

THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondent who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondent or of any member of his family in connection with these proceedings.



Trinity Term

[2019] UKSC 34

On appeal from: [2017] CSIH 57

JUDGMENT

Secretary of State for Work and Pensions (Appellant) v MM (Respondent) (Scotland)

before

Lady Hale, President

Lord Kerr

Lord Hodge

Lady Black

Lord Sales

JUDGMENT GIVEN ON

18 July 2019

Heard on 9 April 2019

Appellant

Samantha Broadfoot QC

Julius Komorowski

Leon Glenister

(Instructed by Office of the Advocate General for
Scotland)

Respondent

Janys Scott QC

Joseph Bryce

(Instructed by Drummond Miller
LLP)

Intervener (C)
Richard Drabinski
Tom Roys
(Instructed by
Legal Unions)

LADY BLACK: (with whom Lady Hale, Lord Kerr, Lord Hodge and Lord Sales agree)

1.

This appeal relates to personal independence payment, which is a non-means tested allowance paid to certain people with long term health problems or disability. The appeal's focus is upon one of the markers used to determine whether a claimant's ability to live his or her daily life is limited, by his or her physical or mental condition, to such an extent as to generate an entitlement to personal independence payment ("PIP"). Various "daily living activities" are examined as markers, and the one in question here is "engaging with other people face to face".

The general scheme of the Welfare Reform Act 2012 and the Social Security (Personal Independence Payment) Regulations 2013

2.

PIP is dealt with in Part 4 of the Welfare Reform Act 2012 ("the Act"). Section 77 introduces the allowance and establishes that a person may be entitled to one or both of its two components, namely "the daily living component" and "the mobility component". This case is concerned with the daily living component. Entitlement is dealt with in section 78, which also points the way to other relevant provisions contained in Part 4 and in the regulations made under it. The component can be paid at either the "standard rate" (which is what is in question here) or, for those whose ability is more limited, the higher "enhanced rate".

3.

By section 78(1), there are two requirements which the claimant must satisfy in order to be entitled to the daily living component at the standard rate, namely the requirement in section 78(1)(a) (which I will refer to as "the limited ability requirement"), and "the required period condition" in section 78(1)(b). So far as is material, the section reads:

"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) [entitlement to enhanced rate]

(3) [meaning of standard and enhanced rate]

(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 ..."

4.

Section 80 provides that the question “whether a person’s ability to carry out daily living activities is limited by the person’s physical or mental condition” (the limited ability requirement in section 78(1) (a)) is to be determined in accordance with regulations, and that the regulations must provide for that question to be determined, except in prescribed circumstances, on the basis of an assessment (or repeated assessments) of the person. The question of whether the person meets the required period condition for the purposes of section 78(1)(b) is similarly to be determined in accordance with regulations.

5.

The Social Security (Personal Independence Payment) Regulations 2013 (“the Regulations”) prescribe the activities which are “daily living activities” for section 78 as those set out in column 1 of the table in Part 2 of Schedule 1 to the Regulations. The table lists ten activities. Column 2 focuses in some detail on the ability of the claimant (referred to throughout the Regulations as “C”) to carry out each activity, on a scale ranging from being able to carry out the activity unaided to being unable to do it. For example, activity 1 in the list is “Preparing food”, and there are six levels of ability in column 2 ranging from “a. Can prepare and cook a simple meal unaided” to “f. Cannot prepare and cook food”. Each sub-paragraph in column 2 is called a “descriptor”.

6.

In column 3, points are attributed, according to the level of ability measured by the descriptors; the greater the difficulty experienced by the claimant, the greater the number of points awarded. So, a claimant who can prepare and cook a simple meal unaided has no points attributed, whereas, at the other end of the scale, eight points are attributed where the claimant cannot prepare and cook food. There are gradations between the two; for example, a claimant who needs prompting to be able to prepare or cook a simple meal has two points attributed, as does a claimant who needs to use an aid or appliance to do so. The same ascending scale of difficulty, reflected in increasing numbers of points, can be seen in relation to each of the activities in the table.

7.

Regulation 5 provides that the points attributed for each activity in the table are added together and, if the total is at least eight but less than 12, the claimant has “limited ability to carry out daily living activities”, and is entitled to PIP at the standard rate, whereas if the total is 12 points or more, the claimant will be classed as having “severely limited ability” and is entitled to the enhanced rate.

