

ROBERT FOITZIK

**THE REVIEW AND APPEAL PROCESS  
UNDER THE NEW ZEALAND SOCIAL SECURITY  
ACT 1964 IN COMPARISON WITH THE GERMAN  
SOCIAL LAW SYSTEM**

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## I INTRODUCTION

The law of social welfare has been developed from the notion that welfare is a “gratuity” furnished by the state, and thus may be made subject to whatever conditions the state seems fit to impose.<sup>1</sup> Accordingly, recipients have been subjected to a variety of forms of procedure and control not imposed on other citizens, almost as to prove that “the poor are all too easily regulated”.<sup>2</sup> The New Zealand Social Security Act 1964 (SSA) deviates from the general welfare idea by providing the claimants and recipients with a complex review and appeals system, arguably to protect the claimants against wrongful decisions of the Department, thereby ensuring procedural fairness and the correct distribution of the benefit payments. However, the very idea of the SSA is not mentioned in the Act, instead it was – and still is – up to the courts to establish its purpose. The court in *Chief Executive Department of Work and Income v Vicary*, put one, possible, interpretation as follows:<sup>3</sup>

[The purpose of the Act is] to aid those who truly are in need of financial assistance in a way that is administratively efficient and not wasteful of public funds. Those considerations have to be balanced.

Considering that the people affected by Departmental decisions have little or no education at all and are afraid of any bureaucracy, it is questionable if such interpretations put forward by the courts do provide for sufficient protection of the applicants. As most applicants in a conflict about benefits won't even reach the stage of a judicial review, either due to lack of financial means or due to unawareness of their rights in general, it is obvious, that the strongest influence arises from the daily application of the Act, and, in this respect, from the efficiency of the provided administrative review process. After explaining the general principles of administrative and judicial justice in New Zealand and Germany, this paper compares the review and appeals process of the SSA with the German social and administrative law system

<sup>1</sup> Charles A. Reich *Individual Rights and social welfare: The emerging legal issues*, 255, 255, in Peter Robson *Welfare Law* (Dartmouth, Hants, 1992).

<sup>2</sup> Above Reich, 255.

<sup>3</sup> *Chief Executive Department of Work and Income v Vicary* [2001] NZAR 628, 634 (HC) per Gendall J.

and has a closer look on two influential New Zealand court decisions. These decisions are first analysed and the differences between the SSA and the German Social Law are highlighted and explained. In a second step, the paper shows how a German court would approach the New Zealand cases and explains why and to which degree the outcome would be different. The final outlook summarises the findings and gives proposals on how the SSA, and its application by the Department and the courts in general could be changed.

## **II GENERAL PRINCIPLES**

Today administrative law is admittedly as much an academic discipline and a practical reality in the common law world as in the continental. There are differences in the two systems due to the origin and growth of administrative law and its instrumentalities and manifestations in many details. But the central theme that runs through administrative law is the same everywhere<sup>4</sup> and that is the legal control of governmental powers:<sup>5</sup>

The primary purpose of administrative law [...] is to keep the powers of the government within their legal bounds, so as to protect the citizen against their abuse.

In other words, administrative law aims at fairness in governmental dealings and a good administration should correspond with the community's sense of justice.<sup>6</sup> The underlying principles in the common and civil law, however, are quite different and, as it is shown later, may lead to different results although considering the same cases.

### **A Administrative Justice In Common Law**

It is widely acknowledged that when things go wrong in Government, certain

<sup>4</sup> Mahendra P. Singh *German Administrative Law in Common Law Perspective* (Springer-Verlag, Heidelberg, 1985) 1.

<sup>5</sup> Quite often this power is also accompanied with duty: "It is also the concern of administrative law to see that the public authorities can be compelled to perform their duties if they make default." William Wade *Administrative Law* (6<sup>th</sup> ed, Clarendon Press, Oxford, 1988) 5.

<sup>6</sup> Above Wade, *Administrative Law*, 7.

instruments must be at hand to provide for an independent examination to discover what happened and to ensure that those responsible may be called to account.<sup>7</sup> Although there are stark differences between the way in which civil servants and ministers make decisions, public law tends to apply and is influenced by principles derived from the courts to administrative decisions,<sup>8</sup> which is especially mirrored in the procedure provided by the relevant legislation to deal with arising disputes.<sup>9</sup> Every administrative procedure has to comply with the notion of natural justice, which is quite often equated with fairness.<sup>10</sup> In administrative law, natural justice refers to two fundamental rules of fair procedure: that a man may not be Judge in his own cause, and that a man's defence must always be fairly heard.<sup>11</sup> These rules are so universal that they cannot be confined to judicial power only, instead apply equally to administrative power,<sup>12</sup> to the extent that "a decision which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority."<sup>13</sup> But when does a decision offend these principles? It is clear, that it is not possible to establish standardized rules applicable for every thinkable case. The concept of fairness therefore needs an element of flexibility<sup>14</sup> to be practicable:<sup>15</sup>

[...] what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

<sup>7</sup> E.C.S. Wade and A.W. Bradley *Constitutional and Administrative Law* (11 ed, Longman, London, 1993) 641.

<sup>8</sup> Through the doctrines of natural justice and procedural fairness: see Carol Harlow and Richard Rawlings *Law and Administration* (Butterworths, London, 1997) 495.

<sup>9</sup> Above Wade/Bradley, 642.

<sup>10</sup> Grahame Aldous and John Alder *Applications for Judicial Review Law and Practice* (Butterworths, London, 1985) 8: "In truth the so called rules are little more than a duty to act fairly."

<sup>11</sup> Above Aldous/Alder, 9; Diane Longley and Rhoda James *Administrative Justice: Central Issues in UK and European Administrative Law* (Cavendish, London, 1999) 215.

<sup>12</sup> Above Wade/Bradley, 466; this is explicitly expressed by the court in *Ankers v The Attorney General* [1995] NZAR 241 (HC) per Thorpe J 241, 268: "In my view, the case for the contention of breach of the rules of natural justice can be put more simply. Administrative fairness in the case of an applicant for a benefit such as a special benefit must, in my view, include an opportunity to place before the decision maker information relevant to his decision."

<sup>13</sup> Above Wade/Bradley, 467. In *Attorney – General v Ryan* [1980] AC 718, 727 (PC) the court expressed that for [a person having legal authority] "it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority; and, if he fails to do so, his purported decision is a nullity."

<sup>14</sup> Above Harlow/Rawlings, 503.



To ensure administrative fairness the SSA provides three steps of review (Administrative Review – transfer to a District Review Committee (DRC) – transfer to Social Security Appeal Authority (SSAA)), before the appeal to the High Court and Court of Appeal is applicable.<sup>16</sup> The reliance to control administrative decisions by way of review through two tribunals (the DRC and SSAA) follows the trend of social legislation in the 20<sup>th</sup> century, which, as the administration of welfare schemes involves large numbers of small claims, demanded tribunals for the reasons of speedier, cheaper and more accessible justice.<sup>17</sup> Although the SSA provides the procedural frame,<sup>18</sup> it is later shown that the ideas of fairness have not been adopted throughout the administration.

### ***B Administrative Justice In Germany***

In contrast to the common law system, where the primary concern of administrative law has been only fairness in administrative dealings, due to a closer relationship between the administration and the courts, a better combination of fairness with good and efficient administration has been established.<sup>19</sup> However, the most distinctive feature of the German administrative law for a common law lawyer is the existence of a separate system of courts to settle administrative disputes.<sup>20</sup> As a “Rechtsstaat” Germany is a state based on the rule of law,<sup>21</sup> which demands that all state activities are based on laws warranted under the constitution. In case of unlawful exercise of power by the state, the individual has legal remedy in

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<sup>15</sup> Lloyd and others v McMahon [1987] AC 625, 702 (HL(E)).

<sup>16</sup> See further under III B.

<sup>17</sup> Above Wade, 897.

<sup>18</sup> This paper does not get into a deeper analysis, as to which extend this structure is indeed useful and appropriate. As the English Social Security Administration Act 1992 follows a quite similar structure (compare above Wade/Bradley, 648.649.), it seems that that New Zealand followed the concept of a tribunal based social security legislation already in existing in England. However, the question arises why the legislature did not follow an easier review process (for example as it was later established with the ACC legislation). There, the review process allows for an appeal to the courts as soon as the claimant received the review decision (for a detailed description of the Review and Appeal Process see New Zealand Council of Trade Unions *ACC Review and Appeals* (Wellington, March 1997) 13.

<sup>19</sup> Above Singh, 1.

<sup>20</sup> Above Singh, 3.

<sup>21</sup> As expressed in Article 1 and 19(2) of the German Basic Law (Appendix II).

an independent court.<sup>22</sup> Furthermore, as the German Basic Law declares the Federal Republic of Germany a Social State,<sup>23</sup> it is the official duty of the part of the administration assigned to look after the welfare of the socially weak to help them in achieving the legally granted rights and benefits.<sup>24</sup> Therefore, the administration has to take the Social State Clause in every decision and every exercise of discretion into account.<sup>25</sup>

### *C Judicial Review In New Zealand*

The rule of law together with the doctrine of ultra vires (both uncoded law)<sup>26</sup> form the basis for judicial review of administrative powers in common law. If no further regulations are codified in the constitution (as it is the case in New Zealand), the challenge of an administrative action can only be based on the grounds that the administrative action is based on no law or is ultra vires.<sup>27</sup> This is reflected in the definition of judicial review as:<sup>28</sup>

[...] the product of the common law reflecting not the direct will of Parliament on who should do what, but the separate assessment by the courts of what is needed for the good of society to (variously expressed) "control", "supervise", "keep within Parliaments instructions" the activities of government related authorities. In doing this, the courts are impliedly claiming to implement a "will" of the public.

