RECENT DEVELOPMENTS IN SOCIAL SECURITY CASE LAW

FEBRUARY 2007

DISABILITY AND INCAPACITY

DISABILITY LIVING ALLOWANCE

Prompting and thinking

The appeal in CSDLA/133/2005 concerned a girl who was eight years old at the time of her claim for DLA. She was described by one consultant "as having significant learning difficulties with prominent language processing disorder and associated behavioural problems". The appeal tribunal held she was not entitled to the care component of DLA. It noted that she received help to keep her motivated in respect of her lessons and to integrate socially with her classmates, but found that this did not constitute attention in connection with a bodily function because "communication" and "social integration" were activities rather than bodily functions. In so doing it purported to follow R(DLA)3/03. A further appeal was heard by a Tribunal of Commissioners, which allowed the appeal.

In the view of the Tribunal of Commissioners functions of the brain can be bodily functions. That was put beyond doubt by Lord Slynn's speech in *Cockburn –v- Chief Adjudication Officer* [1997] 1 WLR 799, where he referred to bodily functions covering the operation of the senses and the brains instructions to other parts of the body. In any event, even without the benefit of this binding authority, the proposition was clearly correct. A person's disability is defined in terms of his or her physical or *mental* power to do things (see paragraphs 34-35 of R(DLA)3/06). Accordingly entitlement to the care component of DLA is not limited to some types of disability alone, and so disability related to a deficit in the functioning of the brain or mind was not to be excluded. Moreover, as the attention which is reasonably required must be related to the functional deficiency – because of the words "in connection with" – the only reasonable construction of "bodily functions" was that it includes functions of the brain.

Further, prompting and motivating are capable of constituting attention in connection with an impaired bodily function. "Attention" here, as the case-law makes plain, is a personal service of an active nature which involves care, consideration and vigilance for the person attended: a service of a close and intimate nature. It was not helpful to add to this any further test of whether the personal service required was of a high degree. Simple apathy will not be enough to qualify for DLA, but where a claimant suffers from a condition which has as a component a lack of motivation which exhortation from another is able to overcome, this is capable of constituting attention with bodily functions.

The Tribunal of Commissioners then addressed was whether 'communication' and 'social integration' could count as bodily functions. The appeal tribunal had said they were not because they were, instead, activities. However, bodily functions could be the normal action of *sets* of organs of the body acting together, thus giving rise to a complex web of functionality which could amount to or involve a bodily function or functions. Accordingly, distinguishing between a bodily function (as the action of an organ of the body) and an activity was neither helpful nor determinative in all cases.

In some cases, for example where the disability is a limit on walking, it may not matter whether the bodily function is described as the movement of the legs (i.e. the action of an organ of the body) or walking (i.e. an activity). However, in other cases addressing the bodily function or functions may require care – and in borderline cases may need the individual bodily function to be unbundled - because of the need to identify what attention is reasonably required in connection with the bodily function or functions. The reason why attention in connection with cooking and shopping does not count is not because both are activities rather than bodily functions in themselves, because properly analysed each activity involves the use of a number of bodily functions such as sight and movement of the limbs. Rather, any attention given does not count because it does not meet the intimate and personal test.

Applying these principles to communication and social integration, the Tribunal of Commissioners said that attention in connection with both could amount to attention in connection with a bodily function.

R(DLA)3/03 did not hold that communication was incapable of amounting to a bodily function. *Cockburn* had expressly said that communication was capable of being a bodily function, but even if it is unhelpful to consider it as a single "bodily function" it is possible to unbundle the functions of individual organs which make up the activity of communication and identify which, if any, of those functions are deficient and reasonably require attention.

A similar approach must be taken to "social integration". *Cockburn* suggested that some form of social interaction may amount to a complex bodily function. Even if that is the case, however, in some cases the functions may require "unbundling" so that the nature and degree of attention reasonably required to address the relevant functional deficit can be assessed: but in all cases to qualify as "attention" the activity will need to meet the test of being sufficiently close and intimate.

Higher rate mobility – exertion required to walk

CDLA/3941/2005 holds that it is an error of law to try and judge serious deterioration in health by reference to the risk of death dealt with in first limb of regulation 12(1)(a)(iii) of the Social Security (Disability Living Allowance) Regulations 1991. Moreover, "health" as used in regulation 12(1)(a)(iii) means no more than the general physical well being of the claimant, but it does not include mental health. Any exertion of walking which gives rise to repeated invasive surgery, repeated general anaesthetics, repeated periods of restricted mobility and a knee operation sooner rather than later leads to a "serious deterioration in health".

Rules for terminally ill

R(DLA)7/06 decides, contrary to the view in CDLA/1804/1999, that section 73(9) and (12) of the SSCBA do not provide that a terminally ill person is to be treated as satisfying the conditions of entitlement to the higher rate of the mobility component for the rest of his or her life. Such an approach would rob section 73(9)(b) of the SSCBA of any effective content in such cases. Therefore, even a terminally ill claimant will only be entitled to an award of the mobility component if, apart from the 3 month qualifying period, he or she would be entitled to it if he or she were not terminally ill.

Migraines and mobility

The decision in **CDLA/1639/2006** examined the effect of migraines on entitlement to the higher rate mobility component. It holds that the effect of migraines on a claimant's vision has to be disregarded when considering the higher rate mobility component, as problems with vision relate to the direction of walking and not the act of walking itself. However, the effect of the migraines on a claimant's balance is relevant, as that relates to the "manner" of walking. On this the Commissioner emphasised that it does not matter that the loss of balance arises before the claimant begins to walk and persists during the time that he or she is walking: following R(DLA)4/04 it is not necessary that the balance problems arise or get worse because of the act of walking; it is sufficient that the balance problem impedes the physical act of walking. However, the effects of section 73(8) of the SSCBA 1992 (benefiting from enhanced facilities for locomotion) must also be taken into account in such cases. The impediment caused to walking in such a case would arise from the migraines but on the evidence in this case when a migraine came on the claimant was often confined to bed. In those situations although the mobility may be undoubtedly restricted (and severely), the claimant arguably could not benefit from enhanced facilities for locomotion as he couldn't go anywhere (by foot or otherwise).

Caution on 'Waddell signs'

In an appeal in respect of the mobility component the appeal tribunal in **CDLA/2747/2006**had found that "when being examined by the [EMP] the Appellant had responded to certain tests in an inappropriate manner suggesting some exaggeration of symptoms on his part.'. The Commissioner set aside their decision for this, and other, reasons. On this issue the Commissioner said tests such as those recorded by the examining medical practitioner were sometimes known as "Waddell signs" (named after Professor Gordon Waddell). In the Commissioner's view ,their significance was often misunderstood by tribunals. He gave as an example the tribunal's finding here that these signs show evidence of exaggeration.

He went on to note that in 1998 Professor Waddell had revisited his work on non-organic signs along with Dr Chris Main. He summarised their conclusions as follows:

- It cannot be assumed without further evidence that the behavioural signs are de facto to be viewed with suspicion.
- Over-interpretation of individual signs is common.
- Assessment of behavioural signs is not a complete psychological assessment.
- Clear evidence of behavioural responses indicates that the patient does not have a straightforward physical problem; an orthopaedic intervention may be required. In such cases, pain management as well as surgery may be necessary.
- An important significant minority of patients become chronically incapacitated after injury, regardless of whether litigation is involved.
- The most serious misuse and misinterpretation of behavioural signs has occurred in medicolegal context; they do not represent a comprehensive

psychological evaluation and formulations such as "functional overlay" should not be taken as definitive.

