The Importance of Procedural Safeguards in the Recovery of Overpayments[1]

Paper presented by Desmond Rutledge[2]
to the Social Security Law Practitioners Association on
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1. This talk considers the effect of CIS/3228/2003[3], in which the Commissioner examines whether an overpayment recovery decision, which failed to comply with the requirement in section 71(5A) of the Social Security Administration Act 1992 ("SSAA 92") could nonetheless be remedied or reissued in a valid form after the Secretary of State had certified the decision as correct.

The Legal Background

2. A recovery decision cannot operate unless and until there is compliance with the requirements of section 71(5A) of the 1992 Act. Section 71(5A) provides that an amount shall not be recoverable under section 71(1): -

> *"... unless the determination in pursuance of which it was paid has been reversed or varied on appeal or has been revised under section 9 or superseded under section 10 of the Social Security Act 1998"*

3. The onus is on the Secretary of State to demonstrate that a valid revision or supersession has been carried out; otherwise there is no legal basis for the section 71 recoverability decision. R(IS) 7/91 and R(IS) 2/96 are the leading cases and effectively establish the framework within which disputes on validity are adjudicated. The challenges concentrate on (a) the lack of evidence and/or (b) the terms of the decision : -

    a. If there is insufficient evidence in the papers to show that the relevant revision or supersession has been carried out such that the decision is defective and of no effect.[4] If the local office cannot produce the original decision, the Commissioners have said that the Secretary of State can adduce secondary evidence, such as computer printouts, which should be complemented by an explanation from the decision maker or a presenting officer.[5]

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[1] An amended version of this talk will be published in the Journal of Social Security Law.
[2] Member of the Civil Team at Two Garden Court Chambers, specialising in welfare benefits and Digest Editor to the Journal of Social Security.
[3] Mr Commissioner Bano, 17 June 2004.
[4] R(IS) 7/91 in the absence of a review the overpayment decision was invalid.
[5] CSJSA/558/2001 – computer records of decisions can be produced with a narrative of the decision to be produced. It is acceptable procedure to verify such a narrative as being a true record by the attachment of a Secretary of State certificate.

b. The decision may be defective because it refers to the wrong date; fail to identify the relevant decision or describes itself as a supersession when it is really a revision.

4. In disputes over the validity of a decision the Commissioners have made use of the distinction between a "defect of form" which is capable of being corrected and a "defect of substance" which is so fundamental that it renders the decision invalid.[6]

5. For example, where the terms of an overpayment decision did not refer to any decision that was operative during the period of the alleged overpayment this was described as a defect of substance.[7] On the other hand, an overpayment decision that did refer to the original operative decision but failed to refer to subsequent revisions within the relevant overpayment period was held to be a defect of form.[8]

Power to remedy defective decisions – R(IB) 2/04

6. The current adjudication scheme[9] was introduced with the intention of giving the Secretary of State greater flexibility to change decisions where a dispute arose. As a result, fewer decisions would need to enter the appeal system; those cases that did would be processed in weeks rather than months. The reality is a system of decision making that is so complex that the Department does not use the statutory terminology everyone, including social security experts, find it confusing.[10]

7. The introduction of a highly technical framework for decision-making gave rise to new arguments in relation to the recovery of overpayments. For example, the power to make a revision or supersession is explicitly given to the Secretary of State. If the overpayment described itself as a supersession when it should have been a revision, it was argued that the tribunal had no power to correct the defective decision and the decision should be declared invalid.[11]

8. These developments were overtaken by the more general debate on supersessions and the powers of an appeal tribunal on an appeal from a revision or supersession decision. Some Commissioners took the view that most defects could be cured so

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[6] The terminology was employed in cases on supersessions but according to the analysis in R(IB) 2/04 it would be wrong to simply declare a decision invalid if it was defective in substance but not if it was only defective in form (para. 78).

[7] CIS/362/2003 para. 6.

