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Bulletin 179

THE SOCIAL SECURITY COMMISSIONERS

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ACT 1998

Commissioner's Case No CIS/4/2003

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

COMMISSIONERS
THE CHIEF COMMISSIONER HIS HONOUR JUDGE GARY HICKINBOTTOM
MR COMMISSIONER MESHER
MR COMMISSIONER TURNBULL

Claimant:	**Mr William McKay**
Tribunal:	**Wakefield**
Tribunal Date:	**24 October 2002**
Tribunal Register No:	**U/01/008/2002/02650**

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Introduction

1. This is an appeal by the claimant against a decision of the Wakefield Appeal Tribunal made on 24 October 2002. It was one of five appeals which were heard together (on 10, 11 and 12 November 2003) because they each raised issues concerning an appeal tribunal's powers on an appeal following a decision under Section 9 (revision) or Section 10 (supersession) of the Social Security Act 1998 ("the 1998 Act"). A decision on the other four appeals (CIB/4751/2002, CDLA/4753/2002, CDLA/4939/2002 and CDLA/5141/2002) was delivered on 21 January 2004. However, the decision on this appeal was deferred because it raised a self-contained issue on which we wished to have the benefit of further submissions from the parties. Further written submissions have now been made on behalf of the Secretary of State and the claimant pursuant to our Direction of 18 December 2003.

2. At the oral hearing the claimant was represented by Mr Richard Drabble QC, instructed by the Child Poverty Action Group ("CPAG") and the Secretary of State by Miss Nathalie Lieven, instructed by the Solicitor to the Department for Work and Pensions.

3. In broad terms, the issue of general importance raised by this appeal is whether there is a right of appeal to an appeal tribunal against a decision by the Secretary of State not to revise a previous decision under Regulation 3(5)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999 No 991) ("the 1999 Regulations"). Regulation 3(5)(a) provides for revision of a decision of the Secretary of State which was made under Section 8 or 10 of the 1998 Act and "which arose from an official error." For the reasons set out below we conclude that there is in effect no such right of appeal. Our decision in the instant case is set out in Paragraph 82 below. It leaves the claimant no better off than under the tribunal's decision.

The Facts

4. The claimant purchased his home from the Wakefield Metropolitan District Council in 1989 under the "right to buy" scheme. Under the terms of the acquisition he was liable to pay a monthly service charge (which was £23.05 per month in July 2002) in respect of a communal boiler. It is accepted by the Secretary of State that this charge was a "service charge" within the meaning of Paragraph 17(1)(b) of Schedule 3 to the Income Support (General) Regulations 1987 (SI 1987 No 1967), and therefore qualified as "housing costs" for income support purposes.

5. On 24 November 1997 the claimant signed an income support claim form. To the question, "Do you or your partner pay service charges for the place where you live?", he answered "no". The next question on the form was: "Do you pay any other charges on your home?". The copy of that page of the form in the papers is not a good one, but the claimant does not appear to have ticked either the "yes" or the "no" answer in respect of that question. The Secretary of State's written submission to the appeal tribunal stated that "it appears that he may have answered "yes"" to that question, but does not give any reason for so stating.

The tribunal found that he did answer "yes" to that question, but again the basis on which it so found is unclear.

6. The claimant was awarded income support from 24 November 1997 in an amount which did not take into account the service charge.

7. That award terminated on 14 February 1998, and on 16 February 1998 the claimant signed a further claim form. There is no doubt that on that form he answered "no" to both of the questions referred to above. By a decision made on 20 February 1998 income support was awarded from 16 February 1998, again in an amount which did not take into account the service charge.

8. On 14 March 2002 the claimant, having received advice from elsewhere, signed a statement asking that he be paid the amount of the service charge, and that this payment be backdated. He said at the end of the statement: "I asked about this 5 years ago."

9. On 12 April 2002, on the basis of that statement, a decision maker considered the matter and wrote a commendably full decision, extending to a page and a half of typed script. The substance of the decision was as follows:

(a) There were no grounds to *revise* the decision dated 20 February 1998 because "there is no evidence in the claim that [the claimant] has ever requested help with his service charges or of official error."

(b) However, there was a ground to *supersede* that decision, namely a change of circumstances (i.e. the payment of service charges), and the decision maker found that the decision should be superseded so as to include the service charge as housing costs for the purpose of calculation of the claimant's income support entitlement. The decision was expressed to take effect from 28 February 2002 on the ground that the decision maker considered that was the date when the change of circumstances had been notified by the claimant: Regulation 7(2)(b) of the 1999 Regulations. However, there appears to be no evidence in the papers that the claimant raised the question of the service charge at an earlier date in 2002 than 14 March.

10. The claimant appealed, contending that his increased award of income support should have been backdated for about 5 years. In his Appeal Forms (of which he submitted two), he stated that at the time of first becoming unemployed (which the tribunal found, on the basis of the claimant's oral evidence to it, to have been in April 1995) he had discussed the matter of the service charge with a named person at the Normanton Social Security Office and had been advised that he could not claim for this charge as he owned his own house. He stated that he therefore considered that there was no point in ticking the relevant box on the income support claim forms. He further stated that he had seen another person from the Benefits Agency, in January 2002 (and possibly on a further, earlier occasion - the relevant Appeal Form is unclear about this) and had been given the same advice.

11. The decision of 12 April 2002 was reconsidered on 17 June 2002 but not revised. The official who made the reference to the decision maker for reconsideration recorded that, when

he had telephoned the claimant in order to explain the decision to him, he (the claimant) said that he had not ticked the relevant box on the claim forms because he did not think that he was going to be on income support for more than a couple of weeks.

12. A written submission to the tribunal on behalf of the claimant relied upon the possibility of revision for official error under Regulation 3(5)(a). The Secretary of State's submission to the tribunal stated that no records were held by the income support section indicating that the claimant had requested help with his service charge back in 1997 or that he had been misinformed with regard to it.

