

**DECISION OF A TRIBUNAL OF SOCIAL SECURITY**  
**COMMISSIONERS**

1. We allow the claimant's appeal. We set aside the decision of the Sutton appeal tribunal dated 8 June 2004 and we substitute the decision that the tribunal should have given, which is to set aside the refusal of the local authority to supersede the decision of 22 April 2003 that the overpayment of housing benefit from 2 September 2002 to 20 April 2003 is recoverable from the claimant. However, this does not preclude the local authority from making a fresh decision, which, on the material before us, we would expect to be to the effect that the overpayment is recoverable from both the claimant and his landlord.

**REASONS**

**The facts**

2. The claimant was awarded housing benefit with effect from 22 January 2001. In early 2003, it came to the attention of the local authority that he had become a full-time student in 2002 and had been awarded a student loan. The claimant was interviewed and, on 22 April 2003, the local authority superseded the award of housing benefit with effect from 2 September 2002 and decided that he was not entitled to housing benefit from that date. It also decided that £6,711.15 had been overpaid from 2 September 2002 to 20 April 2003 and that that sum was recoverable from the claimant. He did not challenge that decision. On 5 September 2003, he was conditionally discharged for 2 years by a magistrates' court and ordered to pay £100 costs, having pleaded guilty to "various benefit fraud" charges related to the decision. He started to repay the overpaid benefit at the rate of £100 per month.

3. The claimant's rent had never been referred to a rent officer because the local authority had been under a misapprehension as to the landlord's status. Having discovered this error, the local authority revised or superseded the award of housing benefit from 22 January 2001 to 1 September 2002, deciding that the claimant had been entitled to only £70 pw until 2 December 2001 and to nothing thereafter and that, in consequence, £13,785.98 had been overpaid to the landlord and was recoverable from it. It appears from later correspondence that the overpayment had arisen due to a misrepresentation by the landlord. The landlord did not challenge the decision. Nor did it challenge similar decisions made in respect of other tenants for the period up to 23 June 2003.

4. However, the claimant, who had been given notice on 5 November 2003 of the decision that the overpayment up to 1 September 2002 was recoverable from the landlord, did react to that decision. On 24 November 2003, he wrote to the local authority arguing that, to the extent that his housing benefit should have been restricted from 2 September 2002, the overpayment from 2 September 2002 to 20 April 2003 should also be recovered from his landlord and not from him. He said that, had his eligible rent been limited, he

would have sought alternative accommodation and so reduced his liability for rent. On 19 December 2003, the local authority refused to supersede the decision of 22 April 2003, stating that the whole of the overpayment from 2 September 2002 was attributable to the claimant's own failure to declare his change of circumstances because, without that failure to disclose a material fact, no housing benefit would have been paid.

5. After unsuccessfully applying for a revision of that decision, the claimant appealed. On 8 June 2004, the tribunal dismissed his appeal on the ground that the local authority was entitled to recover the overpayment by virtue of regulation 101 of the Housing Benefit (General) Regulations 1987 (S.I. 1987 No. 1971) and that the tribunal's jurisdiction on the appeal was limited by virtue of R(H) 3/04 to considering whether the local authority had acted in bad faith, had reached a perverse decision and had considered all relevant matters. The claimant now appeals against the tribunal's decision with the leave of Mr Commissioner Bano. After an initial hearing before Mr Commissioner Bano, the Chief Commissioner directed that the appeal be heard by a Tribunal of Commissioners because it involved questions of law of special difficulty and, in particular, the questions whether regulation 101(2) was defective and whether *Secretary of State for Work and Pensions v. Chiltern District Council* [2003] EWCA Civ 508 (also reported as R(H) 2/03), which was followed in R(H) 3/04, was correctly decided and, if not, whether it was binding upon Commissioners.

#### **The arguments of the parties**

6. At the hearing before us, the claimant appeared in person, the local authority was represented by Mr Steven Kovats of counsel and the Secretary of State was represented by Mr James Maurici of counsel. We are very grateful to the claimant and to counsel for their helpful submissions.

7. The claimant did not attempt to deal with the technical arguments that had led the Chief Commissioner to direct that the case be heard by a Tribunal of Commissioners but he reiterated his point that, to the extent that he had been paid too much housing benefit due to the landlord's misrepresentation, the overpayment should be recovered from the landlord rather than from him. He pointed out that there was no material before the tribunal relating to the misrepresentation by the landlord or showing that the failure to refer the rent to a rent officer had not been due to an official error by the local authority.

8. There was a considerable amount of common ground between Mr Kovats and Mr Maurici. They both submitted that regulation 101(2) was validly made under section 75(3) of the Social Security Administration Act 1992 and entitled a local authority to decide that an overpayment was recoverable from a claimant instead of a landlord to whom it had been paid. They also submitted that *Chiltern* was not decided *per incuriam* and was binding insofar as it decided that there was a right of appeal against a local authority's decision to choose to recover an overpayment from a claimant rather than a landlord to whom the overpayment had been made. However, during the course of oral argument, both accepted that there were difficulties

with the Court of Appeal's decision in the light of the legislation in force at the material time. Nonetheless, they submitted that its reasoning applied to the legislation in force from 1 October 2001 to 9 April 2006, which is applicable to this appeal. They also submitted that the tribunal had been right to follow R(H) 3/04 and hold that the scope of any appeal against a decision to recover an overpayment from a claimant was limited to an examination of the legality of the decision. Mr Kovats, however, said that, in the absence of the binding effect of *Chiltern*, he would have submitted that there was no right of appeal against any discretionary decision as to whether an overpayment was recoverable from a particular person and that something had gone very wrong if a right of appeal to a tribunal had to be construed as narrowly as it was in R(H) 3/04. As to the powers of a tribunal, Mr Kovats and Mr Maurici agreed that, in principle, a tribunal could find part only of an overpayment to be recoverable from an appellant and that a tribunal allowing an appeal on a point of law against a decision that an overpayment should be recovered from one person rather than another would always be obliged to remit the case to a local authority, save where there was only one decision that the local authority could lawfully give.

9. However, Mr Kovats and Mr Maurici differed as to whether we should allow this appeal. Mr Maurici submitted that the tribunal had not dealt adequately with the issues that arose within the limited scope permitted by R(H) 3/04 because it had failed to deal adequately with the claimant's challenge to the local authority's reasoning. In particular he submitted that the local authority had failed adequately to consider whether it was seeking recovery under regulation 101(2)(a) or (c), had referred to the claimant's conviction without explaining what significance it had and had failed to consider whether both the claimant and the landlord had caused the overpayment through their respective misrepresentations or failures to disclose material facts. Mr Kovats submitted that it was unnecessary for the local authority to specify under which sub-paragraph of regulation 101(2) it was seeking recovery and that it was quite entitled to reason that the whole overpayment should be recovered from the claimant on the basis that no benefit would have been payable to him had he disclosed the fact that he had become a student with a student loan.

