COMMON APPENDIX TO CASES -

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INTRODUCTION

1. The cases to which this appendix relates raised, in one way and to one degree or another, how properly should operate the review of decisions provision in section 104 of the Social Security Act 1975, with particular regard to its place in the supplementary benefit scheme. In all cases the claimants were in receipt of a supplementary allowance under an existing award. Each case was initiated by a request by the claimant for a change, to his advantage, in the scope of the existing award. That therefore raised the question of review under the section. One question that then arose was as to who bore the onus of establishing one of the limited grounds upon which such a review may be made. The section, so far as relevant, is reproduced at Schedule I.

2. Other questions arose concerning the effect, if any, of the doctrine of res judicata and as to the scope of regulations related to section 104, in section D of the Social Security (Adjudication) Regulations 1986. In particular there was raised regulation 69 which, according to its side note, deals with review in supplementary benefit cases, and there followed regulation 72 which can, I think properly, be regarded as a concluding but exempting provision applying to the whole of section D. The relevant parts of these two regulations are set out in Schedule II.

3. Questions arose in certain of the cases as to whether there had been a review, or a review of the review decision under appeal, by reason of the terms of certain documents issued by the Department. I was shown documents raising similar questions relating to other cases. I do not take up space dealing with that in detail. But I am satisfied that the word review has on occasions been used in a non-statutory sense - ie simply as meaning "reconsidered". It may be that in some instances that conclusion is incorrect, but where so it is clear that the law about grounds of review, the proper issuance of decisions and, where appropriate, written reasons therefor, have not been adhered to. I deal with that law later.

RES JUDICATA

4. Logically the question of the doctrine of res judicata arises first. I need delay little in dealing with it since, in the course of the hearings, it rapidly became clear that there was little effective dispute. It is enough for present purposes to say that the doctrine effectively stops the re-raising of an issue or question once it has been decided by a competent judicial authority, at least so far as the same parties are concerned. That means in the social security area, broadly, that once a claim has been made or a question raised and adjudicated upon that particular claimant can not re-raise the issue or question involved. But, of course, the social security scheme is based upon statutory authority and to the extent that the statutory authority so requires the common law doctrine of res judicata has to give way. In short, and for practical purposes, once a claim has been adjudicated upon any of the points in it can only be re-raised or further considered by way of appeal, or review, and both of these subject to the relative statutory conditions. I did not

understand, in the end of the day, that there was any dispute but that that was the correct way to regard the doctrine of res judicata as operating upon decisions of the adjudicating authorities and that original submissions that the doctrine had no part to play in the scheme were, effectively, departed from.

5. I must, nonetheless, make one caveat. Although it has no effect upon the outcome of the present appeals I am not persuaded that the doctrine of res judicata applies to decisions or determinations by an adjudication officer. As I understand the doctrine it only operates where the decision in question is one by a judicial or at least a quasi-judicial body. And I note that in Regina v. Secretary of State for Social Services (ex parte CPAG and others) /1989/ 1 All ER1047 and /1989/ 3 WLR 1116, at page 1052 of the former report, the Court of Appeal approved words uttered by Diplock LJ in Regina v Deputy Industrial Industries Commissioner (ex parte Moore) /1965/ 1 All ER81 at 93, /1965/ 1 QB456 at 486 about the nature of the duties of an insurance officer, now an adjudication officer, when dealing with a claim in its original form -

> "His duties are administrative only; he exercises no quasi-judicial functions for there is, at this stage, no other person between whose contentions and those of the claimant he can adjudicate. He must form his own opinion as to the validity of the claim, ..."

It is not for me to question, then, that an adjudication officer's decisions are purely administrative and have no element of quasi-judicial authority. That makes me think that there is no res judicata in an adjudication officer's decision any more than there would be in any other purely administrative decision made by another statutory authority in response to an application. The position is otherwise when the issue has been determined by a judicial or quasi-judicial body and once there is in play a contrary case. Thus a decision by a medical board or appeal tribunal may give rise to the doctrine of res judicata - R(I)9/63, paragraphs 24 and 25. And that line has been followed by such other decisions as CSSB/569/87 (a copy of which is on file CSSB/308/89). I note that in R(SB)4/85, to which I was also referred, the doctrine of res judicata was considered, but in regard to two decisions by tribunals, in claims for supplementary allowance in respect of different periods. It was held, not suprisingly perhaps, that there was no res judicata against the decision for the latter by reason of that for the former period. That was no doubt because the facts which give rise to entitlement for one period, as noted in the decision, and even if they appeared to be the same in regard to a later period, did not necessarily involve the application of the same law. To the contrary effect was the decision of a Tribunal of Commissioners in R(S)1/83 where there was an overlap between the later and the earlier periods. To the extent of the overlap it was held that the doctrine of res judicata applied. But I note that in that case neither what I might call the executive decision was by an adjudication officer. The earlier decision was that of a Commissioner and the later decision was by an appeal tribunal.