8.

Regulation 4(2A) provides some more detail as to how the assessment of ability is approached, providing that:

“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.”

Regulation 4(4) defines these concepts as follows:

“(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."

9.

The assessment of the claimant is more than just a snapshot of ability, given that the required period condition has to be satisfied, see section 78(1)(b). Section 81 dictates the shape of the regulations about this condition, providing (so far as material) that they:

"must provide for the question of whether a person meets 'the required period condition' ... to be determined by reference to -

(a) whether, as respects every time in the previous three months, it is likely that if the relevant ability had been assessed at that time that ability would have been determined to be limited ... by the person's physical or mental condition; and

(b) whether, as respects every time in the next nine months, it is likely that if the relevant ability were to be assessed at that time that ability would be determined to be limited ... by the person's physical or mental condition."

10.

For present purposes, the "relevant ability" is, of course, the ability to carry out daily living activities (section 81(2)). Section 81(3) deals with the reckoning of the periods of three and nine months, providing that "the previous three months" means the three months ending with "the prescribed date" and "the next nine months" means the nine months beginning with the day after that date. The Regulations make provision as required by section 81, including establishing what the "prescribed date" is, and also dealing with further issues to do with the "required period". The detail does not matter for the issue presently under consideration. What is important is to recognise that it is not just the claimant's situation on one day of assessment that is under consideration, but his or her situation over a period of 12 months. Furthermore, it is clear from the Regulations that some degree of fluctuation in the claimant's presentation is anticipated. Regulation 7, which is entitled "Scoring: further provision", sets out how to choose which descriptor applies to a claimant in relation to each activity in the table. It involves looking to see which descriptors are "satisfied on over 50% of the days of the required period", and from that information, working out which descriptor is to be applied. Regulation 7(1)(a) (which deals with the most straightforward situation) will serve as an example; it provides that "where one descriptor is satisfied on over 50% of the days of the required period" that descriptor applies to the claimant.

The provision under consideration in the present case

11.

It is Activity 9 in the table in Part 2 of Schedule 1 to the Regulations which gives rise to the issues in this appeal. In relation to this activity, the table provides:

| Column 1 | Column 2 | Column 3 |
|-----------------|--------------------|-----------------|
| Activity | Descriptors | |

| | | Points |
|---|--|------------------|
| 9. Engaging with other people face to face. | a. Can engage with other people unaided. b. Needs prompting to be able to engage with other people. c. Needs social support to be able to engage with other people. 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. | 0 2 4 8 |

12.

Difficulty has arisen over descriptor 9c, and in particular over what is meant by “social support”, and how it differs from “prompting” in descriptor 9b so as to justify descriptor 9c attracting four points, whereas descriptor 9b only attracts two points. A subsidiary issue that arises is whether social support only covers help given whilst actually engaging with other people face to face, or whether help given in advance is also relevant.

13.

Definitions are provided for the purpose of Schedule 1 by Part 1 of the Schedule, including the following:

“In this Schedule -

‘aided’ means with -

(a) the use of an aid or appliance; or

(b) supervision, prompting or assistance;

‘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;

‘psychological distress’ means distress related to an enduring mental health condition or an intellectual or cognitive impairment; ...

‘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.”

14.

There is no definition of “engaging with other people face to face” or of “engage”. As can be seen, Part 1 provides, instead, a definition of “engage socially”, a term which does not appear anywhere else in the Schedule. It is thought that this is an error, arising when Activity 9, which was originally entitled “engaging socially”, was refined following consultation on the provisions. The settled position in the tribunals (endorsed by the Court of Appeal in *Hickey v Secretary of State for Work and Pensions* [2018] EWCA Civ 851; [2018] 4 WLR 71, para 9) is that factors set out in relation to “engaging socially” are nevertheless relevant to the consideration of a person’s ability to engage with other people face to face, and there does not appear to be any reason to disrupt that approach.

The context in which the present issues arise

15.

