

Starred Decision No.: 107/01

Decision No: C15/99-00(IS)(T)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCOME SUPPORT

Appeal to the Social Security Commissioner on a question of law from
the decision of Banbridge Social Security Appeal Tribunal
dated 8 September 1999

DECISION OF THE TRIBUNAL OF COMMISSIONERS

1. This is an appeal by and on behalf of the estate of the original claimant, now deceased, with leave of the Chairman, against the decision of an Appeal Tribunal to the effect that the claimant was not entitled to Income Support from 6 September 1990 until 21 May 1994 and accordingly was overpaid £63,735.31, which, accordingly, was recoverable from the claimant. As the claimant is now deceased the reference to the claimant must, in these circumstances, refer to her estate. (For convenience we have referred to the original claimant as "the deceased" in this decision).
2. As it appeared to the Chief Commissioner that the appeal involved a question of law of special difficulty, he directed, in accordance with article 16(7) of the Social Security (Northern Ireland) Order 1998 that the application be dealt with by a Tribunal of three Commissioners. As Mr Commissioner Powell, a full time Commissioner in Great Britain who has been appointed as a Deputy Commissioner for Northern Ireland for a limited period of three years, was a member of the Tribunal of Commissioners hearing the present case, counsel for the estate was asked if he had any objection to the constitution of the present Tribunal of Commissioners, as it appeared at that stage he was objecting to the constitution of the Tribunal that heard the original case. Counsel specifically indicated that he was making no such objection in this appeal.
3. We held a hearing of the appeal which was attended by Mr Mortimer of counsel, instructed by Ian Dawson & Company, solicitors, representing the estate of the deceased and by Mrs McRory of the Decision Making and Appeals Unit, representing the decision maker. At the hearing we had the assistance not only of the submissions from Mr Mortimer and from Mrs McRory, but we also had the benefit of the original grounds of appeal set out in the application for leave to appeal dated 20 November 1999, written observations or comments dated 6 September 2000, 13 November 2000, 23 April 2001 and 10 May 2001. In addition we also had the benefit of written observations or submissions from Mrs Hall, on behalf of the Decision Making and Appeals Unit dated 14 July 2000, 10 October 2000 and 10 May 2001 as well as additional comments from Mrs McRory dated 15 May 2001.

4. In this case the Tribunal considered the common provision for recovery of overpayments which is set out in section 69(1) of the Social Security Administration (Northern Ireland) Act 1992 which states:-

“Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –

- (a) a payment has been made in respect of a benefit to which this section applies; or
- (b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,

the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.”

(Under the provisions of Section 69(11) as amended Income Support is a relevant benefit).

In addition the Tribunal was applying the provisions of section 130(1) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 and regulation 45 of the Income Support (General) Regulations (Northern Ireland) 1987 which provided that there is no entitlement to Income Support if the capital of the claimant exceeds an upper threshold of £8,000. Regulation 46(2) and schedule 10 are also relevant in so far as they set out that the value of a claimant's principal residence is disregarded as long as a member of his or her family lives therein.

5. The background to and the circumstances of the case are as follows:-

- (a) The deceased was born on 20 July 1913 and was a widow who prior to going into care lived with her brother. On 3 September 1990 a claim for Income Support was completed on behalf of the deceased by her daughter, and signed in by her son in law. Whilst it was stated on the form by ticking the appropriate boxes, that the deceased had owned her own home before moving into a nursing home, it was also stated that she did not own any other property or land. As the original claim form was thought to have been mislaid, a duplicate form was completed on behalf of the deceased by her daughter on 17 October 1990. Details on this form were the same as on the original claim form. An officer of the Department visited the deceased at a nursing home on 30 October 1990 in relation to her claim for Income Support. The officer reported that although the deceased suffered from slight confusion and arthritis and was very frail, she was still mentally capable of managing her own affairs. However the deceased requested that Mrs Ledlie, the proprietress of the nursing home, act as her agent and the appropriate form was completed.
- (b) The officer also reported that the deceased's former home had been at a specific address in Loughgall. However as the deceased's brother still resided

there, in accordance with the Regulations the value of this property could be disregarded indefinitely for the purposes of the deceased's Income Support claim. Accordingly on 2 November 1990 the deceased's Income Support entitlement was assessed and the payment of benefit commenced with effect from 6 September 1990. On 7 June 1997 information was received that the deceased had died on 21 May 1997. Her Income Support order book was returned on 12 June 1997 with orders cashed up until 28 May 1997.

