s.53(4) limit
note that Commissioner decided s.53* retrospectively.
Overpayment — no review carried out by AO as required by s.53(4) — AO's decision that O'p'd been overpaid SB "is invalid and of no effect.

WMW/JOB Commissioner's File: CSSB/621/88

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL TO THE COMMISSIONER FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: [redacted]

[ORAL HEARING]

1. I hold the decision of the Glasgow East Social Security Appeal Tribunal dated 13 July 1988 to be in error of law. For that reason I set aside that decision. But in exercise of my power under section 101(5)(a)(i) I give the decision which I consider the tribunal should have given. That decision is that the adjudication officer's decision of 4 December 1987, to the effect that the claimant has been overpaid supplementary benefit by a certain stated amount, is invalid, and of no force or effect.

2. This case came before me by way of an oral hearing, which had been sought on behalf of the claimant. At it neither she nor her representative appeared. Indeed, despite reminders, they had failed to return the form OH4C intimating whether or not they intended to attend the hearing. In light of that I thought it right to proceed with the hearing in the absence of the claimant and her representative, but I have considered and taken into account the written submissions made in support of the appeal, and those made in response to the submissions of the adjudication officer, by the representative. The adjudication officer was represented by Mr David Cassidy, of the Office of the Solicitor to the Secretary of State for Scotland. I am grateful to him for the helpful and impartial way in which he laid out the case for my consideration, and for his submissions on behalf of the adjudication officer.

3. On 19 January 1987 the claimant sought a supplementary allowance. She had given birth to a child a month earlier. On the usual claim form, A1, and in response to a question as to whether she was in receipt of child benefit or one parent benefit she ticked neither the "No" nor the "Yes" box but wrote in the words "Not yet". Then in answer to the question as to whether she had applied for any social security benefits but not yet received any money, she ticked the "No" box. In August, 1987, she completed another A1 form to claim in respect of the tenancy of a new home. She then answered the question about receipt of child benefit in the affirmative. Subsequent enquiries by the Department indicated that she had been awarded child benefit and one parent benefit from 15 December 1986 - the relevant order book having been issued on 29 January 1986. Arising out of that an adjudication officer on 4 December 1987 issued a decision in these terms -

> "[The claimant] has been overpaid supplementary benefit of £... because she failed to report timeously that she was in

> receipt of Child Benefit and One Parent Benefit and that this sum is recoverable."

I should, perhaps, pause to explain that one parent benefit, so called, is in reality an addition to the basic rate of child benefit - regulation 2(1) and (2) of the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, as amended, and made under the authority of the Child Benefit Act, 1975. The claimant appealed. The ground of her appeal was that the primary cause of the overpayment was an error on the part of the Department. She stated that she had never knowingly done anything dishonest in her life.

4. When the case came before the tribunal they were informed, by the adjudication officer, that consequent upon what was revealed upon the original form A1 the Department's local office had transmitted to the Child Benefit Centre their usual form C73F requesting that Centre to inform the local office when child benefit was put into payment. But that, in the event, the Centre had failed to do. The gist of the claimant's case, as advanced then on her behalf by her mother, was that she had not informed the Department of the receipt of child benefit through ignorance of the relevant regulations. The tribunal made appropriate findings of fact about the history of the case. And I pause to note that I do not understand there to be any dispute as to that history which is, perhaps rather more fully, set out above. The unanimous decision was that the claimant had "been overpaid supplementary benefit." They gave as their reasons for that decision, this -

> "Social Security Act 1986 section 53. It is quite clear that an overpayment of supplementary benefit has taken place, because the sums paid by way of child benefit and one parent benefit should have been taken into account. The tribunal take the view that, although [the claimant] ought to have informed DHSS when she first received child benefit, the overpayment is only partially the result of her failure to disclose the facts. It was also the result of the Child Benefit Centre's failure to respond in the usual way to the local office's requests. The tribunal therefore take the view that any question of the recovery of the overpayment should at least be modified."

