R(I) 2/94
(CAO v. McKiernon)

Mr. M. J. Goodman **CI/287/1991**
3.4.92

CA (Dillon, Staughton and Waite LJJ)
8.7.93

Review – retrospective change in the law – whether a "change of circumstances"

The claimant made a claim for disablement benefit for occupational deafness which was originally disallowed because his claim was made more than five years after the last date on which he worked in a prescribed occupation. The Court of Appeal decided (see *McKiernon v. Secretary of State for Social Security*, 26 October 1989, Times 1 November) that regulation 25(2) of the Social Security (Industrial Injuries)(Prescribed Diseases) Regulations 1985, which imposed the absolute five year time limit, was *ultra vires*. On 5 July 1990 a social security appeal tribunal found that the claimant has shown good cause for late claim and awarded him disablement benefit for life. On 13 July 1990 paragraph 4 (3) of schedule 6 to the Social Security Act 1990 validated regulation 25 with retrospective effect. An adjudication officer then reviewed the decision of the tribunal and disallowed the claim to benefit. The Commissioner allowed the claimant's appeal on the basis that paragraph 4(3) restored the validity of regulation 25(2) but did not effect cases where a decision had been given, before 13 July 1990, that a claim was timeous and valid.

On 8 July 1993 the Court of Appeal (Dillon, Staughton and Waite LJJ) allowed an appeal by the adjudication officer and

Held that:

> a retrospective change in law is a relevant change of circumstances within section 104(1)(b) of the Social Security Act 1975 (now section 25(1)(b) of the Social Security Administration Act 1992) The adjudication officer was accordingly entitled to review the decision of the tribunal awarding benefit to the claimant.

[**Note:** The Commissioner's decision (referred to in paras. 19 and 20) on file CI/532/1989 *(Chatterton)*, now reported as R(I) 1/94, was upheld by the Court of Appeal on 8 July 1993.]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 18 June 1991, as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given, namely:

> (i) the decision of the social security appeal tribunal dated 5 July 1990 awarding to the claimant disablement benefit for occupational deafness from 3 October 1983 for life should stand;
>
> (ii) the decision of the adjudication officer dated 17 September 1990 purporting to review and revise the said tribunal's decision was invalid as there was no available ground for review. Social Security Act 1975, sections 101 and 104 (as amended).

2. This is an appeal to the Commissioner by the claimant, a man born on 3 January 1916. The appeal is against the unanimous decision of a social security appeal tribunal dated 18 June 1991, which dismissed the claimant's appeal from a decision of the adjudication officer issued on 17 September 1990 in the following terms:

"I have reviewed the decision dated 5 July 1990 of the social security appeal tribunal awarding disablement benefit from and including 3 October 1983. There has been a relevant change of circumstances since the decision was given. This was that Schedule 6, paragraph 4(3) of the Social Security Act 1990 retrospectively restored regulation 25 ... [of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985 No. 967, "the Prescribed Diseases Regulations"] My revised decision for the period from and including 3 October 1983 is as follows: Disablement benefit is not payable from and including 3 October 1983 because the period between the claim made on 15 July 1986 and the latest date before then on which the claimant worked in an occupation prescribed in relation to occupational deafness, which was 31 December 1980 was more than five years."

3. The appeal was the subject of an oral hearing before me on 27 March 1992 at which the claimant was represented by Mr. R. Drabble of Counsel and the adjudication officer was represented by Mr. N. Butt, Counsel, of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr. Drabble and to Mr. Butt for their assistance to me at the hearing.

4. The circumstances in which this appeal arose are as follows. On 15 July 1986 the claimant claimed (on form B1100(OD)) disablement benefit for prescribed disease A10 (Occupational deafness), see Part I of Schedule 1 to the Prescribed Diseases Regulations. He indicated that he last worked in a prescribed occupation in December 1980, so that his claim dated 15 July 1986 was more than five years after he last worked in that prescribed occupation. His claim was disallowed by reference to regulation 25(1) and (2) of the Prescribed Diseases Regulations, which so far as relevant, reads as follows:

"Time for claiming benefit in respect of occupational deafness

25. (1) Regulation 14 of the Claims and Payments Regulations [1979] (time for claiming benefit) shall not apply in relation to occupational deafness ...

