FINAL DECISION OF THE COMMISSIONER

1 On 17 September 2001 I allowed the claimant's appeal against the decision of the Birmingham (social security) appeal tribunal under reference U 04 024 2000 00338. I substituted, with reasons, my own decision for that of the tribunal. The decision I gave was provisional. It required further action by all parties to establish the precise nature of the appeal and its resolution. This is my final decision. It fully replaces the provisional decision and the statement of my reasons for it. The proceedings since the provisional decision required me, on the submissions of the parties, to reconsider the reasons for some aspects of my provisional decision. As requested by one of the parties, I have set out this decision as a full decision without reference to the reasons for the provisional decision. However, I repeat parts of the provisional decision where they remain relevant, including two appendices.

2 Technically, it emerged only during the course of this appeal that it is properly to be considered as a joint consideration of two linked appeals. These are an appeal against the decision of the Inland Revenue on the entitlement of the claimant to a guaranteed minimum pension in respect of his occupational pension, and an appeal against the decision of the Secretary of State about the amount of state retirement pension to which the claimant was entitled. These matters came before me as a single appeal, and I have decided them as such. However, because of the need to consider the guaranteed minimum pension entitlement of the claimant, I directed that the Inland revenue be joined as an additional respondent to this appeal. This enabled me to deal with broader issues to which both the Secretary of State and the Revenue contributed argument and submissions. I am grateful to both, and to Mrs Ferneyhough of the Birmingham Tribunals Unit who represented the claimant, for their help in this case. For the reasons given below, my final decision is:

> **The appellant is entitled to a maximum rate of additional pension of £83.78. As that is less than his guaranteed minimum pension of £83.97, the appellant is not entitled to payment of an additional pension. Any resulting overpayment of state retirement pension to the appellant is not recoverable.**

Introduction

3 This appeal is about two aspects of pension entitlement. First, it is about the right of an individual to get formal decisions about how much state retirement pension he or she is entitled to receive on retirement. Second, it is about how he or she can appeal those formal decisions. This is not as easy as it sounds. There are three reasons for the difficulties.

4 The first reason is that the amount of state retirement pension an individual receives is decided by reference to several different elements of entitlement. This is because what most people refer to as "the state retirement pension" or "state pension" is in law several pensions or elements payable together. In this case the claimant's state retirement pension involved his entitlement to: a basic state pension, a Category A additional pension (often referred to as SERPS, and since 2002 as the state second

pension) and a graduated retirement benefit. In other cases the state retirement pension may also include a category B or C or D pension, additions for dependants or a minimum income guarantee. The claimant is also entitled in law to at least a guaranteed minimum pension (GMP) from the occupational pension of which he is a member. The amount of a GMP is decided by the state and not by the occupational pension fund. However, the amount of state retirement pension is usually reduced by the amount of GMP. How that happens is a key issue in this case.

5 A second reason is that the responsibility for deciding entitlement to state retirement pensions and elements is divided by Acts of Parliament between two state authorities. One is the Secretary of State for Work and Pensions ("the Secretary of State"). The other is the Board of Inland Revenue ("the Revenue"). In order to sort out the determination of an individual's state pension rights it is necessary to sort out which of the two authorities decides what, how that is to be decided, and where any appeal goes from a decision. That is the other key issue in this case.

6 A third reason is the maze of legislative provisions that determine the answers to the first two issues. As my provisional decision showed, one of the key sections (section 170 of the Pension Schemes Act 1993) - an appeals section - has been amended by the following other Acts of Parliament: the Pensions Act 1995; the Social Security Act 1998; the Social Security (Transfer of Functions) Act 1999; the Welfare Reform and Pensions Act 1999. It has also been amended in its operation by regulations. As a curious result of the way that section 170 was amended or referred to in those later Acts, it apparently now has a continuing existence in several concurrent but different forms. In addition to those Acts, I must also look at the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, and various Regulations to get the full picture. Of one thing I can be thankful. Part 2 of the Child Support, Pensions and Social Security Act 2000 introduces a major series of changes to the relevant sections in the Social Security Contributions and Benefits Act 1992, the Pension Schemes Act 1993 and other measures in order to change the additional pension by replacing the state earnings related pension scheme with the state second pension scheme. But that does not apply retrospectively.

7 Before stepping into this maze, I echo the comment of Stanley Burnton J in his decision about overseas retirement pension entitlements, *R (Annette Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin) (paragraph 24):

> "Of all legislation, that relating to social security should be clear and accessible. Regrettably, the relevant provisions are typically and unnecessarily complex, involving the application and disapplication of other provisions..."

And, I add, of all social security legislation, that relating to appeals should be clear and accessible. This decision is evidence that they are not. On the contrary, sections 170 in its several current forms deserves nomination as one of the most obscure - and most obscurely amended - appeal sections in English law. I cannot but admire the bravura of a claimant who sought to challenge the determination of his state pension rights when many others must have given up long before.

8 Bearing that in mind, the important thing is to get answers clarified for the claimant and future claimants. To assist, I have taken the unusual step of fully reconsidering my provisional decision. In particular, I accepted one point in my

provisional decision because of a joint submission of the Secretary of State and the Revenue and because it appeared to me to protect the appellant's position. The two authorities no longer agree on that point. So it is right to consider that issue specifically so as to ensure that the appellant's position remains protected. I also took the step of circulating a draft of this decision to the parties before issuing it. I had previously held a full oral hearing at which I was told of the agreed factual background to the appeal.

The facts

9 The appellant was born in 9 June 1934. In 1999, when he was 65, he claimed state retirement pension for himself and his wife. He had previously been claiming incapacity benefit and his wife was claiming disability living allowance. He had stopped work. He was awarded a Category A retirement pension from and including his 65th birthday. He was first awarded Category A basic pension and graduated retirement benefit. Due to problems with a computer, entitlement to additional pension was confirmed only later, in October 1999. It is this confirmation that the appellant challenged by way of this appeal.

The original decision under appeal

10 The decision in October 1999 was that the appellant's entitlement to "additional retirement pension (SERPS)" was £84.23, that his "contracted out deductions" were £83.97, and that his additional pension payable was therefore 26p. His notice of appeal against this decision challenged the periods taken into account and the calculation of SERPS.

Entitlement to basic and additional pension

11 Section 44(3) of the Social Security Contributions and Benefits Act 1992 ("the Benefits Act") provides that:

> A Category A retirement pension shall consist of -
> (a) a basic pension payable at a weekly rate; and
> (b) an additional pension payable where there are one or more surpluses in the pensioner's earnings factors for the relevant years.

Section 44(4) states the weekly amount of basic pension. Section 44(5) and (6) explain what section 44(4) means, and section 44(7) explains what "relevant years" means. Section 45 of the Benefits Act states how the amount of additional pension is to be calculated by references to the surpluses and then turned into a weekly equivalent figure, and sections 46 to 48 of that Act provide for special cases. (As noted above, I have ignored amendment since 2002.)

The additional pension and offsets

12 Read together, these sections set out the conditions for entitlement to state retirement pension, including additional pension, and the amount to which an individual is entitled. The impression given by standard social security legislative collections is that everyone is entitled to an additional pension depending on his or her level of contributions. That is not so. Additional pension, at least until 2002, is also known by an entirely different name, the State Earnings Related Pension Scheme, or SERPS. (Since 2002, as noted, it has been changed into the state second pension). It is

provided in Part II of the Benefits Act that employees and their employers can pay two levels of contribution on the earnings of the employees, depending on whether the earnings relate to contracted-in or contracted-out employment. Individuals (or more usually their employers) can choose between being in the additional pension scheme ("contracted-in") or not ("contracted-out"). An individual is contracted-out if he or she is a member of an approved occupational pension scheme or has an approved personal pension. Employment subject to an approved occupational pension scheme is "contracted-out employment", and this also covers those with approved personal pensions. An individual who is in contracted-out employment pays a lower rate of national insurance contribution than a contracted-in employee does, and the employer's contribution is also lower, but in return the employee does not receive entitlement to full additional pension. This is because entitlement to full additional pension is replaced by entitlement to the approved occupational or personal pension. If the scheme is not approved, then the effect on the additional pension does not occur. Figures show that most employees are contracted-out at some stage in their careers. Increasingly, there are many like the appellant who are contracted-in for parts of their working lives and contracted-out for other parts.

GMPs and the Pension Schemes Act 1993

13 Under the Pension Schemes Act 1993 ('the Pension Schemes Act"), there is a safety net behind the contracted-out approved occupational or personal pension entitlement of all individuals. They are entitled to receive at least a guaranteed minimum pension (GMP) from their schemes. Each individual is entitled to not less that a weekly amount of pension (the guaranteed minimum) based on the total contributions paid.

14 The Pensions Schemes Act is a consolidation Act , now substantially amended by the Pensions Act 1995. Until the 1995 Act, many powers and duties under the Pension Schemes act were administered by the Occupational Pensions Board ("OPB"), the others being exercised by the Secretary of State (then of Social Services and now for Work and Pensions). With effect from 1997, the OPB was abolished and its duties and powers transferred to the Secretary of State. At that stage, the Secretary of State was responsible for all aspects of the Pension Schemes Act. There were further major changes to the Act in 1999, when many of the duties and powers under the Pension Schemes Act were transferred a second time, this time to the Revenue, by the Social Security Contributions (Transfer of Functions, etc.) Act 1999 ("the Transfer of Functions Act").

15 One issue in this case is about what was, and what was not, transferred from the Secretary of State to the Revenue by the Transfer of Functions Act. The duties and powers transferred from the OPB were not the same duties and powers as those transferred to the Revenue. The relevant parts of the Pension Schemes Act were also amended by the Social Security Act 1998 and by the Welfare Reform and Pensions Act 1999.

16 Until April 1997 (when changes under the Pensions Act 1995 not relevant to this appeal took effect), the Pension Schemes Act provided that an occupational pension scheme could not be certified as contracted-out unless it complied with the statutory provisions on GMPs (Pension Schemes Act, sections 7, 8, 9(2)(b)). A GMP is provided in accordance with sections 13 and 17 of the Pension Schemes Act (section 8(2)).

Section 13(1) of the Act provides that a scheme must provide a pension to an earner who attains pensionable age of a weekly rate not less than the guaranteed minimum. Sections 14 to 16 provide the rules for calculating that guaranteed minimum. As the appellant in this case was in contracted-out employment for part of his working life, he was entitled to a GMP from his occupational pension scheme once he was 65.

Interaction of GMP and additional pensions

17 The Social Security Contributions and Benefits Act 1992 is silent on the position of someone entitled both to an additional pension and an occupational pension with a GMP. Overlap is avoided by section 46(1) of the Pension Schemes Act. As relevant to this case, it provides:

> (1) Where for any period a person is entitled both -
> (a) to a Category A ... retirement pension ... and
> (b) to one or more guaranteed minimum pensions
> the weekly rate of the benefit mentioned in paragraph (a) shall for that period be reduced by an amount equal -
> (i) to that part of its additional pension which is attributable to earnings factors for any tax years ending before the principal appointed day, or
> (ii) to the weekly rate of the pension mentioned in paragraph (b) ...
> whichever is the less.

