Bulletin 1 of 5
[SHEET]

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSIS/355/04

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

Appellant:

Respondent: Secretary of State

Tribunal: Glasgow

Tribunal Case No:

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of the Glasgow appeal tribunal (the tribunal) held on 26 November 2003 is not erroneous in point of law. That decision therefore stands.

The statutory provisions

2. The Public Records Act 1958 (the 1958 Act) at s.3(1) and (6) states the following duties:-

> "(1) It shall be the duty of every person responsible for public records of any description which are not in the Public Record Office or a place of deposit appointed by the Lord Chancellor under this Act to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping.
>
> ...
>
> (6) Public records which, following the arrangements made in pursuance of this section, have been rejected as not required for permanent preservation shall be destroyed or, subject, in the case of records for which some person other than the Lord Chancellor is responsible, to the approval of the Lord Chancellor, disposed of in any other way."

However, subsection (4) of s.3 qualifies the above:-

> "(4) Public records selected for permanent preservation under this section shall be transferred not later than thirty years after their creation either to the Public Record Office or to such other place of deposit appointed by the Lord Chancellor under this Act as the Lord Chancellor may direct:
>
> Provided that any records may be retained after the said period if, in the opinion of the person who is responsible for them, they are required for administrative purposes or ought to be retained for any other special reason and, where that person is not the Lord Chancellor, the Lord Chancellor has been informed of the facts and given his approval."

In the First Schedule to the 1958 Act, the definition of public records includes the following:-

> "1. The provisions of this Schedule shall have the effect for determining what are public records for the purposes of this Act.
>
> *Departmental records*
>
> 2.—(1) ... administrative and departmental records belonging to Her Majesty, whether in the United Kingdom or elsewhere, in right of Her Majesty's Government in the United Kingdom and, in particular,—
>
> (a) records of, or held in, any department of Her Majesty's Government in the United Kingdom, or
>
> (b) ...
>
> shall be public records.
> ..."

3. S.1(1) of the Social Security Administration Act 1992 (the 1992 Act) states:-

"... no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied—

(a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or

(b) he is treated by virtue of such regulations as making a claim for it."

4. S.71 of the 1992 Act reads, so far as relevant:-

"71.—(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

(2) Where any such determination as is referred to in subsection (1) above is made, the person making the determination shall in the case of the Secretary of State or a tribunal, and may in the case of a Commissioner or a court—

(a) determine whether any, and if so what, amount is recoverable under that subsection by the Secretary of State, and

(b) specify the period during which that amount was paid to the person concerned.

(3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.

...

(5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under section 9 or superseded under section 10 of the Social Security Act 1998.

(6) Regulations may provide—

(a) that amounts recoverable under subsection (1) above ... shall be calculated or estimated in such manner and on such basis as may be prescribed;

..."

5. Regulations under s.71(6) of the 1992 Act are the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 (SI 1988/644) (the 1988 regulations). The applicable part of Regulation 13 (as amended) reads:-

"13— (1) Subject to paragraph (2), in calculating the amounts recoverable under section [71](1) of the [1992] Act ... where there has been an overpayment of benefit, the adjudicating authority shall deduct—

...

(b) any additional amount of income support, or state pension credit, or income-based jobseeker's allowance which was not payable under the original, or any other, determination, but which should have been determined to be payable—

(i) on the basis of the claim as presented to the adjudicating authority, or

(ii) on the basis of the claim as it would have appeared had the misrepresentation or non-disclosure been remedied before the determination;

but no other deduction shall be made in respect of any other entitlement to benefit which may be, or might have been, determined to exist.
..."

The issues

6. If a claimant wishes to raise an offset under regulation 13 of the 1988 regulations, on whom lies the onus to prove or disprove its applicability? What effect does it have on the above question where the Department for Work and Pensions (DWP) no longer has copies of earlier claim documents? Do the judgements of the Lords of Appeal in *Kerr (AP) (Respondent) v. Department for Social Development (Appellants) (Northern Ireland)* [2004] UKHL 23 (*Kerr*) help in resolution of these questions?

Background

7. The appellant has been in receipt of income support (IS) from 9 November 1996 on the ba of her incapacity to work. From that date until 11 December 2001, such IS was also paid on the basis that the appellant was a lone parent.

8. On 13 November 2001, the appellant signed the following statement (which was witnessed) and from which she has not subsequently attempted to resile:-

"I [the appellant] ... wish to state that [AS] ... is my partner and we have been living together as husband and wife for all the time that I have lived at this address, i.e. since 30 April 1999.

