IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2015-485-000156
[2015] NZHC 1602

IN THE MATTER OF	An appeal by way of case stated from the determination of the Social Security Appeal Authority at Wellington
UNDER	Section 12Q Social Security Act 1964
BETWEEN	DAVID OWEN CREQUER Appellant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing: Dealt with on the papers

Judgment: 9 July 2015

JUDGMENT OF GENDALL J

What this judgment is about

A case is stated

[1] On 20 May 2014, the Social Security Appeal Authority (SSAA) released its decision relating to Mr David Crequer's dispute concerning the commencement date of his benefit entitlement, and the decision to give him a Domestic Purposes Benefit rather than a Sickness Benefit.[1] Both appeals were dismissed. Following the release of the decision, on 24 February 2015 the SSAA stated a case to this Court, seeking resolution of the following two questions of law:[2]

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1 *Crequer v The Chief Executive of the Ministry of Social Development* [2014] NZSSAA 39.

2 As a preliminary matter, I note that although the proceeding was originally filed in the Wellington Registry of the High Court, it has since been transferred to Christchurch. This was due to Mr Crequer living in Christchurch and associated travel difficulties

(a) Did the Authority err in finding that it was open to the Chief Executive to grant the appellant Domestic Purposes Benefit rather than Sickness Benefit?

(b) Did the Authority err in law in its interpretation or application of s 80BA of the Social Security Act 1964 in finding that the correct commencement date of the appellant's Domestic Purposes Benefit was 3 June 2013?

Mr Crequer objects to the case as it is stated

[2] Before consideration of these legal issues could get underway, Mr Crequer filed a memorandum objecting to the contents of the case stated. In his objection, Mr Crequer states:

> The case stated that the Authority has purported to file bears no relation to the case stated submitted to the Authority by the appellant, which the Authority has seen fit to change in all material respects. I contend that even if it were a draft case stated it is/was not open to the Authority to make changes except for errors of fact.

[3] It therefore seems that Mr Crequer's position is that the case stated which he drafted should be submitted to this Court for determination, subject only to correction of errors of fact. The respondent objects to this course. Its position is that the act of stating a case is an act of the SSAA, not the appellant, and that the case, as stated, should stand.

[4] I attach as **Annexure A** the five questions of law (and multiple sub-questions) Mr Crequer submitted to the SSAA as purported questions of law for resolution.

Further background

[5] Mr Crequer was made redundant. His final day of employment was 28 March 2013. On 2 April, he contacted the Ministry of Social Development (the Ministry), and subsequently attended an appointment at which he discussed the Domestic Purposes Benefit. Two days later, Mr Crequer had an operation for a hernia. On 10 April, Mr Crequer applied for the Domestic Purposes Benefit. On 12

April, Mr Crequer contacted the Ministry, stating that he would prefer to be granted a Sickness Benefit. In support of this, he supplied a medical certificate which indicated he would be unable to work for two weeks, and only able to work on light duties for a further six weeks. The preference for the Sickness Benefit seemed to be predicated on his belief that the two benefits had differing commencement dates.

[6] The Ministry then proceeded to assess the commencement date of Mr Crequer's Domestic Purposes Benefit in accordance with the provisions of the Social Security Act. A formal application for the sickness benefit was not received until 18 April. That request was declined. On the same day, the assessment of Mr Crequer's Domestic Purposes Benefit was completed. The assessment indicated that the commencement date of the benefit would be 9 May 2013.

[7] Mr Crequer sought reviews of the decisions. From this, I take it to mean that the review related to (a) the declination of the application for the Sickness Benefit; and (b) the assessment of the commencement date of the Domestic Purposes Benefit. An internal review revealed that the correct commencement date should have in fact been 17 June 2013. The matter was referred to the Benefits Review Committee, which concluded that, due to Mr Crequer's average weekly wage, the correct commencement date was 11 June 2013. Subsequent to this, the Chief Executive of the Ministry advised that the date had once again been revised to 4 June 2013.

[8] The matter was then appealed to the SSAA, which was heard on 11 April 2014. A decision was released on 20 May 2014. The commencement date issue required the SSAA to interpret and apply ss 80 and 80BA of the Social Security Act. It essentially concluded that Mr Crequer's stand down period ended on 3 June 2013, with the effect that the correct commencement date was 4 June 2013. As to the Domestic Purposes Benefit vs the Sickness benefit debate, the SSAA concluded that the Sickness Benefit would provide Mr Crequer with no advantage. The appeal was dismissed in both respects.

[9] On 24 February 2015, the SSAA stated a case to this Court. I have set out above at [1] the two questions of law requiring resolution. Those questions were formulated by the SSAA following input from the parties. Mr Crequer objects to the

current formulation on the basis that his original questions, which he devised, should be put before this Court. He therefore requests that the case be referred back to the SSAA for reformulation, presumably in line with how he originally drafted the case he considered should be referred to this Court.

