(MM and BJ v Secretary of State for Work and Pensions (PIP) [2016] UKUT 490 (AAC))

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
The Upper Tribunal disallows the appeals of both appellants.

The decisions of the First-tier Tribunals sitting, respectively, at Manchester on 1 June 2015 under reference SC946/15/00512 and at Sheffield on 8 April 2015 under reference SC147/14/01636 did not involve any errors on material points of law and therefore the decisions are not set aside.

This decision is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007

The first appellant (MM) did not appear nor was she represented at the hearing. She did however provide written argument through Jo Rees of Manchester CAB Service.

Mr Christopher Gee, Senior Adviser at Shelter Legal Services, represented the second appellant (BJ).

Ms Fiona Scolding of counsel represented the respondent Secretary of State.

REASONS FOR DECISION

Introduction

1. These two appeals were heard together as both involve the common issue of what is involved in the activity "taking nutrition" in the personal independence payment ("PIP") legislative scheme. Put shortly, the common issue is whether this activity extends to dietary choices or "eating well or nutritiously". Put equally shortly, the answer in my view is "No". Properly understood, in its statutory context the activity in issue is concerned with the *act* of eating (or drinking) and not with the nutritious quality of what is being eaten (or drunk).

2. This common issue is decisive to both appeals as in each of them the appellants had satisfied a score of six points under the daily living activities for PIP so a further award of two points (for needing supervision to be able to take nutrition) or four points (for needing prompting to be able to take nutrition) would have taken the appellants to a points score of eight meriting an award of the standard rate of the daily living component of PIP.

3. The appellant in the second appeal (*BJ*) concedes that his appeal stands or falls on the above issue. The appellant in the first appeal (*MM*) raises other issues, which I will return to at the end of this decision once I have dealt with "taking nutrition".

Relevant background

MM

4. The appellant *MM* applied for PIP in May 2014. Her claim was refused in December 2014. Apart from "taking nutrition", she put in issue on her claim form most of the daily living activities and some of the mobility activities. At the relevant time she was suffering from diverticulitis, a hiatus hernia, chest pain, high blood pressure, haemorrhoids, a burst ear drum, arthritis to her right knee and fibromyalgia. On the PIP claim form she said under *Eating and drinking* that she did not use an aid or appliance to eat or drink, she did not need help from another person to eat or drink but that she "sometimes can't eat properly, feel sick or bloated, just have cereal or soup".

5. She then attended a PIP assessment conducted by Nurse Akhtar of Atos Healthcare on 15 December 2014 and a form PA4 was completed by the nurse either at or after the assessment. Under the sub-heading "Taking Nutrition" under "Functional history" on that form the nurse recorded *MM* as saying she "Manages to feed herself independently with no problems". On page 12 of that form, dealing with "taking nutrition", the nurse concluded that MM could "take nutrition unaided" and so scored no points for this activity. The nurse recorded on page 12 of the form that *MM* was not seen to be experiencing any mental health impairment and that her "typical day" indicated that she avoided certain foods that affected her digestion. The assessment suggested that a score of six points only was merited for the descriptors under the daily living activities. These were for needing an aid or appliance to prepare or cook a simple meal, needing an aid or appliance to wash or bathe and needing an aid or appliance to dress or undress. Those were the points awarded by the Secretary of State, which was insufficient to merit an award of PIP .

6. The appeal by *MM* against this decision was heard on 1 June 2015. The First-tier Tribunal in its decision refusing the appeal confirmed the above six points. It reasoned that no points were merited under "taking nutrition" because although it accepted that *MM* would be limited in what she could eat on occasion because of her irritable bowel like symptoms, this would not result in her scoring points under "taking nutrition". The CAB on *MM*'s behalf argued that this reasoning did not sufficiently address whether *MM* needed prompting to take nutrition.

BJ

7. The second appeal concerns *BJ*. At the relevant time his medical conditions were hypertension, depression, gout, diabetes, alcoholism, and he had suffered a blackout. He made a claim for PIP on 27 November 2013, which was refused on 7 May 2014. He then appealed. In his appeal he said, *inter alia*, that he was unable to cook a main meal due to his lack of motivation arising from his depression, he could manage a simple sandwich but nothing more, his diet was a contributing factor in his diabetes and his sister now made him one hot meal a day, and left to himself his health would be put at risk by his diet.

