From Cameron. File 108.

CSB 508/1982

IEJ/MAJ

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Reported

Name: [illegible] on behalf of Cameron

Supplementary Benefit Appeal Tribunal: Hertford

Case No: 04/88

1. This is a claimant's appeal from the unanimous decision dated 10 February 1982 of a supplementary benefit appeal tribunal ("the tribunal") brought by my leave and upon the contention that the tribunal's decision is erroneous in law. The tribunal upheld a benefit officer's decision dated 23 December 1981 refusing the claimant a single payment for the installation of a cooker.

2. (1) The substantive issue which arises on the appeal is whether or not Regulation 10(1)(b) of the Supplementary Benefit (Single Payments) Regulations 1981 ("the Consolidated SP Regulations") is ultra vires; though it arises in a slightly roundabout way.

(2) The claimant had claimed a single payment for a cooker, and also for the cost of installing it. He was in fact awarded a sum of £15 in respect of the cooker, and that amount was paid to him. But, in the view of the benefit officer concerned with the claim for installation costs (an award in respect of which, if claimed, would normally succeed if the claim for the cooker itself succeeded) the award for the cooker had been made upon an erroneous view as to the claimant's satisfaction of the qualifying requirements. As that error (if error it was) had come to light prior to a decision upon the claim for the costs of installation the decision on the latter claim only was by way of refusal. In the circumstances it now comes about that the refusal of payment in respect of the installation costs stands as the platform for testing whether or not the claimant is entitled to succeed on the issue (common as regards the cooker also, but not in play as to that on the present appeal) which I have identified in (1) last above.

3. My decision follows an oral hearing of the appeal which was commenced in October 1983 but was by my direction adjourned for further argument in the light of additional instructions to be taken by the benefit officer's representative. Much useful ground was covered at the initial hearing, but in the interests of brevity and because there was intermediate change in representation on both sides I will refer only to the representation at the

adjourned hearing held on 21 February 1984 at which the claimant was represented by Mr R Drabble, of counsel, instructed by Child Poverty Action Group, and the benefit officer was represented by Mr D James of the Solicitor's Office, DHSS. I am indebted to both Mr Drabble and Mr James for their helpful and cogent submissions.

4. The appeal succeeds. I set aside the tribunal's decision as erroneous in law in the respect under-mentioned and direct that the claimant's appeal from the benefit officer's decision be re-heard by a differently constituted tribunal. I do not consider it expedient in the circumstances of the case to seek to give myself the decision which the tribunal should have given, as in the light of the view which the tribunal took upon the question of principle they did not go on and make the additional findings of fact relevant to a proper determination as to entitlement or as to quantum if entitlement was substantiated.

5. There does not appear to have been any significant dispute as to the facts. The claimant instituted his claims on 25 November 1981. The Consolidated SP Regulations were by then in force. He had recently become the tenant of the accommodation in which he was living, and had not been in receipt of supplementary allowance for a continuous period of 6 months. He had not qualified for a single payment in respect of removal expenses, he was not chronically sick, or physically or mentally disabled, he had not been a prisoner, nor had he previously been residing in a resettlement unit or anywhere of that nature. In the circumstances the tribunal took the view - in my judgment plainly correctly - that the claimant could not bring himself within Regulation 10(1)(a) of the Consolidated SP Regulations, since although he could comply with the initial requirement thereunder - "the claimant has recently become the tenant or owner of an unfurnished or partly furnished home...." he could not comply with any of the succeeding prescribed conditions thereunder; and further, and again in my view correctly, that he could not succeed under the tenor of Regulation 10(1)(b) of the Consolidated SP Regulations because, having recently become the tenant or owner of an unfurnished or partly furnished home, he could not satisfy the opening prescription thereunder "the claimant has not recently become such a tenant or owner".

6. Such opening prescription in Regulation 10(1)(b) was not to be found in the Single Payments Regulations prior to the Consolidated SP Regulations.

7. Shortly stated, as the case has stood before me it is common ground that the claimant cannot succeed if the opening phrase now to be found in Regulation 10(1)(b) of the Consolidated SP Regulations is to be given effect. But whilst the benefit officer's contention is that, despite the absence of any express provision in the regulations which those replaced, the latter fell to be construed with the implication of a term to that effect, the contention on behalf of the claimant is that the Consolidated SP Regulations broke new ground by so providing; that in so doing they went beyond the proper scope of consolidation and in consequence were regulations which required in order to achieve legislative effect a prior compliance with requirements imposed by section 10(1), (3) and (4) of the Social Security Act 1980 as to procedures in reference to the Social Security Advisory Committee which were not in fact observed; and that the omission so to proceed has, as regards the text in question, the legal consequence of rendering the Consolidated SP Regulations ultra vires.