[AS] is currently employed by [the employers] on a full-time basis earning approximately £300 per week.

The reason that I claimed housing benefit and income support stating that [AS] was my landlord and lived in Wales was because a friend advised me on how to defraud the benefits system, this friend was responsible for making the lease for the property. The signature on the lease is that of [AS] therefore he is aware that I have been in receipt."

9. Not surprisingly, the above circumstances led to an overpayment recoverability decision. The final terms of the decision under appeal to the tribunal are as follows:-

"I have superseded the decision of 20/11/96 awarding income support to [the appellant] from 09/11/96 because there has been a relevant change of circumstance since it was given, namely that since 30/04/99 she has had a partner who is in remunerative work.
As a result, [the appellant] is not entitled to income support from and including 30/04/99.
On 30/04/99, or as soon as possible afterwards, [the appellant] failed to disclose the material fact that she was living with her partner [AS] who was in remunerative work.
As a consequence, income support amounting to £10980.03 in respect of the period 30/04/99 to 05/12/01 (both dates included), as detailed on the attached schedule, was paid which would not have been paid but for the failure to disclose.
Accordingly, that amount is recoverable from [the appellant].

THE LAW USED TO MAKE THIS DECISION
The Social Security Act 1998, section 9.
The Social Security Administration Act 1992, sections 71(1),(2),(3),(5A) and (11).
The Social Security and Child Support (Decisions and Appeals) Regulations 1999, regulation 3(5).

The Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988, regulation 13."

10. There is a history of frequent adjournments and supplementary submissions in the process of this appeal. Although it has been stated by her representative that the appellant's evidence is that she was originally on supplementary benefit (SB) and then continued on IS and that she advised the then Department of Social Security of her health problems, the appellant has never substantiated this before the six tribunals convened to hear her case. She attended the earlier hearings but was not called to give evidence because adjournments resulted following technical arguments about what documents could, or had to be, produced. She did not attend the tribunal hearing, however, and there was no request for an adjournment in order to allow her to do so, nor is there any recorded explanation for her absence.

11. However, it remained her representative's contention that the appellant ought to have received a higher rate heating addition in 1988 at the latest, which would have given her a transitional addition to IS which has never been paid and which gives rise to an appropriate offset under regulation 13 of the 1988 regulations; alternatively, or in addition, she may have been entitled to a disability premium earlier than she was, in fact, awarded it.

12. The DM asserted (in a letter dated 12 March 2003) that the history as known to the DWP is this:-

"Attached are copies of form B1 of 08/08/96 and form A2 of 04/11/97. There is nothing on these forms to indicate that additional income support should have been awarded.
The original claim form completed by [the appellant] in respect of the claim from 22/09/03 *[sic]* has been destroyed in the normal course of events.
I submit that what it contained should be determined on the balance of probability from the available evidence.

According to the previous Presenting Officer, the appellant's representative stated that there were previous periods when [the appellant] had been incapable of work and had made this known to the Department. He believed that she had not been paid a disability premium because she was entitled to income support on the basis that she was a lone parent.

Attached are copies of prints from the RPL Computer System, the system which records incapacity benefit claims, showing that [the appellant] claimed incapacity benefit from 30/10/96. She did not satisfy the contribution conditions but has been incapable of work since that date.
There are no records of any previous claims for incapacity benefit.

An income support full record print has been obtained and has been forwarded to the Presenting Officer. Excerpts are attached.

The record print shows that from 22/09/93 to 07/11/96 [the appellant] was receiving income support for herself and one child. Her applicable amount included lone parent and family premiums.

She was paid on the basis that she was a lone parent until 05/08/96. As her child had reached the age of 16, she then registered as available for and actively seeking employment.

On 14/11/96 she claimed income support on the basis of incapacity for work. That claim was treated as made on 09/11/96. The claim form is at pages 1 to 40 with the original submission.

The full record print shows that lone parent and family premiums were included in [the appellant's] applicable amount from 09/11/96 and that the disability premium was also included from 23/10/97 on the basis of the incapacity benefit claim mentioned above.

As there was no claim for incapacity benefit prior to 30/10/96, and [the appellant] was first awarded disability living allowance from 09/04/99 (see enclosed prints), I submit that there could have been nothing on the claim form in respect of the period from 22/09/03 *[sic]* which would have led to an earlier award of disability premium.

Accordingly, I submit that no deduction from the amount overpaid is appropriate under regulation 13 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988."

