain are short. There is no hint in *Charlton* that a risk arising from some circumstance short of work, the workplace and getting to and from work, that is to be considered.

15. Tribunals are not dealing with an open-ended inquiry into whether, for example, a claimant who is found not to have limited capability for work would go on to apply for Jobseeker's Allowance, let alone with what would be required of him in his JSA agreement.

16. Policy and practical concerns consistent with the narrow focus under the Social Security (Incapacity for Work) (General) Regulations 1995 and ESA Regulations underpin the Court of Appeal's decision. These are apparent from paragraph [47] of *Charlton*; and although the Court of Appeal's remarks in paragraph 47 are directed at how to establish a range of work that the claimant may do, its remarks are in my view equally applicable to the causation issue.

> 46'… 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…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.'
>
> 17. Cases in the Upper Tribunal which seek to expand the circumstances in which a claimant might be at risk beyond looking at the work (and travel to and from work) in which the claimant might be engaged but for regulation 29(2)(b) (or beyond the rare exception where the decision itself would cause a substantial risk to health) widen the causational scope of the enquiry in a way that is inconsistent with *Charlton* and should not be followed."

23. *MW* therefore decides that the risk assessment which is required to be made under regulation 29(2)(b) of the Employment and Support Allowance Regulations 2008, or here paragraph 4(1) of Schedule 8 to the UC Regs, excludes as a matter of law from its consideration consequences of the finding that a claimant is 'fit for work' *other than* (the consequences of) finding work, travel to and from that work and the reaction to the 'fit for work' finding. For the reasons given below, I do not consider that *Charlton* requires the Upper Tribunal to arrive at this conclusion.

24. In my judgment, the appellant is entitled to succeed on the second ground of appeal as well. The tribunal erred in law in focusing too narrowly on travelling to and from work in an unfamiliar location under paragraph 4(1) of Schedule 8 to the UC Regs and in failing to consider her ability to get to and from job interviews in unfamiliar locations and her attendance at the Jobcentre, if in an unfamiliar location. I have arrived at this conclusion essentially for two reasons. Those reasons involve me in rejecting the contrary thesis the Secretary of State initially sought to advance and in concluding that *MW* was wrongly decided.

25. The first reason is that *NS* is a reported decision of the Upper Tribunal. The rules of precedent of this chamber of the Upper Tribunal provide that the starting point should be that I follow the decision in *NS*: see *R(I)12/75* at paragraphs [17] and [21]-[22] and *Bury MBC v CD* (HB) [2011] UKUT 43 (AAC) at paragraph [7]. Put another way, and adopting the language of Upper Tribunal Judge Mesher in paragraph [7] of *DM v LB Lewisham and SSWP* (HB) [2013] UKUT 026 (AAC) (not doubted or overturned on this point on the subsequent appeal to the Court of Appeal in *Mahmoudi v London Borough of Lewisham and the Secretary of State for Work and Pensions* [2014] EWCA Civ 284; [2014] AACR 14):

> "….[*NS*]…must have been regarded as rightly decided by at least a majority of the [UTAAC judges] at the time. For that reason and because of the desirability of certainty about the legal position, under the authority of decision R(I) 12/75 an individual judge of the Upper Tribunal should not depart from the legal principles for which [*NS*] stands unless satisfied that to do so would perpetuate error."

For the reasons given below I do not consider that following the part of *NS* that endorsed *IJ* would be to perpetuate any error, even though this part of the decision in *NS* did not grapple with *Charlton*.

26. Further, there is no later decision that expressly declines to follow *NS* on the basis it was wrongly decided on the "*IJ*" point. The main, if not sole, contrary decision is *MW*, which was decided on 1 December 2015 and so after *NS* had been decided and reported. As set out above, the reasoning in *MW* is similar to (though more emphatic than) the arguments the Secretary of State initially made against this appeal being allowed on the second ground of appeal, but the Secretary of State has now abandoned that as a line of argument. *MW* was decided at the end of 2015 and thus well after *NS* had been decided and reported, but *MW* makes no reference to *NS* and so does not say why it did not follow a reported decision of this Chamber. I note too that other subsequent decisions have been decided on a basis more consistent with the *IJ*/*NS* line of authority than with *MW*: see, for example, the 'by reason of' analysis in paragraph [10] of *JT v SSWP* (ESA) [2018] UKUT 124 (AAC).