PRACTICE

6. It became clear at an early stage of the hearings that the decisions before me could not stand for various reasons. The whole issue in each case, and not least as to whether any review was warranted, was therefore at large before me. Since it was suggested that this decision might be of some importance for the future I thought it right to suggest that evidence as to how section 104 was operated in practice would be of assistance since any useful decision would require to be based upon practicalities rather than an instructed, but possibly philosophical, view of what the section meant. After a short adjournment evidence was led on behalf of the adjudication officers from Miss Fiona McGregor, dealing with the contributory benefit side of social security, and by Mr Robin G Skea, dealing with the non-contributory benefit side, namely supplementary benefit and income support. Both are adjudication officers attached to the Scottish Headquarters of the Department of Social Security. I gladly record my indebtedness to them for the clear and open way in which they set out not only how review cases are handled, or at least are expected to be handled, on each of the contributory and non-contributory sides, but also the difficulties which, in a practical way, can from time to time occur. I entirely accept their evidence. Indeed it is right to record that it was not challenged and that cross-examination went rather to extend, helpfully, the assistance afforded. What now follows are my findings of fact arising from that evidence.

Contributory Benefits

7. I deal first with the contributory benefit side. It will then be helpful to compare that with the later findings in regard to the non-contributory side. The practice set out herein I understood to apply throughout Great Britain.

8. Under both schemes the principal legislation provides for claims to be made in a prescribed manner - sections 165A(1)(a) and section 14(2)(a) of the Social Security Act 1975 and the Supplementary Benefits Act 1976, respectively, and then regulations under each scheme require that the claim shall be delivered to the Secretary of State on a form approved for the purpose, or in such other manner as he may approve. In non-contributory cases writing does not appear to be an essential - regulation 4(1) and 6 and regulation 3(1) of the Social Security (Claims and Payments) Regulations 1987 and the Supplementary Benefit (Claims and Payments) Regulations 1981, respectively. Then, in accordance with their terms and by operation of paragraph 4 of Schedule 7 to the Social Security Act 1986, the provisions of section 98 onwards of the 1975 Act apply to how the claim is to be handled and determined by an adjudication officer and bring in, at section 104, the common provisions about review of decision. So, on receipt of what I will call an original claim the Secretary of State, by one of his officers, must consider its sufficiency as to manner and the information provided. Once satisfied he will pass the papers to an adjudication officer. He may call for further information. Ultimately he will decide the case.

Any such decision is given in writing. That decision remains upon the claimant's file. A copy is sent to him by the Department - strictly speaking by the Secretary of State.

9. It appears that a review may be initiated in a number of ways, not least, apart from at the instance of a claimant, by the Secretary of State or indeed by an adjudication officer at his own hand. And section 104(1) contains nothing to limit the class of persons who may initiate a review.

10. A claimant initiated review, on the contributory benefit side, usually begins with a telephone call. Of course it will not usually be the case that the claimant is aware of the precise legal step that he is seeking to take. The normal procedure then is for the Secretary of State, again by one of his officers of course, to ask questions necessary to focus what is involved in a legally recognisable form. There are forms which can be used to assist in this process and it may even be that a visiting officer's report is required. There are cases where a document from the claimant triggers the review process. At all events, once the Secretary of State is satisfied that the information appropriate to put before an adjudication officer with a view to review is complete, a form LT54 is completed. It bears to be an application for review of an earlier decision by an adjudicating authority, and refers to the date thereof. There is a space for reasons for review to be set out. There is an annotation that "documentary evidence is attached" and on the back there is provision for the adjudication officer to set out his decision upon the application.

11. The adjudication officer, on receipt of a form LT54, will consider first whether there are grounds for review in terms of section 104. If there are then the whole question is taken to be at large and he will consider what decision to give upon the merits of the claimant's case. He will then issue a decision setting out first the grounds upon which he has elected to review the earlier decision and then his new decision. But when appropriate he will issue a decision either refusing, for certain reasons, to review or, although grounds for review have been made out, holding that there is nothing to warrant a revisal. Inevitably, in the course of time a particular claimant, for a particular benefit, may have a number of review decisions in addition to an original, awarding, decision. A copy of the adjudication officer's decision upon a request for a review will be sent to the claimant by the Secretary of State.

Non-Contributory Benefits

12. On the non-contributory side the procedure is much less formal. I understood that to be largely because of an enormous pressure of work resulting in not infrequently the same individual acting for the Secretary of State in the preliminary preparation of the claim and then as adjudication officer in determining it. There is no form LT54 - except in overpayment cases which are handled with rather more formality. In the ordinary non-contributory case a form A14 is used. That allows for relevant information to be noted and the same form is used for both original requests and requests for review. The

adjudication officer will note on the form what he has decided. Part of the A14 is detachable and is sent to the claimant with the reasons for the adjudication officer's decision. There are ancillary letters and forms but it is not normal to record the particular decision in full nor to send it to the claimant. In some cases an additional form or letter explaining the decision may accompany the A14.

13. A review of non-contributory decisions may again start because of something mentioned by the claimant, or by something discovered by a visiting officer. In effect the latter would be a question raised by the Secretary of State, although the visiting officer may even be, under another hat, the adjudication officer. It may, again, be necessary to seek further information.

14. But once it is thought that there is enough information for an adjudication officer to consider the matter the file will be put before him, if it is not already in his hands - under his other hat as it were. He is then required to consider section 104 just as much as his counterpart in the contributory scheme. But because there are no laid down requirements as to how grounds for decision or review are to be recorded in non-contributory cases, it is usually necessary for the adjudication officer to have to reconstruct, from the file and any earlier forms A14, what were the preceding decisions in the case. Once the adjudication officer has felt able to give a decision, first as to whether to review and second as to whether to revise he will annotate the latest A14 with the result. The proper place to record the effect of such a decision is the box marked "Notes (current assessment)". But, it has to be emphasised, there is not set out a properly constructed decision text.

