

**THE PROVISION OF INFORMATION NECESSARY  
TO DETERMINE CLAIMS TO SOCIAL SECURITY  
BENEFITS – *KERR v DEPARTMENT OF SOCIAL  
DEVELOPMENT FOR NORTHERN IRELAND***

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**BACKGROUND**

*Kerr* began before an appeal tribunal with the relatively narrow issue of the knowledge of a claimant to a social fund funeral payment of the benefit status of other close relatives of the deceased. By the time the case had passed through the hands of the Social Security Commissioner,<sup>1</sup> and the Northern Ireland Court of Appeal,<sup>2</sup> the issue had widened to become the question of where the burden of proof lay in establishing whether a close relative of a deceased person is in receipt of a qualifying benefit, or has capital exceeding the relevant amount, for the purposes of Regulation 6(6) of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987.<sup>3</sup> Further the NI Court of Appeal also considered the application of Regulation 7 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987,<sup>4</sup> and the duty to furnish 'such certificates, documents information and evidence in connection with the claim, or any question arising out of it, as may be required by the Department'. In arriving at its conclusions on this issue, the Court rejected the long-standing decision of Commissioner Mesher in *R(IS) 4/93*.<sup>5</sup>

Now, after consideration by the House of Lords,<sup>6</sup> the subject-matter has broadened even further to a consideration of the role and function of social security adjudication. This general but comprehensive analysis confirms that the adjudication process in respect of social security benefits is inquisitorial rather than adversarial. While that proposal had always been accepted in respect of the role and function of the appeal tribunal, as part of the adjudication process, the reasoning of the House of Lords is innovative in re-emphasising the applicability of the principle to other adjudication levels, more particularly first-tier adjudication. What is being submitted is that the process by which information necessary to determine claims to social

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\* The author is writing in a private capacity.

<sup>1</sup> *CI/00-01(SF)*, available at <[www.dsdni.gov.uk/benefitlaw/benefitlaw.asp](http://www.dsdni.gov.uk/benefitlaw/benefitlaw.asp)>.

<sup>2</sup> (2002) NICA 31, available at <[www.courtsni.gov.uk](http://www.courtsni.gov.uk)>. See the analysis by this author at (2003) 54 *NILQ* No.4, p.430.

<sup>3</sup> Equivalent in every detail to the Social Fund (Maternity and Funeral Expenses) (General) Regulations 1987 for Great Britain.

<sup>4</sup> Equivalent in every detail to the Social Security (Claims and Payments) Regulations 1987 for Great Britain.

<sup>5</sup> Available at <[www.osspsc.gov.uk/pages/des.htm](http://www.osspsc.gov.uk/pages/des.htm)>.

<sup>6</sup> [2004] UKHL 23, available at <[www.publications.parliament.uk/pa/ld200304/ldjudgment/jd040506/kerr-1.htm](http://www.publications.parliament.uk/pa/ld200304/ldjudgment/jd040506/kerr-1.htm)>.

security benefits is collated and managed, involves co-operation between the claimant and the Department.

In the longer term, the reasoning of the House of Lords in *Kerr* will have implications across the whole process of social security adjudication. In the shorter term, it will also have a significant influence on the submissions made to the House of Lords, and the eventual decision of that court, in the appeal<sup>7</sup> from the Court of Appeal in *Hinchy v Secretary of State for Work & Pensions*.<sup>8</sup> That case analysed the roles and responsibilities of the recipients of social security benefits, and the Department, with respect to the duty to disclose information likely to affect entitlement to such benefits.

### **Proceedings before the Chief Social Security Commissioner and the Northern Ireland Court of Appeal**

Mr Hugh Kerr died on 19th July 1999. His funeral took place on 27th July 1999 at a cost of £1,172.58. An application for a Social Fund Funeral Payment was made to the Department for Social Development (the NI equivalent of the DWP) by a surviving brother of the deceased, Mr Thomas Frank Kerr. His application was refused (on the basis of a factual error, as it turned out) and he appealed to an appeal tribunal. At the date of the death of the deceased he had another brother and a sister living.

The appeal tribunal found, as a fact, that the appellant and his siblings had drifted apart, and had lost contact, and that the appellant simply did not know whether any of them was in receipt of a qualifying benefit. The appeal tribunal concluded that, while it was reasonable for the appellant to accept responsibility for the funeral expenses, it simply was not known whether any of the close relatives of the deceased was in receipt of a relevant benefit, and the same applied to their capital position. The tribunal concluded that the onus was on the appellant to show that his brother or sister was in receipt of a relevant benefit and did not have capital over the prescribed amount. As he was unable to prove those things, the consequence was that his claim failed.

