Neutral Citation Number: [2024] UKUT 194 (AAC)
Appeal No. UA-2023-000574-ESA
***UA-2023-000576*-ESA**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

- v -

NJ

Respondent

Before: Upper Tribunal Judge Stout

Hearing date(s): 18 June 2024
Mode of hearing: In person, Field House

Representation:

Appellant: Denis Edwards (counsel), instructed by Government Legal Department
Respondent: Daniel Hallström (Legal Officer, Free Representation Unit), instructed by the Respondent

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC002/20/00238 and SC002/22/00259
Digital Case No.: 1596196864004126
Tribunal Venue: Birmingham
Decision Date: 16 September 2022

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Respondent in these proceedings.

SUMMARY OF DECISION

29.8 TEMPORARY ABSENCE FROM GREAT BRITAIN

The Tribunal did not err in law in holding that the claimant's temporary absences from Great Britain in order to be treated by exposure to sunlight at her family home in Spain fell within the exception in regulation 153 of *The Employment and Support Allowance Regulations 2008* so that she continued to be entitled to benefits while abroad. The Upper Tribunal considers what is meant by: (a) the requirement in regulation the absence to be "solely… in connection with … treatment"; (b) the meaning of "treatment" and "arrangements for treatment"; and (c) the requirement for treatment to be by, or under the supervision of, a person "appropriately qualified to carry out that treatment". The Upper Tribunal holds that in this case the Tribunal properly directed itself in law and reached conclusions on the facts that were not perverse. The Upper Tribunal also holds that the Tribunal did not err in law in proceeding as a judge sitting alone and not reconstituting as a panel with a specialist medical member.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal was not made in error of law.

REASONS FOR DECISION

Introduction

1. Normally, a person must be "in Great Britain" in order to be entitled to Employment and Support Allowance (ESA). This appeal is concerned with one of the exceptions to that rule, specifically the exception in regulation 153 of *The Employment and Support Allowance Regulations 2008* (SI 2008/794) (the ESA Regulations) for absence connected with medical treatment. The issue on the appeal is whether the First-tier Tribunal erred in law in determining that regulation 153 applied to time spent by the claimant at her family holiday home in Spain.

2. The Secretary of State for Work and Pensions (the Secretary of State) is the appellant. The respondent to the appeal was the benefit claimant (the appellant before the First-tier Tribunal). In this decision I refer to her as "the claimant" or "NJ" and her husband as "Dr J".

3. The case concerns three decisions of the Secretary of State that were the subject of two appeals to the First-tier Tribunal: (i) appeal number SC002/20/00238 in relation to two entitlement decisions of 8 October 2019 and 4 February 2020; and (ii) appeal number SC002/22/00259 in relation to one overpayment decision of 26 May 2022 to the effect that NJ had been overpaid £4,753.11 of Employment and Support Allowance (ESA). The decisions related to four periods of absence from Great Britain: 26/05/2018-27/07/2018, 22/09/2019-21/11/2018, 19/04/2019-28/07/2019 and 10/09/2019-22/11/2019.

4. The First-tier Tribunal upheld NJ's appeals against the Secretary of State's decisions, holding that her absence did fall within the regulation 153 exception so that she remained entitled to ESA during each of the four periods of absence from Great Britain.

5. The Secretary of State now appeals to the Upper Tribunal under s 11 of the Tribunals Courts and Enforcement Act 2007 (TCEA 2007) on grounds that the Tribunal erred in law. Permission to appeal was granted by Judge Wikeley on 11 August 2023.

6. The structure of this decision is as follows:-

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Relevant legislative provisions

7. Section 1(3)(a) of the Welfare Reform Act 2007 (WRA 2007) provides that one of the "basic conditions" for entitlement to ESA is that the claimant "is in Great Britain". Section 18(4) stipulates that, except where regulations otherwise provide, a person shall be disqualified from receiving ESA for any period during which they are "absent from Great Britain".

8. The relevant regulations are *The Employment and Support Allowance Regulations 2008* (SI 2008/794) (the ESA Regulations). Regulations 151 to 153 are relevant to this appeal, although it is with the application of regulation 153 that the Tribunal was in particular concerned in this case:-

> **Absence from Great Britain**
> **151**.—(1) A claimant who is entitled to an employment and support allowance is to continue to be so entitled during a period of temporary absence from Great Britain only in accordance with this Chapter.
> (2) A claimant who continues to be entitled to a contributory allowance during a period of temporary absence will not be disqualified for receiving that allowance during that period under section 18(4) of the Act.
>
> **Short absence**
> **152**. A claimant is to continue to be entitled to an employment and support allowance during the first 4 weeks of a temporary absence from Great Britain if—
> (a) the period of absence is unlikely to exceed 52 weeks; and
> (b) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance.
>
> **Absence to receive medical treatment**
> **153**.—(1) A claimant is to continue to be entitled to an employment and support allowance during the first 26 weeks of a temporary absence from Great Britain if—
> (a) the period of absence is unlikely to exceed 52 weeks;
> (b) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance;
> (c) the claimant is absent from Great Britain solely—
> (i) in connection with arrangements made for the treatment of the claimant for a disease or bodily or mental disablement directly related to the claimant's limited capability for work which commenced before leaving Great Britain; or
> (ii) because the claimant is accompanying a dependent child in connection with arrangements made for the treatment of that child for a disease or bodily or mental disablement;
> (d) those arrangements relate to treatment—

(i) outside Great Britain;
(ii) during the period whilst the claimant is temporarily absent from Great Britain; and
(iii) by, or under the supervision of, a person appropriately qualified to carry out that treatment; and
(e). . . . . .
(2) In paragraph (1)(d)(iii), "appropriately qualified" means qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment.

