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Commissioner's File: CSB/886/1988
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Region: North Western

SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF A TRIBUNAL OF COMMISSIONERS

Name: Mrs D Woff
Social Security Appeal Tribunal: Birkenhead
Case No: 602 04565

[ORAL HEARING]

1. This is an adjudication officer's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 10 June 1988 which reversed a decision of the adjudication officer dated 11 March 1988. Our decision is as follows:

(1) The adjudication officer's appeal is allowed.

(2) The aforesaid decision of the appeal tribunal is erroneous in law and is set aside.

(3) The claimant is not entitled to housing benefit supplement in respect of the week beginning on 4 April 1988 or thereafter.

2. On 15, 16 and 17 February 1989 we held an oral hearing of the appeal. The Chief Adjudication Officer and the Secretary of State were represented by Mr John Laws, of counsel, instructed by the Solicitor's Office of the Department of Social Security. The claimant was represented by Mr Richard Drabble, of counsel, instructed by Mr Nicholas Warren, solicitor, of the Birkenhead Resource Unit. We are indebted to both counsel for their carefully prepared and closely reasoned submissions. The adjudication officer's appeals in respect of four other claimants were also before us. Each of those four was also represented by Mr Drabble. The crucial issues are identical in all five appeals. With our - much shorter - decisions in those four appeals will be served a copy of this decision.

Background

3. Before we turn to the details, it may be helpful if we summarise the central issue in simple and generalised terms. In April 1988 a profound change was wrought in respect of income-related benefits. Materially, with effect from 11 April 1988 supplementary benefit was replaced by income support. Also, with effect from 1 April or 4 April 1988 (the selection of the appropriate date depended upon the interval at which rent and/or rates were

payable in a particular case) the old scheme of housing benefit was replaced by a new scheme. Regulations 9 and 10 of the Income Support (Transitional) Regulations 1987 [SI 1987 No 1969] provided that - putting it generally - a beneficiary should not receive less by way of income support than he had received by way of supplementary benefit and certain other benefits. A "transitional addition" was payable of the difference between, broadly, the claimant's supplementary benefit for "the first benefit week" and his income support for "the second benefit week". The "first benefit week" means the benefit week beginning on a day during the period of 7 days commencing on 4 April 1988. The "second benefit week" means the benefit week beginning on a day during the period of 7 days commencing on 11 April 1988.

4. With regard to supplementary benefit, since April 1983 one of the items which a claimant could - in appropriate circumstances - carry as a requirement into a claim for supplementary benefit was housing benefit supplement. This was provided for by regulation 19 of the Supplementary Benefit (Requirements) Regulations 1983 [SI 1983 No 1399] (set out in paragraph 29 below, so far as relevant). But regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 [SI 1987 No 1972] provided as follows:

> "(1) Regulation 19 of the Supplementary Benefit (Requirements) Regulations 1983 (housing benefit supplement) shall cease to have effect in relation to any person immediately before the relevant date except that the amount of housing benefit supplement applicable to him under that regulation shall be calculated as if that regulation and the Housing Benefits Regulations 1985 ceased to have effect at the end of his benefit week current immediately before that date."

(The "relevant date" was 1 or 4 April 1988). Thus, a claimant would not be entitled to transitional protection in respect of housing benefit supplement. It was accepted by Mr Drabble that that is the effect of regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 if that regulation falls to be read and applied at its face value. However, Mr Drabble has contended before us that regulation 12(1) was ultra vires the regulation-making powers conferred by Parliament.

5. In the case the subject of this decision, figures were produced by Mr Drabble to show that the application of regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 left the claimant "worse off" by the sum of £11.41 per week on the change from supplementary benefit to income support, although we add that we have no figures to show the effect of the change in the housing benefit scheme. For his part Mr Laws submitted that certainly for rent payers under the new housing benefit scheme anyone in receipt of benefit under it is left with a disposable income after meeting rent and rates in full which is equal to or in excess of his income support level. Mr Laws also placed before us a paper which set out that if housing benefit supplement were to be paid for the period 4 to 11 April 1988 on the basis suggested by Mr Drabble then there would flow the consequences of preferential treatment and double provisions for those affected; we did not understand Mr Drabble to dissent from that submission. With our consent, that paper was revised and annotated after the hearing; Mr Warren, by letter dated 7 March 1989, indicated that neither Mr Drabble nor he had any observations to make thereon. For our part, we do not feel ourselves assisted in the determination of the question of law before us by the financial consequences of the different submissions.

6. In this case the adjudication officer applied regulation 12(1) and gave a decision to the effect that the claimant was not entitled to housing benefit supplement from 4 April 1988. The claimant appealed to the appeal tribunal. She was represented thereat by Mr Warren. He deployed a closely reasoned argument. He was successful. The appeal tribunal decided that regulation 12(1) had been made ultra vires what the tribunal considered to be the relevant regulation-making power conferred by Parliament. As a secondary ground, the appeal tribunal held regulation 12(1) to be so "unreasonable" that Parliament could not have intended the legislative power which it had delegated to be exercised in that way. (We were told at the hearing before us that the "unreasonable" ground had not been put to the tribunal by Mr Warren.) In due course the chairman of the appeal tribunal granted

the adjudication officer's application for leave to appeal to a Commissioner.