13. The representative (Mr Christopher Orr, a local welfare rights officer who has represented the appellant throughout) then responded by letter dated 1 April 2003:-

"My client will give evidence to the effect that her benefit started when she was on Supplementary Benefit and continued on into Income Support from 1988.

It would appear that the department no longer has records for this period.

...

If they were destroyed or lost after the appeal was submitted then it may be necessary to examine the questions to *[sic]* whether this was in fact done deliberately.

If they were destroyed or lost prior to the date of decision then how is it that the adjudication officer claims to have been able to apply regulation 13 (offset) in the way indicated by the Commissioners namely considering the whole period on benefit ..."

14. The terms of the DM's response of 15 May 2003 are these:-

"No documents are held showing that [the appellant] was in receipt of supplementary benefit prior to 1988 or that she then continued on to income support. There is no record that such documents were held and have been destroyed or of the date on which any such destruction took place.

I submit that the onus is on [the appellant] to prove her contention and that the points which she has to establish are as follows.

1. That she was in receipt of supplementary benefit up to 1988 and then continued on to income support.

2. If so, what her final assessment of supplementary benefit was and whether this included a higher heating addition.

3. That she applied for a higher heating addition at the time.

4. That a higher heating addition should have been included in her assessment.

5. If a higher heating addition was not included, did she appeal about this at the relevant time. If she did not, why not? If she did, what was the result?

...

I can confirm that documents relating to this period did not exist on 17/10/02, when I considered whether an offset under regulation 13 was appropriate. As the period must have ended prior to 22/09/03 *[sic]*, the date of the first claim shown on the Income Support Computer System and, probably prior to 1990 when that system had been completely phased in, it is likely that they were destroyed a considerable time before the [overpayment] decision."

15. A supplementary submission from Mr Orr dated 5 August 2003 included the following:-

"...

In CIB/378/2001 (copy attached) the Commissioner considers the practice of the Department in not retaining potentially relevant evidence.

...

At paragraph 13 he continues:-

'Further, the Secretary of State has "requirements in law" under other legislation (the Public Records Act 1958, the Data Protection Act 1968, the Human Rights Act 1998 and the Freedom of Information Act 2000 may all be relevant) ...'

Section 3(1) of the Public Records Act 1958 states ...

The Department's interpretation of this duty is currently reflected in it's *[sic]* Document Retention Guide (copy attached).

...

... I think I can assert that

i. the burden of proof in this matter is upon the Department
ii. the Secretary of State can be assumed to have known the effect of R(IS)5/92 and R(IS)9/96 on the question of offset when writing his document retention policy in any form post 1992.
iii. destroying documents that may not have current relevance but may have future relevant *[sic]* for offset may make it impossible for the Secretary of State to discharge the burden of proof in relation to the calculation of offset."

16. Along with the numerous submissions and counter submissions, the appeal came again before the unfortunate tribunal over a year after it had first been listed. There are pages of recorded argument which, so far as I can tell, reiterate the points already made. The position of the presenting officer was that it was for the appellant to make out the basis for an offset under regulation 13, whereas Mr Orr contended that the burden of proof lay upon the DWP properly to calculate the overpayment and it could not do so without consideration of all prior claims and determinations, a task for which the Department had disabled itself because such documents could not now be made available by it.

The tribunal decision

17. The tribunal dismissed the claimant's appeal:-

"The tribunal decided that the decision-maker had discharged the burden of proof both in relation to the merits of the case, which were not disputed and in relation to the calculation of the overpaid amount.

...

The appellant's representative's position was that because the records relating to the 1993 claim had been destroyed it was impossible to check the claims to ascertain whether there was any potential error which had not been picked up at the time. He argued that as there was a duty on the department to retain relevant documents if they were not retained the department could not discharge the burden of proof in relation to the requirements on them set out in the 1988 POR regs.

...

The presenting officer referred to the evidence available from computer records relating to the appellant's claim for Income Support. There was no evidence that the appellant had claimed or been in receipt of Supplementary Benefit. The tribunal decided that it had not been established that the

appellant was in receipt of supplementary benefit and that the question of a transitional addition in terms of regulation 10 of the Income Support (Transitional) Regulations 1987 did not apply.

In respect of her 1993 claim the appellant's representative stated that she might have included in her claim form a statement to the effect that she was unfit to work and that without the 1993 claim form it was impossible to establish whether her 1993 *[sic]* had been correctly decided. He speculated that there might have been entitlement to the disability premium.

...