8. (1) Such contention raises complex considerations of law which, if the contention be well founded, affects a substantial number of other cases (including another with which I am myself now concerned). I have, for convenience of exposition, accordingly segregated my treatment of that issue so as to constitute Appendix I to this decision.

(2) Appendix I should accordingly be read into my decision at this point.

(3) For the reasons there indicated I have concluded that the contention advanced on behalf of the claimant is well-founded.

9. (1) It is then common ground that as a cooker is an item prescribed by Regulation 9(c) of the Consolidated SP Regulations which (in the form in which it stood at the material time) Regulation 10(5) provided:-

> "(5) In a case to which paragraph (1) applies, a single payment shall be made to meet the reasonable costs of installation of any item mentioned in Regulation 9(c), ...":-
>
> (i) a claim for the reasonable costs of installation of a cooker will succeed where under Regulation 10(1) itself a claimant meets the qualifying requirements for an award in respect of the cooker itself; and that the claimant having claimed both concurrently;
>
> (ii) he will qualify for an award in the amount of such reasonable costs if (as in my view is the case, though not itself in issue before me) he was entitled to succeed on the primary issue as affecting his claim in respect of the cooker.

(2) My decision in paragraph 4 above proceeds accordingly.

10. The tribunal re-hearing the claimant's appeal from the benefit officer's decision are to have regard to my directions set out in Appendix II to this decision.

(Signed) I Edwards-Jones
Commissioner

(Date): 4 April 1984

Commissioner's File: CSB/508/1982
CSBO File: 458/82
Region: London North

APPENDIX I

A: Preliminary:

1. The question of law arising for determination can be shortly stated to be whether or not Regulation 10(1)(b) of the Supplementary Benefit (Single Payments) Regulations 1981 ("the Consolidated SP Regulations") has been validly made, and if and so far as it has not, what are the legal consequences. However, I will, for convenience of treatment, sub-divide it under the following sub-headings:-

(A) As to the legal effect of Regulation 9(3) of the Supplementary Benefit (Single Payments) Regulations 1980 ("the old SP Regulations") as in force immediately prior to the taking effect of the Consolidated SP Regulations.

(B) As to whether, if validly made, Regulation 10(1)(b) of the Consolidated SP Regulations effected a change in the law.

(C) If so, whether or not such a change was within the permitted scope of "consolidation".

(D) If outwith the proper scope of consolidation, was compliance with the procedures under Section 10(1), (3) and (4) of the Social Security Act 1980 ("the 1980 Act") required? - and, it being common ground that such procedures were not in fact complied with -

(E) Are the Consolidated SP Regulations to any extent invalid by reason of the omission? - and if the answer to that be affirmative -

(F) To what extent are they invalid and with what legal consequences?

2. Section 3 of the Supplementary Benefits Act 1976 ("the 1976 Act") authorises the payment of supplementary benefit by way of a single payment in prescribed cases; section 14 of the Act authorises the making of Regulations for carrying into effect (inter alia) section 3; section 33(1) provides (inter alia) that the power to make such regulations is exercisable by statutory instruments; and - save as otherwise prescribed by section 33(3), the prescriptions under which do not in my judgment bear upon the present case - section 33(4) has the effect that any such statutory instrument is to be "subject to annulment in pursuance of a resolution of either House of Parliament". That formula invokes the application of the Parliamentary control procedure styled "the negative procedure" and attracts requirements under section 5(1) of the Statutory Instruments Act 1946 as to laying the statutory instrument before Parliament when made, and a prescribed procedure for annulment of it by Parliament.

3. (1) It is not in dispute that the last mentioned requirements were duly observed in respect of the Consolidated SP Regulations. It is also a matter of record that a motion for the annulment of the Consolidated SP Regulations was in fact debated in the House of Commons, but that the question when put was negatived.

(2) In the course of such debate it was asserted that Regulation 10(1)(b) of the Consolidated SP Regulations effected a change in the law as it had

stood under Regulation 9(3) of the old SP Regulations; but the Under Secretary of State for Health and Social Services gave an assurance that (inter alia) the Consolidated SP Regulations contained no new material.

(3) I have mentioned those annulment proceedings only to discard them as having any legislative effect of which it is appropriate for me to take account, or as affecting in any way my jurisdiction over the issues which arise in the present case.