The purpose of judicial review is two-fold and comprises the definition of principles of Government administration and the safeguarding of individual interests against illegal or unreasonable administrative action.<sup>29</sup> It is important to keep in mind that judicial review is not the same as an appeal: it

<sup>22</sup> Above Singh, 5 and 6: The right to approach the courts in case of infringement of any right by any public authority is one of the basic rights enumerated in the Basic Law.

<sup>23</sup> Art. 1 of the German Basic Law (Appendix II). Above Singh, 7, 8: Although the concept of the social state is not defined either in the Basic Law or any other law, there is a general understanding about its main characteristics: creation of tolerable conditions of life, social security, social freedom and the provision for compensation for injuries to individuals caused through state action.

<sup>24</sup> This was emphasized by the Federal Court of Justice in an early decision: [1957] NJW 1873, 1874 (BGH).

<sup>25</sup> Above Singh, 8.

<sup>26</sup> Above Singh, 65.

<sup>27</sup> Above Singh, 65.

<sup>28</sup> G D S Taylor *Judicial Review A New Zealand Perspective* (Butterworths, Wellington, 1991) 3. In *Chief Constable of the North Wales Police v Evans* ([1982] 1 WLR 1155, 1173), the court gave the definition that "judicial review is concerned, not with the decision, but with the decision making process."

<sup>29</sup> Above Scholtens, 2.

is concerned with the process by which the decision is made, not the merits of the ultimate decision.<sup>30</sup> In New Zealand, the courts have historically had jurisdiction to review the decisions of public bodies under an ancient form of common law remedy known as 'prerogative writs'. Over time the procedural rules became very complex and in 1972 Parliament enacted the Judicature Amendment Act 1972 to simplify the procedures for reviewing the powers, which derived from statutes. The exercise of non – statutory public powers, however, still remains reviewable at common law.<sup>31</sup> But the power of the courts can be restricted by legislation. This takes usually place through the creation of administrative tribunals, which can decide the matters falling within their jurisdiction both on questions of law and fact (as outlined above, the SSA follows this construction by establishing two tribunals, the District Review Committee and the Social Security Authority). In consequence, the power of the courts is then restricted only to jurisdictional questions,<sup>32</sup> meaning that the scope of the judicial control is limited to the excess of jurisdiction or the ultra vires exercise of the powers.<sup>33</sup> The courts therefore examine and rule on errors relating to jurisdiction, i.e. they examine if the decision in question was in the authority of the Department to decide.<sup>34</sup> Although this principle seem to be quite precise, in practice distinctions between errors going to jurisdiction and those not so going can be impossible to draw.<sup>35</sup>

#### ***D Judicial Review In Germany***

There are a couple of differences between the judicial review of administrative power in common law countries and in Germany. First, administrative law matters are assigned specifically to the jurisdiction of the

<sup>30</sup> Above Scholtens, 2; C T Emery and B Smythe *Judicial Review: Legal Limits of Official Power* (Sweet & Maxwell, London, 1986) 201.

<sup>31</sup> Mary Scholtens *Judicial Review – An introduction to administrative law* (New Zealand Law Society Workshop, April 1999) 1.

<sup>32</sup> Above Singh, 64.

<sup>33</sup> Above Emery/Smythe, 39, 40.

<sup>34</sup> S A De Smith *Judicial Review of Administrative Action* (4 ed, Stevens & Sons Limited, London, 1980) 110.

<sup>35</sup> Above Emery/Smythe, 40. Sometimes even further distinctions are drawn between 'a lack of jurisdiction' and 'excess or abuse of jurisdiction' (above Aldous/Alder, 29.) and between the ultra vires of discretionary powers and of questions of law and fact (above de Smiths, 96.).

administrative courts, whereas in common law countries the ordinary courts also review the exercise of administrative power.<sup>36</sup> Second, a traditional common law power as to give remedy against any illegal action is unknown to the German system. The power of the German courts depends only on the legislation that regulates their jurisdiction.<sup>37</sup> Thirdly, where the common law courts can only uphold or invalidate an administrative action, but cannot correct or modify it,<sup>38</sup> the German courts have all choices at hand as they can go both into questions of law as well as facts and can decide on the merits:<sup>39</sup> they can invalidate, modify or change an administrative action, check errors committed within the jurisdiction and can also replace the administrative determination by their own.<sup>40</sup> However, the scope of review is still, like the common law courts, confined to the legality of the action and does not extend to the examining of its expediency ("Zweckmässigkeit"). This is determined by the doctrine of separation of powers: the courts shall not be allowed to question the reasoning of an Departmental decision as long as it stays within the legal limits.<sup>41</sup> As Germany by its constitution commits itself being a Social State,<sup>42</sup> this clause also binds the judiciary. The courts must interpret the laws in its light and, if necessary, order the administration to advise the citizen on the legal position and material facts.<sup>43</sup> This task is facilitated by the inquisitorial principle in the German courts: they are not dependent on the evidence presented to them, instead can demand and collect evidence considered necessary for the dispute in question.<sup>44</sup> Another difference has finally to be marked: whereas in common law no administrative decision can be challenged on the grounds that it is not

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<sup>36</sup> Above Singh, 64.

<sup>37</sup> Above Singh, 64, 66: In Germany, enforcement of the basic rights against the executive has been expressed in the Basic Law itself that the basic rights bind the executive in the same measure as the legislative and the judiciary and are directly enforceable law (Basic Law, Art. 1(3) (Appendix II)). In general, in Germany legislation is supported by the constitution and not any judicial evolved principle is the immediate basis of judicial review of administrative powers.

<sup>38</sup> Above Singh, 64.

<sup>39</sup> Above Singh, 64.

<sup>40</sup> Above Singh, 65. See also Section 113 of the Law of Administrative Courts (Appendix II).

<sup>41</sup> Above Singh, 71. This principle is stressed in the objections proceedings (further under IV) where the authority is empowered to go also into questions of legality and expediency.

<sup>42</sup> Art. 20(1) Basic Law (Appendix II).

<sup>43</sup> Above Singh, 8.

<sup>44</sup> Above Singh, 71.

consistent with good morals standards, administrative acts in Germany, which are violating these standards are null and void.<sup>45</sup>

### **III THE REVIEW AND APPEAL PROCESS OF THE SOCIAL SECURITY ACT 1964**

#### ***A Historical Background***

In September 1938 the first Labour government enacted the Social Security Act, thereby laying the foundations of the modern welfare state in New Zealand.

The aim of this legislation was, according to Prime Minister Michael Joseph Savage:<sup>46</sup>

for the first time to provide, as generously as possible, for all person who have been deprived of the power to obtain a reasonable livelihood through age, illness, unemployment, widowhood or other misfortune. [...] to make an end to poverty, to safeguard orphans and invalids against want and neglect and to free dependent individuals from being an economic burden to relatives and friends.

Although these high ambitions were never fully realised, New Zealand's new social assistance programmes attracted wide international interest and much acclaim. Moreover, for at least four decades following the establishment of the Social Security Act there was solid, bipartisan support for the underlying principles of the welfare state. Of course, a reasonable level of economic growth, low unemployment, relative social stability and an observation that the various forms of social assistance provided were effective, fair and affordable, facilitated the nationwide support and acknowledgement.<sup>47</sup> It is noticeable that the purpose of the Act did not change over the years, as the SSA 1964 simply refers to its predecessor and states that the purpose of the Act is to consolidate and amend the Social

<sup>45</sup> Above Singh, 77. Section 44 of the Law of Administrative Procedure 1976 declares: (1) An administrative act is null and void to the extent it suffers from a specially grave defect and such defect is evident on the appreciation of all the surrounding circumstances.

<sup>46</sup> Jonathan Boston, Paul Dalziel and Susan St John *Redesigning the Welfare State in New Zealand: Problems, Policies, Prospects* (Auckland, 1999), 3.

<sup>47</sup> Above Boston/Dalziel/St John, 3.

Security Act 1938 and its amendments.<sup>48</sup> However, as the economic circumstances changed dramatically during the 1980s, the former support for the welfare state in general vanished. One of New Zealand's leading market liberals, Roger Kerr, even described the welfare state as "one of the seven deadly economic sins of the twentieth century".<sup>49</sup> The critic and the policy change of the welfare system in a number of other countries was not without any effect: in the 1990s New Zealand undertook the most radical policy change in 60 years, and the major initiatives have included significant cuts in benefits and other forms of income support,<sup>50</sup> a change which is too reflected in the various amendments and changes in the SSA during that time.

## **B Structure**

The process for review and appeals under the Social Security Act is listed in Section 10A to 12R Social Security Act<sup>51</sup> and distinguishes between the application to the District Review Committee (DRC),<sup>52</sup> the application to the Appeal Authority and the appeal to the High Court and Court of appeal.<sup>53</sup>

### *1 District Review Committee (DRC)*

#### (a) Jurisdiction

The DRC has jurisdiction over decisions<sup>54</sup> made by any persons in the exercise of any power, function or discretion conferred on the person by delegation under the SSA or under section 19D (1)(a) of the Social Welfare

<sup>48</sup> Social Security Act 1964, available at [www.brookers.co.nz](http://www.brookers.co.nz). (last accessed 20 October 2002).