Other provisions in section 46 make similar provision for other cases of overlap.

Who decides on the interaction under section 46 of the Pension Schemes Act?

18 During the initial stages of this appeal, the appellant challenged each aspect of the calculations required to establish what, if any, pension he was entitled to receive, including whether there should be any deduction against his basic pension. The Revenue challenged the appellant's right to query the decisions it had made because he had appealed only against the Secretary of State's decisions. For the appellant Mrs Ferneyhough stated on advice, and I accept, that her client was not told that any part of it involved a Revenue decision - he had appealed the decisions he was told about by the Secretary of State. By contrast, the tribunal was told that most of the decisions were made by the Revenue, including the calculations deciding additional pension. My conclusion in my provisional decision was that there must have been a Revenue decision about GMP for his retirement pension to have been paid but that no formal notification had been given of the decision. I therefore directed that the decision be notified in proper form to the claimant. I must also decide which of the Secretary of State and the Revenue was responsible for which aspect of the decision-making that put section 46 into effect in an individual case.

19 Until the Social Security Act 1998 and the Transfer of Functions Act, all aspects of section 46 were handled by the Secretary of State, and no difficulties arose. Had anyone appealed against a decision about additional pension and GMP, the Secretary of State would have been required to deal with all aspects of the decision-making in that section (though not all of it was then appealable to an appeal tribunal). But the Transfer of Functions Act transferred key functions about pension entitlement to the Revenue. The question is: what functions? And the Social Security Act 1998 made all decisions appealable. The question is: to whom?

20 Section 16 of the Transfer of Functions Act is the relevant transferring section. This provides:

> (1) The function of determining the questions referred to in subsection (1) of section 170 of the Pension Schemes Act 1993, as that section has effect before the commencement of paragraph 131 of Schedule 7 to the Social Security Act 1998, is hereby transferred to an officer of the Board.
>
> (2) In section 170 of the Pension Schemes Act 1993, as that section has effect before the commencement of paragraph 131 of Schedule 7 to the Social Security Act 1998, for subsections (2) to (4) there is substituted:
>
> > (2) It shall be for an officer of the Inland Revenue -
> >
> > (a) to make any decision that falls to be made under or by virtue of Part III of this Act other than a decision which under or by virtue of that Part falls to be made by the Secretary of State;...
> >
> > *[(b) and (c) not relevant]*
>
> (3) In the following provisions of this section a "relevant decision" means any decision which under subsection (2) falls to be made by an officer of the Inland Revenue, other than a decision under section 53 or 54.

Subsections (4) to (7), also added by section 16(2), deal with the application of the provisions of the Social Security Act 1998 dealing with revisions, supersessions, and appeals to decisions transferred to the Revenue by section 16.

21 This clumsy drafting means that the scope of section 170 after amendment depends on the scope of section 170 before amendment, so meaning that the pre-amendment version of section 170 must stay in existence to give the post-amendment version meaning. For ease of cross-reference, the various versions of section 170 are set out in appendix A to this decision. (This was also appendix 1 to my provisional decision).

22 There is, however, a problem about what version of section 170 is in force. Paragraph 131 of Schedule 7 to the Social Security Act 1998 came into effect in part on 4 March 1999 and in part on 5 July 1999. SI 1999 No 528 (the 5th Commencement Order for the Social Security Act 1998), regulation 2 and the Schedule brought the paragraph into effect but only for the purposes of making regulations, on 4 March 1999. SI 1999 No 1958 (the 8th Commencement Order for that Act, made on 4 July 1999) , regulation 2, brought the rest of the paragraph into effect on 5 July 1999. But SI 1999 No 1962 (the 2nd Commencement Order to the Transfer of Functions Act, made on 13 June 1999, and signed for the Secretary of State by a different Minister) had already provided that section 16 of the Transfer of Functions Act (and therefore the amendments of section 170 in it) came into full effect on 5 July 1999.

23 Some nice (in the obscure meaning that lawyers give "nice") jurisprudential issues about "which came first" arise about this curious interaction. When the amendments to section 170 under the 1998 Act were brought into effect, it had already

been provided that the amendments of that section under the Transfer of Functions Act were to be brought into effect on the same day. But if the amendment under section 16 of the Transfer of Functions Act is supposed to have taken effect before, rather than after, the amendment in paragraph 131 of Schedule 7 to the 1998 Act (as section 16 and the Commencement Order both appear to state), then the functions detailed under section 170 were never effectively transferred to the Revenue. This is because the amendments under paragraph 131 of Schedule 7 to the 1998 Act retain decision making with the Secretary of State while it is the Transfer of Functions Act that transfers the functions to the Revenue. So if the amendments to section 170 under the Transfer of Functions Act took effect to be followed by the amendments to section 170 under paragraph 131 of Schedule 7 to the 1998 Act, but on the same day, then the section 170 functions were transferred from the Secretary of State to the Revenue but were instantly transferred back to the Secretary of State when the 1998 Act took effect.

24 That does not appear to have been Parliament's intention. Rather than get involved in issues such as whether the Transfer of Functions Act impliedly repealed the powers to make conflicting regulations under the 1998 Act, I took the view in my provisional decision that the amendments under the Transfer of Functions Act must be assumed to follow the amendments of the 1998 Act. The parties did not dissent from that view. On that basis, the Transfer of Functions Act provisions amend section 170 both before and after its amendment by the 1998 Act. (Or, in the terms of the traditional way of posing the "which came first" question, it must be assumed for these purposes that the chicken came both before and after the egg!). That is the basis on which I have set out the various forms of section 170 in appendix A to this decision.

25 Section 170(1) provided, before these amendments and so far as relevant:

> (1) The questions to which section 17(1) of the Social Security Administration Act 1992 (questions for determination by the Secretary of State) applies include -
> (a) any question as to the amount of a person's guaranteed minimum pension for the purposes of section 13 or 17 ...

Section 17(1) of the Social Security Administration Act 1992 (repealed by the Social Security Act 1998) listed questions to be determined by the Secretary of State. Those questions could not be considered by appeal tribunals and Commissioners and were subject to separate appeal procedures. It is well established that section 17 should be interpreted narrowly: R(G) 1/82. The text of section 17 itself is irrelevant to this case, but the old form of section 170(1)(a) makes it clear that determination of a GMP under section 13 was within the scope of the earlier version of section 170. It is therefore a function transferred to an officer of the Revenue by section 16(1) of the Transfer of Functions Act. That is the key transfer for present purposes, although I must return to the vexed question of the meaning of section 16(2) of the Transfer of Functions Act below.

The tribunal decision

26 The appellant made a written submission to the tribunal stating that he had been in contracted-out employment until the end of 1992, but had then contracted back into the additional pension from the beginning of 1993 on advice that seemed now to be wrong. He had been given two official pension forecasts of his additional pension entitlement. Both were significantly higher than the figure in the decision. The

submission from the Secretary of State to the tribunal stated that, on the contrary, the appellant had been awarded too much additional pension. The correct calculation of additional pension entitlement was £83.78. This was 19p less than the appellant's guaranteed minimum pension. Accordingly the submission was that the tribunal should decide the lower rate of additional pension and then refer the decision to "the relevant area" for the award of retirement pension to be revised downwards, but without creating a recoverable overpayment. The tribunal accepted the Secretary of State's submission in full and gave the decision requested, adopting as correct the revised calculation of additional pension. Given the complexities of this case, the deficiencies in the submission to the tribunal, and the absence of the texts of or comments on the relevant law in the usual reference sources available to tribunals at that time, it is not surprising that the tribunal took this course of action.

27 Because of the absence of authorities and reasoning, I set out in my provisional decision what I considered to be the relevant considerations for the proper resolution of this case. And, for the reasons given in full in that decision (accepted by the parties and not repeated here), I concluded that the Secretary of State's submission was wrong in law and so the tribunal decision was also wrong in law. I therefore set it aside and replaced it with my own decision. However, I could not then decide any of the key issues in the appeal, so my provisional decision took the form of a series of directions and references to the parties combined with an adjournment of the full decision. I must now deal with each of the issues raised in that decision and make a final decision.

First issue: the decision about the GMP

28 In my provisional decision I directed the Revenue to issue a formal decision to the appellant about his GMP entitlement. Mrs Ferneyhough confirmed on behalf of her client that the Revenue issued the formal decision as directed and that the appellant has not appealed against it. No issue has been taken by either of the two parties directly concerned about this aspect of the case. Save for one comment, this part of the case is closed. The GMP to which the appellant was entitled is £83.97. In appendix B to my decision I repeat in abbreviated and slightly revised form the analysis of the rights of appeal and notification about an individual's GMP that I set out as appendix 3 to my provisional decision. Subject to one point below, I confirm that analysis.

29 My comment relates to the formal determination by the Revenue of the GMP of an individual where that is or may be a dispute about state retirement pension entitlement than involves establishing a GMP. Since issuing my provisional decision I have seen other appeals involving determination of a GMP. It is the duty of the Revenue to make a decision on a GMP. If the GMP has not been formally determined, and the issue arises, then it must be determined formally by the Revenue and the claimant notified of rights of appeal. This is because a pensioner's rights of appeal only start to run from the time the formal decision is notified to the pensioner. If no notice is issued, there can be no appeal. Equally, the time limits applying to the appellant's rights of appeal do not start to run. This means that the decision about the pension does not have finality and, as happened here, a claimant can later challenge the decision and demand a formal decision. The main weakness of the failure to issue a formal decision in a case is that it does not alert a pensioner to rights of appeal (although other literature may do this). The second weakness is that the finality provisions do not apply. And it must follow that if they do not apply to the GMP then

they cannot apply to a decision of the Secretary of State involving a GMP as the Secretary of State has no power to take a Revenue decision.

30 Where there is no final decision, one must be made before an appeal can properly lie and be determined. This is a direct equivalent to the question of determining contribution-based benefit claims, or other questions transferred to the Revenue by section 8 of the Transfer of Functions Act. Those questions are covered by regulations 11A and 38A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. In my view when a GMP decision is in issue, but no formal decision has been made, the Secretary of State and appeal tribunals should follow a procedure parallel to that set out in regulations 11A and 38A. Regulation 38A directs that a tribunal faced with such a question shall refer it to the Secretary of State pending a decision by the Revenue and shall require the Secretary of State to refer the matter to the Revenue for decision. Once the Revenue has made its decision, the Secretary of State is required by regulation 38A to consider if the decision under appeal is to be revised or superseded. If it is not to be revised or superseded the decision is to be forwarded to the tribunal for final determination. That is what should happen in cases like this. I do not think it right to leave the reference to the pensioner whom, it would seem from this and other cases, is not always told of her or his full rights.

Second issue: who decides the section 46 decisions?

