VGHH/RFMH/RS/MB

Commissioner's File: CSB/842/85

C A O File: AO 2576/SB/85

Region: Wales & South Western

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF THE SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Bernard Tyler

Social Security Appeal Tribunal: Bath

Case No: 2/12/02

[ORAL HEARING]

Arrangements of paragraphs in this decision

1. Our decision is that the decision of the social security appeal tribunal dated 19 June 1984 is erroneous in law and we set it aside. It is expedient that we should make further findings of fact and give the decision that is appropriate in the light of those findings. That decision is:

(1) the weekly amount applicable to the claimant and his wife for board and lodging in Oakfield Nursing Home

(a) from 2 April 1984 to 31 March 1985 is £238 each (£476 for two);

(b) from 1 April 1985 to 27 July 1986 is £259 each (£518 for two) and

(c) from 28 July 1986 to 13 January 1987 is £259 + £10 each (£538 for two).

(2) Any assessments or revised assessments that may be required to give effect to this decision should now be made by the adjudication officer.

(3) The adjudication officer and the claimant's representative are to be at liberty to apply in the event of dispute in carrying out the terms of this decision.

Representation

2. We held oral hearings of this, and 5 associated appeals, on 1, 2, 15, 16 September and 10, 11 and 12 November 1987. The claimant in the present appeal (and from his death on 10 November 1987 his appointee) was represented by Mr. R. Drabble of Counsel, who was instructed by Mr. J. Luba, Solicitor, of the Child Poverty Action Group. The adjudication officer was represented by Mr. E.O.F. Stocker.

Nature of this appeal

3. This is one of a group of six appeals, three of which relate to nursing homes and the other three of which relate to residential care homes. All six appeals concern the extent to which the charges made to the claimant (and in the present case to the claimant and his wife, who was also resident in the home) for board and lodging are allowable in calculating the claimant's supplementary benefit and are to be met out of his supplementary benefit entitlement. The appeals involve a consideration of six different sets of regulations which, and the periods to which they relate, are identified and defined in paragraph 7 below.

4. The present appeal, the reference to which on Commissioner's file is CSB/842/1985, and to which we shall refer in other appeals as "Tyler", was heard first. It is a nursing home appeal. Employing the definitions set out in paragraph 7, the main questions raised in this appeal are:

(1) the basis on which the supplementary benefit (now adjudication) officer should estimate "the reasonable weekly charge for the relevant area" under regulation 9(6) of the pre-Cotton Regulations;

(2) whether Schedule 1A of the Cotton Regulations (setting a limit on board and lodging charges) is invalid in its entirety;

(3) determination of the "protected amount" (for board and lodging charges) under the Cotton Regulations, the Camden Regulations and the 1986 Regulations applicable to the claimant and his wife both of whom were resident in the home.

5. The decision in each appeal is accompanied by copies of the decisions on the associated appeals, in order to avoid needless repetition.

The period in issue

6. The period in issue in this appeal extends from 2 April 1984 to 13 January 1987 : see paragraph 20 below.

The relevant law

7. This comprises, as regards the present appeal, the first five of the six sets of statutory regulations, namely:

(1) the Supplementary Benefit (Requirements) Regulations 1983 [SI 1983 No. 1399] which, in their original form, we shall call "the pre-Cotton Regulations". They will remain in force until 11 April 1988 when they will be replaced by the Income Support (General) Regulations 1987 [SI 1987 No. 1976]; but so far as regards the imposition of limits on the board and lodging charges allowable in calculating supplementary benefit entitlement in respect of persons in nursing homes and residential care homes they were only effective from 13 November 1983 to 28 April 1985, when those provisions were replaced by the Cotton Regulations mentioned in (3) below. The relevant provisions of the pre-Cotton Regulations are set out in the First Appendix.

(2) The Supplementary Benefit (Requirements) (Amendment and Temporary Provisions) Regulations 1984 [SI 1984 No. 2034], which we shall call "the Freeze Regulations". These were in force for the period 20 December 1984 to 1 May 1985. The Freeze Regulations were held by the Court of Appeal in Secretary of State for Social Services v. Elkington, judgment delivered on 5 March 1987, a transcript of which is in the case papers, and which we shall refer to as "Elkington", to be entirely invalid.

(3) The Supplementary Benefit (Requirements and Resources) (Miscellaneous Provisions) Regulations 1985 [SI 1985 No. 613]., which we shall refer to as "the Cotton

Regulations". These were in force from 29 April 1985 to 24 November 1985, being revoked by the regulations referred to in (4) below. The Cotton Regulations amended the pre-Cotton Regulations. They were considered by the Court of Appeal in Secretary of State for Social Services v. Cotton and Secretary of State for Social Services v. Waite, judgment delivered on 13 December 1985, a transcript of which was produced at the oral hearing, and which we shall refer to as "Cotton". This held paragraph 6(2) of Schedule 1A to be invalid. Cotton was considered by a Tribunal of Commissioners in a decision, the reference to which on Commissioner's file is CSB/0255/86, which is to be reported as R(SB)9/87 and by the Court of Appeal on appeal from that Tribunal of Commissioners in Kilburn v. Chief Adjudication Officer, judgment delivered on 5 March 1987, a transcript of which is in the case papers and which we shall refer to as "Kilburn". The relevant provisions of the Cotton Regulations are set out in the Second Appendix.

