Decisions of the Commissioner
Income support

March 2002

R(IS) 22/93

(Foster v. Chief Adjudication Officer and Anor.)

Mr. R. A. Sanders **CIS/372/1990**
5.12.90

HL (Lord Templeman, Lord Bridge of Harwich, Lord Ackner, Lord Browne-Wilkinson and Lord Slynn of Hadley)

28.9.93

Applicable amount - severe disability premium - *vires* of paragraph 13 (2)(a)(ii) and (iii) of Schedule 2 to the Income Support (General) Regulations 1987 made under section 22(4) of the Social Security Act 1986

The appellant was a young single woman who was in receipt of attendance allowance, mobility allowance and severe disablement allowance. She was also entitled to income support. The issue was whether in the relevant circumstances and in accordance with the regulations in force since 9 October 1989 the appellant was entitled to the severe disability premium as part of her income support. On appeal to the Commissioner it was held that so much of paragraph 13(2)(a) as operated to defeat the appellant's claim to that premium was *ultra vires* and was severable from the remainder of the sub-paragraph which established her entitlement. On appeal by the Chief Adjudication Officer and the Secretary of State to the Court of Appeal (Lord Donaldson of Lymington MR, Beldam and Nolan LJJ) it was *held*: (1) unanimously, that the Commissioner had no jurisdiction to question the *vires* of a regulation made by the Secretary of State, so that the appeal fell strictly to be allowed on that ground alone, but that it was possible and appropriate for the court to consider the substantive issue by the device of allowing the appellant to invoke its original jurisdiction to entertain an application for judicial review; and (2) by a majority (Beldam and Nolan LJJ) that the provision was *intra vires*, Lord Donaldson of Lymington MR holding that the provision was *ultra vires* but that it was not severable from the rest of the regulation (*Chief Adjudication Officer and Secretary of State for Social Security v. Foster* [1992] QB 31).

The appellant appealed to the House of Lords with the leave of that House.

Held, dismissing the appeal, that:

1. the Commissioners have undoubted jurisdiction to determine any challenge to the *vires* of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in law;

2. as a matter of construction the appellant's contention that the only conditions of eligibility for the severe disability premium which the Secretary of State was empowered to impose by section 22(4) of the Social Security Act 1986 must relate directly to the claimant's disablement was untenable, a conclusion which was reinforced by an examination of the parliamentary material in accordance with the principle in *Pepper v. Hart* [1992] 3 WLR 1032;

3. that the amendment to regulation 3(2) which came into force on 9 October 1989 was not to be struck down on the ground of irrationality.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant is a severely disabled single woman who lives with her parents. The extent of her disabilities is shown by the fact that she receives a severe disablement allowance, an attendance allowance and a mobility allowance. She has been in receipt of income support since 11 April 1988 and her "weekly applicable amount" in accordance with regulation 17 of the Income Support (General) Regulations 1987 has throughout included an amount payable by way of disability premium pursuant to paragraph 11 of Schedule 2 to those regulations. Paragraph 13 of that Schedule makes provision for what is called a **severe** disability premium which is payable at a higher rate than the premium payable pursuant to paragraph 11. By a decision issued in October 1989 an adjudication officer decided that the claimant was not entitled to the paragraph 13 premium because she did not satisfy all of the conditions of sub-paragraph (2)(a)(i) to (iii) of paragraph 13. A social security appeal tribunal confirmed the adjudication officer's decision. I held an oral hearing of the claimant's appeal against the tribunal's decision. She was represented at that hearing by Mr. R. Drabble of Counsel instructed by Mr. N. Warren of the Birkenhead Resource Unit. Mr. T. Prosser of Counsel instructed by the Solicitor to the Departments of Health and Social Security represented the adjudication officer.

2. Section 21 of the Social Security Act 1986 makes provision for payment to a person who is entitled to income support of what is called "the applicable amount". Section 22 of that Act provides, so far as relevant, as follows:

> "22. -
>
> (1) The applicable amount shall be such amount or the aggregate of such amounts as may be prescribed.
>
> (2) The power to prescribe applicable amounts conferred by subsection (1) above includes power to prescribe nil as an applicable amount.
>
> (3) In relation to income support the applicable amount for a

severely disabled person shall include an amount in respect of his being a severely disabled person.

(4) Regulations may specify circumstances in which persons are to be treated as being or as not being severely disabled.

(5)-(9) [not relevant.]"

Regulation 17 of the Income Support (General) Regulations provides that, subject to other provisions which are not relevant to this case, a claimant's weekly applicable amount are to be the aggregate of various amounts that are appropriate in his case. The amounts are to be found in various Schedules to the regulations. So far as relevant to this case, there is a basic amount payable in accordance with Part I of Schedule 2. And Part III of that Schedule provides for payment of certain additional sums called "premiums". The conditions on which a "disability premium" is to be paid are in paragraphs 11 and 12. That is the premium which this claimant already gets. The higher rate "severe disability premium" which she has asked for but does not get is dealt with in paragraph 13 which provides, so far as relevant, as follows:

"13. -

(1) The condition is that the claimant is a severely disabled person.

(2) For the purposes of sub-paragraph (1), a claimant shall be treated as being a severely disabled person if, and only if

(a) in the case of a single claimant or a lone parent-

(i) he is in receipt of attendance allowance, and

(ii) subject to sub-paragraph (3), he has no non-dependants aged 18 or over residing with him, and

(iii) an invalid care allowance under section 37 of the Social Security Act is not in payment to anyone in respect of caring for him;

(b) not relevant to this case.

(3) For the purpose of sub-paragraph (2)(a)(ii) and (2)(b)(iii) no account shall be taken of-

(a) a person receiving attendance allowance; or

(b) a person to whom regulation 3(3) (non-dependants) applies; or

(c) subject to sub-paragraph (4), a person who joins

the claimant's household for the first time in order to care for the claimant or his partner and immediately before so joining the claimant or his partner was treated as a severely disabled person.

(3A) [not relevant to this case.]

(4) [not relevant to this case.]"