[8] CIS/764/2002 para. 9 – distinguishes R(IS) 2/96 on the facts.

[9] Social Security Act 1998, ("SSA") and the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) "(DMA regs").

[10] See Commissioner Rowland comments at para. 9 of CDLA/5196/2001.

[11] For example, the DM in CSIS/1298/2001 wanted to revise an award decision made in 1994 on the grounds of ignorance of a material fact (undisclosed capital over £8,000) but due to the deficiencies of the computer system a supersession based upon a change of circumstances was issued instead. The Commissioner held that the tribunal has no power to convert a purported revision into supersession. This was overruled by R(IB) 2/04.

long as there was substantial compliance with the legislation.[12] Other Commissioners took a more exacting approach holding that defects in a decision that purported to alter an existing award of benefit could not be glossed over as a technical or trivial matter.[13] The debate was settled in R(IB) 2/04, where the Tribunal of Commissioners came to the conclusion that a tribunal has jurisdiction to make the decision, which it considers that the Secretary of State ought to have made.

9. The Tribunal of Commissioners in R(IB) 2/04 rejected arguments which relied on the fact that the 1998 legislation expressly gave particular powers only to the Secretary of State and not to appeal tribunals. They pointed out that the 1992 Act does not expressly give any powers of decision to appeal tribunals. Those powers had to be inferred from the nature of an appeal. In social security, an appeal is by way of a rehearing. The tribunal stands in the shoes of the original decision maker.[14] Their jurisdiction is an investigatory one. Tribunals are therefore under a duty to consider and determine those questions that are necessary to ascertain the claimant's proper entitlement, whether or not the parties have raised them.[15]

10. According to the analysis in R(IB) 2/04, a tribunal has wide jurisdiction to perfect defective decisions because: -

    a. The emphasis in the SSA 1998 scheme is on the outcome of the decision, not the narrow technical issue of the section under which the decision was made (55(4)).

    b. The tribunal has jurisdiction to remedy any defects in the decision and should not simply set a decision aside as invalid (paras. 73, 74, 77-80 and 192), except where the decision is completely incoherent (72).

    c. A failure to spell out the terms of a decision is of less significance than the general conclusion that a tribunal has jurisdiction to decide whether the outcome arrived at by that decision was correct.

    d. A decision should be regarded as having been made under Section 9 (revision) if it alters the original decision with effect from the date of that original decision. On the other hand, it should be regarded as having been

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[12] CDLA/4977/2001 CDLA/5196/2001
[13] CDLA/9/2001
[14] Para. 25.
[15] Para. 32. This was reaffirmed in *CIS/1459/2003*, where a decision on entitlement created a potential overpayment of some £30,000. The tribunal chairman recorded a decision in favour of the claimant, on the basis that the absence of the presenting officer prevented the Secretary of State from discharging the burden of proof. The Commissioners said the tribunal was under a duty to conduct a hearing into the merits if the evidence showed there was a case to answer. The tribunal was not entitled to rely upon a failure to discharge the burden of proof "as a substitute for a proper enquiry into the merits of the case" (CI/1021/2001).

made under Section 10 (supersession) if it alters the original decision from some date after the original decision was made.

11. R(IB) 2/04 addressed the general power to make decisions under Section 9 and 10 and the tribunal's jurisdiction, on appeal, to decide whether the outcome arrived at by that decision was correct. However, as Mr Commissioner Mesher observed, the test for correcting defects in overpayment decisions may be stricter than in an "ordinary review case".[16] Post R(IB) 2/04, the outstanding questions in the overpayment are (i) what is the status of a defective decision for non-compliance with s.71(5A) and (ii) does an appeal tribunal have the same power to remedy a defective overpayment recovery decision as it does in the 'ordinary review case'?