(4) The Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No. 2) Regulations 1985 [SI 1985 No. 1835], which we shall refer to as "the Camden Regulations". These came into force on 25 November 1985 and revoked the Cotton Regulations. They remain in force until 11 April 1988, when they will be replaced by the Income Support (General) Regulations; but have been amended, as regards nursing homes and residential care homes twice. The relevant provisions of the Camden Regulations are set out in the Third Appendix.

(5) & (6) The Camden Regulations have been amended as from 28 July 1986 by the Supplementary Benefit (Requirements and Resources) Amendment Regulations 1986 [SI 1986 No. 1292] and as from 6 April 1987 by the Supplementary Benefit (Requirements and Resources) Amendment and Uprating Regulations 1987 [SI 1987 No. 659]. We shall call these "the 1986 Regulations" and "the 1987 Regulations" respectively. The relevant amendments are set out in the Fourth Appendix.

The "appropriate amounts" (ie board and lodging charge limits) from time to time specified in paragraphs 1 and 2 of Schedule 1A of the Cotton and Camden Regulations are set out in the Fifth Appendix to this decision.

The adjudication officer's decision

8. On 11 April 1984 an adjudication officer issued the following decision:

> "Supplementary pension of £321.60 determined and paid weekly from the prescribed pay day (Monday) from week commencing 2.4.84".

9. The claimant appealed against this decision. In his written

grounds of appeal he stated that his wife was aged 88, he was aged 82, both were physically disabled being able to move only short distances with great difficulty using walking frames. Wheelchairs had to be used for further movement and for this reason they needed either ground floor accommodation or easy access to a lift. His wife suffered from senile dementia and required prompt and frequent attention during the night as well as in the day. He required help to get to the toilet during the night. When in Novemer 1983 they reached the point where they had to accept the necessity for Nursing Home care, the only accommodation available for a couple which was able to meet their need was at the newly opened Oakfield Nursing Home. They had been at Oakfield for six months and a move would be very detrimental to his wife and was unreasonable in view of her daily deterioration and the very short balance of her life.

10. The adjudication officer, in his written submission on the appeal, stated that the date of the move to the Nursing Home was 13 November 1983, and that the claimant made a claim for supplementary pension on 6 December 1983. At the time of claim the fees at the nursing home were £210 a week each. The claimant had a retirement pension of £34.61 a week and an occupational pension of £3.99 a week (£17.33 calendar monthly); his wife had a retirement pension of £20.70 a week and attendance allowance of £27.20 a week. (Their combined savings at the time of claim were £2,911). The supplementary pension entitlement was calculated at £321.60 from 6 December 1983. As the fees were £420 a week and the supplementary pension and all other income amounted to £408.10 a week, this meant that there was a shortfall between the two figures of £11.90. On 1 April 1984 the fees at the nursing home were increased to a total of £68 a day for the claimant and his wife (£476 a week). The amount of supplementary benefit could not be increased and the shortfall rose to £67.90 a week.

11. The adjudication officer explained that he had allowed the weekly amount for board and lodging of £330 (£165 each) as he estimated, in accordance with paragraph (6)(b) of regulation 9 of the pre-Cotton Regulations that that amount represented a reasonable charge for full board and lodging in a nursing home in the area for the claimant and his wife and it was known that there were suitable nursing homes in the area where the charges did not exceed £165 a week. (It is not in dispute that the relevant area in relation to this appeal is the City of Bath). An increase of £30.70 a week was payable over and above the £330 pursuant to the provisions of paragraphs (7) and (8) of the same regulation. [See the first Appendix for these provisions].

The social security appeal tribunal's decision

12. The tribunal heard the appeal on 19 June 1984. The claimant was not present. There is no chairman's note of evidence on form AT3. The tribunal's decision as:

"To confirm the Supplementary Allowance of £321.60".

Their recorded findings of fact were:

1. "[The claimant and his wife] are aged 82 & 88

respectively living in a private nursing home since 13-11-83 when the fees were £420 p.w. The fees increased on 1-4-84 to £476 p.w

2. Retirement and occupational pensions in operation and taken into account, attendance allowance for [the claimant's wife] disregarded.

3. The Presenting Officer stated that similar nursing home accommodation was available for £330 pw for a double room and evidence presented to the tribunal.

4. Mrs. Emerson presented evidence of fees at registered nursing homes in the Bath district health area that varied from £125.00 pw sharing to in excess of £200 pw single.

5. [The claimant's wife] requires 24 hour attention and can only walk with the aid of a walking frame.

6. At the time of entering the nursing home they had capital of £2900."

Their recorded reasons for decision were:

"Having regard to the charge for full board and lodging in similar nursing homes in the area, the amount granted represents a reasonable one, as set out in Requirements Regulation 9(6)B".

Subsequent proceedings

13. The claimant applied for leave to appeal on the grounds that "having regard to the charge for full board and lodging in similar nursing homes in the area, the amount granted does not represent a reasonable one, as set out in the Requirements Regulations 9(6)(B)". Leave was granted by the chairman on 19 March 1985.

14. On 4 July 1985 the adjudication officer made a written submission supporting the appeal on the ground that the findings of fact and reasons for decision were such that the claimant could not tell why his evidence was rejected by the tribunal. He submitted that it might be found expedient to refer the matter to another tribunal.

