Jurisdiction of Tribunals - tribunal must distinguish between a case where a ~~decision~~ appeal brought to ★ 49/94 be carried out and a case where the "down to the date of the decision" approach cannot circumvent parliaments intentions.

JM/1/LM/MB Commissioner's File: CSB/123/93

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

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 10 May 1993 which confirmed a decision issued by the adjudication officer on 21 November 1986. My own decision is that the aforesaid decision of the appeal tribunal is not erroneous in point of law.

2. The substantial elapse of time between the decision of the adjudication officer and the decision of the appeal tribunal arose because it was not until May 1991 that the claimant sought leave to make a late appeal to the tribunal, which application was granted by a tribunal chairman on 18 January 1992. The issue of law presented by this appeal can be stated thus: When an appeal tribunal is considering an appeal, at what point in time does its jurisdiction terminate? To put the general into the particular:

(a) Is the appeal tribunal confined to examining the circumstances which obtained at the date when the adjudication officer (or his predecessor, eg insurance officer, benefit officer, Supplementary Benefits Commission) gave the decision which is under appeal to the appeal tribunal, or

(b) is the appeal tribunal at liberty to survey and to adjudicate upon the whole period down to the date when it is sitting, making such revisions to benefit entitlement as were - from time to time - called for by changes in the circumstances of the relevant claimant?

Those questions have become pressing. In the last two or three years the Welfare Rights Service of Cleveland County Council

("the CWRS") has successfully applied for the admission for hearing of some 500 late appeals. (In some of those cases the decision under appeal goes back to national assistance.) It is of urgent importance that appeal tribunals in Cleveland should be furnished with guidance in respect of what are - at first blush - potentially misleading authorities.

3. Unsurprisingly, I held an oral hearing of the appeal. The claimant did not attend; but he was most ably represented by Mr B Kennedy, of the CWRS. The adjudication officer was equally ably represented by Mr S Cooper, of the Office of the Solicitor to the Department of Social Security. The hearing itself was much facilitated by the detailed written submissions which were already in the papers and by the helpful summaries of the respective submissions which each representative furnished in advance of the hearing. At that hearing we dealt also with the application for leave to appeal to the Commissioner on Commissioner's file CSB/175/93. That case involves the very same issues of law; and that claimant was also represented by Mr Kennedy. I have today signed my decision therein; but that decision is substantially a cross-reference to what follows herein.

4. The essential facts are undisputed and of extreme simplicity. The claimant was born in 1939. He lives with his wife, who is slightly younger than he is. He used to work in the local steel industry; but no one with experience of social security appeals from Cleveland has to be told what become of that industry. The initial claim for supplementary benefit was made in November 1986. In section 11 of claim form B1, "No" was answered to all the questions directed to special needs of the assessment unit; and that correctly reflected the situation at that time. By a decision dated 21 November 1986 ("the original decision") supplementary allowance was awarded in the sum of 53.99 a week with effect from 11 November 1986. There is now no suggestion that there was anything erroneous or inadequate about that award. But on 28 February 1987 the claimant's wife suffered a stroke which left her paralysed down one side of her body. In terms of social security benefits that had the following consequences:

(a) The claimant's wife was awarded mobility allowance as from 31 March 1987.

(b) The claimant's wife was awarded attendance allowance as from 31 August 1987.

(c) The claimant was awarded invalid care allowance (from a date which I do not know).

(d) The original decision was reviewed and revised so as to entitle the claimant, as from 3 April 1987, to a heating addition at the higher rate. (That was commonly referred to as "the disabled person's heating addition".)

It seems probable that, as a result of the claimant's wife's stroke, other additional requirements should have been - at the least - considered. It is common ground, however, that no claim was made in respect thereof and that there has not been since April 1987 any application for a review of the claimant's erstwhile entitlement to supplementary benefit.

5. Most aspects of social security involve - and always have involved - benefits paid over a period at regular intervals. In that respect the social security adjudicational system is operating in a field which differs fundamentally from the field in which operate the ordinary civil courts of the land. It is true that in certain circumstances - the assessment of a business rent is an example - those courts give judgments which have a continuing effect upon the movement of money between the parties. But on the whole, the civil courts consider a given situation and give a "once-and-for-all" judgment in respect thereof. It is for that reason that I say at the outset that I find no assistance in analogies between claims and appeals in respect of social security benefits, on the one hand, and writs, summonses and civil appeals, on the other. The social security adjudicational system is sui generis - and falls to be considered as such.

6. The social security adjudicational system is also, of course, entirely the creature of statute. And the legislature has always - or certainly for as long as there have been Commissioners - tailored that system to the characteristic to which I referred in the first sentence of paragraph 5 above. In essence, the prescribed procedure is this:

(a) A person who considers that he (or she) may be entitled to a benefit makes a claim therefor.

(b) The adjudication officer gives a decision upon that claim. (In the interests of simplicity, I here prescind from cases which involve adjudicating medical authorities.)