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10. The conclusion reached in R(H) 3/04 – that an apparently open-ended appeal to an appeal tribunal is in some cases limited to points of law – is a surprising one. Whether it is necessary or not turns on the construction of the relevant legislation, which was amended between the date material to the decision in R(H) 3/04 and the date material to our decision. Our decision must therefore depend on the construction of the later version but it is instructive to look first at the construction placed on the earlier version by the Court of Appeal in *Chiltern*, which was applied in R(H) 3/04 itself. The development of the law is also easier to understand if matters are considered in chronological order.

11. Before 1 October 2001, section 75(1) and (3) of the 1992 Act provided –

“(1) Except where regulations otherwise provide, any amount of housing benefit determined in accordance with regulations to have been paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.

“(2) ...

“(3) An amount recoverable under this section is in all cases recoverable from the person to whom it was paid; but, in such circumstances as may be prescribed, it may also be recovered from such other person as may be prescribed.”

12. Regulations 98 and 99 of the 1987 Regulations defined “overpayment” and provided that any overpayment “shall be recoverable” except when due to an “official error” (which is limited to cases “where the claimant, a person acting on his behalf or any other person to whom the payment is made did not cause or materially contribute to the that mistake, act or omission”). Regulation 101 was headed “Person from whom recovery may be sought”. Paragraph (1) provided –

“(1) Subject to paragraph (2), a recoverable overpayment shall be recoverable from either –

- (a) where the overpayment was in consequence of a misrepresentation or failure to disclose a material fact (in either case whether fraudulent or otherwise) by or on behalf of the claimant or any other person to whom payment of housing benefit may be made, the person who misrepresented or failed to disclose that material fact; or
- (b) in any case, the claimant or the person to whom the overpayment was made.”

Paragraph (2) provided for recovery from a partner of the claimant.

13. Schedule 7 to the Child Support, Pensions and Social Security Act 2000 makes provision for appeals against decisions by a local authority. Paragraph 6(6) provides –

“Where any amount of housing benefit ... is determined to be recoverable under or by virtue of section 75 ... of the Administration Act (overpayments ...), any person from whom it has been determined that it is recoverable shall have a right of appeal to an appeal tribunal.”

14. Paragraph 1(f) of the Schedule to the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (S.I. 2001 No. 1002), made under paragraph 6(4) of Schedule 7 to the Act (which must presumably be read as qualifying paragraph 6(6) as well as paragraph 6(3)) provides –

“No appeal shall lie against a decision made by virtue of, or as a consequence of, any of the provisions in ... Part XIII (overpayments) of the Housing Benefit Regulations except a decision under –

- ....  
(f) regulation 101 (person from whom recovery may be sought);  
...”

Paragraph 3 of the Schedule to the 2001 Regulations provides –

“Subject to paragraphs 1(f) ..., no appeal shall lie against a decision as to the exercise of discretion to recover an overpayment of housing benefit ...”

15. The details of the facts and argument in *Chiltern* are important. The local authority had made a decision to the effect that an overpayment of housing benefit was recoverable from the claimant’s landlord, the Warden Housing Association, to which it had been made. The housing association appealed, complaining about the way in which the local authority had elected to recover benefit from it rather than the claimant. An appeal tribunal dismissed the appeal but the housing association appealed to a Commissioner. Mr Commissioner Jacobs set aside the tribunal’s decision on other grounds but held that no appeal lay to an appeal tribunal against the exercise of the discretion to recover an overpayment (CH/4943/2001). He reasoned (a) that section 75(3) always permitted recovery of an overpayment from the person to whom it was paid, (b) that regulation 101(1)(b) had the effect that any overpayment was also recoverable from the claimant (because otherwise it added nothing to section 75(3)), (c) that the language of section 75(3) showed that the power to recover an overpayment was discretionary and (d) that, by virtue of paragraph 3 of the Schedule to the 2001 Regulations, there was no appeal against the exercise of that discretion because the discretion did not arise under regulation 101.

16. In holding that the discretion did not arise under regulation 101, but either under section 75 itself or entirely outside the legislation, Mr Commissioner Jacobs was applying the distinction between “recoverability” and “recovery” – i.e., between the question whether the Secretary of State had the right to recover an overpayment and the question whether that right of recovery should be enforced – that had been drawn by Commissioners in appeals against decisions made under section 71 of the 1992 Act and its predecessors in respect of overpayments of benefits administered by the Secretary of State, ever since they had first acquired jurisdiction in supplementary benefit cases in 1980 (see, for example, R(SB) 44/83). The correctness of that approach has never been doubted in respect of cases under section 71 and has recently been reaffirmed by the Court of Appeal in *B v. Secretary of State for Work and Pensions* [2005] EWCA Civ 929; [2005] 1 W.L.R. 3796, in which the Court accepted the Secretary of State’s submission that an “executive discretion” not to enforce recovery of an overpayment against a person from whom it had been held to be recoverable existed independently of the recoverability decision against which the right of appeal lay. Mr Commissioner Jacobs’ reasoning was that, as the legislation provided

that the overpayment was recoverable from both the claimant and the housing association, any question of choosing from whom the overpayment should in fact be recovered fell to be made at the “enforcement” stage and not at the stage of determining “recoverability” and so no appeal lay against it.

17. The Secretary of State, who had not been a party to the proceedings before the Commissioner, applied for, and was granted, leave to appeal to the Court of Appeal. Neither the housing association nor the local authority took any part in the proceedings before the Court of Appeal. The reasons why the Secretary of State appealed appear from the judgment of Hale LJ, as she then was.

“5. The first [of two issues before the Court of Appeal] is whether an appeal tribunal has jurisdiction to hear an appeal against the local authority’s exercise of their discretion as to the person from whom they will recover any overpayment. The Commissioner held that it does not. The Secretary of State argues that it does. Miss Demetriou, on behalf of the Secretary of State, points out that landlords may well have legitimate complaints about the exercise of the local authority’s discretion to recover the money from them. It is of course easier for the local authority to recover the money from the landlord to whom it has been paid, but it may be unfair. The reasons for overpayment are often within the control of the claimant, and within the knowledge of the claimant, but not within the knowledge of the landlord. The landlord simply continues to provide accommodation at the lawful rent in return for the money. He has not necessarily any reason to suppose that the claimant has ceased to be entitled to the benefit in question.”

18. Having referred to the second issue (which is not relevant to this appeal) and having set out the legislation, Hale LJ continued –

“10. At first sight, it looks as if anyone from whom it has been determined that an overpayment is to be recovered may appeal by virtue of paragraph 6(6) of Schedule 7 to the Act. The Decisions and Appeals Regulations exclude many decisions, but in paragraph 1(f) of the Schedule they preserve decisions under regulation 101. Paragraph 3 [the transcript and report erroneously refer to paragraph 1(3)] of the Schedule excludes the exercise of discretion, but subject to the preservation of appeal rights against decisions under regulation 101. Thus it contemplated that there might be an appeal against the exercise of a discretion.