(2) ... Disablement benefit .. shall not be paid in pursuance of a claim in respect of occupational deafness which is made later than 5 years after the latest date, before the date of the claim, on which the claimant worked in an occupation prescribed in regulation to occupational deafness unless -

(a)-(d) [not applicable to this case]."

5. However by a decision dated 26 October 1989 in the case of *McKiernon v. Chief Adjudication Officer, The Times, 1 November 1989,* the Court of Appeal (on appeal by this particular claimant) held that the five year time limit in regulation 25 (2) of the prescribed Diseases Regulations was *ultra vires*, because it was at variance with section 165A of the Social Security Act 1975, as in force at the relevant time. So far as is relevant, section 165A read as follows:

"165A (1) Except in such cases as may be prescribed, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied -

(a) he makes a claim for it

(i) in the prescribed manner; and

(ii) subject to subsection (2) below, within the prescribed time or

(b) [not relevant in this case]

(2) Regulations shall provide for extending, subject to any prescribed conditions, the time within which a claim may be made where it is not made within the prescribed time but **good cause is shown for the delay**.

(3) Notwithstanding any regulations made under this section, no person shall be entitled -

(a)-(b) [not relevant in this case];

(c) to any other benefit (**except disablement benefit**, reduced earnings allowance or industrial death benefit) in respect of any period more than 12 months before the date in which the claim is made." (my emphasis.)

6. The Court of Appeal decided that regulation 25(2) of the Prescribed Diseases Regulations, by not making an exception to the five year period for "good cause ... for ... delay", as' required by section 165A(2) of the 1975 Act, was *ultra vires.* The Court held that regulation 25(2) was not 'saved' by the power contained in section 77(2) of the Social Security Act 1975 which, as then in force, provided as follows:

"77. (2) In relation to prescribed diseases . . . regulations may provide

(a) for modifying provisions of this Act relating to disablement benefit and the administration of such benefit;"

7. The Court of Appeal held that section 165A of the 1975 Act was not a provision of the Act "relating to disablement benefit and the administration of such benefit" (section 77 (2) (a)), since section 165A related to other kinds of benefit and was not confined to disablement benefit. Moreover, the Court of Appeal also decided that regulation 25 (2) could not in any event be taken to have exercised a modifying power, because it did not refer at all to the "good cause" requirement in section 165A (2) but in effect simply ignored it.

8. The Court then referred back to a social security appeal tribunal the question of whether the claimant had in fact shown "good cause" for his delay in claiming, On that reference, a social security appeal tribunal unanimously decided (on 5 July 1990) that the claimant had shown "good cause" for the delay and that he was therefore entitled to a life award of disablement benefit from 3 October 1983, based on the fact that he had been medically assessed as 64% disabled for life (from 1 January 1983) on account of his deafness.

9. However, on 13 July 1990, there came into force paragraph 4 of Schedule 6 to the Social Security Act 1990. Paragraph 4 provides as follows:

"**Regulations relating to industrial injuries and diseases**

4. (1) .....

(2) In section 77 [of the Social Security Act 1975], at the end of subsection (2) (power to modify provisions relating to disablement benefit and its administration) there shall be added the words -

'and for the purposes of this subsection the provisions of this Act which relate to the administration of disablement benefit or reduced earnings allowance shall be taken to include section 165A and any provision which relates to the administration of both the benefit in question and other benefits.'

(3) Regulations 6(2)(c), 25 and 36 of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (onset of occupational deafness and time for claiming in respect of occupational deafness or occupational asthma), and any former regulations which they directly or indirectly re-enact with or without amendment, shall be taken to be, and always to have been validly made."

10. It was as a result of the coming into force on 13 July 1990 of those provisions of paragraph 4 of schedule 6 the 1990 Act that the adjudication officer on 17 September 1990 gave the review decision quoted in paragraph 2 above based on "relevant change of circumstances" and stating that that change, "was that Schedule 6, paragraph 4(3) of the Social Security Act 1990 retrospectively restored regulations 25 and 36." The reference to "change of circumstances" derives from section 104(1)(b) of the Social Security Act 1975 which, so far as is relevant, provides as follows:

"**Review of decisions**

104. (1) any decision under this Act of an adjudication officer, a social security appeal tribunal or a Commissioner may be reviewed at any time by an adjudication officer... if-

(a) .....

(b) there has been any relevant change of circumstances since the decision was given;"

It is common ground that there was no possible ground of review other than "relevant change of circumstances".