27. The second reason is that I consider the legal holdings in *IJ* and *NS* as to the correct scope of the statutory language, which in this appeal is found in paragraph 4 of Schedule 8 to the UC Regs, are correct as a matter of construction of the relevant statutory language and, contrary to *MW*, the Court of Appeal's reasoning and decision in *Charlton* does not require me to hold otherwise.

28. Taking the statutory language first and on its own, as should be the starting point in any exercise in statutory construction, I do not see why attending at the Jobcentre cannot as a matter of law fall within the scope of legitimate enquiry as to the areas of "risk" which might arise from a claimant being found not to have limited capability for work. The relevant language in paragraph 4 is "by reason of [the claimant's illness] there would be a substantial risk to [any person's health] were the claimant found not to have limited capability for work"[1] (my underlining added for emphasis). The test is not a narrower one of "were the claimant found work or a job". It is a wider test founded on a forward-looking exercise of considering the rational evidential consequences that may arise if the claimant is found not to have limited capability for work and the risks to health that may arise from those consequences because of the claimant's ill-health. As Commissioner Jacobs (as he then was) explained in CIB/26/2004 (at paragraph [34]): "[t]he emphasis….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". But equally the test is not limited to the claimant's reaction to the decision that they do not have limited capability for work. That narrow reading of the statutory provisions, as seemingly taken in, for example, CSIB/223/2005, was and is no longer tenable after *Charlton*. Attending at the jobcentre and job interviews may, as a matter of

[1] The language used in regulation 29(2)(b) of the Employment and Support Allowance Regulation 2008 and in regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995 is indistinguishable (save that in regulation 27(b) it was couched in positive terms of the claimant being found capable of work – but the legal effect is the same).

evidence, be a consequence of being found not to have limited capability for work, and, contrary to my reading of paragraph [14] of *MW*, it is no remoter (or, per *MW*, longer) a consequence (indeed it will arguably for many claimants be a more proximate consequence) than finding a job and then travelling to and from work. As was pointed out in CIB/26/2004, attending at the Jobcentre will usually follow from the decision that a claimant does not have limited capability for work.

29. Therefore, the statutory language does not provide any statutory restriction or fetter against taking into account, where relevant, travelling to and from the Jobcentre and job interviews (and engaging with others in so doing and at the Jobcentre or job interview). In the context of income-replacement benefits, it will very often be the inevitable consequence of claimants being found not to have limited capability for work that they will have to take such steps in order to satisfy the conditions of entitlement to jobseeker's allowance or universal credit. Indeed, I struggle to understand the basis on which the statutory language could be taken as importing such a restriction in a context where, per *Charlton*, the reaction to the 'fit for work' decision itself and being in, and travelling to and from, work **are** to be taken as relevant consequences of the decision. To exclude what will in all likelihood be the more immediate or proximate consequences of the decision – for example, attending at the Jobcentre – but include what may perhaps be a remoter consequence of being found work, seems in my judgment to lack rationality, and is not justified on the statutory language alone.

30. Take, just as one example, a claimant who only scores nine points under descriptor 15b in Schedule 6 to the UC Regs ("Is unable to get to a place with which the claimant is familiar, without being accompanied by another person") and so, absent paragraph 4(1) in Schedule 8 to the UC Regs, would be found not to have limited capability for work. The contrary approach in *MW* to the legal test which is now found in paragraph 4(1) of Schedule 8 would require any persuasive or even compelling evidence of substantial risks to that claimant's health from her having to travel to the Jobcentre and not being able to be accompanied in so doing to be ignored. That cannot be justified on the statutory language.

31. However, does *Charlton* require travel to and from the Jobcentre and job interviews to be ignored, as *MW* contends? In my judgment, it does not. The decision in *Charlton* has to be understood against the background of the caselaw at the level of the social security commissioners prior to *Charlton* being decided. One debate, touched on in paragraph 26 above, was around the scope of the test then imposed by regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995 ("the IFW Regs") and whether it was limited to substantial risks to heath arising simply because of (i.e. from being told) the finding that the claimant was capable of work. The commissioners' decisions which found that regulation 27(b) had a wider scope than this, and found it *included* potential risks to health associated with work the claimant had been found capable of undertaking (such as CIB/26/2004), had then sought to identify how that work was to be identified and evidenced, given that at the time of the 'capable of work' decision the claimant would almost certainly not be in work and may not have been for some time, and in some cases may never have

been in work. Thus, Commissioner Jacobs continued in CIB/26/2004 to say the following:

> "34…..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."

