DECISION MAKING AND APPEALS

LEGISLATION

The Social Security (NI) Order 1998

The Social Security and Child Support (Decision and Appeals) Regulations (NI) 1999

Social Security Commissioner (Procedures) Regulations (NI) 1999

The Housing Benefit (Decisions and Appeals) Regulations (NI) 2001

The Child Benefit and Guardian's Allowance (Decisions and Appeals) (NI) Regulations 2003

All these pieces of legislation have been subject to considerable amendment.

The Tax Credits, Child Benefit and Guardian's Allowance Review and Appeals Order 2014

PLEASE NOTE THAT THE RULES DESCRIBED IN THIS SECTION ARE SPECIFIC TO NORTHERN IRELAND AND DO NOT APPLY TO THE APPEALS PROCESS IN THE REST OF THE UK

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GLOSSARY

DEL – Department for Employment and Learning

DLA – Disability Living Allowance

DSD – Department for Social Development

ESA – Employment and Support Allowance

HMRC – Her Majesty's Revenue and Customs

JSA – Jobseeker's Allowance

NIHE – Northern Ireland Housing Executive

PC – Pension Credit

PCA – Personal Capability Assessment

SSA – Social Security Agency

INTRODUCTION

Decision making and appeals in social security consist of a single set of procedures covering almost all benefits and one kind of tribunal to which appeals can be made.

While the rules described here apply to most benefits administered by the Social Security Agency (SSA), Northern Ireland Housing Executive (NIHE) and Her Majesty's Revenue & Customs (HMRC), they do not cover those benefits with separate schemes for decision making and appeals, ie:

- grants and loans from the discretionary Social Fund, administered by local offices of the Social Security Agency;
- War Pensions, administered by the War Pensions Agency (**Note:** these decisions can be appealed to the Social Security Commissioner);
- Statutory Sick Pay, Statutory Maternity Pay, Statutory Paternity Pay or Statutory Adoption Pay administered by a person's employer;
- vaccine damage payments, administered by the Vaccine Damage Payment Unit;
- help with health service benefits.

For all other benefits, the rules governing practice and procedure at the various levels of adjudication are described within the context of claim to appeal.

For further information on the decision making process as it applies to tax credits, administered by HMRC, please see Law Centre (NI)'s tax credit briefings available on the website (www.lawcentreni.org/EoR).

Adjudication in connection with Housing Benefit is now incorporated within decision making and appeals legislation. NIHE continues to have responsibility for receiving and adjudicating on fresh claims and for deciding issues in the first instance. However, anyone seeking to challenge a decision made by NIHE has the right of appeal to an independent appeal tribunal and ultimately to the Social Security Commissioner.

1. CLAIMS AND DECISIONS

1.1 Making a claim to benefit

In order to establish entitlement to any social security benefit, it is necessary to make a claim or be treated as making a claim.

A person seeking to make a claim is responsible for ensuring that the appropriate application form has been completed and is accompanied by all supporting evidence specified. As neither the term 'appropriate form' nor 'necessary supporting evidence' have been clearly defined, the relevant office of the Department for Social Development (DSD), NIHE or HMRC will specify the form which is to be used for each benefit and what supporting evidence is required.

The format in which a claim to benefit can be made depends on the actual benefit being claimed. For example, a claim for Income Support and Jobseeker's Allowance (JSA) must always be made on the appropriate form, while a claim to Pension Credit (PC) and Employment and Support Allowance (ESA) can be made by telephone. For some benefits, ie Attendance Allowance, Disability Living Allowance (DLA), graduated retirement benefit, retirement pension and shared additional pension, a claim can be made electronically. Otherwise, a decision maker may treat a letter as a valid claim.

To establish entitlement from the earliest possible date, a claim should be made immediately and, where there is doubt as to entitlement, a claim should generally be made anyway. However, Law Centre (NI) advises caution to be exercised in some circumstances, for example, where a person is subject to immigration control and has no recourse to public funds, or where the qualifying periods for applying for some benefits must be observed.

1.1.1 Additional supporting evidence

On submission of a fully completed claim form or a Customer Statement in the case of a claim to ESA (together with any necessary supporting evidence), a decision maker will consider the claim.

Before making a decision, the decision maker may require additional supporting evidence. This evidence may be further information such as details in relation to a loan which has been taken out for repairs and improvements when assessing allowable housing costs for Income Support purposes. The decision maker may also require further medical evidence when considering entitlement to an incapacity or disability benefit. When additional supporting evidence is sought by the decision maker, it should be provided as soon as possible. A person's failure to comply with the requirement to provide such information may result in the suspension, disqualification or disallowance of benefit. A negative decision may be made if the decision maker decides the claim in the absence of that evidence. It is therefore necessary to ensure that the decision maker is aware of the reason for any delay which might arise in gathering information or of the reason why a person cannot attend a medical examination.

1.1.2 Requirement to provide a national insurance number

When making a claim to benefit in order to satisfy the national insurance number requirement, a person will be expected to provide a national insurance number or information to allow a national insurance number to be traced. If a person has no national insurance number, s/he is expected to provide enough information to allow one to be allocated. Finally, the DSD or HMRC can require a person to provide documents or evidence to prove her/his identity.

If a joint claim is being made for a means-tested benefits, the partner of the person claiming must normally also satisfy the national insurance number requirement. However, special rules exist where the partner does not have a national insurance

number, is a person subject to immigration control and would not be entitled to benefit. In some circumstances, the partner may not need to provide a national insurance number.