On appeal before the Chief Social Security Commissioner for NI, and on the issue of the burden of proof, the Chief Commissioner followed a decision of Mr Commissioner Henty in *CIS/5321/98*,<sup>9</sup> particularly paragraph 7, and held that a claimant has to prove the basic qualifications to a social security benefit, by proving the circumstances that make him or her entitled, whilst the Department normally had to prove any exceptions such as those matters set out in Regulation 6(3) (of the Social Fund (Maternity and Funeral Expenses) (General) Regulations 1987).

The Chief Commissioner concluded that once the Tribunal had found all the siblings were in equally close contact then the question turned to finances and the burden of proof. It seemed to the Chief Commissioner that a burden might be on the Department if there was sufficient evidence to enable the Department to make relevant enquiries. It was clear, however, that any claimant must to the best of his or her ability give such information to the

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<sup>7</sup> The appeal is likely to be heard early in 2005.

<sup>8</sup> [2003] EWCA Civ 138, available at <[www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2003/138.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2003/138.html)>.

<sup>9</sup> Available at <[www.osspsc.gov.uk/pages/des.htm](http://www.osspsc.gov.uk/pages/des.htm)>.

Department as he reasonably can. Siblings were, on balance, expected to have some knowledge of each other and must be expected to provide basic information to the Department or at the very least show that they have taken all reasonable steps to obtain such information.

The Commissioner also swiftly rejected the argument that contact with the deceased could include contact after death, holding that the contact required by the legislation must be contact during the lifetime of the deceased, though the taking of responsibility for a funeral can be supportive evidence of the quality and nature of a relationship during his life.

In the Northern Ireland Court of Appeal, the majority thought that, as the legislature had not expressly specified on which party the burden of proof lay, it was necessary to attempt to ascertain that by implication or by the application of any relevant rules of construction or presumptions. Applying the principles that 'exceptions are to be set up by those who rely on them',<sup>10</sup> and that where a matter requiring proof is particularly within the knowledge of one party and it would be unduly onerous for the other to have to prove it, the burden lies on the former, the majority thought that that it was the intention of the legislature that the burden of proof of establishing that the exception contained in Regulation 6(6) applies should rest upon the Department.

The majority also thought that if Commissioner Mesher, in *R (IS) 4/93*, had intended to hold that failure to comply with the statutory obligation to furnish evidence has no effect other than to leave the claim short of the necessary evidential foundation, they could not find it possible to agree with that conclusion, which would make the provision of (the equivalent of) Regulation 7 of the Social Security (Claims and Payments) Regulations 1987 otiose. Rather, it seemed to the majority that it was intended to impose an obligation on the claimant fulfilment of which is a condition of entitlement to claim benefit and that failure to comply with the statutory requirement entitled the Department to withhold payment on his claim.

Accordingly, the majority held that the appeal tribunal and the Commissioner were in error in imposing the burden on the appellant of proving that the case did not come within the exception contained in Regulation 6(6) of the 1987 Regulations.

The minority dissented on the important issue of the burden of proof. As the procedure for deciding a claim is an administrative one, rather than judicial, the provision could not be construed in such a way as to suggest that Parliament intended that any onus lay upon the Department under Section 1(1) of the Social Security Administration (Northern Ireland) Act 1992 to establish satisfaction of any of the conditions relating to entitlement to benefit or to negative the existence of disqualifying conditions. Further, the minority thought that it is quite impracticable for the Department to prove many of the matters, which, if established, effectively disqualify a claim, and that Regulation 7(1) of the Social Security Claims and Payment Regulations 1987 was incompatible with an intention on the part of Parliament that the

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<sup>10</sup> Described by Lord Wilberforce in *Nimmo v Alexander Cowan & Sons Ltd*, [1968] A.C. 107 at 130.

Department should be required to establish facts independently of the applicant for benefit.

### **The House of Lords**

The main speech in the House of Lords was delivered by Baroness Hale of Richmond. All other four members of the Appellate Committee were in agreement with Baroness Hale's substantive reasons for dismissing the appeal of the Department of Social Development. Accordingly, this note will concentrate on her analysis. In addition, however, Lord Hope of Craighead and Lord Scott of Foscote undertook an examination of other aspects of the issues, as they arose in the Northern Ireland Court of Appeal, and disagreed on them. These additional considerations will also be explored below.

Baroness Hale began by undertaking a detailed analysis of the evolution of the legislative provisions for entitlement to a Social Fund funeral payment. That analysis included an examination of the significant amendments to the rules, which were made in 1994,<sup>11</sup> and further refined in 1997,<sup>12</sup> in order to ensure that the person who had accepted responsibility for funeral costs was so closely connected with the deceased that it was reasonable for that person, rather than a more closely connected family member, to do so.<sup>13</sup>

The judge then considered the submissions of the parties. For the Department, counsel had argued that a claimant had to prove all of the conditions of entitlement to a benefit. The conditions set out in Regulation 6(6) were still conditions of entitlement rather than exceptions, and the claimant must provide the material to establish them. Granting entitlement to the benefit without this basic information would be open to abuse. Counsel for the Department did concede, however, that the administration of the social security benefits system is an inquisitorial rather than an adversarial process in which strict notions of the burden of proof might be inappropriate.