On Appeal

15. If the adjudication officer's decision on a review is appealed it is relatively easy, in the case of a contributory benefit case, to record it on the form AT2 by which it is conveyed to the tribunal. But in a non-contributory benefit appeal whilst the AT2 may appear to set out the adjudication officer's decision it will not do so in the precise terms of the decision because they have never been so formulated. It will, again, be a reconstruction of the decision, as indeed will be the decision recorded as then under review. Further it rather appears, certainly in non-contributory cases, that where the adjudication officer has held there to be no grounds for a review the claimant will probably not have been asked whether he considers that any such exist.

A CRITIQUE

16. At this stage it is appropriate to record that regulation 63(1) of the Social Security (Adjudication) Regulations 1986 has been more breached than observed by adjudication officers' decisions not having been notified in terms and in writing to claimants in supplementary benefit cases. Nor would it, in my view, be enough to comply with that provision, to send a precis or mere indication of the effect of the decision. In my view what the terms of the regulation require is that the exact terms of the decision be sent, in writing. The

reasons for the decision must also be provided in writing, if requested. I am aware that there does not appear to be any requirement in the statutes or regulations that an adjudication officer's decision be itself set down in writing. But what must be sent to a claimant and the consideration that a lack of formal recording of such decisions must make it difficult correctly to operate any review procedure have persuaded me that there is a necessary implication that all decisions by adjudication officers require to be recorded in writing. It will otherwise be difficult if not impossible to know, later and when circumstances may have quite changed, what was determined. There was a potential model for such recording - form A6(SP), used in single payment cases.

17. I confess to some surprise that the power of review, under section 104 of the 1975 Act, has not been hitherto more rigorously observed. It first came in to the supplementary benefit scheme on 23 April 1984 by virtue of regulation 65 of, and paragraph 5 of Schedule 4 to, the Social Security (Adjudication) Regulations 1984, under authority of Schedule 8 to the Health and Social Services and Social Security Adjudications Act, 1983. It continues to apply, for these cases, by paragraph 4 of Schedule 7 to the Social Security Act 1986. I am almost as surprised that the provision for requiring reasons for decision have not been more utilised. I suspect that had they been so there could have been some improvement of the presentation of cases to tribunals so that such points as the need for review might have been more readily picked up at that stage.

18. Adjudication Regulation 20(1) makes the same express provision in respect of other than supplementary benefit cases, as 63(1), noted above, save that reasons in writing for the decision must then always be provided. It, too, I fear, has not been immaculately observed. Since both regulations 20(1) and 63(1) refer in terms to a decision "on any claim or question" what I have said clearly applies to decisions following upon review. The breach of these regulations in non-contributory cases can, of course, be grave in its consequences. But I have to record that, within even my limited experience, the problem is also to be found in some contributory benefit cases. It may sometimes be a failure in accurate transcription. I have seen cases where the adjudication officer's decision, as put before the tribunal on form AT2, has differed in its wording from that recorded on form LT54. I should add that my concern is not about minor matters, but about differences which could be material to a tribunal's deliberations. A similar difficulty can occur where there is noted later in the AT2 that the adjudication officer's decision as issued and recorded has been revised: but then the exact terms of the revised decision are not put before the tribunal. There is then a further difficulty since a question may arise as to whether the revised decision has superseded the appeal. There can also arise fresh rights of appeal and, it may be, questions as to which decision is properly before the tribunal. Perhaps the most important point about the adjudication officer's decision is that if it is not a judgment, it is certainly the legal basis from which the claimant, or, as it may be, the Secretary of State, derives rights. I consider therefore that it must be drawn with appropriate care - cf. paragraph 19 of R(I)3/87.

SECTION 104 - CONSTRUCTION

19. Against that background the next question that arises for my consideration is as to whether section 104(2) is mandatory or directory in respect of its provision that - "A question may be raised with a view to a review ..." (My emphasis). In short does "may" there equal "must"? And it is relevant to consider sub-paragraph (3A) which provides -

> "Regulations may provide for enabling or requiring, in prescribed circumstances, a review under this section not withstanding that no application under sub-section (2) has been made." [This provision came into operation with effect from 6 April 1987.]

20. No doubt, as Mr Cameron submitted in dealing with this point, "may" normally implies permission rather than compulsion. And the words earlier used in the statute in regard to the making of original claims are clearly compulsory - eg. "There shall be submitted ...", Section 98(1) of the 1975 Act. That similar compulsive language was not used in regard to the review procedure does tend to suggest that Parliament meant the latter procedure to be less formal than the former. I am mindful, as pointed out by Lord Denning MR in Howard v. Secretary of State for the Environment (1975) QB 235 at 242 that the word "shall" is not necessarily itself directory. Indeed in the particular statutory provision there under consideration the same word, used in respect of two stages of making, and what had to be stated in, an appeal, fell to be construed as mandatory for the former but directory only for the latter.