A person is exempt from the national insurance number requirement if:

- s/he is under sixteen and the benefit being claimed is DLA or health in pregnancy grant;
- the benefit being is Statutory Sick Pay, Statutory Maternity Pay, Statutory Paternity Pay or Statutory Adoption Pay or social fund payments;
- the benefit being claimed is Housing Benefit and the person claiming lives in a hostel.

1.2 Decision making process

In Northern Ireland, the DSD has overall responsibility for policy, legislation and delivery of social security. The SSA administers social security on a day to day basis and is responsible for awards and payments of benefits. The SSA runs regional offices in Belfast and Derry and, in conjunction with DEL, runs local offices across Northern Ireland. These regional centres have responsibility for dealing with claims for:

- pensions;
- PC;
- Employment and Support Allowance;
- Incapacity Benefit and benefits payable under the Industrial Injuries scheme;

  bereavement benefits;
- Disability Living Allowance, Attendance Allowance and Carer's Allowance administered by the Disability and Carers Service.

Staff with responsibility for considering claims and for making decisions are employed by the DSD and are known as decision makers. Most decisions in social security are taken by decision makers.

However, the SSA does not have responsibility for all benefits. HMRC has responsibility for administering:

- Working Tax Credit;
- Child Tax Credit; and
- Child Benefit.

Not all decisions are made on the basis of fresh claims to benefit. Sometimes there may be an existing award of benefit, such as DLA, and the person claiming is seeking to have the amount paid altered in some way. This may be because there has been a change in that person's circumstances, eg her/his health may have been subject to deterioration. Where deterioration has occurred, care and mobility needs may

increase, hence an application for a greater amount of benefit to be paid to reflect those increased needs.

Whatever the reason for the claim, the decision maker has to consider factors such as:

- the circumstances in which a claim is made;
- the date of the claim, whether the claim is a new claim or is made in circumstances where there is an existing award of benefit;
- any change in circumstances which may be anticipated.

These factors will dictate the nature of the decision to be made, the duration of any award of benefit and the potential legal remedy open to a person who disagrees with any decision.

The decision maker has to have regard not only to the facts of a person's case, but to the law. The rules governing the award of any social security benefit are defined in legislation and decision makers are required to follow this. The law may be set out in acts, orders and regulations such as the Social Security (NI) Order 1998, or the Social Security (Decision and Appeal Regulations) (NI) 1999. It may also be set out in decisions of Social Security Commissioners or the courts. Northern Ireland Commissioner decisions are binding on decision makers and tribunals unless the facts of the particular case can be distinguished. Commissioners decisions made before the introduction of the Human Rights Act may not, however, be binding if a Human Rights Act argument can now be deployed.

Besides reliance on legislation and caselaw, decision makers are aided by the Decision Makers Guide, available at local offices of the SSA and on the internet. This guide offers advice on how the law should be interpreted.

1.2.1 Notification of decision

Whether a person has made a fresh claim or has asked for an existing award of benefit to be looked at again, the relevant agency must issue a written decision. This is known as an outcome decision. The outcome decision should include the following information:

- the date the decision was made;
- whether or not benefit is payable;
- how much benefit will be paid;
- for what period benefit will be paid;
- where to go to get more information about the decision;
- how to challenge the decision.

Should an accidental error or a 'slip of the pen' occur in any such decision, the decision maker can correct that error. Notification of the correction must be given to the person concerned as soon as practicable.

Where an accidental error does occur in a decision, the time limit for challenging the decision will begin to run from the date of notification of that correction.

1.3 Dispute period and written statement of reasons

While the general rule is that action should be taken within one calendar month of the date of the decision, this will be extended by fourteen days if the person notified of that decision requests a written statement of reasons.

This written statement can be requested by a person who does not understand the decision or how it was made. The request must be made within one month of the decision.

When a written statement of reasons is requested, it should be provided within fourteen days or as soon as is practicable.

If requested, the written statement of reasons should:

- be personalised. It should not just list the qualifying conditions for benefit but should refer specifically to a person's circumstances;
- attempt to explain how the decision was reached and give details of the legislation upon which it was based;
- give information on how to challenge the decision and what the time limits are.

However, this written statement will only be issued, and an extension of the fourteen days to the one month dispute period will only be granted, where a written statement of reasons has not been included in the original decision. Vigilance is therefore required to ensure that time limits are observed.

In addition, if a written statement of reasons is requested within a month but not provided, then the time limit for appealing is fourteen days from the date the statement of reasons is provided.

2. CHALLENGING DECISIONS

Regardless of whether a person requests a written statement of reasons for the decision, there are three ways in which the decision can be changed if a person thinks it is wrong. These are:

- revision on any grounds within the one month dispute period or revision at any time where specific grounds must be shown;
- supersession at any time after the expiry of the one month dispute period;
- appeal either from a revised or from a superseded decision but within one month of the date of that decision.

2.1 Time limits

While extensions of the time limits may be granted in very limited circumstances, the time limit for invoking action is generally taken to be one calendar month from the date the decision was made. The time limit runs from the date the written decision

was sent by the Department to the person and not from the date the notification is received. For Social Fund Maternity or Funeral Payments, the time limit is one month from the date the decision was sent or within one month of the time limit for claiming the payment, whichever is later.

2.2 Revision

This is, by far, the fastest and most effective remedy available to a person seeking to challenge a decision.

As a revised decision takes effect from the date of the original decision, the main advantage in seeking to change a decision by way of revision is that benefit can be backdated to the date of that decision.