Absence in order to receive NHS treatment
154. A claimant is to continue to be entitled to an employment and support allowance during any period of temporary absence from Great Britain if—

(a) while absent from Great Britain, the claimant continues to satisfy the other conditions of entitlement to that employment and support allowance;
(b) that period of temporary absence is for the purpose of the claimant receiving treatment at a hospital or other institution outside Great Britain where the treatment is being provided—
(i) under section 6(2) of the Health Service Act (Performance of functions outside England) or section 6(2) of the Health Service (Wales) Act (Performance of functions outside Wales);
(ii) pursuant to arrangements made under section 12(1) of the Health Service Act (Secretary of State's arrangements with other bodies), section 10(1) of the Health Service (Wales) Act (Welsh Ministers' arrangements with other bodies), paragraph 18 of Schedule 4 to the Health Service Act (Joint exercise of functions) or paragraph 18 of Schedule 3 to the Health Service (Wales) Act (Joint exercise of functions); or
(iii) under any equivalent provision in Scotland or pursuant to arrangements made under such provision;

9. Regulation 2 of the ESA Regulations contains definitions of some of the terms used in the Regulations. The following are of relevance to this appeal:

"health care professional" means—
(a) a registered medical practitioner;
(b) a registered nurse; or
(c) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under section 60 of the Health Act 1999

"medical treatment" means medical, surgical or rehabilitative treatment (including any course or diet or other regimen), and references to a person receiving or submitting to medical treatment are to be construed accordingly

The facts as found by the First-tier Tribunal

10. The First-tier Tribunal had before it documentary evidence from the claimant and the Secretary of State. It received oral evidence from NJ and her husband, Dr J. The Secretary of State was represented by a presenting officer, who asked

questions of the claimant and Dr J at the hearing. The First-tier Tribunal found the claimant and Dr J to be "wholly honest and credible witnesses".

11. The First-tier Tribunal found that NJ suffers from Obsessive Compulsive Disorder (OCD) which can lead to her becoming extremely distressed and has prevented her from continuing in employment. She has been seen by a variety of medical practitioners, and is prescribed medication which aims to maintain serotonin levels which can in turn alleviate OCD symptoms.

12. Dr J is a former Army and NHS surgeon who specialised in colorectal and gynaecological cancer surgery. He retired early in October 2012 in order to care for NJ who was "at crisis point".

13. Dr J has owned property in Spain since 1987. Since 2012 NJ and Dr J have had a house in Almeria in which they have regularly stayed. When staying in the property in 2012 they noted a marked improvement in the claimant's condition: a lessening in catastrophising, better sleep and better ability to cope with triggers. On undertaking research, Dr J formed the view that the improvement in the claimant's condition might be due to the effects of sunlight. Before the Tribunal, the claimant and Dr J presented evidence in the form of research papers and a supportive letter from the claimant's GP in which the GP expressed the view that it was "scientifically plausible" that sunlight would improve the claimant's mental health.

14. Between 2020 and 2022 the Covid-19 pandemic prevented them from going to Almeria and they found that the claimant's mental health deteriorated and she increased her alcohol intake as a result, which became "destructive".

15. The Tribunal found that when in Almeria the claimant "maximises her opportunity to be in the sunlight, spending time in the garden, walking the dogs, and sitting out". While there, the couple meet up with friends once per week. As to Dr J, the Tribunal found that whilst he "does attend to his own chores and jobs around the property, he is never far from the Claimant's side, and will supervise, for example if she is longer in the bathroom than he might anticipate, he is aware that this may be as a result of water having triggered the Claimant's OCD, and he will assist in calming her".

The First-tier Tribunal's decision on the application of regulation 153

16. The Tribunal set out the relevant legislative provisions and noted that there was no dispute in this case that the periods of absence were less than 26 weeks, and no dispute that NJ's OCD was a "bodily or mental disablement directly related to [her] limited capability for work". The Tribunal identified the first disputed issue it had to answer as being whether the claimant's absence from Great Britain was "solely" in connection with arrangements made for medical treatment. The Tribunal concluded it was as follows:-

> 21 . Whilst I accept that the Appellant will go the local town to sit and have a coffee, and will seek to meet friends around once per week for dinner; this does not in

> my view preclude reliance on the absence being 'solely' in connection with arrangements made for medical treatment. I do not read the term 'solely' as meaning that treatment is the sole thing you can do when abroad. That would be nonsensical, as no treatment will be for 24 hours per day. Rather, it must surely be read that medical treatment must be the sole reason for the absence . I accept that the sole reason for the Appellant and Dr [J] going to Almeria for extended periods of time is in order for her to access sunlight and the unusual climate Almeria offers. The couple do not go on other holidays, and their time spent in Almeria is simple and somewhat uncomfortable. I accept the Appellant's evidence that this would not be her choice of holiday. Accordingly, on the facts of this case, I accept that the absence is 'solely' in connection with arrangements made for treatment.

17. On the issue of whether exposure to sunlight could be "treatment" for OCD, the Tribunal also accepted the appellant's case as follows:-

> 22. It is accepted that the Appellant suffers with OCD which would clearly meet the criteria for 'mental disablement', and her evidence as to the effects of this condition on her life were compelling. As to whether exposure to sunlight can be said to be 'treatment' for OCD, Regulation 2 which provides the definition is broad and can include medical, surgical, or rehabilitative treatment (including any course or diet or other regimen). I have sufficient evidence from Dr [J], the studies he relies on and the letter from the Appellant's GP to conclude on the balance of probabilities that the Appellant's exposure to sunlight does meet the definition of treatment. The symptoms of OCD can be alleviated if serotonin levels are increased, and a way of increasing serotonin levels is exposure to sunlight. The Appellant has for some time been on medication which seeks to maintain her levels of serotonin, and this prescribed treatment further supports the theory regarding the benefit of serotonin.
>
> 23. I note the Respondent's supplementary submission which refers to the case of CJ. 275I4W (K.L.) where a claimant had been given a Dr's certificate stating 'change of air recommended'. This is distinguishable from the Appellant's case, as on the particular facts of these Appeals I find that it is the specific climate of the area in which they happen to have a home that provides respite from some of the Appellant's OCD symptoms. I am fortified in this view by the fact that it was coincidence that the Appellant and Dr [J] first noticed an improvement in her symptoms when in Almeria, and then sought and discovered the explanation as to why.
>
> 24. I do not see it as my role to conclude whether this treatment is effective. I find that there is sufficient medical support for it to be considered a valid treatment in principle, and the Appellant is supported by her own GP. The Regulation does not require me to make a judgment as to the efficacy of any treatment. In any event, I have accepted the Appellant and Dr [J's] evidence about the improvement they both notice.