The claimant sought leave of the chairman to appeal to the Commissioner upon the ground that she had been ignorant of the fact that she was receiving any payment she was not entitled to and that the cause of the overpayment had been a breakdown in communication between the DHSS in Newcastle and Glasgow. The chairman refused leave to appeal noting that even at that stage there did not appear to be any dispute that there had been an overpayment. The claimant then applied for, and obtained, my leave to appeal.

5. From that it is clear that both the adjudication officer and the tribunal had concentrated upon the issue as to whether or not there

had been an overpayment. But there is a prior question. Section 53 of the Social Security Act 1986 provides, by subsection 1, that -

> "(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) ... (not relevant)
>
> 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."

But subsection 4 then provides that -

> "(4) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above or regulations under subsection (3) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review."

Now there is nothing in the adjudication officer's decision to indicate that he was, as part of the procedure upon which he had embarked, reviewing and revising the decision that had awarded supplementary benefit to the claimant. Clearly, in terms of Section 53(4), such a review and, indeed a suitable revisal, would have been necessary before there was jurisdiction to make an entitlement to recover decision. In his submission to the tribunal there is no reference to an earlier review, and appropriate revisal, having taken place. Nor was evidence to such an effect put before the tribunal. It is not surprising that they have no finding in fact about either review or revisal. It seems to me then that neither adjudication authority had had in mind Section 53(4). The result is that the tribunal decision is in error of law in respect that it does not contain an essential finding shewing from whence they, and earlier the adjudication officer, derived jurisdiction to make any decision upon entitlement to recover. That could not only have been based upon either an appeal or a review with an effective revisal, but upon some exception regulations. None were, or for the matter of that are, cited. I must therefore hold that no appeal or excepting regulations were in play.

6. A review of the awarding decision would only have been competent under Section 104(1) of the Social Security Act 1975. The ground of any review, had it taken place in this case would, I suppose, have been a material change of circumstances - the receipt of child benefit. Subsection (1)(b) might have authorised a review in such a situation; whether or not a revisal would have been warranted in terms sufficient to satisfy Section 53(4) of the 1986 Act is another

matter. But Section 104(1) only allows a review to be initiated by an adjudication officer. There is no original jurisdiction in a tribunal to do so and so they could not have been asked to cure the defect in the adjudication officer's decision. I am, of course, mindful that on an appeal from an adjudication officer's decision to review, a tribunal may exercise his powers in that regard; but this was not such a case. Accordingly I conclude that the only proper decision for the tribunal in this case was that which I have expressed in paragraph 1 hereof.

7. I am conscious of the fact that the basis of my decision was not the object of submission. Nonetheless I am aware that in other entitlement to recover cases the adjudication officer's submission to the Commissioner has founded upon the issue of no prior review in supporting the appeal. I have therefore not felt it necessary to seek any further submission.

8. The submissions that are before me, both written and verbal, raise a number of questions which are, strictly, over taken by the basis of this decision so that anything I may say on them will be obiter. But out of deference to the care with which they were advanced, I should say something. In the first place I agree with a submission for the claimant that the tribunal decision is defective in that it does not determine whether the overpayment is being held to have been due to misrepresentation or to a failure to reveal. Clearly the latter was the case: I consider it important that the ground be clearly specified from the alternatives. That may affect the decision - which is for the Secretary of State - as to whether and to what extent there is to be actual recovery. The adjudication decision, I should perhaps emphasise, is only upon his 'entitlement to recover'. And one may be entitled to do something with being obliged to do it. Next the tribunal should indeed have specified the amount which the Secretary of State was being held entitled to recover. They have no discretion in the matter - it is the amount of the overpayment, as properly calculated. The submission for the claimant seems to envisage a discretion. But, at least for my part, I am not entirely satisfied that the adjudication officer had made the calculation correctly. Had the matter been of importance I would have remitted the case to him for, as I understand the time sequence, the claimant would only know that the relevant benefits were in receipt, and so be in a position to communicate that, the material fact, some time after 29 January 1987 when, according to the adjudication officer's summary of facts to the tribunal, an order book was issued. It may be that there was an interval of time before the book was received for it is not stated by what means it was "issued". Furthermore it was then necessary, in my view, to consider whether there should have been allowed some short period of time to elapse as that within which it would have been reasonable to expect the material fact to have been disclosed - see the concluding words of regulation 8 of the Supplementary Benefit (Claims and Payments) Regulations 1981, quoted in paragraph 12 below. It is only from the end of that period that it can be properly found that there have commenced payments in respect of a benefit consequential upon a failure to disclose. Then, as I understand it from the schedule setting out how the amount said to be recoverable has been

