

SOCIAL SECURITY  
LEGISLATION 2006

◀ **VOLUME II** ▶

INCOME SUPPORT,  
JOBSEEKER'S  
ALLOWANCE, STATE  
PENSION CREDIT  
AND THE  
SOCIAL FUND

Commentary by

Penny Wood, Richard Poynter, Nick Wikeley, David Bonner

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# **SOCIAL SECURITY LEGISLATION 2006**

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**David Bonner, LL.B., LL.M**

## **VOLUME II: INCOME SUPPORT, JOBSEEKER'S ALLOWANCE, STATE PENSION CREDIT AND THE SOCIAL FUND**

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## CHILD POVERTY ACTION GROUP

The Child Poverty Action Group (CPAG) is a charity, founded in 1965, which campaigns for the relief of poverty in the United Kingdom. It has a particular reputation in the field of welfare benefits law derived from its legal work, publications, training and parliamentary and policy work, and is widely recognised as the leading organisation for taking test cases on social security law.

CPAG is therefore ideally placed to act as Consultant Editor to this 4-volume work—**Social Security Legislation 2006**. CPAG is not responsible for the detail of what is contained in each volume, and the authors' views are not necessarily those of CPAG. The Consultant Editor's role is to act in an advisory capacity on the overall structure, focus and direction of the work.

For more information about CPAG, its rights and policy publications or training courses, its address is 94 White Lion Street, London, N1 9PF (telephone: 020 7837 7979—website: *www.cpag.org.uk*).



## **FOREWORD**

I am glad to be able to commend these latest volumes of Social Security Legislation to anyone interested in this area of work. Whether you are a legal practitioner, a panel member, or a welfare rights adviser they provide a ready source of information and guidance which is indispensable to those who want a better understanding of the legislation. I am grateful to all those involved in their publication.

HH Judge Michael Harris  
President of Appeal Tribunals

## PREFACE

*Income Support, Jobseeker's Allowance, State Pension Credit and the Social Fund* is Volume II of the four volume series: *Social Security Legislation 2006*. The companion volumes are: Bonner, Hooker and White, *Volume I: Non-Means Tested Benefits*; Rowland and White, *Volume III: Administration, Adjudication and the European Dimension* and Wikeley and Williams, *Volume IV: Tax Credits, Child Trust Funds and Employer-Paid Social Security Benefits*.

Each of the volumes in the series provides a legislative text, clearly showing the form and date of amendments, and commentary up to date to April 13, 2006. The commentary in this volume includes caselaw developments up to the end of June 2006.

From the tribunal perspective, April 2006 saw the start of two significant developments outside the scope of this volume but which may prove to have far-reaching consequences. Firstly, the Constitutional Reform Act 2005 came into force. Most of its provisions are concerned with the court-based judiciary, or the “uniformed branch”; the inclusion of tribunals is to be achieved by the Tribunals, Courts and Enforcement Bill (a draft of which was finally published on July 25, 2006). However, the new independent Judicial Appointments Commission and the new statutory system for the discipline of holders of judicial office introduced by the 2005 Act do apply to tribunals. Secondly, the administrative arm of the Appeals Service moved from the Department for Work and Pensions to the Department for Constitutional Affairs (“DCA”), becoming part of the Tribunals Service. The Tribunals Service supports the tribunal organisations currently within DCA and will take over the administration of other tribunals as they transfer to DCA. The aim is to build one integrated, administrative service, as well as, of course, to achieve economies. In the short-term increasing operational convergence between tribunal systems is likely.

Turning to the specific changes this year to the legislation covered by this volume, the following in particular should be mentioned. Firstly there are the amendments made as a consequence of the Civil Partnership Act 2004, the most important of which for means-tested benefits is the new definition of “couple”. Secondly, the capital limit for income support and income-based JSA, which has remained at £8,000 for the majority of claimants since April 1990, increased on April 10, 2006 to £16,000, thus bringing it into line with that which applies for the purposes of housing benefit and council tax benefit. Thirdly, the extended entitlement to child benefit for young people introduced under the Child Benefit Act 2005 has necessitated some changes to the provisions governing income support and income-based JSA for such young people. Finally, the Social Fund Maternity and Funeral Expenses (General) Regulations 2005, although largely consolidatory, have also made some changes to the rules for funeral payments.

