Bulletin 180
Extract

CH 943 2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

There are four parties to the appeal. They are:

Appellant:	**London Borough of Camden (the Council)**
First respondent:	**The claimant (Miss C)**
Second respondent:	**Secretary of Sate for Work and Pensions (the Secretary of State)**
Third respondent:	**Board of Inland Revenue (the Revenue)**

The Council is appealing with permission of the tribunal chairman against the decision of the London (Fox Court) appeal tribunal on 19 February 2003 under reference U 42 162 2002 00213.

For the reasons below, the decision of the tribunal is wrong in law. I set it aside. But I replace it with a decision to similar effect. This is:

> **The appeals by the claimant are allowed. The overpayment of housing benefit and the excess council tax benefit both arise from official error where neither the claimant nor any person acting on her behalf could, at the time of the receipt of the overpayment reasonably have been expected to realise that there was an overpayment or excess benefit.**

REASONS FOR THIS DECISION

1 The grounds of appeal from the Council suggested that this case could raise a number of important issues about the meaning of "official error" in regulation 99 of the Housing Benefit (General) Regulations 1987 and the equivalent in the Council Tax Benefit (General) Regulations 1992. The particular context is that of an error being made about another benefit or tax credit with a direct effect on entitlement to housing benefit and council tax benefit. For this reason I invited both the Secretary of State and the Revenue to consider becoming parties to the appeal. Both became parties, as indicated above. All parties put in written submissions at appropriate stages. I am grateful to them for dealing cooperatively with the procedural issues.

2 I held an oral hearing of the appeal in London on 27 November 2003. The Council was represented by Mr Paul Stagg of counsel, instructed by Mr de la Mothe of the Council. Miss C was represented by Mr Simon Cox of counsel, instructed by Hodge, Jones & Allen, solicitors, London. The Secretary of State was represented by Mr Daniel Kolinsky of counsel, instructed by the Solicitor to the Department for Work and Pensions. The Revenue was not represented, but its full written submissions were noted by the other parties.

The facts

3 The facts are common ground. Miss C had been entitled to working families tax credit (WFTC). She made a periodic renewal claim in the usual way on 24 March 2001. It was refused by the Revenue on 2 April 2001. We now know that was because

of Miss C's sickness absences from work at that time, although the Revenue accept that this was not explained to Miss C fully. This, in the Revenue view, took her working hours below 16 a week for claim purposes. Miss C asked for reconsideration, but she also told the Council. The Revenue did look at its decision again, and made enquiries, but did not change it. When Miss C next claimed WFTC, she was awarded it again. This appeal concerns the gap between the Revenue awards. The Council accepted Miss C's loss of WFTC and awarded her full housing benefit and full council tax benefit, during the gap from March 2001.

4 On 3 April 2002 an appeal tribunal (the first tribunal) heard Miss C's WFTC appeal. It revised the Revenue decision and accepted Miss C's submission that she was working 16 hours a week. The effect of this decision was to backdate Miss C's entitlement to WFTC to March 2001. The result, therefore, was a significant increase in her total weekly income for housing benefit and council tax benefit purposes. That retrospectively reduced her housing benefit and council tax benefit entitlement. Those decisions were taken in August 2002. Consequently Miss C received an overpayment of housing benefit and excess council tax benefit. Precise amounts are not in dispute.

5 The Council issued notices to recover the overpayment and excess benefit. Miss C appealed. She did so on the grounds that she was not to blame for the overpayment. She had at all times kept everyone fully informed. The problem lay with the Revenue decision, which the first tribunal had found was wrong. That was not the Council's fault. But neither was it hers. It was a mistake by the Revenue, and therefore an official error. She should not have to repay the overpayment. The matter came before another tribunal ("the second tribunal"). The second tribunal decided that the Revenue decision was an official error. In consequence, Miss C did not have to repay the overpaid and excess benefit. The Council was granted permission to appeal by the chairman.