31 Section 170 of the Pension Schemes Act as read with the amending legislation places the duty on officers of the Revenue to decide on the amount of a GMP. Section 45 of the Social Security Contributions and Benefits Act 1992 places the duty on the Secretary of State to determine entitlement to a state retirement pension including the full additional pension entitlement. Section 46 of the Pension Schemes Act provides for offsetting between the GMP and the full additional pension entitlement. In my provisional decision, in appendix 2, I set out an analysis of what, in my view, was the division of labours between the Secretary of State and Revenue under those and related legislative provisions. In submissions made after the provisional decision, my attention was drawn to an aspect of the calculation of an individual's pension with which my provisional decision did not deal. That was because it did not arise on the facts before me. But I was asked by the parties to consider the issue as part of my final decision as a matter of guidance. Some points were also made about the way in which some of the issues were covered in that appendix.

32 One of the issues was the question who should aggregate the weekly total of GMPs of an individual who is entitled to more than one occupational or personal pension carrying a right to a GMP? That might sound insignificant but it is an essential step in calculation. And - as with all such calculations - it can give rise to error. It must therefore be attributable to a specific decision maker and appealable from that decision maker. The problem is that the Secretary of State tells me that it is a decision for his officers to decide this on his behalf, while the Revenue tells me it is for its officers to take the decisions. One reason why I took the views I did in my provisional decision was because both authorities agreed, or thought they agreed, on the position. Another reason was that I was satisfied that this result created clear lines of decision making and appeal. That reasoning no longer applies, so I must look at the matter again.

33 Put at its simplest, the submission for the Secretary of State is as follows. It is for the Secretary of State to aggregate GMPs under section 46(1) of the Pension

Schemes Act and to work out in accordance with that section what is left, if anything, after deducting any GMP entitlement of a claimant from her or his maximum additional pension entitlement under section 45 of the Social Security Contributions and Benefits Act 1992. In other words, it is for the Revenue to determine each individual GMP, but it is for the Secretary of State to undertake the rest of the calculation. The Revenue take a different view, on reflection. In the Revenue's view it is clear from the plain language of section 16 of the Transfer of Functions Act that anything to do with GMPs is a decision for the Revenue. The task of dealing with GMPs was transferred from the Secretary of State to the Revenue, and this is part of the transferred functions. This is supported by a reference to the wording of section 170(2) of the Pension Schemes Act in its post 1999 form. In the view of the Revenue, there is no distinction between the Revenue reporting one GMP to the Secretary of State and reporting the total of several.

34 I am not persuaded that any of the relevant legislative provisions to which I have been referred on this narrow but important matter gives me a clear answer. I do not find the terms of section 16(2) of the Transfer of Functions Act 1999 or the form in which it restates section 170 of the Pensions Schemes Act 1993 particularly helpful. I have set out section 16(2) above. In the light of my earlier analysis, I content myself with saying that I do not consider anything about section 16 or section 170 can be described as "clear".

35 Reading section 46 of the Pension Schemes Act together with section 170 of that Act and the amendments in the Transfer of Functions Act , the undisputed starting point is that it is then for the Revenue to start the decision-making process on a claim involving a GMP and for the Secretary of State to finish it. But where precisely does the responsibility of the one end and the other begin? Following my provisional decision it was accepted that most of the functions remained with the Secretary of State and the only issue remaining in dispute was the point about multiple GMPs.

36 As I emphasised in my provisional decision, what matters to a claimant is that the decision maker is identified and subject to appeal rights. I can see no unambiguous legislative direction. I also see no strong legislative policy reason in favour of either authority's argument. Either is obviously entirely competent to do it. The problem remains where the drafter left it: it is for the Secretary of State to make the calculation of state retirement pension entitlement unless it is for the Revenue to make it, by reason of the Social Security Contributions and Benefits Act 1992 and it is for the Revenue to take decisions under Part III of the Pension Schemes Act 1993 unless it is for the Secretary of State to take them, by reason of the Transfer of Functions Act. If these were clearly conflicting answers, then the rule is that the later Act prevails. But neither formulation makes it unambiguously clear whether adding up two or more GMPs is a step under Part III of the Pension Schemes Act generally, or a step under section 46, or a step under section 45 of the 1992 Act. So neither formulation makes it clear which fall-back rule is to operate. The conflict arises when that ambiguity is recognised.

37 I rest my decision on the context within which either authority takes the decision. Whether it is the Revenue or the Secretary of State who decides, it is the Social Security and Child Support (Decisions and Appeals) Regulations 1999 that define how the decision is to be given. There are problems in applying those regulations where there are or may be two or more GMPs or possible GMPs. In order

to get a clear entitlement to state retirement pension at a particular level, the claimant must be able to discover and challenge the existence and effect of each GMP. In practice, I suspect this will usually happen when the claimant challenges the level of state retirement pension he or she is granted. Resolution of that challenge must be worked backwards from a challenged level of entitlement to where, if at all, there is an error in reaching that level. In that process, determining a GMP from an occupational pension is a self-contained operation. It is triggered by identifying the pension rights that give rise to the GMP. A decision about adding together two or more GMPs is more than a plain arithmetical part of this process. It also involves identifying the occupational pensions relevant to a state retirement pension claim and excluding any that are not relevant. That seems to me to be a function for the Secretary of State. It is the task of the Secretary of State to decide the additional pension and what is to be excluded from it.

38 The task of the Revenue is to determine the GMP from an identified pension, not the job of identifying what is relevant to a state retirement pension. I test it this way. What is the position of the claimant who has three different occupational and personal pensions, one being a pension that gives rise to no entitlement to GMP (for example, because it is a personal or an occupational money purchase (or contribution-based) scheme without a GMP). Is it for the Secretary of State or the Revenue to say if it is relevant to calculating additional pension? In my view, that can only be decided by the Secretary of State. It is for the Secretary of State to cumulate individual GMPs and exclude pensions without GMPs. Conversely, it is for the Secretary of State to ask the Revenue to calculate each individual GMP. Of course, the Secretary of State may find it expedient to ask for, and the Revenue may find it expedient to report, more than one GMP at the same time. But that is a practical matter, and does not affect the formal decision. If challenged, there must be a formal decision on each GMP.

Third issue: the amount of the additional pension

39 In my provisional decision I directed a submission on the amount of additional pension to which the claimant was entitled. This was provided by the Secretary of State's representative with a full supporting submission, and a further submission was added. My concern was whether the Secretary of State was correct in deciding that the claimant's maximum entitlement to additional pension was £83.78 a week at the relevant time, or the previous figure calculated but then corrected, or some other figure. The papers issued to the tribunal and claimant made (to me, at any rate) little sense without an explanation of symbols and abbreviations that was not offered, although the tribunal accepted it. The full justification of the figure of £83.78 has now been produced in a form that does make sense. It is not disputed by the claimant and I find that the correct figure is £83.78.

Fourth issue: setting the GMP against the pension

40 I can now decide the offset of the GMP to which the claimant is entitled against the Category A retirement pension to which the claimant is entitled. In my provisional decision I postponed this until the both GMP and the potential maximum additional pension had been decided and confirmed. That postponement was inevitable given the unresolved challenges to the two constituent parts of the offset calculation when the matter first came before me. Both have now been resolved. It is now not challenged

that the GMP is £83.97, and that the additional pension is £83.78. The GMP exceeds the maximum entitlement to additional pension, so the additional pension payable is nil.

41 That conclusion must follow from the application of section 46 of the Pension Schemes Act to the separate calculations of the GMP and additional pension. While it calls into question why the appellant paid as many contributions as he did, and whether he sought and was given sound advice about contracting back into the state pension scheme when he did, I cannot consider those issues. They are administrative matters outside the jurisdiction of an appeal tribunal or Commissioner.

An overpayment?

42 One remaining issue noted by the tribunal should also be noted here. There was an overpayment decision in the original appeal. I agree with the tribunal that it was not in any way the claimant's fault that the calculations were wrong. Any overpayment is not recoverable. That, in fairness, was not disputed before me by the Secretary of State.

Decisions and appeals on state retirement pensions

43 The other issues I considered in my provisional decision were the rights of appeal that the claimant had from the various decisions involved in determining his pension rights. The issues have been explored thoroughly in these proceedings. Rather than repeat the appendix in my provisional decision in amended form, I summarise the guidance in this decision together with the appeal rights that were exercised in this appeal and apply to similar appeals. The following are the steps that must occur in deciding a claim for state retirement pension, including any appeal:

Step one:
The claimant must make a claim for state retirement pension to the Secretary of State: Social Security Contributions and Benefits Act 1992, section 1.

Step two:
The Secretary of State must make a decision on the claimant's entitlement: Social Security Contributions and Benefits Act 1992, section 45 and section 8 of the Social Security Act 1998. This involves obtaining information from the Revenue (a) about the contribution record of the claimant (and possibly a spouse or former spouse) and (b) about the amount of any GMP. Usually the Revenue tells the relevant office of the Secretary of State directly about contributions and GMP. The decision of the Secretary of State must deal with entitlement to the basic pension, any additional pension, and graduated retirement benefit. If the claimant is unhappy about any aspect of the decision on the claim, he or she is entitled to appeal: Social Security Act 1998 section 12. The Secretary of State will normally then reconsider it. Subject to *step three*, if the claimant remains dissatisfied, the appeal must be decided by a social security appeal tribunal.

Step three:
If the appeal involves a dispute about the claimant's contribution record (or, in some cases, that of the claimant's spouse or former spouse), the Secretary of State must refer the matter to the Revenue for formal decision: Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 11A. If the matter gets to an appeal tribunal without a reference, then the appeal tribunal must direct the Secretary

of State to make it: Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 38A. The same course of action should take place if the appeal involves a dispute about the claimant's entitlement to one or more GMPs. If the matter is referred to a social security appeal tribunal without reference to the Revenue, then the appeal tribunal must refer the appeal back to the Secretary of State with a direction to refer the GMP question to the Revenue for formal decision.

Step four:

On a reference from the Secretary of State (or on the direct request of a claimant if one is made) the Revenue must issue a formal decision on the contribution question or the GMP if it has not previously done so: Transfer of Functions Act, section 8(1); Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 28. Any appeal against a formal decision on a contribution question is made to the Revenue and is decided in the absence of agreement by the tax appeal tribunals: Transfer of Functions Act , section 11; Social Security Contributions (Decisions and Appeals) Regulations 1999. Any appeal against a formal decision on a GMP is made to any National Insurance Contributions office of the Revenue and is decided by the (social security) appeal tribunals: Pension Schemes Act 1993, section 170 as amended; Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 33.

Step five:
The Secretary of State must calculate the weekly rate of retirement pension taking into account maximum entitlement to additional pension based on any contribution decision by the Revenue (or, on appeal, by a tax appeal tribunal) and entitlement to any GMP (or the total of individual GMPs if more than one) decided by the Revenue (or, on appeal, by the (social security) appeal tribunals): Social Security Contributions and Benefits Act 1992 section 45. An appeal is decided by the social security appeal tribunals: Social Security Act 1998, section 12.

Step six:
Any further decision about total state retirement pension entitlement is made by the Secretary of State: Social Security Act 1998 section 8. Any appeal is decided by the social security appeal tribunals: Social Security Act 1998, section 12.