- (c) In January 1998 information was received that the value of the deceased's estate at the time of her death was £235,121.09. A form was issued to the deceased's solicitors requesting details of the estate. On 4 February 1998 a reply was received from the solicitors setting out details of the estate and, in particular, the public house and the deceased's home were included in the particulars. After a letter of inquiry was issued and a phone call from the deceased's daughter, on 5 May 1998 a reply was received from the solicitors stating, inter alia, that the deceased had been the sole owner of the public house, though she did not receive any share of profits, and, in addition, in the accounts she was treated as being entitled to a one half share of the profits with income tax being computed and paid on that basis.
- (d) Accordingly on 28 October 1998 the Adjudication Officer reviewed and revised the deceased's original claim and decided, based on all the information available, that an overpayment of Income Support had occurred in respect of the period from 6 September 1990 to 21 May 1997 amounting to £63,735.31 and that this amount was recoverable from the deceased's estate as she had failed to disclose ownership of the public house in Loughgall valued at £162,000.
- (e) On 18 February 1999 the deceased's solicitors on behalf of her estate, appealed against this decision.

6. The grounds of the appeal were as follows:-

- "1. In 1990 when the claim for income support was made the deceased's daughter [...] informed an official in the Social Security Office in Banbridge of the deceased's legal ownership of Hoggs Public House in Loughgall (being the property referred to in the Decision of the Adjudication Officer). Although legal ownership of the property was vested in the deceased, the public house had always been regarded as belonging to her brother [...], who carried on the business personally, and no income from it was ever paid to the deceased. This official told [*the deceased's daughter*] that the deceased's legal ownership of the public house did not need to be mentioned on the application form. This being so, the decision to award Income Support was not made as a result of any failure to disclose any material fact by those acting on behalf of the deceased, nor was it given as a result of any misrepresentation of any material fact by those acting on behalf of the deceased. The decision was not given in ignorance of a material fact. [...], mentioned in the Decision, is the husband of [*the deceased's*

daughter], and personally signed the application forms as a matter of convenience – he had nothing else to do with the matter).

2. The estate of the deceased had been fully administered before receipt of the Decision of the Adjudication Officer. Neither the Executor nor the Solicitors acting for him nor the deceased's daughter have any funds available to discharge the overpayment claim.
3. In the circumstances it is inequitable and not in accordance with the relevant legislation to pursue the overpayment claim.
4. The appellants may also reply on any other grounds of appeal as may be advised to them by counsel before or at the hearing of the appeal."

It is noteworthy that the grounds of appeal to the Tribunal did not rely on the fact that the deceased was not the beneficial owner of the property.

7. The appeal came before a Tribunal on Friday 21 May 1999. The executor of the estate was represented by counsel, Mr Mortimer. It is relevant that at no stage was the issue of beneficial ownership expressly raised. Amongst the papers before this Tribunal (and also the later Tribunal) was a note dated 6 March 1998 of a telephone call between the deceased's daughter and the local office stating that the deceased's daughter had stated that the public house was "always her uncle's" and was only put in her mother's name as he had been under age when their parents died. The Tribunal adjourned the case for medical evidence as to the deceased's mental health at the date of claim.
8. The appeal was then listed before a differently constituted Tribunal (consisting of a Chairman sitting alone) on 8 September 1999. Again the executor was represented by counsel, Mr Mortimer instructed by Mr Dawson, solicitor, of Ian Dawson & Company, solicitors, who also was present. According to the Chairman's record of proceedings the deceased's daughter gave evidence, inter alia, to the following effect:-

"Mummy was long time in Banbridge. I was told that she needed 24 hour care. I saw social worker. We told social worker about mummy's situation. Uncle told social worker about pub. Mummy was never in pub. Got nothing out of it. Social worker said should speak to Social Services. I phoned them up. I don't know who I was speaking to. I told them everything and more or less they saw no problem. I told about her assets. Pub and whole situation."

9. According to the record of proceedings counsel submitted inter alia, as follows:-

"At no stage has family hidden ownership. Well known in wider community she owned it. [*Deceased's daughter*] told Department over phone and in office. Therefore she did disclose pub ownership."

