DECISION OF SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal sitting in Glasgow on 4 July 2001 (the tribunal) is in error of law. I set it aside. The findings of fact are not in dispute and I therefore substitute my own decision for the one the tribunal ought to have made. It is that the decision issued by the Secretary of State on 12 December 2000 is invalid and therefore is also set aside.

The issue

2. Yet again this is whether the process by which the Secretary of State purported to terminate a claimant’s entitlement was validly carried out. There are undeniable deficiencies in how the decision maker (DM) acted in this case. What are the powers of a tribunal to put matters back on track so that the whole process does not have to be undertaken afresh by the Secretary of State, thereby undoubtedly saving time and money? I sympathise with tribunals. Commissioners have been inconsistent in their approach, including myself. The main difficulty lies in differentiating matters only of form from those of substance.

Background

3. The claimant has been in receipt of income support (IS) since an award made on 18 January 1994. A perusal of the claimant’s bank books in December 2000 revealed that she possessed, throughout her IS award, capital in excess of the prescribed amount.

4. On 12 December 2000 the claimant was issued with a decision which, as set out in the appeal papers before the tribunal and as narrated by a DM on 18 January 2001 when refusing to reconsider it, was in these terms:-

“[The claimant] is not entitled to IS because her capital exceeds the prescribed amount.”

5. The ground of appeal to the tribunal was that no valid decision had been made. The appeal papers prepared by the DM for the tribunal contained a computer printout. Against the date 12 December 2000 and a given user identity number, was the information that the following letter types had been issued to the claimant:-

“COC’s [sic] EOC (INF 1,2,4)”

6. A summary of law appended by the DM for the tribunal included the text of s.9 of the Social Security Act 1998 (the 1998 Act) and regulation 3 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the regulations), albeit that the latter was set out in an unamended form. This is but one of many sloppy procedures in this case.
The tribunal decision

7. The claimant was represented by Mr Steven Craig, Welfare Rights Officer with the Queens Cross Housing Association Ltd in Glasgow (the representative). A presenting officer (PO) was also in attendance. Both the representative and the PO referred to the decision under appeal as a supersession, although the representative argued that it was an invalid one. This was because there was no copy in the papers of a decision terminating entitlement. I can best summarise the PO’s response by reference to the tribunal’s statement of it:-

“He accepted that the production of screen prints on their own had in the past been criticised as it was difficult for a Tribunal to make anything of them, but as he was personally present, he indicated that it was legitimate for him to explain the information contained in the screen print. He pointed out that there was a user’s number alongside the date 12/12/00 and this was a secret password and number used by the Decision Maker making the decision. The abbreviations referred to COCs – change of circumstances and EOC – end of claim. He went on to add that a decision would have been issued to the Appellant thereafter otherwise an appeal would not have been lodged. What appears to have happened is that the person preparing the hearing papers has omitted to include the documentation forwarded to the Appellant, as a result of which, she consulted her representative and the appeal was lodged.”

8. The tribunal disallowed the appeal and confirmed the “decision of the Secretary of State issued on 12/12/00”.

Appeal to the Commissioner

9. The grounds of appeal remain that the tribunal had no jurisdiction to uphold a decision which was not produced. The representative now adds a failure by the tribunal to provide adequate reasons for rejection of his submission that the Secretary of State has no power to supersede a decision of an adjudication officer (AO).

10. A written submission to the Commissioner on behalf of the Secretary of State supports the appeal but invites the Commissioner to make a decision with the same practical effect.

11. It is accepted that the tribunal erred in not identifying s.1 and Schedule 22 to the 1998 Act (Commencement No. 12 and Consequential and Transitional Provisions) Order 1999 (SI 3178/99) as authority for the Secretary of State’s power to revise or supersede decisions by an AO.

12. It is not agreed by the Secretary of State that the adverse decision has to be produced in all cases. It is a fact which can be established by other means than the production of the decision. However, it is now pointed out that the facts of the case and the legal provisions set out in the papers, point to revision rather than supersession. Yet the computer print out refers to a change of circumstances, which implies supersession.
13. It is contended on behalf of the Secretary of State that the tribunal erred in law in failing to resolve the contradictions. But it is suggested that the Commissioner can do so in the light of further information. Another screen print is lodged, taken from the IS computer system "notepad" dialogue referable to the claimant. Against the date 12 December 2000 is the entry:-

"CUST FAILED TO DISCLOSE CAPITAL £10420.82 WHEN IS CLAIM WAS MADE ON 18/1/94. CLAIM CLOSED DOWN. SYSTEM WOULD ONLY LET ME CLOSE CLAIM FROM 11/11/99, O/P IS FROM 18/1/94-05/12/00."