The jurisdiction of the statutory authorities to determine ultra vires issues

7. Before we turn to the merits of the ultra vires argument we must deal with a more fundamental question. Do we have any jurisdiction to decide and pronounce upon the vires of a statutory instrument or any provision thereof? As recently as December 1987 that very issue was pronounced upon by a Tribunal of Commissioners in the case on Commissioner's file CSB/241/1987 (to be reported as R(SB) 10/88). The issue had been extensively argued before that Tribunal of Commissioners, counsel for the adjudication officer having submitted that neither the adjudication officer nor the social security appeal tribunal nor the Commissioner ("the statutory authorities") had any such jurisdiction. The arguments were carefully considered in paragraphs 14 to 19 of the decision. After summarising the submissions which had been made on behalf of the adjudication officer, the Tribunal of Commissioners proceeded thus:

> "16. We all reject these submissions. They misconceive the statutory duty of the statutory authorities (the adjudication officer, the social security appeal tribunal and the Commissioner). Where a claimant raises a question relating to the determination of benefit, which is assigned to the statutory authorities and which can only be answered by ruling on the validity of a regulation, the adjudicating authority is obliged so to rule and it is not open to that authority to refuse to do so. Such a refusal would amount to a breach of their statutory duty to determine - and, by virtue of section 117 of the Social Security Act 1975, finally determine (subject to the statutory rights of appeal with leave) - the question assigned to them ..... [original emphasis]
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> 17. The jurisdiction of the Commissioners in supplementary benefit appeals and, since 6 April 1987, in all other appeals from the social security tribunal lies, and lies only, on the ground that the decision of the tribunal was erroneous in point of law: see section 101(1) of the Social Security Act 1975, as amended. If a social security appeal tribunal based their decision on a statutory regulation which is invalid and ultra vires that is an error of law and it is the duty of the Commissioner, in the event of an appeal to him, so to hold."

8. In the event, the claimant's appeal in R(SB) 10/88 was disallowed. Accordingly - whatever the adjudication officer thought about the Tribunal of Commissioners' decision on the jurisdiction issue - there could be no question of an appeal by the adjudication officer to the Court of Appeal. The point as to jurisdiction was fully argued before us; although Mr Laws did not put it in the forefront of his argument. We add that we accept it as established that, in appropriate cases, a Tribunal of Commissioners can depart from a previous decision of a Tribunal of Commissioners. That is not - of course - to be lightly done, but, the power is there. It - and the prudent limitations on its use - are fully dealt with in the decision of a Tribunal of Commissioners R(U) 4/88.

9. But was there any error in the approach to jurisdiction laid down by the Tribunal of Commissioners who decided R(SB) 10/88? At the outset of such enquiry a practical - and significant - difficulty presents itself. In respect of all appeal tribunal decisions recorded in writing on or after 6 April 1987 appeal to a Commissioner lies only in point of law. If Mr Laws' submissions are well founded, an appeal tribunal has no jurisdiction to enquire into the vires of any provision of a statutory instrument which is before it. It must take and apply that provision at its face value - no matter how glaring may be the departure in such provision from the scope of the relevant enabling section in primary legislation. And, if such a provision is applied at its face value by an appeal tribunal, a fortiori - following on Mr Laws' submission - there will be no error of law to justify any intervention by the Commissioner. It is not necessary for the purposes of this appeal to consider the possible projection of this difficulty to the Court of Appeal or Court of Session and the House of Lords, appeals from Commissioners being only for error of law.

10. From those general observations, we turn to the particular. Section 2(1) (as amended) of the Supplementary Benefits Act 1976 provided as follows:

> "(1) The question whether any person is entitled to supplementary benefit and the amount of any such benefit and any other question relating to supplementary benefit which arises under this Act or section 6 of the Social Security (No 2) Act 1980 shall be determined by an adjudication officer appointed under section 97 of the Social Security Act 1975, a social security appeal tribunal constituted under that Act or a Social Security Commissioner in accordance with regulations made for the purposes of this section; and any such regulations may in particular -
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> (a) contain provisions corresponding to, or apply with or without modifications, any of the provisions for the time being applying to the determination of questions as to the right to any benefit under the Social Security Act 1975;
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> (b) make provision for purposes corresponding to those for which provision may be made by regulations under section 115 of that Act."

In our judgment the determination of whether a right to benefit exists and the quantification of benefit necessarily imports a duty to consider whether the regulation in question has a legal existence when that existence is challenged; until the law is ascertained the question of possible entitlement cannot be addressed. Alternatively, it seems to us that "any other question relating to supplementary benefit which arises under this Act" would include a question as to whether a provision in a statutory instrument which relates to supplementary benefit was or was not made in the manner specified by and within the scope of the relevant enabling section or sections in primary legislation and accordingly intra vires or ultra vires. (We add that there is nothing in any of the regulations which were made pursuant to section 2(1)(a) or (b) which can reasonably be read as excluding such a question from the jurisdiction of the statutory authorities.) Our conclusion as to the existence of the jurisdiction is consistent with and supported by the citations from other cases in paragraphs 11, 12 and 13 below.

11. In paragraph 18 of R(SB) 10/88 it is stated -

> "It is the settled practice, in fact, to rule on validity: see, for example, numbered Decision CS 5/76, and Decisions R(S) 8/83 (affirmed by the Court of Appeal in Bhatia v Birmingham on 18 January 1985), R(SB) 26/84, R(SB) 9/87 (affirmed by the Court of Appeal under the name of Kilburn v Chief Adjudication Officer on 5 March 1987). No case has been cited, or is known to us, where this jurisdiction has ever been questioned. We consider this settled practice to be well-founded; and we note that neither in the Bhatia case nor in the Kilburn case was there any suggestion to the Court of Appeal that the Commissioners were acting without jurisdiction."

12. Reg v The Secretary of State for Social Services, ex parte Cotton was an application by a supplementary benefit claimant for the judicial review, upon the grounds that they were ultra vires, of certain regulations which purported to amend the Supplementary Benefit (Requirements) Regulations 1983. In the event, he succeeded. But not without interest in the context of this appeal are the closing words of the judgment of Mann J in the Divisional Court:

> "The Applicant and the Respondent were each anxious and for reasons which are obvious, to secure a quick decision upon the question which I have decided. They were agreed that such a decision could be obtained by invoking the supervisory jurisdiction of this court. Mr Laws, however, recorded the Respondent's view, that a decision could have been achieved, albeit not quickly, by use of the appeal procedure in the

social security legislation (as to this view, see the decision of a Divisional Court in R v Adjudication Officer ex parte Bland (29th January 1985) (CO/1486/84))." (Cotton was numbered CO/799/85 and the judgment was delivered on 31 July 1985.)

