JMe/2 **Commissioner's File:** CSB/018/92

SUPPLEMENTARY BENEFITS ACT 1976
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The appeal is allowed. The decision of the London Central social security appeal tribunal dated 9 August 1991 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to a differently constituted social security appeal tribunal for determination in accordance with the directions given in paragraphs 12 to 21 below (Social Security Administration Act 1992, section 23(7)(b)).

2. This appeal stems from the adjudication officer's decision issued on 25 August 1989 that supplementary benefit amounting to £2949.45 had been overpaid to the claimant from 3 March 1986 to 15 February 1988 and was recoverable from her estate under section 53 of the Social Security Act 1986. The claimant was said to have been in receipt of supplementary benefit from 24 June 1965, although it must have been national assistance for the early months. She continued to receive supplementary benefit until she died on 20 February 1988, in her 95th year. The last payment seems to have covered the period up to 15 February 1988. On various forms completed during the period of receipt of benefit, the claimant's capital was declared at varying sums which were below the level at which they would affect the amount of benefit. After her death, it was discovered that as at 20 February 1988 she had £6,000 worth (or possibly £7,000 worth) of National Savings Income Bonds (bought from 3 March 1986 onwards) and a balance of £1198.62 in a National Savings Account opened on 28 February 1986 with a deposit of £615.73. She had also had a Britannia Building Society account, which appeared to have been closed with a balance of £1032.29 after June 1986.

3. The claimant's daughter, as the executrix of her estate, appealed against the adjudication officer's decision. She said that the Income Bonds were bought with the savings from the claimant's attendance allowance and supplementary benefit. The claimant was able to save the money because she was living with the daughter and contributing only £5 or £10 per week towards her living expenses. Only in the last few months of her life was the

claimant accommodated in the Geriatric Unit of Athlone House, Middlesex Hospital.

4. The adjudication officer's written submission on form AT2 based the recoverability of the overpayment on misrepresentation of a material fact, that the claimant had capital of between £5580.37 and £6961.59, when she had stated that she had only £970. There was no further specification of the misrepresentation or when it was made. It was submitted that knowledge of the correct position was not a necessary element in misrepresentation and that the claimant's misrepresentation may well have been wholly innocent. There was a schedule of capital, showing the effects if entitlement to supplementary benefit had been denied from 3 March 1986 and the capital used for living expenses at supplementary benefit rates. There was also a schedule of overpayment, showing the total of supplementary benefit paid from 3 March 1986 to 15 February 1988, all of which was said to be recoverable.

5. The appeal tribunal on 9 August 1991 confirmed the adjudication officer's decision. Its findings of fact were recorded as follows:

> "The appellant's mother was in receipt of supplementary benefit since June 1965 to 15 February 1988. At the time of her original claim her declared capital assets were in the region of £200 - £970. In March 1986 she purchased N.S. Bonds worth £4,000 and in August and October that year a further £2,000 worth of N.S. Bonds. In March 1988 she also bought £1,000 worth of N.S. Bonds. She failed to declare these capital assets to the Department of Social Security. In consequence she was paid supplementary benefit to which she was not entitled. An overpayment occurred amounting to £2,929.45. It is recoverable."

Its reasons for decision were recorded as follows:

> "We find the Summary of Facts [on form AT2] inaccurate where it says that the appellant's mother had £6,000 N.S. Bonds and a sum of £961.59 in a Building Society account. It appears that in March 1986 she did have capital assets in excess of £3,000 disentitling her to supplementary benefit. Each time she signed an order to cash supplementary benefit she was declaring to the authority that she was entitled to supplementary benefit and that her circumstances had not changed. In so far as the instructions in the book informed her that she should declare her changed circumstances which would affect her entitlement to supplementary benefit her failure to so inform amounted to a misrepresentation albeit an innocent one which resulted in an overpayment of supplementary benefit. The Secretary of State is entitled to recover the amount which we find accurate as per schedule produced by the adjudication officer."

