



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 57  
XA90/16

Lord Brodie  
Lord Drummond Young  
Lord Glennie

OPINION OF THE COURT

delivered by LORD GLENNIE

in the appeal

under section 13 of the Tribunals, Courts and Enforcement Act 2007

by

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

against

MMcK

Respondent

**Appellant: Komorowski; Office of the Advocate General**

**Respondent: Ms Scott QC, Bryce; Drummond Miller LLP**

24 August 2017

**Introduction**

[1] This appeal by the Secretary of State against a decision of the Upper Tribunal (Administrative Appeals Chamber) (“UT”) dated 6 April 2016 raises the question of what is meant by “social support” as that expression is used in Activity 9 descriptor c in Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013.

### Relevant Statutory Provisions

[2] Section 77 of the Welfare Reform Act 2012 provides that an allowance known as “personal independence payment” is payable in accordance with Part 4 of the Act. A person’s entitlement to a personal independence payment may be an entitlement to (a) the daily living component or (b) the mobility component or (c) both of those components. This case is concerned only with the daily living component.

[3] Provision is made for the daily living component in section 78 of the Act which is in the following terms:

**“78 Daily living component**

- (1) A person is entitled to the daily living component at the standard rate if –
  - (a) the person’s ability to carry out daily living activities is limited by the person’s physical or mental condition; and
  - (b) the person meets the required period condition.
- (2) A person is entitled to the daily living component at the enhanced rate if –
  - (a) the person’s ability to carry out daily living activities is severely limited by the person’s physical or mental condition; and
  - (b) the person meets the required period condition.
- (3) ...
- (4) In this Part ‘*daily living activities*’ means such activities as may be prescribed for the purposes of this section.
- (5) See sections 80 and 81 for provision about determining –
  - (a) whether the requirements of subsection (1)(a) or (2)(a) above are met;
  - (b) whether a person meets ‘the required period condition’ for the purposes of subsection (1)(b) or (2)(b) above.

(6) This section is subject to the provisions of this Part, or regulations under it, relating to entitlement to the daily living component ...”

Comparable provision is made in section 79 of the Act for the mobility component, but we are not concerned with that for the purpose of this appeal.

[4] Section 80 of the Act sets out how a person’s ability to carry out daily living activities or mobility activities is to be determined. So far as is material it provides as follows:

**“80 Ability to carry out daily living activities or mobility activities**

(1) For the purposes of this Part, the following questions are to be determined in accordance with regulations –

- (a) whether a person’s ability to carry out daily living activities is limited by the person’s physical or mental condition;
- (b) whether a person’s ability to carry out daily living activities is severely limited by the person’s physical or mental condition;

[paragraphs (c) and (d) identify similar questions in respect of mobility activities.]

(2) Regulations must make provision for determining, for the purposes of each of sections 78(1) and (2) and 79(1) and (2), whether a person meets ‘the required period condition’ (see further section 81).

(3) Regulations under this section –

- (a) must provide for the questions mentioned in subsections (1) and (2) to be determined, except in prescribed circumstances, on the basis of an assessment (or repeated assessments) of the person;
- (b) must provide for the way in which an assessment is to be carried out;
- (c) may make provision about matters which are, or are not, to be taken into account in assessing a person.

...”

[5] The principle behind personal independence payments is that there should be a structured assessment of the needs of the individual based upon a scoring system. The

assessment method is explained in *RJ v Secretary of State for Work and Pensions* [2017] UKUT 0105 (AAC) at paragraphs 2 and 3. Within the separate categories of daily living activities and mobility activities, particular activities are identified which form the basis of assessment. Against each particular activity there are a number of descriptors representing degrees of limitation in carrying out the particular activity. Each descriptor attracts a specified number of points - the greater the limitation, the higher the number of points. The scores for daily living activities and for mobility activities are determined by adding up the number of points awarded for each activity by reference to the applicable descriptor. The two categories, viz daily living activities and mobility activities, are kept separate and the points awarded within each category are not aggregated. Eight points are needed in a particular category (ie daily living activities and/or mobility activities) for any level of benefit to be available by way of personal independence payment under the Act.

[6] This scoring system is set out in Part 2 of The Social Security (Personal Independence Payment) Regulations 2013 (“the Regulations”). Part 2 is headed “Personal independence payment assessment”. The Regulations in Part 2 provide, so far as material, as follows (references in the Regulations to “C” being references to the person entitled to or making the claim for personal independence payment):

**“3 Daily living activities and mobility activities**

(1) For the purposes of section 78(4) of the Act and these Regulations, daily living activities are the activities set out in column 1 of the table in Part 2 of Schedule 1.

(2) [This has a reference to Part 3 of Schedule 1 as regards mobility activities.]

**4 Assessment of ability to carry out activities**

(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or

mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.

(2) C's ability to carry out an activity is to be assessed –

- (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
- (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so –

- (a) safely;
- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period.

(3) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(4) In this regulation –

- (a) 'safely' means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;
- (b) 'repeatedly' means as often as the activity being assessed is reasonably required to be completed; and
- (c) 'reasonable time period' means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity.

## **5 Scoring for daily living activities**

(1) The score C obtains in relation to daily living activities is determined by adding together the number of points (if any) awarded for each activity listed in column 1 of the table in Part 2 of Schedule 1 ('the daily living activities table').

(2) For the purpose of paragraph (1), the number of points awarded to C for each activity listed in column 1 of the daily living activities table is the number shown in

column 3 of the table against whichever of the descriptors set out in column 2 of the table for the activity applies to C under regulation 7.

- (3) Where C has undergone an assessment, C has –
- (a) limited ability to carry out daily living activities where C obtains a score of at least 8 points in relation to daily living activities; and
  - (b) severely limited ability to carry out daily living activities where C obtains a score of at least 12 points in relation to daily living activities.”

Regulation 6 deals in a similar manner with “Scoring for mobility activities”, with which we are not here concerned.

[7] Further provision in respect of scoring for both daily living activities and mobility activities is set out in Regulation 7, which provides as follows:

**“7 Scoring: further provisions**

- (1) The descriptor which applies to C in relation to each activity in the table as referred to in regulations 5 and 6 is –
- (a) where one descriptor is satisfied on over 50% of the days of the required period, that descriptor;
  - (b) where two or more descriptors are each satisfied on over 50% of the days of the required period, the descriptor which scores the higher or highest number of points; and
  - (c) where no descriptor is satisfied on over 50% of the days of the required period but two or more descriptors (other than a descriptor which scores 0 points) are satisfied for periods which, when added together, amount to over 50% of the days of the required period –
    - (i) the descriptor which is satisfied for the greater or greatest proportion of days of the required period; or
    - (ii) where both or all descriptors are satisfied for the same proportion, the descriptor which scores the higher or highest number of points.”