15. The appeal reached the Commissioner on 28 January 1986. The Commissioner directed an oral hearing of the appeal, drawing attention to the amendment of the pre-Cotton Regulations by the Cotton Regulations. The direction required argument, in particular, on Schedule 1A of paragraph 2 of the Cotton Regulations and their ultimate effect on the facts of the present case.

16. The hearing was fixed for, and took place on, 15 May 1986. No postponement of the hearing was sought by the adjudication officer and he was legally represented by a member of the Solicitor's Office of the Department of Health and Social

Security. Mr. Drabble, of counsel, instructed by the Child Poverty Action Group, represented the claimant and argued the questions referred to in the Commissioner's direction. When his argument had been completed, the adjudication officer's representative simply adopted the adjudication officer's submission referred to above, which does not deal with any of the points on which argument was directed. He refused to engage in any further legal argument acting, he said, on instructions "not to show his hand" pending the decision of Divisional Court in two cases, one of which was stated to be "Heydon" and the other of which he was unable to name. We regard the adoption of this stance as deplorable. It rendered the entire oral hearing abortive. Considerable public money and time were wasted. The costs of instructing counsel and the expenses of the Child Poverty Action Group were thrown away. Adopted, as it was, after the completion of counsel's submission on behalf of the claimant it savours of tactics unbecoming to those concerned. We hope that they will never be adopted again.

17. The appeal was perforce stood over until the judgments in Elkington and Heydon, both of which had gone to the Court of Appeal were available.

18. Judgment was delivered by the Court of Appeal in Kilburn and Elkington on 5 March 1987. On 15 April 1987 the Child Poverty Action Group asked for this appeal to be considered, in the light of these cases, by a Tribunal of Commissioners. A Tribunal of Commissioners was appointed to consider all six appeals referred to above. A hearing was fixed for 14 and 15 July 1987 but on the application of the claimant was postponed to September 1987.

Was the appeal Tribunal's decision erroneous in law?

19. Yes, it was. This is not in dispute. The regulations in force during the period before the tribunal (2 April 1984 to 19 June 1984) were the pre-Cotton Regulations. Under regulation 9(6)(b) of those regulations the amount allowable in respect of the claimant or any dependant aged 11 years or over was the amount estimated by a benefit officer as the reasonable charge for the relevant area for full board and lodging (inclusive of all meals) which was available in that area or, if the level of charges there are unusually high, in an adjoining area, and which are of a standard suitable for claimants resident in the type of accommodation which is provided either (i) in a nursing home.... or (ii) .... or (iii).... whichever may be appropriate to the accommodation provided in respect of the claimant in that assessment unit save that [not applicable]". The benefit officer's estimate was challenged before the appeal tribunal and evidence was produced on behalf of the claimant in support of the proposition that the amount estimated by the benefit officer did not represent the reasonable weekly charge. The adjudication officer now concerned submits that the findings of fact and reasons for the decision are such that the claimant cannot tell why his evidence was rejected by the tribunal. It was not enough for the tribunal to accept that £165 a week was the figure applicable under the regulation just because the amount had been submitted by the benefit officer. We agree and set aside the tribunal's decision on these grounds.

20.(1) It is desirable that there should be finality in this case. The claimant's wife died on 13 January 1987 (and the claimant himself died on 10 November 1987). The claimant's daughter has been appointed to pursue the appeal. The proper course is (with the consent of both parties) to exercise our jurisdiction to find further facts and to consider the entire period from 2 April 1984 down to 13 January 1987, in other words from the commencement of the adjudication officer's decision down to the death of the claimant's wife. (The period from her death to death of the claimant can be dealt with by the adjudication officer, when the necessary information is available).

(2) The period requires to be considered in four sections, according to the regulations from time to time in force.

The period 2 April 1984 to 28 April 1985 : the pre-Cotton Regulations

21. During this period the pre-Cotton Regulations were in force. The relevant provisions of those regulations are set out in the First Appendix and the effect of regulation 9(6) is to limit the maximum amount allowable in respect of the assessment unit as a whole, (subject to increase in certain cases where the charge for board and lodging exceeds that maximum) to an amount estimated by the benefit officer as representing the reasonable weekly charge for the relevant area for full board and lodging (inclusive of all meals) which is available in that area or, if the level of charges there is unusually high, in an adjoining area, and which is of a standard suitable for claimants resident in the type of accommodation which is provided in a nursing home.

22. The charges actually made by Oakfield Nursing Home in respect of the claimant and his wife for weeks falling in the period 2 April 1984 to 31 March 1985 were £476 a week (£238 each) and from 1 April 1985 to 28 April 1985 were £518 a week (£259 each). (They remained at £259 each down to 31 March 1986 when they were increased to £280 a week each).

23. It is not in dispute that the relevant area, in terms of regulation 9(6) is the City of Bath, which coincides with the area administered by the local Bath Office of the DHSS. (There is no evidence that the charges in that area are "unusually high" in terms of that regulation).