CIS/3228/2003 – The Facts

12. The claimant made a claim for Income Support ("IS") for himself and his family in January 1996. He re-claimed IS in June 1996 and again in December 1996 and IS was awarded on each occasion. The claim included a step grandchild, for whom the claimant's wife was receiving a residence order allowance under section 15 of the Children Act 1989. In November 2001, the claimant's wife contacted the Benefit Agency after being told by her solicitor that she was required to declare that she had been receiving a residence allowance in respect of one of the children.[17]

13. After recalculating entitlement, a decision was issued in December 2001 stating that there had been a substantial overpayment of IS for the period from January 1996 to November 2001. The overpayment recoverability decision referred to a decision taken on 11 December 2001, in consequence of which the overpayment was said to be recoverable. However, there was no record of the 11 December 2001 decision in the appeal documents. At the tribunal hearing, the claimant put in issue whether the decision had been in compliance with s 71(5A) of the SSAA 1992. The tribunal adjourned to give the Presenting Officer an opportunity to deal with that question and directed that evidence be produced that a letter had been sent to the claimant in December 2001 notifying him that his IS entitlement had been adjusted.

14. A further submission was produced stating "*on 11 December 2001 a decision maker had superseded all income decisions awarding benefit from 4 January 1996 to 28 November 2001, and that that decision reduced benefit from a weekly rate of £160.56 to £127.61.*" Enclosed with the submission were computer printouts and extracts of standard letters from the guidance manual, together with a document headed "Record of Decision" which the Secretary of State certified to be correct *(see copy attached to the end of this paper)*.

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[16] *CIS/362/2003*

[17] These payments are disregarded only to the extent that they exceed the applicable amount in respect of the child: IS (General) Regulations 1987 (SI 1987/1967) reg. 40(2), para. 25(1)(c) and (2)(b) of Sched. 9.

15. Based on these documents and the Presenting Officer's explanation the tribunal concluded that the awarding decisions were properly superseded. However, there is an inconsistency between the presenting officer's further submission to the tribunal and the certified record of the decision taken on 9 December 2001 (*see attached*). The submission states that all IS decisions awarding benefit from 4 January 1996 to 28 November 2001 were superseded, whereas the certified record refers only to the first decision.

16. The computer printouts contained no indication that any decision was made with regard to the claimant's entitlement to benefit for any period prior to the making of the decision on 11 December. In fact the payment history showed that the claimant was only paid up to 30 November 2001. This indicated that the claimant's payment book was probably withdrawn when his wife called at the office to report that she was in receipt of the residence order payments. At that stage, it was only necessary to decide the rate of benefit to which the claimant was currently entitled to and to supersede the most recent decision to ensure that benefit would be paid at the correct rate in the future. The payment record showed that the rate of benefit was adjusted, with effect from 6 December 2001, which would be correct if the decision removing entitlement was, in fact, a supersession decision taking effect from the date on which it was made.

The Decision

17. It was accepted by both parties that on the facts of this case, it was necessary for the Secretary of State to revise the decisions awarding benefit with effect from the date on which each decision was made on the ground of ignorance of a material fact in order to make a valid overpayment recovery decision covering the whole period of each award.[18] A supersession, on the grounds of ignorance of fact, could only take effect from the date of the decision and could not therefore cover the overpayment period.[19] The Secretary of State's representative conceded that the certified decision was defective as it should have been a revision.

18. Mr Commissioner Bano observed that a certified record of a decision signed by an authorised person is conclusive evidence of the decision.[20] The Commissioner therefore proceeded on the basis that the certified decision correctly recorded the decision made on 11 December 2001 altering the rate of benefit payable to the claimant as from the date of the first decision awarding benefit (though the Commissioner doubted whether any such decision had in fact been made).

19. The certified record of the decision purported to record the making of a supersession decision, rather than a revision decision. The Commissioner referred to the Tribunal of Commissioners' analysis in R(IB) 2/04 which considered that a tribunal must have power to give a decision under section 9 of the Social Security

[18] DMA Regs, reg. 3(5)(b).
[19] SSA 1998, s.10(5), and DMA Regs, reg. 6(2)(b)(i)
[20] SSA 1998, para.13 of Schedule 1.