What I am required to resolve in this judgment

[10] In essence, this judgment is concerned with one legal point, and one factual point. The first is whether Mr Crequer has any basis for challenging the contents of the case stated by the SSAA. If that question is answered in the affirmative, I am then required to consider whether, on the facts of this case, Mr Crequer's drafted case stated objections are made out. Naturally, the substantive questions for determination are not traversed in this judgment.

The statutory and regulatory architecture

[11] This application essentially invokes s 12Q of the Social Security Act 1964 and Part 21 of the High Court Rules.[3] The relevant section from the Social Security Act provides:

> **12Q Appeals to High Court on questions of law only**
>
> (1) Where any party to any proceedings before the Authority is dissatisfied with any determination of the Authority as being erroneous in point of law, he may appeal to the High Court by way of case stated for the opinion of the Court on a question of law only.
>
> (2) Repealed.
>
> (3) Within 14 days after the date of the determination the appellant shall lodge a notice of appeal with the Secretary of the Authority. The appellant shall forthwith deliver or post a copy of the notice to every other party to the proceedings.
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> (4) Within 14 days after the lodging of the notice of appeal, or within such further time as the Chairman of the Authority may in his discretion allow, the appellant shall state in writing and lodge with the Secretary of the Authority a case setting out the facts and the grounds of the determination and specifying the question of law on which the appeal is made. The appellant shall forthwith deliver or post a copy of the case to every other party to the proceedings.
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> (5) As soon as practicable after the lodging of the case, the Secretary of the Authority shall submit it to the Chairman of the Authority.

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[3] Sections 12A–12R were inserted into the Social Security Act 1964 by the Social Security Amendment Act 1973, which took effect from 1 May 1974.

> (6) The Chairman shall, as soon as practicable, and after hearing the parties if he considers it necessary to do so, settle the case, sign it, send it to the Registrar of the High Court at Wellington, and make a copy available to each party.
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> (7) The settling and signing of the case by the Chairman shall be deemed to be the statement of the case by the Authority.
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> (8) If within 14 days after the lodging of the notice of appeal, or within such time as may be allowed, the appellant does not lodge a case pursuant to subsection (4) of this section, the Chairman of the Authority may certify that the appeal has not been prosecuted.
>
> (9) The Court or a Judge thereof may in its or his discretion, on the application of the appellant or intending appellant, extend any time prescribed or allowed under this section for the lodging of a notice of appeal or the stating of any case.
>
> (10) Subject to the provisions of this section, the case shall be dealt with in accordance with rules of Court.

[12] The general effect of the section can be summarised. Any party to a proceeding before the SSAA may appeal to the High Court, on questions of law alone, by way of case stated. Within 14 days of the release of the SSAA's decision, a notice of appeal must be lodged with the secretary of the SSAA. Within 14 days thereafter, or within such further period of time as the chairman of the SSAA may permit, the appealing party must lodge with the secretary a draft appeal with the secretary. That appeal must set out the facts and grounds of the determination of the SSAA, and the questions of law for resolution. Once this is done, the secretary must submit the case to the chairman.

[13] Upon receiving the case, the chairman must as soon as practicable, "settle the case, sign it, send it to the Registrar of the High Court at Wellington, and make a copy available to each party". In doing so, the chairman may hear from the parties. This act of settling and signing is deemed, by s 12Q(7), to be the stating of the case by the SSAA. Subject to s 12Q, the case stated may be dealt with in accordance with the rules of Court.[4] This summary is effectively a replication of the short entry about the SSAA in the work, *Appeals and Appellate Courts in Australia and New Zealand*, where the authors comment:[5]

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[4] There is also provision in the rules for extension of time by the Court. There seems to be nothing in this case requiring invocation of that power. I therefore need not discuss it here.

[5] MJ Beazley, PT Vout and SE Fitzgerald *Appeals and Appellate Courts in Australia and New Zealand* (LexisNexis Butterworths, Chatswood, New South Wales, 2014) at [10.330]–[10.331] (citations omitted). The reference in the passage to a "Type I" appeal is a reference to a classification system adopted by the authors (at Chapter 1), largely derived from the judgment of

> The Social Security Appeal Authority was established by s 12A of the Social Security Act 1964. The functions of the Appeal Authority are to sit as a judicial authority for the determination of appeals in accordance with s 12J of the Social Security Act 1964 and s 16A of the War Pensions Act 1954. Sections 12A–12R of the Social Security Act apply to appeals from determinations of the Chief Executive (under the Social Security Act 1964) or determinations of the Secretary of War Pensions (under the War Pensions Act 1954). These sections outline the procedure and functions of the Appeal Authority.
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> **Appeals from the Social Security Appeal Authority to the High Court**
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> Where any party to any proceedings before the Authority is dissatisfied with any determination of the Authority as being erroneous in point of law, he or she may appeal to the High Court on a question of law only. Such an appeal is likely Type I. The appeal must be brought within 14 days after the date of the determination. The case shall be dealt with in accordance with the rules of court. Accordingly, the form for an appeal is set out in the High Court Rules r 21.4.