There are two types of revision that can be sought, an any grounds revision or an any time revision.

2.2.1 Any grounds revision

With an any grounds revision, where a person simply has to show that s/he disagrees with the decision, the time limit for seeking such a revision is normally one month from the date the decision is made. The one month period is known as the dispute period.

A person may make an application for revision in writing, by phone, or by calling at the appropriate office of the Department in person. For Housing Benefit, the request must be made in writing.

The decision maker can ask for more information before making a revised decision. If further information is sought, the person making the application has one month in which to provide it. If s/he fails to furnish the decision maker with that information, the decision maker may make a revised decision based on information and evidence available. Therefore the decision maker should be made aware of any difficulties experienced in collecting information or evidence.

Once a revised decision has been made (and if successful) benefit can be backdated. The benefit can normally be backdated to the date the revision takes effect, ie:

- the date of the decision from which revision is sought; or
- the date from which the original decision would have taken effect if the error had not been made.

Otherwise, the person bringing the application has a further one month period in which to challenge that decision. Remedy in this instance is by way of an independent appeal to a tribunal.

2.2.2 Late revision

In limited circumstances, the dispute period can be extended to allow applications for late revisions to be made. When deciding whether to grant an extension of time within which to bring an application for revision, the decision maker must be satisfied that:

- it is reasonable to grant the application; and
- the application has merit, ie it has a chance of success; and
- the application was not made within the normal one month time limit because of special circumstances. The longer the delay in seeking a revision, the more compelling the special circumstances have to be.

The special circumstances are not defined but may include:

- the person seeking a revision was in hospital;
- the person's partner or a dependant suffered serious illness;
- problems with the postal service;
- misleading advice from someone a person could reasonably rely on.

For tax credit purposes, decisions can be revised during the course of the award if circumstances have changed or the decision is wrong. Otherwise, a final decision can be revised on inquiry within a year, or by a discovery decision within five years for official error, fraud or neglect, or a change in income tax liability.

2.2.3 Any time revision

The second type of revision that can be requested is an any time revision. There is no time limit for doing this but the person must have specific grounds for the request. These are:

- the decision was caused by an official error. This means that the SSA or NIHE or Tax Credit Office made a mistake and no one outside the SSA or NIHE or Tax Credit Office caused or materially contributed to the error. The mistake must have been made by an officer of the Department or Tax Credit Office acting in this capacity when the error was made. If a decision is revised because of an official error, benefit can be fully backdated no matter how long ago the official error was made. For tax credit purposes however, there is a six year bar;
- a mistake as to a material fact has led to an overpayment of benefit and, as a result, the decision was more favourable than it would otherwise have been;
- a decision has been made that JSA cannot be paid because a sanction has been applied;
- a benefit has been awarded but a person becomes entitled to another benefit at a higher rate because another benefit has been awarded (eg DLA award leads to greater entitlement to Income Support or Income-based JSA);
- where an appeal has been lodged (but has not yet been determined) a decision maker should look at the decision under appeal again and decide whether it can be

changed, for example, on the basis of new evidence provided. Where appropriate, a revision can be carried out at any time before the decision of the tribunal is made;

- the decision is one which carries no right of appeal. If the person disagrees with the new decision, judicial review must be sought;
- the decision contains an error about failing to attend a work focused interview or show good cause for failing to attend such an interview;
- for Housing Benefit, the maximum rent eligible for assistance has changed due to an alteration in the Valuation and Lands Agency determination;
- the decision would have been different had the result about a person's other appeal to a tribunal, court or Commissioner been known;
- where an appeal has been lodged and a fresh claim is decided or the appeal decision is superseded before the appeal is determined and the tribunal makes its decision, the decision maker can do an any time revision if s/he would have dealt with the fresh claim differently knowing the outcome of the tribunal's decision;
- where a claimant is entitled to the severe disability premium payable through Income Support, JSA, ESA or the severe disability addition on State Pension Credits because a non dependant is now receiving a qualifying benefit;
- where the decision was made that a person was not entitled to ESA because s/he was treated as not having limited capability for work but s/he has later been found to have limited capability for work for the previous period.

Applications for revision outside the time limit can also be made by the decision maker on her/his initiative if any of the above circumstances apply.

If a decision maker carries out a revision then it can be backdated as per the rules outlined in 2.2.1.

2.2.4 Revision decision

Therefore, upon receipt of an application for revision the decision maker can decide:

- there are grounds for revision, but the original decision was correct;
  - ☐ there will be no change in benefit, but if the original decision had a right of appeal, the revised decision can be appealed;
- there are grounds for revision and the original decision should be changed:
  - ☐ this can still be appealed if the revised decision does not contain everything the claimant wanted;
- there are no grounds for revision:
  - ☐ there is no appeal against a refusal to revise. Should be used rarely, for frivolous applications eg the price of cat food has increased and I need more Income Support. The Court of Appeal has held that a validly made application for revision should carry appeal rights, in order to comply with Article 6 of the European Convention on

Human Rights and only those applications which are invalid or frivolous attract no appeal rights;

- ☐ it may be possible to try and lodge a late appeal against the original decision.

2.3 Supersession

An application for supersession may be made at any time. It is the remedy normally invoked to change a decision which is no longer correct because of the fact that a change in circumstances has occurred since the date of the original decision.

It differs from revision in two main ways:

- there is no time limit for bringing an application for supersession;
- a superseded decision will normally take effect from the date of application with the result that benefits cannot be backdated.