13. The tribunal dismissed the appeal. The decision notice, after stating that the appeal was disallowed and the decision of 12 April 2002 upheld, stated as follows:

> "[The claimant] is entitled to Income Support at the weekly rate of £145.87 from 8 March 2002 following a report received on 14 March 2002 that there had been a change of circumstances in 1997. Reg 7(2)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 applies. I do however accept that [the claimant] had been misadvised about possible earlier entitlement."

14. The tribunal's statement of reasons made no reference to the possibility of revision for official error. It concluded by stating:

> "... I do accept there had been confusion as to whether or not this was a heating bill and therefore not covered as opposed to compulsory charge and therefore [the Claimant] has been misadvised. Although this is not a matter for the tribunal the decision maker may consider it."

The Issues

15. Before referring to the relevant statutory provisions and to the detailed submissions of the parties, it may be helpful if we give a broad overview of the issues between them.

16. It is submitted on behalf of the claimant that the tribunal erred in law in failing to consider whether the award of income support made on 20 February 1998 should be revised for official error. The Secretary of State contends that the tribunal was right not to consider that question because the decision of 12 April 2002 not to revise the decision of 20 February 1998 for official error was not capable of being appealed to an appeal tribunal.

17. It is common ground that a decision under Section 9 to revise or not revise is not itself made appealable by the 1998 Act; the only decision which can be appealed is the original decision as either revised or not revised. It is also common ground that the provision in Regulation 31(2) of the 1999 Regulations extending the time for appealing against the original decision in the case of a revision or refusal to revise does not in terms apply in the case of a decision not to revise for official error.

18. The area of disagreement concerns the claimant's submission that the Human Rights Act 1998, giving effect in English domestic law to (relevantly) Articles 6 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the

Convention"), requires a claimant whose application for revision on the ground of official error is refused by the Secretary of State to be afforded a right of appeal to an appeal tribunal.

The Statutory Provisions

19. Section 9(1) of the 1998 Act provides as follows:

> ".....any decision of the Secretary of State under section 8 above or section 10 below may be revised by the Secretary of State
> (a) either within the prescribed period or in prescribed cases or circumstances; and
> (b) either on an application made for the purpose or on his own initiative;
> and regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised."

20. Regulation 3(1) of the 1999 Regulations provides that decisions of the Secretary of State under Section 8 (original decisions) or Section 10 (supersession) can be revised in the event of either (a) action by the Secretary of State leading to revision being commenced within one month of notification of the original decision or (b) application by the claimant being made within a specified period after notification of the decision (or production of a statement of reasons for the decision). In these cases the only requirement is that the Secretary of State's action is taken or the claimant's application is made (as the case may be) within the specified time, and the revision can therefore be on any ground. The basic period within which a claimant's application must be made is one month from the date of notification of the decision. However, that period can be extended under Regulation 4, but not to a date more than 13 months after the date of notification of the original decision.

21. Regulation 3(3) is a specific provision for revision, on application within a specified time, of decisions relating to a payment out of the social fund in respect of maternity or funeral expenses. Its effect is to provide for an automatic extension, in certain circumstances, of the time within which revision of such a decision on any ground could have been applied for under Regulation 3(1).

22. Regulation 3 also specifies certain types of decision which may be revised by the Secretary of State "at any time" (see, for example, Regulation 3(4), (6), (6A) and (8)). These provisions either do not state any ground on which the specified type of decision may be revised or state simply that the decision may be revised "if it contains an error". In either case the effect is the same, namely that the decision can be revised on any ground - i.e. simply on the ground that it was wrong.

23. Regulation 3(5) specifies three categories of decision under Section 8 or 10 which "may be revised at any time by the Secretary of State". The first of these, and the only one which a claimant would in practice ever wish to invoke, is a decision "which arose from an official error" (Regulation 3(5)(a)). The second and third categories concern certain decisions which as a result of a mistake of fact were more advantageous to the claimant than they would otherwise have been.

24. "Official error" was at the material date (i.e. 12 April 2002) defined by Regulation 1(3) as meaning:

"an error made by

(a) an officer of the Department of Social Security, the Board or the Department for Education and Employment acting as such which no person outside any of those Departments caused or to which no person outside any of those Departments materially contributed;

(b) a person employed by a designated authority acting on behalf of the authority, which no person outside that authority caused or to which no person outside that authority materially contributed,

but excludes any error of law which is only shown to have been an error by virtue of a subsequent decision of a Commissioner or the court."

25. Section 12(1) and (2) of the 1998 Act give the claimant a right of appeal to an appeal tribunal against "any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above)" made on a claim for or on an award of a relevant benefit.

26. By Section 9(5) of the 1998 Act:

"Where a decision is revised under this section, for the purpose of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it is so revised."

27. Regulation 31(1) of the 1999 Regulations provides for time limits for appealing, the primary time limit being one month from the date of notification of the decision "against which the appeal is brought". Regulation 31(2) provides as follows:

"Where the Secretary of State ...

(a) revises, or following an application under Regulation 3(1) or (3) does not revise, a decision under ...Section 9, or

(b) supersedes a decision under ...Section 10

the period of one month specified in Paragraph (1) shall begin to run from the date of notification of the revision or supersession of the decision, or following an application for a revision under Regulation 3(1) or (3), the date the Secretary of State ...issues a notice that he is ...not revising the decision."

28. Regulation 32 contains a general power (normally exercisable by a legally qualified panel member of an appeal tribunal) to extend the time limit for appealing if certain conditions are satisfied, but the time for appealing cannot be extended by more than a year.