14. Furthermore, the named author of the submission on behalf of the Secretary of State:-

"16. ... can speak to how that system works. Cases where there is no title have to be closed on system for administrative and security reasons. Unfortunately, the system is not particularly sophisticated by modern standards. It will generally record the information used and the decision given and, reproduce the record in a form not readily understood without some training or an explanation, though considerably improved above those in R(IS)2/96. It will also issue a notice to the claimant detailing the outcome of the decision and appeal rights. The claimant is invited to request further explanation if required, including the reasons for and the law used in making the decision.

17. In my submission, the note shows that the officer concerned appreciated the claimant had no title throughout. However, system limitations meant in this case it would only accept information back to 11.11.99, which the system interpreted as a change of circumstance. What should then have happened, but did not happen, was for the officer to have inhibited the issue of the defective system decision notice, and arrange for the issue of a decision notice which accurately reflected the decision.

18. I submit it would also have been better if he had, but is not fatal that he had not, indicated in the note that he was revising the awarding decision. However, there being no identifiable ground for his purporting to have carried out a supersession, I submit it is implicit, by default, that he was attempting to record what was a valid revising decision to that effect. I respectfully invite the Commissioner to make a finding to that effect."

The oral hearing

15. The case came before me for an oral hearing on 4 September 2002. Mr Craig was unable to be present and therefore, on his behalf, the claimant was represented by Ms Hayes of the Tollcross Housing Association. The Secretary of State was represented by Ms Stirling, Advocate, instructed by Ms Anderson, Solicitor, of the Office of the Solicitor to the Advocate General. I am grateful to them both for their submissions and particularly indebted to Ms Stirling for her production of CDLA/4977/01, a decision of Mr Commissioner Jacobs whose analysis I found helpful.
The arguments

16. Ms Stirling adhered to the written submission on behalf of the Secretary of State. However, she amplified the point she made that there was sufficient evidence of the decision under appeal.

17. In essence, the arguments of Ms Stirling for the Secretary of State and those of Ms Hayes for the appellant mirrored those made to me by the respective parties in CSIS/399/01 and CSIS/400/01. Ms Hayes argued that the onus to show the validity of the decision lay on the Secretary of State and no decision in an intelligible form had been produced. Reliance was placed on R(IS)2/96 and CSIS/833/99. In response, it is argued on behalf of the Secretary of State that it is possible to prove that a valid decision has been made by sufficient evidence of a verbal nature to flesh out the computer print out.

My conclusion and reasons

Proof of a decision and that it was made by a DM

18. In R(IS)2/96 the Commissioner refers to his own decision in CSIS/13/94. In the latter case he remitted a similar matter back to a tribunal, observing (see paragraph 4):-

"... the new tribunal will require to be astute to see that there is adequate evidence of a verbal nature not only to relate any computer printout put before them to the claimant and the particular decision .... that is in question, but also to explain precisely how that document records that there was a review and how it demonstrates which of the competent grounds of review were held to be satisfied, and why so."

19. In CSIS/752/00 Mr Commissioner May QC accepted a submission that:-

"... under reference to what was actually said by Mr Commissioner Walker QC in R(IS)2/96 that that case did not establish even in respect of review decisions that the actual review decision had to be produced in all cases."

20. Commissioner May QC went on to hold, as also in CSIS/1033/00, that the fact of an award and its date could likewise be established without the production of the awarding decision and that computer print outs, the terms of which were explained by the PO, provided sufficient evidence of the decision.

21. In R(IS)2/96 there was still insufficient evidence of the actual terms of the decision by the time of the hearing. In CSIS/833/99 there was no certification from the Secretary of State that an AO was involved in the decision. Nor is there such certification here. As noted in the written submission for the Secretary of State, a certification under paragraph 13 of Schedule 1 to the 1998 Act would have been conclusive for the purpose of showing that a decision was made by the DM on 12 December 2000. It is yet another error in the way this case was presented to the tribunal.