[14] As will be apparent, the reference to the rules of Court is, of course, a reference to the High Court Rules. As this is an appeal to this Court, expressly by way of case stated, Part 21 has application.[6] Rule 21.4 effectively sets out the mechanics of the process:

> **21.4 Method of commencing appeal or reference**
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> (1) An appellant must commence an appeal to which this Part applies by—
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> (a) giving a notice of appeal to the appropriate officer of the tribunal by which the decision was made, or if there is no such officer, to the person who made the decision; and
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> (b) filing a copy of the notice of appeal in the appropriate registry of the court; and
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> (c) serving a copy of the notice of appeal on every party to the matter in which the decision was given (either before or immediately after the giving and filing of the notice of appeal).
>
> (2) References to which this Part applies that are not appeals (except for references on a tribunal's own initiative) commence in accordance with the tribunal's direction made on application by a party to the matter in which the question of law or fact (or both) arose.
>
> (3) A reference under subclause (2) must comply with rule 21.9(1).

Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619–622.

6 High Court Rules, r 21.1. I note that by r 21.2, rr 20.4(3) and (4), 20.7 and 20.10 apply to appeals by way of case stated *mutatis mutandis*.

(4) A reference by a tribunal on its own initiative must be commenced by filing a case stated, which is signed by the chairman or other authorised officer of the tribunal, and complies with rule 21.9(1).

[15] The time frame set by r 21.5 is 20 working days from the date of the decision. In this case, the date set by the Social Security Act, namely 14 days, plainly prevails.[7] Each notice of appeal is required to specify the decision appealed from (or relevant part thereof), the error of law alleged, the question of law or fact requiring resolution and the relief sought.[8] Rule 21.7 sets out the principles applicable to determining where the notice of appeal is to be filed. However, in this case s 12Q(6) expressly specifies the High Court at Wellington as the place of filing. The contents of a case stated are set out by r 21.9:

21.9 Contents of case

(1) A case must state concisely—

(a) the circumstances relating to the matter leading to the statement of the case; and

(b) the relevant facts as determined by the tribunal (attaching copies of documents, if any) necessary to enable the court to decide the questions; and

(c) where appropriate, the respective contentions of the parties with reference to the questions; and

(d) the questions on which the opinion of the court is sought.

(2) Subclause (3) applies when a ground of appeal is—

(a) that there was no evidence on which the tribunal could properly reach its decision, or a specified part of it; or

(b) that the tribunal reached a wrong conclusion on a question of fact.

(3) When this subclause applies, there must be attached to the case—

(a) copies of the documents, affidavits, and exhibits that were placed before the tribunal; and

(b) a copy of any evidence given at the hearing that has been transcribed.

(4) A transcript certified as correct by or on behalf of the tribunal requires no further verification of its contents.

(5) No document or transcript of any evidence may be attached to the case unless it is necessary for a proper determination by the court of the question of law or fact (or both) specified in the case.

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7 It is important to observe that the High Court Rules cannot override the express provisions of the Social Security Act; to the extent there is a difference, the provisions of the latter must prevail

8 Rule 21.6: *Crequer v Chief Executive of the Ministry of Social Development* [2012] NZHC 2575, [2012] NZAR 951.

(6) The draft case may be amended by the tribunal only to correct errors of fact.

(7) The case must be signed by or on behalf of the tribunal.

[16] Rule 21.11 prescribes when a case is deemed to have been stated, while r 21.12 provides the Court with the power to amend the case:

> **21.12 Power to amend case**
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> (1) The court may send a case back to the tribunal for amendment—
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> (a) to clarify the question of law or fact (or both) on which the opinion of the court is sought; or
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> (b) to provide any further information necessary to enable the court to dispose of the questions in the case stated.
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> (2) The court may amend the case at the hearing.

[17] The Court is also vested with jurisdiction to award security for costs.[9] However, the final provision, which I set out in full, is the determination provision, r 21.14:

> **21.14 Determination of questions**
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> After hearing and determining the question of law or fact (or both) in a case stated, the court must do 1 or more of the following things:
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> (a) in the case of an appeal, reverse, confirm, or amend the decision in respect of which the case was stated:
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> (b) in the case of an appeal, remit the matter to the tribunal for reconsideration and decision in accordance with the opinion of the court on the question of law or fact (or both):
>
> (c) in every other case, remit the matter to the tribunal with the opinion of the court:
>
> (d) in any case, make any other order that is just.

Resolution

The case stated regime

[18] The law is always guided by context. It is therefore useful to contextualise the concept of cases stated. I think it valuable to first traverse the genesis of cases stated. In this respect, Gordon's article provides an invaluable starting point.[10] In

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9 High Court Rules, r 21.13.

10 DM Gordon "Cases Stated Under Common Law" (1973) 89(4) *Law Quarterly Review* 545.

introducing the topic, Gordon provides the following resume of the procedure's history:[11]

> Judges have been given to asserting that a stated case, i.e one stated by a magistrate or magistrates, is a purely statutory remedy. That statement seems to be seriously misleading. It is true that the type of stated case now invariably used is of statutory origin. But the assertion as usually made implies that stated cases were unknown to the common law, which is decidedly wrong. …
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> In the past, not only did justices state cases for several centuries at common law, but for a short time after statutory stated cases were created by the Summary Jurisdiction Act 1857, both statutory and common law cases were in use at the same time. The common law stated case was in no sense an appeal; it operated through the machinery of certiorari proceedings to quash. A case stated under the Act of 1857 began to take on the properties of an appeal, since the Act dispensed with the need for a certiorari to bring the case before the superior court.