6. An application for leave to appeal to the Commissioners was

made on behalf of the claimant's daughter, which was refused by the appeal tribunal chairman, but granted (after consideration of a more detailed application) by a Commissioner on 24 February 1992. The grounds put forward by Mr John Gambell of St Marylebone Citizens Advice Bureau (who had not previously advised the claimant or her daughter) were that the only documents signed by the claimant put before the appeal tribunal were those dated 1965, 1975, 1981 and 1987. The earlier documents were irrelevant to the position from March 1986. The final one was a claim form which was filled in by the claimant's daughter and signed by the claimant when she was already in the Geriatric Unit.

7. The adjudication officer then concerned with the case, in the submission dated 12 June 1992, did not support the grounds put forward by Mr Gambell, because the appeal tribunal had relied on misrepresentations made when signing the counterfoils in the supplementary benefit order book as well as on the form signed on 9 December 1987. He referred to Commissioner's decision CIS/359/1990. However, the adjudication officer submitted that the appeal tribunal did err in law in failing to make any reference to review, as required by section 53(4) of the Social Security Act 1986. Further steps in the appeal were then suspended until the Court of Appeal had decided the appeal from CIS/359/1990. That decision, in Jones v Chief Adjudication Officer, now reported at [1994] 1 WLR 62 and [1994] 1 All ER 225, was given on 1 July 1993. On 19 November 1993 a nominated officer directed that a copy of the transcript of the decision was to be added to the papers in the present case and that further submissions should be made.

8. The adjudication officer, in the submissions dated 10 January 1994, argued that, following the majority of the Court of Appeal, the order book declarations which, according to the evidence, had been signed by the claimant were misrepresentations of material facts. The declarations were representations that there were no facts, known to the claimant at the time, which could affect the amount of her payment of supplementary benefit, but which she had not reported. Specimen pages of a supplementary benefit order book were attached. In the observations in reply dated 10 May 1994, Mr Gambell submitted that the decision in Jones was not relevant, because it applied only where there had been a failure to disclose or a misrepresentation prior to the signing of the order book declaration, and that had not been proved in the present case. He also pointed out Evans LJ's conclusion that the representation "I am entitled to the above sum" is a representation of law, not of material fact.

9. Manifestly, the appeal tribunal of 9 August 1991 did err in law. It based its decision on misrepresentations of material fact made in signing the counterfoils in supplementary benefit order books. Misrepresentations of that kind had not been mentioned in the adjudication officer's written submission to the appeal tribunal or, so far as one can tell from the chairman's note of evidence, in the course of the hearing. It was a breach of the principles of natural justice for the appeal tribunal to rely on that new point without having given the claimant an opportunity

to deal with it. See the judgment of Lord Denning MR in R v Deputy Industrial Injuries Commissioner, ex parte Howarth, appendix to R(I) 14/68, and Commissioner's decision R(I) 2/91 for the general principle. In addition, the appeal tribunal did not have evidence before it of the terms of the declarations made in signing supplementary benefit order book counterfoils. It erred in law in proceeding on an assumption of what would have been declared. There were at least two further errors of law which have been revealed as such by the Court of Appeal's decision in Jones. I agree with the opinion expressed by the Commissioner in CS/102/1993, that Evans LJ was right in holding that a representation of entitlement to benefit is not a representation of a material fact. Evans LJ was the only one of the Lords Justices to deal with that point, so that nothing else said in the case is to the contrary. In so far as the appeal tribunal relied on such a declaration under section 53 of the Social Security Act 1986, it erred in law. Second, it was made clear in Jones that a declaration in the form actually used in supplementary benefit order books is a representation only that there were no facts known to the claimant at the time which had not been reported and which could affect the amount of the payment. The appeal tribunal made no findings of fact as to the claimant's knowledge of her capital assets or their value throughout the period of the alleged overpayment.