In terms of case law, the decision of the Court of Appeal in *Secretary of State for Work and Pensions v Bhakta*, to be reported as *R(IS) 7/06*, and the admissibility decision of the European Court of Human Rights in *Stec and*

## Preface

*Others v The United Kingdom* (July 6, 2005) are perhaps the most significant this year. In *Bhakta* the Court of Appeal agreed with the Commissioner that a decision-maker on behalf of the Secretary of State, or in default the tribunal, did have power to make an advance award under reg.13 of the Claims and Payments Regulations from the date on which habitual residence was likely to be established and that the making of such an award was not precluded by the “date of the decision” rule in s.12(8)(b) of the Social Security Act 1998, as the “mere passage of time” did not amount to “a change in circumstances”. In *Stec* (see Vol.III in this series for discussion of this decision) the Grand Chamber of the European Court of Human Rights ruled that non-contributory benefits are “possessions” for the purposes of Art.1, Protocol 1 ECHR – this will apply to the benefits covered by this book.

However, also of note are the House of Lords’ judgment in *Szoma v Secretary of State for Work and Pensions*, to be reported as *R(IS) 2/06* (exceptions to exclusion from benefit of people “subject to immigration control” – meaning of “lawfully present”), and the decisions of the Court of Appeal in *Esfandiari, Latif and Others v Secretary of State for Work and Pensions*, to be reported as *R(IS) 11/06* (exclusion of funerals abroad from social fund funeral payments not discrimination), in *Collins v Secretary of State for Work and Pensions* (habitual residence test legitimate under EU law), in *Francis v Secretary of State for Work and Pensions*, to be reported as *R(IS) 6/06* (difference in treatment for the purpose of the sure start maternity grant between those who have an adoption order and those with a residence order breaches Art.14, read with Art.8, ECHR), and in *Secretary of State for Work and Pensions v Wilson* (NINO requirement has to be satisfied by both partners, even if one partner is a “person subject to immigration control” and so her inclusion does not affect the amount of benefit). There has as yet been little caselaw on the “right to reside” test. A Tribunal of Commissioners has considered the position of non-economically active claimants in *CIS/3573/2005*, although it is understood that leave to appeal to the Court of Appeal against the Commissioners’ decision is being sought, and the meaning of “temporarily incapable of work” in reg.5(2) of the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326) was examined in *CIS/3890/2005*. However, many more decisions on this complex and controversial subject are likely to emerge during the course of the next few months.

Besides these highlighted developments, there have also been the usual crop of more minor legislative changes and the continuing flow of Commissioners’ decisions, and to a lesser extent, court judgments.

As always, revising and updating the legislative text and commentary, has required considerable flexibility on the part of the publisher and a great deal of help from a number of sources, including CPAG as advisory editor to the series, for which we express our sincere appreciation. Thanks are also due to Miranda Bayliss and Peter Banks. But particular mention must be made here of the debt owed by all of us to John Mesher, who began the provision of annotated legislation for tribunals, has given wise advice on the development of this series, and who happily remains on call as consultant in respect of this Volume.

To maximise space for explanatory commentary we have provided lists of definitions only where the commentary to the provision is substantial, or where reference to definitions is essential for its proper understanding. Users of this book should always check whether particular words or phrases

## *Preface*

they are called on to apply have a particular meaning ascribed to them in the legislation. Generally, the first or second regulation in each set of regulations contains definitions of key terms (check the 'Arrangement of Regulations' at the beginning of each set for an indication of the subject matter covered by each regulation). There are also definition or 'interpretation' sections in each of the Acts (check 'Sections Reproduced' at the beginning of each Act for an indication of the subject matter covered by each section or Schedule).

