

R(U) 1/62. The Commissioners held that it was unrealistic to regard teachers as being on holiday for the whole of the vacation and the extent of any holiday should be determined by the number of weeks holiday that they were actually paid. Once it is established that the teacher is still engaged in employment during the school holidays, along with their entitlement to holiday pay, calculating the number of hours they are engaged in work should be relatively straightforward. Where a person works the same number of hours each week when not on holiday, that is the number of hours to be taken into account. If the number of hours fluctuates, the average is taken. Where there is a cycle of work, reg.51(2)(b) (i) stipulates how the average should be calculated. The Commissioners held that in the ordinary case, this meant dividing the total number of hours worked during the terms by 52, less the number of weeks of holiday to which the claimant is entitled, thereby disagreeing with the reasoning in *R(IS) 15/94*.

Retirement Pension

Retirement Pension—Reduction whilst in hospital—Whether in violation of ECHR Protocol 1 (Protection of property)—Art.14 (non discrimination)

CP/5084/2001 (C. Turnbull)
August 8, 2002

The claimant argued that the provision—SSCBA 1992, s.113(2), Social Security (Hospital In-Patients) Regulations 1975 (SI 1975/555) regs 4 and 5—for reducing the rate of RP after she had been in hospital for six weeks deprived her of a possession contrary to Art.1 of Protocol 1 of the ECHR. Having regard to factors derived from the authorities, including the fact that the provision had been in force throughout the time the claimant had been paying contributions to qualify for the pension, the Commissioner concluded that the provision simply determined the nature and amount of the “possession” and did not deprive the claimant of that “possession”. Any deprivation would have fallen within the “public interest” exception as the reduction was intended to reflect savings in home expenditure likely to be made by a person in hospital. The Commissioner also rejected an argument that the provision was discriminatory under Art.14. The chosen comparators—people in hospital with private pensions or people in receipt of state retirement pension who are not in hospital—were not in an analogous situation to that of the claimant. There was also an objective and reasonable justification on the same grounds given for the “public interest” exception.

Working Families' Tax Credit

Working Families' Tax Credit—Calculation of income—Overpayment of salary and the effect on gross earnings

CTC/1655/2001 (J. Mesher)
September 26, 2002

Three payslips were submitted for a claim for WFTC. All three payslips showed the monthly “salary” as £1,040.60 but on two of the slips there was a deduction for an overpayment of salary that occurred in a previous month, so that the gross pay was only £964. The decision maker took the gross pay as £1,040.60 for all three months. The Commissioner considered that in the assessment of the claimant’s normal weekly income the focus is on what is actually received in the assessment period rather than whether it represents what is normal. A contract of employment to a salary is expressed on an annual basis, to be paid monthly. If too much is paid in one month, then the employee’s entitlement in the following months will be correspondingly reduced. Therefore, in most cases there will be little difficulty in distinguishing cases where there is an adjustment of pay to take account of an earlier overpayment from cases of deduction for other purposes. The Commissioner concluded that the remuneration for the two months where deductions were made was £964.60. The Commissioner declined to follow *CCS/4378/2001*, which decided that deductions for an overpayment of salary could not be taken into account when calculating income for a maintenance assessment.

■ Analysis of recent Social Security Commissioners' Decisions

By Desmond Rutledge

Article 6 and the right to a fair hearing

Introduction

The introduction of the HRA 1998 has not brought about any immediate or dramatic change within social security law. In fact, most of the early cases failed on a preliminary point. The claimant could not invoke a Convention right as the relevant determination was made before the 1998 Act came into force: *CSDLA/1019/1999* (*80/01) (noted at (2002) 9 J.S.S.L. D24) (tribunal sitting with medical member), *CI/442/2000* (*88/01) (independence of tribunals) (noted at (2002) 9 J.S.S.L. D76) *CI5/3150/1999* (*93/01) (whether requirement funeral takes place in UK is discriminatory) (noted at (2002) 9

J.S.S.L. D81). There has also been a tendency to deny that the HRA 1998 represented any kind of radical break with the past. The domestic law, we were told, was already very much in line with the Convention approach; e.g. in *CSDLA/1019/1999*, the test for bias was the same as the test for impartiality and in *C28/00/01(IB)(T)(6/01)* the Tribunal of Commissioners took the view that the HRA 1998 did not add anything to the existing requirements on the standard of reasoning in tribunal decisions. This survey of recent decisions shows how the ECHR is starting to have an important influence in cases involving procedural fairness as Commissioners start to explain decisions in the Convention language of "balance between the parties" and "equality of arms" instead of the domestic principles of natural justice, (see A. Gamble, "Natural Justice and Independent Tribunal Service Tribunals" (1998) 5 J.S.S.L. 62 for discussion of the same).