13. Bland was an application for judicial review of certain advice which had, pursuant to section 97 of the Social Security Act 1975, been issued by the Chief Adjudication Officer to other adjudication officers. Judgment in the Divisional Court was delivered on 29 January 1985 and Taylor J said this:

> "At the outset Mr Laws on behalf of the respondent raised the issue as to whether it is appropriate for this court to entertain an application for judicial review in regard to the issues raised. He has contended that the point raised by all three applications is one which ought to be determined by the statutory appeals procedure provided in the social security field."

And a little later:

> "It is common ground that Mr Bland could have appealed from the decision of the adjudication officer to deduct the specified sum from his supplementary benefit. In the first instance his appeal would have been to the Social Security Appeal Tribunal. With leave, he could have had a further appeal to the Social Security Commissioners on points of law. Finally, with leave, an appeal would lie to the Court of Appeal. Furthermore, section 116 of the Social Security Act 1975 gives power to convene a Tribunal of Commissioners to consider difficult cases.
>
> On the other hand, Mr Laws concedes that this court has power to grant judicial review, notwithstanding the existence of a statutory appeal procedure. He does not assert any want of jurisdiction in this court but submits that in the exercise of our discretion we ought to leave Mr Bland to seek his remedy by the statutory appeal route."

Taylor J's conclusion was this:

> "In my judgment, it is highly desirable that in a specialised field where Parliament has provided machinery expressly to deal with appeals from decisions under its legislation in that field, this court should be chary of by-passing such machinery. Accordingly, for my part, I would hold that Mr Bland's application for judicial review should be dismissed and he should be left to his undoubted rights of appeal by the statutory procedure."

And May LJ agreed.

14. The present Order 53 of the Rules of the Supreme Court deals with applications for judicial review. It replaced the former O.53 in 1977, introducing a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other bodies of persons charged with the performance of public acts and duties. Mr Laws urged upon us that - at any rate since the introduction of the new O.53 - there was no jusfication for the statutory authorities to investigate issues of vires unless (and we think he conceded this exception) neither the adjudication officer nor the Secretary of State took no objection to such investigation. In our view no question of public policy or abuse of process arises in objections on the ground of vires being taken before the statutory authorities rather than by an application for judicial review, and we respectfully adopt what was said in R(SB) 10/88 at paragraphs 15 to 19 which considered the decision of the House of Lords in O'Reilly v. Mackman [1983] 2 A C 237.

15. We were referred to a number of authorities. In Plymouth City

Council v Quietlynn Ltd [1987] 2 AER 1040, for example, in issue was the jurisdiction of the Crown Court (on appeal in a criminal case from a magistrates' court) to examine and pronounce upon the refusal by a local authority to grant a licence for a sex establishment. The matter came before the Divisional Court by way of case stated. It was held that, except in the case of a decision which was invalid on its face, magistrates' courts and the Crown Court were bound when adjudicating in criminal proceedings to presume that decisions of licensing authorities made under the Local Government (Miscellaneous Provisions) Act 1982 had been validly made, unless and until such decisions were struck down by the High Court in judicial review proceedings. But in R v Crown Court at Reading, ex parte Hutchinson [1988] 1 AER 333, the Divisional Court, on an application for judicial review, held that a magistrates' court or, on appeal therefrom, the Crown Court has jurisdiction and is bound to inquire into the validity of a byelaw under which a defendant has been charged or of a decision of a local authority which is an essential element in the proof of the crime alleged. Neither section 31 of the Supreme Court Act 1981 nor RSC Ord 53 have taken away that jurisdiction. We quote from the judgment of Lloyd LJ:

> "Counsel for the respondent submits that Kruse v Johnson [1898] 2 QB 91, was decided per incuriam. He would have to make the same submission with regard to all the many other cases in which byelaws have been considered by magistrates, and appeals brought before the Divisional Court on a case stated, whether by the prosecution or the defence. In all such cases, says counsel for the respondent, the magistrates have exceeded their jurisdiction. Their proper course was always to adjourn the hearing before them to allow the defendant to apply for a prerogative writ, presumably prohibition.
>
> I cannot accept so bold a submission. Nor can it be sustained by the consideration, which I would certainly accept, that the jurisdiction of magistrates is statutory. The absence of express statutory authority for magistrates to inquire into the validity of a byelaw does not mean that they do not have implied authority to do so, when the validity of the byelaw is challenged by the defendant.
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> So I would reject the first submission of counsel for the respondent. In my judgment magistrates have always had jurisdiction to inquire into the validity of a byelaw. They are not only entitled, but bound to do so when the defendant relies on the validity of the byelaw by way of defence." (At p 336)

Lloyd LJ then dealt with - and explicitly rejected - the suggestion that the position had changed in consequence of either the new streamlined procedure for judicial review or of anything which had been said in O'Reilly. At p 337 he said this:

> "As a matter of ordinary commonsense, it cannot be said that the defendants here are abusing the process of the court unless we adopt the principle 'cet animal est tres mechant: quand on l'attaque, il se defend'. It may be more convenient for the Crown Prosecution Service that the validity of byelaws, at any rate these byelaws, be tested by way of judicial review, though I do not accept that it is. But, even if it were so, convenience of the Crown Prosecution Service is one thing; an abuse of the process of the court is something quite different."

Later in his judgment Lloyd LJ expressed reservations about some of the "incidental reasoning" employed in the Quietlynn case - although he felt that the actual decision was fully jusified upon the especially unmeritorious facts.