That is not the end of the trail because "non-dependant" in sub-paragraph (2)(a)(ii) is the subject of a complicated definition in regulation 3 which provides that:

"3.-

(1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2) applies, who normally resides with a claimant.

(2) This paragraph applies to-

(a) any member of the claimant's family;

(b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (membership of the same household);

(c) a person who jointly occupies the claimant's dwelling and either is a co-owner of that dwelling with the claimant or his partner (whether or not there are other co-owners) or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling;

(d) any person who is liable to make payments in respect of his occupation of the dwelling to the claimant or the claimant's partner;

(e) a person who lives with the claimant in order to care for him or a partner of his and who is engaged by a charitable or voluntary body (other than a public or local authority) which makes a charge to the claimant or his partner for the services provided by that person.

(3) [revoked.]

(4) For the purposes of this regulation a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area but not if each person is separately liable to make payments in respect of his occupation of the dwelling to the landlord.

(5) In this regulation "communal area" means any area (other than rooms) of common access (including halls and

> passageways) and rooms of common use in sheltered accommodation."

Now all the words after "the claimant's dwelling" in regulation 3(2)(c) were added by amendment as from 9 October 1989. I deal with the meaning and effect of those words in three other cases heard immediately following this one. So far as this present case is concerned it is not in issue (since my decision in CIS/180/1989 dealing with the meaning of the provision before the amending words were added to regulation 3(2)(c)) that the claimant satisfied the conditions for payment of a severe disability premium from 11 April 1988 (when the income support scheme replaced the former supplementary benefit scheme) until 8 October 1989 when the amendment to regulation 3 to which I have just referred took effect. After that date however it is accepted that whatever might be the meaning and effect of the provision as amended this claimant does not satisfy it. However, what Mr. Drabble submits on her behalf is that sub-paragraphs (2)(a)(ii) and (iii) of paragraph 13 to Schedule 2 are *ultra vires*. If he is right about that it is accepted that the claimant is entitled to the severe disablement premium not only down to 8 October 1989 but beyond.

3. The *ultra vires* point arises in this way. As I have indicated above section 22 of the 1986 Act provides that "... the applicable amount for a severely disabled person **shall** include an amount in respect of his being severely disabled" (my emphasis). And then subsection (4) empowers the Secretary of State to make regulations which "specify circumstances in which persons are to be treated as being or as not being severely disabled". So does subsection (4) allow the Secretary of State to impose whatever terms and conditions he chooses or does it empower him to do no more than define "severely disabled person" (which is otherwise undefined) by reference to the extent of the person's disability? Paragraph 13(2)(a) (read with para. 13(1)) of Schedule 2 to the 1987 Regulations in effect requires a single claimant or lone parent to satisfy three conditions before he can get the severe disability premium. Sub-paragraph (2)(a)(i) (receipt of attendance allowance) clearly goes to the matter of disability. A person is of course entitled to an attendance allowance only if he is so disabled as to satisfy the medical conditions imposed by section 35 of the Social Security Act 1975. On any view sub-paragraph (2)(a)(i) must be within the power contained in section 22(4) of the 1986 Act. But sub-paragraph (2)(a)(ii) has nothing at all to do with disability; it has to do with whether a particular kind of person (defined by the complicated provisions set out above relating to non-dependants in regulation 3 of the 1987 Regulations) is or is not residing with the claimant. And sub-paragraph (2)(a)(iii) is a kind of overlapping benefit provision to the effect that if someone else is in receipt of an invalid care allowance in respect of caring for the claimant the claimant does not get his severe disablement premium.

4. In my view section 22(4) does not empower the Secretary of State to do more than determine by reference to the extent of a person's disability whether he is or is not to be treated as a severely disabled person. As I have said, section 22(3) (in contrast to section 22(1) under which conditions relative to premiums payable to other descriptions of persons are imposed) contemplates indeed requires that, in case of a severely disabled person, the applicable amount **shall** include an amount in respect of his being a severely disabled person. That requirement would be defeated if the Secretary of State could legitimately impose a condition which deprived a person who was e.g. in receipt of an attendance allowance (who surely must be a severely disabled person) of the premium because he did not e.g. fulfil a residence condition; likewise, if a person in receipt of a severe disablement allowance under section 36 of the 1975 Act (entitlement to which depends on an assessment of at least 80% disablement) were to be deprived of his severe disability premium because a person living in the same household was in

receipt of unemployment benefit. In both cases an undoubtedly severely disabled person does not get what section 22(3) says he should have. In my view section 22(4) does not empower the Secretary of State to withhold the premium from a severely disabled person by requiring that person to satisfy extraneous conditions.

5. It is interesting to note that in relation to other benefits e.g. mobility allowance under section 37A of the Social Security Act 1975, there are similar provisions to those in section 22 of the 1986 Act in relation to a person who suffers from "physical disablement such that he is either unable to walk or virtually unable to do so". There, section 37A(1) entitles such a person to a mobility allowance and subsection (2) empowers the Secretary of State to "prescribe the circumstances in which a person is or is not to be treated ... as suffering from such physical disablement ...". But the significant difference between section 37A of the 1975 Act and section 22 of the 1986 Act is that subsection (1) of the former contains the words " ... a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled ...". So the Secretary of State is expressly empowered to prescribe conditions as to other matters thus making it plain that he could not have imposed conditions as to those other matters pursuant to his power to prescribe "the circumstances in which a person is or is not to be treated ... as suffering from such physical disablement ...". It seems to me that if it had been intended that the Secretary of State should, in section 22 of the 1986 Act, have power to impose conditions relating to matters other than the extent of disability there would have been a similar or indeed identical formulation to that used in section 37A of the 1975 Act. In my view a power to specify circumstances in which persons are to be treated as being or as not being severely disabled is significantly different from a power to prescribe conditions to be satisfied by a severely disabled person before he gets his premium. And it is to be noted, in relation to mobility allowance, that the **conditions** which may be prescribed pursuant to section 37A(1) of the 1975 Act are carefully limited as to their subject matter. I find it difficult to believe that it was intended to give the Secretary of State a completely free hand when exercising the power given to him in section 22(4) of the 1986 Act.