The solicitor gave evidence as follows:-

"Deceased treated as equal partner for purposes of pub accounts. She actually received no profit."

10. Therefore whilst there was undoubtedly a certain ambiguity about the ownership of the public house, the deceased's daughter's evidence was relatively clear that the deceased was not the beneficial owner of the public house. Of course it was a matter for the Tribunal whether or not to accept this evidence in light of the totality of the evidence and the circumstances of the case. It was also for the Tribunal to decide whether, in light of the accepted evidence, the beneficial ownership of the public house was vested in the deceased.
11. The Tribunal, in its findings of fact, held that there had been no disclosure of the fact that the deceased had been owner of the public house.
12. The Tribunal, in a full and reasoned decision, held that she was not entitled to Income Support for this period because of the capital rules and also held that her Income Support would not have been paid had the Department been aware of her ownership of the public house. The Tribunal, in the reasons for its decision, dealt with the issue of failure to disclose and misrepresentation at length and concluded that, whilst there was a failure to disclose, it was innocent in the circumstances and, in addition, there was misrepresentation which had led to the overpayment of benefit. Accordingly the Tribunal decided that the Adjudication Officer was correct in reviewing the original decision of 2 November 1990 which awarded Income Support from 6 September 1990 as that decision had been given in ignorance of the material fact that the claimant owned a public house, the value of which exceeded the prescribed amount of £8,000. In particular the Tribunal decided that from 3 September 1990 the deceased had failed to disclose and misrepresented the material fact that she owned a public house valued at £162,000 and that the Income Support would not have been paid but for the failure to disclose and misrepresentation. Accordingly the Tribunal held that the overpayment of £63,735.31 was recoverable from the claimant.
13. Whilst the decision was made on 8 September 1999, the statement of reasons for the decision was only issued on 22 November 1999. An application for leave to appeal was received at the Appeal Service (NI) on 29 December 1999 which was outside the statutory period of one month from the date of issue of the statement of reasons. However a legally qualified member accepted that special reasons existed for the late application and on 9 February 2000 the Chairman of the Tribunal granted leave to appeal to a Commissioner.
14. The grounds of appeal, as eventually settled in the skeleton argument, were as follows:-

“1. PRELIMINARY POINT. JURISDICTION (*sic*)

In the Department's letter of 10th October 2000 the Department made a jurisdictional point in relation to the decision of the adjudication officer which if accepted could result in there being no validly constituted appeal before the Commissioner.

2. THE TRIBUNAL ERRED IN LAW BY NOT EXPLORING THE ISSUE OF A POSSIBLE CONSTRUCTIVE TRUSTEESHIP BY THE LATE MRS JACKSON IN FAVOUR OF HER BROTHER OR HER

BROTHER AND HERSELF IN RELATION TO THE OWNERSHIP OF THE PUBLIC HOUSE.

3. THE DEPARTMENT DID NOT GIVE CLEAR GUIDANCE AS TO EITHER WHO SHOULD ACT ON BEHALF OF THE CLAIMANT OR WHO WAS ACTING ON BEHALF OF THE CLAIMANT. This has led to confusion. THIS IS A VIOLATION OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (the right to a fair trial).

This may be seen either as part of the violation and breach that the case which the claimant's representatives have had to meet has changed and expanded over the course of this appeal (mentioned in previous correspondence) or as a separate violation or breach of the right to a fair trial.

The question was "the Tribunal correct in its conclusion that [*the deceased's daughter and or son-in-law*] were acting on behalf of the claiming (*sic*) in filling in and signing the claim form" is part of the context of (1) the absence of clear guidance from the Department as to either who should act on behalf of the claimant or who was acting on behalf of the claimant and (2) the case which the claimant's representatives have had to meet has changed and expanded over the course of this appeal.

