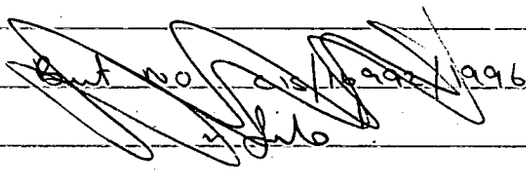
CFC /1580/1997 is filed
with CIS /16992/1996.



PEAs + TRANSITIONAL PROTECTION — MUST BE CLAIMING BENEFIT IMMEDIATELY BEFORE 5/2/96; REMAINED NOT WITHIN RULE REGARDED UNLESS MOVED FROM ONE EA COUNTRY TO ANOTHER AS A WORKER; PROVISION FOR EC ONLY AS FOR CURRENT AWARDS *100/97

MR Commissioner's Files: CIS/16992/1996, CIS/2809/1997 and CFC/1580/1997

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEALS TO A SOCIAL SECURITY COMMISSIONER FROM DECISIONS OF SOCIAL SECURITY APPEAL TRIBUNALS ON A QUESTION OF LAW

Claimant: Jagdish Mittar BAWA

Tribunal: Walthamstow social security appeal tribunal
(Reg. No.: 2/16/96/11211) - 22 July 1996

Claimant: Samir KRASNIQI

Tribunal: Scarborough social security appeal tribunal
(Reg. No.: 1/14/96/14622) - 18 February 1997

Claimant: Sabera KHWAJA

Tribunal: Leicester social security appeal tribunal
(Reg. No.: 4/16/96/26569) - 18 December 1996

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. These three appeals all raise questions as to the proper construction of regulation 12 of the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996. I heard the appeals together. Mr Stephen Cooper, of the Office of the Solicitor to the Departments of Social Security and Health, appeared on behalf of the adjudication officers, Ms Pamela Fitzpatrick, a welfare rights advisor at the National Association of Citizens Advice Bureaux, appeared on behalf of the two claimants of income support and Ms Jackie May, a case worker at Leicester Law Centre, appeared on behalf of the claimant of family credit. I am grateful to all three advocates for the assistance they have given me.

2. The 1996 Regulations came into force on 5 February 1996 and made several amendments to legislation concerning social security benefits. In each of the cases before me, the relevant claim for benefit was made after 5 February 1996. The question in each case is whether the claimant was entitled, on that claim, to the transitional protection afforded by regulation 12 of the Regulations. It is common ground that, if the claimants are entitled to the transitional protection so that the legislation is to be applied as though the amendments had not been made, each of these claimants would be entitled to benefit. It is also common ground that, if the legislation is to be applied in its amended form, the claimants would not be entitled to benefit.

3. In view of the amount of common ground, it is unnecessary for me to consider in detail the amendments made by regulations 2 to 11 of the 1996 Regulations. Everything

turns on the construction of regulation 12 which, as modified by paragraph 5 of Schedule 1 to the Asylum and Immigration Act 1996, provides:-

> "(1) Where, before the coming into force of these Regulations, a person who becomes an asylum seeker under regulation 4A(5)(a)(i) of the Council Tax Benefit Regulations, regulation 7A(5)(a)(i) of the Housing Benefit Regulations or regulation 70(3A)(a) of the Income Support Regulations, as the case may be, is entitled to benefit under any of those Regulations, those provisions of those Regulations as then in force shall continue to have effect (both as regards him and as regards persons who are members of his family at the coming into force of these Regulations) as if regulations 3(a) and (b), 7(a) and (b) or 8(2) and (3)(c), as the case may be, of these Regulations had not been made.
>
> (2) Where, before the coming into force of these Regulations, a person, in respect of whom an undertaking was given by another person or persons to be responsible for his maintenance and accommodation, claimed benefit to which he is entitled, or is receiving benefit, under the Council Tax Benefit Regulations, the Housing Benefits Regulations or the Income Support Regulations, as the case may be, those Regulations then in force shall have effect as if regulations 3, 7 or 8, as the case may be, of these Regulations had not been made.
>
> (3) Where, before the coming into force of these Regulations, a person is receiving attendance allowance, disability living allowance, disability working allowance, family credit, invalid care allowance or severe disablement allowance under, as the case may be, the Attendance Allowance Regulations, Disability Living Allowance Regulations, Disability Working Allowance Regulations, Family Credit Regulations, Invalid Care Allowance Regulations or Severe Disablement Allowance Regulations, those Regulations shall, until such time as entitlement to that benefit is reviewed under section 25 or 30 of the Social Security Administration Act 1992, have effect as if regulation 2, 4, 5, 6, 9 or 11, as the case may be, of these Regulations had not been made."

Each of the claimants relies upon a different paragraph of that regulation. It is convenient to consider each case separately.

CIS/16992/1996

4. The claimant in this case first came to the United Kingdom in 1993 and was at first granted limited leave to remain as a visitor. However, in 1994 he was sponsored by his son and given indefinite leave to remain. It appears that his son, with whom he was living, ceased to be able to support him and the claimant was awarded income support from 8 August 1995. On 14 November 1995 he received a telephone call to the effect that another son was seriously ill in India and, on the following day, he left the United Kingdom to go to India. His son had died before he arrived there. He remained in India, dealing with his son's affairs, and returned to the United Kingdom on 14 March 1996. By that time, regulation 8(2) of the 1996 Regulations, had amended regulation 21(3) of the Income Support (General) Regulations 1987 and the claimant was regarded as a person from abroad whose applicable amount for income support purposes was nil. Furthermore, regulation 8(3)(a) of the 1996

Regulations had amended regulation 70(3)(c) of the 1987 Regulations so that he was not entitled to an urgent cases payment because the son who had sponsored him was still alive.