6. Regulation 17 of and Schedule 2 to the 1987 Regulations provide for premiums of different amounts to be paid to different sorts of persons e.g. lone parents, pensioners and non **severely** disabled persons if they satisfy various conditions. Mr. Prosser submitted that those provisions were all prescribed pursuant to the powers in section 22 of the Act. Certainly there seems to be nothing relevant in the extensive regulation making powers in section 20; the power in question cannot be in section 22(1) because, if that provision enabled the Secretary of State to impose conditions generally, the many other specific regulation making powers in section 20 would not have been necessary. It is not entirely clear to me what powers there are to prescribe the conditions on which for example lone parent and pensioner premiums are to be paid. Mr. Prosser said they were in section 22(1). Whether that is so or not, it is the case as I have said that special provision has been made, in section 22(3) and (4) in relation to **severely** disabled persons; they **shall** have a premium simply by reason of their being severely disabled. There would have been no need to make special provision for such persons unless it had been intended that they **should** have their premium subject only to determining the necessary degree of disability. What has been done for lone parents and pensioners and non **severely** disabled persons could presumably have been done under section 22 (1).

7. If I had any doubt as to the scope of the power in question I would have resolved it by choosing the more restrictive of the possible construction in accordance with what Lord Donaldson MR said in *McKiernon v. Secretary of State for Social Security* (26 October

1989, at page 10 of the transcript). However, for the reasons to which I have referred, I am satisfied that section 22(4) of the 1986 Act does not empower the Secretary of State to impose conditions in effect removing entitlement to a severe disability premium from a severely disabled person because a non-dependant resides with him or because someone else is in receipt of an invalid care allowance in respect of caring for him. Accordingly, paragraph 13(2)(a)(ii) and (iii) which purport to impose such conditions are invalid as being outside the power contained in section 22(4) of the 1986 Act. I should perhaps say that I have considered whether there is a stronger case for the validity of paragraph 13(2)(a)(iii) because in a sense that provision may be said to have something to do with the extent of a person's disability, his need to be cared for. But I think that the condition required to be satisfied by paragraph 13(2)(a)(iii) is not to be read in that way because there is no entitlement to an invalid care allowance unless the person cared for is in receipt of attendance allowance: section 37(2) of the Social Security Act 1975. Such a person is quite plainly a severely disabled person and it seems to follow therefore that paragraph 13(2)(a)(iii) is to do with "overlapping" benefits and not with the extent of disablement.

8. This appeal succeeds. The claimant is entitled to her severe disablement premium notwithstanding that she does not satisfy the conditions in question.

Date: 5 December 1990 (signed) Mr. R. A. Sanders
Commissioner

The Chief Adjudication Officer and Secretary of State appealed to the Court of Appeal which allowed the appeal. The claimant appealed to the House of Lords. The decision of the House of Lords follows.

DECISION OF THE HOUSE OF LORDS

Mr. R. Drabble and Mr. M. Rowland (instructed by Messrs. Hodge Jones and Allen, London) appeared on behalf of the Appellant.

Mr. M. Beloff QC and Ms. C. Katkowski (instructed by the Solicitor to the Department of Social Security) appeared on behalf of the Respondents.

LORD TEMPLEMAN:

My Lords,

For the reasons given by my noble and learned friend Lord Bridge of Harwich I would dismiss the appeal.

LORD BRIDGE OF HARWICH:

My Lords,

The appellant is a young single woman who is severely disabled and who lives at home with her parents. The extent of her disability is such that she is entitled to and does receive under the Social Security Act 1975, as amended by subsequent legislation,

attendance allowance, severe disablement allowance and mobility allowance. These are non-contributory benefits which are not means-tested. Under the Social Security Act 1986 and regulations made thereunder she is also entitled to the income related benefit known as income support. This is a form of social security payment designed to provide or supplement the income of those in need so as to ensure that it does not fall below a certain minimum level. The minimum level is known as "the applicable amount". The applicable amount in relation to any individual varies according to the circumstances of that individual as provided by Part IV of the Income Support (General) Regulations 1987 (SI 1987 No. 1967) ("the 1987 Regulations"). In particular the applicable amount otherwise determined is to be enhanced by the amount of any "premium" to which the individual is entitled under Part III of Schedule 2 to the 1987 Regulations. One of these is the severe disability premium, entitlement to which is prescribed by paragraph 13 of Schedule 2. The issue in this appeal is whether, in the relevant circumstances and in accordance with the regulations in force since 9 October 1989, the appellant is entitled to the severe disability premium as part of her income support. The adjudication officer held that she was not and the Birkenhead social security appeal tribunal affirmed his decision. On appeal to a social security Commissioner, it was held by Mr. Commissioner Sanders, that so much of paragraph 13(2)(a) as operated to defeat the appellant's claim to the severe disability premium was in excess of the Secretary of State's regulation making power and that this was severable from the remainder of the sub-paragraph which established her entitlement. He accordingly allowed her appeal. From this decision the Chief Adjudication Officer and the Secretary of State appealed to the Court of Appeal. The court (Lord Donaldson of Lymington MR, Beldam and Nolan LJJ) held first, unanimously, that the Commissioner had no jurisdiction to question the *vires* of a regulation made by the Secretary of State, so that the appeal fell strictly to be allowed on this ground alone. They went on to hold, however, that in the circumstances it was both possible and appropriate for the court to consider the substantive issue of the *vires* of the provision which the appellant sought to impugn by the device of allowing her to invoke the original jurisdiction of the Court of Appeal to entertain an application for judicial review. On the issue of *vires* the majority (Beldam and Nolan LJJ) held the relevant provision to be *intra vires,* Lord Donaldson MR held it to be *ultra vires*, but further held that it was not severable from the remainder of the regulation. In the result the appellant failed. The Court of Appeal's decision is reported at [1992] QB 31. The appellant now appeals from it by leave of your Lordships' House.