24.(1) Throughout the entire period, the adjudication (formerly benefit) officer fixed the "reasonable weekly charge" for the Bath area at £165 a week. That figure was first fixed in November 1983. The adjudication officer's calculations were in evidence before us but neither the adjudication officer now concerned, in his written submission dated 14 September 1987, nor Mr. Stocker before us, was able to explain why, or how, the figure of £165 had been initially chosen. It manifestly was NOT selected on the basis of the instructions in the S Manual, which advised adjudication officers as to the procedure. The relevant advice then (and now) in this Manual is set out in the Sixth Appendix to this decision. It advised the choice of the highest amount charged by a home which seems to be providing a suitable

standard for the needs of the occupants disregarding any amount that is totally out of line with charges made by other homes. The S Manual basis is not the only basis that might be adopted; but if the adjudication officer's estimate, when challenged, as it has been in this case, is to be accepted it must be possible to discern the process by which the determination of the reasonable amount was calculated. The figure fixed in November 1983 (see document C124 of the case papers) of £165 is £80 less than the highest amount (£245) then charged by the Oakfield Nursing Homes, £75 less than the highest amount (£240) then charged by the Cranhill Nursing Home and £20 less than the highest amount (£185) then charged by the Circus Nursing home.

(2) According to the submission dated 14 September 1987 of the adjudication officer now concerned, for the period 20 December 1984 to 28 April 1985 the adjudication officer relied on the findings of the officer who made the findings of November 1983 (that officer being then deceased) and decided that the reasonable amount should remain at £165 a week. By April 1985 Oakfield Nursing Homes highest charges were £280 and Circus's were £220. Of the other nursing homes' highest charges in document C124 (which is the Bath local office list), Johnstone Street's were £190, Westcroft's were £220, Osborne's were £180, Ormond Lodge's were £170 and only St. Catherine's were £165. All of these charges were significantly higher than their charges as shown on document C124 in November 1983.

25. In our judgment, the "reasonable weekly charge" estimated by the adjudication officer at £165 cannot be sustained or justified on the local office's figures for nursing home charges based on their sample homes either for November 1983 or for the period up to 28 April 1985. They are manifestly too low and it is necessary to consider what that charge should be afresh.

26. Mr. Stocker supported the method of ascertaining the reasonable amount set out in the S Manual. That method cannot, of course, be adopted as inflexible rule: cf Sampson v. Supplementary Benefits Commission (5 March 1979, Mr. Justice Watkins) reported in the HMSO volume of "Decisions of the Courts relating to Supplementary Benefits and Family Income Supplements Legislation" as SB19. But it does afford some guide as to one method, that may be appropriate and we consider this helpful. Applying it to the sample nursing homes considered suitable by the adjudication officer, as at Autumn 1983 the highest amount charged by a home which seems to be providing a suitable standard for its occupants appears to be Oakfield Nursing home itself whose charges range from £189 to £245: See p.C124 for the adjudication officer's figures for this period. The highest amount as at 19 June 1984, on the claimant's own evidence which lists ten nursing homes, is £350. Eight of the other homes are the same as in the adjudication officer's list. Oakfield which is on both lists is shown on the claimant's list of 19 June 1984, as from £233 to £259. At December 1984 Oakfield's charges ranged from £203 - £263 (p. C124) and, on the same page, from £220 to £280 in April 1985, from £248.50 to £280 in February 1986 and from £267.14 to £301 in April 1986. Figures for seven of the homes are available for all dates up to and including February 1986 and Oakfield is not out of line, though charging slightly

more, with the other six. One Clinic, whose charges are out of line with those of the above nursing homes provides, no doubt, more luxurious accommodation than the regulation contemplates and cannot be used to fix the reasonable charge. Another nursing home has charges which are out of line, and above those of the rest, and has also been excluded.

27.(1) We agree with the view put forward by Mr. Drabble, which is largely founded on paragraph 12 of the Report of the Social Security Advisory Committee (Cmnd. 8978). In considering the proposed pre-Cotton Regulations, in reference to the guidance issued by the Chief Supplementary Benefit Officer it is there stated that:

> "It recommends in setting the limit an extensive process of information-gathering about ~~the~~ prices of suitable accommodation in the neighbourhood and makes it clear that the limit taken should not be an average or below-average cost but should be the highest reasonable limit which would provide adequate supply of accommodation. In view of the evidence we have received about present limits we think this point needs to be emphasised strongly in any future guidance document".

In our view, when considering the maximum reasonable weekly charge in the relevant area, any averaging process is wrong. Such a maximum must be greater than the average. Unreasonable charges which are way above the level of charges by most nursing homes providing similar facilities - and charges which, though not unreasonable, are way above those of most nursing homes because they provide an exceptional degree of luxury - should both be left out altogether. By leaving these homes out of consideration, and fixing the maximum at the highest amount being charged for full board and lodging by the establishments not so excluded which seems to provide a suitable standard for the needs of the occupants, a sensible maximum is fixed.

(2) We do not accept the process of fixing the "reasonable charge" on the basis of choosing one or two "sample homes", with the lowest charges, for suitable standard of accommodation. The purpose of the regulation, in our view, is not to "reduce" the availability of suitable nursing homes but to exclude unreasonable charges for the accommodation provided and the use of accommodation catering for "luxury" trade.