16. Mr Laws urged upon us the element of discretion which is an important constituent of the judicial review jurisdiction. A statutory authority - in pronouncing upon the vires of a provision of subsidiary legislation - has no such discretion. That - submits Mr Laws - renders the statutory authority a clumsy and inappropriate tool for such pronouncements. But - with all respect to Mr Laws eloquent arguments - we are not persuaded. It would appear anyway

that the circumstances would have to be exceptional indeed for the Divisional Court to hold that a provision in a statutory instrument was ultra vires but that the Court - in the exercise of its discretion - would not formally declare it to be so or would not strike it down.

17. The adjudication officer is, of course, in a somewhat special position. He is basically an administrative officer - but he gives decisions which he must approach in a judicial or quasi-judicial manner. On appeal to the appeal tribunal, he becomes the respondent in respect of such decisions. But, again, since this is an inquisitorial jurisdiction, he is expected to - and does - bring a substantial measure of objectivity to the defence of the decision. If he were seriously troubled by the vires of a regulation, we believe that he would - in practice - refer the issue to an appeal tribunal rather than pronounce upon it himself. Mr Laws submitted that the jurisdiction to determine a question of vires could not have been conferred on the adjudication officer, but we cannot - and do not - sever the adjudication officer from what we have said about the jurisdiction of the statutory authorities.

18. Accordingly we are of the view that it is not contrary to public policy or an abuse of process or otherwise jurisdictionally inappropriate for a statutory authority to entertain and to pronounce upon the vires of a provision of subsidiary legislation which comes before it for application.

19. We therefore summarise this limb of our decision by saying that we do not consider that the appeal tribunal erred in law by the mere fact of its examining and pronouncing upon the vires pursuant to which was made regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987.

"Reasonableness"

20. But we do not consider that what we have said above holds good in respect of the second ground of the appeal tribunal's decision, which was set out thus:

> "2. If our reasoning in paragraph 1 above is wrong, our conclusion remains the same because we considered that despite the subjective language used in sect.89(1) [of the Social Security Act 1986], (i.e. 'Considers necessary and expedient') Parliament cannot have intended such delegated legislative power to be exercised unreasonably. The power does appear to have been used unreasonably if indeed it was actually delegated. Reg 12 [Housing Benefit (Transitional) Regulations 1987] is unreasonable in particular because it is partial and unequal in its operation as between different groups of recipients of supplementary benefit. For most recipients the Requirements Regs remained in fact up to April 10th thus enabling them to secure the advantages of the IST [Income Support (Transitional)] regulations denied to the appellant and other claimants in the same position. On this basis Reg 12 HBT Regs appears to be illegal."

21. For our part, we are satisfied that it is not the proper function of the statutory authorities to entertain argument as to the "reasonableness" of provisions in delegated legislation. The issue was succinctly treated in paragraph 21 of R(SB) 10/88:

> "It is not for the Social Security Commissioners to substitute their judgment of what is reasonable for provisions approved by Parliament. No authority has been cited, or is known to us, in which the validity of subordinate legislation has been successfully questioned on the ground that the Secretary of State acted unreasonably. As Lord Scarman said in R v The Secretary of State for the Environment, ex parte Notts CC [1986] AC 240 at page 250 when considering guidance to local authorities on expenditure given by the Secretary of State and approved by the House of Commons:
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> > "If a statute ..... requires the House of Commons to approve a Minister's decision before he can lawfully enforce it, and if the action proposed complies with the

terms of the statute ..... it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons has notice was perverse and must be set aside. For that is a question of policy for the Minister and the Commons, unless there is bad faith or misconduct by the Minister.'

That citation is taken from a case where the action of a Secretary of State required an affirmative resolution of the House of Commons, whereas the 1986 Regulations [amending the Supplementary Benefit (Single Payments) Regulations 1981] were laid before Parliament under the negative procedure. But the quoted principle is equally applicable where that procedure is used."

22. The same issue was also dealt with in relation to other regulations in Appendix 2 to a later decision on Commissioner's file CSSB/116/1987. (The appeal was in Scotland.) After recording that the adjudication officer's representative had conceded that the Commissioner was bound to follow the principles set out in paragraphs 14 to 19 of R(SB) 10/88 (with which principles the Commissioner expressed his own agreement), the Commissioner proceeded as follows:

"Secondly, I consider it clear that social security appeal tribunals, or indeed the Commissioners, in dealing with such questions are exercising a limited jurisdiction and not the supervisory jurisdiction that properly belongs and belongs exclusively to the Superior Courts - in this case the Court of Session exercising the function of judicial review. I note that this point was also recognised in the context of English Law by the Commissioner in a reported Decision R(SB) 26/84, paragraph 25(2). I however proceed on the basis that I am entitled to rule upon challenges to the vires of regulations based on contentions that the regulations are not made in conformity with the enabling powers of the statute either in substance or procedurally, and that in this case I am entitled to do so notwithstanding that the Amendment Regulations were laid before Parliament under the negative procedure and a prayer against them was tabled but rejected. See Hoffmann-La Roche & Co v Secretary of State for Capital Trade and Industry [1975] AC 295. I do not consider that I would be entitled to sustain a challenge to the regulations based on grounds of alleged unreasonableness. See Edinburgh District Council v The Secretary of State for Scotland [1985] SLT 551." (Paragraph 2 of Appendix 2).