21. Mr Cameron also drew attention to a passage in R(S)5/86 where a Tribunal of Commissioners recorded their judicial notice of a "large section of the public which is to a significant extent unversed in social security law". - paragraph 15. He also drew my attention to a line of authority, including Burns International Security Services (UK) Ltd v Butt (1983) ICR 547, which vouches the legitimacy of construing such procedural requirements with regard to the nature of the proceedings involved. In that case, dealing with procedure before an industrial tribunal, it was said that where persons without professional assistance were seeking to operate the jurisdictional procedure, "a technical approach is particularly inappropriate." The judge also referred to Howard and to a case under the Rent Acts where Fox LJ, sitting in the Court of Appeal, said that when such cases are being conducted -

> ".. by lay persons without professional assistance, .. I think that a technical approach to the requirements as to the contents of application forms is not to be encouraged..." - Druid Development Company (Bingley) Ltd v Kay (1982) 44P & CR. 1976.

22. But I was also concerned by a line of authority that where the word "may" is used in such a way as to appear to empower a public officer to take certain steps then, if that power is conferred not for the furtherance of his own duties but to be used as and when

required for the benefit of others there may be held to be cast upon that officer a duty to exercise that power whenever someone with the interest in the exercise of the power seeks its assistance - see, for example, the cases referred to at page 235 of Maxwell on Interpretation of Statutes, 11th Edition.

23. I start, then, by noting that in order to make an original claim there are mandatory requirements to be complied with by the individual claimant. The next stage is also a mandatory requirement - by implication upon the Secretary of State since the claim was required to be delivered to that officer - to put the claim before an adjudication officer - section 98(1)(a) of the 1975 Act. But there is no statutory, nor so far as I can find regulatory, provision dealing with how an individual claimant is to raise with the Secretary of State a question that might give rise to a review of an existing decision. It seems to me then that he may do so in any way that he pleases. Section 98(1)(b) certainly requires there to be submitted forthwith to an adjudication officer for determination "any question arising in connection with a claim for, or award of, benefit ..". That appears habile to include a request for review. But by whom is it to be submitted? The statutory scheme viewed as a whole does not seem to envisage an individual claimant having direct access to an adjudication officer. That is clear so far as an original claim is concerned from the combination of sections noted in paragraph 8 above dealing with the making of claims, and as to what is to happen next under section 98(1)(a). That the same language applies to section 98(1)(b) suggests that much the same procedure was envisaged for review applications as for original claims - at least so far as concerns the adjudication officer. (See also Section 104(3) which requires any request for a review to be dealt with as under sections 99 to 101, which are the sections which deal with how an original claim is to be processed after being passed to the adjudication officer.) So too, in regard to rights of appeal from a review decision; again Sections 99 to 101 are to apply - "with the necessary modifications". It is, I suspect, a necessary modification that whereas in an original claim the Secretary of State may make investigations, he appears to have no power to do so in the case of a "question" - see regulation 4 of the Supplementary Benefit (Claims and Payments) Regulations 1981 for the power in respect of a claim; I can find no similar power relating in terms to a "question". And the same appears to obtain in contributory benefits - cf. regulations 7 and 8 of the Social Security (Claims and Payments) Regulations 1987. On the other hand as an investigatory authority the adjudication officer can always require further information. I conclude that what Parliament envisaged was that the individual could raise any question he might have about a claim or award with the Secretary of State, again through one of his officers of course. If it was thought to be a question requiring a determination by an adjudication officer then it was to be forthwith submitted to him. It is following that, then, that section 104(2) comes into place and makes what to my mind is a logical sequence. Questions arising in connection with a claim or an award which require consideration of a review of the existing decision must be submitted to an adjudication officer for determination by the Secretary of State acting for the claimant, "by means of an

application in writing" to that officer. And the grounds of the application must be set out, so far as may be. Such a logical sense of the whole scheme then presents a parallel between the initial application being made to the Secretary of State and his referring it to an adjudication officer and a claimant, however unwitting he may be about the review provisions, raising a question with the Secretary of State which might give rise to the need to consider a review. That logic is perhaps enhanced when it is considered that the Secretary of State is more likely than a claimant to be able to maintain records, and moreover sufficiently reliably, for the proper operation of such an ongoing process. It seems to me to be unrealistic to suppose that individual claimants would keep their copy records of decisions - so far as they ever get them - so as, when necessary, to be able to focus grounds for any later review - and it might be much later. Finally such an interpretation seems to make some sense of the added-in paragraph (3A) of Section 104 since, unless paragraph (2) of section 104 is in some sense imperative it would seem to be otiose to provide power to make regulations for enabling or requiring, in any circumstances, a review where there had been no application under (2). For these reasons I hold that "may" in section 104(2) is mandatory; but mandatory upon the Secretary of State when and where he receives some intimation by, from or about a claimant indicative that a question arises, or may be arising, requiring the case to be put before an adjudication officer in order to have him determine whether there should be a review and, of course, if so then to carry out that review.