For the claimant, counsel argued that the reasoning of the majority of the Court of Appeal was correct, for the reasons which they had given. He, too, also submitted that the burden of proof had no function at all in the processing and determination of a claim for funeral expenses.<sup>14</sup> The

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<sup>11</sup> The Social Fund (Maternity and Funeral Expenses) (General) (Amendment) Regulations (Northern Ireland) 1994 (S.R. 1994/68). The equivalent for Great Britain were the Social Fund (Maternity and Funeral Expenses) (General) (Amendment) Regulations 1994 (S.I. 1994/527).

<sup>12</sup> The Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations (Northern Ireland) 1997 (S.R. 1997/155). The equivalent for Great Britain were the Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations 1997 (S.I. 1997/792).

<sup>13</sup> Baroness Hale comments that the original entitlement conditions were exploited by some claimants to ensure that responsibility for arranging the funeral was undertaken by someone in receipt of a qualifying award. This had led to a marked increase in the number of awards of funeral payments between 1988 and 1994.

<sup>14</sup> It is submitted that the concessions on the inquisitorial nature of the system of benefits' administration by counsel for the Department, and on the non-relevance of the burden of proof by counsel for the claimant, may have influenced Baroness Hale's eventual reasoning on the issues raised by the appeal.

Department had the mechanisms to discover facts necessary to determine the claim. Further, certain of those facts were peculiarly within the Department's own knowledge. If, after all proper enquiries are made, there is no evidence that the disqualifying conditions in Regulation 6(6) exist, then the claimant should succeed.

On the basis of this analysis, Baroness Hale identified two issues arising in the appeal:

- “(i) What sort of process is involved in the determination of a claim?
- (ii) What happens if, at the end of the process, relevant facts are simply not known?”

In relation to the first question, the judge began by conceding that the benefits system is necessarily enormously complex.<sup>15</sup> That intricacy was increasing in line with the policy objective of targeting benefits to those who needed them most. Such complexities were not for members of the public, however:

“The general public cannot be expected to understand these complexities. Claimants should not be denied their entitlements because they do not understand them. It has been a consistent objective of social security administration over the years to devise user-friendly forms and procedures to enable the benefits agencies to discover whether or not a claimant is entitled to benefit.”<sup>16</sup>

How should the process of claim determination work? It is for the claimant to start the process. Clearly, the relevant legislative provisions<sup>17</sup> provide that no claimant is entitled to a social security benefit, unless a claim is made in the appropriate manner, and require any claimant to furnish relevant certificates, documents, information and evidence in support of the claim. Thereafter, the duty is on the Decision Maker,<sup>18</sup> having received the relevant information from the claimant, to determine the claim. Further enquiries

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<sup>15</sup> This comment reflects a plethora of parallel observations by the appellate authorities over the years. Many examples could be quoted. Mr Justice Stanley Burnton in *Bell v Todd* ([2002] Lloyd's Rep Med 12) stated: “I should only like to add one comment. If there is one area of the law that should be clear and accessible it is social security law. As the arguments in this case showed, so far as the issues between the parties in this case are concerned, it is neither clear nor accessible.”

<sup>16</sup> [2004] UKHL 23 at para 56.

<sup>17</sup> S.1(1) of the Social Security Administration (Northern Ireland) Act 1992 and the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. In Great Britain the equivalent are the Social Security Administration Act 1992, and the Social Security (Claims and Payments) Regulations 1987.

<sup>18</sup> Baroness Hale refers to an ‘Adjudication Officer’. The Social Security (Northern Ireland) Order 1998 (Social Security Act 1998 in Great Britain) transferred the functions of Adjudication Officers to the Department (Secretary of State). The Department's duties with respect to decision-making are now delegated to Decision Makers.

may be made by the Decision Maker, if required.<sup>19</sup> Finally the decision of a Decision Maker may be appealed to an Appeal Tribunal.<sup>20</sup> The judge then referred to the sequence of litigation which had established the principle that the process of benefits adjudication is inquisitorial rather than adversarial. In particular, she makes reference to the judgement of Mr Justice Diplock, as he then was, in *R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble*.<sup>21</sup>

Baroness Hale thought that what emerged from her analysis of the process of claim determination was:

“ . . . a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.”<sup>22</sup>

The judge thought that such an approach was sensible, and, if taken, meant that it should rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof.

Where do the duties lie in the Baroness Hale’s ‘sensible’ process? She thought that the claimant was, naturally, under a duty to provide all of the information to the Department which he or she reasonably can. Relying on the comments of Commissioner Henty in *CIS/5321/1998*,<sup>23</sup> she agreed that adverse inferences could be drawn against a claimant who defaulted in the duty to provide relevant information. Similar considerations could also apply to the Department, however. If the Department fails to obtain information which it could reasonably be expected to discover for itself, then inferences could be drawn against the Department.