The tribunal decided that it should take a common sense approach to the question of the missing 1993 claim form. It was satisfied that the document had been destroyed in the normal course to release storage space and as part of the exercise of computerising the department's records. It had not been deemed relevant to the appellant's continuing claim and there was no evidence that it had been deliberately destroyed to destroy evidence. It no longer existed and the tribunal had 'to seek to establish as best may be what had been the terms thereof'. The department provided the computer record, which showed that a decision had been reached on the appellant's claim for Income Support awarding the family premium and the lone parent premium. The appellant's representative did not lead any evidence from the appellant relating to her state of health at the time of her claim to support his contention that the disability premium should be payable. On a balance of probabilities t tribunal decided that the claim had been correctly decided and it did not raise any basis for t calculation of an underpayment, which could be deducted from the amount of the overpayment, made to the appellant.

...

The tribunal decided that the onus was on the appellant to establish entitlement or additional entitlement. The claim form might have 'prompted enquiry' regarding other entitlement however the appellant had to provide evidence to bring her claim within the conditions of entitlement. She did not do so. In 1993 the department considered her claim on the information provided and an award was made. There was no evidence that it had been challenged. There was no evidence lead *[sic]* that she had an additional entitlement, which if taken into account retrospectively would result in an underpayment of benefit, which could be offset against the amount of the overpayment.

The onus to establish entitlement does not shift to the department when considering the question of a potential underpayment. The onus is on the department to show that the question of underpayment of income support had been considered. Commissioner Mitchell in R(IS)9/96 stated that it was not necessary for the department to state expressly that it had considered and found an underpayment but that it was enough to include reference to the 1988 POR regs. This has been done ..."

Appeal to the Commissioner

18. The main points of the written submission on behalf of the appellant are, firstly, that no reference was made to the Public Records Act or to the DWP's guidelines on document retention and secondly, that the tribunal ignored the following express argument:-

> "Once the effect of R(IS) 5/92 and R(IS)9/96 were known then there could be no such thing as a claim not having continuing relevance as a criterion for destruction as there would have to be borne in mind the need to consider offset in possible future overpayment cases."

19. The Secretary of State does not support the appeal on the basis that there was nothing to point to any underpayment at the relevant times. However, Mr Orr contends this does not deal with the crucial issue:-

> "As the Secretary of State had destroyed the relevant documentation he had put himself in a position where he could not finalise the calculation of the overpayment because he could not properly consi offset.

> It is this point that the tribunal have failed to deal with. Calculation of offset is a compulsory step I *[sic]* submit that his destruction of the documents should not be excused as the tribunal have apparently done without making any reference to the submission at all."

The oral hearing

20. The case came before me for an oral hearing on 6 October 2004, which hearing had been requested by Mr Orr. On the day prior to it, Mr Orr applied to withdraw the appeal but I declined to give the necessary leave. This was for two reasons; firstly, the importance of the issues and, secondly, the short notice.

21. The Secretary of State was represented at the oral hearing by Mr Bartos, Advocate, instructed by Mrs Parker, Solicitor, of the Office of the Solicitor to the Advocate General. As already noted, the appellant was represented by Mr Christopher Orr. I am grateful to them all for their assistance.

The oral arguments

On behalf of the appellant

22. Mr Orr does not now rely on any duty arising directly under the 1958 Act but rather that the mandatory wording of regulation 13(1) of the 1998 regulations ("shall deduct") and the integrated nature of the overall recoverable overpayment scheme make apparent that the burden lies on the decision maker (DM), as it does under s.71 of the 1992 Act, to demonstrate all applicable criteria. Without past claim forms, whatsoever is the reason for that, the DM cannot discharge the onus. If the DM cannot correctly calculate the amount, then no part of it is recoverable even if (as here) there is no dispute that an overpayment under s.71 arose.

23. The approach of the Lords of Appeal in *Kerr* only strengthens the appellant's position. Mr Orr founds in particular on paragraphs 62 and 63 of *Kerr* (in the opinion of Lady Hale of Richmond, with which the other members agreed) which are as follows:-

> " 62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
>
> 63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision *CIS/5321/1998*, "a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself."

24. Then in paragraph 66 of *Kerr*, Baroness Hale continued:-

> "This will not always be sufficient to decide who should bear the consequences of the collective ignorance of a matter which is material to the claim. It may be that everything which could have been done has been done but there are still things unknown. The conditions of entitlement must be met before the claim can be paid: SSA(NI)A, section 1(1) [Social Security Administration (Northern

> Ireland) Act 1992 which is in identical terms to s.1(1) of the 1992 Act]. It may therefore become relevant to ask whether a particular matter relates to the conditions of entitlement or to an exception those conditions. ..."