24. To an extent I find myself perhaps differing from views expressed by the Commissioner who decided the case on file CSB/751/86, at paragraph 4, where he held that section 104(2) does not mean that a request for review must be in writing and that it could be made in some other way. If I may so say, I think that that decision was correct but it is clear that that Commissioner did not have before him submissions raising the question in the way in which it came before me. If he is taken as referring only, as I believe he was, to how an individual claimant may raise a review question then I entirely agree. A number of other decisions by Commissioners were put before me, including at least one of my own, where views were expressed which might appear to conflict with what I have now determined. I think it only necessary to cite one other, namely the decision on file CSB/336/87. In that case the question arose somewhat obliquely. The relevant issue was as to whether regulation 87(1)(b) of the Social Security (Adjudication) Regulations 1984 fell to have included as an understood extension to the word "request" the writing referred to in section 104(2) of the 1975 Act. I am not at all surprised that the Commissioner there rejected that submission and held, for the purposes of regulation 87(1)(b) - now, of course, regulation 69(1)(b) of the 1986 Adjudication Regulations, that in that context the request could as well be oral as written. The same would appear to apply to a request for a review in what is now regulation 69(1)(a). Again I would understand the Commissioner to have been concerned with the date when a request was made for a review by an individual, however unwittingly. But once it is clear

that a communication falls to be regarded as a request for a review its date will or should become clear. And that, again, is a different matter from how the request falls to be put before an adjudication officer. All that, I am happy to think, fits in with the interperation I have determined.

ONUS

25. Next and related to the interpretation of section 104 was the question of onus of proof - especially in the case of an appeal to a tribunal. It was conceded, on the authority of R(I)1/71, that the onus was on the claimant to establish grounds sufficient to warrant a review. Submissions followed as to the problems in particular cases. I do not need to rehearse them as I am satisfied that the concession should have been qualified. In R(I)1/71 the then Chief Commissioner held, at paragraph 14, that - ".. the insurance officer [now the adjudication officer] has not shown on the balance of probabilities that .." there had been a change of circumstances material to that case. He then went on to say, in paragraph 16, that once a claimant has been awarded a benefit ".. he may fairly insist that those who contend that the award should be cancelled or varied on review must shew that there are valid grounds for review." The equity of that is clear. But for the reasons earlier discussed I do not consider a claimant to be on equal terms with the Secretary of State or an adjudication officer when it comes to querying the content of his award. For the same reasons I consider that once the matter is before that officer, it is for him to cause such investigation as appears appropriate to be able to determine whether or not a review is warranted. It may be that the answer is obvious - thus a claimant complaining about a recent development may be at once understood to raise a question of a relevant change of circumstances. Once the adjudication officer has decided whether a review is warranted and an appeal is under way I consider that it is incumbent upon him to put his reasons before the tribunal, if they have not already been requested by the claimant under adjudication regulation 63(1). If he does not, or if they feel unable to accept those reasons, the tribunal must investigate the matter for themselves. The onus will then again, at least initially rest on the adjudication officer but may shift as noted below. But given reasons, the claimant may agree with the facts found by the adjudication officer but argue as to whether they satisfy section 104. If not it is then that I consider the onus shifts to him to prove any facts felt relevant and other than those before the adjudication officer. In the case of certain claimants, especially those unrepresented, it will be for the tribunal, again in their investigatory capacity, to seek out information relevant to the grounds in section 104, for themselves. They will then have to consider the exercise, the only time that they can, of the review power of an adjudication officer.

ADJUDICATION REGULATIONS 69 & 72

26. The effect of these regulations were the next matter of submission with which I have to deal. It is, I think, enough to start by quoting the words of regulation 69(1) which requires that a

determination on a claim or question relating to supplementary benefit "shall not be revised on review ... so as to make supplementary benefit payable or to increase the amount of benefit in respect of ..." and there then follow the particular time and financial limits. I note that under the general heading of section D, "Review of Decisions", of the Regulations there are other particular provisions dealing with limitations on the consequences of reviews in respect of other benefits. It seems to me that what the regulation means is just what it says. The matter was not really in dispute before me. At all events, in my view, if and when a determination or decision is being revised on review the effect must not be to transgress the limits which follow. But there is a general relief applicable to all the section D provisions, in regulation 72 -

> "(1) nothing in this section shall operate so as to limit the amount of benefit or additional benefit that may be awarded on a review of a decision if the adjudicting making the review is satisfied either -"

and then there follow particular grounds upon which alone the decision may be released from the earlier restrictions on its effect. There is now also a further paragraph, (2), restricting that relief in cases where, to put it broadly, the law has been determined by a Commissioner or by the Court to an effect contrary to what had earlier been understood. I confess to finding the inconsistent use of the words "decision" and "determination" in different parts of the statutory provisions and the regulations somewhat confusing. I think it must be that the words are effectively interchangeable, however much it might have been preferable to be able to regard a decision on a claim as just that and anything that followed as a determination following upon a request for review, or raising a question in relation to the decision. But I am clear and again it was not in dispute before me, that section 104 must first be satisfied. Regulations 69 and 72 so require in terms. Next, and only if a ground for review has been made out, an adjudication officer may proceed to revise the decision but the effect of that is limited by regulation 69 save in cases where, and to the extent to which, regulation 72 can be held to relieve the revised decision from its restrictions on effect. But I should emphasise that these regulations do not affect the time and financial scope of the review, only the practical effect as it might be recorded in a revised decision making an order for payment. It may be important to determine on a review that a claimant was entitled to a favourable finding in arrears covering some years. That might be very relevant later, for example in regard to a further request for review later on. But the financial consequences of the review cannot exceed 12 months in arrears. So, for example, a claimant may be found to have been entitled under the supplementary benefit system, to relief from the requirement to be available for work for six years prior to the date that the matter was raised; but he could not be found entitled to the long term benefit rate for more than 12 months prior to the same date.