11. At the hearing before me, Mr. Drabble contended that "relevant change of circumstances "was not appropriate to the enactment of paragraph 4 of Schedule 6 to the Social Security Act 1990 and in particular was not appropriate to the case of the present claimant who had, by the combined decisions of the Court of Appeal and the social security appeal tribunal, an actual award of disablement benefit for occupational deafness. Mr. Drabble referred to the decision of the Court of Appeal in *Eyre v. Wynn-Mackenzie* [1896] 1 Ch. 135 (see below). Mr. Butt submitted, however that there was a proper ground for review and that the adjudication officer was correct in revising on review, so as to make disablement benefit no longer payable to the claimant. He relied on reported Commissioner's decisions and in particular on paragraph 10 of R(G) 3/58, (a decision of a tribunal of Commissioners, see below).

12. The first part of Mr. Drabble's argument was directed to this particular claimant. He contended that this claimant had the benefit of an award under the combined decisions of the Court of Appeal and of the social security appeal tribunal

and that therefore the question was in his case *res judicata*. There was Mr. Drabble said, nothing in paragraph 4 of Schedule 6 to the Social Security Act 1990 that constituted any relevant change of circumstances affecting that award. He drew attention to the decision of the Court of Appeal in the *Eyre* case (cited in para. 11 above). In that case an application was made to the Court of Appeal for an extension of time for asking for leave to appeal from the decision of the High Court that a solicitor was not entitled to charge his profit costs. The extension was asked for because section 3 of the Mortgagees Legal Costs Act 1895 (enacted since that High Court decision) had provided that such costs could be charged by a solicitor mortgagee. Moreover, section 3(2) provided. "This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act.".

13. In dismissing the application, Lindley LJ said (at p. 137):

> "If this application is to be regarded as an appeal on the merits, it is impossible for us to say that the judgment was wrong as the law stood at the time when it was given [i.e. before the passing of the 1895 Act]. It is obvious that the Act was not intended to interfere with judgments which had already been given by the Court. If we give leave to appeal in this case, we should be re-opening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that."

14. Mr. Drabble contended that the same general rule, which he derived from that judgment, applied here. Although paragraph 4(3) of schedule 6 to the Social Security Act 1990 was avowedly retrospective in terms, it could not, Mr. Drabble submitted, affect the validity of a decision already given by the Court of Appeal before the 1990 Act came into force. However, I do not consider that the *Eyre* case is *in pari materia* with the present case. That case was concerned with the whether or not there should be a grant of leave to appeal to the Court of Appeal, out of time. Here I am concerned with a statutory power of review in section 104(1) of the Social Security Act 1975. It is of course clear that that power of review can be used in appropriate cases to take away, or diminish, the benefit of an award, adjudication or decision, which was otherwise *res judicata*. In paragraph 10 of the decision of the tribunal of Commissioners in R(G) 3/58, it was said:

> "We are of the opinion that if [a particular social security regulation], was retrospective in its operation, the coming into force of that regulation would be a 'relevant change of circumstances since the decision was given' . . ."

That ruling is binding on me and I reject Mr. Drabble's argument, as related to this particular claimant, based on the *Eyre* decision.

15. However, Mr. Drabble also put before me a separate and broader argument, based in effect on the way in which paragraph 4(3) of Schedule 6 to the Social Security Act 1990 is worded. He conceded that a legislative provision even retrospective in nature, which clearly took away a claimant's right to social security benefit would constitute a "relevant change of circumstances", allowing a review. However, Mr. Drabble contended that paragraph 4(3) of Schedule 6 to the 1990 Act was not in that category. He submitted that all that paragraph 4 (3) did was to cure the *ultra vires* of regulation 25 of the Prescribed Diseases Regulations 1985, thus reversing the ruling to that effect of the Court of Appeal in the *McKiernon* case. He

pointed to the words in paragraph 4 of Schedule 6, "regulation ... 25 ... shall be taken to be, and always to have been, **validly made**."

