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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CP/5257/1999

Starred Decision No: 71/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 10th August 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Whittington House social security appeal tribunal dated 5 February 1999 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute a decision on the claimant's appeal against the adjudication officer's decision issued on 14 November 1994, having made the necessary findings of fact (Social Security Act 1998, section 14(8)(a)(ii)). My decision is that:

(a) the adjudication officer's decision awarding the claimant an increase of retirement pension for his wife fell to be reviewed and revised on the ground of a relevant change of circumstances when she was awarded severe disablement allowance and that the revised decision is that the increase is not payable from 17 December 1991;

(b) accordingly, there has been an overpayment from that date down to 18 September 1994, and the conditions for recoverability of the overpayment of retirement pension under section 71 of the Social Security Administration Act 1992 are met from 19 October 1992 to 18 September as from about 14 October 1992 the claimant failed to disclose a material fact;

(c) the amount of the overpayment which is recoverable after applying regulation 13 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 is nil.

The background

2. The claimant was awarded retirement pension, including an increase for his wife, from around his 65th birthday in November 1991. Payment of the pension and of the increase was at about 45% of the basic rate. He was also entitled at that time to invalid care allowance ("ICA") and to income support. His wife claimed severe disablement allowance ("SDA") on 17 December 1991. An award was not made for many months and the first payment (covering the period from 17 December 1991) was not made until 12 October 1992. It does not seem to be in dispute that the claimant did not inform the office dealing with his retirement pension of his wife's receipt of SDA, although in a letter of 2 September 1992 to the ICA Unit he had mentioned her claim and the fact that it was still under consideration. Payment of the increase of retirement pension and of SDA continued to be made. It seems from a copy of a page from the wife's SDA claim form that she had disclosed there that her husband was in receipt of income support, but not that he was in receipt of an increase of retirement pension for her. (There is some dispute about whether at the relevant date the pension was actually in payment). But in any event the SDA authorities did not inform the retirement pension authorities of the award of SDA to the claimant's wife.

3. On 10 November 1994 the claimant telephoned the Pensions Directorate to enquire why payment of the increase of retirement pension for his wife had been suspended in September 1994. This was apparently standard practice, as she was approaching the age of 60 and it was anticipated that she would make a claim for her own retirement pension. However, the officer concerned later checked the wife's records and discovered that SDA was

in payment to her.

3. When the case was referred to an adjudication officer, he gave a decision, issued on 14 November 1994, reviewing the decision awarding the claimant an increase of retirement benefit on the ground of material change of circumstances (that the claimant's wife was in receipt of SDA). The revised decision was in effect that the increase was not payable from 17 December 1991 because its payment at the same time as SDA for the person concerned was not allowed. There had been an overpayment of £2145.10 for the period from 17 December 1991 to 18 September 1994, which the adjudication decided was recoverable from the claimant under section 71 of the Social Security Administration Act 1992, as it was made as a result of the claimant's failure to disclose the material fact that his wife was receiving SDA.

4. The claimant appealed, having already raised several additional matters. One was that as at 17 December 1991 he was in receipt of income support in which the amount of his retirement pension was taken into account as income. Therefore, if the amount of the retirement pension had gone down, the amount of income support payable would have gone up by an equivalent amount. The second was that on 4 November 1992 his wife had sent a pension forecast form BR19 to the RPFA Unit in Newcastle upon Tyne, on which her receipt of SDA was recorded. The copy retained by the claimant of the actual form is now at pages 127 to 129 of the papers.

5. In the written submission to the appeal tribunal, the adjudication officer suggested that the decision of 14 November 1994 was wrong in two ways. First, he submitted that there had only been an overpayment for the period from 19 October 1992, following the first actual payment of SDA. The overpayment for that period was calculated at £1512.28. Second, it was submitted that the amount recoverable should be reduced by a further £1111.01 to take account of the additional income support which would have been payable if the increase of retirement pension had not been paid. That left an amount of £401.27.