David Williams
Commissioner

24 February 2003

[Signed on the original on the date shown]

APPENDIX A TO CP 4479 2000

Section 170 of the Pension Schemes Act 1993 in its present form (as last amended in 1999):

[[1] 170 Decisions and appeals

(1) Section 2 (use of computers) of the Social Security Act 1998 ("the 1998 Act") applies as if, for the purposes of subsection (1) of that section, this Act were a relevant enactment.

[[2] (2) It shall be for an officer of the Inland Revenue -

(a) to make any decision that falls to be made under or by virtue of Part III of this Act, other than a decision which under or by virtue of that Part falls to be made by the Secretary of State;

(b) to decide any issue arising in connection with payments under section 7 of the Social Security Act 1986 (occupational pension schemes becoming contracted-out between 1986 and 1993); and

(c) to decide any issue arising by virtue of regulations made under paragraph 15 of Schedule 3 to the Social Security (Consequential Provisions) Act 1992 (continuing in force of certain enactments repealed by the Social Security Act 1973). [3] [4]

(3) In the following provisions of this section a "relevant decision" means any decision which under subsection (2) falls to be made by an officer of the Inland Revenue, other than a decision under section 53 or section 54.

(4) Sections 9 and 10 of the 1998 Act (revisions of decisions and decisions superseding earlier decisions) apply as if -

(a) any reference in those sections to a decision of the Secretary of State under section 8 of that Act included a reference to a relevant decision; and

(b) any other reference in those sections to the Secretary of State were, in relation to a relevant decision, a reference to an officer of the Inland Revenue.

(5) Regulations may make provision -

---

[1] Section (as amended in 1995) replaced in entirety with effect from 4. 3. 99 by Social Security Act 1998 Schedule 7, paragraph 131

[2] Subsections (2) - (7) substituted for the previous text by section 16 of the Social Security Contributions (Transfer of Functions) Act 1999 with effect from 1. 4. 99. For transitional provisions see SI 1999 No 527

[3] Decisions under this subsection are subject to the power in section 23 of the Social Security Contributions (etc) Act 1999, section 23, transferring functions between the Secretary of State and the Inland Revenue.

[4] A decision under this subsection may be revised at any time by an officer of the Board where it contains an error: SI 1999 No 991, regulation 3(4), as amended by SI 1999 No 1662, art 3(3).

[[5]](a) generally with respect to the making of relevant decisions;

(b) with respect to the procedure to b e adopted on any application made under section 9 or 10 of the 1998 Act by virtue of subsection (4); and

(c) generally with respect to such applications, revisions under section 9 and decisions under section 10;]

but may not prevent such a revision or decision being made without such an application.

(6) Section 12 of the 1998 Act (appeal to appeal tribunal) applies as if, for the purposes of subsection (1)(b) of that section, a relevant decision were a decision of the Secretary of state falling within Schedule 3 to the 1998 Act.

(7) The following provisions of the 1998 Act (which relate to decisions and appeals) -

sections 13 to 18,
sections 25 and 26,
section 28, and
Schedules 4 and 5,

shall apply in relation to any appeal under section 12 of the 1998 Act by virtue of subsection (6) above as if any reference to the Secretary of state were a reference to an officer of the Inland Revenue.]]

Section 170 of the Pension Schemes Act 1993 as amended up to and including the amendments made by the Social Security Act 1998:

(1) *[as present version]*

(2) Sections 8, 9, and 20 of the 1998 Act (decisions by the Secretary of State, revision of decisions and decisions superseding earlier decisions) apply as if, for the purposes of section 8(1)(c) of that Act, this Act were a relevant enactment.

(3) Regulations may make provision -

(a) with respect to the procedure to be adopted on any application made under sections 9 or 10 of the 1998 Act by virtue of subsection (2); and

(b) generally with respect to such applications, and revisions under section 9 and decisions under section 10,

but may not prevent such a revision or decision being made without such an application.

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[5] Amended by Welfare Reform and Pensions Act 1999, Schedule 11, paragraph 22.

(4) Section 12 of the 1998 Act (appeal to appeal tribunal) applies as if, for the purposes of subsection (1)(b) of that section, any decision of the Secretary of State falling to be made under this Act were a decision falling within Schedule 3 to that Act.

Section 170 of the Pension Schemes Act 1993 as originally enacted:

(1) The questions to which section 17(1) of the Social Security Administration Act 1992 (questions for determination by the Secretary of State) applies include –

(a) any question as to the amount of a person's guaranteed minimum for the purposes of section 13 or 17;

(b) any questions –

(i) whether any state scheme premium is payable or has been paid in any case or as to the amount of any such premium; or

(ii) otherwise arising in connection with any state scheme premium;

(c) any question whether for the purposes of this Act a cash sum paid or an alternative arrangement made under the Policyholders Protection Act 1975 provides the whole or any part of the guaranteed minimum pension to which an earner or an earner's widow or widower was entitled under a contracted-out scheme; and

(d) any question arising in connection with minimum contributions or payments under section 7 of the Social Security Act 1986,

other than a question such as is mentioned in paragraph (b)(ii) or (d) which is required by virtue of this act to be determined by the Board.

(2) The Secretary of State may make any determination required by subsection (1)(c) on such basis as he considers appropriate.

(3) Any question arising under this Act as to whether the employment of an earner in employed earner's employment at any time is or was contracted-out employment in relation to him shall be referred by the Secretary of State to the Board and determined by them.

(4) Neither section 17(1) nor section 20(1) of the Social Security Administration Act 1992 (questions for determination by adjudication officers) shall apply to any such question as is mentioned in subsection (3).

(5) and (6) [applied to equal access requirements appeals only and repealed on enactment: Schedule 7 paragraph 3.]

APPENDIX B to CP 447 2000

Rights of appeal and notification

B1 The decision notified to the appellant about his pension entitlement was a combination of decisions taken by the Secretary of State and the Revenue under section 45 of the Social Security Contributions and Benefits Act 1992 (the 1992 Act) and section 46 of the Pension Schemes Act, although it was not notified as such. How should the appellant challenge these decisions? As regard the additional pension element of the decision, that answer should be straightforward. As the submission from the Secretary of State pointed out, the figure used in section 46 of the Pension Schemes Act is a hypothetical figure based on the provisions in section 45 of the Social Security Contributions and Benefits Act 1992. A decision under section 45 of the 1992 Act is covered by the provisions on decisions and appeals within the scope of the provisions now in the Social Security Act 1998 and the Social Security and Child Support (Decisions and Appeals) Regulations 1999. As a claimant is entitled to an additional pension under section 45 of the 1992 Act save in so far as that entitlement is reduced or removed under section 46 of the Pensions Schemes Act, my view is that the determination of the additional pension in cases such as this is a matter covered directly by the 1998 Act and regulations.

B2 The determination of the GMP is for an officer of the Inland Revenue. The current form of section 170 makes it clear that this is within the scope of Social Security Act 1998. In particular, the key provisions of Chapter II of the 1998 Act (social security decisions and appeals) are expressly applied to these decisions. These include the powers to revise and supersede, the appeals provisions, and the powers to prescribe procedures both for decision making and for appeals. Section 170 grants rights of appeal against a decision of the Revenue on a GMP in the same way as if it were a decision of the Secretary of State within Schedule 3 to the Social Security Act 1998. Schedule 3 is entitled "Decisions against which an appeal lies". Section 12(1) of the Social Security Act 1998 provides that the section applies to any decision made otherwise than on a claim or award and falls within Schedule 3. Section 12(2) then gives a right of appeal to an appeal tribunal against that decision, and on to a Commissioner and the courts.

B3 Had this case concerned only the GMP entitlement of the claimant, again the situation would have been straightforward. The Revenue would have made, or be asked to make, a GMP decision, and this would then be appealable to the appeal tribunal via a National Insurance Contributions Office (Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 3(11)(d)). But this is not, in that sense, a straightforward section 170 decision, nor are most such decisions. The Revenue was asked for the figures by the Secretary of State. The appellant did not ask the Revenue for a decision (nor had he any reason to do so), and the Revenue did not make it and then formally notify it to the appellant. In the submission to me from the Solicitor to the Inland Revenue, it is stated:

> "The DSS has confirmed that the Inland Revenue sent the GMP calculation to the local office who decide total pension entitlement which will include the GMP calculation...".

Mrs Ferneyhough, for the appellant, told me that he had received no individual notice from the Revenue, and neither the Revenue nor the Secretary of State suggested otherwise. The appellant received notification only of the Secretary of State's decision.

B4 It is axiomatic as part of the decision-making process that however the decision is presented it must be properly notified. The appeal rights should also be set out. That did not happen here. At the oral hearing Mr Chang (not, of course, representing the Revenue but the Secretary of State) presented me with a copy of what I was told was a standard Revenue letter issued about GMP decisions in such cases. The letter nowhere mentions on it the appeal rights to an appeal tribunal under section 170, nor does the leaflet mentioned in that letter and of which I was also given a copy. This does not, however, remove the fact that there must have been a decision by an officer of the Revenue, in whatever form, and that there are appeal rights against that decision activated once it has been notified properly.

B5 The final element of section 46 is the decision to deduct the GMP from the retirement pension. I was told in the submissions that was in practice a Secretary of State decision, and I accept that provided that there is a clear right of appeal. Trying to identify precisely how decisions by the Secretary of State under the Pension Schemes Act fit within sections 8 and 12 of the Social Security Act 1998 is not as easy as it should be. I start from the position that under section 170 as it applied before the amendments in 1999 by the Transfer of Functions Act but after the amendments in 1998 by the Social Security Act 1998 (assuming, as I do, that there was such a time), it was clear that all decisions under Part III of the Pension Schemes Act were appealable to the appeal tribunals as if a decision were a decision falling under Schedule 3 to the 1998 Act. (See appendix A for each of the relevant forms of section 170). The post-1999 version of section 170 applies that approach to Revenue decisions under Part III (subsection (2)). But it seems that the repeal and replacement of section 170(4) (in the post-1998 version) by section 170 (2), (3) and (6) (in the post-1999 version) removed appeal rights under section 12 against any decisions of the Secretary of State under Part III of the Pension Schemes Act. I cannot believe that this was the intention of Parliament, given that there was no reason to remove those rights and there is no specific provision expressly doing so, and given also that the Human Rights Act 1998 was about to come into effect. If that were the unavoidable interpretation of the relevant legislation, then I would have been inclined to decide that it is for the Revenue to make all section 46 decisions save in so far as I could be shown express statutory authority (and I have seen none) stating that the decision were to be made by the Secretary of State, in order to protect appeal rights.

B6 In my view this second legislative maze can be avoided in a more direct way if a broader view is taken of the central appeals section. Section 12(1) of the Social Security Act 1998 provides that:

> This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which -
>
> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
>
> (b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act ...

Section 8(1) provides that:

> Subject to the provisions of this chapter, it shall be for the Secretary of State -

(a) to decide any claim for a relevant benefit ...