An application for supersession is appropriate on a number of grounds including where:

- there has been a relevant change of circumstances since the original decision or one is anticipated (where no previous award of benefit has been made, a change in circumstances can only be considered by a person making a fresh claim to benefit);
- the original decision was based on an error in law (NIHE cannot supersede a decision on this ground if it can be revised instead);
- the original decision was made in ignorance of a material fact or was based on a mistake about a material fact (NIHE cannot supersede a decision on this ground if it can be revised instead);
- for ESA purposes, a healthcare professional has provided medical evidence on a person's capability for work, or a decision maker has decided that a person can be treated as having limited capability for work under certain provisions;
- the decision cannot be appealed. If a person disagrees with the new decision, the only remedy is judicial review;
- a benefit has been awarded, but the person claiming becomes entitled to benefit at a higher rate after the award began because s/he has been awarded a qualifying benefit (eg DLA award leads to greater entitlement to Income Support, ESA or Income-based JSA). This ground does not apply to Housing Benefit.

When considering whether the grounds exist for making an application for supersession, thought should also be given to the grounds for applying for a late revision. The latter remedy may prove more advantageous because it allows benefit to be backdated for up to thirteen months, rather than from the date of the application.

If any of the grounds for supersession can be identified, an application should be made in writing. In this application, a person should give as much information as possible to explain why the decision should be changed. This is because decision makers need not consider any issue not raised in the application. A decision maker can ask for more information and evidence within one month (or such longer period as is reasonable). If

this time limit is not met, the decision maker can make a decision without the additional information. Hence the importance of including all relevant information at the time of the application.

This is particularly so where the claim is being made by reason of a change in circumstances. To bring a successful application on this basis, a person will have to prove that the change of circumstances is relevant and must potentially mean that an existing award of benefit may be incorrect and needs to be altered.

2.3.1 Supersession decision

Therefore on receipt of an application for supersession, the decision maker can decide the following:

- there are grounds to supersede and the award should be changed as a result:
  - this can be appealed further if the changed decision does not have all that the claimant wanted.
- there are grounds to supersede but no change in the award:
  - decision maker supersedes the award but does not change it. This can still be appealed.
- there are no grounds for supersession:
  - like revision, this should be rarely used and only for frivolous applications, eg the price of cat food has gone up and I need more Income Support. The Court of Appeal has held that a validly made application for supersession should carry appeal rights, in order to comply with Article 6 of the Human Rights Act 1998 and only those applications which are invalid or frivolous attract no appeal rights;
  - no appeal against this refusal to supersede.

2.3.2 Date from which the change takes effect

Any change addressed by way of a supersession normally takes effect from the date of application. There are however, some exceptions to this rule:

- where any change in circumstances is notified within one month of that change having taken place, benefit will be backdated to the date of the change;
- in a case concerning an incapacity or disability benefit, where the change of circumstances is disadvantageous to the person claiming, the supersession will take effect from the date that the change in circumstances should have been reported;
- if an increase in either DLA or Attendance Allowance is being sought on the basis of deterioration, the supersession can take effect from the date the qualifying period is satisfied, provided the person notifies DSD within one month of the end of that qualifying period;

- for DLA and Attendance Allowance only, where the change of circumstances is that there is a change in relevant legislation, the date from which the superseded decision will take effect is the date the new legislation takes effect;
- where an overpayment of benefit has been made, the decision maker can supersede and invoke recovery of benefit proceedings from the date benefit was first overpaid. Overpayments can only be recovered, however, where DSD can show that a person failed to disclose a material fact or that s/he misrepresented a material fact and as a consequence the overpayment occurred;
- a decision of an appeal tribunal or a Commissioner can be superseded if it was made in ignorance of a material fact or was based on a mistake about a material fact. Where the decision superseded results in more benefit being paid to a person, the date from which the change will take effect will be the date of application for supersession. Where the supersession results in benefit being reduced or disallowed, the change will take effect from the date of the new decision;
- for Income Support, JSA, ESA and PC, any changes take effect from the benefit week payday;
- for PC only, where the person claiming or her/his partner is aged 65 or over, and is in receipt of housing costs, a change in a non-dependant's circumstances which reduces the award will not take effect until 26 weeks after the change occurred;
- for most Housing Benefit cases, the new decision takes place from the start of the benefit week after the one in which the change occurs.

2.3.3 Backdating on supersession

The general rule is that benefit cannot be backdated prior to the date of application for supersession. However, backdating is permitted for up to thirteen months in limited circumstances.

To bring a successful application for backdating where a change of circumstances has arisen, a person must show there were exceptional reasons to explain why the application was not made within the one month time limit.

When considering an application for backdating prior to the date of application, the decision maker will only award benefit where s/he is satisfied that:

- it is reasonable to grant the application; and
- the change in circumstances is relevant to the decision being superseded; and
- the application was not made within the one month time limit because of special circumstances which mean it was not practicable to notify the change earlier. The longer the delay in notifying the change, the more compelling the special circumstances have to be. When deciding whether it is reasonable to grant a late application, no account can be taken of a court or Commissioner's decision:
  - ☐ which has interpreted the law in a different way from previously understood; or
  - ☐ which a person misunderstood; or

- ☐ where a person was unaware of the relevant law including rules on time limits.

