Children with "behavioural problems". No need for
child to be of "severe disability" under s. 72(1) SSCBA.
Also no need for medical "label" of disability.
R(A) 2/92 and CA) 123/1991 doubted but followed.

CDLA/15467/1996
CDLA/16176/1996
CDLA/1659/1997
CDLA/2252/1997

COMMON APPENDIX

1. This is a common appendix to the four decisions listed above, each of which concerns the entitlement of a particular child to disability living allowance. On 11th January 1999 I held an oral hearing in all of the appeals except CDLA/16176/1996, which I considered on the papers. At the hearing the adjudication officers were represented by Mr Heath. Mr Wright of counsel and Ms George of CPAG represented the claimants in the third and fourth cases listed, who were each appealing against the decision of a disability appeal tribunal. The claimant's mother attended in the third case. The claimant in the first case, in which the adjudication officer was appealing against the decision of the tribunal, did not attend and was not represented but Mr Wright kindly agreed to deal with points of law in that case which also arose in the cases in which he was instructed. I am grateful to them all for their assistance.

2. Section 72(1) of the Social Security Contributions and Benefits Act 1992 provides that, subject to certain other conditions, a person shall be entitled to the care component of disability living allowance for any period throughout which-

(a) he is so severely disabled physically or mentally that-

(i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients; or

(b) he is so severely disabled physically or mentally that, by day, he requires from another person-

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(c) he is so severely disabled physically or mentally that, at night,-

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.

A person who comes within section 72(1)(a) but not (b) or (c) is entitled to the lowest rate of care component. A person who comes within (b) or (c) is entitled to the middle rate but not also to the lowest rate. A person who comes within both (b) and (c) is entitled to the highest rate but not also to the middle or lowest rate.

3. The principal issue of law in these four cases is what is meant by, or perhaps more accurately how to apply, the phrase "so severely disabled physically or mentally that ...". This phrase appears in each of the three paragraphs of section 72(1) and also in relation to attendance allowance under section 64(2) and (3) of the Act, containing similar provisions.

Mr Heath helpfully reviewed the cases on this and, by and large, supported the view taken by the tribunals in the third and fourth cases. My own analysis largely accepts the submissions made by Mr Wright. In R(A) 2/92 Mr Commissioner Skinner stated (in paragraph 8) that he could find "no relevant decision relating to the criterion imposed by those words". There have been several subsequent decisions in which those words have been considered but it is not necessary or helpful to look at earlier cases for assistance except to note the comment by Lord Bridge in *In Re* Woodling [1984] 1 WLR 348 at 352E:

> " The language of the section should, I think, be considered as a whole, and such consideration will, I submit, be more likely to reveal the intention than an attempt to analyse each word or phrase separately."

Below, I set out what I consider the language of the section "considered as a whole" requires the tribunal to do.

4. The 1992 Act gives no further definition of the word "disabled". This is in contrast to the Disability Discrimination Act 1995, section 1(2) of which defines a "disabled person" as a "a person who has a disability" and section 1(1) of which provides that a person has a disability for the purposes of that Act:

> "if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities".

"Mental Impairment" is further defined in paragraph 1(1) of schedule 1 to:

> "include an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness."

There are no such definitions in the 1992 Act or the predecessor legislation and it would not be right to read any such definitions back into that legislation. The 1992 Act does not define the words "physically" and "mentally". I conclude that these are ordinary words of the English language to be understood in the ordinary way by members of the tribunal, although to be applied in the way required by the law. It should be emphasised that the focus of the relevant sections is on the needs of claimants and on their ability to cope without assistance, rather than on any specific diagnosis

5. At the centre of my approach is the composition of the disability appeal tribunal under the provisions of the Social Security Administration Act 1992 (prior to amendments made by the Social Security Act 1998). In addition to the chairman the tribunal consists of two members. One is a medical practitioner (s 42(3) and s 43(2)). The other is drawn from a panel (s 43(3)) which is composed of:

> "persons who are experienced in dealing with the needs of disabled persons-
> (a) in a professional or voluntary capacity; or
> (b) because they are themselves disabled
> but may not include medical practitioners (s 42(4))".

