FAMILY CREDIT

Family Credit—"remunerative work"—Salvation Army Officers Commissioners—no power to make order for costs or expenses.

The claimant and her husband were both officers of the Salvation Army for whom they worked for 40 hours a week. They were provided with free accommodation and living allowances. On a review of the decision awarding family credit, the adjudication officer decided that the weekly income of both the claimant and her partner should include an amount of £12 in respect of their free accommodation. The claimant was therefore not entitled to family credit The tribunal in allowing her appeal decided that Regulation 19(3) of the Family Credit (General) Regulations 1987 did not require £12 to be taken into account in respect of both of them and awarded family credit of £7.98 per week from 7.6.88. The adjudication officer appealed to the Commissioner initially in relation to the operation of Regulation 19(3) but, in response to the claimant's observations, substituted as the leading grounds of appeal the issue of engagement and normal engagement in remunerative work. At the hearing of the appeal, Counsel for the claimant requested the Commissioner to make an order that the legal costs of the claimant be reimbursed by the Secretary of State on the grounds that the case concerned a matter of public importance

Held that:

a. First decision

1. Section 93 of the Social Security Act 1975 does not apply for family credit purposes in determining whether a person is an employed earner or self-employed earner within the meaning of Section 2 of the Social Security Act 1975, it is for the Statutory Authorities including the Commissioner to determine such questions (paragraph 15);

2. a Commissioner is not bound by an administrative recognition by the Secretary of State of a person as being an employed earner (paragraph 16);

3. despite the special relationship between the Salvation Army and its officers, the claimant and her husband were "engaged in remunerative work". Remuneration was paid by the Salvation Army to its officers for the substantial work they did and the payments were not just a maintenance grant (paragraph 17);

4. the test of whether work is remunerative work, namely whether it is "work for which payment is made or which is done in expectation of payment" (Regulation 4(1) of the 1987 Regulations), does not mean the same as "entitlement" to payment (paragraph 18);

5. where a married couple are living in one house only, which is provided free of charge, it cannot be correct to ascribe to them under Regulation 19(3) an income which would normally be attributable to them only if they had 2 separate houses The context requires that the wider meaning of "claimant" normally required under Regulation 10(1) should not apply (paragraph 27).

b. Supplemental decision

1 the Social Security Commissioner has no power, statutory or otherwise, to make an order that one party should reimburse another party for the costs and expenses, legal or otherwise, incurred in the making of, or being respondent to, an appeal to the Commissoner (paragraph 4);

2. there can be no reasonable implication as part of the Commissioner's statutory powers that he should compensate one party in favour of the other by an award of costs (paragraph 20).

1. I dismiss the adjudication officer's appeal against the decision of the social security appeal tribunal dated 4 April 1989 as that decision is not erroneous in law: Social Security Act 1975, section 101 (as amended).

2. This is an appeal by the adjudication officer against the decision of a social security appeal tribunal dated 4 April 1989 which allowed the appeal

of the claimant (a married woman aged 39, living with her husband aged 42 and their two children aged 10 and 7 years respectively). Both the claimant and her husband are full-time Salvation Army Officers. The appeal is against the decision of a local adjudication officer issued on 28 September 1988. That officer's decision on review held that the claimant was not entitled to family credit for the period from and including 7 June 1988 because her income was not equal to or less than the amount of family credit appropriate to the family. Effectively that is because, in ascertaining the claimant's income, the local adjudication officer applied twice over regulation 19(3) of the Family Credit (General) Regulations 1987 (S.I. 1987 No. 1973—cited below), by attributing the "notional" sum of £12 per week for living accommodation provided free to the claimant by reason of her "employment" by the Salvation Army, once in relation to herself and once in relation to her husband, deeming therefore the family to have a "notional" income, not of £12 per week but of £24 per week. I deal in detail with that issue below. On the appeal of the adjudication officer against the decision of the social security appeal tribunal, which held that only one sum of £12 per week should be treated as income in relation to the free accommodation, the adjudication officer has raised a more fundamental point relating to the nature of payments to their officers by the Salvation Army (see below).

3. The appeal was the subject of an oral hearing before me on 4 January 1990 at which the claimant and her husband were present, together with Captain P. Smith, the Legal Officer of the Salvation Army. They were represented by Mr. A. Wilkie of Counsel. The adjudication officer was represented by Mr. M. Parke of the Office of the Solicitor to the Departments of Health and Social Security. The Secretary of State, who took part in the proceedings before the Commissioner, was represented by Mr. A. Popperwell of Counsel. I am indebted to all those persons for their assistance in this particular appeal and at the hearing of it.

4. It is convenient to take first the more fundamental issue to which I refer above and which was taken by the adjudication officer, not on his original appeal but at a later stage during the appeal. It was agreed on all sides that the adjudication officer's having done this was a proper course of action and that no element of surprise or prejudice had been caused to the claimant. The claimant has however asked me to consider the making of an order for costs against the Secretary of State on the ground that this case concerns a matter of public importance. I shall however deal with this matter in a separate and distinct decision and I say no more about it here. My separate decision will deal with the question whether a Commissioner has any inherent power to make an order that one party should pay another party's costs or expenses, the claimant contending that there is such a power.

5. The more fundamental issue to which I allude was first raised in a written submission dated 21 September 1989 by the adjudication officer. It relates to the decision of the Court of Appeal in *Rogers v. Booth* [1937] 2 All E.R. 751 (concerning the non-contractual relationship of Officers of the Salvation Army to the Army) and to the provision of section 20(5)(b) of the Social Security Act 1986 that it is a pre-condition of entitlement to family credit that the claimant or his/her partner shall be "engaged and normally engaged in remunerative work".

