DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since it is not expedient for me to make the findings of fact which are necessary to decide what decision the tribunal should have given, I refer the case for rehearing before a differently constituted tribunal.

2. This is an appeal by the Secretary of State against the decision of the tribunal allowing the claimant's appeal against a decision that the claimant had become a full-time student and was therefore no longer entitled to carer's allowance. I held an oral hearing of the appeal on 18 January 2005, at which the Secretary of State was represented by Miss Das, of the Department of Work and Pensions Solicitor's Department, and the claimant represented himself.

3. The claimant was awarded invalid care allowance, as it was then called, from 29 October 2001. Under section 70(3) of the Social Security (Contributions and Benefits) Act 1992, a person who is receiving full-time education is not entitled to carer's allowance, and under regulation 5(1) of the Social Security (Invalid Care Allowance) Regulations 1976 a person is treated as receiving full-time education during any period during which he attends a university for twenty-one hours or more per week. On 29 August 2003 the claimant telephoned the Care Allowance Unit, stating that he was going to start a full-time university course in October. He was sent an inquiry form, which he returned, stating that his number of hours of supervised study was 10-15.

4. The Care Allowance Unit wrote to the university to obtain further details of the course. On 17 November a reply was received from the Course Leader for Qualifying Law Degrees, as follows:

> **"Your letter dated 11th November 2003...has been passed to me for reply because (the claimant) has transferred to LLB Law and Criminology and I am the relevant Course Leader.**
>
> **Twelve hours per week are spent in lectures and seminars and I would expect him to work at least three further hours each day at home or elsewhere."**

On the basis that the claimant's course of education was for more than 21 hours per week, a decision was made on 25 November 2003 superseding the decision awarding invalid care allowance with effect from 29 September 2003.

5. The claimant appealed on 19 December 2003, accepting that lectures and seminars occupied 12 hours per week, but continuing:

> **"It is contended that 3 hours per day is taken up as personal study time. This period is only a recommendation and is not obligatory. Any time for personal study is undertaken at home. I live with the person I care for full time. 1 hour per day is allocated for personal study seven days per week. This totals seven hours per week. When added to the 12 hours of attendance it totals 19 hours per week. Exemption has been granted from two subjects. Therefore three hours must be deducted to allow for this per semester.**

Therefore total study hours are 16 per week. Five hours below the time limit stated by the regulation."

The claimant concluded by saying that he was able to study at the same time as carrying out his caring responsibilities.

6. The Care Allowance Unit contacted the claimant on 23 January 2004 to explain the decision under appeal. The file note recording the conversation contains the following passage:

"(The claimant) explained to me that he had been granted exemption from parts of the course because he already had a masters degree. This meant that his number of contact hours was reduced by 5 hours per week. I explained that I was prepared to accept this information but pointed out that the total number of hours still amounted to 22 per week. (The claimant) said that he was aware that the hours were over 21, however he wished to proceed because he would be able to use the whole procedure as a contribution toward his law degree."

At the hearing before me the claimant produced his postgraduate degree certificate, which is a M.Sc degree in Strategic Quality Management, awarded by the institution where he is currently studying. The claimant also told me that what he had in fact said on 23 January 2004 was that he was aware that the hours required by the regulation for a full time course of education were 21, and that while he had said that these proceedings would be useful experience in connection with his studies, he had not said that that was his reason for bringing the appeal.

7. The decision was reconsidered, but not revised, on 15 January 2004 and accordingly the appeal proceeded to a hearing on 11 May 2004. The claimant attended the hearing and gave evidence, which is summarised in the statement of reasons as follows:

"The Appellant explained that:-

in the context of (the course leader's) letter, he was not typical of students on his course, because he had already completed part of the curriculum on a previous economics and law course.

he had been granted exemption from 5 hours per week of attendance at university due to his previous achievements;

much of the relevant study that he was required to do was not demanding of the time stipulated by (the course leader);

as (the course leader) was head of the law department, not the business department, she did not have personal knowledge to entitle her to comment on the time requirement of business modules, as he was studying Law with Business Studies;

he attended 8 hours per week of lectures and seminars, and otherwise studied only at home, including use of the internet;

the nature of his "homework" was preparation for participation in seminars, taking on average 6 hours per week, plus papers and essays taking about ½ hour per week. He calculated that 9 hours formal attendance, and 6½ hours in other relevant study, added

up to 15½ hours, but was willing to add another hour for safety, making a total in relevant study of 16½ hours altogether"

8. The tribunal allowed the appeal for the following reasons::

"The Tribunal accepted the evidence of the Appellant with regard to the actual time spent by him and required of him in relevant study, preferring his evidence to that of (the course leader), whose stipulations as to time were regarded by the Tribunal to be aspirational, and did not even purport to be based upon any historical or statistical analysis, or actual knowledge of his relevant time commitment."

The Secretary of State sought leave to appeal on the ground that the tribunal failed to follow the guidance of the Court of Appeal in *R(G)2/02* that in deciding whether a course is full-time, particular regard should be had to the amount of time which those who conduct the course expect a student to devote to contact hours and supervised study in order satisfactorily to complete the course. In granting leave to appeal, I expressed uncertainty as to what the tribunal meant by saying that the course leader's stipulations as to time were "aspirational".

9. Regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976, as amended by amendment regulations in 1992 and 1996, provides:

"(1) For the purposes of section 70(3) of the Contributions and Benefits Act a person shall be treated as receiving full-time education for any period during which he attends a course of education at a university, college, school or other educational establishment for twenty-one hours or more a week.

(2) In calculating the hours of attendance under paragraph (1) of this regulation-

(a) there shall be included in the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise, experiment or provision for which provision is made in the curriculum of the course; and

(b) there shall be excluded any time occupied by meal breaks or spent on unsupervised study, whether undertaken on oe off the premises of the educational establishment.

(3) In determining the duration of a period of full-time education under paragraph (1) of this regulation, a person who has started on a course of education shall be treated as attending it for the usual number of hours per week throughout any vacation or any temporary interruption of his attendance until the end of the course or such earlier date as he abandons it or is dismissed from it."

10. In *Flemming v Secretary of State*, reported as *R(G)2/02,* the Court of Appeal followed the decision of the Court of Appeal in Northern Ireland in *Bronwyn Wright-Turner v Department for Social Development,* reported as *R1/02(ICA),* in preference to *CG/4348/1998;* in holding that supervised study in a university context includes all work done in pursuance of an instructor's requirements. The Court of Appeal in Northern Ireland had set out propositions for the guidance of tribunals and Commissioners in deciding whether a course is a full-time course, which the Court in *Flemming* endorsed. Pill L.J. held (paras. 21 and 22):

"I also agree that ascertainment of the hours of attendance is a question of fact to be determined by the adjudicating officer or tribunal. Evidence from the university

authorities as to the amount of time they expect students to undertake to complete the course is likely to be important evidence. I agree that the "tribunal of fact should ordinarily focus primarily on it" as stated in the opening words of proposition 8 in *Wright-Turner.*

Evidence from the student himself as to the time he spends to meet the requirements of the course is not excluded. In the latter part of proposition 8, the Court attempted to deal with the question arising from the varying abilities and conscientiousness of students of all generations. Some students on a course of education will spend more time studying than others do. A fact finding tribunal should however scrutinise with care evidence from a student who claims that he attends the course for significantly fewer hours than the university authorities expect of him. Moreover, on many courses of education it may be a foolhardy student, unless a very brilliant one, who genuinely claims that he attends, within the definition, for fewer than 21 hours a week. His successful completion of the course may be imperilled. The more structured the course, with, for example, modules, detailed course work and regular assessment, the easier it is likely to be to make the determination of fact."

Chadwick LJ held (at para. 38):

"...it would be unsatisfactory to dispose of this appeal without an indication, at least in general terms, whether the approach of the Court of Appeal in Northern Ireland in *Bronwyn Wright-Turner v Department for Social Development* should be followed by appeal tribunals in England and Wales. In my judgment that approach is broadly correct and should be adopted. I would draw particular attention to three factors identified in the judgment of Lord Chief Justice Carswell. First, that study which is in the discharge of the course, as prescribed by those who conduct it, constitutes supervised study for the purposes of regulation 5. I would add that, in my view, time spent in private study which is a necessary adjunct to physical attendance at lectures and laboratory work falls within that description. Second, ascertainment of the hours for which a person attends a course of education is a question of fact, to be determined by the Secretary of State or a tribunal. Third, the tribunal of fact should have particular regard to the amount of time which those who conduct a course expect a student to devote to contact hours and supervised study in order satisfactorily to complete the course. I recognise that the "average" student is an elusive concept, that the less able but diligent student will take longer than the time expected, and that the more able (or less diligent) student will take (or devote) less than the time expected. But it is plainly desirable that a person with care responsibilities who is contemplating a course of education should know in advance whether, by attending the course, he or she will be treated as receiving full-time education. A tribunal of fact should, I think, be very slow to accept that a person expects or intends to devote-or does, in fact, devote-significantly less time to the course than those who have conduct of the course expect of him; and very slow to hold that a person who is attending a course considered by the educational establishment to be a part time course is to be treated as receiving full-time education because he devotes significantly more time than that which is expected of him."

11. Miss Das submitted that the tribunal should have accepted the Course Leader's letter of 17 November 2003 as an accurate statement of the hours of supervised study which the university required the claimant to carry out, and that in rejecting that evidence the tribunal failed to follow the guidance given by the Court of Appeal in *Flemming*. Miss Das also submitted that the tribunal ought to have had regard to the telephone conversation on 23 January 2004, which indicated that the claimant did not genuinely believe that his total

number of study hours were less than 21. Finally, Miss Das adopted the observation in my grant of leave to appeal that the tribunal's finding that the Course Leader's evidence was "aspirational" was ambiguous.