4. THE VIOLATION (BREACHES) OF THE RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (please see also point 3 above and previous correspondence).
5. ONUS OF PROOF

The onus of proof is on the Department.
6. THE TRIBUNAL MADE A MISTAKE IN APPLYING THE LAW
7. THE TRIBUNAL PLACED TOO MUCH EMPHASIS ON THE CASE OF CAO -V- SHERRIFF
8. THE DECISION OF THE TRIBUNAL TOOK NO ACCOUNT OF THE EVIDENCE
9. THE CLAIMANT HAD WITNESSES AND THE CHIEF ADJUDICATION OFFICER HAD NONE
10. THE CLAIMANT'S REPRESENTATIVES HAD ASKED FOR THE VISITING OFFICER TO BE PRESENT AT THE HEARING TO GIVE EVIDENCE AND SHE DID NOT APPEAR

11. THE ADJUDICATION OFFICER'S CASE WAS BASED ON HEARSAY AND ON INSINUATION AND NOT ON THE EVIDENCE OF WITNESSES
12. THE ADJUDICATION OFFICER HAD NO WITNESSES AND THEREFORE HAD NO EVIDENCE
13. THE TRIBUNAL TOOK NO ACCOUNT OF THE MEDICAL EVIDENCE PRESENTED"

It is noteworthy that there was no mention of the beneficial ownership of the public house in the application for leave to appeal.

15. A Tribunal has the duty and responsibility of deciding the relevant issues in any particular case before it. What were the relevant issues in the present case? As argued before the Tribunal, the issues related to misrepresentation and failure to disclose, as well as the deceased's capacity. The Tribunal addressed these issues fully and there is no doubt that these matters were dealt with in a most conscientious and thorough manner.
16. The question arises – were there any other issues in the case that ought to have been dealt with because they were relevant and clearly apparent? This matter must be approached bearing in mind that it is a Tribunal's responsibility to deal with the issues that arise, either by being specifically raised or because they are so clearly implicit that they ought to be dealt with by the Tribunal – see paragraph 14 of *R5/99(IB)*.
17. The grounds of appeal to the Tribunal dated 17 February 1999 included the following:-

“Although legal ownership of the property (*the public house*) was vested in the deceased, the public house had always been regarded as belonging to her brother [...], who carried on the business personally, and no income from it was ever paid to the deceased.”
18. It seems surprising to us that the issue of whether or not the deceased was the beneficial owner of the public house was not raised by the professional representatives representing the deceased's estate. In fact the point did not become an issue in this case even when the Chairman was asked to grant leave to appeal to a Commissioner. The matter was only directly raised when the Commissioner who had conduct of the present appeal specifically directed the parties by letter from the Office of Social Security Commissioners and Child Support Commissioners dated 13 February 2001, to make written submissions on this point.
19. Mrs McRory on behalf of the Department, who made the final written submissions dated 23 May 2001 and also the oral submissions at the hearing before us, conceded that the Tribunal had erred in this respect. Mrs Hall in her skeleton argument dated 10 May 2001 on behalf of the Department, stated the following:-

“... ”

6. The initial issue in this case is whether or not the claimant was both the legal and beneficial owner of the public house. The tribunal has accepted that [*the deceased*] was the legal owner of the public house but there are a number of issues which indicate that [*the deceased*] was not, at least solely, its beneficial owner.
7. In the papers before the tribunal there is a record (on Form BF500 dated 6 March 1998) of a phone call made by the claimant's daughter, [...], to the social security office. In that call [*the deceased's daughter*] stated that the public house was always her uncle's. It was only put in her mother's name when her grandparents died as her mother was over 21 and her uncle was not (the licensing authorities presumably would/could not grant a licence to a person who had reached the age of majority).
8. The claimant's grounds of appeal dated 17 February 1999 included a statement that in 1990 when the claim for income support was made the deceased's daughter [...] informed an official in the social security office in Banbridge of the deceased's legal ownership of Hogg's Public House and that although legal ownership of the property was vested in the deceased, the public house had always been regarded as belonging to her brother [...], who carried on the business personally, and no income from it was ever paid to the deceased (the claimant).
9. Although the Inland Revenue returns for the bar stated that [*the deceased*] received a half share of the profits from the public house the tribunal, as they were properly entitled to do, accepted as a fact that this was not the case. I submit that this would tend to show that the beneficial interest in the public house was at least partly [*the deceased's*] brother's. However, in a letter dated 2 February 1998 the claimant's solicitor stated that [*the deceased's*] brother [...] did not become the legal owner of the public house until November 1997.
10. On the basis of the above I submit that the tribunal erred in law by not exploring the issue of a possible constructive trusteeship by the [*the deceased*] in favour of her brother, or her brother and herself in relation to the ownership of the public house.
11. In C11/99(IS) the Commissioner stated that the tribunal has an inquisitorial role. It has to pronounce on proper benefit entitlement and therefore has to deal with issues which are apparent from the papers before it. In that case the tribunal did not consider fully the necessity for the claimant to have been beneficially entitled in possession to a capital asset before regulation 52 of the Income Support (General) Regulations (Northern Ireland) 1987 could apply."