6. That calculation was based on the following evidence and reasoning. It was stated that verbal information from the income support section was that the claimant had received income support during the period from 19 October 1992 to 19 December 1992, calculated on the basis that his income included both the retirement pension with the increase and his wife's SDA, and again for the period from 28 June 1993 to 18 September 1994, calculated on the basis that his income included the retirement pension, but not his wife's SDA. The claimant had gone abroad with his wife (whose health benefited from a warm dry climate) in the intervening period. According to his evidence they left Britain on 20 December 1992 and returned on 19 June 1993. The adjudication officer submitted that during the periods of receipt of income support any reduction in the amount of the retirement pension would have led to a corresponding increase in entitlement to income support, so that the effect of regulation 13 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 ("the Payments Regulations") was to wipe out the recoverable overpayment for those periods. It was submitted that, although the SDA should have been taken into account as income for the second period, that created a separate overpayment of income support, which would have to be dealt with separately. That process was said to remove £1111.01 from the amount of

£1512.28.

The appeal tribunal's decision

7. There were a number of adjournments while appeal tribunals tried to get an explanation of the calculation of the overpayment. The appeal was eventually determined on 5 February 1999. The claimant did not attend, as he did not feel able to leave his wife. There was a written submission from his representative, Mr Parker of Leyton Advice Centre, the main point of which was that the claimant's disclosure to the ICA Unit constituted sufficient disclosure for retirement pension purposes. There was a further written submission from the adjudication officer setting out again the calculation of the amount of £401.27.

8. The appeal tribunal's decision was that the appeal was allowed and that the adjudication officer's revised decision was accepted. Since the adjudication officer's further submission was set out on the decision notice it is plain that the decision was that the amount of £401.27 was recoverable. However, in the statement of material facts and reasons the only explanation of why that amount was recoverable (between a summary of the background and another repetition of the adjudication officer's further submission) was this:

> "[The claimant's wife] did not disclose that her husband was in receipt of an increase of retirement pension for her and as a result an overpayment occurred."

9. The claimant now appeals against the appeal tribunal's decision with the leave of a full-time chairman of appeal tribunals. It is accepted on behalf of the Secretary of State (who has now taken over the functions of adjudication officers) that the appeal tribunal erred in law in failing to give adequate reasons, and in particular in failing to explain why the contentions on disclosure made on behalf of the claimant had been rejected. I agree. For that reason, the appeal tribunal's decision must be set aside.

The Commissioner's substituted decision

10. What has required a number of written submissions and an oral hearing is the question of the proper legal basis for determining recoverability, in the light of the decisions of the Tribunal of Commissioners in CG/4494/1999 and CG/5631/1999, and for calculating the amount of any overpayment recoverable. At the oral hearing, the claimant was represented by Mr Neil Garrod, a pupil barrister from the Free Representation Unit. The Secretary of State was represented by Ms Vicky Bergmann of the Office of the Solicitor to the Department of Social Security. I am grateful to both representatives for their helpful submissions. By the time of the oral hearing it appeared that sufficient evidence was available for me to be able to substitute a decision on the claimant's appeal against the adjudication officer's decision of 14 November 1994. Accordingly, there was an opportunity for the production of further evidence and submissions on an outstanding factual issue.

11. It is not disputed that the decision awarding the claimant an increase of retirement pension for his wife fell to be reviewed and revised on the ground of a relevant change of circumstances when she was awarded SDA. That is because of the effect of regulation 10 of the Social Security (Overlapping Benefits) Regulations 1979. Therefore, the revised decision is that the increase is not payable from 17 December 1991, and there has been an

overpayment from that date down to 18 September 1994.

Recoverability and failure to disclose

12. The question to be decided is whether any of that overpayment is recoverable from the claimant under section 71 of the Social Security Administration Act 1992. The only ground of recoverability which has been relied on is failure to disclose a material fact, ie the payment of SDA to the claimant's wife. It is plain that until the claimant's wife was notified of the award of SDA there could be nothing for the claimant to disclose. Since he dealt with benefits for both of them, he knew of the award when it was made, but the overpayment could not have been caused by any failure to disclose before 19 October 1992. It is not in dispute that the overpayment incurred prior to 19 October 1992 is not recoverable.