6. Section 20(12)(c) of the Social Security Act 1986 enables the making of regulations "as to what is or is not to be treated as remunerative work or as employment". In pursuance of that power, regulation 4 of the Family Credit (General) Regulations 1987 (S.I. 1987 No.1973), hereinafter referred to as "the 1987 Regulations" provides, so far as is relevant, as follows,

"*Remunerative work*

(1) Subject to the following provisions of this regulation, for the purposes of section 20(5)(b) of the Act (Conditions of Entitlement to Family Credit) and these Regulations, remunerative work is work in which a person is engaged, or where his hours of work fluctuate, is engaged on average, for not less than 24 hours a week, *being work for which payment is made or which is done in expectation of payment.*

(2) [Relates to calculation of number of hours worked—not in issue in this case].

(3) A person shall be treated as engaged in work during any period during which he is absent from work if the absence is by reason of a recognised, customary or other holiday." (My emphasis)

7. I must now deal with the Court of Appeal's decision in *Rogers v. Booth* [1937] 2 All E.R. 751 (see above). The headnote to the report of that case reads as follows,

"The Appellant, who was an officer in the Salvation Army, when working at the Army's hall fell over a bucket, and sustained injuries. She claimed compensation under the Workmen's Compensation Act:—

HELD: Upon the construction of the 'orders and regulations for officers of the Salvation Army' and of the form which set out the appellant's rights and duties, and which was signed by the appellant when she became an officer of the Salvation Army, the relationship between the appellant and the General of the Salvation Army was a purely spiritual, and not a contractual, one, and the fact that the applicant received money for her maintenance according to a scale and that deductions had been made therefrom for a pension fund did not affect that relationship. The appellant was therefore not a 'workman' within the Workmen's Compensation Act, 1925, s.3, and was not entitled to compensation under that Act."

It should be noted that under section 3(1) of the Workmen's Compensation Act 1925 a "workman" is defined as meaning, "any person who has entered into or works under a contract of service or apprenticeship with an employer".

8. It has been agreed by all parties that the documentary and other circumstances of the present claimant and her husband were exactly the same as those of the officer of the Salvation Army in the *Rogers* case. Mr. Parke contended that consequently neither the claimant nor her husband was "engaged in remunerative work" within section 20(5)(b) of the 1986 Act and regulation 4(1) of the 1987 Regulations. Mr. Parke drew attention to a number of excerpts cited in the Court of Appeal's decision in *Rogers v. Booth* from the "Orders and Regulations for Officers in the Salvation Army". These include the following statements:—

"Every officer becomes such upon the distinct understanding that no salary or allowance is guaranteed to him."

"The officer is pledged to do his duty, with or without pay; he works from love to God and souls, whether he receives little or much."

"The Army does not recognise the payment of salary in the ordinary sense; that is, the Army neither aims at paying nor professes to pay its officers an amount equal to the value of their work; but rather to supply them with sufficient for their actual needs, in view of the fact that, having devoted themselves to full-time salvation service, they are thereby prevented from otherwise earning a livelihood."

9. It appears from the *Rogers* decision that each officer has to sign that these regulations etc. are understood and in particular a declaration in the following terms,

"Do you understand and agree that, as an intending officer, you are giving yourself to the work of the Salvation Army, that you are not 'employed', that you have no right to any 'wages', that there is no contract of service and that whatever your future rank or service may be, your position, so long as you remain in the Army, will be that of a voluntary co-operator in the Army's work for God, without claim to any other award than the approval of God and the doing of the work itself will bring you?"

10. Mr. Parke drew attention to those quotations and contended that they were completely incompatible with the claimant or her husband being "normally engaged in remunerative work". He further drew attention to two reported Commissioners decisions on the meaning of "remunerative work" under the Family Income Supplement Scheme which was the predecessor of the Family Credit Scheme. Those decisions are R(FIS) 1/83 (relating to a claimant receiving training under the Youth Opportunities Programme) and R(FIS) 1/86 (relating to a claimant who was a mature student on a degree course at a University). In both those decisions the Commissioners held that the claimant could not claim family income supplement because he or she was not "engaged in . . . remunerative full-time work" (see section 1(1)(a) of the Family Income Supplements Act 1970).

11. Mr. Parke stressed that in order to calculate the amount of any family credit due it was necessary to consider "earnings of employed earners" (heading of regulation 19 of the 1987 Regulations) and "earnings of self-employed earners" (heading of regulation 21 of the 1987 Regulations). He contended that, as the *Rogers* case had decided that a Salvation Army officer had no contract of employment with the Army, it was not possible to operate the Family Credit Scheme in relation to the claimant and her husband because they had no "earnings". He submitted that that must mean that, where regulation 4(1) of the 1987 Regulations referred to "work for which payment is made or which is done in expectation of payment", that "work" must be work as an employed earner or a self-employed earner. I deal with these contentions below.

