

provided in pursuance not only of those enactments but of any other enactment of the class specified in section 2(5).

13. The important point to note is that on this construction of section 2(5) the words "in pursuance of any other enactment" are used in reference to the provision of accommodation and not in reference to the bearing of the cost thereof out of public or local funds. It follows, if this construction is right, that regulation 5 is in part based on a misconstruction of section 2(5). For regulation 5 not only disentitles a person to an attendance allowance while he is living in accommodation provided for him in pursuance of any of the enactments mentioned in the Schedule; its second limb also disentitles him while he is living in accommodation provided for him in circumstances in which the cost thereof is or may be borne wholly out of public or local funds in pursuance of any such enactment. (It will be convenient henceforth to refer to persons living in accommodation subsidised in this manner as "persons living in subsidised accommodation".)

The second limb of regulation 5, assuming the above construction of section 2(5) to be right, is seen to be ineffective for want of an enabling power.

14. The alternative construction of section 2(5), which one reaches simply enough by disregarding two commas inserted in the Stationery Office print, gives it the following effect:—

Regulations may provide that an attendance allowance shall not be payable in respect of a person for any period when he is a person for whom accommodation is provided

(a) in pursuance of the three named enactments; or

(b) in circumstances in which the cost of the accommodation is or may be borne wholly or partly out of public or local funds in pursuance of any other enactment relating to persons under disability etc.

15. From Miss Windsor's point of view, the difficulty about this construction is that she submitted that the County Council's contribution to Kevin's maintenance is made in pursuance of section 12(1); and she expressly disclaimed relying on any other enactment. Yet it will be seen that the Secretary of State's disentitling power in relation to persons living in subsidised accommodation is restricted to cases in which the cost thereof may be borne wholly or partly out of public or local funds in pursuance of any enactment *other* than the three named ones, the three named ones including section 12(1).

16. If one considers regulation 5 on the assumption that the second construction is right, it will be seen that there has again been a failure to observe the strict terms of the enabling power. In relation to persons living in subsidised accommodation, regulation 5 disentitles them to an allowance if the cost thereof is or may be borne out of public or local funds in pursuance of *any* of the scheduled enactments. This is too wide. Section 2(5) does not authorise disentitlement where, as here, the cost is borne out of public or local funds in pursuance only of section 12(1).

17. I prefer the second of the above constructions of section 2(5), but find it unnecessary to choose between them. Whichever is adopted, regulation 5 must be construed and applied in a manner conformable to the enabling power. On either construction there has been a limited excess of power, and to that limited extent regulation 5 is ineffective. Either construction seems to me fatal to Miss Windsor's second submission. If the first construction is right she has to show that Kevin's accommodation is

provided in pursuance of section 12(1); and if the second is right it is fatal to her case that on her own submission, evidenced by the County Council's statement, the County Council's contribution is made pursuant only to section 12(1).

18. I have found this a difficult case, and must confess that I would have welcomed a rather more elaborate and fuller argument on behalf of the insurance officer. I have an uneasy feeling that I may not have done justice to all the considerations which could have been urged against the view I have formed.

19. My decision is that an attendance allowance at the lower rate is payable in respect of Kevin from and including 4th June 1973.

(Signed) Hilary Magnus,  
Commissioner.

19.11.73

R(A) 2/74

APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON  
REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A  
QUESTION OF LAW

Approach to the medical conditions contained in section 2(1) of the National Insurance Act 1972 and whether each night has to be considered separately; whether indirect attention can constitute attention within the meaning of that section.

Claim for attendance allowance by person who was kept alive by means of what is commonly known as a kidney machine. Renal dialysis required three nights a week for duration of 10 hours every Monday, Wednesday and Friday starting at 8.00 pm and ending at 6.00 am on the following day. Operating machine with the help of husband. Decision on behalf of Attendance Allowance Board that night condition not satisfied as attention necessary on three nights per week and no attention required on the other nights.

Held that the decision was erroneous in point of law and should be set aside on the grounds that it wrongly equated normative approach to arithmetical approach.

In the course of his decision considering issues raised on the appeal the Chief Commissioner observed:—

- (a) that the phrase "normative approach" enshrined an important truth but it was so likely to mislead that its use was undesirable (para 24).
- (b) that he was not persuaded that each night has necessarily to be considered separately (para 33).
- (c) in relation to preparation and use of a kidney machine that what can be described as indirect attention could constitute attention within the meaning of section 2(1) of the National Insurance Act 1972 (para 13).
- (d) that in answering the composite questions posed by section 2(1) and (2) of the 1972 Act a broad view should be taken of the matter (para 35).