"Official error"

6 The relevant parts of the Housing Benefit (General) Regulations 1987 are:

> **98 Meaning of overpayment**
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> In this Part "overpayment" means any amount which has been paid by way of housing benefit and to which there is no entitlement ...
>
> **99 Recoverable overpayments**
>
> (1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.
>
> (2) ... this paragraph applies to an overpayment caused by an official error where the claimant ... could not, at the time of receipt of the payment or of any notice relating to that payment reasonably have been expected to realise that it was an overpayment.
>
> (3) In paragraph (2) "overpayment caused by official error" means an overpayment caused by a mistake made (whether in the form of an act or

omission) by ... an officer of ... the Commissioners of Inland Revenue acting as such; ...

All parties accept that, save for necessary changes of phraseology, the equivalent provisions in the Council Tax Benefit (General) Regulations 1992 are to be understood to the same effect. I therefore deal on with the Housing Benefit (General) Regulations.

7 The question of law that emerges is as follows. Was the Revenue decision refusing WFTC to Miss C a "mistake" as judged by the decision of the first tribunal that it was wrong?

8 Two related questions that might have been in issue no longer are. The first is whether, under regulation 99(2), Miss C, or anyone on her behalf, could reasonably have realised at the time of the overpayment that it was an overpayment. The tribunal found as fact that this was not so, and that finding was not challenged. The second is whether Miss C caused or materially contributed to the Revenue mistake, act or omission. This is the condition in regulation 99(3). In this case, again, the tribunal found no factual basis for an argument based on causation or contribution by Miss C to the Revenue decision. Arguments were put to me on the causation issue, but as there is no factual basis for this I do not deal with those issues. This case raises the central question in regulation 99(2) without any provisos. If the Revenue decision on WFTC was a mistake, then Miss C is entitled not to repay the overpaid benefit. If it was not, then she must repay.

9 A point of semantics emerges immediately. Paragraph (2) makes the test "overpayment caused by an official error". Paragraph (3) rephrases that slightly then defines it as meaning "overpayment caused by a mistake by (an official)". That makes "error" and "mistake" interchangeable words in defining the scope of the rule. I see nothing to be derived from seeking to add or subtract to "error" by reference to "mistake". My dictionaries define each by the other, and show as ever the huge wealth of the English language by noting that one is derived from Latin and German, while the other is derived from middle English and old Norse. I use the words interchangeably in this decision, as did the parties.

The powers of tribunals

10 The other matter of law is the power of a tribunal to change the decision of the Revenue (or equally of the Secretary of State or of a local authority). The power of a Commissioner to alter the decision of a tribunal is, of course, confined to errors of law. An appeal tribunal is not similarly limited. On this topic I now have the benefit of the full analysis of the Tribunal of Commissioners in CIB 4751 2002 and related cases (the Tribunal supersession and revision decisions). At paragraphs 11 to 33 of its decision, the Tribunal analysed the jurisdiction and powers of appeal tribunals. I have not invited any further submissions from the parties to this case about the application of that case to this. It is of course binding on me. And in my view it is beyond argument that the rulings of the Tribunal in the context of sections 12 and following of the Social Security Act 1998 apply, save where there are legislative differences, not only to decision on WFTC which involve the Revenue but also to decisions under the equivalent provisions at paragraph 6 and following of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.

11 I repeat and adopt for present purposes the following from that decision. After setting out section 12(1), (2), (8), and (9) of the Social Security Act 1998 the Tribunal explained:

> 12 It is notable that section 12(2) provides simply that in the case of decision specified in section 12(1) "the claimant ... shall have a right to appeal to an appeal tribunal" and the legislation does not expressly specify the powers - any powers - of the appeal tribunal in relation to the decision under appeal. There are provisions limiting an appeal tribunal's powers (notably section 12(8)(a) and (b)), but otherwise the legislation does not even expressly specify that an appeal tribunal may allow or disallow an appeal, or confirm or vary the decision under appeal. Therefore all the powers of an appeal tribunal - including even the most basic - must be implied. They must be derived from the fact that the statute gives a right of appeal, and from the nature of such an appeal in the context of the statutory scheme.
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> 13 The following features of an appeal to an appeal tribunal are in our judgment clear.
>
> 14 First, the appeal is general, ie it is an appeal on fact and law. This was common ground between the parties to the appeals before us, and has been universally accepted since the introduction of the statutory scheme. Indeed, the appeal tribunal is designed to be a superior fact finding body, and is able to investigate the facts in greater depth than usually occurs before the decision maker. ... Unlike the decision maker, appeal tribunals hear oral evidence where necessary. In the light of the fact that the initial decision is made by the Secretary of State (ie a person patently lacking in independence) and of the limited scope for the claimant to make representations to the Secretary of State, nothing less than such a superior fact finding body would be sufficient to comply with Article 6 of the European Convention on Human Rights ("the Convention") ...
>
> 15 Second, and as a consequence of the first feature to which we have referred, the appeal tribunal's jurisdiction is not limited to affirming or alternatively setting aside the decision under appeal. If, having made its own findings of fact, it considers the decision to be wrong, it has power to make the decision on the claim which it considers the Secretary of State ought to have made on the basis of the facts which it has found. In cases where the appeal tribunal makes a different decision from that made by the Secretary of State, the appeal tribunal's decision simply replaces that of the Secretary of State - and it is at least arguable that this is also the case where the appeal tribunal confirms the Secretary of State's decision and dismisses the appeal (see, for example, the decision of the Tribunal of Commissioners in R(I) 9/63).

12 That must apply equally to the Revenue and tribunals in connection with decisions under the Tax Credits Act 1999 and to decisions of local authorities and tribunals under the equivalent provisions of the 2000 Act. Indeed, from the point of view of the Revenue, this confirms that appeal tribunals have much the same appellate powers as the general and special commissioners of income tax under the Taxes Management Act 1970.

The decision of the second tribunal

13 The second tribunal gave three reasons for its decision that the Revenue decision not to award WFTC to Miss C was a mistake simply because the first tribunal found it to be wrong. They are:

> "(a) The appellate structure is hierarchical. When a commissioner disagrees with a proposition of law which is accepted by a tribunal he or she holds that the tribunal is in error of law. I do not accept that there is any difference between the meaning of the words "error" and "mistake" in this context. It is no answer to this to say that the proposition is one on which reasonable people may differ and the commissioner has merely taken a different view. The commissioner's superior position in the judicial hierarchy means that the view taken by the tribunal is wrong and the tribunal was mistaken in taking it. I see no reason why the same principle does not apply as between appeal tribunals and the decision makers whose decisions those tribunals consider.
>
> (b) If an incorrect view of the law were not a mistake then it would be open to local authorities to pay benefit on one view of the law for many years and then, on that view being shown by subsequent case law to be incorrect, decide to recover all the benefit so paid. If the view previously taken of the law is not a mistake then the claimant would have no defence to the overpayment as without a mistake there could be no official error.
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> (c) I accept [the claimant's representative's] submission that [the Council's] view of the matter is incompatible with the decision of the High Court in the *Griffiths* case."

The submissions of the parties

14 With no disrespect intended to counsel, it is convenient to take the submissions for Miss C before turning to the official views, and to summarise together the written and oral submissions of the parties.

The claimant's view

15 For Miss C, Mr Cox argued that nothing was to be gained from the difference in wording between "error" or "mistake" or, in his view, "incorrect" or "wrong". All mean the same thing and all must be applied under regulation 99 to the decision. The crucial point about regulation 99 was that it allocated responsibility in cases where something was wrong in the decision. If the mistake was "official" then on the facts of this case Miss C did not bear the consequences. If it was a mistake of the claimant, or of any other person, then she did bear the consequences.

16 Mr Cox supported the tribunal's decision reasoning. In his view paragraph (a) had been misunderstood by the criticisms aimed at it by the official parties. It was not a contention that decisions of appeal tribunals are binding. Rather, it reflects the principle of judicial finality. In order to bring and end to litigation, things should not be litigated twice. As he saw it, the approaches taken by the official parties to this point led to the need to take different approaches on mistakes of law and mistakes of

fact - what he would term a *Wednesbury* approach to the facts and a *Factortame* approach to the law. That approach was too complex. He also agreed with the reasoning in paragraph (b) of the decision. He did not see how different effects could follow from mistakes of fact as against mistakes of law.