32. I do not read these passages, and particularly the phrase "in relation to", as saying anything more than that what may happen at any work the claimant may be capable of doing and the journey to and from it is *included* in the legitimate field enquiry under the forward-looking risk assessment under what in this appeal is paragraph 4(1) of Schedule 8 to the UC Regs. They are words of inclusion not exclusion. However, even if the decision in CIB/26/204 can on one reading be read in a way which is exclusionary, I would decline to do so for the reasons in paragraphs 28-30 above. The rest of paragraph 35 and paragraphs 36-37 of CIB/26/2004 are concerned with the means of identifying the type of work the claimant may be capable of doing so as best to assess risk, in the context of a benefit which is generally for people who are not in work.

33. *Charlton* was concerned with both issues: that is, whether 'work' is included in the 'fit for work' risk assessment and, if it is, how to assess the type of that work. However, before turning to consider the Court of Appeal's judgment it is worth emphasising a few points about the social security commissioner's decision in *Charlton* (CIB/143/2007). First, on the evidence and in argument Mr Charlton's case had as its focus under regulation 27(b) of the IFW Regs whether there would be a substantial risk to his health if he were "made to go back to work" (see the GP's evidence as quoted in paragraph 10 of CIB/143/2007). Second, the commissioner said that "…the question posed by this appeal [is] [w]hat work, if any, is relevant to regulation 27(b)?" (paragraph 36). Mr Commissioner Williams then came down in favour of "….going beyond the non-specific idea that the risk is to be assessed without any focus on the kind of work a claimant may do" (paragraph 43). The key point for present

purpose, however, is that no argument was made on the evidence or on the law about whether attending at the Jobcentre (or job interviews) could fall within the 'fit for work' risk assessment. That nowhere featured as an issue in *Charlton* at commissioner level, and there was certainly no argument (contested or otherwise) on whether as a matter of law attending at the Jobcentre could fall within the risk assessment under regulation 27(b).

34. This in my judgment is a critical starting perspective for understanding *Charlton* in the Court of Appeal and what was in issue on the appeal to that court. In short, the Court of Appeal was being asked to address and answer two issues, and two issues only. First, did work fall to be considered under regulation 27(b). Second, if it did, what type of work fell to be considered. No part of the Court of Appeal's consideration was therefore about whether matters other than work (other than the reaction to the 'fit for work' decision) could in law fall to be considered. Nor, as I read it, was any such point argued before the Court of Appeal.

35. That this is so is demonstrated, in my judgment, by consideration of the Court of Appeal's decision in *Charlton* and, crucially, in the context of the arguments made on behalf of Mr Charlton to that court. The court noted that Commissioner Williams' decision in *Charlton*, which it upheld, had proceeded on the basis that the assessment of risk under regulation 27(b) of the IFW Regs depended "to some extent" on the kind of work that the claimant may be asked to do (paragraph [24] of *Charlton*). It was whether work fell to be considered at all under regulation 27(b) that formed Mr Charlton's argument against Commissioner Williams' decision. That is apparent from paragraph 28 of *Charlton*. It is perhaps noteworthy that this paragraph was not referred to in *MW*. Paragraph 28 of *Charlton* reads as follows.

> "28. The appellant challenges the Commissioner's interpretation of regulation 27(b). [The Commissioner's] 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 generally. The claimant argues that it is sufficient to demonstrate risks either to his own or another's safety whether they might arise in a domestic setting or at work."

36. Mr Charlton's argument was therefore limited (on this point) to an argument that it was not necessary to show a substantial risk to health relating to work and the workplace and Commissioner Williams had been wrong to decide to the contrary. The argument put forward for Mr Charlton was that it was sufficient to demonstrate a substantial risk to health in a domestic setting. That context is of central importance to what the Court of Appeal then says in paragraph [29]-[35] of its decision. There the Court of Appeal rejected Mr Charlton's argument and held that consideration of work and the workplace was necessarily included under regulation 27(b). However, no argument arose in *Charlton* about the finding of being capable of work leading to the need to attend at the Jobcentre or job interviews. That was not a matter which was in issue or the subject of any argument, in *Charlton*. And that, in my judgment, is the correct starting point for reading and understanding what is then set out in

paragraphs 33 and 34 in *Charlton*, on which *MW* founded so heavily. I set those paragraphs out again.

> "33. Once it is appreciated that regulation 29(2)(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 29(2)(b). 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 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."