8. On the *Eating and drinking* part of his PIP claim form it had been said for *BJ* that he needed prompting to eat due to his alcoholism and depression, and that if he was not prompted he would not take any nutrition. Due to his health conditions he needed to eat and drink healthier food and at regular intervals but his mental health meant that he could not do so without support.

9. *BJ* was assessed by a Ms Atkin of Atos Healthcare on 8 April 2014. It would seem she was a physiotherapist. Under the "Functional history" taken *BJ* was recorded as saying, amongst many other things, that he would make sandwiches when hungry and had no problems when eating. Ms Atkin found no points were merited under "taking nutrition". The "Summary justification" for this was that he had reported that he prepared himself sandwiches when hungry but would require prompting to make anything else, and he had no problems eating. Ms Atkin suggested that only four points were merited under the daily living activities. These were for needing supervision or prompting to be able to wash or bathe and needing prompting or assistance to be able to make complex budgeting decisions. These points were the points found met under the Secretary of State's refusal decision of 7 May 2014. After a mandatory reconsideration decision dated 24 September 2014 this points score remained the same, though it would seem that there was then a further reconsideration and the points score for daily living increased to six, with an additional two points being awarded to *BJ* for needing to be prompted to either prepare or cook a simple meal.

10. By its appeal decision of 8 April 2015 the First-tier Tribunal upheld this six points score for the daily living activities and refused the appeal. The relevant part of its statement of reasons said the following about "taking nutrition":

"the Appellant is able to live alone with some support from his sister and support worker, self-care with the aid of some prompting from his sister in relation to eating properly and keeping himself clean and some help from his support worker with budgeting."

11. With the aid of Shelter, *BJ* sought permission to appeal on the ground that the First-tier Tribunal had not adequately explained why no points were awarded for "taking nutrition". It was argued in particular that on the face of the tribunal's finding that *BJ* needed some prompting from his sister to eat properly this *prima facie* gave rise to an award of four points under the descriptor 2d – "needs prompting to be able to take nutrition".

Relevant law

12. PIP was introduced under Part 4 of the Welfare Reform Act 2012. Section 78 of that Act deals with the daily living component. It provides, so far as here relevant, that:

> "**78. –** (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 the person's
>
> physical or mental condition; ...
> (2) a person is entitled to the daily living component at the enhanced rate if –

(a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; ...".

I have added the underlining to emphasise that the focus of the test under the Act is on an ability to carry out an activity. Section 80 of the same Act then provides that whether a person's ability to carry out activities is limited by his physical or mental condition is to be determined in accordance with regulations and on the basis of an assessment of the person.

13. The relevant regulations are the Social Security (Personal Independence Payment) Regulations 2013 (the "PIP Regulations" (SI 2013/377)). I need only refer to the most relevant parts of these regulations.

14. Part 2 of the PIP Regulations deals with the "Personal Independence Assessment". It provides by regulations 3 and 4 as follows, insofar as is relevant on these appeals:

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

"**4. –** (1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.

...

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

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

15. Schedule 1 to the PIP Regulations then sets out, in Part 2 of that Schedule, the daily living activities and the points scores for the descriptors under those activities. Prior to this, however, Part 1 of Schedule 1 provides definitions for terms used in Part 2 (and Part 3, which deals with the mobility activities). Parts 1 and 2 of Schedule 1 to the PIP Regulations provide relevantly, and respectively, as follows:

"'take nutrition' means –

(a) cut food into pieces, convey food and drink to one's mouth and chew and swallow food and drink; or

(b) take nutrition by using a therapeutic source;

'therapeutic source' means parenteral or enteral tube feeding, using a rate-limiting device such as a delivery system or feed pump"

	DAILY LIVING ACTIVITIES	
Column 1 Activity	*Column 2 Descriptors*	*Column 3 Points*
1. Preparing food	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2
	e. Needs supervision or assistance to either prepare or cook a simple meal.	4
	f. Cannot prepare and cook food.	8
2.Taking nutrition	a. Can take nutrition unaided.	0
	b. Needs – (i) to use an aid or appliance to be able to take nutrition; or (ii) supervision to be able to take nutrition; or (iii) assistance to be able to cut up food.	2
	c. Needs a therapeutic source to be able to take nutrition.	2
	d. Needs prompting to be able to take nutrition.	4
	e. Needs assistance to be able to manage a therapeutic source to take nutrition.	6
	f. Cannot convey food and drink to their mouth and needs another person to do so."	10