17 On the reference to the *Griffiths* case by the tribunal in paragraph (c), Mr Cox adopted the views in *CPAG's Housing Benefit and Council Tax Benefit Legislation* (eds. Findlay, Poynter, Stagg and Ward, 2002-2003 edition, p.472). He adopted in particular the passage:

> " ... ***a mistake made, whether in the form of an act or omission*** ..." No fault is required for the act or omission to amount to a "mistake". All that is necessary is that, with the benefit of hindsight, something is done which should not have been done or something is not done which should have been. In *R v Liverpool CC ex p Griffiths* (1990) 22 HLR 312, QBD, the authority's housing benefit department was unable to implement changes to the HB scheme which had been brought in at very sort notice. Estimated awards were made on review and reviewed again when the authority were able to work out claimants' exact entitlement. Some of the estimated awards were too high and the authority sought to recover the difference. Even thought he authority could not have avoided making the error, it still amounted to a relevant mistake."

In Mr Cox's view, that was the right approach. He did not read the tribunal decision as one of a tribunal that felt itself bound by *Griffiths*. The case was mentioned as a supporting, third reason. Nor did he regard *Griffiths* as being necessary to the CPAG Guide comment. In that decision Nolan J (at 22 HLR 312, 315) noted that Liverpool City Council did not dispute that it had made an error. The point was simply not in issue in the case, so there were no points in it that bound the tribunal or me.

18 The proper basis for the approach of the second tribunal was to accept the decision of the first tribunal. It had not been appealed, and was therefore final under section 17 of the Social Security Act 1998. It followed that the first tribunal decision was right and the Revenue decision was wrong. To argue otherwise is to challenge the fundamental principles of the finality of litigation because it would force the second tribunal in this case to reopen the issues decided by the first tribunal. Those principles were laid down with great authority by Lord Bridge in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273, 289, where he stated, with support from the others of their Lordships:

> "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in the terms of the two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa". These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination

unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."

In these post-Latin days, I should perhaps, with respect both to Lord Bridge and the language, translate the principles. I would express the first as that it is in the public interest that legal disputes should end, and the second as that no one should be troubled twice about one and the same dispute. Applying those principles to regulation 99 strongly argues to the conclusion that the second tribunal should accept that the first tribunal decision has decided that the Revenue decision was mistaken.

19 Mr Cox was concerned that any other approach to the relationship between the Council and second tribunal and the Revenue decision would reopen both the Revenue decision and the first tribunal decision because the Council would then have to decide for itself if the Revenue were mistaken. That offended the rules on finality. It took the Council into areas in which it had no expertise and no powers, and into decisions to which it was not, and could not be, a party. It also put his client in double jeopardy. Not only did she have to win her appeal at the first tribunal, but she had to win it all over again with the Council or the second tribunal. Nor was it any answer, as the Revenue had suggested in is submissions, to take a view that the Revenue decision was right and the first tribunal wrong, but that it was not appropriate to appeal the first tribunal decision. He submitted that either the decision of the first tribunal was appealed, or it was not. If it was not, section 17 blocked any view that it was not right.

20 Treating the first tribunal decision as final and as decisive of the existence of official error also fitted in with the deliberately parasitic structure of housing benefit. The Council was required to accept other benefit decisions (such as those on income support) and to apply them without question. If the income support decision was wrong, the housing benefit decision would also be wrong, but the Council could not interfere with this. It was entirely consistent with that approach that the Council should pay the same respect to a tribunal decision.

The Council's view

21 On behalf of the Council, Mr Stagg submitted that the question now before me had been answered by Commissioners in previous decisions, although no reference had previously been made to this. In particular he drew my attention to the recent decision of Commissioner Howell QC in CH 5485 2002. That case concerned the failure of a claimant to tell Cardiff City Council that she was getting more WFTC than she had previously told the Council she was getting. She failed to notify the Council when her WFTC was increased; and this recurred with a later decision. Mr Stagg relied on paragraph 13 of the decision rejecting the claimant's appeal against the resulting overpayment decision on the grounds that the Council had made an official error:

> "While the Council might perhaps have taken a more hardnosed attitude and insisted on being notified of the actual award figure for WFTC ... it was not in my view and "error" or "mistake" in terms of regulation 99 not to do so ... That in my judgment is nowhere near the kind of "mistake" envisaged by the wording used in this regulation, which is a "clear and obvious" error of fact

or law made by some officer on the facts disclosed to him, or which he had reason to believe were relevant: cf: R(SB) 2/93, paragraph 6; R(SB) 10/91 paragraph 11; CH 571/03. "

22 Turning to the comments in the *CPAG Guide*, it was common ground that no fault need be shown on the part of the official for the action to be a mistake. But not every decision that was later overturned was a mistake, even including mistakes made in good faith. One example would be a case where the officer took the right decision on the information then available, and the tribunal took a different decision because it acted on further information. Another example might be one where there was scope for a degree of judgment and the tribunal differed in its view to that of the officer. For this reason the tribunal had taken too fundamentalist view in its reason (a). The reasoning overlooked the wider powers of a tribunal compared with a Commissioner.

23 With regard to the tribunal's reason (b) this was also unsound. It overlooked the "test case" rule in Schedule 7, paragraph 18, to the 2000 Act. This dealt with the problem of interacting decisions, and provided an answer to the concerns of the tribunal. Turning to the *Griffiths* case, it had been accepted for the claimant that this did not bind the tribunal, nor did it assist in this case.

24 However, the Council did accept that there would be cases where there was an official mistake within the scope of regulation 99, and he adopted the phrase from Commissioner Howell QC that the test was that the mistake was one that was "clear and obvious". He further submitted that the burden of establishing that there was a mistake was on the claimant in each case. That was clear from the structure of regulation 99 as a whole, and emphasised by the difference approach taken to the recovery of overpayments under section 71 of the Social Security Administration Act 1992, where the burden was firmly on the Secretary of State. He relied on the formulation of Commissioner Jacobs in CH 4065 2001 at paragraph 1.3: "the legal burden is on the Secretary of State to show recoverability, although the claimant bears at least the evidential burden of proving the case that she alleges".

25 Mr Cox's argument failed to recognise the difference between the issue of whether the officer taking the original decision was wrong and that the decision of the tribunal was binding. It did not follow that because the tribunal changed the decision that the initial decision had been wrong. In this case it was the second tribunal that had been wrong. It had taken too wide a view of "mistake". To take any other view did not involve the Council in challenging the decision of the first tribunal as a binding decision, and it did not seek to do that. But that was not to say that the Revenue officer was mistaken.

26 Mr Stagg did not seek to rely on an alternative argument in the papers about causation. But I do note as of more general help the decision he cited on this topic, namely the Court of Appeal decision in *R(Sier) v Cambridge City Council Housing Benefit Review Board* [2001] EWCA Civ 1523. That case concerned the link between the official error and the overpayment in regulation 99. The Court of Appeal laid down the approach to be taken as follows:

"Parliament has laid down in the regulations that a person is to be relieved of the obligation to repay an overpayment when that has been occasioned by an

> administrative mistake and not by any fault on the part of the recipient. That seems to me to be the basic thrust of the regulation and one should approach the meaning of the word "cause" and its application to the facts on that basis." (Latham LJ at paragraph 24)

I find that view helpful in the overall decision in this case. But on the agreed facts of this case (unlike *Sier* and CH 5485 2002, and in factual dispute in CH 4065 2001)) there is no suggestion of any "fault", breach of duty or other relevant action by Miss C that could in any sense be regarded as a cause of the Council's decision.

The Secretary of State's view

27 For the Secretary of State, Mr Kolinsky emphasised that he was instructed on the issues of principle, not the issues of fact between Miss C and the Council. It was the submission of the Secretary of State that the tribunal had been wrong in assuming an error by the Revenue simply because of the first tribunal decision. It was in each case necessary to ask on the facts if there had been an error within the regulation 99(3) sense. Mr Kolinsky was happy to adopt Mr Stagg's criticisms of paragraphs (b) and (c) of the tribunal decision and his approach to the meaning of "mistake". On the test itself, he adopted the approach of Commissioner Howell QC.