22. However, in this case, unlike that of CSIS/833/99, there was both evidence given by the PO at the hearing about the user identity number applicable to a DM and also a copy of a reconsideration dated 18 January 2001 of the decision under appeal in which a DM to whom the matter is referred expressly states that the decision on 12 December 2000 was decided by
a DM. I accept Ms Stirling’s submission that this is sufficient evidence from which a rational inference may be drawn that the decision of 12 December 2000 was made by a DM and not, for example, by a cleaner.

23. S.2(1) of the 1998 Act provides that:-

“any decision … to be made by the Secretary of State … may be made … not only by an officer of his acting under his authority but also-

(a) by a computer for whose operation such an officer is responsible;”

24. I am satisfied that a DM was responsible for operating the computer on 12 December 2000 and that there is sufficient evidence a decision was made.

The tribunal on appeal has power to perfect the supersession or revision which a DM should have undertaken

25. In the common appendix to CIB/16092/96, CIB/90/97 and CIB/2073/97, Commissioner Mesher said at paragraph 31:-

“In paragraph 47(1) and (5) of the Appendix to CSIS/137/94 the Tribunal [of Commissioners] indicated that if an AO’s decision was incorrect, an appeal tribunal has jurisdiction itself to conduct or perfect any review of the relevant decision. Here the AO had identified events, i.e. the carrying out of an assessment under the all work test, which could amount to a relevant change of circumstances under s.25(1)(b). On an appeal from the decision, the appeal tribunal had jurisdiction to conduct the review under s.25 and give the appropriate decision identifying the decision reviewed. It is better that the appeal tribunal should deal with the substance of the dispute … rather than declare the AO’s decision without foundation, so that the process has to be started again.”

26. I similarly stated in CSIS/399/01 and CSIS/400/01 that a tribunal has a power not merely to perfect but to carry out a review which an AO should have undertaken. I now consider this proposition went too far. I am so persuaded firstly, by Commissioner Mesher who has in effect restated from that view. In CIS/362/2002, at paragraph 12 he opined:-

“The Tribunal of Commissioners in decision R(IS)2/97 held that in ordinary review cases defects of form could be corrected by an appeal tribunal on appeal, but not defects of substance which rendered the purported review invalid.”

27. I consider even more persuasive the analysis of Mr Commissioner Jacobs in CDLA/4977/01. Much of what he says has relevance here, so that I set it out:-

“27. The representative is correct that the legislation does not give an appeal tribunal the power to make a revision or supersession. If there has been no supersession, the tribunal cannot undertake one. Assume, for example, that the Secretary of State has dealt with a change of circumstances under the revision procedure. There is no power to do that. A change of circumstances cannot [sic] only be taken in to account under a supersession: regulation 3(9)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. On appeal,
the tribunal can only decide that the revision was made without legislative authority and was of no force or effect. That leaves the Secretary of State to undertake a supersession. The claimant will have a right of appeal against the outcome decision. The same applies in reverse if the Secretary of State has used the supersession procedure instead of the revision: see regulation 6(3) of the 1999 Regulations.

28. However, that does not mean that any defect, however minor and however insignificant, renders a decision of no force or effect, with the effect that the whole process must be undertaken afresh by the Secretary of State. As a matter of interpretation, so long as there has been a supersession or revision, the tribunal has jurisdiction to correct the defect. The issue for the tribunal is whether the defect is a correctable one. This is the terminology I suggested in CCS/1992/1997, paragraphs 11 to 13. An indication of the narrow limits within which a decision is not correctable by an appeal tribunal may be found in R(CS) 7/99, paragraph 25. Without claiming to provide a comprehensive statement, the Commissioner gave three instances of defects which would, in my suggested terminology, be uncorrectable: (a) where the decision was given by an officer who had no authority to make it; (b) where the decision had already been made by another officer; (c) there was an absence of some application, leave, notice or other step necessary to give the officer authority. (This list is similar to the cases in which a decision of a tribunal will be held to have been made without jurisdiction: see the decision of the Commissioner in CI/79/1990, paragraph 30.) That corresponds with the modern administrative law approach which emphasises substantial compliance as the test for whether procedural requirements have been satisfied. See Haringey London Borough Council v Awaritefe (1999) 32 Housing Law Reports 517 and R v Immigration Appeal Tribunal, ex parte Jayanthan [1999] 3 All England Law Reports 231 at pages 238 and 239.