(c) By his decision, the adjudication officer allows or disallows the claim. If he allows the claim, he will quantify his award. Where - as is frequently the case - the award relates to a continuing, periodically paid benefit, the adjudication officer will specify -

(i) the date from which entitlement is to start, and

(ii) the rate of that entitlement (usually in weekly terms).

(d) The claimant has an unfettered right of appeal to the appeal tribunal against whatever decision is given by the adjudication officer (unfettered, that is, provided that the appeal is brought within the prescribed time).

(e) The appeal tribunal looks at the case again. (Mr Kennedy was ready with authorities which establish that such an appeal is by way of rehearing and that the tribunal's role is inquisitorial. We did not need to examine those authorities. Both propositions are beyond question.)

(f) The appeal tribunal has power -

(i) to confirm the adjudication officer's decision, or

(ii) to replace that decision with a decision of its own - which may be more or less favourable to the claimant than was the adjudication officer's decision.

(g) Appeal or no appeal, circumstances may well change so as to render no longer appropriate whatever decision (whether given by an adjudication officer, by an appeal tribunal or, indeed, by a Commissioner) is operative for the purposes of entitling the claimant to a continuing, periodically paid benefit. An obvious example is an up-rating of the relevant benefit. But there are many, many more instances where the effects of changed circumstances will be less mechanical. A sick claimant may recover; dependants may come upon or may leave the scene; the unemployed may find work; and so on and so on. Such changes were particularly likely to happen in the case of supplementary benefit. The long list of additional requirements scheduled to the Supplementary Benefit (Requirements) Regulations 1983 (and to the 1980 precursor to those Regulations) specified sets of circumstances which were pregnant with mutability. Quantification of the appropriate entitlement was correspondingly mutable.

(h) To cope with changes of the type referred to in sub-paragraph (g) above the legislation provides - and has for very many years provided - for a process of review and revision by the adjudication officer (and his predecessors). That process has proved eminently practicable. It imports, of course, a substantive decision upon which it can be brought to bear. But so long as such a decision exists, a review will enable account to be taken of material changes in circumstances; and the power of revision can be invoked in order to bring the reviewed decision into line with then current realities. And any review or refusal to review by the adjudication officer is subject to the same appellate procedures as are available in the case of initial decisions by the adjudication officer.

7. I must stress that what I have set out in paragraph 6 above

is intended as an outline, and nothing more, of the general scheme of the social security adjudicational system. I have made no attempt to be exhaustive. I have passed over, for example, the adjudication officer's power to instigate a reference to the appeal tribunal. And in sub-paragraph (f)(ii) I have used phraseology sufficiently wide to avoid a prejudgment of the central issue in this appeal. But what I have said demonstrates that the general intention of the legislature is, and for long has been, that -

(a) initial entitlement or non-entitlement shall be the subject of an initial decision; and

(b) any subsequent changes of circumstances which inhibit further entitlement or which affect the quantification flowing from entitlement shall be the subject of the review/revision procedures.

8. But this has always been an eminently practical jurisdiction; and the Commissioner has always been ready to adopt a pragmatic approach in the interests of achieving a just outcome with a minimum of time-consuming and (therefore) costly procedures. In consequence, there is abundant authority (including the authority of Tribunals of Commissioners) for the proposition that an appeal tribunal should -

(a) take account of relevant changes in circumstances which have occurred since the adjudication officer (or his predecessor) gave the decision which is under appeal; and

(b) carry the award down to the date upon which the tribunal is sitting.

That is manifestly reasonable. Provided that all parties have the opportunity to deal fully with the intervening changes, no injustice is suffered by anybody; and the system is spared the prolixity of procedure inherent in a tribunal's -

(i) giving a decision down only to the date of the adjudication officer's decision, and

(ii) advising the parties that the review procedure should be instigated in order that the tribunal's decision should be revised so as to take account of the intervening changes.

Nor, of course, is there any pragmatic mileage in having review proceedings under way whilst an appeal is pending in respect of the very decision which is sought to be reviewed.

9. Many decisions - reported and unreported - were laid before me. Four of those are decisions of Tribunals of Commissioners. Those four are, of course, binding upon me (subject to any such "compelling reasons" as are referred to in paragraph 21 of R(I) 12/75, itself a decision of a Tribunal of Commissioners).

I shall, accordingly, deal specifically with each of those four. But I turn first to R(SB) 1/82; for that decision was expressly approved by the Tribunals of Commissioners which gave, respectively, R(FIS) 1/82 and R(SB) 42/83 (see paragraphs 11 and 12 below).

