DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(b) of the Social Security Act 1998. It is:

I SET ASIDE the decision of the Llangefni appeal tribunal, held on 10 March 2004 under reference U/03/915/2003/00121, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT as follows.

The appeal tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the 1998 Act, any other issues that merit consideration.

The appeal tribunal must investigate and determine the claimant's entitlement to a disability living allowance on his claim that was treated as made on 4 April 2003.

The appeal tribunal must not take account of circumstances that were not obtaining during the period from the date of claim to the date of the decision under appeal (30 June 2003): see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

What I have to decide

2. In this case, a district chairman chaired the initial hearing of the claimant's appeal. The hearing was adjourned. At the resumed hearing, the same chairman sat but with different members. I have to decide whether the district chairman was entitled to chair the appeal tribunal with different members at the resumed hearing following the adjournment?

3. This issue used to be the subject of regulation 51(5) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999:

> 'Where a hearing has been adjourned and it is not practicable, or would cause undue delay, for it to be resumed before a tribunal consisting of the same member or members, the appeal or referral shall be heard by a differently constituted tribunal and the proceedings shall be by way of a complete rehearing.'

That provision has now been revoked. So I also have to decide whether the effect of that revocation was to remove all control over the constitution of a tribunal following an adjournment.

How the issue arises

4. The claimant's appeal first came before an appeal tribunal on 9 September 2003. The tribunal consisted of a district chairman, sitting with Dr G and Miss M. The chairman's record of proceedings shows that evidence was taken before the issue arose of whether Miss M should sit as a member. The concern was that she had been a member of an appeal tribunal on 3 April 2003, which had dismissed the claimant's appeal on an earlier claim.

5. The tribunal adjourned the hearing. The chairman gave directions that at the rehearing Miss M was excluded for the rehearing but not herself or Dr G.

6. At the resumed hearing, the chairman sat with Dr B and Mrs R. The tribunal heard evidence and dismissed the claimant's appeal. I granted the claimant leave to appeal against the tribunal's decision on the issue whether the district chairman had been entitled to sit at the resumed hearing. The Secretary of State has supported the appeal.

The right to a fair hearing

7. The claimant had a right to a fair hearing. That is provided for by the Convention right in article 6(1) under the Human Rights Act 1998, as well as by the pre-existing domestic law principles of natural justice. As so often, I can see no difference between the Convention right and natural justice in the circumstances of this case.

8. There is an interrelationship between the right to a fair hearing and the express provisions of the procedural regulations governing a hearing. The regulations may override the right to a fair hearing. But the regulations will be interpreted so as far possible to prevent a conflict between their express provisions and the right to a fair hearing. As Mr Justice Megarry put it in *John v Rees* [1969] 2 All England Law Reports 274 at page 309, the language used is relevant to the issue whether it is 'apt ... to exclude the ... expectation of being accorded natural justice.' And in *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All England Law Reports 865, Lord Russell said at page 872:

> 'For it is to be implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles.'

The relationship between regulation 51(5) and the right to a fair hearing

9. On its wording, the provision dealt with two issues. First, it prevented any argument that a party was entitled to have the same members assembled, regardless of the practicalities and the delay. Second, it emphasised that if the members were different, there had to be a complete rehearing. It did not purport to provide a complete code dealing with the constitution of a tribunal following an adjournment. In other words, it left scope for the operation of the principles governing a fair hearing in other circumstances.

10. Even on the limited issues covered by regulation 51(5), there was still scope for those principles to operate. Suppose that the same members could be reassembled without difficulty or delay, but that in the meantime one of those members had come into a personal relationship with one of the parties. Regulation 51(5) would not prevent that member sitting. But would that member be entitled to sit? The answer is obviously: no. Natural justice and the Convention right would require that the member did not sit to hear the case.

11. The relationship between regulation 51(5) and natural justice was this. Regulation 51(5) dealt only some issues that could arise following an adjournment. The right to a fair hearing dealt with others. The two were not, though, mutually exclusive. It is likely that in respect of

those issues covered by regulation 51(5), the right to a fair hearing would have produced the same result.

The effect of the revocation of regulation 51(5)

12. So, regulation 51(5) and the right to a fair hearing operated together to govern the constitution of an appeal tribunal following an adjournment. Given that, what effect did the revocation of regulation 51(5) have? It removed the need to consider the practicalities of, and the delay involved in, assembling the same members. Did the revocation of that provision affect the right to a fair hearing?

