DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The claimant is appealing with permission of a chairman from the decision of the Manchester appeal tribunal on 2 August 2001 under reference U 40 072 2001 02854. The tribunal confirmed the decision of the Secretary of State to end the claimant's incapacity benefit on 20 February 2001 by superseding a previous award because the claimant was no longer incapable of work.

3 For the reasons below, the decision of the tribunal is erroneous in law. I set it aside. The appeal is referred to a new tribunal for a full rehearing in accordance with section 14 of the Social Security Act 1998. **The tribunal should note that there is an outstanding request that it must decide, namely whether it summon the examining medical practitioner as a witness under regulation 43 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.**

4 I held an oral hearing of the appeal at Bury County Court on 7 August 2002. The claimant attended and was represented by her husband. He is a professional representative before other tribunals. The Secretary of State was represented by Ms D Haywood of the Officer of the Solicitor to the Department for Work and Pensions. I thank both for their clear presentations and in particular for the skeleton arguments and citations that both produced. I intend no discourtesy in not setting out their extensive arguments on human rights caselaw in full.

Background to the appeal

5 After the claimant filled in the usual incapacity benefit questionnaire, an examining medical practitioner (whom I call Dr K - I cannot read the name properly) reported in January 2001. Dr K confirmed that the claimant had thoracic outlet syndrome, for which she had had two ribs removed in August 2000. But Dr K found that the claimant's only limitation was inability to walk more than 400 metres. The standard score of the personal capacity assessment for that limitation is 3 points. An official queried Dr K's agreement with the claimant's stated inability to walk. AS Dr K was away, the matter was referred to a Benefits Agency Medical Services (BAMS) medical adviser. The adviser advised that Dr K was wrong in saying that the claimant could not walk more than 400 metres. The decision maker who assessed the claimant's inability to work ignored the BAMS advice and based the decision on Dr K's evidence. The decision was that the claimant was not incapable of work.

6 The claimant appealed, restating her limitations and supporting this by a full medical report from a consultant neurologist. The claimant supported her appeal by reference to the European Convention on Human Rights (the Convention). She contended that the appeal tribunal was not able to give her a fair hearing under article 6 of the Convention, that the personal capacity assessment was discriminatory under article 14 of the Convention, and that incapacity benefit was a possession and that removing it was a breach of her rights under Protocol 1 article 1 to the Convention. The claimant's representative made a written submission before the hearing in which he asserted the claimant's position. He pointed out errors and inconsistencies in the

examining medical practitioner's report. He challenged the advice of the BAMS medical adviser. He asked that both Dr K and the BAMS medical adviser be called as witnesses.

The tribunal decision

7 The claimant attended an oral hearing with her husband. The Secretary of State was not represented. Her husband presented his arguments on human rights to the tribunal. The record of proceedings then records:

> "Chairman took advice from Human Rights Act 1998 expert and proceeded."

The chairman apparently announced that the tribunal could rectify any breach of human rights. The tribunal then heard the substance of the case. Applying the personal capacity assessment, it agreed with 3 points for walking and awarded 8 points for lifting. It confirmed that there were no other limitations and dismissed the appeal.

Grounds of appeal

8 There are several grounds of appeal. Some raised issues of fact. Most challenged aspects of the fairness of the decision-making process. Two were not pursued at the hearing before me. One, based on article 14 of the Convention, was that there was discrimination in the way the personal capacity test was operated. The other was that the tribunal was itself not independent because it was established by the Department for Work and Pensions and not the Lord Chancellor's Department. The points that were pursued were as follows: the Secretary of State (or Decision Maker) was not independent, and his initial decision was not in compliance with article 6 of the Convention; the tribunal could not "rectify" that breach, and certainly could not do so in the way it purported to do; by accepting the unfair decision below the tribunal was also unfair; and it was also unfair in failing to give the claimant a chance to cross examine those who gave the evidence used by the Secretary of State.

The telephone call

9 The statement of reasons for the tribunal's decision explained the cryptic comment in the record of proceedings as follows:

> "It was argued that there was a Human Rights issue involved as the Decision maker had not complied with Article 6. The Chairman took advice and determined that any irregularity was cured by the tribunal being fair and impartial. The Appellant accepted that the Tribunal complied with Article 6."