10. R(SB) 1/82

This case concerned a claimant who had left his job voluntarily and then claimed a supplementary allowance. By the time when the benefit officer made his initial decision there had been no decision from the insurance officer in respect of a claim for unemployment benefit. Regulation 8 of the Supplementary Benefit (Requirements) Regulations 1980 made detailed provision for the interim decision to be given by the benefit officer whilst the insurance officer was pondering whether there should be disqualification for receiving unemployment benefit; and it provided for the subsequent revision of that interim decision so as to reflect the decision to which the insurance officer eventually came. I need not here go into the niceties of the erstwhile regulation 8; and I say no more about the case's progress through the supplementary benefit appeal tribunal than that the tribunal did not, either in its recorded findings of fact or in its reasons, make any explicit reference to what had become of the claim for unemployment benefit. In the context of the case now before me, I set out the following extracts from the Commissioner's decision:

> "I add that the effect of a claim for unemployment benefit being made or adjudicated on by an appeal tribunal between the date of the determination by the benefit officer and that of that appeal tribunal is to make it appropriate for an appeal tribunal to apply a different sub-paragraph of regulation 8(1) from that applied by the benefit officer." (From paragraph 8)
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> "It was submitted to me that an appeal tribunal had no power to consider new facts that had arisen since the date of the benefit officer's decision." (From paragraph 9; and the Commissioner then summarised the three arguments advanced in support of that submission.)
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> "There is a well recognised distinction between an appeal in the strict sense and an appeal in the nature of a rehearing. On an appeal of the former kind a judgment can only be given if it can be said that it ought to have been given at the former hearing, while with a rehearing a judgment may be given that could have been given by the tribunal of first instance if it were considering the matter at the time of the rehearing (see per Lord Davey in Ponnamma v Arumogam [1905] AC 383 at page 390). I have no doubt that appeals to [a supplementary benefit] appeal tribunal are (like appeals under the Social Security Act 1975 to local tribunals and Commissioners (as to which see Decision R(F) 1/72 at paragraph 9)) in the nature of rehearings to which the latter rule applies. I consider

that section 15(3)(c) of the Supplementary Benefits Act 1976 is to be interpreted in that sense." (Paragraph 10) As Mr Kennedy pointed out, the wording of section 15(3) of the 1976 Act was more restrictive of an appeal tribunal's powers than is the current legislation.

"The argument that where review is possible appeal is not open was rejected in the National Insurance field even before the introduction of what is now section 102 of the Social Security Act 1975 [now section 36 of the Social Security Administration Act 1992 - "Question first arising on appeal"], in Decision R(S) 20/51. And I think that it should be rejected also in the supplementary benefit field. I have not overlooked that under regulation 4(6)(a) of the [Supplementary Benefit (Determination of Questions) Regulations 1980] review is mandatory, where this is necessary, in a case such as the present. An appeal can make it unnecessary. It seems to me to be most undesirable that an appellate tribunal should be forced to close its eyes either to what has become fact since the time of the decision appealed from or to facts which have come to light since such a decision. [I myself have emphasised that passage because it seems to represent the high-water-mark of the submissions advanced by Mr Kennedy.] Further it can impose delay if a claimant instead of being able to put forward new facts at the hearing before an appeal tribunal, has to ask for review of the benefit officer's decision and then, if review is refused or the revised decision in unsatisfactory to him, to appeal from that refusal or unsatisfactory decision to the appeal tribunal. In the National Insurance field it was decided in Decision CU 42/54 (not reported) that the effect of reviewing a decision (meaning I think revising it on review) was to annul the decision so that any pending appeal from it lapsed. This decision was followed in the case on Commissioner's file CI 202/77 where it was stated that after the earlier decision a practice had grown up, which had the approval of the Commissioners, of not reviewing (or perhaps of not revising on review) decisions from which there was a pending appeal unless the revised decision would give the claimant all that he could get on the appeal. I would commend this practice for application in supplementary benefit cases. It is calculated to minimise delay." (Paragraph 12).

"For the foregoing reasons I consider that an appeal tribunal can consider the effect of events supervening since the time that the benefit officer gave his decision and that in the present case the appeal tribunal to whom this matter is referred, as the result of my decision, will determine the appeal in the light of any decision [by them] given on the question of disqualification for receiving unemployment benefit." (From paragraph 13. I have put square brackets round two words which seem to have got in by oversight.)

I have quoted at such inordinate length from R(SB) 1/82 because - in essence - what the Commissioner said therein underlies all such subsequent decisions as support an appeal tribunal's power (if not duty) to carry its own decisions down to the date of that decision.

11. R(FIS) 1/82 (Tribunal of Commissioners)

In this case the claimant, on 1 August 1980, became self-employed as a solicitor. Four days later he made a claim for family income supplement. In such circumstances the assessment of his gross weekly income was as teasing as it was crucial. Before the Supplementary Benefits Commission was a trading and profit and loss account for the period 1 August 1980 to 31 August 1980. That showed a net loss; but the Commission was not satisfied that those accounts represented the claimant's normal income from his occupation; and family income supplement was refused. Before the supplementary benefit appeal tribunal were accounts for the period from 1 August 1980 to 24 October 1980, again showing a net loss. The appeal tribunal upheld the decision of the Commission - on the ground that at the time of the claim the figures quoted did not reflect a true picture of the trading position, particularly since some of the items of expenditure should be related to a longer period than that indicated. This was one of the earliest family income supplement cases to reach Commissioner level; and several issues were considered. For present purposes, however, I refer only to paragraph 20 of the decision, where there were repeated some of the passages from R(SB) 1/82 which I have myself quoted in paragraph 10 above. In paragraph 20 the Tribunal of Commissioners made these observations:

> "The tribunal were in error in point of law in considering that the claim should have been determined at the time of application .... The tribunal should have considered, in the light of the facts and evidence before them, what the proper decision to make was and then to have made it, whether or not those facts and evidence were before the Commission or then in existence. In our judgment, Decision C.S.B. 12/81 (reported as Decision R(SB) 1/82) is clearly correct and applies just as much to appeals to the supplementary benefits appeal tribunal on FIS matters as it applied to supplementary benefit appeals .... [here follow the quotations from R(SB) 1/82] .... The Commissioner concluded that an appeal tribunal could consider the effect of events supervening since the time that the benefit officer gave his decision. We agree.... The question of review of an existing decision on the ground of change of circumstances does not arise in FIS cases, because review is not allowed. <u>But criticism made by the Commissioner of the delay involved in accepting the suggestion made to him that where there are new facts review is appropriate is equally applicable to the suggestion made to us that a claimant cannot produce accounts to the appeal tribunal which were not produced to the Commission and, if he wishes to have these accounts considered, must make a fresh claim.</u>

There is no merit at all in the suggestion that children of the family, for whom FIS is primarily intended, should be subjected to delay in receiving benefit on such technical grounds and we reject this submission." (My emphasis)

12. R(SB) 42/83 (Tribunal of Commissioners)

This decision was directly concerned with claims for single payments; and in that context were enunciated important principles as to the jurisdiction of and approach to be adopted by the adjudicating authorities. Claims for supplementary pension or allowance were referred to only tangentially; but R(SB) 1/82 was clearly accepted as representing good law in its own sphere:

"6. A crucial characteristic of a claim for a single payment is that it deals with a specific need existing at a specific point of time. Once satisfied, such need will cease to exist. This type of claim is to be contrasted with the more usual claim for supplementary pension or allowance, which of its very nature is general and continuing. Whilst in the latter type of claim a tribunal is competent, and normally under a duty, to consider the position as at the date of such tribunal's decision (R(SB) 9/81; R(SB) 1/82 (expressly approved by a Tribunal of Commissioners in R(FIS) 1/82, paragraph 20)), the position is quite different where the subject matter of appeal is a claim for a single payment." (My emphasis)

13. R(SB) 4/85

This was not a decision of a Tribunal of Commissioners. It was given by the Commissioner who gave the decision R(SB) 1/82; and I refer to it at this stage since it carries a little further the discussion of the issue central to this appeal. The forensic history of the case was slightly tortuous. The claimant's business as a property developer ran into difficulties. He claimed supplementary benefit on 10 June 1982. The benefit officer refused that claim on the ground that the claimant had capital resources in excess of the then limit. The claimant carried that refusal to the supplementary benefit appeal tribunal, contending that certain investments were business assets as opposed to personal assets. On 25 August 1982 the appeal tribunal confirmed the refusal; but on 1 November 1983 the Commissioner set aside the decision of that tribunal. At the remitted hearing on 8 February 1984 the appeal tribunal again confirmed the benefit officer's refusal. In respect of that decision leave to appeal to the Commissioner was granted. In the meantime, however, the claimant had made a further claim. That claim, too, was refused by the benefit officer; and on 29 March 1983 that second refusal was confirmed by the appeal tribunal. It was the appeal to the Commissioner against that decision which was the subject of R(SB) 4/85; and at the time when the Commissioner gave his decision, the earlier round of proceedings (ie the round stemming from the claim made on 10 June 1982) had not got beyond the granting of leave to appeal

to the Commissioner against the appeal tribunal's decision of 8 February 1984. (I have already described the forensic history as "slightly tortuous"!) I pass straight to paragraph 13 of the Commissioner's decision:

> "13. Quite apart from the question of business assets there is in fact another ground on which the decision was erroneous. The claim was an open-ended claim for an allowance. In the national insurance field it has been held that a decision refusing benefit under an open-ended claim operates as a refusal of benefit down to the date of the decision unless otherwise stated (see Decision R(I) 8/68); and that in particular a decision of a person or tribunal refusing benefit given on a particular day operates down to that day, and if confirmed on appeal operates down to the date of the appeal decision. (This last proposition does not apply in the case of the decision of a Commissioner with a limited jurisdiction only on supplementary benefit see Decision R(SB) 22/83 at paragraph 9.) It follows that the benefit officer's decision in this case operated down to 12 November 1982 and the appeal tribunal's down to 29 March 1983. The appeal tribunal however clearly looked at the position only as at the date of the claim, whereas with a claim for a continuing benefit like a supplementary allowance the facts must, if the situation is fluid, be looked at week by week (see Decision CSB 1120/83 (not yet reported)). The tribunal found that the claimant had disposed of investments since the date of claim and discharged debts and the position should have been considered to see if the assets had been reduced below the statutory figure at some time before the date of their decision. This omission has now to some extent been remedied by the subsequent award of an allowance from the payment date."