The jurisdiction of the Commissioners

The issue as to the Commissioners' jurisdiction is in one sense academic, since, if your Lordships were to affirm the Court of Appeal on this issue, it would still be necessary to go on, as the Court of Appeal did, to determine the issue of the *vires* of the provision under challenge and it is only if the appellant succeeds on this second issue that she can effectively succeed in the appeal. The jurisdiction issue, however, has far-reaching procedural implications for the future, it has been very fully argued and it is important that your Lordships should resolve it, the more so, perhaps, since the Court of Appeal's decision in the instant case runs counter to the practice of the social security Commissioners established by a long series of decisions, both by single Commissioners and by tribunals of Commissioners, holding that they had jurisdiction to decide and in fact deciding issues as to the *vires* of secondary legislation. Some of those decisions have been reviewed by the courts without any previous suggestion that issues of *vires* were beyond the jurisdiction of the Commissioners.

Part III of the Social Security Act 1975 is headed "Determination of Claims and Questions". It has been extensively amended by subsequent legislation and any reference in this opinion to the provisions of the Act will be to their form as in force at the material time. The *fasciculus* of sections 97-104 is headed "Adjudication officers, social security appeal tribunals and Commissioners". Section 97 provides that in the first instance an adjudication officer is to determine any claim for benefit and any question arising in connection with a claim for benefit except questions required by some other provision in Part III to be determined otherwise than by an adjudication officer. From the adjudication officer's decision the claimant has an appeal as of right to a social security appeal tribunal: section 100. From the decision of a social security appeal tribunal an appeal lies to a social security Commissioner on the ground that the decision of the tribunal was "erroneous in point of law:" section 101. The Commissioners, who are of comparable standing to Circuit Judges, normally sit singly but the Chief Commissioner may direct that an appeal involving a question of law of special difficulty be dealt with by a tribunal of three Commissioners. Provision for an appeal from a Commissioner's decision to the Court of Appeal is made by section 14 of the Social Security Act 1980. An appeal lies on a point of law, but only with the leave of the Commissioner or the Court of Appeal and the parties entitled to appeal include the Secretary of State.

This is only the barest outline of the statutory scheme for the adjudication of benefit claims. But it focuses immediately on the central question, which is whether a claimant otherwise entitled to some social security benefit which has been denied to him by the adjudication officer and the appeal tribunal in reliance on some provision in a regulation which the Secretary of State had no power to make is entitled to succeed on appeal to the Commissioner on the ground that the decision against him was "erroneous in point of law" or whether, as must follow if the Court of Appeal were right, before he invokes the statutory machinery by which alone his claim can be enforced, he must first proceed by way of an application for judicial review to have the offending provision quashed or declared invalid. It is common ground that the principle of *O'Reilly v. Mackman* [1983] 2 AC 237 has no application, since there can be no abuse of process by a party who seeks a remedy by the very process which statute requires him to pursue. It was further rightly accepted by Mr. Beloff before your Lordships that a decision giving effect to secondary legislation which is *ultra vires* is, indeed, in the ordinary meaning of the words "erroneous in point of law." The question then is whether, when that phrase is used in section 101 of the Act of 1975, there is something in the context in which it appears which requires by necessary implication that it be given a restricted meaning so as to exclude from its ambit any errors of law referable to a misuse by the Secretary of State of his regulation making power.

I shall seek to summarise, hoping that I do them justice, the several considerations relied on in the judgments of the Court of Appeal and in the arguments advanced for the respondents before your Lordships as giving rise to such an implied restriction and consider them in turn.

It is pointed out rightly, that, if the Commissioner can base his decision in any case on the invalidity of some provision in regulations made under the Act, it must follow that appeal tribunals and adjudication officers can do likewise. Adjudication officers may be, and no doubt normally are, civil servants without legal qualifications and it cannot have been intended by Parliament, it is said, that such relatively lowly officials should have power to question the validity of regulations made by the Secretary of State. Closely allied to this point is the point made that the Secretary of State is not a party to an appeal from the adjudication officer to the appeal tribunal and cannot, therefore, appear before it to defend the *vires* of any provision in regulations which is challenged or

himself appeal to the Commissioner from an adverse decision of an appeal tribunal. I think both these objections are theoretical rather than real. Under section 99(2) the adjudication officer to whom a claim or question is submitted may either decide it himself or refer it to an appeal tribunal and I should expect that whenever a claimant before an adjudication officer sought to mount a challenge to the *vires* of some provision in regulations, the adjudication officer, if he thought there might be any substance in the point, would refer it to an appeal tribunal. Moreover, there is a Chief Adjudication Officer whose duty it is under section 97(1C) to advise adjudication officers on the performance of their functions and I should expect him to give or to have given advice to this effect. Again, once such a challenge is before an appeal tribunal, the adjudication officer becomes a party to the proceedings and, on this or any other issue of law of whatever nature, there seems no reason why the arguments on which the Department wishes to rely in opposition to the claimant should not be addressed to the appeal tribunal and, if appropriate, to the Commissioner on appeal in the name of the adjudication officer; I presume this is what happens in practice.

Thus the reality, I believe, is that whenever there is a serious challenge to the validity of a provision in regulations which stands in the claimant's way, the issue, unless the Department accepts that the challenge is well made, will effectively be decided at the level of the Commissioner and from there either the claimant or the Secretary of State may seek leave to appeal to the Court of Appeal. Certainly we have not been told of any case where difficulty has arisen from a decision taken at a level below that of the Commissioner relating to a question of *vires*, although the Commissioners have consistently held ever since 1976 that they have jurisdiction to entertain such questions.

Next, reliance is placed on section 96(1) which provides so far as material, that:

> "... the Secretary of State may review any decision given by him on any question within section 93(1) above if-
>
> (a) new facts have been brought to his notice; or
>
> (b) he is satisfied that the decision-
>
> (i) was given in ignorance if some material fact;
>
> (ii) was based on a mistake as to some material fact; or
>
> (iii) was erroneous in point of law."