State retirement pension is a relevant benefit. If a claimant claims it, then the Secretary of State must decide the claim. The Secretary of State cannot decide the claim without applying section 46 of the Pension Schemes Act, in so far as it falls to the Secretary of State to make the relevant decision. Any decision applying section 46 to entitlement to retirement pension is in my view a decision "made on" the claim. Therefore any decision made or to be made by the Secretary of State in connection with the appellant's claim for retirement pension, including both the decision on the maximum additional pension and on the difference between the GMP and the Category A pension, is within section 12(1)(a) and appealable.

B7 Finally, are the decisions by the Revenue and those by the Secretary of State appealable as part of the same appeal, or as different appeals? Returning to the analysis based on section 12, section 170(6) in the post-1999 version provides that:

> Section 12 of the 1998 Act (appeals to appeal tribunal) applies as if, for the purposes of subsection (1)(b) of that section, a relevant decision were a decision of the Secretary of State falling within Schedule 3 to the 1998 Act.

Section 170(3) includes Revenue decisions about GMP within this provision. This cannot therefore be regarded as part of the Secretary of State's decision "made on" the additional pension claim in the same way as the other aspects of decisions under section 46. Decisions of the Secretary of State are appealable under section 12(1)(a), but decisions of an officer of the Revenue are appealable under section 12(1)(b). It follows that appeal rights under section 12 apply to the calculation of the GMP as part of the application of section 46 separately from other aspects of decision under section 46, and that therefore there must be a separate appeal against the decision of an officer of the Revenue, and a separate notification of that right of appeal.

Bulletin 168 [Cont]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CP/4479/00

Starred Decision No: 116/01

*Commissioners' decisions are identified by **case references** only, to preserve the privacy of individual claimants and other parties.*

***Starring** denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.*

***Reported** decisions in the official series published by DSS are generally to be followed in preference to others, as selection for reporting implies that a decision carries the assent of at least a majority of Commissioners in Great Britain or in Northern Ireland as the case may be. Northern Ireland Commissioners' decisions are published by The Stationary Office as a separate series.*

*The practice about official reporting of Commissioners' decisions in **Great Britain** is explained in reported case R(I) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987. The Chief Commissioner selects decisions for reporting after consultation with Commissioners. As noted in the memorandum there is also a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it. The practice in **Northern Ireland** is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner.*

Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 11th January 2002

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Commissioners' case no: CP 4479 2000

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The appellant (and claimant) is appealing against the decision of the Birmingham appeal tribunal on 14 July 2000 that his entitlement to additional retirement pension was £83.78 subject to any relevant deductions, and that his case was referred to the Benefits Agency for his award of retirement pension to be revised.

3 For the reasons below, the decision of the tribunal is erroneous in law. I set it aside. It is expedient that I take the decision that the tribunal should have taken. This is:

(1) The decision about the guaranteed minimum pension:
The case is referred to the Inland Revenue for an officer of the Board to issue notification of the decision taken under section 170 of the Pension Schemes Act 1993 about the appellant's guaranteed minimum pension, in accordance with section 170(7) of that Act, section 18 of the Social Security Act 1998 and regulation 28 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. I direct the officer that if the decision issued does not include a statement of reasons as indicated in regulation 28(1)(b) then the officer is to issue with the decision a sufficient statement of reasons to comply with the alternative requirement in regulation 28(1)(b). The officer is directed to copy any such notification and, if in addition, the reasons for the decision, to me on issue.
It is for the appellant to decide if he wishes to appeal against that decision once notified, within the time limit laid down by regulation 31(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, notification being to the relevant National Insurance Contributions office. The appellant and his representatives are directed to inform me, at the latest by a submission made on the last day for appealing under that regulation, whether he is exercising the right of appeal. If he is, I direct that further consideration of this aspect of this decision be adjourned until the appeal has been heard. The appellant and representative are to inform me of the decision of the tribunal within seven days of the issue of that decision or, if they ask for it, within seven days of receiving the full statement of reasons, and whether they are seeking leave to appeal against that decision.

(2) The decision about the additional pension:
I direct the Secretary of State to provide a full submission on the calculation of the appellant's additional pension entitlement under section 45 of the Social Security Contributions and Benefits Act 1992 and any other relevant statutory provisions or regulations. Alternatively, the Secretary of State is to provide, and is to provide an explanation of, any computer generated decision made under section 45.
That submission is to be made within one month of the date of issue of this direction. The submission is to be copied to the appellant and representative on receipt, and the appellant and representative have one month from the date of receiving that submission to make any further submission they wish about entitlement to the additional pension.

(3) The decision about offsetting the guaranteed minimum pension against the Category A pension under section 46 of the Pension Schemes Act:
I adjourn this aspect of the decision until the guaranteed minimum pension has been established under decision (1) above, and the submissions have been received under decision (2) above.

4 I held an oral hearing of this case at Birmingham Crown Court on 16 August 2001. The appellant attended and was represented by Mrs Ferneyhough of the Birmingham Tribunal Unit. The Secretary of State for Work and Pensions (as successor to the Secretary of State for Social Security) was represented by Mr Chang of the Office of the Solicitor to the Department for Work and Pensions. (In this decision I refer to both the Department and its predecessor as "the Department"). The Board of Inland Revenue ('the Board") was not represented at the hearing, but a full written submission from the Board had been submitted to me and the parties by Mr Greer of the Inland Revenue Solicitor's Office. I am most grateful to Mrs Ferneyhough and Mr Chang for their help in this case, and also to Mr Greer for his detailed written submission. I directed the oral hearing as a preliminary hearing. I did so because the appeal, as it came to me, raised issues about whom were the parties to the appeal and what decisions were under appeal. I directed that the Inland Revenue should be joined as a party to the oral hearing so that this could be sorted out.

The facts

5 The primary facts are not in dispute. The appellant was born in 9 June 1934. In 1999, when he was 65, he claimed retirement pension for himself and his wife. He had previously been claiming incapacity benefit, and his wife was claiming disability living allowance. He had stopped work. He was awarded a Category A retirement pension from and including his 65th birthday. He was first awarded Category A basic pension and graduated retirement benefit. Due to problems with a computer, entitlement to additional pension was confirmed later, in October 1999. It is this confirmation which the appellant challenged by way of appeal.

The original decision under appeal

6 The decision in October 1999 was that the appellant's entitlement to "additional retirement pension (SERPS)" was £84.23, that his "contracted out deductions" were £83.97, and that his additional retirement pension payable was therefore 26p. His notice of appeal against this decision challenged the periods taken into account and the calculation of SERPS.

The tribunal decision

7 The appellant made a written submission stating that he had been in contracted-out employment until the end of 1992, but had then contracted back into SERPS from the beginning of 1993 on advice which seemed now to be wrong. He had been given two official pension forecasts of his additional pension entitlement, which were both significantly higher than the figure in the decision. The submission from the Secretary of State to the tribunal stated that, on the contrary, the appellant had been awarded too

much additional pension. The correct calculation of additional pension entitlement was £83.78. This was 19p less than the appellant's guaranteed minimum pension, and accordingly the submission was that the tribunal should decide the lower rate of additional pension and then refer the decision to "the relevant area" for the award of retirement pension to be revised downwards, but without creating a recoverable overpayment. The tribunal accepted the Secretary of State's submission in full and gave the decision requested, adopting as correct the revised calculation of additional pension. Given the complexities of this case, the deficiencies in the submission to the tribunal, and the absence of the texts of or comments on the relevant law in the usual reference sources available to tribunals, it is not surprising that the tribunal took this course of action. But, for the reasons below, the Secretary of State's submission was wrong in law and so the tribunal decision was also wrong in law.

What is under appeal?

8 It was not clear on the papers what aspects of the appellant's pension entitlement were being challenged by the appellant in his appeal. At the oral hearing, Mrs Ferneyhough stated that her client was not challenging the basic pension entitlement or the graduated retirement benefit, but she was challenging all aspects of the original calculation of the additional pension, including the "relevant periods" for the calculation. This included the calculation of the appellant's guaranteed minimum pension. She also challenged the tribunal decision to take the "excess" guaranteed minimum pension from the basic pension.

9 Notwithstanding the many thousands of pensioners directly affected by the law relating to additional pension in the way that the claimant was affected, there has apparently been no previous appeal to a Commissioner on these points. Nor, so far as informal enquiries show, have there been previous appeals to appeal tribunals about the calculation of additional pension and guaranteed minimum pensions and the operation of section 46. I was also unable to gain assistance in deciding this case in the standard social security literature or the standard pensions literature. For that reason I set out the relevant law and an explanation of it in more than usual detail in this decision.

Entitlement to basic and additional pension

10 Section 44(3) of the Social Security Contributions and Benefits Act 1992 ("the Benefits Act") provides that:

> A Category A retirement pension shall consist of -
> (a) a basic pension payable at a weekly rate; and
> (b) an additional pension payable where there are one or more surpluses in the pensioner's earnings factors for the relevant years.

Section 44(4) states the weekly amount of basic pension. Section 44(5) and (6) explain what section 44(4) means, and section 44(7) explains what "relevant years" means. Section 45 of the Benefits Act states how the amount of additional pension is to be calculated by references to the surpluses and then turned into a weekly equivalent figure, and sections 46 to 48 of that Act provide for special cases.

SERPS

11 Read together, these sections set out the conditions for entitlement to retirement pension, including additional pension, and the amount to which an individual is entitled. The impression given by standard social security legislative collections is that everyone is entitled to an additional pension depending on his or her level of contributions. That is not so. Additional pension is also known by an entirely different name, the State Earnings Related Pension Scheme, or SERPS. It is provided in Part II of the Benefits Act that employees and their employers can pay two levels of contribution on the earnings of the employees, depending on whether the earnings relate to contracted-in or contracted-out employment. Individuals (or more usually their employers) can choose between being in the SERPS scheme ("contracted-in") or not ("contracted-out"). An individual is contracted-out if he or she is a member of an approved occupational pension scheme or has an approved personal pension. Employment subject to an approved occupational pension scheme is "contracted-out employment", and this also covers those with approved personal pensions. An individual who is in contracted-out employment pays a lower rate of national insurance contribution than a contracted-in employee does, and the employer's contribution is also lower, but in return the employee does not receive entitlement to SERPS or additional pension. This is because entitlement to SERPS is replaced by entitlement to the occupational or personal pension. Figures show that most employees are contracted-out at some stage in their careers. Increasingly, there are many like the appellant who are contracted-in for parts of their working lives and contracted-out for other parts.

GMPs and the Pension Schemes Act 1993

12 Under the Pension Schemes Act 1993 ('the Pension Schemes Act"), there is a safety net behind the contracted-out occupational or personal pension entitlement of all individuals. They are entitled to receive at least a guaranteed minimum pension (GMP) from their schemes. Each individual is entitled to not less that a weekly amount of pension (the guaranteed minimum) based on the total contributions paid.