13. It did not expressly affect that separate right or the principles that govern it. Nor did it have that effect by implication. If regulation 51(5) had never been enacted, the principles governing a fair hearing would have applied. Mere silence does not exclude a right the fair hearing. Sir Jocelyn Simon, President, dealt with the effect of a failure to make procedural regulations in *Qureshi v Qureshi* [1971] 1 All England Law Reports 325 at pages 342 to 343:

> 'In such case the tribunal or body acts effectively provided it acts in accordance with natural justice and to promote the objects with which it was set up, and possibly by analogy with the rules of procedure prescribed for comparable tribunals or bodies.'

If that was the position if the provision had never been enacted, how can its revocation have a different effect? Test it like this. Regulation 51(5) provided for a rehearing if the members of the tribunal were different following a rehearing. That provision has now been revoked, but there can be no doubt that the need for a rehearing in those circumstances remains.

Does my decision render the revocation of regulation 51(5) ineffective?

14. No, it does not. My conclusion is that the revocation of regulation 51(5) has not affected the claimant's right to a fair hearing. But the revocation of that provision still has practical effect. It is no longer necessary to consider whether it is practicable or would cause undue delay to assemble the same members. A differently constituted tribunal can now be assembled without considering these factors. However, the constitution remains subject, as it always was even when regulation 51(5) was in force, to the requirement of a fair hearing under the principles of natural justice and the Convention right in article 6(1).

Was there a breach of the right to a fair hearing in this case?

15. The key factor in this case is that the tribunal heard evidence before adjourning. The danger is that the members of the tribunal at the resumed hearing did not all have the same information on which to base a decision. The chairman recorded evidence at the initial hearing. Her record of proceedings was in evidence at the resumed hearing. But there is more to evidence than the words recorded. For one thing, a chairman does not produce a verbatim record of evidence. So there may have been evidence that was not recorded but which the chairman recalls or affects the chairman's view of the evidence at the later hearing. That additional evidence may have been given orally by the claimant or taken the form of an observation. Another consideration is this. Evidence is not assessed just by its content. There is also the manner in which the evidence was given. That could affect the chairman's

assessment of the evidence given at the rehearing and that, in turn, could influence the other members.

16. This danger was considered by the Tribunal of Commissioners in *R(U) 3/88*. The Tribunal was concerned with a provision that if a tribunal was differently constituted following an adjournment, it had to conduct a complete rehearing. The Commissioners dealt with the practice at the rehearing in paragraph 7:

> 'As the tribunal is differently constituted from the earlier one, which part heard the case, it would be prudent for none of the members of the earlier tribunal to be included as part of the second tribunal. The members are judges of fact at the hearing and it seems to us undesirable for a member to have a residual knowledge of evidence given at the earlier hearing which is not shared by the other members – knowledge of what was said as distinct from what was written down.'

Other comments in that paragraph show that this was one of the safeguards for making admissible the written record of evidence given at the initial hearing.

17. I have not overlooked that the Commissioners were setting out a practice that was 'prudent'. They did not expressly say that it was obligatory or that a different practice would deprive the claimant of a fair hearing. That would not have been appropriate. The Commissioners were speaking in general terms. They had to make allowance for the possibility that the circumstances of a particular case might justify a different approach.

18. I have also considered the significance of the way that the legal concept of a fair hearing has developed since 1988. The Commissioners were concerned with the risk of residual knowledge in one of the members of a tribunal. That remains a concern today. If the members of the tribunal do not all have access to the same evidence, there is a reasonable basis for apprehension that there may not be a fair hearing.

19. I am sure that the district chairman believed that she was not affecting the claimant's right to a fair hearing by chairing the resumed hearing. I am sure that she would have refused to sit if she felt that she had evidence that was not available to the other panel members. But that is not the point. There is always a risk of subconscious impressions being carried over from one hearing to another. And that is sufficient to give rise to objective concern about the danger of residual knowledge.

20. My decision is that the claimant did not have a fair hearing.

Future tribunals

21. My decision may affect the listing practice for appeal tribunals in the future. For that purpose, it is important to understand the basis of my decision. It is not based on the mere fact that the district chairman was present at both hearings. Nor is it based on the fact that an odd word of evidence was given. It is a crude measure, but I have compared the length of the chairman's record of the *evidence* at the two hearings. For the first hearing, her record of the evidence covers half a page. For the resumed full hearing, her record covers two pages. That is indicative of the amount of evidence that was heard before an adjournment was discussed.

22. The amount of evidence heard is not alone decisive. The nature of that evidence is also relevant. As in all issues of judgment, all will depend on the circumstances of the case. That is not a particularly helpful advice on which to base a listing practice. The most useful advice that can be given was that given by the Tribunal of Commissioners in *R(U) 3/88*. The practice of having a completely different tribunal whenever evidence has been heard is 'prudent'.

Disposal

23. I allow the appeal and direct a rehearing before an appropriately constituted appeal tribunal.

Signed on original
on 6 September 2004

Edward Jacobs
Commissioner