<sup>49</sup> Above Boston/Dalziel/St John, 4.

<sup>50</sup> Above Boston/Dalziel/St John, 4.

<sup>51</sup> According to Section 81 SSA the Department has the authority to review decisions at any time (see Appendix I). This administrative review is, however, an internal procedure only and not part of the formal review process and is therefore not covered (for a detailed description see Wellington People Resource Center *Benefit Fact File* (Wellington, April 2001) 31.

<sup>52</sup> Legal Information Service (Inc) *Legal Resource Manual* (Auckland, November 2001) 66, refers to the DRC as the Benefit Review Committee (BRC). To avoid misunderstandings, this paper uses only the term District Review Committee (DRC).

<sup>53</sup> For an overview see the diagram above Benefit Fact File 32.

<sup>54</sup> Although not stated in Section 10A, the DRC has also jurisdiction about a "determination" by the chief executive: according to Section 12J the appeal authority has jurisdiction over any "decision or

(Transitional Provisions) Act 1990 conferred on the decision making person by delegation under the SSA (Section 10A (1)(a) and (b)). This general jurisdiction is further delegated to the responsible local DRC (Section 10A(2)).<sup>55</sup>

(b) Form and Notice

The application has to be in writing and has to be submitted within 3 months after receiving notification of the decision (Section 10A(1A) and (1B)(a)).<sup>56</sup>

(c) Violation of Rights (Appellant)

The SSA requires that either the applicant or the beneficiary (in case of a decision made under the Social Welfare Transitional Act: any other person) is affected by the decision (Section 10A(1)(a) and (b)).<sup>57</sup>

(d) Scope of review

The DRC has the power to confirm, vary or revoke the decision of the Chief Executive. Should the decision in question have been a purely discretionary one, the DRC can therefore decide on the matter upon its own discretion (Section 10A(8)).<sup>58</sup>

## 2 Appeal Authority

(a) Jurisdiction

The appeal authority has jurisdiction over any decision or determination of the Chief Executive that has been confirmed or varied by a DRC. A direct application is allowed – without applying to the DRC first – if the decision in

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determination” of the chief executive which is confirmed or varied by a DRC (Section 12J(1)), meaning that a determination can be too subject of a review for the DRC.

<sup>55</sup> For the text of the SSA Section 10A, 12J, 12K, 12M, 12Q and 12R see Appendix I.

<sup>56</sup> See Appendix I.

<sup>57</sup> See Appendix I.

question was made by the Chief Executive other than pursuant to a delegation (Section 12J(1) and (1A)).<sup>59</sup> Exceptions to the jurisdiction are listed in Section 12J(2) (appeals on medical grounds).<sup>60</sup>

(b) Form and Notice

The application has to be in writing and shall state the grounds of appeal and the relief sought (Section 12K (1) and (2))<sup>61</sup> and has to be submitted within three months with the secretary of the appeal authority (Section 12K 1A(a) and 1B (a)).<sup>62</sup>

(c) Violation of rights (appellant)

The SSA requires that either the applicant or the beneficiary is affected by the decision (Section 12J(1) and (1A)).<sup>63</sup>

(d) Scope of review

The appeal authority has the power to confirm, modify or reverse the decision or determination appealed against (Section 12M(7))<sup>64</sup> and may refer the matter back to the chief executive for further consideration (Section 12M(8)),<sup>65</sup> who is obliged to take all necessary steps to carry the decision into effect (Section 12P).<sup>66</sup>

### 3 High Court

(a) Jurisdiction

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<sup>58</sup> See Appendix I.

<sup>59</sup> See Appendix I.

<sup>60</sup> See Appendix I.

<sup>61</sup> See Appendix I.

<sup>62</sup> See Appendix I.

<sup>63</sup> See Appendix I.

<sup>64</sup> See Appendix I.

<sup>65</sup> See Appendix I.

<sup>66</sup> See Appendix I.



The High Court has jurisdiction only over determinations of the authority which are erroneous in a point of law (Section 12Q(1)).<sup>67</sup>

(b) Form and Notice

The (written) notice of appeal has to be lodged within 14 days with the secretary of the authority and in within another 14 days the appellant has to set out the facts and the grounds of determination, specifying the question of law on which the appeal is made. A failure to this requirement may lead to the Chairman of the authority to certify that the case has not been prosecuted (Section 12Q (3) and (4) and (8)).<sup>68</sup>

(c) Violation of rights (appellants)

A dissatisfaction with any determination of the authority is required (Section 12Q (1)).<sup>69</sup>

(d) Scope of review

The High Court rules on a question of law only (Section 12Q (1)).

#### **IV THE GERMAN REVIEW AND APPEAL PROCESS**

##### **A History Of The Social Law System**

It has long been recognized in Germany that the state had a special role and function in promoting social welfare. This idea originated from the earlier feudal view that, as long as the peasant fulfilled his obligations towards the appropriate authority, he had a right to expect adequate provision of his material need.<sup>70</sup> In reaction to the changes in the late 19<sup>th</sup> century Kaiser

<sup>67</sup> See Appendix I.

<sup>68</sup> See Appendix I.

<sup>69</sup> See Appendix I.

<sup>70</sup> Gerhard A Ritter *Social Welfare in Germany and Britain – Origins and Development* (Berg Publishers Ltd., Southampton, 1986), 17.

Wilhelm I. determined in his "kaiserliche Botschaft" (emperor's message) the claim of the population to material security. In a quite similar statement as to the first New Zealand Social Security Act, the preamble to the first draft of the accident insurance law of 8 March 1881 stated that 'the unpropertied classes, which were at once the most numerous and least educated among the population' be shown by means of 'directly tangible advantages' that 'the state does not exist merely out of necessity or is simply created for the better situated classes in society', but is a benevolent 'institution also serving their needs and interests.'<sup>71</sup> With this statement, the first step to a German Social Insurance had been done, establishing the first comprehensive legal compendium of the world for a social security of the workers and employees.<sup>72</sup> In 1975 a first collection of the Social Law was established in the Book of Social Law I and nowadays the German Social Law is codified in the 11 books of Statutes of Social Law<sup>73</sup> and comprises several areas of law, one of which is the Social Insurance Scheme.<sup>74</sup> The Social Law System distinguishes between applicants for unemployment benefits and social benefits.<sup>75</sup> The Federal Employment Ministry is responsible for the unemployment scheme, whereas the responsibility for Social Benefit Scheme lies with the Federal Social Ministry.<sup>76</sup> Although the

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<sup>71</sup> Above Ritter, 34.

<sup>72</sup> In 1883 the Health Care Insurance was introduced, followed 1884 by the Occupational Accident Insurance and 1889 by the Disability and Aging Insurance for workers. For more details about the history and the development of the Social Insurance and Social Law in Germany compare the extensive description on [www.erziehung.uni-giessen.de/studis/Robert/soz\\_vers.html](http://www.erziehung.uni-giessen.de/studis/Robert/soz_vers.html) and [www.erziehung.uni-giessen.de/studis/Robert/gesetze.html](http://www.erziehung.uni-giessen.de/studis/Robert/gesetze.html) (last accessed 22 October 2002).

<sup>73</sup> Besides these 11 books, the Employment-Promotion - Act ("Arbeitsfoerdungsgesetz") and the Federal Law on Social Benefits ("Bundessozialhilfegesetz") also comprise important regulations.

<sup>74</sup> Social Insurance is, according to a common German definition, "a provisional system, invented by the state and based on a compulsory insurance duty. Its task is to prevent certain risk to occur and, should these risks occur, to equalize in full or part the unexpected expenditures and losses on wages under special consideration of social objectives." It is commonly described as consisting of five pillars: Health Insurance, Pension Insurance, Promotion of Employment, Occupational Accident Insurance and Long-term Care Insurance. For a more detailed description [www.erziehung.uni-giessen.de/studis/Robert/soz\\_defi.html](http://www.erziehung.uni-giessen.de/studis/Robert/soz_defi.html) (last accessed at 22 October 2002).

<sup>75</sup> An applicant who becomes unemployed is first entitled for unemployment payment ("Arbeitslosengeld", currently between 60 - 67% of his last (net) wage). The period for which he is entitled for this payment depends on his age and how long he has been working in the last 7 years (see for further details the table on [www.arbeitsamt.de/hst/services/merkblatt/mbalo/mb3.html](http://www.arbeitsamt.de/hst/services/merkblatt/mbalo/mb3.html), last accessed on 20 October 2002). After the expiration of this period the applicant is entitled for unemployment aid ("Arbeitslosenhilfe", currently between 53-57% of his last net wage). Unemployment aid is, in principle, paid without any timely limitation.

<sup>76</sup> Due to the federal system in Germany, each of the 16 countries ("Bundesländer") has its own Social Ministry and is responsible for the organization and allocation of the Regional Social Departments

Social Law has become extremely complex and complicated over the years, the review and appeal process follows a quite simple and easy structure, which was basically established in the Law of Administrative Procedure 1976 and Law on Administrative Courts 1960.<sup>77</sup>

## **B Structure**

All decisions of administrative authorities affecting individual rights can be challenged in courts: this is guaranteed by the Federal Constitution, Article 19(4) of the German Basic Law.<sup>78</sup> The relevant review and appeal process is standardised regulated in two federal Acts, the Law on Administrative Courts 1960 and the Law of Administrative Procedure 1976.<sup>79</sup> Three levels of administrative courts have been instituted<sup>80</sup> and process before these courts is regulated by the Law on Administrative Courts 1960 (“Verwaltungsgerichtsordnung”).<sup>81</sup> At the bottom are the lower administrative courts (“Verwaltungsgerichte”), in the middle the higher administrative courts (“Oberverwaltungsgerichte”) and at the top is the Federal Administrative Court (“Bundesverwaltungsgericht”).