“11. The Commissioner, however, drew a distinction between the decision that the overpayment was ‘recoverable from a person’ and the decision that the overpayment would be recovered from that person. Section 75(3) of the 1992 Act talked of an overpayment being ‘recoverable’ from the person to whom it was paid, but provided that it ‘may also be recovered’ from someone else. It was, therefore, concerned with recoverability not actual recovery. That was left to the discretion of the local authority. Regulation 101 was, in terms,

concerned only with recoverability. It is limited to identifying the circumstances in which and the person, other than the payee, from whom recovery may be sought:

‘The local authority’s discretion is not a decision made under that regulation. The exercise of the discretion is independent of that regulation. Either the discretion is ... exercised directly under section 75 or it is a matter that is left outside the legislation altogether.’ (Paragraph 54 of his decision.)

Hence, he concluded, there is a right of appeal against the decision that the overpayment is recoverable from that person but not against a decision that it will actually be recovered from him rather than anyone else.

“12. Miss Demetriou argues that that conclusion is wrong. Firstly, regulation 101 must contemplate a decision being taken by the local authority. Paragraph 1(f) of the schedule to the Decisions and Appeals Regulations refers to a decision under regulation 101: what decision could this mean other than a decision to seek recovery from one rather than the other? Secondly, section 75(3) gives no power to recover from anyone other than the payee without further provision. That further provision is in regulation 101. That is the only source of the power to recover from someone other than the payee. Hence it must also be the source of the power to choose. Thirdly, a decision that the overpayment might be recovered from either (a) or (b) is not a decision at all. It is simply a ground for the real decision, which is whom to choose as between the two. Fourthly, paragraph 3 clearly refers to the exercise of a discretion. The question of whether someone is either a payee or a claimant is a question of fact not an exercise of discretion. The only discretion which could be contemplated by paragraph 3 [the transcript and report erroneously refer to paragraph 1(3)] is the choice between them.”

“13. Miss Demetriou also, for what it is worth, refers to a parliamentary written answer from Angela Eagle, MP, who was a junior minister in the Department at the time in question, given on 10 January 2001, stating:

‘We have decided that in cases where more than one person may be liable under the legislation to repay an overpayment, the person from whom the local authority decides to seek recovery should have a right of appeal to an Appeal Tribunal against that decision.’

The reasons why it is thought appropriate to allow such an appeal are, of course, those mentioned at the outset of this judgment.

“14. Appeals are against decisions, not against the basis or grounds for the decision, just as appeals are against orders and not the reasons

for the orders. There would be no power to choose without regulation 101. The exercise of that power of choice must be a decision under that regulation. It is quite clear that the legislation contemplates a right of appeal against the exercise of a discretion in this context.

“15. So, on this aspect of the matter, I would allow the appeal, while recognising the much greater familiarity with this area of the law enjoyed by the Commissioner. In this case, in my judgment, he allowed himself to be beguiled by an unusually seductive argument, presented to him in the face of clear and sensible provision the other way.”

Brooke and Arden LJ agreed, the latter commenting that “a right of appeal to a specialist tribunal is a matter of importance particularly in the light of the European Convention on Human Rights”.

19. R(H) 3/04 is the decision of a Tribunal of Commissioners appointed by the then Chief Commissioner to consider the practical implications of the Court of Appeal’s decision and, in particular, the scope of the right of appeal the Court had found to exist against a decision to choose to recover an overpayment from one person rather than another.

20. The Commissioners first held, at paragraphs 17 to 19 of their decision, that the traditional distinction between “recoverability” and “enforcement” decisions applied as much to cases where it was claimed that housing benefit was recoverable under section 75 of the 1992 Act as to cases where it was claimed that a social security benefit administered by the Secretary of State was recoverable under section 71. They said –

“It is beyond doubt, and common ground among all parties, that the function of the tribunal appeal process is confined to the *first* stage, of determining legal liability: decisions of the Secretary of State or a relevant authority whether to proceed with the *second* stage, of enforcing it once properly established, lie outside the appeal jurisdiction with which we are concerned.”

They referred to R(SB) 44/83 and also to R 1/02 (IS)(T), a decision of a Tribunal of Commissioners in Northern Ireland.

21. The Commissioners then observed that the housing association in the *Chiltern* case had never denied that the local authority could recover the overpayment from it but had merely challenged what it regarded as the improper use of discretion and that therefore the only relevant issue before the Court of Appeal had been the question whether a landlord was entitled, on an appeal to a tribunal, to question the legality of the decision to invoke the statutory process against it. They held –

“60. There is in our judgment no doubt that the decision of the Court of Appeal in *Warden [Chiltern]* stands as clear authority that in any attempt by a housing authority or the Secretary of State to make use of

the statutory procedure for recovery of overpaid benefit under section 75 of the Administration Act, any person thus sought to be made legally liable for the repayment of money may, in his appeal against the determination of his legal liability to pay under paragraph 6(6) of Schedule 7 to the 2000 Act, put in issue the legality of the authority's action or 'choice' under the combined effect of section 75 and regulation 101 to pursue him and make the determination against him."

22. However, they rejected the submission made to them that an appeal tribunal was entitled to consider the broad merits of any such "choice" for three reasons. First, because it appeared to contradict the terms of the primary legislation, secondly because such an issue was essentially non-justiciable and thirdly because *Chiltern* had involved only an appeal as to the legality of the choice. Accordingly, they concluded at paragraph 69 that –

"the scope of any challenge on appeal to an authority's choice to use the statutory recovery powers against a particular appellant is limited to the propriety and lawfulness of any such choice that necessarily precedes or is incidental to the making of a determination against which he has the right of appeal under paragraph 6(6) of Schedule 7; such an appeal cannot extend to reopening the merits of any such choice or exercise of discretion by the authority."

23. That was a novel approach to the construction of an apparently open-ended right of appeal. Normally a right of appeal is confined to points of law only if express provision is made to that effect. However, the Tribunal of Commissioners was faced with what appeared to be the novel situation of a right of appeal being conferred in respect of a non-justiciable exercise of discretion.