16. The activity "taking nutrition" was considered in *SA v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 512 (AAC) by Upper Tribunal Judge Mark. (I note in passing that the

descriptive notes for this decision on the UT(AAC)'s website say "Need for encouragement to eat to an acceptable standard"). In [9]–[12], *SA* says the following:

> "[The claimant's] own evidence, which appears to have been accepted is that her lack of energy prevents her cooking, that she stays with her daughter 4 days a week when the daughter would cook and that her daughter encouraged her to eat as she had severe appetite loss and would happily live on soup and coffee. The ATOS healthcare report states that the claimant would get a sandwich at lunchtime. She was not cooking much and would not cook on her own, and that she had low motivation and appetite. The opinion of the healthcare professional was that she needed prompting to be able to take nutrition.
>
> The finding of the tribunal was that she lived on soup and coffee and had severe appetite loss. The tribunal, in its findings, appears to have confused the claimant's lack of motivation to cook with her loss of appetite and lack of motivation to eat. There was no evidence to suggest that if her daughter prepared nutritious food for her she would take it without prompting, and the tribunal's own findings of fact indicated the contrary.
>
> Living on soup and coffee, even with the occasional sandwich, cannot be seen as taking nutrition to an acceptable standard, and it is plain on the tribunal's own findings of fact that the claimant had no appetite for anything more and had to be encouraged to eat. There is nothing in those findings to suggest that her appetite returned if somebody else did the cooking. Rather it indicated that she would still need encouragement to eat properly even if somebody else had done the cooking.
>
> I am satisfied that the decision makers were correct to award 4 points for this activity...."

Appellants' arguments

17. I set out only the arguments for the appellants because I need to explain why I disagree with the fundamental thrust of them.

18. The argument for *MM* is encapsulated in the submissions of Ms Rees of Manchester CAB Service put before me shortly before the hearing of the appeal. They are arguments made in response to the Secretary of State's skeleton argument filed for the hearing. The crux of *MM*'s argument relies on the view expressed in *SA* that "[l]iving on soup and coffee, even with an occasional sandwich, cannot be seen as taking nutrition to an acceptable standard". She submits that "an acceptable standard of nutrition is one which is sufficient to maintain health and not result in deterioration of health. This is the everyday meaning ... a test of whether nutritional intake is 'good enough' is appropriate. It would *not* lead to very many people who chose not to cook, or who cannot cook because they have never learnt, to score points". Dealing with the Secretary of State's reference to the *PIP Assessment Guide* – and the passage in it "The type of food and drink for nourishment is not a consideration for this activity, but rather the claimant's ability to nourish themselves" – *MM* argues that the key words used are "nourishment" and "nourish" and relies on

the Oxford English Dictionary definition of these words as meaning "provide with food ... necessary for growth, health and good condition". A poor or restricted diet was not nourishing and so did not amount to "taking nutrition".

19. The argument made by Mr Gee for *BJ* is similar. He argues that in the phrase "take nutrition" the correct focus is on the word "nutrition" and not "take". The correct approach to descriptor 2d is to ask whether *BJ* needed prompting to "take proper food" or "eat nutritiously". The decision in *SA* supported this approach. Moreover, the evidence supported *BJ* meeting descriptor 2d because it showed that he needed prompting to make a simple meal, if he was not prompted he would not take any nutrition nor would he eat regularly or healthily, and he found it hard to get motivated to prepare any meals except even the most simple of foods and struggled to take the correct nutrition. *BJ*'s poor diet was a major contributing factor to his diabetes and he needed supervision to ensure he was eating safely, reliably and repeatedly. He had subsequently been awarded the daily living component of PIP from 15 July 2015 to 29 November 2017, though even under this award he had not attracted any points for "taking nutrition".