[8] Part 2 of Schedule 1 to the Regulations contains information set out in three columns. Column 1 lists the different activities considered relevant to an assessment of whether a person is in need of personal independence payments. A wide range of activities is covered: 1 preparing food; 2 taking nutrition; 3 managing therapy or monitoring a health condition; 4 washing and bathing; 5 managing toilet needs or incontinence; 6 dressing and undressing; 7 communicating verbally; 8 reading and understanding signs, symbols and words; 9 engaging with other people face to face; and 10 making budgetary decisions. Column 2 is headed "Descriptors". Against each activity listed in Column 1, Column 2 contains a description of the range of abilities and needs potentially relevant to the person being assessed. Thus, in respect of Activity 1, preparing food, the descriptors range from: being able to prepare and cook a simple meal unaided; through various requirements for assistance, including the need for prompting to prepare or cook a simple meal and the need for supervision or assistance to prepare or cook a simple meal; to being unable to prepare and cook food. Column 3 sets out the points awarded for each descriptor. Thus, in the context of Activity 1, preparing food, no points are awarded if the person can prepare and cook a simple meal unaided; 2 points are awarded if the person needs to use an aid or appliance to be able either to prepare or cook a simple meal, the person cannot cook a simple meal using a conventional cooker but can do so using a microwave or the person needs prompting to be able to prepare or cook a simple meal; 4 points are awarded if the person needs supervision or assistance to prepare or cook a simple meal; and 8 points are awarded if the person cannot prepare or cook food at all. A similar scoring system is set out under the same three columns in respect of each of the activities listed in Column 1.

[9] In this case we are concerned only with Activity 9, “engaging with other people face to face”. In respect of this activity, the descriptors and points set out in Columns 2 and 3 are as follows:

<b>DAILY LIVING ACTIVITIES</b>		
<b>Column 1 Activity</b>	<b>Column 2 Descriptors</b>	<b>Column 3 Points</b>
9. Engaging with other people face to face	a. Can engage with other people unaided.	0
	b. Needs prompting to be able to engage with other people.	2
	c. Needs social support to be able to engage with other people.	4
	d. Cannot engage with other people due to such engagement causing either (i) overwhelming psychological distress to the claimant; or (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	8

[10] Finally we should note certain definitions set out in Part 1 of Schedule 1 to the Regulations which apply to the expressions used in Part 2:

“assistance’ means physical intervention by another person and does not include speech; ...

‘communication support’ means support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into a non-verbal form and vice-versa; ...

‘engage socially’ means

- (a) interact with others in a contextually and socially appropriate manner;
- (b) understand body language; and
- (c) establish relationships; ...

‘Prompting’ means reminding, encouraging or explaining by another person; ...

‘social support’ means support from a person trained or experienced in assisting people to engage in social situations; ...

‘supervision’ means the continuous presence of another person for the purpose of ensuring C’s safety; ...

‘unaided’ means without –

- (a) the use of an aid or appliance; or
- (b) supervision, prompting or assistance.”

### **The Relevant Facts**

[11] The following facts are taken from the decision of the First-tier Tribunal dated 22 October 2015. Ages and periods are as set out in that decision and have not been corrected to reflect the passage of time. Although the precise details are not directly relevant to the way in which this case is to be decided, we think it helpful to set them out to provide a context for the discussion which follows.

[12] The respondent (“M”) is a 47 year old man. He lives with his partner and two young children aged 3 and 5 in a three storey house with stairs. He has suffered from anxiety and depression for about six years, and has been on medication for that condition for about four years. He suffered intermittent bouts of depression before that and first attended his GP about this problem as early as 2000. He worked for the Department of Work and Pensions until November 2011 when his employment was terminated following a number of

attempts by him to return to work. His depression is treated by fluoxetine, the dosage of which was raised to 60 mgs at the end of 2014 due to a worsening of his depression at that time. The medication has been helpful. He has had counselling and cognitive behavioural therapy (“CBT”) in the past. He has no physical health problems.

[13] M separated from his ex-wife some years previously and went through a very lengthy and acrimonious divorce. He found it difficult to meet people from that period in his life and had a fear of meeting his ex-wife. He no longer saw his children from that marriage. He tends to avoid social contact – meeting strangers is fine in some respects if it is completely impersonal, but he finds it very difficult if asked whether he has children. He has some social anxiety with a very complex background of social stressors. However, he has had no suicidal thoughts since before Christmas 2014.

[14] M’s medication is kept safely in the bathroom as he has small children. His current partner ensures that he takes that medication – he had forgotten to take it on a number of occasions and that had led to a sharp deterioration in his mood. He is able to drive, and might drive five times a week to the local nursery or supermarket. In practice his partner is with him most of the time when driving and otherwise, as she does not work and is at home with him. He also enjoys dabbling in the garden. He is able to read, but rather than reading newspapers he tends to look at something on television or online. He takes the children to the park or to a library. Even when going to the nursery or to the shops he is not alone very often - his partner is usually with him. He is able to attend parents’ evenings. His partner attends to the household finances and has access to his current account. He tends to put things aside with the result that they do not get done. He is able to shop, for example at a supermarket, tending to pay in cash though he is able to pay by card. He is able to calculate change.

[15] M has not told DVLA or his insurer about any problem with concentration. He is able to plan the route of a journey and can drive alone to the nursery if he has to. He can do this most days if required. He can engage socially if prompted to do so and is able to read and understand both basic and complex written information. He is able to use a computer and is able to email if he has to, although in practice he does not do so. He is also able to use a mobile phone, though he finds it difficult to initiate a telephone call to bodies such as the Department of Work and Pensions. His partner deals with all the finances to relieve any pressure on him from this.

### **The Claim for Personal Independence Payment**

[16] M made a claim for personal independence payment ("PIP") on about 25 February 2015. He completed the relevant forms on 6 March 2015. He then attended for face to face consultations on 16 April 2015, at which time form PA4 was completed. On 27 April 2015 the Secretary of State (not in person but by a decision maker in the Department for Work and Pensions) decided that he was entitled to an award of 4 points in respect of daily living activities (descriptors 1d and 9b) and 4 points in respect of mobility activities (descriptor 1b); and therefore, since he had not scored at least 8 points in respect of either daily living activities or mobility activities, he did not meet the threshold for an award of PIP. The matter was reconsidered on 19 May 2015 but the decision was not changed.