13. In relation to the remainder of the period down to 18 September 1994, Mr Garrod's first submission was that the overpayment was not recoverable for any period after the claimant's wife's BR19 request for a pension forecast was received in the RPFA Unit. Mr Garrod, rightly in the light of the decision of the Tribunal of Commissioners in CG/4494/1999, did not make any submission that the claimant's communication with the ICA Unit constituted disclosure of his wife's receipt of SDA in relation to his retirement pension claim. But he did submit, first, that because the BR19 form recorded that the claimant's wife was married and that she was in receipt of SDA, that constituted disclosure to the correct office in relation to the retirement pension claim so as to prevent any subsequent overpayment from being recoverable. At least, there was a position where it could not reasonably be expected that the claimant should do anything further by way of disclosure, so that there was no "failure". Mr Garrod's second submission was that, if it were decided that the claimant had failed to disclose his wife's receipt of SDA to the correct office, the result of the receipt of the BR19 form was that the part of the Department of Social Security administering retirement pension knew of the wife's receipt of SDA, so that the cause of any subsequent overpayment could not be the claimant's failure to disclose, but the failure to act on that knowledge.

14. I do not accept the first submission. On the first part of it, the Tribunal of Commissioners in R(SB) 15/87, paragraph 29, said this on the question of by whom disclosure of material facts should be made:

> "In our judgment disclosure must be made, in connection with the claimant's own benefit, by the claimant himself or, on his behalf, by someone else. In this context we would consider that disclosure could fall within the ambit of having been made 'on behalf' of the claimant if someone else were to give information concerning the claimant in the course of some entirely separate transaction (for example, in connection with the informant's own claim for benefit), provided that:-
>
> (a) the information was given to the relevant benefit office;
> (b) the claimant was aware that the information had been so given; and
> (c) in the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself."

However, it was also said in the same paragraph that the Tribunal was:

> "clearly of the opinion that casual or incidental disclosure by some other person (in the present case E, for example) of information regarding the claimant will not discharge the duty of disclosure."

In R(SB) 15/87 E was a daughter of the claimant who had claimed supplementary benefit in her own right. The information she gave was held not to be disclosure in relation to the claimant of the fact that she had left school. Nor did the claimant's wife's handing back to the child benefit section of the local office of a child benefit book in respect of another child constitute disclosure in relation to the claimant's supplementary benefit.

15. In the present case, regardless of the other provisos laid down in R(SB) 15/87, the mention of the receipt of SDA on the form BR19 fell into the category of casual or incidental disclosure by another person. The forecast request was to do with the claimant's wife's own pension position on her own contribution record. The form asked whether she was married, but nothing more about her husband and did not ask whether he was receiving a retirement pension. The information about receipt of SDA was not given in connection with the claimant's retirement pension. The form did not constitute disclosure on the claimant's behalf.

16. But did the sending of the form create a situation in which the claimant could not have reasonably been expected to make further disclosure of his wife's receipt of SDA, so that he could no longer be said to have "failed" to disclose? It seems obvious from the papers that it was the claimant who did the filling in of all the social security forms for both himself and his wife. Thus, although the form BR19 was in his wife's name and signed by her, the claimant had full knowledge of what was in the form.

17. I have grave doubt whether, in a situation where the Secretary of State has specified within the first part of regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987 that particular information is to be given to a particular office, the question of what is reasonably to be expected from a claimant is relevant. The Tribunal of Commissioners in CG/4494/1999 said in paragraph 13 that:

> "the Department may require the disclosure set out in the regulations but may make such conditions as they think appropriate about the location for such disclosure as evidenced in the quotation above from the order book in this case. We are satisfied that a requirement to make disclosure about the loss of attendance allowance, for example, to the ICA Unit is a good and valid requirement which, if not attended to, may amount to a misrepresentation or a failure to disclose."

Yet the Tribunal went on to say in paragraph 14:

> "In short we are satisfied that R(SB) 15/87 and, indeed, R(SB) 21/82 which determined that a failure to disclose could occur only where disclosure was reasonably to be expected, which would have been the case here, were correctly decided. We endorse them."

I do not need to decide whether that was an accurate statement of what was decided in R(SB) 21/82 or whether the endorsement of that rule was necessary to the decision in CG/4494/1999. That is because I have concluded in the present case that disclosure was still reasonably to be expected of the claimant after the form BR19 was sent.