[19] As to these common law species of cases stated, Gordon divides them into two categories. Helpfully, the latter bears resemblance to the procedure currently before the Court:[12]

> It should be mentioned that two types of cases were stated by justices at common law. Justices stated one type of case during the course of a hearing before them; they set out the facts that raised a legal problem, and that statement was sent before the Assize judges for solution. The judges' opinion was returned to the justices, who then completed their hearing and adjudicated in the light of that opinion.
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> The other type of stated case was stated after the justices had made their conviction or order. If a legal problem had arisen on which they had felt difficulty, they could state the facts and the problem in the form of an appendix to their conviction or order, and it was then brought up as part of the record by a certiorari. Then the Queen's Bench quashed or affirmed the adjudication brought up, according as they agreed or disagreed with the justices' legal rulings.

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[11] At 545 (citations omitted). See too Chantal Stebbings "The Appeal by way of Case Stated from the Determinations of General Commissioners of Income Tax: an Historical Perspective" (1996) 6 *British Tax Review* 611, where the author states (at 612 (citations omitted)):

> An appeal in the modern sense of the term could only be allowed by statute, but procedures did exist to allow questions of law to be reviewed by the superior courts. The writs of error and of *certiorari* were applicable in specialised and limited situations, and were not regarded as general methods of appeal. There also existed an established procedure whereby the decision of a trial judge could be reviewed *in banc,* namely the full court sitting at Westminster, and the predecessor to the Divisional Court. …

[12] At 546 (citations omitted).

[20] As to the purpose of such a mechanism, it is quite straight forward. It stems from a desire to ensure that the legal interpretation of inferior Courts and tribunals is correct. As Beck remarks:[13]

> Sometimes a point of law arises in proceedings not before the High Court where it would be wasteful to go through the whole process of appeal of review. Part 21 HCR makes provision for the court to be consulted on a point of law where this is authorised by a statute. The empowering statute governs the nature and purpose of cases that may be stated for the court's opinion; the rules determine the procedure to be adopted.

[21] Informed by this history, I think today it is safe to say that the case stated procedure is simply a species of appeal that is narrow in compass. However, it has been said that:[14]

> In theory, a case stated appeal is not an appeal in the ordinary sense of the word but a form of consultation by a tribunal with the Court in order to obtain an answer on a point of law.

[22] Ordinarily the ability to state a case will be confined to questions of law. That is not a panoptic statement, of course; as with many facets of our law, there are exceptions. But, the general position is accurately captured in *Conroy v Patterson*, where Henry J stated:[15]

> On an appeal by way of case stated on a point of law only the Court is concerned with the relevant facts as found and the grounds for determining the particular question of law, which question itself must be properly stated. The Supreme Court is not further or otherwise concerned with the evidence or the other findings which were made. In my respectful opinion, the position is correctly stated by Paull J. in *McGee v George* (1964) 108 S.J. 119, where the learned Judge says that the object of appeal by way of case stated is that the Court should look only at the case as stated and the facts as found.

Narrowing the context – the Social Security Act

[23] In determining this issue, it is necessary to consider the rationale behind introducing the case stated procedure, rather than full rights of appeal, in relation to

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13 Andrew Beck *Principles of Civil Procedure* (3rd ed, Thomson Reuters, Wellington, 2012).

14 *Commissioner of Inland Revenue v G* (1995) 19 TRNZ 724 (HC) at 726, citing *Harris, Simon & Co Ltd v Manchester City Council* [1975] 1 WLR 100 (DC).

15 *Conroy v Patterson* [1965] NZLR 790 (SC) at 791. See too the comments of Tipping J in *Police v O'Neill* [1991] 3 NZLR 594 (HC) at 597–598; *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA). As to the importance of the facts, refer *Watson v Miles* [1953] NZLR 958 (CA); *Cattell v New Zealand Native Land Settlement Co Ltd* (1895) 13 NZLR 551 (CA).

decisions of the SSAA.[16] In the United Kingdom, concerning the case stated procedure in the tax context, the decision *Allen v Sharp* provides helpful insight.[17] There, Parke B said:[18]

> On a careful consideration of these acts of Parliament, they seem to me to differ from the statute of Elizabeth, as to poor-rate (42 Eliz. c. 2), and that the legislature intended that the assessment of the assessors appointed by the commissioners should be final and conclusive, unless appealed from, in the first place, to the commissioners, and further, if necessary, to the judges of the superior courts. *It would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors*. Actions would be innumerable, juries would have to decide on facts without end, judges on law, and cases would be carried to the highest tribunal, when the exigencies of the state required a speedy determination. *Without referring to the statutes, I should say, à priori, that the object of the legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out*.