12. The claimant submitted that the statement of reasons disclosed no error of law. The letter of 17 November 2003 contained an obvious error in saying that the claimant was enrolled on a Law and Criminology Course, when he was in fact enrolled for a Law and Business Studies degree. The tribunal was therefore entitled to conclude that the letter was written without any knowledge of the claimant's particular circumstances. Furthermore, his postgraduate degree entitled the claimant to exemptions in the business studies element of the course, which would have been outside the Course Leader's knowledge as the person responsible for law degrees. The claimant submitted that because of his postgraduate degree there was no requirement for him to study for as many hours in the first semester of the course as an undergraduate student. For those reasons, the claimant submitted that the tribunal was fully entitled to accept his evidence with regard to the hours which he actually spent and which were required of him in studying for his degree.

13. It is clear from the decision of the Court of Appeal in Northern Ireland in *Wright-Turner* and of the Court of Appeal in *Flemming* that the normal starting point in determining the hours of attendance at a course of university education will be evidence from the university authorities with regard to the amount of time which the authorities expect the student to devote to contact hours and supervised study. The evidence of the claimant will be relevant if there is a dispute about those issues, but it is probably only in a very unusual case that a tribunal will prefer the evidence of a student to the evidence of the college authorities on the question of how much study a student on the course is expected to carry out. As Mrs Commissioner Heggs observed in *R(SB) 41/83*, evidence from the university authorities concerning the description of a course is not conclusive, but any evidence produced in rebuttal should be "weighty in content" (para. 12) .

14. The Court of Appeal in *Flemming* rejected the submission that the word "attends" in regulation 5(1) requires physical attendance at the premises of the university, holding that the expression "attends a course of education at a university" is to be construed in the sense of being enrolled on such a course (para. 17). The focus of the regulation is therefore on the requirements of the course, rather than on the way in which a student in fact conducts his studies. As Chadwick LJ pointed out (para. 28), the phrase in regulation 5(1) is "receiving full-time education by attendance", and not "receiving education by full-time attendance", and I do not consider that a claimant can establish that he or she is not a full-time student simply by showing that he or she does less work than the course requires. If a student is very able, it is also legitimate to expect the student to study for the same length of time as a less able student in order to achieve a better degree. If a student is enrolled on a course requiring contact and supervised study time in excess of 21 hours and the student falls within the normal range of abilities and entry qualifications of students for whom the course is intended, in the absence of any special circumstances, the student should in my view generally be regarded as being in receipt of full-time education.

15. There will however be cases, such as the present, in which a student claims to be exempted from certain requirements of the course, for example, because the student has an overlapping qualification or has previously completed a relevant course of study. There is no doubt that regulation 5 in its present form allows such circumstances to be taken into account,

and in such cases the starting point of the inquiry will be to establish the number of hours of contact time and supervised study expected of the particular student. In most cases there will be some form of documentary evidence from the university of an exemption or other relevant dispensation, and decision makers should be cautious in accepting uncorroborated evidence from a student that he or she is not expected to satisfy the normal requirements of the course. Regulation 5(3) requires a claimant undertaking a full-time course of study to be treated as attending the course for the usual number of hours per week during vacations, but if a claimant is exempted from full-time attendance for periods of the course, there is no reason why the claimant should not be entitled to benefit during such periods.

16. In his grounds of appeal to the tribunal, the claimant asserted that he had been granted exemptions in respect of two subjects, and also raised a doubt as to whether the Course Leader had taken that exemption into account when writing her letter of 17 November 2003. Although the tribunal correctly identified the factual issues raised by the claimant, they did not make the findings which were necessary in relation to those issues. The tribunal rejected the Course Leader's evidence, but their finding that her evidence was "aspirational" leaves it unclear whether they rejected her evidence in relation to the course requirements generally, or in relation to the claimant in particular. They made no specific finding on the question of whether the claimant had been granted exemptions from attendance at lectures and tutorials, nor on whether he had been allowed any dispensations from private study of the subjects in respect of which he had been granted exemptions. In saying that they accepted the evidence of the claimant with regard to the time "required of him in relevant study", the tribunal made a further ambiguous finding, in that it is not clear whether they meant the time required by the university, or the time which in their view was necessary for the claimant satisfactorily to complete the course. The tribunal impliedly criticised the university for not producing evidence of actual study times, but such evidence was not necessary to establish the hours of attendance and supervised study which the university expected.

17. The ambiguities in the tribunal's findings leave it unclear they gave proper weight to the Course Leader's evidence, or the evidence concerning the telephone conversation on 23 January 2004, as the Secretary of State has submitted. Despite the claimant's exceptionally able submissions, I have come to the conclusion that the tribunal's failure to make the findings of fact which were necessary to deal with the issues in this case renders their decision erroneous in point of law. Accordingly, I allow the appeal and set that decision aside.

18. I indicated at the hearing that I would refer this case for rehearing before a differently constituted tribunal if I decided to allow the appeal. I understand that neither side objects to that proposal and, accordingly, my decision is as set out in paragraph 1. The Secretary of State will no doubt wish to consider obtaining further and more detailed evidence from the university authorities dealing with the issues which I have discussed.

(signed on the original) **E A L Bano**
Commissioner

21 January 2005