THE SCOPE FOR A REVIEW

27. The next question which arose was as to whether, once a ground for review had been made out, it was only upon the basis of the material contained in, or in elaboration of, that ground that it could be determined whether the original decision fell to be revised and if so to what extent: or whether, on the other hand, the whole original decision was then open so that matters could be raised which were not within the actual, and could never have independently justified any, ground for review. To some extent that point is inter-related with the next and last, namely the effect of a revision upon a decision and in particular the extent to which the revisal replaces, in the sense of superseding, that decision, be it an original decision or one itself upon an earlier review.

28. Section 104(3) requires an adjudication officer, on receipt of an application raising a question with a view to a review, to proceed to deal with -

> "any question arising thereon in accordance with sections 99 to 101."

These sections equate claims or questions and in particular section 99(2) provides that, having taken a claim or question into consideration the adjudication officer may either decide it himself or refer it to an appeal tribunal. The common thread-word 'question' persuades me that once a ground has been made out for a review under section 104(1) the adjudication officer may only decide, on the review, that which arises out of that question. Thus, for example, if an application raises a question of a relevant change of circumstances since the decision was given then, on the review, it is only the consequences of that change of circumstances to which effect may be given by varying the terms of the current version of the decision.

THE "DECISION"?

29. This might be regarded as the major subject for contention before me - certainly in terms of time. It involved issues as to the extent to which an original decision remained in being following a revisal, or to which a review decision remained in being following a further revisal; and what different, if any, effect there was if the later decisions were refusals to review - or even, to make it more difficult, determinations to review but not to revise. All this raised rather fundamental questions about the nature of a decision, in social security law, in its widest sense. However esoteric became some of the submissions, the matter is of importance to the proper operation of the scheme. It was thus that Mr Cassidy introduced the concept of a one-doored house with internal inter-connecting rooms. That idea was much discussed. Its essence was that in the first place there had to be a ground under section 104 to allow entry through the door into the house - ie the decision. Once in one could get, if necessary, to any one of the rooms but, as I understood it, the room behind the only door was the latest version of the decision and it was that version, therefore, to which entry via section 104 had first to be gained. Thereafter it might be that from it access could be got to other rooms - ie to earlier versions or aspects of

the decision. The submissions one way and another were considerable.

30. It is only fair to record that my conclusion has itself evolved after being persuaded successively of the soundness of various of the submissions on either side. I hope that I will cause no offence if I concentrate on recording the decision to which that evolutionary process has, for good or ill, guided me rather than take up, necessarily considerable, space recording the submissions in detail.

31. But I must first pause to recall that what I have primarily in mind, because of the nature of the cases before me, is a continuing award of benefit. The extent to which other awards and their possible review might be covered by this decision was not the subject of any submission and I am not to be taken as expressing any view relating to such cases.

32. I find myself unable to regard original and revised decisions, in respect of the same claimant and the same benefit, as separate decisions or even as related decisions. The essence of a running and potentially variable award seems to me to be that it is a continuing operation rooted in the original grant of benefit - ie in what the Adjudication Regulations refer to as the "original decision". It seems to me that, however much it may be necessary to prune, change or alter that original decision, it never disappears. In short I regard the sequence of original decision, reviews and possible revisals as but aspects of the same thing. The form in which it read before a revisal will govern the situation during the time that it was in force and must remain so after any revisal. Otherwise there would cease to be any demonstrable warrant for payments or rights earlier obtained or removed. After any revisal the decision will, in an altered form of wording, govern for another period of time until it is again revised or, as it must ultimately be, terminated. Even so, for the same reason, termination can mean only that from a particular date the decision, by way of a final revisal, is to have no force or effect. It has then ceased to be a running or continuing decision. But, if only as a warrant for what has gone before, it has not and cannot have ceased to exist. But there is still only one decision.

33. Matters appear somewhat more complicated when a decision on review revises the award not only so as to cease it but to find an overpayment to have been made and, as it may be, an amount to be recoverable. But I see no difficulty in reconciling any of that with the principles that I have tried to set out. To take the last example: the claimant will remain entitled as between the dates of the original grant and the revisal in question to have received the amount of benefit but then, because of the revisal, it has been found that he should not have been given that right. For that reason any benefit overpaid becomes recoverable - if the grounds for recoverability are independently made out - but only, of course, from the date of revisal.

34. Even coming to the issues at large in the present cases, I see no difficulty in reconciling the continuing life of the original

decision with incoming requests for review. That is so whether upon the basis that some element of benefit had not been awarded or had since the original decision, or the last revisal thereof, become in right - whether that be for example, an additional rate, such as in respect of laundry, or the removal of the Supplementary Benefits Act 1976 section 5 condition about availability for employment. Again the original award provides the legal entitlement that the claimant had from time to time during its operative currency to receive his then rate of benefit. From the date on which he applies for, and if he later receives a revisal upon review, the scope of his right will change. Even should he receive an augmentation for the past, the right to it is only granted by the revised decision. It is only the new or additional payment, including anything that accrues as a result of backdating, that is warranted by the revisal. Any arrears will be only then payable. In no way is affected the right conferred by the earlier form of the decision to benefit already received, even during any apparently overlapping period.