12. First, however, I should note that Mr. Popperwell on behalf of the Secretary of State and Mr. Wilkie on behalf of the claimant concurred in their arguments to the effect that Mr. Parke's submissions were erroneous. They both submitted that in fact a Salvation Army officer, despite the absence of contract of employment, can be said to be "engaged in remunerative work" (1986 Act, section 20(5)(b)). They referred to correspondence between Captain Smith the legal officer of the Salvation Army and the Secretary of State which shows that the Secretary of State has accepted (though there does not seem to have been a formal decision) that for social security contributions purposes the claimant and indeed her husband are treated as self-employed earners within the meaning of section 2(1)(b) of the Social Security Act 1975 but by virtue of regulation 2(1) of and paragraph 5 of Schedule 1 to the Social Security (Categorisation of Earners) Regulations 1978 [S.I. 1978 No. 1689] they are regarded as being employed earners in respect of whom Class 1 contributions are payable.

13. Mr. Popperwell also pointed out that by virtue of regulation 2(2) of the Categorisation of Earners Regulations the claimant and her husband were also regarded for the purposes of the 1975 Act as being "gainfully employed". I ought perhaps to mention that paragraph 5 of Schedule 1 to the Categorisation of Earners Regulations refers to "employment as a

minister of religion, not being employment under a contract of service or in an office with emoluments chargeable to income tax under Schedule E" but excepts persons "whose remuneration in respect of that employment (disregarding any payment in kind) does not consist wholly or mainly of stipend or salary".

14. On the general issue Mr. Popperwell drew attention to the fact that the enabling power in section 20(12)(c) of the Social Security Act 1986 contrasts "employment" with "remunerative work" and contended that regulations 4(3) of the 1987 Regulations (relating to holidays—see above) might be otiose if in fact what was meant by "remunerative work" was the same as work under a contract of employment. (cf. regulation 5(3) of the 1987 regulations—payments by charities of *expenses* to 'workers' for the charity do not make such workers "engaged in remunerative work".).

15. All parties were agreed that the structure of the family credit legislation is such that, if it is necessary for there to be determined whether or not the claimant and her husband were employed earners or self-employed earners within the meaning of section 2 of the Social Security Act 1975, then for *family credit purposes* section 93 of the Social Security Act 1975 (reservation of certain questions to the Secretary of State for determination), certainly in so far as it relates to the questions of categories of earners (section 93(1)(a)), does not apply and it is for the statutory authorities including the Commissioner to determine such questions. Reference was made to section 52(2) of the Social Security Act 1986 which states that questions for determination by the Secretary of State under section 93(1) of the Social Security Act 1975 shall include certain questions specified in Part II of Schedule 5 to the 1986 Act but the questions therein set out do not relate to whether or not a claimant is an employed earner or a self-employed earner.

16. In my view *all* issues in this appeal are for determination by the Commissioner and no question of a reference to the Secretary of State for decision arises. Moreover I accept Mr. Parke's submission to me that I am not bound, in determining those issues by the administrative recognition by the Secretary of State of the claimant and her husband as being employed earners (see paragraph 12 above) nor would I be bound by any Secretary of State's decision on the point eg. as to contributions. I must arrive at my own conclusion on the point but I naturally pay heed to what has been done by the Secretary of State within the area that is within his jurisdiction.

17. In my judgment, despite the special relationship between Officers of the Salvation Army and the Salvation Army itself (see above), the claimant and her husband have demonstrated that they were "engaged in remunerative work" within the meaning of section 20(5)(b) of the Social Security Act 1986 and regulation 4 of the 1987 Regulations. They were in fact paid, taking the Salvation Army's own figures, in the case of the claimant approximately £35 per week gross and in the case of the claimant's husband approximately £55 per week gross though part of those sums represented a small monthly allowance for fuel and heating costs. Moreover the claimant and her husband lived in accommodation provided free by the Salvation Army. They were under a duty to carry out full-time the duties of a Salvation Army officer (which are so well known as to need no elaboration). The claimant did explain in answer to question 10 on the form of claim that she could not specify the hours on duty in detail because, as she put it, she and her husband were "shown as 'on call' because as ministers of religion it is difficult to work out actual hours worked". The Salvation Army stated, in response to a departmental enquiry, that the claimant and her husband each worked 40 hours per week.

18. There can in my view be no doubt that the onerous duties of a Salvation Army officer and the extent of them do constitute "work" within the meaning of the legislation (see above) and the real question is whether it is "remunerative" work. For that purpose it must be "work for which payment is made or which is done in expectation of payment" (1987 Regulations, regulation 4(1)). I accept Mr. Popperwell's submission that this does not mean the same as "entitlement" to payment and I reject Mr. Parke's submission to the contrary. I also accept Mr. Wilkie's point that a Salvation Army Officer's duties as prescribed in the Orders and Regulations cited in the *Rogers* case do show the very full commitment that Officers have to make.

19. In paragraph 9 of R(FIS) 1/86 the Commissioner (in fact myself) dealt with this question of what is meant by "remunerative" and quoted the following definition from the Shorter Oxford English Dictionary. The word "remunerative" derives from the verb "remunerate" which is given the following meanings by the Oxford English Dictionary, "to repay, requite, make some return for (services, etc)" and "to reward (a person); to pay (a person) for services rendered or work done". I then went on to hold that a grant made to a mature university student in that case could not be regarded as "remuneration" within the meaning of that definition and added, "the grant from the local authority was intended as a contribution towards the maintenance costs of the claimant and his family while he was at university and in no sense constituted a '*quid pro quo*' for the claimant's work on his course . .".