16. I consider that that contention is correct. Paragraph 4(3) of Schedule 6 to the 1990 Act makes no provision as to the ceasing of continuing entitlement to benefit. It merely restores the validity of regulation 25 as a whole and in particular regulation 25(2) (the absolute five year limit). That means that all cases are to be governed by regulation 25 and its absolute five year limit whenever the claim was made and whenever the period of five years was running, thus achieving a degree of retrospection. But there is nothing in paragraph 4(3) to affect cases where there has already been a decision that a claim is timeous by reason of an adjudication, correct at the date it was made. There will have been a number of adjudications in the period since the *McKiernon* decision was given by the Court of Appeal on 26 October 1989 and the coming into force on 13 July 1990 of paragraph 4(3) of Schedule 6 to the 1990 Act, based on an extension of the five years period for "good cause". Those adjudications were correct when made and paragraph 4(3) of Schedule 6 to the 1990 Act does not constitute in those cases any relevant change of circumstances. Such an adjudication is to the effect that a claim was **in time** when made. It was a once and for all decision, which was then correct. The **claim** is not subsequently invalidated by paragraph 4 of Schedule 6 to the 1990 Act. Regulation 25 (2) states, "disablement benefit ... shall not be paid in pursuance of a claim in respect of occupational deafness which is made later than 5 years ..." etc. That must be read in the light of the Court of Appeal's decision in *McKiernon* i.e. a requirement of "good cause" is super-added, at least until the enactment of the 1990 Act. Even though payment of benefit is a continuing matter, the validity of the claim can and must be judged only once.

17. In construing the application of the phrase "relevant change of circumstances" in section 104(1)(b) of the Social Security Act 1975 to the provisions of paragraph 4(3) of Schedule 6 to the Social Security Act 1990, I have borne in mind the statement of principle enunciated in paragraph 16 of R(I) 1/71, in which the then Chief Commissioner said:

> "I think that this case illustrates how important it is that at all levels the fundamental difference between a decision on a claim and a decision on an application for a review and the nature of the grounds for review should be understood. The difference depends on a simple principle. A claimant must in general prove his title to a benefit. Once he has done so and has been awarded, and perhaps paid, the benefit, he can fairly insist that those who contend that the award should be cancelled or varied on review must show that there are valid grounds for review."

18. In my judgment, in the present case also, that fundamental difference must be born in mind. The claimant in this case has proved his title to disablement benefit for occupational deafness by establishing "good cause" in accordance with the law as laid down by the Court of Appeal. For that entitlement then to be removed, it must be shown by the adjudication officer that there are valid grounds for review and revision. I have already indicated above that I do not consider that the adjudication officer has discharged that burden in the present case.

19. Lastly, I should add that I have proceeded throughout this decision on the assumption that, were it not for the fact that the claimant had already established by a favourable adjudication that his claim was timeous, he would not now be able to

assert the claim to be in time, because of paragraph 4(3) of Schedule 6 to the Social Security Act 1990 which, on one construction at least, would re-impose the absolute five year time limit in regulation 25(2) of the Prescribed Diseases Regulations, without any exception for "good cause" However, I understand that a Commissioner's decision to that effect (on file CI/532/1989 *Chatterton*) is to be the subject of appeal to the Court of Appeal. Moreover, I was also given to understand at the hearing before me on 27 March that the Divisional Court had also recently ruled on this subject in the case of *McIntyre.*

20. In those circumstances I consider it better if I express no opinion one way or the other on whether the construction adopted by the Commissioner in the *Chatterton* case is the correct one. I am aware that an alternative construction has been put forward by Mr. Drabble, namely that all that paragraph 4 (3) of Schedule 6 to the 1990 Act does is to take away the *ultra vires* of regulation 25(2) of the Prescribed Diseases Regulations but leaves in that regulation the requirement of "good cause", so far as concerns claims prior to the coming into force of the 1990 Act on 13 August 1990. He prays in aid the fact that paragraph 4 (2) of Schedule 6 to the 1990 Act is not retrospective. I consider it better if I express no opinion on that argument, bearing in mind that this is now a point which hopefully will in due course be the subject of a decision by Court of Appeal.

Date: 3 April 1992

(signed) Mr. M. J. Goodman
Commissioner

The Chief Adjudication Officer appealed to the Court of Appeal. The decision of the Court of Appeal follows.

DECISION OF THE COURT OF APPEAL

Mr. D. Ouseley QC and Mr. J. R. McManus (instructed by the Solicitor, Department of Social Security, London WC2) appeared on behalf of the Appellant.

Mr. R. Drabble (instructed by Messrs. Sinclair Taylor & Martin, London W10) appeared on behalf of the Respondent.