1. My decision is that the claimant's application for leave to appeal against the review decision dated 24th January 1973 of the Attendance Allowance Board's delegate is granted and that that decision is erroneous in point of law and is set aside.

2. On 28th May 1973 whilst her application to the Commissioner was pending the claimant died. Her husband was appointed by the Secretary of State for Social Services to continue the proceedings. At the hearing before me the husband was represented by a solicitor Mr. H. E. G. Hodge and the Secretary of State was represented by Mr. Canlin of the solicitor's office of the Department of Health and Social Security, to both of whom I am grateful for their helpful arguments. At the hearing they both gave unqualified consent to my dealing with the application as an appeal.

3. The facts of the case are short and undisputed. In my judgment they raise two important questions. The first general question concerns the approach to the medical conditions now contained in section 2(1) of the National Insurance Act 1972, to which I will refer simply as "section 2" and "the 1972 Act". The second particular question concerns the position where the claimant requires attention from a machine and the machine requires attention from someone else.

4. The claimant was born in 1930 and consequently came within category 1 for attendance allowance purposes (the 1972 Act, Schedule 4, Part II, paragraph 4). From 1969 onwards she was kept alive by means of what is commonly known as a kidney machine. In medical terms she required renal dialysis three nights weekly to maintain her from going into irreversible renal failure. If she had not received that treatment at home she would have had to be in hospital, and if she had not received it at all she would presumably have died earlier. Her routine on the machine was perfectly regular. She was on it for 10 hours three nights a week starting at 8 p.m. every Monday, Wednesday and Friday and ending at 6 a.m. on the following day. I will refer to these as "the dialysis periods".

5. The best description of the procedure is contained in a statement dated 18th December 1972 given by her to one of the reporting doctors. That statement began: "I am on my dialysis three nights a week—the routine is on Monday I start to prepare the apparatus with the help of my husband at 6 p.m. and then I start on the machine at 8 p.m. until 6 a.m. but in between whiles my husband has to be at hand to see the machine is functioning properly and he gets up every 2-3 hours each night and I myself have little sleep during this period. My husband then strips (two illegible words) and tidies up and re-arranges the machine ready for the rebuilding, this takes up to 8 a.m."

6. The statement continued: "I then go to bed about 9 a.m. until about 2 p.m. and then get up and wait until my husband returns when we get the machine ready again in the evening for the following night."

7. The statement concluded: "My husband has to see to my bodily functions whilst I am on the machine as I cannot move at all and he gives me a bed-pan as required, and also sees that I am alright. My husband has to be at hand during the night as constant attendance and vigilance is necessary to avoid any substantial danger to myself if the machine should fail or need attention and he takes certain medical records and observations eg. Blood-flow, and blood-pressure every four hours and he also has to keep to a rigorous back-up programme to maintain me on the Renal Dialysis Machine and he has to do the heavy work involved in maintaining and setting up the machine, eg. carry 1 cwt bag of salt and storage of bottles."

8. After one of the Board's delegates had on 14th November 1972 given an unfavourable decision the claimant applied for a review, and another delegate gave the review decision of 24th January 1973. In paragraphs 3 and 5 of it he decided (entirely in the present tense) that neither of the day conditions "is" satisfied. Mr. Hodge does not seek to challenge that part of the decision in the present proceedings but reserves the right to do so later.

9. Paragraph 4 of the decision of 24th January 1973 reads as follows: "With regard to the night conditions, attention is necessary when Mrs. — is on the dialysis machine which is three nights per week. On the other nights no attention is necessary and I am, therefore, unable to accept that she requires prolonged or repeated attention during the night in connection with her bodily functions. So far as supervision is concerned, I accept that supervision is necessary when she is on the dialysis machine, but this is three nights per week and I do not accept that she requires from another person *continual* supervision throughout the night in order to avoid substantial danger to herself or others."

In paragraph 5 the delegate held that he was unable to issue a higher or lower rate certificate or to revise the determination of 14th November 1972.