Act 1998 when the decision under appeal was made under section 10 (and vice versa) because of the need for a tribunal to have the same power to give an "outcome decision" in the case of a decision involving a change in entitlement to benefit as it has on an appeal against an initial decision. The Commissioner went on to draw a distinction between a decision on the issue of entitlement and a decision on recoverability of an overpayment: -

> "... in this case the claimant's representative put the Secretary of State to proof that a decision had been made in accordance with the requirements of section 71(5A) of the Administration Act, but did not raise any entitlement issues and appealed only the recoverability decision. There was therefore no issue before the tribunal with regard to the 'outcome' of the decision made on 9 December, and I therefore consider that the tribunal had no power to substitute any decision which they considered ought to have been made for the decision which was in fact made by the decision maker (para. 14).

20. In the light of the analysis in R(IB) 2/04, the tribunal was entitled to remedy certain errors in the 9 December 2001 decision as mere defects of form, such as the erroneous description of the decision as a supersession, provided that the tribunal found "that a decision had been made on that date, which changed the decision awarding benefit, from the date on which the awarding decision was made", which the Commissioner doubted could be borne out by the facts in this case.

> "If the decision in this case recorded in the certified record is taken at face value, it changed the decision awarding income support as from the date on which the awarding decision took effect, and could therefore only have been a revision decision under section 9 of the 1998 Act. The record of the decision gave a valid ground for the making of such a decision, namely that the decision awarding benefit was made in ignorance of a material fact. The tribunal was not called on to exercise any jurisdiction over the decision altering entitlement to benefit, other than to determine whether a valid decision had been made which complied with the requirements of section 71(5A) of the Administration Act. On the basis that the certified record of the decision taken on 11 December 2001 was correct in recording a decision which removed benefit from the date of the award, I do not consider that the erroneous description of the decision as a supersession decision prevented the tribunal from regarding it as a valid revision decision."

21. The tribunal could treat the decision as "a valid revision decision" but on the evidence before him, the Commissioner concluded the decision as recorded in the certified record did not confer entitlement on the Secretary of State to recover overpaid benefit under section 71(1) of the 1992 Act. The Commissioner gave two reasons for that conclusion: -

    a. The decision does not alter all of the awarding decisions: On the facts of this case, separate awards must have been made on or about 29 February 1996, 23 June 1996 and 26 December 1996. The additional submission to the tribunal stated that all the decisions awarding IS had been superseded. However, according to the certified record, the decision made on 9 December 2001 only altered the first decision awarding benefit. This

meant that the requirements of section 71(5A) were not satisfied in relation to the second and third awards.

b. The decision failed to specify the amounts of the revised entitlement: The certified record did not set out the revised amounts of benefit to which the claimant was entitled to in each benefit period.[21] Where the decision resulting in an overpayment is made separately from the recovery decision, the revised entitlement should be calculated as part of the revision decision, before the overpayment recovery decision is made: -

> *"...a decision awarding a claimant benefit of a stated amount can only be effectively revised if it is replaced by a new decision which also specifies the amount of benefit (if any) to which the claimant is entitled, in the light of the fact which was not taken into account when the original decision was made. A revision decision to the effect that an earlier decision awarding benefit of a specified amount has been 'revised', but which does not state the amount of the revised entitlement is, in my judgment inchoate. If a revision (or supersession) decision resulting in an overpayment is made separately from a recovery decision, it will therefore be necessary for the claimant's revised benefit entitlement to be calculated as part of the revision decision before a valid overpayment recoverability decision can be made under section 71(1) (para. 21)."*