A new approach to procedural fairness

In *CJSA/5100/2001* (noted at (2002) 10. J.S.S.L. D23) Mr Commissioner Jacobs called for a new approach to procedural fairness. He argued that it was desirable for Commissioners to use the introduction of the HRA 1998 as an opportunity to rebase their decisions on procedural fairness in fresh terms. The case concerned an overpayment in which it was alleged that the claimant's wife had failed to declare that she was working full time. The Secretary of State's case turned on the identification of the claimant's wife as the person who had undertaken work. The claimant wanted to challenge the Secretary of State's witness but the tribunal dismissed the case without making any arrangements by which the claimant's assertions could be tested. Mr Commissioner Jacobs held that the tribunal had failed to provide a procedural balance between the parties. Though he could have reached this conclusion under the domestic principles of natural justice, the Commissioner explained his decision in terms of the claimant's Convention right to a fair hearing because although tribunals are familiar with the principles of natural justice, there have been a number of cases in which they have not been applied. The Commissioner suggested that one of the factors contributing towards this trend was the concern in the Appeals Service to avoid adjournments. This had led some tribunals to take an approach that was robust at the expense of fairness. It was therefore desirable that there should be a new approach to procedural fairness based on the language of balance: *Dombo Beheer BV v The Netherlands* (1993) 18 E.H.R.R. 213. The Convention provided fresh criteria by which appropriate cases for adjournment could be identified. The Commissioner referred to one of his own decisions—*CIB/3985/2001*—as an example of a new approach based on the Convention.

In that case, the claimant asserted that the extent of his incapacity had not changed since previous assessments for incapacity. The Secretary of State did not include any earlier assessments in the submissions to the tribunal. Mr Commissioner Jacobs said that the claimant had identified evidence that was potentially relevant but he could not produce this because the other party to the proceedings, the Secretary of State, held it. The only way the claimant could obtain it was by a direction of the tribunal. In those circumstances, the tribunal should have adjourned the hearing for the evidence of the earlier assessment to be produced by the Secretary of State. Its failure to adjourn deprived the claimant of a fair hearing. There have been several decisions in which the claimant's right to a fair hearing has been at issue. In *CH/1618/2002* (see highlighted decisions above) the local authority's decision was based on the application of reg.6 of the Housing Benefit (General) Regulations 1987 (SI 1987/1971) but the appeal tribunal ruled against the claimant on the basis of reg.7. As the claimant had no warning that reg.7 was in issue, Mr Commissioner Jacobs held that this amounted to a breach of the claimant's Convention right to a fair hearing.

Decision *CDLA/2748/2002* concerned a challenge to an interpreter's competence. During the course of the hearing the representative became aware that the interpreter appointed by the tribunal spoke a different dialect of Somali from the claimant. The representative drew this to the attention of the chairman but he took no action. The matter was not mentioned in the record of the hearing. Mr Commissioner Williams held that the general approach to interpretation at tribunal hearings should be guided by the ruling on the scope of Art.6(3) in *Karuninski v Austria* Series A No.168, December 19, 1989 [1991] 13 E.H.R.R. 36. As the tribunal appointed the interpreter, the interpreter was not associated with either party to the appeal. The interpreter was neutral and was in effect part of the tribunal in the same way as the clerk. A failure of interpretation must therefore affect the fairness of the tribunal hearing.

In *CIB/4137/2002*, the claimant's representative wanted to cross-examine the doctor who gave the evidence used by the Secretary of State. Mr Commissioner Williams held that, under Art.6, each party must be afforded a reasonable opportunity to present his case under conditions that do not place them at a disadvantage *vis-à-vis* his opponent. There was no rule of law preventing an examining medical practitioner (EMP) from being summoned to give evidence on their reports. The papers revealed that the decision maker had asked the EMP a question about the report and fairness required that the claimant should also be able to question the EMP about the report. The decision to summon an EMP was for the chairman to make in accordance with reg.43 of the Social Security and Child Support

(Decisions and Appeals) Regulation 1999 (SI 1999/991). However, if a tribunal refused the request and subsequently relied on an EMP report which the claimant challenged as containing discrepancies or weaknesses, then the tribunal might open itself to a challenge as to its fairness.