20. While we consider that the possible trust should not necessarily be referred to as a constructive trust, as it might be more correctly described as an express trust or even a presumed resulting trust, the particular trust classification is probably academic. In any event we consider that Mrs Hall's argument (which was adopted by Mrs McRory) is largely correct in the circumstances.

21. It is also, in our view, relevant that [*the deceased's daughter*] gave evidence, as noted in the record of proceedings (and as already quoted at paragraph 8 herein), as follows:-

“Mummy was never in pub. Got nothing out of it. Social worker said should speak to Social Services. I phoned them up. I don't know who I was speaking to. I told them everything and more or less they saw no problem. I told about her assets. Pub and whole situation.”

In our view, by making this point in evidence, [*the deceased's daughter*] was giving evidence directly relevant to the point raised in the grounds of appeal to the Tribunal.

22. Counsel on the other hand submitted that, as noted in the record of proceedings and already mentioned earlier in this decision:-

“Well known in wider community she, (*the deceased*) owned it (*the public house*) ...”

We also note that, after this point was dealt with by counsel, Mr Dawson, the solicitor instructing Mr Mortimer, stated in evidence, (as noted in the record of proceedings and already referred to earlier in this decision) as follows:-

“Deceased treated as equal partner for purposes of pub accounts. She actually received no profit.”

This evidence, which might suggest partial beneficial ownership on the part of the deceased, appears to contradict [*the deceased's daughter's*] evidence to some extent.

23. In light of the legal representative's approach, it is not surprising that the Tribunal dealt with [*the deceased's daughter's*] evidence as a factor in deciding whether or not there was misrepresentation or a failure to disclose rather than relevant evidence in relation to the question of beneficial ownership. However, the question of the deceased's possible beneficial interest in the public house was still a fundamental issue in the case, even though it was not adverted to either by the presenting officer, who also prepared the written submission to the Tribunal, or counsel for the estate. In our view there was an issue for the Tribunal to decide in light of the evidence and the original grounds of appeal to the Tribunal, namely – was deceased the beneficial owner, in whole or in part, of the public house?

24. At some stage in the proceedings, the Tribunal, exercising its inquisitorial role, ought to have grasped the nettle and asked itself the question – did the deceased have beneficial (or part beneficial) ownership of the public house? The reason for this is that it was a fundamental point in the case, in spite of the fact that counsel and the presenting officer both failed to appreciate this.

25. We have considerable sympathy for the Tribunal which failed to get the assistance that it could reasonably have expected, both from counsel and the presenting officer, especially as the issue was heavily "disguised" by the way proceedings were conducted on behalf of the deceased's estate. It is fair to say that Mr Mortimer also made the point to us that the estate's interests should not suffer because of the inadequacy of presentation of the case in light of the fact that the Tribunal's inquisitorial role required it to deal with all the relevant issues.
26. We take the view that a Tribunal must have a reasonable expectation that the important and fundamental issues in a case will be brought to its attention in any proceedings where there is professional representation on behalf of a claimant. However, somewhat reluctantly we conclude that if an issue on the evidence, is explicitly or implicitly before a Tribunal, even though not raised by the professional representative, it is the Tribunal's duty and responsibility to deal with such an issue. We therefore conclude in the circumstances of this case that the Tribunal erred in law by not dealing with the issue of beneficial ownership of the public house. Had the matter not been so clearly apparent from the deceased's daughter's evidence both before and at the hearing, our conclusion might have been otherwise as, in the exercise of its inquisitorial role, a Tribunal is entitled to expect all live issues to be raised at hearing by professional representatives. A Tribunal may also be entitled to conclude that, if a professional representative does not raise an issue that issue has been dropped. It is only because the deceased's daughter herself again alluded to the matter at hearing that we consider the issue remained "live" in this case.
27. Mr Mortimer, in various written submissions and in his skeleton argument, made other legal points. These matters are adequately summarized at paragraph 14 herein. These other matters were not developed at the hearing. It is not strictly necessary for us to consider these arguments as they were undeveloped at hearing and in light of our decision on the trust issue. However, we feel it may be helpful for us to deal with some of the points although it must be emphasized, as we have already mentioned, that the arguments were not developed before us. Therefore our views must be considered with that in mind.
28. It was argued on behalf of the deceased in the skeleton argument that there was no validly constituted appeal before the Commissioner as the Adjudication Officer, now the Decision Maker, had no power to decide that an overpayment was recoverable from the deceased's estate as probate or letters of administration had not been granted. This proposition relies on the authority of Great Britain decision *CIS/1423/97*, a decision of Mr Commissioner Mesher. However, that decision had no application in the present case as it is accepted by the deceased's solicitor (by letter dated 13 November 200) that probate in the deceased's estate was granted on 5 August 1997. Therefore we see no substance in this argument.
29. It was also submitted that confusion as to who was acting or should be acting on behalf of the deceased could lead to a violation of article 6 of the European Convention on Human Rights (the right to a fair trial).
30. On the facts as found it is clear that the deceased's daughter (and her husband), were acting on behalf of the deceased in filling in and signing the claim form, even though

