

## Article

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### "Recent Reform of Social Security Adjudication in Great Britain"

A. W. Bradley

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# Recent Reform of Social Security Adjudication in Great Britain

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A. W. BRADLEY \*

*Cet article expose les transformations qu'a subies en 1984 le système des tribunaux administratifs de la sécurité sociale en Grande-Bretagne.*

*Ce système avait jusqu'alors comme caractéristique principale la répartition du contentieux des prestations de sécurité sociale entre deux réseaux de tribunaux locaux. Les uns étaient chargés d'entendre les appels relatifs aux prestations, pour la plupart contributives, prévues par le Social Security Act 1975, tandis que les autres avaient compétence en matière d'aide sociale (supplementary benefits).*

*L'élément majeur de la réforme de 1984 est la fusion de ces deux réseaux. Les nouveaux tribunaux locaux de la sécurité sociale se distinguent de leurs prédécesseurs par leur composition : ils seront obligatoirement présidés par un juriste, exerçant cette fonction à temps partiel mais encadré au niveau national et régional par un état-major permanent constitué d'un juge et d'avocats ; les autres membres ne seront plus désignés selon le système paritaire syndicats-patronat qui avait traditionnellement prévalu en matière d'assurances sociales. Le renforcement de la présence des juristes prolonge l'évolution amorcée par les réformes antérieures du régime d'aide sociale. Celles-ci favorisaient à la fois la judiciarisation de la procédure et la réduction du pouvoir discrétionnaire de l'administration par le développement de la réglementation. L'unification des tribunaux administratifs avait également été amorcée dès 1980, par l'attribution aux Social Security Commissioners de la compétence de dernier ressort relativement à la plupart des prestations sociales.*

*L'auteur commente cette réforme en fonction des objectifs qu'elle prétend servir : la qualité des décisions, l'indépendance des juridictions, l'accessibilité d'une instance d'appel unique, la rapidité des décisions. Il fait observer que la réforme n'a rien fait pour simplifier et assouplir la procédure, ou pour rendre l'aide juridique accessible aux prestataires. Il note que les tribunaux administratifs spécialisés chargés du contentieux médical de la sécurité sociale n'ont pas été visés par la réforme, en dépit de la contestation dont ils font l'objet, et que l'aide au logement échappe également à la compétence des tribunaux de la*

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\* Professor of Constitutional Law, University of Edinburgh, and a Chairman of the Social Security Appeal Tribunal, Edinburgh.

*sécurité sociale. Enfin, il fait valoir que le développement de l'encadrement réglementaire des prestations de sécurité sociale ne garantit en rien ni la rapidité du processus juridictionnel, ni la qualité des rapports entre décideurs et prestataires; par ailleurs, il accroît le contrôle du gouvernement sur la mise en œuvre de sa politique sociale.*

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## Introduction

More than forty years after publication of the Beveridge Report on Social Insurance and Allied Services in 1942, the welfare state in Britain is under greater pressure than at any time during this period. With unemployment at over three million, an increasing number of elderly pensioners and

single parent families, and a government committed to cutting back the public sector, social security is seen in some quarters as an undue burden upon the taxpayer and on the machinery of government. The total costs are indeed vast. In 1985-1986, expenditure on social security, the most expensive head of government spending, will be £40 billion, about 30% of total public expenditure of £132 billion. This expenditure may be compared with the next most expensive items: defence (£18 billion), health and personal social services (£16.5 billion), and education and science (£13.6 billion). Although the Conservative government is endeavouring to cut back public expenditure in general, a marked increase in social security expenditure seems probable by 1987-1988<sup>1</sup>. Early in 1985, the government was expected to announce its conclusions about the reform of the social security system, reached after a series of policy reviews led by ministers between 1983 and 1985. These reviews considered not merely the overall scale of the problem, but also the anomalies and defects that had developed in the scheme. For example, because of prevailing thresholds for paying income tax and social security contributions, many families with low incomes were paying tax and social security contributions at the same time as they qualified for supplementation of income from the state.<sup>2</sup>

What is an immense burden seen by taxpayers or the government from a certain political perspective is the reverse of burdensome for millions in Britain who look for all or part of their income to social security. Thus about half of all social security expenditure in 1985-1986 will go to those who are over retirement age. Child benefit is a universal benefit payable to over 7 million families. Over half a million single parent families receive the additional one-parent supplement. The family income of over 200,000 low wage earners is increased by family income supplement, and many more are eligible to apply. Of the 2.9 million unemployed claimants registered in November 1983, 1.6 million were solely dependant on supplementary benefit and 684,000 were receiving unemployment benefit alone; another 221,000 were receiving supplementary benefit in addition to unemployment benefit. In February 1983, 4.3 million assessment units (families or single adults) were in regular receipt of supplementary benefit<sup>3</sup>. Opinions may differ about the case for universal benefits, but in the light of such figures, and of the

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1. *The Government's Expenditure Plans, 1985-86 to 1987-88*, Cond. 9428, 1985.

2. For the inter-relation between income tax and social security, see H. PARKER, *The Moral Hazard of Social Benefits*, London, The Institute of Economic Affairs, No. 37, 1982. And see A.W. DILNOT, J.A. KAY and C.N. MORRIS, *The Reform of Social Security*, Oxford, Clarendon Press, 1984.

3. Social Security Statistics 1984 (H.M.S.O.).

accounts published of the effects of economic deprivation<sup>4</sup>, it is impossible to accept that social scientists are responsible for having redefined poverty, rather than for having rediscovered its existence.<sup>5</sup>

Since no practice of federalism exists currently in Great Britain<sup>6</sup>, the British scheme of income maintenance is administered by the Department of Health and Social Security (hereafter DHSS), in cooperation with the Department of Employment over unemployment benefit, and with the Inland Revenue in the collection of social security contributions. Thus policy-making and administration are in the hands of large government departments each with its own centralised hierarchy of control; and there is little direct involvement in the social security system on the part of local authorities. Efforts have been made under the Conservative government to trim down the administrative burden by reducing the number of civil servants. Thus, by a policy, which proved to be an organisational disaster, the government introduced in 1982 a new form of housing benefit administered by local authorities instead of by the DHSS<sup>7</sup>. Since 1983, statutory sick pay has been paid by employers in place of sickness benefit for the first eight weeks of an employee's illness, and this is shortly to be extended to the first 28 weeks<sup>8</sup>. The DHSS also plans to make full use of the new information and communications technology in drawing up an operational strategy for the future and seeking to improve the quality of service to the public — for example, by establishing compatible computer systems for tax and social security purposes, and by achieving the "one office" approach for the unemployed<sup>9</sup>. Critics of the present scheme have argued strongly for a strategy of seeking to take advantage of improved technology in storing, communicating and handling information, while concentrating staff resources on "the kinds of job that humans will always do better than computers — making judgments and dispensing help and advice to claimants and taxpayers".<sup>10</sup>

4. E.g. P. TOWNSEND, *Poverty in the United Kingdom*, Berkeley, University of California Press, 1979.

5. But the definition of poverty is far from settled: see D. PIACHAUD, *New Society*, 10 September 1981, 419 and ensuing correspondence.

6. The schemes of devolution proposed for Scotland and Wales in 1978 did not extend to social security (e.g. *Scotland Act 1978*, sch. 10, part II, item 2; and cf. sch. 10, part I groups 2 and 4). In Northern Ireland, a separate administrative structure exists even under direct rule, but the policies followed are essentially uniform with those applying in Great Britain.

7. *Social Security and Housing Benefits Act 1982*, part II. For criticism of the scheme by the Comptroller and Auditor-General, see H.C. 638 (1983-84) and 6<sup>th</sup> report by the Public Accounts Committee, 1984-85 (H.C. 78).

8. *Social Security and Housing Benefits Act 1982*, part I; *Social Security Bill 1985*.

9. *Social Security Operational Strategy — a Framework for the Future*, DHSS, 1982.

10. A.W. DILNOT, J.A. KAY and C.N. MORRIS, *supra*, note 2, p. 80; see also p. 3 and 46.

In comparison with the broad strategic considerations on which the future of the social security system depends, the procedure for handling disputes that arise out of the scheme may seem insignificant and peripheral. The best statistical examples of this arise in relation to the universal benefits such as retirement pension (see Annex A). In 1983, 9 million retirement pensions were in payment, over 400,000 being paid for the first time in that year: yet there were only 900 appeals from the decisions of officials awarding retirement pension. Child benefit is paid for nearly 13 million children, but in 1983 there were under 1,000 appeals. Compared with retirement pensions and child benefit, eligibility for unemployment benefit is often more difficult to determine; but in 1983 when there were over 5 million new claims for unemployment benefit, there were just under 17,000 appeals to local tribunals. The figures for attendance allowance tell a different story: out of over 207,000 claims, 48,000 were initially rejected; 30,000 of these rejections were taken further to review, and 20,000 of the claims succeeded at that stage. In supplementary benefits, over 6 million claims were received: of these about 1.7 million claims were refused or withdrawn; only some 56,000 decisions were made by appeal tribunals. It thus appears that the proportion of decisions that are taken to review or appeal varies a great deal according to the benefit in question. (To make the same point in a different way, the ratio of appeals to claims in the case of death grant is 1 to 14,853; in the case of maternity benefits, it is 1 to 2,111; in the case of retirement pensions, 1 to 467; in the case of industrial injury benefit, 1 to 152; in the case of supplementary benefit, 1 to 108; in the case of attendance allowance, 1 to 6. The ratio of appeals to claims that are initially unsuccessful is in the case of supplementary benefit, 1 to 30.7; in the case of attendance allowance, 1 to 1.6.) The total number of appeals also varies from year to year (see annex B), but within the range of variation the total is still a small proportion of the total number of individual decisions made within the scheme as a whole.

Professor Mashaw has suggested that the principal values which decision-making in a mass social security system must foster are accuracy, consistency, fairness and timeliness<sup>11</sup>. Experience both in the United States and in Great Britain indicates that the process of appealing is "highly and mysteriously selective"<sup>12</sup> and it is not known why some dissatisfied claimants appeal and many others do not. Whether or not most claims are decided

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11. J.L. MASHAW *et al.*, *Social Security Hearings and Appeals*, Lexington (Mass.), Lexington Books, 1978, p. xix-xxiii. And see J.L. MASHAW, "The Management Side of Due Process", (1974) 59 *Cornell L.R.* 772; and J.L. MASHAW, *Bureaucratic Justice*, New Haven, Yale H.P., 1983.

12. J.L. MASHAW, "The Management Side of Due Process", (1974) 59 *Cornell L.R.* 772, p. 784.

correctly at the outset, the appeals system would break down unless most decisions were acceptable to the claimants most of the time.

Yet inevitably mistakes are made, failures of communication occur, complex rules are misunderstood, the interaction of different benefits is unforeseen, the significance of crucial events is not appreciated, individual expectations are disappointed, citizens and officials attempt to cut corners — and the consequent dispute has somehow to be resolved. One form of constitutional protection against incompetent or sub-standard administration in Britain lies in the responsibility owed to parliament by departmental ministers. This traditional means of accountability has possibly more weaknesses than strengths: but the means available to the Westminster parliament have been strengthened since 1967 through the office of the Ombudsman, the Parliamentary Commissioner for Administration. Every year the British Ombudsman receives more complaints about the DHSS and the Inland Revenue than about other government departments, and many are held to be justified<sup>13</sup>. But even on a statistical basis the Ombudsman is far less important as a means of protecting the citizen's rights in social security than is the system of appeal tribunals<sup>14</sup>. The British Ombudsman's role is also limited since by law he is confined to dealing with complaints of injustice caused by maladministration, and may not criticise the merits of discretionary decisions<sup>15</sup>, whereas in the social security system the right of appeal against a prior administrative decision generally extends to all aspects of the decision, both on the facts and on the law.

Tribunals have been a feature of the British social security scheme since unemployment insurance was introduced in 1911<sup>16</sup>. Because of this, the courts have traditionally made only a small contribution to developing the law of social security. In 1982, an English court was required for the first time to interpret a key phrase in unemployment benefit law (the disqualification that arises when a person voluntarily leaves his employment "without just cause") that has been part of the law since 1911<sup>17</sup>. In 1977 and

13. See e.g. P.C.A.'s Annual Report for 1982 (1982-83, H.C. 257): 243 complaints against DHSS, 84 accepted for investigation: 26 upheld, 34 some criticism of department. The Inland Revenue takes second place to DHSS in the number of complaints received.

14. Cf. G. GANZ, "The Role of the Ombudsman in Welfare Law", in (ed.) M. PARTINGTON and J. JOWELL, *Welfare Law and Policy: Studies in Teaching, Practice and Research*, London, Frances Pinter, 1979, p. 117-129 and A.W. BRADLEY, "The Role of the Ombudsman in relation to the Protection of Citizens' Rights", [1980] *Camb. L.J.* 304, p. 308.

15. *Parliamentary Commissioner Act 1967*, s. 12(3).

16. *National Insurance Act 1911*, ss. 88-90, and see J. FULBROOK, *Administrative Justice and the Unemployed*, London, Mansell, 1978, ch. 6. For an earlier study, see W.A. ROBSON, *Justice and Administrative Law*, 2<sup>nd</sup> edn., London, Stevens, 1947, p. 164-173.

17. *Crewe v. Social Security Commissioner*, [1982] 2 All E.R. 745.