28. We consider that the best, or at least one suitable, way of arriving at the reasonable amount for the area is that set out in the S Manual, which takes as the maximum the highest amount charged by a home which seems to be providing a suitable standard for the needs of the occupants, ignoring those which are totally out of line with charges made by other homes. Applying this method, we would fix the reasonable amount for the Bath area, on the available evidence, as £245 from autumn 1983 to the beginning of June 1984, at £259 from then until December 1984, at £263 from then till April 1985 and at £280 from 1 April 1985 to 28 April 1985. (These are Oakfield's highest charges and the highest charges of the sample homes chosen by the local office, ignoring

those totally above and out of line with the rest).

29. We are confident that our estimate of the reasonable weekly charge is properly and fairly carried out on the basis of adequate evidence. If, however, we are wrong, the proper approach (which leads to exactly the same result for the claimant) must be that indicated by Mr. Justice Simon Brown (though not by consent formally incorporated in his order) in the case of Elkington decided on 22 July 1986. (There is nothing in the judgment of the Court of Appeal affirming his decision on 5 March 1987 which is inconsistent with what he said). Mr. Justice Simon Brown was considering the position relating to board and lodging charges where the Freeze Regulations, which covered part of the period to which the pre-Cotton Regulations relate, had been held to be totally invalid. He said:

> "I have concluded that adjudication officers remain entitled, if not bound, to carry out, in relation to all affected Freeze Regulations cases the fact finding exercise provided for by the Requirement Regulation before either its various amendments or its final repeal. Unless, however, these officers are confident, despite the passage of time that they can properly and fairly carry out their estimate in the individual cases now falling for review, it would seem to me necessary to give the claimant the benefit of the doubt and to refund to him the whole difference between the maxima in fact fixed and the board and lodging charge actually paid, the course which I am told was taken in respect of all those who benefited from the declaration of invalidity in the Cotton case"

30. In the result, we accept Mr. Drabble's contention that the weekly amount applicable to the claimant and his wife for board and lodging in Oakfield Nursing Home for the period from 2 April 1984 to 31 March 1985 is £476 for two (£238 each) and from 1 April 1985 to 28 April 1985 is £518 for two (£259 each) which is the same as the actual amount charged. These are the amounts which should be allowed and applied in re-working the benefit calculation for those periods. Paragraph (7) of regulation 9 will, of course, no longer be in point since the full board and lodging charge has been allowed.

The period 29 April 1985 to 24 November 1985: the Cotton Regulations

(1) Is Schedule 1A invalid

The first question that arises is whether the Commissioners have any jurisdiction to consider this question? In the appeal the reference to which on Commissioner's file is CSB/241/1987 it was argued at length, before a Tribunal of Commissioners composed of the same members as the present Tribunal, that Commissioners have no jurisdiction to decide the vires of statutory instruments. The Commissioners must, it was asserted, decide on the basis that the statutory provisions were valid. It was unanimously decided in that case that this proposition was misconceived, and

that the Commissioners do have juridiction to decide ultra vires questions. We propose to follow that decision in this respect.

(2) The second question is whether the present Tribunal is bound in the Young v. Bristol Aeroplane Company Ltd [1944] K.B.718 sense, and must accordingly follow the decision of the Tribunal of Commissioners in Kilburn, the reference to which on Commissioner's file is CSB/0255/1986 and which is to be reported as R(SB) 9/87. It was held in the case of Slater the reference to which on Commissioner's file is CU224/86, by a Tribunal of Commissioners, that the Young and Bristol principle did not apply to decisions of Tribunals of Commissioners and that, applying the principles adopted in Chapman v. Goonvean and Rostowrack China Clay Co., Ltd [1973] ICR 50 former decisions should be treated as normally binding but a Tribunal of Commissioners might consider itself free to depart from them when it appears right to do so, (though bearing in mind the dangers of disturbing retrospectively previous decisions). We are in agreement with the principles emunciated in Slater's case and consider ourselves free to depart from the decison in Kilburn's case if satisfied that it was wrongly decided.

32. The validity, or otherwise, of paragraph 2 of Schedule 1A is crucial in determining to what extent nursing home fees should be allowed to supplementary benefit claimants in respect of the period 29 April 1985 to 24 November 1985. (The validity of paragraph 1, which turns on similar arguments, is likewise crucial in respect of residential care home fees). Both paragraphs are expressed to be subject to paragraph 5. If paragraph 5 is invalid and ultra vires then are paragraphs 1 and 2 (and the remainder of Schedule 1A) invalid also or can they be severed, applying the principles set out in Olsen v. City of Camberwell [1926] VLR 58and adopted by the Court of Appeal in Dunkley v. Evans [1981] 1 WLR 1522 ("Dunkley") and Thames Water Authority v. Elmbridge Borough Council [1983] QB 570 ("Elmbridge")?

33. The Court of Appeal in the Cotton case had held that paragraph 6(2) of Schedule 1A was beyond the powers conferred on the Secretary of State by section 2(1A) of the Supplementary Benefits Act 1976 as amended, broadly on the ground that whereas that section empowered him to make regulations giving himself power to adjudicate on questions arising in individual cases of the kind mentioned in section 2(1), it did not enable him to give himself power to make general decisions akin to subordinate legislation; though of course he could do this later by further regulation, which in this particular instance would, under section 33(3) of the Act, be effective only after being laid before Parliament and approved by affirmative resolutions of both Houses of Parliament. Now paragraph 5(2) purports to give the Secretary of State power to make general decisions akin to subordinate legislation in respect of residential care homes and nursing homes. We are satisfied (and it was indeed conceded before us) that that regulation is also invalid and beyond the powers conferred on the Secretary of State for exactly the same

reasons as those given in the Cotton decision in respect of paragraph 6(2). Paragraph 5(1) must fall with paragraph 5(2) as each hinges on the other.