18. The copy of the information sheet issued to the claimant as a recipient of retirement pension by credit transfer into an account (pages 15A and 16) instructs recipients to tell "us" straightaway, amongst other things, if their spouse starts getting another benefit or pension or allowance from the Department of Social Security. At the head of the instructions is the following:

> "**Remember** - if you need to get in touch with us about your benefit, we can give you a quicker service if you contact us direct, instead of contacting you local Social Security office.
> Our address is
> Department of Social Security
> Central Pensions Branch (PP)
> Newcastle upon Tyne
> NE98 1YX"

There is also a telephone main switchboard number given with the instruction to ask for Central Pensions Branch Periodic Payments. It is therefore plain that the "us" in the instructions to whom information is to be given refers to the Central Pensions Branch Periodic Payments. The address to which the form BR19 was to be sent was:

> "Department of Social Security
> RPFA Unit
> Room 37D
> Newcastle upon Tyne
> NE98 1YX"

19. Looking at the circumstances as known to the claimant at the time and assuming that as the hypothetical reasonable person he had kept the instructions now on pages 15A and 16 in mind, I cannot conclude that he could reasonably think that he did not need to tell the Central Pensions Branch Periodic Payments that his wife had started to receive SDA. I accept that he may have thought that he had told "Newcastle", that the interaction of all the benefits that he and his wife received or had claimed was very complicated indeed and that a reasonable claimant cannot be expected to understand the precise structure of the Department of Social Security and its component Branches, Units, teams etc. But that is all the more reason, where precise instructions have been given, to look at them. I do not see how the claimant could reasonably think that, by sending a form asking for a forecast of his wife's pension entitlement on her own contributions, which did not (in the circumstances of a subsisting marriage) even ask for the claimant's name or national insurance number, he had done enough to inform the Central Pensions Branch Periodic Payments of his wife's receipt of SDA. He failed to disclose that material fact for the period down to 18 September 1994.

20. That brings me to Mr Garrod's second submission. Shortly after 4 November 1992 the RPFA Unit knew that the claimant's wife was in receipt of SDA. Does that mean that the Secretary of State knew of that fact in a way which renders the subsequent overpayment of increase of retirement pension to the claimant not a consequence of his failure to disclose?

21. The Tribunal of Commissioners in CG/4494/1999 rejected the submission that if anyone of any authority in the Department of Social Security knows a material fact the Secretary of State has the appropriate knowledge. It put the correct test, in the context of a multiplicity of different benefits and of units for administering them, in this way in paragraph 11:

> "It is not then the Minister's knowledge or responsibility that is in issue but that of that part of the Department administering the relevant benefit scheme. Unless it has been told or is shown to know then there is not knowledge relevant to cut the causal link."

The Tribunal was not prepared on the evidence before it to impute knowledge within the attendance allowance section of the Department to the ICA Unit. It further summarised its approach as follows in paragraph 14:

> "In general, so far as disclosing or representing is concerned, the objective to do so must be either to that unit clearly stated in relevant correspondence or the relevant order book or otherwise to the office, or as it was submitted at one stage the team, so far as that can be clearly identified within the office in an appropriate case."

22. It also follows from the Tribunal of Commissioners' second decision, CG/5631/1999, that if there is evidence of administrative arrangements (including computer links) such that there is an automatic notification of changes from one unit to another, sufficiently related to the particular claimant in question, the causal link between a claimant's failure to disclose and the overpayment will be broken.

23. The second passage from CG/4494/1999 quoted in paragraph 21 is strictly to do with the question of disclosure, but the approach must also be relevant to the question of what is "that part of the Department administering the relevant benefit scheme". With respect to the members of the Tribunal, it leaves the issue of how narrowly "that part" can be defined somewhat obscure. As Mr Garrod has submitted, it would be undesirable if the Secretary of State were able, by pointing to a myriad of fragmented administrative units or teams, effectively to allow a blind eye to be turned to information coming into an office. At the oral hearing there was no evidence of the exact function of the RPFA Unit and the structure and operation of the Pensions Directorate, including arrangements for the sharing of information. I gave a direction for such evidence to be produced and for further submissions to be made.

24. Ms Bergmann has produced a good deal of interesting information, but as she acknowledged in her submission dated 2 March 2001, the information about the overall structure of the Pensions and Overseas Benefits Directorate is up-to-date and extremely limited. It is thus difficult to draw inferences about the overall structure in 1992, and the

statement from the supervisor in the RPFA Unit is of little help on that either.