The Commissioner remitted the case for rehearing by a fresh appeal tribunal; and in paragraph 15 gave pragmatic advice as to the desirable order in which should be heard the various appeals then outstanding or (by virtue of the pending appeal to the Commissioner) potentially outstanding.

14. I make no apology for the amount of attention which I have devoted to R(SB) 4/85. The Commissioner's approach to the adjudicational complexities with which he was faced furnishes a classic demonstration of the efforts which the Commissioners have repeatedly made to keep the system working with the minimum of procedural duplication and the maximum of fairness for the claimant. I can deal more succinctly with the remainder of the authorities which were laid before me.

15. CIS/649/92

This case involved complicated calculations of the income derived by the claimant from a business in which he had a share. He made his claim on 24 October 1990. The adjudication officer refused benefit. On 27 April 1992 the appeal tribunal reversed

that. The Commissioner set aside that decision and referred the case for rehearing. As to the period before the fresh tribunal, the Commissioner said this:

> "The tribunal will be concerned with the position as from 24 October 1990. Any award they make of benefit will apply from that date and continue unless and until it is reviewed. They are not, in my judgment concerned with any review called for after 24 October 1990. I say this, notwithstanding the contention put forward by Mr Roe [who represented the adjudication officer] that the tribunal should deal with the position up to the date of their hearing. He based this approach on what was said in paragraph 13 of R(SB) 4/85 where the Commissioner said as follows ...." (From paragraph 8; and there followed almost the whole of the passage set out by me in paragraph 13 above.)
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> "9. I am afraid that I cannot accept the above approach, at least in relation to income support. Income support which is a means-tested weekly benefit is liable to frequent changes .... Now, if an adjudicating authority is to give a decision which is not restricted to the particular date of claim, but purports to cover the whole situation up to the date when that decision is given, it will, as I see it, be necessary to investigate each of the intervening weeks, and to take into account all the numerous possible variations in the claimant's financial position. Such an approach would impose an unwelcome, and, in my view, unnecessary, burden upon the relevant adjudicating authority." (From paragraph 9)

I must confess that I myself have difficulty in following the final sentence of that passage. "Unwelcome" the burden no doubt is. But "unnecessary"? Manifestly the burden will have to be shouldered at some time. The advantages of its being shouldered by the appeal tribunal are expedition and (a degree of) finality. But I need say no more. CIS/649/92 cannot be reconciled with what the respective Tribunals of Commissioners said in R(FIS) 1/82 and R(SB) 42/83; and it found no favour with the Tribunal of Commissioners which gave the decision in CSIS/28/92 (see paragraph 17 below). It was not relied upon by Mr Cooper.

16. CIS/391/92 (Tribunal of Commissioners)

This was one of three associated appeals which were heard together by a Tribunal of Commissioners. In issue was the valuation to be placed upon the interests which the respective claimants had in various properties. The relevant law is complex; and each of the three decisions of the Tribunal of Commissioners is currently under appeal to the Court of Appeal. By each of those decisions the respective decision of the appeal tribunal was set aside and the case was referred back to the appeal tribunal. The issue central to this decision of mine was dealt with in a single sentence (which formed the whole of paragraph 10):

"10. The period in issue in this appeal runs from 15 March 1991 [the date from which ran the decision of the local adjudication officer] down to the date when the issues in this case are finally decided."

To anyone who has read thus far in this decision, it will be clear why the Tribunal of Commissioners felt that no justification of that pronouncement was called for.

17. CSIS/28/92 (Tribunal of Commissioners)

In issue was entitlement to severe disability premium ("SDP"). That premium came upon the scene as a potential component of income support (which itself, of course, came upon the scene on 11 April 1988). It was the subject of paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987.

In its relatively short life paragraph 13 -

(a) has been before the House of Lords (Foster v Chief Adjudication Officer [1993] 2 WLR 292); and

(b) has been the subject of various amendments taking effect at various dates.

CSIS/28/92 was much concerned with the Scots law concepts of recompense and negotiorum gestio. In the event, the case was referred back to the appeal tribunal for rehearing. The Tribunal of Commissioners had before it decision CIS/649/92 (cf paragraph 15 above); and the Tribunal said this about the period which would be before the appeal tribunal:

"3. Before proceeding further we should make it clear that our endorsement of the tribunal's having determined the claimant's right to SDP after the date of claim is made in knowledge of decision CIS/649/92 wherein it was held that an adjudicating authority should only consider an income support claim as at the date from which that benefit is sought and not down to the date of decision. That, it was appreciated, was contrary to what had been held in paragraph 13 of R(SB) 4/85. We have not thought it right to seek submissions upon this issue since we have also become aware of the decision by another Tribunal of Commissioners, more recently, on file CIS/391/92. [Cf paragraph 16 above] In the last, at paragraph 10, it was clearly stated by that Tribunal that the issue in that appeal covered a period from 15 March 1991, the date of claim in that case, down to -

" .... the date when the issues in this case are finally decided."