5. Accordingly, when he claimed income support, his claim was rejected by an adjudication officer. However, on appeal, the Walthamstow social security appeal tribunal decided, on 22 July 1996, that regulation 12(2) of the 1996 Regulations applied and they awarded income support from 22 March 1996. The adjudication officer now appeals against that decision with the leave of the tribunal chairman.

6. While the appeal has been pending, the scope of regulation 12 has been considered by Dyson J in the course of determining three applications for judicial review in the High Court. The proceedings were brought on behalf of three claimants (and the wife of one of them) against various respondents. I shall refer to the case as *Regina v Secretary of State for Social Security, ex parte Vijeikis, Okito and Zaheer*, although the decisions being challenged, "refusing claims by asylum seekers for income support", were presumably made by adjudication officers (who were not among the identified respondents) rather than by the Secretary of State. Dyson J gave judgment on 10 July 1997. The first issue before him was whether a claimant was entitled to the protection of regulation 12(1) of the 1996 Regulations "if he was entitled to benefit at some time before the 5 February 1996, but was not entitled at that date". He answered that question in the negative and gave the following reasons (transcript pages 11C to 14B):-

> "(1) The words 'those provisions of those Regulations as then in force shall continue to have effect' are fatal to Mr Duffy's argument. They show clearly that the paragraph is concerned to preserve the entitlement of persons who are entitled to benefit at the time when the relevant provisions are in force. This interpretation is confirmed and supported by the amendment, which speaks of 'at the coming into force of these Regulations'. It would be inapt to speak of someone who once was, but no longer is entitled to benefit, as a person as regards whom the provisions 'continue' to have effect. For something to continue, it must exist; it cannot be something that once existed, but no longer exists. In my view, Mr Drabble is right when he submits that this is an ordinary saving clause, which preserves the entitlement to benefit of someone who has claimed political asylum, and who is currently entitled to benefit at the time when the regulations come into force. I do not consider that it is possible to read the paragraph in any other way.
>
> (2) This interpretation is supported by the language of Regulation 12(2) and (3). These paragraphs are also part of the saving provision. Paragraph (2) provides:
>
> > 'Where, before the coming into force of these Regulations, a person, in respect of whom an undertaking was given by another person or persons to be responsible for his maintenance and accommodation, *claimed benefit to which he is entitled, or is receiving benefit*, ... those Regulations as then in force shall have effect as if ..' (my emphasis)
>
> Paragraph (3) provides:

'Where, before the coming into force of these Regulations a person *is receiving* attendance allowance ... under ... Regulations, those Regulations shall ...' (my emphasis).

It will be seen that the only persons who are protected by these saving provisions are ones who are currently entitled to or are receiving benefit at the time when the Regulations come into force. Although in each case the phrase 'before the coming into force of these Regulations' is used, it is clear that paragraph (2) and (3) do not apply to persons who once were, but no longer are entitled to or receiving those benefits or allowances.

The significance of paragraph (2) and (3) is twofold. First, it would be surprising if the phrase 'before the coming into force of these Regulations' were to bear a different meaning in paragraph (1) from that in the other paragraphs. Secondly, it is clear that, in relation to the benefits and allowances referred to in paragraphs (2) and (3), Parliament did intend to limit the effect of the saving provision to persons who were entitled to them at the time when the Regulations came into force, notwithstanding the curtailment of human rights involved, and despite any retrospective effect of the Regulations.

(3) I feel driven to accept Mr Drabble's construction by the clear language of Regulation 12(1). The implications of this interpretation are a matter of great concern. The plight of asylum seekers who are denied income support, is, in many cases, appalling, even though it has to some extent been mitigated by the *Westminster* decision. It is true that the Courts now favour a purposive, rather than a literalist approach to statutory interpretation. The difficulty facing the applicants in this case is that the purpose of the 1996 Regulations is plain and obvious: it is, inter alia, to curtail the rights to benefit of asylum seekers. Thus, a purposive approach does not assist Mr Duffy's argument at all. The only question is how generous a saving provision is to be found in Regulation 12(1). It would have been open to Parliament to draft a saving provision, which provided that the original and more liberal definition of 'asylum seeker' would continue to apply to all those who had entered the United Kingdom at the time when the 1996 Regulations came into force. But Parliament chose to draft the saving provision in a far more restrictive way, and by reference to entitlement to benefit at that time.

(4) I have taken account of Mr Duffy's argument that Mr Drabble's construction means that a persons who once were entitled to benefit, but who at the date when the 1996 Regulations came into force have found employment, are penalised for their efforts in so doing, and that that is irrational and absurd. I can accept that it is very unfair. If, however, the submission is that it is so absurd and irrational that it cannot of been intended by Parliament, then I cannot agree. The saving provision was intended to avoid the unfairness that would have resulted if a person who was entitled to benefit lost that benefit overnight by reason of the amendments. The saving provision cannot be criticised for absurdity or unfairness so far as it goes. The argument is that it should have gone further. In the context of regulations which are, to use the words of Simon Brown L.J., 'so draconian', I do not find it particularly surprising that the saving provision went no further. Above all, I see nothing in this

point that causes me to doubt that Regulation 12(1) bears the clear meaning that I have found."

7. The present case arises under regulation 12(2) and Dyson J was considering regulation 12(1) but it is common ground that there are no grounds upon which it can be said that a different approach is warranted under either paragraph (2) or (3) from that taken from under paragraph (1) and, in any event, Dyson J's decision in relation to paragraph (1) was partly based upon the language of paragraphs (2) and (3). Mr Cooper submitted that Dyson J's decision was binding on me and was, in any event, right and should be followed for the reasons given in the judgment. Ms Fitzpatrick submitted it was not binding on me and should not be followed. Therefore, I must first consider whether I am bound by the decision of Dyson J. Mr Cooper referred me to a number of authorities on this question and conceded that it was not free from difficulty.

