IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CV/5273/2014

Appellant: The Secretary of State for Work & Pensions

Respondent: [name redacted]

DECISION OF THE UPPER TRIBUNAL

E MITCHELL

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal:	First-tier Tribunal
Tribunal Case No:	SC 946/14/00810
Tribunal Venue:	Manchester
Hearing date:	28th August 2014

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Upper Tribunal case No. CV/5273/2014

Before: E Mitchell Judge of the Upper Tribunal

At: Bream's Buildings, Field House, London on 2nd March 2015

Attendances: Mr Heppenstall, instructed by the appellant, the Secretary of State for Work & Pensions;
Mr Peretz Q.C. instructed by Hodge, Jones and Allen, solicitors for the respondent.

Decision: The decision of the First-tier Tribunal (28th August 2014, Manchester, file reference SC 946/14/00810 did not involve the making of a material error on a point of law. It is not set aside. If he has not done so, the Secretary of State must make a payment of the relevant statutory sum in accordance with the Vaccine Damage Payments Act 1979.

REASONS FOR DECISION

Overview of the appeal

1. This appeal concerns assessment of disability for the purposes of the Vaccine Damage Payments Act 1979 (VDPA 1979). The Act requires a person to be severely disabled. The principal issue is whether the assessment (or mental evaluation) of the severity of disability looks to the future or is solely concerned with disability and disablement at the date of assessment.

2. The Secretary of State argues the future is irrelevant. He challenges a First-tier Tribunal decision that looked to the future when assessing the disablement of a boy with narcolepsy and cataplexy. Those conditions developed after a 'swine flu' vaccine. I reject that challenge, and all other challenges, so that the Secretary of State must make the payment of £120,000 that the Tribunal decided was required under the VDPA 1979.

3. Unfortunately, the Vaccine Damage Unit's conduct of this appeal before the First-tier Tribunal was below the standard required. I give some guidance aimed to prevent the problems recurring. As requested by the parties, I have also given some general guidance about how the VDPA 1979 assessment scheme works.

Background

4. This case is about a boy whom I shall refer to as John. It is not his real name and I trust this causes no offence. I have used a pseudonym to preserve the family's de facto anonymity but I make no anonymity order or direction. If the family wish publicly to link themselves with this decision, that is a matter entirely for them.

5. John's mother claimed a payment under the VDPA 1979 on his behalf. Within the VDPA 1979's terminology, that makes her the "claimant" and John the "disabled person".

6. John had a vaccination against pandemic influenza A (H1N1), more commonly known as swine flu, on 10th December 2009. Then, he was aged 7.

7. Following extensive hospital investigations, a consultant paediatric neurologist diagnosed John with narcolepsy and cataplexy on 14 April 2010 (p.553 of the First-tier appeal papers). The current Oxford Textbook of Medicine describes narcolepsy as "the specific symptom of daytime sleepiness with cataplexy, where there is a sudden loss of muscle tone – often provoked by the anticipation of emotions – leading to a tendency to fall, mouth opening, dysarthria or mutism, and facial muscle jerking". Of cataplexy, the Textbook says "full-blown episodes reflect an intrusion of profound muscle paralysis that descends over a few seconds from head to the lower limbs, often causing collapse to the floor".

8. On 18th January 2012, the claimant claimed a payment under the VDPA 1979. She sent her claim to the Department for Work & Pensions' (DWP) Vaccine Damage Unit (VDU). Initially, the Secretary of Stare refused the claim because he was not satisfied that John's vaccination caused his narcolepsy and cataplexy.

9. On 1 September 2013 a DWP medical adviser advised the VDU (p.1127 of the appeal papers) that "on the ground of probability in this case there appears to be a causal link between the development of narcolepsy and the Pendremix, however the claimant appears to have improved with medication and level of disablement would appear to be less than 60%".

10. On 16th September 2013, John's mother wrote to the VDU. This must have been in response to a letter from them because it says "I note in your letter that you ask me to comment on whether [John's] disability qualifies at the level of 60% under the DWP tariff. I note that 60% equates to the loss of one hand". That VDU letter was not in the appeal bundle but it should have been. Rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the First-tier Tribunal's Procedure Rules") requires the decision maker to supply, with his response to the appeal, "copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise".

11. The claimant's letter set out detailed and coherent reasons why she thought John's disability was at least as severe as the loss of one hand. This involved her tracking through John's future life and highlighting the disadvantages he would experience due to his condition.

12. On 11 February 2014, the initial refusal decision was 'reversed'. The Secretary of State now accepted H1N1 vaccine caused John's narcolepsy with cataplexy. However, he did not accept John was severely disabled, as the VDPA 1979 requires. So the outcome remained the same; the claim was refused. A VDU letter dated 11 February 2014 (p.1117) contains a 'statement of reasons' for the decision. However, this simply includes brief summaries of certain parts of the documentary evidence, a very selective summary of the claimant's letter of 16th September 2013, an assertion that "we have to compare his current impairments with that of a child of the same age" so that many of the claimant's arguments were irrelevant, followed by this statement:

> "the latest evidence does indicate that he is reasonably well controlled at present, functioning and staying awake at school. With support, evidence indicates that he is

progressing reasonably well at school. The overall evidence would indicate an assessment significantly less than 60%".

13. Reasons involve reasoning. There is virtually no reasoning here. It is simply a brief summary of the evidence, a bare assertion of what the assessment involves, a partial and selective description of the claimant's case followed by a conclusion. I make this observation not for the sake of it but because the Secretary of State now generally criticises the First-tier Tribunal for not dealing with some matter, or deviating from the law in some respect, yet at no point did the case as presented to the Tribunal take the form of a structured analysis of what the law required and why in this case those requirements were not met.

14. The appeal papers show that the contents of the 11 February 2014 decision letter were taken word-for-word from written advice given to the VDU by a DWP medical adviser on 15th January 2014 (p. 1133).

15. On 27th February 2014, the claimant's solicitors, Hodge, Jones & Allen, appealed on her behalf to the First-tier Tribunal.

16. While the appeal hearing was pending, the DWP commissioned a further medical report from a departmental medical adviser, Dr Read (p.1145 of the First-tier appeal papers). The report itself is undated but sent to the First-tier Tribunal under covering letter dated 17th May 2014. This report:

(a) says the assessment of disablement is "a functional assessment of what the person can/cannot do in comparison to a person of the same age and sex whose physical and mental condition is normal";

(b) explains that DWP Medical Advisers use the "Scheduled Assessments" and "a major part of [their training] is how to equate the disability arising from a condition not covered in the Schedules to those which are covered". Further "by Medical Advisers using their expertise in disability assessment to apply the Schedules to the effects of conditions not listed in the Schedule it is assured that equivalent, though different, disabilities are compensated at the same level". Later, I will explain what is meant by the 'Scheduled Assessments';

(c) identifies "what is normal for an 11 year old boy" and compares John to that baseline. The conclusion is that "the evidence on file suggests that he is functioning well and only minimal difference [sic] to a boy of all. As such his level of disablement is well below the 60%".

17. On 10th June 2014, the claimant's solicitors submitted a report from Professor Gringras, a "Professor in Paediatric Neurodisability and Sleep Medicine". The biographical section of the report shows that Professor Gringras, who is in clinical practice, may properly be described as a leader in his field, nationally and internationally.

18. Professor Gringras' report was based on a review of medical notes. He did not meet John. The report considers the possible link between H1N1 vaccine and narcolepsy but it also addresses John's situation. Professor Gringras states that, in the light of John's history of resistance to medication, his case "would be classed as a more severe case of narcolepsy and cataplexy"; he has "many of the secondary mood and behavioural issues associated with

narcolepsy that can compound the impact of this disease"; he has a "lifetime neurological disease" that is "very likely" adversely to affect his education, ability to work and earn.

19. On 10th June 2014, the claimant's solicitors submitted her witness statement, describing in detail how she thiought John changed following vaccination and why he ought to be classified as severely disabled. A consistent witness statement from John's father was also submitted.

20. On 11th July 2014, the DWP responded with a supplementary submission (p.1269). However, it was not much more than a repetition of the points made previously in the 11th February 2014 letter and the DWP medical adviser's report sent to the Tribunal on 17th May 2014. In so far as it responded to the Gringras report, it summarised it as stating John will have a "lifetime of medication" and the Professor thought it was "likely" (not "very likely") that his, education, work and earning power will be affected.

21. However, the 11th July 2014 submission places less emphasis on the Scheduled Assessments than did Dr Read's report of 17th May 2014. It says these "are a guide to normal" but because they are general, not age or gender specific and few in number they "can only be used as a non-specific guide".