10. The appeal tribunal made another group of errors of law related to its application of section 53 of the Social Security Act 1986. As determined in R(SB) 7/91 and other Commissioners' decisions too numerous to mention, a decision that an overpayment is recoverable under section 53(1) of the Social Security Act 1986 (now re-enacted as section 71(1) of the Social Security Administration Act 1992) can only be made, where review proceedings are available, if there has been a review and revision of entitlement for the period over which the overpayment is said to have occurred. In my view, the weight of authority is that paragraph 4 of R(SB) 7/91 should be followed, so that if an appeal tribunal does not have sufficient evidence that such a review decision has been made by the adjudication officer, it should declare that the overpayment decision is of no force or effect. I reject the submission put forward by the adjudication officer in the submission dated 12 June 1992 that in such circumstances an appeal tribunal could remedy the want of review by itself determining the question of review and revision under its powers in section 36 of the Social Security Administration Act 1992 (formerly section 102 of the Social Security Act 1975). In the present case, there was no evidence whatsoever of a review and revision by the adjudication officer. Therefore, in so far as section 53 of the Social Security Act 1986 was applicable, the appeal tribunal should have determined that the adjudication officer's overpayment decision was of no force or effect and that it could no make any further decision itself. However, we now know, as the result of the decision of the House of Lords on 7 July 1994 in Plewa v Chief Adjudication Officer [1995] AC 249, that section 53 only applies to payments of benefit made on or after 6 April 1987. In so far as recovery is sought of payments of benefit made before that date, the overpayments legislation

in force at the time must be applied. Thus, in the present case, in relation to the portion of the overpayment alleged to have occurred from 3 March 1986 to 5 April 1987, section 20 of the Supplementary Benefits Act 1976 should have been considered. Section 20 does not contain a requirement that there should have been a prior review and revision of entitlement before a decision can be made on the recoverability of an overpayment.

11. For those reasons, the appeal tribunal's decision dated 9 August 1991 must be set aside as erroneous in point of law. There are some other matters which should have been considered in the determination of the appeal, which I shall mention in my directions to the new appeal tribunal. There are many outstanding issues of fact, which can only be determined by a new appeal tribunal. Therefore, I refer the appeal to a differently constituted social security appeal tribunal for determination in accordance with the following directions.

Directions to the new appeal tribunal

12. There must be a complete rehearing, on the evidence presented and submissions made to the new appeal tribunal. In view of the considerable legal developments since the original AT2 was prepared, and the deficiencies of the adjudication officer's submission set out there, the adjudication officer should make a fresh written submission to the new appeal tribunal bearing in mind the terms of these directions.

13. The new appeal tribunal should first divide the alleged overpayment into the portion which is subject to section 53 of the Social Security Act 1986 ("section 53") and the portion which is subject to section 20 of the Supplementary Benefits Act 1976 ("section 20"). In relation to the portion subject to section 53, if the adjudication officer cannot produce sufficient evidence that the decision awarding supplementary benefit for the period over which that portion was paid had been reviewed and revised either before or at the same time as the decision issued on 25 August 1989 was made, the new appeal tribunal should declare that that decision was of no force or effect in relation to that portion of the alleged overpayment. The best evidence will be a copy of any review decision made, but I do not exclude the possibility that the new appeal tribunal could be satisfied by other evidence that there had been a review and revision. If the new appeal tribunal makes that declaration, I direct that it does not have the power to determine the question of whether the decision awarding supplementary benefit for that period should be reviewed and revised. However, in those circumstances, the declaration of the invalidity of the overpayment decision (to the extent that section 53 properly applied) would not in itself prevent the adjudication officer from carrying out a review and revision in the future, leading to a decision that a resulting overpayment was recoverable. There might be a difficult question about the combined effect of regulation 12 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 and the revocation of regulation 49 of the Social Security (Claims and Payments) Regulation 1987, but I should express no

opinion here about that matter.