29. It is clear from the wording of Section 12(1) of the 1998 Act, when read together with Section 9(5) and Regulation 31, that an appeal following a refusal to revise is treated as an appeal against the original decision. However, in the case of a refusal to revise Regulation 31(2)(a) extends the time limit for appealing against that original decision, but only in the case where the refusal is "following an application for a revision under Regulation 3(1) or (3)".

30. Therefore, on the face of the legislation, the position is that if a claimant applies for revision outside the time limits prescribed by Regulation 3(1) or (3) (and any extension granted under Regulation 4) - i.e. if he applies for revision in any of the other cases provided

for in Regulation 3, such as the case of official error in Regulation 3(5)(a) - there can be no appeal in the event of a refusal to revise, because the claimant will be out of time for appealing against the original decision (which is the decision which must be appealed). The only qualification to that proposition is the power in Regulation 32 to extend the time for appealing, but time cannot be extended by more than a year.

31. Consequently, in broad terms, the position is that:

(a) a claimant who seeks to have a decision revised more than 13 months after the date of notification of that decision will have no right to appeal to an appeal tribunal in the event of a refusal to revise and

(b) a claimant who seeks to have a decision revised more than one month but less than 13 months after the date of notification of that decision will have no right to appeal to an appeal tribunal in the event of a refusal to revise unless either (i) his application for revision was accepted as an application within Regulation 3(1) by extension of the time limit under Regulation 4, or (ii) the time for appealing is extended under the general power in Regulation 32.

32. As indicated above, the claimant accepts this construction of the legislation. It is not contended on his behalf that the breaches of Articles 6 and 14 of the Convention which he asserts could be avoided by a process of construction in accordance with Section 3 of the Human Rights Act 1998. Section 3 requires legislation to be read and given effect in a way which is compatible with Convention rights "so far as it is possible to do so", but the claimant accepts that (i) Section 12(1) of the 1998 Act cannot be read as if the opening words were "This section applies to any decision of the Secretary of State under section 8, 9 or 10 above ...", and (ii) the provision in Regulation 31(2) for the time limit for appealing to run from the date of notification of the refusal to revise in the case of a decision "following an application for a revision under Regulation 3(1) or (3)" cannot be read as meaning "following an application for a revision under Regulation 3". We consider that these concessions were properly made.

Article 6 of the Convention: The Parties' Submissions

33. The claimant submitted that:

(1) the right to apply for revision at any time for official error is a "civil right" for the purposes of Article 6; and

(2) in the absence of a right of appeal following a refusal of an application to revise for official error there is a breach of Article 6: the possibility of applying for judicial review of such a decision is not in all the circumstances sufficient to comply with the requirement in Article 6 that "in the determination of his civil rights and obligations ...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

34. The broad thrust of the Secretary of State's submission was that:

(1) there is nothing contrary to Article 6 in having time limits within which an appeal must be brought; and

(2) if a claimant were to be entitled to appeal against a refusal to revise for official error the claimant would (by applying for revision for official error and then appealing in the event of a refusal to revise) in effect be entitled to challenge the correctness of the original decision at any time (however long) after the decision, and so in effect sidestep the time limits for appealing.

35. The Secretary of State made the following more specific submissions.

(1) A decision by the Secretary of State whether to revise a previous decision for official error does not involve a determination of the claimant's "civil rights" for the purposes of Article 6 (and Article 6 is therefore not engaged) because:

(a) a claimant has no entitlement to revision for official error - there is merely a discretionary power for the Secretary of State to revise on this ground;

(b) whether or not the claimant has a right to revision for official error, the only civil right relevant for Article 6 purposes is the entitlement to the social security benefit in question, not the right to revision for official error;

(c) a decision by the Secretary of State is in the nature of an administrative determination - there is no "contestation" for the purposes of Article 6 until the claimant appeals.

(2) If there is an entitlement to revision in the case of official error amounting to a "civil right", the absence of any possibility of appeal in the event of a refusal to revise more than 13 months after the date of the original decision is not in breach of Article 6 because:

(a) a claimant has the right to appeal to an appeal tribunal against the original decision (and thus to challenge the correctness of that decision at a full hearing on fact and law before an independent and impartial tribunal) within one month from the date of notification of that decision (extendable by up to a year in certain circumstances);

(b) time limits for appealing are not contrary to Article 6 unless the essence of the Article 6 right is thereby impeded;

(c) in the circumstances, the right to appeal against the original decision, together with the possibility of applying for judicial review in the event of a decision by the Secretary of State not to revise for official error, is sufficient to comply with Article 6.

Article 6: Analysis and Conclusion

36. These submissions gave rise to two determinative issues, namely:

(1) does a decision by the Secretary of State whether to revise for official error involve a determination of the claimant's civil rights for the purposes of Article 6?

(2) if so, does the absence of a right of appeal to an appeal tribunal against a decision refusing to revise for official error involve a breach of Article 6?

We shall deal with these issues in turn.

Does a decision by the Secretary of State whether to revise for official error involve a determination of the claimant's civil rights for the purposes of Article 6?

37. In our judgment, a decision of the Secretary of State whether to revise for official error does involve a determination of the claimant's civil rights for the purposes of Article 6. In respect of this issue, it is most convenient to deal with the Secretary of State's submissions to the contrary, as briefly set out above, in turn.

38. First, Miss Lieven submitted that the power to revise for official error is "a discretionary addition to the Secretary of State's powers, not an entitlement. The consideration of Regulation 3(5) is similar to ex gratia payments, where it is a purely discretionary matter for the Secretary of State to be exercised on general public law principles."

39. We reject that submission, for the following reasons.

(1) As a matter of construction of Section 9(1) and Regulation 3(5)(a) a claimant is in our judgment entitled to apply for revision on the ground of official error.