1978, the Scottish courts had to rule on what it means to have a “direct interest” in a trade dispute, an issue that had not previously arisen before a British court<sup>18</sup>, and which reached the House of Lords for the first time only in 1983.<sup>19</sup>

It was probably this ability of the social security system to function without constant recourse to the courts that misled Sir Leslie Scarman, as he then was, in 1974. In his much-publicised Hamlyn Lectures, *English Law — the New Dimension*, he commented that social security was so far removed from the practice of the law that very few lawyers had any but the haziest idea of its nature and content, there being “an almost total divorce” between the law and the social security system: “Why should entitlement necessarily be as the administrator interprets it?”<sup>20</sup>. Within fourteen months he had revised his views, saying of the tribunal system for contributory benefits:

An admirable legal system culminating in the National Insurance Commissioners has been devised to make certain that recipients get their rights. Whatever criticisms one is tempted to make of national insurance, absence of legal control is not one... There is emerging a healthy jurisprudence based upon a theory of rights obtained by contributions duly paid.<sup>21</sup>

As the rhetorical question asked by Scarman in 1974 indicated, within a scheme of social insurance decisions awarding benefit are not arbitrary but must be based upon rules. This is so whether the scheme is interpreted as a legal or an administrative phenomenon. Beveridge’s insight in recommending in 1942 a universal scheme for social insurance administered by a single government department made it possible for something approaching a universal scheme for adjudicating disputed questions to be created when the social security system was reconstructed under the influence of the Beveridge report after 1945<sup>22</sup>. The main scheme of appeals for contributory benefit set up in 1946 was modelled upon the three-tier structure of insurance officer, local court of referees and umpire established in 1911 for deciding unemployment insurance questions<sup>23</sup>. Beveridge was convinced that individuals had a

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18. *Watt v. Lord Advocate*, 1979 S.C. 120.

19. *Presho v. Insurance Officer*, [1984] 1 All E.R. 97.

20. L. SCARMAN, *English Law — The New Dimension*, London, Stevens, 1974, p. 35, 37, 39.

21. Lord SCARMAN, Upjohn Lecture, January 1976, quoted in R. MICKLETHWAIT, *The National Insurance Commissioners*, London, Stevens, 1976, p. 138-139.

22. The reality fell short of this: thus industrial injuries adjudication was kept legislatively separate from adjudication on contributory benefits generally, and there was a different structure for family allowance appeals until 1959: see *Report of Committee on Administrative Tribunals and Enquiries (Franks Report)*, Cond. 2f8, 1957, paras. 177 and 184.

23. The working of this structure had been examined in the *Report of the Committee on Ministers’ Powers*, Cond. 4060, 1932, and by other official committees: see W.A. ROBSON, *supra*, note 16, p. 179-180.



right to benefit in return for their contributions. Without discussing the matter in detail, he recommended the continued existence of tribunals on the 1911 model, subject to special arrangements being made for deciding industrial disablement questions. He condemned as totally unsatisfactory the recourse to litigation and the courts that had been such an expensive feature of the workmen's compensation scheme.<sup>24</sup>

It was implicit in Beveridge's idea of rights under social insurance that they should not be dependent on official discretion. This was to be one of the critical distinctions between social insurance and social assistance. For Beveridge, the function of social assistance was to provide a safety-net for those whose needs were not met by social insurance, and who would diminish in number as universal social insurance came into operation. Such a safety-net was by definition non-contributory and Beveridge declared that the assistance it gave "must be felt to be something less desirable than insurance benefit — otherwise the insured persons get nothing for their contributions"; fortunately the work of the Assistance Board showed that "assistance subject to a means test can be administered with sympathetic justice and discretion taking full account of individual circumstances".<sup>25</sup>

The scheme of national assistance created in 1948 followed the pattern set by the previous scheme of unemployment assistance, and provided for a right of appeal to a local tribunal from official decisions, but the initial thinking behind this had been more to protect the system of unemployment assistance against political attack, rather than to protect individual rights<sup>26</sup>. In consequence, until recent reforms the British scheme of adjudication in social assistance (national assistance until 1966, thereafter supplementary benefits) was different from, and often seemed inferior to, the system of adjudication that operated in social insurance. The distinction manifested itself in many ways, but the cumulative effect was to diminish the procedural rights of the claimant for social assistance. Thus early in the 1970s the system of supplementary benefit appeals was conducted with very little input from the legal profession; there was no right of appeal from the local tribunals; and there was effectively no scope for the doctrine of precedent to operate. It was this form of adjudication that Lord Scarman had in mind in the passage quoted above from his Hamlyn lectures in 1974. When the welfare rights

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24. *Beveridge Report*, Cond. 6404 (1942) p. 37–39, 101–103, 148.

25. *Beveridge Report*, p. 141 and 12.

26. See T. LYNES, in (ed. M. ADLER and A.W. BRADLEY), *Justice, Discretion and Poverty*, London, Professional Books, 1975, ch. 2; and T. PROSSER, "Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and their Predecessors", (1977) 4 *Br. J. of Law and Society* 39.

movement began to grow in the early 1970s, it was these features of social assistance adjudication that generated the most criticism since, for reasons going back to the Beveridge report, the system of appeals for contributory benefits had a stronger and more elaborate structure that could protect the rights of claimants against arbitrary decisions by DHSS officials.

Legislation integrating these two main branches of social security adjudication came into effect in 1984. It had been preceded in 1977–1984 by a variety of other changes in the system of appeals. The object of the present article is to outline the various changes to that system, up to and including the process of integration in 1984, and to suggest some questions concerning the reformed system which are not yet answered.

We will look first at adjudication under the *Social Security Act 1975*, which is the principal authority for most forms of social security benefit (all the benefits mentioned in annex A, except for child benefit, one parent benefit, supplementary benefit, and family income supplement); then at adjudication under the *Supplementary Benefits Act 1976* (and the *Family Income Supplements Act 1970*); and finally at the recent reforms which have brought about a more closely integrated structure of social security appeals.

## 1. Adjudication under the *Social Security Act 1975* (before 1984)

### 1.1. The three-tier structure

Until the reforms of 1983–84, the principal machinery for the adjudication of disputes arising under the *Social Security Act 1975* took the form of a three-tier structure comprising (a) the insurance officer, (b) the national insurance local tribunal, and (c) the Social Security Commissioners<sup>27</sup>. Outside this three-tier structure lay matters which the Act assigned for adjudication by other procedures (notably questions kept for decision by the Secretary of State, disablement questions relating mainly to industrial accidents and diseases, and claims for attendance allowance)<sup>28</sup>. Since the effect of the reforms in 1983–84 has been to retain this three-tier structure, albeit with modifications, it is worthwhile to look briefly at some aspects of the earlier system.

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27. See Part III of the *1975 Act* and the *Social Security (Determination of Claims and Questions) Regns.*, 1975/558. See also A.I. OGUS and E.M. BARENDT, *The Law of Social Security*, 2<sup>nd</sup> edn., London, Butterworths, 1982, ch. 15 and H. CALVERT, *Social Security Law*, 2<sup>nd</sup> edn., London, Sweet and Maxwell, 1978, ch. 13.

28. See below, text for notes 54–65.

### 1.1.1. The insurance officer

The insurance officer was an officer of the DHSS or (in respect of unemployment benefit) the Department of Employment, authorised to make or withhold awards of benefit on his own responsibility in accordance with the law. Usually the insurance officer would serve in a local office, but decisions on certain benefits (for example, child benefit and non-contributory invalidity pension for housewives) were made centrally by insurance officers working at the administrative headquarters of the relevant scheme. Elsewhere I have written, "the insurance officer is an adjudicating animal who is so well camouflaged within his natural habitat that he is easily mistaken by the uninitiated for an administrative or executive official"<sup>29</sup>, but the scheme of designating insurance officers did help to emphasise that benefit decisions must be based on law rather than on administrative policy or political dictates. It also meant that there was no direct ministerial responsibility for these first instance decisions, so a dissatisfied claimant was required to appeal to a tribunal from the officer's decision and not seek political redress. The position of the insurance officer was thus like that of a tax inspector, authorised in his own right by law to impose or approve a tax assessment.<sup>30</sup>

In many routine matters, the insurance officer's imprimatur might be no more than a rubber stamp applied to a whole batch of claims, or a single signature applied to a long computer print-out. But, to take the example of a new claim for unemployment benefit, where entitlement might be in jeopardy because the claimant had walked out of his previous job for no good reason, the insurance officer might require a series of written statements to be obtained from the claimant and the former employers before the decision is made. So too, in a case of special hardship allowance where a disablement resulting from an industrial accident had caused a loss of earning power, it might take a long time before adequate documentary information was obtained to enable a decision to be taken. Once a decision was made and an individual appealed against it, the insurance officer had to assemble the papers to go to the local tribunal; these would include a summary of the facts, a full submission of reasons for the decision including the relevant statutory rules and case-law, and copies of evidentiary material. The insurance officer's decision was always based solely on written material: where the material available to him revealed a conflict of fact or opinion which could not be resolved, the insurance officer could make use of his power to refer the matter to a local tribunal for decision. Basic as the insurance officer's role was to the structure of adjudication, very little was

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29. A. W. BRADLEY, *infra*, note 67, p. 115.

30. *Taxes Management Act 1970*, ss. 1(2) and 29(1).

known outside the department about it. While the insurance officer was required by law to take decisions in his own name, in practice he was trained and guided in his work by senior insurance officers acting at a regional or national level.

### 1.1.2. The national insurance local tribunal

The second tier was the national insurance local tribunal, which before the recent reforms sat at 178 centres throughout Great Britain. Every claimant had a right to appeal within 28 days to the tribunal against an adverse decision by the insurance officer. At a hearing, a tribunal would consist of three persons, the chairman (who was in practice always legally qualified, although this was not a statutory requirement), a lay member drawn from a panel representing employers and the self-employed, and a second lay member drawn from a panel representing employed earners (trade union officials or members nominated by trade union organizations). The chairman received a fee for each session. The lay members would receive only travelling expenses or compensation for loss of earnings. Up to six appeals were customarily heard and decided in a single session of two to three hours. The tribunal would receive the papers relating to the appeals about ten days in advance, at the same time as each appellant received his own set with the notice to attend. At the hearing, an additional statement might have been sent in by the appellant or the appellant might attend with any representatives, friends or witnesses whom he might bring to the hearing. Often the appellant did not attend the hearing; sometimes he might decide to withdraw the appeal upon seeing the tribunal papers. Legal representation was rare. Procedure was informal and very much in the hands of the chairman. In 1974, a New Zealand lawyer commented on the proceedings, "the apparent casualness of the hearing has directed attention away from the formality of decision".<sup>31</sup>

In 1970-71, research into the operation of these tribunals in Scotland and North England was carried out by a group from Newcastle University led by Professor Kathleen Bell<sup>32</sup>. One conclusion reached, based on the widely differing percentages of successful appeals as between different tribunals, was that despite the statutorily defined conditions of benefit, and

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31. J.A. FARMER, *Tribunals and Government*, London, Weidenfeld and Nicolson, 1974, p. 108-109.

32. K. BELL *et al.*, "National Insurance Local Tribunals", (1974) 3 *Jl. Social Policy* 289; (1975) 4 *Jl. Social Policy* 1. For other accounts of the tribunals, see H. STREET, *Justice in the Welfare State*, London, Stevens, 1968, ch. 1 and P.S. ATIYAH, *Accidents, Compensation and the Law*, 3<sup>rd</sup> edn., London, Weidenfeld and Nicolson, 1980, p. 401-407.

the governing case-law contained in Commissioners' decisions, these local tribunals were able to exercise more judicial discretion than was often supposed and were "engaged in an exercise which is not confined to the application of objective rules and standards"<sup>33</sup>. But the implications of this conclusion were not explored by the Newcastle researchers, who did not examine the substance or value or legal difficulty of what was in issue on appeal, and suggested no reason why different tribunals engaged on basically the same exercise should produce widely varying results. Nor did the researchers attempt to explain why the types of cases coming before the tribunals they studied differed so sharply.<sup>34</sup>

### 1.1.3. Social Security Commissioners

From decisions of local tribunals, a right of appeal lay to the full-time body of salaried lawyers created in 1948 and known as the National Insurance Commissioners, and renamed Social Security Commissioners in 1980<sup>35</sup>. Persons appointed Commissioners must be barristers, advocates or solicitors of ten years standing. Their main work formerly was to decide appeals from decisions of national insurance local tribunals but successive additions were made to their jurisdiction, notably in 1959 when a right of appeal on questions of law was provided to the Commissioners from decisions by medical appeal tribunals on disablement questions. As the Commissioners gained in experience in the years after 1948, they brought an increasingly expert and reflective judgment to bear on particular cases. The publication of selected decisions (and the availability of others for consultation) gave authoritative guidance in applying social security legislation to insurance officers and local tribunals. Their published case-law brought to life the dry bones of enacted rules, set standards of procedure and evidence for local tribunals, and enabled a judicial discretion to be exercised in the interpretation of phrases such as "voluntarily leaving employment without

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33. *Supra*, note 32, p. 310. One weakness of the analysis of the performance of different tribunals made at p. 306-310 is that no definition of "local tribunal" for statistical purposes is given. In large urban areas, it is likely that several chairmen would sit regularly in the same "tribunal" whereas in less populous areas, only a single chairman might be available. On the hypothesis that the legal chairman had the greatest single influence on the outcome of appeals, the analysis would have been more informative if it had been related not to "tribunals" but to individual chairmen.

34. Thus amongst 25 tribunals within Scotland, 55% of all appeals in 1970 concerned unemployment benefit; but at five tribunals the proportion of unemployment benefit appeals ranged from 94% to 78%, and at five tribunals the proportion ranged from 42% to 16%: BELL *et al.*, *supra*, note 32, p. 308.