25. The chart showing the current structure and the information taken from the Directorate's website shows that it is divided into four divisions. One is the Pensions Services Division. Within that Division the chart shows three sub-divisions - Maintenance, Awards/Forecasts and Change Implementation. Maintenance consists solely of Pensions Payments (PP), dealing with United Kingdom beneficiaries who have pensions paid direct into an account or by order. Awards/Forecasts covers Pensions Direct (PD), a telephone information service which also handles calls for PP; Pensions Awards, which handles mainly claims from divorced and widowed claimants; London Pensions Group (LPG), which handles claims from the Greater London area; and Retirement Pension Forecast and Advice (RPFA), to which I shall return. Change Implementation covers a number of units whose description is obscure, but includes telephone services for an electronic claim form service in Greater London and for the minimum income guarantee. I give very little weight indeed to the fact that the RPFA Unit appears in a different sub-division from PP. Even if it were assumed that the administrative divisions had been the same in 1992, there is no evidence that the sub-divisions have any particular purpose. The website information simply describes all the various units within the Pensions Services Division without putting them into any sub-divisions. There does not appear to be a clear line between the kind of work done by Maintenance and by Awards/Forecasts as a whole. I consider that I should disregard the sub-divisions in asking whether facts known by the RPFA Unit were known by that part of the Department administering the retirement pension scheme.

26. On that point the new evidence of the work of the RPFA Unit is relevant. The nature of the work can in my view be assumed not to have changed all that much from 1992. It may be helpful to set out some of the evidence of the supervisor in the Unit, who had worked there since 1995:

> "2. The unit was set up in 1988 to provide a forecast service and most of the staff in the unit are not trained in other areas. The purpose of the unit is to provide a forecast to the applicant only in respect to their own pension entitlement. The unit could not forecast any potential entitlement of a person in respect of the contributions of their spouse. If a request had been made for notification of the amount payable on the husband's contribution the RPFA would not be able to accommodate this. The customer would be provided with her forecast and at the time in question the forecast would have included a paragraph explaining that if her RP was less than 60% of the full amount, she would be able to receive up to 60% of her husband's basic RP when she reached age 60, providing her husband was of state pensionable age and depending on his entitlement. This would not be decided or calculated until she made an application for retirement pension.
>
> 3. The unit is a completely separate Department to those sections actually paying Retirement Pensions. The sections paying Retirement Pension (RP) are Pension Payments (PP). The Pension payment Telephone Helpline is Pensions Direct (PD). Separate staff in separate departments deal with separate work. The unit deals exclusively with Pension Forecasts, Pension Payments deal with the payment of

Retirement Pensions. Staff do not move around unless they are actually changing their job.

4. Staff in the unit do not have access to the retirement pension accounts, they are held either by PP when the pension is paid directly into a bank/building society account or by the Local Office in other cases. The computer system on which the RP accounts are stored is called PSCS and is available to Pensions Direct (PD) as well as Pensions Payments (PP). If the account was managed by a local office PP and PD would be able to access the account but they could not amend or take action on the account.

5. When a Pension Forecast is prepared and processed, if a person is married or single, the only record which is examined and used is that of the person concerned. In this case when [the claimant's wife] applied for a Pension Forecast, the only record accessed would have been her own National Insurance record, as forecasts are based purely on an individual's National Insurance record, except where the customer is divorced or widowed."

27. I accept that evidence. I found part of it surprising. I had assumed, and this was the basis of some of the discussion at the oral hearing, that a pension forecast for a married woman would include not just her Category A retirement pension entitlement on her own contributions, but also her Category B entitlement on her husband's contributions. However, it is plain that that is not so and that the forecast is effectively only of the Category A entitlement. A very careful reading of the information accompanying the BR19 application form might reveal that, at least to someone knowledgeable about the different bases of entitlement to retirement pension. I therefore accept that in dealing with the application for a forecast from the claimant's wife the staff of the RPFA Unit would not have been interested in the claimant's own benefit situation at all.

28. I conclude from the supervisor's evidence that, if the RPFA Unit was not at the relevant time within that part of the Department administering the retirement pension scheme, there were not arrangements for automatic transfer of information in relation to a spouse to PP within the principle set out in CG/5631/1999. I have not set out the further detail on that in the supervisor's evidence. Any links were likely to have been even more tenuous in 1992 than in 2001.