The tribunals consider appeals from decisions of lay adjudication officers. The introduction of disability living allowance and a new system of adjudication indicated a clear move away from

the previous system of exclusively medical adjudication for awards of attendance allowance and mobility allowance. Mr Heath referred to provisions in the Social Security Administration Act 1992 enabling adjudicating authorities to "refer any question of special difficulty arising for decision" to experts "for examination and report" (s 53) and authorising the chairman of the tribunal to "refer the claimant to a medical practitioner for such examination and report as appears to him to be necessary" for the purpose of providing the tribunal "with information for use in determining the appeal" (s 55(1)). However, these provisions do not detract from the general point about non-medical adjudication and it should also be noted that at a hearing the tribunal may not carry out a physical examination of the claimant (s 55(2)).

6. The wording of the statute does not require that a person has a severe or serious disability in the sense that such a description must be applicable without consideration of the effects of the disability referred to in section 72 (or section 64). The severity of the disability is to be measured by the consequent need for attendance or supervision (or by the effect on the claimant's ability to prepare a cooked main meal for himself or herself). I acknowledge that in Mallinson v Secretary of State for Social Security [1994] 2 All ER 296 Lord Woolf (considering the same wording in section 35 of the Social Security Act 1975) stated that a claimant must establish that he was severely disabled (page 299) and that similar wording has been used in several other decisions but rarely has it been made explicit that the issue is often concerned with the method of establishing that a disability is severe. Lord Woolf accepted (at page 306) that:

> "If a mental disability is not serious it will be a case for supervision, which if it is to qualify must meet the requirements in the second limb of the subsection. "

I cite this to reinforce the point made by Lord Bridge in Woodling that language of the section must be "considered as a whole" and to emphasise that it is wrong to impose any precondition that a disability must be established as serious or severe before the rest of the test can be considered. A similar point was made by Mr Commissioner Mesher in CDLA/926/1994. This issue was identified before the Court of Appeal in Re H (a Minor) (17th February 1994) and the Court proceeded "on the footing" that it was correct to say that there was no such precondition (per Lord Justice Nourse). I do not rely on this, except in so far as the Court of Appeal did not rule out such an approach, because the Court gave no definitive opinion, but I do rely on the wording of the statute. (Re H is considered further below. This was the appeal from the decision of Mr Commissioner Heald in CA/648/1991 (*9/93) and the decisions of both the Commissioner and the Court of Appeal are reported as R(A) 1/98.)

7. The claimant must be disabled "physically or mentally". No other kind of disability is relevant. I adopt the view put by Mr Rowland in his Medical and Disability Appeals Tribunal: The Legislation (Sweet and Maxwell 1998 at page 21) that:

> "The purpose of the phrase appears to be to limit cases where the requirement for attendance arises from a condition of body or mind rather than from any convention, religious belief, cultural habit or other possible cause."

He cites CA/137/1984 in which the Chief Commissioner took the view that the words of the statute did not include the situation where the religious beliefs of the claimant meant that he could not use the same hand for washing his private parts and for eating. Of course, ideas of disablement, especially mental disablement, change over time and the real question is whether,

in the ordinary use of the language, the tribunal can say that a claimant is "disabled physically or mentally". It is also a question of fact for the tribunal to decide whether the claimant is feigning the effects of a disability or whether alleged manifestations are the result of freely willed decisions rather than of disability. These are difficult questions, especially perhaps in relation to children, but the legislation does not give the medical profession the exclusive task of answering them in relation to entitlement to these allowances, although medical evidence will often be important and valuable to the tribunal.

8. In order to decide whether a claimant is "disabled physically or mentally" the tribunal must take into account all relevant medical and other evidence. It would be wrong to reach a conclusion on this without doing so or to treat it as a preliminary issue in the sense of disregarding the evidence as to the effect of the claimed difficulties or problems. A medical report describing or confirming a well established or well known diagnosis (such as "fractured leg" or "severe learning difficulties") or a "clinically well-recognised illness" (the words of paragraph 1 of schedule 1 to the Disability Discrimination Act 1995) might settle this particular issue. However, that does not mean that the absence of such a report, diagnosis or illness must inevitably lead to the conclusion that the words of the statute do not apply. The state of medical knowledge is neither certain nor static. The tribunal should consider the manifestations of a condition and the actions and abilities of the claimant together with any other evidence. The fact that no diagnosis has or has yet been made, or that no label has been given or has yet been invented for the condition, does not deprive the tribunal of its jurisdiction and responsibility to decide the issue. It is for the tribunal, and not for an external expert, to decide whether the claimant is "disabled physically or mentally". In particular, it would be unjust to have different results in two cases, one where the evidence of specific manifestations has been presented to the tribunal without a label, and one where evidence of the same manifestations has been presented together with a label. Sometimes the label is assigned or confirmed or the diagnosis is made after the tribunal hearing although there is no new substantive evidence as to medical investigations or behaviour or manifestation of the condition. The result of the appeal in such cases should not depend on whether the tribunal happens to sit before or after this is done.