35. *Social Security Act 1975*, s. 97(3) and sch. 10; *Social Security Act 1980*, ss. 12, 13. And see R. MICKLETHWAIT, *supra*, note 21.

just cause” and “good cause” for late claims for benefit<sup>35a</sup>. In cases of exceptional difficulty, a tribunal of three Commissioners might sit to decide the appeal; such decisions have greater authority than that of a single Commissioner.<sup>36</sup>

Before 1980, every claimant who was dissatisfied by the decision of a local tribunal could appeal to the Commissioner within three months as of right, both on facts and law. So too could an insurance officer when the tribunal’s decision went against him, although in practice use of this right was controlled by regional and national insurance officers. But this unrestricted right of appeal was abused by some claimants and the thoroughness of the process of appeal at this level led to considerable delays and a substantial backlog of appeals. In 1980, the law was changed to allow the right of appeal to continue only when the local tribunal made a majority decision. When the local tribunal was unanimous, the case with most tribunal decisions, leave to appeal was thereafter required, either from the tribunal chairman or from a Commissioner.<sup>37</sup>

#### 1.1.4. Judicial review of Commissioners’ decisions

But for the Commissioners and their expertise, there would certainly have been much more litigation in the courts arising out of the social security scheme. Those who framed the three-tier system in 1946 may well have intended it to be self-regulating, with recourse to the courts excluded. The decisions of the Commissioners were stated in the 1946 legislation to be “final”<sup>38</sup>, but it was established in 1957 that this meant merely that the decision was final on the facts, and did not exclude certiorari<sup>39</sup>. Thus Commissioners’ decisions could be challenged in the English High Court by certiorari, on grounds of excess of jurisdiction, breach of natural justice, or error of law on the face of the record. Since the Commissioners habitually gave reasoned decisions, and their decisions were accompanied by documentation that could if necessary be treated as part of the record, this meant that where an application for certiorari went to the High Court, no technicalities barred the court from reviewing the soundness of the Commissioner’s legal reasoning. Considering the number of decisions recorded by

35a. For analysis of the case-law on the first, see OGDUS and BARENDT, *supra*, note 27, p. 106–118; and on the second, M. PARTINGTON, *Claim in Time — A Study of the Time Limit Rules for Claiming Social Security Benefits*, London, Frances Pinter, 1978.

36. See Commissioner’s decision R(I) 12/75.

37. *Social Security Act 1980*, s. 15. It seems from the figures in annex B of national insurance appeals for 1979–83 that this restriction may have reduced the number of appeals.

38. *National Insurance Act 1946*, s. 43(1); see now *Social Security Act 1975*, s. 117.

39. *R. v. Medical Appeal Tribunal, ex p. Gilmore*, [1957] 1 Q.B. 574.

the Commissioners (well over 2,000 per year between 1960 and 1973) remarkably few decisions were challenged in the English High Court, less than 40 in all between 1948 and 1975.<sup>40</sup>

Until 1975 virtually all these cases concerned the industrial injuries scheme, which is capable of giving rise to difficult mixed questions of fact and law and where the amount of benefit in dispute may be substantial. On matters of procedure, the High Court accepted that the work of the Commissioners departed in important respects from the adversary process of civil litigation and, subject only to natural justice, could adopt an inquisitorial or investigatory style<sup>41</sup>. But what of the substance of the law being administered? In 1965, in the Court of Appeal, Lord Denning M.R. stated that it would be unfortunate if the courts became too ready to detect errors of law in the decisions made by the Commissioners :

This is one of those questions which, as it seems to me, the legislature has decided should not be brought up to the courts of law for decision, but should be entrusted to the specialised statutory authorities for determination. It may occasionally be of use, if there is a real error of law, for a case to be brought before this court, but not in such a case as this.<sup>42</sup>

Subsequent cases in the High Court raised important issues of law concerning Commissioners' decisions outside the industrial injuries scheme. For example, judges defined the extent of the Commissioners' jurisdiction to review decisions by the Attendance Allowance Board on claims for attendance allowance<sup>43</sup>, held that a woman who kills her husband may on grounds of public policy be disqualified from receiving widows' benefit<sup>44</sup>, and considered how the law of unemployment benefit applies to a redundancy scheme affecting the armed forces<sup>45</sup>. In the last case, Lord Denning reiterated that the judges should adopt a non-interventionist approach in reviewing decisions of the Commissioners. He said :

If a decision of the Commissioners has remained undisturbed for a long time, not amended by regulation, nor challenged by certiorari, and has been acted on by all concerned, it should normally be regarded as binding. The High Court should not interfere with it save exceptional circumstances.<sup>46</sup>

40. MICKLETHWAIT, *supra*, note 21, p. 124.

41. *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore*, [1965] 1 Q.B. 456; and *R. v. National Insurance Commissioner, ex p. Viscusi*, [1974] 2 All E.R. 724.

42. *R. v. Industrial Injuries Commissioner, ex p. A.E.U.*, [1966] 2 Q.B. 31, p. 48.

43. *R. v. National Insurance Commissioner, ex p. Secretary of State for Social Services*, [1974] 3 All E.R. 522.

44. *R. v. National Insurance Commissioner, ex p. Connor*, [1981] 1 All E.R. 769. See now *Forfeiture Act 1982* and R(G) 2/84.

45. *R. v. National Insurance Commissioner, ex p. Stratton*, [1979] Q.B. 361.

46. *Stratton's case, idem*, p. 369.

The Commissioners' jurisdiction extended to the whole of Great Britain, yet the law of judicial review of administrative action in Scotland is different from English law. Thus the prerogative orders have never been available in Scottish courts, although broadly equivalent remedies exist<sup>47</sup>. In particular, it was formerly uncertain whether the Court of Session could review tribunal decisions for error of law where no excess of jurisdiction was involved. In *Watt v. Lord Advocate*, the Court of Session held that it did not have the power of review for error of law, although in the particular case the Commissioner's decision was quashed on jurisdictional grounds<sup>48</sup>. Since this meant that social security claimants in Scotland did not have the same right to seek judicial review of Commissioners' decisions as in England, there was an evident need for legislation. In 1980, there was created a right of appeal on a question of law from any decision of a Commissioner (with leave of a Commissioner or the court) to the English Court of Appeal and to the Inner House of the Court of Session in Scotland; the appropriate court is to be specified by the Commissioner when leave to appeal is sought<sup>49</sup>. Possibly the most significant aspect of this change was that appeals now go direct to the Court of Appeal, not to the High Court. This cut out one possible level of appeal and implied (rightly) that the Commissioners had greater legal expertise and authority than most tribunals in Britain, from whom appeal on law usually lies to the High Court<sup>50</sup>. In the first appeal to the Court of Appeal under the *1980 Act*, Lord Denning followed the same approach as he had done earlier in exercising the jurisdiction to review by certiorari, when he upheld a long line of decisions by the Commissioners concerning the definition of "just cause" for voluntarily leaving employment<sup>51</sup>. This approach has subsequently been endorsed by the House of Lords.<sup>52</sup>

Although it is undesirable for any inferior tribunal to be the ultimate arbiter on questions of law, and the Commissioners should not be immune from judicial scrutiny, there are good reasons why the superior courts should continue to respect their expertise. One exceptional situation is where differences of opinion on a point exist among the Commissioners, when the Court of Appeal may have to resolve the matter.<sup>53</sup>

47. See Scottish Law Commission, *Remedies in Administrative Law*, Memo. No. 14, 1971.

48. 1979 S.C. 120.

49. *Social Security Act 1980*, s. 14. The Commissioner's choice of the appropriate court depends in principle on "the premises where the authority whose decision was the subject of the Commissioner's decision usually exercises its functions" (s. 14(5)).

50. *Tribunals and Inquiries Act 1971*, s. 13.

51. *Crewe v. Social Security Commissioner*, [1982] 2 All E.R. 745.

52. *Presho v. Insurance Officer*, [1984] 1 All E.R. 97.

53. See *Stratton's case*, *supra*, note 45, p. 369 and *R. v. National Insurance Commissioner, ex p. Secretary of State*, (1981) reported at R(A) 2/80. Another way of resolving such differences is for a Tribunal of Commissioners to be appointed, *supra*, text for note 36.



## 1.2. Other forms of adjudication under the *Social Security Act 1975*

The three-tier structure described in the previous section determined all questions arising under the *1975 Act* except where other provision was made. Three other procedures may be mentioned briefly. Since they have been less materially affected by recent reforms it may be assumed that they are continuing to function as described, except where it is stated to the contrary.

### 1.2.1. Secretary of State's questions

Certain questions are required by the Act to be decided by the Secretary of State, in particular those relating to the status of an earner and the category of earners in which he should be placed, questions as to an individual's contribution record, and questions whether a person was in the past excluded from employment because of home responsibilities. Before the decision is taken, a hearing may be held before an appointed official (usually a departmental lawyer) and there is provision for reference or appeal on a question of law to the High Court<sup>54</sup> but there is no right of appeal on the merits and this can lead to the DHSS being judge in its own cause<sup>55</sup>. The questions to be decided by the Secretary of State are varied from time to time<sup>56</sup>. There are also other discretionary powers which are decided by the Secretary of State, without any procedural safeguards<sup>57</sup>. The reservation of certain questions to the Secretary of State excludes decision of them by the insurance officer, the local tribunal and the Commissioner, but the precise division of power to decide can be complex.<sup>58</sup>

### 1.2.2. Disablement questions

Under the industrial injuries scheme certain questions (whether the relevant accident resulted in a loss of faculty, and the degree and duration of any resulting disablement) are known as disablement questions. They were for many years determined first by a board of two doctors (the effect of recent reforms is to replace the medical board for many purposes with a single adjudicating medical practitioner) and then on appeal or reference by

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54. *Social Security Act 1975*, ss. 93-94.

55. As in *D.H.S.S. v. Walker Dean Walker Ltd.*, [1970] 2 Q.B. 74.

56. *E.g. Social Security and Housing Benefits Act 1982*, s. 11.

57. *Social Security Act 1975*, s. 95; and see *e.g.* references to Secretary of State in *Social Security (Claims and Payments) Regulations 1979/628*.

58. R(U) 9/60: Secretary of State to decide whether form of claim acceptable; statutory authorities to decide whether document was a claim.

a medical appeal tribunal, consisting of a legal chairman and two doctors<sup>59</sup>. Decisions of a medical appeal tribunal have since 1959 been subject to an appeal to the Commissioners on a point of law, with leave of the tribunal or a Commissioner. Failure to record adequate findings of fact and reasons for a decision constitutes an error of law<sup>60</sup>. These authorities also decide whether the medical conditions of entitlement to mobility allowance are satisfied<sup>61</sup>. The jurisdiction of the medical authorities is tightly drawn and the three-tier structure of insurance officer, local tribunal and Commissioner also dealt with many types of case involving medical issues, for example incapacity for work and entitlement to special hardship allowance. The division of jurisdiction between the three-tier structure and the medical authorities can be very complex and led on two occasions to Commissioners' decisions being taken to the House of Lords.<sup>62</sup>

### 1.2.3. Attendance allowance

Attendance allowance has since 1970 been payable to persons who on medical grounds need frequent attention or supervision throughout the day and/or during the night. The non-medical questions of entitlement are decided by the statutory authorities, but decisions on the medical conditions are made either by the Attendance Allowance Board, a body consisting mainly of medical doctors, or by individual doctors under powers delegated to them by the Board<sup>63</sup>. An unsuccessful applicant may within three months seek review by the Board of an adverse decision, and many decisions are revised by this procedure. Appeal from the Board lies to the Commissioners, but only on questions of law. The first reported Commissioner's decision on attendance allowance laid down the standards to be observed by the Board in giving reasons for decisions<sup>64</sup>, and these standards have been widely applied in other areas of social security. The scrutiny given by the Commissioners to the Board's procedures and decisions has been valuable.<sup>65</sup>

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59. *Social Security Act 1975*, ss. 108–113 and sch. 12, amended by *Health and Social Services and Social Security Adjudications Act 1983*, sch. 8, part VI; *infra*, text for notes 144, 145.

60. R(I) 14/75.

61. *Mobility Allowance Regulations, 1975/1573*, Part IV.

62. *Minister for Social Security v. A.E.U.*, [1967] 1 A.C. 725 and *Jones v. Secretary of State*, [1972] A.C. 944.

63. *Social Security Act 1975*, ss. 105–106; and *infra*, text for notes 189, 191.

64. R(A) 1/72.

65. D. CARSON, "The Attendance Allowance", (1975) 26 *N.I.L.Q.* 291.

## 2. Adjudication under the *Supplementary Benefits Act 1976* (before 1984)

### 2.1. The need for reform 1966–1976

The adjudication of disputes arising out of claims for social assistance in Britain has given rise to more controversy than the adjudication of contributory benefits. The basic structure from 1966 to 1978 was that (a) decisions on claims for benefit were made in the name of the Supplementary Benefits Commission, and (b) claimants had the right of appeal to a supplementary benefit appeals tribunal (hereafter SBAT). There was no further right of appeal, although an individual was free to make fresh claims whenever he chose. Review of SBAT decisions by the courts was a possibility that came to be used only gradually during the 1970s.