### **Decisions of the First-tier Tribunal ("FTT") and the Upper Tribunal ("UT")**

#### *FTT*

[17] M appealed to the First-tier Tribunal (Social Entitlement Chamber). On 22 October 2015 his appeal was refused and the decision made by the Secretary of State on 27 April 2015

was confirmed. The FTT decided that M scored 7 points in respect of the daily living activities in Part 2 of Schedule 1 to the Regulations. Although that was an increase of 3 points, the new total of 7 points was still insufficient to meet the threshold for an award of personal independence payment, the threshold being 8 points.

[18] The scores awarded by the FTT in respect of daily living activities were as follows:

<b>DAILY LIVING ACTIVITIES</b>		
<b>Column 1 Activity</b>	<b>Column 2 Descriptors</b>	<b>Column 3 Points</b>
1. Preparing food	d. Needs prompting to be able to prepare cook a simple meal.	2 Points(s)
3. Managing therapy all monitoring a health condition	b. Needs either – (i) to use an aid or plans to be able to manage medication; or (ii) supervision, prompting or assistance to be able to manage medication or monitor a health condition.	1 Point(s)
9. Engaging with other people face to face	b. Needs prompting to be able to engage with other people.	2 Point(s)
10. Making Budgeting Decisions	b. Needs prompting or assistance to be able to make complex budgeting decisions.	2 Point(s)

[19] In its Statement of Reasons for its decision, issued at M's request on 13 November 2015, the FTT explained its reasoning as follows. It recorded that the award of 2 points for Activity 1 (preparing food) was not contested. M was fully competent mentally and was able to drive a car but he would benefit from prompting to cook a main meal due to lack of motivation. So far as Activity 3 (managing therapy or monitoring a health condition) was concerned, the FTT accepted that during the relevant period M's partner ensured that he

took his medication and such intervention was required. This justified the award of 1 point, on the basis that this amounted to “supervision, prompting or assistance to be able to manage medication”. In respect of Activity 10 (making budgeting decisions), the FTT noted that M’s partner had taken over the role of managing and paying household bills to relieve pressure on M and to prevent a worsening of the depression and anxiety from which he suffered. For that reason they considered that 2 points were due in respect of descriptor 10b (“needs prompting or assistance to be able to make complex budgeting decisions”). They noted that M was able to manage simple budgeting decisions.

[20] The issue in this appeal relates to Activity 9 (engaging with other people face to face). As already noted, the FTT considered that M fell within descriptor 9b (“needs prompting to be able to engage with other people”). The explanation as set out in the Statement of Reasons was as follows:

“Activity 9 – Engaging with other people face to face. Two points had been awarded in respect of 9b. From the activities of daily living and our findings in fact above we consider that this is the appropriate descriptor. The appellant did not require social support as defined to be able to engage with other people nor did engaging with other people cause him overwhelming psychological distress or to exhibit behaviour which would result in a substantial risk of harm to himself or another person. Two points are due as awarded.”

[21] We should note that the FTT also awarded M 4 points under the mobility component (Part 3, mobility activities) on the grounds that he needed prompting to be able to undertake any journey to avoid suffering overwhelming psychological distress (descriptor 1c). This was the same score as had been awarded by the Secretary of State and no appeal is taken against that part of the decision. As we have already observed, these points are not added to the points awarded in respect of daily living activities.

*UT*

[22] M appealed to the UT, challenging the decision to award only 2 points in respect of Activity 9. He contended that his case fell within descriptor 9c (“needs social support to be able to engage with other people”) and that therefore he should have been awarded 4 points. That would have brought his total number of points in respect of Daily Living Activities to 9, one more than the minimum of 8 points required to be classified under Regulation 5(3)(a) as having limited ability to carry out daily living activities, and would have qualified him to receive personal independence payment at the standard rate.

[23] The UT judge allowed the appeal, set aside the decision of the FTT, and remitted the case back to the FTT for rehearing before a differently constituted tribunal in accordance with directions set out in his decision. He explained that the appeal raised a short point of construction as to the meaning of “prompting”, in Activity 9b, and “social support” in Activity 9c. He considered that the difference in meaning between those two expressions was difficult to comprehend and that the FTT in its Statement of Reasons had given an inadequate explanation of why they had selected descriptor 9b rather than descriptor 9c. All the FTT had said was that M “did not require social support as defined to be able to engage with other people ...”. It was clear that his partner was involved with his engagement with other people, but it was not clear from the reasons given by the FTT whether the tribunal accepted that his partner provided social support. Further, he considered that the tribunal had not made adequate findings in fact about “Engaging with other people face to face”, the specific Activity engaged on this issue.

[24] In considering the terms of his directions to the tribunal rehearing the appeal, the UT judge noted the definitions of “prompting” and “social support” in the list of definitions in

Part 1 of Schedule 1 to the Regulations. He then quoted from page 38 of the Government

Response to the consultation on the meaning of “social support”:

“Some respondents were concerned that our definition of social support excludes friends and family. This is not the case, we recognise the importance of friends and family and that is why our definition of social support is: ‘support from persons trained or experienced in assisting people to engage in social situations’. By referring to ‘experienced’ we mean both people such as friends and family who know the individual well and can offer support, or those who do not know them better and are more generally used to providing social support for individuals with health conditions or impairments.”

He noted in paragraph 3 of his Reasons for his decision that the guidance accepted that friends or family could be “experienced” in assisting persons such as M to engage in social situations. However, the definition did not define what “social support” was - it simply defined the persons by whom such support was to be given. As to this, he made the following observation:

“3. ... It is clear that in a situation where a claimant is engaging with other people face to face and qualifies for either 9b or 9c that another person must be available either to prompt or to provide social support. Clearly the prompter can be anyone, but the social support has to be from a particular class of person. From this I deduce that, for example, if a person can only engage with other people if ‘a person trained or experienced in assisting people to engage in social situations’ is present or available then they would qualify under 9c, but if they could go into such a situation with anyone present or available to provide the prompting then they could only qualify under 9b. Clearly it will be a matter of fact and degree for a tribunal.