13 The Pensions Schemes Act is a consolidation Act , now substantially amended by the Pensions Act 1995. Until the 1995 Act, many powers and duties under the Pension Schemes act were administered by the Occupational Pensions Board ("OPB"), the others being exercised by the Department (in the name of the Secretary of State). With effect from 1997, the OPB was abolished and its duties and powers transferred to the Department. At that stage, the Department was responsible for all aspects of the Pension Schemes Act. There were further major changes to the Act in 1999, when many of the duties and powers under the Pension Schemes Act were transferred a second time, this time to the Board, by the Social Security Contributions (Transfer of Functions, etc.) Act 1999 ("the Transfer of Functions Act") . Those transfers are important because one of the issues in this case is about what was, and what was not, transferred from the Department to the Board by the Transfer of Functions Act. The duties and powers transferred from the OPB were not the same duties and powers as those transferred to the Board. The relevant parts of the 1993 Act were also amended by the Social Security Act 1998 and by the Welfare Reform and Pensions Act 1999. One of the critical sections in this decision, section 170 of the Pension Schemes Act (decisions and appeals), was significantly

amended by the Pensions Act 1995, the Social Security Act 1998, and both 1999 Acts (and by subordinate legislation as well, but thankfully I do not need to deal with that). Indeed, it must be a strong candidate for some sort of award as "the most amended appeals section in primary legislation".

14 Until April 1997 (when changes under the Pensions Act 1995 not relevant to this appeal took effect), the Pension Schemes Act provided that an occupational pension scheme could not be certified as contracted-out unless it complied with the statutory provisions on GMPs (Pension Schemes Act, sections 7, 8, 9(2)(b)). A GMP is one provided in accordance with sections 13 and 17 of the Pension Schemes Act (section 8(2)). Section 13(1) of the Act provides that a scheme must provide a pension to an earner who attains pensionable age of a weekly rate not less than the guaranteed minimum. Sections 14 to 16 provide the rules for calculating that guaranteed minimum. As the appellant in this case was in contracted-out employment for part of his working life, he was entitled to a GMP from his pension scheme once he was 65.

Interaction of GMP and SERPS

15 The Benefits Act is silent on the position of someone entitled both to a SERPS pension and an occupational pension with a GMP. Overlap is avoided by section 46(1) of the Pension Schemes Act. As relevant to this case, it provides:

> (1) Where for any period a person is entitled both -
> (a) to a Category A ... retirement pension ... and
> (b) to one or more guaranteed minimum pensions
> the weekly rate of the benefit mentioned in paragraph (a) shall for that period be reduced by an amount equal -
> (i) to that part of its additional pension which is attributable to earnings factors for any tax years ending before the principal appointed day, or
> (ii) to the weekly rate of the pension mentioned in paragraph (b) ...
> whichever is the less.

Other provisions in section 46 make similar provision for other cases of overlap.

The payable amount of additional pension

16 It follows that a full calculation of the appellant's retirement pension entitlement in this case involves:

- establishing entitlement to additional pension (SERPS) as if the claimant were contracted-in to the state scheme for all relevant periods (referred to as the "hypothetical" SERPS entitlement), then
- establishing entitlement to Category A retirement pension as a whole,
- establishing entitlement to any GMP under any contracted-out scheme of which the claimant was a member during that period, and
- calculating the net difference between the entitlement to Category A pension and the entitlement to GMP.

This analysis, which follows the language of section 46(1), is not in fact what has happened in this case. Rather, the Department (and the Revenue) calculated the

difference not between the Category A pension as a whole and the GMP entitlement, but between the SERPS entitlement and the GMP entitlement. While the end result is the same, the failure to follow the express terms of section 46 in the way in which the appeal was presented to the tribunal in the submission meant that the decision it took was in error of law because it failed properly to decide how section 46 applied to the appeal.

Can excess GMP be set off against the basic retirement pension?

17 Mrs Ferneyhough questioned this, and she was right to do so if she based her approach on the way in which the law was presented in the submission to the tribunal. But that is not what section 46 says. Under section 46, the amount of GMP is to be set off against not just the additional pension but against the Category A pension entitlement as a whole. What the tribunal should have been asked to do was to determine the Category A pension as a whole, then deduct the GMP, then decide the weekly rate of pension payable. It should not have been asked to refer any part of that decision to "the relevant area". As there was no dispute in this case about the basic weekly retirement pension entitlement of the appellant, this should have caused no problem. I must therefore reject that part of Mrs Ferneyhough's submissions on behalf of her client while accepting that it highlights an error by the tribunal.

Who makes the section 46 decisions

18 In my view it is:

- for the Secretary of State to decide on entitlement to pension, including any SERPS entitlement, under section 46(1) (a) of the Pension Schemes Act and to the weekly rate of that entitlement,
- for an officer of the Board to decide on entitlement to any GMP entitlement under section 46(1)(b), and to decide the weekly rate of that entitlement (or those entitlements), and
- for the Secretary of State to decide on the amount of reduction to Category A pension under section 46(1) .

That conclusion is not obvious in the legislation, and I have given my reasons for this conclusion in Appendix 2.

Rights of appeal

19 Following from the above analysis:

- any decision of the Secretary of State under section 46 of the Pension Schemes Act is a decision "made on" a claim for retirement pension, and is appealable to an appeal tribunal under section 12(1)(a) of the Social Security Act 1998 as part of any decision on retirement pension entitlement;
- any decision of an officer of the Board under Part III of the Pension Schemes Act about entitlement to the guaranteed minimum pension that is made for the purposes of the application of section 46 by the Secretary of State is appealable to an appeal tribunal under section 12(1)(b) of the Social Security Act 1998.

It follows that the two elements of decision making involved in this case are separate issues giving rise to separate appeal rights and the Department and the Board must separately give claimants notice of their decisions under section 46 together with

statements of the separate rights to appeal the separate aspects of the decisions if section 46 applies. Whether or not they do that in one document or two is for them. My analysis of the legislative provisions that lead to this conclusion is in Appendix 3.

Applying the conclusions to this case

20 It follows that the submissions to the tribunal are wrong in law on a number of counts, and so therefore is the tribunal decision. In particular, there should be a separate appeal about the decision by the officer of the Board. At the same time, I accept fully the submissions for the appellant in this case that he was appealing the only decision of which he was notified. My conclusion must be that the Board never gave the appellant the notification to which he was entitled about his GMP, and the tribunal were asked the wrong questions, and dissuaded from asking the right questions, by the submissions from the Department. I deal with the consequences of these errors in the order in which they occurred.

The decision of an officer of the Board

21 I accept that the appellant was not notified about the Board decision. This is accepted, it seems, in the submission for the Inland Revenue to the Commissioner. The relevant part of the submission is that "[the appellant] has never requested a formal review or a formal decision on the amount of his GMP". This suggests not only that the appellant did not receive a notification of the decision in this case, but also that such notifications are not generally issued. Indeed, the Revenue submission suggests that officer have not actually taken decisions under Part III in cases such as this. As the Revenue were not represented at the hearing I was unable to establish this.

22 The relevant procedure for decision-making under Part III of the Pension Schemes Act by an officer of the Board is laid out in detail in the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (which, as noted elsewhere in this decision, have been amended so that they apply to section 170 decisions) ("the Decisions and Appeals Regulations"). Section 170 of the Pension Schemes Act expressly applies the provisions made under the Social Security Act 1998, including these Regulations, to decisions by an officer of the Board under section 170, and therefore section 46. There is no category of non-formal decision in those Regulations, nor is there any procedure whereby a claimant has to ask for a formal decision. In all cases where a decision is made that has operative effect, regulation 28 of the Decisions and Appeals Regulations applies and the claimant must be given written notice of the decision and of the appeal rights. If the submission of the Inland Revenue is a statement that officer of the Board have not made decisions in cases such as the present one, the consequence is that the Secretary of State has been unable properly to make decision under section 46, and the issues still remain in abeyance. I do not think that is what the Revenue are suggesting.

23 The alternative is that an officer of the Board has made a decision, but has failed to comply with the requirements of regulation 28. If that is so, (and I assume that it is so), then it is for the Revenue to issue that notice. This is not a mere technicality, because a claimant's appeal rights start running only on notification of a decision of an officer (regulation 31(1) of the Decisions and Appeals Regulations, as amended to take account

of decisions under section 170). Failure to issue proper notification of a decision prevents that decision giving rise to rights of appeal, and prevents the decision becoming final. I note the suggestion in *Social Security Legislation 2000, Volume III*, paragraph 4.297 (Sweet and Maxwell, 2000) that a failure to give notice at all may have the effect that there is no decision. I have not heard argument on this matter, but I can see that it would have profound effects if it were applied to the Revenue decisions in cases such as the present case, because of its effect on all subsequent section 46 decision and on any related overpayment decisions. Without argument, I do not go that far. I find that in this case an officer of the Board failed to notify the GMP decision to the appellant. The appeal papers are to be referred to the Revenue for that notification to be issued. This does not require any application from the appellant as it should have been done in ordinary course of making the decision. It will be for the appellant to decide if he wishes to appeal. If he does, it goes to an appeal tribunal.

What should the tribunal have decided?

24 On the grounds of appeal put before me, there seems to me only one decision that the tribunal could have taken on the full decision put before it. That is to adjourn the proceedings, or at least part of them, until the GMP has been determined. The tribunal could have, and did, decide the amount of additional pension. But it could not decide on the application of section 46 until the Revenue had decided the GMP and notified that decision, and any appeal was considered.

The appellant's additional pension rights

25 This leaves one substantive issue undetermined, namely whether the tribunal erred in law in accepting the second calculation of the additional pension, but not the first. The tribunal accepted the calculation of additional pension on document 4 of the appeal papers. The statement of the tribunal reasoned that:

> "The decision maker has explained in detail in his submission to the tribunal the law as it relates to the appellant's pension entitlement and how that entitlement has been calculated under the relevant provisions. The tribunal examined this submission and agreed with it. The appellant's query about his contributions during the 17-month period is fully addressed. The Decision Maker also pointed out that the calculation used in the award of the appellant's additional pension was incorrect because a figure of £6,491, which should have been used, had inadvertently been transposed as £6,941. A recalculation using the correct figure showed that the appellant's additional pension should be £83.78 instead of the £84.23 awarded ... "

26 The submission which the tribunal was accepting states that :

> "The amount of the Additional Pension and the Guaranteed Minimum Pension are calculated from the contributions paid by the appellant in accordance with the Law. These figures were calculated by an Officer of the Inland Revenue and the calculations are attached to this submission. "

The implication is that the Officer of the Revenue calculated the additional pension, not the Department. This is important because the submission also states:

> "I submit that the law says that any issues that fall to be decided by an Officer of the Inland Revenue are outside the jurisdiction of the Benefits Agency Decision Maker ... It also follows that any question relating to the accuracy of the figure supplied by the Inland Revenue is outside the jurisdiction of a Social Security Appeal Tribunal ."