### *1 Administrative objections proceedings (“Widerspruchsverfahren”)*

This proceeding is required prior to any judicial review and has to be initiated at latest one month after the recipient receives the decision of the

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(“Sozialämter”). Accordingly, the same structure exists for the Employment Ministries and the Employment Departments; for the administrative organization in Germany see above Singh 12, 16.

<sup>77</sup> The review and appeals process is basically the same in all areas of administrative law and is based on the structure of the review and appeals process established in the Law of Administrative Procedure 1976 and Law on Administrative Courts 1960. For example, the Law on Social Courts 1975 (available at [www.gesetzesweb.de/index1.html](http://www.gesetzesweb.de/index1.html), last accessed 20 October 2002) provides in Section 77 – 122 for a review and appeal process, but these sections basically copy the process described in the Federal Law of Administrative Procedure 1976 and Law on Administrative Courts 1960 and do not deviate from it. Also the Section 1 – 66 in the X. Book of Social Statutes (“SGB X”) correspond to the regulations in the Federal Law of Administrative Procedure 1976. For a more detailed comparison see [www.jura.uos.de/prof/udsching/ud\\_01.pdf](http://www.jura.uos.de/prof/udsching/ud_01.pdf) (last accessed 20 October 2002).

<sup>78</sup> See Appendix II.

<sup>79</sup> Above Singh, appendix II and III, 164 – 183. The only difference being the jurisdiction, as appeals in social law are directed to the Social Courts and appeals in regards to unemployment schemes are directed to the normal Administrative Courts. For an overview about the administrative courts system in Germany: above Singh, 102 – 115.

<sup>80</sup> Section 2 of the Law on Administrative Courts 1960.

<sup>81</sup> Above Singh, Appendix III, 181 – 183.

Department. The administrative Act<sup>82</sup> in question is first examined through the issuing Department, which, should it not change, alter or modify it, transfers the matter then to the next Department higher in the hierarchy. This supervising Department reviews the original decision in respect of any legal aspect (including the exercise of discretion), and issues either a new decision or confirms the original decision.<sup>83</sup> It is one special feature of the “Widerspruchsverfahren” that the final decision can, in its consequences for the appellant, be more disadvantageous than the original decision.<sup>84</sup>

## 2 Judicial review

Both the Department and the appellant can appeal to the courts of the first instance, the administrative courts, which have original jurisdiction. They cover all questions of law and fact however difficult or important they may be.<sup>85</sup> The lower courts may go both into questions of law and facts about the validity of the administrative action and may also, in certain cases, substitute their own decision for that of the Department. Like with the common law courts, this is confined to the legality of the action and does not extend to examining its expediency (“Zweckmässigkeit”), although its scope is, in reality, quite wider,<sup>86</sup> as it is expressed in Section 114 of the Law on Administrative Courts 1960:

So far as the administrative authorities are authorized to act in their discretion the courts also examine whether the administrative Act or its refusal or omission is

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<sup>82</sup> The administrative act (“Verwaltungsakt”) is a core concept of the German administrative law. It covers most of the action of the administrative authorities through which they affect the legal interests of an individual. Section 35 of the Law of Administrative Procedure of 1976 defines the administrative act in the following words: “Administrative act is every order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences.” For the various characteristics on Section 35 above Singh, 32 – 36.

<sup>83</sup> Section 68 – 74 Law on Administrative Courts 1960.

<sup>84</sup> By contrast, this consequence and if the scope of review for the DRC is limited only to the issues raised by the claimant, is not stated in the SSA and quite contentious: above Legal Resource Manual, 69, 70, mentions a case currently under appeal in which a beneficiary had the decision of the Department to cancel two of his benefit payment reviewed. Although the application addressed only one decision of the Department, the DRC also ruled about another decision which was not part of the review application, on the grounds that “any appeal is a rehearing and therefore everything can be litigated again”. The authority in its interim decision did not state clearly if the DRC has had the jurisdiction to rule about the decision not questioned, but seems inclined to allow the Department – although the Department itself is not allowed to appeal – to raise the issue in the process.

<sup>85</sup> Above Singh, 112.

<sup>86</sup> Above Singh, 71.

illegal because the statutory limits of the discretion have been exceeded or because the discretion has not been exercised for the purpose of the authorization.

Further, Section 40 of the Law on Administrative Procedure 1976 lays down:

If an administrative authority is authorized to act in its discretion, it has to exercise its discretion in consonance with the purpose of the authorization and the legal limits of the discretion have to be observed.

From the lower courts there is an appeal to the higher administrative courts. These courts are primarily courts of appeal and hear appeals against the final judgements of the lower administrative courts.<sup>87</sup> Both the Department and the appellant can apply to the Federal Administrative Court, which is primarily a court of revision and rules over a question of law only.<sup>88</sup>

## V APPLICATION OF THE SSA

### A Meaning Of Decision v Determination

The review and appeals process is only applicable if a “decision” (Section 10A SSA) or a “decision or determination” (Section 12J (1)) is challenged. As no further explanation is given in the Act whether the nature of the decision or determination, one might conclude that every decision or determination is reviewable, irrespective of its nature as long as the applicant is affected. However, the courts have not been following this wide interpretation. Especially two court decisions, *Wharerimu*<sup>89</sup> and *Moody*,<sup>90</sup> have narrowed the scope of the review process and limited the position of the applicants quite considerably, with far reaching effects.

#### 1 *Wharerimu*

The High Court had to decide in *Wharerimu* whether or not the appeal

<sup>87</sup> For a detailed description of the jurisdiction of Administrative Courts: above Singh, 112, 113.

<sup>88</sup> Above Singh, 113.

<sup>89</sup> *Wharerimu v Chief Executive of Department of Work and Income* [2000] NZAR 467 (HC) per Baragwanath J.

<sup>90</sup> *Moody v Department of Work and Income* [2001] NZAR 608 (HC) per Young J.

authority was right denying its jurisdiction to review the decision to search the house of a beneficiary, Mrs. Wharerimu. The search was conducted to ascertain whether she remained entitled to receive her benefit and Mrs. Wharerimu claimed that officers of the Department of Social Welfare pushed their way in and forced her to allow them to search her home for evidence.<sup>91</sup> The search led to no results and, after an unsuccessful application to the DRC, Mrs. Wharerimu appealed to the Social Security Appeal Authority. The authority did not consider that the visit was conducted in an unreasonable way and also expressed no final view of evidence, but found it lacked jurisdiction and therefore dismissed the appeal. The High Court had to decide about two questions (formulated for appeal under Rules 4, 5, and 9 High Court Rules), whether Mrs. Wharerimu had a right to appeal under Section 12J(1) SSA against a decision made under Section 10A(1) when the:

- a) decision related to manner of undertaking interview and search under Section 12 and Section 81; and
- b) no decision was made as result of such interview and search to vary appellant's benefit.

The court held that the use of the double expression "decision or determination" in Section 12J(1) could be due to a number of reasons and concluded, "that "decision" may be apt to embrace operative conclusions of the Chief Executive's delegate as an administrator, and "determination" the more formal operative conclusion of the Authority."<sup>92</sup> Defining the purpose of the Act as "about the promotion of Social Security for New Zealanders in need of public assistance" and that "it means of promoting that purpose are, however, essentially financial."<sup>93</sup> the court reached the conclusion (in reference to Section 12K(4)(d))<sup>94</sup> that the undertaking of an interview and search did not fit in these categories (as it did not have any financial

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<sup>91</sup> According to Section 81SSA the Chief executive is empowered to review any benefit in order to ascertain whether the beneficiary remains entitled to receive it (see Appendix I).

<sup>92</sup> Above Wharerimu, 478, 479.

<sup>93</sup> Above Wharerimu, 477.

<sup>94</sup> See Appendix I.

consequences) and could therefore not be reviewable. The appeal was dismissed.

## 2 *Moody*

In *Moody v Department of Work and Income* the court had to decide whether the “decision” that an overpayment had been made is reviewable or not. It was an undisputed fact that Mrs. Moody received domestic purposes benefits (DPB) payments between 1995 and 1997 for which she was not entitled to, but it was also acknowledged that, had she not been receiving the DPB, she would have been entitled to other payments from the Department. The Department’s position, however, was that, as the schemes of the SSA do not allow benefits to be granted with retrospective effect, no offset can be allowed and her liability to the Department remains in the full amount of the overpayment (at \$32,324.39).<sup>95</sup> The court acknowledged a general right at common law to recover money paid under mistake of fact,<sup>96</sup> as well as the specific statutory provision in Section 86 SSA.<sup>97</sup> As for Section 86 SSA, the court held that the Director-General is basically empowered to take on three decisions under it:<sup>98</sup>

- a) To take proceedings to recover an over- payment.
- b) To put in place an offset arrangement in relation to future benefit payments.
- c) To write-off provisionally apparent liabilities.