23. The Edinburgh District Council case is instructive. The pursuers raised an action against the Secretary of State for Scotland seeking reduction (compare certiorari in England) of an Order which the Secretary of State had made imposing a rate fund contribution limit for the year 1985-86 on all local authorities obliged to keep a housing revenue account. The Order had been laid before Parliament. It had been debated in the House of Commons but a prayer to annul it was not moved and it thereafter came into operation. Further details of the case are not relevant to our decision. We feel justified, however, in quoting at some length certain general principles enunciated by the Lord Ordinary (Lord Jauncey):

"In all the foregoing cases except the Hoffmann La Roche case the court were considering situations in which Parliament had conferred upon a Minister or a local authority a decision making power exercisable entirely at their own hand. Once the decision had been made the courts alone could stop its implementation. When Lord Greene referred to an executive discretion being entrusted by Parliament to a body such as a local authority and Lord Diplock referred to Parliament never having 'intended to give authority to make such rules' they clearly had in mind a situation in which Parliament having conferred the power had thereafter no means of controlling the exercise thereof. If Parliament could not control the exercise the courts alone could intervene to protect the subject. However, such a situation is removed from that where Parliament having entrusted the power to a Minister retains a general

measure of control over the exercise of that power. In the present case Parliament not only had but made use of the opportunity of considering the exercise by the Secretary of State of the power and having so considered did not limit or control that exercise in any way. To test the matter: how could the courts label as irrational or unreasonable a decision which Parliament had expressly or impliedly approved? I do not think that they could. In Wade's "Administrative Law" the following passage occurs at page 769: 'An Act of Parliament will normally require that rules or regulations made under the Act shall be laid before both Houses of Parliament. Parliament can then keep its eye upon them and provide opportunities for criticism. Rules or regulations laid before Parliament may be attacked on any ground. The objective of the system is to keep them under general political control, so that criticism in Parliament is frequently on grounds of policy'.

As I have already remarked no authority was cited to me in which Wednesbury principles or principles of natural justice had been applied in relation to a statutory instrument. I do not, however, find this surprising in view of the important distinction to which I have above referred. In my view when Lord Diplock in Hoffmann La-Roche referred to defects in procedure he had in mind defects in statutory procedure laid down in the enabling Act, for example, a duty to consult before making an order such as appears in s. 108B(5) of the Local Government (Scotland) Act 1973 which was added by s. 3 of the Rating and Valuation (Amendment) Scotland Act 1984. This is entirely comprehensible since Parliament, having passed primary legislation, cannot lawfully authorise departure therefrom or non-compliance therewith by a Minister without amendment of that legislation. Parliament, however, is well able to determine whether a Minister's decision has been taken fairly or rationally. In these circumstances I conclude that the courts can only hold to be ultra vires a statutory instrument which has been laid before and considered by Parliament where that instrument is patently defective in that it purports to do what is not authorised by the enabling statute or where the procedure followed in making that instrument departed from the requirements of the enabling statute." (At p 556)

24. When at the beginning of that long quotation Lord Jauncey referred to "all the foregoing cases except the Hoffmann-La Roche case", he was referring to Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (cf Lord Jauncey's reference to Lord Greene MR in the above passage), Mixnam's Properties Ltd v Chertsey Urban District Council [1964] 1 QB 214 (cf Lord Jauncey's first reference to Lord Diplock), Secretary of State for Education and Science v Thameside Metropolitan Borough Council [1977] AC 1014 and Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374. Since, as Lord Jauncey observed, those were all cases concerning "situations in which Parliament had conferred upon a Minister or a local authority a decision making power exercisable entirely at their own hand", we do not consider it necessary to analyse them here. This case concerns a provision in a statutory instrument - and it is what Lord Jauncey said about statutory instruments which is relevant to our present purposes. And we should add that Lord Jauncey's dismissal of the pursuer's action was later affirmed by the Second Division of the Court of Session, the Lord Justice-Clerk Lord Wheatley at page 560 expressly stating that the Lord Ordinary Lord Jauncey had reached the right conclusions for the right reasons.

25. But cited to us by Mr Drabble was the comparatively recent case of R v Immigration Appeal Tribunal, ex parte Manshoora Begum [1986] Imm. AR 385. That case was decided in the Divisional Court on 10 July 1986. It had not - of course - been decided by the date of most of the Divisional Court, Court of Appeal or House of Lords decisions to which we have referred above. It had been decided by the respective dates of Quietlynn and Hutchinson and of the decisions in R(SB) 10/88 and CSSB/116/87; but it was not cited in any of those appeals. It came before Simon Brown J by way of an application for judicial review of a decision of the Immigration Appeal Tribunal. One of the applicant's grounds was that paragraph 52 of the Immigration Rules HC 169 should be struck down as being ultra vires

and unreasonable. The enabling section of the Immigration Act 1971 provided that the Secretary of State should from time to time lay before Parliament statements of the rules or of any changes in the rules; and that if any such statement was disapproved by a resolution of either House of Parliament, then the Secretary of State should make such changes as appeared to him to be required in the circumstances and then lay a statement of those changes before Parliament. So this was not a case where - in Lord Jauncey's words - "Parliament had conferred upon a Minister .... a decision making power exercisable entirely at [his] own hand". Simon Brown J held that the relevant rule was unreasonable and, therefore, ultra vires; and he set aside the decision of the Immigration Appeal Tribunal. The Edinburgh District Council Case (which had been decided the previous year) was not cited to his Lordship and he was in any event concerned with the High Court. In our judgment it is the principles set out in the Edinburgh District Council Case which should be followed in this jurisdiction by the statutory authorities. They should not entertain submissions as to "reasonableness".

26. In Begum Simon Brown J made explicit reference to the "supervisory jurisdiction" of the High Court in England. The statutory authorities do not in our judgment have such a supervisory jurisdiction beyond such as may be conferred by their statutory duties and powers. Moreover, we are firmly of the opinion that, if a challenge is to be made to the reasonableness of any provision in social security subsidiary legislation, the statutory authorities are not the appropriate forum for such challenge on practical grounds. The appeal tribunals are dispersed throughout the length and breadth of the country. It would - in our view - be intolerably impracticable if they were obliged to consider "reasonableness" and conduct the necessary fact-finding investigation whenever a claimant raised the point. (It is within our own experience that a significant proportion of claimants consider as unreasonable the particular provision pursuant to which their respective claims have been disallowed.)

Was regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 made ultra vires?

27. Here we are - of course - confining ourselves to an enquiry within the scope of the principles which we have set out in paragraphs 7 to 19 above. For that purpose we must turn to the wording of the relevant legislation.