In *CCS/1925/2002*, one of the parties was directed to produce evidence of their income. It was sent to the Appeals Service some two months before the hearing but it was only given to the other party ten minutes before the hearing started. Mr Commissioner Williams held this rendered the hearing unfair, as the claimant was not told why the papers were not sent in advance of the hearing so that he did not have the normal time to consider and seek advice on the new evidence. The Commissioner said that it should be understood that evidence is only properly produced when it is made available to the other party as well as to the tribunal in proper time before any hearing.

In *CIB/2751/2002*, a decision concerning a request for a domiciliary hearing, Mr Commissioner Williams agreed with the sentiments expressed in *CJA/5100/2001*, observing that unassisted claimants regularly misunderstood what was meant by "natural justice". By contrast, the Convention right to a "fair hearing" was more specific and more accessible to both claimants and lay representatives.

Conflicts of evidence and EMP reports

There have been a number of decisions in which tribunals have rejected medical evidence produced by the claimant's doctor on the generalised basis that the EMP report is more "independent". For example, in *CDLA/1850/2001*, the tribunal rejected the GP's evidence because "those treating a patient would be more sympathetic and less critical than an independent EMP". In *CDLA/925/2002*, (noted at (2002) 9 J.S.L. D153) reports from the claimant's GP and two consultants were dismissed because the "only independent evidence before the tribunal" was the EMP's report. In *CDLA/3814/2002*, the tribunal held that the claimant's evidence was outweighed by the EMP report because it was "expert and objective" and was based on clinical findings. It appears that too many tribunals, when dealing with conflicting expert evidence are relying on what Mr Commissioner Williams in this case characterised as a "meaningless standard form" of wording. These cases are normally analysed in terms of the tribunal's failure to give an adequate explanation for its decision, i.e. some discussion of the contents of the reports is necessary. On that basis it remains unclear why the tribunal in *CIB/3868/2001* rejected a GP's evidence because the EMP's report was "likely to be the more objective, being based on the clinical findings of a doctor who was disinterested in the outcome of the claim"; Mr Commissioner Levenson,

substituting his own decision, was able to accept the same evidence as specific and consistent with the claimant's medical history. It is submitted that an analysis in terms of the principle of equality of arms sheds more light on this issue. As a matter of principle, no special evidential status should be accorded to an EMP report as against any other similar report. As Mr Commissioner Williams observed in *CIB/4137/2002*, if a tribunal were to give any special status to evidence presented by the Secretary of State that was not equally given to evidence prevented by or given by the claimant, it would run foul of the principle of equality of arms under Art.6 of the ECHR.

Hearing in the claimant's absence

There have been two schools of thought on whether a Commissioner can set aside a decision where a tribunal decides a case in the claimant's absence because the relevant notice had been posted to the claimant and therefore deemed to be served, but it subsequently became clear that they wished to attend the hearing. The Commissioner in *R(SB) 19/93* decided he could find the tribunal was in breach of the rule of natural justice but the Commissioner in *R(SB) 55/83* felt that there was nothing intrinsically repellent to natural justice in an enactment providing that proof of the sending of a notice was conclusive, so the only remedy available was by way of the set aside provisions. In *CIB/4533/1999* (*36/01), (noted at (2001) 8 J.S.L. D160) the claimant received notice of the hearing but misread the date so that he attended two days late. In the meantime the appeal was dismissed in his absence. Mr Commissioner Rowland accepted a submission by the Secretary of State that a tribunal is not bound to consider why the claimant was not present once it has established that the notice was sent to the claimant. He held that there had been no breach of the rules of natural justice because the claimant had the opportunity of appearing but failed to do so through his own mistake. This can be contrasted with the approach in *CDLA/5413/1999* in which the claimant asked for an oral hearing but she did not receive the notice of the hearing. Mr Commissioner Williams held that the principles of "equality of arms" were relevant when dealing with the deemed notice provisions. The terms of reg.2 of the reg.43 of the Social Security and Child Support (Decisions and Appeals) Regulation 1999 (SI 1999/991) give a preferential treatment to government departments as compared to all other parties, i.e. notice depends on the day it is received for the departments compared to the day it is posted to the claimant's address. The claimant asked for an oral hearing and she did not receive one. This was through no fault of her own but was due to the operation, against her interests, of a rule of procedure that was not a "fair balance" as between her and the other party to the