22. As the evidence was insufficient to establish a decision satisfying section 71(5A) of the 1992 Act, then, no valid overpayment recoverability decision had been made under section 71(1). The tribunal's decision was set aside. The Secretary of State's representative asked the Commissioner to refer the case for rehearing in order to give the Secretary of State a further opportunity of establishing that a valid revision decision was made in respect of each of the three awarding decisions. The Commissioner rejected that request. The Secretary of State had certified that the decision complied with section 71(5A) but this was not borne out by the evidence. However, according to the Commissioner, there was insufficient evidence to show (i) that the revision decision was made on the date certified, further (ii) there was a conflict between the evidence in the submission to the tribunal and the certified record; and (iii) the terms of the decision certified did not comply with section 71(5A). In these circumstances there is no justification for referring the case back to the Secretary of State as there was no legal basis for altering the decision. In fact to ask him to alter a certified decision would be tantamount to perjury: -

> The Secretary of State has already had one opportunity of producing evidence of a decision satisfying the requirements of section 71(5A). Under section 5 of the Perjury Act 1911, it is an offence punishable by two years imprisonment for a person knowingly and wilfully to make, otherwise than on oath, a statement which is false in a material particular in a certificate which is authorised by any statute for the time being in force. A decision complying with section 71(5A) of the Administration Act is a pre-condition of recovery of overpaid benefit under section 71(1) of the Administration Act, so that a false statement which has been certified as the record of a decision under paragraph 13 of Schedule 1 of the 1998 Act with regard to a decision required by section 71(5A) in an

[21] Compare CSB/1272/1989 where Mr Commissioner Rice held that the claimant is entitled to a full explanation of the overpayment, including a schedule of how the diminishing capital rule was applied.

overpayment recovery case may expose the maker of the statement to criminal sanctions. Proof of a supersession or revision decision complying with section 71(5A) of the Administration Act is not a question of "constructing a narrative", as the Secretary of State has submitted, but of establishing that the necessary decision was actually taken by a decision maker, or by a computer in accordance with the procedure now authorised by section 2(1) of the Social Security Act 1998. The Secretary of State has submitted that there was evidence to construct the narrative set out in the certified record of the decision, but for the reasons I have given, I can find no evidence that any decision was made prior to the overpayment recoverability decision with regard to the claimant's entitlement to benefit for any period prior to 11 December 2001. If that was the case, section 71(5A) was not satisfied and no useful purpose can be served by referring the case for re-hearing so that the narrative can be "corrected by the Secretary of State". I therefore decline to refer the case for rehearing, and I make the decision which I consider that the tribunal ought to have made on the evidence before it (para. 24).

Analysis

23. CIS/3228/2003 takes as it starting point that compliance with section 71(5A) of the SSAA 1992 is a pre-condition of recovery of overpaid benefit under section 71(1) of the Administration Act. The real issue in the case is whether the decision could nonetheless be remedied, either by the tribunal itself or by allowing the Secretary of State to re-issue the decision. In public law terms, the requirement under section 71(5A) is regarded as mandatory rather than directory only.[22] This appears self-evident from the terms of the provision itself. The courts have regard to a number of factors, including the consequences of failure to comply with the requirement. In essence the court will ask whether the procedure should be regarded as an important procedural safeguard for the citizen, or is the requirement more a symptom of bureaucracy?[23] Where the administration seeks to impose a financial burden on the citizen, or in this case, seeks to recover money previous paid,[24] it is arguable that the procedural requirements must be strictly observed.[25] Compliance with section 71(5A) is therefore an essential safeguard, which protects the claimant from recovery being based upon inaccurate or incomplete records or sub-standard adjudication procedures.

24. The Commissioner advances the proposition that according to the analysis in R(IB) 2/04, an appeal tribunal has wide powers to remedy defects in an outcome decision on entitlement. However, this power does not extend to whether a recovery decision complies with the requirement in section 71(5A). This procedural requirement is not concerned with the 'outcome' of the recovery decision. Rather, it is a pre-condition for the decision to have any effect at all. R(IB) 2/04 is distinguished on this basis.