The court expressed that (contrary to the opinion of the Social Security Authority) “Section 81 (3) of the Act does not permit the retrospective crediting of benefits”.<sup>99</sup> Also, the court acknowledged that, should the Department decide not to write off the overpayment, Mrs. Moody could

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<sup>95</sup> Above *Moody*, 611.

<sup>96</sup> Above *Moody*, 612.

<sup>97</sup> See Appendix I.

<sup>98</sup> Above *Moody*, 620.

<sup>99</sup> Above *Moody*, 625.

defend herself under Section 94B Judicature Act 1908<sup>100</sup> as she believed that she was entitled for the benefits she received (and spent the money which was paid to her).<sup>101</sup> Therefore, on any claim by the Department to recover the overpayments, Mrs. Moody could have at least set-off her entitlements to any other benefits which she would have otherwise received against her liability to the Department.<sup>102</sup> Further considering that it was most unlikely that Mrs. Moody would ever receive income other than by way of state benefits and that therefore any repayments would come out of future benefits, the court concluded that the indebtedness ought provisionally to be written-off pursuant to Section 86(9A) SSA.<sup>103</sup>

Although the court did not expressly make a reference to the distinction between “decision” and “determination”, it held, comparable to the statements in *Wharerimu*:<sup>104</sup>

When the Director-General decides to rely on powers of offset, a necessary step in such a decision is a conclusion as to the amount of the over-payment. In such a case the decision to “establish an over-payment” can fairly be regarded as being a statutory decision under s86. [...] In cases where no offset is involved, the “establishment of an overpayment” is simply a matter of Departmental practice with no legal effect and, indeed, no practical effect on the recipient of the alleged over-payment. In such a case, I am of the view that the “establishing of an over-payment” cannot be regarded, in itself, as a decision under s86 for the purposes of review and appeal rights.

### 3 *Discretion*

The scope of review for the courts to examine discretionary powers is in principle confined to the legality of the action and does not extend to examining its expediency. In common law, the reasoning behind this rule is the understanding that the legislature in its wisdom has assigned a job to the administrative authority and so long as it performs that job within the legal

<sup>100</sup> Above *Moody*, 612: “Relief [...] shall be denied wholly or in part if the person from whom the relief is sought received the payment in good faith [...]”.

<sup>101</sup> Above *Moody*, 612, and 627: “Had she not been receiving those payments, her spending patterns would have been different.”

<sup>102</sup> Above *Moody*, 613.

<sup>103</sup> Above *Moody*, 627.

<sup>104</sup> Above *Moody*, 621.



limits set by the legislature, the court cannot review its decision.<sup>105</sup> It is, however, recognized, that, especially in social security appeals, whenever a decision is taken that adversely affects an individual, he or she should be able to appeal against it, if only because such decision must be founded upon a sound legal base, not upon the arbitrary decision of an official.<sup>106</sup> All claimants for benefit are entitled to have their claims decided by a proper procedure and in accordance with the relevant legal rules. Moreover, even where benefits are discretionary, no public body can operate such a scheme responsibly without developing administrative rules to govern the exercise of official discretion.<sup>107</sup> These principles follow the general idea, that, if an authority goes beyond the limits imposed by the statute in question on which it operates, it acts ultra vires. The superior court may then, if necessary, quash or prohibit the ultra vires decision or act and order the authority to exercise its discretion according to law, or make declarations.<sup>108</sup> However, this approach, as consequent and logical as it seems, has only been recently developed. The very idea that special principles should apply to departmental actions has long not been accepted in the common law tradition.<sup>109</sup> Furthermore, matters of discretion were considered as not suitable for judicial review for two reasons: first, as the decisions by nature can be highly political or politically sensitive and second, that a particular issue can be unsuited to be resolved by the courts.<sup>110</sup> Additionally, in cases where the jurisdiction is transferred to special tribunals to decide on the relevant disputes, the courts are even more reluctant to rule about (or against) departmental decisions.<sup>111</sup> For example, the Court of Appeal held in *Regina v Preston Supplementary Benefits Appeal Tribunal*:<sup>112</sup>

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<sup>105</sup> Above Singh, 71.

<sup>106</sup> Above Wade/Bradley, 648.

<sup>107</sup> Above Wade/Bradley, 648.

<sup>108</sup> Above Emery/Smythe, 201. Still, some argue that there is a remaining discretion for the court not to intervene even when the authorities decision is ultra vires: above Aldous/Alder, 114.

<sup>109</sup> D J Galligan *Discretionary Powers – A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1986) 221.

<sup>110</sup> Above Galligan, 241.

<sup>111</sup> Above Peter Robson *Judicial Review and Social Security* in Trevor Buck *Judicial Review and Social Welfare* (Pinter, London, 1998) 90, 106. Compare too the statement of the court above Moody, 621:

“Considerations such as these, along with some of the problems thrown up by this and other cases, may point to the desirability of a general tidying up of the relevant statutory provisions.”

<sup>112</sup> *Regina v. Sheffield Supplementary Benefits Appeal Tribunal* [1975] 1 WLR 624, 631 (CA).

The courts should hesitate long before interfering [...] with the decisions of the appeal tribunals. [...] The courts should not enter into a meticulous discussion about of the meaning of this or that word in the Act. They should leave the tribunals to interpret the Act in a broad reasonable way, according to the spirit and not to the letter: especially as Parliament has given them a way of alleviating any hardship.

This reluctance not to interfere with administrative bodies, whose decisions have already been reviewed by the relevant legislative tribunal, is also palpable in *Moody*.<sup>113</sup> There, the court held that "in practice, Departmental officers exercise discretions in relation to the recovery of over-payments which lie outside the strict scope of Section 86." However, the court refused to examine the grounds leading to the Departmental decision and expressed that<sup>114</sup>

Further, I am uneasy about rights of appeal being conferred to beneficiaries which enable a beneficiary to test, on appeal, assessments made by the Department which relate not to the underlying merits of the beneficiary's position but rather to considerations which are really internal to the Department, that is whether recovery action in a particular case is, in fact, worthwhile.

There is, however, no legal reason to establish that every discretionary decision is non-justiciable and the following analysis shows that the court had had the opportunity in *Moody* to go deeper into the other underlying facts and conclusions drawn by the authority.

## **VI ANALYSE AND COMPARISON**

### **A Wharerimu**

In *Wharerimu*, the court made two very distinctive statements, which have and will have considerable impact on future appeals of beneficiaries:

First, the court agreed with the argumentation of the Department that the words "decision" and "determination" are "interchangeable",<sup>115</sup> and that it

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<sup>113</sup> Above *Moody*, 621.

<sup>114</sup> Above *Moody*, 621.

<sup>115</sup> Above *Wharerimu*, 477 (position of the Department) and 478:" [...] I am satisfied that Mr. Liddel' s construction strikes a fair balance between the protection of disadvantaged New Zealanders against abuse and the need for a system that will operate without unreasonable interference."

would be pedantic to “infer that there is an essential difference of kind or degree between the concepts”.<sup>116</sup> The second statement referred to the purpose of the Act itself, to which the court held that it was only a decision that had an economic effect on the person affected, which could be a reviewable decision under the Act.<sup>117</sup>

The statement that there is no practical difference between decision and determination is not convincing at all. Interpretations of statutes have to keep first of all to the wording<sup>118</sup> of the statute and “ignoring the existence of a word in statute on the basis that it was inserted by mistake is an interpretative tool of last resort”.<sup>119</sup> That the courts should be very reluctant to interpret statutes too narrowly was also clearly expressed in *Boulton v Director General of Social Welfare*:<sup>120</sup>

[...] in the absence of any assistance from the legislature within the Act, and in the absence of any authority to the contrary, this court should be reluctant to limit rights of appeal granted by the legislature under s12J unless there is the clearest language.

It is not clear, why the court ventured in a long discussion about the nature and definition of a determination<sup>121</sup> to finally conclude that the “analysis of the expression”(s) do “not provide an answer to this case”.<sup>122</sup> As the SSA uses both the expressions “decision” and “determination” it is for the Department and the courts to respect this differentiation. One possible -and quite obvious- interpretation could be that both expressions refer to departmental decisions, but “determination” also includes statements by the Department without any – immediate – legal or financial effect, for example the eligibility of a beneficiary to attend a work test.

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<sup>116</sup> Above Wharerimu, 478.

<sup>117</sup> Above Wharerimu, 477: “Its [the SSA] means of promoting that purpose are, however, essentially financial.”

<sup>118</sup> Compare for example Section 5 Interpretation Act 1999: (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose. (available at [www.brookers.co.nz](http://www.brookers.co.nz), last accessed 22 October 2002).

<sup>119</sup> Above Moody, 616.

<sup>120</sup> *Boulton v Director General of Social Welfare* [1990] NZFLR 32, 35 (HC) per Doogue J.

<sup>121</sup> Above Wharerimu, 478.

<sup>122</sup> Above Wharerimu, 479.

It becomes clear and obvious that also departmental “determinations” have to be accessible for a review, when considering the following statement in Moody that:<sup>123</sup>

[I]n cases where no offset is involved, the “establishment of an over-payment” is simply a matter of Departmental practice with no legal effect and, indeed, no practical effect on the recipient of the alleged over-payment.