20. Mr Gee argued that the Secretary of State was wrong to suggest that *SA* imported into descriptor 2d a "qualitative test" of what is or is not an acceptable diet. *SA* simply turned on the application of the criteria in regulation 4(2A) of the PIP Regulations, and in particular the test of carrying out the activity to an acceptable standard, to the activity of taking of nutrition. The Secretary of State's approach, so Mr Gee argued, exported "to an acceptable standard" out of the statutory scheme and deprived it of any force or application. Limiting activity 2 in the manner suggested by the Secretary of State to an enquiry into whether someone is physically and mentally able to eat (or drink) anything without support or prompting would preclude regulation 4(2A) of the PIP Regulations having any application, and in particular would remove the need to determine whether the claimant could carry out the activity to an acceptable standard. It was further argued on behalf of *BJ* that the inclusion of "cut food into pieces" in the definition of "take nutrition" showed that it did not just cover someone who only eats soup and coffee without prompting. The claimant must at least have the motivation to cut food into pieces on his plate, and even if the activity does not encompass diet it must cover taking sufficient food. The word "nutrition" was not defined in the PIP Regulations nor was the phrase "to an acceptable standard", but it was argued on behalf of *BJ* that the former should take its meaning from the Oxford English Dictionary definition of "nourishment" (as quoted in [18] above).

21. It was further argued for *BJ* that there is a clear delineation between people who have a poor diet and people who have a poor diet because of their health condition: only the later could qualify under activity 2 in Schedule 1 to the PIP Regulations. Moreover, introducing "diet choices" would not make activity 2 too difficult to adjudicate because it is well known what a reasonably healthy diet consists of.

22. In summary, *BJ*'s argument was that a person who by reason of their physical or mental condition does not eat sufficient food, or any solid food, should score points. Furthermore, a person who needs prompting to eat an adequate range of food to have a reasonable diet should score points.

Discussion and conclusion

23. The fundamental problem in my judgment with the arguments made for both appellants is the failure to have any, or any adequate, regard to the statutory definition of "take nutrition" in the PIP Regulations. Absent this definition I can see why taking nutrition might be said to cover "eating well" or "eating nutritiously". Activity 2 in Schedule 1 to the PIP Regulations is not expressly framed in terms of "eating and drinking" and so the use of the word "nutrition" might be thought to add something qualitatively to what is being taken by way of food or drink.

24. This, however, is to ignore the meaning given to "take nutrition" provided for in Part 1 of Schedule 1 to the PIP Regulations; a meaning which has a more limited and narrower focus than one concerned with the nutritious content of what is being eaten or drunk. Neither of these appeals are cases concerning the use of a therapeutic device to take on board food and drink, so that part of the definition can be ignored. This leaves "take nutrition" meaning, and being limited to meaning, "cut food into pieces, convey food and drink to one's mouth and chew and swallow food or drink". Without wishing to be thought to be labouring the obvious, the activity of "taking nutrition" must therefore mean "cutting food into pieces, conveying food and drink to one's mouth and chewing and swallowing food or drink", and no more. Nothing in any of these actions which go to make up the activity concerns the nutritious adequacy of that which is being eaten or drunk (save, perhaps (I am not sure if this can sensibly be described as being anything to do with the nutritious quality of the food), that the food contemplated needs to be one which is capable of being cut into pieces).

25. The plain focus of the activity "taking nutrition" in my view is therefore on, and is only on, the act of eating and drinking, and thus the enquiry under the PIP scheme has on be on whether, *per* sections 78(1) and 80(1)(a) of the Welfare Reform Act 2012, a person's ability to carry out the activity of cutting food into pieces, conveying food and drink to their mouth and chewing and swallowing food or drink, is limited by their physical or mental condition. Once it is understood that, putting matters colloquially, it is the activity of *eating and drinking* and the physical and mental actions needed to carry out that activity which is in issue under the activity "taking nutrition", then the word "nutrition" ceases to have any special quality beyond its being a term to cover both eating and drinking, and therefore the nutritious quality of what is being eaten or drunk can be recognised as being irrelevant under the PIP statutory scheme.

26. I accept that there may be instances where what is being consumed may be so outwith any reasonable or rational view of what constitutes food or drink that it might not fall on any reasonable analysis within a person taking nutrition within activity 2. This, however, has nothing to do with what is being consumed not being "nutritious" in some healthy eating sense but it simply not being "food" or "drink" at all. Such cases are likely to be very rare. Neither of these two appeals is such a

case, nor were they argued as being such a case. It may also be open to argument that a person who due to their physical or mental functions is only able to cut up the softest type of food or can only chew or swallow the most tiny amount of food or drink might not be said to be "taking nutrition" in the PIP statutory sense. Again, however, this is not because they are not having a nutritious diet but because they are not in any proper sense of the words either cutting food into pieces or carrying out the actions of chewing or swallowing food or drink. And again, neither of these cases is such a case.