4. I say ‘present or available’ because although under 9c the qualified person is likely to have to be present, there may be situations where a qualified person can provide support in anticipation of a claimant meeting people face to face, which is sufficient to get them through the meeting without the person being present. There is no requirement to be in attendance in the definition because the qualified person has to be experienced in ‘assisting people to engage in social situations’. A psychologist could give a psychological intervention which could mentally attune the claimant to go in to meet people face to face; that would be ‘assisting [the claimant] to engage in social situations’.”

The UT judge noted that, in paragraph 6 of the Government Response, the Secretary of State had tried to define the difference between “prompting” and “social support” by referring to a situation where someone required “assistance” (ie “physical intervention by another person”) in order to engage with others:

“As long as the help required is something different to, and more than, ‘prompting’ then it could be ‘social support’, and it would be for the Tribunal to work out whether this was the case or not.”

The UT judge made the following observations on this definition:

“The Secretary of State refers to assistance as physical intervention by another person as being part of this support and I can envisage situations where physical assistance might be relevant although it does not fit easily with the concept of engaging with other people. I consider that what is being envisaged under social support is emotional or moral support [i.e. the need to have a qualified person in attendance or available to give the necessary emotional and moral support, and perhaps also physical support, to allow engagement] and other interventions which could include everything in the definition of prompting provided it can only be accepted by the claimant if given by a qualified person. The mere fact that a qualified person prompts the claimant is not enough; I consider the question is whether only a qualified person would be acceptable to the claimant in giving such prompting, in which case the claimant is not only getting prompting but also social support from the qualified person. Note that from the definition is ‘(n)eed(s) social support’, so there has to be an element of needing the qualified person to be available to give the support.”

[25] Having discussed the matter in this way, in paragraph 6 of his Reasons the UT judge set out his directions to the tribunal rehearing the appeal in the following terms:

“6. Against that background the tribunal rehearing the appeal will have to make findings of fact about what the claimant needs in order to be able to engage with other people face to face. Does he need prompting, in which case could anyone help with that? Does he need the support of his partner’s involvement in order to be able to engage with other people face to face? I note that the tribunal found that the claimant ‘has some social anxiety with a very complex background of social stressors’. In light of these social stressors, did he need his partner to be present or available to give support to calm these stressors, in which case I consider that would be ‘social support’. The tribunal noted that ‘Even going to the nursery or shops he was not out a lot alone – for the most part his partner would be with him’. The tribunal will have to make findings as to why for the most part his partner would be

with him. Did he need her to be with him? If so why? As I have said the activity could be fulfilled if the qualified person was present or available, the tribunal should investigate those circumstances where the claimant has gone to a meeting on his own, whether his partner has in fact provided social support in advance of the meeting to equip him to go to such a meeting so that he can engage face to face. The tribunal will also have to be satisfied that the claimant's partner is 'experienced' in assisting [the claimant] to engage in social situations', so there will need to be finding made as to what support his partner has in fact given him in the past to qualify her under the definition. Such answers will be relevant to the question of whether or not the claimant is in need of social support; i.e. support from a qualified person. I have tried to give examples of the issues which need to be addressed by the tribunal rehearing the appeal, but they are not to be taken as conclusive, because other factors may become apparent in the evidence that bear on the meaning of social support."

The UT judge accordingly allowed the appeal and remitted the case for a rehearing before a differently constituted tribunal.

### **The Appeal to this Court**

[26] The Secretary of State appeals, not against the decision of the UT remitting the case to the FTT (with which he is content), but against the directions to the FTT given by the UT judge in his Reasons.

[27] In the Grounds of Appeal, it is contended on behalf of the Secretary of State that the UT judge erred in law in two ways: first, in directing that, for the purposes of Activity 9, descriptor c, there might be situations where a qualified person could provide "social support" in anticipation of a claimant meeting people face to face - it is contended that the UT ought to have directed that the social support must be contemporaneous with the social engagement being supported; and, second, in directing that, for those same purposes, "social support" could include everything falling within the definition of "prompting" provided it could only be accepted by the claimant if given by a qualified person - it is contended that the UT ought to have directed that "social support" requires something more

substantial than prompting, and thus does not include everything that falls within the definition of prompting.

[28] The questions of law for the opinion of the court are as follows: for the purposes of the Social Security (Personal Independence Payment) Regulations 2013, Schedule 1, Part 2, Activity 9, descriptor c:

1. Must the social support needed be contemporaneous with the engagement being supported?
2. Does anything that constitutes prompting also constitute social support, subject only to it being provided by “a person trained or experienced in assisting people to engage in social situations”?

### **Submissions**

#### *Secretary of State*

[29] On behalf of the Secretary of State, Mr Komorowski submitted that the first question should be answered in the affirmative and the second in the negative. He moved the court to find that the decision of the UT involved the making of an error of law, to set aside the decision of the UT, and to remit the appeal to the FTT with the following directions: that for the purposes of Activity 9 descriptor c of Part 2 of Schedule 1 to the regulations, the FTT must (i) only take account of a need for social support contemporaneous with the social engagement being supported and (ii) only find that social support is needed where some form of help beyond that constituted by prompting is required.

[30] On the question of contemporaneity, in other words whether the social support must be contemporaneous with the social engagement being supported, he submitted that the UT had erred in stating that there might be situations where a qualified person could provide

support in anticipation of a claimant meeting people face to face. If that were the proper construction to be applied to descriptor 9c, it would place that descriptor in a unique position. No other descriptor for personal independence payment included help provided ahead of the activity being assisted. He referred in this context to “communication support” under Activity 7, descriptors c, d and e, which by its nature had to be provided at the time of the communication. He founded on the language used in Activity 9, descriptor a (“can engage with other people unaided”), implying that the help referred to in the other descriptors under Activity 9 was a form of “aid” which, in ordinary usage, referred to something from which advantage was derived while the activity was being aided. The alternative approach, he submitted, would render the provision very difficult to apply. Where individuals have existing relationships with friends or family, it would be difficult if not impossible to distinguish between moral, social and emotional support as an ordinary incident of such relationships and the type of assistance designed to equip someone for a social encounter which might qualify under descriptor 9c. For those receiving counselling or other therapy, difficult judgments would have to be made as to how much time could pass between the therapy and the subsequent engagement, before the therapy could no longer be regarded as having supported the engagement. In support of these submissions he referred to the decision of the UT (Judge Gray) in *EG v Secretary of State for Work and Pensions* [2017] UKUT 101 (AAC) at paragraphs 57 and 58, a decision issued after the UT decision in this case, which he submitted was to be preferred to the analysis in *PR v Secretary of State for Work and Pensions* [2015] UKUT 584 (AAC).