Although not explicitly referring to Wharerimu, the court here states that the factual ‘determination’ of an overpayment has no practical, i.e., financial or economic effect to the applicant (as the court also does in Wharerimu by determining that only decisions with an economic effect on the side of the applicant can be reviewable).<sup>124</sup> Apparently, the courts do not acknowledge that the establishment of the over payment (the determination) is conditional to the departmental decision to either claim an overpayment or to write it off. The determination – overpayment yes/no – is therefore an integral part of the final decision and must be subject to a review as it already affects the recipient (financially).<sup>125</sup> Considering the statement of the court that:<sup>126</sup>

[the word ‘provisional’ has the meaning] that any decision to write-off a debt is provisional, i.e. it can be revisited by the Director- General at any time he or she chooses; for instance if the Director-General later comes to the view that the recipient did not, in fact, act in good faith.

it is obvious that the two statements of the court (decision equals determination and only economic decisions can be reviewable) can not be upheld. If indeed the Director – General can, at any time, decide to establish or to write off an overpayment, it is a requirement of a fair administrative procedure to allow the beneficiary as well at any time to have his obligation to repay the overpayment – if this is justified or not – determined by the court.

In comparison, a German court confronted with the Wharerimu - case would take a different approach (on the basis of the German statutes and

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<sup>123</sup> Above Moody, 621.

<sup>124</sup> Above Wharerimu, 477.

<sup>125</sup> For another example above Legal Resource Manual, 64.

<sup>126</sup> Above Moody, 616.

regulations): first, a discussion about the meaning of “decision v determination” would not take place. The Law on Administrative Courts 1960 sees in Section 43 for a special (declaratory) suit (“Feststellungsklage”) to demand the court to declare the existence or non- existence of a legal relationship.<sup>127</sup> Required is only a legal interest in the declaration on the side of the appellant. So, even without the specific reference of the relevant Act to a ‘decision’ or ‘determination’, a beneficiary can demand at any time that the court decide whether a determination or a decision of the relevant Department, irrespective of its economic impact to the beneficiary, is legally correct. A German administrative court would therefore decide and answer the question whether the search of Mrs. Wharerimus house was justified (due to the inquisitorial system, it would not even be necessary for Mrs. Wharerimu, to pose the question) and the appeal would have been allowed.<sup>128</sup> Second, the German court would also not go into questions about the nature of the underlying social legislation. The purpose of the Social Law Statutes is for almost every statute explained in the Act itself,<sup>129</sup> and therefore the courts normally not venture into a further interpretation. However, the German Court would surely confirm the submissions put forward by Mrs. Wharerimu, that the function of the Social Security Legislation is to protect the dignity of the beneficiaries, and that the statute is concerned with more than money,<sup>130</sup> as this are indeed aspects of the very idea behind the German Social System.

### **B Moody**

In Moody, the court decided that a retrospective permission of benefits is not allowed by the Act, but that, due to Mrs. Moody successful defence against a claim by the Department to recover the paid benefits, the payments should

<sup>127</sup> Section 43 of the Law on Administrative Courts 1960 reads: “Declaration of the existence or non-existence of a legal relationship, or the nullity of an administrative act, may be demanded through a suit, if the plaintiff has a legal interest in a prompt declaration (declaration suit).”

<sup>128</sup> A different question is, however, how a German administrative court would decide on the question whether the search of Mrs. Wharerimus was justified or not. This is discussed later under C.

<sup>129</sup> Compare, for example, the extensive description of the purpose of the Act in the first Book of Statutes of Social Law (“SGB I”), Section 1, available at [www.bma.de/download/gesetze\\_web/Sgb01/sgb01x01.htm](http://www.bma.de/download/gesetze_web/Sgb01/sgb01x01.htm) (last accessed 26 September 2002).

<sup>130</sup> Above Wharerimu, 475.

be written off. Again, in comparison, a German court would take on a different approach, mainly because this problem has already been considered in the relevant legislation: the question whether an applicant is liable for on overpayment of benefits is regulated in Section 50 of the 10<sup>th</sup> Book of Statutes of Social Law.<sup>131</sup> According to Section 50, the beneficiary must repay the benefits he received without entitlement. However, the Department cannot demand a repayment if the beneficiary had reason to rely on his or her entitlement to receive the benefits. In this respect, the Act defines a general assumption that the recovery of overpayments (or payments to which the beneficiary was not entitled to) is excluded should the beneficiary spend all the money received.<sup>132</sup> Both assumptions are fulfilled in *Moody*: Mrs. *Moody* had in fact spent all the benefits she received, and she was generally entitled to receive benefits. That she was not entitled for the benefits she actually received, does not rule out her acting in good faith, as there was no indication for her to question the payments<sup>133</sup> (the payments she received were in fact almost in the same amount as the payments she would have been legally entitled to receive). In consequence, the court would rule that the Department couldn't recover the overpayment.<sup>134</sup>

### *C Discretion*

In *Wharerimu*, the court, due to the limited scope of review assigned in this special case,<sup>135</sup> did not rule about whether the decision of the Department to search Mrs. *Wharerimus* house was unlawful or not. However, a German court would in the scope of a 'declaration suit',<sup>136</sup> decide on this

<sup>131</sup> Section 50 SGB X available at <http://www.sozialgesetzbuch.de/gesetze/sgbx/index.html> (last accessed 22 October 2002).

<sup>132</sup> Section 45 II(2) SGB X available at <http://www.sozialgesetzbuch.de/gesetze/sgbx/index.html> (last accessed 22 October 2002).

<sup>133</sup> Above *Moody*, 612, 613.

<sup>134</sup> In case of deliberately, wrongful declarations whether the entitlement of benefit payments, the Department can of course claim the overpaid amount back. However, the Department is only allowed to cut off 20% of the benefit for a period of 2 years to recover the overpayment. An overpayment due to a mistake of the Department can not be recollected; for this case the act sees for a general offset – prohibition (Section 25a I Federal Social Law – for more details see [www.soziales-koeln.de/sozialhilfe/r1.html](http://www.soziales-koeln.de/sozialhilfe/r1.html)) (last accessed 22 October 2002).

<sup>135</sup> Above *Wharerimu*, 469: the court had to decide on two questions imposed according to RR 4,5, and 9 of the High Court Rules (above VA 1).

<sup>136</sup> Above footnote 127.

discretionary issue and its approach and outcome would, again, be different from a New Zealand or other common law court. This is partly because, although the scope of judicial review in Germany is also confined to the legality of the administrative action, its operation becomes much wider than in common law.<sup>137</sup> Discretion of the administrative authorities is not discretion free from all legal limits, instead it is judicious discretion to be exercised for the purpose it is granted.<sup>138</sup> Further, where the common law system only has one category of ultra vires exercise of discretion, the German system distinguishes between excess and abuse of discretion.<sup>139</sup> By applying these standards, the German court would review the departmental decision to search Mrs. Wharerimu's house according to the Principle of Reasonableness ("Verhaeltnismässigkeit").<sup>140</sup> This comprises of the three limbs Suitability (of various means the authority must use the most suitable), Necessity (the means which causes the minimum injury must be employed) and Proportionality (the intrusion into the rights of an individual must not be out of proportion to the aspired ends).<sup>141</sup> Although the given facts don't allow for a definite evaluation as how a German court would finally decide, it can be said, that the search of Mrs. Wharerimus house does not seem to be proportional. The search and intrusion of a private house has to be the last measure and should only be reserved to serious, criminal offences. To assess whether someone is still entitled for benefit payments can hardly justify such a severe measure.<sup>142</sup> It is therefore quite likely that a German court would consider the aspired end – the establishment if Mrs. Wharerimu is still

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<sup>137</sup> Above Singh, 71.

<sup>138</sup> Above Singh, 83.

<sup>139</sup> Above Singh, 85.

<sup>140</sup> Assuming, that the relevant facts gave enough reason for the Department to actually consider a search and that the relevant act provides for such a measure to be taken by the Department. (Remark: it is not clear, however, according to which section of the SSA the Department considered itself entitled to search Mrs. Wharerimus house. It is quite questionable if the Department does have the power at all to conduct searches of homes of beneficiaries, but this topic can't be covered in this paper (and this was no issue in the review and appeal process either). For example, in Germany, even when the relevant legislation empowers the relevant administrative body to conduct a search into a private house, it has to be approved by a judge beforehand regardless which administrative body conducts it. This applies too for the police and there are only very limited exceptions (and, again, these exceptional circumstances can be reviewed through a court by means of a 'declaration suit').

<sup>141</sup> Literally "Verhaeltnismässigkeit" can be translated as proportionality, but the true and most exact correspondence is found in the common law principle of reasonableness. For a detailed description above Singh, 88-92.

entitled for benefits – compared to the intrusion into her rights as way out of proportion and rule this decision ‘ultra vires’.

By way of this comparison, it becomes apparent that decisions like the one to search the house of a beneficiary – which have indeed no economic effect, but can be very humiliating to the affected beneficiary - have to be reviewable: although no decision was made by the Department after the search (there was therefore no economic impact on Mrs. Wharerimu’s side), it has to be considered -and that’s not a far fetched proposition- that the Department might decide later on that again a search is necessary to ascertain her entitlement for benefit payments. The courts ruling that the first search was not proportional (ultra vires) would then prohibit the Department to carry out its decision and protect Mrs. Wharerimu (which is now not the case).