18. On the issue of whether the treatment was under the "supervision" of a person "appropriately qualified", the Tribunal found it was as follows:-

> 27. Dr [J] has a medical background, albeit not in mental health, or psychiatry. I cannot accept the Respondent's submission that treatment in this case in the context of Regulation 153 must be by a registered psychiatrist. To apply such a narrow interpretation would not be compatible with the wording of Regulation 153(2) where 'appropriately qualified' means qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of forms of treatment. The Regulation does not in fact require any medical qualification; yet Dr [J] is medically qualified. Simply because his specialism was not psychiatry does not in my view exclude him from the definition. The Regulation also places no requirements for licencing, and accordingly the fact that Dr [J] has retired need not exclude him. Further, there is nothing it the Regulation that excludes family members from carrying out the role.
>
> 28. I find that Dr [J] knows his wife and thus the impact and severity of her condition better than any treating psychiatrist would. Further, as he himself is medically qualified, he has the necessary transferable skill set to be able to conduct research and acquire knowledge in relation to the specific disablement which his wife suffers. I accepted his evidence as to his supervisory role whilst the couple are in Almeria, and applying the specific facts of this case to the Regulation, I find that it falls within the wide ambit of Regulation 153 as drafted.

19. By way of a concluding paragraph, the Tribunal observed:-

> 31.I can appreciate on the face of these Appeals why the Respondent may have taken the stance they have. However, having had the opportunity to consider detailed oral evidence and gain further information and insight into the Appellant's specific circumstances, I am wholly satisfied that this is not a case of a couple simply spending time holidaying in their second home. Quite conversely, the Appellant has fortuitously discovered that the climate at their home in Almeria provides respite from her condition as exposure to sunlight increases her serotonin levels, thus alleviating some of her symptoms, and for that specific reason they seek to spend extended periods of time there.

20. The Tribunal therefore upheld the claimant's appeals, finding that she had been entitled to ESA during all four periods of absence from Great Britain and accordingly that there had been no overpayment.

My decision on the grounds of appeal

21. The Secretary of State's grounds of appeal have evolved since the grant of permission. As presented at the hearing, they focus on a number of issues in relation to the Tribunal's approach to regulation 153; there is also a final ground concerning the composition of the panel. I am going to deal with all the points

argued by the parties, but I will do so under the following headings and in the following order which seems to me to be the most logical order in which to address the issues:

a. "Solely … in connection with … treatment";

b. "Arrangements made for the treatment of the claimant";

c. "Appropriately qualified to carry out that treatment";

d. Panel composition.

22. I should make clear that I have considered carefully each iteration of the parties' written submissions in the bundle, their skeleton arguments, their oral submissions and their further written submissions following the hearing. The fact that in this judgment I only summarise their submissions does not mean that I have not taken account of all their arguments.

a. "Solely… in connection with … treatment"

23. So far as relevant to the present appeal, the exception in regulation 153 does not apply unless "the claimant is absent from Great Britain **solely** … in connection with arrangements made for the treatment of the claimant for a disease or bodily or mental disablement directly related to the claimant's limited capability for work which commenced before leaving Great Britain" (emphasis added).

The parties' submissions

24. Mr Edwards for the Secretary of State submits that the Tribunal failed to apply a sufficiently strict approach to the interpretation of "solely" and/or failed to consider what the claimant's sub-conscious reasons for the absence were in line with the House of Lords judgment in *Mallalieu v Drummond* [1983] 2 AC 861. That case concerned the similar question in s 130(a) of the Income and Corporation Taxes Act 1970 of whether expenditure was "wholly and exclusively laid out or expended for the purposes of" a profession. Mr Edwards submits that, if the Tribunal had applied a proper approach, it would have been bound to conclude that the claimant was not spending time at their house in Almeria "solely" for the purposes of treatment, but also as a holiday and/or for the purpose of visiting/maintaining their holiday home. Mr Edwards disavowed making a perversity argument, but submitted that if necessary he would maintain that the decision was perverse.

25. Mr Hallström for NJ submitted that there was no error of law in the Tribunal's approach. It had directed itself by reference to the wording of the statute, taken into account all relevant factors, including those relied on by the Secretary of State, and had reached a conclusion on the particular facts of this case that was open to it on the evidence and not perverse. Adequate reasons had been given for the Tribunal's decision. Mr Hallström referred to the Court of Appeal's decision in *Moyna* [2003] 1 WLR 1929 in support of the submission that factual

determination is for the Tribunal and on the same facts there may be two different outcomes notwithstanding a proper direction in law by the Tribunal.

My analysis

26. There was no real difference between the parties as to what "solely" means in this case. Both were agreed that it means that the treatment needs to be the only reason for the absence. Both referred back to predecessor legislation and to other current legislation containing similar provisions. The predecessor legislation (in particular regulation 2 of the *Social Security Benefit (Persons from Abroad) Regulations 1975* had used the language of "specific purpose". Neither advocate sought to suggest that the fact that regulation 153 does not use the language of "purpose" or "reason", but just stipulates that the absence must be "solely in connection with", means that it requires consideration of something other than the reason or purpose for the absence. I agree. I have not been referred to any materials explaining the intended effect of a change in wording from "reason" or "purpose" to "in connection with", but it seems to me that, given the context, "in connection with" still requires consideration of the reason or purpose for the absence as I cannot see how else the requisite causal connection could be judged. The change in language does, though, suggest to me that the legislator wished to make clear that the reason or purpose was to be judged *objectively* and not simply by reference to the stated reason or purpose of the claimant. I return to this point below.