(4) I have in fact myself reached a firm conclusion contrary to that which was indicated by the Under Secretary of State to the House of Commons; but would be the first to allow that the process has involved anxious consideration of complex questions of legal principle of wider application than the immediate context of delegated legislation under social security law.

B: As to the legal effect of Regulation 9(3) of the old SP Regulations:

4. (1) As in force immediately prior to the enactment of the Consolidated SP Regulations, regulation 9 of the old SP Regulations was in the following terms:-

> "9. - (1) Where a claimant has recently become the tenant or owner of an unfurnished or partly furnished home, a single payment shall be made for the purchase of any item of furniture and equipment to which paragraph (4) applies which either -
>
> (a) he does not possess; or
>
> (b) he does possess, but which is defective or unsafe and the cost of repair to which Regulation 10 would otherwise apply would exceed the cost of the replacement or would be uneconomic having regard to the future viability of the item,
>
> and one or more of the conditions in paragraph (2) is satisfied."

(2) The conditions mentioned in paragraph (2) are:-

(a) the claimant has moved to a new home and one of sub-paragraphs (a) to (f) of regulation 13(1) applied to or in respect of his previous home;

(b) a member of the assessment unit is over pensionable age, aged 15 or less, pregnant or chronically sick or mentally or physically disabled;

(c) the claimant has been in receipt of an allowance for a continuous period of 6 months or more and has, in the opinion of a benefit officer, no immediate prospect of employment;

(d) immediately preceding the circumstances to which paragraph (1) applies the claimant was a prisoner, or living in a resettlement unit or accommodation provided for an analogous purpose by a voluntary organisation,or in accommodation provided by a statutory authority or voluntary organisation for the purpose of providing special care and attention for him, or had been a patient for a continuous period of more than one year,

and in a case to which sub-paragraph (c) or (d) applies there is no suitable alternative furnished accommodation available in the area.

(3) A single payment shall be made for the purchase of any item of essential furniture and equipment to which paragraph (4) applies where -

(a) the item is one which -

(i) the claimant does not possess, or

(ii) he does possess but which is defective or unsafe and the cost of repair to which Regulation 10 would otherwise apply would exceed the cost of replacement or would be uneconomic having regard to the future viability ofthe item; and

(b) either

(i) one of the conditions mentioned in paragraph (2)(b) or (c) is satisfied, or

(ii) the item is a cooking or heating appliance, or

(iii) the item is a bed and the claimant has entered the home without permission of the owner but permission to occupy the home has been granted to him as a temporary expedient,

so however that, except in a case to which head (iii) applies, no payment shall be made by virtue of this sub-paragraph to a claimant who has entered the home without permission of the owner, notwithstanding that permission to occupy that home as a temporary expedient has or has not been granted.

[Paragraphs (4) and (5) go on respectively to deal with a list of the "items of essential furniture and household equipment" and the amounts payable in respect of such.]

5. (1) It is readily apparent, and has not been in dispute before me, that in consequence of the opening words of regulation 9(1) of the old SP Regulations an award could not be made under it to a claimant other than a claimant who had "recently become the tenant or owner of an unfurnished or furnished home"; as also that regulation 9(3) of the old SP Regulations contained no reference as to a claimant either having or not having recently become the tenant or owner of a home.

(2) Thus, according to its text, regulation 9(3) is entirely "free standing" save for its reference to regulation 9(4) - which, as I have indicated, does no more than prescribe a list of "items".

(3) Nor is the "drafting pattern" of the old SP Regulations such as to support the conclusion that only one main head of claim is to be spelt out of any one principal regulation. A plurality of separate heads of claim will be found, for example, in regulation 10(1) and (2) and in regulation 17(1), (4) and (5).

(4) If regulation 9(3) is to be given effect by reference to its expressed terms only then it clearly follows that eligibility under it may be established without the claimant having to bring himself within any of the qualifying requirements prescribed in regulation 9(2), which are expressed to apply in reference only to regulation 9(1).

In particular, it then follows that a claimant who cannot satisfy any one of the qualifying requirements under regulation 9(2) may successfully claim under regulation 9(3) such a cooking or heating appliance as is provided for in regulation 9(4); and that will be so even if he has recently become the tenant or owner of such a home as is referred to in regulation 9(1).