27. Once the above is understood it seems to me that the flaw in the arguments of the claimants relying on the "acceptable standard" provision in regulation 4(2A) of the PIP Regulations is revealed. As regulation 4(2A) makes clear, it applies where a claimant's ability to carry out an activity is assessed, and the claimant is to be assessed as satisfying a descriptor only if they can do so "to an acceptable standard". What has to be assessed, therefore is the ability to carry out an activity to an acceptable standard. The activity under activity 2 "taking nutrition" is, as set out above, the ability to cut food into pieces, convey food and drink to one's mouth and chew and swallow food or drink. It is those acts, which make up the activity, eg the act of cutting food into pieces, which have to be done to an acceptable standard: see to similar effect [22] to [24] of *PE v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 309 (AAC); [2016] AACR 10. The (nutritious) quality of what is eaten or drunk is not part of those acts, and so the contents of what is being eaten or drunk does not need to be to "an acceptable standard".

28. Likewise, if the focus is on satisfying, say, descriptor 2d, the analysis still has to be, on the statutory wording, on needing prompting to be able to "cut food in to pieces, convey food and drink to one's mouth and chew and swallow food or drink" to an acceptable standard. The content of the food and drink is irrelevant. It is the actions involved in eating and drinking that have to be to an acceptable standard and not the food and drink consumed.

29. If further support for this reading of activity 2 is required (though I do not consider it is needed) then it can be found in the words of descriptors 2b(iii) and 2f under activity 2 in Schedule 1 to the PIP Regulations. The former refers to needing assistance to be able to cut up food; the latter to a claimant not being able to convey food and drink to their mouth and needing another person to do so for them. Both address, and are limited, to the mechanics of eating and drinking. Neither supports a more expansive reading of activity 2 and the word "nutrition" in it as covering the quality of the food and drink consumed or diet requirements in respect of the same.

30. Once the above analysis is understood it seems to me that concerns about subjective diet requirements simply fall away as diet is not part of the statutory test under activity 2. Moreover, this analysis does not, as Mr Gee contended for *BJ*, remove from the PIP statutory scheme the test of "to an acceptable standard". Instead it locates that test in its proper place, as a qualitative add-on to the assessment of how the acts that make up the activity of taking nutrition are carried out. The appellants' arguments on the other hand elevate the test of "acceptable standard" to something which it is not.

31. Where diet requirements or the quality of the food might be said to be relevant is under activity 1 in Schedule 1 to the Regulations, which is concerned with "Preparing food". The "simple meal" referred to in the descriptors under activity 1 is defined in Part 1 of Schedule 1 to the PIP Regulations as meaning "a cooked one-course meal for one using fresh ingredients" (my emphasis). It may therefore be argued that it is at this stage that dietary requirements and not just eating tinned food might be reflected in the statutory scheme. It may further be argued that, if so, this further emphasises that activity 2 is not concerned with the contents of the food because that is addressed in activity 1. Put shortly, activity 1 might be said to be directed to the actions of making a meal and activity 2 the actions then needed to eat (or drink) the meal once made.

32. However, I do not need to travel further down this route because in my judgment the answer to understanding activity 2 is provided for in its own terms and without the need to refer to other of the PIP daily living activities. I am also mindful of travelling further down this particular route when (a) it was not subject of full argument before me, and (b) beyond the need for fresh ingredients, it may be difficult to even read the need for particular diets into activity 1: and see also, albeit in a different statutory context, *AI v Secretary of State for Work and Pensions (DLA)* [2015] UKUT 176 (AAC).