27. Although Mr Edwards had sought to refer back to case law on predecessor versions of the legislation in support of his argument that a similarly strict approach should be taken to the current regulations, it is in fact apparent from *CIB/1956/2001* (to which Mr Hallström referred) that "solely" is actually a 'tightening up' on the wording in the predecessor legislation. The predecessor legislation, as I have noted, required absence to be for the "specific purpose" of being treated. The predecessor legislation was interpreted by Judge Rowland in *CIB/1956/2001* at [5] as requiring only that treatment be an "operative purpose" of the absence, even if it was not the main (let alone "sole") purpose of the absence. It is plain that "solely" is a stricter test.

28. Both parties were agreed that the fact that someone does things other than being treated while away from Great Britain does not mean that they are not absent "solely in connection with" the treatment. For example, the fact that someone abroad for the purpose of treatment also has breaks between treatment in which they go swimming, eat, or engage in sight-seeing does not necessarily change the purpose of the absence, although both parties accept that it might if the Tribunal concludes that the activities engaged in between treatments are actually part of the purpose for going (or staying on after arrival). I agree, and would add that "solely" does not allow for any "dominant purpose" type test: as soon as there is more than one purpose to the absence, regulation 153 ceases to be satisfied.

29. In deciding whether other activities engaged in while abroad are, or have become, part of the reason for the absence or not, it may be helpful to refer to the concepts of object and effect as Lord Brightman did in *Mallalieu* at 870F-871A as follows:

> The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes. For example, a medical consultant has a friend in the South of France who is also his patient. He flies to the South of France for a week, staying in the home G of his friend and attending professionally upon him. He seeks to recover the cost of his air fare. The question of fact will be whether the journey was undertaken solely to serve the purposes of the medical practice. This will be judged in the light of the taxpayer's object in making the journey. The question will be answered by considering whether the stay in the South of France was a reason, however subordinate, for undertaking the journey, or was not a reason but only the effect. If a week's stay on the Riviera was not an object of the consultant, if the consultant's only object was to attend upon his patient, his stay on the Riviera was an unavoidable effect of the expenditure on the journey and the expenditure lies outside the prohibition in section 130.

30. As a matter of principle, both parties are also agreed that, in deciding whether treatment is the "sole" reason for the absence, the Tribunal must not confine itself to considering whether, subjectively, it is the claimant's sole reason for absence, but must consider the matter objectively. As already noted, I agree that the test must be objective, and that the use of the language "in connection with" rather than "purpose" makes clear that the Tribunal has to consider the matter objectively.

31. Neither party was willing to commit to specific wording by way of guidance to the Tribunal as to the approach required. Mr Edwards placed some reliance on Lord Brightman's approach in *Mallalieu*, which appeals to the concepts of conscious and unconscious motivation as follows at 875C-E:

> "Of course Miss Mallalieu thought only of the requirements of her profession when she first bought (as a capital expense) her wardrobe of subdued clothing and, no doubt, as and when she replaced items or sent them to the launderers or the cleaners she would, if asked, have repeated that she was maintaining her wardrobe because of those requirements. It is the natural way that anyone incurring such expenditure would think and speak. But she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the Commissioners are entitled to find to exist. In my opinion the Commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion."

32. However, neither party considered it was necessary under regulation 153 for a Tribunal to consider the issue by reference to a person's conscious or unconscious motivation. I agree that it is better to adhere to the statutory language: the Tribunal needs to decide whether, objectively, the claimant is absent solely in connection with the treatment or not. Determining this question will require the Tribunal to consider what the claimant's real reasons for absence are. It can, it seems to me, to be helpful for the Tribunal to think of that in terms of a quest for the claimant's 'conscious or unconscious' reasons, but Tribunals should not allow that 'thought experiment' to distract them from simply applying the statutory language.

33. I must now consider the Tribunal's decision in this case. The Tribunal directed itself by reference to the statutory language. There can be no criticism of its self-direction on the law. Further, it is apparent that it did not confine itself to considering what the claimant had said about her reason for absence. The Tribunal at [21] and [31] demonstrates that it recognised it needed to evaluate the claimant's evidence and decide whether the treatment was really her reason for absence or not.

34. The Secretary of State submits that if the Tribunal had taken the correct approach to "solely" it would have to have concluded that NJ had more than one reason for staying in Almeria. At least, the Secretary of State says, it was clearly a holiday as well as treatment. However, the Tribunal has dealt expressly with that submission in those paragraphs and it seems to me that the reasons it gives for rejecting the Secretary of State's case in this respect were adequate and not perverse.

35. It is important in this respect not to overlook that the Tribunal was, quite properly, considering the claimant's reasons for "going to Almeria **for extended periods of time**" (emphasis added). It was right to do so because, as both parties accepted in the course of argument, the regulation 153 exception only becomes relevant after the regulation 152 exception has been exhausted. Any claimant can be absent from Great Britain for a "short absence" of up to four weeks without losing their entitlement to benefit. The issue for the Tribunal in this case was therefore what NJ's reasons were for extended periods of absence going beyond four weeks. In so saying, I am mindful that a Tribunal of Commissioners in *R(S) 1/90*, addressing the predecessor provisions in the 1975 Regulations, held that in order to qualify for that exception the claimant needed to have had treatment as a "specific purpose" for the absence before going abroad. I am not sure whether it would necessarily be right to read that decision across to the differently-worded provision in the ESA Regulations, but I do not need to decide that point in this case. Even assuming that the necessary purpose needs to be established before departure from Great Britain in accordance with *R(S) 1/90*, the Tribunal in this case was still right to focus on the claimant's reasons for extended absences going beyond the initial four-week period as it is only that extended period that needs to fall within the scope of regulation 153. Any shorter period will be caught by regulation 152. Once that point is understood, it can readily be seen that it was open to the Tribunal to accept that NJ's reasons for extended

absences (going beyond 'normal holiday' length, and in a place that NJ would not choose to go on holiday) were rational.