6. It has nevertheless been strenuously contended on behalf of the benefit officer that regulation 9(3) of the old SP Regulations falls to be construed with the implication into it, in amplification of its expressed text, that it is to apply only to claimants who have not recently become the tenant or owner of such a home as is indicated in Regulation 9(1). That, it emerged, had been the view held by the Department both when Regulation 9(3) was originally made and when by successive amendments in 1980 and 1981 prior to the making of the Consolidated SP Regulations it had been amended to the form in which I have above set it out, the 1981 amendment having substituted an entirely new text of 9(3)(b)(iii) (which has effect in regard to what are not so referred to but I can conveniently describe as "squatters") but having also added "or (c)" to the previous text of 9(3)(b)(i).

7. It would, I recognise, be a matter for no surprise if following a provision which related exclusively to persons who had recently become the owner or tenant of specified accommodation one found a provision which dealt with persons who had not so become. But that, in my view, is the highest that the proposition can be put. Moreover, in my judgment one would both expect and require to see express co-relative words to that effect, and their absence is not a sufficient ground for construing Regulation 9(3) with such an implication as has been contended for. Regulation 9(3) has a clear and unambiguous effect without such an implication. In particular, construed in accordance with its expressed tenor it may as regards 9(3)(ii) be regarded as reflecting an official recognition that a person who has need of a cooking or heating appliance has a basic human need the provision of which should be subject to less stringent qualifying requirements than are set for other items to be found in Regulation 9(4). True it is that some - though not all - of the force of the prescription in Regulation 9(1) as to a claim having to satisfy one of the conditions in paragraph (2) is idle if he can, notwithstanding that he has recently become the tenant or owner of prescribed accommodation, separately qualify under Regulation 9(3)(b)(i). But recognition of that falls far short, in my judgment, of a sufficient ground for making the suggested implication and - as would result - thereby altering the plain meaning of the provision as it stands expressed in reference to a claimant whose claim

is for a cooking or heating appliance. The point does not admit of great elaboration; but I am wholly unpersuaded that in accordance with recognised principles of statutory construction (see in particular Luke v Inland Revenue Commissioners 1963 AC 557 at p. 577 per Lord Reid, and Lumsden v Inland Revenue Commissioners 1914 AC 877 at p. 892 per Viscount Haldene) the suggested or indeed any, implication properly falls to be made. I have not in arriving at that conclusion overlooked the technical possibility that the implication did not fall to be made prior to the 1981 amendment but that once the words "or (c)" had been thereby added to regulation 9(3)(b)(i) it does. I do not consider that such amendment - the effectuation of which is adequately accounted for by the Department's belief (which I regard as an erroneous belief) as to the proper construction of regulation 9(3) - can properly be regarded as having effected such a change.

C: As to whether, if validly made, 10(1)(b) of the Consolidated SP Regulations effected a change in the law

8. Once the suggested implication into the antecedent regulation 9(3) of the old SP Regulations is rejected, regulation 10(1)(b) in my judgment clearly represents a change in the law. Indeed, upon that initial premise this conclusion was conceded before me.

D: Was such a change within the permitted scope of "consolidation"?

9. No, in my judgment it clearly was not. Changes beyond pure "consolidation" may be authorised under special authority conferred by the Consolidation of Enactments (Procedure) Act 1949; but that has not been invoked in the present case, and the change in wording here made has, if effective, produced a substantive change in the law, by excluding from eligibility for a benefit a class of persons antecedently eligible. And, as it was said in regard to "consolidation" by Lord Radcliffe in Galloway v Galloway 1956 A.C. 299 at 320, the function of consolidation is "to repeat but not to amend the existing statute law".

10. Regulation 10 of the Consolidated SP Regulations, replacing regulation 9 of the old SP Regulations, materially proceeds as under:-

> "10. - (1) This paragraph shall apply where either -
>
> (a) the claimant has recently become the tenant or owner of an unfurnished or partly furnished home and one or more of the following applies:-"

- there then follow conditions corresponding to those previously to be found in regulation 9(2), after which it continues -

> ";or
>
> (b) the claimant has not recently become such a tenant or owner and one or more of the following applies:-"

- and there then follow conditions corresponding to those previously contained in regulation 9(3).

11. The effect of the opening text of the new 10(1)(b) is, of course, to prejudice a claimant who could satisfy the requirements of regulation 9(3) of the old SP Regulations, but not the requirements under the old SP regulation 9(1), although a person who had recently become such a tenant or owner as therein prescribed; and that is an effect outwith the proper scope of mere consolidation.

E: Was compliance with the procedures required under Section 10(1), (3) and (4) of the 1980 Act required?