20. Mr. Parke submitted that in this case there was no "*quid pro quo*" from the Salvation Army to the claimant or vice versa. I consider that the facts show otherwise. The reality of the matter is that remuneration within the above definitions is in fact paid by the Salvation Army to its officers for the substantial work they do and the payments are not just a maintenance grant. The *Rogers* case is of course distinguishable on its facts in that section 3(1) of the Workmen's Compensation Act 1925 required a "workman" to have entered into or worked under a contract of service. I note that the Orders and Regulations for Officers of the Salvation Army, as cited in the *Rogers* case provide "the officer is pledged to do his duty, with or without *pay*" (my emphasis). The Orders also provide that "the Army neither aims at paying nor professes to pay its officers an amount equal to the value of their work; but rather to supply them with sufficient for their actual needs, in view of the fact, that having devoted themselves to full-time Salvation service, they are thereby prevented from otherwise earning a livelihood". In my judgment the reference to "actual needs" goes beyond mere maintenance, such as would be paid to a student, and refers to the fact that they must receive something in the nature of remuneration in return for their having devoted themselves to full-time Salvation service.

21. It follows from the above that I do not in fact have to decide whether or not the claimant and her husband were employed earners or self-employed earners within the meaning of section 2 of the Social Security Act 1975. However, when it comes to calculating the actual entitlement of family credit it would appear to me that it is quite correct for the tribunal to have adopted the reasoning of the local adjudication officer that what was received by the claimant and her husband from the Salvation Army constituted earnings within the meaning of regulations 14 and 15 of the 1987 Regulations. Regulation 2(1) of the 1987 Regulations provides that "employed earner" and "self-employed earner" must be construed in accordance with the definitions in section 2 of the Social Security Act 1975 and the Secretary of State has already accepted that the claimants came within those definitions (see above). It is perfectly proper for the tribunal to have decided likewise.

22. Having therefore decided that the claimant and her husband satisfied the primary requirement that they were "engaged in remunerative work", I must then consider the other question on which the adjudication officer's appeal was first brought, namely whether the claimant is to be regarded as having £24 per week notionally in relation to the free accommodation provided by the Salvation Army for her and her husband or whether it should only be £12 per week. That depends on a construction of regulation 19(3) of the 1987 Regulations which provides as follows,

"*Earnings of employed earners*

19. (1)-(2)

(3) Where living accommodation is provided for a claimant by reason of his employment, the claimant shall be treated as being in receipt of weekly earnings of an amount equal to—

(a) where no charges made in respect of the provision of that accommodation, £12;

(b) where a charge is made and that weekly charge is less than £12, the amount of the difference,

except that where the claimant satisfies the adjudication officer that the weekly value to him of that accommodation is an amount less than the amount in sub-paragraph (a) or (b), as the case may be, he shall be treated as being in receipt of that lesser value."

23. No allegation is made in this case that the accommodation is worth less than £12 per week and the question is therefore whether the claimant shall be regarded as having a notional weekly earnings of £12 per week or £24 per week. The contention of Mr. Parke that it should be £24 per week derives from the provision of regulation 10 of the 1987 Regulations which, so far as is relevant, provides as follows,

"*Calculation of income and capital of members of claimant's family*

. . .

10. (1) The income and capital of a claimant's partner . . . which by virtue of section 22(5) of the [Social Security Act 1986] is to be treated as income and capital of the claimant, shall be calculated or estimated in accordance with the following provision of this Part in like manner as for the claimant; and any reference to the 'claimant' shall, except where the context otherwise requires be construed, for the purposes of this Part, as if it were a reference to his partner . . ."

24. Section 22(5) of the Social Security Act 1986 provides as follows,

"22. (5) Where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of that person."

There is therefore an aggregation of income, a familiar principle.

25. Mr. Parke argued that, as the claimant's husband's income had to be aggregated with hers, the £12 per week accommodation provided for him must be aggregated with her income making £24 in all for accommodation. If that were so, then the family's income overall would be such as to negate entitlement to family credit. If however only £12 per week were to be regarded as income from this source then the decision of the tribunal (subject to my observations as to the figures—see below) would be correct and family credit would be payable to the claimant for the 26 week period from 7 June

1988 to 5 December 1988. I note at this point that the tribunal in fact found the weekly amount of family credit to be £7.98 per week but the original adjudication officer's award before revision was for £21.31 per week. Although I have upheld the decision of the tribunal, it seems there must have been some mistake as to the amount but this is a matter which I would have thought could be rectified by the local adjudication officer as it is apparent that the tribunal intended in principle to restore the original award of the local adjudication officer. If any difficulty arises in relation to this matter it can be referred to me for supplemental decision.

26. Mr. Popperwell and Mr. Wilkie concurred in submitting to me that regulation 19(3) did not in fact provide for such a result and that only one £12 per week was to be attributed to the claimant as the income of herself and her husband. An argument by Captain Smith in earlier correspondence on behalf of the claimants that regulation 19(3) did not apply at all because it provided only for circumstances where "living accommodation is provided for a claimant by reason of his *employment*" was abandoned by Mr. Wilkie at the hearing before me. In view of the wide definition of "employment" in eg. Schedule 20 to the Social Security Act 1975 I consider that that abandonment was correct.

27. However in my judgment commonsense and a legal interpretation both require that in circumstances such as this where a married couple are living in one house only, which is provided free of charge, it cannot be correct to ascribe to them an income which would normally be attributable to them only if they had two separate houses. It so happens in the present case that the claimant and her husband possibly had two separate employments with the Army (though it is not entirely clear) and that fact was used by Mr. Parke in support of his argument that they therefore must be regarded as each having a separate £12 per week for the living accommodation provided free. However I cannot consider that to be so, nor was it my view the intention of the legislation. I note that regulation 10(1) of the 1987 Regulations provides that 'aggregation' is to occur "except where the context otherwise requires". This is in my view an obvious case where the context does otherwise require and that only one £12 per week is to be attributed to the claimant.

