DECISION OF THE COMMISSIONER

1. This is an appeal, brought by the claimant with my leave, against a decision of the Ashton-under-Lyne social security appeal tribunal dated 25 September 1996, whereby they purported to dismiss an appeal by the claimant against a decision of an adjudication officer to review a decision dated 29 January 1996 that the claimant should be treated as receiving a notional income. The adjudication officer (now the Secretary of State) accepts that the tribunal's decision was erroneous in point of law but there is little agreement between the parties as to why that is so. I held an oral hearing at which the claimant was represented by Mr Sanatkumar Dave of Manchester Welfare Rights Service and the adjudication officer was represented by Ms Karen Steyn of counsel, instructed by the Solicitor to the Departments of Social Security and Health. Since then I have received further written submissions. I apologize for the delay since the last of those submissions was received.

2. The claimant was a single woman in her mid-twenties living with her mother above her mother's shop. She had been in receipt of income support since 2 June 1995. On 15 January 1996, the Benefits Agency were informed by the Employment Service that they believed that she was working in her mother's shop. She was called in for interview. In consequence of the interview, it was decided that her entitlement to income support should be reassessed so as to take account of notional earnings. The result was that she held to be no longer entitled to benefit. The claimant was notified of this on 29 January 1996. Unfortunately, computerisation means that there is no copy of the adjudication officer's decision and no adequate record of what was in it. The instructions given on 26 January 1996 to the local office section dealing with the claim were:-

> "Please re-assess taking notional earnings into account of £49.77 less £5 disregard.
>
> LT54 action is appropriate as claimant has stated that she has helped out in her mother's shop on average from when she first became unemployed."

A computer printout shows that on 29 January 1996 there was issued to the claimant a letter of type "COC's, EOC (INF3, 2, env)". Nothing is recorded about the date from which any review was effective. At a guess, "COC's EOC" means "change of circumstances, end of claim" but that may be wrong. "LT54 action" is the procedure by which the Secretary of State refers an overpayment question to an adjudication officer. It appears that no such action was in fact taken straightaway. On 29 March 1996, the claimant wrote to ask for her claim to be reassessed. It appears that this was treated as an application for review of the decision notified on 29 January 1996. On 16 April 1996, the Benefits Agency wrote to the claimant saying"-

> "If your circumstances have now changed you can make a new claim and a decision will be made on the claim.
>
> The previous decision on your claim cannot be reviewed as there are no grounds for review."

The submission to the tribunal says that the claimant "was reminded of the right of appeal" but the hand-written letter to the claimant, which was not before the tribunal, says nothing about that at all. However, on 18 April 1996, a proper adjudication officer's decision was sent to the claimant in the following terms:-

> "As a result of the review decision dated 29.1.96 an overpayment of income support has been made amounting to £1494.64 (as shown in the attached schedule). On 7.6.95 or as soon as possible afterwards [the claimant] misrepresented the material fact that she was not working whereas in fact she was engaged in unpaid work. As a consequence income support amounting to £1494.64 from 2.6.95 to 12.1.96 was paid which would not have been paid but for the misrepresentation.
>
> Accordingly that amount is recoverable from [the claimant]."

That was presumably the result of "LT54 action". The language would have been more suitable had recovery been sought on the ground of failure to disclose rather than misrepresentation. On 11 June 1996, the claimant signed an appeal form stating that she wished to appeal against the decision dated 18 April 1996 and would be represented by Mr Dave. However, the appeal was treated by the Benefits Agency as an appeal against the decision of 16 April 1996, refusing to review the decision notified on 29 January 1996. The submission prepared by the Benefits Agency for the tribunal made no reference whatsoever to the question of the recovery of an overpayment.

3. On 19 April 1986, the Independent Tribunal Service received from the claimant a form stating that she would be attending a hearing and that Mr Dave would be representing her. She also asked that her representative be contacted before the hearing was listed. That was not done but the claimant and, I think, Mr Dave were notified on 9 September 1996 that the hearing would take place on 25 September 1996. Neither the claimant nor Mr Dave appeared at the hearing. The tribunal determined the appeal they thought they had before them and dismissed it.