Section 9(1) provides for revision by the Secretary of State "(a) either within the prescribed period or in prescribed cases or circumstances; and (b) either on an application made for the purpose or on his own initiative." Regulation 3(1)(b) and (3) provide for revision on a claimant's application made within a specified time. Regulation 3(5), which is the provision containing the power to revise for official error, contains no reference to the possibility of application by the claimant, but says simply that where a relevant ground is satisfied the decision "may be revised at any time by the Secretary of State." The same is true of the other cases in which a decision may be revised under Regulation 3. That can be contrasted with the structure of Regulation 6. Regulation 6(2), which sets out the circumstances in which a decision may be superseded, begins by stating that a supersession decision may be made either on the Secretary of State's own initiative or on an application made for the purpose. The absence of a similar reference in Regulation 3(5) to the possibility of application by the claimant may therefore arguably support the Secretary of State's contention that the statutory scheme gives the claimant no right to apply for revision on the ground of official error.

However, in our judgment the answer to that contention is that the general provision in Section 9(1)(b) (that a decision may be revised by the Secretary of State either on an application made for the purpose or on his own initiative)

applies to the whole of Regulation 3, and therefore to the case of revision for official error under Regulation 3(5). The specific reference to application by the claimant in Regulation 3(1) and (3) is not an indication that claimants are not intended to be able to apply for revision under the other provisions of Regulation 3. Specific reference to application by the claimant is necessary in Regulation 3(1)(a) and (3) owing to the need to make clear that those provisions only apply where the application is made within a specified time. We do not overlook that the cases in Regulation 3(5)(b) and (c) are ones in which the original decision could only be revised to the detriment of the claimant, who would therefore in practice not wish to apply for revision. However, that does not in our view require Regulation 3(5) to be read as meaning that a claimant cannot apply for revision in a case within Regulation 3(5)(a). In our judgment, a claimant must be entitled to bring to the attention of the Secretary of State matters which the claimant considers amount to an official error in the relevant decision, and must be entitled to do so by way of application.

(2) If, as we have concluded is the case, a claimant is entitled to apply for revision for official error, that strongly suggests that, if it is established that there was an official error and that the original decision would have been more favourable to the claimant if that error had not been made, the claimant is entitled to have the original decision revised. As we understand it, the Secretary of State accepts that that is so in the case of an application for supersession on the ground of (say) mistake of fact, and we can see nothing in the language of Regulation 3 which indicates that any different effect was intended in the case of an application for revision.

(3) The contention that the Secretary of State has a wide discretion as to whether or not to revise for official error is inconsistent with the structure of Regulations 3 and 6. The Secretary of State's contention would appear to lead to the conclusion that, if the Secretary of State is satisfied that the original decision was, owing to an official error, insufficiently favourable to the claimant, but nevertheless in his discretion decides not to revise the original decision with full retrospective effect, he would at least be permitted to supersede the original decision, with effect from the date of the claimant's application, for error of fact or law under Regulation 6(2)(b)(i). However, it is difficult to reconcile that approach with the general provision in Regulation 6(3) that "a decision which may be revised under Regulation 3 may not be superseded under this regulation". If the Secretary of State has (as he contends) simply a discretion to revise similar to the discretion whether to make an ex gratia payment, Regulation 6(3) would appear to have the effect that if the Secretary of State could revise for official error but in his discretion decides not to (so that the case is one where "the decision may be revised" within the meaning of Regulation 6(3)), he cannot supersede either. Regulation 6(3) only makes sense, in our view, on the footing that, if the claimant establishes that the original decision was wrong owing to an official error, he is entitled to have the decision revised (not superseded).

(4) It was accepted by Miss Lieven that a claimant would be able to apply for judicial review of a decision not to revise for official error. There is, however, no

indication in the legislation of the range of factors which the Secretary of State would be bound or entitled to take into account in exercising the suggested discretion. If the power to revise were a discretionary one of the width submitted by Miss Lieven, one might have expected at least some reference to the factors which the Secretary of State could permissibly take into account.

(5) It is of course true that both Section 9 and Regulation 3 state that the original decision "**may** be revised" by the Secretary of State in certain circumstances. However, Section 10 and Regulation 6 use the wording "**may** be superseded", and it is implicit in the decision of the Court of Appeal in *Wood v Secretary of State* [2003] EWCA Civ 53 (reported as R(DLA) 1/03) that a claimant who establishes a ground for supersession which requires a change to the original decision is entitled to have that decision superseded. There may be a residual discretion in the Secretary of State not to revise or supersede (e.g. if it is clear that a revision or supersession of the original decision favourably to the claimant would not, when his benefit position is looked at overall, benefit him). In essence, however, the claimant is in our view entitled to revision of a decision which, owing to an official error, was less favourable to him than it should have been.

40. The Secretary of State's second submission on this issue was that, even if the claimant has a right to revision for official error, for the purposes of Article 6 the only "civil right" is the right which was the subject of the original decision, not the right to have that decision revised for official error. Therefore, the Secretary of State contended, a decision whether to revise does not involve a determination of the claimant's civil rights and so Article 6 is not engaged in the case of a decision whether to revise or not.

41. In our judgment the Secretary of State was correct in submitting that, for the purposes of Article 6, the claimant's "civil right" is the right (if he has one) to the social security benefit which was the subject of the original decision on his claim. The right of appeal to an appeal tribunal provides the necessary compliance with Article 6 in respect of the initial determination of that civil right. (It is common ground that restrictions on the right of access to an independent and impartial tribunal are not incompatible with Article 6 if they do not restrict the very essence of the right and only do so in a way which is proportionate: *Lithgow v United Kingdom* (1986) 8 EHRR 329, *Stubbings v United Kingdom* (1996) 23 EHRR 213.) Article 6 would therefore be complied with if there were no possibility at all of the claimant seeking to have the original decision revised for official error, but merely the right of appeal to an appeal tribunal given by the current scheme.