12. In my judgment, yes:

(1) Under section 10(1) of the Act the Secretary of State is when proposing to make regulations under any of the "relevant enactments" (of which - see section 9(7) of the 1980 Act - the 1976 Act is one) required to refer the proposals to the Social Security Advisory Committee (constituted under section 9(1) of the 1980 Act) unless one of the exceptions from such obligation which are prescribed in section 10(2) of the 1980 Act applies.

(2) Where the obligation under section 10(1) does bear, section 10(3) imposes on the Committee a statutory duty to consider the proposals and to make a report to the Secretary of State containing such recommendations with regard to the subject matter of the proposals as the Committee thinks appropriate.

(3) Section 10(4) of the 1980 Act then goes on to provide that:-

> "(4) If after receiving a report of the Committee the Secretary of State lays before Parliament any regulations or draft regulations which comprise the whole or any part of the subject matter of the proposals referred to the Committee, he shall lay with the regulations or draft regulations a copy of the Committee's report and a statement showing -
>
> (a) the extent (if any) to which he has, in framing the regulations, given effect to the Committee's recommendations; and
>
> (b) in so far as effect has not been given to to them, his reasons why not."

(4) It is in my judgment clear that in addition to the assistance to the Secretary of State which the Committee is to render by reporting to him in accordance with section 10(3), the procedure under section 10(4) is separately intended to assist Parliament in deciding whether or not to take action under the "negative procedure" when the regulations are laid before Parliament.

(5) I will come below to the matter of the exceptions afforded by section 10(2) of the 1980 Act; but before so doing I will deal with an aspect of section 10 which has been canvassed before me as a factor of consequence when, in cases to which section 10(1), (3) and (4) do apply, the obligations so imposed fall to be evaluated as to their legal force.

13. (1) It will be apparent from the opening words of section 10(4), and I accept as a matter of construction, that sub-section (4) bears only where the regulations are laid after the Committee's report has been received. This admits of a sequence of events in which the Secretary of State first refers the proposals to the Committee and then lays the regulations before Parliament without waiting for the Committee's report. So, the argument runs, although the Secretary of State will thereafter receive a report from the Committee he will not be required to lay before Parliament either that report or his statement in reference to it contemplated by section 10(4). And this "by-pass" possibility, it is further contended, is a powerful support for the proposition (with which I will be dealing later and more generally below) that the force of Section 10 is "directory" and not "mandatory".

(2) I reject the argument so formulated. Whilst accepting that as a matter of construction section 10(4) bears only where the regulations are laid subsequently to the receipt by the Secretary of State of the Committee's report, the clear intention manifested by section 10 is, in my judgment, that (save in the excepted cases) the Secretary of State is to have the benefit of the Committee's report before laying the regulations before Parliament; and, additionally, that Parliament is to have the opportunity of considering both the Committee's report and the Secretary of State's statement in reference to it during the period following the laying of the regulations and within the time limit for annulment under the "negative procedure".

(3) In my view it is to be presumed that the Secretary of State will act in good faith vis a vis the obvious entailment - and that this presumption is reinforced, if reinforcement be needed, by a proper inference that short shrift would be given by Parliament to regulations laid in circumstances in which it was apparent that section 10(1) applied and that reference to the Committee had been made, but that neither their report nor the Secretary of State's statement in reference thereto was before Parliament.

14. (1) Section 10(2) of the 1980 Act materially provides as follows:-

> "(2) The preceding sub-section shall not apply to the Regulations specified in Part II of Schedule 3 to this Act; and nothing in that sub-section shall require any proposals to be referred to the Committee if -
>
> (a) it appears to the Secretary of State ... that by reason of the urgency of the matter it is inexpedient so to refer the proposals; or
>
> (b) the Committee has agreed that the proposal should not be referred to it."

(2) Rightly, in my view, no contention was advanced before me that the case fell within the prescriptions of either (a) or (b) above. Accordingly any relevant exception is to be found, if at all, in Part II of Schedule 3 to the 1980 Act.

15. (1) Part II of Schedule 3 to the 1980 Act is headed "Regulations not requiring prior submission to the Committee" and contains 11 numbered paragraphs. After close analysis I am satisfied that none of those paragraphs with the exception of paragraph 20 can conceivably bear in the present case.

(2) Paragraph 20 of Schedule 3, in conjunction with section 10(2) of the 1980 Act excepts:-

> "Regulations made for the purpose only of consolidating other regulations revoked thereby."

(3) Other paragraphs of Part II of Schedule 3 are, however, in my judgment of relevance inasmuch as they embody verbal formulations of exceptions other than the exception "made for the purpose only of consolidation" but which are of relevance in construing that formulation.