28 The Secretary of State did not agree with the tribunal's approach in paragraph (a). The analogy between the position of a commissioner and a tribunal was not a safe analogy. He also found support in the opinion of Lord Hoffmann in the decision of the House of Lords in *Moyna v Secretary of State* [2003] UKHL 44, at paragraph 18. Decisions were at time "an exercise of judgment rather than an arithmetical calculation of frequency". Again at paragraph 20 his Lordship stated:

> In any case to which a tribunal has to apply a standard with a greater or lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law in deciding the case either way ... I respectfully think that it was unrealistic of Kay LJ to think that he could sharpen the test to produce only one right answer."

29 I asked Mr Kolinsky to address the practical problem of how the Council and second tribunal in this case was to decide if the Revenue decision was an official error. I did so in the context that there was no statement of facts and reasons of the first tribunal decision because no one had asked for one. Mr Kolinsky was of the view that if that request had been made, the answer would have been easy. In its absence, the second tribunal had to reach a critical understanding of the first tribunal decision. There was no mistake simply because the tribunal differed from the Revenue as a matter of judgment, or if it were clear that the tribunal relied on new facts. It was for the claimant to establish any error. On the basis of the arguments put, the second tribunal should take a common sense approach, with the evidential burden on the claimant.

The Revenue's view

30 The Revenue did not appear at the oral hearing, but had assisted by a full submission on both the issues and the background to the case as seen from the

Revenue perspective. It also helpfully produced further factual and documentary information about the first decision and appeal. What I have to record as less helpful was the Revenue submission that its original decision was right and the decision of the first tribunal one that was "impossible to explain" in the absence of a statement of facts and reasons for the tribunal decision. I record that as less helpful for two different reasons. The first is that this case is not an appeal from the first decision. I agree with the submissions of other parties that that decision cannot now be challenged. The Revenue chose not to ask for a statement or to appeal, and it must now accept the decision as it stands and not go behind it. But the other reason runs to the heart of this case. If the Revenue cannot explain the tribunal decision in the absence of a statement of facts and reasons, what is the second tribunal, the Council or the claimant supposed to do with it? How can the tests put forward by Mr Stagg and Mr Kolinsky lead to any practical conclusion for a tribunal in the second tribunal's unenviable situation if tested by the detail of this case as analysed in the Revenue submission?

My decision

31 The focus of this appeal is on how the Council (or any similarly placed public body) must handle the Revenue decision on WFTC (or any similar decision) in the light of the first tribunal decision (or any similar tribunal decision) that found the Revenue (or any similar) decision appealed to it to be wrong. To add the extra dimension of the second tribunal to that focus is in my view to blur it. What matters is how the Council must deal with the problem of a successful appeal against an official decision on which it has previously properly relied.

32 My starting point is, as noted above, the comprehensive analysis of the jurisdiction and powers of appeal tribunals in CIB 4751 2002 by the recent Tribunal of Commissioners. The core issue is how that approach is to be applied here, alongside the overriding principles of judicial finality as endorsed by the House of Lords in *Thrasyvoulou*, when viewed from the standpoint of the Council.

33 The importance of giving due weight to a tribunal decision, combined with the fact that the claimant in this case in no way caused or contributed to the Revenue decision being wrong, separate this case from the issues considered by Commissioner Howell QC in CH 5485 2002 or the other cases cited to me. The first tribunal decided that the Revenue decision was wrong. The Tribunal of Commissioners in CIB 4751 2002 put renewed emphasis on the role of the appeal tribunal as a superior decision maker. Any doubts that it did not do its job properly were ended when the appeal period ran out without anyone seeking permission to appeal. At that point the weighty principles of judicial finality must come into play. The claimant cannot be expected to show all over again to the Council that the Revenue was wrong or, for it amounts in substance to the same thing, why it was wrong.

34 Had this case come forward without the first tribunal's decision in the claimant's favour, then I would have adopted the approach in CH 5485 2992 and I would have wanted to see why it was that Miss C contended that the Revenue decision was wrong and how she based her arguments. But she has done that. She persuaded the superior decision maker that the Revenue decision needed changing. If there was an evidential burden on Miss C, then she discharged it in winning that

appeal. And in persuading the tribunal as she did, she established that there was something clearly wrong with the Revenue's decision. It may not have been clear before the appeal, but it is clear in the light of the tribunal decision. As compared with the situation in CH 5485 2002, things have gone a further stage here, and that stage cannot be ignored.