they had not been formally appointed to do so. Indeed neither the deceased's daughter or son-in-law have contested this. Suffice to say the Great Britain decisions *CWG/6/50*, *R(P)1/56*, *CIS/332/93* and *CIS/649/93* make it clear that the deceased in this case is bound by the actions of her agents, her daughter and son-in-law. In addition Mr Commissioner Monroe in Great Britain decision *R(A)2/81* at paragraph 20 made it clear that he accepted counsel's proposition in that case to the effect that:-

“... the claimant cannot get her case on its feet at all without first adopting the claim expressed to be made on her behalf ...”.

In the present case any rights that the deceased had to obtain benefit in the first place depend on the acceptance of the validity of the original claim, otherwise the deceased had no right to the benefit at all. In the circumstances the lack of a formal appointment of someone to act on the deceased's behalf is immaterial. Therefore we conclude that there is no substance in this point for the reasons set out in this paragraph (and also for the additional reasons set out at paragraph 32 to 34).

31. It was also argued in the written submissions made on behalf of the deceased's estate that the Tribunal was in breach of article 6 of the European Convention on Human Rights in that (1) the Tribunal was not independent and impartial, (2) it erred in law in finding for the Department, (3) its decision was not fair because it dealt with a decision that was different from the decision given by the Adjudication Officer, (4) the hearing was not fair because the Department's claim was not made until after the deceased's estate had been wound up and (5) the hearing had not taken place within a reasonable time.
32. As Mrs McRory stated in her written submissions dated 23 May 2001, section 7(1) of the Human Rights Act 1998, which gave effect to article 6 of the European Convention on Human Rights, did not come into force until 2 October 2000, by means of the Human Rights Act 1998 (Commencement No.2) Order 2000. The date of the Tribunal hearing and the date of the Tribunal's decision predated the coming into force of section 7(1) which provides:-

“A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention rights or rights concerned in any legal proceedings

but only if he is (or would be) a victim of the unlawful act.”

It is also relevant that section 22(4) of the Act provides:-

“Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but other wise that subsection does not apply to an act taking place before the coming into force of that section.”

33. Mr Commissioner Lloyd-Davies in Great Britain decision *CG/2356/2000* considered the application of section 22(4) of the Human Rights Act and held at paragraph 7:-

“... the 1998 Act came into force (so far as material) on 2 October 2000. The ‘act’ of a public authority of which complaint is made in the present case is the decision of 1 March 2000 disallowing the claimant’s claim for widow’s benefits. That ‘act’ was before 2 October 2000 and was not ‘proceedings’ brought by or at the instigation of a public authority. Accordingly, by virtue of Section 22(4) of the 1998 Act, the claimant is not within section 7(1) and he cannot rely on the Convention rights referred to in any appeal.”

34. The “act” complained of in the present case is a decision of the Appeal Tribunal dated 8 September 2000. Therefore since that “act” occurred before 2 October 2000 and the present proceedings have not been brought by or at the instigation of a public authority, we conclude that Mrs McRory is correct in her submission that Convention Rights cannot be relied upon in this case.