4. In a letter received by the Independent Tribunal Service on 27 November 1996, the claimant, in a letter clearly drafted by Mr Dave, applied for the decision to be set aside on the ground that Mr Dave had written a letter dated 12 September 1996 asking for a postponement. A copy of that letter of 12 September 1996 was intended to have been enclosed with her application but it appears that it may not have been. In any event, the application was refused on 28 January 1997, the tribunal stating that they did not consider it to have been established that the postponement application had been made. It is unclear quite what the tribunal meant by that. If they meant that they were not satisfied that the letter of 12 September 1996 had ever been *written*, their decision would be understandable but it might be questionable whether they should have proceeded to determine the application without seeking a copy of the document which the claimant had intended to put before them and without giving Mr Dave the opportunity of defending himself at an oral hearing. A finding that a local authority representative has, in effect, lied to a tribunal by claiming to have written a letter that was not written is a serious matter. If, on the other hand, the tribunal meant that it was not established that the letter of 12 September 1996 was *received*, the tribunal should have considered setting aside the decision on the ground that the document

relating to the proceedings had not been received by the tribunal, which they did not. They would have been entitled to take the view that Mr Dave and the claimant were wrong to fail to attend the hearing without making enquiries as to whether it had been postponed following the letter of 12 September 1996 but they might have taken the view that justice would best have been served by making that criticism of Mr Dave and the claimant while allowing the application. However, no appeal lies against the tribunal's decision of 28 January 1997. The claimant's application for leave to appeal against that decision has been treated by me as an application for leave to appeal against the decision dated 25 September 1996.

5. I accept that the letter dated 12 September 1996 was in fact sent by Mr Dave. However, if, as appears to be the case, it was not received by the Independent Tribunal Service, I do not consider that the tribunal's decision can be said to have been erroneous in point of law on the ground that they did not have the letter before them. Mr Dave should have checked that it had been received before deciding not to attend the hearing.

6. However, it is common ground that the tribunal's decision is erroneous in point of law because they did not consider the decision against which the claimant had actually appealed and so made no decision on the question of the recoverability of the overpayment. This was not the fault of the tribunal but was due to them being misled by the Benefits Agency, although I have no doubt that the Benefits Agency acted in good faith and that there was only an administrative error. It seems to me that many of the procedural problems in this case stem from the fact that the questions of entitlement to benefit and of recovery of overpayment were dealt with in different administrative sections while the legislation sensibly required that any question of the recoverability of an overpayment should be dealt with "in the course of" the review on which was made the determination that there had been an overpayment (see section 71(2)) of the Social Security Administration Act 1992).

7. There has been much discussion in the submissions to me about exactly what issues *were* before the tribunal in the light of that legislation. Determining that question is not made easier by my not knowing exactly what decision was notified to the claimant on 29 January 1996. I do not consider it will be helpful to analyse all the submissions in detail because I consider that there was more than one way in which the tribunal could have approached the case had they been in possession of the full facts about the procedural history. I will merely set out what seems to me would have been the simplest approach for the tribunal to have taken, had they tribunal known the true history. This would have been to treat the claimant's appeal as having been against both the decision of 18 April 1996 and the decision of 16 April 1996, as is now suggested by the adjudication officer. In respect of the decision of 18 April 1996, it could have been said that the decision as to recoverability was invalid because there does not appear ever to have been a formal review decision in respect of the period over which the overpayment had been made. In respect of the decision of 16 April 1996, it could have been said that there were grounds for review of the decision of 29 January 1996 because that earlier decision was never completed because, as is now conceded by the adjudication officer, the local adjudication officer had not determined from what date the original award of income support should have been revised and had not decided whether any consequential overpayment was recoverable. If the ground of the review of the original award was really change of circumstances, the adjudication officer should have revised entitlement from the date of the change. If the adjudication officer's case was really that the award was based on ignorance of a material fact from the very beginning of the claim, as appears to have been the