Questions which are to be determined by the Secretary of State under section 93(1) include questions governed by regulations. It is said that the use of the phrase "erroneous in point of law" in section 96 cannot possibly have been intended to give to the Secretary of State jurisdiction to decide whether he has himself exceeded the powers conferred upon him to make regulations. Hence it is argued that the same phrase when used in section 101 of the same Act must be given the same restricted meaning. With respect, 1 believe this point to be misconceived. Section 96 must be construed in the context of the fasciculus of sections 93-96 relating to the adjudication by the Secretary of State of the questions which he is required to determine under section 93. Section 94, so far as material, provides:

> "(1) A question of law arising in connection with the determination by the

> Secretary of State of any question within section 93(1) above may, if the Secretary of State thinks fit, be referred for decision to the High Court ...
>
> (3) Any person aggrieved by the decision of the Secretary of State on any question of law within subsection (1) above which is not referred in accordance with that subsection may appeal from that decision to the court."

The questions of law which, under this section, the Secretary of State may either refer to the High Court or determine himself, subject to an appeal to the High Court, must include any question which depends on the *vires* of a provision in regulations. It would be absurd that the Secretary of State confronted with such a question, should, instead of referring it to the High Court, require the party before him to institute separate proceedings by way of judicial review. Moreover, the power to review a previous decision under section 96(1)(b)(iii) as having been erroneous in point of law would clearly apply to a case when the Secretary of State had made one or more decisions on the basis that a certain regulation governed the question to be determined and in a later case the High Court, on a reference or appeal under section 94, had held that same regulation to be *ultra vires*. Accordingly, if the phrase "erroneous in point of law" is used in the same sense in section 101 as in section 96 it bears its ordinary unrestricted meaning.

It is said that, if the Commissioner were intended to have power to hold a provision in a regulation to be *ultra vires* and to determine whether or not it was severable, one would expect to find that he was also empowered to make a declaration to that effect, which he is not. This, again, I find quite unconvincing. The Commissioner has no power and no authority to decide anything but the issue which arises in the case before him, typically, as in this case, whether in particular circumstances a claimant is or is not entitled to the benefit claimed. If the success of the claim depends, as here, on whether a particular provision in a regulation is both *ultra vires* and severable, the Commissioner's decision of that question is merely incidental to his decision as to whether the claim should be upheld or rejected. If not appealed, his opinion on the question may be followed by other Commissioners, but it has *per se* no binding force in law. To my mind it would be very surprising if the Commissioners were empowered to make declarations of any kind and the absence of such a power does not, in my opinion, throw any light on the question presently in issue.

Lord Donaldson MR quoted in his judgment [1992] 1 QB 31, 48, from the headnote to a decision of a tribunal of Commissioners (R(SB) 15/89) where it is said:

> "the determination of whether a right to benefit exists and the quantification of benefit necessarily [imports] a duty for the statutory authorities (including the adjudication officer) to consider whether the regulation in question has a legal existence when that existence is challenged' but that 'it was not a proper function of the statutory adjudicating authorities to entertain arguments as to the 'reasonableness' of provisions in delegated legislation."

Lord Donaldson MR commented:

> "I fully accept that, under the further framework, if the Commissioners have this power, so has each of the many hundreds of relatively junior adjudication officers. I do not, however, understand the logic of the distinction between questions of 'existence' and questions of 'reasonableness.' One reason at least for setting aside subordinate

> legislation upon grounds of '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223) would be that Parliament never intended the regulation-making power to be exercised in that way. That is really indistinguishable from a question of 'existence' or '*vires'."*

It is, of course, correct that, if the Commissioners have jurisdiction to question the *vires* of secondary legislation, the scope of that jurisdiction must, at least theoretically, embrace a challenge on the ground of irrationality as well as illegality. But, in the case referred to, the full judgment of the tribunal of Commissioners shows that, in distinguishing between "legal existence" and "reasonableness", they were not making a point peculiar to their own jurisdiction, but were relying on authority which they interpreted as precluding any court or tribunal from condemning as irrational delegated legislation enacted under a statutory power which may only be exercised subject to parliamentary control by affirmative or negative resolution. The judgment cites a well known passage from the speech of Lord Scarman in *Reg. v. Secretary of State for the Environment, Ex parte Nottinghamshire County Council* [1986] AC 240, and a passage from the judgment of Lord Jauncey, as Lord Ordinary, in the Scottish case of *City of Edinburgh District Council v. Secretary of State for Scotland* [1985] SLT 551, 556. The latter case goes rather further than the former. It was concerned with an Order made under the Rating and Valuation (Amendment) Scotland Act 1984. Although the Order was debated in the House of Commons, a prayer to annul it was not moved. In an action for reduction of the Order the District Council attacked it on grounds of (1) illegality, (2) irrationality and (3) impropriety of procedure. The Secretary of State disputed that the last two grounds could be applied to statutory instruments considered by Parliament. The relevant part of Lord Jauncey's judgment is sufficiently summarised in the following passage from the headnote:

"The Lord Ordinary distinguished between such orders and orders exercisable entirely at the hand of a Minister or authority, and held that a statutory instrument considered by Parliament could only be held to be *ultra vires* upon the ground of illegality, in the narrower sense, where it was patently defective in that it purported to do what it was not authorised to do by the enabling statute, or where the procedure followed departed from the requirements of the enabling statute."

On appeal to the Inner House this judgment was affirmed.

This is not the occasion when it would be appropriate for your Lordships to consider whether to go beyond the speech of Lord Scarman, unanimously agreed to by the Appellate Committee, in the *Nottinghamshire* case, which leaves room for possible exceptions in extreme cases from any absolute rule that the courts may not condemn as irrational secondary legislation which has been subject to parliamentary scrutiny. But I have no doubt that the social security Commissioners have good pragmatic reasons not to take it upon themselves to identify any such exceptional case, but to leave that to the higher courts who, as Lord Jauncey pointed out, have never yet done so in any reported case.