28. It therefore follows that subject to the point that I have mentioned about the actual calculation of the family credit (which should now be looked at as a matter of urgency by the local adjudication officer), the decision of the Social Security Appeal tribunal was correct in law. This is so even though of course the point as to the nature of the Salvation Army Officer's relationship with the army (the *Rogers v. Booth* point) was not raised before them but it was of course assumed by the tribunal that the claimant was engaged in remunerative work. Mr. Parke suggested that I ought to consider remitting this case to another social security appeal tribunal for determination of certain problems as to the exact net income and earnings of the claimant and her husband. However I do not consider that to be necessary in this case. I have made the necessary declaration of principle above. The tribunal's decision, subject to the question of the calculation, was correct and I have already indicated that the local adjudication officer should now deal with the actual calculation and implement my decision. I would reiterate that if any difficulty arises it can be referred back to me for supplemental decision.

Commissioner's File No: CFC 011/1989

(Signed) M. J. Goodman
Commissioner

CORRIGENDA

This is the Supplemental decision as referred to in R(FC) 2/90. It should have been printed and distributed with R(FC) 2/90 decision.

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1. This decision is supplemental to a decision by me on this file dated 18 January 1990 in which I dismissed the adjudication officer's appeal against a decision of the social security appeal tribunal dated 4 April 1989 in favour of the claimant, a married woman living with her husband. Both the claimant and her husband were full-time Salvation Army Officers. The appeal concerned the question of whether or not the claimant was entitled to family credit and if so the amount thereof.

2. The appeal was the subject of an oral hearing before me on 4 January 1990 at which the claimant and her husband were present, together with Captain P. Smith, the Legal Officer of the Salvation Army. The Army was in fact financing the claimant's appeal, as the issue was of importance to Army Officers generally. The claimant and her husband were represented by Mr. A. Wilkie of Counsel. The adjudication officer was represented by Mr. M. Parke of the Office of the Solicitor to the Departments of Health and Social Security. The Secretary of State, who took part in the proceedings before the Commissioner, was represented by Mr. A. Popperwell of Counsel.

3. At that hearing, Mr. Popperwell reiterated a request made in earlier correspondence (see below) for the Commissioner to make an order that the legal costs of the claimant be reimbursed to her by the Secretary of State on the ground that the case concerned a matter of public importance. At the hearing and in paragraph 4 of my decision of 18 January 1990 I reserved this point and in a direction dated 5 January 1990 I indicated that I would give a separate decision on this issue of costs and requested further written submissions. There have been two sets of these and the relevant parts are set out below.

4. My decision on the issue of costs is that, for the detailed reasons set out below, the Social Security Commissioner has no power statutory or otherwise, to make an order that one party should reimburse another party for the costs and expenses, legal or otherwise, incurred in the making of, or being respondent to, an appeal to the Commissioner. The fact that nowhere in the Social Security Acts nor in the subordinate legislation, in particular the Social Security Commissioners Procedure Regulations 1987 [S.I. 1987 No. 214], is there any enforcement machinery for the payment of an order for costs is not of course conclusive. By comparison, regulation 18 of the 1987 Regulations gives the Commissioner power to make an order summoning a person to attend as a witness at a hearing before a Commissioner but there is no enforcement machinery for such a summons (save for a possible question of contempt).

5. Before I give reasons for my decision, I must set out the relevant parts of the correspondence and submissions. By letter dated 22 December 1989 the Solicitors acting for the Salvation Army and for the claimant stated,

> "We wish to take this opportunity of raising another matter for the Commissioner's attention, namely the matter of costs. If the Commissioner finds in favour of the Claimant, we would ask him in addition to make an order for costs in favour of the Claimant, exercising the powers reserved by Regulation 27(5) of the Social Security Commissioners Regulations 1987."

6. Before I quote further from that letter, I should set out the relevant provisions of regulation 27(5) of the 1987 Regulations. Regulation 27 deals with "general powers of a Commissioner" and regulation 27(5) provides that, "Nothing in these Regulations shall be construed as derogating from any inherent or other power which is exercisable apart from these Regulations." In my judgment and for the reasons given below there is no "inherent or other power" for a Commissioner to make an order for costs.

7. To continue with the letter, the Solicitors add,

> "Costs have been incurred by, and on behalf of, the Claimant partly in the natural course of the Appeal to the Commissioner because that Appeal included a submission dated 21 September, 1989 by the Adjudication Officer on matters outside the scope of his original Application for Leave to Appeal. These are matters of some complexity on which legal advice was essential, and indeed, the Adjudication Officer suggested that the Claimant might wish to seek legal representation in the light of this later submission by him. The subsequent legal costs were thus the result of the direction in which the Adjudication Officer decided to take this Appeal. Such costs will, of course, continue to be incurred until the case is settled. We submit that in the circumstances neither the Claimant nor the Salvation Army (who, in practice, failing an order for costs, would pay for the legal advice provided to the Claimant) should be required to bear these costs and that an order to that effect should be made."