[24] Platt B stated as follows:[19]

> I cannot doubt but that the legislature intended the assessment to be binding, unless appealed against. Indeed, it is of the first importance that the revenue should be quickly raised. *Then, for the protection of the subject, the legislature has given a right of appeal, first to the commissioners, and afterwards, by a special case before the judges; thus providing a cheap and expeditious remedy*.

[25] Similar comments could be made in relation to the regime relating to benefits in New Zealand. The intention is that there are machinery provisions in place which permit expeditious decisions to be made relating to benefits. For the protection of vulnerable members of society seeking benefits, however, there are equally expeditious avenues of challenge. At each stop along those avenues rest persons, or

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16 I note that the case stated procedure is still to be found in a variety of statutes to this day. See for example, Taxation Review Authorities Act 1994, s 24; Sale and Supply of Alcohol Act 2012, ss 209 and 210; Fisheries Act 1996, ss 106B and 182; Contraception, Sterilisation, and Abortion Act 1977, s 26; Resource Management Act 1991, s 287; Customs and Excise Act 1996, s 274; Electoral Act 1993, sch 1, cl 14; Accident Compensation Act 2001, s 163; Copyright Act 1994, s 223; Commerce Act 1986, s 100A; Family Courts Act 1980, s 13. In light of the wide ranging circumstances in which a case may be stated, I would at least query the comment of the authors of *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR21.1.01] that "there are relatively few instances left where the case stated procedure is used".

17 *Allen v Sharp* (1848) 2 Ex 352, 145 ER 529 (Exch).

18 At 363, 533 (emphasis added).

19 At 367, 535 (emphasis added).

bodies of persons, who are particularly adept, and therefore best positioned, to make factual and legal assessments about those benefits.[20]

[26] It is beyond question that a case stated from the SSAA is limited to questions of law.[21] That is an important method by which the scope of any challenge is limited. This was an intentional decision on the legislature's part. Indeed, in enacting the Social Security Amendment Act, Parliament envisaged that the substantive right of appeal would be to the SSAA itself. In introducing the Social Security Amendment Bill to the House, the Hon Norman King stated:[22]

> The purpose of the Bill is to introduce new and important provisions for social security beneficiaries. Firstly, the Bill introduces an independent appeal system for beneficiaries …

[27] The Member goes on to describe the status quo as it then existed:[23]

> Members will know that under the existing law there is no independent statutory authority to which aggrieved people can appear if they are dissatisfied with a decision of the Social Security Commission. There is a right of appeal to the commission itself from a decision given at a subordinate level, and of course an appeal to the Minister has always been open. A criticism of this system is that the commission and the subordinate are part of the same organisation. The Ombudsman has provided a means of reviewing the social security cases, but of course he has no power to make a decision. The Bill sets up an independent appeal authority of three members … I would like to stress that the establishment of an independent appeal authority is in no way a reflection on the impartiality or competence of the Social Security Commission and departmental officials. … However, I believe that the setting up of this independent authority is desirable in the interests of fairness and natural justice, and I am sure than it will be popularly received.

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20 As to the general concept that specialist tribunals are best poised to make assessments in their field of expertise, refer *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 at [11]; *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30].

21 See *Blencraft Mfg Co Ltd v Fletcher Development Co Ltd* [1974] 1 NZLR 295 (SC) at 303. As to what amounts to a question of law generally, refer *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50]–[58]; *Bryson v Three Foot Six Ltd* [2005] NZSC 36, [2005] 3 NZLR 35 at [24]–[28]; *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) at 29, 36; *Georgiou (t/a Marios Chippery) v Customs and Excise Commissioners* [1996] STC 463 (CA); *Napp Pharmaceutical Holdings Ltd and others v Director General of Fair Trading* [2002] CAT 5, [2002] Comp AR 259, [2002] All ER (D) 537 (May) at [26]–[35].

22 (5 September 1973) 385 NZPD 3294.

23 (5 September 1973) 385 NZPD 3295. I note that little of any moment is contributed by the further debates: (1 November 1973) 387 NZPD 4777–4779; (6 November 1973) 387 NZPD 4841–4844; (7 November 1973) 387 NZPD 4946–4947; (13 November 1973) 388 NZPD 5052.

[28] The legislative intent, that the SSAA be the primary appellate body, simply reinforces the position that this Court plays only a limited role on appeal.

Who controls the content of the stated case?

[29] I think that once this issue is contextualised, it becomes apparent that stating a case is a judicial act. While s 12Q(1) provides the parties a right of appeal by way of case stated, it is limited to questions of law. It is also telling that this right of appeal is qualified by the subsequent provisions, which variously require the draft case to be referred to the secretary of the SSAA, and the chairman of the SSAA. The chairman has, on the plain words of the Act, final control of the case. As s 12Q(6) provides:

> The Chairman shall, as soon as practicable, and after hearing the parties if he considers it necessary to do so, settle the case, sign it, send it to the Registrar of the High Court at Wellington, and make a copy available to each party.