- The signs should only be described as "behavioural responses to examination" and should be understood as such.

- The signs are a form of communication between the patient and doctor and are therefore influenced by expectations (both by the patient and the doctor).

- The signs are not a reason to deny appropriate physical treatment. Some patients may require both physical management and physical pathology and more careful management of psycho social behavioural aspects of their illness.

- The behavioural signs are not on their own a test of credibility.

The Commissioner concluded by saying that a claimant who exhibits "Waddell signs" may be exaggerating. However, the mere presence of those signs is not conclusive of the matter. They may be consistent with the claimant's disablement being a mixture of physical and mental components, and they have to be viewed in the context of the evidence as a whole. The tribunal here had failed to do that.

INCAPACITY FOR WORK

Judging whether SSAC misled

A Tribunal of Commissioners was convened in **CSIB/803/2005 and CSIB/818/2005** to consider whether, in light of the Court of Appeal's judgment in *Howker* (R(IB)3/03), the January 1997 amendment to Activity 14 of the personal capability assessment (PCA), that relates to 'remaining conscious', was valid. The January 1997 amendment had removed the words "other than for normal periods of sleep" and replaced them with "without having epileptic or similar seizures during waking moments". R(IB)3/04 had decided that the amending words were *ultra vires*.

However, the approach to the question of invalidity in R(IB)3/04 was wrong. The correct approach was to look at all the material placed before the Social Security Advisory Committee ("the SSAC") as the basis for the amendment and consider whether the overall effect was misleading. What then needs to be shown on the basis of all this relevant information – in order to show that an amendment is invalid - is that there is a real possibility that the information might have misled the SSAC as to the effect the proposed regulation would have and that there is a real possibility that, had the SSAC been aware of its true effect, it would have wished to have the proposed regulation formally referred to it. It was impossible to say here that the Secretary of State had misled the SSAC as to the proposed change to Activity 14.

As to the wording of Activity 14, the Commissioners held that a person has an episode of "altered consciousness" when they are no longer properly aware of their surroundings or their condition, so as to be incapable of any deliberate act (CSIB/14/1996 was thus wrongly decided for implying that a claimant suffering from severe headaches which caused him to lie might be considered to suffer from altered consciousness. Moreover, "seizures" are involuntary, overwhelming and sudden, and

the phrase "similar seizures" is to be construed by reference to the similarity of the *effects* (rather than the cause or mechanism) of the seizures to epileptic seizures.

Use of x-ray evidence

In **R(IB)/2/06**, the Commissioner held that consideration of x-ray evidence by an appeal tribunal did not constitute a physical examination (and so was not unlawful). Neither was a claimant prevented from submitting such evidence. However, a tribunal may adjourn because they do not feel properly able to consider such evidence without expertise. Further, where they do lack such knowledge but fail to adjourn in circumstances where the claimant reasonably believed they would be able to understand the x-rays, that may constitute a breach of the rules of natural justice.

Independence of examining doctors

In **CSIB/502/2006** the Commissioner held that it is inherently implausible that an examining doctor would falsely claim to have carried out an examination (ie, in a situation where he had not carried out an examination). The decision of the House of Lords in *Gillies* (R(DLA 5/06) had confirmed that examining medical doctors are independent.

CLAIMS

Proving date of claim when sent by post
In ***Levy –v- Secretary of State for Work and Pensions*** **[2006] EWCA Civ 890, 24th May 2006, R(G) 2/06 (CA)** Mrs Levy had been widowed on the 23rd May 2000. On the 4th of July that year she posted to the Glasgow Benefits Centre a claim form for widow's benefit. The claim form never reached that office. As Mrs Levy was very ill at the time, she made no enquiries as to what had happened to her claim, and it was not until October 2001 that she sent a further claim for widow's benefit. That was received by the relevant DWP office and benefit awarded on it from that date.

Regulation 6(1)(a) of the Social Security (Claims and Payments) Regulations 1987 provides that a claim is made on the date on which it is received in an appropriate office. The issue was whether the claim could be treated as having been made by the original claim sent on 4 July 2000 or by the later claim that was received on 29 October 2001. The Court of Appeal held the latter.

Regulation 6(1) was not *ultra vires* the Social Security Administration Act 1992. This was either because it was empowered by section 5(1) of that Act or, even if that was wrong, because section 189(5) of the same Act empowered its making. Further, section 7 of the Interpretation Act 1978 had no application to regulation 6(1) at all as that regulation was not concerned with serving documents by post, rather it was concerned with that date the claim was made. Even if that was wrong, however, and section 7 of the Interpretation Act 1978 could in theory apply, its application was here ousted because of the plain contrary intention evidenced in the wording of regulation 6(1) that a claim was made on the date it was received. Seeking to craft on here notions of deemed receipt made no sense where regulation 6(1) was plainly referring to the date on which the claim form was *actually* received in the DWP office.

Comment: It would seem, however, that if what is in play is a rule in respect of documents sent by the Secretary of State, that rule may treat the document as having been received on the day it was posted, whether in fact it is received or not (see *Secretary of State for Work and Pensions –v- Roach* [2006] EWCA Civ 1746, 20th December 2006, unreported (CA), commenting on regulation 2 of the Child Support (Maintenance Calculation Procedure) Regulations 2000, which arguably would apply equally to regulation 2(b) of the Decisions and Appeal Regulations 1999).

OVERPAYMENTS

Whether partner of claimant can fail to disclose

The claimant's partner in **CIS/1996/2006** had worked without her knowledge, with the result that she had been overpaid income support. Her partner later admitted lying about whether he was working and admitted that he was aware that his working would have an affect on the income support which his partner had claimed for them as a couple. However, it was accepted that he had never told his partner that he was working and that she didn't know he was working.

On these facts the Commissioner held that the overpayment was not recoverable from the claimant, or her partner. As the claimant never knew the relevant material fact (about her partner working) it was common ground that she could not have failed to disclose. Moreover, any attempt to pin failure to disclose on her partner, despite his clearly knowing and concealing his working and knowing what affect his work would, have on their income, could not succeed post the Court of Appeal's decision in *B –v- Secretary of State for Work and Pensions* [2005] 1 WLR 3796 (R(IS)9/06). Following that decision, for the partner to be guilty of any failure to disclose he had to be under a legal duty to disclose. But regulation 32(1B) of the Social Security (Claims and Payments) Regulations1987 placed no duty on him as the partner of the claimant to report or disclose any change in his circumstances.

Accordingly, notwithstanding that disclosure of his working could reasonably have been expected of the claimant's partner, the decision in *B* meant that the overpayment was not and could not be recoverable from him. Anything said in CIS/674/1994 about the possible liability of partners of claimants could no longer stand in the light of *B*.