28. The Commissioner went on to hold that the Secretary of State had taken a decision on supersession in the case in front of him but that the tribunal (and because it failed to do so, the Commissioner) on the evidence should substitute the proper ground for supersession as error of fact, not change of circumstances. He therefore substituted a decision based on that ground.

29. On the above analysis, the defect in CSIS/399/01 and CSIS/400/01 was one merely of form. There was evidence sufficient to establish a review decision by an AO. It was irregular only in form in that it ended the claimant’s award for a change of circumstances without expressly setting out what award of which benefit was being reviewed or from when or what was the decision on revision. However, there was the necessary evidence both to demonstrate the decision as a valid review and to perfect its deficiencies of form, so that the tribunal (and the Commissioner in the tribunal’s place on the same facts) had jurisdiction to correct the defects.

30. Thus I am satisfied that the result in CSIS/399/01 and CSIS/400/01 was correct. There had been a demonstrated review and the tribunal was not being asked to make one but only to perfect one already carried out.
If there has been no revision or supersession, the tribunal cannot undertake one

31. The evidence establishes that the DM has acted in this case but that he made the wrong substantive decision. The tribunal has no power thereafter to carry out the right process on his behalf.

32. Whatever may be the inadequacies of the computer system, the claimant cannot be prejudiced by them. Irrespective of what was in the mind of the DM, the evidence shows a supersession for change of circumstances. The DM did not then, as it is acknowledged he should have done, suppress the defective system decision notice and issue a correct one in its place, which would be revision on the ground of ignorance of fact. The result is that the claimant must have received a letter informing her of what is now admitted was the wrong decision.

33. There is a distinction between submission and evidence. An officer of the Secretary of State who has the necessary personal knowledge is able to give evidence about the administrative system, how it works and what the computer abbreviations mean. While I am not able to understand why an exact copy of the letter intimating the decision sent out to a claimant is not kept on the file, it is nevertheless my view that, if the tribunal is given a style letter and evidence that the computer issues that text in certain circumstances, the tribunal can infer that such was the text of the letter sent to the claimant triggered by the computer instruction. But the only inference from the computer entry here is that the claimant would have received intimation of a different decision from what was intended.

34. Under s.12(6) of the 1998 Act, a person with a right of appeal must be given notice of a decision. Due process requires that such notice correctly sets out the nature of the adverse decision which is to be challenged (see CDLA/9/2001). What was issued here was notice of supersession (which is implicit for a change of circumstances) rather than a revision. The notepad entry only underscores that the DM wanted to make a revision but had instead to make a supersession and it is further accepted that thereafter the defective system decision notice was not cancelled, as it could have been, and replaced by an accurate notification.

35. The case is therefore doubly flawed. Firstly, there was not the necessary revision in the case and therefore the tribunal cannot correct one. The fundamental process used was wrong. Supersession and revision are entirely distinct and the Secretary of State’s actions have not properly reflected that. The mistake has been consolidated by intimating the wrong decision to the appellant. All that a tribunal can do is to say that supersession for a change of circumstances does not fit the facts of the case and is therefore set aside. It does not itself have jurisdiction to carry out the correct alternative procedure of revision. It is for the Secretary of State so to do.

Summary

36. In any event, the tribunal’s decision had to be set aside because of the errors identified by the Secretary of State’s representative. As the Secretary of State’s decision is invalid, there is therefore no matter to remit to a fresh tribunal. Ms Stirling pointed out that the Secretary of State may now make a valid decision. She consequently regretted the delay and cost which an appellate decision requiring that would produce, particularly as the end result may be the same for the claimant. However, the remedy lies in the hands of the Secretary of State. In CSIS/399/01 and CSIS/400/01 I commented:-
"The sloppy nature of much of what was done evokes considerable concern."

Nothing seems to have changed. The two distinct processes, which were introduced by the Secretary of State in substitution for the former single review regime, have now been in place long enough for the Secretary of State to get it right.

37. I leave the last word to a memorable quotation from Danckwerts L J in Bradbuny v. Enfield L B C [1967] I WLR 1311 at 1325, cited by Commissioner Williams in CDLA/9/01:-

"...it is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law...."

(signed)

L T PARKER
Commissioner

Date: 12 September 2002