Having judged that the paragraphs relied on by the claimant in *Kerr* were worded in terms of exceptions rather than qualifying conditions, Baroness Hale at paragraph 69 said:-

> "69. This, therefore, is a case in which the department should bear the burden of the collective ignorance and pay the claim."

25. Mr Orr argues that by destroying documents, the DM has made it impossible for the required cooperation under Kerr to take place. In R(IS) 5/92 Mr Commissioner J G Mitchell QC first emphasised the importance of regulation 13(1)(b) for a claimant. Moreover, in R(IS)9/96 the same Commissioner directed that once an issue was raised under regulation 13(1)(b), then the relevant claim form should be produced to a tribunal in order for it to consider the question of possible underpayment of income support.

26. The reach of Commissioner Mitchell's opinion extends even further in the light of *Kerr;* no an adjudicating authority does not wait for the issue to be raised but itself seeks information on t potential application of a regulation 13(1)(b) deduction by asking the relevant questions. On an ordinary approach to the weighing of evidence, it may have been appropriate for the tribunal to determine that it was more probable than not that there was no prior underpayment of benefit in the appellant's case; but the judgement in *Kerr,* combined with the failure of the Department to follow Commissioner Mitchell's direction in R(IS)9/96, meant that such a determination was wrong in a regulation 13(1)(b) case. The Department had not played a reasonable part in the required regulation 13 investigation so that contrary inferences should have been drawn against it; and irrespective of whether this led to an even balance in the probabilities still the DM must fail, because the legal burden of proof lay on him and not on the appellant as the tribunal held.

27. Although in general terms it is for a claimant to make out conditions of entitlement, this yields to the legal burden which it is accepted falls upon the DM on all matters relating to an overpayment. Issues of entitlement may also be relevant to whether there has indeed been the overpayment stated, but this does not shift the burden of proof under s.71 of the 1992 Act. As regulation 13(1)(b) of the 1988 regulations is part and parcel of the same scheme, then the same rule must apply. The result of placing the burden on the claimant is wrong in principle and in practice would mean that, even though, for example, the estate of a dead claimant asserted a sizeable offsetting underpayment, such an argument necessarily fails if the Department has destroyed the relevant claim form.

On behalf of the Secretary of State

28. Mr Bartos posited a contrary example. If the burden of proof under regulation 13(1)(b) lies on the Department then, if a previous claim has been destroyed in the course of routine weeding out, all the claimant has to do in the case of a proven overpayment is to assert some prior underpayment and, even without verifying details and even though the claimant did not object at the time or subsequently to what is now said was a wrong earlier decision, the asserted onus of proof may mean that no amount is recoverable because the sum cannot be accurately calculated.

29. Mr Bartos argues that, on basic principle, it is for a claimant to prove that he has entitlement to a benefit which has not been paid but which he argues should have been paid. This is what regulation 13(1)(b) encompasses. It is, in effect, a retrospective claim for a notional benefit.

30. He does not accept that either R(IS)5/92 or R(IS)9/96 assist the claimant. In the former, Mr Commissioner J G Mitchell QC held that, under regulation 13(1)(b), the scope of a deduction is not limited to the period of the overpayment and that the expression "the claim as presented" includes those factors which could have been established by reasonable enquiry prompted by the terms of the claim. But the Commissioner held that the decision of the tribunal was not shown to be erroneous in law, albeit that it considered only the question of entitlement to an additional requirement for heating during the period of overpayment of benefit, because there was insufficient evidence of any entitlement at an earlier stage.

31. In R(IS)9/96, Commissioner Mitchell confirmed that, under regulation 13(1)(b), the benefit overpaid was not confined to income support although the question of underpayment was so limited; therefore, it was not possible to argue an underpayment of supplementary benefit except to the extent, as is also argued in the present appeal, that it ought to have led to a transitional addition under the Income Support (Transitional) Regulations 1987.

32. Mr Bartos submits that paragraph 8 of R(IS)9/96 answers the arguments put by Mr Orr, when Mr Commissioner Mitchell said:-

> "In my judgement the terms of regulation 13 do render it obligatory for the adjudication officer in an overpayment case to consider the question of possible underpayment of income support. For that purpose he clearly requires to consider the 'basis of the claim as presented' in terms of regulation 13(b)(i) or 'the basis of the claim as it would have appeared ...' in terms of regulation 13(b)(ii) and the awarding decision which followed the claim. Depending on the information in the claim he may also have to look at 'any other determination'. I do not consider it necessary that the adjudication officer should in every case expressly state that he has considered regulation 13 and not found there to have been any underpayment, provided he includes a reference to regulation 13 among the provisions stated to have been taken into consideration. I agree with [the representative on behalf of the Department of Social Security] that a claimant who has reason to believe he may have been underpaid income support should state the basis of that belief. In the event of an appeal raising a question of possible underpayment the adjudication officer should produce the claim and the relevant determination so that the tribunal can consider and decide upon any challenge to the adjudication officer's conclusion in the decision under appeal."