10. Subsections (1) and (2) of section 2 of the 1972 Act provide as follows:—

"(1) Subject to the provisions of the National Insurance Act 1965, of the National Insurance Act 1970 and of this section, a person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain and either—

- (a) he is so severely disabled physically or mentally that, by day, he requires from another person either—
  - (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
- (b) he is so severely disabled physically or mentally that, at night, he requires from another person either—
  - (i) prolonged or repeated attention during the night in connection with his bodily functions; or
  - (ii) continual supervision throughout the night in order to avoid substantial danger to himself or others.

(2) Subject to the following provisions of this section, the period for which attendance allowance is payable to any person shall be that specified in a certificate issued in respect of him by the Attendance Allowance Board as being—

- (a) a period throughout which he has satisfied or is likely to satisfy the condition mentioned in subsection (1)(a) above or that mentioned in subsection (1)(b), or both; and
- (b) one immediately preceded by a period of not less than six months throughout which he satisfied or is likely to satisfy one or both of those conditions;

and the weekly rate of the attendance allowance payable to a person for any period shall be the higher rate specified in Part 1 of Schedule 3 to the National Insurance Act 1965 (as from time to time amended) if the certificate states both as regards that period and as regards the preceding six months that he has satisfied or is likely to satisfy both those conditions, and shall be the lower rate so specified if the certificate does not so state."

Section 2(3) prevents an allowance from being payable for any period preceding the date of the claim.

11. Subsections (1) and (2) of section 2 replace subsections (2) and (3) of section 4 of the National Insurance Act 1970 ("the 1970 Act"). The main reason for the changes was that the original allowance at a single rate was being replaced by allowances at the higher and lower rates, and this necessi-

tated changing the wording of the medical conditions to what is now in subsection (1) of section 2. The power to review is still contained in section 6(3) of the 1970 Act.

12. Mr. Hodge's grounds for alleging that the decision is erroneous in point of law, as developed at the hearing before me, may be stated as follows:—

(1) The requirement of the three weekly dialysis periods in itself, or alternatively coupled with the other matters mentioned in the claimant's statement in paragraphs 5 to 7 above, as a matter of law established satisfaction of the condition contained in section 2(1)(b)(i) of night attention; no person acting judicially and properly instructed as to the relevant law could have decided to the contrary as the delegate did.

(2) Alternatively to (1), if what has come to be described as the "normative approach" was correct, it was erroneous in law to treat it as being necessarily an arithmetical approach. There was evidence on which the delegate could hold the condition in section 2(1)(b)(i) to be satisfied, and he erred in law in holding that because the dialysis periods occurred only three nights a week out of seven "therefore" he could not hold the condition to be satisfied.

(3) A similar argument to (1) above in relation to section 2(1)(b)(ii) concerning night supervision.

(4) The delegate had omitted to take into consideration any or alternatively some of the evidence in paragraphs 5 to 7 above relating to periods other than the dialysis periods.

(5) He had not complied sufficiently with the statutory requirement that a review decision must give reasons (regulation 14(2) of the National Insurance (Attendance Allowance) Regulations 1971 [S.I. 1971 No. 621]).

13. At the hearing Mr. Canlin accepted that there was evidence on which the delegate was entitled to hold that attention was required and given in connection with the claimant's bodily functions consisting of

(a) her husband's activities relating to her during each of the dialysis periods; and also

(b) his activities at other times in the preparation of the machine and the various things that he had to do in connection with it.

I think that these admissions were rightly made. They are important since they show, if it needs showing, that what can be described as indirect attention can constitute attention within the meaning of section 2.

14. Mr. Canlin submitted however that to satisfy the night attention condition (section 2(1)(b)(i)) one must look at each night separately and the attention must be prolonged or repeated on that particular night; if a claimant required attention for three minutes on each of three succeeding nights that would not satisfy the condition. Having considered that one particular night the delegate must go on to look at other nights one after the other.

15. He submitted that paragraph 4 of the review decision meant that the night attention condition was satisfied on three of the seven nights in the week. He proceeded, although the word "ordinarily" does not appear in this particular decision before the word "requires", to submit a full and

illuminating argument on the "normative approach", which he assumed that the delegate must have used.