Users of the original three volumes in this series, and their predecessors, have over the years provided valuable comments which have invariably been helpful to us in ensuring that the selection of legislative material for inclusion and the commentary upon it reflect the sort of difficulties encountered in practice. In so doing, readers have thus helped shape the content of each of the volumes in the current series. We hope that readers will continue that tradition. Please write to the General Editor of the series, David Bonner, Faculty of Law, The University, Leicester LE1 7RH, who will pass on any comments received to the appropriate commentator.

Our gratitude also goes to the President of the Appeal Tribunals, Judge Harris, and his staff for continuing the tradition of help and encouragement.

July 2006

Penny Wood  
Richard Poynter  
Nick Wikeley  
David Bonner



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## USING THIS BOOK, USING LEGAL AUTHORITY AND FINDING OTHER SOURCES OF INFORMATION

### Introduction

This book is not designed as an introduction to, or general textbook on, the law relating to social security. Inevitably some familiarity with the social security system has been assumed. This note is designed to assist readers who are not lawyers—and also those lawyers who are not familiar with this particular field of law—by identifying the sources of social security law and showing how to find them. Volume IV also deals with income tax law, and its version of this section contains additional comments about that.

### Primary sources of social security law

Social security law is based on legislation, consisting of *Acts of Parliament*, which are primary legislation and are also known as statutes, and *statutory instruments*, which are secondary or delegated legislation made by ministers acting under powers conferred by primary legislation and are also known as regulations (or, occasionally, orders). Another source of the law lies in *judicial decisions*, made, in this context, principally by Social Security Commissioners who hear appeals from appeal tribunals although some decisions of the courts are also relevant. Such judicial decisions provide authoritative interpretation of the legislation. The precise mixture of the three sources differs from benefit to benefit.

### The scope of this book and the status of the commentary

This book contains an up-to-date text of the principal statutes and statutory instruments relevant to the work of appeal tribunals and Commissioners. It also contains a commentary on that legislation, referring to relevant decisions of Commissioners and the courts. The commentary aims to help readers understand the legislation and its implications. The focus in decision-making, however, must remain on the actual words of the legislation as applied by the Commissioners and courts, because the commentary merely reflects the opinion of the commentator on what the law is.

### Finding a particular section in a statute

Statutes consist of numbered sections (sometimes grouped in Parts, which may in turn be divided into Chapters) and they often have schedules at the end.

Suppose you wanted to find section 137 of the Social Security Contributions and Benefits Act 1992. Sometimes the word “section” is abbreviated to “s.”; so you could refer to the Social Security Contributions and Benefits Act 1992, s.137.

To find this provision, you can use the contents pages to find where

provisions of the Social Security Contributions and Benefits Act 1992 are printed. You can also use the running heads at the top of each page; the header on the left-hand page gives the name of the Act while the header on the right-hand page gives the year and chapter number (abbreviated “c.”) as well as the section dealt with on that page. The chapter number simply indicates the order in the Parliamentary year of the statute; the Social Security Contributions and Benefits Act 1992 is chapter 4, meaning that it was the fourth statute to be passed by Parliament in 1992.

After the text of the section comes a note of the AMENDMENTS made to the provision, reference to relevant DEFINITIONS, and the commentary, which appears under the heading GENERAL NOTE. Where the section is re-enacted in consolidating legislation, that is, legislation drawing together all the amendments over time in a new statute, the DERIVATION, or source, of the provision is also given so that you can see where the provision originally appeared. This can be helpful in considering any decisions of Commissioners or the courts on the earlier form of the provision.

### **Finding a particular regulation**

Statutory instruments consist of numbered regulations (or articles where the statutory instrument is in the form of an order rather than being a set of regulations) and, like statutes, they sometimes have schedules at the end.

Suppose you wanted to find regulation 42 of the Income Support (General) Regulations 1987. Sometimes the word “regulation” is abbreviated to “reg.”; so you could refer to the Income Support (General) Regulations 1987, reg.42.

To find this provision, use the contents pages to find the Income Support (General) Regulations 1987. Then move forward within the regulations until you find the one you want. Again the running headers at the top of each page will assist you. The header on the right-hand page gives the statutory instrument number, that is the year of publication and the number, as in SI 1987/1967, indicating that these regulations were the 1967th statutory instrument made by Ministers and approved by Parliament in 1987.