We have made the same approach to these issues in this case, in preference to the views expressed in CIS/649/92." (Paragraph 3)

18. I add that I have also looked at each of the following decisions: R(F) 1/72, R(SB) 56/83, R(I) 4/84, CIS/255/89 (to be reported as R(IS) 21/93) and CSB/1198/1989. I have found nothing in any of those which carries the issue before me any further than do the seven decisions with which I have dealt specifically in paragraphs 10 to 17 above.

19. So where does all that authority leave the answers to the two questions which I posed under (a) and (b) in paragraph 2 above? The answer to question (a) presents no difficulty. It is quite clear that where a continuing, periodically paid benefit is in issue, an appeal tribunal not only has the power but is normally under a duty to carry its award down to the date of its decision. The practical advantages of that course - including overall fairness to claimants - are convincingly explained in the many passages which I have set out. But it does not follow from that that the answer to question (b) is an unqualified affirmative. In every one of the cases at which I have looked, the relevant adjudication officer's decision had been the starting-point of adjudicational processes which had continued without abatement until the appeal tribunal (indeed, the Commissioner) gave - or was to give - the relevant decision. That, of course, is the situation in the overwhelming majority of cases which come before appeal tribunals; and that is why I have emphasised "normally" in the third sentence of this paragraph. I am myself completely satisfied that every Tribunal of Commissioners and every individual Commissioner who enunciated the "down to the date of decision" principle was considering - and considering only - the "normal" situation; and that every one of the Commissioners involved in such enunciation would have been dismayed at the thought that what he was saying would be projected as applying to the abnormal situation of a grossly belated appeal admitted for hearing years and years after the adjudication officer (or his historical predecessor) had given the decision the subject of the appeal.

20. And, of course, the situation in the appeal now before me is abnormal. Although there are, apparently, some 500 appeals of this type currently in the adjudicational system, each of those appeals has been set afoot by the CWRS. Mr Kennedy was perfectly frank about the underlying motivation. From the procedural outline which I offered in paragraph 6 above, it is quite clear that the legislature intended that such intervening misfortunes as the stroke suffered by this claimant's wife should be dealt with procedurally by review/revision. And if there had been contemporaneous application for review, that is how it would have been dealt with. In this case there was no contemporaneous application. Even so, application for review could properly have been made at the date (in May 1991) when the CWRS sought leave to make the late appeal to the appeal tribunal. But regulation 69 of the Social Security (Adjudication) Regulations 1986 inhibits payment under a revised decision in respect of any period falling more than 12 months before the date upon which the relevant review was requested. Regulation 72 of the Adjudication Regulations (which was not revoked until 31 August 1991) afforded a well-known escape route from the

consequences of regulation 69; but that escape route was less readily available than some representatives believed (or affected to believe); and the CWRS decided against risking the hazards of establishing such circumstances as were prescribed in regulation 72. Mr Kennedy (on behalf of the clients of the CWRS) decided to fight or fall beneath the standard of the "down to the date of decision" dicta. In the course of the argument (which was urbane and good-humoured), I commented that if he had indeed found a "loophole" in the system, he was fully entitled to avail his clients thereof; and Mr. Kennedy said that he preferred "avenue" to "loophole". But either way, Mr Kennedy made no attempt to dissemble. The CWRS had had wholesale resort to the late appeal procedure afforded by regulation 3(3) of the Adjudication Regulations with the intention of avoiding the restriction imposed by regulation 69 upon the effects of belated review.

21. In paragraph 2 above I referred to "potentially misleading authorities". There is no doubt but that - taken out of their context - several passages from the decisions which I have considered in paragraphs 10 to 13 and 16 and 17 above furnish support for Mr Kennedy's contentions. It is within my own knowledge that certain appeal tribunals have so interpreted such passages; and in this very case the adjudication officer first concerned in the appeal to the Commissioner, in his submission dated 2 September 1993, contended that the appeal tribunal had erred in law in failing to heed what the Commissioner had said in paragraph 13 of R(SB) 4/85 (cf my paragraph 13 above). And that adjudication officer might well have alluded also to the passage (from R(SB) 1/82) which I have emphasised in my paragraph 10 above. But what seems to me to be of crucial importance in all this is that not one of the cases at which I have looked was concerned with a highly belated appeal to the appeal tribunal. (In CSIS/28/92 - where entitlement was bedevilled by successive amendments to the legislation - a late appeal seems to have been admitted so as to allow consideration of the period from 11 April 1988 to 8 October 1989, thereby carrying consideration back to the inception of severe disability premium; but that was a late appeal of a type wholly distinct from the late appeal with which I am confronted in the instant case.) In this decision I have been at pains to demonstrate that -

(a) the clear intention of the legislature is - and for many, many years has been - that changes to entitlement under a subsisting award should be dealt with by the review/revision procedure; but

(b) in the pragmatic interests of expedition, simplicity and overall fairness to claimants, the Commissioner has - where appeal proceedings are already afoot - encouraged the conflation of appeal and review.