Your Lordships were referred in argument to the hitherto unreported judgment of the Divisional Court (Woolf LJ and Pill J) delivered by Woolf LJ in *Bugg and Greaves v. The Director of Public Prosecutions*, 31 July 1992. This examines comprehensively the authorities bearing on the question how far a Magistrate's Court, hearing a prosecution for an offence under by-laws, may properly entertain a challenge to the *vires* of the by-laws. In brief summary, the judgment draws a distinction between what Woolf LJ calls

"substantive invalidity" and "procedural invalidity" and concludes that it is within the jurisdiction of a Magistrate's Court to determine the issue of substantive invalidity, where the by-law is alleged to be bad on its face, either as beyond the power of the enabling legislation under which it purports to have been made or as patently unreasonable, but that where procedural irregularity is alleged the issue can only be determined on examination of the relevant evidence in proceedings to which the by-law making authority is a party and is therefore beyond the competence of a criminal court which should presume that by-laws were made in accordance with the prescribed procedure unless and until they have been set aside by the appropriate court with jurisdiction to do so.

It seems to me neither necessary nor appropriate for your Lordships in the instant case to consider the issue with which this judgment was concerned, nor to determine whether a comparable distinction between substantive and procedural invalidity should be made in relation to the jurisdiction of the Commissioners. Here no question of procedural validity arises. The provision in the regulations which is challenged is either within or without the scope of the enabling power. Hence the issue is one of pure statutory construction unaffected by evidence. So far as I am aware all previous issues of *vires* determined by the Commissioners have been of the same character. How an issue of procedural invalidity should be determined in this field can be safely left for decision if and when it arises.

My conclusion is that the Commissioners have undoubted jurisdiction to determine any challenge to the *vires* of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law. I am pleased to reach that conclusion for two reasons. First, it avoids a cumbrous duplicity of proceedings which could only add to the already over burdened list of applications for judicial review awaiting determination by the Divisional Court. Secondly, it is, in my view, highly desirable that when the Court of Appeal, or indeed your Lordships House, are called upon to determine an issue of the kind in question they should have the benefit of the views upon it of one or more of the Commissioners, who have great expertise in this somewhat esoteric area of the law.

The issue of *vires*

Income support is one of the income-related benefits for which provision is made by Part II of the Social Security Act 1986. The provisions of the Act which are relevant for present purposes are the following:

> "20(3) A person in Great Britain is entitled to income support if-
>
> (a) he is of or over the age of 18 .."
>
> "21(1) ... where a person is entitled to income support-
>
> > (a) if he has no income, the amount shall be the applicable amount; and
> >
> > (b) if he has income, the amount shall be the difference between

his income and the applicable amount."

"22(1) The applicable amount shall be such amount or fix aggregate of such amounts as may be prescribed.

(2) The power to prescribe applicable amounts conferred by subsection (1) above includes power to prescribe nil as an applicable amount ....

(3) In relation to income support ... the applicable amount for a severely disabled person shall include an amount in respect of his being a severely disabled person.

(4) Regulations may specify circumstances in which persons are to be treated as being or as not being severely disabled."

Applicable amounts are governed by the 1987 Regulations and the conditions of entitlement to the various "premiums" are those specified in paragraphs 8 to 14 of Schedule 2. Paragraph 13, headed "Severe Disability Premium" provides so far as relevant:

"(1) The condition is that the claimant is a severely disabled person.

(2) For the purposes of sub-paragraph (1), a claimant shall be treated as being a severely disabled person if, and only if-

(a) in the case of a single claimant or a lone parent-

(i) he is in receipt of attendance allowance and

(ii) subject to sub-paragraph (3), he has no non-dependants aged 18 or over residing with him, and

(iii) no one is in receipt of an invalid care allowance under section 37 of the Social Security Act in respect of caring for him; ..."

Sub-paragraph (2)(b) establishes a more elaborate set of conditions which a claimant who has a "partner" must satisfy in addition to being in receipt of attendance allowance. I need not set these out but may mention that, like the conditions in sub-paragraph (2)(a)(ii) and (iii), they all relate to matters other than the degree of disablement of the claimant. Sub-paragraph (3) which provides that certain categories of persons are to be disregarded for the purpose of sub-paragraph (2)(a)(ii) is not presently relevant.

The appellant's contention is that the only conditions of eligibility for the severe disability premium which the Secretary of State is empowered to impose by section 22(4) must relate directly to the claimant's disablement. If this is right, it must follow that the only valid condition imposed, in the case of single claimants, lone parents and claimants with partners alike, is that the claimant must be in receipt of attendance allowance which, as we shall see, is payable only to those with a very severe degree of disability. If the other conditions are both *ultra vires* and severable, it must further follow that ever since the 1987 Regulations came into force any person in receipt of attendance allowance has also been entitled to the severe disability premium as part of the applicable amount of

his income support irrespective of his domestic circumstances and whether or not any invalid care allowance was in payment in respect of him.

The argument for the appellant points out correctly that, in contrast with the power conferred by section 22(2) to prescribe nil as an applicable amount, the Secretary of State is obliged by section 22(3) to include in the applicable amount for a severely disabled person **some** amount in respect of his being such a person. Hence, it is submitted, if the purpose of section 22(3) is not to be frustrated, section 22(4) must be construed as solely referable to the nature and degree of a person's physical or mental disability. Thus the Secretary of State may specify circumstances directly related to the degree of physical or mental disability but can take no account of other circumstances which may affect the extent of the disabled person's needs.

The contrary argument for the respondents is that subsections (3) and (4) of section 22 must be read together. Any person qualifying as a member of the category of severely disabled persons within subsection (3) is certainly entitled to an addition, on that account, to any other applicable amount for which he qualifies. But subsection (4), is in effect, a deeming provision whereby the Secretary of State, in defining the category of persons who are to be treated as being severely disabled for the purposes of subsection (3), may do so by reference to circumstances which either relate to their degree of physical or mental disability or affect the extent of their need for income support arising from that disability. Reliance is placed on the striking similarity between the language of section 22(4) and the language used to confer other regulation-making powers for the purposes of Part B of the Act of 1986 by section 20(12) which provides *inter alia*:

> "Regulations may make provision for the purposes of this Part of this Act-
>
> (a) as to circumstances in which a person is to be treated as being or not being in Great Britain.
>
> ....
>
> (d) as to circumstances in which a person is or is not to be treated as-
>
> (i) engaged or normally engaged in remunerative work;
>
> (ii) available for employment; or
>
> (iii) actively seeking employment;
>
> ....
>
> (f) as to circumstances in which a person is or is not to be treated as receiving relevant education;
>
> (g) as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home;
>
> ...
>
> (k) as to circumstances in which persons are to be treated as being or not

being members of the same household;

(l) as to circumstances in which one person is to be treated as responsible or not responsible for another."