I asked the representative what happened. He was told at the start of the hearing that the chairman had read the papers. But it became clear that the chairman had not done so, or had failed to notice the human rights points. This included a written request for witnesses. When the representative raised those points, the chairman said that the tribunal would adjourn so that she could make a phone call. Everyone left the room, including the chairman. Later, the chairman reconvened the tribunal. She explained that another chairman had advised that any problem with human rights could be rectified by the tribunal. The tribunal then heard the case. Having heard the representative's account of events, Ms Haywood readily agreed that the decision of the

tribunal could not stand. It was clearly unfair. I unhesitatingly agree. I am not surprised that the claimant and her husband wanted to appear in front of me to assert that this tribunal acted in breach of her human rights. It undoubtedly did. But no reference to human rights was necessary to establish that it also flouted her common law rights to a fair hearing.

10 I emphasise why the tribunal erred, in the hope that such action is never repeated. The representative raised his points on human rights in his written submissions in advance. The tribunal plainly had to decide them. The chairman might have made a telephone call about them when reading the papers before the tribunal hearing, but did not. Having failed to do that, the chairman could have adjourned the matter completely with directions for a future hearing, but did not. The tribunal could also have agreed to hear the case so far as possible, and then make a decision later having checked the law, but again did not. Instead, the chairman telephoned an unidentified colleague during the hearing. That approach might work for contestants in "Who wants to be a Millionaire" (except that even there everyone else is party to the telephone call and the colleague is identified). It does not work for tribunals. The tribunal is under a duty to make its own decision. It cannot delegate that duty. It is improper for a chairman to telephone any third person during an ongoing tribunal hearing for any substantive reason related to the hearing. Additionally, it is improper for a tribunal to act on such a communication without giving the parties full details of it and an opportunity to answer it. To do so is both to deny the parties a fair hearing and to introduce a real possibility of bias in the decision made. Or, in Convention terms, this tribunal patently failed to act as an independent and impartial tribunal.

11 I indicated to the parties at the oral hearing that the tribunal decision was to be set aside for that reason. They agreed that I should also look at the other issues raised by the representative to give any appropriate directions to the new tribunal.

Human rights and the Secretary of State

12 I deal with one issue swiftly. The representative is wrong to argue that the Secretary of State is bound by article 6 of the European Convention on Human Rights. I agree with the analysis put forward by Ms Haywood. Put in Convention terms, there is no "contestation" (or dispute over a civil right) in this case until the claimant appealed against the decision of the Secretary of State. Ms Haywood argued the point fully by reference to the case law of both the European Court and the British courts. It was confirmed by the European Court, for example, in *Zander v Sweden* (1994) 18 EHRR 175. She also referred to the decision of the House of Lords in *R v Secretary of State for the Environment ex p Holdings and Barnes PLC* [2001] UKHL 23. In that case, their Lordships confirmed that it is sufficient to meet the Convention that any decision making body be subject to subsequent control by a judicial body that had full jurisdiction and did provide the guarantees of article 6(1). In a social security case, the Secretary of State can make a decision to award, or to stop, benefit on any basis consistent with law and on any evidence that the Secretary of State considers it proper to use within the information powers available to the Secretary of State. At that level there is no need for a "fair hearing", or indeed any hearing. It is the duty of a tribunal to provide the fair hearing when asked to deal with a dispute about such a decision.

Summoning witnesses

13 The tribunal is bound to comply with both the principles of natural justice and article 6 of the Convention, as applied by the Human Rights Act 1998. In practice, these often interact to provide the same safeguard. They both require that the tribunal be impartial and independent. They both require that the parties receive a fair hearing. The representative argued that the claimant did not have a fair hearing in this case as he was not allowed to cross examine Departmental witnesses. I asked the representative whom he wanted to have called as witnesses. He told me that he expected to be able to cross examine: the official who made the decision on behalf of the Secretary of State, the examining medical practitioner, and the BAMS medical adviser who had commented on the examining medical practitioner report. I asked him why. His answer was that he would be able to do that in the tribunals of which he had experience, and he assumed that the same rules of fairness applied here. I asked Ms Haywood for her submissions on this point. She was of the opinion that there was no basis for the tribunal to call any of those persons as witnesses. I pressed her as to why, in particular, the tribunal should not call an examining medical practitioner as witness. Her reply, on instructions, was that there was no occasion to do so. It was not necessary to call an examining medical practitioner because the full report was before the tribunal. The tribunal had a medical member who could assess it. If necessary, the tribunal could exclude the evidence or ignore it. But she pointed to no specific rule of law that gave any special status to the evidence of an examining medical practitioner.