16. Mr. Canlin drew attention to the fact that in both paragraphs (a) and (b) of subsection (2) of section 2 of the 1972 Act (as in section 4(3) of the 1970 Act which they replaced) the periods are ones "throughout" which the condition must be satisfied. He suggested that there were three possible interpretations of the Act. Firstly, it might mean that the condition must be satisfied on each and every night throughout the relevant periods. The Commissioners had however held otherwise, and, in my opinion rightly, he did not seek to dispute their view of the matter. Secondly, it might mean that it was sufficient if the condition was satisfied on only one individual night. He submitted that this would be straining the language of the Act and disregarding the presence of the word "throughout" and this construction could not be correct. I agree. The third and only remaining possibility was that attention of the kind and to the extent specified in the statute (to which from now onwards for brevity I will refer merely as "attention etc.") was required on some but not all nights or days. He submitted that this inevitably involved drawing a line and made it necessary to insert some word such as "ordinarily" or "normally" or "usually", and that this was the basis of the normative approach. He relied strongly on what was said by the Commissioner Mr. Shewan in paragraph 8 of Decision C.S.A. 2/73 (not reported).

17. Mr. Canlin went on to discuss the question whether the delegate either must or in appropriate circumstances could treat the normative approach as being an arithmetical one, i.e. meaning that attention etc. was required on the majority of nights. He suggested at first that it was difficult to see what other approach was possible, but eventually he made a further concession which I consider to be of great importance to claimants. He submitted that in applying the normative approach the delegate was not in law bound to treat it as an arithmetical approach but he was entitled to do so if he thought fit. It followed, Mr. Canlin submitted, that in this case where attention etc. was required on three out of seven nights the delegate was entitled, though not bound, to hold that the night attention condition was satisfied, even if it was not required "ordinarily" in the sense of being required on the majority of nights.

18. Having carefully considered the arguments addressed to me I have reached a clear conclusion as to what must be the result of this appeal, but there are a number of aspects of it which I find confusing and puzzling.

19. In my judgment the review decision of 24th January 1973 is erroneous in point of law on Mr. Hodge's second ground (paragraph 12(2) above). The delegate thought on the evidence that the night attention condition was satisfied on only three out of the seven nights in each week, and he held that *therefore* he could not hold the condition to be satisfied. This in my opinion can only mean that he thought that the normative approach must be an arithmetical approach. Mr. Canlin disputes that this was the delegate's view, but admits that, if it was, it would be wrong. In my judgment this was the delegate's view, and it constitutes a misdirection which makes the decision erroneous in point of law.

20. The position in relation to Mr. Hodge's first ground (paragraph 12(1) above) is much more obscure. Apparently the delegate thought that the only evidence of attention at night related to the dialysis periods. But this overlooks the part of the claimant's statement set out separately in paragraph 6 above. Does that statement mean that, for example, she and her husband attended to the machine on Tuesday evenings? If so, was that during the

day or the night? When this case is reconsidered these matters will need to be clarified. (This is yet another illustration of the enormous difficulty of administering a provision which divides time into night and day without defining either word; the claimant and her husband could not be expected to know that it might make a difference whether getting the machine ready for use was done on one day rather than another and by day rather than by night (whatever those words might mean).)

21. On the materials before me I am not prepared to hold the decision to be erroneous in point of law on Mr. Hodge's first ground (paragraph 12(1) above). Parliament has entrusted the decision of the medical questions to the Attendance Allowance Board or their medically qualified delegates, and the Commissioner's only right to interfere is on a question of law. It is most important that the Commissioner should not in the guise of deciding questions of law be substituting his layman's opinions on medical questions or questions of fact. (In saying this I must not be assumed to have formed any particular view either way on the facts of this case; that is no part of my duty.) Section 2 contains a number of words describing matters of degree which must be matters of fact. No doubt at each end of the scale there can be cases where it could be said that a decision one way or the other was perverse and therefore wrong in law, but there must be a large neutral area where a decision either way could not be held to be wrong in law.

On the evidence in this case I am not prepared to hold that the delegate was as a matter of law bound to hold that the night attention condition was satisfied.

22. It is unnecessary to consider whether the fact that the delegate did not deal with the evidence referred to in paragraph 6 above, or at any rate it is not clear that he did do so, renders the decision erroneous in point of law on either or both of the grounds in paragraph 12(4) and 12(5) above.