But (b) above reflects a situation fundamentally distinct from that where -

(i) the obvious intention of the legislature is that a claimant should make application for review, but

(ii) a claimant elects to proceed by launching a late appeal - with the intention of thereby avoiding the restrictions which the legislature has imposed upon the effects of belated review.

After close consideration of the authorities, I am satisfied that that latter type of situation has never yet been the subject of any decision by the Commissioner. In the Latin beloved of lawyers: the issue is res integra and I am uninhibited by any doctrine of stare decisis.

22. Not unnaturally, Mr Kennedy adverted to the hardship which would be suffered by this claimant ("who had no extensive command of the English language") if he were now to be deprived of all opportunity of exploring the additional requirements to which he might have been entitled in consequence of his wife's stroke in 1987. But that is - in essence - an assault upon the legislation and not upon the adjudicating authorities. Every civilised legal system of which I myself have any knowledge imposes time limits in respect of the bringing of civil claims. The "12 months back" restriction in respect of supplementary benefit reviews has obtained ever since the introduction (in November 1980) of the "new" system of supplementary benefit (see regulation 4(2) of the Supplementary Benefit (Determination of Questions) Regulations 1980). That restriction represents the clear intention of Parliament. When (on 6 April 1987) there came into operation the Social Security (Adjudication) Regulations 1986, many of us rejoiced that the potential harshness of the "12 months back" rule had been tempered by regulation 72. But it was not long before that regulation was being prayed in aid in circumstances for which it had never been intended. It was revoked with effect from 31 August 1991; and replaced by the more stringently worded regulation 64A. What all that demonstrates - in the context of the issue before me - is that it has always been the intention of the legislature to keep a relatively tight control over the retrospective effects of a review. Can it be plausibly suggested that the legislature ever intended that such control should be circumvented by the bringing of a late appeal as an alternative to applying for a review?

23. I pose that question because - as was common ground at the hearing before me - the relevant legislation makes no express provision as to the precise powers of an appeal tribunal when confronted by a belated appeal. As with many other aspects of social security law, the legislature has been content to leave to the adjudicating authorities a discretion to be exercised sensibly in the light of particular circumstances. The "down to the date of decision" approach, which has been adopted in cases where appeal proceedings are already afoot by the time review comes into contemplation, is entirely "Commissioner-made" law; and - I trust - none the worse for that. The Commissioner would not, in my confident view, be exercising a sensible discretion if he held that the legislature's clearly expressed distinction

between the role of appeals and the role of reviews in the adjudicational system could be overridden in cases where the sole, or principal, aim of such overriding is to escape the express restrictions which the legislature has imposed upon review. Were the Commissioner to countenance the "down to the date of decision" approach in cases such as the case now before me, he would be encouraging a manifest abuse of the adjudicational processes.

24. In saying the foregoing, I have not permitted myself to be influenced by the somewhat lamentable fact that in each of the cases presently before me the chairman's consent to the late admission of the appeal was obtained - not to put too fine a point upon it - by blatant misrepresentation. In both cases the application under regulation 3(3) of the Adjudication Regulations was made on a pro-forma prepared by the CWRS. The common-form text of that pro-forma opened thus:

> "The above person wishes to seek leave for late appeal against the amount of benefit awarded when National Assistance/Supplementary Benefit was first awarded.
>
> My grounds for appeal are that the medical condition of myself (or a member of my family) gave rise to a number of weekly 'additional requirements' which were not awarded to me <u>when I first claimed benefit</u> or, if they were awarded, were insufficient." (The emphasis is mine)

In neither case has the slightest attempt been made to substantiate those "grounds". It would be hard to find a clearer indication that the purpose of these whole proceedings was to try to circumvent the restrictions imposed by Parliament upon the effect of retrospective review. But - as I have been at pains to demonstrate - there is a "No entry" sign at the mouth of Mr Kennedy's "avenue".

25. I say a word about the role of appeal tribunal chairmen in the admission of late appeals. I am conscious that - since a flood of 500 regulation 3(3) applications is unlikely ever to recur - I am turning rather late to the stable door. But it does seem to me that a chairman - when confronted with so grossly delayed an application for the admission of a late appeal - ought to seek from the relevant claimant written particulars of the "special reasons" which are alleged to justify the favourable exercise of the chairman's discretion; and I mean, of course, something which goes well beyond a common-form document. And it almost goes without saying that, the older the decision appealed against, the more reluctant should a chairman be to exercise his discretion. As I indicated in paragraph 2 above, I have seen cases from Cleveland where appeals have been admitted in respect of awards of national assistance. No such awards were made after 1966. In what other spheres of the civil law of this country is a party allowed to found a claim upon events which occurred or circumstances which prevailed a quarter of a century ago? In a phrase of Lord Denning MR: "Justice has turned sour". How, for example, can any adjudicating authority, considering the matter

in the 1990s, pronounce with any confidence upon the laundry generated by a party in 1966 - or on the wear and tear upon clothing at that time? At the very least, unequivocal independent corroboration could reasonably be looked for.