Applying those principles to the facts of the appeal, the judge found that the claimant, after initial mistakes made by the funeral undertakers who had completed the claim form to the Social Fund funeral payment, had collaborated fully with the Department and had given the Department all of the information which he had about his brother and sister. He had played his

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<sup>19</sup> Once again, Baroness Hale refers to the Social Security (Adjudication) Regulations (Northern Ireland) 1995 (S.R.1995/293) (Social Security (Adjudication) Regulations 1995 (S.I. 1995/1801) in Great Britain), in support of this conclusion. The 1995 Regulations have now been repealed and replaced with the Social Security and Child Support Decisions and Appeals (Northern Ireland) Regulations 1999 (S.R. 1999/162) (Social Security and Child Support (Decisions and Appeals) Regulations in Great Britain (S.I. 1999/991)).

<sup>20</sup> Baroness Hale refers to a ‘Social Security Appeal Tribunal’. Social Security Appeal Tribunals were amalgamated with other type of appeal tribunal to become the ‘Appeal Tribunal’ under the reforms introduced by the Social Security (Northern Ireland) Order 1998, (Social Security Act 1998).

<sup>21</sup> [1958] 2 QB 228, at p.240.

<sup>22</sup> [2004] UKHL 23 at para 62.

<sup>23</sup> Available at <[www.osspsc.gov.uk/pages/des.htm](http://www.osspsc.gov.uk/pages/des.htm)>.

part in the co-operative process. The Department had not, however. The information given to the Department by the claimant was not sufficient for the Department to determine whether the brother and sister were, or were not receiving qualifying benefits. The Department could, however, have easily obtained such information. Names, and dates of birth are sufficient to enable National Insurance numbers to be traced. In turn, National Insurance numbers provide the key to information about social security benefit entitlement. The Department did not play its part in the process, despite having the capability to do so. The consequences of such failure should lie with the Department.

As was noted above, Lord Hope of Craighead and Lord Scott of Foscote both agreed with Baroness Hale's substantive reasoning. Both judges, however, wished to add some comments on the meaning of the phrase 'close contact' within the context of Regulation 6 of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987, as amended. In the event, the judges were in disagreement.

Lord Scott was of the view that the reason why the appeal tribunal had found that it was reasonable for the claimant to accept responsibility for the expenses of his deceased brother's funeral, was that they were brothers, had grown up together, and that the claimant was the eldest of all of the siblings, not that the claimant and his deceased brother had been in close contact with each other. The judge could find no fault with that reasoning, holding that paragraph (5) of Regulation 6 did not require contact to be 'close' or 'recent' contact.

Comparison of contact was required by paragraph (6) of Regulation 6. Here, the appeal tribunal, the Social Security Commissioner, and the majority in the Northern Ireland Court of Appeal, had found that an equal amount of close contact can constitute equally close contact within the meaning of Regulation 6(6). Lord Scott could not agree with such a proposition finding that both a literal and purposive construction of the provision were inconsistent with it. The judge then gave details as to the manner in which the provision was to be tackled by adjudicating authorities.

Lord Hope disagreed with Lord Scott, finding that there was nothing in the Regulation that required that the relevant contact must have been current at, or immediately before, the date of the deceased's death. Accordingly, he concluded that there is no restriction as to the time of the relevant contact.

### **Commentary**

This re-interpretation of the legislative provisions concerning entitlement to a Social Fund funeral payment, to the advantage of the claimant, will be welcomed. The constant restrictive amendments to the rules, described in detail, and in terms of policy objective, by Baroness Hale, have consistently been criticised by advisory groups, appellate authorities, and academic commentators.

The attempts to amend the rules concerning entitlement to a funeral payment have been subject to consistent comment and criticism by the Social Security Advisory Committee. Following earlier reports on the 1995<sup>24</sup> and

1997<sup>25</sup> amendments to the Regulations, the Committee decided to prepare a paper for submission to the Secretary of State. In its 14<sup>th</sup> Report,<sup>26</sup> the Committee criticised the current legislative provision on the grounds of complexity, inappropriateness, method, and disincentives provided. The specific ‘closeness’ provision is described as involving ‘an investigation which – at the time of bereavement – is intrusive, undignified and simply impracticable’.<sup>27</sup> Although the reasoning in *Kerr* does not amount to the whole-scale reform sought by the SSAC, the requirement for the Department to have some role to play in the collation of required information, goes some way to meeting the censure of unseemly imposition at the time of grief.