8. The approach that Commissioners take to decisions of other Commissioners and to decisions of the courts was considered in R(I) 12/75, where a Tribunal of Commissioners said:-

> "21. In so far as the Commissioners are concerned, on questions of legal principle, a single Commissioner follows a decision of a Tribunal of Commissioners unless there are compelling reasons why he should not, as, for instance, a decision of superior Courts affecting the legal principles involved. A single Commissioner in the interests of comity and to secure certainty and avoid confusion on questions of legal principle normally follows the decisions of other single Commissioners (see decisions R(G) 3/62 and R(I) 23/63). It is recognised however that a slavish adherence to this could lead to the perpetuation of error and he is not bound to do so.
>
> 22. The insurance officer, local tribunals and Commissioners on questions of legal principle are all bound to follow the decisions of the High Court and Superior Courts."

In R(U) 4/88, another Tribunal of Commissioners held that, on rare occasions, one Tribunal of Commissioners might depart from the decision of another Tribunal of Commissioners.

9. This is consistent with the approach that judges of the High Court take to other decisions of the Court. In *Huddersfield Police Authority v. Watson* [1947] K.B. 842, it had been held that a judge at first instance was not bound by a decision of another judge at first instance but that, not only were judges at first instance bound by decisions of the Divisional Court, so also the Divisional Court was bound by its own decisions. However, circumstances have changed. That particular case was decided in a context in which there was no right of appeal from the Divisional Court. There are now, I think, fewer instances where there is no right of appeal against a decision of the High Court and, in any event, there has since been some change in the approach taken by courts of last instance to their own decisions. Furthermore, most cases that were formerly decided by the Divisional Court of the Queen's Bench Division are now decided by single judges. In the light of those changes, the modern approach to precedent in cases where the High Court is exercising its supervisory jurisdiction was considered in *Regina v Greater Manchester Coroner, ex parte Tal* [1985] Q.B. 67, (to which reference was made in R(U) 4/88), where a divisional court held, at page 81:

"If a judge of the High Court sits exercising the supervisory jurisdiction of the High Court then it is, in our judgment, plain that the relevant principle of stare decisis is the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court, viz., that he will follow the decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge of equal jurisdiction (see *Huddersfield Police Authority v. Watson* [1947] K.B. 842, 848, *per* Lord Goddard C.J.), for either the judge exercising such supervisory jurisdiction is (as we think) sitting as a judge of first instance, or his position is so closely analogous that the principle of stare decisis applicable in the case of a judge of first instance is applicable to him.

In our judgment, the same principle is applicable when the supervisory jurisdiction of the High Court is exercised not by a single judge, but by a divisional court, where two or three judges are exercising precisely the same jurisdiction as the single judge. We have no doubt it would be only in rare cases that a divisional court will think it fit to depart from a decision of another divisional court exercising this jurisdiction. Furthermore, we find it difficult to imagine that a single judge exercising jurisdiction would ever depart from a decision of a divisional court. If any question of such a departure should arise before a single judge, a direction can be made under R.S.C., Ord. 53, r. 5(2), that the relevant application should be made before a divisional court."

10. When R(I) 12/75 was decided, it was obvious that Commissioners must be bound by decisions of the High Court and the Court of Session because, until 1980, there was no appeal against decisions of Commissioners. Their decisions could be challenged only by an application to the Divisional Court for a prerogative order or, in Scotland, by an action for reduction in the Outer House of the Court of Session. In 1980, it was provided that an appeal should lie from a decision of a Commissioner to the Court of Appeal or the Inner House of the Court of Session. It is now less obvious that a decision of the High Court or of the Outer House of the Court of Session is binding on a Commissioner.

11. A second change that took place in 1980 was that the Commissioners for the first time acquired jurisdiction in respect of supplementary benefit and family income supplement. Until 1978, there was no right of appeal at all from decisions of supplementary benefit appeal tribunals which could be challenged only by recourse to the same supervisory jurisdiction of the High Court or Court of Session that was exercised in relation to Commissioners. From 1978 to 1980, there was a right of appeal to a single judge of the High Court, or the Court of Session, under the Tribunal and Inquiries Act 1971. Only in 1980 was it provided that appeals from supplementary benefit appeal tribunals should lie to the Commissioners.

12. Against that background, there soon arose the question whether Commissioners were bound by decisions of the High Court given in relation to supplementary benefit before there was introduced the right of appeal to a Commissioner. In R(SB) 6/85, a Tribunal of Commissioners held that they were not bound by a decision given by a single judge under the procedure in force between 1978 and 1980. On appeal, the Court of Appeal agreed (*Chief Supplementary Benefit Officer v. Leary*, reported as an appendix to R(SB) 6/85). Having

recorded that it was not in dispute before them "that all judgments given by the High Court under its supervisory jurisdiction are binding on the Commissioners", the Court held:-

> "A distinction has to be drawn in decisions of the High Court exercising its supervisory jurisdiction which are, and always have been, binding on the Commissioners and the particular jurisdiction conferred on the High Court by the [1971] Act and the statutory instrument to which we have referred. The supervisory jurisdiction of the High Court is wide and discretionary. That given to the High Court between 1st January 1978 and 24th November 1980 was much narrower and was not discretionary. The effect of the 1980 Order was to transfer the narrow jurisdiction from the High Court to the Commissioners, probably for reasons of convenience. In these circumstances, it cannot, in our judgment, have been intended that when exercising this same jurisdiction the Commissioner should be bound by earlier decisions of the High Court."

In *Commock v Chief Adjudication Officer* (reported as an appendix to R(SB) 6/90, Purchas L.J. said:-

> "If the judgment of the Court of Appeal which was delivered by Lawton L.J. in *Chief Supplementary Benefits Officer v Leary*, referred to in the text, is consulted, it will be found that a clear distinction is drawn between the rule of the High Court Judges exercising their powers under the statutory provisions concerned and the supervisory role of the Judges of the High Court exercising their judicial review jurisdiction. Decisions of the High Court Judges in the latter role, it should be made perfectly plain are, of course, binding upon the Commissioners, as indeed is indicated in the first sentence of the passage which I have quoted from the text book."