22. The claimant supplied a further witness statement on 29th July 2014 (p.1273). This included John's recently issued Statement of Special Educational Needs and a 2012 educational psychologist's report.

23. Meanwhile, mother's solicitors had obtained, through a Freedom of Information Act 2000 request, a copy of DWP Medical Services "Vaccine Damage Payments Scheme – Protocol for Medical Guidance", dated 18th December 2013 (p.1306). The guidance was submitted to the Tribunal. Only half a page is devoted to assessment of disablement. It says "Schedule 2 of the General Benefit Regulations sets out certain degrees of disablement for specified injuries" and "the level of disablement, caused by vaccination and present at the date of claim or immediately before death is to be determined". It also records that "for children, the assessment of disablement should take account of impairment of development and growth". But that, in substance, is all it says on the topic.

24. The First-tier Tribunal hearing was on 28th August 2014. The DWP were not represented at the hearing. The claimant was represented by her solicitor. John's father also attended. Both parents gave extensive oral evidence. The solicitor has said the hearing took half a day and, judging by the length of the record of proceedings, I am sure it did.

25. The claimant's solicitor brought a skeleton argument to the hearing, which the Tribunal admitted. It should have been supplied to the Tribunal and the DWP beforehand but the Secretary of State does not take issue with this. In relation to disability assessment, the skeleton argued the Tribunal needed to "consider the prescribed scale and then go on to assess the severity of [John's] condition so as to consider whether his disability satisfies the requirement for an award" and that John's situation was to be equated with the 60% disablement injuries on the prescribed scale. The skeleton also argued that the Secretary of State misapplied the legislation by excluding "the future aspects of the disability from consideration" and that must be "contrary to the intention of Parliament".

Observations on how the case was presented to the First-tier Tribunal

26. I am going to take stock and identify some themes within the case as put to the First-tier Tribunal. From the above, it can be seen:

(a) the Secretary of State's case clearly suggested the assessment task involved comparing John's disabilities with those of a person with an injury graded at 60% disablement on the prescribed scale, ignoring personal factors other than age, sex, physical and mental condition. The prescribed scale played a central role in ensuring consistency, according to Dr Read. While there was some rowing back in a supplementary submission, the tenor of the Secretary of State's case was that the prescribed scale was of central importance and that is the topic on which the claimant's views had specifically been sought by the VDU. Of course, there would be no need to speak of the 'impression' or 'tenor' of a party's case if it had been set out clearly;

(b) neither party explained to the Tribunal why comparing with the prescribed scale was the correct approach;

(c) neither party put forward a case by reference to the industrial injury assessment rules, of which the prescribed scale is but one part;

(d) there was a live and contested issue as to whether the assessment of disability took into account future disabilities (although no one was clear as to whether future meant after the date of the decision under appeal or after the hearing);

(e) the Secretary of State gave no reasons for his stance that future disability was irrelevant. Mother's solicitors did but not by reference to any legislation or case law although I remind myself they were trying to deal with a reasoning vacuum because the Secretary of State had not exposed his thinking on this point for scrutiny.

27. I also have some points to make about the VDU/DWP's engagement with the proceedings before the First-tier Tribunal.

28. The DWP's formal written submission for the Tribunal was not of an acceptable standard. Extending over only a single A4 page, it simply asked the Tribunal to decide whether John was severely disabled as a result of vaccination.

29. The DWP's submission made no attempt at all to summarise the 1,500 pages of documentary evidence, made no reference to the applicable legal framework and did not marshal the legal arguments. The only legal submission made was that any disablement not due to vaccination should be disregarded. But that was not even an issue on this appeal. The true nature of the DWP's case had to be pieced together, needle in a haystack fashion, by working through 1,500 pages of appeal papers to locate those which explained their position. In my experience, more effort is put into and more assistance derived from DWP submissions in Jobseekers Allowance sanction cases involving a few hundred pounds. Here, £120,000 of public money was at stake.

30. The DWP decided not to send a representative to the hearing. I find that surprising. Looked at objectively, John's case was not fanciful and his parents were bound to give oral evidence about John's disabilities. While the Tribunal has an inquisitorial function, it is not

expected to be a quasi-representative for an absent party. If the DWP fail to ensure representation at First-tier Tribunal hearings in vaccine damage cases, in particular where disablement is a live and contested issue, it is unlikely to have cause for complaint if the Tribunal simply accepts the oral evidence it hears. As these cases usually involve children, those who know them best are their parents. Unless there is some obvious incompatibility between oral evidence and documentary evidence or medical expectation, the Tribunal is unlikely to face justifiable criticism for simply accepting what a parent says. That is especially so where the DWP's written case is as fragmented and unstructured as it was here.

The First-tier Tribunal's decision

31. The First-tier Tribunal allowed the appeal and decided that John was entitled to a VDPA 1979 payment. The Tribunal was comprised of a tribunal judge and a registered medical practitioner. While the contested issue was severity of disability, the Tribunal did make a positive finding that "the appellant's narcolepsy and cataplexy resulted from the vaccination".

32. I need to look closely at the Tribunal's statement of reasons.

33. So far as the relevant law was concerned, the Tribunal referred to neither the requirement for disability to be assessed "as for as for the purposes of section 103 of the Social Security Contributions and Benefits Act 1992" nor any of the legislation controlling assessments for the purposes of section 103 except, that is, for Schedule 2 to the Social Security (General Benefit) Regulations 1982. This contains what has been referred to as the 'prescribed scale' of disablement or the 'Scheduled Assesments'.

34. The Tribunal's recitation of the evidence, within its statement of reasons, is not always clearly demarcated from its findings of fact. But it is tolerably clear that the Tribunal made the following findings of fact.

35. The Tribunal found John's narcolepsy and catoplexy symptoms would not go into remission. I will set out the Tribunal's reasoning, as well as its findings, because, when read together, they show the Tribunal found that John's condition would never improve:

> "17...In general, the damage caused to the brain of an adult would show signs of significant improvement within two years if they were going to improve and if there was no improvement in that time then, on a balance of probability, there was likely to be permanent damage. The same cannot be said of children. It would, however, be a reasonable proposition that if there had been no improvement after five years, on a balance of probability significant improvement is unlikely. In the appellant's case the vaccination was on 10 December 2009. By the time of the Department's decision on 13 February 2014 it was more than four years since the vaccination. It was not suggested that there had been a significant improvement even by the date of the tribunal on 28 August 2014 and on that basis the tribunal accepted that significant improvement was unlikely".

36. Before the vaccination, John had no "relevant significant health issue" (para. 19).

37. So far as the effects of John's narcolepsy and cataplexy were concerned, the Tribunal found:

(a) John "does not sleep well and gets up in the morning unrefreshed" (para. 20);

(b) John "has autonomic behaviour, i.e. he is not aware of what he is doing. He could, for example, stand under a shower and just continue to stand there without moving" (para. 20). There is no finding of the frequency of autonomic behaviour. However, para. 22 records that in the morning John "can be told to get dressed but because of his autonomic behaviour he may not register what he has to do and just sits there";

(c) John "falls asleep frequently. He could not be allowed to travel to school by bus on his own as he would be likely to fall asleep on the bus and not get off" (para. 20). There is no finding as to frequency of falling asleep nor whether there are particular triggers. However, para, 25 finds "when he returns from school he is tired and wishes to sleep", John now only has one friend and "the problem is that he needs to keep resting and sleeping and that sets him apart from other children of the same age who do not wish to do that and may not understand the appellant's needs". Para. 27 finds that "with regard to the narcolepsy, he is permanently tired and would happily stay in bed most of the time" and "under the regime of attending school he has two or three sleeps, one in particular planned with the school";

(d) John "has some behavioural issues and can be intolerant when extremely tired. At the end of summer 2014 he went on a week's taster for the high school to which he will be going in September 2014. On two occasions in one week he got into scraps with other children, which he would not have done prior to the vaccination. That happened at a time when he was in a strange environment and therefore likely to be on his best behaviour and so demonstrated something of a change of character" (para. 20);

(e) John "suffers hallucinations or night terrors which cause distress" (para. 20). There is no finding as to their frequency;

(f) John's "education is reasonable" (para. 23), by which the Tribunal meant his academic progress. His grades were slightly above average for his age but he did have a statement of special educational needs and required "one-to-one help at school to keep him reasonably on task";

(g) "With regards to cataplexy, most days are roughly similar but it can be worse when he is tired. He loses muscle control perhaps five or six times a day. It is often when he is sitting...occasionally he has spontaneous falls to the floor. It is not possible to say how often they would be but very roughly this would happen about once a month" (para. 26). Para. 24 finds that heightened emotions increase the risk of an episode of cataplexy and, for that reason, John was not allowed to attend a recent school outward bound.