Criticism of the current form of the legislation has come from elsewhere. In *CIS/3150/99*,<sup>28</sup> Commissioner Howell commented:

“Not for the first time, I express my regret that I am required to interpret and apply the dispiriting set of means-testing regulations that now constitute the state provision for state benefit . . . which regulations themselves have been the subject of repeated and successive piecemeal amendment, mainly to the disadvantage of claimants, by amending instruments too numerous to mention here. The contrast between the simplicity, practicality and humanity of Lord Beveridge’s original scheme for a universal insured death grant to pay for a decent burial . . . and the ignoble set of complex means-tested restrictions we have now simply could not be more stark. The proportionate cost of administering all this must be enormous, to say nothing of the cost in human terms to those subjected to it just at a time when any ordinary person of family is at their most vulnerable.”<sup>29</sup>

The facts of *Kerr*, although not the most graphic, illustrate something of this vulnerability and human cost. Mr Kerr, having willingly accepted responsibility for the funeral costs of his deceased brother, whom he had not seen for twenty years, re-paid the funeral directors in full, ‘albeit with great difficulty over a long period’,<sup>30</sup> and had to go as far as the House of Lords to obtain his funeral payment entitlement. Commissioner Howell must welcome this minor victory for claimants.

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<sup>24</sup> SSAC *Social Fund Maternity and Funeral Expenses (General) Amendment Regulations 1995* (1995, Cm 2858).

<sup>25</sup> SSAC *Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations 1997* (1997, Cm 3585).

<sup>26</sup> SSAC *Fourteenth Report* (2001), Annex D, available at <[www.ssac.org.uk/pubs.htm](http://www.ssac.org.uk/pubs.htm)>.

<sup>27</sup> *Ibid* at para 17.

<sup>28</sup> Reported as *R(IS) 3/02*, and available at <[www.osspsc.gov.uk/pages/des.htm](http://www.osspsc.gov.uk/pages/des.htm)>.

<sup>29</sup> *Ibid* at para 2.

<sup>30</sup> [2004] UKHL 23 at para 46.

Professor Nick Wikeley describes the ‘immediate family test’ in Regulation 6 as the ‘zenith of tortuous legislative complexity in the social fund’.<sup>31</sup> He also recognises the potential for the application of the relevant provisions to involve ‘highly intrusive questioning’, and reflecting the criticisms of the SSAC that they represent ‘a narrow and inflexible view of family responsibilities’.<sup>32</sup>

The greater significance of the decision in *Kerr* lies in the more general application of the reasoning across the adjudication system for all social security benefits, not just the Social Fund.<sup>33</sup> Baroness Hale did not impose any single benefit restriction on her reasoning. As was noted above, she was prepared to describe all aspects of the process of benefits adjudication as inquisitorial. That the appeal tribunal, as the second-tier of the adjudication system, has been categorised as inquisitorial, or ‘enabling’, in its functions has never been without doubt. Indeed, a Tribunal of Commissioners in Great Britain has recently re-emphasised the appeal tribunal’s philosophy.<sup>34</sup> While the case-law cited by Baroness Hale supports the inquisitorial philosophy which she advocates, it is some time since it was applied to first-tier adjudication by Decision Makers. Rather, this is the first opportunity, since the administrative reforms introduced in 1998,<sup>35</sup> for the re-application of the role formerly applied to Adjudication Officers to the duties and functions of Decision Makers. This is to be welcomed, for two reasons.

Firstly, the emphasis on an enabling role for the Appeal Tribunal, as the second-tier level of social security adjudication, has not been unproblematic. The decision of the Tribunal of Commissioners in *CIB/4751/2002 et al*,<sup>36</sup> confirmed that an Appeal Tribunal has the power to remedy defects in the first-tier decision-making process. That conclusion led to a submission that the new power might encourage poor- decision-making within the Department, with the possibility that Decision Makers might become careless in the identification of the proper method of altering a decision, in the knowledge that any defects may be remedied by the appeal tribunal.<sup>37</sup> There has also been a concern that the Appeal Tribunal, on the face of it strictly independent of the Department, might come to be seen to doing the Department’s job for it, where it takes the enabling philosophy too far. This might be evident in the many appeals where no representative of the

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<sup>31</sup> N. Wikeley, *Wikeley, Ogus & Barendt’s The Law of Social Security*, (5<sup>th</sup> ed, 2003, Butterworths) at p.490.

<sup>32</sup> SSAC *Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations 1997* (1997, Cm 3585) at para 46.

<sup>33</sup> The relevance of the decision in *Kerr* for the determination of claims to Housing Benefit and Council Tax Benefit is seen by the inclusion of a detailed analysis of the decision in the latest *Supplement* to the annotated legislation related to those benefits. See Wright S *Housing Benefit and Council Tax Benefit Legislation 2003/2004 – Supplement* (2004 CPAG) at iv and 2-3.

<sup>34</sup> In *CIS/1459/2003* available at <[www.osspsc.gov.uk/pages/des.htm](http://www.osspsc.gov.uk/pages/des.htm)> at paragraph 26. See also the comments of the Tribunal of Commissioners in *CIB/4751/2002* at para 32.