As with statutes, after the text of the regulation comes a note of the AMENDMENTS made to the provision, reference to relevant DEFINITIONS, and the commentary which appears under the heading GENERAL NOTE. Where the regulation is re-enacted in consolidating regulations, that is, legislation drawing together all the amendments made over time in a new set of regulations, the DERIVATION or source, of the provision is also given so that you can see where the provision originally appeared. This can be helpful in considering any decisions of Commissioners or the courts on the earlier form of the provision.

### **Commissioners’ decisions**

Both reported and unreported decisions of Commissioners are important sources of guidance on the interpretation and application of legislation relating to social security benefits and their administration. Where relevant, these are binding on both decision-makers and on tribunals. The binding nature of Commissioners’ decisions is discussed below. A single Commissioner hears most appeals, though the Chief Commissioner does occasionally direct that three Commissioners sitting together should hear

cases of special importance. This is then known as a Tribunal of Commissioners.

### **Reported decisions**

About 40 to 50 decisions a year are selected to be “reported”. Selection used to be a decision of the Chief Commissioner acting alone. Later he made his selection on advice from a committee of Commissioners, but, since 2002, selection of decisions to report has been the task of an Editorial committee chaired by the Chief Commissioner. Decisions are selected for reporting only if they are of general importance and command the assent of at least a majority of Commissioners. They are published in biennial bound volumes by The Stationery Office and in looseleaf form (contact Margaret Drummond, Print Solutions, Room B0202, Benton Park Road, Newcastle-upon-Tyne NE98 1YX (tel. 0191 225 5422)) and on the world wide web ([www.dwp.gov.uk/advisers/docs/commdecs/index.asp](http://www.dwp.gov.uk/advisers/docs/commdecs/index.asp)) by the Department for Work and Pensions (replacing the DSS). They can also be accessed via the Commissioners’ website ([www.osscc.gov.uk](http://www.osscc.gov.uk)). These decisions are available in all tribunal venues and can be consulted in local social security offices, and some main libraries.

Reported decisions are renumbered with the initial letter “R” for “reported”. *R(IB) 1/00* was the first decision on incapacity benefit to be reported in 2000. A decision of a Tribunal of Commissioners is often identified by adding a letter “T” in brackets after the reference, as in *R(IB) 2/99(T)*. Scottish decisions are not specifically identified as such.

### **Unreported decisions**

Reported decisions are selected from a greater body of decisions in the cases dealt with by the Commissioners. Those not reported are known as unreported decisions but still have precedential value. Each Commissioner’s decision is given a file number in the Commissioners’ Office, which is a unique identification number. From 1997 cases have been registered consecutively by number within a calendar year, without a separate range of numbers for each benefit. Prior to 1995, there was a separate range of numbers for each benefit. So Commissioner’s decision *CU/23/1992* is the 23rd case on unemployment benefit registered in 1992. The letters “CU” indicate that the decision is that of a Commissioner (C) and that the benefit in question is unemployment benefit (U). Between 1995 and 1997, there had been a change of approach, reflecting computerisation. The system of numbering consecutively within benefits in a particular year ceased. The lettering system remained the same, but the number after the letters, as in *CU/7328/1995*, indicated that this was the 7328th case on any benefit registered since the beginning of 1995.

Scottish decisions have an “S” after the “C” (e.g. *CSI/26/98*) and, until the Welsh office of the Commissioners was closed, Welsh decisions could be identified as having a “W” after the “C”. The “W” will be added again in 2005.

Until the end of 2001, some 100 decisions a year were “starred” because it was considered that they raised points of significance or interest and deserved wider circulation. They did not, however, acquire any enhanced precedential status from being starred. The practice of starring was discontinued from the start of 2002. Instead decisions that Commissioners believe



should have wider currency are available on the Commissioners' new website ([www.ossesc.gov.uk](http://www.ossesc.gov.uk)). Some decisions are selected as of particular interest and highlighted for a time in the Most Recent Decisions part of the Decisions section of that website. As with "starring", however, a decision does not gain enhanced precedential status through "highlighting".