[31] On the second question, dealing with the quality of the support required to fall within descriptor 9c, Mr Komorowski submitted that the UT ought to have directed that “social support” required something more substantial than prompting, and thus did not

include everything falling within the definition of prompting. He submitted that on the approach of the UT in the present case the only difference between prompting for the purpose of descriptor 9b and “social support” for the purpose of descriptor 9c was the claimant’s need for the assistance to be provided by someone who was a person trained or experienced in assisting people to engage in social situations. He commended the approach of Judge Parker in CSPIP/203/2015 and CSPIP/210/2015 who said, at paragraph 9, that social support “has to involve more than ‘reminding, encouraging or explaining’”, that being the definition of “prompting” in Part 1 of the Regulations; it had to be help which was “more substantial than prompting”. Mr Komorowski referred to other decisions of the UT in which views similar to those of Judge Parker had been expressed, viz: *HB v Secretary of State for Work and Pensions* [2016] UKUT 0160 (AAC) (Judge Rowley at paragraph 25), CPIP/3401/2015 (Judge Humphrey at paragraph 19), CPIP/1861/2015 (Judge West at paragraph 24) and *EG v Secretary of State for Work and Pensions* (Judge Gray at paragraph 61).

M

[32] Ms Scott QC, who appeared for M, invited the court to refuse the appeal, with the result that the case would be remitted to the FTT in accordance with the decision of the UT with no further directions.

[33] In the Note of Argument lodged on behalf of M it was submitted that the appeal should be refused as premature as it raised issues which might be academic once all the facts had been found. This submission was not developed at length, the court having indicated that it was minded to hear the appeal and Ms Scott, in light of that indication, not insisting on the point.

[34] In respect of the first question raised in the appeal, the contemporaneity issue, Ms Scott commended to us the remarks of the UT judge when he said, in paragraph 3 of his Reasons, that there might be situations where a qualified person could provide support in anticipation of a person meeting people face to face, which might be sufficient to get them through the meeting without the qualified person being present. That was consistent with the observations of Judge Mark in *PR v Secretary of State for Work and Pensions* at paragraph 31. That approach was to be preferred to that stated by Judge Gray in *EG v Secretary of State for Work and Pensions*. While, as a matter of commonsense, most social support would be contemporaneous, it was submitted that it would be an error of law to exclude all social support that was not contemporaneous. “Social support” meant “support from the person trained or experienced in assisting people to engage in social situations”. Such a person might, as a matter of fact, provide support in advance of a social situation which allowed the person to whom the support was given to engage with other people face to face. Thus, a psychologist might work with an individual on how to engage with other people face to face and then send them off to put that support into practice. There would still have been the need for that social support even though it was provided before rather than during the face to face engagement. Social support provided in advance could include, for example, providing psychological aid to a person suffering from PTSD to enable him to avoid panic when engaging with other people (the situation covered by descriptor 9d(i)); or it could include classic anger management support, providing psychological aids or tools to avoid an outburst that would have prevented face to face engagement happening at all (the situation covered by descriptor 9d(ii)). The question was one of fact and degree and it was wrong to impose a “bright line” test of contemporaneity when the Regulations did not suggest that such a test was appropriate or required. Had a contemporaneity test been

intended, provision to that effect could easily have been made in the Regulations. Ms Scott pointed out the potential adverse consequences of excluding situations of training and encouragement on the ground that the support was not being given contemporaneously with the face to face contact with others. It risked discouraging the process of progression of a person who was capable of improvement. Without support of the type under consideration, given in advance of a face to face engagement with other people, and forming part of a learning and training process, the individual might well be unable to engage with other people at all because of the risk of psychological distress or alarming behaviour such as those contemplated in descriptor 9d(i) and (ii). In that situation the individual would score 8 points under that Activity alone and would be eligible for personal independence payment simply by reason of meeting that descriptor. The Secretary of State appeared to be concerned that, in the absence of a bright line test of contemporaneity, judgments would have to be made about how much time could pass between therapy and face to face engagement with other people. It was accepted that a judgment would be necessary, but that was inherent in the tests set out in the various Activities and descriptors in the Schedule.

[35] So far as concerned the second question raised on the appeal, namely whether to qualify as “social support” the help given had to go beyond “prompting”, Ms Scott again endorsed the remarks of the UT judge in paragraph 5 of his Reasons (which we have quoted earlier). It was not her submission that the difference between “prompting” and “social support” turned simply on the question of who was providing the help. The difference was the necessity, in the case of “social support”, for the help to be given by a person who was trained or experienced in assisting people to engage in social situations. In other words, prompting which could be given by anyone was simply prompting and fell within

descriptor 9b, even if in fact given by someone who was trained or experienced. But if it were necessary to make that prompting effective that it be delivered by someone who was trained or experienced, then that could qualify as social support within descriptor 9c. Where even that help was insufficient to permit engagement to an acceptable standard, then the relevant descriptor was 9d. Whatever help is to be given is directed towards the individual needing that help. He or she is the recipient of the reminder, the encouragement or the explanation. It would be no good at all if a prompt were to be given but not understood. In some circumstances there might be the necessity for a trained or experienced person to deliver that prompt. If the effectiveness of the “reminding, encouraging explaining”, to use the statutory definition of “prompting”, depended on the assistance of a qualified or experienced person to ensure that it was received and understood, then the case fell within descriptor 9c notwithstanding that the action itself falls within the definition of “prompting”. Ms Scott provided examples of how this might apply in practice. An individual needing reminding or encouragement might not listen to anyone other than a particular trained or experienced individual; a particular technique might be used to prompt the individual needing prompting; or the partner of the individual needing prompting might use his or her experience and knowledge of the individual to tell when prompting will be effective and how it should be delivered.