35. In the skeleton argument it was argued on the deceased’s behalf that the Tribunal failed to apply the correct onus of proof. This point is without substance. The onus of proof in relation to whether or not there was a failure to disclose and the recoverability of any overpayment rest with the Adjudication Officer (now the Department). The Tribunal gave due regard to this and in particular cited the Great Britain decision of Mr Commissioner Rice, *R(SB)34/83*, which supports this proposition. In our view it is not reasonably arguable that the Tribunal failed to apply the correct onus of proof in the present case.

36. The skeleton argument also criticises the Tribunal for relying on the decision of *Chief Adjudication Officer v Sherriff (1995) 92 (22) L.S.Gaz. 41* and also for not distinguishing the case in any event. The *Sherriff* case is a decision of the English Court of Appeal. In substance the court decided that if a claimant had the capacity to make a claim, he had the capacity to make the representation. Also, if the claimant was mentally incapable of understanding that he was making a representation, he also lacked the necessary mental capacity to make a claim. If that was the case, since it was a necessary condition of entitlement to benefit that a valid claim had been made, the Income Support that had been paid would be recoverable on the ordinary principles of restitution.

37. The Tribunal was perfectly entitled to follow the principles of law set out in a relevant decision made by the English Court of Appeal. Indeed it would be have been remiss not to have followed and taken into account such a precedent without good reason as it is a highly persuasive authority in the legal sense. Therefore the Tribunal did not err in following the *Sherriff* decision especially as there is no relevant case law on this matter emanating from the Court of Appeal in Northern Ireland. In addition there are no grounds on which the Tribunal could have distinguished the *Sherriff* case as it was considering similar issues in the present case.

38. It was submitted in the skeleton argument that the Tribunal took no account of the evidence. This submission is manifestly incorrect as the Tribunal in its reasoned

findings of fact and reasons for decision has clearly taken into account the relevant evidence. Save in relation to the issue of the beneficial ownership of the public house.

39. The skeleton argument also relied on the fact that the Tribunal had erred in coming to its decision in light of the fact that the claimant had witnesses and the Adjudication Officer had none. As Mrs McRory pointed out in her submissions dated 23 May 2001, a Tribunal does not err in law because it accepts the evidence of one party over another, provided it explains why. In addition the number of witnesses, in itself, should not be crucial, in itself, to a Tribunal's decision. We conclude that the acceptance or rejection of evidence is essentially a matter for a Tribunal and does not ordinarily give rise to a question of law (following the decision of Mr Commissioner Mitchell QC in Great Britain decision *R(SB)9/81* at paragraph 11).
40. The skeleton argument also made the point that the Tribunal was in error as the representative asked the Visiting Officer to be present at the hearing but she did not appear. However there is no record of any complaint being made by the representative at the hearing when the Visiting Officer did not appear, although it was explained by the presenting officer that the Visiting Officer had an appointment, and presumably could not attend on that day. In any event, the Tribunal had a contemporaneous account of the Visiting Officer's interview with the deceased. In light of the decision of Mr Commissioner Lazarus in Great Britain decision *R(SB)1/81*, where it was held that a claimant had no right to demand the presence of an official, we conclude that the Tribunal did not err in law in this respect.
41. The skeleton argument also objected to the fact that the Adjudication Officer's case was based on hearsay and on insinuation and not on the evidence of witnesses. However, the submission of the Adjudication Officer was the basis of the presenting officer's submission on the day. We agree with Mrs McRory that this submission was based on the summary of the facts as outlined at part four of the written submission and the law as applied to those facts set out at part five. We see no objection to the Tribunal accepting this submission and taking it into account in coming to its decision.
42. The skeleton argument also made the point that the Tribunal was in error in coming to its decision in light of the fact that the Adjudication Officer had no witnesses present and therefore had no evidence to adduce to the Tribunal. However, we agree with Mrs McRory that the function of an Appeal Tribunal is inquisitorial and does not therefore rest on the oral evidence of witnesses. The submission of the Adjudication Officer contained all the evidence that the Adjudication Officer had used to come to his decision and this evidence (which saliently included the completed claim form wherein the failure to disclose and misrepresentation were stated to have occurred) was taken into account by the Tribunal on the day of the hearing. We see no error in this approach.
43. The skeleton argument also alleged that the Tribunal took no account of the medical evidence presented. However, as Mrs McRory submitted, it is clear that the Tribunal did take account of all the evidence, including the medical evidence. There may be some doubt as to the deceased's mental capacity during the period of her claim. Had the relevant form been completed by her this issue might have had more significance. However the claim being accepted as valid, as it was and had to be before there was

any right to Income Support, the focus in this case is on the contents of the form completed on 17 October 1990 by the daughter of the deceased acting as her agent.