### **Other sources of/on Commissioners' decisions**

There are a number of other sources of valuable information or commentary on Commissioners' decisions, whether reported or unreported: publications such as the *Journal of Social Security Law*, the *Journal of Social Welfare and Family Law*, *Legal Action*, *The Law Society's Gazette*, the *Adviser* and CPAG's *Welfare Rights Bulletin*. A range of reported and unreported decisions and many valuable updates and comments were also available on the website maintained by Commissioner Howell ([www.hywels.clara.co.uk/commrs/decns.htm](http://www.hywels.clara.co.uk/commrs/decns.htm)). This website is remaining in existence for the time being (although it has not been updated since May 21, 2004), despite the advent of the Commissioners' new website referred to above. To quote Commissioner Howell, this is "in the hope that the improved arrangements on the official website . . . will prove permanent".

### **What does it mean to say that a case is binding?**

Reference to decisions being binding means that where a similar point is raised in a later case before an adjudicating authority bound by the decision, that adjudicating authority must accept the interpretation of the law contained in the decision. So a Commissioner's decision explaining what a term in a particular regulation means, lays down the definition of that term in much the same way as if the term had been defined in the regulations themselves. The decision may also help in deciding what the same term means when it is used in a different set of regulations, provided that the term appears to have been used in a similar text.

Appeals to the Commissioners are now available only on points of law, but before April 1987 appeals were available on points of fact as well as law. Care should be taken in reading older decisions to appreciate that some were concerned with fact rather than law, though the reported decisions invariably contain points of general application. Relevant decisions of the Commissioners and the courts are explained in the commentary to the statutory provisions in this volume, together with guidance on their significance for decision-making in the tribunals. Users of the book should remember that it is the decision itself which is binding and not the explanation of it in the commentary; that is merely the opinion of the commentator.

### **Using Commissioners' decisions: the hierarchy of authority**

Although the Chief Commissioner has directed that, so far as possible, reference should be made to reported decisions only, the legal position is that all decisions of Commissioners are binding on decision-makers and tribunals. Where there is a conflict, a decision of a Tribunal of Commissioners should be preferred to a decision of a single Commissioner and a reported decision should generally be preferred to an unreported decision (*R(I) 12/75(T)*), unless the unreported decision was the later decision and the

Commissioner expressly decided not to follow the earlier reported decision (see the Northern Ireland decision, *(R 1/00(FC))*). Decisions of Commissioners are not binding on other Commissioners. However, a single Commissioner will always follow a decision of a Tribunal of Commissioners and will generally follow a decision of another single Commissioner (*R(I) 12/ 75(T)*). A Tribunal of Commissioners will generally follow a decision of another such Tribunal but is not bound to do so (*R(U) 4/88(T)*).

There are separate Commissioners in Northern Ireland considering legislation that is often indistinguishable from the legislation in Great Britain. Decisions of Northern Ireland Commissioners are not binding in Great Britain (*R(SB) 1/90(T)*) but are persuasive. Such decisions are included in the decisions published on the website of the Great Britain Commissioners but the selection of decisions to be reported is made by the Chief Commissioner in Northern Ireland. Looseleaf publication by The Stationery Office and on the world wide web by the Department for Social Development ([www.dsdni.gov.uk](http://www.dsdni.gov.uk)) is separate from the publication of Great Britain decisions. So was the publication of bound volumes by The Stationery Office until 1999. From 2000, reported Northern Ireland decisions are included in the same bound volumes as reported decisions of Commissioners in Great Britain. References to decisions of Northern Ireland Commissioners can always be distinguished from references to decisions of Commissioners in Great Britain because the former are numbered differently with the letters identifying the type of benefit always being in brackets after the numbers, as in *C12/98(IS)*, which has been reported as *R1/00(IS)*. Unreported decisions of the Northern Ireland Commissioners can be found on the Department for Social Development website at [www.dsdni.gov.uk](http://www.dsdni.gov.uk).