[30] It is obvious why this control mechanism exists. A person aggrieved with a decision of the SSAA could raise legion complaints, ignorant of the need to, or the means of, confining the grievances to discrete questions of law. Thus, the chairman is vested with the power to hear the parties if he or she considers it necessary to do so, and then settle a case. Once this is done, the case is deemed to have been stated.[24]

[31] This approach is entirely consistent with Mallon J's judgment in *Crequer v Chief Executive of the Ministry of Social Development*, where Her Honour declined to refer a similar matter back to the SSAA.[25] The background is described by Mallon J thus:

> [2] The process which has been followed began with Ms Crequer filing a case stated for her appeal. The Authority sought comments from the Ministry of Social Development on the case stated submitted by Ms Crequer and then sought comments from Ms Crequer on the Ministry's comments. It then "settled" the case stated, by substituting the 22 questions of law posed by Ms Crequer with the three questions of law suggested by the Ministry. Ms Crequer objects to the case as settled by the Authority because she submits that the Authority could only make amendments to correct any

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[24] Social Security Act 1964, s 12Q(7).

[25] *Crequer v Chief Executive of the Ministry of Social Development* [2012] NZHC 2575, [2012] NZAR 951.

> errors of fact. The Ministry submits that the Authority is not confined to correcting factual errors in settling the case stated

[32] Her Honour there agreed with the position of the Ministry of Social Development, which can be concisely summarised. First, it is for the SSAA to settle a case.[26] This is "fundamentally a judicial act", with the "ultimate responsibility" resting on the decision maker, who must "ensure that the case stated … complies in all respects with legal requirements".[27] Second, the High Court Rules cannot overbear the express provisions of s 12Q of the Social Security Act. Those provisions contemplate that it is the SSAA which has the power to amend the case, and that the High Court Rules should not interfere with either that ability, or the ability of the SSAA to determine the case to be stated.[28]

[33] Her Honour agreed with these submissions and commented:

> [16] I accept the Ministry's submissions that r 21.9(6) cannot override the process set out in s 12Q of the Social Security Act. The High Court Rules apply subject to the provisions of s 12Q. I agree with the Ministry that s 12Q contemplates a draft case, followed by comment from the other party, followed by the settling of the case by the chairperson. I also agree that case law establishes that under s 12Q it is for the Authority to determine the case to be stated. I consider that r 21.9(6) cannot have been intended to override this established position. I therefore consider that the case stated was appropriately accepted by this Court.

[34] In determining the point, Mallon J was referred to passages from *Re Fehling* and *Boulton v SSC*.[29] The relevant passage from *Re Fehling* was as follows:[30]

> The appellant's rationale and belief are understandable, particularly when the Authority's case stated is labelled as filed by the appellant himself. It is also wrong. The case stated procedure is a specialised one. *While parties draft a suggested case, ultimate formulation of the question involved is for the tribunal concerned*. Within the Social Security Act 1964, s 12Q(6), and more generally r 724F [now r 21.11], exemplify. It has not been at all uncommon in various contexts for tribunals to differ, and quite sharply, from parties involved as to the appropriate scope of the question of law involved.

[35] And from *Boulton v SSC*, the following passage was cited:[31]

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26 At [11].

27 At [11], citing *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 (HC) at 95; *Cowper v Takapuna City Corporation* [1976] 1 NZLR 224 (SC) at 225.

28 At [15].

29 *Re Fehling* [1997] NZFLR 857 (HC); *Boulton v SSC* [1995] NZFLR 625 (HC).

30 *Re Fehling* [1997] NZFLR 857 (HC) at 861–862 (emphasis added).

> A "case stated" is a document recording one or more questions referred to the High Court by the original tribunal. It is not a case which can be referred to any or all of the parties to the litigation. That is the position in substance and of course in this case it is reinforced by the express statutory wording of s 12Q(6). So there is no room for consideration of any "case stated" document emanating from any other quarter such as the appellant.

[36] A similar interpretive issue arose in *Zhang v Police and Manukau District Court*.[32] That case concerned s 107 of the Summary Proceedings Act 1957. While that arose in the criminal context, the material parts of the section are virtually identical to the present. In particular, the relevant judicial officer is obliged by s 107(4), after hearing the parties if considered necessary, to "settle the case, sign it, and transmit it to the Registrar".

[37] In the judicial review proceedings, one of the objections raised by Mr Zhang was that he had a right to be consulted on the contents of the case to be stated. Further, that it was a breach of natural justice that he was no so consulted. Gilbert J eschewed this argument in short shrift:[33]

> … Mr Zhang had no right to be heard on the form and content of the case stated. The case stated sets out the question or questions of law to be considered on appeal by this Court. The Judge has the responsibility of settling these questions of law. The respondent to the appeal has no right to participate in that exercise. The Judge may convene a hearing of the parties before settling the case and signing it but is not obliged to do so. This is clear from s 107(4) …

[38] There is some authority, however, that this Court can refer back to the tribunal from which the case is stated, the questions of law for resolution in the High Court. Implicit in this is the idea that a party can challenge the contents of a stated case. This was the issue before Barker J in *Commissioner of Inland Revenue v G*.[34] The headnote of the case describes the proceeding in this way:

> The appellant filed a case stated in this Court by way of appeal against a decision of the Taxation Review Authority ("the TRA"). There was a two year delay between the notice of appeal and the filing of the case stated die to difficulty of counsel in reaching agreement on the wording of the questions to be raised on appeal. The TRA refused to hear the parties to allow altering of the wording of the appeal as sought by the appellant. The

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31 *Boulton v SSC* [1995] NZFLR 625 (HC) at 627.
32 *Zhang v Police and Manukau District Court* [2013] NZHC 1949, [2014] NZAR 335.
33 *Zhang v Police and Manukau District Court* [2013] NZHC 1949, [2014] NZAR 335 at [18].
34 *Commissioner of Inland Revenue v G* (1995) 19 TRNZ 724 (HC).

> appeal came before judicial conference where it was suggested that the appellant file a formal application that the case be returned to the TRA for amendment, resulting in the case stated. The issue was whether this Court had jurisdiction to return the case stated to the TRA for amendment prior to the hearing of the appeal by this Court …

[39] His Honour there concluded that it was within the jurisdiction of the High Court to send the matter back for determination.[35] That decision is distinguishable in the present context. First, cases stated under the Inland Revenue Department Act 1974 encompass issues of fact and law. Second, the case referred to the Court under that Act is defined by the parties. The judicial officer does not settle the case, he or she may only refer it back to the parties for amendment.

[40] As far as it goes, the position is well established. It can be summarised as follows:

(a) it is for a party to the proceeding before the SSAA to commence an appeal. This is done by filing with the secretary of the SSAA a notice of appeal within 14 days of the SSAA's decision being released. A copy of the notice must be forwarded to other parties to the proceeding;

(b) within 14 days of the notice of appeal being lodged, or within a time otherwise fixed by the chairman of the SSAA, the appealing party must state a case in writing to the secretary of the SSAA, which sets out:

(i) the facts and grounds of the determination; and

(ii) the question of law founding the appeal;

a copy of the case must be forwarded to the other parties to the proceeding;

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35 At 728–729.

(c) once the case is lodged, the secretary of the SSAA must forward it to the chairman of the SSAA as soon as practicably possible following its receipt;

(d) upon receipt of the case, the chairman must, as soon as practicably possible, "settle the case, sign it" and send a copy to the relevant High Court registry and to each party. This is deemed to be the stating of the case. For my part, I consider the role of the chairman to include:

(i) excising surplussage material (i.e. duplication and prolixity) from the case as submitted by the appealing party – particularly irrelevant factual material;

(ii) confining the case to errors of law alone;

(iii) narrowing the ambit of the case to the issues genuinely in contention between the parties (not every legal issue will be submitted to the High Court. Some will have obvious answers, or a long and settled history etc);

(iv) garnering input from the other party, or parties, as is considered appropriate (in the chairman's discretion);

[41] What, then, of this case? To my mind, the case presented to this Court by the SSAA perfectly captures the issues in dispute. It appropriately narrows the compass of the proceeding before this Court in accordance with the rational underlying the case stated procedure. A reading of the relevant material indicates that very nearly the entirety of the dispute, at least insofar as it is able to be entertained by this Court, is captured within the two questions posed. In sum, there is no basis whatsoever to impeach the contents of the case stated, or the procedure followed by the SSAA.

[42] That said, there is one matter that must await resolution for another day. Namely, whether the final power conferred upon the chairman by s 12Q(6) is such that he or she is able to raise questions for remission to this Court not originally

raised, or contemplated, by the parties.[36] In other words, whether it is competent for the chairman to broaden the scope of the appeal. This may be an issue because it is the parties, not the SSAA, which is conferred a right of appeal by s 12Q(1). It is trite that rights of appeal are statutory in origin. Thus, in the absence of a statutory right of appeal, I would at least query whether the SSAA itself has such jurisdiction. In this respect, Fisher J's comments in *Auckland City Council v Wotherspoon* are apposite:[37]

> *If the parties cannot agree as to the facts to be recited in the case stated, it is for the Judge at first instance to settle those facts and record them in the case stated*, not to simply abdicate that role by annexing the notes of evidence and leaving it to the High Court to try to resolve the matter: *Cowper v Takapuna City Council* [1976] 1 NZLR 224, 225. As Denning J said in *Bracegirdle v Oxley* at p 358:
>
> > "The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal which sees the witnesses to assess their credibility and to decide the primary facts which depend on them".
>
> The same point is made by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 36 when he says:
>
> > ". . . it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination".

[43] For my part, I would tend towards the conclusion that the SSAA is able to narrow the scope of any appeal, or points raised, to ensure the questions of law are distilled to their fundamental essence, but not broaden them. This seems to be consistent with the right of appeal being conferred on the parties, and the scheme of the Social Security Act and cases stated generally. The role of the chairman is a controller of floodgates; ensuring that the parties raise only questions of law, and, then, only relevant questions of law.