Possibly because the Franks Report in 1957 regarded SBATs as somehow different from all other tribunals (in form adjudicatory but in practice resembling an assessment or case-committee)<sup>66</sup>, the post-Franks reforms were never fully applied to SBATs, though they were brought under the supervision of the Council on Tribunals. Despite the establishment of a statutory right to supplementary benefit in 1966, the need to reform the tribunals to take account of this change was not appreciated at the time. As pressure from the welfare rights movement increased after 1970, the SBATs were not capable of taking the strain. By 1975, the critics were virtually unanimous that reform was needed and that in many ways these tribunals were lacking in fairness, openness and impartiality<sup>67</sup>. In particular, the DHSS was forced to take note of a report on research by Professor Kathleen Bell, which the Department had itself commissioned. She concluded that there was “an unanswerable case for a comprehensive review as a matter of urgency”<sup>68</sup>. Based on research into tribunals in the northern region of England, the report found *inter alia* that the tribunal chairmen, who were mostly not lawyers, “did not fully comprehend the complexities of the work”. Proceedings were too often “unsystematic, inconsistent and over-influenced by sympathy or otherwise”. A weak tribunal would rely too heavily for support upon its clerk (a departmental official) and on the official who presented the case for the Supplementary Benefits Commission. A large number of reports of tribunal proceedings was examined, “the majority of

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66. *Franks Report*, 1957, *supra*, note 22, para. 182.

67. See M. ADLER and A.W. BRADLEY, *supra*, note 26, and the literature mentioned in A.W. BRADLEY, “Reform of Supplementary Benefit Tribunals — the Key Issues”, (1976) 27 *N.I.L.Q.* 96.

68. K. BELL, *Research Study on Supplementary Benefit Appeal Tribunals: Review of Main Findings, Conclusions, Recommendations*, H.M.S.O. 1975, p. 20.

which did not adequately record a reasoned decision". There was not so much a lack of goodwill towards claimants as a failure to follow a consistent and clear judicial process in their decision-making. "Overall, the tribunals had not evolved a disciplined and systematic approach to the exercise of discretion."<sup>69</sup>

This last finding was central to the matter. The entitlement to benefit introduced by the *Supplementary Benefits Act* in 1966 was little more than nominal. The Act and regulations were no more than a skeletal and incomplete framework for the benefits scheme. Such general rules as the 1966 Act contained were nearly all subject to discretionary exceptions; thus most general rules could be departed from when the Supplementary Benefits Commission as a matter of policy thought this was justified or when a claimant's individual circumstances might seem to an official to warrant this<sup>70</sup>. Decisions by officials were in fact largely based on secret administrative rules (the A-Code), the full details of which were made known neither to the public nor to the tribunals. Yet the Act gave the tribunals on appeal the power to substitute for the decision made by the Supplementary Benefits Commission, any decision which could lawfully have been made by the Commission. The tribunals, unlike the officers, were not bound by Commission policies. This open-ended system was kept within bounds only by the apparent reluctance of many tribunals to use their freedom to depart from Commission policies. A tribunal would often merely confirm that the Commission's decision had been correctly made in accordance with the Act, even though that decision might have been determined according to a policy that had no specific statutory base — and might indeed appear to run counter to the legislation.<sup>71</sup>

In the absence of an appeal to the courts, the decisions of tribunals were subject at common law to judicial review on grounds of excess of jurisdiction, breach of natural justice and error of law. The Child Poverty Action Group and the Citizens' Rights Office adopted a test case strategy; by attacking tribunal decisions that were vulnerable to judicial review, they sought to force improvements in the benefits scheme. The earliest expectations of this strategy were not realised<sup>72</sup>. Yet in a number of instances, the court held that the exercise of the Commission's discretionary powers was not justified in

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69. BELL, *idem*, p. 13.

70. For a fuller discussion, see BRADLEY, *supra*, note 67, p. 104–111.

71. See *infra*, note 73.

72. T. PROSSER, "Politics and Judicial Review: the Atkinson Case and its Aftermath", [1979] *P.L.* 59; and T. PROSSER, *Test Cases for the Poor*, London, Child Poverty Action Group, 1983.

law<sup>73</sup>. Some decisions held that the rules of means-testing had not been correctly applied<sup>74</sup>, and others were concerned with tribunal procedure<sup>75</sup>. By contrast, on the first occasion that review of a tribunal's decision reached the Court of Appeal, the court doubted whether this territory should be invaded by lawyers<sup>76</sup>; nor did the judges always see as problematic issues which in practice were highly controversial like the definition of co-habitation<sup>77</sup>. Even where there was success in the courts, this sometimes was short-lived, as amending legislation was rapidly passed<sup>78</sup>. Nonetheless these cases served to focus attention on actual and potential weaknesses in the scheme.

## 2.2. The first reforms — 1977–1980

The Bell report had in 1975 concluded that there was an unanswerable and urgent case for a comprehensive review of supplementary benefit tribunals. The report's detailed recommendations included those steps which could by a change in practice be introduced without delay (for example, the introduction of training for tribunal chairmen and members), those which would take a longer period to implement (for example, the appointment of legally qualified chairmen), and those of a structural kind which would require legislation, such as the provision of a second-tier appeal body and (as the ultimate objective) the integration of national insurance and supplementary benefit appeals.<sup>79</sup>

The government's response to the Bell report and other criticisms of the tribunals was made known in January 1977. They included (1) a move to appoint more legally qualified chairmen; (2) the provision, by order under the *Tribunals and Inquiries Act 1971*, of a right of appeal on law from SBATs to the High Court in England and the Court of Session in Scotland; (3) the introduction of training for all tribunal chairmen; (4) the preparation

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73. *R. v. Greater Birmingham Tribunal, ex p. Simper*, [1973] 2 All E.R. 461; *R. v. West London Tribunal, ex p. Taylor*, [1975] 2 All E.R. 790; *R. v. Barnsley Tribunal, ex p. Atkinson*, [1977] 3 All E.R. 103; *R. v. West London Tribunal, ex p. Wyatt*, [1978] 2 All E.R. 315.

74. *Ex p. Taylor, supra*, note 73; *R. v. West London Tribunal, ex p. Clarke*, [1975] 3 All E.R. 513.

75. *R. v. South West London Tribunal, ex p. Bullen*, [1976] S.B. (Supplementary Benefit Decisions) 59.

76. *R. v. Preston Tribunal, ex p. Moore*, [1975] 2 All E.R. 807.

77. *R. v. South West London Tribunal, ex p. Barnett*, [1973] S.B. 25; cf. *Crake's case, infra*, note 83.

78. *Ex p. Simper, supra*, note 73; *ex p. Atkinson, supra*, note 73.

79. BELL, *supra*, note 68, p. 20–25.

of a guide to tribunal procedure; and (5) a number of other improvements, regarding such matters as the role of the clerk and tribunal documentation.<sup>80</sup>

The decision to appoint more legally qualified chairmen was justified but there was no undue haste in its implementation. In 1977, barely 10% of approximately 300 SBAT chairmen in Britain were legally qualified. By September 1980, this had risen to 26% and by July 1982 to 36%<sup>81</sup>. A series of ten week-end training conferences for the three hundred chairmen then in post was held between November 1977 and September 1978. An initial problem had been to devise a framework which allowed the training to take place under the auspices of DHSS, without prejudicing the impartiality of the tribunals. In the event, the content of the training conferences was settled and the instructing staff appointed by a small committee comprising the author of this article, a representative of the Social Affairs Committee of the Trades Union Congress, and two serving SBAT chairmen. The approval of the DHSS as such was never sought nor given to the content of the programme, which covered the legal framework of supplementary benefits and the social background to the scheme, as well as practical problems of tribunal procedure and decision-making. Administrative support for the training conferences was provided by DHSS staff but no officials took part in the programme of instruction, which was provided by practising lawyers, serving chairmen of tribunals, and academic specialists in social security from the fields of law and social policy. It is inevitably difficult to assess the success of such a programme. But those who took part were made aware of the independent role of the tribunals and of the important difference between rules of law and Commission policies. A modified form of the training programme was later extended to tribunal members.

Treatment of tribunal procedure in the training programme was assisted by the issue in 1977 of a fifty-page guide to procedure<sup>82</sup>. Again a problem had been to find a way of enabling the guide to be prepared without causing the DHSS to be criticised for interfering with the independence of the tribunals. In fact the DHSS could not avoid being responsible for the booklet, but the final text was approved by the independent members of an advisory committee and there was consultation with the Council on Tribunals. The guide had no legal force and it was up to individual tribunals whether or not to accept the advice it gave. But in due course it received some judicial blessing.<sup>83</sup>

80. Hansard, H.C. Deb. 18 Jan. 1977, W.A. 664-665. See also N. HARRIS, "The Reform of the Supplementary Benefit Appeal System", [1983] *J.S.W.L.* 212.

81. Annual Report, Council on Tribunals 1981-82, p. 30.

82. *SBATs, A guide to procedure*, London, H.M.S.O., 1977. A revised edition was issued in 1982.

83. *Crake v. S.B.C.*, [1982] 1 All E.R. 498, p. 506.

The most controversial item announced in January 1977 was the provision of an appeal on law direct from the tribunals to the High Court. The main advantage of this was that no primary legislation was needed. The new appeal came into operation in January 1978<sup>84</sup>, despite a rearguard action against this within government circles, in which the DHSS, the Lord Chancellor's Office and the Treasury were all involved. The view of external critics of the proposal was that it was incongruous to go from a wholly lay tribunal, unaccustomed to basing its decisions on legal authority and finding difficulty in formulating reasons for its decisions, direct to the High Court<sup>85</sup>. In the event, the direct appeal to the High Court turned out to be a temporary expedient pending the substitution of an appeal to the Social Security Commissioners, as we shall see below.

Decisions of the High Court on appeal between 1978 and 1980 did not in essence differ from earlier decisions given on certiorari. They enabled authoritative interpretations to be given of key statutory phrases<sup>86</sup>, the application of the cohabitation rule ("living together as husband and wife") to be considered<sup>87</sup>, advice to be given to tribunals about the recording of reasons<sup>88</sup> and the exercise of discretionary powers to be reviewed<sup>89</sup>. There were indications that a direct appeal on points of law might lead to the court "being somewhat readier to intervene than when the procedure had been by certiorari"<sup>90</sup>. Difficulties arose when the court wished to establish what had happened during the tribunal proceedings, as the record was usually uninformative; the expedient was adopted of requiring the chairman's notes of evidence to be produced, where these existed.<sup>91</sup>

By the *Social Security Act 1979*, additional legislative changes were made in the scheme. Authority was given for the appointment of full-time salaried senior chairmen, who in addition to adjudicating were to have some responsibility for organising tribunals in the regions assigned to them<sup>92</sup>. But for reasons of economy only four senior chairmen were appointed to cover

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84. *Tribunals and Inquiries (Supplementary Benefit Appeal Tribunals) Order 1977*, S.I. 1977/1735.

85. See e.g. M. ADLER and A.W. BRADLEY, *supra*, note 26, ch. 15.

86. Notably by the House of Lords in *S.B.C. v. Jull*, [1981] A.C. 1025.

87. *Crake v. S.B.C.*, *supra*, note 83.

88. E.g. *Crake v. S.B.C.*, *supra*, note 83; *Miller v. S.B.C.*, [1980] S.B. 329; *Imrie v. S.B.C.*, [1980] S.B. 209.

89. E.g. *S.B.C. v. Clewer*, [1979] S.B. 151; *S.B.C. v. Lamb*, [1979] S.B. 183; *R. v. Manchester Tribunal, ex p. Crookall*, [1979] S.B. 191.

90. E.g. *Clegg v. S.B.C.*, [1979] S.B. 199; *Crake v. S.B.C.*, *supra*, note 83.

91. E.g. *Imrie v. S.B.C.*, [1980] S.B. 209.

92. *Social Security Act 1979*, s. 6(2) and sch. 2, amending *Supplementary Benefits Act 1976*, sch. 4.

the whole of Britain. This was a step on the way to establishing a "presidential" system for the organisation of SBATs, akin to that already used for industrial tribunals and rent assessment committees.<sup>93</sup>

### 2.3. Discretion, rights and regulations

None of the measures adopted to meet criticism of the tribunals dealt with what was probably the main underlying problem, namely the legal structure of the benefits scheme itself. In 1971 the late Professor R.M. Titmuss had defended the place of discretion in the scheme and the use of administrative rules, attacking what he called the pathology of legalism<sup>94</sup>, but it had become impossible to exercise discretion flexibly and on an individualised basis for several million claimants. The policy rules issued by the Supplementary Benefits Commission often prevailed over the discretion of the individual officers in dealing with the personal needs of a claimant. But officer discretion was still extensive and, from a departmental point of view, it was difficult to maintain reasonably consistent use of discretionary powers amongst different regions and different local offices; and in law it was impossible to achieve uniformity of decision by the tribunals. In a series of annual reports between 1975 and 1979, the Supplementary Benefits Commission under the vigorous leadership of Professor David Donnison called attention to the main issues. The Commission argued that the reliance on discretionary additions to the basic rates of benefit eroded public confidence in the scheme, since claimants did not have clearly defined rights to benefit; discretionary powers were also inefficient to administer. If the scheme was left unchanged, discretion was liable to proliferate still further.<sup>95</sup>

The Commission's arguments and other factors led to a large-scale review of the scheme by officials, whose report *Social Assistance*<sup>96</sup> recommended the introduction of a new structure which would set out the rules of the scheme fully and precisely, rather than leaving many areas open to interpretation and discretion. The report argued that if the legislation were

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93. R.E. WRAITH and P.G. HUTCHESSON, *Administrative Tribunals*, London, Allen & Unwin for the Royal Institute of Public Administration, 1973, p. 84-92; BELL, *supra*, note 68, p. 20; and cf. A.W. BRADLEY, *supra*, note 67, p. 112.