24. We do not find it surprising that the Tribunal of Commissioners considered the merits of the choice from whom to recover an overpayment to be non-justiciable in the sense that it was not an issue on which a tribunal could properly substitute its own view for that of a local authority. In a case where an overpayment arises out of a deliberate misrepresentation by a claimant of which a landlord is entirely innocent, it may be in the interest of the local authority's council tax payers nonetheless to have speedy recovery from the relatively wealthy corporate landlord to whom the overpayment was made, whereas the landlord may say that it is fairer to pursue the tenant from whom it may be unrealistic ever to expect full recovery. The landlord will have had the money but the claimant will have had the benefit of the accommodation and, if the overpayment is recovered from the landlord, the landlord may have the right to sue the claimant for unpaid rent. On the other hand, the landlord might have been prepared to accept a lower rent if the misrepresentation had not been made and housing benefit had been paid at a lower rate or the claimant might have moved to cheaper accommodation. Deciding from whom to recover the overpayment therefore involves weighing up a number of competing considerations. The difficulty facing the Tribunal of Commissioners under the legislation then in force, as interpreted by the Court of Appeal, was that the considerations were unrelated to each other and

there was no indication in the legislation or the context as to which might properly be regarded as relevant. For instance, the fact that section 75(3) provided that an overpayment was “in all cases” recoverable from the person to whom it was paid militates against any suggestion that the relative fault of that person and the claimant is a determining factor. If simple restitution is a relevant principle, how is ease of recovery from an innocent person to be weighed against the fault of another? As the Tribunal of Commissioners said, the choice required the making of “essentially non-legal judgments on matters of policy, finance and social considerations”. The consistency required of modern government by public law could be achieved only by a local authority adopting a coherent policy and by tribunals or courts confining themselves to the consideration of points of law. Tribunals and courts can, of course, develop consistent principles on a case-by-case basis but that takes time and is not practical where first-tier decisions are not reported and second-tier appeals are confined to points of law. If a statutory scheme under which large numbers of decisions have to be made every day makes provision for a right of appeal on the merits of those decisions, it is reasonable to expect the legislation to make the relevant considerations clear, either expressly or by implication.

25. On the other hand, it is extraordinary that a statutory scheme as comprehensive as the housing benefit scheme should provide for a right of appeal against a decision that is non-justiciable without expressly limiting the right of appeal to points of law. This has caused us to look again at the reasoning in *Chiltern*.

26. In R(H) 3/04, the Tribunal of Commissioners implicitly took the view that the Court of Appeal had not blurred the traditional distinction drawn between the decision as to whether an overpayment is recoverable, which is appealable and any *subsequent* decision as to whether, or how, to enforce recovery, which is not appealable. Consistently with that approach, the Commissioners reasoned in paragraph 69 that the power to choose whether to recover an overpayment from the person to whom it was paid or the claimant arose either *before* the decision was made as to recoverability or *as part of* that decision. We do not consider that the choice could properly have arisen *before* a decision as to recoverability. If the choice did not arise as part of the decision that the overpayment was recoverable, we agree with Mr Kovats’ submission in his skeleton argument that, “as a matter of logic, you must decide whether an overpayment is recoverable from both x and y before you can decide as a matter of discretion which of x and/or y to pursue for the debt.” Moreover, there is nothing in the judgment of Hale LJ to suggest that the Court took the view that the choice could arise before a decision had been made as to whether the overpayment was recoverable. Either the Court found that the choice arose as part of the decision that the overpayment was recoverable or, contrary to the view apparently taken in R(H) 3/04, the Court found that it arose afterwards but nonetheless decided that the landlord had a right of appeal against it.

27. Given the terms of regulation 101(1) as in force at the material time, it would not be entirely surprising if the Court accepted the submission of

counsel that that regulation conferred a relevant discretion at the recoverability stage and, given the terms of paragraph 3 of the Schedule to the 2001 Regulations, it is not surprising that the Court should have held that there was a right of appeal against the exercise of that discretion. However, as Mr Commissioner Jacobs had pointed out, regulation 101(1) had to be read in a way that was consistent with section 75(3) of the 1992 Act. What neither he nor the Court of Appeal considered was whether that was possible. Insofar as it was not possible, the regulation was *ultra vires*.

28. The problem is that section 75(3) as originally enacted simply did not permit regulations to be made that had the effect that an overpayment might be recoverable from another person *instead of* the person to whom the overpayment was made; it permitted only regulations having the effect that an overpayment might be recoverable from another person *as well as* the person to whom the overpayment was made. It was permissible for the regulations to require the local authority to choose from which of a number of other persons an overpayment was recoverable in addition to the person to whom the overpayment had been made but it was not permissible for regulations to enable a local authority to choose one of those other persons instead of the person to whom the overpayment had been made. An overpayment was recoverable under section 75(3) itself, rather than under regulation 101, from the person to whom it was made "in all cases". As the landlord in *Chiltern* was the person to whom the overpayment had been made, the landlord could not escape liability and had accepted as much.

29. We accept that, on any literal reading, regulation 101(1) did appear to allow a local authority to recover an overpayment from another person instead of the person to whom the overpayment was made, because sub-paragraphs (a) and (b) were expressed as alternatives and sub-paragraph (b) could also be read as suggesting that an overpayment might be recovered from a claimant instead of the person to whom the overpayment was made. This led the majority in R(H) 3/04 to suggest that the words "a claimant or" in sub-paragraph (b) were *ultra vires*, although Mr Commissioner Howell QC reserved his position and subsequently decided that they were not (CH/4733/2003).

30. In the absence of authority, we might have found the words "or the person to whom the overpayment was made" to have been *ultra vires* because the overpayment was clearly recoverable from the person to whom it was made by virtue of section 75(3) irrespective of anything in the regulation. There would still then have been an *intra vires* choice between a person within the scope of sub-paragraph (a) and a claimant, which might well have been justiciable (because the principles upon which it was to be made might have been discernible as fault was clearly an issue) and which would certainly have been sufficient to explain the reference to paragraph 1(f) of the Schedule to the 2001 Regulations in paragraph 3 of that Schedule. There would have been no non-justiciable choice falling to be made under regulation 101 between a person to whom an overpayment had been made and a claimant and therefore no issue as to the scope of an appeal against the choice would have arisen. That, however, was not the approach taken by the Court of Appeal.

31. Mr Kovats and Mr Maurici both accepted that, if the Court of Appeal found there to be a choice at the stage of determining recoverability, it would be difficult to reconcile the decision with the terms of section 75(3) but they also both submitted that the decision could not be regarded as having been made *per incuriam*. Given that Hale LJ set section 75(3) out in her judgment and that Mr Commissioner Jacobs had so clearly identified the issue, we are inclined to agree. However, we also agree with Mr Kovats and Mr Maurici that, if the Court of Appeal's decision was based on a finding that regulation 101 entitled a local authority to decide that an overpayment was not recoverable from the person to whom it was made, then that decision is, strictly speaking, only binding upon us so far as the construction of the legislation in force before 1 October 2001 is concerned and that it cannot bind us as to the construction of the legislation in force from that date, with is the version with which we are directly concerned.

32. However, it is arguable that, contrary to the view implicit in R(H) 3/04, the Court recognised that the legislation did not specifically provide for a choice at the stage of determining recoverability but instead overlooked or rejected the traditional distinction drawn between the determination of recoverability and decisions concerned with enforcement. Certainly the argument of counsel for the Secretary of State, recorded in paragraph 12 of Hale LJ's judgment, ignored the traditional distinction. Counsel appears to have argued the case on the basis that the choice fell to be made *after* it had been established that the overpayment might be recovered from either of the two parties, but she did not regard there to be separate decisions. Her submission, apparently adopted by the Court, was that there was only one "real" decision, which was making the choice, and that the finding that the overpayment might be recovered from either of the two parties was merely a preliminary finding.