appeal, the Secretary of State. The Commissioner concluded that there was not a fair hearing of the case before the decision of the tribunal was made. Generally, tribunals dealing with cases where claimants have requested an oral hearing but do not attend must have in mind that this may be because they did not receive the notice and this of itself would normally be a reason to adjourn.

The impartiality of the decision making process

In *CIB/4137/2001*, the claimant argued that the Secretary of State was not independent, and his initial decision was not in compliance with Art.6 of the Convention. Mr Commissioner Williams held that it was wrong to argue that the Secretary of State was bound by Art.6 of ECHR. There was no "contestation" (or dispute over a civil right) until the claimant appealed against the decision: *Zander v Sweden* (1994) 18 E.H.R.R. 175. In a social security case, the Secretary of State can make a decision to award or stop benefit on any basis consistent with law and on any evidence that he considers proper to use. At this level there was no need for a "fair hearing" or indeed any hearing. It was the duty of a tribunal to provide the fair hearing when asked to deal with a dispute about such a decision.

The issue was raised in a different context in *CF/3565/2001*, (noted at (2002) 9 J.S.S.L. D148). The Secretary of State argued that a tribunal had no jurisdiction to consider his decision not to recognise a course as one of education under s.142(1)(c) of the SSCBA 1992. Mr Commissioner Levenson held that the Secretary of State was not an independent and impartial tribunal in the matter because the way in which he exercised the discretion under s.142(1)(c) of the 1992 Act had implications for his Departmental budget and public expenditure under s.141. However, the House of Lords in *R. v Secretary of State for the Environment Ex p. Holding and Barnes plc* [2001] U.K.H.L. 23, [2001] 2 All E.R. 929, whilst accepting that the Secretary of State was not an independent and impartial tribunal in individual planning cases, held that the availability of judicial review provided sufficient procedural safeguards to make the relevant provisions and procedures compatible with Art.6(1). Applying that approach, the Commissioner held that any misinterpretation of the legislation by the Secretary of State could be challenged on judicial review and so there was no basis for him to interfere with the regulation excluding the jurisdiction of the tribunal and the Commissioner. If the Secretary of State went on to apply the legislation properly and still reached the same conclusion on the facts, then, the Commissioner added, the question might arise at that stage whether there was entitlement to a hearing by an independent and impartial tribunal. (On whether the Commissioners' practice on

applications for leave to appeal is unfair under Art.6 see highlighted decision *CDLA/3432/2001* noted above.)

In *CDLA/4977/2001*, concerning the proper approach to a defective supersession, the claimant used the equality of arms aspect of a fair hearing to argue that as the regulations for making a valid appeal (Social Security and Child Support (Decisions and Appeals) Regulations 1999, reg.33) imposed formalistic requirements upon the appellant, the Secretary of State should be expected to meet equally stringent requirements in order for there to be a valid supersession. Mr Commissioner Jacobs rejected the submission because he found that the requirements for making an appeal were the basic minimum and therefore appropriate to the subject matter and the appellant's likely degree of understanding of the legal issues.