36. The Secretary of State also submits that, if the Tribunal had taken the correct approach, it would have been bound to infer that part of the reason for the absence was the fact that the Almeria property is NJ and Dr J's second home and thus one of NJ's reasons for absence must be to live in and maintain a family home (or, at a minimum, to accompany her husband while he does so). However, again, the Tribunal was rightly focusing on NJ's reasons for extended periods of absence. The Tribunal was clearly alive to the Secretary of State's argument the fact that the property is their second home meant that the claimant must have more than one purpose in staying there for extended periods. Those facts are in the judgment, but the Tribunal rejects the Secretary of State's case in that respect for essentially the same reasons as it rejects the Secretary of State's case about holidays. As the judge puts it at [31], "I am wholly satisfied that this is not a case of a couple simply spending time holidaying in their second home … the climate at their home in Almeria provides respite from her condition as exposure to sunlight increases her serotonin levels, thus alleviating some of her symptoms, and for that specific reason they seek to spend extended periods of time there".

37. While many Tribunals would not have reached the same conclusion, I am not persuaded that this Tribunal's decision was perverse, particularly given its findings as to the severity of the claimant's OCD condition, and the credibility of NJ's and Dr J's evidence as to the positive impact on her of spending time in Almeria. These factors together explain the Tribunal's conclusion that in this particular case the sole reason for NJ spending extended periods of time in Almeria was to alleviate her condition and that holidaying or maintaining of their second home was not part of her reasons for spending an extended period of time there. The fact that by staying for extended periods they may also enjoy the opportunity of holidaying or maintaining their second home does not prevent the Tribunal from concluding that the sole purpose of their extended stays was the treatment. Provided a Tribunal is satisfied for adequate reasons (as this Tribunal was at [21]) that these were merely incidental benefits ("effects", to use Lord Brightman's term in *Mallalieu*) rather than the purpose of the extended stay, there is nothing wrong in law with the Tribunal reaching the conclusion that this Tribunal did in this case.

<u>b. "Arrangements made for the treatment of the claimant"</u>

38. The parties made separate submissions about the meaning of "treatment" and "arrangements for treatment", but it seems to me to be difficult to deal with the submissions in isolation in that way. The phrase that appears in regulation 153 is "arrangements made for the treatment of the claimant" and it needs to be approached as a whole.

The parties' submissions

39. Mr Edwards for the Secretary of State submits that sitting in sunlight is not "treatment" and the Tribunal has erred in law in accepting that something that one

does to oneself is capable of being "treatment" under regulation 153. He referred to *R(S) 2/69* and the consideration given there to regulation 7(1)(b) of the National Insurance (Residence and Persons Abroad) Regulations 1948, a predecessor provision, which referred to the purpose of the absence as "being treated". In that case, it had been submitted that "rest" (on a cruise) was a treatment for coronary thrombosis. The Commissioner did not accept that argument, holding that it would involve rewriting the regulation so as to substitute for the words "being treated" words such as "recovering" or "convalescing". Mr Edwards submitted that the different wording in regulation 153 should be given the same meaning. He submitted that is achieved by the wording "arrangements made for the treatment of the claimant" which indicates there is an element of agency involved. He submitted that you cannot "treat yourself".

40. He further submitted that merely making travel arrangements could not be "arrangements for treatment". He argued that this was clear from the regulation itself, in particular the requirement in regulation 15(3)(d) that the arrangements be "by, or under the supervision of, a person appropriately qualified to carry out that treatment". He submitted that it was apparent that the "arrangements" therefore had to be the kind of arrangements that a medical professional might make, not just travel arrangements or sitting in the sun.

41. In his reply submissions, Mr Edwards sought to go further and suggested that the Tribunal had erred in law by failing to deal with the Secretary of State's case that sunlight is not an effective treatment for OCD, although he accepted that the Secretary of State had not advanced the appeal on the basis the Tribunal had perversely failed to accept the Secretary of State's medical evidence on this issue, and he did not put the Secretary of State's medical evidence before the Upper Tribunal. What he did submit, however, was that the Tribunal should have considered the Secretary of State's evidence and that, in any event, the Tribunal should not have accepted the claimant's evidence that sunlight was treatment for OCD without properly constituting itself as a panel with an expert medical member. This latter point overlaps with Mr Edwards' final ground (dealt with below).

42. Mr Hallström for the claimant submitted that it is not necessary for "treatment" to involve someone else practicing on the individual. An individual can treat themselves. That is clear from the definition of "medical treatment" in regulation 2 of the ESA 2008 Regulations. Regulation 153(2) expands the definition of "treatment" still further in this context. He contrasted regulation 153 with regulation 154 which deals with absence from Great Britain to receive NHS treatment. He submitted that the Tribunal had reasonably accepted the claimant's evidence as sufficient to conclude that sunlight was a treatment for OCD. He submitted there was no requirement for it to be shown the treatment would be effective, although the claimant had presented evidence of her experience of it being effective. There was reasonable evidence, supported by Dr J as an appropriately qualified medical practitioner, other research materials and the claimant's GP that sunlight could be an effective treatment for OCD. There may be scope for debate about the efficacy of the treatment, he submitted, but this was not a treatment 'on the lunatic fringe'.

My analysis

43. I broadly agree with Mr Hallström. As set out above, regulation 153(1)(c)(i) applies where the claimant is absent "for the treatment of the claimant for a disease or bodily or mental disablement". There is a definition of "medical treatment" in regulation 2 as meaning "medical, surgical or rehabilitative treatment (including any course or diet or other regimen)". That is in itself a broad definition, from which it is clear as a result of the reference to "diet or other regimen" that even "medical treatment" can be something that one does to oneself without any direct third party involvement. However, regulation 153 is not even limited to "medical treatment". It just refers to "treatment". As such, it is in principle capable of being even broader in scope.

44. I do not consider that the fact that treatment appears in the phrase "arrangements made for the treatment of the claimant", or indeed that regulation 153(1)(d)(ii) refers to the appropriately qualified person 'carrying out' the treatment, means that "treatment" only includes active treatment by a third party agent. The use of the words "diet or other regimen" preclude such a limited approach, as does the fact that the treatment need not be medical and that it may be under the "supervision" of the appropriately qualified person rather than "by" them.