14 The request for witnesses raises, and to some extent confuses, two separate issues. The first relates to the presentation of the Secretary of State's decision to the tribunal. The representative's experience was that the government department was always represented at the tribunals with which he is familiar (and he had himself acted as a representative). The representative was right to base his comments on such a comparison. The appeal tribunals constituted under the Social Security Act 1998 are, like other appeal tribunals, based on the assumption that the Secretary of State will be represented at the tribunal. In incapacity benefit cases, a representative of the Secretary of State should be there to answer questions that he wished to put about how the decision was made by the Secretary of State. But the representative is wrong in assuming that the secretary of state's representative is a witness. The role of the secretary of state's representative is not that of providing evidence but of representing the Departmental officials who made the decision under appeal. The issue of testing the evidence used by those officials or presented to the tribunal on behalf of the Secretary of State raises different issues. I deal with each in turn.

The presence of a secretary of state's representative

15 The task of the tribunal in an incapacity benefit case is to decide, independently and impartially, between the Secretary of State and the claimant. When I first acted as a part time tribunal chairman it was common to have the actual decision maker at a tribunal. He or she explained the basis of the decision, and often accepted new points at an appeal and advised the tribunal accordingly. That now rarely happens. In incapacity benefit cases, the Secretary of State is rarely represented by anyone. But that is a decision of the Secretary of State not of the tribunal.

16 When the Secretary of State declines to appoint a representative, it is not the task of the tribunal to attempt to redress that failure. Under the Social Security Act 1998, a tribunal has no power to act on its own initiative in an appeal. And under the Convention, it must remain independent and impartial. If a claimant or representative raises a point that can be answered only by the Secretary of State, then the tribunal may draw a conclusion adverse to the Secretary of State in the absence of anyone contending otherwise. Or it may refer the matter back to the Secretary of State to sort the issue out. Any other course of action is outside its powers under the Social Security Act 1998. This is not, I emphasise, an issue of producing evidence or calling witnesses. It is an issue of explaining and justifying a decision made. For that reason, I disagree with the suggestion apparently made by the tribunal, that it can "rectify" an error by the Secretary of State. What it can do where appropriate is to take its own decision in place of that of the Secretary of State. That is not the same thing. I reject the idea that the claimant can ask the tribunal to summon the Secretary of State or any officer representing the Secretary of State to explain a decision under appeal. One party cannot summon the other to attend, and the tribunal cannot help it do so under the guise of summoning a witness.

The presence of witnesses

17 The opposite is true of the request to call witnesses to test their evidence. The European Court has emphasised that the right to a fair hearing under article 6 includes the presentation of the evidence. In particular, as I pointed out in CIB 2308 2001 recently, the tribunal must ensure "equality of arms" between the parties in dealing with the evidence. "Each party must be afforded a reasonable opportunity to present his case -including his evidence - under conditions that do not place him at a disadvantage vis-à-vis his opponent" (*Ankerl*, European Court of Human Rights, 22 February 1996, paragraph 38).

18 In this case the representative wanted to cross-question Dr K. I asked him why. He indicated several reasons. One was whether Dr K understood the consequences of thoracic outlet syndrome, as in his view Dr K did not appear to do so from the report. He wanted to question Dr K about inconsistencies in his report. He wanted to ask Dr K how he had formed the views he had in so short an examination. His submission was that, had he been representing at other tribunals of which he had considerable experience, the equivalent to Dr K would have been produced as a witness if he had asked, and he would have raised those issues. As I have noted above, Ms Haywood could see no reason why Dr K should be called as a witness, nor should any similar examining medical practitioner. Surprisingly, I am told that there is no decision of a Commissioner on precisely this point since the Human Rights Act 1998 took effect. So I set out the issues fully.