34. The real question is whether there are grounds for departing from the decision reached by the Tribunal of Commissioners in Kilburn that paragraph 1 (which applies to residential care homes) or paragraph 2 (which applies to nursing homes but was not strictly in issue before the Tribunal in Kilburn) can properly be allowed to stand without the qualification of being subject to paragraph 5. That Tribunal of Commissioners did not consider that the result of omitting paragraph 5 was (using the language of the Olsen decision which they applied) to make so radically or substantially a different law as to warrant a belief that the Secretary of State would not, if all could not be carried into effect, have enacted paragraph 1 (or 2 or 3 or 4) without qualifying it by paragraph 5. There is no doubt, in our view, that the decision on paragraph 1 was not obiter, for the reasons given in the well-known passage in Jacobs v. LCC [1950] AC 361 at page 369 where Lord Simonds said:

> "there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing."

35. On behalf of the claimant, Mr. Drabble made a general submission raising points which were not before the Tribunal of Commissioners who decided Kilburn; though they were before the Court of Appeal in that case. The Court of Appeal, however, gave their decision on other grounds and did not consider the question of the validity of paragraphs 1 or 2 of Schedule 1A to the Requirements Regulations.

36. Mr. Drabble submitted that it was axiomatic that an administrative law provision can be invalid in one of two ways:

(1) The context of the relevant regulation can be outside the four corners of the enabling Act and it is simply unlawful because it is outside the four corners of the statute.

(2) An administrative law act or decision or regulation which would be lawful if carried out by an administrator who properly directs himself as to the law but who in fact has misdirected himself in some material respect. In regard to this second category, this was submitted to be also ultra vires because there was a wrong legal assumption. Reliance was placed on the second category when determining the question of the validity of paragraph 2 (and 1) The argument proceeds as follows:-

(i) Paragraph 5 of Schedule 1A in its "Cotton" form is invalid for precisely the same

reasons as the provisions actually considered in Cotton.

(ii) Paragraph 2 is expressly linked to pararaph 5. The wording itself says so. To adopt the words of Mustill L.J. in Kilburn (p. 5 letter G) summarising this argument, paragraph 2 and paragraph 5 form part of an indivisible system of determining the maximum allowance to boarders in respect of accommodation in Nursing Homes.

(iii) The key issue, of general legal importance, is deciding the correct approach to the issues of severance. On what principle should the Court decide whether one provision can be severed from an admittedly invalid but related provision?

(iv) The case-law suggests a number of phrases. McNeill J. lists a number of phrases in R. v. Transport Sec., Ex. p. G.L.C. [1985] 3 W.L.R. 591 B/C.

(v) The phrases suggest, and the Appointee is happy to accept, that the question can be described as whether the good and the bad are "inextricably linked"? That, however, in a sense takes one no further. When are provisions "inextricably linked"? The basic submission is that provisions must be regarded as being "inextricably linked" in delegated legislation when it is apparent that the delegate acted under a common error of law. Here there is no doubt that the Secretary of State, when he came to fix the maximum in paragraph 2, was acting under the mistaken belief that he could challenge the maximum by the relatively informal mechanism provided by paragraph 5. The error of law, and its close connection with the operation of fixing the maximum under paragraph 2, is apparent on the face of the Schedule itself.

(vi) On basic administrative law principles, therefore the fixing of the maximum in paragraph 2 of Schedule 1A cannot stand. It is the Secretary of State who is Parliament's delegate when making these regulations, and his exercise of the power will only be lawful if he properly directs himself as to the relevant law and does not act unreasonably in a Wednesbury sense.

In this case, he misdirected himself as to law. The geographical or map-based cases such as Dunkley v. Evans and Thames Water v. Elmbridge are dealing with a different problem e.g. in Dunkley the erroneous inclusion of an area of sea by a delegate who makes

no error in relation to that area of sea where the alleged offence was actually committed.

37. Further, Mr. Drabble submitted that:

(a) Olsen is the wrong test. In Olsen it is said that the remainder of the provisions stand, when some other provision has been held to be ultra vires, unless the delegate exercising the power would not have exercised the power without the part which was erroneous in law. The remaining provisions must fail unless it can be shown that the delegate would have exercised the power without the error of law.

(b) In any event the Olsen test is satisfied. The Secretary of State in pararaph 2 had fixed highly precise rates. At the same time there was essential machinery for informal variation. He set the rate at a time when it was apparent that variation might be required to meet inflation or to correct under or over estimates in the setting of the maximum. The Secretary of State's Advisory Committee Report was referred to in Cotton and argued therein; see page 12F of the transcript. That report (1985 Cmd. 9467) contains a statement which was made after the advisory committee report that it "will keep under review the pattern of charging across the country to see if the balance of evidence on national limits changes; the regulations give scope to make changes if appropriate"; see paragraph 30 of the Report. It could therefore be said that the regulations would not have been enacted in precisely this form.