In coming to this conclusion the Commissioner commented:

> *"It may be debated whether it was wise (or even necessary: cf. [R(A) 2/96]) for the Tribunal of Commissioners and the Court of Appeal in [B] to throw overboard the previous law and practice on failure of disclosure under section 71 to the extent they did, and with such scant regard for the learning and experience of those who evolved and applied it over so many years; but there is no denying it has been done".*

Disclosure to same office

The decision in **CIS/4422/2002** follows *CIS/1887/2002* in holding that where an overpayment arises because of a change in one DWP benefit affecting another DWP benefit and those two benefits are administered by the same DWP office, there will be no failure by the claimant to disclose that change unless either (i) the Secretary of State can show that the claimant had been required to give notification of the change to the separate section of the office dealing with the other benefit, or (ii) evidence shows that the two sections would in fact appear to any reasonable person as two different offices (albeit at the same address or in the same building). The Commissioner ended by commenting:-

> *"now that the question appears to be simply whether there has been a literal non-compliance with the requirements of some regulation, the decision in **B. v Secretary of State** seems to admit no room for or relevance in any inquiry into*

whether or when a reasonable person in the position of the claimant should have realised a mistake had been made in his favour and ought to have done something to draw it to the attention of the department. It follows that there can be no question here of any recovery under section 71 based on what would formerly have been considered the continuing duty on a benefit recipient to make the disclosures reasonably to be expected of him in such circumstances: R(SB) 54/83 paragraph 18. I cannot myself regard that as sensible but the Secretary of State must live with the fruits of his victory in ***B.***"

DECISIONS AND APPEALS

Decision making

Supersession date in attendance allowance cases where residence in GB lost
The decision of the Commissioner in **CA /2650/2006** holds that the date from which a supersession can apply in respect of attendance allowance where the change in circumstance is the claimant's loss of his or her residence in Great Britain is only the date of the supersession decision and cannot be the date of the loss of residence if earlier. This is because the excepting provisions in regulations 7 and 7A(l)(a) of the DMA Regs 1999 only extend to the disability related conditions of entitlement arising under section 64. Accordingly, they do not extend to determinations relating to residence and presence (under section 64(1) SSCBA). Therefore, a supersession decision to remove entitlement based on the person no longer being resident in the GB can only take effect from the date of the supersesion decision, even if the person ceased to be resident prior to this date.

Appeal Tribunals

Whether right of appeal against tribunal chair's decision
In **CIS/1363/2005** the decision which was appealed by the claimant was one to stop paying him by order book. The appeal was struck put on the basis that it was outside the tribunal's jurisdiction. In another of the appeals before the Commissioner the legally qualified panel had refused to extend time for appealing because the appeal had been brought more than a year late. In a third case an appeal against suspension of jobseeker's allowance had been struck out.

The Commissioner decided that, in principle, an appeal can lie to the Commissioners from the decision of a legally qualified panel member on either a strike out decision or a decision refusing to extend time for appealing. The implication of section 12(2) of the Social Security Act 1998 (SSA) is that Parliament intended that these types of decisions would be made (or be treated as having been made) by an appeal tribunal. Moreover, it could not be right that the general right of appeal to an appeal tribunal conferred by the SSA could be undermined by the Secretary of State providing, without express authority, that appeals may be disposed of other than by the appeal tribunal. Absent such authority in the SSA, all decisions made by legally qualified panel members must, in principle, be regarded as decisions of appeal tribunals, and that remains the case even where the substantive appeal was to be heard by a tribunal with other members among its constitution.

However, it did not follow that all such decisions are appealable under section 14(1) of the SSA. The key, following *Rickards –v- Rickards* [1990] Fam 194, was whether the decision in question acted to finally dispose of the appeal. That was the case with both strike out decisions and decisions refusing to extend time for appealing to the appeal tribunals, and so each decision of the legally qualified panel was a decision of an appeal tribunal which was capable of being appealed under section 14(1) of the SSA 1998. In most cases, however, leave will seldom be given because the scope of

the issues to be considered in such cases was limited so the scope for errors of law in making such decisions was correspondingly limited.

Comment: It is understood that the Secretary of State is to seek to challenge this decision.

Tribunal's observations of appellant

R(DLA) 8/06 points out that although tribunals should be wary about placing undue weight on observations of a claimant on the day of the hearing, and should in general provide an appellant with the opportunity of commenting on any inferences the tribunal may be thinking of drawing from those observations, this need not apply in every case. The touchstone is that observations should only be given weight if they are both relevant and reliable. Accordingly, where an observation merely confirms what the tribunal would have decided in any event a failure to invite comment on it will not render the decision erroneous in law, as long as the reasons make this plain. However, if the reasons do not identify the significance (or lack of it) attached to the observations then it is likely to be assumed that they were significant and a failure to have put them to the appellant may render the tribunal's decision erroneous in law. Even here, however, the context is important. In this case the observation of the claimant coming into the tribunal room (though not leaving it) had been put to him and the significance of them, though not stated to the claimant, would have been obvious to him, since his case was based on his being in pain and exhaustion.

Criminal and appeal proceedings arising out of same facts

R(IS)1/07 holds that there is no rule that criminal proceedings should take precedence over an appeal hearing such that latter should always be adjourned until the former is concluded. Whether an appeal should be adjourned in these circumstances is a discretionary decision of the tribunal and Commissioners will not interfere unless the appeal tribunal erred in law in its approach or arrived at a perverse decision. Here, cogent reasons had been given for the refusal to adjourn the appeal, namely (a) entitlement was a different issue to whether the claimant had dishonestly falsified a document or failed to report a change of circumstances, (b) dishonesty was not relevant to entitlement or to recoverability under the social security and housing benefit provisions, (c) the judge at the criminal trial would be able to withhold from the jury any evidence from the appeals that would be unfairly prejudicial and therefore nothing decided by the tribunal would undermine the presumption of innocence in the criminal trial, (d) had he attended the appeal hearing the claimant would have been entitled to decline to answer any question from the tribunal if the answers may have tended to incriminate him, (e) it would be inappropriate to adjourn solely to give the claimant the tactical advantage of surprise in the criminal proceedings, and (f) it could be useful for the purposes of any necessary mitigation in the criminal proceedings that the matters before the tribunal had already been resolved.

Whether obliged to substitute another 'outcome' decision

In **CIS/624/2006** a Tribunal of Commissioners was convened to consider whether when allowing an appeal against an 'outcome' decision an appeal tribunal must substitute another 'outcome' decision. The dispute in CIS/624/2006 rested on whether the claimant had notional or actual capital, or no capital at all. The claims for benefit in the appeal had a very torturous history, however in essence the issue boiled down

to whether when an appeal tribunal had "allowed" a claimant's appeal against a notional capital decision it had in fact decided all entitlement questions, here in the context of other facts which arguably gave rise to the claimant separately having actual capital. The Commissioners decided that the tribunal had not in fact made any decision on actual capital. However, despite this, did the "appeal allowed" in the decision notice mean that the tribunal had awarded, or at least had purported to award benefit. That in turn depended on whether an appeal tribunal hearing an appeal against an 'outcome decision' (here, the no entitlement decision based on the notional capital decision) is required to make an outcome decision either awarding or refusing benefit.

Some support for the view that a tribunal in such a situation must always make an outcome decision was provided by CH/2673/2003, but in that case it was unclear if there were any other factual issues to be resolved which could affect entitlement. However, as the Tribunal of Commissioners in R(IB)2/04 had pointed out, section 12 of the SSA 1998 is silent as to an appeal tribunal's powers: there is thus no express requirement on a tribunal to substitute one outcome decision for another nor is there any express prohibition on remitting a case to the decision-maker.