Neither of the other members of the Court said anything on that issue and Purchas L.J. admitted that it was "really a collateral but, in my judgment, important matter."

13. Meanwhile, after the decision of the Tribunal of Commissioners had been given in R(SB) 6/85 but before that case had reached the Court of Appeal, another Tribunal of Commissioners (differing only slightly in its constitution) had, in R(SB) 52/83, considered the approach to be taken by Commissioners to decisions of the Divisional Court given before 1978. Having explained the changes to the way in which decisions of supplementary benefit appeal tribunals might be challenged, they said:-

> "12. In our view, therefore, basically the same appellate jurisdiction has been exercised in turn by the Divisional Court, a single Judge of the High Court and now by the Commissioner. Accordingly, the judgments of the Divisional Court in this context arise, to quote paragraph 11 of the unreported Decision of a Tribunal of Commissioners in CSB/838/1982 [later reported as R(SB) 6/85] 'out of a co-ordinate and not a superior jurisdiction and [are] therefore not binding upon us. There is no statue or common law rule by which one court is bound to abide the decision of another court of co-ordinate jurisdiction'. The Tribunal in that case, citing a number of authorities (paragraph 11 of their Decision), concluded that it was not bound by the decision of a single High Court Judge on appeal from a supplementary benefit appeal tribunal, stating that decision to have persuasive but not binding force. We consider

the position to be exactly the same with regard to the decisions of the Divisional Court on certiorari from supplementary benefit appeal tribunals. We would emphasise that by so saying we are merely referring to cases where the Divisional Court in the past has exercised the same jurisdiction as is now conferred on the Commissioner. Where there has been a ruling of the Divisional Court in exercise of any other of their jurisdictions e.g. on certiorari from a Commissioner, then of course we regard the rulings of that court as binding on us (see the statement of a Tribunal of Commissioners to this effect in R(I) 12/75 (paragraph 22)). In this connection we might usefully add that a Commissioner's refusal of leave to appeal is of course subject to judicial review, when appropriate (*Bland v Chief Supplementary Benefit Officer* [1983] All E.R. 537, C.A., at 541 - Decision R(SB) 12/83 appendix). However the Divisional Court's powers are in our judgment, limited to setting aside the Commissioner's refusal to grant leave, the practical effect of which is that the Commissioner will grant leave and then proceed to deal with the appeal. The Divisional Court does not itself have jurisdiction to hear the appeal, that being the function which Parliament has entrusted exclusively to the Commissioner."

In referring to the Divisional Court in the latter part of that passage, the Tribunal overlooked the fact that, with the coming into force in 1981 of amendments to R.S.C., Ord. 53, most cases that would previously have been decided by a Divisional Court were, by then, decided by a single judge of the High Court. However, that does not affect the point made by the Tribunal that, in some cases, the High Court, in exercising its supervisory jurisdiction, exercises a jurisdiction that is co-ordinate with that of the Commissioners.

14. I do not consider that R(SB) 52/83 should be regarded as having been overruled by the Court of Appeal in *Leary*, or the dictum of Purchas L.J. in *Commock*. Not only was what was said in those cases about the effect of decisions given by the High Court in exercise of its supervisory jurisdiction obiter and without the benefit of argument, there are also powerful reasons for supposing that the distinction drawn by the Tribunal is a valid one and that, while some decisions given by the High Court in its supervisory jurisdiction are binding on Commissioners, some are not. It is of particular importance that it was recognised in *Leary* that a decision of a High Court judge was no longer to be regarded as *per se* binding on a Commissioner. It also seems to me to follow from the decision of the divisional court in *Tal* that a decision of a High Court judge exercising the Court's supervisory jurisdiction is not strictly binding upon another High Court judge exercising any other jurisdiction, although it will usually be followed as a matter of judicial comity. Taken together, these two decisions lead logically to the conclusion that a Commissioner is not necessarily bound by a decision of a single judge of the High Court exercising the Court's supervisory jurisdiction. The position seems to be the same in Scotland, where judges of the Outer House of the Court of Session generally follow one another's decisions but are not strictly bound to do so.

15. Of course, the High Court and the Outer House of the Court of Session continue to exercise a supervisory jurisdiction in respect of Commissioners. Indeed, I do not doubt that, in theory, the High Court could, in exercise of its supervisory jurisdiction, still quash a final decision of a Commissioner given on an appeal but, since the introduction of a right of appeal to the Court of Appeal, that is now as much of a dead letter as is the equivalent power in relation to final decisions of county courts and, in my view, it should be disregarded for the purpose of considering the question of precedence. In practice, the jurisdiction is far more

limited and is most often, if not only, exercised in the circumstance noted by the Tribunal deciding R(SB) 52/83, namely when a challenge is brought to a Commissioner's refusal to grant leave to appeal from a tribunal. Clearly, decisions given in the exercise of the supervisory jurisdiction in respect of Commissioners must be binding on Commissioners. The question is: to what extent does that imply that decisions of the High Court or the Outer House of the Court of Session on substantive issues of social security law must be binding on Commissioners ?

16. There are at least three ways in which social security cases may come before a High Court judge on an application for judicial review quite apart from challenges to Commissioners' decisions. Firstly, as in the cases before Dyson J, leave may be granted to apply for judicial review of a decision of an adjudication officer or a tribunal notwithstanding the fact that the applicant has an alternative remedy through the normal appeal procedure. Secondly, there are cases where a challenge is made to the making of regulations or the issuing of administrative instructions or guidance by way of an application for judicial review of the act of the Secretary of State or the Chief Adjudication Officer. Such challenges could be made collaterally within the scope of an appeal to a Commissioner (see *Foster v. Chief Adjudication Officer* [1993] A.C. 754) but there are often good reasons why a more direct challenge should be permitted. Thirdly, there are cases concerning housing benefit or council tax benefit which do not fall within the jurisdiction of Social Security Commissioners but are governed by legislation which is often in identical terms to the legislation governing income support which does fall within the jurisdiction of the Commissioners. It seems to me that, in all three of those situations, the High Court is plainly exercising a jurisdiction that is co-ordinate with, or parallel to, the jurisdiction of the Commissioners. There seems no reason in principle why decisions in such cases should be binding on Commissioners. On the other hand, it would be unsatisfactory if there were other decisions given by the High Court on the same points that had greater authority.