27 Aside from the fact that the social security appeal tribunals had been abolished for all purposes several months before this submission was prepared, it contains several other errors of law, as this decision identifies. Decisions about "the accuracy of figures" are only outside the jurisdiction of an appeal tribunal if they relate directly to questions within the jurisdiction of the Board under section 8 of the Transfer of Functions Act (and therefore within the jurisdiction of the tax appeal tribunals). That is not in dispute in this case, but the submission to the tribunal goes far wider than that. The decisions of the Officer under section 170, including the calculations, are within jurisdiction on a correctly made appeal. More important, it is for the Department to make its own decision about additional pension under section 45 of the Social Security Contributions and Benefits Act 1992. There is nothing wrong with it using figures generated elsewhere to do that, as long as the Department accepts that the decision is the Department's decision for appeal purposes, that any errors are the Department's errors, and that it is for the Department to explain and notify the decision. It cannot avoid those consequences , as it has tried to do here, by blaming the Board for the figures and the errors.

28 Further, no mention is made at any point in the submission to the tribunal of section 45 of the Social Security Contributions and Benefits Act 1992. That is the section under which the Department makes additional pension decisions. It follows that the submission to the tribunal totally failed to mention, let alone explain, the law under which it was made, and the tribunal was under a complete (if understandable) when it concluded that the submission "explained in detail ... the law". The only relevant information given is the sets of figures and associated abbreviations in documents 3 and 4. They include a series of abbreviations that I do not understand and that no one has attempted to explain. Nor has anyone attempted to explain the significance of the figures.

29 This is far from an adequate submission. As a result, I cannot decide this aspect of the appellant's appeal nor properly refer it to another tribunal. I therefore direct a full submission from the Secretary of State stating how the figures are derived from section 45 of the Social Security Contributions and Benefits Act 1992 and any relevant regulations. In so directing, I accept that I have no jurisdiction over contributions questions that are within section 8 of the Transfer of Functions Act. The submission is to include any necessary information within the scope of section 8, but the Secretary of State is directed only to identify those issues not to explain them.

Use of computers

30 I suspect that the effective decision-making in this case was not done by officer of the Department or Board but by their computers. Computers were blamed for delay in the original decision. The tribunal was presented with a series of computer printouts as the explanation for the decisions of both the Department and the Board. This is expressly authorised for the Department by section 2 of the Social Security Act 1998, and expressly extended to the Board by section 170 of the Pension Schemes Act. What is wrong is reliance on something like document 4 without any explanation. That is not in my view notification of a decision, let alone an explanation of a kind sufficient to meet regulation 28. That is why I direct a full explanation of that document from the Secretary of State responsible for the decision made by it.

Summary

31 My decision has unfortunately been lengthy and yet also inconclusive. In large part this is, as I think the appellant was somewhat surprised to learn, because he has sought to appeal against decisions taken by two government departments acting not entirely in tandem with each other under complex and frequently changed legislation not so far tested by the courts, the appeal tribunals or the Commissioners. That may explain some hesitancy and confusion on the part of those making submissions about this case, but it is nonetheless unfortunate that I have to record a catalogue of errors in the approaches taken to these decisions. It is also why I make three separate operative decisions to take this appeal forward. They are set out at the head of the decision. While I conclude that, in the formal sense, the appellant has won his appeal (in that I agree that the appeal tribunal erred in law), I cannot yet say whether that is to his individual advantage.

David Williams
Commissioner

17 September 2001

APPENDIX 1 TO CP 4479 2000

Section 170 of the Pension Schemes Act 1993 in its present form:

[[1] 170 Decisions and appeals

(1) Section 2 (use of computers) of the Social Security Act 1998 ("the 1998 Act") applies as if, for the purposes of subsection (1) of that section, this Act were a relevant enactment.

[[2] (2) It shall be for an officer of the Inland Revenue -

(a) to make any decision that falls to be made under or by virtue of Part III of this Act, other than a decision which under or by virtue of that Part falls to be made by the Secretary of State;

(b) to decide any issue arising in connection with payments under section 7 of the Social Security Act 1986 (occupational pension schemes becoming contracted-out between 1986 and 1993); and

(c) to decide any issue arising by virtue of regulations made under paragraph 15 of Schedule 3 to the Social Security (Consequential Provisions) Act 1992 (continuing in force of certain enactments repealed by the Social Security Act 1973). [3] [4]

(3) In the following provisions of this section a "relevant decision" means any decision which under subsection (2) falls to be made by an officer of the Inland Revenue, other than a decision under section 53 or section 54.

(4) Sections 9 and 10 of the 1998 Act (revisions of decisions and decisions superseding earlier decisions) apply as if -

(a) any reference in those sections to a decision of the Secretary of State under section 8 of that Act included a reference to a relevant decision; and

(b) any other reference in those sections to the Secretary of State were, in relation to a relevant decision, a reference to an officer of the Inland Revenue.

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[1] Section (as amended in 1995) replaced in entirety with effect from 4. 3. 99 by Social Security Act 1998 Schedule 7, paragraph 131

[2] Subsections (2) - (7) substituted for the previous text by section 16 of the Social Security Contributions (Transfer of Functions) Act 1999 with effect from 1. 4. 99. For transitional provisions see SI 1999 No 527

[3] Decisions under this subsection are subject to the power in section 23 of the Social Security Contributions (etc) Act 1999, section 23, transferring functions between the Secretary of State and the Inland Revenue.

[4] A decision under this subsection may be revised at any time by an officer of the Board where it contains an error: SI 1999 No 991, regulation 3(4), as amended by SI 1999 No 1662, art 3(3).

(5) Regulations may make provision -

[5(a) generally with respect to the making of relevant decisions;

(b) with respect to the procedure to b e adopted on any application made under section 9 or 10 of the 1998 Act by virtue of subsection (4); and

(c) generally with respect to such applications, revisions under section 9 and decisions under section 10;]

but may not prevent such a revision or decision being made without such an application.

(6) Section 12 of the 1998 Act (appeal to appeal tribunal) applies as if, for the purposes of subsection (1)(b) of that section, a relevant decision were a decision of the Secretary of state falling within Schedule 3 to the 1998 Act.

(7) The following provisions of the 1998 Act (which relate to decisions and appeals) -

sections 13 to 18,
sections 25 and 26,
section 28, and
Schedules 4 and 5,

shall apply in relation to any appeal under section 12 of the 1998 Act by virtue of subsection (6) above as if any reference to the Secretary of state were a reference to an officer of the Inland Revenue.]]

Section 170 of the Pension Schemes Act 1993 as amended up to and including the amendments made by the Social Security Act 1998:

(1) *[as present version]*

(2) Sections 8, 9, and 20 of the 1998 Act (decisions by the Secretary of State, revision of decisions and decisions superseding earlier decisions) apply as if, for the purposes of section 8(1)(c) of that Act, this Act were a relevant enactment.

(3) Regulations may make provision -

(a) with respect to the procedure to be adopted on any application made under sections 9 or 10 of the 1998 Act by virtue of subsection (2); and

(b) generally with respect to such applications, and revisions under section 9 and decisions under section 10,

but may not prevent such a revision or decision being made without such an application.

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[5] Amended by Welfare Reform and Pensions Act 1999, Schedule 11, paragraph 22.

(4) Section 12 of the 1998 Act (appeal to appeal tribunal) applies as if, for the purposes of subsection (1)(b) of that section, any decision of the Secretary of State falling to be made under this Act were a decision falling within Schedule 3 to that Act.

Section 170 of the Pension Schemes Act 1993 as originally enacted:

(1) The questions to which section 17(1) of the Social Security Administration Act 1992 (questions for determination by the Secretary of State) applies include –

(a) any question as to the amount of a person's guaranteed minimum for the purposes of section 13 or 17;

(b) any questions –

(i) whether any state scheme premium is payable or has been paid in any case or as to the amount of any such premium; or

(ii) otherwise arising in connection with any state scheme premium;

(c) any question whether for the purposes of this Act a cash sum paid or an alternative arrangement made under the Policyholders Protection Act 1975 provides the whole or any part of the guaranteed minimum pension to which an earner or an earner's widow or widower was entitled under a contracted-out scheme; and

(d) any question arising in connection with minimum contributions or payments under section 7 of the Social Security Act 1986,

other than a question such as is mentioned in paragraph (b)(ii) or (d) which is required by virtue of this act to be determined by the Board.

(2) The Secretary of State may make any determination required by subsection (1)(c) on such basis as he considers appropriate.

(3) Any question arising under this Act as to whether the employment of an earner in employed earner's employment at any time is or was contracted-out employment in relation to him shall be referred by the Secretary of State to the Board and determined by them.

(4) Neither section 17(1) nor section 20(1) of the Social Security Administration Act 1992 (questions for determination by adjudication officers) shall apply to any such question as is mentioned in subsection (3).

(5) and (6) [applied to equal access requirements appeals only and repealed on enactment: Schedule 7 paragraph 3.]

APPENDIX 2 to CP 4479 2000

Who decides section 46?

A2.1 The appellant has challenged each aspect of the calculations required to establish what, if any, pension he was entitled to receive, including whether there should be any deduction against his basic pension. The Revenue challenged the appellant's right to query the decisions it had made because he had appealed only against the Department's decisions. For the appellant Mrs Ferneyhough stated on advice, and I accept, that her client was not told that any part of it involved a Board decision - he had appealed the decisions he was told about by the Department. By contrast, the tribunal was told that most of the decisions were made by the Board, including the calculations deciding additional pension. My conclusion in this decision is that there must have been a Revenue decision about GMP for his retirement pension to have been paid. I must also decide which of the Department and Board was responsible for which aspect of the decision-making that put section 46 into effect in an individual case.

A2.2 Until the Transfer of Functions Act, all aspects of section 46 were handled by the Department, and no difficulties arose. Had anyone appealed against a decision about additional pension and GMP, the Department would have been required to deal with all aspects of the decision-making in that section (though not all of it was appealable to an appeal tribunal). That Act transferred key functions to the Board, including calculating a GMP. Section 16 of the Transfer of Functions Act is the relevant transferring section. This provides:

> (1) The function of determining the questions referred to in subsection (1) of section 170 of the Pension Schemes Act 1993, as that section has effect before the commencement of paragraph 131 of Schedule 7 to the Social Security Act 1998, is hereby transferred to an officer of the Board.

Paragraph 131 came into effect on 4 March 1999, when the text of section 170 was completely replaced by a new text under the 1998 Act. This clumsy drafting means that the scope of section 170 after amendment depends on the scope of section 170 before amendment! (It is additionally clumsy as that text refers to the now-repealed Social Security Administration Act 1992 to further determine its scope).

A2.3 The full version of section 170 as at that date is set out in Appendix 1. Subsection (1) provided, so far as relevant:

> (1) The questions to which section 17(1) of the Social Security Administration Act 1992 (questions for determination by the Secretary of State) applies include -
> (a) any question as to the amount of a person's guaranteed minimum pension for the purposes of section 13 or 17 ...

A2.4 Section 17(1) of the Social Security Administration Act 1992 (repealed by the Social Security Act 1998) listed questions to be determined by the Secretary of State. Those questions could not be considered by appeal tribunals and Commissioners, but were subject to separate appeal procedures. It is well established that section 17 should be

interpreted narrowly: R(G) 1/82. The text of section 17 itself is irrelevant to this case, but the old form of section 170(1)(a) makes it clear that determination of a GMP under section 13 was a question transferred to the Board by the 1999 Act.