In all these cases, it is said, the simple questions whether a person is in Great Britain, is engaged in remunerative work etc. are questions of fact. But in giving the Secretary of State power by regulation to make provision as to circumstances in which a person is to be treated as being or not being in Great Britain, engaged in remunerative work etc., the Secretary of State is clearly empowered to look beyond the question of fact to the surrounding circumstances and, for example, to provide that in certain circumstances a person who, as a matter of fact, is not physically in Great Britain shall be treated as being in Great Britain or, conversely, that in other circumstances a person who is physically in Great Britain shall be treated as not being in Great Britain.

This is a very formidable argument and it seems to me that if the only power intended to be conferred on the Secretary of State by section 22(4) were a power to define the degree of disability which was to qualify as severe for the purposes of subsection (3), the language used was totally inappropriate to effect that purpose. Thus, even without looking beyond the Act of 1986, it would be my opinion that the regulation making power under subsection (4) cannot be confined as the appellant suggests, but allows the Secretary of State in delimiting the category of persons who are to be treated as severely disabled for the purposes of subsection (3) to take account of any circumstances relevant to the disabled person's needs.

This opinion is powerfully reinforced if one reads the Act of 1986, as one should, in the context of the social security legislation as a whole and compares the subsection which your Lordships have to construe with the elaborate provisions in the Act of 1975 which confer on disabled persons benefits which are not income-related and are wholly dependent on their degree of disability. The most severe degree of disability attracts an attendance allowance under section 35 of the Act of 1975. To qualify for this a person must be so severely disabled mentally or physically that he requires from another person either frequent attention in connection with his bodily functions or supervision to avoid substantial danger to himself or others. Distinct from this, and normally payable to any person who qualifies for attendance allowance in addition thereto, is the severe disability allowance provided for by section 36. The normal qualification for this, in addition to incapacity for work, is a loss of physical or mental faculty assessed "such that the assessed extent of the resulting disablement amounts to not less than 80%", section 36(5). The assessment is to be made in accordance with the provisions of Schedule 8. Paragraph 1 of the Schedule sets out the general principles to be applied including the requirement in paragraph 1(c) that the assessment should be made "without reference to the particular circumstances of the claimant other than age, sex, and physical and mental condition." Paragraph 2 enables provision to be made by regulations for "further defining the principles on which the extent of disablement is to be assessed" and in particular regulations may direct "that a prescribed loss of faculty shall be treated as resulting in a prescribed degree of disablement."

Given that the social security legislation in force when the Act of 1986 was passed already contained this very precise code for determining what degree of physical or mental disability was to qualify a person for severe disability allowance, if it was intended in 1986 that the qualification for a severe disability premium as part of the applicable amount of a person's income support should be governed by a similar code and subject to a similar restriction to that imposed by paragraph 1(c) of Schedule 8, it is

to my mind almost inconceivable that this should not have been achieved by reference to this ready made code, or at least by the use of similar language. It is to my mind quite inconceivable that it was intended to be achieved by the brief and expansive language of section 22(4) of the Act of 1986.

These considerations were the basis of the opinion I had formed at the conclusion of the oral argument, which I understand all your Lordships shared, that the appellant must fail on the *vires* issue. But since the oral argument on the appeal your Lordships' House has ruled in *Pepper v. Hart* [1992] 3 WLR 1032, that in certain circumstances the Parliamentary history of a provision in a Bill and references to it in Hansard may be considered when that provision reaches the statute book and falls to be construed. Since the delivery of that judgment the respondents have invited your Lordships to consider the circumstances in which subsections (3) and (4) of section 22 came to be enacted and certain passages from the debates in both Houses as satisfying the conditions of admissibility as aids to construction laid down in *Pepper v. Hart* and your Lordships have had the benefit of submissions in writing by both parties directed to this issue.

The Bill which became the Social Security Act 1986 did not, when first introduced, contain any specific provision relating to income support for the severely disabled. In your Lordships' House an amendment was moved to the clause which became section 20 of the Act, requiring that any scheme for income support should provide for a "community care addition" payable to certain persons. I need not set out the text of the somewhat elaborate sub-clause which it was proposed to introduce, but it was said by the mover of the amendment to be intended to apply "to a very small number of very severely disabled people" and to be payable "only according to the needs of the claimant': special circumstances and the extent to which other payments or benefits under this part of the Bill fail to meet those needs:" Hansard (House of Lords), 23 June 1986, col. 13. This amendment was opposed by the Government but was agreed to on a division when the Lords' amendments were considered by the House of Commons, the Minister of Social Security moved that the House disagree with this amendment but at the same time he moved as an alternative amendment the two sub-clauses which are nor subsections (3) and (4) of section 22. The Minister said:

> "We are seeking to accept the spirit of the way in which the amendment was spoken to and passed in the other place.
>
> ....
>
> As an additional sign of our good intentions, I point out that there is no need to amend the Bill to provide for a severe disablement premium. There are ample powers within the Bill as it stands for us to have as many premiums as we wish. We have thought it right to make clear our intentions and to respond to the feelings both in this place and the other place. Nevertheless, we wished to table an amendment that specifically provides for a severe disablement premium.
>
> We are proposing a higher and additional premium for a particular group of disabled people. It will be paid on top of the other structural improvements for disabled people in the Bill, and in particular the disablement premium. As I have said, in effect it provides the two-tier disablement premium that many commentators, including the Select Committee, have urged upon us. It will be paid as an extra amount to severely disabled people who are living on

> their own, and who are most likely to need extra support and care. It will be paid to them direct and as of right within the income support scheme. It will also form part of the assessment of need in the housing benefit rules.
>
> In considering the issue, we have sought criteria that are consistent with other social security arrangements. Our intention is that receipt of the higher rate of attendance allowance should be the first qualifying condition. The present domestic assistance addition already has a condition that there must be no one in the household capable of carrying out normal domestic duties. The purpose behind that rule, on the need for extra support to maintain independence that cannot otherwise be provided, is a sensible one.
>
> We have recently announced a major extension of the invalid care allowance as the benefit that is paid to those caring for disabled people. Consistent with that, we intend that the extra disablement premium will be paid direct to a severely disabled person where there is no one receiving or eligible for the invalid care allowance in respect of that person's care needs. We envisage setting the rate at the same level as for invalid care allowance, currently, although shortly to rise, £23 a week. This will be paid on top of the disablement premium in relevant cases. It is nearly double the rate of the basic disablement premium for a single person that is illustrated in the technical annex": Hansard 23 (House of Commons), July 1986, cols. 399-400).