33. If the Court of Appeal implicitly held that the traditional distinction between recoverability and enforcement was not material, the decision in *Chiltern* appears to us to be inconsistent with the subsequent decision of the Court of Appeal in *B* to which we have referred above. That case arose under section 71 of the 1992 Act, but we can see no material distinction between sections 71 and 75. Both are expressed in terms of an overpayment being "recoverable". Nor can we see any material distinction in the rights of appeal provided under section 12(4) of the Social Security Act 1998 in respect of decisions under section 71 and under paragraph 6(6) of Schedule 7 to the 2000 Act in respect of decisions under section 75.

34. We accept, of course, that a decision that an overpayment is recoverable from more than one person necessarily requires there to be a subsequent decision as to against which of them the right of recovery should be enforced. This most often arises as an issue in housing benefit cases but it can also arise in cases within the scope of section 71 (see, for instance, R(IS) 5/03). Clearly, a local authority cannot recover the whole of an overpayment of housing benefit from both of two people because then there would be double recovery. However, the relevant right of appeal is conferred by

paragraph 6(6) of Schedule 7 to the 2000 Act, which refers to a determination that housing benefit is “recoverable”. The Tribunal of Commissioners held at paragraph 33 of its decision that “such an appeal is by necessary implication an appeal against the making of that determination”. We respectfully agree.

35. If *Chiltern* is inconsistent with *B*, we prefer to follow the latter case. The issues were the subject of greater argument in *B* but we also respectfully consider that the distinction between recoverability and enforcement is logical. If legislation provides that an overpayment is recoverable from two people, choosing against which of them to enforce the right of recovery is clearly different from deciding that there is a right of recovery. The exercise of the public law function of determining whether an overpayment is recoverable, to which the statutory appeal mechanism applies, gives rise to private law rights and obligations (cf. *Cocks v. Thanet District Council* [1983] 2 A.C. 286 per Lord Bridge of Harwich at p. 292H) to which private law remedies apply, although the exercise of the discretion available to any person as to whether and how to enforce his private law rights is subject to public law constraints when exercised by a public authority (see *B* per Sedley LJ at paragraph [43]). Judicial review of the exercise of such a discretion may well provide an adequate remedy and, in purely legal terms, it certainly provides as effective a remedy as a statutory appeal that is limited to points of law.

36. We are therefore satisfied that the decision of the Court of Appeal in *Chiltern* is not material to the issues before us. Either it is simply no longer relevant because the legislation has been amended or else it should not be followed because it is inconsistent with other binding authority.

37. It will be plain that we consider that the arguments deployed before the Court of Appeal on behalf of the Secretary of State did not really grapple adequately with Mr Commissioner Jacobs’ reasoning. It was recorded in R(H) 3/04 that the judgments in *Chiltern* were *extempore* and that the proceedings were completed within an hour. No doubt the Court relied heavily on the submissions of counsel. However, those submissions may reflect the appeal having been brought due to a misapprehension by the Secretary of State as to the practical significance of Mr Commissioner Jacobs’ decision. It appears from the submissions recorded in paragraph 5 of Hale LJ’s judgment that the Secretary of State brought the appeal because he regarded it as unfair in some cases that an overpayment should be recovered from a landlord to whom it was made and he understood that Mr Commissioner Jacobs’ decision had a result that was contrary to the intention behind the 2000 Act, as expressed in the written answer of Ms Eagle MP quoted by Hale LJ in paragraph 13 and on which reliance had been placed by counsel for the landlord before Mr Commissioner Jacobs. What the Secretary of State may have forgotten by the time he brought the appeal, but what will have been apparent to Ms Eagle when she gave her written answer in January 2001, is that the 2000 Act not only introduced the right of appeal to a tribunal but also, by section 71, amended section 75 of the 1992 Act. The amendment had the effect that the Secretary of State could make regulations prescribing circumstances in which an overpayment was not recoverable from the person to whom it was made. It came into force for the purpose of making regulations on 1 November 2000

and Ms Eagle signed such regulations, amending regulation 101 of the 1987 Regulations, in March 2001. It will be seen below that the amended regulation provided that, in certain circumstances, a landlord to whom an overpayment had been made was not liable to repay it if he was blameless and the claimant was not, which substantially addressed the point about unfairness made by counsel before the Court of Appeal. It seems to us that Parliament had understood that, if a landlord to whom an overpayment had been made was to escape liability for repaying it, the mere provision of a right of appeal was not enough. The practical value of a right of appeal depends on the substantive law that must be applied by the appellate tribunal and section 75 needed to be amended as well. However, the amendment to section 75 did not fully come into force until 1 October 2001 and, of course, neither did the regulations, whereas Schedule 7 to the 2000 Act, introducing the right of appeal, came into force on 2 July 2001 and also applied to cases where an initial determination that an overpayment was recoverable had been made even before that date.

38. It is understandable that Ms Eagle should have referred in her written answer only to the introduction of the new right of appeal. The question had referred specifically to appeal rights and the introduction of a right of appeal was a major reform, stretching well beyond the narrow issue of overpayments. The reform was no doubt prompted in part by a recognition that the previous system of reviews might be held not to comply with Article 6 of the European Convention on Human Rights. It would, in due course, be valuable to landlords in dispute with local authorities. However, in the absence of authority, we would have held that, on an appeal brought against a decision made under the legislation in force before 1 October 2001, the value to a landlord of an appeal was limited. Of course, a landlord would have been entitled to argue that he had not in fact been the person to whom benefit had been paid or to dispute the calculation of the overpayment. Mr Commissioner Jacobs did not say anything to the contrary because such points were not in issue in *Chiltern*. Those seldom are points of contention so far as landlords are concerned. The most a landlord could usually have achieved on an appeal was a declaration that the overpayment was not recoverable from him alone. It was only from 1 October 2001, that liability might be avoided and so the right of appeal might be of more practical value. *Chiltern* was one of a relatively limited number of cases arising before the reforms made by the 2000 Act had fully come into force. So were the three cases determined in R(H) 3/04. In bringing the appeal in *Chiltern* and arguing it in the way he did, the Secretary of State may have overlooked the fact that the problem he had identified had by that time already been addressed through legislation, which in turn implied that legislation had been needed.

39. However, although these observations about the decision of the Court of Appeal in *Chiltern* may suggest that R(H) 3/04 was based on an erroneous, but binding, construction of the legislation, that does not undermine the conclusion of the Tribunal of Commissioners that a right of appeal against an exercise of discretion that is non-justiciable because the relevant considerations cannot be discerned must be limited to points of law. The

question that arises on this appeal is whether that conclusion has any bearing on the legislation in force from 1 October 2001.