<sup>35</sup> The Social Security (Northern Ireland) Order 1998 and the Social Security Act 1998.

<sup>36</sup> Available at <[www.osspsc.gov.uk/pages/des.htm](http://www.osspsc.gov.uk/pages/des.htm)>.

<sup>37</sup> See K. Mullan, ‘Supersession – The One True Interpretation?’ 2004 3 *JSSL* 148 at pp.154-155.

Department are present, and the Appeal Tribunal finds it incumbent to put the Department's submissions, points and evidential base to the appellant.<sup>38</sup> The danger in such a case is that the reality of independence is lost. In such circumstances, the re-emphasis of an inquisitorial role for first-tier adjudicators by Baroness Hale is to be welcomed, and may take some of the inquisitorial glare off Appeal Tribunals.

Secondly, an inquisitorial role carries with it duties and responsibilities for those involved in first-tier adjudication. Decision Makers are under a duty to fully explore entitlements, or changes to entitlements, and to identify the evidence necessary to make decisions on initial claims or on alterations to existing entitlements. The decision in *Kerr* outlines the extent of the duty imposed on Decision Makers with respect to the provision of information necessary to determine claims. The Department knows which questions need to be asked, and what information needs to be collated in order to determine whether the conditions of entitlement have been met. While the claimant is under a duty to supply information available to him/her, where the information is alternatively available to the Department, then the Department is under a duty to take the necessary steps to enable it to be traced.<sup>39</sup>

It has been the experience of appeal tribunals, (through the exercise monitoring the correctness of decisions of decision makers, and the President's report, on the standards achieved by the Secretary of State in the making of decisions<sup>40</sup>) that many decisions are incorrectly made due to insufficient facts/evidence due to inadequate investigation of the claim or other faults in eliciting evidence or in relevant fact-finding. That experience has been confirmed by the House of Commons Select Committee on Public Accounts. In its 12<sup>th</sup> Report '*Getting it Right, Putting it Right: Improving Decision Making and Appeals in Social Security Benefits*',<sup>41</sup> the Select Committee found that some 20% of benefit decisions contained errors.

The decision in *Kerr* now makes it clear that there are consequences for a failure to elicit information relevant to the determination of a claim to a social security benefit. The Department can no longer use its own failure to ask questions, or to use its own superior facilities to obtain information relevant to the claim, to disallow entitlement. That is not to say that this new duty for the Department in any way abrogates a parallel duty on the claimant. The co-operative process requires the claimant to play his or her part. What

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<sup>38</sup> In *CIS/1459/2003*, the Tribunal of Commissioners thought that the inquisitorial nature of the appeal tribunal involved an obligation, in the absence of a Presenting Officer, to put the Department's case to the claimant. The Tribunal further concluded that this duty does not affect the independence or impartiality of the appeal tribunal. That conclusion, with the utmost respect to the Commissioners, must be open to debate.

<sup>39</sup> [2004] UKHL 23 at para 62 per Baroness Hale.

<sup>40</sup> Para 10 of Sch 1 to the Social Security Act 1998, and the Social Security (Northern Ireland) Order 1998.

<sup>41</sup> House of Commons Select Committee on Public Accounts '*Getting it Right, Putting it Right: Improving Decision Making and Appeals in Social Security*' (HC 406) available at <[www.parliament.uk/parliamentary-committees/committee-of-public-accounts/](http://www.parliament.uk/parliamentary-committees/committee-of-public-accounts/)>. See also the comments of the Commissioner in *C34/02-03(IB)* at para 13.

is clear, however, is that where the claimant does co-operate but the Department fails to act, the consequences will be adverse to the Department.

Baroness Hale made significant comments about the question of the burden of proof in social security adjudication. She exhorts all of those involved in the adjudication process to avoid recourse to a concept more relevant to the adversarial process of litigation.<sup>42</sup> Where does this leave the important legal principle of the burden of proof in relation to social security adjudication? Has it been swept away?

The place of the rules of evidence in appeal tribunal proceedings, and the inevitable tension between the informality of the inquisitorial role and the convention of the rules of evidence, have been discussed in depth by a number of commentators.<sup>43</sup> Commissioner Mesher<sup>44</sup> thought that the formal rules of evidence, particularly the burden of proof, was problematic in a number of areas of social security adjudication. Firstly, the claimant may be able to take advantage of a number of express statutory presumptions. Secondly, where there are exceptions from the basic conditions of entitlement to a social security benefit, it was for those who asserted that any exception should apply, invariably the Department, to prove that they do. Thirdly, where the legislative provisions left adjudicating authorities with a discretion which has to be exercised judicially, the application of the burden of proof might be difficult. Fourthly, it had always been accepted that once a decision had been made that a social security benefit should be awarded for a particular period, the onus of proving that such a decision should be reversed had always been on the Department.<sup>45</sup> Finally, the Commissioner thought that there were some practical difficulties in applying the standard of the balance of probabilities in an inquisitorial jurisdiction.<sup>46</sup>