17. The fourth way in which social security cases may come before a High Court judge is in the exercise of the supervisory jurisdiction that the High Court retains over Commissioners. In R(SB) 52/83, which was decided very soon after it had been held in *Bland v. Chief Supplementary Benefit Officer* [1983] 1 W.L.R. 262 (C.A.) that a Commissioner's refusal of leave to appeal to a Commissioner could not be challenged on appeal to the Court of Appeal and before there was any practical experience of challenges in the High Court, it was held that the High Court was concerned only with correctness of the decision refusing leave and not with the substantive issue that would arise on the appeal if leave were given. In practice, in order to persuade a judge that a Commissioner plainly erred in refusing leave, it is often necessary for an applicant to show that an appeal to the Commissioner might have succeeded and the simplest way of doing that is often to argue the substantive point before the High Court judge. If, in addition to challenging the Commissioner's refusal of leave, the applicant has taken the precaution of applying for judicial review of the tribunal's decision and, in appropriate cases, the adjudication officer's decision, it is then possible for the judge to give a final ruling on the substantive point and, in effect, to give the decision that a Commissioner would have given on the appeal had leave not been refused. This possibility was admitted to, but not encouraged, in *Regina v. Secretary of State for Social Services, ex parte Connolly* [1986] 1 W.L.R. 421 (C.A.). However, it does not follow that the ruling on the substantive point is made in the exercise of the High Court's supervisory jurisdiction in respect of Commissioners. This point was very clearly made in

Regina v. Social Security Commissioner, ex parte Akbar (28 October 1991), where the applicant had challenged only the Commissioner's refusal of leave to appeal. In determining the application, Hodgson J considered the substantive issue and concluded that the decision of the social security appeal tribunal was, on its face, wrong in law. He therefore quashed the Commissioner's refusal of leave but he expressly made it clear that his decision was not binding upon the Commissioner who would eventually consider the appeal. That was consistent with the approach taken in R(SB) 52/83 and seems to me to be a clear recognition by the judge that, in considering the substantive point, he had been exercising a jurisdiction co-ordinate with that of the Commissioners.

18. Mr Cooper referred me to CS/140/91 in which a Commissioner held that he was bound to follow the decision of Hodgson J in *Akbar* despite Hodgson J himself having said that his decision was not binding on the Commissioner who would consider Mr Akbar's appeal. I respectfully suggest that the Commissioner's decision was based on a misreading of *Tal* because the Commissioner did not draw any distinction between the effect of a decision of a single judge and a decision of a divisional court.

19. I have come to the conclusion that decisions on *substantive* points of social security law made by the High Court in exercise of its supervisory jurisdiction are all to be regarded as being made in a jurisdiction co-ordinate with that of Commissioners and that I should take the same approach to them as would a single judge of the High Court. I consider that I am not bound to follow a decision of a single High Court judge but should do so unless convinced that it is wrong. I should take the same approach to a decision of a judge of the Outer House of the Court of Session. On the other hand, like a judge of the High Court, I would regard myself as bound by a decision of a divisional court (other than, perhaps, in the special circumstances identified in R(SB) 52/83) for much the same reasons that I am bound by a decision of a Tribunal of Commissioners. I note that in *Chapman v. Goonvean and Rostowrack China Clay Co. Limited* [1973] I.C.R. 50 (affirmed on appeal [1973] I.C.R. 310) the National Industrial Relations Court decided that they were not bound by a decision of the Divisional Court because, like Commissioners, they had jurisdiction in Scotland as well as England and Wales and there was no equivalent in Scotland to a Divisional Court. However, there is now equivalence between a single judge of the High Court and a judge of the Outer House of the Court of Session and the reasoning behind that decision is now less compelling in the context of Commissioners. Furthermore, I take R(SB) 52/83 as authority for the proposition that a Tribunal of Commissioners would not regard themselves as bound by a decision of a divisional court, in which case a Commissioner in Scotland, faced by what he regarded as an unsatisfactory decision of a divisional court, could take the action that it was suggested in R(U) 4/88 should be taken when a Commissioner is faced with an apparently unsatisfactory decision of a Tribunal of Commissioners and refer the case to the Chief Commissioner so that it might be considered by another Tribunal of Commissioners.

20. It follows from all this, that I am not strictly bound by the decision of Dyson J in *Vijeikis, Okito and Zaheer* but that I should follow it unless convinced that it is wrong. Ms Fitzpatrick submitted that Dyson J's decision was wrong. She argued that it had the effect that the word "immediately" was implied into the regulation to qualify "before" and she cites authority to the effect that it is a strong thing to imply into a statutory provision a word that is not there. She also relied on the unconventionality of the transitional provision if it has the effect contended for by Mr Cooper. She says that, contrary to the point made by Mr