29. The question then is whether the knowledge of the RPFA Unit about the claimant's wife's SDA was knowledge of the part of the Department administering the retirement pension scheme. Mr Garrod has submitted that it was, in the submission received on 6 April 2001. I reject his submission that the fact that knowledge of PD is imputed to PP points to a similar process for the RPFA Unit. Although both PD and the RPFA Unit come within Awards/Forecasts, I have explained above why I give little weight to that. Similarly, I do not think it of any significance that, as shown by the memo recording the claimant's telephone call to PD on 10 November 1994, staff of PD had access to the Pensions Strategy Computer System. I consider that the most important factor is the nature of the work done by the RPFA Unit. The work is and was self-contained and limited to the provision of a forecast of a

person's Category A entitlement. The Unit does not deal with claims for benefit or with cases where there has already been an award. I conclude, in agreement with Ms Bergmann's submission, that it is and was at the relevant times not a part of the Department of Social Security or the Benefits Agency administering the benefit system in relation to retirement pensions.

30. Accordingly, there was nothing to break the causal link between the claimant's failure to disclose and the overpayment of the increase of retirement pension from 19 October 1992 to 18 September 1994 and the appropriate amount for that period is recoverable from the claimant under section 71 of the Social Security Administration Act 1992. I must now consider the calculation of the amount recoverable.

The calculation of the amount recoverable

31. This issue turn on the effect of regulation 13 of the Payments Regulations as in force at the relevant time:

> "13. In calculating the amounts recoverable under section [71(1) of the Social Security Administration Act 1992] or regulation 11, where there has been an overpayment of benefit, the adjudicating authority shall deduct--
> (a) any amount which has been offset under Part III;
> (b) any additional amount of income support which was not payable under the original, or any other, determination, but which should have been determined to be payable--
> (i) on the basis of the claim as presented to the adjudicating authority, or
> (ii) on the basis of the claim as it would have appeared had the misrepresentation or non-disclosure been remedied before the determination;
> but no other deduction shall be made in respect of any other entitlement to benefit which may be, or might have been, determined to exist."

It is very easy to criticise somebody else's drafting in hindsight, but that seems to me a masterpiece of obscurity.

32. If the words of regulation 13 are looked at in isolation, one might well think that paragraph (b) could only have operated where the amount of an overpayment of income support was being calculated. The references in sub-paragraphs (i) and (ii) to what ought to have been determined to be payable on the basis of the claim can only be to the relevant income support claim. Then in sub-paragraph (ii) the misrepresentation or non-disclosure which is to be assumed to have been remedied would most naturally be the misrepresentation or failure to disclose which has triggered the recoverability of the overpayment in question. That approach appears to link all the elements together in a way which worked only where the overpayment was of income support. The simplest and most straightforward reading would exclude the case where the overpayment was of another benefit.

33. In view of that I specifically asked Ms Bergmann whether she wished to submit that regulation 13 of the Payments Regulations could not apply to the calculation of the amount

of an overpayment of retirement pension. She replied that she did not. I am prepared to accept that regulation 13 does apply in such a case. That is for two reasons.

34. First, that has been the assumption since the rule first appeared with effect from 6 April 1987 and there are a number of statements by Commissioners that regulation 13 does apply in such a case. I have found statements, not necessary to the decision, in paragraph 13 of CIS/137/1992 (Mr Commissioner Rowland), paragraph 4 of CIS/503/1994 (Mr Commissioner Sanders) and paragraph 9 of R(IS) 9/96 (Mr Commissioner J G Mitchell QC). Further, in CSG/357/1997 Mr Commissioner Walker QC decided that an appeal tribunal erred in law in failing to deal with regulation 13 in a case of an overpayment of ICA.

35. There is a recent decision of Mr Commissioner Jacobs, CIS/1777/2000, which might be thought to be to the contrary. However, on close analysis it decides a different point. CIS/1777/2000 was concerned with a later version of regulation 13, in which the words "or income-based jobseeker's allowance" had been added in regulation 13(b) after "income support". The claimant was overpaid income support, I think because of a failure to disclose that she was working. She argued that there should be a deduction under regulation 13(b) of the amount of income-based jobseeker's allowance ("JSA") which would have been payable if she had claimed that benefit rather than income support. The Commissioner rightly rejected that argument. Where there had been no claim for JSA during the period of the overpayment, the conditions of sub-paragraph (i) or (ii) could not be met. I have looked at the Commissioners' decisions relied on by the Secretary of State in CIS/1777/2000, but none of those decide the point before me either. CIS/718/1993, CIS/577/1994 and CSIS/490/1997 merely decide that there can be no deduction of any additional amount of family credit that would have been payable if the overpaid benefit had not been paid. That is because family credit is not specified in regulation 13 as a benefit the underpayment of which can be taken into account. CIS/503/1994 and CIS/17334/1996 decide that there can be no deduction of an amount of income support that would have been payable to another person if a claim had been made by that person. Thus the authority of which I am aware, although slight, is in favour of the application of regulation 13 to the calculation of the amount of overpayments of benefits other than income support, and now income-based JSA.