45. That said, the phrase "treatment of the claimant" does on its natural and ordinary meaning indicate that there must be something actively being done to the claimant by someone or something other than the claimant themselves. The meaning of "treatment" was discussed by the Deputy Commissioner in *R(S) 2/69* as follows at [5]:

> 5. The expression "being treated" in regulation 7(l)(b) is not defined. In its context however, and seeing that sickness benefit is only available to persons who are "incapable of work by reason of some specific disease or bodily or mental disablement " (see section 110 of the Act of 1946) it seems to me clear that regulation 7(1)(b) contemplates the receipt of treatment which serves, or is intended to serve, the purpose of remedying the disease or disability, or of palliating its ill effects or the pain or discomfort occasioned by it. It is perhaps relevant to note that the verb "treat" when used in a medical context is defined in the Shorter Oxford Dictionary as meaning "to deal with or operate upon (a disease or affection, a part of the body, or a person) in order to relieve or cure"; and "treatment" in such context is defined as "management in the application of remedies; medical or surgical application or service".

46. In that case, the Deputy Commissioner decided that rest while on a cruise ship did not amount to "being treated" even though the medical evidence was that rest is required to recover from a coronary thrombosis, and it had been recommended by a doctor and the claimant's wife, who was a qualified doctor, was with him on the cruise ship ensuring that he did not over-exert himself.

47. I do not have to decide in this case whether the facts of *R(S)2/69* would produce a different outcome under the current regulations, but I, for my part, consider that

the principles enunciated in that case 'hold good' under the current regulations. Specifically, I would hold, in line with the Deputy Commissioner's decision in that case, that 'mere' rest or convalescence or a 'change of air' could not amount to "treatment" under the current regulations either. If all that is recommended is a "heal thyself" approach of simply allowing the body time to recover without anything that in ordinary parlance would be regarded as active agency, that would not constitute "treatment" under regulation 153. In this respect, I also agree with the observations of the Deputy Commissioner in that case where he emphasises that it does not matter how beneficial the 'rest' may be or whether the medical practitioners call it "treatment" or not, what matters is whether the Tribunal finds it as a matter of law to be "treatment" within the meaning of the regulations. See at [6] in *R(S)2/69*:

> It is fair to record that Dr. Baker in his evidence spoke of rest as being the recognized "treatment" for a coronary thrombosis, but the meaning of" treatment" or "being treated" is a question of law, and the fact that a doctor or any other person uses either of these expressions in a colloquial sense cannot in my judgment be conclusive of their lawful meaning. I think that Dr. Baker could equally well (and perhaps more accurately) have said that in the first few weeks after a patient has suffered a coronary thrombosis he is treated with drugs, and that thereafter he requires no further treatment but merely complete rest to assist recovery.

48. As regards the distinction made between rest and treatment, I note that this is a distinction that actually appears in some of the other current legislation that contains similar exceptions to that in regulation 153. For example, regulation 11 of The Universal Credit Regulations 2013 (SI 2013/376) permits absence for up to six months "solely in connection with" treatment **or** "medically approved **convalescence or care** as a result of treatment for an illness or physical or mental impairment" (emphasis added). Similar provision appears in regulation 3 of The State Pension Credit Regulations 2002 (SI 2002/1792) and regulation 7 of The Housing Benefit Regulations 2006 (SI 2006/213). From a comparison between the drafting of those regulations and the drafting of the ESA Regulations with which this case is concerned, one might therefore also conclude that it is important for a Tribunal dealing with regulation 153 to be aware that 'mere' provision of "care" is also not "treatment". However, the Secretary of State has not suggested that the Tribunal in this case erred in failing to make such a distinction.

49. A further limitation to what can constitute "treatment" under the current ESA Regulations is to be found in regulation 153(2) itself which provides that a person will be "appropriately qualified" to supervise the treatment if they are "qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment". Reading the regulation as a whole, it seems to me to follow from this requirement that, in order to be "treatment" within the meaning of the regulation, the treatment will need to be

"similar to, or related to" medical or physiotherapy treatment. Such an interpretation is necessary in my view because if the nature of the treatment is not so limited, then it will not be possible for the person who is providing or supervising it to be "appropriately qualified" to carry out "that treatment" as required by regulation 153(d)(iii). So-called "treatment" founded in (for example) religious practice or with a basis in spiritualism or superstition would therefore be unlikely to constitute "treatment" for the purposes of regulation 153.

50. In this case, though, I have no difficulty in accepting as a matter of principle that the Tribunal did not err in law in finding that exposure to sunlight could be "treatment". The element of agency in this case is provided by the sun. It is, for example, common knowledge that we create Vitamin D from sunlight on our skin and I see no reason why exposure to sunlight cannot in principle constitute a treatment for Vitamin D deficiency just as much as taking a vitamin supplement can. In the claimant's case, the Tribunal accepted the evidence produced by the claimant and Dr J, supported by her GP and other studies, that sunlight can stimulate the production of serotonin which in turn may reduce OCD symptoms. In so concluding, the Tribunal found it unnecessary to consider the evidence produced by the Secretary of State, which I understand sought to show that sunlight is not an effective treatment for OCD. (I say "I understand" because although I invited Mr Edwards to direct me to the Secretary of State's medical evidence if he considered it relevant to this appeal, he did not do so and so I have not considered it.) The First-tier Tribunal for its part explained at [24] why it did not need to consider the Secretary of State's evidence in order to determine the claimant's appeal.

51. In my judgment, there was no error of law in the Tribunal's approach in that regard. There is nothing in regulation 153 that suggests that treatment has to be effective in order to count as "treatment". All that is required is that there is evidence that the regimen is properly capable of being regarded as a "treatment" for the condition applying the principles I have identified above. That is not to say that a Tribunal is prevented from determining in a particular case that what is claimed to be a "treatment" is not in fact capable of being properly described as such. Evidence as to its lack of efficacy may be relevant to that question in some cases. But in this case the Tribunal had before it evidence presented by the claimant and Dr J from a variety of sources suggesting that sunlight could be efficacious as a form of treatment for OCD. The Tribunal also had their accounts of experiencing exposure to sunlight in the particularly intense climate of Almeria as being apparently efficacious.