calculated, that period seems to have commenced on 2 February 1987. If that understanding is correct it does not appear to me that there has been any allowance for delay in receipt of the order book or of any time within which it would have been reasonable to expect the claimant to make the necessary disclosure. How long the necessary alterations might have taken, in normal course, so as to produce the appropriate reassessment of the claimant's supplementary allowance might then have been a further question so that that time would not count as time during which any overpayment had been made because of the failure to disclose.

9. Next I should deal with submissions based upon the decision in case CSB/727/87, required by direction of a Nominated Officer. And Mr Cassidy based the main thrust of his submissions against the correctness of that decision. In that case the claimant, in similar circumstances to those of this claimant, completed a form A1; ticked neither box in answer to the question about child and one parent benefit but added "applied for" and then, in dealing with the question about benefits applied for but not yet in receipt, ticked the 'yes' box and specified "one parent benefit". In both cases, of course, the local office then issued their internal enquiry form C73F. Mr Cassidy therefore found it understandably difficult to argue that what the claimant had done in this case was insufficient to put the Department (i.e. the local office) on notice of an impending award of child benefit, so as to be able to distinguish this case from that decision. That decision had held that what that claimant had done could not be regarded as constructive notice of the receipt of child benefit - an argument equally rejected by other Commissioners - and that it was the receipt of benefit that was the material fact which required to be disclosed. So far I entirely agree. Then the decision went on to hold that there had not been a failure to disclose the material fact because the circumstances did not suggest that such disclosure was reasonably to be expected of the claimant. And as I understand paragraph 12 of the decision those circumstances were what she had put on form A1 and that the Department had been put on enquiry, based upon an analogy with the rule in insurance law that a failure to disclose a material fact in proposing a policy of insurance may not matter, if what was disclosed was such as to put the insurers on notice about the fact - paragraph 11 of the decision.

10. With regret I find myself unable to accept the reasoning of my brother Commissioner upon the last point. I feel it sufficient to say that that is because, as it seems to me, considerations governing payment under a policy, as I think would be a better analogy, are quite different from those governing the making of a policy. It is not a question as to whether an insurer, entitled to full and frank notification of all factors that might affect the risk from the only party likely to know of them, so as to determine whether to enter into the contract, or policy, of insurance has received, or waived receipt of, that information. It is how much is to be paid, an insured event having occurred. And if at that stage an insurer required to be told of any other payment sought or made under any other policy on the same event it cannot in my view be supposed

that it would be enough only to say that a claim had been made. But, in any event, I would have held that this case was distinguishable on its facts because so much less was stated by this claimant - in effect that she was at most in contemplation of making another claim; in CSSB/727/88 it was made quite clear that the other claim had been made so that it was only the receipt that was awaited and, no doubt, there was also in contemplation that if anything can be certain in social security, it is that a single parent with a child in life will get child benefit.

11. Upon this aspect of the matter I prefer the approach, relatively simple though it may be, of my brother Commissioner who gave the decision on file CSB/64/86. At paragraph 11 he indicates that insurance cases, upon the question of causation, are not of real assistance in trying to construe what was the then in force Section 20 of the 1976 Act. He posed as the central relevant question whether -

> "The claimant had not failed to disclose the relevant material fact, would the Secretary of State have avoided the relevant expenditure?"