2.3.3.1 Examples of revision and supersession in practice

Joe claims ESA on 3 February 2015. He had also submitted a claim to DLA two days earlier on 1 February 2015. Joe gets a decision on his ESA after a few weeks informing him that he is entitled to payment. A month later, he is informed he is not entitled to DLA. He appeals this and eventually wins his appeal, being awarded middle rate care from1 February 2015. He informs the ESA office that he is entitled to DLA. As the award of DLA is backdated to 1 February 2015 and this is prior to the date that his ESA award began, the decision maker revises the original ESA decision as he should have been getting the severe disability premium with his ESA award.

If Joe had claimed DLA after he had claimed ESA, the decision maker would have to supersede as this would have been a change in circumstances or award of a qualifying benefit after the date that his ESA award began.

Susan claims ESA and states on her claim form that she has no savings in the bank. She is awarded ESA and continues to get this for six months and then wins £50,000 on the lottery. She does not tell ESA about this change in circumstances. When the DSD discovers that she has capital in excess of the limits, the decision maker supersedes on the basis of a change of circumstances and finds that she is no longer entitled. As this is a decision not favourable to Susan, the supersession takes effect from the date that the change occurred. There would also be a possibly recoverable overpayment.

If Susan had won the lottery a week before she claimed ESA, the decision maker would instead have to revise the original decision awarding ESA.

2.4 Appeal

An appeal can be made against most decisions made by a decision maker on a claim, a revision or a supersession. It should normally be made within the one month dispute period (or within 30 days in the case of tax credits) from the date the decision which is the subject of the appeal was sent to the person claiming. Decisions which cannot be appealed include:

- who should be the person claiming when a couple cannot agree this issue;
- how benefit should be paid;
- whether a claim for one benefit can be treated as a claim for (or in addition to) another benefit;
- a decision to suspend benefit;
- taking action against a person liable to maintain the person claiming;
- appointing a person as an appointee;

- failure to cash a benefit payment within one year of issue unless the appeal concerns a request for a payment outside the time limit eg where good cause can be shown;
- paying interim payments;
- whether a college or school is a recognised educational establishment;
- the rate of recovery of an overpayment;
- where restrictions are imposed on entitlement to Income Support or JSA made by a court, eg failure to comply with a community order without reasonable excuse and where the only ground of appeal is that a court decision was made in error. In this situation, the appropriate remedy is to challenge the court decision.

2.4.1 How to make an appeal

To make a valid appeal, the person appealing should do so in writing by completion of the appropriate form. The GL24 form is the form on which an appeal should be made for most decisions on social security benefits. Child Benefit appeals should be made on a form called CH24a. If an appropriate form is not available however, a valid appeal can still be made in writing via a letter. For benefits other than Housing Benefit and Child Benefit, the appeal must be sent to the Departmental office specified on the letter notifying the decision. Housing Benefit appeals should be made in writing to the NIHE District Office (if a tenant) or the Land and Property Service's Housing Benefit Central Unit (for owner occupiers). Child Benefit appeals should be sent to Her Majesty's Revenue and Customs.

An application to appeal a decision must contain the following, whether the appeal is made on the approved form or in some other way:

- must be in writing;
- sufficient information to allow the decision being appealed against to be identified. This will include the benefit involved, the date of the decision being appealed and the personal details of the person appealing (name, address, DOB and NINO);
- the grounds of the appeal. This should set out why the person believes the decision is wrong; it must be signed by the person appealing or a representative if the person has authorised one to act for her/him.

As a tribunal is not obliged to consider any issue not raised in an appeal, regard should be given to ensuring the inclusion of all potential legal arguments at the time the appeal is made. It is also useful at this stage to include any additional evidence, legislation or caselaw that the person wants to rely on for the appeal.

If all the above is not complied with, a decision-maker can return an appeal form back for further information. The time limit for returning the appeal form with more information is extended by fourteen days from the date the request for more information is made. Where a decision-maker gives more than fourteen days, then the time limit is extended by the actual time allowed by the decision-maker.

2.4.2 Reconsideration Stage and Mandatory Reconsideration

The provisions to be introduced under Welfare Reform are not yet applicable in Northern Ireland. However, because Child Benefit and tax credits are governed by UK wide legislation anyone who wants to challenge a decision regarding either Child Benefit or tax credits made on or after 6 April 2014 needs to ask for a Mandatory Reconsideration before appeal. This means HMRC will look at the decision again and see if it can be changed, either fully or partly. The board will then write out to the claimant with the outcome of the Mandatory Reconsideration – this letter should also advise the claimant how s/he can then appeal if not satisfied. All appeals must be made directly to the Tribunal. This is called 'direct lodgment'. This was introduced by *The Tax Credits, Child Benefit and Guardian's Allowance Review and Appeals Order 2014*.

In relation to all other benefits administered by the Social Security Agency in Northern Ireland, once a valid appeal as been received by the Department, the application will be referred to a decision making and appeals team. The purpose of this referral is to ensure that the application is looked at again with a view to considering whether the decision can be altered. This is known as a reconsideration which will be carried out automatically in connection with every appeal made. Therefore, it is possible to make an appeal without the need to first invoke revision or supersession proceedings. However, by seeking a revision or supersession first, a person gets two bites of the cherry and, if unhappy with a revised or superseded decision, s/he can then appeal.

Lapsing of appeals

If on reconsideration the decision-maker changes the decision, that appeal will lapse if the new decision is more favourable to the person claiming. An appeal will lapse where, as a result of a revised decision:

- any relevant benefit paid is greater or is awarded for a longer period;
- a person would have received benefit or received benefit for a longer period but for legislative provisions restricting or suspending payment of the benefit or disqualifying her/him from receiving some or all of the benefit (for example due to involvement in a trade dispute);
- a denial or disqualification from receiving any relevant benefit or a JSA sanction is lifted wholly or in part;
- a decision to pay benefit to a third party is reversed;
- an overpayment is not recoverable in part or in full;
- a person gains financially.