How the Tribunal approached the assessment of disability

38. The Tribunal rejected the Secretary of State's argument that the future should be discounted and John's disablement assessed by reference to an 11 year old boy in normal health. However, there is no principled explanation for this. The Tribunal simply said this:

> "17...It was not suggested that there had been a significant improvement even by the date of the tribunal on 28 August 2014 and on that basis the tribunal accepted that significant improvement was unlikely, so the tribunal was of the view that it could take

into account future problems that were reasonably foreseeable in the appellant's case by 13 February 2014".

39. The Tribunal, as it was effectively invited to do, compared John's condition to the injuries on the prescribed scale. Its conclusion was explained as follows:

> "31. As at 13 February 2014, the date of decision, the appellant had significant disability with narcolepsy and cataplexy. He was falling asleep regularly and ran risks of dropping to the ground. He could not travel to school alone, go swimming alone and had to be supervised to ensure that he had a shower and got dressed. He also required one-to-one help at school to keep him reasonably on task and did require to sleep. His schoolwork was progressing reasonably, as could be seen from his SATS results, but he needs a Statement of Special Educational Needs. On that basis the Tribunal felt that the appellant had significant disability at 13 February 2014 but did not feel that that would of itself amount to a 60% disablement. The tribunal, however, felt that the reasonably foreseeable disablement which was likely to occur in the future could be taken into account. It was reasonably foreseeable that the appellant would struggle to continue with his school work and keep up with his peer group in view of his requirement for additional sleep. There was a risk that he would fall asleep during exams and may not achieve the grades he would have achieved without the disablement. He is likely to be significantly disadvantaged in the jobs market and may find it difficult to get paid employment. He is unlikely ever to be able to drive a car and his social life is likely to be curtailed as a result of the problems. Adding those factors, the tribunal considered that the appellant's disablement was as great as numbers 11 and 26 in Schedule 2 to the Social Security (General Benefit) Regulations 1982 and as such confirmed that the appellant was entitled to a payment under the Vaccine Damage Payment Scheme."

40. Subsequently, the First-tier Tribunal granted the Secretary of State permission to appeal to the Upper Tribunal. The Tribunal did not limit the grant of permission and so I proceed on the basis that permission to appeal was granted for all grounds of appeal relied on by the Secretary of State. There was an exchange of written submissions. The claimant's solicitors also submitted a fresh medical report but I have not taken that into account because it was not before the First-tier Tribunal.

How the Vaccine Damage Payments Act 1979 operates

41. The Secretary of State has asked the Upper Tribunal to give guidance about the operation of the VDPA 1979 assessment scheme. And some of his case about the scope of assessment relies on his view of the structure and purpose of the VDPA 1979. For those reasons, I should analyse how the Act works. Inevitably, I focus on those aspects that are most relevant to John's case and, generally, I leave out of account the provisions about deceased persons.

The Secretary of State's duty to make a vaccine damage payment

42. While section 2 of the VDA is entitled "conditions of entitlement", the natural starting point when considering entitlement is section 1. Section 1(1) imposes a duty on the Secretary of State to make a payment of the "relevant statutory sum" if "on consideration of a claim, the Secretary of State is satisfied":

(a) "that a person is, or was immediately before his death, severely disabled as a result of vaccination against any of the diseases to which this Act applies; and

(b) that the conditions of entitlement which are applicable in accordance with section 2 below are fulfilled".

43. The relevant statutory sum has been £120,000 since 12 July 2007.

44. There are three elements to section 1(1)(a) which effectively operate as entitlement conditions:

(a) causation must be established. A person must be disabled "as a result of" vaccination; and

(b) a disability threshold must be reached: the disability must be "severe"; and

(c) the vaccination must have been against a disease to which the Act applies.

Causation and disability

45. Causation is not an issue in this appeal and I will say nothing about it.

46. The issue before the First-tier Tribunal was whether John's disability was severe. Whether or not a disability is severe is governed by section 1(4) which provides, in relation to Great Britain:

> "For the purposes of this Act, a person is severely disabled if he suffers disablement to the extent of 60 per cent or more, assessed as for the purposes of section 103 of the Social Security Contributions and Benefits Act 1992 (disablement gratuity or pension)."

47. As originally enacted, the disability threshold was 80% but this was reduced to 60% by amendment (S.I. 2002/1592). And disability was originally to be assessed as for the purposes of section 57 of the Social Security Act 1975 but none of the parties argue that anything turns on that since section 103 of the Social Security Contributions and Benefits Act 1992 (SSCBA 1992) is simply the successor legislative provision.

Vaccinations (and diseases) to which the Act applies

48. Section 1(2) of the VDPA 1979 contains a list of diseases. It also confers power on the Secretary of State to specify additional diseases by order.

49. This case involves the specified disease "influenza caused by the pandemic influenza A (H1N1) 2009 virus", more commonly known as swine flu. It was specified by the Vaccine Damage Payments (Specified Disease) Order 2009 (S.I. 2009/2516) ("the 2009 Order"). The disease's status as a specified disease was short-lived. Having come into force on 10 October 2009, the Order was revoked with effect from 1 September 2010 by the Vaccine Damage Payments (Specified Disease) (Revocation and Savings) Order 2010 (S.I. 2010/1988).

50. The revocation order does not affect this case. A saving provision in article 4 of the order provides that "the 2009 Order shall continue to apply to any vaccination administered prior to the date this Order comes into force" as was John's. The 2010 Order's Explanatory Memorandum says influenza H1N1 was de-specified once the UK's swine flu vaccination programme had finished.

The entitlement conditions in section 2

51. Section 2 contains the "conditions of entitlement" referred to in section 1(1)(b). They impose requirement as to:

(a) *place and date of vaccination* (section 2(1)(a)). These were met in John's case because his vaccination was carried out in the UK on or after 5th July 1948;

(b) *age at vaccination*. For influenza H1N1 vaccinations, the age condition is omitted by article 3 of the 2009 Order. This means the usual requirement for vaccination to have been administered to a person aged under 18 does not apply. It would not have mattered to John though as he was aged 7 at vaccination;

(c) *age at date of claim*. The disabled person must be "over the age of two on the date when the claim was made". John met this requirement.

Claims and time limits

52. Claims must be made in writing (regulation 2 of the Vaccine Damage Payments Regulations 1979).

53. Section 3 defines a "claim" for the purposes of the VDPA 1979. In so doing, it creates a time limit for claiming. Section 3(1) provides that "a claim" means a claim for a payment under section 1(1) made on or before the later of two dates:

(a) the date on which the disabled person attains the age of 21;

(b) the end of the period of six years beginning with the date of vaccination.

54. If a 'claim' is made outside this window, it is not a claim at all. The Secretary of State's duty to make a payment under section 1(1) VDPA 1979 can only arise "on consideration of a claim". The duty cannot be triggered, therefore, by a non-claim which is why the definition of "claim" effectively imposes a time-limit for claiming. In this case, the claim was in-time.

Decision-making on claims

55. It is for the Secretary of State to decide a claim (section 1(1)). Claims may be made on behalf of a disabled person (section 3(1)(a)) and in this case the claim was made by John's mother. That means, within the terminology of the VDPA 1979, she is the "claimant" (section 3(1)) upon whom the right of appeal is conferred. It follows that John's mother did not need to be made his appointee in order to appeal to the First-tier Tribunal, as seems to have happened.

56. Upon receiving a claim, the Secretary of State must as soon as practicable give written notice to the claimant "of his determination whether he is satisfied that a payment is due under section 1(1) above to or for the benefit of the disabled person" (section 3(2)). If he is not satisfied, the notice "shall state the grounds on which he is not so satisfied" (section 3(3)).

57. The written notice must inform an unsuccessful claimant of the right of appeal under section 4 where the Secretary of State is satisfied that the section 2 conditions are fulfilled but "is not satisfied that the disabled person is...severely disabled as a result of vaccination" (section 3(4)).

58. If a claim on behalf of a child is allowed, "the payment shall be made for his benefit by paying it to such trustees as the Secretary of State may appoint to be held by them upon such trusts or, in Scotland, for such purposes and upon such conditions as may be declared by the Secretary of State" (section 6(3)).

Reversal of decisions

59. The VDPA 1979 allows the Secretary of State to change his mind, a process known as reversal. The reversal powers are an important component of the Secretary of State's argument that disability is to be assessed at the date of the assessment. The appeal in this case was said to be an appeal against a reversal decision.