Section 12(8)(a) of the SSA 1998 provides that, in deciding an appeal, a tribunal need not consider any issue that is not raised by the appeal. The implication is that a tribunal must consider every issue that *is* raised by the appeal and, as a tribunal has an inquisitorial or investigative function, that includes any issue that is "clearly apparent from the evidence" (*Mongan v. Department for Social Development* [2005] NICA 16 (reported as R3/05 (DLA)). Therefore, what a tribunal must not do is ignore an issue that is clearly apparent from the evidence. However, it does not follow that the tribunal must make a *decision* on *every* issue raised by the appeal if there is a more appropriate way of dealing with one or more issues. The Commissioners went on:-

> *"When an appeal against an outcome decision raises one issue on which the appeal is allowed but it is necessary to deal with a further issue before another outcome decision is substituted, a tribunal may set aside the original outcome decision without substituting another outcome decision, provided it deals with the original issue raised by the appeal and substitutes a decision on that issue.*
>
> *The Secretary of State must then consider the new issue and decide what outcome decision to give. In that outcome decision, he must give effect to the tribunal's decision on the original issue unless, at the time he makes the outcome decision, he is satisfied that there are grounds on which to supersede the tribunal's decision so as, for instance, to take account of any changes of circumstances that have occurred since he made the decision that was the subject of the appeal to the tribunal.*
>
> *Because his decision is an outcome decision, the claimant will have a right of appeal against it."*

At the request of the Secretary of State, the Tribunal of Commissioners concluded by giving the following guidance -

- in order to assist tribunals, the Secretary of State's submission to a tribunal should indicate whether it is considered that, if the appeal is allowed, there are any outstanding issues that need further consideration and whether the Secretary of State wishes the tribunal to deal with them;

- where a tribunal, having dealt with the issues originally raised in an appeal, is not able immediately to give an outcome decision, it must decide whether to adjourn or whether to remit the question of entitlement to the Secretary of State if he would be in a better position to decide the issue and to seek further information from the claimant;

- the tribunal's decision, as recorded on the decision notice issued at the conclusion of the hearing, should explicitly record what has and has not been decided and in particular, should make it absolutely clear whether the tribunal has made an outcome decision (subject, in some cases, to the precise amount being calculated by the Secretary of State) or has remitted the final decision on entitlement to the Secretary of State.

HUMAN RIGHTS and EU LAW

Pension age and sex discrimination

In three cases the European Court of Human Rights (ECtHR) has followed *Stec* (see last issue) in rejecting complaints that had as a common feature the linking of benefit entitlement to the differential pensionable age for men and women. The justification for having a differential pensionable itself had been conclusively answered in *Stec*.

In ***Barrow –v- United Kingdom*** **(Application No 42735/02), 22nd August 2006, unreported (ECtHR)**, Mrs Barrow complained that the UK rule which prevented her from continuing to get invalidity benefit beyond the age of 60 was contrary to her rights under Article 1 of the Protocol 1 when read together with Article 14 of the European Convention on Human Rights (ECHR). This had led to her losing £24.04 per week, when her invalidity benefit of £81.85pw stopped when she reached 60 and she instead became entitled to state retirement pension of £57.81pw. It was accepted in *Stec* that the use of the state pension age as the cut-off made the scheme easy to understand and administer, and it was further accepted in *Stec* that questions of administrative economy and coherence were generally matters falling within the State's margin of appreciation. In addition the ECJ case of *Graham* [1999] ECR I-2521 – which held that the loss of invalidity benefit for women at the age of 60 did not breach EU law – was of strong persuasive value. As in *Stec*, the linkage of the cut-off age for invalidity benefit to the notional end of working life or the state pension age had to be regarded as pursuing a legitimate aim and as being reasonably and objectively justified. There was therefore no breach of Article 14.

The applicant in ***Pearson –v- United Kingdom*** **(Application No 8374/03), 22 August 2006, unreported** challenged the rule which meant that he would not qualify for a state retirement pension until he was 65 whereas at his age (63) a woman would qualify for a state retirement pension. However, the exact same issue had been considered and decisively ruled on by the Grand Chamber of the ECtHR in *Stec*. The Court here could not but reach the same conclusion on Mr Pearson's case.

In ***Walker –v- United Kingdom*** **(Application No 37212/02), 22 August 2006, unreported** Mr Walker complained that the UK rule which required him to pay national insurance contributions whilst he was working between the ages of 60 and 64, whereas a woman in the same situation would not have to pay such contributions, was contrary to his rights under Article 1 of the Protocol 1 when read together with Article 14 of the ECHR. Similarly to *Stec*, Mr Walker's obligation to pay national insurance contributions was linked to the date at which he was eligible to obtain his state retirement pension. The use of the state pension age as a cut-off made the scheme easy to understand and to administer, and such questions of administrative economy and coherence are generally matters falling within the State's margin of appreciation. The fact that over time an increasing percentage of the NI fund had been diverted to the NHS did not render the continuing policy choice of linking the obligation to pay to the state pension age manifestly unreasonable. There was still a link between work and working life and the payment of NI contributions. Moreover, although not directly on point, the ECJ's judgment in *R –v- Secretary of State for Social Security ex parte Equal Opportunities Commission* [1992] ECR1-4297, was of some persuasive value as it found that the inequality between men and women with

respect to contribution periods could not be dissociated from the difference in pensionable age and was justified. Accordingly, the linkage of the requirement to pay NI contributions to the notional end of working life or state pension age had to be regarded as pursuing a legitimate aim and as being reasonably and objectively justified.

Denial of disability premium to street homeless

The judgment of the High Court in ***R(RJM) –v- Secretary of State for Work and Pensions*** **[2006] EWHC Admin, 13th July 2006, unreported**, was on a test case brought by CPAG on behalf of a "street homeless" claimant who had been denied entitlement to the disability premium in his income support for the periods when he was sleeping rough on the streets. The critical substantive issue on the judicial review was whether the denial of the disability premium to a person who was street homeless amounted to unjustified discrimination contrary to Article 14 of the ECHR.

The claim for judicial review was rejected, for two reasons. Firstly, the High Court said that Article 14 was not engaged because treating someone differently because they were street homeless did not amount to discrimination on the grounds of "status" under Article 14. The difference of treatment had to be based on a personal characteristic, but in the judge's view, a "lifestyle of being liable to be a rough sleeper" did not amount to a personal characteristic. Even if this was wrong, however, the judicial review failed because the discrimination was justified. As the decision of the House of Lords in *Carson and Reynolds* [2005] 2 WLR 1369 made plain, in the field of allocation of social welfare benefits whether a difference in treatment is justified is primarily a matter for the legislature and the executive, and all a court has to be satisfied of is whether the difference in treatment has a rational basis. Such rational reasons for the difference in this case had been put forward by the Secretary of State: he wanted to target finite resources and assist the homeless (and not least the disabled homeless) in other ways than through premiums in their income support. That was a sufficient explanation to render the difference in treatment justified.

Comment: The claimant's appeal to the Court of Appeal is due to be heard in May 2007.