An appeal will lapse even if a person does not get everything that was requested in the appeal. Where this occurs, a new outcome decision will be notified. From the date of notification, a person will have a further one month in which to bring a further appeal

if still dissatisfied. A new appeal must be submitted if the person wishes to continue to challenge the new decision.

If, on the other hand, a no change decision is made, an appeal submission will be written and passed to the Appeals Service for processing. This submission will comprise of a discussion of the relevant legislation and evidence on which the decision-maker relies. Copies of all relevant documents will be attached.

The Appeals Service (to whom appeals are referred) is an independent agency with wide reaching powers.

Amongst its decision making powers is to decide whether:

- appeals made outside the one month time limit can be admitted for hearing;
- reasons exist to suggest that an appeal cannot be accepted or should be struck out.

2.4.4 Grounds for late appeal

The one month time limit for making an appeal may be extended in limited circumstances.

A decision-maker can grant (but can never refuse) an extension of time in which to make an appeal. A decision maker can only grant an extension of time where the person has a good reason why the appeal is being submitted late. The legislation refers to this as being "in the interests of justice"(see below). Where a decision-maker does not or cannot grant an extension, the application must be passed to the Appeals Service for a legal member to decide. The legal member of a tribunal has the power to extend the time limit for appealing where it is either "in the interests of justice" or if the legal member is satisfied that the appeal has a reasonable prospect of success.

The term 'in the interests of justice' applies where it was not practicable to apply earlier because:

- a person or her/his partner or a dependant of the person has died or has suffered serious illness; or
- the person is not resident in the UK; or
- normal postal services were interrupted.

If the reason for the delay is not one of the above, it should be wholly exceptional and relevant to the application. The longer the delay in appealing, the more compelling the special circumstances have to be. In deciding about the delay, the chairperson cannot take account of any delay resulting from a person misunderstanding or being unaware of the relevant law or that a court or Commissioner has interpreted the law differently. Regardless of how mitigating the circumstances for failing to make an appeal within the time limit, an extension of time for appealing will not be granted to anyone whose application is received more than one year after the expiry of that time limit. In other words, applications for a late appeal will only be considered within thirteen months of the date of the decision under appeal (plus fourteen days if a statement of reasons was requested).

2.4.5 Striking out of appeals

An appeal may be struck out by a clerk to the appeal tribunal or by a legally qualified tribunal member:

- if it is an appeal against a decision which does not carry appeal rights. These are known as out of jurisdiction appeals. While most social security decisions can be appealed, some cannot. Non-appealable decisions are generally administrative matters such as whether to accept a claim made other than on an approved form. Where an appeal might be struck out, the person will be notified of the impending risk and will be given fourteen days in which to make representations;
- for want of prosecution including an appeal not made within the absolute time limits;
- if a person has failed to comply with a direction eg to indicate a preference for either an oral or a paper hearing or to provide additional information to support an appeal. A person must be told that failure to comply may lead to an appeal being struck out.

A person can ask for an appeal to be reinstated within a month of it being struck out by application to the clerk of the tribunal if:

- further information is provided that there are reasonable grounds to reinstate; or
- there are no grounds for striking out; or
- it is not in the interests of justice to strike out the appeal.

If the clerk is not satisfied that there are reasonable grounds for reinstatement, however, the application must be passed to a legally qualified member of a tribunal who will decide whether:

- the appeal can be reinstated; or
- it would be more appropriate to address the question as a preliminary issue at an oral hearing.

2.4.6 Oral and paper hearings

There are two options open to a person who has made a valid appeal. S/he can either have her/his case determined by a tribunal in her/his absence (paper hearing) or can attend the hearing in person (oral hearing).

A paper hearing will be decided on the basis of the written submissions and on any additional evidence which might be forwarded. An oral hearing, on the other hand, affords the person an opportunity to attend the appeal (with or without a representative) to explain why, in her/his view, the decision is wrong. A person is asked whether s/he wishes to have an oral hearing. Normally, an oral hearing is a much better option.

Such hearings are public unless the chair of the tribunal is satisfied that a particular hearing should be held in private:

- because it is in the interests of national security, morals or public order or children are involved; or
- for the protection of the private or family life of a party to the proceedings; or
- in special circumstances, because publicity would prejudice the interests of justice.

If a person wishes her/his case to be heard in private, this should be brought to the attention of the legally qualified member of the tribunal who will decide whether to grant the application. The legally qualified member of the tribunal can also decide on applications to make representations by way of live television link.

An application of this nature can be made by any party to the proceedings, by a representative or by a tribunal member (other than the legal member).

The permission of the legal member must be granted and the consent of the person appealing sought for such an application to succeed.

2.4.7 Notice of hearing

Fourteen days notice should be given of the date on which an oral hearing is to take place. This notice period, however, can be shorter if the person appealing waives her/his right to that notice by expressing a willingness to proceed in the absence of that notice. Fourteen days notice runs from the date notice is given and ends the day before the appeal is due to be heard.

2.4.8 Postponement, adjournment and withdrawal of appeals

A person to whom notice of an oral hearing is given may request a postponement of a tribunal prior to the hearing. Applications should be made to the clerk to the tribunal in writing and should include reasons.