33. Mr Bartos argues that it follows from the above that the DM must consider the possible applicability of regulation 13(1)(b) if a claimant raises a challenge and must produce the claim if it exists, (that is consistent with the duty of reasonable cooperation set out by *Kerr*); however, such premises in no way lead to the proposition that the legal burden is on the DM. Nor does Mr Bartos accept that the reasoning in *Kerr* further assists the appellant: because documents have been destroyed in the normal course of events does not suggest that the Department is guilty of conduct which means that inferences should be drawn against it. If everything has been done which could have been done in the particular circumstances but there are still things unknown, then the principles set out by Lord Hope at paragraphs 14 to 17 of *Kerr* support the Secretary of State's case:-

> "14. But it can at least be said that a claimant ... is not in the same position as a litigant. His position is similar to that described by Diplock J in *R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble* [1958] 2 QB 228, 240. The claim to benefit in that case was a claim to receive money out of insurance funds fed by contributions from all employers, insured persons and the Exchequer. The procedure for determining whether the claimant is entitled to a disability benefit was said to be more like an inquest than an action. The social fund with which we are concerned in this case is, of course, non-contributory. It is maintained out of funds paid into it by the department. The claimant does not have the same rights as an insured person. Nevertheless the position of the department is not to be regarded as adverse to that of the claimant. In this case too the process is inquisitorial, not adversarial.

15. In this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and department must contribute. The claimant must answer such questions as the department may choose to put to him honestly and to the best of his ability. The department must then make such inquiries as it can to supplement the information which the claimant has given to it. The matter is then in the hands of the adjudicator. All being well, the issue of entitlement will be resolved without difficulty.

16. But there some basic principles which made be used to guide the decision where the information falls short of what is needed for a clear decision to be made one way or the other:

(1) Facts which may reasonably be supposed to be within the claimant's own knowledge are for the claimant to supply at each stage in the inquiry.

(2) But the claimant must be given a reasonable opportunity to supply them. Knowledge as to the information that is needed to deal with his claim lies with the department, not with him.

(3) So it is for the department to ask the relevant questions. The claimant is not to be faulted if the relevant questions to show whether or not the claim is excluded by the Regulations were not asked.

(4) The general rule is that it is for the party who alleges an affirmative to make good his allegation. It is also a general rule that he who desires to take advantage of an exception must bri himself within the provisions of the exception. As Lord Wilberforce observed, exceptions are to be set up by those who rely on them: *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, 130.

17. If therefore the claimant and the department have both done all that could reasonably have been expected of them, the issue of fact must be decided according to whether it was for the claimant to assert it or for the department to bring the case within an exception. ..."

34. Mr Bartos contends that the House of Lords collectively decided in favour of the claimant in the *Kerr* appeal because the statutory provisions in issue were construed by the House of Lords as *disentitling* ones, and therefore exceptions rather than qualifying provisions, so that it was for the DM to prove their applicability. Mr Bartos submits that the context of *Kerr* is crucial. It concerned entitlement to funeral expenses under the complex provisions of regulation 6 of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987 Regulations (equivalent to regulation 7 in the corresponding regulations in Great Britain). Much of the information was already available to the Department, and the House was concerned that the Department should not defeat a claim by its own failure to ask questions which would have led it the right answer.

35. The statutory provisions in issue in the present appeal concern an entirely different scenario. This is where a claimant has been in receipt of benefit under an award securing his entitlement and a DM seeks to claw back all or part of such benefit paid, either through revision or supersession of the award, because misrepresentation or failure to disclose for which the claimant is responsible has resulted in an overpayment. On general principle, which is fully accepted by the Secretary of State, a claimant is entitled to keep a properly made award unless the DM can demonstrate that the statutory criteria for recovery under s.71 of the 1992 Act are made out. But where lies the burden of proof in a dispute must always depend upon the terms and context of the particular legislative provision in issue.