LORD JUSTICE DILLON: This is an appeal by the Chief Adjudication Officer against a decision of a social security Commissioner Mr. Goodman, made on 3 April 1992. It concerns the Mr. McKiernon who was involved in the decision of this court on 26 October 1989, to which I referred in my judgment, this morning, on the appeal of Mr. Chatterton.

The question that arises involves considering the effect of the provisions of the Social Security Act 1990, to which I referred in the *Chatterton* judgment, on Mr. McKiernon's case, in the light of the subsequent development of that case after the decision of this court.

Mr. McKiernon was complaining, in his proceedings, that he suffered occupational deafness and he sought disablement benefit under Chapter V in Part II of the Social Security Act of 1975. The question was, as in Mr. Chatterton's case, whether he had made his claim within the prescribed time limit under regulation 25(2) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985. If that regulation was taken standing on its own, he had not, because he made his application out of time. His claim was only made on 15 July 1986, more than five years after his employment came to an end. But in the first *McKiernon* appeal to this court, decided on 26 October 1989, he succeeded in establishing that regulation 25 was invalid for the reasons to which I referred in my judgment in the *Chatterton* case. Therefore the position was that the case was remitted to be reconsidered in the lower court to determine whether he had good cause for the delay in making his application. That was followed by a confirmation by the adjudicating medical authority in May of 1990 that he was suffering from the appropriate disease and, on 5 July 1990, the social security appeal tribunal reviewed, in the light of the Court of Appeal decision, the appeal tribunal's own original decision disallowing Mr. McKiernon's claim for benefit. It determined that had good cause for the delay and benefit was awarded to him backdated to 5 October 1983.

Then, on 13 July 1990, paragraph 4(3) of Schedule 6 of the Social Security Act 1990 came into force and the effect of that was to validate regulation 25, as originally drafted, with retrospective effect. I have already set out the wording in my judgment on Mr. Chatterton's appeal. Following that, an adjudication officer, on 17 September 1990, reviewed the decision of the appeal tribunal of 5 July and, in the light of the retrospective validation of regulation 25, he disallowed Mr. McKiernon's claim to benefit.

Mr. McKiernon appealed to the social security appeal tribunal, but his appeal was dismissed by that tribunal. However, leave was given to him to appeal to a social security Commissioner and the Commissioner allowed his appeal by a decision of 3 April 1992, which is the decision against which the present appeal is brought.

The basis on which the Commissioner allowed the appeal was that he accepted an argument put before him by Mr. Drabble based on the wording of paragraph 4(3) of Schedule 6 to the 1990 Act. Mr. Drabble conceded that a legislative provision even retrospective in nature, which clearly took away a claimant's right to social security benefit, would constitute a relevant change of circumstances allowing review. However, Mr. Drabble contended that paragraph 4(3) of Schedule 6 to the 1990 Act was not in that category. He submitted that all that paragraph 4(3) did was to cure the *ultra vires* of regulation 25, thus reversing the ruling of the Court of Appeal to that effect in the *McKiernon* case. From that, the Commissioner, Mr. Goodman, concluded as follows in paragraph 16:

> "I consider that that contention is correct paragraph 4(3) of Schedule 6 ... makes no provision as to the ceasing of continuing entitlement to benefit. It merely restores the validity of regulation 25 as a whole and in particular regulation 25(2) (the absolute five year limit). That means that all cases are to be governed by regulation 25 and its absolute five year limit whenever the claim was made and whenever the period of five years was running, thus achieving a degree of retrospection. But there is nothing in paragraph 4(3) to affect cases where there has already been a decision that a claim is timeous by reason of an adjudication, correct at the date it was made."

That is, of course, not the adjudication by the Court of Appeal, but the subsequent adjudication by the appeal tribunal, having considered the facts and held that Mr. McKiernon had good cause for not making his application earlier. The Commissioner ended that paragraph:

> "Even though payment of benefit is a continuing matter, the validity of the claim can and must be judged only once."

I think the *gravamen* therefore, of his decision is that if the claim is validly decided in accordance with the law as it was on that date, to be timeous and valid, then a subsequent retrospective change of the law does not invalidate that decision.

In what I have set out, I have referred to the phrase "relevant change of circumstances". That is the key phrase in section 104 of the Social Security Act 1975 as in force at the relevant times for Mr. McKiernon's case. We were told that it has now been replaced by section 25 of the Social Security Administration Act 1992.