The respondent is a man in his forties. He made a claim for PIP relying, inter alia, upon the effects that his mental health has upon his ability to engage with other people. When his claim was refused because he had not been awarded the required eight points, he appealed unsuccessfully to the First-tier Tribunal (“FTT”). A central issue in the appeal was the number of points that should be attributed to him under Activity 9. The FTT considered that the decision maker had correctly found him to fall within descriptor 9b (prompting), rather than 9c (social support). Explaining this, the FTT Judge simply said:

“Two points have 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.”

16.

The respondent appealed to the Upper Tribunal, contending that he should have been awarded four points under 9c, which would have qualified him to receive PIP. The appeal was allowed on the basis that the FTT had given an inadequate explanation of why 9b had been selected rather than 9c, and that it had failed to make adequate findings of fact going to that issue. The Upper Tribunal judge remitted the case to the FTT for rehearing, providing directions as to how the tribunal should approach Activity 9. The essence of the directions might be said to be as follows:

i)

what is envisaged as “social support” is “emotional or moral support” “and perhaps also physical support”, 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”;

ii)

qualified people are those who are “trained or experienced in assisting people to engage in social situations” and friends or family can come within that category;

iii)

the qualified person needs to be “present or available” to provide the support.

17.

The Secretary of State appealed to the Inner House of the Court of Session. The Upper Tribunal’s decision to set aside the FTT’s determination and to remit the matter for rehearing was not challenged, but the directions which were to govern the FTT’s approach were. The grounds of appeal were that the Upper Tribunal should have directed the FTT that the social support must be contemporaneous with the social engagement being supported, and that social support requires something more substantial than prompting.

18.

The Inner House refused the appeal. It rejected the argument that the support had to be contemporaneous with the social engagement, considering that there might be situations in which a qualified person could provide sufficient support in anticipation of the claimant meeting people face to face, without the supporter actually having to be present during the meeting. However, although there was, in the Inner House’s view, no justification for a requirement that the support must be given during or immediately before the engagement, there did have to be “a ‘temporal or causal link’ of some sort between the help given and the activity in respect of which the help is needed” (para 51 of the Inner House’s opinion).

19.

As to the nature of “social support”, the Secretary of State’s position was encapsulated by the Inner House in this way (at para 53 of its opinion):

“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’.”

This approach had found favour with a number of Upper Tribunal judges (in CPIP/1861/2015 UKUT(AAC) (unreported) 12 April 2016; CSPIP/203/2015 and CSPIP/210/2015 UKUT (AAC) (unreported) 11 March 2016; AH v Secretary of State for Work and Pensions [2016] UKUT 276 (AAC); EG v Secretary of State for Work and Pensions [2017] UKUT 101 (AAC)).

20.

In the view of the Inner House, however, the Secretary of State’s approach failed to recognise the potential for overlap between the “prompting” and the “social support” categories (para 54 *ibid*). It held that they are not mutually exclusive categories. As the Inner House saw it, the critical distinction between descriptor 9b prompting and descriptor 9c support lay not in a difference in the nature of the help provided but in the fact that, with social support, there is a necessity for the help to come from a person trained or experienced in assisting people to engage in social situations (para 55). Having given the example of psychological support given by someone trained in psychology, which would clearly count as “social support”, it went on to say:

“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."

21.

The Inner House slightly modified the Upper Tribunal judge's direction to the FTT, setting out its own formulation, at para 56, as follows:

"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."

22.

The case was remitted to the FTT for determination in accordance with the guidance given in the Inner House's opinion. The Secretary of State then appealed to this court, challenging the Inner House's interpretation of "social support" (termed by the parties "the qualitative issue"), and its conclusion that it need not be contemporaneous with the engagement being supported ("the timing issue").

23.

The respondent, who made his claim for PIP in February 2015, meanwhile continues to await the factual findings and ruling in the FTT that is necessary to resolve whether or not he is entitled to any payment. He maintains that the Inner House's ruling is substantially correct.

24.

Mind was given permission to intervene and has provided helpful submissions, both in writing and orally. It considers the respondent's position in relation to the timing issue to be correct, but invites the court not to decide that issue, on the basis that it is unnecessary and undesirable to do so in the circumstances of this case. It concentrates its submissions on the qualitative issue, aligning itself with the respondent and the courts below.

The Secretary of State's argument: the qualitative issue

25.