36. Under regulation 13(1)(b) of the 1998 regulations, because the claimant is asserting a *fresh* entitlement then, under the premise of *Kerr* that the general rule is that it is for the party who alleges an affirmative to make good his allegation, this inevitably means that it is for the claimant to demonstrate the supposed underpayment of past benefit; alternatively, the principle that "he who desires to take advantage of an exception must bring himself within the provisions of the exceptio reinforces the same distribution of the onus. The claimant is, in effect, wanting an exception to the

calculation which would otherwise result from a strict application of s.71. The Secretary of State accepts that, following R(IS)9/96, a DM must consider whether a case under regulation 13(1)(b) has been established if the applicant raises it. Moreover, if so made out, the deduction is mandatory. But it most certainly does not logically follow that, contrary to general evidential principle, the DM must prove that there was never a relevant underpayment at any stage in the claimant's history.

My conclusion and reasons

The 1958 Act

37. Mr Orr picked up the reference to the Public Records Act 1958 from paragraph 13 of CIB/378/2002, and set out part of that paragraph in his submission of 5 August 2003; an extract from which submission is itself set out in my paragraph 15 above. Mr Commissioner Williams in the paragraph there quoted by Mr Orr had continued:-

> "and any 'clear out' of public records of continuing relevance will need to be considered in those contexts [i.e. the cited legislation] too."

38. The Commissioner was considering a quite different factual context to that of the present appeal. He was criticising the failure by the Department to produce reports of previous examining medical advisers in incapacity benefit cases despite complaint by the claimant that her condition had not improved since the prior such report when the medical evidence was that the personal capability assessment was satisfied. The Commissioner did not amplify his remarks nor specify the precise legal impact of the legislation mentioned on different aspects of social security adjudication.

39. So far as the 1958 Act is concerned, the only one mentioned by Commissioner Williams which was put in issue in this appeal as relevant, Mr Orr in my view is right in his concession that it does not assist. What constitutes a "public record" is imprecisely defined, as is the differentiation between those records which ought to be "permanently preserved" under s.3(1) and those which under s.3(6) are to be destroyed. Those records selected for permanent preservation are, once 30 years have elapsed, subject to different arrangements for their safe keeping under section 3(4) of the 1958 Act. It is difficult to believe that these elaborate procedures were ever intended to apply to social security claim forms. In any event, there is no statutory sanction for any breach and it is not clear to me what relevance the legislation has to missing documentation and the problems that poses for accurate and fair social security adjudication. It is interesting that the same Commissioner, in CG/3049/2002, relied instead on the use of normal evidential principles when corroborative claim documents were missing. Although it would have been preferable had the tribunal referred to the submission on the 1958 Act put to it, given the vague nature of what was being argued no error of law arises from the omission which justifies setting the tribunal's decision aside.

Weighing the evidence

40. It may be that, on the *Kerr* approach, where the Department is judged to have acted unreasonably in destroying documents, then inferences contrary to its interests could be drawn if there is still ignorance about a relevant matter. However, as those circumstances are not present here, I do not decide the point. Otherwise, no presumptions arise with respect to the content of documents destroyed; their terms must be established, in so far as feasible, on the usual balance of probabilities.

41. At paragraph 14 of CG/3049/2002, in an appeal against an overpayment determination where the claimant said that she had informed the Department of her true situation when she applied for Widow's Benefit but the claim form was now missing, Mr Commissioner Williams said:-

> "As the whole case then depends on what that claim form did or did not say, the tribunal should do its best, following R(IS) 11/92, to reconstruct the form. .....And the tribunal must also bear in mind that if there is no evidence, it should not guess. The critical question is: are the submissions and assertions of either party just guesswork, or are they something more than that? In weighing the evidence and the lack of it, the tribunal must have the principle of equality of arms in mind (under article 6 of the European Convention on Human Rights). It should not make assumptions that the Department is less likely to have made a mistake than the claimant unless it has evidence for that. If the tribunal cannot establish what was in the claim form then, to repeat the words of Commissioner Mitchell, it should leave the tree lying where it fell."

42. It does not seem reasonable to expect the Department to retain claim forms for ever just because some claimants subject to a competent recoverable overpayment determination may wish to seek a deduction under regulation 13 and require a claim form for a past period then to be produced for that purpose. Therefore, I do not accept Mr Orr's submission that *Kerr* necessitates contrary inferences being drawn merely from the fact of destruction. On the basis that, in the absence of a claim form no presumptions as to its contents (or even about the mere existence of a claim) fall to be made without more, it was a justifiable conclusion on the tribunal's part after weighing available evidence that it was more probable than not that the factual circumstances for a deduction under regulation 13(1)(b) did not exist at any relevant time. The tribunal did not go wrong in law in that respect.