### **Using Commissioners' decisions at Tribunals and before the Commissioners**

Decision-makers and claimants are entitled to assume that tribunals and Commissioners have immediate access to reported decisions of Commissioners and they need not provide copies, although it may sometimes be helpful to do so. However, where either a decision-maker or a claimant intends to rely on an unreported decision, it will be necessary to provide a copy of the decision to the tribunal or Commissioner. A copy of the decision should also be provided to the other party before the hearing because otherwise it may be necessary for there to be an adjournment to enable that party to take advice on the significance of the decision.

### **Decisions of the Courts**

Decisions of the superior courts in Great Britain and Northern Ireland on questions of legal principle are almost invariably followed by decision-makers, tribunals and Commissioners, even when they are not strictly binding because the relevant court was in a different part of the United Kingdom or exercised a parallel—but not superior—jurisdiction (see the note to section 14 of the Social Security Act 1998 in Part I of *Vol. III: Administration, Adjudication and the European Dimension*).

Decisions of the courts on social security matters are generally included among the reports of Commissioners' decisions. So, for example, *R(I) 1/00* contains Commissioner's decisions *CSI 12/98*, the decision of the Court of

Session upholding the Commissioner's decision and the decision of the House of Lords in *Chief Adjudication Officer v Faulds*, reversing the decision of the Court of Session. Some of them can also be found in the various series of law reports familiar to lawyers (in particular, in the *Law Reports*, the *Weekly Law Reports*, the *All England Law Reports*, the *Industrial Cases Reports* and the *Family Law Reports*. Decisions of the House of Lords since mid-November 1996 are available on the world wide web ([http://www.parliament.uk/judicial\\_work/judicial\\_work5.cfm](http://www.parliament.uk/judicial_work/judicial_work5.cfm)). Very recent ones are available there only hours after delivery of their Lordships' opinions. Some Court of Appeal decisions can be obtained on the Court Service website ([http://www.courtservice.gov.uk/judgments/judg\\_home.htm](http://www.courtservice.gov.uk/judgments/judg_home.htm)). Sweet and Maxwell's online subscription service *Westlaw* is another valuable source ([www.westlaw.co.uk](http://www.westlaw.co.uk)), as is Smith Bernal's *Casetrack* ([www.casetrack.com](http://www.casetrack.com)) and LexisNexis' *Lexis* ([www.lexis.com](http://www.lexis.com)).

### European Community Law

The European Community is part of the European Union. European Community Law affecting social security is covered in the third volume in this series: *Administration, Adjudication and the European Dimension*.

The European Union has two courts: the Court of Justice of the European Communities, and the Court of First Instance. Decision-makers, tribunals and Commissioners are under a duty by reason of Article 10 (ex.5) of the EC Treaty to apply decisions of the Luxembourg courts, where relevant to cases before them, in preference to other authorities binding on them.

Decisions of the Court of Justice of the European Communities come in two parts: the Opinion of the Advocate General and the decision of the Court. It is the decision of the Court which is binding. The Court is assisted by hearing the Opinion of the Advocate General before itself coming to a conclusion on the issue before it. The Court does not always follow its Advocate General. Where it does, the Opinion of the Advocate General often elaborates the arguments in greater detail than the single collegiate judgment of the Court. No dissenting judgments appear in reports from the Court of Justice.

Decisions of the Luxembourg courts are available on the world wide web at [www.curia.eu.int](http://www.curia.eu.int).

### The European Convention on Human Rights, the Strasbourg Court and the Human Rights Act 1998

The Court of Human Rights in Strasbourg is quite separate from the Luxembourg courts and serves a different purpose: interpreting and applying the European Convention on Human Rights, which is incorporated into United Kingdom law by the Human Rights Act 1998. From October 2, 2000, public authorities, including courts, Commissioners, tribunals and decision-makers (the Secretary of State) must act in accordance with the incorporated provisions of the Convention, unless statute prevents this. They must take into account the Strasbourg case law. They are required to interpret legislation, so far as is possible to do so, to give effect to the incorporated Convention rights. Any court or tribunal may declare secondary legislation incompatible with those rights and, in certain circumstances, invalidate it. Only the higher courts can declare a provision of primary leg-