## **Discussion**

[36] The Secretary of State does not challenge the decision by the UT judge to remit the matter back to the FTT for reconsideration. In those circumstances it might be open to question whether he was entitled to bring this appeal. In general, an appeal lies against a decision or order, not the reasons given for that decision or order. The matter was

canvassed briefly before us, and properly so, though we should make it clear that it was not contended on behalf of M that the appeal was incompetent. In our opinion the Secretary of State is entitled to bring this appeal. The decision of the UT was that the decision of the FTT be set aside and the case remitted to the FTT for rehearing before a differently constituted tribunal “in accordance with the directions set out below”, in other words in accordance with the directions set out in the Reasons given by the UT judge. That is part of the decision and, unless this court is persuaded to the contrary, that is the basis upon which the FTT will have to reconsider the case. In those circumstances it is open to the dissatisfied party to challenge the directions given by the UT judge and to seek an order that the FTT rehear the case in accordance with directions given by this court. That is what has been done in this case. That is what was done in *Secretary of State for Work and Pensions v Brade* 2014 SC 742 at paragraph [39]. Support for that approach, albeit under reference to English rules of procedure, is to be found in *Curtis v London Rent Assessment Committee* [1999] QB 92 at 107D-109D.

[37] Before looking in detail at the two specific issues raised in this appeal, we should make some comments about the Regulations and the Schedule.

[38] The first point is to note that when, in the descriptors in Column 2 of Part 2 of the Schedule to the Regulations, there is a reference to the ability of the person to do various things - for example, being able to engage with other people unaided, requiring prompting to be able to engage with other people, needing social support to be able to engage with other people - that refers to the person’s ability to do that thing safely, to an acceptable standard, repeatedly and within a reasonable time period: see regulation 4. That is perhaps obvious; but it deserves emphasis as showing that the level to be achieved is not a bare minimum, and that the help contemplated in the various descriptors in respect of the

particular activities listed in Part 2 of the Schedule includes the help needed to enable the person to improve his abilities to that “acceptable standard” (using this as a shorthand for what is set out in regulation 4). It appears to be recognised that a person’s level of social functioning is not necessarily static but will, or may, improve over time with the appropriate level of help.

[39] Activity 9 is “engaging with other people face to face”. As was pointed out in *Secretary of State for Work and Pensions v AM* [2015] UKUT 215 (AAC) at paragraph 10, Part 1 of the Schedule contains no definition of the word “engage”. There is only a definition of “engage socially”. That means interacting with others in a contextually and socially appropriate manner, understanding body language and establishing relationships. The reason for this mismatch between the use of the word “engage” and “engaging” in Activity 9 and the fact that the only relevant definition is “engage socially” may be, as suggested in *HB v Secretary of State for Work and Pensions* at paragraph 12, that in an earlier draft what is now Activity 9 was named “engaging socially”. Be that as it may, it would appear that Activity 9 is not now limited to social engagement but will include engagement with other people face to face on other occasions. For present purposes it is enough to note that interacting “with others” includes interacting with strangers in formal as well as informal situations. It might be anticipated that there will be occasions when such interaction is not only face to face but also one to one, without others being present.

[40] “Prompting” is defined in Part 1 of the Schedule as meaning “reminding, encouraging or explaining”. The definition of “social support” is that it is “support” from a person trained or experienced in assisting people to engage in social situations. There is a similar approach to the definition of “communication support”. It does not say what is meant by “support” and there is no definition of “support”. The word “support” is a

familiar one in ordinary English usage. It covers a wide range of situations, including physical or structural support; but a common meaning, to be found in all the leading dictionaries, includes (as a verb) “encourage” and (as a noun) “encouragement”.

Mr Komorowski did not dispute this. On that basis there would appear to be considerable overlap between the word “support”, as used in the expression “social support”, and the word “prompting”, which also includes “encouraging”. That would suggest that the concepts of support and prompting as used in the Regulations (and in particular as used in respect of Activity 9 in Part 2 of the Schedule) are not intended to be mutually exclusive.

And for what it is worth, the same point might be made about the word “assistance” as used in respect of other activities listed in Column 1 of Part 2 of the Schedule. “Assistance” is defined as meaning physical intervention and not including speech, but it is difficult to see why it cannot also fall within the notion of “support” and “prompting”, at least where the prompt takes the form of physical encouragement or reassurance.

[41] The possibility of overlap between “prompting” and “support” is, in our view, reinforced by the fact that “social support” is not limited to support provided by persons with particular training or expertise or which is provided professionally, but may include support provided by family or friends: see *SL v Secretary of State for Work and Pensions* [2016] UKUT 147 (AAC). This was not disputed by Mr Komorowski and is consistent with the passage from the Government Response to the consultation quoted by the UT judge in this case in paragraph 3 of his Reasons. The importance of this is that it tends to exclude the necessity of there being a qualitative difference between the type of intervention meant by “prompting” and that meant by “social support” (or “communication support”); if the reference to support from persons “trained or experienced in assisting people” had been construed as support which required to be given by trained psychologists, psychotherapists

or other professionals, it might have been possible to argue that the expression “social support” referred to the particular type of intervention which only a professional of that type could make. But that argument is not available once it is accepted, as it is, that “social support” can come from family members or friends who, while they have relevant experience, do not have any such qualifications.

[42] We should also note the use of the word “continuous” in the definition of “supervision” in Part 1 of the Schedule: “the continuous presence of another person for the purpose of ensuring C’s safety”. The person providing the supervision must be present throughout the relevant task. This shows that when it is intended to introduce a requirement that the person providing the help must be present during the activity to which the help relates then that can be made clear in the definition. There is no similar wording in the definition of “prompting” or “social support”.

[43] We would make one further observation at this stage, though it is a point to which we shall return in the context of considering the individual questions raised on this appeal. At times in the submissions to this court references were made to the descriptors referable to the other activities listed in Part 2 of the Schedule; and comparisons were drawn between a suggested construction of wording referable to Activity 9, with which we are concerned in this case, and the effect of similar wording referable to other activities. In our opinion it would be wrong to assume that there is necessarily an absolute consistency between the descriptors relative to the different activities listed in Part 2. There are good reasons for this. The activities listed in Column 1 of Part 2 differ widely. They cover food preparation, taking and receiving medication, washing, toilet needs, dressing and undressing, verbal communication, reading, and making budgeting decisions, as well as engaging with people face to face. In many cases the intervention required will, of necessity, be made by a person

who is present throughout the activity which requires their help. An example given to us in argument was in relation to verbal communication, where one of the descriptors related to the need for communication support to be able to express or understand either basic or complex verbal information. By definition that is likely to require the person to be present throughout the activity. But it does not follow from this that, where support is required in a different context, the person providing the support will have to be present throughout. All depends on the context in which the help is required.

[44] With these general observations in mind we turn now to consider the two specific questions raised in the appeal.