Contrary to the position taken below, in this court the Secretary of State accepts that "social support" for the purposes of descriptor 9c may consist of "prompting", but submits that the prompting involved in social support is different by virtue of the fact that, in accordance with the definition of "social support", the support needed has to be support "from a person trained or experienced in assisting people to engage in social situations". If "a person trained or experienced" were to be narrowly construed, denoting someone who has such training or experience by virtue of their professional training or occupational history, there would be no difficulty in identifying situations within 9c, but the Secretary of State adheres to the assurance given during the consultation process that a friend or family member who knows the claimant well, and can offer support, can also be included as a relevantly "experienced" person. So, the Secretary of State submits, the key feature that distinguishes "social support" is that, as it is put in the written case:

"the help needs to be given by [the] trained or experienced person by reason of their training or experience. Familiarity is not enough."

26.

The Secretary of State's concern (as articulated in the written case) is that the Inner House's direction risks generating confusion:

"between the persons who require support from a person because of their relevant experience (which might include experience gained in the course of being friends or family), and those who require support from a friend or family member solely because of that relationship ... It is very common for a person to only respond well to someone they know and trust. However, the need for help from someone familiar or trusted on its own does not turn prompting into social support."

27.

There will be a qualitative difference, the Secretary of State says, in the help given by a helper using his or her training or experience as opposed to other help. The trained or experienced person will understand what is lacking in the claimant's social engagement and be able to overcome this, or enable the claimant to do so, whereas an inexperienced person would not necessarily be able to see what was lacking, anticipate a difficulty, or know how to remedy it.

Discussion: the qualitative issue

28.

The difference between the Secretary of State's interpretation and that of the Inner House (supported by the respondent and the intervener) is somewhat nebulous, and appears as if it might, in fact, be limited. Rather than risk confusing the issue by indulging in a comparison of the two positions, it might be better to return directly to the text of Activity 9.

29.

It is well to bear in mind, when considering the ambit of the various limbs of Activity 9, that "engaging with people face to face" is an activity that can take many differing forms. As was pointed out in the course of oral argument, face to face interactions will range from engagements such as formal interviews and medical examinations to establishing and furthering close personal relationships. Similarly, the sort of assistance that enables the engagement to occur will take many differing forms.

30.

The obvious starting point, in determining which of the Activity 9 descriptors applies, is to establish what help the particular person needs in order to be able to engage with other people face to face, remembering that this is not about the help the person is actually receiving, but about the help that they need, although the one may of course inform the other. It is worth stressing that the provisions are not concerned with support that the person would like to have, or would appreciate as generally comforting; the particular support has to be needed to enable the activity to take place.

31.

Having assembled the facts in this way, one can start to consider whether the help needed is of a type that falls within the ambit of "social support" for the purposes of descriptor 9c. Early in the oral argument, the Secretary of State sought to confine the scope of "social support" by adopting a rather technical construction of the Activity 9 descriptors. The starting point was that descriptor 9a concerns a person who "can engage with other people unaided". The submission flowing from this had the following elements:

i)

it can be inferred that, in contrast to those within 9a who can manage "unaided", claimants falling within 9b and 9c all need to be "aided";

ii)

“aided” is a term defined in Part 1 of the Schedule (see para 13 above), and involves the use of an aid or appliance, or supervision, prompting or assistance;

iii)

so 9b and 9c claimants will all require aid in one of these forms;

iv)

and other forms of support are therefore irrelevant in considering what is meant by “social support” in 9c.

32.

There are difficulties with this proposed interpretation, but there is nothing to be gained in elaborating them. It suffices to say that, in my view, such a narrow and technical approach would introduce an unwarranted limitation of the broad word “support” which has been used in descriptor 9c. This would be inconsistent with the government’s objectives in introducing the new disability benefit provisions, including PIP, which included simplifying matters, and creating a benefit that was easier to understand, and reached those in need of extra support to live independently and participate in everyday life. In practice, support might take many forms, responding, no doubt, to the varied needs of claimants, and the varied forms of face to face engagement. The examples provided by Mind underline the wide variation in the help people have/require in order to engage with other people. Prompting is one form of support, as is now accepted, but there will be other forms, and they may well not fall within the definition of “aided”. The “use of an aid or appliance” might not often be relevant, “supervision” is about ensuring safety rather than directed at Activity 9, and the only other form of aid included in the definition is “assistance” which means “physical intervention ... not includ[ing] speech”, and might play a part, but is unlikely to sweep up all other available forms of support. I would accordingly reject the argument that only support that falls within the definition of “aid” is relevant, although acknowledging that a consideration of the various forms of “prompting” and of the other sorts of aid identified in the Regulations could assist in lending some colour to the concept of “support”.