The discretionary aspect worth analysing in *Moody* has a different focus: it has already been explained, that, in common law, if a public body is under a duty to perform a certain act, it is possible for the High Court to order the act to be done. However, the High Court cannot require that a power be exercised in any particular way. Instead it can only require that the discretion lying behind the decision to exercise a power be used lawfully.<sup>143</sup> Although the court did not refer to this principle, it explains its statement that internal decisions of the Department can or should not be reviewed.<sup>144</sup> However, the decision in *Moody* is not compulsory: even assuming that discretionary decisions are, to a certain degree not justiciable, there are other aspects suitable for review. The courts can, for example, examine whether there is enough foundation of evidence, for finding of facts or whether the decision strategies are supported by rational considerations.<sup>145</sup> (In fact, although restricted to jurisdictional questions, the courts often go into questions of the

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<sup>142</sup> It is also not clear from the given facts if the Department has considered other alternatives as to establish Mrs. Wharerimu’s entitlement (for example the request to disclose relevant facts, plus supportive statutory declarations etc.).

<sup>143</sup> Above *Aldous/Alder*, 5.

<sup>144</sup> Above footnote 114.

<sup>145</sup> Above *Galligan*, 246.



merits.)<sup>146</sup> These standards equal very much the German categories of excess, failure or abuse of discretion<sup>147</sup> (and come close into the region of the Principle of Reasonableness). The statement in *Moody*, that as the decisions of the Department were internal, they are not reviewable, is therefore not correct (and certainly not *fair*). It was in the power of the court to actually review the departmental decision leading to the off-set by applying the standards set out above. Of course, this examination would go deeper into the internal fact-finding process of the Department and would involve a more thorough investigation as by (simply) applying the ultra vires doctrine only. Not to forget: the standards applied don't allow for a review of the expediency of the Departmental decisions, instead the examination would still be restricted to legal questions (as required by law). Also, it would not interfere with the fact, that the court in common law can not set up his own investigations: should the Department not be able to prove that it has acted fairly and can't explain under which rationale considerations it has reached the decision to search Mrs. Wharerimu's house, the court ruling had to be in favour for the beneficiary.

## VII CONCLUSION

The Social Security Act 1964 appears to be very flawed and insufficient after the comparison with the German Social Law System, but to blame all the critic above to a flawed legislation, is too simple. However, starting point for any critic (and reform) must be the missing preamble of the Act. Lack of a sufficient and extensive parliamentary explanation as to the purpose of the Act leads, consequently, to two different phenomena: on the one hand, it creates confusion on the side of the Department as to which extent it can exercise its power. Statements of the court as the one in *Hall* that "the Director-General should be proactive in seeing to welfare and not defensive or bureaucratic"<sup>148</sup> show an apparent misunderstanding on part of the Department about its position towards beneficiaries. Without guidelines

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<sup>146</sup> Above Singh, 64.

<sup>147</sup> Above Singh, 86,87.

<sup>148</sup> *Hall v D-GSW* [1997] NZFLR 902, 921 (HC) per McGechan J.

from parliament and shaped through experience of the decline of the general welfare state idea in New Zealand, it is not surprising that the Department adopted a restrictive, and somehow defensive, policy as to the distribution (and recollection) of benefit payments. On the other hand, also the courts can't refer to an established interpretation and are forced to decide on a case-to-case basis and seem to be inclined to follow close the narrow application of the Department, arguably because of its expertise in this field as assigned to it by the relevant legislation.<sup>149</sup>

A second flaw it's the structure of the review and appeal system. Its not only – unnecessary – complicated: the establishing of two tribunals as review authorities (the DRC and the SSAA) before an appeal to the courts is applicable, with different requirement as to its jurisdiction is prone to misleading interpretations (the very extent is shown above in Wharerimu). Also, considering that both the DRC and the SSAA are in fact quite closely linked to the Department, one is allowed to question their impartiality.<sup>150</sup> And it's a matter of common sense, that principles of openness, fairness and impartiality are more likely to be maintained whenever Parliament does not leave it to an authority to make its decisions in the manner it thinks best.<sup>151</sup>

As for the position of the courts: administrative law and the review of administrative decisions are all about control of the requirements of the relevant legislation *and* the internal procedures leading to these decisions. Public bodies are not on the same level as normal citizens; they are exercising the power of the state and with this power comes the obligation not only to act fairly, but also to disclose the underlying principles leading to the relevant decisions. It is shown above that discretionary decisions can be, also according to common law standards, reviewed and the answer to

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<sup>149</sup> Compare in this respect the statement in Wharerimu, 477: "Standing back and considering the practical operation of the legislation, I am satisfied that M. Liddell's construction strikes a fair balance between the protection of disadvantaged New Zealanders against abuse and the need for a systems that will operate without unreasonable interference."

<sup>150</sup> The whole process of determining the members of both the DRC and the SSAA is all but transparent: the community representative in the DRC, for example, is appointed by the Minister of Social Services. Which standards do apply for this appointment? What kind of qualifications are required? The three people on the panel of the SSAA are appointed by the Governor General, but recommended by the Minister of Social Welfare. Again: what kinds of criteria apply?

Wharerimu in this respect comes from the court in *Chief Constable of the North Wales Police v Evans*:<sup>152</sup>

judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

It is not about bias towards bureaucracy, it is about protection of the weakest and poorest members of society. New Zealand has started as a role model in Social Security, but the ideas have somehow been abandoned and got lost in a complex legislation and case law system. To come back to these very ideas, in the frame of the legal possibilities, that is the task of the judiciary. At the end of the day, this could make up for a well intentioned, but flawed Act.

<sup>151</sup> Above Wade/Bradley, 643.

<sup>152</sup> *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, 1173 (HL).

## APPENDIX I

### Social Security Act 1964

#### Section 10A Review of decisions

- (1) This section applies to—
- (a) an applicant or beneficiary affected by a decision made by any person in the exercise of any power, function, or discretion conferred on the person by delegation under this Act, against which the applicant or beneficiary has a right of appeal under section 12J; or
  - (b) an applicant, beneficiary, or other person in respect of whom a person makes any decision in the exercise of a power under section 19D(1)(a) of the Social Welfare (Transitional Provisions) Act 1990 conferred on the decision-making person by delegation under that Act, against which the applicant or beneficiary or other person has a right of appeal under section 12J.
- (1A) A person to whom this section applies may apply in writing for a review of the decision to the appropriate district review committee established under this section.
- (1B) The application must be made—
- (a) within 3 months after receiving notification of the decision; or
  - (b) if the committee considers there is good reason for the delay, within such further period as the committee may allow on application made either before or after the expiration of that period of 3 months.
- (2) The Minister shall establish at least 1 benefits review committee for every office of the Department where decisions or recommendations in relation to the matter or matters to which the Act applies are being made or was taken or made
- (3) Every benefits review committee shall consist of—
- (a) A person resident in or closely connected with the office of the Department where decisions or recommendations in relation to the matter or matters to which the Act applies are being made or was taken or made appointed by the Minister to represent the interests of the community on the committee;
  - (b) Repealed.
  - (c) Two officers of the Department appointed by the chief executive—
    - (i) From time to time; or
    - (ii) In respect of the particular review.

- (4) The member of the benefits review committee appointed under subsection (3)(a) of this section—
- (a) Shall hold office during the Minister's pleasure:
  - (b) May be paid out of the Department's Bank Account, from money appropriated by Parliament for the purpose, remuneration by way of fees, salary, or Fees and Traveling Allowances Act 1951 allowances, and traveling allowances and expenses, in accordance with the; and that Act shall apply accordingly:
  - (c) Shall not be deemed to be employed in the service of the Crown for the purposes of the State Sector Act 1988 or the Government Superannuation Fund Act 1956 by reason only of his or her membership of the benefits review committee
- (5) All secretarial and administrative services required for the purposes of the review committee shall be supplied by the Department.
- (6) At any meeting of the review committee the quorum shall be the total membership, and the decision of any 2 members of the review committee shall be the decision of the committee.
- (7) No officer of the Department shall act as a member of the review committee if that officer was involved in the decision being reviewed.
- (8) As soon as practicable after receiving an application for review the review committee shall review the decision and may, in accordance with this Act, confirm, vary, or revoke the decision.
- (9) On reaching a decision on any review, the review committee shall give written notification of its decision to the applicant for review and shall include in the notification—
- (a) The reasons for the review committee's decision; and
  - (b) Advice that the applicant has a right of appeal against the decision to the Social Security Appeal Authority.

#### **Section 12 J Right of Appeal**

- (1) Any applicant or beneficiary affected may appeal to the Appeal Authority against any decision or determination of the chief executive under—
- (a) Any of the provisions of Part I or Part 2; or
  - (b) Section 124(1)(d); or
  - (c) Part I of the Social Welfare (Transitional Provisions) Act 1990; or
  - (ca) Part 1 of the New Zealand Superannuation Act 2001; or

- (d) The Family Benefits (Home Ownership) Act 1964; or
  - (e) Any regulations in force under section 132A or section 132B that has been confirmed or varied by a benefits review committee under section 10A, or that was made by the chief executive other than pursuant to a delegation
- (1A) An applicant or beneficiary or other person may appeal to the Appeal Authority against a decision—
- (a) that was made in relation to that person by the chief executive under the power conferred by section 19D(1)(a) of the Social Welfare (Transitional Provisions) Act 1990; and
  - (b) that has been confirmed or varied by a benefits review committee under section 10A or that was made by the chief executive other than pursuant to a delegation.
- (2) The Appeal Authority shall not have the authority to hear and determine any appeal on medical grounds or on grounds relating to incapacity, or capacity for work against any decision or determination of the chief executive in respect of—
- (a) An invalid's benefit; or
  - (b) A child disability allowance under section 39A of this Act; or
  - (c) Repealed.
  - (d) A veteran's pension under section 8 of the Social Welfare (Transitional Provisions) Act 1990; or
  - (e) A sickness benefit.
- (3) Repealed.
- (4) Despite subsection (1), the Appeal Authority does not have the authority to hear and determine any appeal against any decision or determination made by the chief executive under section 110 (defining job seeker development activities.)