A clerk has the power to grant or refuse an application for postponement. Alternatively, s/he will pass it to a legally qualified panel member for a decision.

If the application is granted, the appeal will be re-listed to be heard at a later date. If refused, however, the person making the application will be notified in writing. The application and the decision to refuse a postponement will then be placed before the tribunal delegated to hear the case.

Once the hearing has begun, a tribunal may grant an adjournment if requested to do so by any party to the proceedings. Alternatively, the tribunal itself may decide to adjourn a case where, for example, additional evidence is needed to enable a decision to be reached.

If an adjournment is granted and the appeal is later heard by a different tribunal, there must be a complete new hearing of the appeal of the case. Where the case is re-listed before the same tribunal, however, evidence collected at the previous hearing may be taken into account.

Any party to the proceedings may withdraw an appeal by application in writing to the clerk to the appeal tribunal before the hearing. Alternatively, applications for

withdrawal may be made at the hearing but must be made before the appeal is determined.

Where an appeal is withdrawn prior to the date of hearing, the clerk to the appeal tribunal will give notice in writing to all parties. In situations where the appeal is withdrawn at the hearing, notice in writing will be given to any party who is not present.

2.4.9 The appeal hearing

An appeal tribunal consists of a legally qualified chairperson and up to two other members.

- Most tribunals are conducted by a legally qualified chairperson sitting alone.
- A two member tribunal (a lawyer and doctor) hears appeals about whether a person has limited capability for work for ESA purposes.
- A three member tribunal (a lawyer and two doctors) hears appeals about Industrial Injuries Benefit unless the only question is whether the person has had an industrial accident. A three member tribunal hears DLA and Attendance Allowance appeals (lawyer, doctor and person with experience of disability).
- Where an appeal involves a difficult financial issue, for example interpreting balance sheet, profit/loss accounts, or trust funds, then a two member tribunal may hear the appeal (ie lawyer and financial expert).

There are no strict rules of procedure save that the rules of natural justice should be followed and that all parties should receive a fair hearing from an impartial tribunal. Tribunals cannot carry out medical examinations except in very specific circumstances (to assess degree of disablement for Industrial Injuries Benefits).

A tribunal hearing the appeal can only consider circumstances up to the date of the decision under appeal and not beyond this date. A tribunal is also not obliged to consider issues not raised on appeal so it is important to ensure all legal arguments are put forward at the appeal.

2.4.10 The tribunal decision

A brief decision will be given in writing and signed by the legally qualified panel member of the appeal tribunal at an oral hearing. It will be given to any party present. A copy will also be sent to any party unable to attend. Similarly, the decision of the tribunal which considers a paper hearing will be issued in writing to all parties.

2.5 After the tribunal hearing

If the person appealing believes that the decision of the tribunal is wrong, a number of options are open for her/him to consider. These are to:

- have an accidental error in the tribunal decision corrected;

- apply for the decision of the appeal tribunal to be set aside;
- apply for leave to appeal to the Social Security Commissioner;
- apply for supersession of an appeal tribunal decision.

2.5.1 Correction of an accidental error

This allows an obvious error such as an incorrect date to be amended in the tribunal decision.

Application should be made to either the clerk or the legally qualified panel member, who, after correcting such an accidental error, will issue all parties with a copy of the corrected decision.

Where an accidental error in the tribunal decision has occurred, the time limit for challenging the decision only begins to run from the date the corrected decision is issued.

2.5.2 Setting aside the decision

On application by any party to the proceedings, the legally qualified panel member of the appeal tribunal can set the decision aside where it appears just to do so because:

- a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party to the proceedings or the person's representative or the person making the decision; or
- a party to the proceedings in which the decision was made or the person's representative was not present at the hearing relating to the proceedings.

Applications for the decision of the tribunal to be set aside should be made in writing to the clerk to the appeal tribunal. The application will be copied to all parties to the proceedings. If granted, the appeal will be re-listed for hearing and the earlier decision will be cancelled. A notice of the decision will be sent to the parties. This will include a statement of reasons for setting the decision aside.

An application for setting aside should be made within one month of the date on which the decision notice of the tribunal was issued.

Late applications for setting aside can be considered up to thirteen months from the date the decision was issued. A late application can only be accepted if there is a reasonable chance of success and it is in the interests of justice to extend the time limit. It will only be in the interests of justice to extend time where it was not practicable to apply earlier because:

- a person, her/his partner or a dependant of the person has died or has suffered serious illness; or
- the person is not resident in the UK; or
- normal postal services were interrupted.

If the reason for the delay is not one of the above, it should be wholly exceptional and relevant to the application. The longer the delay, the more compelling the special circumstances need to be.

Where a decision is not set aside, the one month time limit for obtaining written reasons and appealing to the Commissioner runs from the date of that refusal. If the refusal to set aside was due to a refusal to extend the time limit, days awaiting this decision are not ignored for time limits for obtaining a full written decision and an appeal to the Commissioner.

2.5.3 Leave to appeal to the Social Security Commissioner

If a person is considering this course of action, a copy of the statement of reasons for the tribunal decision should be requested by application in writing to the legally qualified panel member of the appeal tribunal.

This application should normally be made within one month of the date the tribunal decision was notified.

Applications for extending the time limit within which to make such an application will be considered by a legally qualified panel member only where:

- a request for an extension is made in writing and explains why the application is late;
- it is in the interests of justice to grant the application.