### **The legislation in force from 1 October 2001**

40. Section 71 of the 2000 Act amended section 75(3) of the 1992 Act with general effect from 1 October 2001. Section 75(3) now provides –

“An amount recoverable under this section shall be recoverable –

- (a) except in such circumstances as may be prescribed, from the person to whom it was paid; and
- (b) where regulations so provide, from such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed.”

41. In order to give practical effect to the new subsection, a new regulation 101 was substituted with effect from 1 October 2001 by regulation 2 of the Housing Benefit (General) Amendment (No.2) Regulations 2001 (S.I. 2001 No. 1190). Paragraph (1) was made under section 75(3)(a) and paragraph (2) was made under section 75(3)(b). They provided –

“(1) For the purposes of section 75(3)(a) of the Administration Act (prescribed circumstances in which an amount recoverable shall not be recovered from the person to whom it was paid), the prescribed circumstance is –

- (a) housing benefit has been paid in accordance with regulation 93 (circumstances in which payment is to be made to the landlord) or regulation 94 (circumstances in which payment may be made to a landlord);
- (b) the landlord has notified the relevant authority or the Secretary of State in writing that he suspects that there has been an overpayment;
- (c) it appears to the relevant authority that, on the assumption that there has been an overpayment –
  - (i) there are grounds for instituting proceedings against any person for an offence under section 111A or 112(1) of the Administration Act (dishonest or false representations for obtaining benefit); or
  - (ii) there has been a deliberate failure to report a relevant change of circumstances contrary to the requirement of regulation 75(1) (duty to notify a change in circumstances) and the overpayment occurred as a result of that deliberate failure; and
- (d) the relevant authority is satisfied that the landlord –
  - (i) has not colluded with the claimant so as to cause the overpayment;
  - (ii) has not acted, or neglected to act, in such a way so as to contribute to the period, or the amount, of the overpayment.

“(2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), the prescribed person is –

- (a) in a case where the overpayment arose as a consequence of a misrepresentation or failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant or any other person to whom housing benefit has been paid, the person who misrepresented or failed to disclose that material fact;
- (b) in a case where a recoverable overpayment is made to a claimant who has one or more partners, the claimant’s partner or any of his partners;
- (c) the claimant.”

42. This is the version of the legislation with which we are directly concerned. A subsequent consolidation measure, the Housing Benefit Regulations 2006 (S.I. 2006 No. 213) which came into force on 6 March 2006, re-enacted this version of regulation 101 without even changing the number of the regulation but, with effect from 10 April 2006, there have since been further amendments, including the substitution of a third version of paragraph (2) the effect of which we consider below.

43. The question that was originally raised on this appeal was whether the tribunal was correct to say that R(H) 3/04 precluded it from considering the merits of the claimant’s argument that part of the overpayment was recoverable from the landlord under section 75(3)(a) instead of from the claimant. However, the more fundamental question, as with the previous version, is whether the legislation provides for any choice at all to be made as to from whom an overpayment is recoverable. If it does, the next question is whether the choice is a matter of discretion to be determined upon undefined and unascertainable criteria and so is non-justiciable. Only if there is such a non-justiciable choice does R(H) 3/04 require the right of appeal conferred by paragraph 6(6) of Schedule 7 to be construed as one that is limited, in respect of that issue, to points of law.

44. Read in isolation, regulation 101(2) may appear at first sight to require a local authority to decide in every case, as a matter of discretion, whether an overpayment is recoverable from a person within the scope of that paragraph “as well as or instead of a person to whom the overpayment was made”. If that is so, the criteria upon which the decision is to be made are not apparent from the legislation and we see the force of the submissions of counsel that R(H) 3/04 must apply. However, the words in parenthesis in regulation 101(2) merely reflect the language of section 75(3)(b). In our judgment, this case turns on how section 75(3)(b) is to be construed, because regulation 101(2) cannot have an effect that would extend beyond the regulation-making power in the primary legislation.

45. The words in parenthesis in section 75(3)(b) are ambiguous in their effect. Three possible constructions were considered in argument. First, they might be construed as enabling regulations to be made that leave to the local

authority in every case the question whether an overpayment is recoverable from a prescribed person as well as, or instead of, the person to whom it was paid. Secondly, they might be construed as enabling regulations to be made that have the effect that an overpayment is always recoverable from a prescribed person as well as the person to whom it was made, except where regulations under section 75(3)(a) have the effect that it is not recoverable from the person to whom it was made in which case it would be recoverable from the prescribed person instead of that person. Thirdly, they might be construed as enabling regulations to be made that themselves specify whether an overpayment is recoverable from the prescribed person as well as the person to whom it was made or is recoverable from the prescribed person instead of the person to whom it was made.

46. The first of those constructions was the one advanced by both Mr Kovats and Mr Maurici as being the most obvious implication of the words in parenthesis. However, that construction seems to us to sit oddly with section 75(3)(a) because it is not easy to see why Parliament should have intended that a local authority should be given an open-ended power under regulations under section 75(3)(b) to determine that an overpayment is not recoverable from the person to whom it has been paid when section 75(3)(a) provides that an overpayment shall always be recoverable from such a person save in defined circumstances.

47. There also seem to us to be other reasons for concluding that section 75(3)(b) was not intended to confer on local authorities a broad discretionary power to choose whether an overpayment should be recoverable from another person as well as or instead of the person to whom an overpayment has been made.

48. Given its fiduciary duty to its council tax payers, it is hard to see why a local authority, given a free hand, should ever decide that an overpayment is recoverable from only one person when it could equally well decide that it is recoverable from two.

49. Moreover, since a local authority undoubtedly has the same discretion as any private law creditor whether and how to enforce private law rights arising out of the exercise of its public law powers, there is no obvious reason why Parliament should have provided that the public law power to make a recoverability decision should also be discretionary. A broad discretion is much more appropriate to questions of enforcement than to questions of liability.

50. However, perhaps the most compelling argument against the construction of section 75(3)(b) supported by Mr Kovats and Mr Maurici is that, as the Tribunal of Commissioners found in R(H) 3/04, the question whether an overpayment should be recovered from the person to whom it was paid or some other person is not really justiciable in the absence of any statutory guidance as to the relevant considerations. If there is to be a power to relieve a person to whom an overpayment has been made from the liability to repay it and if the exercise of that power is to be subject to a right of appeal

that is not expressly limited to points of law, it is to be expected that the legislation will give some guidance as to the circumstances in which the power is to be exercised, unless the context is such that the relevant considerations can be implied. Here, neither the context nor section 75(3)(b) gives any guidance and, on this construction, section 75(3)(b) fails to require secondary legislation to do so.