35. The previous paragraphs have identified the concept of a continuing decision with changes occurring to it from time to time. These may arise from a number of causes: thus changes in the rules which open a right to an augmentation which had otherwise not existed, or had been closed off to a particular claimant; changes in a claimant's circumstances may occur such that he becomes qualified for the first time for an augmentation, or, as it may be, such that he ceases to be qualified for some part, or the whole, of his existing award; or discovery of an error in the awarding decision. I note, although such a situation does not arise in any of the cases before me, that there may also be a change, in certain circumstances on account of a mis-application of the law - section 104(1A) of the Act.

36. Interesting as it was, and great as was the discussion about it, I have to confess that I find it difficult to reconcile Mr Cassidy's concept of the mono-doored house with the idea of a continuing decision able to undergo changes to all or any of its parts, or even its whole, from time to time unless I were to regard the house as so potentially unsatisfactory that it had to be capable of substantial redesign, frequently it may be, and even of demolition without actually disappearing!

37. Any analogy has it drawbacks, but I find myself preferring that of a goods train running, as it were, on the track of time. It cannot change direction on that track. But it may be necessary from time to time to bring it into a siding for examination - ie if a section 104 ground is made out. A wagon may require to be added, removed or exchanged - each wagon representing any of the individual parts of which an awarding decision may be composed. It may even be that a wagon has come too far, or should never have been sent out - i.e. an element in the award which should not have been included for all or part of the journey, as it were. Whether that wagon has then to be returned down another line is another matter. As in any good railway organisation, a reliable record will be kept of the train so that it can be ascertained where it, and the wagons then composing it, is or was at any particular time, where, when and why any wagons

joined or left it or, where appropriate, where, when and why they are due to join or leave it. Indeed it can only be upon a consideration of such a record that, given a request that falls to be regarded as one for a review, and the grounds thereof as duly focussed, it can be decided whether the train should be called into a siding at any particular point on its journey. The record is also the proof of what composed the train at any particular time, how it has been altered and indeed upon what journey it has been. It is, of course, in fact an amalgam of the adjudication officer's original decision and his successive determinations upon a claim. It will be appreciated from what I have said that an original decision is susceptible in my view of growth terms. Indeed to set it out in full at any stage could be a lengthy operation. Hence the need to identify at a preliminary stage, the basis for any particular potential review and to focus upon it. Were the whole thing in all its ramifications to be required to be set out in order to discover whether there was any part of it that might offer a review, and then, as it were, to be wholly overhauled that would be little more than an indeterminate and fishing operation which is the opposite of any judicial, or even semi-judicial, process.

38. I am thus led to the conclusion that when the Act talks of a review of a decision it means of that wording current at the point of time when the application in writing was made - section 104(2). It follows that it is only that version of the decision that an adjudication officer may revise. And it equally follows that when, for example, section 104(1)(b) speaks of a change of circumstances since the decision was given it means since that current version of the wording of the decision was formulated. Anything else could lead to anything but the finality in such matters inherent in the common law as exemplified by the doctrine of res judicata, and in the statute at section 117(1) -

> "Subject to the provisions of this Part [Part III which includes sections 93 to 119] of this Act and [to provisions about appeal from the Commissioner] the decision of any claim or question in accordance with this Act shall be final and subject to the provisions of any ... [Adjudication Regulations] ..., the decision of any claim or question in accordance with these regulations shall be final."

To be able to reraise one question as another or in regard to a version of the decision other than that current at the time of review would, I consider, be to drive a coach and horses through these principles.

39. Before leaving this subject I should record, first, that I do not see any incompatibility between my concept of a decision and set-aside provisions - as explained for example at paragraph 19 of R(I)9/63. Second, I am not unmindful of Adjudication Regulation 69(5) which allows in certain limited circumstances, such as a general change of rate, the appropriate change to the terms of the awarding decision as it currently stands, and that without involving a review under section 104 - it says in terms that such changes as it refers to are not to be taken as changes of circumstances for the

purpose of the section. But I do not not see any conflict with what I have tried to set out herein - even under my analogy, with all its faults, the train can have an old fashioned wagon which can pick up, or let down since in theory rates may be reduced, small goods without having to be brought into a siding - and its record will so show.

LIMITS OF REVISAL

40. I must finally, for completeness consider the scope for revisal of a decision - the adjustment of the train when it is in a siding. I see nothing in section 104 to limit, in terms of time, when may be raised a ground for review. A change of circumstances at any time since the date of the original awarding decision, so long as not since then raised in any form, appears to be enough. Thus, as already discussed, and in short, after a particular change of circumstances has been through the adjudication process it will, in relation to that case, cease to be such a change. Equally once there has been a review on the basis of "ignorance of a material fact" there can no longer be said to be ignorance of that fact in respect of that, running, decision.

41. Of course there must be power to make the change desired at the date of review. If such a power existed at the date of the original decision but was discontinued before the date for review it cannot then be exercised. That seems to me only to accord with logic and principle and moreover is evidenced by such a familiar provision whereby, when thought appropriate, the cessation of a statutory power may be expressly continued for use in certain circumstances, including, it may be, in respect of existing cases.

42. In order, then, to try to make a complete review of the subject, in deference to all that was put before me, and to try to make sure that that which I have decided does not appear to contradict any other part of the whole, I should record that, as at present advised, I tend to the view that if a claimant on a given day seeks a revisal of a decision awarding him supplementary benefit but on that day supplementary benefit - or the particular element thereof in question - has ceased to exist, and there is no carry-forward provision, then there is no authority, however much there may be a warrant to review the decision, to give an effective revisal to run from the date of review.