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[22] Foulkes Administrative Law 8th edn, p 273.
[23] R(SB) 15/87 para 10.
[24] Recovery of an overpayment is not penal (R(IS) 5/03, approved in CIS/4348/2003 and is more akin to restitution; see also CH/2443/2002, liability is not one of fault or liability but one of restitution. Nonetheless it still involves recovery of money by the State from the citizen.
[25] Administrative Law Wade & Forsyth, 9th edn, p 281.

25. Where a statute imposes a procedural requirement, which is mandatory, the effect of not following the required procedure is to invalidate or nullify the decision in question. This suggests that it is always open to the Secretary of State to start the proceedings afresh by issuing the decision in a valid form.[26] This is not an option in CIS/3228/2003. The certified decision is a valid revision under section 9 of the DMA regs. This step in the analysis is significant because if the errors had been so extensive that the 'decisions' could not be regarded as valid under section 9 or 10, then the case could have been referred back to the Secretary of State to remedy on this basis.[27] Despite being a valid revision under section 9 of the DMA regs, the decision was defective for non-compliance with section 71(5A) of SSAA 1992. In those circumstances, there is no scope to start over again. For in any future proceedings, the Secretary of State would be obliged to rely upon the same certified decision as conclusive evidence of the decision made on the claimant's case. There is no wiping the slate clean. The certified decision will continue to remain defective for the purposes of any future proceedings. It may well be arguable that if the Secretary of State did issue fresh proceedings in these circumstances, this would amount to an abuse of power.

26. Some tribunals may have misgivings about dealing with an overpayment wholly on this preliminary point. But surely the claimant is entitled to ask whether the Department has issued a valid decision showing that there are grounds for altering the original award throughout the period of the alleged overpayment. If the Secretary of State cannot satisfy the tribunal on this most basic point, why should the case proceed to the substantive issue? Where a certified decision has been issued but the decision still fails to satisfy the s.71(5A) requirement, there can be no basis for a recoverability decision and the matter should end there.

CIS/3228/2003 IN SUMMARY

a. Where Secretary of State certifies that the record of the decision complies with section 71(5A) the tribunal must proceed on the basis that the certified record is correct.
b. If the payment record contradicts the description of the decision in the certified record and/or the terms of the certified decision does not comply with section 71(5A) then the overpayment recovery decision does not confer entitlement on the Secretary of State to recover overpaid benefit under section 71(1) of the 1992 Act.
c. Where the issue is the decision's non-compliance with section 71(5A) rather than the outcome of that recovery decision, the tribunal has no power to remedy the defect, R(IB) 2/04 distinguished.
d. In these circumstances there is no justification for referring the case back to the Secretary of State as it would be perverse to invite the Secretary of State to alter a decision he has already certified to be correct when a certified record is conclusive evidence of the decision.

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[26] R(IS) 7/91 – decision invalid, so overpayment proceedings should be commenced afresh (para. 4).
[27] See CIS/1675/2004.

RECORD OF DECISION

(Claimant's name and National Insurance number)

SECRETARY OF STATE'S DECISION GIVEN 9.12.01

The decision of 29.02.96 awarding Income Support from 04.01.96 is superseded.

This decision was made in ignorance of a material fact.

The material fact is that (the claimant's wife) was in receipt of a Residence Order Allowance in respect of (S). This was in payment at a rate exceeding the personal allowance for that child. This allowance was not disclosed on the Income Support Claim form dated 04.01.96 or on subsequent claim forms.

Therefore on supersession (the claimant's) Income Support shall be revised with effect from 04.01.96.

Law used

The Social Security Administration Act 1992 Sections 71(1), (2), (3) (5A), (6) and (11)

The Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 Regulation 5(1) and (2) and 13

Certificate

I being an officer authorised in that behalf by the Secretary of State, certify that this document, apart from this certificate, is a record of a decision of an officer of the Secretary of State.

(Signature of Presenting Officer)

(Name of Presenting Officer

(Date)

Note: Under the provisions of paragraph 13 of Schedule 1 to the SSA 98, this document is conclusive evidence of this decision.