Both sides proceeded on the basis that section 104 was the governing section. It provides by subsection (1):

> "Any decision under this Act of an adjudication officer, a social security appeal tribunal or a Commissioner may be reviewed at any time by an adjudication officer or, on a reference by an adjudication officer, by a social security appeal tribunal, if-
>
> (a) the officer or tribunal is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or
>
> (b) there has been any relevant change of circumstances since the decision was given ..."

There are two other alternatives (bb) and (c), but they do not matter.

Subsection (5) of section 104 provides that regulations may prescribe what are, or are not, relevant changes of circumstances for the purposes of subsection 1 (b), but no such regulations have as yet been made. Subsection (1A) provides that:

> "Any decision of an adjudication officer may be reviewed, upon the ground that it was erroneous in point of law, by an adjudication officer or, on a reference from an adjudication officer, by a social security appeal tribunal."

It is stressed to us that (1A) only authorises an adjudication officer to review on grounds of error of law a decision of an adjudication officer, not a decision of a social security appeal tribunal or a Commissioner, and the decision in the present case is, of course, that of an appeal tribunal.

It is somewhat difficult to feel around the distinctions drawn in these provisions of section 104 so far as errors of law are concerned. It seems plain, however, that the fact that an appellate court reverses a decision of a Commissioner and declares the law to be other than the Commissioner and perhaps the Department had supposed, does not warrant any interference under (1A), because the appellate court is merely declaring the law as it has always been. It is not, therefore, a change of circumstances.

But we have a decision of this court in the case of *Browning v. National Insurance Commissioner* [1984] 3 CMLR 192, which gives a very wide meaning to the phrase "relevant change of circumstances", which is the phrase used in the section 104. The position there involved European law and it appears that member states were required, under certain regulations, to declare whether certain of its laws conferred a minimum benefit "under Article 50". The United Kingdom had made various declarations and a situation had arisen where there was a question whether the declaration was correctly worded in accordance with European law. There was, therefore, an application to the European Court for a preliminary ruling of that court. The question asked was:

> "Is there a minimum benefit within the meaning of Article 50 of Council Regulation (EEC) 1408/71 where the legislation of a memberstate makes ..."

Certain provisions which I need not read. The answer to that was that there was, in such circumstances, no minimum benefit.

In those circumstances there was a question whether there had been a relevant change of circumstances. In giving his judgment in this court, Lord Justice Griffiths said:

> "This appeal turns upon the scope of the words 'relevant change of circumstances' in section 104(1)(b) of the Social Security Act of 1975."

And then a little later:

> "The words 'relevant change of circumstances' are very wide words. In my judgment, a change in the declaration under Article 5 falls within those words. It is a change which, by virtue of the ruling of the European court, binds the United Kingdom Government in the way in which it applies its Social Security legislation. If this [is] not an actual change in the law, it has the same effect as a change in the law, because it directly affects the entitlement of those who are applying for pensions."

That is an interpretation of the phrase which is binding on us and it seems to me that, whereas a change by mere judicial decision could well be said to be not within (1) (b), a change by statute definitely effects a change and is not merely declaratory of what the position previously was.

One has, of course, to face the fact that this was a retrospective change. But looking at the position on the date on which the appeal tribunal made its decision; that is to say 5 July, the law which the tribunal had to apply was that which had been laid down by this court. But on 13 July and thereafter the law was different as a result of paragraph 4(3) coming into force. Therefore there had been a change of circumstances. The change was retrospective and so there is the argument that that means that there had not been a change, because the effect of it, when it had effect, took it back behind 5 July to the date in 1985 when regulations 25 had originally been introduced. But it seems to me that that is altogether too much of a magician's sleight of hand to be acceptable in the interpretation of section 104.

I would hold that there was indeed a change of relevant circumstances and that therefore the adjudication officer was entitled to review the decision of the appeal tribunal. The change is not excluded on the ground on which the commissioner relied, that the decision was one to be made once and for all. It was to be made afresh on the review because that was what regulation 25 required in carrying through the review. The adjudication officer and the appeal tribunal were bound by the wording of regulation 25, that disablement benefit shall not be paid in pursuance of a claim in respect of occupational deafness made after the expiration of the five year period, and that must catch the sums which had not, at the time of the review, been paid to Mr. McKiernon under the decision of the appeal tribunal.