28. Schedule 1 to the Supplementary Benefits Act 1976 was entitled "Provision for Determining Right to Benefit and Amount of Benefit". The basic principle was set out in paragraph 1(1) of that Schedule:

> "(1) The amount of any supplementary benefit to which a person is entitled shall, subject to the following provisions of this Schedule, be the amount by which his resources fall short of his requirements."

Paragraph 1(2) opened thus:

> "(2) For the purpose of ascertaining that amount -
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> (a) a person's requirements shall be determined in accordance with paragraph 2 of this Schedule; and
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> (b) a person's resources shall be calculated in the prescribed manner ....."

and the remainder of paragraph 1 was devoted to resources. Paragraph 2 of Schedule 1 was devoted to requirements. Only the first two sub-paragraphs need be quoted here:

> "2. (1) For the purposes of this Schedule requirements shall be of three categories, namely, normal requirements, additional requirements and housing

requirements; and the items to which each category relates and, subject to sub-paragraph (3) of this paragraph, the weekly amounts for those categories shall be such as may be prescribed.

(2) A person's requirements shall consist of normal requirments together with requirements, if any, of such of the other categories as are applicable in his case."

29. The first Requirements Regulations under the "new" system of supplementary benefit which came into effect in November 1980 were the Supplementary Benefit (Requirements) Regulations 1980 [SI 1980 No 1299]. Part IV was devoted to housing requirements. It embraced regulations 14 to 23. Regulation 14 opened thus:

"14. (1) The items to which housing requirements relate are -

(a) rent ....."

There then followed six other items.

But the introduction of housing benefit led to significant amendments of the Requirements Regulations. Those amendments were reflected in the consolidation represented by the Supplementary Benefit (Requirements) Regulations 1983, the Regulations which were in force until the demise of supplementary benefit. Part IV was still devoted to housing requirements. In regulation 14(1) rent had been removed from the list of items, and a further item, "housing benefit supplement", had been added.

30. Regulation 19 of the Requirements Regulations 1983 was, as we have said, solely devoted to housing benefit supplement. We need quote only the first two paragraphs thereof (in the form in which they subsisted as from 1 September 1986):

"19. (1) Subject to paragraphs (3) to (4), where -

(a) the resources of the assessment unit are sufficient to meet its requirements as determined apart from this regulation; and

(b) a member of the assessment unit has been granted one or more housing benefits other than under regulation 9 of the Housing Benefits Regulations (certificated cases) or would have been so granted but for regulation 20(1) of those regulations (minimum amount of housing benefit);

there shall be applicable to the claimant an amount ("housing benefit supplement") determined in accordance with paragraph (2).

(2) The amount referred to at paragraph (1) shall be the difference, calculated on a weekly basis, between -

(a) the aggregate amount of any eligible rates and eligible rent as ascertained for the purposes of the Housing Benefits Regulations less the amount of any deductions made under regulation 18 of those regulations (deductions for non-dependants); and

(b) the actual amount of the housing benefit which was granted or which would have been granted but for regulation 20(1) of the Housing Benefits Regulations."

In simple terms, the effect was that housing benefit supplement was calculated by deducting the amount of housing benefit actually granted to a claimant from that part of his housing expenses which was represented by rates and rent. It was accepted by the legislature that in certain cases there would be such a difference; in other words, that a claimant might receive somewhat less by way of housing benefit than would have been his requirements in respect of rent and rates calculated under Part IV of the Requirements Regulations as they had stood prior to the aforesaid amendments. There had been claimants whose resources were such that their requirements only exceeded those resources whilst those requirements included rent and rates pursuant to Part IV. When that element in their requirements disappeared, the resources/requirements balance swung against them. But for regulation 19 they would have dropped out of the supplementary benefit system altogether - with the consequent loss of "passport" benefits in relation, for example, to prescriptions and dental treatment. Two points must be emphasised:

(a) The housing benefit supplement sum ascertained by the application of regulation 19 was not a sum to be automatically translated into benefit. It represented an element in the relevant claimant's requirements.

(b) Although housing benefit supplement was closely related to housing benefit (and, indeed, paid by the local authority along with housing benefit), it was undoubtedly an element in supplementary benefit. So the "fringe" claimants who remained beneficiaries of the supplementary benefit scheme by virtue solely of their housing benefit supplement retained their entitlement to the "passport" benefits.

31. We have set out in paragraph 4 the provisions of regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987.

Regulation 1(3) and (4) of these Regulations provide as follows:

"(3) For the purposes of these Regulations 'relevant date' means -

(a) in any case to which paragraph (4) applies, 1st April 1988; and

(b) in any other case, 4th April 1988.

(4) This paragraph applies to any case where -

(a) rent is payable at intervals of one month or any other interval which is not a week or a multiple thereof; or

(b) payments by way of rates are not made together with payments of rent at weekly intervals or multiples thereof."

32. It is common ground that the Housing Benefits Regulations 1985 [SI 1985 No 677] fell with the repeal of section 28(1) of the Social Security and Housing Benefits Act 1982, under which they were made. The repeal took effect from 1 or 4 April 1988, depending upon the intervals at which rent and/or rates were payable (cf paragraph 31 above).

33. It is, of course, to the vires underlying regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 that Mr Drabble's principal attack is directed. The preamble to those Regulations opens:

"The Secretary of State for Social Services in exercise of the powers conferred on him by sections 84(1) and 89(1) of the Social Security Act 1986, and of all other powers enabling him in that behalf, by this instrument ....."

It is convenient to take those sections in reverse order. Section 89(1) provides thus:

> "89. (1) Regulations may make such transitional and consequential provision (including provision modifying any enactment contained in this or any Act) or saving as the Secretary of State considers necessary or expedient in preparation for or in connection with the coming into force of any provision of this Act or the operation of any enactment which is repealed or amended by a provision of this Act during any period when the repeal or amendment is not wholly in force." (Section 89 came into force on the day the Act was passed - ie 25 July 1986.)