It was then observed that if the answer was positive it was -

> "Immaterial that the Secretrary of State might also have avoided the expenditure, had the back-up procedure operated properly, and the supplementary benefits section been informed by the Child Benefit Centre of the payment of child benefit. If, irrespective of the intervention of any other party or event, the claimant's compliance with his duty to disclose would have prevented an overpayment then the failure to disclose is for the purposes of section 20(1) the cause of the unnecessary expenditure."

I further agree with what is then quoted from paragraph 7 of decision CSB/684/81 -

> "... no doubt, Departmental procedure when efficiently carried out does ensure that when child benefit becomes payable, recovery of supplementary benefit paid in lieu of child benefit is automatically effected. But the proximate cause of the overpayment in this case was the failure by the claimant to disclose the receipt of child benefit from September 1980 until 12 February 1981. This led to an overpayment ... if the claimant had performed his duty to see that the Department was aware of all the material facts, which section 20 of the Act imposes on him, he would not have been overpaid. The Department's failure to issue form C73F does not absolve the claimant from his responsibilities under that section."

12. I should say something on only one other matter. What is the scope of the phrase "material facts" in Section 53(1) of the 1986 Act - or for the matter of that of "relevant change of circumstances" in Section 104(1) of the Social Security Act 1975 - may be affected by consideration of section 14(2)(g) of the Supplementary Benefits Act, 1976, which provides that regulations may

make provision, amongst other things, as to "... the information and evidence to be furnished in connection with payment of ..." supplementary benefit. And then the Supplementary Benefit (Claims and Payments) Regulations 1981, made under that authorising power, provide, so far as relevant, as follows -

> "8. Every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine ... such information of facts affecting the right to benefit, or to its receipt, as the Secretary of State may require ... and in particular -
>
> (a) shall notify the Secretary of State in writing of -
>
> (i) any change of circumstances which is specified in the notice of determination ... or, where applicable, the book of serial orders, and
>
> (ii) any other change which that beneficiary or person might reasonably be expected to know
>
> might affect the right to benefit, or to its receipt,
>
> as soon as reasonably practicable after the occurrence of that change ..."

Paragraph 5(1) of Schedule 7 to the 1986 Act applies Section 53 to the Supplementary Benefits Scheme and paragraph 4 of Schedule 7 to that Act performs a like office in respect of Section 104 of the 1975 Act. And I pause to note that in certain of the authorities and submissions put before me in writing, reference is made to section 20 of the Supplementary Benefits Act 1976, a provision dealing within the supplementary benefits scheme for recovery in cases of misrepresentation or non-disclosure. However that section was repealed with effect from April 1987 by Schedule 11 to the 1986 Act, by virtue of the Social Security Act 1986 (Commencement No 4) Order 1986 (S.I. 1986 No. 1959). And paragraph 4 of that order makes it clear that it is the date upon which the original determination of any question of repayment or recoverability has been made that regulates whether section 20 of the 1976 Act or Section 53 of the 1986 Act is to apply. In short, since in this case the original such determination was by an adjudication officer on 4 December 1987 it is the latter statutory provision which applies. No doubt the effect of the two provisions is similar but it is to the language of Section 53 of the 1986 Act that I have had to have regard.

13. Now I am doubtful whether the tribunal's decision is sufficiently based on facts found or supported by adequate reasoning in respect that it does not deal with the central question which arises under Section 53(1) of the 1986 Act, namely whether, and if so why, receipt of child benefit was in this case a material fact to be disclosed. There is nothing specifically found to show that, for

example, it came within Claims and Payments Regulation 8(a)(i), nor, in terms of 8(a)(ii) upon what basis of fact it fell to be concluded that that receipt was one which this claimant "might reasonably [have been] expected to know might [have] affect[ed] [her] right to [supplementary] benefit, or its receipt." She had put in issue her ignorance of the regulations. Entitlement to recovery cases, so far as my limited experience goes, usually point to some relevant notice in the order book or a document which the claimant has signed. But as this is not a principle ground of decision I should say no more on the subject.

14. The appeal succeeds.

(signed) W M Walker
Commissioner
Date: 13 March 1990