26. Although the point could not have arisen in either of the cases now before me, I ought to say something about the effect of the appeal tribunal's decision in the following circumstances:

(a) A late appeal is admitted in respect of an award of national assistance.

(b) It is decided that that award was - in the light of the circumstances prevailing at the date when it was made - inadequate.

(c) The appeal tribunal - putting itself in the position of the National Assistance Board - does its best to quantify the weekly sum which should have been awarded to the claimant by the initial decision.

How, in those circumstances, is the adjudication officer to calculate the arrears of benefit due to the claimant?

27. My suggested answers to that question are as follows:

(a) There was no fundamental difference between the principles which underlay the assessment of national assistance and those which underlay the assessment of the "old" type of supplementary benefit which came into force in November 1966. Accordingly, the adjudication officer should project until 23 November 1980 the weekly sum to which I refer in paragraph 26(c) above, making such increases as would have been reflected by the Supplementary Benefits Commission in consequence of (i) any statutory up-rating or (ii) significant changes in the value of money.

(b) The "new" system of supplementary benefit which came into force on 24 November 1980 <u>was</u> fundamentally different. At that time all claimants were required to complete one of the new claim forms; and entitlement was re-assessed. (That was, of course, a review process.) The adjudication officer will, accordingly, have to put himself in the position of the benefit officer and assess the supplementary benefit to which the claimant would have been entitled at the end of 1980 if -

(i) at the date of the initial award of benefit there had been such a decision as that given by the appeal tribunal in the 1990s; and

(ii) throughout the period between that initial award and 24 November 1980 the claimant's

circumstances had remained such as to satisfy the initial award (as replaced by the appeal tribunal).

(c) The exercise pursuant to (b) above will be, of course, a full-blown review - and subject to regulations 64A and 69 of the Adjudication Regulations. It would seem to me that regulation 64A(2)(c) will be satisfied. The relevant "evidence", namely the decision of the appeal tribunal, "did not exist and could not have been obtained" in 1980.

(d) The revised decision of November 1980 will then be subject to further revision in the light of periodic up-ratings of the relevant elements of supplementary benefit. And everything may end in a transitional addition at the inception of income support.

28. I refer very briefly to a point raised by Mr Kennedy (although raised, I think, with no great optimism). The appeal tribunal could - submitted Mr Kennedy - have dealt with the benefit issues thrown up by the claimant's wife's stroke as "a question first arising in the course of an appeal" (cf section 36 of the Social Security Administration Act 1992). What is or is not "a question first arising" can present difficulties of its own. I make no attempt to discuss those difficulties here. Section 36 confers a discretion upon the relevant adjudicating authority. It is inconceivable that any such authority would "think fit" the determination of a question which had been laid before it with the manifest purpose of circumventing Parliament's clearly expressed intentions with regard to the review procedure.

29. There was also canvassed before me the familiar question: If an awarding decision is reviewed and revised, does that awarding decision pass out of juridical existence, its place being entirely taken by the revised decision? (In each of the cases presently before me there had been subsequent review and revision of the initial award.) I have never attempted to conceal my own distaste for too close a discussion - in this pragmatic jurisdiction - of the more metaphysical aspects of jurisprudence. This decision is already of quite inordinate length. I prescind from the question which I have just set out. From the practical standpoint, I say no more than this: Had the appeal tribunal been satisfied that there was error in the initial award of benefit made by the adjudication officer on 21 November 1986, I myself should have regarded the tribunal as being under a duty to replace that decision with a decision of its own.

30. This decision of mine has, of course, been called forth in the particular context of these Cleveland late appeals, every one of which, so far as I am aware, is against a decision which -

(a) had itself been given several years before application was made for the late admission of the appeal; and

(b) was in respect of a benefit which had passed from the statute book about three years before such application.

It is against that background that I have considered and pronounced upon the proper extent of the appeal tribunal's jurisdiction. I am not to be taken as having suggested that the "down to the date of decision" principle can be applied only in cases where the appeal to the appeal tribunal has been brought within "the specified time" prescribed by regulation 3 of the Adjudication Regulations. Manifestly, where application is made within a few weeks of the expiry of the specified time, that guiding pragmatism to which I have repeatedly referred above will call for the application of the "down to the date of decision" approach; and there may well be cases for that approach where the relevant delay has been longer than "a few weeks". I am certainly not going to offer any firm period of time by way of a "cut-off". The commonsense of an appeal tribunal can be relied upon to distinguish between -

(i) a case where review ought to be carried out as being conveniently ancillary to the tribunal's decision; and

(ii) a case where the "down to the date of decision" approach would circumvent Parliament's plainly expressed intentions in respect of the review procedure.

31. Before me it was suggested that, in this case, the appeal tribunal's reasons for rejecting the "down to the date of decision" approach were too tersely set out. That may or may not be so. I doubt, however, if that charge will be levelled against this decision of mine.

32. The claimant's appeal is disallowed.

(Signed) J Mitchell
Commissioner

Date: 19 May 1994