19 Is a party is entitled to call witnesses to a tribunal hearing? Yes. To deny that would be to deny the party a fair hearing. So, for example, the claimant might ask her general practitioner to attend and give evidence. Such attendance is voluntary on the part of the witness acting on the request of the party for whom that witness is asked to give evidence. The only obligation on the tribunal in those circumstances is fairly to hear the evidence and to test it or allow it to be tested fairly. Unlike other tribunals, the tribunal has an investigative jurisdiction, so it may examine witnesses itself. But that does not require it to adopt the approach of cross-questioning such evidence on behalf of the Secretary of State in the absence of a secretary of state's representative. The

tribunal must be careful not to stray beyond the investigative role into one where it is acting for an absent party.

20 Can a tribunal summon a witness who will not otherwise attend? Yes. Regulation 43 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 gives the chairman of a tribunal the power to summons a witness and lays down the proper procedure for doing so. The language of regulation 43 is the language of compulsion.

21 Can a tribunal summon an examining medical practitioner? Yes. I reject the submission to the contrary made by Ms Haywood. There are safeguards on the power of summonsing in regulation 43(3). None of those safeguards apply to an examining medical practitioner. There is nothing in the Social Security and Child Support (Decisions and Appeals) Regulations 1999 or any other rule of law of which I am aware that gives an examining medical practitioner any sort of privilege against being summoned to give evidence on reports. Of course, the report of an examining medical practitioner is entitled to respect as the report of an expert, as is any other expert report. And it may be approached as an independent report: CSDLA 1019 1999. But at the same time the examining medical practitioner is, or if properly trained should be, aware that his or her report may form evidence to a tribunal. And he or she should be prepared to justify that report to a tribunal if summoned to do so. But there is no special evidential status accorded to an examining medical practitioner report as against any other similar report.

22 Any special status given by a tribunal to evidence presented by the Secretary of State that is not equally given to evidence of a claimant is likely to run foul of the principle of equality of arms under article 6 of the Convention. It is also to be noted that in this case the decision maker, on behalf of the Secretary of State, asked the examining medical practitioner a question about his report. As it happened, the BAMS medial adviser intercepted the request and (wrongly) answered it directly. But that does show that the secretary of state's representative had asked the examining medical practitioner about the report. If that is so, does not fairness require that the claimant can also ask the examining medical practitioner questions about the report?

23 Should the tribunal summons the examining medical practitioner if the claimant maintains her request? I cannot decide that. It is for decision in accordance with regulation 43 by the chairman of the tribunal when the tribunal next meets, unless the Secretary of State ensures the presence of Dr K at the next hearing without a summons. If the representative repeats his request, the chairman must make that decision judicially, and must give reasons for either allowing or refusing it. Any attempt to follow a policy of refusing any such request, for example to avoid adjourning, will stop the tribunal from giving the claimant a fair hearing.

24 The decision to grant or refuse a summons, if taken properly, will not be open to appeal. But if the tribunal both refuses the request and then relies on the examining medical practitioner report despite discrepancies or weaknesses to which its attention is drawn or which it should have noted, it may open itself to a challenge as to its fairness. Similarly, if the tribunal allows the claimant to be cross-questioned by a secretary of state's representative or, in effect, cross-questions the claimant or her witnesses itself, but refuses to let the claimant have the same access to cross-

questioning those giving evidence for the Secretary of State, then that may place the claimant at a disadvantage in handling the evidence, and so render the hearing unfair.

25 The decision whether to summons a witness if requested is part of a chairman's general control of procedure of a tribunal. It is something to be weighed with other courses of action. Directing another examining medical practitioner report or other medical evidence may be an alternative. Or the examining medical practitioner might be asked to give a further report or answer specific written questions. Excluding the report or part of it may be an alternative. Should the tribunal take a robust view and act on the evidence that is available at the tribunal other than that of the examining medical practitioner, as Ms Haywood suggested?

26 The representative also asked to cross-examine the BAMS medical adviser. There is no point in that. The request to the examining medical practitioner should not have been answered by the medical adviser. The report of the medical adviser was not evidence of anything. The Secretary of State's decision was made without reference to that adviser's comments. It should not have been in the papers, and should be ignored by the new tribunal.

David Williams
Commissioner

29 August 2002

[Signed on the original on the date shown]