42. However, it does not necessarily follow that, if the adjudication system does provide an entitlement to have the original decision changed on a specified ground, a decision about that entitlement does not also involve a determination of the claimant's civil rights (i.e. his entitlement to the benefit in question) for the purposes of Article 6. For example, it was conceded on behalf of the Secretary of State in the *Wood* case, and accepted by the Court of Appeal, that there would be a breach of Article 6 if there were no entitlement to appeal against a decision refusing to supersede the original decision. However, the grounds for supersession include the ground (in practice, by far the most used) that there has been a change of circumstances since the original decision. A change in circumstances is plainly a matter which goes to the claimant's substantive entitlement to the benefit in question. It is by no

means as obvious that the same applies to a right to have a decision revised for official error. By definition a decision which is liable to be revised for official error must be a decision which was wrong when made, and which therefore (if the claimant had been aware of the official error) could have been appealed to an appeal tribunal by the claimant on that ground. The possibility of revision for official error gives the claimant the right, in effect, to have the original decision changed at any time in the future because it was wrong for a particular reason (official error).

43. The question of substance is whether, where the adjudication structure provides the possibility of changing a decision (a) by way of a full Article 6 compliant appeal on fact and law within strict time limits and (b) by a revision decision at the first instance level at any time in the future on a ground which could (had the claimant been aware of it) have been invoked as a ground of appeal, that structure must also provide also for an Article 6 compliant means of challenging the revision decision.

44. We have not been referred to any authority which directly answers this question. The best analogy in the Strasbourg jurisprudence (and even this is perhaps not particularly close) appears to lie in the line of authority that, although Article 6 does not (if the initial determination of the claimant's rights complies with Article 6) guarantee a right of appeal, where a Contracting State provides a right of appeal, Article 6 will apply to the appeal proceedings: *Delcourt v Belgium* (1970) 1 EHRR 355 (Paragraph 25), *Edwards v United Kingdom* (1993) 15 EHRR 417 (Paragraph 34), *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 (Paragraph 59). Thus, in the *Tolstoy Miloslavsky* case, the European Court of Human Rights considered whether the fact the applicant had been required to give security for the costs of his appeal against a judgment in a libel action at which he had had a full Article 6 compliant hearing meant that there had been a breach of Article 6.

45. This jurisprudence, whilst not being directly in point, indicates that the provisions permitting decisions to be revised should be regarded as part of the process whereby a claimant's entitlement to social security benefits is determined, and therefore cannot be regarded as outside the scope of Article 6, even in circumstances in which the claimant has had the opportunity of an appeal in satisfaction of his Article 6 rights in relation to the original decision.

46. We therefore reject the second submission put forward by the Secretary of State in support of the contention that a decision whether or not to revise for official error does not involve a determination of the claimant's civil rights for the purposes of Article 6.

47. The Secretary of State's third submission in support of that contention was that a decision by a decision maker was one of a merely administrative nature. He relied upon decisions of individual Commissioners in CG/2119/01 and CIB/4137/01, and in particular the following passage (in Paragraph 15) of the former:

> "So far as Article 6 is concerned, I consider that there was no determination of a civil right or obligation ("contestation") within the scope of Article 6 until the claimant challenged the recoverability decision by appealing to the tribunal - see Paragraph 25 of the judgment in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425"

48. However, that statement was made in the context of a discussion of the different question of when time begins to run for the purpose of the requirement in Article 6 that a fair hearing take place within a reasonable time. We express no opinion on the correctness of the actual decision in that case. In our judgment the submission based on that passage (which, in fairness to Miss Lieven, was made only in the written submissions, prepared by those instructing her, in relation to the Article 14 issue, with which we deal below) cannot be right. It was emphatically (and, in our judgment, correctly) dealt with by Mr Commissioner Howell QC in Paragraph 39 of CIS/540/2002:

> "While it is true that the Secretary of State's initial determination of any question under Section 8 of the 1998 Social Security Act is not itself a legal proceeding or *litis contestatio* of the kind to which the requirements of Article 6 for a public hearing and so forth can usefully be applied, it seems to me that this argument takes far too narrow a view of what Article 6 requires. In effect, it enables the Article to be stultified, since if the only question is whether there is compliance once an issue is referred to a court or tribunal, but a non-independent executive body can exclude a material issue from ever being so referred, the protection of any civil rights that depend on that issue is lost."

Moreover, the Secretary of State's submission is wholly inconsistent with the concession made to and accepted by the Court of Appeal in the *Wood* case that there would be a breach of Article 6 if there were no right of appeal against a refusal to supersede.

49. For these reasons, in our judgment, a decision of the Secretary of State as to whether or not to revise a decision for official error does involve a determination of the claimant's civil rights for the purposes of Article 6, in the context of a possible breach of the right of free access to an independent and impartial tribunal.

Does the absence of a right of appeal to an appeal tribunal against a decision refusing to revise for official error involve a breach of Article 6?

50. Two lines of authority are in our view relevant here.

51. First, it is clear from the line of authority in relation to the applicability of Article 6 to appeal processes (see Paragraph 44 above) that the question whether Article 6 is complied with is not to be determined by reference to the appeal process in isolation: "[A]ccount must be taken of the entirety of the proceedings [i.e. including those at first instance] and of the role of the appellate court therein" (*Tolstoy Miloslavsky* case, Paragraph 59). In the *Tolstoy Miloslavsky* case itself, it was held that, taking into account the nature of the proceedings at first instance, the order for security for the costs of the applicant's appeal did not give rise to a breach of Article 6. By parity of reasoning, the possibility of revision for official error at any time after the original decision should in our view be seen as part of the adjudication mechanism for determining the claimant's entitlement to social security benefits. That mechanism includes the making of the original decision, the availability of a full appeal to an independent tribunal, and the possibility of revision of the original decision. We therefore reject Mr Drabble's submission that, in determining whether the absence of an appeal against a decision refusing to revise for official error involves a breach of Article 6, it is irrelevant that the claimant had a full right of appeal to an independent tribunal against the original decision.