*Question 1: Must the social support needed be contemporaneous with the engagement being supported?*

[45] The decisions of the UT to which we were referred show a marked divergence of opinion on this question. In *PR v Secretary of State for Work and Pensions* Judge Mark pointed out at paragraph 31 that there was nothing in descriptor 9c to suggest that the social support had to be provided at the moment when the claimant might be expected to engage face to face with other people. He considered that the tribunal had failed to ask the right question. The tribunal had asked whether the support worker and social worker (the individuals providing the help in that case) were there at the time of the face to face engagement, whereas they should have asked: “would the claimant have been able to engage with other people without the social support she received?” In *EG v Secretary of State for Work and Pensions*, decided after the UT decision in the present case, Judge Gray took the opposite view. At paragraphs 57-58 he held that social support within Activity 9 descriptor c related to a need for help “while the activity is being carried out”. He pointed out that in all the

other activities listed in Column 1 in the Schedule, the help given to the disabled person was given as the activity was being undertaken. Although Activity 9 was “more nebulous than others” that did not necessarily require a different approach to be taken. The converse approach, where the help given “behind the scenes” was taken into account, presented real difficulties as to the extent to which historical assistance could be included. He said that the assessment of the person making the claim under the Regulations was:

“... a calibration of functional problems at the date of claim with the application of the qualifying periods. It is an assessment of actual disability during activity, not of the level of prior involvement required to get the person to the stage where they can engage alone.”

Other UT judges have expressed similar views leaning one way or the other. It is unnecessary to refer to these decisions in detail.

[46] A somewhat more nuanced approach was taken by Judge West in his decision in CPIP/1861/2015 (12 April 2016). At paragraph 26 of his reasons he recorded the submission by the Secretary of State that it had hitherto been his position in relation both to descriptor 9b (prompting) and descriptor 9c (social support) that the help provided should be given at the time of the engagement or immediately before it - “the prompter would be present to provide prompting and the social supporter to give social support”. He also noted that Judge Mark in *PR v Secretary of State for Work and Pensions* had held to the contrary. Judge West stated at paragraph 27 that in his judgment Judge Mark was correct to hold that as a matter of construction there was nothing in the descriptor to suggest that the social support had to be provided at the moment when the claimant might be expected to engage face to face with other people or immediately before it. He went on to say this at paragraph 28:

“28. There must, however, be a temporal or causal link of some sort between the support received and the carrying out of the activity in order to qualify for the necessary points under the descriptor. That will be a matter of fact in the individual case. I am not impressed by the *reductio ad absurdum* ... to the effect that the residual effect of the therapy arguably never ends because one could still plausibly answer “No” to Judge Mark’s question – “would the claimant have been able to engage with other people without the social support she received?” – whenever in the future it was asked.

[47] The UT judge in the present case expressed a similar view. In agreement with Judge Mark in *PR v Secretary of State for Work and Pensions* and with Judge West in the case just cited, he pointed out that there was no requirement in the definition of “social support” for the person providing the help to be in attendance during the face to face engagement. He thought that there might be situations where a qualified person could provide support in anticipation of a claimant meeting people face to face, which support was sufficient to get them through the meeting without the person providing the help having to be present during the meeting. He gave as an example the possibility that a psychologist could give a psychological intervention which could mentally attune the claimant to go in to meet people face to face. That, he considered, would fall within descriptor 9c.

[48] We consider that this is the correct approach to this problem. We note that in the submissions made on behalf of the Secretary of State in the case before Judge West it was accepted by him that whatever was the position in respect of descriptor 9b (prompting) would apply equally in the case of 9c (social support), and vice versa. That must be right. There can be no justification for thinking that prompting could take place before the engagement but that social support would require to be in place while the engagement was going on. The submission that the help had to be contemporaneous with the engagement in respect of which it was required must, therefore, apply equally to prompting and social support. In the course of argument – and this is reflected in the argument presented to

Judge West – Mr Komorowski was constrained to recognise that in the appropriate case the social support or prompting might be given immediately before the occasion to which it related. This seems, with respect, obviously right. On a simple level, one can envisage the situation of a helper encouraging an individual to go into a meeting, or into a social function, standing at the door but not going in with him. There is nothing in the Regulations to suggest that this cannot count under either of the relevant descriptors. As we have pointed out under reference to the definition of “supervision”, the draughtsman clearly had in mind some occasions when the help would have to be given by someone who was physically present throughout. In the definition of “supervision” he used the words “continuous presence”. There is no such wording in the relevant descriptors here.

[49] Once one accepts that there is no need for absolute contemporaneity, and that the help may be given immediately before the face to face engagement, then the argument about the difficulty of the judgments which would have to be made loses much of its force. The question becomes one of fact and degree in each case. We accept that descriptor 9b and 9c would not apply to a case where, as a result of a successful psychiatric or psychological intervention in the past, the person being assessed was now able to engage with other people satisfactorily and without further help. He would not be able to say, on the strength of that previous intervention, that he continued to fall within descriptor 9c. That, as Judge West pointed out, is a *reductio ad absurdum* which does not advance the argument. And it is in any event inapt, because the wording of descriptor 9c is “needs social support”, in the present tense.

[50] We have cautioned against cross-referencing Activity 9 and descriptors 9b and 9c with other activities listed in Part 2 of the Schedule. However we cannot help noticing that in connection with Activity 1, preparing food, descriptor 1d refers to the need for prompting

to be able to prepare or cook a simple meal. Mr Komorowski submitted that such prompting, to qualify under descriptor 1d, would have to have been given not more than “minutes” before the person needing prompting began to prepare or cook his meal. We can see no justification for such an approach. It is commonplace for people providing assistance with meals to come in at different times of day, set out the ingredients and leave notes, all designed to remind and encourage the person needing help to look after themselves and cook themselves an evening meal. We see no difference in principle between, on the one hand, that person coming in at noon and leaving the ingredients and notes in place then and, on the other, that person coming in later in the day just before the individual they are helping begins to cook. It would be impracticable for everyone to be given such prompting immediately before they set about cooking for themselves. It would be an unnecessary gloss on the wording in the relevant descriptor to require that. So also, in our opinion, with the requirement for the prompting or social support referred to in descriptors 9b and 9c; there can be no justification for a requirement that prompting or social support must be given during or immediately before the face to face engagement with other people.