Drabble for the Secretary of State in argument before Dyson J, regulation 12 of the 1996 Regulations is not an "ordinary saving clause" because it is not in a form conventionally used in social security provisions where transitional protection is to be confined to those entitled to benefit at the date when amendments take effect. Usually, such a saving provision is applied expressly to those who were entitled to benefit "immediately" before the date the relevant legislation comes into force or who were entitled to benefit on a specified date which is in fact the day before the legislation comes into force. There is some force in those points. However, as I understand the second of Dyson J's reasons, he did not reach the conclusion he did by implying the word "immediately" into the regulation regardless of the actual language. It was the use of the present tense in paragraphs (2) and (3) of the regulation which persuaded him that the claimant must have been entitled to benefit at the time that the 1996 Regulations came into force if he was to be able to take advantage of the transitional protection. In those circumstances, it is quite proper to read those paragraphs as applying only to those who were entitled to benefit at, or immediately before, the time the Regulations came into force, and to extend that construction to paragraph (1). Ms Fitzpatrick also suggested that there were cogent reasons why the Secretary of State might have chosen to confer the protection on people who had been claimants at any time before 5 February 1996. I agree, but Dyson J also recognised that point when giving the third of his reasons. He felt compelled by the language to take the view that the Secretary of State had decided to confer the protection on a more limited class of people. In my respectful view, Dyson J's decision was correct. I agree that a claimant is not entitled to transitional protection under regulation 12 of the 1996 Regulations unless he or she was entitled to the relevant benefit at the time the those Regulations came into force on 5 February 1996. The present claimant was not entitled to income support on 4 or 5 February 1996 and therefore was not entitled to income support on his subsequent claim.

21. I therefore allow the adjudication officer's appeal. I set aside the decision of the Walthamstow social security appeal tribunal dated 22 July 1996 and give the decision the tribunal should have given which is that the claimant was not entitled to income support from 22 March 1996.

CIS/2809/1997

22. In this case, the claimant arrived in the United Kingdom on 5 December 1995. On 2 January 1996 he applied for asylum. He then claimed income support which was paid by way of an urgent cases payment under regulation 70 of the Income Support (General) Regulations 1987 until 1 February 1996. On 2 February 1996, he started work. He did not claim income support again until 2 August 1996. On 14 August 1996, an adjudication officer decided that the claimant was not entitled to income support under regulation 70 of the 1987 Regulations, as amended by the 1996 Regulations, because he did not claim asylum on his arrival in the United Kingdom. On 18 February 1997, the Scarborough social security appeal tribunal allowed the claimant's appeal, holding that regulation 12(1) of the 1996 Regulations applied to him. The adjudication officer now appeals against the tribunal's decision with my leave.

23. Regulation 8(2) and (3)(c) of the 1996 Regulations was held in *Regina v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275 to be ultra vires, to the extent that it made the amendments relevant to this case,

and it was only restored by paragraph 2 of Schedule 1 to the Asylum and Immigration Act 1996. Nevertheless, the material date on which the Regulations came into force for the purpose of regulation 12(1) as it applies to this case remains 5 February 1996, rather than 24 July 1996 which was the date when the Act came into force (see *Regina v Secretary of State for Social Security, ex parte T* (18 March 1997, C.A.)). The claimant was not entitled to income support on 4 and 5 February 1996 and, therefore, in the light of Dyson J's decision in *Vijeikis, Okito and Zaheer*, it is clear that the claimant was not entitled to income support under domestic law when he reclaimed benefit in August 1996.

24. However, Ms Fitzpatrick submitted that the claimant was entitled to benefit by virtue of Regulation (EEC) 1408/71. She submitted that he was a worker and a refugee within article 1(a) and (d) and therefore was a person within the scope of the Regulation by virtue of article 2. She further submitted that income support was a benefit within the scope of the Regulation by virtue of article 4(2)(a). Accordingly, she submitted that the claimant was entitled to the benefit of article 3(1) which provides:-

> "Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State."

Ms Fitzpatrick had some difficulty in precisely formulating what the inequality of treatment was in the present case and explaining why it should be regarded as unlawful. Obviously, an asylum seeker who has not claimed asylum on arrival is treated less favourably than a national of the United Kingdom, but not all asylum seekers are prevented from receiving income support. It is not unlawful to create rules to prevent certain classes of claimant from obtaining benefit or to entitle some people to more benefit than others.

25. Mr Cooper did not admit that the claimant was either a worker or a refugee but he accepted that further investigations would have to be made before any findings on those issues could be made and that the claimant might well turn out to be a worker. He did accept that income support was a the benefit within the scope of article 4(2)(a). However, he took a fundamental objection to Ms Fitzpatrick's case. In his submission, the present case does not fall within the scope of Regulation (EEC) 1408/71 at all because the case does not involve any movement from one member state to another.

26. He referred me to the recent decision of the European Court of Justice in *Land Nordrhein-Westfalen v. Uecker* and *Jacquet v. Land Nordrhein-Westfalen* (joined cases C64/96 and C65/96). In those cases, a Norwegian national and a Russian national, married to German nationals, lived in Germany and were employed there as foreign language assistants on fixed-term contracts. They challenged the right of their employer to limit the term of their employment and sought to rely on article 11 of Regulation (EEC) 1612/68 which provides:

> "Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State."

The Court held:-

> "23 ..., it must be noted that citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law. Furthermore, Article M of the Treaty on European Union provides that nothing in that treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those treaties. Any discrimination which nationals of a Member State may suffer under the law of that state fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State.
>
> 24. The answer to be given must therefore be that a national of a non-member country married to a worker having the nationality of a Member State cannot rely on the right conferred by Article 11 of Regulation No 1612/68 when that worker has never exercised the right to freedom of movement within the Community."

They so ruled. There does not appear to be a similar authority specifically relating to Regulation (EEC) 1408/71 and article 11 of Regulation (EEC) 1612/68 is expressly limited to cases where workers (i.e., the husbands of the litigants before the Court) are nationals of one Member State and are pursuing activities in another. However, I accept Mr Cooper's submission that the reasoning applied by the Court must apply to Regulation (EEC) 1408/71 as it applies to Regulation (EEC) 1612/68. As Mr Cooper pointed out, the Regulation was made pursuant to article 51 of the Treaty of Rome which provides for the adoption of "such measures in the field of social security as necessary to provide freedom of movement of workers" and it is concerned with the co-ordination of social security schemes rather than the imposition of a common standard. For the purpose of applying the judgment of the Court to the present case, it seems to me that a refugee from a non-member country must be treated as being in the same position as a national of the Member State in which he or she claims asylum. The effect of the judgment of the Court is, therefore, that any discrimination which a refugee from a non-member country may suffer under the law of the Member State where he or she has claimed asylum falls within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State. It is, I think, the lack of movement between Member States that makes it difficult for Ms Fitzpatrick precisely to formulate the terms of the inequality of treatment that is said to be unlawful. I am satisfied that the claimant can derive no benefit from European Union law.