33.

I return, therefore, to the central question of what differentiates the claimant who needs social support and is entitled to four points under descriptor 9c, from the claimant who is only entitled to two points, because he or she only needs prompting in the form covered by descriptor 9b. It is inherent in the scheme that, broadly speaking, descriptor 9c reflects a greater degree of disability than descriptor 9b, so attracting increased points. Responding to the greater degree of disability requires the attention not just of “another person” (as in the case of “prompting” simpliciter), but of “a person trained or experienced in assisting people to engage in social situations”. That is what differentiates prompting for the purposes of 9b from prompting which is social support for the purposes of 9c. And where the support takes a form other than prompting, it will similarly only qualify for 9c if the claimant needs it to come from a person so trained or experienced.

34.

The Secretary of State’s anxiety that the provision will be taken to include the sort of confidence-boosting and reassurance that occurs in most close relationships can be allayed by keeping the focus very firmly on the twin requirements of necessity and relevant training or experience. Applied in the family/friends setting, to qualify for points under 9c, the claimant has to need support from someone who is not just familiar with him or her, but who is also experienced in assisting engagement in social

situations. It is the training/experience of the helper upon which the claimant depends in order to enable the face to face engagement with others to take place, not simply the close and comforting relationship that may exist between the claimant and the helper.

35.

Having dispatched the idea that “prompting” can never constitute “social support”, the words of descriptor 9c, taken with the definition of “social support”, clearly define the ambit of the category and distinguish it from descriptor 9b. There is no need to complicate them. As the Inner House observed in para 55 of its opinion (see the passage quoted at para 20 above), the nature of the support provided might not differ between 9b and 9c. What brings the claimant into 9c rather than 9b is that, to be able to engage with others, he or she needs that support to come from someone trained or experienced in assisting people to engage in social situations. As the Inner House helpfully put it, the support “will only be effective if delivered by someone who is trained or experienced”.

36.

I would express a word of caution about the Inner House’s statement (at para 56) that help can qualify as “social support” if, “to render it effective or to increase its effectiveness” (my italics), it requires to be delivered by a trained or experienced person. It is useful to ask oneself what is required to render help “effective” in enabling the social engagement to take place, as I have observed in my preceding paragraph. But I cannot endorse the addition of the italicised words. Descriptor 9c revolves around what the claimant “needs”, and “need” is not a relative term. The claimant either needs or does not need trained/experienced help in order to be able to engage with other people. If only trained/experienced help will be effective in achieving the objective, the claimant can be said to need it. If what could be called, for want of a better shorthand, “lay” help would enable the claimant to engage, the claimant does not fall within 9c, but might fall within 9b. And, of course, if not even trained/experienced help would work, the claimant might fall within 9d.

37.

There will, inevitably, be cases in which it is not immediately evident whether descriptor 9c applies, and it is only after scrutinising the facts particularly carefully that the decision maker will be able to reach a determination. Although the provision is concerned with the help the claimant needs, rather than with the help which he or she is actually getting in practice, it seems likely that, in many family/friends cases, someone will already be carrying out the supportive role in face to face engagements. Where this is so, the assessment/decision making process will be assisted by looking at the elements of the support that they actually provide, how they have come to know what to do, whether or not the sort of help that they provide could be provided by any well-meaning friend or family member, and what additional help (if any) is required. Exploring these issues will no doubt be a sensitive task.

38.

Mind points out that people often struggle to convey the relevant information or they put it in terms which are misunderstood. Claimants are likely to be handling their applications for PIP themselves, or with assistance only from family and friends. Here, for example, the respondent and his partner attended the hearing before the FTT, both gave evidence, and the partner acted as the respondent’s representative. During the application process, whether it be upon the first request for payment or in the tribunal system upon appeal, it may be necessary to probe what is being said in support of the claim so as to establish the elements of the help that is required to enable the face to face engagement to take place and the characteristics of the person who will need to provide it in order for it to be effective. By way of example, if a claimant says, “I need to have someone I trust with me when I meet people face to face”, a number of questions are likely to be required to follow this up, and to

determine whether the claimant comes within descriptor 9b or 9c. Everything will depend on the facts of the particular case, but they might include questions (sensitively put, of course) such as “why is that?”, “who would you trust in that role?”, “what sort of things could they do to help you engage?”, “how would they know what to do?”, “what would happen if that person was not there?”