[51] We would accept that there must be what Judge West described as a “temporal or causal link” of some sort between the help given and the activity in respect of which the help is needed. It will be for the decision maker and, if necessary, the tribunal to determine in any particular case whether that temporal or causal link is there. In the present case we would endorse the questions which the UT judge raises in paragraph 6 of his Reasons as being relevant to the decision to be made by the FTT. But like him we would emphasise that those questions are not to be taken as conclusive, because other factors may become apparent in the evidence that bear on the question whether, in this case, he needs “social support” to be able to engage with other people.

[52] Accordingly, we would answer the first question in the negative. To qualify under descriptor 9c, the social support need not be contemporaneous with the engagement being supported.

*Question 2: Does anything that constitutes prompting also constitute social support, subject only to it being provided by “a person trained or experienced in assisting people to engage in social situations”?*

[53] The UT judge in the present case considered that there was potentially an overlap between prompting, within descriptor 9b, and social support, within descriptor 9c.

Rejecting an argument that “social support” had to be something different to earn more points than “prompting”, and recognising the fact that the definition of “social support” requires the support to be given by “a person trained or experienced in assisting people to engage in social situations”, he expressed his conclusion in this way:

“The mere fact that a qualified person prompts the claimant is not enough; I consider the question is whether only a qualified person could be acceptable to the claimant in giving such prompting, in which case the claimant is not only getting prompting but also social support from the qualified person. Note that the definition is ‘(n)eed(s) social support’, so there has to be an element of needing the qualified person to be available to give the support.”

A number of other UT judges have come to the opposite conclusion: see Judge West in CPIP/1861/2015 at paragraphs 23-25, Judge Parker in CSPIP/203/2015 and CSPIP/210/2015 at paragraph 9, Judge Humphrey in *AH v Secretary of State for Work and Pensions* [2016] UKUT 276 (AAC) at paragraph 19(2), and Judge Gray in *EG v Secretary of State for Work and Pensions*. Most of these cases have referred to a “qualitative difference” between “prompting” on the one hand and “social support” on the other. It has been stated that social support must be “significantly different” from prompting, “more substantial” than prompting, in particular because descriptor 9c (social support) attracts double the points

compared with descriptor 9b (prompting). In CPIP/1861/2015 at paragraph 23 Judge West puts the matter in this way, which appears to reflect the consensus of these various decisions:

“23. As to what the difference between ‘prompting’ and ‘social support’ is, I agree with the Secretary of State that one cannot be prescriptive in defining the difference, but a clear example of the latter would be if a person required assistance in the sense of physical intervention by another person in order to engage with others. As long as the help required was something different from, and more than prompting, it could constitute social support and it would be for the tribunal to determine whether that was the case or not. If, once one had subtracted the ‘prompting’ aspect from the support the claimant received (and the other person met the definition of a ‘social supporter’), and there was still a significant level of support being given, then that would qualify as social support. What that distinction may be in any given case is a matter for individual determination depending on the facts of the case and the conclusions drawn from those facts.”

Like the UT judge in the present case (in paragraph 5) we do not find the reference to physical intervention particularly helpful, though it tends to reinforce our earlier view that there is potential for overlap between expressions used in the Schedule such as “assistance”, “prompting” and “social support”. The exercise suggested is, in effect, to treat “prompting” and “social support” as mutually exclusive, deduct everything that amounts to “prompting” and see what, if anything, you are left with which, if sufficient in quantity, might amount to “social support”.

[54] This approach fails, in our opinion, to recognise the potential for overlap between the two categories. We have already pointed out that the definition of “prompting” in Part 1 of the Schedule includes “encouragement”, a term sometimes used as a synonym for “support” and commonly included within the ordinary meaning of “support”, save when that word is used in a structural sense. There is nothing in the definitions in the Schedule to suggest that there should not be an element of overlap. Nor does the fact that “social support” attracts 4 points whereas “prompting” attracts only 2 points assist on this point. It may well be that

the award of twice the number of points for “social support” reflects the fact that the person being assessed is suffering from a greater disability; but it does not follow from this that it is necessary to treat the two categories as mutually exclusive.

[55] In our opinion the critical distinction between “prompting” (as defined in the Schedule) and “social support” is the fact that social support comes from a person trained or experienced in assisting people to engage in social situations. That does not mean, as the argument is somewhat unkindly parodied in some of the cases, that “prompting” qualifies as “social support” merely because the help is in fact given by a person trained or experienced in assisting people so to engage. There has to be some necessity for the help to be given by a person with this training or experience. In many cases it may well be that that is because the help is of some specialist kind which only a person trained in that specialism can deliver. For example, psychological support would normally be given by someone trained in psychology. This would clearly count as “social support”. But there may be cases where the support is in the nature of encouragement or explanation but, because of the claimant’s mental state, will only be effective if delivered by someone who is trained or experienced in delivering that type of support to that individual. In such a case there will not be a qualitative difference in the help given, but the help can be regarded as “support” because of the necessity for it to be provided by someone trained or experienced in delivering it.

[56] The UT judge in this case considered that the question was whether only a qualified person (ie one who was trained or experienced in terms of the definition of “social support”) would be “acceptable to the claimant” in giving the encouragement or explanation. This might be taken to suggest that the claimant has a free choice, a right of veto over who he will accept help from. We do not think that the judge intended this. However, for the avoidance

of doubt, we would express it somewhat differently. Encouragement or any other sort of prompting can qualify as “social support” if, to render it effective or to increase its effectiveness, it requires to be delivered by someone trained or experienced in assisting people to engage in social situations.

[57] With this small qualification we agree with the discussion of this point by the UT judge. It will be a question of fact for the tribunal to consider in each case.

[58] The question raised in the appeal is whether “anything that constitutes prompting also constitutes social support, subject only to it being provided by “a person trained or experienced in assisting people to engage in social situations”. For the reasons set out above, we would answer this in the negative, but with this qualification, namely: that, a thing which constitutes prompting may also constitute social support if, to render it effective or to increase its effectiveness, it requires to be delivered by someone trained or experienced in assisting people to engage in social situations.

### **Disposal**

[59] For these reasons we shall refuse the appeal. We answer the questions posed in the appeal as follows:

1. No;
2. No, but a thing which constitutes prompting may also constitute social support if, to render it effective or to increase its effectiveness, it requires to be delivered by someone trained or experienced in assisting people to engage in social situations.

[60] We shall remit the case to the First-tier Tribunal for rehearing before a differently constituted tribunal in accordance with the guidance given in this opinion.

[61] All questions of expenses are reserved.