52. Second, there is the line of Strasbourg authority, applied by the House of Lords in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 WLR 388, that, where Article 6 extends to cover an administrative decision which is considered to determine civil rights, such a decision may properly be made by a person or body which did not itself possess the necessary independence to satisfy the requirements of Article 6(1) so long as measures are in place to safeguard the fairness of the proceedings and the decision is subject to ultimate judicial control by a court with jurisdiction to deal with the case as its nature requires. It was held in the *Runa Begum* case, in relation to a decision by a local authority officer that accommodation offered to a homeless person was suitable, that the County Court's appellate jurisdiction (which was in substance the same as that of the High Court on judicial review) was sufficient to comply with Article 6. We accept that the facts of the *Runa Begum* case were very different from those in the present case. First, the nature of the "civil right" (if there was one in the *Runa Begum* case, a question which the House of Lords left open) was different. Second, the first instance decision-making process was in that case subject to substantially greater procedural safeguards for the citizen (the homeless person) than when the Secretary of State makes a decision in respect of social security benefits. For example, as emphasised by Lord Bingham in *Runa Begum* (at Paragraph 9(3)), the homeless person was entitled to make representations and to be represented. That case is, however, important as affirming that the jurisdiction of the independent tribunal need not necessarily be by way of a full rehearing on the facts.

53. In our judgment, Miss Lieven is correct in submitting that, in the light of the fact that the claimant has the right to a full rehearing on appeal of the original decision, the ability to apply for judicial review of a decision not to revise for official error renders the procedure as a whole compliant with Article 6. In coming to this conclusion we do not overlook that the claimant will not necessarily be aware, at the time of the original decision, that it was wrong owing to an official error. He will, however, usually have access to information from which it can be deduced that the decision is wrong for some reason. Further, although the express provision in Regulation 28(1) of the 1999 Regulations entitling a claimant to ask for a written statement of reasons of an appealable decision would appear not to apply in the case of a decision refusing to revise for official error made more than 13 months after the original decision (because the refusal to revise is not an appealable decision), if reasons were not given and the claimant could on judicial review produce prima facie evidence that there had been an official error, there would be a high likelihood that the Administrative Court would grant relief. If reasons were given, the Administrative Court would on judicial review be able to examine the adequacy of those reasons, in the light of the claimant's evidence.

54. The absence of a right of appeal against a decision refusing to revise for official error (where that decision is made more than 13 months after the date of the original decision) does not therefore in our judgment involve a breach of Article 6.

Article 14: The Parties' Submissions

55. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion,

political or other opinion, national or social origin, association with a national minority, property, birth or other status."

56. The submissions on behalf of the claimant were, in outline, that a housing benefit claimant in an equivalent position to the claimant would in effect be able to appeal against the refusal to revise for official error, and the fact that the claimant had no such right of appeal therefore constituted unjustified discrimination contrary to Article 14, in conjunction with Article 6. The comparators chosen by the claimant were therefore housing benefit claimants who apply to have a decision revised for official error. The claimant submitted that such claimants would be able to appeal against a refusal to revise because under the housing benefit provisions the time for appealing against the original decision is made to run from the date of the refusal to revise in the case of all applications for revision, and not only those where no ground for revision need be shown because the application is made within a short time of the original decision.

57. The Secretary of State submitted that there is no difference between the time limits applying in social security cases on the one hand, and housing benefit cases on the other; and that a housing benefit claimant is therefore in no better position than a social security claimant to appeal against a decision refusing to revise a previous decision for official error.

58. It is therefore necessary to examine the relevant housing benefit adjudication and appeal provisions, which, although they are modelled closely on the equivalent provisions relating to social security, are not identical.

Article 14: The Relevant Statutory Provisions relating to Housing Benefit

59. Paragraph 3(1) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 ("the 2000 Act") is the equivalent of Section 9 of the 1998 Act. It provides as follows:

> "Any relevant decision may be revised or further revised by the relevant authority which made the decision
>
> (a) either within the prescribed period or in prescribed cases or circumstances; and
>
> (b) either on an application made for the purpose by a person affected by the decision or on their own initiative;
>
> and regulations may prescribe the procedure by which a decision of a relevant authority may be so revised."

60. Regulation 4(1) and (2) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001 No 1002) ("the 2001 Regulations") provides as follows:

> "(1) Subject to the provisions in this regulation, a relevant decision ("the original decision") may be revised or further revised by the relevant authority which made the decision where
>
> (a) ... the person affected makes an application for revision within
>
> (i) one month of the date of notification of the original decision; or
>
> (ii) such extended time as the relevant authority may allow under regulation 5;

(b) within one month of the date of notification of the original decision that authority has information which is sufficient to show that the original decision was made in ignorance of, or was based on a mistake as to, some material fact; or

(c) an appeal is made under Paragraph 6 of Schedule 7 to the Act against the original decision within the time prescribed in Regulation 18 or, in a case to which Regulation 19 applies the time prescribed in that regulation, but the appeal has not been determined.

(2) An original decision may be revised or further revised by the relevant authority which made the decision, at any time by that authority, where that decision

(a) arose from official error; or

(b) was made in ignorance of, of was based upon a mistake as to, some material fact and as a result of that ignorance of or mistake as to that fact, the decision was more advantageous to the person affected than it would otherwise have been but for that ignorance or mistake."

61. Paragraph 6 of Schedule 7 to the 2000 Act gives a right of appeal to an appeal tribunal against any "relevant decision" of a relevant authority.