33. I have arrived at the above (clear) conclusion on the basis of what I see as the plain meaning of the relevant statutory words. I have not, therefore, felt the need to have regard to information outside the statutory wording, and in particular what is said in the *PIP Assessment Guide* and the *Government's response to the consultation* on the *Personal Independence Payment assessment criteria and regulations*, dated 13 December 2012 (the "*Government's response*"). The legal basis upon which I could have had regard to either of these documents was unclear. The *PIP Assessment Guide* in particular is no more than the DWP's view of how the regulations once enacted were thought to apply for the benefit of those carrying out the PIP assessments. Its legal worth as a permissible aid to statutory construction therefore seems negligible, if not non-existent. The *Government's response* might be of more relevance, but its place in the legislative journey that led to the PIP Regulations made on 25 February 2013 was not set out. In any event, nothing said in the *Government's response*, even if admissible as an aid to statutory construction, added to or subtracted from what I have concluded is the plain meaning of the relevant statutory words.

34. It follows from what I have said above that if what was said in *SA*, about "[l]iving on soup and coffee, even with the occasional sandwich, cannot be seen as taking nutrition to an acceptable standard", and the later statement in the same paragraph of that decision that the claimant "would still need encouragement to eat properly even if somebody else had done the cooking", was ruling that the nutritious quality of food fell within the scope of "taking nutrition" under activity 2 then I respectfully disagree with it and would decline to follow *SA*. I have had the advantage, which as far as I can tell Judge Mark did not in *SA*, of contested argument, and at an oral hearing, on the meaning of activity 2 and have arrived at my decision with the benefit of that input.

35. I should add, however, that it is not clear to me that the decision in *SA* turned on the above, what I hold to be erroneous view, of the scope of activity 2. I say this for two reasons.

36. First, because, even though Judge Mark found *SA* was entitled to the standard rate of the daily living component of PIP because she satisfied descriptor 2d under the "taking nutrition" activity in the PIP Regulations (as well as other scoring descriptors), it is arguable on one reading of the decision that he did so because *SA* needed to be prompted to carry out the acts of eating even when she had nutritious food in front of her. In other words, the decision turned on *SA* needing to be prompted to eat any food and so the comments in it about taking nutrition to an acceptable standard were *obiter* (that is, not necessary to the decision arrived at).

37. Second, although not expressed as such, it may be that what Judge Mark was concerned with on the facts of the case in front of him was that the claimant, without encouragement and prompting, would not cut food into pieces and then eat but instead mainly existed on liquid foods (soup), and a liquid only diet would not satisfy the statutory definition of "take nutrition" in the PIP scheme. If that is the essential force of the analysis underpinning the decision in *SA*, I would agree with it because the statutory test includes having the mental and physical ability to cut food into pieces and so if a person cannot carry out this act without prompting or supervision then they should score points under activity 2.

38. Applying my analysis of the scope of activity 2 to these two appeals, in my judgment neither First-tier Tribunal erred materially in law in finding that *MM* and *BJ* did not satisfy any of the descriptors under activity 2.

39. Taking *MM*'s case first, the key problem she had was with her digestion and how this affected what she could eat. On her own case as set out in the PIP claim she had no mental health problems and did not need help from another to eat or drink. She was recorded as having told the health care professional – Nurse Akhtar – that she could feed herself independently. On this evidence there was no basis for any award of points under activity 2. The problem *MM* had, and only on occasion, was with the content of what she ate and not with acts involved in eating (or drinking).

40. *BJ*'s case, as I have already highlighted, was argued by Mr Gee on the basis *BJ* met descriptor 2d because he needed to be prompted to eat sensibly and nutritiously. For the reasons given above, those considerations are legally irrelevant to whether descriptor 2d is satisfied. Once that point falls away it seems to me that the First-tier Tribunal was entitled on the evidence before it to conclude that *BJ* was physically able to carry out the acts of eating and drinking encompassed in the definition of "taking nutrition" under the PIP Regulations and did not need to be prompted to carry out those acts. The focus of the evidence presented on his behalf to the First-tier Tribunal was on *BJ* needing to be prompted to prepare meals for himself and "eating properly" (ie eat nutritious food), rather than on his needing to be prompted to eat food when it was in front of him. This together with the evidence he gave to the health care professional – Ms Atkin – that he could prepare himself sandwiches (which I infer showed he had the ability to cut- up food without prompting) and had no problems eating was sufficient to justify the First-tier Tribunal's finding that no point scoring descriptor under activity 2 in Schedule 1 to the PIP Regulations was satisfied. The First-tier

Tribunal therefore did not err materially in law, despite the compressed nature of its reasoning on this issue.