On a division the Government amendment was carried in lieu of the Lords' amendment.

When the Bill was again before this House, the Lord President of the Council, moving that the Government amendment be agreed to said:

> "The additional premium will be paid directly as of right to severely disabled people who meet certain criteria. The first is that they should be in receipt of the higher rate of attendance allowance: so it will apply to those in households where there is no one capable of carrying out normal domestic duties. We think the purpose behind that rule, the need for extra support to maintain independence that cannot otherwise be provided, is a sound one. We have recently announced the extension of invalid care allowance, the benefit that is paid to those caring for disabled people. Consistent with that, we intend that the extra disablement premium will be paid directly to a severely disabled person where there is no one receiving or eligible for the invalid care allowance in respect of that person's care needs. We envisage setting the rate at the same level as for invalid care allowance currently £23 a week. It is nearly double the rate of the disablement premium in relevant cases." Hansard (House of Lords), 24 July 1986, cols. 386-387.

This time on a division the Government amendment was agreed to by this House.

This account of the circumstances in which section 22(3) and (4) came to be enacted and the statements made by the Government spokesmen moving the relevant amendment in both Houses seem to me to provide precisely the kind of material which was considered in *Pepper v. Hart* [1992] 3 WLR 1032 to be available as an aid to statutory construction. Section 22(4) is undoubtedly ambiguous, as the difference of opinion in the courts below clearly shoes. But it was made perfectly dear to both Houses that it was intended to use the regulation-making power conferred by subsection (4) so

as to provide that a person was only to be treated as severely disabled for the purposes of subsection (3) if he was in receipt of attendance allowance and living in a household with no other adult able to care for him and where no invalid care allowance was in payment to any other person to provide for his care. This is, of course, precisely what, in principle, paragraph 13 of Schedule 2 to the 1987 Regulations sets art to achieve. Parliament, having enacted the two subsections with full knowledge of how the regulation making power was proposed to be used must clearly have intended that it should be effective to authorise such use. Thus the parliamentary material unequivocally endorses the conclusion I had reached as a matter of construction independently of that material.

The significance of this, following as it does two other cases decided by your Lordships' House since *Pepper v. Hart* [1992] 3 WLR 1032 *Stubbings v. Webb* [1993] 2 WLR 120 and *Reg. v. Warwickshire County Council, Ex parte Johnson* [1993] 2 WLR 1 where the Parliamentary material has been found decisive of a statutory ambiguity, is to illustrate how useful the relaxation of the former exclusionary rule may be in avoiding unnecessary litigation. Certainly in this case, if it had been possible to take account of the Parliamentary material at the outset, it would have been clear that it refuted the appellant's contention and there would probably never have been any appeal to the Commissioner, let alone beyond him. I doubt if any of us who were party to the decision in *Pepper v. Hart* anticipated that within so short a time after it Hansard would be found to provide the answer in three other cases before the House. But this encourages the hope that as time passes the effect of the new rule will be to prevent or to curtail much litigation relating to ambiguous statutory provisions which would otherwise be fought through the courts.

The subsidiary point

Counsel for the appellant argued before your Lordships another point to which the judgments in the Court of Appeal make no reference, although we were told that the point was raised before them. The point arises in the following way: regulation 3(1) of the 1987 Regulations defines "non-dependant" as meaning "any person ... who normally resides with the claimant" subject to the list of exceptions in regulation 3(2). As the regulation was originally drafted one of these exceptions was "a person who jointly occupies the claimant's dwelling". If construed widely this exception seems almost co-extensive with the definition. Be that as it may, the respondents do not dispute that this exception applied to the appellant's parents so that they were not "non-dependants" under Schedule 2, paragraph 13(2)(a)(ii). But by paragraph 3 of the Income Support (General) Amendment No. 3 Regulations 1989, SI 1989 No. 1678, which came into force on 9 October 1989, the relevant exception in regulation 3(2) of the 1987 Regulations was amended by the addition of the following words:

> "and either is a co-owner of that dwelling with the claimant or his partner (whether or not there are other co-owners) or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling."

It is common ground that the amended exception does not apply to the appellant's parents who are accordingly "non-dependants" as defined. But the appellant boldly submits that the 1989 amendment should be struck down on the ground of irrationality. The object of the amendment was clearly to narrow the scope of the original exception,

which was probably wider than had been intended. It may perhaps not be immediately apparent what policy consideration requires that an exception from the category of "non-dependants" be made in favour of adults normally residing with claimants either on the ground that they are joint occupiers with the claimants, whatever that was intended to mean, or that they are co-owners as provided by the amended regulation. But that is a matter for the Secretary of State and Parliament, not for the courts. It seems to me unarguable that the amended exception in regulation 3(2) should be invalidated as irrational. Even if it were, it would not assist the appellant. There is no power to reinstate the unamended exception.

I would dismiss the appeal.

LORD ACKNER:

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge of Harwich. I agree with it and for the reasons which he gives would also dismiss the appeal.

LORD BROWNE-WILKINSON:

My Lords,

I have read the speech of my noble and learned friend Lord Bridge of Harwich. I agree with it and for the reasons which he gives would also dismiss the appeal.

LORD SLYNN OF HADLEY:

My Lords,

For the reasons given by my noble and learned friend Lord Bridge of Harwich I too would dismiss this appeal.

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