Thus:

(i) Para 12(1) refers to regulations "relating only to" a prescribed social security benefit;

(ii) Para 12(2) refers to regulations "contained in a statutory instrument which (emphasis here supplied by me) "states that it contains only provisions in consequence only of an order under" prescribed primary legislation;

(iii) Paras 12(3) and 13(1) both refer to regulations "contained in a statutory instrument or rule which" (emphasis here supplied by me) "states that it relates only to" specified subject matters;

(iv) Para 13(2) refers to regulations "made only for the purposes of" antecedently identified primary and secondary legislation;

(v) Para 15 refers to regulations "of which" (emphasis here supplied by me) "the effect is" as there specified;

(vi) Para 19 refers to regulations:

"in so far as they consist only of" certain procedural rules in respect of which consultation with the Council on Tribunals is required.

16. It is in my judgment clear that in regard to the formulations employed in paras 12(2) and (3) and para 13(1) above cited an "ipse dixit" in the regulations suffices to render the exception applicable even if on proper analysis of the content of the instrument in issue its effect is found to be not, or not exclusively, as stated to be.

17. As regards the formulations above cited from paras 12(1), 15, and 19, it is in my view beyond controversy that any content of the instrument the effect of which on proper analysis was found to be outwith the specified prescription would not fall within the exception.

18. (1) What then is the scope of the exception in para 20? In particular does "made for the purpose only of" contemplate objective or effect? I find it somewhat surprising that so familiar a phrase to lawyers as "for the purpose only of consolidation" is not the subject of well-settled case law. But no specific authority on the point has been cited to me, nor have I been able to find any myself.

(2) The meaning of "purpose" at large and in everyday usage is not, I think, open to any significant doubt. As it is put in the Shorter Oxford English Dictionary, sense 3, it means "the object for which anything is done or made, or for which it exists; end, aim." And if that be the meaning to be attributable to its use in para 20 that is an end of the matter, for I have no doubt that the Secretary of State, in making the Consolidated SP Regulations, did so with the object of effecting consolidation alone in view - indeed, the preamble to the Consolidated SP Regulations itself states in terms that they are made "for the purpose only of consolidating regulations hereby revoked".

19. (1) If that was the position, then, despite the significant difference in wording, there is no substantive difference (short of a demonstration of bad faith) between "made for the purpose only of" and "states that it contains" (and "states that it relates only to"). If, on the other hand, the correct interpretation is a reference to "effect" then, similarly, the formulation is indistinguishable in substantive effect from the formula "of which the effect is".

(2) There is, I appreciate, no impediment to determining that different verbal formulations carry the same sense. But though in the absence of bad faith the "stated to contain only" formula plainly bears as to intendment, the formula with which I am concerned is not "intended for the purpose only" but "made for the purpose only".

20. "Made" carries in ordinary English usage - see again the Shorter Oxford English Dictionary - the sense:-

> "Made ... [pa.pple.of 'make'] 1. Produced or obtained by 'making'. 2. Of which the making has taken place."

(1) It is convenient at this stage to digress to deal with the possibility that the statement in the preamble to the Consolidated SP Regulations to which I have above made reference can itself affect their legislative effect.

(2) I find the meaning of the words used in regulation 10(1)(b) unambiguous, and on the authority of Ward v Holman 1964 2 QB 580 D.C and Powell v Kempton Park Racecourse Co. 1899 AC 143 at 157 I consider that I am not at liberty to ascribe any other meaning to them merely because I consider their effect to be at variance with the intendment demonstrated by the preamble. I consider also that the formula used in the preamble is there exclusively to demonstrate intendment, and has no legislative force of its own since it precedes the words of operative legislative effect.

22. In the present case any excess exercise of legislative authority arises only in the context of section 10 and its concern with the views of the Social Security Advisory Committee. In wider contexts, however, the same formula of words has relevance to the mode and extent of Parliamentary control to which a measure is subject. And I find it impossible to accept that in using in para 20 so widely used a formulation Parliament can have intended it to bear any different meaning from that it bears in those wider contexts. Moving on from that, I find it impossible to accept, also that Parliament could have intended that the mere statement in a preamble as to a measure being "made for the purpose only of consolidation" should exonerate the measure from exposure to remedy in the Courts if, upon a correct analysis, the content of the measure should be held to go beyond the authorised bounds of consolidation. That, to my mind, is a result properly flowing only from the employment of such a formula as "stated to contain only". I therefore take the view, and hold, that in paragraph 20 the criterion "made for the purpose only", is a criterion to be applied to the effect achieved by the measure if it takes legislative effect.