MM's other grounds

41. These were not pursued by Ms Rees in her final written submission on the appeal. Even if they were and are being pursued, they are of no merit for the reasons given by the Secretary of State. In the circumstances, I can take them very shortly.

42. The first other ground concerns whether the First-tier Tribunal adequately addressed and clarified contradictions in the evidence about how *MM* travelled to the PIP assessment. The argument is (or was) that this had a bearing on the cogency of the tribunal's reasoning on *MM*'s ability to mobilise. There is nothing in my judgment in this point. The alleged contradiction is between *MM* telling the tribunal that she attended that assessment with her daughter by bus and then walking for 10–15 minutes from the bus station to get to the assessment centre, and Nurse Akhtar – the health care professional – recording that she had attended the assessment with her son who had driven her to the assessment. The First-tier Tribunal however directly addressed this contradiction but preferred the former explanation about that journey because both *MM* and her daughter (who was at the First-tier Tribunal appeal) told the tribunal this is how the journey occurred and who was present on it. It thus clear that the tribunal did clarify how this journey had occurred.

43. The second other ground concerns the First-tier Tribunal's statement that although she suffered from some anxiety there was no mental health condition for which *MM* was receiving specific treatment. It is argued that this was wrong because in her oral evidence to the tribunal *MM* had said her GP had given her anti-depressants, and she had become distressed in the hearing and had repeatedly said she was accompanied by her son or daughter when going out. It is said that all of this was relevant to whether *MM* need help with planning and following a journey under activity 1 in Part 3 of Schedule 1 to the PIP Regulations.

44. Much of this argument, if it is still being pursued, in truth is just an attempt to reargue the facts. As the Secretary of State points out, *MM*'s GP in his letter of 22 May 2015 did not list *MM* as suffering from any mental health problem, nor had she identified herself as having any mental ill-health in her PIP claim form or at the PIP assessment. In those circumstances the First-tier Tribunal was entitled, in my judgment, as a matter of its expertise and judgment to conclude that at the relevant time *MM* had no mental health condition for which she was receiving specific treatment. Furthermore, this was said by the tribunal in the context of MM not having a mental health condition "that would mean she cannot plan and follow the route of an unfamiliar journey without assistance", and from that context the finding was justified on the evidence and not contradicted by the fact *MM*'s GP gave her anti-depressants. Moreover, on the totality of the evidence, much of which has been touched on in this paragraph, the tribunal was entitled to conclude that *MM* had the mental ability to plan and then follow the route of an unfamiliar journey on her own, and it adequately reasoned out why that was so. Nor was there any real evidence that she needed

prompting to be able to undertake any journey to avoid overwhelming psychological distress to *MM*.

45. The last other argument made concerns "managing toilet needs" under activity 5 in Schedule 1 to the PIP Regulations. The First-tier Tribunal here found that *MM* was able to clean herself afterwards, "although on occasion her husband passes her cleaning material", but this was not for the majority of the time. It is argued that, given in her oral evidence to the tribunal *MM* had said "sometimes when been to toilet, husband helps provide me with cleaning materials", the tribunal had failed to make findings as to how often *MM* needed help with toilet needs.

46. There is nothing in my judgment in this point. The First-tier Tribunal formed the judgment, based on *MM*'s evidence, that the help from her husband did not pass the 50 per cent rule in regulation 7(1) of the PIP Regulations. Given the definition of "toilet needs" in Part 1 of Schedule 1 to the PIP Regulations, the qualifying help from *MM*'s husband had to be in respect of *MM* cleaning herself after opening her bowels or bladder. It is not immediately apparent why on account of her physical condition *MM* could not sometimes get the cleaning material (presumably toilet paper) for herself when on the toilet. Be that as it may, in a context where *MM* had not said anything either in her PIP claim form or to the health care professional about needing to be handed cleaning material in order to clean herself, in my judgment the First-tier Tribunal was entitled on the evidence before it to conclude that this help was in fact provided only occasionally and so did not merit any award of points.

Overall Conclusion

47. For the reasons set out above, both appeals are dismissed and the tribunals' decisions of 1 June 2015 and 8 April 2015, upholding respectively the Secretary of State's decisions of 18 December 2014 and 7 May 2014, stand as the determinative decisions on the appeals.