Two further aspects of Commissioner Mesher's analysis are worth noting. Firstly, he addresses the issue as to how the former Adjudication Officers approached the question of the burden of proof in determining claims to social security benefits. He thought that there was authority for the proposition that there might have been a duty on the Adjudication Officer to assist the claimant in collecting and presenting relevant evidence. Secondly, he was of the view that the main area of difficulty lay in drawing lines in particular cases between the elements of entitlement which are for the claimant to prove, and exceptions or disqualifications which are for the Adjudication Officer to prove. The Commissioner thought that there was no authority for the general proposition that where there are exceptions from basic entitlement, it is for those who assert that the exceptions apply to prove

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<sup>42</sup> Clearly, these comments reinforce her conclusion that the entire process of social security adjudication is inquisitorial.

<sup>43</sup> See, for example, C. Yates, *Supplementary Benefit Appeals and the Rules of Evidence*, Logie & Watchman, *Social Security Appeal Tribunals: An Excursus on Evidential Issues* (1989) 8 C.J.J. 109.

<sup>44</sup> Writing in a private capacity, 'Social Security Law' in A.K.R. Kiralfy (ed.) *The Burden of Proof* (1987, Professional Books) 211.

<sup>45</sup> Commissioner Mesher cites the well-known case of *R(I) 1/71* in support of this proposition.

<sup>46</sup> That the standard of 'balance of probabilities' is the applicable standard in social security adjudication has been confirmed on numerous occasions. See *R(I) 32/61*, for example.

that they do. There is now. In *Kerr*, Lord Hope clearly states that ‘it is a general rule that he who takes advantage of an exception must bring himself within the provisions of the exception’.<sup>47</sup>

Professor Rowe has also tackled the issue of the relationship between the burden of proof and the inquisitorial role of the adjudicating authorities.<sup>48</sup> He concludes that the laws of evidence are an invaluable guide to accurate fact-finding, and to exclude them altogether would be a fruitless exercise. He concedes that the presumption of legitimacy might be developed into a declaration that, apart from the rules of inadmissibility, all of the rules of evidence, applicable in civil cases, should apply to social security adjudication, particularly at the second-tier.

Can a compromise on the issue be reached? It is submitted that the solution lies in Baroness Hale’s qualifying words that it will ‘rarely’ be necessary to resort to concepts such as the burden of proof. This clearly confirms that the burden of proof retains a relevance for adjudicators but should not be the routine determinative factor for such adjudication. This reflects earlier guidance to the judiciary<sup>49</sup> on the place of the formal rules of evidence which exhorted those charged with the assessment of evidence to adopt a systematic approach to the task. It is important that the issue is rarely admissibility of evidence but its relevance. The accurate weighing and assessing of admitted evidence is usually sufficient for the determination of the issues in dispute. It is only when there is a significant conflict in evidence that more formal principles such as the application of the standard, and, eventually, the burden of proof, should be considered.

The decision of the House of Lords in *Kerr* will have significant implications for the future direction of another case waiting to be heard by the court, *Hinchy v Secretary of State for Work & Pensions*.<sup>50</sup> In *Hinchy*, the Court of Appeal of England and Wales was concerned with the issue of the duty imposed on a recipient to a social security benefit to disclose information which could affect entitlement to that benefit, and which might lead to a sum of benefit being overpaid, for the purposes of Section 71 of the Social Security Administration Act 1992.<sup>51</sup> The court decided that there could be no failure to disclose in circumstances where the information was already known to the Department, albeit in a different branch of the Department.

*Hinchy* confirms that where the Department has actual knowledge or information which is relevant to an entitlement to a social security benefit, it is under a duty to act on that knowledge or information. Further, in such circumstances, the claimant’s existing duty to disclose is abrogated. Failure to act on the relevant knowledge or information cannot be laid at the door of the recipient to a social security benefit. Rather the consequences of a failure to act should lie with the Department who cannot recover resultant overpaid social security benefit. The House of Lords in *Kerr* employs similar

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<sup>47</sup> [2004] UKHL 23 at para 16, relying on *Nimmo v Alexander Cowan & Sons Ltd* [1968] A.C. 107.

<sup>48</sup> ‘*The Strict Rules of Evidence in Tribunals: Rhetoric v Reality*’ (1994) 1 J.S.S.L. 9.

<sup>49</sup> See K. Mullan and A. Wilton ‘*Weighing the Evidence*’ (2002) *Tribunals* 2.

<sup>50</sup> [2003] EWCA Civ 138.

<sup>51</sup> The Social Security Administration (Northern Ireland) Act 1992 in Northern Ireland.

reasoning. The Department is under a duty to act on existing knowledge or information, and where it fails to do so, the adverse consequences of the failure should lie with the Department rather than with the claimant to benefit.