60. Section 3A(1) identifies reversible decisions and provides that the Secretary of State may reverse on application or on his own initiative. Reversible decisions are those under section 3 (on a claim), section 3A itself and a decision of a tribunal under section 4.

61. The Secretary of State's power to reverse a decision is not at large. He is only empowered to do so within the "prescribed" period or "in prescribed cases of circumstances". "Prescribed" means prescribed in regulations and that takes us to regulation 11 of the Vaccine Damage Payments Regulations 1979.

62. Dealing with applications for reversal first, regulation 11(1)(a) provides that the Secretary of State may, on application, reverse a section 3 decision or a tribunal's decision "in the circumstances described in paragraph (2)". Paragraph (2) provides:

> "(2) The circumstances referred to in paragraph (1)(a) above are-
>
> (a) the application is made in writing and contains an explanation as to why the applicant believes the decision in respect of which the application is made to be wrong; and
>
> (b) where the application is in respect of a decision of the Secretary of State, the application is made at any time after notification of that decision was given but before a decision of an appeal tribunal has been made; or
>
> (c) where the application is in respect of a decision of an appeal tribunal, the application is made before whichever is the later of-
>
> (i) the date two years after the date on which notification of that decision was given; or
>
> (ii) the date six years after the date on which notification of the decision of the Secretary of State which was appealed was given."

63. I note the absence of any time limit if a decision has not been appealed to a tribunal. But, where a tribunal has made a decision (in this context, one assumes this will be a refusal to make a payment), there is a time limit. I imagine the time-limit in regulation 11(2)(c)(ii) is of most practical significance. This allows an application to be made within six years of the Secretary of State's decision. Regulation 11(2)(c)(i) would only be of relevance (only be the later date) if more than four years had elapsed between notification of the Secretary of State's decision and the tribunal deciding an appeal against that decision.

64. Regulation 11 constrains the Secretary of State's power to reverse a decision on his own initiative. By regulation 11(1), the Secretary of State has power to reverse on his own initiative "except where paragraph (3) applies". Paragraph 3 provides:

> "(3) This paragraph applies where--
>
> (a) less than 21 days have elapsed since notice under regulation 12 below was given [regulation 12 provides for notices of proposed reversal]; or
>
> (b) more than six years have elapsed since the date on which notification of that decision was given except where it appears to the Secretary of State that a payment was made in consequence of a misrepresentation or failure to disclose any material fact."

In other words, so far as disappointed claimants are concerned, the Secretary of State has a 6 year window during which he may, on his initiative, convert a refusal to make a payment into the grant of a payment.

65. Drawing the reversal strings together, the upshot, so far as unsuccessful claimants are concerned, is that, if they go to tribunal and lose, they have a limited period in which to apply for reversal. This is either two years from notification of the tribunal's decision or six years from notification of the original decision of the Secretary of State, whichever is later. But if they keep their powder dry, as it were, and do not appeal, there is no time limit and an application for reversal may be made at any time. However, the Secretary of State's power to reverse on his own initiative expires six years after notification of his original decision (unless he wishes to reverse due to misrepresentation of or failure to disclose a material fact which I imagine means converting a decision to award a payment into a decision to refuse).

66. Since 28th October 2013, a new regulation 11A has provided for mandatory consideration by the Secretary of State of reversal before an appeal may be brought. It is not clear whether that happened in this case but no party has placed any reliance on regulation 11A.

Rights of appeal

67. Under section 4(1) of the VDPA 1979, a claimant may appeal to the First-tier Tribunal against any decision of the Secretary of State under section 3 (on a claim) or section 3A (a reversal decision). The right of appeal is not limited in any way.

68. Vaccine damage cases are assigned to the Social Entitlement Chamber of the First-tier Tribunal. The First-tier Tribunal's Procedure Rules govern the proceedings. A special feature of the rules in vaccine damage cases is that there is no time limit for bringing an appeal

69. Section 4(4) requires the First-tier Tribunal, in deciding an appeal, to "consider all the circumstances of the case (including any not obtaining at the time when the decision appealed

against was made)". Accordingly, all relevant circumstances up to the date of the appeal hearing are to be taken into account. This is consistent with the absence of a time limit for bringing an appeal because, in theory, many years might elapse between decision and appeal hearing.

70. Section 4(4) has the potential to catch out First-tier Tribunal judges who spend most of their time on social security appeals. In those cases, the Tribunal is prohibited from taking into account circumstances not obtaining at the date on which the decision being appealed was taken (section 12(8) of the Social Security Act 1998). I think this may have happened in this case.

Relationship with civil proceedings

71. The Secretary of State argues the birth of the VDPA 1979 was connected to a plan to reform civil liability for vaccine damage, and this influences interpretation of the Act. What section 6(4) provides, though, is:

> "The making of a claim for, or the receipt of, a payment under section 1(1) above does not prejudice the right of any person to institute or carry on proceedings in respect of disablement suffered as a result of vaccination against any disease to which this Act applies; but in any civil proceedings brought in respect of disablement resulting from vaccination against such a disease, the court shall treat a payment made to or in respect of the disabled person concerned under section 1(1) above as paid on account of any damages which the court awards in respect of such disablement."

72. Accordingly, a payment under the VDPA 1979 does not affect any rights to bring proceedings but, where civil proceedings are brought in respect of disablement, the payment will reduce the damages received by the claimant.

73. In written argument and at the hearing, Mr Heppenstall emphasised that the VDPA 1979 was intended to be a short-term measure pending introduction of strict liability in certain cases of vaccine damage. I do not doubt that but I note this is reflected neither in the provisions of the Act (there is, for example, no 'sunset clause' providing for its expiry) nor its long title which describes:

> "An Act to provide for payments to be made out of public funds in cases where severe disablement occurs as a result of vaccination against certain diseases or of contact with a person who has been vaccinated against any of those diseases; to make provision in connection with similar payments made before the passing of this Act; and for purposes connected therewith."

Assessment of disability

74. I turn now to the principal point at issue, the incorporation in the VDPA 1979 of the assessment regime under section 103 of the Social Security Contributions and Benefits Act 1992 ("SSCBA 1992"). To recap, section 1(4) of the VDPA 1979 provides:

> "For the purposes of this Act, a person is severely disabled if he suffers disablement to the extent of 60 per cent or more, assessed as for the purposes of section 103 of the Social Security Contributions and Benefits Act 1992 (disablement gratuity or pension)."

Squaring the circle

75. Section 103 of the SSCBA 1992 is a component of a wider legislative scheme for compensating victims of industrial injury. This complicates its incorporation in the VDPA 1979. Assessments for the purposes of section 103 have elements, sometimes connected to unique entitlement features of the industrial injuries scheme, which are of either no, doubtful or disputed relevance to VDPA 1979 assessments. Parliament made no attempt to clarify the incorporation of section 103 whether by textual amendment or express modification. How, then, to decide which elements apply for VDA purposes and which are not?

76. At the hearing, I drew counsels' attention to what is sometimes done when a legislative scheme created for one purpose is applied for another purpose. Sometimes, the application is made expressly subject to any "necessary modifications". Under this approach, the modifications are not set out but instead need to be deduced by asking what is necessary. I think this approach has fallen out of legislative drafting favour because it creates uncertainty but it has not disappeared and a recent example is section 16 of the Anti-social Behaviour, Crime and Policing Act 2014. Both counsel agreed that such a qualification should be read into section 1(4) of the VDA.

77. I agree that the application of section 103 SSCBA 1972 must be subject to any necessary modification. I note that approach is assumed to be correct in the fifth edition of *Bennion on Statutory Interpretation* which states "Incorporation of an enactment by reference does not affect the separate identity of that enactment. By implication it requires any necessary verbal adjustments to be made in the incorporated provisions where these adjustments are not spelt out" (p. 758). The incorporation of the section 103 assessment scheme into the VDPA 1979 cannot have been intended by Parliament to import those elements that are simply meaningless in the VDPA 1979 context or would thwart its purpose. I approach its application on that basis.

The purposes of section 103 of the 1992 Act

78. Section 103(1) of the 1992 Act links entitlement to a disablement pension, for a person who has suffered a relevant accident, to the extent of the person's disablement. Entitlement only arises if a person suffers, as a result of the accident, from "loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 14%".