23. Whilst I recognise that the construction of language in Taxing Acts is sometimes conducted by reference to considerations not of application under the general law, I am fortified in this conclusion by the Privy Council decision in Newton v Commissioner of Taxation 1958 AC 450 where - in the context of a provision of the Australian Tax Code providing for "arrangements having or purporting to have a prescribed purpose or effect" - their Lordships at p. 465 approved the formulation by Williams J. in a lower court that "the purpose of ... [an] arrangement must be what it is intended to effect and that intention must be ascertained from its terms. Those terms may be oral, written or may have to be inferred from the circumstances, but, when they have been ascertained" (emphasis to be supplied by me) "their purpose must be what they effect".

24. It follows from what I have already indicated that in my judgment:-

(i) section 10(1) did bear on the Consolidated SP Regulations;

(ii) they did not fall within any exemption under section 10(2);

(iii) the omission to implement the prescribed steps accordingly constituted a breach of statutory obligation.

F: Does the omission render the Consolidated SP Regulations to any extent invalid?

(The further question "if so, to what extent" is dealt with separately under the next heading.)

25. (1) It was - not unexpectedly - contended on behalf of the benefit officer that section 10 imposed only "directory" requirements, breach of which (and none was conceded) in no respect invalidated the regulations. For the reasons later below indicated I reject that contention.

(2) Before coming to those I should, however, make clear that in my judgment my jurisdiction confers upon me no discretion as to the results attendant upon invalidity, if any be held to have occurred. I mention this particularly because when considering the case law upon the consequences of the failure to observe "modo et forma" a statutory prescription, it is apparent that many of the reported decisions were given in exercise of jurisdiction under the procedures now represented by "judicial review", in regard to which jurisdiction it is well-settled law that although the substantiation of breach of statutory obligation is a condition precedent to the grant of relief, the nature and extent of the relief, if any, to be granted is wholly discretionary. The distinction is clearly drawn in Miller v Supplementary Benefits Commission SB 39 at p. 334 A in the "Little Yellow Book", and (in a broader climate) helpfully discussed in London & Clydeside Estates Ltd v Aberdeen District Council 1979 3 All ER 876 (H.L) at p. 883 per Lord Hailsham L.C.

26. Much of the case law, and much of the treatment of the subject by text book writers, is concerned with the different consequences attendant upon breach according as to whether the provision breached was "mandatory" or "directory". However, surprisingly little assistance can be gleaned as to the criteria by which in a particular case it is to be determined into which category the relevant requirements fall. The test appears to a considerable extent to be a matter of impression and - as is said of "an emergency" - a matter of recognition and not of definition.

27. Making the best appraisal I can, I gauge that the obligations imposed upon the Secretary of State by section 10 of the 1980 Act are "mandatory" and that breach of them has an invalidating effect.

28. In so concluding I have taken particularly into account the following:-

(i) Wade's Administrative Law 5th Edition p. 220, citing Grunwick Processing Laboratories Ltd v ACAS 1978 AC 277 and Agricultural (etc) Training Board v Aylesbury Mushrooms Ltd. 1972 1 WLR 190 ("the Mushroom case") and stating:-

> "Procedural safeguards, which are so often imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them. Where there is a statutory duty to consult persons affected this must genuinely be done ..."

(ii) Ibid p.756:

> "Innumerable statutes empower delegated legislation by various procedures, some requiring the laying of ... Orders before Parliament when made, others requiring consultation with advisory bodies or persons affected ... Errors ... will invalidate the legislation if the statutory procedure is mandatory, but not if it is merely directory. Once again the principle is the same as in the case of other administrative action.
>
> A statutory duty to consult is a matter of importance, and so normally mandatory."

[The learned author then goes on to treat with the Mushroom case, where the requirement was held mandatory but the consequence held to ensue was not a total invalidity of the relevant order but that it was not binding on the members of the association in reference to which the omission to consult had occurred - a result I confess I found surprising before I had the advantage of reading the observations of Lord Hailsham L.C to which I have made reference in paragraph 25(2) above.]

29. (1) I have noted also that in an article "The legal requirements of Consultation" by Allan D Jergesen,1978 Journal of Public Law 290 (a detailed treatment extending to the consequences of failure to consult as required) it is stated (at p. 312):-

> "Nonetheless in all cases so far the duty to consult has been held to be mandatory."