94. R.M. TITMUSS, "Welfare 'Rights', Law and Discretion", (1971) 42 *Pol. Quarterly* 113.

95. Report of S.B.C. for 1976, Cmnd. 6910, 1977, p. 11-14; and see D. DONNISON, *The Politics of Poverty*, Oxford, Martin Robertson, 1982. The extensive literature on discretion is reviewed by D. BULL, "The Anti-Discretion Movement in Britain: Fact or Phantom?", [1980] *J.S.W.L.* 65; and see T. PROSSER in M. ADLER and S. ASQUITH (ed.), *Discretion and Welfare*, London, Heinemann, 1981, ch. 7.

96. D.H.S.S., 1978. For a full history of this review, see C. WALKER, *Changing Social Policy, the case of the supplementary benefits review*, London, Bedford Square Press, 1983.



left unchanged, there would be increasing resort to appeal tribunals and the courts :

As case-law and precedents built up, they will in practice take over much of the Supplementary Benefits Commission's policy-making functions. Already local office staff are often unsure whether the Commission's policies can and should be adhered to in the face of pressures from claimants' groups and obviously different views adopted by their local appeal tribunal.<sup>97</sup>

The review concluded that the detailed rules of the scheme should be contained either in regulations or in a Code of Practice, in each case published and laid before Parliament. The report found the idea of a code attractive, since it would leave some flexibility in the scheme and could be drafted in plainer language than the difficult phraseology of statutory regulations.

Despite much criticism of this report, particularly as it had been conducted on the basis of no extra cost being incurred<sup>98</sup>, the Conservative government decided to adopt an urgent programme of reform on the lines indicated in *Social Assistance*<sup>99</sup>. The resulting legislation (*Social Security Act 1980*) drastically amended the *Supplementary Benefits Act 1976*. The idea of a Code of Practice having been rejected by the government, the detailed rules of the scheme were thereafter to be contained in an extensive series of regulations made under the 1976 Act in its new form.<sup>100</sup>

The legal effect of the changed structure can best be illustrated by reference to the discretionary power to make single payments to claimants for particular needs that could not be made out of the regular weekly payments. Before the changes made in 1980, the *Supplementary Benefits Act 1976*, s. 3(1) provided simply :

Where it appears to the Commission reasonable in all the circumstances they may determine that supplementary benefit shall be paid to a person by way of a single payment to meet an exceptional need.

Millions of pounds were paid out under this power each year, for all manner of purposes. In 1980, this provision was altered to read :

There shall be payable in prescribed cases, to a person who is entitled or would if he satisfied prescribed conditions be entitled to a supplementary

97. *Social Assistance*, *supra*, note 96, p. 23.

98. *Response of Supplementary Benefit Commission to 'Social Assistance'*, H.M.S.O., 1979.

99. *Reform of the Supplementary Benefits Scheme*, Cmnd. 7773, 1979; and see M. PARTINGTON, "Rules and Discretion in British Social Security Law", in *In Memoriam, Sir Otto Kahn-Freund*, Munich, 1980, p. 619.

100. For comment, see C. HARLOW, (1981) 44 *M.L.R.* 546, R. LISTER, [1980] *J.S.W.L.* 341, D. CARSON, [1980] *J.S.W.L.* 343. And see OGUS and BARENDT, *supra*, note 27, ch. 12.

pension or allowance, supplementary benefit by way of a single payment to meet an exceptional need.<sup>101</sup>

The regulations themselves prescribe at length and in great detail when a need is to be regarded as existing, which claimants are eligible, matters for which no payment may be made (e.g. school uniform, telephone charges, television and radio, holidays, costs or expenses consequent upon an appearance in court) and those matters for which payments may be made if stated conditions are satisfied (e.g. clothing and fuel costs, funeral expenses, furniture and household equipment, removal expenses, essential redecoration, costs of taking a job, voluntary repatriation expenses).<sup>102</sup>

In a similar manner, there was formerly power where there were exceptional circumstances to make weekly payments additional to the normal scale rates "as may be appropriate to take account of those circumstances"<sup>103</sup>. There is now a set of regulations specifying when increased weekly payments may be made, such as for extra heating and dietary costs. The permitted amounts are often specified exactly and there is no power to make increased weekly payments for requirements that are not stated in the regulations.<sup>104</sup>

Some other changes related to decision-making were also made in 1980. First, the Supplementary Benefits Commission was abolished. Responsibility for use of what are now wide powers of making regulations was vested directly in the ministers responsible for the DHSS, subject only to consultation with the Social Security Advisory Committee<sup>105</sup>. Second, decisions on claims for benefit were after 1980 to be made not in the name of the Commission but by DHSS officials designated as "benefit officers" on the insurance officer model. In one sense, the appeal tribunals survived virtually intact but their powers were cut back in the following way. The power which they had before November 1980 to take any decision on an appeal which the Commission could have taken (bound only by the skeletal provisions of the 1976 Act) was transmuted into a power to take any decision on an appeal which a benefit officer could have taken<sup>106</sup>. Thus tribunals, like the benefit officers, had thereafter to take decisions in accordance with the amended Act and the detailed regulations. Third, the short-lived appeal on law from these tribunals to the superior courts gave way in 1980 to an appeal

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101. *Supplementary Benefits Act 1976*, s. 3(1) as amended by *Social Security Act 1980*.

102. *Supplementary Benefit (Single Payment) Regulations 1981*, S.I. 1981/1528.

103. *Supplementary Benefits Act 1976*, sch. 1, para. 4(1).

104. See now *Supplementary Benefit (Requirements) Regulations 1983*, S.I. 1983/1399, Part III.

105. *Supplementary Benefits Act 1980*, ss. 9, 10.

106. *Supplementary Benefits Act 1976*, s. 15(3), as amended in 1980.

on law to the Social Security Commissioners, but the leave of a Commissioner is needed for such an appeal.<sup>107</sup>

In consequence, these tribunals could no longer range with freedom in the area of policy and discretion. Their task after November 1980 was to decide whether regulations had been correctly applied, after giving the claimant an opportunity to submit evidence and to argue that a different decision should have been made. In these circumstances, the scope of tribunal discretion was determined by the regulations. Before 1980, many tribunals were more at ease in responding to arguments based on hardship that sought to show that the claimant deserved extra help from the tribunal, than in dealing with more legal arguments based on the interpretation of statute and on case-law. When a tribunal was persuaded that a claimant deserved extra assistance, a suitable discretionary power was usually available. After 1980, such tribunals had much less scope for giving expression to their own perceptions of need. Instead tribunal work called for greater technical ability in dealing with arguments based on entitlement under regulations. Since their decisions could be appealed on law to the Social Security Commissioners, there was extra pressure on the tribunals to make an adequate record of the proceedings and the decision. Moreover the arguments which a skilled representative could use had changed, since after 1980 it would often be pointless to direct a plea for help to the residual discretion of the tribunal, if indeed such discretion had survived.

It will be evident from these considerations that the role of SBATs changed in 1980 to become much closer to that of the national insurance local tribunals. This change, together with the concomitant need for greater legal expertise, was a major factor in establishing the case for integration of the two sorts of tribunal, which Professor Bell had in 1975 described as the ultimate objective<sup>108</sup>. Before dealing with the integration that occurred in 1984, I propose first to consider the immediate effects on supplementary benefit tribunals of the introduction of an appeal on law to the Social Security Commissioners in 1980.

#### **2.4. Appeals on law to the Social Security Commissioners**

As mentioned above, the introduction of the new legal structure of the supplementary benefits scheme in November 1980 was accompanied by the provision of an appeal on law from SBATs to the Social Security Commissioners, with leave of a Commissioner. Judicial review of SBAT decisions as

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107. *Supplementary Benefits Act 1976*, s. 15A, inserted by *Social Security Act 1979*, s. 6.

108. BELL, *supra*, note 68, p. 25.

it occurred before 1980 thereby gave way to a new jurisdiction in the Commissioners, jurisdiction that was admittedly exercised on legal grounds but in a different judicial style and by a very different procedure. No legal aid was available for appeals to the Commissioners whereas it had been for appeals on law to the High Court, but since lawyers have no exclusive right of audience before them, the way was open to welfare rights advisers to take to the Commissioners cases that they had already handled before local tribunals. Moreover, no liability to legal costs could arise in proceedings before the Commissioners. Despite the restrictions on the right of appeal, the flow of cases reaching the Commissioners soon became a veritable torrent by contrast with the trickle of supplementary benefit cases that had reached the courts before 1980. As annex B shows in 1981 the Commissioners dealt with 310 supplementary benefit appeals; in 1982 the figure rose to 1,497 and in 1983 to 1,605<sup>109</sup>. One reason for these figures is to be found in the effects of the new legal structure of supplementary benefits after 1980. But it is likely that the advantages which the Commissioners enjoy, compared with the superior courts, as a forum for resolving disputed claims to benefit are another reason for the rapid rise in appeals to the Commissioners in 1981–83. A consequence of the provision of an appeal to the Commissioners has been the virtual disappearance of supplementary benefit cases from the courts.

No complete study of Commissioners' decisions in supplementary benefits has been undertaken, although expert commentary on them is available<sup>110</sup>. Between 1981 and 1984, 150 such decisions have been published. During 1981–82, the reported decisions gave guidance to tribunals on matters of procedure (for example, the hearing of witnesses) and the scope of matters that can be considered on an appeal<sup>111</sup>. A recurrent theme was the necessity for an adequate record of findings of fact and reasons for decision<sup>112</sup>; failure in this respect amounts to an error of law<sup>113</sup>. Tribunals were found to make elementary errors in applying the Act, for example reaching decisions without any evidence to support them<sup>114</sup>, deciding the

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109. These figures include the cases in which Commissioners refused leave to appeal.

110. In journals such as the *Journal of Social Welfare Law*. And see J. MESHER, *Supplementary Benefit and Family Income Supplement: the Legislation*, London, Sweet and Maxwell, 1984, for detailed annotation of the legislation.

111. R(SB) 1/81, 5/82, 6/82; and R(SB) 9/81, 14/82.

112. R(SB) 6/81, 16/81, 19/81, 4/82, 13/82, 23/82, cf. 5/81 (Commissioner assumed tribunal familiar with Act).

113. R(SB) 11/82.

114. R(SB) 3/81, 5/82, 11/82.

status of a claimant as a householder without any reference to the lease under which he had possession<sup>115</sup> and making extra payments to non-householders in the erroneous belief that three statutory conditions for these payments were alternative and not cumulative<sup>116</sup>. The Commissioners frequently drew attention to the complexity of the regulations<sup>117</sup> and clarified difficult points of interpretation<sup>118</sup>. The largest group of reported decisions in 1981 and 1982 concerned the making of single payments where, as we have seen, detailed regulations took the place of what before 1980 had been a wide and easily exercised discretion. In one decision, where the tribunal had made an award totalling £ 13.60 for certain items of underwear for a woman who had a disability which caused heavy wear and tear of some of these items but not others, the Commissioner allowed items costing £ 3.60 to stand but remitted the other items to a tribunal for further consideration<sup>119</sup>. Where an unemployed man with four children needed £ 12.50 for a pair of boots, the tribunal allowed the claim, on the basis that he had already spent money on clothing for his children which could have been the subject of a special grant; but the Commissioner found that the tribunal had misapplied the regulations and remitted the case with detailed directions as to how it should be dealt with. He commented that before 1980, the single payment in question would have been within the discretion of the tribunal, "untrammelled by any such detailed code as is now constituted by regulations".<sup>120</sup>

Decisions such as these make depressing reading, and they illustrate the depths that are plumbed when techniques of legalization are applied to an unreasonable degree in an area where they are inappropriate. The Commissioners have little choice in interpreting their role as requiring them to decide whether the regulations have been correctly applied; and their interpretation is sometimes more favourable to the claimant than was the benefit officer's (for example, in deciding when new wallpaper for an elderly and crippled widow's living room may be regarded as "essential")<sup>121</sup>. But from the decisions reported in 1981 and 1982 an inescapable conclusion is that one of the Commissioners' functions is to curb the desire of some tribunals to make single payments in deserving cases, and thus to reinforce the fundamental policy changes made in 1980. In particular, tribunals have been checked for

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115. R(SB) 13/82.

116. R(SB) 4/81, 11/81, 16/81.

117. R(SB) 7/81, 2/82, 19/82.

118. R(SB) 12/82, 16/82, 19/82.

119. R(SB) 6/81.

120. R(SB) 7/82.

121. R(SB) 10/81.

being too ready to make awards under regulation 30 of the regulations on single payments. This regulation is entitled "Discretionary payments" and it provides for single payments to be made where there is an exceptional need which cannot be met under other regulations, and where a single payment is in the opinion of a benefit officer, "the only means by which serious damage, or serious risk to the health or safety of any member of the assessment unit may be prevented"<sup>122</sup>. An early decision by one Commissioner stated that, since this regulation made discretionary provisions for exceptional need when the consequences of deprivation were liable to be serious for the claimant, the regulation should be broadly construed and the exercise of discretion by the local tribunal should not be lightly disturbed<sup>123</sup>. But a later decision examined the wording of regulation 30, finding that the conditions for payment were strictly defined and allowed "no innate discretion" to award payment; in the Commissioner's view, the title of the regulation was misleading since the conditions allowed no scope for the exercise of discretion "in the legal sense of the word".<sup>124</sup>

In 1976, when advocating the need for a new supplementary benefit code to contain a full statement of the rules and policies then employed in the administration of benefits, I argued that such a code should not totally exclude the exercise of a residual discretion in individual cases<sup>125</sup>. In the light of the regulations that were first made in 1980 and the published decisions of the Commissioners, it is evident that the system has not retained such a residual discretion. It may be argued that the grid of rules promulgated in the regulations has become too fine a mesh to serve the broader interests of justice. There are many reasons why this situation has come about, one being the reluctance of those responsible for supplementary benefit expenditure to permit judicial bodies, including the Social Security Commissioners, to be a rival source of policy<sup>126</sup>. Although this function was denied the Commissioners, they nonetheless are able to set important procedural standards for decision-making on supplementary benefit claims; and their powers serve to prevent erosion of the principle of legality which was so heavily emphasised in the reform of the supplementary benefits scheme in 1980.