Habitual residence and the Chagos Islands

In *R(Couronne) –v- Crawley BC and Secretary of State for Work and Pensions and others* [2006] EWHC 1514 (Admin), 30th June 2006, unreported, a number of British Citizens of non-British origin arrived in the UK on 2004 and were refused entitlement to JSA on the basis of the habitual residence test ("HRT"). They had come from Mauritius and were the children of Chaggosian islanders who had been forcibly removed to Mauritius in 1971 from the Chagos Islands to enable the USA to operate a large military airbase on Diego Garcia They brought the judicial review proceedings on the basis that the imposition of the HRT discriminated against them as a distinct ethnic group when compared to British citizens of Irish ethnic origin, and so was contrary to Part III of the Race Relations Act 1976 ('RRA 1976') and/or Council Directive 2004/431 EC ("the Race Directive"). Alternatively it discriminated against them contrary to Article 14 of the ECHR when read with either Article 8 or Article 1 of the First protocol to the ECHR. All the grounds were rejected by the High Court.

The HRT could not be attacked on race discrimination grounds under the RRA 1976 because of the exception provided by section 41(2) of that Act, which says in effect that no act will be unlawful if the discrimination based on a person's nationality or place of residence arises in pursuance of any statutory instrument. Moreover, nothing in the Race Directive properly affected this conclusion, as, following *Gingi –v- Secretary of State for Work and Pensions* [2002] 1 CMLR 20 (R(IS) 5/02), it had no application to this dispute as it did not concern movement within the EU but rather movement from outside the EU (Mauritius) to the EU.

As to Article 1 of the First Protocol to the ECHR, notwithstanding the ECtHR's decision in *Stec*, following the decision of the House of Lords in *Leeds City Council – v- Price* [2006] UKHL 10, the High Court was bound to follow the Court of Appeal's decision in *Campbell and others –v- South Northamptonshire DC and others* [2004] EWCA Civ 409(R(H)8/04), and hold that the non-contributory benefits claimed in these cases were not 'possessions'. Accordingly, Article 14 could not apply as the benefits in question did not come within the "ambit" of Article 1 Protocol 1. Equally, the benefits in question and the HRT in particular, did not come within the ambit of Article 8, as the HRT itself has nothing to do with promoting respect for private and/or family life.

Comment: Leave has been granted to the claimants to appeal to the Court of Appeal. It is frustrating that despite what was understood to be the Secretary of State's acceptance that *Stec* had settled that non-contributory benefits are "possessions" once and for all (at least for Article 14 discrimination arguments), he is now using the *Price* decision to block Article 14 arguments concerning means-tested benefits. However, it is arguable that the special circumstances of the post-Court of Appeal litigation in *Reynolds* (to which CPAG was a party) would provide grounds for not following the general rule in *Price*.

Exporting career's allowance

The claimant in ***Hosse –v- Land Salzburg*** **(Case C-286/03), [2006] All ER EC 640 (ECJ)** was a German national who worked in Austria. He paid taxes and social security contributions in Austria but he lived in Germany with his severely disabled daughter. He made a claim for a care allowance to the Austrian social security authority in respect of his daughter but this was refused on the basis that the person reliant on care (here, the daughter) had to have her main residence in Austria, and she lived in Germany. In the course of challenges by the claimant to this decision the Austrian Supreme Court referred the issue to the ECJ for a preliminary ruling. It was dealt with by the Grand Chamber of the ECJ, because of its importance.

The ECJ observed that the provisions of Regulation 1408/71 must be interpreted in the light of the objective of contributing to the greatest possible freedom of movement for migrant workers. That objective would be undermined if workers were to lose benefit on account of their moving to work in another member state. Accordingly, any derogation (such as in article 4(2)(b) of Regulation 1408/71) has to be interpreted strictly. That means satisfying all the conditions laid down in article 4(2) as well as being listed in Annexe II to Regulation 1408/71.

The concept of 'social security benefit' within article 4(1)(a) and special non-contributory benefit within article 4(2)(b) (and article 10a) are mutually exclusive, and so if the care allowance fell within article 4(1)(a) then it could not fall within

article 4(2)(b), notwithstanding that it may appear in Annexe II. Here the care allowance was a 'sickness benefit' falling within article 4(1)(a) because it was granted objectively on the basis of a legally defined position and was intended to improve the state of health and life of persons reliant on care.

Moreover, it would contrary to article 19(2) of Regulation 1408/71 to deprive the daughter of a worker of a benefit which she would be entitled to if she were resident in the paying state (here Austria). To hold otherwise would deter workers from exercising their right to freedom of movement.

Comment: In the light of the Grand Chamber of the ECJ's approach to the first issue in this case, it is arguable that the UK's adherence to the view that DLA, AA and Carer's Allowance are not exportable benefits (based on *Snares* (R(DLA) 5/99 and *Partridge* (R(A)1/99) will be found by the ECJ to be unsustainable.

MEANS-TESTED BENEFITS

Income Support

Failed asylum seeker on asylum claim before 2.04.2000
The decision in **CIS/176/2006** holds that the phrase "ceases to be an asylum seeker ...when his claim for asylum is recorded by the Secretary of State as having been decided (other than on appeal..." in regulation 12(5) of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 means ceases to be an asylum seeker when the claim is decided other than decided on an appeal. Accordingly, any asylum appeal challenge is disregarded, and the claimant will cease to be an asylum seeker as soon as his or her claim for asylum is recorded by the Secretary of State as having been refused. To treat a person as remaining as an asylum seeker while he or she was pursuing an appeal against the initial refusal of asylum would controvert the clear words of regulation 12(5).

Undue distress and reduced benefit directions
The appeal by the Secretary of State in ***Secretary of State for Work and Pensions –v- Roach* [2006] EWCA Civ 1746, 20th December 2006, unreported (CA),** was from a decision of Mr Commissioner Levenson in *CIS/2482/2005*. It concerned whether the Secretary of State was entitled to serve a reduced benefit direction on Ms Roach following her request that the Secretary of State not seek to pursue her ex-partner for child support maintenance.

The appeal tribunal, whose decision the Commissioner had set aside, had, in essence, not believed Ms Roach either as to the facts which she alleged or the feelings which she claimed they had engendered in her, and so had dismissed her appeal against the Secretary of State's decision to make a reduced benefit direction in respect of her, which had had the consequence of reducing her income support. In order to avoid this consequence Ms Roach had to satisfy the Secretary of State (and on appeal the appeal tribunal) that there were reasonable grounds for believing that, if the Secretary of State sought to obtain child support maintenance from her ex-partner, there would a risk of her or her child suffering harm or undue distress. The appeal tribunal did not believe on the facts that any harm or undue distress would be risked. On appeal the Commissioner set aside the appeal tribunal's decision.

The Court of Appeal allowed the Secretary of State's appeal because in truth the Commissioner had just taken a different view of the facts of the case to that of the tribunal rather than identifying any error of law on the tribunal's part. In addition, the Commissioner had commented in his decision that "distress can only be experienced subjectively", which was wrong. The Court of Appeal ruled that the question of undue distress should not be approached on a purely subjective basis. If that was the correct approach then the word 'undue' would have no real meaning. In order to judge whether a particular claimant has shown reasonable grounds for believing that there would be a risk of undue distress (that is, a realistic possibility of undue distress) to her or a child, an objective judgement must be made as to whether the foreseeable distress is unjustified or unreasonable in the context of the personal, subjective, characteristics of the claimant or child. Irrationality or paranoia are factors to be taken

into account as providing the context against which the extent of the distress is to be assessed but are not determinative.