Section 84 is devoted to the general interpretation of the Act. From subsection (1) the following definitions are in point:

> "'modifications' includes additions, omissions and amendments, and related expressions shall be construed accordingly;"
>
> "'regulations" means regulations made by the Secretary of State under this Act;"

Section 83(3) provides that certain statutory instruments shall not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House. (This is the affirmative procedure.)

34. Section 83(4) of the 1986 Act provides thus:

> "(4) All regulations and orders made under this Act, other than those to which subsection (3) above applies and orders under section 88 below, shall be subject to annulment in pursuance of a resolution of either House of Parliament."

(This is the negative procedure.)

It is common ground that subsection (3) did not apply to the Housing Benefit (Transitional) Regulations 1987; and those Regulations were not, of course, an order, whether under section 88 or at all. Section 83(4), accordingly, applied to the Housing Benefits (Transitional) Regulations 1987. Bearing in mind the dates of the demise of the old housing benefit scheme, we think it to be unarguable that regulation 12(1) was not a "transitional and consequential provision" within the meaning of section 89(1) of the 1986 Act. No issue arose before us in connection with the Secretary of State's view as to necessity or expediency; or as to consultation, to which reference is made in the preamble to the Regulations. So we are satisfied that - within the four corners of the Social Security Act 1986 - regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 was intra vires.

35. But the thrust of Mr Drabble's attack lies outwith those four corners. He founds upon section 33(3)(c) of the Supplementary Benefits Act 1976 (which was, of course, still in force at the time when the Housing Benefit (Transitional) Regulations 1987 were made). We quote:

> "(3) Regulations of the following kinds, namely -
>
> (a) .....
>
> (b) .....
>
> (c) regulations made in pursuance of paragraph 1 or 2 of Schedule 1 to this Act except regulations made for the purpose only of consolidating regulations which they revoke,
>
> shall not be made unless a draft of the regulations has been laid before Parliament and

approved by a resolution of each House and, in the case of regulations falling within paragraph (a) or (c) of this subsection, shall not be made without the consent of the Treasury."

(That, of course, imports the affirmative procedure.)

We have set out paragraph 2(1) and (2) of Schedule 1 to the Supplementary Benefits Act 1976 in paragraph 28 above. It will be recalled that it set out certain basic provisions in respect of requirements. For convenience we here repeat sub-paragraph (1):

> "(1) For the purposes of this Schedule requirements shall be of three categories, namely, normal requirements, additional requirements and housing requirements; and the items to which each category relates and, subject to sub-paragraph (3) of this paragraph, the weekly amounts for those categories shall be such as may be prescribed."

And section 34(1) of the 1976 Act contained the following definition:

> "'prescribed' means specified in or determined in accordance with regulations;"

36. Regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 - urged Mr Drabble - manifestly and substantially altered the housing requirements which could be invoked by a claimant for supplementary benefit. A period of only one week was affected. But - submits Mr Drabble - Parliament had clearly provided that, for as long as the supplementary benefit scheme subsisted, the prescribed requirements of claimant's should be set out in - and should only be altered by - regulations made by the affirmative procedure. Section 33 was, of course, repealed with effect from 11 April 1988; but until that date it was in full effect and, submitted Mr Drabble, there was nothing in the Social Security Act 1986 to suggest that its provisions could lawfully be ignored prior to its repeal. Put another way - in Mr Drabble's submissions - section 33(3)(c) of the 1976 Act and sections 83(4) and 89(1) of the Social Security Act 1986 operated "in tandem". At the material time both were in effect in respect of their appropriate spheres. But where those spheres overlapped (as was the case in the situation to which regulation 12(1) was directed) the more exacting provisions of section 33(3)(c) prevailed.

37. Mr Drabble's argument cannot in our view withstand a true construction of section 33(3)(c). Paragraph (c) refers to "regulations made in pursuance of paragraph 1 or 2 of Schedule 1 to this Act" (our emphasis). As we have observed above, paragraph 2(1) of Schedule 1 to the 1976 Act (read in the light of the definition of "prescribed" in section 34(1) of that Act) clearly contemplated the making of regulations. Section 33 bore the marginal caption "Rules and regulations" and opened thus:

> "(1) Powers conferred by this Act to make rules or regulations are exercisable by statutory instrument."

But nowhere in section 33 is any express power given to make regulations bearing upon either the items or the weekly amounts in respect of a claimant's requirements. Section 33(3)(c) takes such regulation making power for granted and is confined to prescribing the procedure by which that power is to be exercised. So the power itself must be looked for - and is found - in paragraph 2(1) of Schedule 1. Accordingly, in our view, when section 33(3)(c) referred to "regulations made in pursuance of paragraph 1 or 2 of Schedule 1", it meant - and was intended to mean - "regulations made under paragraph 1 or 2 of Schedule 1" and nothing more. "In pursuance of" is a less direct expression than "made under"; and was, no doubt, adopted because of the somewhat indirect way in which the regulation making power is expressed in paragraph 2(1) of Schedule 1.

38. Mr Drabble referred us to The Shorter Oxford Dictionary under "pursuant". The first

two meanings given equate that word with "pursuit". The third meaning is:

> "The action of following out (a process); continuation, prosecution."

The fourth (and last) meaning given is:

> "The action of proceeding in accordance with a plan, direction, or order; prosecution, following out, carrying out."

"Pursuant to" is given this meaning:

> "Following upon, consequent on and conformable to; in accordance with."

Mr Drabble invoked those meanings in support of his submission that in section 33(3)(c) "in pursuance of paragraph 1 or 2 of Schedule 1" meant something like "having the effect of prescribing any provision which could properly have been made under paragraph 1 or 2 of Schedule 1". He prayed in aid paragraph (a) of section 33(3):

> "(a) regulations of which the effect is to increase an amount which is specified in regulations made in pursuance of section 3 of this Act or which, by virtue of regulations made in pursuance of paragraph (b) of section 4(1) of this Act, is specified in a provision mentioned in that paragraph ....."