79. Accordingly, section 103 assessments serve a statutory scheme that distinguishes between:

(a) *an accident.* Not mentioned in section 103, but a necessary pre-condition because benefit is not payable otherwise, is that the accident caused "personal injury" which was described by Lord Diplock speaking in the House of Lords in *Jones v Secretary of State for Social Services* [1972] A.C. 944 as "a generic term embracing all adverse physical or mental consequences of an "accident"";

(b) *loss of physical or mental faculty, because of the accident.* "Loss of faculty" means "an impairment of the proper functioning of part of the body or mind" (Lord Simon in *Jones*); and

(c) *disability incurred as a result of the loss of faculty.* While disability is not separately identified in section 103, later provisions show that it is a discrete and essential element of the assessment scheme. In *Jones* Lord Simon was of the opinion that "disability" meant "partial or total failure of power to perform normal bodily or mental processes"; and

(d) *disablement.* This is the "sum of disabilities, which, by contrast with the powers of a normal person, can be expressed as a percentage" (Lord Simon in *Jones*)

80. A section 103 assessment's purpose is to identify disablement resulting from lost physical or mental faculty with an intermediate step being identification of disabilities. If the existence of an accident causing personal injury is assumed, the sequence of analysis is therefore this: identification of loss of faculty – identification of disability or disabilities – judgement as to disablement.

81. These are essential structural elements of an assessment for the purposes of section 103. In order, therefore, to comply with the requirement in section 1(4) of the VDPA 1979 to assess disablement "as for the purposes of" section 103, the VDPA 1979 assessment should reflect these elements. This calls for:

(a) identification of an event akin to a relevant accident that has caused personal injury. That is if course the vaccination;

(b) identification of a loss of physical or mental faculty (or both) because of the vaccination;

(c) identification of disability or disabilities incurred as a result of the loss of faculty;

(c) a judgement to be made as to the extent of disablement, expressed as a percentage which represents the sum of the person's disabilities.

The role of Schedule 6 to the 1992 Act

82. Section 103(1) of the SSCBA 1992 operates by reference to the "assessed extent" of disablement. Section 103(5) provides that "in this Part of this Act "assessed", in relation to the extent of any disablement, means assessed in accordance with Schedule 6 to this Act". The requirements of Schedule 6, and secondary legislation made under it, must apply, subject to necessary modifications, to an assessment of disablement for VDPA 1979 purposes. Otherwise, the assessment will not be an assessment "as for" the purposes of section 103. Neither party contends otherwise.

The general principles of assessment in Schedule 6(1)

83. Schedule 6(1) is headed "general provisions as to method of assessment". It begins by stating that "for the purposes of section 103...the extent of disablement shall be assessed by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty".

84. Schedule 6(1) maintains, therefore, the distinction between loss of faculty and disablement introduced in section 103. But it also distinguishes between "disabilities" and "disablement", as mentioned in paragraph 79 above. Disabilities are to be identified and, then, the extent of disablement determined "by reference to" the identified disabilities. That is why Lord Diplock in *Jones* referred to "disabilities to do things which in sum constitute the disablement". Schedule 6(1) requires the process of assessing the extent of disablement by reference to disabilities incurred to be in accordance with "the following general principles" in sub-paragraphs (a) to (d).

Identifying disabilities

85. Schedule 6(1)(a) provides as follows:

> "except as provided in paragraphs (b) to (d) below, the disabilities to be taken into account shall be all disabilities so incurred (whether or not involving loss of earning power or additional expense) to which the claimant may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal".

86. If this is dissected, it shows:

(a) Schedule 6(1)(a) is about identifying the disabilities to be taken into account in assessing the extent of a person's disablement. Its role in the overall assessment is limited to that;

(b) the assessment is over a particular period (the "period taken into account by the assessment") although this period is not fixed by paragraph (a);

(c) unless excluded by sub-paragraphs (b) to (d), the disabilities to be taken into account are "all disabilities so incurred" (as a result of the loss of faculty) to which the individual "may be expected to be subject during the period taken into account". This requires, therefore, the assessor to make predictions about what is likely to happen during the period taken into account;

(d) in identifying the disabilities to which the person may be expected to be subject over the period taken into account, regard must be had to the individual's "physical and mental condition at the date of the assessment";

(e) in identifying the disabilities expected during the period taken into account, a comparison is to be made with "a person of the same age and sex whose physical and mental condition is normal".

87. To sum up, paragraph (a) directs the assessor to identify disabilities presenting over a "period taken into account". This produces the raw material for making the final important judgement as to the extent of disablement. This is not a snapshot looking only at matters at the date of an assessment. It creates an assessment (or mental evaluation) hitched to a timeline. As Lord Diplock said in *Jones* the legislation "directs [the decision maker] to conduct this inquiry [i.e. assessment of the extent of disablement] by ascertaining all the disabilities to which the claimant may be expected to be subject during the period covered by the assessment". That also tells us something about the nature of "disablement" in this statutory scheme. In this context it has no meaning without an associated timeline.

88. Sub-paragraph (b) allows regulations to deal with disabilities with a dual cause. This is not relevant in this case.

The role of personal circumstances

89. Schedule 6(1)(c) prevents an individual's circumstances from being taken into account, other than to a limited extent:

> "the assessment shall be made without reference to the particular circumstances of the claimant other than age, sex and physical and mental condition".

90. This refers to the assessment of the extent of disablement by reference to the disabilities identified (the introductory words of Schedule 6(1) and Schedule 6(1)(d) show that it is disabilities that are assessed in order to arrive at disablement). Personal circumstances, other than those listed, cannot be taken into account. However, that certainly does not mean that evidence about a person's circumstances and life more generally must be ignored either at this stage or when identifying disabilities. Any evidence that says something relevant about the nature of a person's disabilities and their disablement may be taken into account. 'I can't sit through a meal so I've stopped going to restaurants' or 'I had to give up my allotment because it was too demanding', for example, is relevant evidence about disability even though it springs from day-to-day life.

100% disablement for prescribed losses of faculty

91. Schedule 6(1)(d) provides:

> "the disabilities resulting from such loss of faculty as may be prescribed [in regulations] shall be taken as amounting to 100 per cent disablement and other disabilities shall be assessed accordingly".

92. This is a power in regulations to couple losses of faculty with 100 per cent disablement. If that is done, the disabilities themselves are simply skipped over. If a loss of faculty is prescribed, there is no point in identifying disabilities. Whatever the disabilities are in fact, they must be taken to amount to 100% disablement;

93. The meaning of the requirement for other disabilities to be "assessed accordingly" does not exactly leap from the page. But it must refer to disabilities incurred by losses of faculty other than those prescribed (disabilities from the prescribed losses of faculty have been catered for). It should be remembered that disabilities themselves are only a stepping-stone to the important concept of disablement.

94. To assess other disabilities "accordingly" must relate to the mental process by which a disablement figure is ascribed to a disability or disabilities. But the instruction to assess "other disabilities...accordingly" can confuse because the very act of prescribing a loss of faculty obscures its disabilities: they are skipped over because they are deemed to amount to 100% disablement. In order to comply with the requirement to assess other disabilities "accordingly", it is necessary to go back a stage and identify the disabilities incurred by the prescribed losses of faculty. Where other disabilities are commensurate with these, disablement should be assessed at 100%.

95. More generally, it is relevant in this and every case that the prescribed losses of faculty, while catastrophic, do not generate disabilities amounting to what would normally be considered total disablement. For example, the 100% disablement injuries set out in Schedule 2 to the Social Security (General Benefit) Regulations 1982 include loss of one hand and one foot, and absolute deafness. This conditions the whole approach to assessment. Assessing disablement cannot proceed on the basis that 100% disablement is equivalent to total disablement. There is longstanding authority for this.

Further powers to make regulations defining the principles of assessment

96. Paragraph 2 contains a power to make regulations:

> "Provision may be made by regulations for further defining the principles on which the extent of disablement is to be assessed and such regulations may in particular direct that a prescribed loss of faculty shall be treated as resulting in a prescribed degree of disablement; and, in connection with any such direction, nothing in paragraph 1(c) above prevents the making of different provision, in the case of loss of faculty in or affecting hand or arm, for right-handed and for left-handed persons."

97. So this allows, in particular, prescribed losses of faculty conclusively to be matched with prescribed degrees of disablement.

The period to be taken into account

98. Schedule 6(6) identifies the period to be taken into account by an assessment for the purposes of section 103 of the SSCBA 1992. Sub-paragraph (1) provides:

> "(1) Subject to sub-paragraphs (2) and (3) below, the period to be taken into account by an assessment for the purposes of section 103 above and Part II of Schedule 7 to this Act of the extent of a claimant's disablement shall be the period (beginning not

earlier than the end of the period of 90 days referred to in section 103(6) above and in paragraph 9(3) of that Schedule and limited by reference either to the claimant's life or to a definite date) during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty."