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122. S.I. 1981/1528, *supra*, note 102, regn. 30. The decisions include R(SB) 2/81, 13/81, 3/82, 8/82, 9/82, cf. 5/81.

123. R(SB) 13/81.

124. R(SB) 9/82.

125. BRADLEY, *supra*, note 67, p. 119.

126. See *supra*, note 97.

### 3. The present structure of social security adjudication in Britain

Earlier sections of this article described separately adjudication under the *Social Security Act 1975* and the *Supplementary Benefits Act 1976*. It was shown in the introduction that the separate historical origins of this dual system were reinforced by Beveridge's emphasis on the distinction between social insurance and social assistance. More recent developments (in particular stemming from 1966, when the concept of entitlement to social assistance was introduced tentatively into the legislation) tended to bring the two systems closer together.

In the mid-1970s, when supplementary benefit tribunals were being strongly criticised, proposals were made for integrating the two systems of adjudication<sup>127</sup>. The DHSS came in time to accept that the answer to the criticisms was to subject the tribunals to a greater measure of legalization. This was consistent with a general shift of opinion in favour of legal rights and entitlement and away from administrative discretion as the basis for conferring means-tested benefit. The change in the legal structure of the supplementary benefit scheme that occurred in 1980 meant, as we have seen, a significant change in the role of the appeal tribunals.

In 1981, responsibility for supplementary benefit tribunal policy was transferred from the supplementary benefits division of DHSS to the adjudication section of the same department, that was already concerned with the functioning of all other social security tribunals. As a result of a review into the structure of adjudication, the government decided to integrate supplementary benefit and national insurance tribunals and to place the integrated tribunals under a presidential system. Thereafter this decision was implemented by an Act in 1983<sup>128</sup> which made numerous amendments to the earlier legislation, notably the *Social Security Act 1975* and the *Supplementary Benefits Act 1976*. The effect of these changes was to create a three-tier structure modelled on that described in section 1. above, but with changes in nomenclature. The new structure came into being in April 1984.<sup>129</sup>

#### 3.1. The present structure in outline

(a) Decisions at first instance are made by an *adjudication officer*, who replaces the insurance officer, under the *Social Security Act 1975*, the benefit

127. See BELL, *supra*, note 68; and H. CALVERT, in ADLER and BRADLEY, *supra*, note 26, ch. 14.

128. *Health and Social Services and Social Security Adjudications Act 1983* (hereafter: the Act of 1983), s. 25 and sch. 8.

129. *Health and Social Services and Social Security Adjudications Act* (Commencement No. 3) Order 1984, S.I. 1984, No. 276.

officer under the *Supplementary Benefits Act 1976* (as amended in 1980) and the supplement officer under the *Family Incomes Supplement Act 1970* (as amended in 1980). Adjudication officers are civil servants within the DHSS and the Department of Employment, appointed by the Secretary of State for the Social Services to perform the functions of adjudication officers under any statute, or such of their functions as may be specified at their appointment<sup>130</sup>. Appointments are in practice made by the wholesale designation of certain grades of officer<sup>131</sup>. The Secretary of State also appoints a Chief Adjudication Officer, who must advise adjudication officers on the performance of their functions, keep under review the operation of the system, and report annually to the Secretary of State on "standards of adjudication"<sup>132</sup>. The predecessors of the Chief Adjudication Officer (the chief insurance officer and the chief benefit officer) had before 1984 advised insurance and benefit officers on the making of their decisions on a non-statutory basis. Such general guidance as has been given about supplementary benefit decisions is contained in what is known as the S-manual, which since 1983 has been made publicly available<sup>133</sup>. In two loose-leaf volumes, it contains a full code of guidance about the law and its interpretation, as well as a detailed manual of office procedures.

While in law an adjudication officer could be authorised to take decisions over the whole range of social security benefits, in practice different adjudication officers are assigned to deal with particular classes of claim. This permits complete administrative flexibility. Thus the decision on some benefits may be taken centrally (for example, child benefit) and on other benefits in regional or local offices. These "integrated" arrangements have meant the end of the former requirement that on some matters (for example, whether a claimant for supplementary benefit was available for employment) the question had to be referred to an insurance officer for a decision<sup>134</sup>. In practice there will still be a need for reference of certain matters from one class of adjudication officer to another, since the single designation of "adjudication officer" has not done away with the division of labour in a massive and complex administrative scheme.

(b) From decisions of an adjudication officer, a right of appeal lies to the second tier of the three-tier structure, the *social security appeal tribunal*

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130. *Social Security Act 1975*, s. 97(1)(1A) as substituted by the *Act of 1983*, sch. 8.

131. See *infra*, note 133.

132. *Social Security Act 1975*, s. 97(1B)–(1E), substituted by the *Act of 1983*, sch. 8.

133. *Supplementary Benefits Procedure Manual: Guidance for Supplementary Benefit Officers and Procedural Instructions*, DHSS, 1983.

134. See now *Social Security (Adjudication) Regulations 1984*, S.I. 1984, No. 451, regn. 69. On the earlier position, see R(SB) 22/83.



(hereafter SSAT), which is the successor of both the national insurance local tribunals and the supplementary benefit appeal tribunals. Like those tribunals, an SSAT will consist of a chairman and two other persons<sup>135</sup> but detailed changes have been made in the composition and functions of the tribunals. First, no-one may be appointed to the panel of chairmen by the Lord Chancellor (or in Scotland by the Lord President of the Court of Session) unless he or she is a barrister, advocate or solicitor of not less than five years' standing<sup>136</sup>. Second, in place of the former rules requiring the two lay members to be selected from two separate panels, they are now selected from a single panel, consisting of persons who appear to the President of SSATs to "have knowledge or experience of conditions in the area of the tribunal and are representative of persons living or working in the area".<sup>137</sup>

Third, SSATs have been brought within a presidential system. The office of President of Social Security Appeal Tribunals and Medical Appeal Tribunals was created in 1983. The statutory qualification for appointment to this post is to be a barrister, advocate or solicitor of at least ten years' standing<sup>138</sup>, and the first President is Judge John Byrt, Q.C. The President's duties include the administration of all SSATs, a task of some complexity which, in respect of the former local tribunals, was previously undertaken by the DHSS. The President does not appoint the chairmen of these tribunals, but he does assign chairmen to sit on particular tribunals and as already mentioned he appoints the panel of lay members for each tribunal. He also appoints clerks to serve each tribunal. He must arrange for meetings and training of chairmen and members of the tribunals, and ensure that appropriate works of reference on social security law are available for their use<sup>139</sup>. In addition to the President, there are appointed regional chairmen of the tribunals, to whom the President may devolve many administrative tasks, and full-time chairmen of tribunals, this marking a departure from the tradition in social security matters that service as chairman is essentially a part-time activity. In 1984, there were seven regional chairmen and four full-time chairmen in post.<sup>140</sup>

(c) The third tier of the adjudication structure continues to be the *Social Security Commissioners*, whose jurisdiction and functioning are not directly affected by the changes in the two lower tiers. Indeed, creation of the

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135. *Social Security Act 1975*, s. 97(2), substituted by the *Act of 1983*, sch. 8.

136. *Social Security Act 1975*, s. 97(2D), (2E), substituted by the *Act of 1983*, sch. 8.

137. *Social Security Act 1975*, s. 97(2A) and sch. 10, para. 2 substituted by the *Act of 1983*, sch. 8 and *Health and Social Security Act 1984*, s. 16.

138. *Social Security Act 1975*, sch. 10, para. 1A(3) inserted by the *Act of 1983*, sch. 8.

139. *Social Security Act 1975*, sch. 10, paras. 1A-1D inserted by the *Act of 1983*, sch. 8.

140. Hansard, H.C. Deb., 21 May 1984, col. 784.

SSATs has not been accompanied by legislative integration, and rights of appeal to the Commissioners from the SSATs are not uniform. As regards matters formerly within the jurisdiction of the national insurance local tribunals, there is still an unlimited right of appeal where the SSAT's decision is by a majority; but leave to appeal from either the SSAT chairman or a Commissioner is required where, as is usually the case, the SSAT's decision is unanimous<sup>141</sup>. By contrast, as regards matters formerly within the jurisdiction of supplementary benefit tribunals, the appeal is confined to points of law and may be brought only with leave, given either by an SSAT chairman or by a Commissioner<sup>142</sup>. There continues to be a right of appeal on law from a Commissioner's decision to the Court of Appeal in England or to the Inner House of the Court of Session in Scotland.<sup>143</sup>

The 1983 legislation also made changes in the adjudication of medical questions. At first instance, decisions of disablement questions may now be made by an adjudicating medical practitioner in place of the former medical board of two doctors<sup>144</sup>. Medical appeal tribunals come within the presidential system just described, and administration of these tribunals has been transferred to the new President from the DHSS<sup>145</sup>. Appeals to the Social Security Commissioners on points of law from the medical appeal tribunals are not affected.

Finally, these various changes have led to the issue of new procedural regulations applying to all forms of social security adjudication. The *Social Security (Adjudication) Regulations 1984*<sup>146</sup> replace a wide variety of procedural rules applying to the different tribunals and also to decisions by the Secretary of State and the Attendance Allowance Board<sup>147</sup>. These regulations include general procedural rules that apply to all tribunals. Thus (a) the procedure in connection with a claim or question is to be such as the chairman of the tribunal or board shall determine<sup>148</sup>; (b) any person with a right to be heard at a hearing or inquiry "may be accompanied and may be replaced by another person whether having professional qualifications or not"<sup>149</sup>; (c) where a person is entitled to be heard at an oral hearing, he or

141. *Social Security Act 1980*, s. 15.

142. *Social Security Act 1975*, s. 101 applied to supplementary benefit cases by *Social Security (Adjudication) Regulations 1984*, sch. 4, para. 2.

143. *Social Security Act 1980*, s. 14.

144. *Social Security Act 1975*, s. 108(2) as substituted by *Act of 1983*, sch. 8, para. 21.

145. *Social Security Act 1975*, sch. 12, paras. 5A, 9 inserted by *Act of 1983*, sch. 8, paras. 9, 10.

146. S.I. 1984, No. 451.

147. This Board decides whether the medical conditions for an award of attendance allowance are satisfied: *Social Security Act 1975*, s. 35 and sch. 11.

148. S.I. 1984, No. 451, regn. 2(1)(a).

149. S.I. 1984, No. 451, regn. 2(1)(b).

his representative may address the tribunal, may give evidence, may call witnesses and may put questions directly to any other person called as a witness<sup>150</sup>; (d) oral hearings before adjudicating authorities are in principle to be in public although in some circumstances a hearing may be in private<sup>151</sup>; (e) members of the Council on Tribunals and the Council's Scottish Committee may be present at tribunal hearings and deliberations even though they are in private.<sup>152</sup>

In addition to these general provisions, separate procedural rules are laid down for specific tribunals. For the most part, those of the SSATs serve to harmonise procedures that formerly differed as between the national insurance and supplementary benefit tribunals. Thus the chairman of the SSAT may decide that a medical assessor should sit with the tribunal to advise on medical issues, a power that did not formerly apply to supplementary benefit appeals<sup>153</sup>. It is now the duty of the chairman of the SSAT to record the tribunal's decision in writing together with the reasons and the findings of fact<sup>154</sup>: formerly in supplementary benefit cases this was the duty of the whole tribunal.

Procedure before the Social Security Commissioners is also governed by these regulations. In an endeavour to speed up the decision of cases by the Commissioners, time-limits now apply for making written observations on any application, appeal or reference.<sup>155</sup>

### 3.2. Comment

It must never be assumed that the best legislative intentions are fulfilled in practice. As was said during a debate in the House of Commons about delays in the award and payment of social security benefits, "We are in danger of assuming that people who have got entitlements get those entitlements promptly — or even at all"<sup>156</sup>. Changes in the structure of welfare adjudication do not necessarily produce practical gains. Thus administration of local tribunals by a presidential system may be no more

150. S.I. 1984, No. 451, regn. 4(8).

151. S.I. 1984, No. 451, regn. 4(4). The hearing is in public except where in a case before an adjudicating authority other than a Social Security Commissioner, the claimant requests a private hearing, or where the tribunal chairman or the Commissioner decides that intimate personal or financial circumstances may have to be disclosed or that considerations of public security are involved.