The Secretary of State’s argument: the timing issue

39.

The Secretary of State submits that social support needs to be contemporaneous with the face to face engagement being supported, and that it does not include help provided in advance of it. The contrary interpretation would, submits the Secretary of State, leave matters so open that it would inevitably generate inconsistencies and arbitrariness in decision making. The reasons given in support of the narrow approach include:

i)

The assessment is “a calibration of the claimant’s functional limitations at the date of the claim with the application of the qualifying periods”; it is an assessment of actual disability during the activity.

ii)

Descriptor 9c uses the present tense: “needs”. This suggests presence during the activity, for example to do the reminding, encouraging or explaining involved in “prompting”.

iii)

Supporting the face to face engagement requires that the supporter perceives the full context of the engagement and has the ability to react to what is done by the person with whom the claimant is seeking to engage.

iv)

Descriptor 9c is concerned with an intensity of need on the part of the claimant (as reflected in the need for a trained/experienced supporter) which is such as to make it unrealistic to contemplate sufficient support being given without the supporter actually being present during the engagement.

v)

Social support would be in an anomalous position if it could occur in advance of the engagement, whereas other descriptors require support to be contemporaneous. The Secretary of State invites comparison with, for example, communication support (relevant to Activity 7) which it is submitted would, by its nature, have to be provided at the time of the communication.

vi)

It would be very difficult to apply the provision if support in advance would qualify. How would the moral, social and emotional support which is an ordinary incident of family relationships and friendships, be distinguished from assistance that would qualify for 9c?

vii)

As for psychological support, the Secretary of State would say that it is not within the scope of social support at all, but if it were, the problem would be to know how far back one should go, and whether to include counselling sessions the day before the engagement, or a week before, or a year before.

Discussion: the timing issue

40.

It might be helpful to consider the timing issue having in mind some examples of the practical ways in which a person can be helped to engage face to face with others. Given that no findings of fact have yet been made in relation to the respondent's circumstances, it is desirable to avoid focusing particularly on him, but in the course of his counsel's submissions, examples were given of the sort of support that an experienced family member might give. Preparation might occur prior to the engagement which enables it to occur without, for example, overwhelming psychological distress. One technique that can be deployed is to look together, in advance of the meeting, at the "worst case scenario". During the meeting, with knowledge of the claimant, the supporter can watch out for things that are known to trigger his or her anxiety, and redirect the conversation. Where memory is a problem, the supporter can remind the claimant of things they have forgotten. Private signs of reassurance can be given where required. And, where required, the supporter might recognise the need to remove the person from the meeting.

41.

It is important to remember that each claimant is an individual with individual needs, and that different techniques might help in different cases, or at different times in the life of the same person. It seems to me that the Secretary of State's insistence on it being necessary for the supporter to be present with the claimant during the face to face engagement would stand in the way of other means of support which work for the particular claimant, and would also be likely to impede attempts to improve the claimant's abilities to handle matters without support at all, or with diminished support. It is not difficult to contemplate a situation in which the trained or experienced supporter is aiming to make progress so that a claimant, who initially cannot manage without the supporter physically present during the face to face engagement, learns in stages to manage with the supporter at the door of the room, next door, leaving the building for a short period during the meeting, bringing the claimant to the meeting and collecting him after it, and so on. Discussion before (and possibly after) engagements, and also practical exercises, might be deployed, in order to equip the claimant to deal with encounters without the physical presence of the supporter. At some point in the progress, the claimant will cease to qualify under 9c, but, looking at things entirely practically, rather than legalistically, it would be hard to say that, in all cases, from the moment in the continuum when the supporter is no longer in the room with the claimant, he no longer needs social support to be able to engage with people.

42.