In *CIB/2620/2000*, the claimant suffered from dysmenorrhoea (heavy periods) and it was submitted that the hearing was unfair because the lack of a female member of the tribunal was in breach of Art.6. The appeal was allowed on other grounds but Mr Commissioner Bano observed that the repeal of s.46(1) of the SSA 1992 had removed the requirement to include a member of the same sex as the claimant. Nevertheless, there will be exceptional cases where the absence of a tribunal member of the same sex as the claimant may inhibit the presentation or understanding of the claimant's case to such an extent that there will be a breach of Art.6 if the tribunal is not reconstituted. Perhaps the most well known case in this area is the Scottish Tribunal of Commissioners' decision in *CSDLA/1019/1999* (*80/01, or *Gillies*) (noted at (2002) 9 J.S.S.L. D24) on whether medical members who prepared reports used by the Department to assess entitlement to benefits should also be sitting on appeal tribunals assessing entitlement to benefit. This was one of the first test cases in which the independence and impartiality of an appeal tribunal was challenged under Art.6 of the ECHR; but as the ECHR could not be directly invoked under the HRA 1998, the long-term significance of the decision remains uncertain. The Secretary of State argued that the domestic test for objective bias provided the same protection to that given under the Convention so there was no need to look at the HRA 1998. The Commissioners decided that the claimant could not invoke a Convention right under Art.6 as the tribunal hearing took place before the provisions of the HRA 1998 came into force. Nonetheless, the Convention did have an indirect impact on the outcome of the case as the Court of Appeal felt it had to modify the domestic test for bias after a consideration of the Convention cases on Art.6: *Director General of Fair Trading v Proprietary Association of Great Britain* [2000] E.W.C.A. Civ. 350. The test of "real danger" was held to be too close to "actual bias" and was replaced by the test of whether a fair-minded lay observer would have had "an apprehension of bias", regardless of any

actual bias. As a result, the Commissioners did not follow the approach taken in *CDLA/22/94*, in which Mr Commissioner Mesher held there was no real danger of bias from the presence on a disability appeal tribunal of a doctor who also held an appointment as an "adjudication medical practitioner" to determine disablement questions. More generally, the Commissioners took the view that, as the application of the common law test for bias was not materially different from the test of impartiality under Art.6, so the law to be applied was "very much in line with the Convention". While accepting that the Benefits Agency was a party to the appeal, the Commissioners rejected any suggestion that an approved doctor was therefore, in effect, a "Benefits Agency doctor". The reports of approved doctors could be relied upon as independent reports. The Commissioners allowed the claimant's appeal on the ground that there could be an apprehension of bias. Where a doctor who sat as a medical member on an appeal tribunal was also currently producing EMP reports in the assessment of benefit, a lay person might reasonably suspect that the medical member would look more favourably on reports by EMPs when assessing conflicts of evidence. The attempt to issue a general direction that any medical member who had produced an EMP report within the last year should be prevented from sitting on tribunals as a medical member was abandoned when challenged by the Secretary of State. The Appeals Service took the view that there is no need to change their practice as the decision was confined to the particular doctor in the case (see Editorial (2001) 8 J.S.S.L. 139) and the onus fell on the individual claimant to raise the issue. The Secretary of State has been granted leave to appeal to the Court of Session, so the long-term significance of the decision remains unclear.

An indication of how a challenge to the independence of the first-tier appeal tribunals could be mounted is provided by some observations made by Mr Commissioner Jacobs in the course of *CI/4421/2000* (*88/01, noted in (2002) 9 J.S.S.L. D76). The claimant alleged that the appeal tribunal created by SSA 1998 was not independent under Art.6(1). The HRA 1998 could not apply because the hearing took place before the Act came into force so the issue was raised in terms of the Commissioner's jurisdiction to decide the case himself rather than remitting the case back to a tribunal under s.14(8)(a)(ii) of the SSA 1998. The Commissioner decided against the claimant on this point and leave to the Court of Appeal was granted but not pursued. We are left with some *obiter* remarks on the legislation governing appeals and the various ways in which the Secretary of State might become involved in an appeal. The Commissioner pointed to the combination of three factors. First, there were matters of practice, such as the making of an appeal to the Department itself rather than to the tribunal and the reconsideration process, that can deter a claimant from pursuing an

appeal. Secondly, some provisions of delegated legislation are weighted against the claimant and in favour of the Department, such as the rules on service, which are beneficial to the Department. Thirdly, the SSA 1998 includes provisions that are also weighted against the claimant, such as the power delegated to the Department for Work and Pensions to make procedural rules for the tribunal and for the Secretary of State, in so-called "look-alike appeals" following test cases, to dictate to an appeal tribunal (and a Commissioner) the decision to be given on an appeal. When taken together, this might suggest that the appeal tribunal was not independent from the Secretary of State. On a more cautious note, Commissioner Rowland in *CA/264/2001*, opined that if tribunals are not as independent of the Secretary of State as they might be, and if an appeal to a Commissioner, who is independent, did not amount to a sufficient safeguard, nevertheless, a Commissioner had no power to ignore primary legislation or declare the SSA 1998 incompatible with the Convention. It remains to be seen whether these points will be pursued in further appeals.