51. Mr Kovats and Mr Maurici submitted that the second possible construction, which was one of two alternative constructions suggested by the Chief Commissioner when directing that this appeal be heard by a Tribunal of Commissioners, was untenable. It would, in effect, mean that the question whether an overpayment is recoverable from a prescribed person as well as, rather than instead of, the person to whom it was made would be determined by the terms of regulation 101(1), which is made under section 75(3)(a). That would be perfectly sensible but we are driven to accept that the words in parenthesis would not add anything to the rest of the paragraph if that construction were correct. In the absence of any clear indication to the contrary, words in legislation are to be presumed to have some purpose and meaning and we therefore accept that the draftsman of section 75(3)(b) intended the scope of the regulation-making power to be wider, so that regulations may be made that have the effect that an overpayment may be recoverable from a prescribed person instead of the person to whom the overpayment was made even where regulations under section 75(3)(a) do not apply.

52. The third construction, which is the other construction suggested by the Chief Commissioner, requires that any regulation made under section 75(3)(b) should specify whether a prescribed person is jointly liable with the person to whom the payment was made or is liable instead of that person. Under this construction the words in parenthesis have a purpose. The construction is consistent with section 75(3)(a) because, where the Secretary of State makes regulations providing that an overpayment is recoverable from a prescribed person instead of the person to whom it was made, he is, in effect, providing for additional, but defined, circumstances in which the person to whom the payment was made is not liable to repay an overpayment. The circumstances are defined by the terms in which the prescribed person is defined or by the circumstances in respect of which he is prescribed (see section 189(4)). This construction is also consistent with paragraph 6(6) of Schedule 7, which provides a right of appeal to a tribunal in terms that do not limit it to points of law, because all issues arising under regulations made under section 75(3) as to from whom an overpayment is recoverable are justiciable. If the Secretary of State makes regulations having the effect that an overpayment is recoverable from a prescribed person as well as the person to whom it is made, the non-justiciable choice as to from which of them the overpayment should actually be recovered falls to be made by the local authority at the stage of enforcing the right of recovery and so is not within the scope of the right of appeal. For all these reasons, we are satisfied that this is the correct construction of section 75(3)(b).

53. Mr Kovats and Mr Maurici both submitted that, if this were the correct construction, the version of regulation 101(2) in force from 1 October 2001 would be *ultra vires* because the Secretary of State has failed to specify whether overpayments are recoverable from the prescribed people in addition to the person to whom the overpayment was made or instead of that person. The consequence, they submitted, would be that the overpayment would not be recoverable from the claimant in this case. However, we do not accept these submissions.

54. If possible, a regulation should be read so that it is consistent with the relevant regulation-making power and is therefore valid and also so that it gives effect to the intention of the legislator. Regulation 101(2) must be presumed to have been made with the correct construction of section 75(3)(b) in mind and therefore to have been intended to provide either that overpayments are recoverable from prescribed persons *as well as* those to whom section 75(3)(a) applies or that overpayments are recoverable from prescribed persons *instead of* those to whom section 75(3)(b) applies. It is plain beyond doubt that it cannot have been intended that an overpayment should always be recovered from a claimant *instead of* from a person to whom the overpayment was made, because there is always a claimant and so liability would never fall on the person to whom the overpayment was made, which would defeat section 75(3)(a) and would make regulation 101(1) entirely redundant. It is also obvious that it was intended that a claimant's partner (if any) should have concurrent liability with the claimant. This version of regulation 101, in contra-distinction to both the previous and subsequent versions, does not provide that a third party who has misrepresented, or failed to disclose, a material fact should be liable instead of the claimant and any partner. That makes it clear that such a third party, if there is one, also has concurrent liability with the claimant. It follows that the legislator's intention must be taken to have been that an overpayment should be recoverable from all the prescribed persons *as well as* from the person to whom the overpayment was made. If regulation 101(2) as in force from 1 October 2001 is construed in that light, as we consider that it should be in order to give effect to the presumed legislative intent, it was validly made.

55. We therefore conclude that, under the legislation in force from 1 October 2001 to 9 April 2006, an overpayment of housing benefit is always recoverable from any person within the scope of regulation 101(2) as well as, if different, the person to whom the overpayment was made, except where regulation 101(1) applies in which case it is recoverable only from any person within the scope of regulation 101(2). No non-justiciable issues fall within the scope of the right of appeal and so there is no longer any need to apply R(H) 3/04 and construe that right as being limited to points of law.

#### **The new legislation in force from 10 April 2006**

56. Regulation 101(2) of the 2006 Regulations has been substituted with effect from 10 April 2006 by regulation 6(3) of the Housing Benefit and Council Tax Benefit (General) Amendment Regulations 2005 (S.I. 2005 No. 2904), as amended by paragraph 29(7) of Schedule 2 to the Housing Benefit

and Council Tax Benefit (Consequential Provisions) Regulations 2006 (S.I. 2006 No. 217). It now provides –

“(2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), where recovery of an overpayment is sought by a relevant authority –

- (a) the prescribed person from whom it is sought shall be –
  - (i) in a case where an overpayment arose in consequence of a misrepresentation of or a failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant or any other person to whom housing benefit has been paid, the person who misrepresented or failed to disclose that material fact instead of, if different, the person to whom the payment was made;
  - (ii) in a case where an overpayment arose in consequence of an official error where the claimant or a person acting on his behalf or any other person to whom the payment has been made could reasonably have been expected, at the time of receipt of the payment or of any notice relating to that payment, to realise that it was an overpayment, that person instead of, if different, the person to whom the payment was made; or
- (b) where sub-paragraphs (a)(i) and (ii) do not apply, the prescribed person from whom it is sought is –
  - (i) the claimant;
  - (ii) in a case where a recoverable overpayment is made to a claimant who has one or more partners, the claimant's partner or any of his partners.”

57. The new regulation 101(2)(a)(i) and (ii) expressly provides that recovery of an overpayment will be sought from the specified person *instead of* the person to whom the overpayment was made. It is not expressly specified in regulation 101(2)(b)(i) and (ii) whether the overpayment is to be sought from the claimant or a partner of the claimant as well as, or instead of, the person to whom the overpayment was made. However, for the reasons we have given in respect of the previous version of the legislation, it is clearly intended that recovery may be sought from the claimant and any partner of the claimant *as well as* the person to whom the overpayment was made, subject to two exceptions. The first exception is where regulation 101(1) has the effect that the person to whom the overpayment was made has no liability and the second exception is where regulation 101(2)(a) has the effect that only the person to whom it applies is liable (although it is possible for both the person to whom the payment was made and the claimant and his partner to fall within the scope of regulation 101(2)(a) themselves). The sub-paragraph must be read accordingly. That this is the correct construction of regulation 101(2)(b) is, of course, strengthened by the contrast with the language of regulation 101(2)(a). However, we hope that the legislation will be amended to make the legislative intent clear to a reader who is unfamiliar with the background.