Notional Capital

Deprivation by person who then becomes partner

The decision in CIS/1757/2006 holds that the deprivation of capital rule in regulation 51 of the Income Support (General) Regulations 1987 can apply to deprivations made by someone who only later becomes the claimant's partner. In this case the person who had made the alleged deprivations had done so with the proceeds of the sale of her house, from which she paid off her daughter's student debts and then taken all of the family on holiday. The tribunal found that in so doing the person had deprived herself of capital with the significant operative purpose of securing entitlement to income support. Further, there was no error of law in holding that the claimant was caught by this finding even though the person was not his partner at the time of the deprivation. The combined effect of sections 134(1) and 136(5)(a)of the SSCBA 1992 was to treat a partner's deprivation of capital as a deprivation of the claimant, even though the deprivation may have taken place before they became partners, as the focus of regulation 51 is at the time when entitlement is in issue but in respect of a past disposal of capital.

In such a situation the Commissioner stated that:

> *"It is in principle neither oppressive nor irrational to take account of disposals of capital made by a person before becoming the claimant's partner. Quite the reverse. Both in aggregating the capital of the members of a family and in taking account of notional capital, the legislation fulfils an anti-avoidance function. If notional capital were not aggregated, a future partner could dispose of capital before coming to live with the claimant or couples could separate in order to dispose of capital before reuniting. It is a legitimate function of legislation to prevent an obvious means of avoidance. And the legislation does so in a proportionate way. The notional capital rule will only apply to a future partner when there has been conduct that is related to future entitlement to benefit either for the person alone or as a member of a family. That will limit the circumstances in which the rule applies and restrict it to those cases in which a course of conduct has been directed at future benefit entitlement. Moreover, on the interpretation of the Commissioners, a purpose is only relevant for regulation 51 if it is a significant operative purpose (R(SB) 40/85)."*

Right to reside

Parents of qualifying children

The facts in ***W(China) and X(China) v Secretary of State for the Home Department*** **[2006] EWCA Civ 1494, 9 November 2006,** were that W and his partner, X, who were citizens of the People's Republic of China, had entered the UK illegally before leaving for the Republic of Ireland, where their child, Q, was born. Q acquired Irish nationality. W and X later re-entered the UK, bringing Q with them. On an appeal against being classed as illegal entrants to the UK, W and X argued that since Q was an Irish citizen, and since she could not assert her rights of free movement within the EU without her parents' assistance, W and X were themselves legally entitled to bring Q here for that purpose, and to stay here.

Rejecting a further appeal by W and X, the Court of Appeal held that where a child who is an EU citizen is brought to the UK from another EU state by her parents, who themselves lack EU status, both the child and her parents each had to demonstrate possession of medical insurance as well as sufficient resources to avoid becoming a burden on the social assistance system of the host state. On the facts here neither W nor X could satisfy these conditions, and so they had not right to reside. The relevant law was contained in Article18 of the EC Treaty and EC Directive 90/364, which had been the subject of the decision in *Chen* (Case C-200/02) [2004] ECR I-9925, in similar circumstances. However, *Chen* had not addressed the question whether the accompanying carer or carers of a child with EU citizenship needed to demonstrate that they satisfied the pre-conditions which, pursuant to article 1 of Directive 90/364, would apply to an adult EU citizen seeking to exercise the right of free movement. In the Court of Appeal's view they did.

Temporary incapacity for work must be due to claimant's illness

Two issues were addressed in **CIS/3182/2005**, firstly, whether the right to reside test is contrary to Article 3 of EC Regulation 1408/71, secondly, whether a person remains a qualified person when temporarily off work to look after their sick child. The case concerned a Dutch national who came to the UK in April 2004. She worked for about 2 months but then had to give up work because she was pregnant. She gave birth to her son prematurely, and had to care for him and so was unable to work when she made her claim for income support. This was refused on the basis that she did not have a right to reside. The refusal was upheld by an appeal tribunal and the Commissioner.

On EC Regulation 1408/71 the Commissioner accepted that the right to reside test potentially gives rise to unlawful indirect discrimination on the grounds of nationality because it is far less likely that a foreign national will be able to show a right to reside than a British national. However, the test did not amount to direct discrimination. Turning then to justification, the Commissioner accepted that the justification accepted by the Tribunal of Commissioner's in *CIS/3573/2005* (in the context of Article 12 of the EC Treaty) may not apply in all cases. However, if, as was held in *CIS/3573/2005*, the application of the "right to reside test" is justified in the case of those who have been in the United Kingdom for a short period without ever being economically active, it must remain justified in respect of those who have been economically active for only part of such a period and who no longer have a right of

residence because they have ceased to be in the job market or to be merely temporarily incapable of work.

On the second argument, the claimant argued that, after the birth of her child, the fact that she had to care for her child meant that the claimant was temporarily incapable of work by reason of her child's illness and that that was sufficient for the purposes of regulation 5(2)(a) of the Immigration (European Economic Area) Regulations 2000. The Commissioner rejected this argument because in his view it was implicit in regulation 5(2)(a) that the incapacity had to be due to an illness or accident suffered by the person who claimed to be a worker and not any child of that person.

Recipient of services

In **CIS/3875/2005** the appeal tribunal found that claimant, who was French national who had returned to the UK in October 2004, had a right to reside in the United Kingdom because he was a recipient of services "in that he receives accommodation for which he pays rent".

The Commissioner allowed the Secretary of State's further appeal. Although the provision of housing can be a "service" within the scope of Article 50 of the EC Treaty (indeed, the provision of accommodation, social services and medical services are all capable of falling within the scope of Article 50), that is subject to two important limiting factors. Firstly, the services must normally be provided for remuneration. Secondly, Article 50 does not apply where a national of a Member State goes to the territory of another Member State and establishes his principal residence there in order to provide or receive services there for an *indefinite* period: per *Steymann v. Staatssecretaris van Justitie* (Case 196/87) [1988] E.C.R. 6159 and *Sodemare S.A. v, Regione Lombardia* (Case C-70/95) [1997] E.C.R. 3395 (both considered in CIS/4727/1999).

Moreover, the test is not whether the claimant travelled to (here) the UK in circumstances where it was *likely* that he would receive services even if that was not the purpose of the journey. The test applies only where the claimant came to the UK *in order to* receive services here. Accordingly, the tribunal erred in law because it failed to consider whether the claimant had come to the UK for the purpose of receiving services here, and as there was no evidence that he had come to the UK with this purpose in mind his claim had to fail. Furthermore, even if such evidence did exist, it would need to show that the obtaining of accommodation or NHS services was for a temporary period, which itself would undermine the claim (for the habitual residence test) that the claimant had a settled intention to remain in the UK.

Genuine and effective work

The appeal in **CIS/3315/2005** concerned a Dutch single parent with two young children who had come to the UK on the 8th of March 2004. She had been awarded income support up until July 2004, but she then worked from July to October 2004. Her further claim for income support (and housing benefit) was rejected on the basis that she did not have a right to reside. On her claim for income support she said that she was looking for work of about 3 hours a day. Her hours were so limited in order to accommodate her child care arrangements. Her argument was that she was a qualified person – and thus had a right to reside - by virtue of being a work-seeker

under regulation 5(1)(a) and 2(b) of the Immigration (European Economic Area) Regulations 2000.