9. For the purposes of the mental health legislation, mental disorder, in particular, may be defined by reference to a person's behaviour rather than to any prior or separate diagnosis. Section 1(2) of the Mental Health Act 1983 defines "mental disorder" to include mental illness, arrested or incomplete development of mind, "psychopathic disorder and any other disorder or disability of mind ...". The section continues:

> "psychopathic disorder" means a persistent disorder or disability of mind .... which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned ...

Often, the way that the disorder is diagnosed is by reference to a pattern of conduct. I am not suggesting that these definitions should be read into the 1992 legislation but it would be strange if a person could be said to be suffering from psychopathic or mental disorder such that steps could be taken under the 1983 Act but could not be said to be disabled mentally for the purposes of disability living allowance (or attendance allowance) under the 1992 legislation. Mr Rowland (at the same place as referred to above) cites as an example the facts in W v L [1974] 1QB 711, a case to which reference was also made by Mr Wright. In that case a man engaged in a series of acts of sadistic cruelty to the family pets and threatened his

pregnant wife and the baby she was carrying but the doctors had decided that (under the legislation applicable then) he was not mentally ill. Lord Justice Lawton said (at page 719):

> " ... what would the ordinary sensible person have said about the patient's condition in this case if ... informed of his behaviour to the dogs, the cats and his wife? In my judgment such a person would have said: "Well the fellow is obviously mentally ill"...".

However, if the argument by Mr Heath is taken to its logical conclusion it would be possible to exclude the patient in that case from the meaning of "disabled physically or mentally" because the only evidence was the man's behaviour and there was no diagnosis based on anything else.

10. Similarly, there is no reason why behavioural or developmental problems in children should be excluded from the notion of "disabled physically or mentally", whether or not a defined physical or mental condition has been diagnosed, although evidence of such will be helpful to the tribunal (and my comments here are subject to what I say below about section 72(6)). In CDLA/15892/1006 the tribunal found that the claimant "suffers from persistent nocturnal enuresis requiring attendance ..." but that he was not suffering from any severe or mental disability giving rise to his need for care. In that case I did not find it necessary to go beyond the plain words of the section but I said (paragraph 6):

> "It seems to me that to suffer from enuresis is to suffer from a disability. Whether it is physical or mental in origin, or whether its origin can or cannot be established, is irrelevant."

In CDLA/5779/1997 Mr Commissioner Williams pointed out that behavioural disorder may be symptomatic of mental or physical disability. I agree that it is necessary to decide whether this is so in any particular case, but it is not necessary to identify a label in all cases, although it might be helpful in some cases if there is a label.

11. Having decided, on the basis of all of the evidence, that the claimant is disabled physically or mentally, the tribunal must then consider the degree of attention or supervision thereby reasonably required (and the cooking test where appropriate). If the tribunal is of the opinion that the requirements fall within any of the sets of conditions in section 72(1) or section 64 as appropriate, then the claimant is, indeed, so severely disabled that those requirements are satisfied. For those who are concerned that dispensing with the need for a medical diagnosis or label might in some way "open the floodgates" it is this stage of the decision that ensures that disability allowance or attendance allowance is not made available to those whose condition means that they should not be entitled to it. If, for example, the activities of the claimant and the consequent needs are results of freely willed conduct that could not be described as meaning that the claimant is disabled physically or mentally, then the needs do not come within the provisions of section 72 and section 64. Neither do they if the claimant is disabled but the needs do not arise from the disability. These are questions of fact for the tribunal to decide.

12. Where the claimant is a child under the age of 16 (as in all four cases to which this common appendix relates) the special rules in section 72(6) must be applied. In the second case to which this appendix relates there is a very helpful note from the Medical Policy Group of the Department of Social Security about the normal development of a child aged three or four. Such evidence can be very helpful to a tribunal in deciding whether the claimant is

disabled physically or mentally, what is reasonably required, and whether the requirements of section 72(6) are satisfied, but I would not go so far as to say that such evidence is necessary in all cases (and indeed it would be impractical to require it).