58. We note that the regulation is now expressed in terms of the person from whom “recovery of an overpayment is sought” rather than in terms of the person from whom an overpayment is “recoverable”. However, as “recoverable” is the word used in the primary legislation, a reference to a person from whom “recovery of an overpayment is sought” must be considered to be a reference to a person from whom the overpayment is recoverable. The language used, which is consistent with the heading of the regulation, presumably reflects the view expressed by Roch LJ in *Haringey LBC v. Awaritefe* (1999) 32 H.L.R. 517, at p.528.

“The payment of housing benefits involves expenditure of public money which is in short supply. If there have been overpayments as defined by the regulations and there is a person who has received those overpayments and from whom they can be recovered, the decision of the review board should be to confirm the local authority’s decision to recover the overpayments.”

#### **Decisions where there is joint liability**

59. It seems to us that a lot of confusion might have been avoided if, where overpayments were recoverable from more than one person concurrently, local authorities had issued decisions in respect of all those from whom they were recoverable. Had that been done, the erroneous idea that the legislation provided for overpayments to be recoverable from only one person would not have taken such a hold. The problem seems to have been caused by local authorities deciding from whom they would recover an overpayment before issuing any decision as to recoverability. Logically, as we have said, the choice as to against whom to enforce a right of recovery does not arise until it has been decided from whom the overpayment is recoverable. Making decisions against all of those from whom an overpayment is recoverable is also right in principle. It is difficult for a local authority to justify not making a decision against any person from whom it is entitled to recover public money. Equally, any person from whom it is decided that an overpayment is recoverable is entitled to a decision which shows from which other persons the local authority is also entitled to recover the overpayment.

60. In every case where a recoverable overpayment has been made, the local authority should make a single decision referring to all of those from whom the overpayment is recoverable, rather than separate decisions addressed to each of them. Moreover, where a local authority decides that an overpayment is not recoverable from the person to whom it was made, a proper decision to that effect should be made and included within the decision as to the person from whom the overpayment is recoverable. It should then be communicated to the person to whom the overpayment was made and to those from whom it is recoverable. The advantage of that is that, if there is an appeal, all those potentially affected by the appeal will be parties to the proceedings and neither the local authority nor a tribunal will consider one person’s liability without regard to the liability of others. As the local authority has to go through the process of identifying those from whom an

overpayment is recoverable before taking any action to recover it, we do not consider it will be burdensome to record the decision properly and issue copies to all those concerned.

61. If, contrary to that suggestion, a local authority issues a decision against only one of, say, two people from whom an overpayment is recoverable, it seems to us that, on an appeal, the appellant will be entitled to a finding that he or she is not the only person from whom the benefit is recoverable. However, the tribunal will not be entitled to make a decision against both people because the other will not have been a party to the proceedings. Consequently, the tribunal will be limited to setting aside the decision under appeal and leaving it to the local authority to make another decision against both people. That is not a unique situation because it is well established that a tribunal has a similar power to set aside a decision without substituting another decision in a case where it finds the decision under appeal to have been made without jurisdiction. As Mr Kovats and Mr Maurici both observed, there is nothing in the 2000 Act to suggest that a tribunal has no power effectively to remit a case to a local authority where that appears to be more appropriate than substituting its own decision.

62. Our construction of the version of regulation 101 directly relevant to our decision means that there is no scope for a tribunal to decide that part of an overpayment is recoverable from the claimant and part from the person to whom the overpayment was made (except where regulation 101(1) is found to apply to only part of the overpayment). However, in principle, regulation 101 as now in force raises more obvious possibilities of one or more people being liable to repay one part of an overpayment and one or more people being liable to repay another part. Also, of course, where an overpayment is recoverable from two people who are jointly and severally liable, there is nothing to prevent a local authority from enforcing part of the liability against one and the rest against the other.

### **Our conclusion**

63. Because we do not consider that the tribunal's jurisdiction was limited to points of law and we also do not consider that the local authority had any broad discretionary power to decide whether the relevant overpayment was recoverable from the claimant's landlord instead of the claimant, many of the points argued before us have lost their significance. It is not even significant that the tribunal erred in considering that its jurisdiction was confined to points of law, because there was no relevant issue of fact between the parties.

64. The material error made by the tribunal was its acceptance that the local authority had had a discretionary power to choose from which of the claimant and his landlord the overpayment was recoverable. It is on this ground that the tribunal's decision must be set aside.

65. The overpayment to which this appeal relates was clearly recoverable from the claimant under both of sub-paragraphs (a) and (c) of the relevant version of regulation 101(2). However, it appears to us that it was also

recoverable from the landlord because there is nothing before us to suggest that regulation 101(1) applies. In particular, there is no evidence that the condition imposed by regulation 101(1)(b) is satisfied and, therefore, it seems to us that the local authority should have made a decision to the effect that the overpayment was recoverable from both the landlord and the claimant. As the landlord was not a party to the appeal before the tribunal, the tribunal should have set aside the local authority's decision and left it to make the correct decision. The landlord is not a party to the appeal before us either and so we are in the same position as the tribunal. Accordingly, we give the decision the tribunal should have given and we set aside the local authority's decision of 19 December 2003, refusing to supersede the decision of 22 April 2003.

66. We expect the local authority now to make a decision superseding the decision of 22 April 2003 and deciding that the overpayment from 2 September 2002 to 20 April 2003 is recoverable from both the claimant and the landlord. However, we stress that the landlord cannot be bound by our decision insofar as any issue of fact is concerned so that, if the landlord persuades the local authority that regulation 101(1) does in fact apply to it and regulation 101(2)(a) does not, the local authority should make a decision to the effect that the overpayment is not recoverable from the landlord but is recoverable from the claimant and should issue it to both of them. On any new appeal by the claimant, the local authority would then have to explain why the landlord was not also liable.

67. It follows from our analysis of the law that we have no power to decide to what extent any concurrent liability should be enforced against the landlord rather than the claimant. Nonetheless, as we have heard argument on the point, we record that there does appear to us to be some force in Mr Maurici's submission that, to the extent to which the claimant received housing benefit during the relevant period that he would never have received but for the landlord's misrepresentation, both he and the landlord contributed to the overpayment. In other words, the claimant appears to be wrong to suggest that the relevant part of the overpayment is attributable only to the landlord's misrepresentation and the local authority appears to be wrong to suggest that it is attributable only to the claimant's failure to disclose a material fact. Mr Maurici referred to *Duggan v. Chief Adjudication Officer* (reported as an appendix to R(SB) 13/89) for the proposition that an overpayment may have more than one cause. If the local authority takes the view that the liability should be enforced in a way that reflects the extent to which each of the parties caused the overpayment (which, we stress, is not the only basis upon which the decision as to the person who should actually repay the money could be taken), Mr Maurici's submission might suggest that half of the relevant part of the overpayment should be recovered from each of them with the balance, if any, being recovered from the claimant alone. However, these are all matters for the local authority, who must have regard to any representations made by the landlord.

**MARK ROWLAND**  
**Commissioner**

**E. A. L. BANO**  
**Commissioner**

**E. A. JUPP**  
**Commissioner**

**12 May 2006**