Rejecting this argument, the Commissioner held that the claim failed because the claimant could not show that the work she was seeking was both "genuine and effective" as opposed to being marginal and ancillary, and be work which she had reasonable prospects of securing . The test of "genuine and effective" had to be separated out. There was no doubt that the claimant was seeking work which was "genuine". However, it was not "effective", nor on the facts did she have reasonable prospects of securing such work. In the Commissioner's view the work being sought was not "effective" because that word has to be considered by reference to the person's need to claim social assistance. Child benefit and tax credits should be disregarded as forms of social assistance. Having done this, "effective" work meant work that, with any tax credits payable, would produce an income equivalent to income support entitlement plus eligible rent: in other words, an income which would mean that the claimant would not need to claim either income support or housing benefit if she found the work she was looking for.

Comment: The Commissioner's approach to "genuine and effective work" is arguably wrong. The case-law on rights of movement of workers in the EU strongly suggests that the phrase "genuine and effective" is used simply as the antithesis of work which is "marginal and ancillary", and so arguably has no special meaning other than being work which is not "marginal and ancillary". Moreover, the Commissioner's reading or distinguishing of *Kempf* (Case 139/85) is of doubtful validity as the overall *ratio* of *Kempf* seems to be that work is not rendered ineffective simply because it is supplemented by social, assistance, and arguably leads to a conclusion on "genuine and effective" which is inconsistent with other EU case-law (e.g. Case C-3/90). Whether the Commissioner's decision on this aspect of the appeal is binding on appeal tribunals is arguable, as his finding that the appellant had no reasonable prospects of securing the work she was seeking in any event may arguably render it *obiter*.

Unregistered work

The Northern Ireland Commissioner's decision in **C6/05-06(IS)** concerned the right to reside of a Polish national who had worked in the UK for over a year, but for part of that period in employment which was not registered. The Commissioner held that the claimant did not have a right to reside consequent on this 12 months of work as it has to be 12 months of registered work. The requirement that A8 nationals must engage in 12 months of *registered* work is not contrary to EU law or otherwise unlawful. In particular, work by an A8 national if it is unregistered cannot confer the status of 'worker' on the person under Article 7(2) of EC regulation 1612/68, even if the work would have conferred such a status had the person been a non-A8 EU national.

Comment: The claimant is appealing to the Court of Appeal in Northern Ireland.

HOUSING BENEFIT

Whether claim must be made for partner even if she is person from abroad
The decision of the Court of Appeal in ***Secretary of State for Work and Pensions –v- Wilson*** **[2006] EWCA Civ 882, The Times, 4th July 2006 (CA),** is a successful appeal by the Secretary of State from the decision of Mr Commissioner Levenson in CH/3810/2004. In short, the Court of Appeal concluded that where a claim for housing benefit is made by one member of a couple who are cohabiting, that benefit is also being claimed "in respect of" the claimant's partner and the claimant therefore had to provide information about the partner's national insurance number in order to satisfy the condition of entitlement in section 1(1A) of the Social Security Administration Act 1992.

Mr Wilson's wife was a Thai national who had entered the United Kingdom as a visitor, with a condition that she neither work nor have recourse to public funds. She had no national insurance number, nor had she applied for at the relevant time. In the Court of Appeal's view, as a matter of ordinary language benefit was claimed "in respect of whom he is claiming" in section 1(1A) encompassed a person if the benefit was referable in some way to that person, as where the benefit or some component of it was defined or quantified by reference to that person. There was no reason for departing from that ordinary meaning here. A claim for housing benefit by a member of a couple was just such a case. The partner was taken into account in the quantification of the benefit, in particular the applicable amount in the case of a couple was "an amount in respect of both of them" and was in general a larger amount than in respect of a single person: per regulation 16 of the Housing Benefit (General) Regulations 1987. Accordingly, where benefit was claimed by one member of a couple, it was claimed in respect of the claimant's partner as well as the claimant and the national insurance number condition had to be satisfied in relation to both of them. Indeed, counsel for Mr Wilson effectively conceded this point.

Her argument, however, was that on the facts of this particular case, the NI number requirement did not bite in respect of the housing benefit claim because he had been passported to entitlement to housing benefit because he had been awarded income support. In the view of the Court of Appeal this made no difference because the NI number requirement did and should have applied to any claim for income support made by Mr Wilson.

The Court of Appeal also rejected a further argument made by Mr Wilson that the information provided in the claim for housing benefit was enough to satisfy section 1(1B)(b) SSAA 1992. The short answer to that was that the information had to accompany an *application* for an NI number, and in this case there was no such application. The housing benefit claim form could not be treated as amounting to such an application. Indeed the correspondence made it plain that no application was being (wrongly, because it was thought that the making of the application would jeopardise Mrs Wilson's immigration status)

The Court of Appeal finally noted that the Secretary of State had made clear that a national insurance number could be applied for, and would be allocated, irrespective

of any intention to work and without any conflict with a visa condition prohibiting a person from working in this country. The use of a national insurance number had a non work-related function in the control of fraud in benefit claims. Thus, in the Court of Appeal's view, it was open to the claimant's wife to apply for a national insurance number (as she eventually did) without prejudicing her immigration status or her application for leave to remain. The fact that housing benefit was claimed by the claimant in respect of his wife as well as himself would not place her in breach of her visa condition not to have recourse to public funds, since her status as a person from abroad meant that there was no increase in the amount of benefit actually paid.

Comment: Despite the paucity of reasoning in the Commissioner's decision on the point, it is disappointing that the key "in respect of" point was conceded by counsel for Mr Wilson. Arguably the words "any other person in respect of whom he is claiming benefit" in this context are concerned with where the claim is being made by an adult on behalf of (e.g. as appointee of) another (e.g. claiming DLA for a child).

Who 'owns' the appeal: tribunal or local authority?

CH/2812/2005 concerned the London Borough of Ealing "Ealing" and its housing benefit department. In 2000 Ealing made two decisions to the effect that the claimant was not entitled to housing benefit and had been overpaid that benefit for a past period on the basis that the claimant's tenancy was created to take advantage of the housing benefit scheme. The claimant sought a judicial review of the review decisions, as at that point in time there was no right of appeal to an appeal tribunal in respect of housing benefit decisions. There was an attempt by the parties to compromise the judicial review proceedings. However, for reasons which were not entirely clear, the proceedings continued, leading to permission initially being refused on the papers (on account of delay) but then being granted in open court, the judicial review claims allowed and the decisions quashed. The effect, and the intended effect, of quashing the decisions was to allow them to be taken on appeal to an appeal tribunal, which acquired jurisdiction from 2 July 2001. If the order had been implemented, the local authority would have referred the claimant's appeals to the tribunal. However, the local authority considered that Mr Justice Turner's order was not valid and was not binding, and so it simply ignored it.

The tribunal however became aware of the appeals and listed the cases for hearing. The tribunal decided that quashing order of the High Court was binding and that it had jurisdiction to hear the appeals. It allowed both appeals, as Ealing had not provided any documentation to support either of its decisions.A further appeal by Ealing was dismissed by Mr Commissioner Jacobs.

There was no merit in Ealing's first argument that the appeal tribunal had jurisdiction to ignore the quashing order of the High Court. It was the obligation of every person against, or in respect of, whom an order of the High Court was directed to obey it unless and until that order had been set aside: *Hadkinson v Hadkinson* [1952] P 285 and *Isaacs v Robertson* [1985] AC 97. The tribunal (and Ealing) thus had to accept that the quashing order was valid.