99. What does this tell us? It shows:

(a) the starting point cannot be earlier than the period of 90 days referred to in section 103(6). That is the period of 90 days from the date of accident (excluding Sundays) and links with the condition that disablement pension is not payable during those 90 days. It probably matters little in practice but I think this provision cannot apply to VDPA 1979. It would serve no useful purpose automatically to ignore the first 90 days following accident / vaccination;

(b) the principal rule in Schedule 6(6)(1) is that the period to be taken into account is the period "during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty";

(c) the duration of this period must be limited by reference either to the claimant's life or a "definite date";

(d) the period must be one "during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty". The decision limiting the period to be taken into account must respect this. A definite date cannot be selected unless, throughout the period created by selecting that date, the person may be expected to continue to suffer from the relevant loss of faculty.

100 Those rules are subject to sub-paragraphs (2) and (3).

101. Sub-paragraph (2) provides:

"(2) If on any assessment the condition of the claimant is not such, having regard to the possibility of changes in that condition (whether predictable or not), as to allow of a final assessment being made up to the end of the period provided by sub-paragraph (1) above, then, subject to sub-paragraph (3) below-

(a) a provisional assessment shall be made, taking into account such shorter period only as seems reasonable having regard to his condition and that possibility; and

(b) on the next assessment the period to be taken into account shall begin with the end of the period taken into account by the provisional assessment."

102. Sub-paragraph (2) reveals something about sub-paragraph (1). It shows that, without sub-paragraph (2), sub-paragraph (1) would require the end point of the assessment period to be either:

(a) the individual's whole life, if s/he is expected to continue to suffer from the relevant loss of faculty; or

(b) the date on which the assessor thinks the person will cease to suffer from the relevant loss of faculty.

103. I find that sub-paragraph (2) does not apply to VDPA 1979 assessments. Provisional assessments would serve no purpose within its one-off payment scheme. They are an integral part of a scheme for paying weekly benefit and are designed to prevent over or under payments in response to changes in disability levels. They make no sense in the one-off VDPA 1979 scheme. If, therefore, VDPA 1979 assessments are not simply a snapshot of disability as at the date of assessment, the assessment period is governed by Schedule 6(6(1). I

suspect that, normally, the nature of vaccine damage is such that the period would be the disabled person's whole life or something close to that.

104. Sub-paragraph (3) contains a general rule that, where disablement is assessed at less than 14 per cent, it shall be a final assessment. This clearly has no relevance to VDA assessments where the threshold is 60%.

105. Paragraph 7 requires the assessment to "state the degree of disablement in the form of a percentage" and specify the period taken into account.

Social Security (General Benefit) Regulations 1982

106. These Regulations have effect as if made under Schedule 6 to the SSCBA 1992 (section 2 of the Social Security (Consequential Provisions) Act 1992).

107. Regulation 11(1) provides that the Act's general principles of assessment "shall have effect subject to the provisions of this regulation".

108. Regulations 11(2) to (5B) contain special rules for assessing disabilities with a dual cause and are not relevant in this case. No one argues John's disabilities were caused by anything other than vaccination.

109. Regulation 11(6) is indirectly relevant to this case. It provides:

> "(6) Where the sole injury which a claimant suffers as a result of the relevant accident is one specified in column 1 of Schedule 2 to these regulations, whether or not such injury incorporates one or more other injuries so specified, the loss of faculty suffered by the claimant as a result of that injury shall be treated for the purposes of...the Act as resulting in the degree of disablement set against such injury in column 2 of the said Schedule 2 subject to such increase or reduction of that degree of disablement as may be reasonable in the circumstances of the case where, having regard to the provisions of the said ...Act and to the foregoing paragraphs of this regulation, that degree of disablement does not provide a reasonable assessment of the extent of disablement resulting from the relevant loss of faculty."

110. What that vast sentence means is that, where a claimant suffers a sole injury specified in Schedule 2 to the Regulations, the statutory presumption is that the associated loss of faculty results in the specified degree of disablement. This is only a starting point because it must be increased or reduced by such amount as may be reasonable where it "does not provide a reasonable assessment of the extent of disablement". In this case, and I suspect all vaccine damage cases, regulation 11(6) is of no direct relevance because the specified injuries are different kinds of physical trauma.

111. Regulation 11(8) is highly relevant in this case. It introduces what has been variously referred to as the Scheduled Assessments and the prescribed scale. Regulation 11(8) provides:

> "(8) For the purposes of assessing, in accordance with the provisions of...the Act, the extent of disablement resulting from the relevant injury in any case which does not fail to be determined under paragraph (6) or (7), the Secretary of State or, as the case may be, the First-tier Tribunal may have such regard as may be appropriate to the prescribed degrees of disablement set against the injuries specified in the said Schedule 2."

112. Whatever John's injuries are, they are not specified in Schedule 2. Therefore regulation 11(8) permitted the Secretary of State, and First-tier Tribunal, to pay appropriate regard to the prescribed degrees of disablement. It is worth considering what that means. The Schedule

matches injuries to degrees of disablement. It declares that particular injuries are presumed to have a particular consequence in terms of disablement (I say presumed since regulation 11(6) provides for departure from the prescribed disablement). There is, however, a missing link, namely disabilities. As discussed above, the sequence of analysis generally required is: loss of faculty – disability / disabilities – disablement. Having regard to the prescribed degrees of disablement means, at a superficial level, having regard to a correlation between particular injuries and particular degrees of disablement. But at a more meaningful level, it means having regard to a connection between disabilities and disablement. That is more meaningful if the prescribed scale is being used for comparative purpose because often the instant injury will bear little relation to a prescribed injury.

113. I would suggest that, if recourse is to be had to the prescribed scale in vaccine damage cases (where injuries are likely to be of a very different nature to those in the prescribed scale), it should involve, firstly, identification of the disabilities resulting from those prescribed injuries that might be of some comparative relevance. Using the meaning of disability given in the *Jones* case, this means identifying the "partial or total failure of power to perform normal bodily or mental processes". That failure of power to perform normal bodily or mental processes is what the legislator presumes amounts to 60%, 50%, 40% disablement etc. Once the disabilities resulting from vaccine damage have been identified, the process of comparison is likely to be more meaningful than simply trying to correlate injuries.

114. Since the threshold under the VDPA 1979 is 60% disablement, I shall set out the two prescribed injuries that are presumed to result in that degree of disablement:

(a) "loss of a hand or of the thumb and four fingers of one hand or amputation from 11.5 centimetres below top of olecranon". To put that in context, loss of four fingers equates to 50% and loss of thumb 30%;

(b) "amputation at knee resulting in end-bearing stump or below knee with stump not exceeding 9 centimetres". If the amputation is below knee and results in a stump of more than 9 centimetres but not exceeding 13 centimetres, the prescribed disablement is 50%. If the stump exceeds 13 centimetres, the prescribed disablement is 40%.

Arguments and conclusions

115. I record my gratitude to Mr Heppenstall, for the Secretary of State, and Mr Peretz Q.C. for the claimant for their assistance at the hearing. I am particularly grateful to Mr Peretz Q.C. simply because I am told he has acted for the claimant pro bono. As I understand it, both counsel were instructed shortly before the hearing.

Ground 1 – whether a vaccine damage assessment is a snapshot, restricted to considering presenting disablement

116. Probably the Secretary of State's main ground of appeal was that assessment of disability for the purposes of the VDPA 1979 must not look to the future. As Mr Heppenstall put it at the hearing, it is a "snapshot" which addresses presenting disability at the date of assessment. And, where an appeal is made, the Tribunal carries out a snapshot assessment of disability as at the date of the hearing.

117. The Secretary of State accepts that the VDPA 1979 does not, in express terms, prohibit the assessor from looking to the future. However, there are a number of indications, he argues,

that it must have been Parliament's intention that VDPA assessments only address disabilities presenting at the date of the assessment:

(a) section 1(1) of the VDPA 1979 uses the present tense "is" to describe the Secretary of State's duty to make a payment. The duty arises where the Secretary of State is satisfied that a person "is severely disabled...as a result of vaccination";

(b) Schedule 6(1)(a) of the SSCBA 1992 provides that "the disabilities to be taken into account shall be all disabilities so incurred...to which the claimant may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account". According to the grounds on which the First-tier Tribunal granted permission, this when read with section 1, "makes it clear that the assessment is to be made having regard to his physical and mental condition at the date of assessment. This must mean that the "period taken into account by the assessment" is that limited period of time at which the consideration of the claim is being made";

(c) Mr Heppenstall relied on the decision-making structure of the VDPA 1979, in particular the reversal provisions. This meant claimants whose disablement might increase over time had the indefinite opportunity to put that before the Secretary of State. Accordingly, a requirement to assess disability at the date of assessment was not objectionable on the ground that it deprived those whose conditions subsequently deteriorate;

(d) Mr Heppenstall also relied on the VDPA 1979's genesis as a temporary measure pending changes to the law to introduce strict liability for vaccine damage which, in the event, did not materialise. This was addressed at length in written observations he submitted shortly before the hearing. Since the Act was only ever intended as a stop gap, Parliament enacted it on the basis that those whose disability might deteriorate would be catered for by those planned changes to the law of tort.