23. In view of the careful arguments addressed to me on the "normative approach" I think it right to add the following comments on it. A practice grew up of delegates inserting the word "ordinarily" before "requires" in their decisions. In Decision C.A. 2/73 (not reported) the Commissioner Mr. Temple held that a decision that attention etc. was not "ordinarily required" was erroneous in point of law, because the delegate had misdirected himself by adding a further qualification to the statutory condition. In Decisions C.A. 4/73 and C.A. 5/73 (neither reported) other Commissioners echoed this criticism. In paragraph 8 of Decision C.S.A. 2/73 however Mr. Shewan expressed a contrary view. He wrote:—

"... the statutory condition could not, in my view, be held to be satisfied by evidence that on one solitary occasion the disabled person required prolonged or repeated attention during the night: nor, in my view, is it necessary, for satisfaction of the condition, to show that on every night he requires such attention. The test must be something between these two extremes. I respectfully agree with the statement, in Decision C.A. 2/73 (paragraph 13), that "in order to determine whether a condition is satisfied, or is likely to be satisfied, regard must be paid to evidence of the claimant's requirements over a period of time..." This, to my mind, virtually concedes the necessity for a normative approach; and the necessity for a normative approach is strongly reinforced, to my mind, when one refers to the provisions of section 4(3) of the Act, which indicate that the conditions must be satisfied throughout a period. Moreover, if the correct approach is a normative one, I see nothing illegitimate in the adoption of "ordinarily" as the norm. Adoption of "ordinarily" as the norm

does not in my view constitute the interpolation of an additional condition, or a modification of the express provisions of the statute: rather, in my view, it is exegetical of these provisions. I therefore reject the contention that the determination of 26th November 1971 is erroneous in law in the second respect submitted on behalf of the claimant."

24. In my opinion the phrase "normative approach" enshrines an important truth, but it is so likely to mislead that its use is undesirable.

25. An approach means getting nearer to something. But in this case what were the delegates approaching? Section 2(1) states the medical conditions. It is not phrased in the past tense; it is a timeless provision, not referring to any particular date, such as that of the claim or the original decision or the review decision. It is useless however to the claimant to establish merely that on some date he satisfied a condition in section 2(1). Section 2(2) makes it necessary for him if he is to obtain an award to shew much more.

26. The printed decision form DS 7 supplied for the use of delegates (in this and other cases) contains four alternative forms of decision. The first, which is a form of higher rate certificate reads:—

"I certify . . . that the period . . . commencing on [date] . . . ending on [date] . . . is a period throughout which he has satisfied or is likely to satisfy both of the conditions mentioned in Sections 2(1)(a) and 2(1)(b) . . . and is one immediately preceded by a period of not less than six months throughout which he satisfied or is likely to satisfy both of those conditions."

27. The second printed form of lower rate certificate deals similarly with the situation (satisfaction of the condition in section 2(1)(a) or 2(1)(b)) justifying the issue of such a certificate.

28. These two positive certificates seem to me to be admirably expressed. They cover the necessary matters in section 2(2) as well as section 2(1), following the wording of the statute. They do not give reasons, but an original as opposed to a review decision is not required to do so.

29. The remaining printed forms on the form DS7 are rejection forms. The third form reads:—

**"REJECT (WITHIN CATEGORIES APPOINTED)**

I am unable to accept that the above named claimant to attendance allowance satisfies either the condition in Section 2(1)(a) or that in Section 2(1)(b) of the National Insurance Act 1972."

The fourth form reads:—

**"REJECT (OUTSIDE CATEGORIES APPOINTED)**

I am unable to accept that the above named claimant to attendance allowance satisfies both the condition in Section 2(1)(a) and that in Section 2(1)(b) of the National Insurance Act 1972."

(The claimant was by one day outside the categories appointed.)

30. These rejection forms seem to me far less satisfactory. They suggest that the delegate is considering a situation at some particular moment in time, whereas he should be considering the state of affairs over a substantial period. Moreover, though in most cases, where the claimant's condition has been and is likely to remain static, the forms of rejection may in a practical sense be adequate, technically they are not: it is possible for a person to be

entitled to an award for a past period even though none of the conditions in section 2(1) "is" satisfied at the date of the decision. This present tense form of decision is repeated in review decisions, and I think that it tends to cause confusion.

31. I think that there is an important difference between the use of non-statutory language, e.g. by inserting a word such as "ordinarily" in discussion and at the point of decision. I venture to quote what I said in paragraph 17 of Decision R(I) 2/74:—

"It commonly happens that a decision . . . of any adjudicating authority contains different parts, including discussion of the problem before it reaches the actual point of deciding the questions before it. I cannot see the slightest objection to the use of non-statutory language in the course of discussion. Such language can be found in almost any reasoned judgment of a Court; it forms part of the considerations which lead up to the decision. When however the adjudicating authority comes to the point of actual decision of a statutory question, it is then essential for it to decide that question and not some other one. This makes it dangerous for either an adjudicating authority or the forms supplied for its use to use, at the decision stage, language different from that of the statute, which may lead to doubt whether the authority has decided the correct question."