(2) However, on studying the case law myself - the cases are noted in Halsbury's Laws of England 4th Edition vol 1 title "Administrative Law", paras 25 and 37 - it is apparent that whilst in numerous "duty to consult" cases the court has proceeded on the basis that the duty was mandatory, it emerges also that this issue was not contested. This was so also of all those of such cases cited to me by Mr Drabble.

(3) That such is the state of the case law is a tenable confirmation of the proposition (on the inference that the contrary has repeatedly been considered unarguable). But I think that upon a proper application of the principles of judicial precedent it is preferable to modify the proposition and say merely that no case has been cited or is known to me in which a statutory duty to consult has been treated as otherwise than mandatory.

30. (1) In Garner's Administrative Law 5th Edition p. 81 (and with a footnote reference to Port Louis Corporation v A-G of Mauritius 1965 AC 111 P.C (" the Port Louis case" - one of the numerous cases cited to me) it is stated:-

> "Where it is required by the statute consultation must be genuine, and if it is not adequate, it seems that any delegated legislation subsequently made would be invalid as having been made in a manner contrary to that provided for in the enabling statute ..."

(2) However, whilst Professor Garner's personal views on this subject themselves merit respect, I do not consider that the Port Louis case carries the matter very far, since although the issue of ultra vires was raised in it the actual decision did not turn on that, it being held on the facts that adequate consultation had taken place.

31. Despite the qualifications above I have expressed, the whole weight of authority and opinion to which I have referred in my judgment points clearly to the conclusion I have indicated in para 27 above.

G: To what extent are the Consolidated SP Regulations invalid and with what legal consequences?

32. It has been "common ground" before me - and I regard such approach as correct - that in accordance with the principles of "severance" whereby the good may be separated and survive notwithstanding that the bad must be discarded - no question arises as to the Consolidated SP Regulations as a whole being invalid. The "bad" can be localised to regulation 10(1)(b).

33. Moreover, although the "blue pencil test" can now be regarded as constituting less than the entire scope for severance of good from bad - see per Ormrod L J in Dunkley v Evans 1981 1 WLR 1522 at 1524-1525 - it will in my judgment suffice for present purposes. All that is needed is that in applying regulation 10(1)(b) the words "the claimant has not recently become such a tenant or owner and" be ignored. And in my judgment that is what requires to be done by way of practical implementation of my decision.

34. (1) Whilst strictly I am not for present purposes concerned with this, I should I think for completeness go on to say something in regard to the circumstance that regulation 10(1)(b) of the Consolidated SP Regulations has now itself been twice amended since enacted - first as from 9 8 1982 by the Supplementary Benefit (Miscellaneous Amendment) Regulations 1982, reg. 7(8)(a)(i), and secondly as from 15 8 1983 by regulation 7(6)(a) of the Supplementary Benefit (Miscellaneous Amendment) Regulations 1983.

(2) Both the 1982 and 1983 regulations last mentioned were the subject of prior reference to the Social Security Advisory Committee - and the amendments thereby made are not affected by my decision.

(3) However, as the amendments in 1982 have included the insertion in regulation 10(1)(b) of the words "or his partner" immediately after "the claimant" and before "has not recently become", the combined practical effect of my decision and of such amendment is to leave the opening text of regulation 10(1)(b) now effectively - but less than intelligibly - reading:-

> "(b) or his partner one or more of the following applies:-
>
> ....".

- a situation I record for consideration in the context of any legislative action which may ensue from my own decision.

APPENDIX II

1. The tribunal re-hearing the appeal are to be furnished with a copy of my present decision and both Appendices thereto and are to proceed on the footing that the conclusions of law expressed in Appendix I to my present decision are correct (unless the same have by the time for their decision been displaced by higher authority).

2. All issues of fact will again be at large before the tribunal for their determination, but if the tribunal conclude that, applying regulation 10(1)(b) of the Consolidated SP Regulations as if the words "the claimant has not recently become such a tenant or owner and" did not there appear, the claimant satisfied, at the date of his claim for installation costs in respect of a cooker, the qualifying requirements for a successful claim for a cooker then they are to proceed upon the footing that the claimant satisfied also the qualifying requirements in respect of his claim for installation costs in respect of a cooker pursuant to regulation 10(5) of the Consolidated SP Regulations and are upon the evidence before them to determine and award an amount representing the reasonable cost of installation.

3. The tribunal are in due compliance with rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 to include in the record of their decision all material findings of fact and state reasons for their decision from which the respective parties to the appeal can ascertain, as the case may be, how it is that their respective contentions upon it have prevailed or have been rejected.