#### **Section 12 K Procedure on Appeal**

- (1) An appeal under section 12J is begun by a written notice of appeal.
- (1A) If the appeal is against a decision or determination of the chief executive confirmed or varied by a benefits review committee, the notice of appeal must be lodged with the Secretary of the Appeal Authority within—
- (a) Three months after the applicant is notified of the confirmation or variation under section 10A(9); or

(b) An additional time allowed by the Appeal Authority, on an application made to it before or after the end of that period of 3 months.

(1B) If the appeal is against a decision or determination of the chief executive made other than pursuant to a delegation, the notice of appeal must be lodged with the Secretary of the Appeal Authority within—

(a) Three months after the applicant is notified of the decision or determination; or

(b) An additional time allowed by the Appeal Authority, on an application made to it before or after the end of that period of 3 months.

(1C) The parties to an appeal are—

(a) The applicant or beneficiary affected by the decision or determination; and

(b) The chief executive.

(2) The notice of appeal shall state with particularity the grounds of appeal and the relief sought.

(3) Either before or immediately after the lodging of the notice of appeal, a copy of it shall be left with or sent to the chief executive.

(4) As soon as possible after the receipt of the copy of the notice of appeal by the chief executive, he or she shall send to the Secretary of the Appeal Authority—

(a) Any application, documents, written submissions, statements, reports, and other papers lodged with, received by, or prepared for, the chief executive and relating to the decision or determination appealed against;

(b) A copy of any notes made by or by direction of the chief executive of the evidence given at the hearing (if any) before the chief executive;

(c) Any exhibits in the custody of the chief executive.

(d) A copy of the decision or determination appealed against; and

(e) A report setting out the considerations to which regard was had in making the decision or determination.

(5) The Authority may direct that a further report be lodged by the chief executive, in addition to the report sent to the Authority under paragraph (e) of subsection (4) of this section.

(6) A copy of every report lodged pursuant to paragraph (e) of subsection (4), or subsection (5), of this section shall be given or sent forthwith to every party to the appeal, and any such party shall be entitled to be heard and to tender evidence on any matter referred to in the report.

(7) As soon as conveniently may be after the receipt of any appeal, the Appeal Authority shall, unless it considers that the appeal can be properly determined without a hearing, fix a time and place for the hearing of the appeal, and shall give not less than 10 clear days' notice thereof to the appellant and to the chief executive.

(8) At the hearing of any appeal the chief executive may be represented by counsel or by an officer of the Department and any other party may appear and act personally or by counsel or any duly authorised representative.

(9) Proceedings before the Authority shall not be held bad for want of form

(10) Except as provided by this Act or by any regulations for the time being in force under this Act, the procedure of the Authority shall be such as the Authority may determine.

(11) Where notice of any decision or determination in respect of which an appeal lies to the Authority has been given by post addressed to the appellant at his last known or usual address, then, for the purposes of subsections (1A) and (1B), the appellant shall be deemed to have been notified of the decision or determination at the time when the letter would have been delivered in the ordinary course of post

#### **Section 12M Hearing and determination of appeal**

(1) Subject to subsection (7) of section 12K of this Act, every appeal against a decision of the chief executive shall be by way of rehearing; but where any question of fact is involved in any appeal, the evidence taken before or received by the chief executive bearing on the subject shall, subject to any special order, be brought before the Authority as follows:

(a) As to any evidence given orally, by the production of a copy of the notes of the chief executive or of such other material as the Authority thinks expedient:

(b) As to any evidence taken by affidavit and as to any exhibits, by the production of the affidavits and such of the exhibits as may have been forwarded to the Authority by the chief executive, and by the production by the parties to the appeal of such exhibits as are in their custody.

(2) Notwithstanding anything in subsection (1) of this section, on any appeal against a decision or determination of the chief executive, the Authority may rehear the whole or any part of the evidence, and shall rehear the evidence of any witness if the Authority has reason to believe that any note of the evidence of that witness made by the chief executive is or may be incomplete in any material particular.

(3) The Authority shall have full discretionary power to hear and receive evidence or further evidence on questions of fact, either by oral evidence or by affidavit.

(4) The Authority shall also have regard to any report lodged by the chief executive under section 12K of this Act and to any matters referred to therein and to any evidence tendered thereon, whether or not such matters would be otherwise admissible in evidence.



(5) In the exercise of its powers under this section the Authority may receive as evidence any statement, document, information, or matter which in the opinion of the Authority may assist it to deal with the matters before it, whether or not the same would be admissible in a Court of Law.

(6) The Authority shall, within the scope of its jurisdiction, be deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908, and subject to the provisions of this Act, all the provisions of the Act, except sections 2, 10, 11, and 12, shall apply accordingly.

(7) Subject to subsection (2) of section 12I of this Act, in the determination of any appeal the Authority may confirm, modify, or reverse the decision or determination appealed against.

(8) Notwithstanding the provisions of subsection (7) of this section, the Authority may refer to the chief executive for further consideration, the whole or any part of the matter to which an appeal relates, and where any matter is so referred the Authority shall advise the chief executive of its reasons for so doing and shall give such directions as it thinks just as to the rehearing or reconsideration or otherwise of the whole or any part of the matter that is so referred.

#### **Section 12P Notice of decision**

On the determination of any appeal, the Secretary shall send to the chief executive and to the appellant a memorandum of the Authority's decision and the reasons for the decision, and the chief executive shall forthwith take all necessary steps to carry into effect the decision of the Authority.

#### **Section 12 Q Appeals to High Court in 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.

(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.

- (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.
- (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.
- (7) The settling and signing of the case by the Chairman shall be deemed to be the statement of the case by the Authority.
- (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.

#### **Section 12 R Appeals to Court of Appeal**

The provisions of section 144 of the Summary Proceedings Act 1957 shall apply in respect of any determination of the High Court under section 12Q of this Act as if the determination were made under section 107 of the Summary Proceedings Act 1957.

#### **Section 81 Review of benefits**

The chief executive may from time to time review any benefit in order to ascertain—

- (a) Whether the beneficiary remains entitled to receive it; or
- (b) Whether the beneficiary may not be, or may not have been, entitled to receive that benefit or the rate of benefit that is or was payable to the beneficiary—

and for that purpose may require the beneficiary or his or her spouse to provide any information or to answer any relevant question orally or in writing, and in the manner specified by the [chief executive]. If the beneficiary or his or her spouse fails to comply with such a requirement within such reasonable period as the chief executive specifies, the chief executive may suspend, terminate, or vary the rate of benefit from such date as the chief executive determines.

- (2) If, after reviewing a benefit under subsection (1) of this section, the chief executive is satisfied that the beneficiary is no longer or was not entitled to receive the benefit or is or was entitled to receive the benefit at a different rate, the chief executive may suspend, terminate, or vary the rate of the benefit from such date as the chief executive reasonably determines.

[(3) If, after reviewing a benefit under subsection (1) of this section, the chief executive considers the beneficiary is more appropriately entitled to receive some other benefit, the chief executive may, in his or her discretion, cancel the benefit the beneficiary was receiving and grant that other benefit commencing from the date of cancellation.

- (1) The dignity of man shall be inviolable. To respect and protect it shall be duty of all state authority.
- (2) The German people therefore acknowledge, inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

#### Article 19 (Restriction of basic rights)

- (1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, such law must name the basic right, indicating the Article concerned.
- (2) In no case may the essential content of a basic right be encroached upon.
- (3) ...
- (4) Should any person's right be violated by public authority, recourse to the court shall be open to him. If provision is not specified, recourse shall lie to the ordinary courts.

#### Article 20 (Basic principles of the constitution - Right to resist)

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) ...
- (3) ...
- (4) ...

### Law on Administrative Courts 1968

#### Section 113

- (1) To the extent an administrative act is unlawful and through it the rights of the plaintiff have been infringed, the court quashes the administrative act as well as the interim ruling in an objection (to administrative proceedings). If the administrative act has already been executed, then on application the court may also pronounce that, and how, the administrative authority has to reverse the execution. ... If through withdrawal or otherwise the administrative act has already ceased to exist, then on application the court through judgment pronounces that the administrative act was unlawful, if the plaintiff has a legitimate interest in such a declaration.
- (2) ...
- (3) ...
- (4) ...

## Appendix II

### The German Basic Law ("Grundgesetz")

#### Article 1 (Protection of human dignity)

- (1) The dignity of man shall be inviolable. To respect and protect it shall be duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
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### Law on Administrative Courts 1960

#### Section 113

- (1) To the extent an administrative act is unlawful and through it the rights of the plaintiff have been infringed, the court quashes the administrative act as well as the interim ruling on an objection [in administrative proceedings]. If the administrative act has already been executed, then on application the court may also pronounce that, and how, the administrative authority has to reverse the execution... If through withdrawal or otherwise the administrative act has already ceased to exist, then on application the court through judgment pronounces that the administrative act was unlawful, if the plaintiff has a legitimate interest in such a declaration.
- (2) ...
- (3) ...
- (4) ...

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