27. I therefore allow the adjudication officer's appeal. I set aside the decision of the Scarborough social security appeal tribunal dated 13 February 1997 and substitute my own decision which is that the claimant was not entitled to income support from 2 August 1996.

CFC/1580/1997

28. The claimant in this case arrived in the United Kingdom on 30 September 1994 and claimed asylum on 10 October 1994. She was awarded family credit. The precise periods of awards are obscure and Ms May very properly said there was at least a doubt as to whether she was actually entitled to family credit during February 1996. However, the case has proceeded this far on the basis of an express concession of the adjudication officer who prepared the submission to the tribunal which was to the effect that the claimant was entitled

to family credit at the time when the 1996 Regulations came into force. Both parties have asked me to deal with this case on that basis. It is not an unrealistic basis. It is possible that there was a late claim at some stage and that, whether rightly or wrongly, that had the consequence that benefit was awarded for a period that was not exactly 26 weeks. The Family Credit Unit have destroyed the records that would enable the true history to be established.

29. The claim with which I am concerned with made on 14 September 1996. It was a repeat claim and it makes no difference whether or not it was the first such claim made after the 1996 Regulations came into effect. The adjudication officer disallowed the claim on the ground that the claimant could not be treated as being in Great Britain because she was an asylum seeker (see section 128(1) of the Social Security Contributions and Benefits Act 1992, regulation 3(1)(aa) and (1A) of the Family Credit (General) Regulations 1987, as amended by regulation 6 of the 1996 Regulations, and R(FC) 2/93). She appealed on the ground that she was entitled to transitional protection under regulation 12(3) of the 1996 Regulations. It will be recalled that, as it applies to family credit, regulation 12(3) provides:-

> "Where before the coming into force of these regulations, a person is receiving ... family credit ... under ... the ... Family Credit Regulations ..., those Regulations shall, until such time as his entitlement to that benefit is reviewed under section 25 ... of the Social Security Administration Act 1992, have effect as if regulation ... 6 ... of these Regulations had not been made."

On 18 December 1996, the Leicester social security appeal tribunal allowed the claimant's appeal, reasoning that, as she had been receiving family credit under the Family Credit Regulations before the coming into force of the 1996 Regulations, and as her entitlement to that benefit had not in fact been reviewed under section 25 of the Social Security Administration Act 1992, the Family Credit Regulations continued to have effect in her case as if regulation 6 of the 1996 Regulations had not been made. The adjudication officer now appeals against that decision with the leave of a Commissioner.

30. The problem which arises in the present case does so because, by virtue of section 128(3) of the Social Security Contributions and Benefits Act 1992, family credit is awarded for periods of 26 weeks at a time, a repeat claim being required at the end of each period. Mr Cooper submitted that regulation 12(3) of the 1996 Regulations operates to continue entitlement for those persons receiving family credit at the time those Regulations came into effect, and that, as the only entitlement the claimant had at that time was by virtue of her current award of benefit, a literal construction of the regulation would have the effect that her entitlement could be continued only down to the end of that award. Alternatively, he submitted that reading regulation 12(3) as conferring protection only until the end of a current award was the only construction which would lead to a reasonable result and that, if necessary, the provision should be given a purposive construction to avoid absurdity. He relied particularly on the references in regulation 12(3) to reviews and he sought to bolster that part of his submission by referring me to paragraph 32 of the explanatory memorandum submitted by the Department of Social Security with the draft 1996 Regulations when they were referred for consideration by the Social Security Advisory Committee under section 174 of the Social Security Administration Act 1992. The Committee's report and related documents are published as Cm 3062. Paragraph 32 of the explanatory memorandum says:-

"*Transitional Arrangements*

32. The Government proposes that the new benefit rules should apply to all new claims and reviews made after the coming into force of the regulations. Existing recipients will, therefore, continue to retain entitlement until a relevant change of circumstances leads to a review of their entitlement. Claims to disability working allowance will remain unaffected as entitlement depends on qualifying benefits which will themselves be subject to an exclusion."

The Committee themselves disapproved of the proposed amendments altogether and did not make any comment on that paragraph.

31. I do not accept the first part of Mr Cooper's submission. Regulation 12(3) is not drafted in terms of continuation of entitlement but in terms of the Family Credit (General) Regulations 1987 having effect in their unamended form until a specified event occurs. There is no prima facie reason why they should cease to have effect in that form upon the termination of a particular award of benefit. In the first of his reasons for his decision in *Vijeikis, Okito and Zaheer*, Dyson J said that "[i]t would be inapt to speak of someone who once was, but no longer is entitled to benefit, as a person as regards whom the provisions 'continue' to have effect". In paragraphs (2) and (3), that word "continue" that appears in paragraph (1) is omitted. However, even if that word should be read into paragraph (3), it might only have the effect that the transitional protection could last only until a claimant first ceased to be entitled to benefit. It would not necessarily follow that he or she could not rely on the protection during entitlement conferred by successive awards in respect of periods following immediately one upon an other. In the absence of any reference to reviews I would also reject Mr Cooper's submission that there is any absurdity in the construction placed on the paragraph by the tribunal. I do not consider that it would be at all absurd if protection were to be granted on successive awards of family credit. Protection under regulation 12(1) and (2) is open ended. It is only a formal procedural rule that requires claims for family credit to be made at 26 week intervals. Of the other benefits mentioned in regulation 12(3), disability working allowance is subject to a similar rule but attendance allowance and disability living allowance are usually awarded for longer periods or for life and severe disablement allowance and invalid care allowance may be the subject of indefinite awards. It would not have been unreasonable to provide that transitional protection should continue in respect of all of the benefits mentioned in regulation 12(3) for as long as the claimant continued to qualify for them on successive claims. That is not to say that the construction for which Mr Cooper contended would produce an unreasonable result: only that there may be more than one reasonable approach to transitional protection.