8. On 22 January 1990 the adjudication officer now concerned, in compliance with my direction of 5 January 1990, made the following submission,

> "It is the adjudication officer's considered and respectful view that there is no power for the Commissioner to make an order for costs in favour of the claimant or any other party to these proceedings. The basis for this proposition is that the Commissioner is a creature of Statute (section 97(3) and (4) of, and Schedule 10 to the Social Security Act 1975) and that there is no express power for costs to be awarded by a Commissioner. It is submitted that if it had been the intention of Parliament to permit Commissioners to make awards of costs, specific provision would have been made for this, including funds out of which such awards could be made and enforcement procedures. In the absence of such provisions, it is suggested that no power exists. In particular, it is not accepted that Regulation 27(5) of the Social Security Commissioners Regulations 1987, authorises the payment of costs: that Regulation is not made under any power contained in any statute which permits the making of subordinate legislation authorising the payment of costs. An example of an express power to award costs contained in the Social Security legislation is section 94(8) of the Social Security Act 1975. This enables the High Court or, in Scotland, the Court of Session, to order the Secretary of State to pay the costs (or, in Scotland expenses) of any other person on an appeal or reference from a determination by the Secretary of State of a question under Section 93(1) of the Social Security Act 1975. There is no such express provision for costs in relation to the powers of a Commissioner. Even the Court has no jurisdiction to make an order for costs in respect of matters which are not incidental to Court proceedings which the Court lacks jurisdiction to deal with, e.g. an inquiry before the Secretary of State under Section 64(1) of the National Insurance Act 1965 (see now Section 93 of the Social Security Act 1975) as to whether an employer owed National Insurance contributions in respect of certain employees. (See

Department of Health and Social Security v *Envoy Farmers Ltd* [1976] 1 WLR 1018.) For the same reasoning it is submitted that the Commissioner has no power, in the absence of express enabling provisions, to award costs in proceedings before him."

9. However, in my judgment the case of *Department of Health and Social Security* v *Envoy Farmers Ltd*, cited by the adjudication officer, does not really deal with the point since all that the case is saying in effect is that the court's undoubted power to award costs can extend only to costs incurred in the course of the court proceedings themselves. The case does not deal with the general issue of whether or not there is power to make an award of costs.

10. On 31 January 1990 the Solicitor to the DHSS indicated that he had seen the submission dated 22 January 1990 on behalf of the Secretary of State, accepted it in its entirety, and had no further points he wished to make.

11. On 2 February 1990 the claimant's Solicitors responded to my direction of 5 January 1990, in the following terms,

"We write to inform you that, after further research and consideration by our Counsel, he has advised, and our clients have accepted his advice, that there is no tenable basis for our submission that the Commissioner has the power to award costs to [the claimant] in respect of her successful resistance of the Adjudication Officer's appeal against the Social Security Appeal Tribunal's decision in her favour on the issues of her entitlement to claim Family Credit and the extent of that entitlement. Accordingly, our clients have instructed us to withdraw that submission. The reasons for our reaching this conclusion are as follows. Paragraph 27(5) of the Social Security Commissioners Procedure Regulations 1987 (S.I. 1987 No. 214) provides that:—

> 'Nothing in these Regulations shall be construed as derogating from any inherent or other power which is exercisable apart from these Regulations'.

Thus, the Regulations assume that the Commissioners do have powers which are 'inherent' as distinct from powers deriving from these particular Regulations or 'other' powers deriving from other Acts or Regulations. Research has revealed that the powers of the courts of common law and Equity to make awards of costs do not derive from the courts' inherent jurisdiction or powers but rather are rooted in statute (the Statute of Gloucester [6 Edw.1, c.1] and the Statute of the 17th of Richard the Second, Chapter 6, in the case of the Courts of Equity). These conclusions are derived from the relevant chapters in Beames, Doctrine of Costs 1822 and Marshall on Costs 1860 and we enclose photocopies of these chapters for your information. Accordingly we have been constrained to advise our clients that, whatever other inherent powers the Commissioners may enjoy, the power to award costs is not and never has been a power inherent to any judicial body and accordingly it is not possible for us to argue, by way of analogy, that it is so included as one of the Commissioner's inherent powers. We are instructed by our clients to express their severe misgivings about this, apparent, hiatus in the power to award costs. As this case has amply demonstrated issues do arise for determination by the Commissioners, from time to time, which require the application of legal skills and analysis and where legal representation is necessary both for the assistance of the applicant and the Commissioner. In the present case [the claimant] has been fortunate enough to be backed by the Salvation Army and so has been represented. Most applicants will not be so

fortunate, and so, unless there is some power available to Commissioners to make an award of costs in appropriate cases, many applicants will be unable to be legally represented in cases where, in the interests of justice and in the interests of the proper development of a body of case law, such representation would be highly desirable, if not essential."

12. That submission does not in terms withdraw the application for costs and in any event as the application has initially been made and the matter placed before the Commissioner it is part of my inquisitorial duty to give a fully reasoned decision on this subject. Secondly so far as the last paragraph of the submission is concerned, i.e. as to the "hiatus in the power to award costs", this is not of course a matter for the Commissioner, who is an independent judicial authority, but may of course be a matter of concern elsewhere.

13. With their submission, the claimant's Solicitors have in fact submitted photocopies of the relevant extracts from the 19th Century works cited on the law of costs. Those extracts do indeed bear the construction put upon them. In particular Marshall on the Law of Costs, chapter 1, states as follows,

"*Costs first given to plaintiffs by the Statute of Gloucester*

No costs are recoverable by the common law. But before they were given by statute [the losing party] was not liable for the payment of any costs of suit, at least under that title. In reality, however, costs were always considered and included in the quantum of damages in such actions where damages are given. But inasmuch as the damages given proved frequently inadequate to compensate the claimant for his costs, and the recovery of costs in this shape was uncertain, the Legislature provided a remedy by enacting the Statute of Gloucester."