152. S.I. 1984, No. 451, regns. 2(2)(a) and 3.

153. S.I. 1984, No. 451, regn. 18(4).

154. S.I. 1984, No. 451, regn. 19(2).

155. S.I. 1984, No. 451, regn. 29.

156. Hansard, H.C. Deb., 29 Jul. 1982, col. 1389.

efficient than administration by the DHSS. Nonetheless, as shown above, earlier developments in the social security system prepared the way for the integration of tribunals<sup>157</sup>, and there was no opposition in Parliament to the basic proposal. But it will take time to achieve a working integration of the two previous systems. In law the new tribunals came into being in April 1984, but extensive training will be needed before the chairmen, members and clerks are fully able to deal with both sides of the new jurisdiction. Until 1989 certain chairmen, that is those chairmen of supplementary benefit tribunals who continue in office although not legally qualified, will be restricted to hearing supplementary benefit appeals<sup>158</sup>. Moreover, procedures will need to be created for enabling the integrated adjudication system to deal with the questions which had before 1984 to be referred from the supplementary benefit side to national insurance tribunals for decision<sup>159</sup>. Continuing specialization of functions among adjudication officers will be inevitable. A civil servant with great experience of deciding claims for additional payments for hearing or clothing cannot be expected to command similar knowledge of the rules which govern whether a claimant has lost employment through a stoppage at his place of work due to a trade dispute, or whether a claimant's injury occurred in an industrial accident. Yet the local tribunals will in time need to be able to deal with all manner of disputes arising out of social security and social assistance, other than those assigned to other adjudicating procedures for adjudication.

One argument advanced by the government for the reforms was that it would improve the *quality* of adjudication. The issue of how within an adjudicative system one can measure and promote the quality of decisions has been more fully explored in American literature than in Great Britain<sup>160</sup>. Three features of the recent British reforms may be said to promote the quality of decisions : (a) the requirement of legally qualified chairmen ; (b) the merger of the tribunals dealing with means-tested and non-means tested benefit ; and (c) the creation of the presidential system. As regards (a), the requirement that all chairmen of SSATs appointed in future must be solicitors or barristers of five years' standing is not in itself a sufficient test of suitability. The professional qualification and the rule of standing will not ensure knowledge or professional experience of social security law. Still less

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157. *Supra*, note 127. And see L. PLIATZKY, *Report on Non-Departmental Public Bodies*, Cmnd. 7797, 1980, 81.

158. S.I. 1984, No. 451, regn. 93.

159. *Supra*, note 134.

160. See *e.g.* works cited in note 11, *supra*.

will the rules ensure possession of the personal qualities that a tribunal chairman needs.<sup>161</sup>

As regards (b), the merger of tribunals should promote the uniform treatment of social security and social assistance appeals, and minimize the risk of lower standards of adjudication being applied to means-tested benefits.

As regards (c), the presidential system, the national president and regional chairmen will be in a position to become actively involved with the work of the tribunals through training and conferences, following up complaints and giving advice, without meeting the criticism that this activity is interfering with the independence of tribunals. Thus the president could (if he so wished) instigate a close monitoring of the performance of local tribunals, that might resemble American schemes of "quality assurance"<sup>162</sup>. This is something that the Council on Tribunals in Britain has never been able to undertake, despite its broad statutory oversight of all tribunals.<sup>163</sup>

Schemes of quality control have yet to be created, but a different step in the same direction was taken in 1980 when the Social Security Commissioners were given an appellate jurisdiction in supplementary benefit cases. That step, coinciding with the change in the legal nature of the supplementary benefit scheme, made it necessary for local tribunals to acquire greater expertise in conducting hearings, in performing an inquisitorial role without breaching natural justice<sup>164</sup>, in dealing with submissions by the parties, and in formulating and justifying their decisions. Since the role of the clerk had by then been down-graded, so that a tribunal could no longer look to the clerk for advice on the rules of supplementary benefit<sup>165</sup>, the necessary expertise had to come from within the tribunal. If it is argued that lawyers do not have a monopoly of common sense and good judgment<sup>166</sup>, the reply — reminiscent of the reply which Sir Edward Coke gave to the same argument when it was advanced by James I of England in 1607<sup>167</sup> — is that a tribunal's

161. See also J. MESHER, "The Merging of Social Security Tribunals", (1983) 10 *Br. J. of Law and Society* 135, p. 138-139. In Mesher's view, the necessity for lawyer chairmen outweighs any disadvantages there may be.

162. J.L. MASHAW, "The Management Side of Due Process", *supra*, note 11; J.L. MASHAW, *Bureaucratic Justice*, *supra*, note 11, ch. 7.

163. *Tribunals and Inquiries Act 1971*, s. 1(1). See also *The Functions of the Council on Tribunals*, Cmnd. 7805, 1980, p. 17-20.

164. *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore*, [1965] 1 Q.B. 456; Commissioners' Decisions R(SB) 2/83 and R(SB) 30/84.

165. On the role of the clerk, see R(SB) 13/83.

166. *E.g.* Hansard, H.C. Deb., 17 Feb. 1983, col. 551.

167. *Case of Prohibitions del Roy*, (1607) 12 Co. Rep. 63.

decision on supplementary benefit appeals can no longer be based on common sense and good judgment of what the claimant needs. We saw above that Beveridge characterised decision on claims for social assistance as requiring “sympathetic justice and discretion taking full account of individual circumstances”<sup>168</sup>. The justice that needy claimants now receive can be no more sympathetic than the regulations allow; and many individual circumstances that are relevant to the claimant’s social situation are legally irrelevant to the tribunal’s proceedings.

We may suppose that, for the DHSS ministers who decide government policy towards the poor and express it through regulations, what matters is that appeal tribunals should be able to make decisions that faithfully apply the regulations and which stand up to scrutiny on legal grounds by the Social Security Commissioners. The greater the legal competence of local tribunals, the less the need for claimants and adjudication officers to appeal to the Commissioners. As one minister said in Parliament, the requirement of legal chairmen “is almost a necessity to improve the tribunal’s chances of coming to a sound decision”<sup>169</sup>. Quality thus becomes indistinguishable from legal expertise.

Another argument advanced in favour of the recent changes was that they would promote the *independence* of the tribunals; in particular, that the presidential system would set the tribunals at a greater distance from the DHSS. For similar reasons, administrative responsibility for the Social Security Commissioners has recently been transferred from the DHSS to the Lord Chancellor’s Department, which is responsible for the judicial system and the ordinary courts<sup>170</sup>. Now judicial independence is a jewel with many facets, and even the Social Security Commissioners recently departed from due even-handedness of justice when they gave priority to appeals brought to them by benefit officers and made private appellants wait<sup>171</sup>. That social security tribunals should be perceived as deciding appeals independently of the DHSS is fundamental to their role. But in social security the scope for decision-making depends to a great extent on the enacted legislation. Greater independence for the tribunals does not mean that their decisions

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168. *Supra*, note 25.

169. House of Commons Standing Committee B, 21 April 1983, col. 637.

170. *Transfer of Functions (Social Security Commissioners) Order 1984*, S.I. 1984, No. 1818.

171. The Commissioners responded to a rising torrent of supplementary benefits appeals in 1981 by deciding to give priority to appeals brought by benefit officers which they considered likely to raise points of law of general importance, whereas appeals brought by claimants were more likely to raise issues applicable to a claimant’s individual circumstances. Hansard, 18 Jan. 1982, col. 48 (W.A.); and *Legal Action Group Bulletin*, March 1982, 7; May 1982, 8.

can be more favourable to the claimant than the enacted law permits. In fact, as the formal independence of the tribunals has been fostered, the rule-making powers of the DHSS have also increased. The statutory process of consultation with the Social Security Advisory Committee<sup>172</sup> and parliamentary scrutiny is rarely able to deflect the government from its chosen course of action. While the Social Security Commissioners exercise a measure of legal review over the validity of regulations, they rarely find it necessary to hold a regulation invalid, and such a decision is likely to lead the DHSS to make the regulation over again<sup>173</sup>. In a similar way, decisions by Social Security Commissioners interpreting the regulations in a manner contrary to the official view are liable to cause the DHSS to have recourse to amending regulations.<sup>174</sup>

*Simplicity* has also been advanced in support of the reforms. It makes for simpler public explanation to have a standard appeal to a local tribunal from most first instance decisions<sup>175</sup>, but the rules of procedure made in 1984 are little easier to understand than the mass of substantive regulations governing the award of benefit, and the recent reforms do not, as will be discussed below, reduce the need for most appellants to have expert help. Similarly, while ministers expressed a modest hope that the reforms would improve the *speed* with which decisions are taken<sup>176</sup>, this is not a necessary consequence. If undue delays do occur, however, responsibility for the delays will be focussed more clearly than in the past, on the Chief Adjudication Officer so far as first instance decisions are concerned, and on the President of SSATs and Medical Appeal Tribunals in respect of second-tier delays. It may be hoped, for reasons already discussed, that the President may be able to tackle delays by local tribunals more vigorously than the DHSS could have done. However, while the delays that seem inherent in a system of appeals are rightly unpopular with appellants and their M.P.s.<sup>177</sup>,

172. *Social Security Act 1980*, ss. 9, 10.

173. An important example is R(SB) 26/84, where part of the consolidated *Supplementary Benefit (Single Payments) Regulations 1981* was held *ultra vires* on procedural grounds, since it sought to change the law and thus fell outside the procedure for consolidating regulations.

174. Sometimes this power is used because of the public expenditure implications of a Commissioner's decision: thus R(S) 7/78 led immediately to a tightening in the eligibility of housewives for non-contributory invalidity pension (S.I. 1978, No. 1340) and R(SB) 52/83 led to an exclusion of medical needs from single payments of supplementary benefit (S.I. 1983, No. 1630). But the power may be used to extend the scope of benefit after Commissioners' decisions interpreting regulations restrictively (e.g. R(SB) 2/82, 5/83 and 26/83).

175. See DHSS leaflet *How to appeal*, N.I. 246 (May 1983).

176. Hansard, H.C. Deb., 17 Feb. 1983, col. 497.

177. See e.g. Hansard, H.C. Deb., 17 Feb. 1983, cols. 543, 555; H.C. Standing Committee B, 21 Apr. 1983, col. 678; H.C. Deb., 21 May 1984, cols. 777, 780.

it is not always certain which stages in the appeals process in fact cause delay; this information is needed before it can be known whether any sacrifice of procedural rights would reduce the risks of delay.

Nor is it known whether structural change and a stress on formal independence materially affect how tribunal members perceive their role, or influence their decision-making. Of the reforms under discussion, the change that proved most controversial in Parliament was the re-constitution of the panels from which tribunal members are selected. Before 1984, one of the two lay members of a national insurance local tribunal was required to be drawn from a panel representing employers and self-employed earners, and the other from a panel representing employed earners<sup>178</sup>. The long-established practice by which the panels of employed earners were appointed was that the DHSS sought nominations from local Trades Councils (i.e. local federations to which trade union branches affiliate). To include in every local tribunal one member representative of employers and one representative of employed workers was appropriate when most cases coming before a tribunal were likely to arise out of employment disputes. Despite their different antecedents, supplementary benefit tribunals had come to have a similar composition, with one member being appointed from persons “appearing to have knowledge or experience of conditions in the area... and of the problems of people living on low incomes”, and the second member being appointed from a panel of those “appearing to represent work-people”<sup>179</sup>; the latter panel was chosen from nominations submitted by local Trades Councils. In 1983, the government wished to substitute for these two panels a single panel appointed by the President of SSATs from persons appearing “to have knowledge or experience of conditions in the area and to be representative of persons living or working in the area”<sup>180</sup>. The government argued that this would enable nominations to be made by a wide range of voluntary organizations and community groups (for example, disability and single-parent support groups) and that many social security disputes no longer arose out of the employment context.

Strong resistance to this came from the Labour opposition in Parliament, who insisted that the change be taken out of the Bill of 1983, when its passage through Parliament was cut short by the general election in May 1983. Thereafter, the government returned to the matter and in 1984 a single panel of members was established on the lines first proposed in 1983. In vain did the opposition argue that the requirement of a trade union nominee was

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178. *Social Security Act 1975* s. 97(2), before amendment in 1983.

179. *Supplementary Benefits Act 1976*, sch. 4, para. 1, before amendment in 1983.

180. See now *Social Security Act 1975*, s. 97(2A) and sch. 10, para. 2, amended by *Health and Social Security Act 1984*, s. 16.



essential to ensure that ordinary appellants could identify with at least one member of the tribunal<sup>181</sup>. The Council on Tribunals welcomed the change to a single panel<sup>182</sup>. While there was indeed an argument to be made for broadening the basis of tribunal membership, there was considerable force in an opposition proposal that would have spelled out in detail the President's obligations in making appointments to the panels<sup>183</sup>. When the new system came into force, the members of the existing panels were transferred *en bloc* to the new single panel, and it is likely that the President of SSATs will continue to make use of existing forms of consultation. In Scotland, he is to continue to seek nominations from the Scottish Trades Union Congress and plans to appoint half of the panel from those nominated by that body.<sup>184</sup>

While the recent reforms sought to increase the legal expertise of the tribunals, they did not include steps to increase the availability of skilled representation or expert advice for appellants. The legal aid scheme does not extend to representation before social security tribunals, even in respect of appeals to the Social Security Commissioners on points of law, although preliminary advice or assistance (for example, the drafting of a letter of appeal) is available under the present legal advice scheme<sup>185</sup>. In the legislative debates, M.P.s. frequently referred to the anxiety, helplessness and lack of comprehension which many claimants feel about the tribunal process. The latest statistics on representation before supplementary benefit tribunals (equivalent statistics for national insurance tribunals were not published) appear in annex C. From table I it will be seen that the greatest measure of success, 35%, was secured (in just on one-quarter of all appeals), when the appellant both attended and was accompanied or represented at the appeal hearing. The lowest measure of success, 7%, was recorded (in the largest group of cases, 37%) when the appellant neither attended nor was represented. Information about the relative success achieved by different forms of representation is summarised in table II. The high success-rate of social workers as representatives suggests strongly that even under a scheme based on statutory entitlements, legal advocacy is not essential for success. At present government policies on the funding of law centres and the future

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181. See Hansard, H.C. Deb., Standing Committee A, 6 Mar. 1984, col. 466 ff; H.C. Deb., 2 May 1984, col. 498 ff; H.L. Deb., 21 June 1984, col. 548 ff. and 3 July 1984, col. 214 ff.