The rules around what constitute the interests of justice or other special circumstances are the same as those for setting aside a decision outlined in 2.5.2.

There is an absolute time limit for seeking written reasons for a decision of three months from the date the appeal tribunal notified its decision to the person appealing.

While not a legal requirement for those seeking to challenge a tribunal decision by way of this remedy, it is advisable that, when applying for the statement of reasons, an application is also made for a copy of the record of proceedings compiled by the tribunal who heard the appeal. As a statement of the facts, evidence and legislation to which the tribunal had regard when making its decision, the Social Security Commissioner will normally wish to have sight of this document as well.

Where an application for the record of proceedings is not made at the same time as that for a written statement of reasons, the tribunal will issue it to any person who applies within six months of the date the decision was given or sent to all parties to the proceedings. In practice, the Appeals Service now issues the record of proceedings routinely where the statement of reasons is requested by any party, so making the legal requirement on the tribunal to issue the record if requested within six months somewhat redundant. Otherwise, for applications made outside the six month time limit, the record of proceedings will be issued only at the discretion of the legal member.

To make an application for leave to appeal to the Social Security Commissioner, the first step is to seek the leave of the legally qualified panel member of the appeal

tribunal by completion of form Comm. 11. This must be done within one month of the date the full written reasons for the decision are issued. A late application for leave can only be accepted if the legally qualified tribunal member accepts that there are special reasons to admit the application late. There is also an absolute time limit of thirteen months from the date the original decision under appeal was notified to the person applying.

This application should include:

- a completed Comm.11 application form on which the person seeking leave to appeal should cite her/his grounds for application;
- a copy of the record of proceedings (including a full statement of reasons) for the tribunal decision.

In this application, a person seeking leave to appeal must show why in her/his opinion the decision of the appeal tribunal is erroneous in law. As tribunal decisions can only be appealed to a Social Security Commissioner, where the person appealing can establish that the decision is erroneous in law, the application for leave to appeal should set out what error of law has been made, for example:

- making perverse or irrational findings on a matter or matters that were material to the outcome ;
- failing to give reasons or any adequate reasons for findings on material matters;
- failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- giving weight to immaterial matters;
- making a material misdirection of law on any material matter;
- committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings.

Once an application for leave to appeal has been made to the legally qualified panel member of the appeal tribunal, the application will be copied to all parties to the proceedings. Once all parties have made written representations in connection with the application or on the expiry of a one month period from the date of issue (whichever comes first), the legally qualified panel member will consider the application and give a decision.

Where all parties to the proceedings agree there has been an error in law, the legally qualified member shall remit the case to a differently constituted appeal tribunal for determination.

Where all parties are not agreed, however, that an error has occurred and the legally qualified member grants leave to appeal, then remedy is by way of application for appeal to the Social Security Commissioner. Applications for appeal should be made within one month of the date the decision to grant leave is notified.

Appeals to the Social Security Commissioner are made by completion of Form OSSC1 on which the person appealing should set out grounds. Attached to this form, a valid appeal must include the following documents:

- the decision of the legally qualified panel member granting leave to appeal;
- the application for leave to appeal to the legal member together with additional information;
- the record of proceedings (if available);
- the full statement of reasons for the tribunal decision;
- any additional evidence including Commissioners' decisions upon which the person wishes to rely.

On the other hand, if leave to appeal to the Social Security Commissioner is refused by the legally qualified panel member, remedy is by way of an application for leave to appeal to the Social Security Commissioner directly.

Applications for leave to appeal are made in the same format as applications for appeal. The OSSC1 form should be considered carefully to ensure that the appropriate sections are completed to reflect the nature of the application being made. An application must be made within one month of the date the refusal of leave decision was sent to the person applying. A Social Security Commissioner may accept a late application if there are special reasons to admit the application late. There is an absolute time limit of thirteen months from the date the original decision under appeal was notified to the person applying.

If the Commissioner grants leave to appeal, the application will be treated as an appeal. Arrangements will be made for an oral hearing of the appeal. Otherwise, the Commissioner may decide to determine the case by consideration of all written documents. If the Commissioner chooses the latter option, all parties to the proceedings will be granted one month in which to make further written representations before s/he decides the case.

On consideration of the application, the Commissioner will normally make one of three decisions to:

- substitute the decision that the appeal tribunal should have given, making additional findings of fact as necessary;
- remit the case back to a differently constituted appeal tribunal for further findings of fact to be established with directions detailing how the tribunal should consider the matter;
- disallow the application.

Should the Commissioner disallow the application, remedy is by way of an appeal to the Court of Appeal by way of case stated. Leave to appeal to the Court of Appeal must be sought from the Commissioner.

2.5.4 Supersession of an appeal tribunal decision

A decision of a tribunal or a Social Security Commissioner can be superseded if it was made in ignorance of or was based on a mistake about a material fact. Applications should be made in writing to the decision maker. An application for supersession of an appeal tribunal decision or that of the Social Security Commissioner should be accompanied by all supporting evidence.

If it is not possible to challenge the decision of the appeal tribunal through any of these remedies, a person wishing to gain entitlement to benefit for the first time may do so by making a fresh application for benefit. To ensure entitlement to benefit from the earliest possible date, applications should be made as soon as possible. Where there is a doubt as to entitlement, a claim to benefit should be made anyway, subject to the exceptions referred to in paragraph 1.1 of this chapter.

3. FURTHER INFORMATION

Welfare Benefits and Tax Credits Handbook, 17th Edition*, CPAG, 2015/2016, £59*