14. If, as the result of following the process required by paragraph 13 above, the new appeal tribunal has to consider the substantive application of section 53, the correctness of the review and revision by the adjudication officer will be part of what it has to decide. Similarly, in relation to the portion of the overpayment subject to section 20, the new appeal tribunal must consider whether the adjudication officer has proved that the award of supplementary benefit to the claimant for the period in question has been shown to be incorrect in relation to the material facts as they actually were at the relevant times.

15. The new appeal tribunal must make findings of fact about the amount and nature of the claimant's capital resources throughout the period in question. The original overpayment decision made the start date of the period of overpayment 3 March 1986. That was apparently because that was the first date on which evidence of the possession of a substantial amount of capital existed, in the form of evidence that a National Savings Income Bond in the amount of £4,000 was bought on that date. However, that purchase raises the obvious question of where the £4,000 came from. In R(SB) 34/83 the Commissioner pointed out that if such circumstances came to light while a claimant was living, an adjudication officer would be bound to enquire from the claimant how long she had possessed the sum used for the purchase. If the claimant then refused to give the necessary information, which was in her possession, adverse inferences could be drawn against her. The adverse inferences could be sufficient evidence of the possession of capital for a period before the purchase was made. The Commissioner held that if a claimant had died, her estate should be in no better position, so that an administratrix of the estate should make every reasonable enquiry as to the origin of the money in question. In the present case, I direct that the new appeal tribunal is not bound to consider only the period starting on 3 March 1986, but is required in exercise of its inquisitorial function to consider whether it has been proved, possibly by the drawing of inferences, that the claimant possessed sufficient capital to affect her entitlement to supplementary benefit before 3 March 1986. There are statements in the papers that the claimant bought the income bonds with savings from her attendance allowance and supplementary benefit. For the reason which will appear from paragraphs 16 and 17 below, the new appeal tribunal must investigate with particular care what payments of attendance allowance and supplementary benefit were made to the claimant prior to 3 March 1986. By the same token, the origin of the initial deposit of £615.73 in the National Savings account, which seems to pre-date the closing of the Britannia Building Society account, must be carefully investigated. At the end of the period in issue, some clarification is needed of the date of purchase of the last income bond. The note of the telephone call to National Savings at page T15 of the papers before me gives the date as 9 March 1988, which is after the date of the claimant's death. In her letter dated 20 May 1989 (page T23) the claimant's daughter gives the date as 8 February 1988.

16. Once the new appeal tribunal has determined what capital the claimant possessed throughout the period in issue, it must then determine whether, if that had been known at the time, that would have affected the claimant's entitlement to supplementary benefit and, if so, how. Such a determination will be relevant to review and revision under section 53 or to the identification of an overpayment under section 20. The new appeal tribunal must give close consideration to the terms of regulation 6 of the Supplementary Benefit (Resources) Regulations 1981 ("the Resources Regulations"), which defined what part of a claimant's capital resources could be disregarded. In particular, paragraph (1) provided for the disregard of:

> "(e) for a period not exceeding 12 months from the date of receipt, any arrears of--
> (i) attendance or mobility allowance paid under the Social Security Act [1975],
> (ii) supplementary benefit,
> (iii) housing benefit;"

and, from 1983, of:

> "(i) any sum attributable to savings made out of income for the purpose of meeting any periodically recurring liability in respect of such personal living expenses and expenses of the home as are reasonable in the opinion of the adjudication officer, including in particular charges for:-
> (i) rent
> (ii) rates
> (iii) fuel
> (iv) telephone rental or calls
> for such a period and up to such an amount as are reasonable in the opinion of the adjudication officer, having regard respectively to the time when the liability falls to be met and its expected amount;"