62. By Paragraph 1(2) of Schedule 7:

"In this Schedule "relevant decision" means any of the following

(a) a decision of a relevant authority on a claim for housing benefit or council tax benefit;

(b) any decision under paragraph 4 of this Schedule which supersedes a decision falling within paragraph (a), within this paragraph or within paragraph (b) of sub-paragraph (1) of that paragraph;

but references in this Schedule to a relevant decision do not include references to a decision under paragraph 3 to revise a relevant decision."

63. Regulation 18(1) provides that an appeal must be brought within one month of the date of notification of the decision. By Regulation 18(3):

"Where the relevant authority

(a) revises a decision under paragraph 3 of Schedule 7 to the Act;

(b) following an application for a revision under regulation 4, does not revise; or

(c) supersedes a decision under paragraph 4 of Schedule 7 to the Act,

subject to paragraph (2), the period of one month shall begin to run from the date of notification of that revision or supersession, or following an application for a revision, the date the authority issues a notice that it is not revising the decision."

64. As with social security benefit appeals, therefore:

(1) An appeal following a decision to revise or not to revise is in form an appeal against the original decision (as either revised or not revised), not against the

revision decision (see Paragraph 6(1) of Schedule 7 to the 2000 Act, and the definition of "relevant decision" in Paragraph 1(2) of Schedule 7).

(2) The primary time limit for appealing runs from the date of notification of the decision under appeal (Regulation 18(1) of the 2001 Regulations).

(3) However, in the case of certain decisions to revise, and decisions not to revise "following an application for a revision under regulation 4", the time limit for appealing against the original decision is extended so as to run from the date of notification of the decision to revise or not to revise (Regulation 18(3) of the 2001 Regulations).

Article 14: Analysis and Conclusions

65. Mr Drabble's submission for the claimant was that Regulation 18(3)(b) of the 2001 Regulations, in extending the time for appealing where the local authority does not revise "following an application for a revision under regulation 4", does so in relation to a refusal of an application for any revision provided for by Regulation 4, including the case of official error provided for by Regulation 4(2)(a). He submitted that, whereas the equivalent provision in Regulation 31(2)(a) of the 1999 Regulations is expressly limited to an application for an "any grounds" revision under Regulation 3(1) or (3), Regulation 18(3)(b) of the 2001 Regulations is not expressly limited to refusal of an "any grounds" application under Regulation 4(1), but refers simply to "an application for a revision under regulation 4".

66. The Secretary of State, on the other hand, submitted that the only reference in Regulation 4 of the 2001 Regulations to the making of an application is that in Regulation 4(1), and therefore the reference in Regulation 18(3)(b) to "an application for revision under regulation 4" is a reference only to an application for an any grounds revision under Regulation 4(1), and not to refusal of a claimant's application for revision on the ground of official error.

67. If and in so far as the Secretary of State's submission was that a claimant has no right to apply for revision on the ground of official error under Regulation 4(2)(a) of the 2001 Regulations, we reject it, for the same reasons as we rejected the Secretary of State's equivalent submission in relation to the social security provisions (see Paragraph 39(1) above). Although Regulation 4(2)(a) does not make express provision for the possibility of application by the claimant for revision on this ground, the general provision in Paragraph 3(1) of Schedule 7 to the 2000 Act that a decision may be revised by the local authority "either on an application made for the purpose ...or on their own initiative" in our view applies, and so enables a claimant to apply for revision on the ground of official error.

68. This issue consequently turns upon the proper construction of Regulation 18(3)(b). We find this provision particularly difficult to construe. However, we are, on balance, persuaded that the Secretary of State is right in submitting that Regulation 18(3)(b) of the 2001 Regulations is referring only to an application for revision **for which Regulation 4 itself makes express provision** - i.e. to an application under Regulation 4(1). In our view, there are differences between the drafting of Regulation 18(3) of the 2001 Regulations and Regulation 31(2)(a) of the 1999 Regulations which indicate that the reference in Regulation 18(3)(b)

simply to an application under Regulation 4 (rather than to an application under Regulation 4(1)) does not have the effect for which the claimant contends.

69. We note that Regulation 18(3)(a) and (c) provides for the cases where the local authority does revise, or does supersede, a previous decision by referring to revision (or supersession, as the case may be) "under paragraph 3 [or paragraph 4, as the case may be] of Schedule 7 to the [2000] Act". In other words, the reference is to the provision of the primary legislation which authorises revision or supersession, and not to the relevant provisions of the 2001 Regulations (i.e. Regulation 4 or 7) which, under the authority of that primary legislation, specify the cases and circumstances in which a decision may be revised or superseded.

70. Regulation 18(3)(b), on the other hand, does not refer to applications for revision under the primary legislation, but rather to applications under Regulation 4. We consider this difference from sub-paragraphs (a) and (c) to be important: and take the contrast between Regulation 18(3)(a) and (c) on the one hand, and Regulation 18(3)(b) on the other, to indicate that, when Regulation 18(3)(b) refers to "an application for a revision under Regulation 4", it is not intending to refer to any application which (by virtue of the general provision in Paragraph 3 of Schedule 7 authorising applications) may be made for one of the heads of revision specified in Regulation 4, but rather only to applications for which Regulation 4 itself makes express provision. The only express provision in Regulation 4 for the making of an application is that in Regulation 4(1).

71. Some support for that conclusion may perhaps be drawn from the fact that Regulation 5(1) of the 2001 Regulations provides for circumstances in which there is to be an extension of "the time limit for making an application for a revision specified in regulation 4". In that context it is clear that the reference must be to Regulation 4(1), and only to Regulation 4(1), because that is the only provision in Regulation 4 which contains a time limit for making an application for revision. However, the draftsman considered it sufficient to refer to Regulation 4, when he could have referred more specifically to the time limit specified in Regulation 4(1). The equivalent provision for extension of time in Regulation 4(1) of the 1999 Regulations does, by contrast, refer to the time limit specified in Regulation 3(1) or (3) of the 1999 Regulations.