35 Without the benefit of the statement of facts or reasons for the first tribunal decision I agree with the Revenue view that it is impossible to say whether the tribunal found that the Revenue decision was wrong on a factual basis, or a basis of law, or by exercise of some discretion on which the tribunal could rightly take a different view of the overall situation. So I cannot decide, or direct another tribunal how to decide, whether the Revenue decision was "right" or "wrong" in the secondary sense argued by the official parties to this case. Further, even if there were a statement of reasons, it would be wrong to use it to speculate whether the tribunal thought that the Revenue decision was an "official error" in the regulation 99 sense. That is an impossible approach in this case. Even if it were possible in other cases it is wrong. There was no appeal against the tribunal decision. It must stand, and the Revenue decision must go. To engage in speculation about the first tribunal decision is to go behind that decision in an unacceptable manner. To expect the Council to go behind it in this way offends judicial certainty and imposes a double jeopardy on the claimant. Further, if this approach allowed the Council to ignore the tribunal decision then issues of Article 6 independence and equality of arms arise.

36 The only answer to this problem consistent with the principles set out above is that the Council must accept the first tribunal decision. And it must accept that the first tribunal decision shows that the Revenue decision was an "error" or "mistake".

37 As there is in this case no question on the facts of Miss C being in any way causative of or contributory to the Revenue decision, then the error or mistake, or incorrect or wrong decision, of the Revenue (all those terms can be used interchangeably in my view) must be an official error for the purposes of regulation 99(2), regardless of the reason - fact, law or discretion - why the tribunal disagreed with the Revenue. This is of course subject to any appeal against that tribunal decision.

38 Arguments in support of the approach of the official parties to this case were based on the tribunal's remarks to the effect that Miss C was unjustly enriched by this decision. I do not agree that the tribunal's remarks on that issue are appropriate, nor do I find much help in the "public money" policy arguments deployed by the official parties to the case. Regulation 99 provides a small but important safeguard to claimants against being required to repay overpaid benefits. But, as the Court of Appeal emphasised in *Sier*, regulation 99 also includes safeguards for those official bodies against abuse of this safeguard. A claimant can only rely on regulation 99(2) if, first, she or he (or any agent) did not cause or materially contribute to the mistake and, second, she or he (or any agent) could not reasonably be expected to realise that there was an overpayment at the time the payment was received.

39 The answer to arguments about tribunals reaching decisions on new facts lies not in narrowing the meaning of "official error" but in asking why the official did not have access to the facts that were before the tribunal. Whose fault was that? If a claimant failed to put something in evidence to the official when that should have

been done, but then persuaded the tribunal of the relevance of the evidence, it is open for consideration whether the failure of the claimant to produce the evidence earlier contributed to the official error. Similarly, if the claimant knew that there was a "clear and obvious" official error that gave rise to the overpayment, and appealed on that ground, it would be difficult for the claimant also to argue that he or she could not reasonably have been expected to realise that there was an error at the time of the payment.

40 The first tribunal decision establishes that the Revenue decision was an official error. Miss C neither caused nor contributed to that error. Nor could she reasonably be expected to realise that it was an error at that time. The second tribunal established those facts and its findings are not challenged. The second tribunal therefore reached the right decision on those facts.

41 I have set out fully above the reasoning of the second tribunal and the parties' comments on it. I have reached this decision, after the advantage of full argument, on grounds that differ from the tribunal's reasoning. I find the *Griffths* decision of no assistance, and I put the argument about judicial certainty on a different basis to the approach adopted in the tribunal decision. Nor do I consider that any useful divide can be drawn between official errors about facts and official errors about law. But the tribunal did reach the right decision. I therefore consider that I should set its decision aside for error of law but reimpose it on the grounds set out in this decision.

David Williams
Commissioner

02 February 2004

[Signed on the original on the date shown]