14. At this point therefore all parties submitted that the Commissioner has no power to make any kind of order for the payment by one party of the costs of another. In view of the importance of the matter, I also consulted the Chief Commissioner. Following such consultation I issued the following further direction, on 21 February 1990,

"The jurisdiction of a Commissioner is statutory. The proceedings are inquisitorial in nature and not adversarial (R(SB) 2/83 paragraph 10 and R(S) 6/83 paragraph 7). There is no *lis inter partes*. The Commissioner must give what seems to him to be the correct decision and is not restricted to points raised by the parties before him or below. The parties shall within 28 days make a further submission on the following points:—

(a) given that the Commissioner's jurisdiction is the creation of statute, does there extend to Commissioners the power to do non-prohibited things which are incidental to their statutory function and reasonably and properly to be done for carrying out their function—see *per* Lord Blackburn in *Attorney General* v *Great Eastern Railway Co* (1880) 5 A.C. 473 at 481 and per Lord Selbourne in the same case at p. 478? See also *per* Lord Selborne in *Small v Smith* (1884) 10 A.C. 119 at 129. The point is one of construction and not of presumption and does not require a necessary implication but only a reasonable implication—*Graham* v *Glasgow Corporation* (1936) S.C. 108 at 116.

(b) If it is submitted that such a principle of implication may apply to Commissioners, does a power to award costs fall within it? (cf. R(S) 6/83 and R(SB) 23/83)."

15. In response to that direction, a written submission dated 6 March 1990 from the adjudication officer now concerned reads as follows,

"It is accepted by the adjudication officer that proceedings before the Social Security Commissioners are inquisitorial and not adversarial in nature. It is also accepted that the Commissioners have implied powers which they may properly exercise in performing their adjudication functions. An example of this arises out of paragraph 5 of Decision R(SB) 6/83, where it was held that the existence of the Social Security (Correction and Setting Aside of Decisions) Regulations 1975 did not derogate from the implied power to set aside a decision which was in breach of the rules of natural justice. That inherent power is expressly recognised by regulation 27(5) of the Social Security Commissioners Procedure Regulations 1987. In relation to the award of costs, the adjudication officer does not accept that the inherent powers of the Commissioners are wide enough to include such a power. Such a power is not inherent because it must be based upon statute and there is no statutory provision which provides for this. It is not incidental to the jurisdiction of the Commissioners because the Commissioners may perfectly properly exercise their powers without awarding costs. In fact they have done so for a number of years. In the absence of an express provision, it is submitted that it is not necessary for such a power to be implied."

16. On 21 March 1990, the claimant's Solicitors made the following further submission,

"Under section 101(1) of the Social Security Act 1975 (as amended) '. . . an appeal lies to a Commissioner from any decision of a social security appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law.' In the Direction it is observed that a Commissioner must give what seems to be the correct decision and is not restricted to points raised by the parties before him or below. Nonetheless, for two reasons, it is undeniable that in a hearing before a Commissioner there are elements of a *lis inter partes*. First, the matters on which the Commissioner must decide reach him by way of an appeal process. Secondly, the Commissioner's decision will be to the benefit of one party and the cost of the other. At the same time, however, a Commissioner's decision will have the effect of clarifying the law and will thus ease the future administration of social security benefits by removing uncertainty. It was further no doubt in Parliament's mind in establishing the Commissioners to ensure the fair and, as far as possible, efficient administration of social security benefits. As to the proceedings before a Commissioner, these appear to have elements of both the adversarial and inquisitorial. The general position as regards tribunals as described by one leading commentator is as follows: 'it is fundamental that the procedure before a tribunal, like that in a court of law, should be adversary and not inquisitorial. The tribunal should have both sides of the case presented to it and should judge between them, without itself having to conduct an enquiry of its own motion, enter into the controversy, and call evidence for or against either party' (Administrative Law. 6th Edn., H. R. Wade, p. 923). The Commissioners clearly have a discretion to act outside these limitations and adopt a more inquisitorial approach. Regulation 18(1) of the Social Security Commissioners Procedure Regulations 1987 (the

'Regulations') empowers a Commissioner to summon any person to attend as a witness to answer questions or produce documents, and Regulation 12 empowers a Commissioner to direct any party to any proceedings before him to make such written observations as may seem to him necessary to enable the question at issue to be determined. Insofar as the Commissioners' functions include elements corresponding to the functions of a quasi-judicial body this points in the direction of the courts as an appropriate analogy in regard to costs. However, in view of the fact that there is an element of the inquisitorial in the proceedings before a Commissioner, and that the Commissioner is a creature of statute, it is, or may legitimately be, the case that an appropriate analogy may be drawn with statutory corporation. Statutory Corporations may be divided into those established for private profit (albeit with a quasi-public service element) (e.g. railway companies) and others, including those established for public purposes (e.g. local authorities). The principle enunciated in *A. G.* v *Great Eastern Railway Company* is, however, applicable to statutory corporations of diverse natures. We repeat our submission that paragraph 27(5) of the Regulations in its reference to 'inherent' powers assumes that the Commissioners have certain powers which are 'inherent' as distinct from powers deriving from the Regulations or 'other' powers deriving from other Acts or Regulations. If the analogy with statutory corporations is adopted, the following the language of the House of Lords in *A. G.* v *Great Eastern Railway Company* and *Small* v *Smith*, the Commissioner's inherent powers, it is submitted, are (or include, since other analogies may remain appropriate) powers to do whatever may fairly be regarded as incidental to or consequential upon those things which statute has expressly authorised and which may reasonably and properly be done under their main purpose and against which no express prohibition is found. The main purpose of the Commissioners, in the context of Family Credit, is to hear appeals on points of law from social security appeal tribunals (ss. 101(1)), and to hear those appeals in accordance with the Regulations (ss. 101 and 115) and to determine the points of law raised by those appeals and to reach decisions accordingly (ss. 101(5)). There are certain cases, and our submission is that this is one such, where the issues of law that arise for determination are of some complexity and where, we submit, it is part of the main purpose of the Commissioner to hear legal argument from solicitors or counsel when instructed by the parties to represent them (cf. Regulation 16). It is therefore fairly incidental to or consequential upon such main purpose to make provision in an appropriate case for the legal costs of these parties, and in particular Claimants, who have legal submissions made on their behalf. If by analogy with statutory corporations, the power to make such provision exists. Whether it ought to be exercised would depend on a number of factors including:

(i) whether an appeal to the Commissioner has been instigated by the Claimant or by the Adjudicating Officer;

(ii) whether the point is one of genuine legal difficulty in which the Commissioner has been assisted by legal submissions;

(iii) whether or not the claimant's legal submissions have found favour with the Commissioner;

(iv) whether the point at issue is of more general application than the individual case so that the Department of Social Security is assisted by its determination, being in part, achieved at the expense of the Claimant in being legally

represented for the purpose of assisting the Commissioner by making legal submissions; and

(v) the means of the Claimant, the importance of the issue to her, and the nature of anybody which has supported her in providing equal representation.

In our submission each of these factors is satisfied by [the claimant]. In particular under (v) the issue is of very great significance to the Claimant particularly having regard to the nature of her calling and her means, and the Salvation Army which has supported her is a charitable body and religious organisation which exists to advance the spiritual and material welfare of those it serves, and does not have as a primary object to promote the financial position of its Officers whether through legal representation or other methods.

Accordingly our submission is that:—

(i) the nature of the proceedings before a Commissioner permit an analogy with statutory corporations;

(ii) if such analogy is adopted, the power to award costs is one of the Commissioner's inherent 'powers' because such an award would in the appropriate circumstances be an act which may reasonably and properly be done under the Commissioner's main purpose; and

(iii) if the analogy in (ii) above is pursued, then this is an appropriate case for the Commissioner to make an award in favour of the claimant and direct that the claimant's costs be paid or contributed to by the Secretary of State."

17. I am grateful for the detailed research involved in the above submissions. After consideration, however, I have ultimately come to the conclusion that I must reject the last submission on behalf of the claimant and accept the submissions on behalf of the adjudication officer that the Commissioner has no implied or inherent power to make an award of costs in any circumstances. The fact that the courts derive their powers to make orders for costs from statute (see above) is not of course conclusive. Regulation 27(5) of the Social Security Commissioner Procedure Regulations 1987, in any event, does reserve "inherent" powers to the Commissioners. However considerable research has failed to reveal any case in which an *implied* or *inherent* power to award costs has been exercised. None of the numerous cases interpreting the principle in *Attorney General* v *Great Eastern Railway Co.* (1880) 5 A.C.473 (see above) concerns a power to make orders for costs or any matter analogous to such a power. Moreover I do not consider, although the Commissioners are the creature of statute, that a power to award costs is "incidental to their statutory function and reasonably and properly to be done for carrying out their function" (*per* Lord Blackburn in the *Great Eastern Railway* case at p. 481).

18. It appears to me that a power to make an order that one party pay the costs of litigation incurred by another must arise out of the principle that if one party wins a case or is successful in litigation then he has established some kind of "wrong" such as a breach of contract, a tort, or a breach of statutory duty. He is then entitled to be indemnified by the other party against all financial losses that are not too remote a consequence of that wrong. Damages are of course one aspect of this but in my view the notion that there should be some kind of limited indemnity as to costs must flow from the same principle. I note from the passage from Marshall's book cited above that that was the original basis on which costs could be recovered in the common law courts before the Statute of Gloucester was enacted.

19. But when a Commissioner decides a point in favour of either a claimant or an adjudication officer, the Commissioner's decision is not a decision that any "wrong" has been committed by the "losing" party. In truth there is no "winning" or "losing" party. The Commissioner is in fact simply interpreting the social security legislation at the behest of the parties and declaring what their rights are. He exercises an inquisitorial function (see R(S) 6/83, a decision of a Tribunal of Commissioners. The limitations set out in *Wade's* text-book cited above by the claimant's Solicitor do not apply to a Commissioner). It is true that he also makes an actual award of social security benefit where appropriate but this derives not from any declaration of a "wrong" but from the fact that only the statutory authorities including the Commissioner have any power to make such an award (see *Punton* v *Ministry of National Insurance* [1963] 1 W.L.R.186,CA).

20. It follows in my view that there can be no "reasonable implication" as part of the Commissioner's statutory powers that he should compensate one party in favour of the other by an award of costs. I entirely accept what is said in the claimant's further submission dated 21 March 1990 as to the public interest in cases before Commissioners and the expense that may be incurred by claimants who wish to be legally represented (particularly bearing in mind that at present no Legal Aid is available for representation at oral hearings before the Commissioners) but the expense so incurred is not the consequence of any "wrong" committed by the Secretary of State, nor by the Adjudication Officer.

(Signed) M. J. Goodman
Commissioner

(Date) 15 May 1990