32. It is the reference to reviews that is Mr Cooper's strong point. Ordinarily, a review under section 25 or 30 of the Social Security Administration Act 1992 may lead to an increase in entitlement, or to a reduction of entitlement, or to a complete loss of entitlement or, in the light of *Saker v. Secretary of State for Social Services* (16 January 1988, C.A., reported as an appendix to R(I) 2/88), to no change in entitlement at all. Regulation 12(3) is so drafted that, on any such review, a claimant who is dependent on transitional protection under that paragraph loses the protection and so ceases to be entitled to benefit. As a review may take place at any time, this seems just as arbitrary in its effect on individual claimants as

the immediate withdrawal of all entitlement on 5 February 1996 would have been and, indeed, claimants in identical situations may be treated differently. On the other hand, claimants obviously have the advantage of the transitional protection until the review takes place and the problems arising from the withdrawal of benefit are spread out over time. The importance that the reference to reviews has in the present case is that it supports Mr Cooper's contention that it was intended that transitional protection should continue only until it was necessary for the claimant's case to be looked at again. If that contention is right, it must have been anticipated that the protection should not be available on a repeat claim.

33. Mr Cooper's reference to the memorandum to the Social Security Advisory Committee does not seem to me to advance his case at all. There is no indication that the Department had addressed their minds to repeat claims, unless, in the light of section 11(3) of the Social Security Administration Act 1992, something can be made of the obscure last sentence of the paragraph on which he relied. In the absence of any reference to reviews, the phrase "new claims" might well have been intended to exclude repeat claims. Furthermore, the draft regulations submitted to the Committee suggest that the Department's understanding of the fine detail of procedural matters was not complete. That draft contained no reference to section 30 of the Social Security Administration Act 1992. Section 25 provides for the review by adjudication officers of decisions of adjudication officers, tribunals and Commissioners but it does not apply to decisions relating to attendance allowance, disability living allowance or disability working allowance. Section 30 provides for the review by adjudication officers of decisions of adjudication officers relating to those benefits. Section 35 provides for the review by adjudication officers of decisions of tribunals and Commissioners relating to those benefits. The failure to include any reference to section 30 in the draft regulations appears to have been an oversight and it was remedied when the 1996 Regulations were finally made. It is odd that there remains no reference to section 35 and I presume that that is the result of another oversight.

34. In any event, without reference to the memorandum to the Committee, I am satisfied that, despite the language of regulation 12(3), Mr Cooper is right in so far as he submitted that it must have been intended that the transitional protection should not apply on a repeat claim. It really is quite inconceivable that it should have been intended that the transitional protection should be lost on a review but not on a repeat claim. In this context, I use the word "intended" as meaning "intended or would have been intended had the point not been overlooked". The question is whether the language of the provision defeats the purpose behind it. In *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105, Lord Diplock said:

> ".... I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [1971] A.C. 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to

be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."

I would accept that the three conditions identified by Lord Diplock for reading into an Act words that are not there are all satisfied in the present case. However, as I am engaged in the task of construing the legislation, it seems to me that the inserted words must be ones that can be added without doing too much damage to the general sense - as opposed to the literal sense - of the language used. For instance, I do not see how I can construe the clause "until such time as his entitlement to that benefit is reviewed under section 25 or 30 of the Social Security Administration Act 1992" as "until such time as his entitlement to that benefit comes to an end on the expiration of the award or is reviewed under section 25, 30 or 35 of the Social Security Administration Act 1992". There is a limit to the extent to which a purposive construction may be placed on wholly unsuitable language. I doubt that the omission of a reference to section 35 can be rectified by any process of statutory construction.

35. However, I consider it to be reasonable to read the words "continue to" into regulation 12(3) so that the main clause reads "those Regulations shall .... continue to have effect" and then to give that clause the meaning for which Mr Cooper contended, i.e., that the Regulations continue to have effect in their unamended form until the expiration of the current award. That is presumably what the draftsman himself or herself thought the clause meant; otherwise there would have been a specific reference to the expiration of an award. It seems unlikely that the omission of the words "continue to" in paragraphs (2) and (3) was deliberate and intended to have the effect that those paragraphs should operate in a different way from paragraph (1). Paragraph (2) did not appear in the draft submitted to the Social Security Advisory Committee and Mr Cooper suggested that the Regulations might have been drafted by more than one person. I accept that the use of different language in similar provisions is generally intentional, showing that they should be construed differently, but is sometimes accidental, so that no such inference can be drawn. In my view, regulation 12(3) should be construed so that transitional protection continues only during the period covered by the award of benefit that was current on 5 February 1996.

36. It am therefore satisfied that the tribunal misconstrued regulation 12(3), although they can be forgiven for doing so in view of the way it was drafted. The claimant was not entitled to transitional protection on her repeat claim. This result is harsh but the claimant is treated no more harshly than those whose first claim was made after the 1996 Regulations came into force. As Dyson J pointed out in the third of his reasons in *Vijeikis, Okito and Zaheer*, if Parliament intends a harsh result, a purposive construction does not assist the claimant.

37. I therefore allow the adjudication officer's appeal. I set aside the decision of the Leicester social security appeal tribunal dated 18 December 1996 and substitute my own decision which is that the claimant was not entitled to family credit as a result of the claim made on 14 September 1996.

M. ROWLAND
Commissioner
23 December 1997