118. Mr Peretz Q.C's argument for the claimant in response was straightforward. The VDPA 1979 incorporates assessment rules which assess disablement over a period which includes the future. That is what the principles of assessment in Schedule 6 to the SSCBA 1992 provide for. Mr Peretz also argued that the reversal provisions are designed simply for those whose condition unexpectedly deteriorates following assessment. They do not reveal a legislative intention that assessments must only consider disability as it presents at the date of assessment.

119. I agree with Mr Peretz Q.C. I start on the basis that Parliament knew what it was letting itself in for when it decided to enact a requirement for the VDPA 1979 to assess disability "as for the purposes" of section 103 the SSCBA 1992. It knew it was adopting an assessment process integral to which was assessment over a time-line (see paragraph 87 above). While some aspects of the SSCBA 1992's assessment rules do not fit with the VDPA 1979 scheme, there is no need to disapply or otherwise modify the rule that assessment is to be over a period limited by reference to that during which the disabled person may be expected to continue to suffer from the relevant loss of faculty. Letting this rule do its work does not result in anything that can properly be considered to thwart or run counter to the purpose of the VDPA 1979. In this case, on the First-tier Tribunal's findings, and I suspect most vaccine damage cases, the period of assessment would be the disabled person's lifetime.

120. I find none of the Secretary of State's arguments persuasive:

(a) to focus simply on the phrase "is severely disabled" in section 1(1) of the VDPA 1979 is to see only part of the picture. By section 1(4), there is only one means of establishing that a person "is severely disabled" and that is if "he suffers disablement to the extent of 60 per cent

or more". So what actually needs to be established is that the person "suffers disablement". The concept of disablement clearly connotes an ongoing state of affairs (and there is a respectable argument that "disability" does too). When section 1(1) is considered in its proper context, it becomes clear that the use of the phrase "is severely disabled" is no indication that Parliament intended for the usual approach to assessment of disablement under the 1992 Act (over a time-lime) not to apply:

(b) the Secretary of State misunderstands the phrase "having regard to his physical and mental condition at the date of the assessment" in Schedule 6(1)(a) to the SSCBA 1992. As explained in paragraph 86 above, the function of this term is to influence the identification of disabilities to be taken into account during the period of the assessment. Identifying disabilities over a period, so that they may be assessed, is the sole concern of Schedule 6(1)(a) and so it really makes no sense to argue that a term within it supports the 'snapshot' theory of assessment;

(c) the powers of reversal do not influence the question whether assessment is or not a snapshot. As Mr Peretz Q.C. pointed out, they have meaning and purpose within a scheme that assesses disablement over a timeline. They allow those whose conditions deteriorated unexpectedly, or more rapidly than anticipated, to seek reversal of a refusal to make a payment. Further, it is not the case that the reversal scheme gives disappointed claimants an indefinite ability to seek reversal. Due to regulation 11 of the Vaccine Damage Regulations, a guillotine provision becomes operative once a claimant has appealed to the Tribunal. Only those who do nothing to challenge a refusal have the open-ended ability to seek reversal. I cannot see how that shows assessment is only to consider disabilities presenting at the date of assessment. Moreover, the effective availability of reversal is controlled by regulations and those could be changed at any time;

(d) what I have been told about the unexpected longevity of the VDPA 1979 is immaterial. The starting point for determining the purpose of an Act of Parliament is its provisions. That will also be the finishing point in many cases and so it is here. There is nothing in the VDA that discloses a purpose as a temporary legislative measure.

121. I therefore reject the Secretary of State's first and, it is fair to say, principal ground. It was certainly the subject of most argument at the hearing. The First-tier Tribunal did not err in law by taking into account John's likely future disability or disabilities.

Ground 2 – failure to explain why future was taken into accoune

122. The second ground was in part a variant of the first. It was that "the Tribunal failed to explain how the relevant legislation entitled it to take into account possible future disablement".

123. There is an element of smoke and mirrors here. The Secretary of State argues the Tribunal should have explained why it departed from his unreasoned assertion that the future was to be ignored because, frankly, unreasoned is what it was (see para. 26 above). But this does not matter. The assessment was not merely permitted to look to the future; this was necessary to comply with Schedule 6(4) to the SSCBA 1992. There is no need for a Tribunal to explain why it complied with the law.

Ground 3 – misuse of the prescribed injuries and disablements

124. By this ground, the Secretary of State points out that the 'prescribed scale' in Schedule 2 to the Social Security (General Benefit) Regulations 1982 does not have to be taken into account. That is correct. It is what the regulation introducing it says. The criticism made of the Tribunal is that "the Tribunal wrongly constrained the exercise of its judgement, and thereby

erred in law, by seeking to compare the Appellant's narcolepsy with cataplexy with the prescribed conditions in Schedule 2, particularly by trying to measure those symptoms against irrelevant and incomparable injuries".

125. The other element of this ground is that "the Tribunal's role was not to compare the Appellant's disablements against somebody suffering from [the 60% disablement prescribed injuries] and to see as if there was at least parity, but to only make the comparison with someone of the same age and sex but whose physical and mental condition is normal".

126. At root, the Secretary of State criticises the First-tier Tribunal for not ignoring the case he put to it. That is somewhat surprising. As explained in para. 26 above, his case, fragmented though it was, asserted that an important factor in assessment was a comparison with the 'Scheduled Assessments'. In fact, the Tribunal was told by a departmental medical adviser that it resulted in a type of assessment nirvana where very different injuries were precisely equated with each other in disability terms and everyone was treated fairly and consistently. And the Departmental medical services guidance clearly expects the Scheduled Assessments to be used as comparators in vaccine damage assessments. If not, why bother mentioning them?

127. In any event, I agree with Mr Peretz Q.C.'s argument that the Secretary of State has not demonstrated an error on a point of law.

128. Schedule 6(1)(a) to the SSCBA 1992 requires the disabilities to be taken into account over the relevant period to be identified. In so doing, the assessor must compare with a person of the same age and sex in normal physical and mental condition. So, for example, typical age-related disabilities ought to be stripped out. The disabilities thus identified provide the raw material for the final determination which involves an exercise of judgement in converting those disabilities into an overall disablement figure, expressed as a percentage. The disablement represents "the sum" of the disabilities as the House of Lords put it in *Jones*.

129. Schedule 6(1)(c) requires the assessment of the disablement flowing from the person's disabilities not to take into account personal circumstances, other than those listed (age, sex, physical and mental condition). Alongside this, regulation 11(8) authorises appropriate regard to be paid to the relation between injuries, disability and disablement expressed in the prescribed scale in Schedule 2 to the Social Security (General Benefit) Regulations 1982.

130. There is no rule that the prescribed scale can only be considered in particular types of case. If a Tribunal in a vaccine damage case rationally decides it is appropriate to pay regard to it, it may do so. Even in the case of widely divergent injuries, the comparative exercise may bear some useful fruit. The declaration that a particular disability is presumed to generate a particular percentage disablement may say something relevant for disabilities associated with very different injuries. It certainly cannot be ruled out. I do not read the decision in *R (I) 2/06*, relied on by the Secretary of State, in which guidance was given that "a tribunal is not obliged to try and force the disablement with which it is concerned into an imaginary position on the scale set out in the regulations", as saying anything to the contrary. I therefore reject the first element of this ground.

131. To the extent that the ground argues that the Tribunal erred by failing to follow the core assessment rules in Schedule 6 to the SSCBA 1992, I reject it. The Secretary of State never asked the Tribunal to do this and, in any event, he has not demonstrated that, in substance, the Tribunal deviated from the Schedule 6 course.

Ground 4 – inadequate reasons for taking into account the prescribed scale

132. In the light of the way in which the Secretary of State put his case to the First-tier Tribunal, he can hardly complain that the Tribunal failed to explain why it took the prescribed scale into account. I reject this ground.

Ground 5 – Tribunal improperly took into account the child's personal circumstances

133. This ground argues the Tribunal erred by taking into account personal factors beyond those permitted by Schedule 6(1)(c) (age, sex, physical and mental condition). The prohibited matters were said to be leisure activities, social life and earning capacity.