CONCLUSIONS

43. The common law doctrine of res judicata does not apply to decisions and determinations on claims or questions given by adjudication officers but it does apply, save so far as displaced, as it largely is in Social Security law, by express statutory provisions about review and appeal, to decisions and determinations made by higher adjudication or judicial authorities.

44. Adjudication officers' decisions, both original and on review, must be accurately framed so as to indicate the precise legal ground of grant, review and revision, or refusal to review, as the case may be. Records thereof must be carefully preserved and updated so that

on any appeal of that decision, or of it as revised later, the relevant terms may be accurately and precisely transcribed onto the AT2, or, it may be preferable, be otherwise made part of the adjudication officer's presentation to the tribunal.

45. Whenever the Secretary of State comes into possession of what appears to be a suggestion that a review of an existing award is required, whether because desired by a claimant, or by himself, he must put the matter into an application in writing to the adjudication officer.

46. Since it goes to jurisdiction, section 104's requirements can not be waived.

47. The adjudication officer must consider and determine, first as to whether a review is warranted, and second whether any, and if so what, revisal is appropriate. He must then proceed in accordance with sections 99 to 101 of the 1975 Act.

48. Review is only competent if one of the grounds set out in section 104 of the 1975 Act is first held to have been established. Both the ground and the facts establishing it must be recorded in writing. The consequence of the review must then be fully set out in any revised decision.

49. At a revisal only that part of an award, present or potential, may be considered which relates to or arises out of the particular fact or facts establishing the ground, or it may be grounds, accepted as warranting the review. By present I mean the terms upon which runs the decision as it currently stands. By potential I mean any part which is competent to be included in an award of the benefit concerned, notwithstanding that such part is not then included in the decision.

50. Once a review has been completed, whether or not a revisal has followed, the facts which made out the ground for that review cannot be utilised again for that purpose on the same ground in regard to that running decision.

51. An appeal tribunal must satisfy itself in any review case that there were, or in the case of a refusal to review by the adjudication officer, are, grounds under section 104 for that procedure. It may, however, be that in some cases the ground is sufficiently obvious not to require any or much exposition. Even so, the tribunal should expressly record how that is, if only to demonstrate that the matter has been considered by them.

SCHEDULE I

104. - (1) Any decision under this Act of an adjudication officer, a social security appeal tribunal or a Commissioner may be reviewed at any time by an adjudication officer, or, on a reference by an adjudication officer, by a social security appeal tribunal, if -

(a) the officer or tribunal is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or

(b) there has been any relevant change of circumstances since the decision was given; or

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but regulations may provide that a decision may not be reviewed on the ground mentioned in paragraph (a) above unless the officer or tribunal is satisfied as mentioned in that paragraph by fresh evidence.

(1A) Any decision of an adjudication officer may ... be reviewed, upon the ground that it was erroneous in point of law, by an adjudication officer or, on a reference from an adjudication officer, by a social security appeal tribunal.

(2) A question may be raised with a view to a review under this section by means of an application in writing to an adjudication officer, stating the grounds of the application.

(3) On receipt of any such application, the adjudication officer shall proceed to deal with or refer any question arising thereon in accordance with sections 99 to 101.

(3A) Regulations may provide for enabling or requiring, in prescribed circumstances, a review under this section notwithstanding that no application under subsection (2) has been made.

(4) A decision given on a review under this section, and a refusal to review a decision thereunder, shall be subject to appeal in like manner as an original decision, and sections 99 to 101 shall, with the necessary modifications, apply in relation to a decision given on such a review as they apply to the original decision of a question.

SCHEDULE II

69. - (1) Subject to regulation 72 a determination on a claim or question relating to supplementary benefit shall not be revised on review under section 104 of the 1975 Act so as to make supplementary benefit payable or to increase the amount of benefit payable in respect of -

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(b) any period which falls more than 12 months before the date on which the review was requested or, where no request is made, the date of review; or

(c) any past period which falls within the period of 12 months mentioned in sub-paragraph (b) and has been followed by termination or interruption of entitlement to a pension or allowance and -

(i) the total amount of the increase would be £5 or less, or

(ii) the grounds for review are a material fact or relevant change of circumstances of which the claimant was aware but of which he previously failed to furnish information to the Secretary of State.

72. - (1) Subject to paragraph (2), nothing in this section shall operate so as to limit the amount of benefit or additional benefit that may be awarded on a review of a decision if the adjudicating authority making the review is satisfied either -

(a) that the decision under review was erroneous by reason only of a mistake made, or of something done or omitted to be done by an officer of the Department of Health and Social Security or of the Department of Employment acting as such, or by an adjudicating authority or the clerk or other officer of such authority, and that the claimant and anyone acting for him neither caused nor materially contributed to that mistake, act or omission; or

(b) that where the grounds for review are that the decision was given in ignorance of or was based on a mistake as to a material fact, those grounds are established by evidence which was not before the adjudicating authority which gave the decision; that the claimant and anyone acting for him could not reasonably have produced that evidence to that authority at or before the time the decision was given, and that it has been produced as soon as reasonably practicable.

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