The appeal by the Department in *Hinchy* is due to be heard early in 2005. Given the House of Lords thinking in *Kerr*, it is submitted that it is difficult to see how the House could over-turn the decision of the Court of Appeal. There might be one further line of argument. In *Kerr*, it was accepted that the claimant had co-operated fully in the information-gathering process, necessary for the determination of his claim, and that, having done so, the onus switched to the Department. In overpayment cases, such as *Hinchy*, it is often the case that the recipient of benefit does not co-operate in the process. Indeed, the recipient may intentionally refrain from disclosing information in order to retain existing entitlement. Will such a claimant's duty to disclose be abrogated, on the Court of Appeal's reasoning, by the Department's failure to act on its existing information or knowledge? That argument, although not strong, might support the confining of the decision in *Kerr* to its own facts.

The comments of Baroness Hale concerning the enormous complexity of the social security benefits system are entirely appropriate. The volumes of annotations to social security legislation now run to four volumes,<sup>52</sup> with a fifth likely to appear soon. This legislation is supplemented by various user-friendly guides,<sup>53</sup> associated web-sites,<sup>54</sup> official manuals,<sup>55</sup> academic textbooks<sup>56</sup> and journals.<sup>57</sup> Appeal tribunals, involving hundreds of members,<sup>58</sup> apply this law to tens of thousands of appeals per annum<sup>59</sup>, which, in turn lead to numerous appeals before the Social Security Commissioners, and other appellate authorities. Despite this complexity, there is strong evidence to suggest that appeal tribunals, as the second-tier of adjudication, perform a very good job.<sup>60</sup>

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<sup>52</sup> *Social Security Legislation 2003 – Volumes I-IV* (2003 Sweet & Maxwell).

<sup>53</sup> The best of which is undoubtedly the Child Poverty Action Group's *Welfare Benefits and Tax Credits Handbook 2004/2005* (2004 CPAG).

<sup>54</sup> Of which the best is <[www.rightsnet.org.uk](http://www.rightsnet.org.uk)>.

<sup>55</sup> See the wealth of Departmental guidance available at <[www.dsdni.gov.uk/benefitlaw/benefitlaw.asp](http://www.dsdni.gov.uk/benefitlaw/benefitlaw.asp)> and <[www.dwp.gov.uk/resourcecentre](http://www.dwp.gov.uk/resourcecentre)>.

<sup>56</sup> The most comprehensive text is N. Wikeley, *Wikeley, Ogus & Barendt's The Law of Social Security*, (5<sup>th</sup> ed, 2003, Butterworths).

<sup>57</sup> *The Journal of Social Security Law* and *The Journal of Social Welfare & Family Law*, for example.

<sup>58</sup> In Great Britain there are over 2000 part-time judicial members appointed to determine social security appeals. See *The Appeals Service: Annual Report and Accounts 2003-2004* available at <[www.appeals-service.gov.uk](http://www.appeals-service.gov.uk)>. The figure for Northern Ireland is approximately 250.

<sup>59</sup> In Great Britain there are approximately 250,000 social security appeals per annum. See *The Appeals Service: Annual Report and Accounts 2003-2004* available at <[www.appeals-service.gov.uk](http://www.appeals-service.gov.uk)>. The figure for Northern Ireland is approximately 23,000.

<sup>60</sup> See *Transforming Public Services: Complaints, Redress and Tribunals* (2004, Cm 6243), Chap. 5.

Finally, it might be argued that the reasoning in *Kerr* should be restricted to its own particular facts, given that the entitlement at issue was to a Social Fund funeral payment. It might be submitted that the rules relevant to adjudication on Social Fund payments should not have a universal application to all social security benefits. Such a submission can be easily dismissed. The functions of the former Social Fund Officers were transferred to the Department,<sup>61</sup> under the provisions of Article 3 of the Social Security (Northern Ireland) Order 1998,<sup>62</sup> and it is now for the Department to decide any claim for a Social Fund payment.<sup>63</sup> Appeals from such decisions lie to the Appeal Tribunal<sup>64</sup>, and onwards to the Social Security Commissioners.<sup>65</sup>

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<sup>61</sup> Dept of Social Development in Northern Ireland, the Dept for Work & Pensions in Great Britain.

<sup>62</sup> S.1 of the Social Security Act 1998 in Great Britain.

<sup>63</sup> Art. 9(1)(b) of the Social Security (Northern Ireland) Order 1998. S.8(1)(b) of the Social Security Act 1998 in Great Britain

<sup>64</sup> Art.13 of the Social Security (Northern Ireland) Order 1998. S.12 of the Social Security Act 1998 in Great Britain

<sup>65</sup> Art.15 of the Social Security (Northern Ireland) Order 1998. S.14 of the Social Security Act 1998 in Great Britain