Turning to the cases, Dunkley was a case in which the area definition was too large and there was nothing to indicate that in the area in which they were fishing the Minister had made any error of law at all. But in the present case the Minister was acting on the basis that the rates could be altered under paragraph 5 since it is "subject to paragraph 5". Thames Water was not a delegated legislation case at all. Reliance was placed on Ex parte GLC [1986] QB 556 at page 557 where severance would have changed the character of what had been provided. Olsen's case could have adopted his, Mr. Drabble's test and reached the same result.

38. In our view, the Olsen test, which was cited with approval in both Dunkley and Thames Water, both of which are decisions of the Court of Appeal, is one that we should follow and apply, as did the Tribunal of Commissioners in Kilburn. We accept that Olsen itself, and Dunkley and Thames Water, could all have been decided on the basis of the alternative test, put forward by Mr. Drabble under which the onus of proving that the remainder of the regulations are capable of severance from the invalid part lies on those who seek to establish this proposition, instead of being on whoever is seeking to assert that the legislation fails altogether and cannot be severed. But the Olsen test is, unlike Mr. Drabble's, based on a clear principle, with which we are in agreement, and which it must be taken that the Court of Appeal in

Dunkley and also in Thames Water approved, and we consider we should follow. That principle is stated on page 69 of the report in Olsen to be, "that the expressed intentions of the legislative body should be preserved as far as possible, and that before giving effect to the applicant's contention that the parts are so interwoven that there should fall with the admittedly invalid part". That is why the test is (p.68):

> "If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail."

39. Applying the Olsen test, it is our view that there is no warrant for the belief that if the whole of Schedule 1A of the Requirements Regulations could not be carried into effect the legislative body would not have enacted the remainder. Paragraphs 1 and 2 are fully effective, if the reference therein to paragraph 5 is omitted and paragraph 5 is itself omitted. All that the Secretary of State has done by paragraph 5 is to reserve to himself (in excess of the power conferred on him) power to fix new rates, something that otherwise would require a separate statutory instrument whenever a new rate was fixed, which would have to be laid before Parliament under the negative procedure. In the report by the Secretary of State, prior to the approval of the regulations by Parliament, the Secretary of State did point out that he would keep under review the pattern of charging across the country and that the regulations gave scope to make the changes. But we do not consider that this warrants a belief that Parliament would not have approved the regulations without a power to fix new rates. New rates are, generally, fixed on a yearly basis, in social security cases, by fresh statutory provisions. We do not consider that a belief that Parliament would not have approved the regulations without paragraph 5 has any warrant. We would reach the same result if the onus of proof were shifted in the way suggested by Mr. Drabble. Applying the "inextricably linked test" suggested by Mr. Drabble (see paragraph 36(2)(v) above), our conclusion is that paragraph 5 is not so linked. The entire scheme makes perfect sense without a power to fix new rates and it would, of course, then be perfectly valid, as is known for certain since the Camden Regulations take that form (though they fix, no doubt due to the lapse of time since the Cotton Regulations, rather higher rates).

40. We do not accept the suggestion that where the Secretary of State acts on a mistaken belief as to the law, severance is impossible. The Secretary of State, if he has made regulations which are ultra vires in part, must always have had a mistaken belief as to the law, namely that the invalid part was valid. It must be a question of degree whether the error is so fundamental that the Secretary of State would not have made the rest of the regulations, if he had known that the particular part in question was invalid. We do not consider that it has been shown that the

Secretary of State would not have made the valid part of the Regulations. Even if Mr. Drabble's test (which we have rejected) were to be applied our belief is that the Secretary of State would have made the valid part of the regulations.

41. We see no reason for departing from the decision of the Tribunal of Commissioners in Kilburn, which we propose to follow. Accordingly, we hold paragraphs 1 and 2 of Schedule 1A of the Cotton Regulations to be valid and effective.

(2) What nursing home boad and lodging charges are allowable for the period 29 April 1985 to 24 November 1985?

42. Whenever a nursing home or a residential care home was occupied by a claimant during the pre-Cotton regulations period (13 November 1983 to 28 April 1985), it is necessary, in order to ascertain the allowable board and lodging charges in respect of his occupation during the Cotton period (29 April 1985 to 24 November 1985) to calculate the "protected amount". Nursing home and residential home charges have not been payable in full since 13 November 1983 unless they satisfy certain tests. The pre-Cotton test has already been considered. The effect of the Cotton (and Camden) regulations is that the amount allowable immediately before 29 April 1985 is described, in regulation 9(17) (see the Second Appendix), as "the protected amount" and if this exceeds the relevant limit for board and lodging charges that is set out in Schedule 1A, the protected amount is that which is payable.