13. The key issue has been considered in a number of recent cases. All but the most recent concerned entitlement under section 35 of the 1975 Act and deal with the system of medical adjudication where the same decision makers provide the medical expertise and make the findings of fact. The approach in those decisions should not survive the replacement of medical adjudication by the system to which I have referred above. I do not read the decisions as requiring a disability appeal tribunal (which did not exist before the implementation of the system now described in the 1992 legislation) to be bound by whether the condition in question is medically recognised. Decisions that depend so heavily on the medical expertise of the Delegated Medical Practitioner (DMP) of the Attendance Allowance Board should not be regarded as binding on the disability appeal tribunal constituted as I have indicated above.

14. In R(A) 2/92 (which was decided without oral argument) the claimant was "given to violent and irresponsible behaviour and ... committed criminal acts, both of violence and dishonesty". Mr Commissioner Skinner declined to substitute his own view of the evidence for that formed by the doctors of the Attendance Allowance Board and said (in paragraph 10):

> " Clearly when a person indulges in aggressive or seriously irresponsible conduct the Board has to consider whether that arises from some recognised disordered mental condition or whether it merely arises from a defective character. In my judgment that was what the Board did in the case before me and they are not to be faulted".

I do not find the term "defective character" to be helpful but it seems that the Commissioner was (correctly) upholding the right of the Board to decide whether they recognised this as coming within entitlement or whether this was just ordinary criminal behaviour (no further facts are given). If, however, the Commissioner was agreeing with the proposition put on behalf of the Secretary of State that the phrase "severely disabled physically or mentally relates to a condition of mind that can be defined medically and is not meant to encompass unsociable behaviour that is not related to serious mental illness" then I cannot go along with that view. It would miss the point that severity depends on the consequences of the disability and would insert a requirement ("serious") that was not in the legislation. (In the extract from Mallinson quoted above Lord Woolf makes it clear that the allowance could be awarded even if the mental disability is not serious).

15. CA/123/1991, which was also cited in the present appeals, raises points similar to those in R(A) 2/92 and was decided at about the same time. Neither decision cites the other. It concerned a child with what are described as "severe behavioural problems" (no further details are given). The DMP concluded that "in his medical opinion there was no evidence to sustain a finding that ... the claimant had suffered from a severe mental or physical disability and he therefore did not meet the primary condition for an award ...". Mr Commissioner Hallett declined to substitute his own view of the evidence for that taken by the DMP, who had used his own expertise and clinical judgment. The Commissioner took the view that the phrase under consideration related to a condition "that can be defined medically and it is not meant to encompass unsociable behaviour which is not related to serious mental illness". I am not certain that this latter point was part of the ratio of the decision, but to the extent that it was, then (as with R(A) 2/92) I would not view it as correct to insert into the statute the word

"serious" or to limit the application of the words of the statute to conditions that "can be defined medically".

16. Re H concerned an 11 year old girl who displayed bizarre behaviour (apparently of epileptic-type attacks although it was accepted that she was not suffering from epilepsy) and complained of various physical symptoms. A consultant paediatric neurologist had reported that she was not mentally retarded, did not exhibit dangerous behaviour or automatisms and there was a considerable "emotional component involved". A child and adolescent psychiatrist had reported that the attacks did not involve loss of consciousness and their frequency could be modified by the behaviour of those around her. The DMP concluded that there was no evidence to sustain a finding that the claimant had suffered from a "severe" mental or physical disability and that her symptoms were "behavioural in origin" and improving with psychiatric help. I find this use of language unhelpful. Whatever their cause, symptoms are behavioural in their manifestation or in their nature, rather than in their origin, and if psychiatric help led to an improvement than there must have been a psychiatric aspect to her problem. The DMP revoked a certificate which had been issued in 1988 and the claimant appealed to the Social Security Commissioner.

17. Mr Commissioner Heald refused to interfere with the decision of the DMP. He said (paragraph 9) that whether a person was disabled medically or physically was for the medical authorities alone and they must be entitled to come to a conclusion that bizarre conduct by the claimant may not be caused by any disability but for some other reason recognised by them and that the Commissioner should not trespass on their expertise. On further appeal the Court of Appeal endorsed the approach taken by the Commissioner and took the view that there was no question of law involved.

18. Finally I refer again to the decision by Mr Commissioner Mesher in CDLA/926/1994, which did concern the disability appeal tribunal system of adjudication. He referred the case back to a tribunal, because the tribunal had not identified whether the claimant was disabled physically or mentally or whether the claimant's problems stemmed from some condition which was not a physical or mental disablement. He also said that to describe a condition as having "behavioural origins" did little more than to restate the problems (paragraphs 9 and 12). His decision in that case turns on the structure of the tribunal's decision and I do not read it as saying anything inconsistent with the approach that I have taken.

H. LEVENSON
1st February 1999