case, he or she should have revised entitlement from the beginning of the claim.. The decision of 29 January 1996 should accordingly have been reviewed on the ground of mistake of law and, there being grounds for review of that decision, the tribunal could then have considered afresh whether there were really grounds for review of the original award of income support. As that award was plainly made in ignorance of the claimant having spent any time at all in her mother's shop, it appears to me that there were grounds for review on the ground of ignorance of a material fact. It would then have been open to the tribunal to consider all the merits of the case for the purpose of deciding whether or not the original award should have been revised. The central questions were whether the claimant's contact with the shop was such as to affect her entitlement to income support and, if so, whether any overpayment was recoverable.

8. In her last submission, the adjudication officer has raised the question whether the claimant should be regarded as being in remunerative work. She refers to the short judgment of Sir Thomas Bingham MR in *Chief Adjudication Officer v. Ellis* (to be reported as R(IS)22/95) and submits that "the possibility exists that [the claimant in the present case] received some other form of indirect payment or payment in kind and that oral evidence at the hearing may make a difference". This case has proceeded this far on the basis that the claimant had no expectation of any form of remuneration from whatever she did in the shop. There is not a shred of evidence to the contrary. Even if, as was at one time suggested, the claimant made no payments to her mother for her food and accommodation, it is not a natural inference that that was because she worked in the shop rather than merely because she was her mother's daughter. No doubt, if it emerges during the hearing before the tribunal to whom I now refer the case that the claimant did have some expectation of remuneration, they will consider whether the claimant was in remunerative work but, unless there is some new evidence to that effect, they can safely ignore the point.

9. The real issue at the moment is whether the claimant should be deemed to have had notional income by virtue of regulation 42(6) of the Income Support (General) Regulations 1987 which, at the material time, provided:-

> "Where -
>
> (a) a claimant performs a service for another person; and
>
> (b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area,
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> the adjudication officer shall treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies him that the means of that person are insufficient for him to pay or to pay more for the service; but this paragraph shall not apply to a claimant who was engaged by a charitable or voluntary organisation or is a volunteer if the adjudication officer is satisfied in any of those cases that it is reasonable for him to provide his services free of charge."

The adjudication officer's case is the claimant worked for two to three hours a day for seven days a week in the shop and therefore performed a service and that, while she was a volunteer, it was not reasonable for her to provide her services free of charge. The claimant

has not suggested that the hourly rates suggested by the adjudication officer are unreasonable or that the her mother did not have the means to pay them. Her case is that what she did was too slight to amount to a "service" or, in the alternative, that it was reasonable for her to do what she did free of charge. She does not deny spending time in the shop but she says that she was there because she and her mother were the only members of the household, that the shop was below their living accommodation and that she was keeping her mother company following the deaths within the preceding months of both her (the claimant's) father and her only brother. She submits that what she actually did was negligible and she could hardly avoid talking to the customers and being of some assistance while she was in the shop.

10. It is apparent from *Clear v. Smith* [1981] 1 W.L.R. 399, that the question whether an activity carried out for no remuneration is "work" is a question of fact and degree, to be judged having regard to, *inter alia*, the effort, energy and time put into the activity. It seems to me that the question whether such an activity amounts to a "service" is also a question of fact and degree but that one should focus more on the advantage derived by the recipient of the alleged service. If the help given by the claimant to her mother was substantial - in the sense of not being negligible - then the claimant was providing a service, whether or not what she did amounted to "work".