It is also relevant to consider the sensitivity of some of the face to face engagements that a claimant may need to undertake. Social support by physical presence with a claimant during a medical examination, or what was called during the hearing "a romantic engagement", might be counter-productive, whereas social support which did not involve actual presence might enable the claimant to engage when that would not otherwise have been possible. For example, it is easy to contemplate that the claimant and the experienced supporter might have a discussion in advance of a medical examination, going through every element of the procedure and exploring how the claimant might respond to it, the claimant might then allow him or herself to be accompanied to the door of the consultation room and given into the care of the doctor or nurse, and the necessary continuing reassurance might come from the knowledge that the supporter was nearby in the waiting room.

43.

It is undesirable to construe the provision in a way that runs counter to these sorts of considerations, unless that is dictated by the provision itself, or by something in its legal context. There is nothing in the wording of descriptor 9c, or the definition of "social support", to require actual presence of the

supporter during the engagement, nor yet to require that the support is timed to coincide with the engagement, rather than being provided in advance, or indeed afterwards. The use of the present tense (“needs”) does not carry the Secretary of State this far. It does dictate that the claimant actually needs the support “as respects every time” over the course of the 12 months made relevant by the required period condition (see para 9 above). The need has to be a continuing one, not one that has been addressed or otherwise ceased, and I would certainly agree with the Inner House when they said (para 49) that descriptor 9c (and for that matter descriptor 9b) 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 Activity 9, descriptor c.”

But the requirement that there should be a current need at all relevant times does not, of itself, exclude the possibility of assistance given outside the confines of the engagement itself. This is perhaps most easily demonstrated by an example: if social support includes, say, advice and discussion prior to a face to face engagement, it could perfectly properly be said of a claimant, who can only engage if that sort of help is provided, that he “needs social support”. The Secretary of State’s interpretation would only be made out if “social support” is confined to that which is provided on the spot, and there is nothing in the definition of it to confine it in that way.

44.

In the absence of express wording dictating contemporaneity, the Secretary of State’s argument must depend upon inferences drawn from elsewhere in the Regulations and/or from the likely circumstances of claimants.

45.

Comparisons with other daily living activities where presence is required during the activity are unhelpful, in my view, because all the various activities are different in nature, and the ways of overcoming difficulties in carrying them out will inevitably be different. Nor am I persuaded by the submissions based upon the intensity of the claimant’s need and the supposed need for the supporter to perceive and react to the engagement as it unfolds. Sometimes these factors will dictate that the supporter can only provide effective help if actually present, but I see no reason to assume that this will always be the case, and no reason to limit the scope of descriptor 9c so as to exclude cases where support is required from a person trained or experienced in assisting people to engage in social situations but which do not fall within this model.

46.

In short, I do not consider that descriptor 9c is limited to cases where a claimant needs social support actually during the face to face engagement. Given that social support is likely to take many different forms, depending on the individual needs of the claimant, it is undesirable to attempt to prescribe, in the abstract, which other forms of support will be sufficient. It will be a question of fact and degree, and is something that will have to be worked out on a case by case basis, by those with expertise in making assessments and decisions in relation to claims, keeping the wording of the provision firmly in mind. I am hopeful that it will prove possible to do this without the Secretary of State’s fears of inconsistent and arbitrary decisions being realised.

47.

Before concluding, I should say something about the Inner House’s acceptance that what was required was a “‘temporal or causal link’ of some sort between the help given and the activity in

respect of which the help is needed” (para 51). This is not a formulation that should, in my view, be adopted. A detailed explanation of why not is unlikely to be of assistance, and one illustration of the problem will perhaps suffice. The formulation contemplates two separate ways in which the requisite link could exist, expressed as alternatives, namely a link by virtue of timing (“temporal ... link”) and a link by virtue of being instrumental in securing the engagement (“causal ... link”). It is difficult to envisage how support which is linked in time to a face to face engagement but has no causal link to what occurs could have any relevance.

48.

Sometimes, explaining and elaborating upon a provision confuses rather than assists, and this might be one of those situations. The answer is more likely to be found, in any given case, by close attention to the words of descriptor 9c, as defined in the Regulations, and to the required period condition. This exercise, paying close attention in particular to the requirement that the claimant “needs” the support (see para 43 above), should serve to confine the scope of descriptor 9c within appropriate time boundaries.

Conclusion

49.

I would allow the appeal in the limited sense that I would interpret the relevant legal provisions slightly differently from the Inner House, as I have explained above.