I would allow this appeal.

LORD JUSTICE STAUGHTON: Social security benefits take the form of continuing periodic payments or, at any rate, some of them do. So if it is decided that a claimant is entitled to benefit, he will, in the ordinary way, continue to receive it until the law provides that it shall cease. But circumstances may change. Either the facts may change so that possibly the claimant no longer suffers from the disability that he once had, or the law may change. Parliament may enact that benefit is no longer to be payable for the disability in question.

Sections 98 to 103 of the Social Security Act 1975 made provision for questions to be decided, first, by an insurance officer, then on appeal by a local appeal tribunal and then again on appeal by a Commissioner. The titles of the first two were later altered to adjudication officer and social security appeal tribunal.

I suppose that it was felt that once that machinery had operated and been exhausted, either because there were no appeals or the appeals had been determined, there might be no power to stop paying benefit whatever change in circumstances might occur. Hence section 104 was enacted. Subsection (1)(a) as subsequently amended provided:

> "(1) Any decision under this Act of an adjudication officer, a social security appeal tribunal or a Commissioner may be reviewed at any time by an adjudication officer or, on a reference by an adjudication officer, by a social security appeal tribunal, if -
>
> (a) the officer or tribunal is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact;
>
> (b) there has been any relevant change of circumstances since the decision was given...."

There was also introduced, at some stage, section (1A):

> "Any decision of an adjudication officer may be reviewed, upon the ground that it was erroneous in point of law, by an adjudication officer or, on a reference from an adjudication officer, by a social security appeal tribunal."

Mr. Drabble accepts that a relevant change of circumstances in subsection (1)(b) may include a change of the law. That, in my opinion, must be right. There is a contrast between (1)(a), which talks of ignorance of or mistake as to some material fact, and (1)(b), any relevant change of circumstances. But Mr. Drabble submits that the change of law must be such that, although the decision to pay benefit was right when made and it still remains the case that the decision was right when made, the payment of benefit later becomes wrong. He contrasts that with a change in the law which shows that the initial decision to pay benefit was wrong from the start. That, he submits, is not a relevant change of circumstances within subsection (1)(b). For example, a new enactment that benefit shall no longer be payable for industrial deafness would be a relevant change of circumstances. On the other hand, a new

enactment that benefit for industrial deafness is not and never has been payable, would not.

To support his argument he refers to the occasions when a higher appellate tribunal declares the law to be different than it was previously thought to be. That, he submits, is not a relevant change of circumstances affecting cases which had previously been decided and in which there has either been no appeal or all avenues of appeal were exhausted. I am inclined to accept the submission that in such a case there is no relevant change in circumstances; merely a higher court has taken a different view of the law to that previously accepted. But I see no reason why the enactment by Parliament in a statute of a retrospective change in the law should not be a relevant change of circumstances.

There is a *dictum* to that effect in an old case concerning death grant in 1958, with the reference R(G) 3/58. There a widow had failed to obtain payment of death grant within time, and under the regulations her right to payment was extinguished. Later the regulations were amended so that the right to death grant was no longer extinguished by lapse of time. She claimed that the new regulations were retrospective and they were also a relevant change in circumstances under the regulations enforced at that time, which apparently used the same wording. In the event, a tribunal of Commissioners held that the new regulations were not retrospective, so that what follows was not essential to the decision. But they said in paragraph 10:

> "We are of the opinion that if regulation 3 was retrospective in its operation, the coming into force of that regulation would be a 'relevant change of circumstances since the decision was given' within the meaning of regulation 18(1)(b) of the National Insurance (Determination of Claims and Questions) Regulations, 1948 and would entitle the claimant to have that decision reviewed."

Since then, the wording that was apparently in the regulations in those days has found its way into the Act of Parliament in section 104 (1) of the Social Security Act 1975. It may perhaps be a little far-fetched to say that Parliament is deemed to have been aware of the view that was taken of the meaning of those words when the same language was used in the 1975 Act. However that may be, in my opinion the words comprehend the kind of change of circumstances that has occurred in this case, and I too would allow this appeal.

LORD JUSTICE WAITE: I agree.

Order: Appeal allowed; order of Commissioner set aside; decision of social security appeal tribunal restored; no order as to costs.