[44] Thus, while the Crown may well be correct when it says "[t]he questions of law stated by the Authority in this case address the key issues raised under the Social Security Act 1964" and that they "do not require amendment" in the opinion of the

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[36] Or, indeed, to settle a case which does not include a question legitimately raised by the appellant.

[37] *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 (HC) at 86 (emphasis added). His Honour referred to a number of authorities as supporting this position: *van der Kaap v Police* HC Hamilton AP09/96, 30 April 1997 at 31; *Police v Edwards* [2006] DCR 271 (HC); *Police v M* [2013] NZHC 1101 at [18].

Crown, that may miss the point in some proceedings. As I have pondered, if neither party to the proceedings challenges, or wishes to challenge, a point raised by the SSAA, then there may not be a valid proceeding before this Court in terms of s 12Q(1). But, that does not arise in this proceeding. The questions distilled by the SSAA were well within the scope of the broad objections raised by Mr Crequer.

Outcome

[45] The application is dismissed. The challenge to the contents of the case is without foundation.

.....
Gendall J

Solicitors:
Crown Law, Wellington
Copy to appellant

ANNEXURE "A"

D. The questions of law for the opinion of the Court is whether the Authority is erroneous in point of law and in particular:

1. Is it consistent with the legislation for the Authority to find that the BRC was correct to make the findings it did, or that it was permissible under the legislation for the Chief Executive to decide as it did, in regard to the following:
   (a) Take into account holiday pay that relates to a period outside the 26 week (or 52 week) period the Chief Exec is entitled to consider?
   (b) Use the 52 week period without election by the applicant?
   (c) Apply a notional extension of employment term in an Employment Contracts Act situation?
   (d) Incorrect use by the Chief Exec of the information supplied by the applicant and the employer (amounts paid)?
   (e) Include public holiday pay or statutory days pay as holiday pay when Holidays Act ordains that employer required to pay public holidays within 4 days of cessation?
   (f) Incorrect calculation of average weekly wage?
   (g) Last day of work?
   (h) Stand down finish date?
   (i) Benefit start/grant date?
   (j) Demand separate application specifically for DPB or SB?
   (k) Advise that one of the above applications will preclude consideration of the other?
   (l) SB is dependent on employment status in the same way as DPB?
   (m) "Conflicting" info on medical certificate?
   (n) Deliberate privacy breach of third party (son) when correct information supplied by applicant?
   (o) Provision or availability of free legal advice?
   (p) BRC treatment of legal advice it received?
   (q) Relevancy of date of event of medical cert in relation to DPB?
   (r) DPB or SB stand down start date / grant of benefit start date, the same for different events and different applications?
   (s) Claimed DPB work exemption had been granted for medical reasons – when no exemption was actually granted?
   (t) Same legislation for SB and DPB?

(u) Grant of DPB which applicant is not entitled to, instead of SB so applicant can receive it "sooner"?
(v) Or because it would be more advantageous to the applicant?
(w) Or so the applicant would not be required to provide another medical cert – when the med cert provided inferred that a further med cert would be provided?
(x) Or because the applicant would be required to transfer to another benefit when no more medical cert available?
(y) Or because one has a more favourable abatement rate?
(z) Or because one caters better for possible part time income?
(aa) Assessment and Grant of DPB on 18 Apr (start date 9 May) while Chief Exec holding 10 Apr application for SB and 12 April supporting medical cert for SB?
(bb) Date(s) of DPB grant – Actual grant 9 May, Internal review 17 June, BRC review 11 June, Chief Exec at Authority hearing 4 June, and Authority 3 June – all of them wrong?
(cc) Bogus write-off of money not owed by applicant?
(dd) Effect on actual debt owed by applicant (some of which is now written off)?
(ee) Application of 80BA(3) employment 'ceased' provision to SB when SB is not employment / income dependent?
(ff) It was open to the Chief Exec to pay either DPB or SB?

2. Is it consistent with the legislation for the Authority to find as it did in regard to the following:
   (a) An inference that the applicant is required to pay from their own means first, in regard to a benefit that is 'income tested' and not 'means tested'?
   (b) Eligibility would not have been prior to 9 May date of start of payment, so the Chief Exec and BRC was correct?
   (c) Date of stand down end and benefit start end is OK because applicant was not financially disadvantaged in this instance?
   (d) That the Authority is 'concerned' about the 'alarming' differences in calculation of amounts?
   (e) That timing 'needs to be clearly understood' by the Chief Exec?
   (f) That the appeal is dismissed, when the benefit type was wrong?
   (g) That the appeal is dismissed, when the amount was wrong, and the start date was wrong, etc. etc., as acknowledged by the Authority?

3. Is it consistent with the legislation for the Authority to (incorrectly) conclude that because the applicant was not financially dis-advantaged, that the legislated requirement for a remedy is annulled?
4. What remedy is appropriate?
5. What is the appropriate application of that remedy to this case?

A decision of the Social Security Appeal Authority is annexed hereto.

DATED at WELLINGTON this day of 2014

Chairperson

Social Security Appeal Authority