43. The scheme of the statutory provisions which achieves this result operates as follows, in respect of persons over pensionable age (65 years for a man, 60 years for a woman). Regulation 9(1)(a) provides for a weekly amount for board and lodging which is not to exceed the amount referred to in paragraph (6). Paragraph (4) provides that where the charge for board and lodging includes all meals the charge shall be the full weekly amount of that charge. Paragraph (6) provides that, subject to paragraph (7) and (17), the maximum amount in respect of the assessment unit as a whole shall be in respect of each member of the assessment unit other than a dependant aged less than 11 (for whom there is a different provision) "the appropriate amount specified in or as the case may be determined in accordance with Schedule 1A". Paragraph (7) need not be considered as it does not apply to nursing homes or residential care homes from 29 April 1985. It is paragraph (17) which is in point. This provides, by sub-paragraph (b) (the full terms of which are set out in the Second Appendix) that the appropriate amount shall be the weekly amount determined to be appropriate under paragraph 1(a) of regulation 9 prior to 29 April 1985 ("the protected amount") so long as the protected amount exceeds the amount which would otherwise be appropriate under paragraph (6). In plain English, this means that the weekly amount properly allowable to the claimant in respect of board and lodging for each member of the assessment unit (including a wife or husband) immediately before 29 April 1985 is to continue to be allowed from and after 29 April 1985 notwithstanding that that amount is greater than the maximum amount allowable under Schedule 1A.

44. The weekly amount properly allowable to the claimant in respect of board and lodging immediately prior to 29 April 1985 was £259 each (£518 for two). This exceeds all the amounts specified in paragraph 2 of Schedule 1A for nursing homes throughout the period 29 April 1985 to 24 November 1985 (see the Fifth Appendix to this decision). Accordingly that amount continues to be allowable throughout that period. The result is the claimant is to be allowed the full amount of the charges made to himself and his wife for board and lodging throughout the period namely £259 each (£518 for two.)

The period 25 November 1985 to 27 July 1986: the Camden Regulations

45. The Camden regulations were held by the Court of Appeal in Camden to be valid. They take a similar form to the Cotton regulations but paragraph 5 and 6 of Schedule 1A, which purported to empower the Secretary of State to fix new rates, are not reproduced and there are no references to paragraph 5. There are some slight amendments to the wording and the rates are different. So far as relevant the Camden Regulations are set out in the Third Appendix.

46. The board and lodging charges remained at £259 a week each (£518 for two) in respect of the claimant and his wife throughout the period 25 November 1985 to 31 March 1986. The provisions as to the protected amount are set out in the Camden paragraph (17) which replaces the Cotton paragraph (17) in regulation 9 and have the same effect as regards the present case. The amounts specified in paragraph 2 of Schedule 1A for nursing homes in respect of this period (see the Fifth Appendix to this decision) are less than the protected amount specified in paragraph (17). Accordingly the protected amount continues to be allowable throughout that period. The result is that the claimant is to be allowed the full amount of the charges made to himself and his wife for board and lodging up to 31 March 1986.

47. From 1 April 1986 the charges made to the claimant and his wife were increased to £280 a week each (£560 a week for two) and they remained at that level for the remainder of the period ending on 27 July 1986 and continued thereafter unchanged up to 13 January 1987. During the period from 1 April 1986 to 27 July 1986 the protected amount was still £259 each (£518 for two): see paragraph 42 above. Accordingly the actual charges made to the claimant and his wife were not allowable. The weekly amount allowable to the claimant and his wife for board and lodging during this period accordingly remained at the protected amount namely £259 each (£518 for two). That amount continued to be greater than the amounts currently specified in paragraph 2 of Schedule 1A, which accordingly are inapplicable.

The period 28 July 1986 to 13 January 1987: the Camden Regulations as amended by the 1986 Regulations

48. The protected amount allowable to the claimant and his wife for board and lodging during this period is increased by £10 each as a result of the insertion of paragraph (18) in to regulation 9: see the Fourth Appendix. Accordingly the weekly amount

allowable for board and lodging was £269 each (£538 for two). The actual charges made to the claimant and his wife of £280 a week each (£560 a week for two) were not allowable.

49. The 1986 amendments contain special provisions as to a claimant's partner. These are set out in regulation 9(17)(j) and paragraph 5A of Schedule 1A. A partner is an expression defined in regulation 2 as one of a married or unmarried couple. The restrictions on the maximum allowable amount for board and lodging specified in regulation 9(6) in its pre-Cotton version, its Cotton version and its Camden versions has always applied to each member of the assessment unit and no special provision was required in this respect. The effect of the 1986 amendments was, in our judgment, (in so far as it was not declaratory and intended to rectify the omission of any specific reference to the claimant's partner in Schedule 1A) to deal with the case where the original claimant has died first. If that claimant's partner continued in the nursing home or residential care home, there was, under the Cotton Regulations, and under the Camden Regulations as originally drafted, no provision under which the surviving partner, who then became the claimant, was entitled to the benefit of the "protected amount" provision of paragraph (17) since prior to 29 April 1985 the surviving partner was not the claimant. In the present case, the original claimant survived his wife. Accordingly, these provisions do not affect the benefit position after the death of the wife (which is a period which we have left the adjudication officer to deal as our decision terminates on her death) in any way.

Conclusion

50. Our decision as to the weekly amounts from time to time applicable to the claimant and his wife for board and lodging in Oakfield Nursing Home throughout the period to issue is set out in paragraph 1. The actual supplementary benefit entitlement of the claimant during that period is complex and we do not have sufficient information before us to make the calculation. This should now be made by the adjudication officer. If there is any dispute, either party is to be at liberty to apply.

(Signed) V.G.H. Hallett
Commissioner

(Signed) R.F.M. Heggs
Commissioner

(Signed) R.A. Sanders
Commisiner

Date: 11 February, 1988