52. The Tribunal did not err in law in accepting that evidence as sufficient. It did not need to embark on the exercise that the Secretary of State invited it to do of considering competing expert evidence on whether sunlight was an effective treatment for OCD. Provided there was enough in the claimant's evidence for it to be satisfied that sunlight could properly be described as a "treatment" for OCD within the meaning of regulation 153, the Tribunal did not need to go further.

53. As indicated above, for something properly to be a "treatment" within regulation 153 it must be "similar to, or related to" medical or physiotherapy treatment. The

First-tier Tribunal in this case did not give itself a specific legal direction to that effect, but at [22] it referred to the similarity between the effects of sunlight in stimulating serotonin production and the serotonin-based medication that the claimant had been prescribed for her condition in pill-form. That seems to me on any view to be sufficient to indicate that the Tribunal was as a matter of fact satisfied that the treatment was "similar to, or related to" medical treatment.

54. Finally on this issue, I also reject Mr Edwards' submission that the Tribunal erred in law in finding that there were in this case "arrangements for treatment" within the meaning of regulation 153. Given that the Tribunal found exposure to sunlight was treatment for OCD, it follows that the arrangements made for that treatment included the travel to Almeria, living in the property and exposing herself to the sun. Such a conclusion falls easily within the language of the legislation. There is no requirement that the "arrangements for treatment" should be arrangements that only a qualified medical practitioner (or physiotherapist or similar) could make. The only requirement is that the arrangements are for treatment that is carried out by, or under the supervision of, such a person, which brings me to the next element of regulation 153 at issue on this appeal.

c. "Appropriately qualified to carry out that treatment"

55. To fall within regulation 153(1)(d)(iii), the treatment must be "by, or under the supervision of, a person appropriately qualified to carry out that treatment". "Appropriately qualified" is defined in regulation 153(2) as meaning "qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment".

The parties' submissions

56. Mr Edwards for the Secretary of State submits that Dr J is not "appropriately qualified" to treat OCD. He accepts that there is no qualification that can be obtained in the treatment of OCD. He accepts that a GP might be "appropriately qualified". However, he asserts that the evidence is "highly contested" as to whether sunlight is a treatment for OCD. He submits that, the more innovative or experimental the treatment, the more qualified a person must be in order to be "appropriately qualified" to supervise the treatment. In this particular case, he submits only a psychiatrist would be "appropriately qualified" to supervise treatment for OCD. He points out that in *R(S)2/69* the Commissioner found it "irrelevant" that the claimant's wife was a qualified doctor and on the cruise with him (although Mr Edwards accepted that the predecessor legislation at issue in that case did not include any requirement for the treatment to be under the supervision of an appropriately qualified person). Mr Edwards submits that it is implicit in the requirement for "appropriately qualified" that the person must also be "registered", so the fact that Dr J is retired means that he is not "appropriately qualified". Further, the professional standards of regulatory bodies require that someone does not prescribe for close relatives, so Dr J as the claimant's husband is not, he submits, "appropriately qualified" to carry out treatment in her case.

57. Mr Hallström submits that that *R(S)2/69* does not help because the legislation was different. He submits that what is required is that the person be "appropriate qualified to carry out that treatment" and "appropriately qualified" is defined in reg 153(2). Unless it is being submitted that a particular qualification is required in order to supervise sunlight treatment in Spain then there is nothing wrong with the Tribunal reaching the decision it did on the basis of the facts. Further, it was clear that "appropriately qualified" was not intended to incorporate a requirement for registration as the legislation could have said that if it meant it. For example, paragraph 4 of Schedule 8 to the Universal Credit Regulations refers to medication being "prescribed for the claimant by a registered medical practitioner".

My analysis

58. I reject Mr Edwards' submissions, which are not founded in the words of the regulation. The regulation does not include a requirement for the person to be registered; it could easily have done so, and the fact that it does not makes it clear that 'registration' is not a requirement for someone to be appropriately qualified. 'Qualification' does not on its natural meaning encompass 'registration'. Further, I do not see how this could be a requirement given that the treatment that the person has to be appropriately qualified to provide does not even have to be medical treatment. The forms of treatment can thus evidently in principle cover treatment by professionals of types for whom there are no registration requirements.

59. Mr Edwards' submissions would also, it seems to me, produce unworkable or arbitrary results. If he is right, Tribunals would be required in effect to come up with a regulatory regime of qualifications that could be treated for the purposes of regulation 153 as 'appropriate' when in fact there is no professional regulatory regime mandating any such qualification. Of course, there may be some types of treatment that are professionally regulated so that a Tribunal would err in law if it held to be "appropriately qualified" someone who was actually not professionally permitted to provide the treatment. I have in mind by way of example the requirements of the Health and Care Professions Council in terms of who is permitted to prescribe licensed and unlicensed medicines. Likewise, there may be cases in which 'registration' can properly be said to be a 'qualification' for providing a treatment, since a regulator may impose a requirement that a particular treatment only be prescribed by a registered healthcare practitioner. However, that is not this case.

60. In this case, the parties are in agreement that there is no professional regulator that has determined that only a particular category of medical professional can provide treatment for OCD. Further, the requirements of regulation 153(2) are even more specific: the qualification has to be appropriate to the particular treatment. Evidently, there are no restrictions on who can supervise a regimen of exposure to sunlight.

61. I also do not consider that it was an error of law for the Tribunal to accept that Dr J was "appropriately qualified" despite being her husband. Mr Edwards submitted

that it was professionally inappropriate for a medical practitioner to treat a relative. He did not, however, refer me to any specific regulatory materials on this issue. As a matter of ordinary language a requirement to be "appropriately qualified" does not impute a requirement not to be related to the patient. Such a restriction could be written into the legislation if it were thought necessary, but it cannot be implied.