In *CIS/540/02*, Mr Commissioner Howell came to the conclusion that regulations purporting to exclude claimants' appeal rights were contrary to Art.6 and should be treated as having no effect. The Secretary of State contended that appeal tribunals created under the SSA 1998 no longer had any jurisdiction to decide whether a claim was validly made under reg.4 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) because these questions were non-appealable under reg.27 or para.5 of Sch.2 to the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991). The Commissioner noted that compliance with the requirements in reg.4 of the 1987 Regulations was an essential condition of entitlement and that the type of decision making involved was predominately fact-finding rather than one involving administrative discretion. The Commissioner concluded that treating these questions as non-appealable meant the non-independent executive body could exclude a material issue from ever being referred to a independent fact finding body so that the protection of any civil rights that depended on that issue was lost. The Commissioner said his decision should not be viewed as "earth-shaking"; he was merely restoring the scope of claimants appeal right to the pre-1998 position. This does not change the fact that the human rights challenge was successful where the *ultra vires* challenge available under the domestic law failed.

Delay

CG/2119/2001 concerned an overpayment. The relevant events took place 18 years previously. The claimant submitted that the delay from October 1987 to November 1999 in making a decision to recover the overpayment

resulted in a breach of the right to a fair hearing under Art.6 of the ECHR. Mr Commissioner Bano rejected this argument, holding that there had been no determination of a civil right or obligation ("contestation") within the scope of Art.6 until the claimant challenged the recoverability decision by appealing to a tribunal: *Feldbrugge v The Netherlands* (1986) 8 E.H.R.R. 425. The claimant's appeal was made in April 2000 and the appeal was heard in December 2000; the statement of reasons was issued in February 2001. A period of approximately 10 months to determine the claimant's appeal was not unreasonable. In *CIS/1077/1999* and *CIS/6608/1999* (*3/01) (noted in (2001) 8 J.S.S.L. D163) the potential delay was far longer. The substantive issue concerned entitlement to IS where a sponsored immigrant had been granted leave to re-enter the United Kingdom. The appeal was dismissed but the Commissioner was asked to consider whether a Commissioner had jurisdiction to award damages for a claimant whose case has been delayed to the point where there is a breach of Art.6(1). With some misgiving, Mr Commissioner Jacobs reserved the issue pending the outcome of any further appeal.

Legal Representation

The right for a claimant to be accompanied and represented by another person at an oral hearing is an unfettered one under reg.49 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991); see Mr Commissioner Levenson in *CS/1753/2000* (*23/01) (McKenzie friend forbidden to speak) (noted in (2001) 8 J.S.S.L. D168) and Mr Commissioner Mesher in *CDLA/3965/2001* (authorised representative excluded from an appeal hearing). However, when in *CJSA/5100/2001*, a claimant complained that not being provided with legal representation at tribunal violated his human rights, Mr Commissioner Williams decided that he had no power to appoint a legal representative simply on the basis of Art.6(1). It did not guarantee legal assistance or representation in civil proceedings except for those cases where it was indispensable for an effective access to court: *Airey v Ireland* (No.1) (A/32) (1970-80) E.H.R.R. 305, ECHR. As a result, a right to legal representation was not an inherent part of the right to a fair hearing in every social security case. Presumably this means that legal representation should be provided if the conditions in *Airey* are met? According to the Commissioners' response to the Leggatt Report the conditions will not arise in hearings before tribunals. Whilst acknowledging the significant impact representation makes on the outcome of appeals at the first-tier level, their response goes on to state that as "points of law are resolved on appeal by Commissioners, we doubt whether there would be any cases before the first-tier tribunal in which public funding would be appropriate". The Response does agree

that public funding should be available for cases before the Commissioners but this should only be for "exceptional cases". Given the complexity of the legislation to be applied, (one provision was described as a "masterpiece of obscurity" in *CP/5257/199* (*71/01)) and the fact that the Secretary of State is represented throughout, it is not clear how an unrepresented claimant can be expected to participate effectively in proceedings before a Commissioner without some kind of legal assistance. The force of these arguments has now been accepted in Scotland, since from December 2002 civil legal aid (via ABWOR) became available in all proceedings before the Scottish Commissioners.