37. I recognise that the language issued by the Court of Appeal in these passages could on one reading (but in my judgment one which would be out of context) be said to be laying down an exclusionary of law that, save for the reaction to the 'fit for work' decision itself, only risks relating to work can as matter of law be taken into account under regulation 27(b) and now paragraph 4(1) in Schedule 8 to the UC Regs (i.e. the *MW* thesis). However, I consider the better reading is that the Court of Appeal was simply addressing whether risks relating to work are in law to be <u>included</u>. It was not thereby ruling out other sources of risk, provided that those risks arise by reason of the claimant's disease or disablement.

38. Even if I am wrong in this reading of the Court of Appeal's decision in *Charlton*, and paragraphs 33 and 34 of its decision contain its *ratio* and that *ratio* has to be read as amounting to a holding that, save for the reaction to the 'fit for work' decision, it is only issues relating to work and the workplace which as a matter of law may be relevant, I do not consider that *ratio* is binding on me. This is because I am satisfied that that *ratio* falls within the limited class of non-binding *ratio* of a superior court identified by the Court of Appeal in *Kadhim v LB Brent Housing Benefit Review Board* [2004] EWCA Civ 344; [2001] QB 955, namely a ratio founded on an assumption of the law which was not the subject of any argument before, or consideration by, that superior court. This principle as set out in *Kadhim* (and see prior to it *Re Hetherington* [1990] Ch 1) is now a settled legal proposition: see, for example, *Wright v Cambridge Medical Group* [2011] EWCA Civ 669; [2013] QB 312 (at para. [101]) and *FSHC Group Holdings Limited v Glas Trust Corporation Limited* [2019] EWCA Civ 1361; [2020] Ch 365 (at para. 136).

39. The *ratio decidendi* on this alternative reading of the Court of Appeal in paragraphs 33 and 34 in *Charlton* is that (as per *MW*) attendance at the Jobcentre and job interviews (and travel to and from the same) cannot be included in the relevant considerations of risk to health under paragraph 4(1) of Schedule 8 to the UC Regs. I have, of course, borne in mind here the caution expressed in *Kadhim*

about proceeding to draw conclusions where the arguments made by the parties may not be clearly set out and further bear in mind that the absence of argument does not necessarily mean that the point has not been considered by the court (on this last point see further *Master Data Center, Inc v The Comptroller General of Patents* [2020] EWCA Civ 475 at para. [36]). However, for the reasons I have endeavoured to set out above, I am confident that no argument was made before the Court of Appeal in *Charlton* about attendance at a Jobcentre or job interviews arising as consequence of the 'fit for work' decision nor was that issue the subject of any consideration by the Court of Appeal in *Charlton*. As I have said before, it was simply not anywhere in issue in *Charlton*.

40. I should add that I can find nothing in the remaining paragraphs of the Court of Appeal's judgment *Charlton* that alters this conclusion. The remaining paragraphs, from paragraph 36 onwards, are concerned with the consequential and separate issue of how to identify the *type* of work, and the degree of detail in respect of the same, when considering risks in relation to work, and those paragraphs have to be read in that light. I can find nothing in those paragraphs, nor would a reader expect to find, anything about risks other than risks at work, but that is not a basis for concluding that such other risks are as a matter of a considered judgment by the Court of Appeal to be excluded.

41. Nor do I consider that what the Court of Appeal had to say in paragraph 47 of *Charlton* has any real or decisive bearing on the issue. Firstly, the "practical application of these regulations" spoken of in that paragraph was in respect of the amount of detail required in identifying the type of work a claimant may have been capable of undertaking and I do not consider it really has any further reach than this. However, in so far as practical considerations may have a bearing on construing the breadth or limits of the statutory wording, I do not see why the Court of Appeal's concern in paragraph 47 about a "fair and effective system for assessing entitlement to [benefit]", should lead me to construe the statutory wording in paragraph 4(1) of schedule 8 to the UC Regs as excluding risks associated with journeys to and from the Jobcentre and job interviews.

42. On either analysis of the Court of Appeals decision in *Charlton*, it does not in my judgment require me to adopt the view taken in *MW*. I decline to follow *MW* and consider it was wrongly decided for the reasons given in paragraphs 25 to 30 above. The tribunal therefore erred in law under paragraph 4(1) of Schedule 8 to the UC Regs in considering only the problems the appellant may have had travelling to and from work.

43. For the reasons given above, both grounds of appeal succeed. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

44. The appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether her 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.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 26 February 2021