11. However, the question whether what the claimant did amounted to "work" is important when it is being considered whether, if the claimant did provide a service, it was reasonable for her to do so free of charge. It is, in my view, significant that what a claimant is deemed to possess under regulation 42(6) is "earnings", rather than any other form of income. The provision is aimed at those who it could reasonably be expected to have actual earnings and that seems to me largely, if not completely, to limit its application to those who do "work". The concluding words recognise that there are instances when it is reasonable to do "work" free of charge. Judging reasonableness requires many factors to be taken into consideration. The claimant's motivation may be one factor but I do not consider that it can be determinative as Mr Dave appears to suggest. Thus, if the claimant in the present case provided a great deal of help while present in the shop, the fact that she wished to be there to keep her mother company and occupy her own mind might be of little significance, because it might be thought reasonable for her mother to pay for the advantage she received. Both the amount of help and the motivation are relevant factors. It might also be thought relevant to consider whether the mother would have employed someone else if her daughter was not there. There was evidence that the mother did employ other people from time to time. The tribunal to whom I now refer this case may wish to consider the circumstances in which those other people were employed - whether they were employed to work with the claimant's mother or only when she was not there, the time of day at which they were employed and so on. They may further wish to consider, not only exactly what the claimant did, but also whether she did it at times that suited herself or at times that suited her mother. There may be other matters that the tribunal consider relevant.

12. This question whether the claimant did any "work" is even more important if it is decided that the claimant should be deemed retrospectively to have had notional earnings and there arises the question of the recoverability of an overpayment on the ground that there was either a failure to disclose a material fact or a misrepresentation. The adjudication officer has argued that any overpayment would be recoverable because the claimant made a misrepresentation on page 5 of her claim form when she answered "no" to the question, "Are

you or your partner working for an employer at the moment?". That submission is misconceived because the claimant's mother was not an employer if the claimant in fact received no remuneration of any kind. However, the claimant also answered "no" to the question on the previous page, "Have you or your partner done any work in the last 6 months?". Above that question it is explained that "work" includes unpaid work. This takes one back to *Clear v. Smith*. Not every activity amounts to work but, if what the claimant did amounted to "work", then it seems to me that she made a misrepresentation and any overpayment would be recoverable (although she might not have been liable to prosecution because, in *Clear v. Smith*, it was held that a person could not "knowingly" make a declaration that was false unless he or she knew it was false and so was dishonest). If, on the other hand, what the claimant did did not amount to "work", there was no misrepresentation on the claim form. I suspect that there would also have been, throughout the claim, no failure to disclose any material fact.

13. The adjudication officer has not sought to rely upon any representation that might have been made by the claimant if she ever signed a document stating that she had reported any fact that might affect her entitlement to benefit. It is, perhaps, conceivable that a tribunal might conclude that a claimant should be deemed to have earnings under regulation 42(6) even though what she did did not really amount to "work". My understanding is that claimants are asked to report "work" but not other activities and, if that is so, I do not see how any claimant could reasonably be expected to disclose an activity that fell short of "work". It therefore seems to me that it would be most unfair to seek to recover benefit on the basis that a claimant is to be deemed retrospectively to have earnings from such an activity. The answer to that apparent dilemma might be for it to be decided that it was reasonable for the claimant to provide his or her services free of charge before the suggestion of charging had been made by the Benefits Agency, even if it were to be decided that it was not reasonable for him or her to continue to do so once the idea of charging had been raised. Indeed, that distinction could be drawn even if the claimant's activity amounted to "work".

14. In any event, for the reason given in paragraph 6, I allow the claimant's appeal. I set aside the decision of the Ashton-under-Lyne social security appeal tribunal dated 25 September 1996 and I refer the case to an appeal tribunal, constituted under regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 by a legally-qualified panel member who was not the chairman of the tribunal sitting on 25 September 1996, for determination. I direct the tribunal to adopt the approach I have suggested in paragraph 7 above, treating the appeal as made against the decisions of both 16 April 1996 and 18 April 1996, finding that there are grounds for reviewing the decision of 29 January 1996 because it was erroneous in point of law and that there are grounds for reviewing the original award of income support because it was made in ignorance of the fact that the claimant spent time in her mother's shop. The tribunal must then consider whether notional earnings are to be attributed to the claimant and, if so, for what period and whether there has been a recoverable overpayment of income support, having regard to what I have said in paragraphs 10 to 13 above.

M. ROWLAND
Commissioner
9 March 2000