36. Second, that accords with the history of the introduction of the rule in regulation 13. Before the 1987 Payments Regulations came into force on 6 April 1987, there were separate tests for the recoverability of overpayments of supplementary benefit etc and of national insurance benefits. The supplementary benefit etc test was of failure to disclose or misrepresentation (see section 20 of the Supplementary Benefits Act 1976) and there were no specific regulations about taking into account underpayments of supplementary benefit against the overpayment. The national insurance test was of due care and diligence (see section 119(1) of the Social Security Act 1975). Immediately before 6 April 1987, regulation 91(1) and (2) of the Social Security (Adjudication) Regulations 1984 made this provision:

> "(1) Subject to paragraph (3), this regulation has effect where--
> (a) in pursuance of a decision given under the [Social Security Act 1975] or the Child Benefit Act 1975 benefit has been paid for a period and--
> (i) the effect of a decision given on appeal against, or review of, that

decision is such that if it had been given in the first instance the whole or part of that benefit would not have been paid, or

(ii) [applied only where there could not be a review], and

(b) it appears to the adjudicating authority that an additional amount of supplementary pension or allowance would have been paid to a person (whether or not the claimant) in receipt of such pension or allowance, but for the fact that that benefit, or such part of it as would have been paid in the circumstances envisaged in paragraph (a)(i) or (ii), was taken into account as a resource in calculating his entitlement to such pension or allowance.

(2) Where this regulation has effect, the decision on appeal or review, or the subsequent decision referred to in paragraph (1)(a)(ii), as the case may be, shall direct that benefit under the [Social Security Act 1975] or, as the case may be, the Child Benefit Act 1975, to the extent of the additional amount of supplementary pension or allowance, was properly paid."

Thus a deduction was required from an overpayment of, say, retirement pension, for the additional supplementary benefit that would have been paid if a smaller amount of retirement pension had been received, at least where there was an existing award of supplementary benefit.

37. Section 53 of the Social Security Act 1986 introduced a common rule for the recoverability of overpayments of all benefits with effect from 6 April 1987, by adopting the misrepresentation or failure to disclose test. The 1984 Adjudication Regulations were revoked and the 1986 Regulations contained no equivalent of regulation 91. Instead the 1987 Payments Regulations contained the provision which later became regulation 13 of the 1988 Payments Regulations. There appears to have been no intention to make any other changes by virtue of the adoption of the common rule (although the litigation culminating in Plewa v Chief Adjudication Officer [1995] 1 AC 249 revealed that a broader category of people could be liable to recovery of overpayment of national insurance benefits). For what it is worth, in the debate in the House of Commons on the 1987 Payments Regulations (House of Commons Hansard, vol 110, cols 877 - 87, 17 February 1987), the Minister did not mention what has become regulation 13 and said (at col 878) that no other changes arose from the adoption of the common test. It would therefore be reasonable to have expected the Payments Regulations to make a broadly equivalent provision to regulation 91(1) and (2) of the 1984 Adjudication Regulations.

38. For those reasons, I accept that the operation of regulation 13 of the Payments Regulations is not excluded on the ground that the overpayment in question is of retirement pension, even though that involves a departure from the simplest and most straightforward reading of the words of the regulation.

39. Ms Bergmann submitted that there could be no deduction from the overpayment of retirement pension for the period from 19 October 1992 to 19 December 1992, or for the first four weeks of the claimant's absence abroad (see paragraph 42 below). This was because the latest claim for income support had been made in July 1992 and the award was made from