17. Paragraph (1)(e) did not apply to savings made out of benefit, in the sense of amounts of payments of benefit remaining in a claimant's possession after the end of the period for which each payment would have been taken into account if they were treated as income within the Resources Regulations. Such savings could only be disregarded under the conditions of paragraph (1)(i) once that provision came into effect. That principle applied even in the case of benefits such as attendance allowance, payments of which were disregarded as income (Resources Regulations, regulation 11(4)(b)). Savings out of ordinary payments of attendance allowance and of supplementary benefit would amount to capital, subject to paragraph (1)(i) of regulation 9. Paragraph (1)(e) applied when payments of arrears of the benefits mentioned were made. It may be that in the present case a payment of arrears of attendance allowance was made to the claimant, either on her becoming entitled in the first place or in becoming entitled to the higher rate. It may even be that some payments of arrears of supplementary benefit were made. The new appeal tribunal must investigate such matters,

and the possible application of paragraph (1)(i), carefully. The claimant's daughter may be able to give relevant evidence. The adjudication officer should also make all possible investigations of official records to discover whether any payments of arrears of attendance allowance or supplementary benefit were made to the claimant.

18. If the new appeal tribunal concludes that overpayments of supplementary benefit were made for some period, it must then consider whether they were made as a consequence of a failure to disclose or a misrepresentation of a material fact. That aspect of the test is the same under section 20 and under section 53. The adjudication officer should in the fresh submission to the new appeal tribunal state whether he relies on one or both of the possible grounds. The new appeal tribunal will not be restricted to dealing with the specific ground put forward by the adjudication officer, but if it is minded to rely on a different ground it must give the claimant and any representative a fair opportunity of dealing with the altered case (R(SB) 40/84). If the adjudication officer relies on the ground of misrepresentation of material fact, he should identify the specific representations alleged to be misrepresentations and demonstrate how any overpayment resulted from such misrepresentations. The new appeal tribunal must consider particularly carefully what exactly is being warranted in any representation which it is satisfied was made by the claimant, and bear in mind the guidance given by the Court of Appeal in Jones v Chief Adjudication Officer. It must accept the ruling of the majority in that case that a misrepresentation on a supplementary benefit order book counterfoil that any facts (known to the claimant) which could affect the amount of payment had been correctly reported is a misrepresentation of a material fact. In addition, I draw attention to the fact that the declaration on the form SP1 signed by the claimant on 9 December 1987 was "As far as I know, the information on this form is true and complete" and to what was said in Jones (in relation to the case of Sharples) about such declarations. Thus, although an innocent misrepresentation can found recovery (see Page v Chief Adjudication Officer (24 June 1991), appendix to R(SB) 2/92), it may be necessary to determine the extent of the claimant's actual knowledge in order to determine whether a particular representation is a misrepresentation. In so far as Commissioner's decision CP/34/1993 is to the contrary, I decline to follow it. The claimant and her representative may put forward evidence as to the claimant's mental condition, mentioned in particular in the observations dated 10 May 1994, in relation to this point. However, the new appeal tribunal will wish to know who in practical terms ran the claimant's National Savings account and made the purchases of National Savings Income Bonds, especially bearing in mind that a purchase may have been made as late as 8 February 1988.

19. If the adjudication officer relies on the ground of failure to disclose, in order to succeed he must prove the matters set out in paragraph 13 of Commissioner's decision R(SB) 54/83.

20. If the new appeal tribunal concludes that the conditions for recoverability of benefit are met in relation to a particular period, it must state clearly the amount recoverable and explain sufficiently clearly how the amount is calculated. It should be noted that the specific provision in regulation 14 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 for the quarterly diminution of capital resources in the calculation of an overpayment applies only for the purposes of section 53, but is extended to cover overpayments of supplementary benefit by regulation 31(1). However, in relation to section 20, the "diminishing capital" principle endorsed in Chief Supplementary Benefit Officer v Leary, appendix to R(SB) 6/85, and R(SB) 15/85, will apply.

21. The above directions deal with questions which appear likely to arise on the rehearing of the appeal. They are not an exhaustive list of all the questions which will in fact arise, and the new appeal tribunal must be prepared to consider any other relevant questions on the facts as it determines them to be.

(Signed) J Mesher
Commissioner

Date: 13 March 1995