72. Some force may be taken from this support by the fact that Regulation 10A(3), which provides in effect for the time limits for applying to revise and for appealing against a decision which has been corrected for accidental error to run from the date of notice to the claimant of the correction, does refer specifically to an application made under Regulation 4(1)(a). However, that provision was inserted only with effect from 20 May 2002 (i.e. after the relevant date in this case), but even on the footing that it could properly be taken into account in construing Regulation 18(3)(b) in the present case, it would not alter our conclusion.

73. For these reasons, we do not consider that there is any discrimination within the meaning of Article 14 against someone in the position of the claimant (seeking revision for official error, in a social security context) compared with someone seeing revision on a similar ground in a housing benefit context. Neither category of person in our view has a right of appeal against a refusal of an application to revise for official error made more than 13 months after the original decision.

Conclusion

74. In our judgment, therefore, the absence of a right of appeal following a decision refusing to revise a previous decision for official error (at any rate where the refusal to revise is more than 13 months after the date of the original decision) does not constitute a breach of a claimant's rights under either Article 6 or Article 14 of the Convention.

75. It is therefore unnecessary for us to consider what the position would have been if we had reached the opposite conclusion. However, we record that Mr Drabble and Miss Lieven both submitted that the consequence would have been that the claimant would have to be afforded a right of appeal, because an appeal tribunal (or legally qualified panel member of the appeal tribunal) which refused to admit for determination a claimant's appeal against the original decision on the ground that the appeal was out of time would be acting incompatibly with a Convention right, and therefore unlawfully (by virtue of Section 6 of the Human Rights Act 1998).

Our Decision on this Appeal

76. The claimant's contention that the tribunal erred in law in failing to consider whether the decision awarding income support made on 20 February 1998 should be revised for official error was based solely on the contentions founded on Convention rights, which we have rejected.

77. It was not submitted on behalf of the claimant that the tribunal was, in the appeal against the supersession decision which was probably before it, in any event entitled to revise the decision of 20 February 1998 for official error. That was because it was argued on behalf of the claimant, as it was on behalf of the Secretary of State, that on appeal against a decision under Section 10 of the 1998 Act, an appeal tribunal has no power to substitute a decision under Section 9 of that Act. In our decision dated 21 January 2004 in respect of the other four appeals which were heard at the same time as this (CIB/4751/2002 and others), we rejected that proposition (see Paragraph 55, under Issue 1A).

78. However, in the present case the appeal tribunal had before it an appeal against a Section 10 decision in circumstances in which there had been an express refusal to revise by the Secretary of State which (as we have held) was not capable of being appealed, and which by Section 17 of the 1998 Act was "final". It seems to us that, in those circumstances, if an appeal tribunal were permitted to substitute a revision decision for the supersession decision, that would in effect be to permit by the back door what is not permitted by the front door, namely an appeal against the refusal to revise. This is another instance where an express statutory limitation on the powers of an appeal tribunal cuts into the general principle set out in Paragraph 55 of CIB/4751/2002 and others (see Paragraph 12 of that decision). We do not therefore consider that, in dealing with the appeal against the supersession decision, the tribunal was entitled to consider whether the decision of 20 February 1998 should have been revised for official error. It would have been a different matter if the Secretary of State had not made a decision (whether express or implied) on the issue of revision for official error.

79. In our judgment the tribunal should in its statement of reasons have dealt expressly with the question whether there was before it an appeal against the decision of 12 April 2002

refusing to revise for official error the decision of 20 February 1998. However, that error of law made no difference to the outcome, because we have held that there was no such appeal properly before it. It follows that we also have no jurisdiction to decide whether the decision of 20 February 1998 should be revised for official error. We therefore need not consider the Secretary of State's contention that a further reason why the claimant had no case for revision for official error was that he contributed to the error by indicating on his claim form that he did not pay service charges, and so the case fell outside the definition of "official error" in Regulation 1(3) of the 1999 Regulations.

80. The Secretary of State submitted, and we accept, that the tribunal's decision was also technically wrong in law because it upheld the conclusion of the decision maker on 12 April 2002 that the ground for supersession was that there had been a relevant change of circumstances, whereas the correct ground was that the decision of 20 February 1998 was made in ignorance of a material fact, namely that the claimant was paying the service charge.

81. We accept the Secretary of State's further submission that, in view of that error of law, we should set aside the tribunal's decision and substitute a decision superseding the decision of 20 February 1998 on the ground of mistake as to a material fact. The supersession should take effect from 14 March 2002, namely the date of the application for supersession (see the primary rule in Section 10(5) of the 1998 Act, which is not varied by any of the provisions of Regulation 7 of the 1999 Regulations). Our decision is therefore little different in effect from that made by the Secretary of State on 12 April 2002, and the claimant's appeal (the purpose of which was to obtain increased income support back to 1998 by way of a revision) has in substance failed.

82. Our decision is therefore that the decision of the Wakefield Appeal Tribunal made on 24 October 2002 was erroneous in law and we set it aside. In exercise of the power under Section 14(8)(a)(i) of the 1998 Act, we make the decision which the tribunal should in our judgment have made, namely:

The decision of the Secretary of State made on 12 April 2002 in respect of supersession is varied by the substitution for it of the following decision:

"The decision made on 20 February 1998 awarding income support to the claimant is superseded with effect from 14 March 2002 under Regulation 6(2)(b)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 on the ground that that decision was made in ignorance of a material fact, namely the payment by the claimant of a monthly service charge in respect of a communal boiler. The weekly

amount of income support payable to the Claimant from 14 March 2002, taking into account the service charge, was £145.87."

(Signed) **His Honour Judge Gary Hickinbottom**
Chief Commissioner

(Signed) **Mr Commissioner Mesher**

(Signed) **Mr Commissioner Turnbull**

10 March 2004