"In pursuance of", submitted Mr Drabble, is wider - and easier to satisfy - than "of which the effect is to".

39. We are not persuaded by the arguments set out in the preceding paragraph. For our part, we derive little assistance from the dictionary meanings; they seem to us to be at least as consistent with our construction of section 33(3)(c) as with Mr Drabble's construction. As for the contrast between "of which the effect is" and "in pursuance of", we consider that the difference in language between section 33(3)(a) and section 33(3)(c) undermines - rather than supports - Mr Drabble's construction. His position surely would have been much stronger if section 33(3)(c) had been in some form such as -

> "regulations of which the effect is to prescribe or to amend any of the items or weekly amounts referred to in paragraph 2(1) of Schedule 1."

40. It would not, of course, have been impossible for Parliament - had it been so minded - to give to supplementary benefit claimants the protection of which, in Mr Drabble's submission, they have been wrongly deprived by the making of regulation 12(1) under the negative procedure. Section 83 of the Social Security Act 1986 contains a number of supplementary provisions in respect of the order-making and regulation-making powers conferred by that Act. Section 83(3) refers to the affirmative procedure, and subsection (5) provides:

> "(5) An order under section 30 or 63 above or section 85 below shall not be made without the consent of the Treasury."

Clearly in section 83 Parliament was dealing with both the affirmative and the negative procedures and, as in section 83(5), a particular precondition (Treasury consent). Into section 83 Parliament could have inserted a provision reserving to the affirmative procedure any regulation which dealt with any of the matters the subject of regulations made pursuant to paragraphs 1 and/or 2 of Schedule 1 to the 1976 Act. But the fact remains that Parliament did not do so. Nor is it necessary - in our view - to find that anything in the Social Security Act 1986 has to be read as an implied repeal of section 33(3) of the 1976 Act or of any part of that subsection.

41. Before leaving this head of our decision, we ought, perhaps, to touch upon one other matter. It is our view that - even if regulation 19 of the Requirements Regulations 1983 had not been revoked with effect from the prescribed dates - that regulation would have been of no avail to any claimant after those dates. The regulation makes explicit reference to regulations of the "Housing Benefits Regulations" - and without the following through of those references the prescribed calculation cannot be made. But in regulation 2(1) of the Requirements Regulations 1983 was the following definition:

> "'Housing Benefits Regulations' means the Housing Benefits Regulations 1982."

The Housing Benefits Regulations 1985 were a consolidating measure. By their regulation 57 and Schedule 6 they revoked the whole of the 1982 Regulations. In consequence of the combined effect of section 17(2) and 23(1) of the Interpretation Act 1978, no difficulty would have arisen in the application of regulation 19 of the Requirements Regulations 1983 by reason only of the fact that the Housing Benefits Regulations 1982 had been replaced by the 1985 version. But that would in no way have held good when the 1985 Regulations were replaced (with effect from 1 and 4 April 1988) by the Housing Benefit (General) Regulations 1987. Both the 1982 Regulations and the 1985 Regulations were made under the Social Security and Housing Benefits Act 1982. The 1987 Regulations were made under the Social Security Act 1986. By no legitimate stretch of the imagination can the sections of the Social Security Act 1986 which deal with housing benefits be regarded as the repeal and re-enactment, "with or without modification", of those sections in the Social Security and Housing Benefits Act 1982 which dealt with housing benefits (cf the wording of section 17(2) of the Interpretation Act 1978). And the same is true in respect of the Housing Benefit (General) Regulations 1987 vis-a-vis the Housing Benefits Regulations 1985. Mr Drabble submitted strenuously to the contrary. He accepted that there were - between the two schemes - certain changes (some of which were identified in a document put before us by Mr Laws). But he contended that the 1987 Regulations were a "modified" form of the 1985 Regulations. The basic concept of rent and rate allowance did not change; and none of the changes bit upon the application of regulation 19 of the Requirements Regulations 1983. (Mr Laws commented that it was difficult to conceive of a housing benefit scheme which did not embrace the concepts of rent and rate allowances.) But we do not propose to labour those issues here. In view of our conclusion as to the vires of regulation 12(1) of the Housing Benefits (Transitional) Regulations 1987, they are peripheral to this decision; though it is not, perhaps, without relevance that the Housing Benefit (Transitional) Regulations 1987 contain, in regulation 1(2), the following definitions:

> "'new scheme' means the housing benefit scheme made under section 20(1)(c) of the Social Security Act 1986;"
>
> "'old scheme' means a scheme made under section 28 or 30 of the Social Security and Housing Benefits Act 1982 for granting rebates, rent rebates or rent allowances;"

42. Our conclusion under this head of this decision is that -

(a) regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 was made intra vires the enabling powers conferred by the Social Security Act 1986; and

(b) nothing in the Supplementary Benefits Act 1976 bears upon the vires of that regulation.

43. For the reasons set out in paragraphs 20 to 26 above, we do not embark upon any enquiry into the "reasonableness" of regulation 12(1). However, lest the issue should be pursued in a higher court, we record that both Mr Drabble and Mr Laws deployed full arguments before us on that issue.

44. Our conclusion is that the appeal tribunal erred in law in -

(a) holding that regulation 12(1) of the Housing Benefit (Transitional) Regulations 1987 was ultra vires the regulation making powers conferred by Parliament; and

(b) embarking into an investigation and pronouncing upon the effect of the "unreasonableness" of regulation 12(1).

It is not in dispute that we can, without making fresh or further findings of fact, give the decision which we consider that the appeal tribunal should have given - and, in paragraph 1 above, we have so done.

45. The adjudication officer's appeal is allowed.

(Signed)
Leonard Bromley
Chief Commissioner

(Signed)
D Reith
Commissioner

(Signed)
J Mitchell
Commissioner

Date: 8 March 1989