A2.5 The new version of section 170 brought in by the Transfer of Functions Act is also set out in full in Appendix 1. The operative subsection is subsection (2), which provides (so far as relevant):

> (2) It shall be for an officer of the Inland Revenue -
> (a) to make any decision that falls to be made by or by virtue of Part III of this Act, other than a decision which under or by virtue of that Part falls to be made by the Secretary of State .....

A2.6 If I have wound my way through this legislative maze correctly, the conclusion is :

- that before the Transfer of Functions Act took effect in 1999 all decisions under Part III were taken by the Department,
- that any decision under the Pension Schemes Act that fell to be made under the old version of section 170(1) of that Act by the Department is now a decision to be made by the Board under the new version of section 170(2)(a) of that Act by virtue of section 16 of the Transfer of Functions Act,
- that all other decisions under Part III of the Pension Schemes Act are to be taken by the Board unless they "fall to be made" by the Department "under or by virtue of" that Part.

How does that apply to decisions under section 46 of the Pension Schemes Act (which is in Part III of the Pension Schemes Act)?

Submissions of the Departments

A2.7 On behalf of the Secretary of State, the following submission was made. The submission relied on the terminology of the submission made to the tribunal, which listed the decision in question in this appeal as containing five elements:

A) The weekly amount of basic retirement pension
B) The additional pension (SERPS)
less
C) Contracted out deductions (GMP)
D) (B - C)
E) Graduated retirement pension

Figures B, C and D are all in issue in section 46. Using that language, the submission was that figure B was to be determined by the Department , and figure C by the Board. On figure D the submission to the Commissioner was:

> "Section 46 is part of Part III of the Pension Schemes Act. Therefore on the face of it, figure D may be a decision which falls to be determined by an officer of the Inland Revenue under section 170 of the Pension Schemes Act. However, this calculation is carried out by the Secretary of State. It is a straightforward arithmetical function which I submit is analogous with the pensions calculations carried out at sections 44 et seq of the Contributions and Benefits Act where the Secretary of State makes

decisions about retirement pension based on contribution information supplied by the Inland Revenue.

In the light of its arithmetical nature, I would submit that any dispute on the additional amount payable is likely to concern calculations at figures B and C, rather than figure D which could be easily identified and amended.

Nevertheless I also submit that it is possible that the claimant is complaining about the methodology of the calculation itself. The claimant may be arguing that there should be separate calculations for the SERPS payable in respect of those periods when he was contracted out of SERPS and in respect of periods when he was contracted into SERPS. This is not the approach adopted by the Secretary of State. The amount of SERPS payable is calculated with reference to the entire period of a claimant's working life and deducts the amount of GMP accrued as a result of any contracted-out employment during that period."

The submission from the Solicitor's Office of the Inland Revenue "does not disagree with the views expressed by the Department of Social Security" in this submission.

A2.8 This submission is wrong in law because it is based on a misreading of section 46 of the Pension Schemes Act, as I have explained in the main text of my decision. Using the Department's labelling, the calculation should involve the following stages:

A) The weekly amount of basic retirement pension
B) The additional pension (SERPS)
P) The Category A pension entitlement (A + B)
C) Contracted out deductions (GMP)
D) (P - C)
E) Graduated retirement pension

I have emphasised the inclusion of a new line P and the error in line D by italics. The importance of this is that D cannot be decided until P and C are all decided, not merely B and C. But that error does not alter the identity of the government department deciding each stage of the decision.

A2.9 The submission of the Secretary of State to the Commissioner contradicts the submission made by the Department to the tribunal (section 5.3 on document 1e) which expressly says that "these figures were calculated by an Officer of the Inland Revenue and the calculations are attached to this submission". I have indicated elsewhere in this decision that I consider that the submission to the tribunal erred in law not least because it sought to shift responsibility for all the figures to the Revenue and outside the jurisdiction of the tribunal. That is clearly wrong because it attempts to shift responsibility for matters that are unequivocally within the Department's duty to decide issues.

Conclusion

A2.10 I find it established that the Revenue decides B) (GMP) and the Department decides C) (hypothetical SERPS). The Department must also decide A) (the basic retirement pension) and P), but there is no clear legislative answer about who decides D).

I agree with the submission that this is of limited importance provided that there can be an appeal against any error or challenge to the approach to the calculation. As I am satisfied for the reasons set out in Appendix 3 that the matter can be appealed whether either the Revenue or the Department decides it, I accept what is in effect the joint submission to me by the two government departments that it is the Department that decides D). In other words, it is for the Board to decide the GMP, and for the Department to decide the rest. This, of course, means that the submission to the tribunal and the decision of the tribunal are both wrong in law.

APPENDIX 3 to CP 447 2000

Rights of appeal and notification

A3.1 The decision notified to the appellant was a combination of decisions taken by the Department and the Board under section 46, although it was not notified as such. How should the appellant challenge these decisions? As regard the additional pension element of the decision, that answer should be straightforward. As the submission from the Secretary of State pointed out, the figure used in section 46 is in fact a hypothetical figure based on the provisions in section 45 of the Social Security Contributions and Benefits Act 1992. A decision under section 45 of the 1992 Act is covered by the provisions on decisions and appeals within the scope of the provisions now in the Social Security Act 1998 and the Decisions and Appeals Regulations. As a claimant is entitled to an additional pension under section 45 of the 1992 Act save in so far as that entitlement is reduced or removed under section 46 of the Pensions Schemes Act, my view is that the determination of the additional pension in this case is a matter covered directly by the 1998 Act and regulations.

A3.2 The determination of the GMP is for an officer of the Inland Revenue. The current form of section 170 makes it clear that this is within the scope of Social Security Act 1998. In particular, the key provisions of Chapter II of the 1998 Act (social security decisions and appeals) are expressly applied to these decisions. These include the powers to revise and supersede, the appeals provisions, and the powers to prescribe procedures both for decision making and for appeals. Section 170 grants rights of appeal against a decision of the Revenue on a GMP in the same way as if it were a decision of the Secretary of State within Schedule 3 to the Social Security Act 1998. Schedule 3 is entitled "Decisions against which an appeal lies". Section 12(1) of the Social Security Act 1998 provides that the section applies to any decision made otherwise than on a claim or award and falls within Schedule 3. Section 12(2) then gives a right of appeal to an appeal tribunal against that decision, and on to a Commissioner and the courts.

A3.3 Had this case concerned only the GMP entitlement of the claimant, again the situation would have been straightforward. The Revenue would have made, or be asked to make, a GMP decision, and this would then be appealable to the appeal tribunal via a National Insurance Contributions Office (Decisions and Appeals Regulations, regulation 3(11)(d)). But this is not, in that sense, a straightforward section 170 decision. The Board was asked for the figures by the Department. The appellant did not ask the Revenue for a decision (nor had he any reason to do so), and the Revenue did not make it and then formally notify it to the appellant. In the submission to me from the Solicitor to the Inland Revenue, it is stated:

> "The DSS has confirmed that the Inland Revenue sent the GMP calculation to the local office who decide total pension entitlement which will include the GMP calculation...".

Mrs Ferneyhough, for the appellant, told me that he had received no individual notice from the Revenue, and neither the Revenue nor the Department has suggested otherwise. The appellant received notification only of the Department's decision.

A3.4 It is axiomatic as part of the decision-making process that however the decision is presented it must be properly notified. The appeal rights should also be set out. That did not happen here. At the oral hearing Mr Chang (not, of course, representing the Board but the Department) presented me with a copy of what I was told was a standard Revenue letter issued about GMP decisions in such cases. The letter nowhere mentions on it the appeal rights to an appeal tribunal under section 170, nor does the leaflet Inland Revenue 120 mentioned in that letter and of which I was also given a copy. This does not, however, remove the fact that there must have been a decision by an officer of the Board, in whatever form, and that there are appeal rights against that decision once it has been notified properly.

A3.5 The final element of section 46 is the decision to deduct the GMP from the retirement pension. I was told in the submissions that was in practice a Department decision, and I accept that provided that there is a clear right of appeal. Trying to identify precisely how decisions by the Secretary of State under the Pension Schemes Act fit within sections 8 and 12 of the Social Security Act 1998 is not as easy as it should be. I start from the position that under section 170 as it applied before the amendments in 1999 (the Transfer of Functions Act) but after the amendments in 1998 (the Social Security Act 1998), it was clear that all decisions under Part III of the Pension Schemes Act were appealable to the appeal tribunals as if a decision were a decision falling under Schedule 3 to the 1998 Act. (See Appendix 1 for each of the relevant forms of section 170). The post-1999 version of section 170 applies that approach to Revenue decisions under Part III (subsection (2). But it seems that the repeal and replacement of section 170(4) (in the post-1998 version) by section 170 (2), (3) and (6) (in the post-1999 version) removed appeal rights under section 12 against any decisions of the Secretary of State under Part III of the Pension Schemes Act. I cannot believe that this was the intention of Parliament, given that there was no reason to remove those rights and there is no specific provision expressly doing so. If that were the unavoidable interpretation of the relevant legislation, then I would have been inclined to decide that it is for the Revenue to make all section 46 decisions save in so far as I could be shown express statutory authority (and I have seen none) stating that the decision were to be made by the Secretary of State, in order to protect appeal rights.

A3.6 In my view this second legislative maze can be avoided in a more direct way if a broader view is taken of the central appeals section. Section 12(1) of the Social Security Act 1998 provides that:

> This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which -
>
> (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or
>
> (b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act ...

Section 8(1) provides that:

> Subject to the provisions of this chapter, it shall be for the Secretary of State -

(a) to decide any claim for a relevant benefit ...

Retirement pension is a relevant benefit. If a claimant claims it, then the Secretary of State must decide the claim. The Secretary of State cannot decide the claim without applying section 46 of the Pension Schemes Act, in so far as it falls to the Secretary of State to make the relevant decision. Any decision applying section 46 to entitlement to retirement pension is in my view a decision "made on" the claim. Therefore any decision made or to be made by the Secretary of State in connection with the appellant's claim for retirement pension, including both the decision on the hypothetical additional pension or SERPS and on the difference between the GMP and the Category A pension, is within section 12(1)(a) and appealable.

A3.7 Finally, are the decisions by the Board and those by the Department appealable as part of the same appeal, or as different appeals? Returning to the analysis based on section 12, section 170(6) in the post-1999 version provides that:

> Section 12 of the 1998 Act (appeals to appeal tribunal) applies as if, for the purposes of subsection (1)(b) of that section, a relevant decision were a decision of the Secretary of State falling within Schedule 3 to the 1998 Act.

Section 170(3) includes Revenue decisions about GMP within this provision. This cannot therefore be regarded as part of the Secretary of State's decision "made on" the additional pension claim in the same way as the other aspects of decisions under section 46. Decisions of the Secretary of State are appealable under section 12(1)(a), but decisions of an officer of the Board are appealable under section 12(1)(b). It follows that appeal rights under section 12 apply to the calculation of the GMP as part of the application of section 46 separately from other aspects of decision under section 46, and that therefore there must be a separate appeal against the decision of an officer of the Board, and a separate notification of that right of appeal.