182. Council on Tribunals, Annual Report 1983-84, p. 22.

183. See Hansard, H.C. Deb., 2 May 1984, col. 498.

184. Newsletter from regional chairman (Scotland) of SSATs and medical appeal tribunals, Feb. 1985. Since the former panels are now merged into one, and the clerk summons members in rotation, a tribunal may now include two former employers' nominees, or two former union nominees, in addition to the chairman.

185. *Legal Aid Act 1974*, part I.

of legal aid are uncertain<sup>186</sup>. Since the proclaimed interest of the government lies in encouraging self-help in presenting appeals, the government does not accept that the legalization of social security adjudication has reached a point where legal representation has become a virtual necessity for an appellant to have any chance of success<sup>187</sup>, and annex C gives support to this position. However, while the government has paid lip-service to the proposition that appellants should be enabled to conduct their own cases whenever possible, it has not yet provided resources to the Council on Tribunals to review tribunal procedures for this purpose.<sup>188</sup>

The reforms of 1983-84 were extensive but did not amount to a comprehensive re-making of social security adjudication. The changes which the *1983 Act* made in medical adjudication have already been described. In 1985 other aspects of medical adjudication were under review, in particular the procedures of the Attendance Allowance Board, which have attracted much parliamentary criticism. A senior opposition M.P., who wished to see attendance allowance decisions entrusted to the new SSATs, described the Board's procedures as an "undisguised shambles", "the ultimate in irresponsibility, in sheltered decisions and in injustice to the claimants"<sup>189</sup>. Criticism has focussed on the undue delays in decisions, and on the fact that there is no right of appeal against refusal of the allowance, although review by the Board of earlier decisions does occur. Another benefit for disabled persons that has been criticised is the mobility allowance, the medical conditions for which are decided by the medical authorities who decide industrial disablement questions.<sup>190</sup>

In 1983 a review of attendance allowance and mobility allowance procedures was undertaken for the DHSS by Mr. P.R. Oglesby<sup>191</sup>. His report examined the extent to which a claimant's own doctor should provide the medical assessment on which the award of benefit is based, and the need for medical expertise in the adjudication process. Oglesby proposed that the right of appeal against a refusal of benefit should be to a social security appeal tribunal, consisting for mobility allowance appeals of the legal

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186. See 34<sup>th</sup> Report of the Lord Chancellor's Advisory Committee on Legal Aid, H.C. 151 (1983-84).

187. A notable exchange on the need for representation at social security tribunals is recorded in H.C. Deb., Standing Committee B, 21 April 1983, cols. 657-664.

188. Council on Tribunals, Annual Report 1983-84, p. 9. And see Cmnd. 9077, 1983.

189. H.C. Deb., Standing Committee B, 21 April 1983, col. 696. See also H.L. Deb., 16 Dec. 1982, col. 725.

190. *Social Security Act 1975*, s. 37A (inserted by *Social Security Pensions Act 1975*, s. 22(1)) and the *Mobility Allowance Regulations 1975*, S.I. No. 1573.

191. And see Council on Tribunals, Annual Report 1983-84, p. 23.

chairman, a doctor and one lay person; and, for attendance allowance appeals, of the legal chairman, a doctor and an experienced nurse. Such a proposal would alter the character of the SSAT from being a generalized tribunal for all aspects of social security into a more specialized tribunal for some purposes. This in turn raises the broader question of whether for other appeals that may turn on matters of medical judgment but are not within the jurisdiction of the medical appeal tribunal, the SSAT should regularly include a doctor instead of basing its decision on written medical evidence (which happens frequently), and in a difficult case calling on a medical assessor for advice (which happens much less frequently). A related question is whether the Social Security Commissioners should be authorised to sit with a doctor in cases involving difficult medical issues. In this respect, the experience of the *Commission des affaires sociales* in Quebec, the body which in Canada corresponds most closely with the Social Security Commissioners in Britain, is directly relevant.

An area of welfare which falls completely outside the present structure of social security appeals is that of housing benefit. This benefit was introduced in 1982 to replace a variety of earlier benefits and allowances, including the housing element of supplementary benefit. Housing benefit is administered by local housing authorities, not by the DHSS, and the only right of appeal is to a housing benefit review board appointed by the local authority<sup>192</sup>. This board lacks some essential qualities of a tribunal, and has not been placed under the supervision of the Council on Tribunals. Nothing seems to have gone right with the introduction of housing benefit<sup>193</sup>, and there is every reason why rights of appeal against adverse decisions on housing benefit should be fully comparable with rights of appeal against social security decisions — both directly determine the incomes of many needy families<sup>194</sup>. In 1985, these matters were under review by the government, along with the housing benefit scheme itself.

## Conclusion

The improvement of an adjudication system is inevitably a never-ending process, as new demands are placed upon it and perceptions of the system change. The immediate priority for the appeals system in Britain is for the integration of appeals at local level to be fully realized, and the benefits of the presidential system obtained. Once that has been achieved, it would be

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192. *Housing Benefits Regulations 1982*, S.I. 1982, No. 1124, part VIII.

193. See the reports cited in note 7, *supra*.

194. Hansard, H.C. Deb., 17 Feb. 1983, col. 556 and H.C. Deb., Standing Committee B, 26 April 1983, col. 711 ff.

possible to devise further refinements in the system (possibly on the lines recommended by Mr. Oglesby) and to add housing benefit to the jurisdiction of SSATs. At present it would be premature to attempt such further changes.

A dominant theme in the recent reforms has been the need to improve the legal capability of local tribunals, in response to the greater legal complexity of the social security scheme. However, for two reasons the contribution of legality is not an answer to all the stresses and strains that are imposed on the social security system.

First, what may be a satisfactory process judged by narrowly legal standards may not be satisfactory from other viewpoints. Thus the adverse effects of delay are worse for the claimant than for those operating the system, even if a decision eventually emerges that bears legal scrutiny. Again, a tribunal may handle an appeal correctly but score low marks in terms of human relations. As was said in the House of Commons, "We want a responsive, sympathetic tribunal which through its composition will have some knowledge of the problems the poor appellant has to face"<sup>195</sup>. The need for response and sympathy does not arise merely from the fact that many appellants for social security are poorer than most tribunal members. It also arises from the vulnerability of the unrepresented individual at a tribunal hearing, compared with the tribunal members, the adjudication officer and others who regularly take part in tribunal proceedings.

Second, the more that legal efficiency is achieved, the more accurately will the government's social policies as expressed in legislation be applied in decisions affecting the individual. Adjudication by tribunals as they now are in Britain can play a positive part in determining what claimants are entitled to, and in enabling them to receive that entitlement. But scope for using the courts and tribunals in Britain as a surrogate political process is very limited in present circumstances<sup>196</sup>. Only a redeployment of economic resources and a determined political commitment are capable of making significant improvements in the state's social policies.<sup>197</sup>

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195. H.C. Deb., Standing Committee B, 19 Apr. 1983, col. 619.

196. Cf. T. PROSSER, *Test Cases for the Poor*, London, Child Poverty Action Group, 1983.

197. To repeat the conclusion I reached in (1976) 27 *N.I.L.Q.* 96, p. 119. An earlier version of the present article was read in 1983 by Professor P. Issalys and by Mr. J.G. Mitchell Q.C. I wish to record my thanks for their comments and also for help given by Mr. R.W. Deans, C.B.

**ANNEX A**  
**Social Security Appeals 1983**

TYPE OF BENEFIT	TOTAL CLAIMS	TOTAL APPEALS & REFERENCES TO LOCAL TRBL. (a)	DECISIONS IN FAVOUR OF CLAIMANT		APPEALS TO COMMRS.	DECISIONS IN FAVOUR OF CLAIMANT	
				%			%
Unemployment	5.17m new claims	16,449	3,295	20%	314	66	21%
Sickness Invalidity	3.16m new claims (b)	3,076 3,371	592 984	19% 29%	81 164	25 46	31% 28%
Non-contributory invalidity pension	Not available	1,516	555	37%	78	16	21%
Maternity	658,000 grants (c) 330,000 allowances (c)	468	88	19%	14	9	64%
Death Grant	609,000 grants (c)	41	10	24%	—	—	—
Guardian's Allowance etc.	4,894 (no. of children) (d)	49	5	10%	3	1	33%
Invalid Care Allowance	6,619 (3508 successful)	58	2	3%	2	—	—
Widows	406,000 (d)	216	59	27%	25	3	12%
Retirement Pension	9.28m (d)	900	219	24%	56	12	21%
Attendance Allowance	207,387 (159,491 successful) (e)	144 29,843 (h)	25 19,819	17% 66%	8 154	2 17	25% (11%)

Mobility Allowance	275,628	(d)	255 3,102	(i)	8 1,019	3% 33%	12 86	0 80	— 93%
Industrial Injury	116,000		763		329	43%	} 253	98	(39%)
Industrial Disablement	189,000	(d)	1,790 10,425	(i)	729 4,186	41% 40%			
Industrial Death	1,349	(f)	60		12	20%			
Child Benefit	12.68m	(g)	952		102	11%	32	5	(16%)
One Parent Benefit	508,000	(d)	342		37	11%	—	—	—
Supplementary Benefit	6.08m (4.36m successful)		56,084	(j)	9,386	23% (k)	} 1,605	N.A.	N.A.
Family Income Supplement	351,270		2,009	(j)	125	6%			

(a) National insurance local tribunal, except where otherwise stated.

(b) In 1983, 672,000 claims for sickness and invalidity were referred to regional medical services. 278,000 medical examinations took place; 201,000 claimants were considered incapable of work; 77,000 claimants were considered capable of normal occupation or alternative work; 61,000 claimants failed to attend for examination; 14,000 claimants withdrew claim after receiving notice to attend for examination.

(c) Total awards in 1983.

(d) Awards in payment on 30<sup>th</sup> November or 31<sup>st</sup> December 1983.

(e) Initial claims.

(f) Figure for 1982.

(g) Children in respect of whom benefit was being paid at end of 1982.

(h) Decisions by Attendance Allowance Board on review.

(i) Appeals and references to Medical Appeal Tribunal (medical questions).

(j) Decisions by Supplementary Benefit Appeal Tribunal.

(k) As percentage of appeals about right to or amount of any benefit — 41,154.

[The figures in this annex are all extracted from various tables in *Social Security Statistics 1984*, H.M.S.O. In some cases the figures refer to 1982 rather than 1983.]

**ANNEX B**

**Cases Disposed by National Insurance Local Tribunals,  
Social Security Commissioners and  
Supplementary Benefit Appeal Tribunals  
1970-1983 (Great Britain)**

(1)	(2)	(3)	(4)
Year	National Insurance Local Tribunals	Social Security Commissioners	Supplementary Benefit Appeal Tribunals
1970	35,641	2,576	28,717
1971	29,334	2,261	29,648
1972	35,903	2,189	36,051
1973	29,477	2,039	26,002
1974	28,510	1,916	27,242
1975	31,485	1,975	34,042
1976	37,425	1,853	54,407
1977	40,403	1,997	63,943
1978	45,024	1,857	63,943
1979	39,304	2,751	47,101
1980	30,098	3,329	50,504
1981	36,744	3,187	51,229
1982	34,218	4,523	57,846
1983	30,468	3,730	62,070

Source: Annual Reports of Council on Tribunals. The figures in column 3 include appeals on law from medical appeal tribunals and the Attendance Allowance Board. The figures in column 3 for 1981-83 include the following appeals on law from Supplementary Benefit Appeal Tribunals: 1981, 310; 1982, 1,497; 1983, 1,605. The figures in column 4 include appeals concerning Family Income Supplement (1981, 1,365; 1982, 1,762; 1983, 1,503).

**ANNEX C**  
**Representation, attendance and success-rate**  
**at supplementary benefit appeal tribunals in 1983**

(source : Social Security Statistics 1984)

Table I shows the number of cases in which the appellant (A) attended the hearing and/or was represented, the number in brackets being a percentage of all appeals. The success-rate in each category is also shown.

**TABLE I**

	A was represented	success rate	A was not represented	success rate	Totals	success rate
A attended	14,508 (24%)	35%	21,290 (35%)	21%	35,798 (59%)	27%
A did not attend	2,319 (4%)	31%	22,450 (37%)	7%	24,769 (41%)	9%
Totals	16,827 (28%)	34%	43,740 (72%)	14%	60,567 (100%)	19.5%

“Representation” for this purpose does not necessarily mean representation as a lawyer would understand it. Thus, if the appellant was accompanied by a friend or relative who took an active part in presenting the appeal, this would be shown as representation. “Success” is to be understood as referring to those appeals whose outcome was that the earlier award of benefit was revised in a manner advantageous to the appellant.

The main categories of representation and the respective success-rates are shown in Table II.

**TABLE II**

Type of representation	number of cases	success-rate
Friend/relative	9,164	25%
Trade union official	155	32%
Solicitor	601	40%
Social worker	3,259	47%
Child Poverty Action Group	81	42%
Claimants' Union	707	43%
Other	2,860	47%
Total	16,827	34%