The matter may be stated more briefly thus. Either the insertion of the word "ordinarily" or some such word in the question actually decided alters the sense or it does not. If it does, in my opinion it results in the delegate's having answered the wrong question. If it does not, it is surplusage, and for reasons which I will explain undesirable surplusage since it may be calculated to mislead. I must therefore record my agreement with the view expressed on this point by Mr. Temple in Decision C.A. 2/73. I think that the proper place for exegesis is in the discussion. In other respects I respectfully agree with what Mr. Shewan wrote (paragraph 23 above).

32. Although in general in discussion as opposed to decision I see no objection to the introduction of non-statutory language, there happen to be particular reasons why the use of words such as "normative" or "normal" or "ordinarily" are in my opinion undesirable in this context. There is a real danger of their being interpreted as necessarily involving a rigid arithmetical approach, which Mr. Canlin admits would be wrong. In other branches of national insurance law where words such as "normal" and "ordinarily" appear such a rigid arithmetical approach is commonly adopted. Well known examples are under section 20(1)(b) of the National Insurance Act 1965 (the "normal idle day" rule) and regulation 7(1)(f) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1967 [S.I. 1967 No. 330] (the "full extent normal" rule). Decision R(U) 14/59 paragraph 16 shews that by its date the arithmetical approach was firmly established, and if a person had worked on at least 50 per cent of the relevant days it could not be held that in the normal course he would not have worked on the day in question. This strictly arithmetical approach is further illustrated by Decision R(U) 12/64, arising out of a case where the numbers of days were almost equal.

33. As at present advised I am not persuaded that Mr. Canlin's contention (paragraph 14 above) is correct that each night has *necessarily* to be considered separately. It would mean presumably that if on any particular night the claimant requires attention which in the opinion of the delegate is not repeated on that night and does not amount to prolonged attention, that

night would have to be disregarded altogether, although on other nights massive attention was required.

I think that the words "during the night" may well mean merely at night and not during a particular night and may be explained by the verbal changes needed to split up the single supervision condition in section 4(2)(b) of the 1970 Act into the separate supervision conditions in section 2(1) to enable the allowance to be paid at the higher and lower rates.

34. In my judgment an original rejection decision of a delegate should deal not only with the (present tense) questions arising under section 2(1) but also with the wider questions arising under section 2(2), so as to dispose of all the medical questions affecting the claimant's rights. Obviously if, for example, he can find no period throughout which the claimant has satisfied or is likely to satisfy any of the conditions he need not go on to deal with further questions which in that event do not arise. Similarly a review decision should deal with all the questions, though, if the original decision has done that, the reviewing delegate may deal with them by reference to it. In the present case it happens that the delegate on 14th November 1972 had no power to issue a lower rate certificate or refuse one, since the appointed day (15th November 1972) had just not arrived. (See the National Insurance Act 1972 (Commencement No. 3) Order 1972 [S.I. 1972 No. 1665 (C. 41)].) Mr. Hodge has however very sensibly not sought to argue that technically the decision of 14th November 1972 in any event required revision and that the review decision was therefore erroneous on that ground.

35. I am in full agreement with the view of Mr. Temple quoted and supported by Mr. Shewan (paragraph 23 above): in my judgment in answering the composite questions posed by section 2(1) and 2(2), "regard must be paid to . . . the claimant's requirements over a period of time". I think that the delegate should take a broad view of the matter, asking himself some such question as whether in the whole circumstances the words in the statute do or do not as a matter of the ordinary usage of the English language cover or apply to the facts. These are matters for the good sense and judgment of the delegate. In a case such as that suggested as an example by Mr. Canlin (paragraph 14 above) I cannot conceive that any delegate would hold the condition to be satisfied. But on the other hand the claimant in this case required attention for at least 10 hours on more than 150 nights in the year, more than half of which hours, incidentally, were after midnight and therefore part of the following period of 24 hours, and it was for the delegate to decide whether it would be a misuse of the English language to hold on these facts alone that at night she received and required prolonged or repeated attention during the night.

36. The claimant's application is granted, and the appeal of her husband is allowed.

(Signed) R. G. Micklethwait,  
Chief Commissioner.