44. In the circumstances we are satisfied that the Tribunal's decision is erroneous in law for the reasons set out at paragraphs 16 to 27. Accordingly we allow the appeal, set aside the decision of the Tribunal and refer the matter back to a differently constituted Tribunal for a rehearing. The new Tribunal must deal with the issue of beneficial ownership of the public house. In relation to that issue we give the following, tentative, guidance
45. The facts relating to the ownership of the public house remain to be investigated. Our present understanding of what is being said on behalf of the estate is that ownership of the property derived from the parents of the deceased. On the death of the parents, the beneficial ownership of the public house passed, in some way which is unknown to us, to the deceased's brother. However, he was then under 21. That was then the age of majority and a person below that age could not hold an estate in land or, the relevant licence. It is said that the deceased was then over 21, and it was convenient to vest the legal estate in her as trustee for her brother. For reasons which have not been explained, title to the property was not transferred to the deceased's brother until after the deceased's death. We assume that the parents of the deceased and her brother died many years ago. Nevertheless, if the foregoing facts are indeed correct, then many of them can be proved from public records or from an examination of the deeds, documents and other records relating to the public house.
46. The following matters appear to us to be relevant.
 - (i) If the public house was owned by the parents of the deceased, or one of them, then that is a matter which should be easily ascertainable from the title deeds.
 - (ii) Similarly, if the public house was left to the deceased's brother by will, then again, the matter can be easily proved by production of the grant of probate and a copy of the will. If the matter is more complicated, for example if, following the relevant death or deaths, there was some sort of family arrangement, then what needs to be produced are the relevant probates and wills together with the terms of the arrangement, an explanation of why it was required and any documents which might prove its terms.
 - (iii) If the deceased's brother was a minor at the time of the relevant death while the deceased had attained her majority, their respective birth dates are proveable by production of their birth certificates.
 - (iv) The deed or assent by which the public house was conveyed to the deceased is an important document because it may indicate, one way or the other, what was to happen to the beneficial interest.
 - (v) The new Tribunal needs to investigate why, if the deceased's brother was always entitled to the beneficial interest, the legal estate was never conveyed to him despite, we assume, the passage of many years and the fact that failure to do so was quite likely to give rise to legal problems of one sort or another. A public house is, after all, both a valuable piece of real property and a business.

- (vi) The new Tribunal is also entitled to know why the deceased was treated as an equal partner for the purposes of the accounts for the public house without, apparently, actually receiving any share of the profits (though it will be for the new Tribunal whether or not it accepts that this was so). The manner in which the deceased was treated for the purposes of the accounts suggests, prima facie, that she did have some sort of interest in the property.
- (vii) Finally, the deceased's own will, grant of probate and the assent or other conveyance of the public house into her brother's name are important documents. If, for example, the deceased left the property to her brother in her will, then that would suggest that she considered that it was hers. The suggestion can, however, be rebutted. Conversely, if she left a will which does not specifically mention the public house, that might tend to suggest that she had always thought of it as her brother's. How was the public house dealt with in her estate and how was it declared to the relevant tax authorities? How was the assent or conveyance to the deceased's brother worded?

47. The above observations, while intended to be helpful, are not intended to be comprehensive and they are based on our understanding of the deceased's family's case. They should be applied with common sense. The facts may not be as we understand them, in which case other considerations may apply. There may be other or additional ways of proving some of the facts – not least by credible oral evidence.

48. For the reasons given, the appeal is allowed and remitted for rehearing.

(Signed):

**JOHN A H MARTIN QC
CHIEF COMMISSIONER**

(Signed):

**MOYA F BROWN
COMMISSIONER**

(Signed):

**J P POWELL
DEPUTY COMMISSIONER**

(Dated):

3 AUGUST 2001