62. In those circumstances, there was no error of law in the Tribunal accepting that Dr J, as a qualified medical practitioner, albeit retired, was "appropriately qualified". Whether he was "appropriately qualified" or not was a question of fact for it to determine. The core of the Tribunal's reasoning in this respect was that Dr J was medically qualified, and that this had given him "the necessary transferable skill set to be able to conduct research and acquire knowledge in relation to the specific disablement which his wife suffers". The Tribunal also accepted Dr J's evidence as to the supervisory role that he plays while the couple are in Almeria.

d. Panel composition

63. By regulation 2(1) of the *First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008* (SI 2008/2835), the number of members of the First-tier Tribunal who are to decide any matter "must be determined by the Senior President of Tribunals in a practice direction in accordance with paragraphs (2) and (3)" of that regulation. Paragraph (2) provides that it is for the Senior President of Tribunals to determine whether the tribunal consists of one, two or three members, and paragraph (3) provides that the Senior President must have regard to "(a) the nature of the matter that falls to be decided and the means by which it is to be decided; and (b) the need for members of tribunals to have particular expertise, skills or knowledge". The Practice Statement made under that regulation provides, in summary, for the Tribunal normally to be constituted:

    a. As a three-member panel consisting of a Tribunal Judge, Tribunal Member who is a registered medical practitioner and a Tribunal Member who has a disability qualification in cases relating to attendance allowance, disability living allowance or personal independence payment (paragraph 4);

    b. As a two-member panel consisting of a Tribunal Judge and a Tribunal Member who is a registered medical practitioner for the types of cases listed in paragraph 5, which include where the appeal involves the limited capability for work/work-related activity assessment under the ESA Regulations;

    c. In all other cases, a Tribunal must consist of judge alone (paragraph 6).

64. By paragraph 7, however, the Chamber President is given a delegated power to determine that any Tribunal constituted under paragraph 5 or 6 "may" also include "an additional Member who is a registered medical practitioner, where the

complexity of the medical issues in the appeal so demands". By paragraph 9, this power may be delegated further to a Regional or District Tribunal Judge.

The parties' submissions

65. Mr Edwards on behalf of the Secretary of State submits that where medical research is relied on, as the claimant did in this case, then the Tribunal if constituted as a single judge should not engage with it as it is not a matter within the judge's expertise. If the Tribunal considers the research relevant, then (Mr Edwards submits) it should reconstitute with a medical member. Mr Edwards submits that the Tribunal was not in a position to determine whether sunlight was treatment at all. He acknowledges that the Secretary of State was represented at the hearing but did not raise with the Tribunal the question of the composition of the panel. He points out that the presenting officer "is not a lawyer" and submits it was a matter for the Tribunal to ensure that it was properly constituted.

66. Mr Hallström submitted that if there was a breach of a jurisdictional mandatory requirement as to panel composition (such as happened in *ZY v SSWP* [2024] UKUT 163 (AAC)) that would be an error of law, but that is not the Secretary of State's argument here. He submits this is really another perversity argument about the Chamber President's exercise of her discretion under the Practice Statement. The Tribunal was deciding whether or not exposure to sunlight was a treatment, it did not have to deal with efficacy. There is no reason why a judge alone cannot deal with this sort of issue. The Secretary of State also did not raise with the First-tier Tribunal the point of whether the panel should have been reconstituted and there was no need for the Tribunal to consider the point of its own motion. There was no breach of natural justice. The Secretary of State put in his own evidence that the Tribunal considered.

My analysis

67. On this ground too, I consider there is no merit in the Secretary of State's argument. This case did not involve any complex medical issues. For the reasons discussed above, deciding whether regulation 153 applies will not normally require a Tribunal to have any particular medical expertise. In particular, deciding whether something is "treatment" for the purposes of regulation 153 is a mixed question of law and fact of the sort that judges routinely deal with alone. Given the relatively low threshold that needs to be met before something falls within the definition of "treatment" for the purposes of the regulations, and that in most cases it will not matter whether the treatment is effective, there is little scope for the use of medical expertise. The position might be different if there was an issue as to whether the disease or bodily or mental disablement for which the claimant was receiving treatment "directly related" to the claimant's limited capability for work. That could be an issue on which medical expertise would be helpful, but the issues that arose in this case were not complex medical issues.

68. As such, it was not an error of law for the Tribunal to fail to consider (or to fail to consider requesting that the Regional Judge or Chamber President consider) reconstituting the Tribunal as a two-person panel with a medical member. In any

event, even if this had been a case involving a complex medical issue, it would still have been a matter of discretion, to be exercised by the Chamber President, Regional Tribunal Judge or District Tribunal Judge in accordance with paragraphs 7 and 9 of the Practice Statement, susceptible to challenge on appeal only on rationality grounds.

69. I would also add that, as a matter of good practice, if either party considers that an appeal would merit hearing by a differently constituted panel, they ought to raise that at the time. That is particularly the case for the Secretary of State, who is a respondent to every appeal in this jurisdiction and thus can reasonably be expected to raise such matters, regardless of the particular qualifications or experience of the presenting officer in any particular case.

Conclusion

70. The Secretary of State's appeal therefore fails and is dismissed.

71. However, I should emphasise that it does not follow from my conclusion that the Tribunal in this case has not erred in law that everyone whose medical condition may be improved by sunlight can now rely on regulation 153 so as to remain entitled to benefits during lengthy sojourns abroad. It will still be difficult in most cases for a claimant to satisfy all the elements of regulation 153 on the facts. In particular, in most cases it will be difficult for a person to satisfy the "solely" requirement. If they are also going for a holiday or because they choose to live part of the year abroad or if they would go anyway even if treatment were not required or if sunlight in the UK would be as effective in treating the particular case, any one of these factors will normally indicate that the time abroad is not "solely" for the purposes of medical treatment.

72. Most cases will also have difficulty satisfying the requirement for the treatment to be "by or under the supervision of" an "appropriately qualified person". The Secretary of State did not on this appeal seek to challenge the Tribunal's conclusion that Dr J was providing "supervision" of the "treatment". Generally speaking, it may be difficult to establish that "supervision" is being provided in respect of a person's exposure to sunlight (rather than, for example, "care" for the person's condition more generally) and, in any event, in most cases there will be no "appropriately qualified" person on hand who is in a position to 'supervise' the "treatment". It is only the peculiar facts of this case, as they were found to be by this Tribunal, that the Tribunal did not err in law in concluding that Dr J was an "appropriately qualified" person who had, over the years, been 'supervising' the appellant's exposure to sunlight in Almeria.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 5 July 2024