134. Further the ground argues that the Tribunal failed to explain its decision in accordance with the guidance in *R(I) 5/95* and the correct approach was put before the Tribunal in a report of a Dr Nixon (I think it Dr Read is meant) at p.1145 of the appeal papers. I have to observe that, if this report was thought to be so significant, why did its contents appear solely at p.1145 and not at p.1 of the appeal bundle in the Secretary of State's submission to the Tribunal?

135. The Tribunal's statement of reasons finds John would be likely to face significant disadvantage in the jobs market, be unlikely ever to drive a car and have his social life curtailed. Does this show that it took into account personal factors other than age, sex, physical and mental condition?

136. John's disabilities were relatively clear. Using the "partial or total failure of power to perform normal bodily or mental processes" meaning of disability, on the Tribunal's findings they included: pervasive tiredness affecting many bodily and mental processes during the daytime; regular daily loss of all muscle control, that is the process by which the body keeps its shape; less frequent instantaneous lapsing into unconsciousness, that is failure of the mental process of maintaining waking consciousness; impaired sleep; impaired anger management, that is the mental process for dealing appropriately with aggravation. On the Tribunal's findings, these were lifetime disabilities. It is true that the Tribunal decided, at the date of the Secretary of State's decision, the 60% disablement threshold was not met. However, it looked to the future and, of course, John would age during the future. Age is a personal factor that may be taken into account. I agree with Mr Peretz Q.C. that the Secretary of State has not shown that the Tribunal did anything other than rely on John's increasing age to justify its determination that, over the period of the assessment, the 60% disablement threshold was met. I do not think an assessor is prevented from deciding that disablement levels will change, despite disabilities remaining the same, due to a disabled person ageing. To take a clear example, imagine a child with a serious permanent speech disorder. As a baby, the disablement associated with that disability might reasonably be considered minimal. As an adult, however, the disablement associated with that disability might reasonably be considered significant.

137. *R(I) 5/95* was an industrial injuries case and it is tolerably clear from the reported decision that the Tribunal was referred to the various relevant concepts under the industrial injuries legislation and asked to make findings accordingly. Its reasons for finding that the appellant was 5% disabled for life due to a hand injury were that "social and domestic activities such as playing bowls, darts, gardening and domestic duties have been affected". That was it.

138. By contrast, the present Tribunal was not referred to the wider legislative scheme for assessing industrial injuries. The Secretary of State's case was that John did not meet the 60% disablement threshold and that was argued, in large part, by a comparison, albeit a very loose one, with the 'Scheduled Assessments'. And in fact that is what the report at p.1145 asserts is

required, albeit restricting that consideration to the present. The more detailed analysis on p.1145 of that report about functionality was given on the assumption that the Secretary of State correctly thought the future was irrelevant. In those circumstances, the First-tier Tribunal did enough to explain its decision.

Ground 6 - perversity

139. The final ground is that the Tribunal made a perverse or irrational finding that John was unlikely to improve. It was so contrary to the weight of evidence that it was "not a finding on the evidence to which a tribunal was entitled to come". This ground is devoid of merit and, in fairness, it was little pressed by Mr Heppenstall at the hearing. It relies on passages in a report of DWP medical adviser written on 15th January 2014. However, that report contained no proper analysis of trends. It was simply a summary of some of the medical evidence followed by a statement that "the latest evidence does indicate that he is reasonably well controlled at present".

140. By contrast, the Tribunal had before it a medical report from Professor Gringras which said, in the light of John's history of resistance to medication, his case "would be classed as a more severe case of narcolepsy and cataplexy" and he has a "lifetime neurological disease" that is "very likely" adversely to affect his education, ability to work and earn. The Tribunal also heard extensive oral evidence from John's parents. In those circumstances, I reject this ground without hesitation.

Further observations

141. I have rejected all of the grounds relied by the Secretary of State. In terms of fallback argument, in the event that the Tribunal was found right to take into account future disability, this was simply the irrationality point in ground 6. Accordingly, the First-tier Tribunal's decision stands and, if he has not done so, the Secretary of State must make a payment for John's benefit of the relevant statutory sum.

142. I cannot, however, say that the Tribunal gave a model statement of reasons. It will be seen that many of the points I make in the guidance section below were not followed.

143. At the hearing, Mr Heppenstall also made the point that Tribunal overlooked the requirement in section 4(4) of the VDPA 1979 to take into account the circumstances up until the date of the hearing, appearing instead to focus on the date of the decision under appeal. I think he is right and that was an error of law. The Tribunal considered what was likely to happen to John from the standpoint of what might reasonably have been expected at the decision date. However, I do not see how this error could have made a difference to the outcome in the light of the Tribunal's findings of fact. The prognosis was the same at the date of hearing as at the date of decision.

Guidance

Points for the Secretary of State

144. The Secretary of State brought this appeal partly so that the Upper Tribunal might give guidance about the operation of the VDPA 1979 assessment rules. First, of all I need to say something about how this appeal was presented to the First-tier Tribunal.

145. The Secretary of State's written submission at the start of the First-tier Tribunal appeal bundle was not of an acceptable standard. As I mentioned above, it did not refer to the relevant legislation about assessments, it did not identify the main issues on the appeal; it did not explain why the Secretary of State refused to make a payment; it did not make any attempt to summarise the 1,500 pages of documentary evidence; and the one issue it asked the Tribunal to decide was not even relevant on this appeal. It was more of a covering note than a submission. This needs to be improved.

146. The Secretary of State has a duty under rule 2 the Tribunal Procedure Rules to help the Tribunal further the overriding objective of dealing with cases fairly and justly, as well as a duty to co-operate with the Tribunal. The rules also require the Secretary of State in his response to an appeal to ensure that his grounds for opposing an appeal are included, together with relevant documents in his possession. Combining those two sets of obligations means the Secretary of State should produce a helpful appeal bundle in that it identifies the relevant law, draws attention to the matters in dispute, whether of fact and law, where there are thousands of pages of evidence does something to help the Tribunal get to grips with the evidence such as a summary, and explains why the appeal is opposed. That is important in every case but even more so in a case like this given the amount of public money involved.

147. The Secretary of State is also required to include all relevant documents in the appeal bundle (although there are limited exceptions). Correspondence between vaccine damage officials and a claimant about a claim should always be considered relevant and included in the appeal bundle. In this case, a significant letter was notable by its absence (namely a letter which the claimant took to mean that the prescribed scale was used to assess disability and sought her comments on how John's disabilities might fit within that scale).

148. I would also suggest that the Secretary of State reconsiders his practice of not sending presenting officers to vaccine damage appeal hearings, especially in cases where causation is accepted. This is for the reasons given in paragraph 30 above.

Assessments

149. We are concerned here with assessment in the sense of a mental evaluation, rather than a physical examination. No one can ignore the fact that the VDPA 1979 assessment rules have been taken from, and are therefore influenced by, the industrial injuries scheme. This means the assessment/evaluation adopts certain structural features that should be respected (although I do not think it is for me to prescribe how that is done). They are:

(a) the need to identify something akin to an accident. This is straightforward because it is, of course, is the vaccination;

(b) the need to identify a loss of faculty, which is generally taken to mean "an impairment of the proper functioning of part of the body or mind";

(c) the need to identify the period to be taken into account by the assessment. In many cases, the nature of vaccine damage is that this is the disabled person's lifetime because that will be the period during which the person is expected to suffer from the loss of faculty;

(d) the need to identify the disabilities, resulting from the vaccination, that may be expected during that period. A disability is generally taken to mean "partial or total failure of power to perform normal bodily or mental processes";

(e) the need to understand how the prescribed scale of disablement functions and the extent to which it is legitimate to rely on it. I think it is clear that vaccine damage would be most unlikely to take the form of an injury on the prescribed scale because prescribed injuries all tend to be various types of physical trauma. Therefore, it will be used for comparative purposes only. A meaningful comparison is only likely to be made between disabilities, rather than injuries. To do that effectively calls for the disabilities associated with the prescribed injury to be compared with those associated with disabilities resulting from vaccination;

(f) the final stage in the process is to express the sum of disabilities in terms of overall disablement, using a percentage. At this stage, I think it is important to note that vaccine damage, tending often to be systemic in nature, may well result in a constellation of disabilities. These should be carefully identified;

(g) it should be remembered that personal factors may not be taken into account, other than age, sex, physical and mental condition. However, evidence about personal activities is perfectly acceptable if it says something relevant about disability or disablement.

150. I have restricted myself to providing general guidance about those features of the assessment that were relevant in this case. And so I have not mentioned the special rules about injuries with a dual cause and offsetting. But those involved in this area should be aware that there are further assessment rules that might be relevant.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
23rd May 2015