The second argument for Ealing – that the appeal tribunal could only deal with the appeal once Ealing had referred the appeal to it – was also without substance. Referral

of cases to the appeal tribunal by the local authority was not a condition precedent to the tribunal having jurisdiction. Nor was the only course open to the claimant to apply for a judicial review of the local authority's failure or refusal to refer. A tribunal always has power to determine whether it has jurisdiction in a particular case: *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* [1951] 1 All ER 482. Returning to the question of whether an appeal tribunal's jurisdiction is dependant on having the case referred to it by the body appealed from, one question arose: as a matter of statutory construction, what was the effect of a failure to refer the claimant's appeal to the appeal tribunal?

The procedure for handling appeals is dealt with by regulation 20 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. That provides that the appeal is to be lodged with the local authority and not with the appeal tribunal itself. So long as regulation 20(1) is satisfied, the appeal tribunal has jurisdiction. Moreover, the only role of the local authority is to receive the appeal documents and to ensure, as far as it can, that they contain the necessary information. It has no power to decide whether the information provided is sufficient. That is for the legally qualified panel member and there is an express duty to refer the issue to that member. The local authority's function is, thus, essentially administrative.

As the appeal is lodged elsewhere, there has to be a procedure by which it comes to the notice of the clerk or the tribunal. In the case of housing benefit the referral is but one of the many necessary administrative steps that have to be taken to bring a case before a tribunal. These steps are assumed as necessary to allow the statutory powers and duties of the tribunal to operate. Given this, it would be irrational to interpret the legislation as making the tribunal's jurisdiction depend on a particular exercise of these administrative tasks. That would be incompatible with their function, which is to ensure that the tribunal established by the legislation can discharge its statutory function and do so efficiently and effectively.

Accordingly, as long as there is an appeal that satisfies the conditions of regulation 20(1), the tribunal has jurisdiction to deal with any issues that arise in respect of it, regardless of how they are brought to the tribunal's attention. However, this does not mean that parties are free to disregard the usual procedures at will. Claimants cannot simply bypass the local authority and lodge appeals with the tribunal, nor can they usually expect the tribunal to deal with a case before the local authority has had a chance to prepare the submission and assemble the papers for the parties and the tribunal. But what the tribunal is free to do is to allow matters to be handled differently if circumstances require it.

Here the circumstances of the case did require the appeal tribunal to act as it had, for two reasons. First, the local authority was refusing to refer the cases to the tribunal on the basis of an issue which the tribunal had (perhaps exclusive) jurisdiction to decide. Second, the local authority was trying to force the claimant to embark on an expensive legal procedure, which was risky in that the Administrative Court might not accept jurisdiction.

Industrial Injuries Benefit

Injury by spoken words

CI/142/2006 emphasises the need to consider the *context* of a conversation when deciding whether it constituted an accident. It spells out that the matters which must be taken into account when deciding whether an interview or conversation amounts to an "accident" are not confined to the way in which the interview or conversation was conducted. Sexual harassment, deliberate misinformation, deliberately setting an employee unachievable targets, or instituting disciplinary proceedings in bad faith, may cause psychological injury without any overt signs of aggressive or overbearing behaviour. In those exceptional cases where depressive illness can be attributed to one or more specific incidents, it may be necessary to carry out a careful investigation of the context of the incidents in order to decide whether injury has been caused by accident. Thus, an interview which is not conducted in accordance with company policy (e.g. by not having a personnel officer present) may constitute, in context, an unexpected event and so may amount to an accident.

FUTURE CASES

European Court of Human Rights

***White and Runkee –v- United Kingdom* (ECtHR): right of widowers to widow's pension**

In *Willis* the ECtHR said that the arguments on the widow's pension issue were premature on the facts of the case (as entitlement would not accrue to Mr Willis, at the earliest, until 2006), and so it did not rule on the substantive arguments on the widow's pension issue. This issue was to have been the subject of an oral hearing before the ECtHR on the 17th of September 2002 in the cases of Mr White and Mr Runkee. However, that hearing was postponed to allow the ECtHR to consider the Court of Appeal's decision in the *Hooper* and related cases, and was further postponed to await the decision to the House of Lords in *Hooper*. The judgment of the House of Lords – that it was not discriminatory for widows pensions not to extend to men between 1995 and 2001 (when they were abolished) - provides strong support for the UK Government against Mr White and Mr Runkee, but arguments are still available to them which. Both the claimants and the Government filed observations with the ECtHR in the summer of 2005 on the implications of *Hooper*, but resolution of the case was further adjourned pending the ECtHR's final decision on the case of *Stec*. That having been given in the summer of 2006, a decision in *White* and *Runkee* is expected soon.

House of Lords

***Kola and Mirzajani v Secretary of State for Work and Pensions*: income support – on arrival asylum seeker's – whether claim for asylum must be made at port of entry – whether acts of agent attributable to claimant at all times.**

This is the claimants' appeals from the decisions of the Court of Appeal made more than 18 months ago (see [2004] EWCA Civ 1465 (21 May 2004) and *Bulletin* 180, p.14) but on which leave was only granted by the House of Lords at the end of 2005.

Court of Appeal/Court of Session

***Abdiraham and others –v- Secretary of State for Work and Pensions*: right to reside test.**

These are appeals by the claimants from the Tribunal of Commissioners' decisions in CH/2484/2005, CIS/3573/2005 and CPC/2920/2005. The appeals are due to be heard on the 18th or 19th of June 2007.

***Zalewska v Department of Social Development*: right to reside and A8 nationals – whether registered work requirement lawful – whether can rely on unregistered work to establish that a "worker".**

This is an appeal from the decision of the Northern Ireland Commissioner in C-6/05 (above).

***R(RJM) –v- Secretary of State for Work and Pensions*: denial of disability premium to disabled people without accommodation – whether breaches human rights law.**
This is the claimant's appeal from the decision set out under *Human Rights* above. It is due to be heard by the Court of Appeal on the 22nd or 23rd of May 2007.

***Tkachuk v Secretary of State for Work and Pensions*: asylum seekers and backdated claims for be benefit - whether notice of grant of refugee status has to be served on the claimant personally or whether it is effective if served on his or her solicitors.**

This is an appeal from Commissioner Angus's decision in CIS/4022/2006.

***Brown v Secretary of State for Work and Pensions*: offsetting of benefits under PAOR Regs - whether Secretary of State entitled to offset arrears due to claimant for one period against non-recoverable overpayment for another period**
This is an appeal from CDLA/3742/2004. It was heard by the Court of Appeal on 23.01.07

***Secretary of State for Work and Pensions v McNab*: bias and EMPs after *Gillies* - whether one prior sitting of member of tribunal and EMP can constitute - apparent bias.**
This is an appeal from CSDLA/364/2005, which held that one prior sitting could allow for a successful apparent bias challenge for a claimant in an appeal tribunal where the EMP sat with the other member of the tribunal for a second time. It is to be heard in the Court of Session on the 27th of April 2007.

Commissioners

CIS/1132/2006
In this appeal the Commissioner is being asked to rule on whether the intercalating student rules in the income support regulations are unlawful (under the Human Rights Act) because they unjustifiably indirectly discriminate against pregnant women who take time out from college or university to have a baby.

CIS/3715/2005
The key issue before the commissioner in this appeal is whether failing to grant the child maintenance premium to an income support claimant whose maintenance payments are assessed under the old child support rules is contrary to Article 14 of the ECHR (when read with Article 1 of the First Protocol), and is thus unlawful.