27 July 1992. That award was on the basis that the claimant was in receipt of the increase of retirement pension for his wife and that she was not in receipt of SDA, which had not yet been awarded. The submission concentrated on the precise words of regulation 13(b)(i) and (ii). Under sub-paragraph (i) there would not be any additional income support payable on the income support claim as originally presented in July 1992. It was said that under sub-paragraph (ii) one had to envisage that the failure to disclose had been remedied before the determination on the income support claim. But in July 1992 the claimant was properly entitled to the increase of retirement pension, as SDA had not been awarded to his wife, so that no additional income support could have been determined to be payable in July 1992. By contrast, Ms Bergmann agreed that regulation 13 operated in relation to the period from 28 June 1993 to 18 September 1994, because a new claim for income support was made on the claimant's return from abroad. She also accepted that the records showed an underpayment of income support from 19 September 1994 to 28 May 1995, because there was no review to take account of the lower amount of retirement pension paid to the claimant in that period, and that R(IS) 5/92 required that underpayment to be deducted notwithstanding that it related to a period outside that of the overpayment. Ms Bergmann submitted that, although there could be no deduction under regulation 13 in relation to the first period, the Secretary of State could take account of the effect on income support in deciding how much of the legally recoverable overpayment actually to require to be paid back.

40. Mr Garrod submitted that since the overpayment went back to December 1991, although no amount was recoverable for any period before 19 October 1992, regulation 13 should operate for the whole period.

41. I reject Ms Bergmann's submission in relation to the first period from 19 October 1992 to 17 January 1993. As noted briefly in paragraphs 32 and 38 above, a departure from the simplest and most straightforward reading of regulation 13 is needed for it to be applied at all to an overpayment of retirement pension. Ms Bergmann supported that application. I do not think that she can then rely on the precise words of regulation 13(1)(b) to limit their assistance to the claimant. A much broader approach must be taken to give the provision a common sense scope once the operation of the regulation 13 is extended beyond overpayments of income support. The overall purpose is to take account, in calculating what should be repaid into public funds, of additional income support which would have been payable if the claimant's other benefit income had been lower. For that purpose there is no reason to differentiate between cases where the income support determination was made before the date of the relevant misrepresentation or failure to disclose and cases where the determination was made later. It is a condition that a relevant claim for income support must have been made. Sub-paragraph (b)(ii) must be interpreted as applying to hypothetical situations where the "remedying" of a misrepresentation or failure to disclose results in the removal or reduction of payability of some other benefit and then requiring consideration of the effect of that on an income support claim if some hypothetical determination had been made at that point.

42. The result in the present case is that there should be a deduction under regulation 13 for the first period as well as for the second period of the overpayment. It was not clear whether the claimant's entitlement to income support had been wrongly terminated on 19 December 1992, instead of after the first four weeks of absence from Great Britain. Ms

Bergmann produced a copy of an A6, unfortunately undated, recording a decision that the claimant was entitled to income support for the period from 21 December 1992 to 17 January 1993. I conclude that income support was payable for that period, on the basis of the claimant's income including the increase of retirement pension for his wife. If actual payment has not been made, that is a matter now to be pursued with the Secretary of State. It does not affect the regulation 13 calculation, which is concerned only with additional amounts which should not have been "determined to be payable").

43. I base my calculation on the figures in, and attached to, the submission dated 5 September 2000 on behalf of the Secretary of State. The gross amount of retirement pension overpaid and recoverable was £1512.28. In the first period the additional income support which would have been payable was £14.65 per week for 13 weeks, making £190.45. The amount of additional income support for the second period is agreed at £621.97 and £357.19. Thus for the entire period of the recoverable overpayment there is £1169.61 to be deducted under regulation 13 of the Payments Regulations from the gross amount of £1512.28, leaving £342.67. The submission of 5 September 2000 shows that there was an underpayment of income support of £555.09 for the period from 19 September 1994 to 28 May 1995, because of the failure to review entitlement to take account of the removal of the increase of retirement pension. It has been suggested on the claimant's behalf that this underpayment should all be made good to the claimant, while the Secretary of State might exercise his discretion not to require repayment of the £342.67. However, I consider that R(IS) 5/92 requires me to take the underpayment into account under regulation 13. And in any event the amount would only become legally payable to the claimant following a review, or now revision or supersession, of the decision setting entitlement too low. There might be problems with the time-limits on making benefit payable for past periods, depending on circumstances about which I have no evidence. Plainly the amount of the underpayment is more than enough to wipe out the remaining recoverable overpayment of £342.67. Therefore, the amount of the overpayment recoverable under section 71 of the Social Security Administration Act 1992 in the present proceedings is nil. I do not need to make any further calculations.

44. My formal decision is set out in paragraph 1 above.

(Signed) J Mesher
Commissioner

Date: 4 June 2001