The onus of proof under regulation 13(1)(b) of the 1988 regulations

43. In paragraph 66 of *Kerr* Lady Hale recognised that, under section 1(1) of the Social Security Administration (Northern Ireland) Act 1992 (which is in exactly similar terms to section 1(1) of the 1992 Act), "the conditions of entitlement must be met before the claim can be paid". Therefore, if a particular matter relates to the qualifying conditions of entitlement it is a claimant who must bear the consequences of ignorance; however, if what is in issue constitutes an exception to such conditions, then the Department bears the burden of establishing that factor which operates to disentitle the claimant.

44. In my judgement, section 1(1) of the 1992 Act, the structure of section 71 of the same Act, the wording of regulation 13(1)(b) of the 1988 regulations and the overall context of the relevant legislation, all lead to the conclusion that while the onus of proof lies upon the Department to make out a recoverable overpayment under s.71, such onus shifts to the claimant who then seeks appropriate deduction from the amount first calculated.

45. I agree with Mr Orr that issues of correct entitlement, additional to whether or not there was a misrepresentation or failure to disclose, *may* arise under section 71. For example, in CSIS/407/2000 I accepted the argument made at an oral hearing on behalf of the Secretary of State, that on the facts of that case, before any issue of misrepresentation and its results arose, the preliminary questions were the correctness of the review of the existing award and what was the resulting overpayment. In that case, the claimant had been receiving income support as a single person and then claimed on behalf of herself and her ex-husband as her partner. It was later determined that there was a recoverable overpayment because she had misrepresented that the partner was doing no work. The claimant then maintained that she was not actually living at the relevant time with the partner as a couple, but claimed on that basis as a favour to him because they were told that was the only way for the partner to receive any money since he had no permanent address at the time. I agreed with the Secretary of State's representative that the initial point was whether on the proven facts the underpinning review and revisal to the effect of no entitlement throughout the period of the overpayment was correct, or whether it should have been that the claimant at least was entitled throughout the relevant period to the amount applicable to her as a single person; of course this made a crucial difference to any resultant overpayment.

46. The required supersession or revision under section 71 necessarily alters adversely the prior award in order to underpin the resultant recoverable overpayment; in some cases disputes therefore arise about what the correct entitlement decision now is, quite apart from failure to disclose or a misrepresentation. As the Secretary of State seeks the change under section 71, the burden necessarily falls on him to make out the propriety of such action. However, as Mr Bartos submitted, this can have no logical bearing on the very different issue under regulation 13(1)(b); here the claimant raises an entirely new issue of entitlement which is either not related to the period which is covered by the section 71 revision or supersession or concerns a different benefit from the subject of the s.71 recovery process.

47. The coherent order of steps under section 71 is that the propriety of an adverse alteration of the award is first shown, then a resultant overpayment, and finally that such overpayment is due to a relevant misrepresentation or failure to disclose. It has always been accepted that, as a disqualifying provision, the legal burden of proof lies on the Secretary of State with respect to all relevant matters arising under the section. But regulation 13(1)(b) of the 1988 regulations operates at a later stage; it allows, in finally calculating the recoverable overpayment, for deductions of notional entitlement to income support (or state pension credit or income-based jobseeker's allowance), albeit such deductions are wholly unrelated to the circumstances of the section 71 revision or supersession. If, as is trite law, one who submits an initial claim for benefit has the burden of showing that its qualifying conditions are met, it can hardly be the case that one who must pay benefit back because it has been demonstrated that she should never have had it, has an easier task in establishing a similar entitlement to offset against the proven debt. In my judgement, nothing in principle or on account of the statutory language or from the structure of the overpayment scheme or to further its consistency can justify such a departure from what is usual and right.

48. The circumstances of the present appellant illustrate only too graphically the consequences if it is the Secretary of State who must make out a negative set of circumstances. The appellant admits that she intended to defraud the Department. She has asserted a prior entitlement but has neither subjected herself to probing questions nor adduced any corroborative evidence. It is difficult to see how any policy could dictate this case as one where "the department should bear the burden of the collective ignorance and pay the claim". Regulation 13(1)(b) forms an exception to liability for what is otherwise the recoverable amount; just as the Secretary of State in the case of an exception to a qualifying condition for entitlement bears the onus of proof, so by analogy should the claimant under regulation 13(1)(b) have to show that the full reach of the demonstrated overpayment should not be sought. The tribunal applied the correct rule on the burden of proof.

Summary

49. As no error in law has been made out, my decision is as set out at paragraph 1 above.

(signed)
L T PARKER
Commissioner
Date: 18 October 2004