Chapter 06 - Making appeals and staying

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Legislation used in Chapter 06

|  |  |
| --- | --- |
| Abbreviation | Full Title |
| Copyright Act 56 | The Copyright Act 1956 |
| CS Commissioners (Procedure) Regs (NI) | The Child Support Commissioners (Procedure) Regulations (Northern Ireland) 1999 No 226 |
| CS (NI) Order 91 | The Child Support (Northern Ireland) Order 1991 No 2628 |
| SS & CS (D&A) Regs (NI)SS Commissioners (Procedure) Regs (NI)SS (NI) Order 98Tribunals & Inquiries Act 92 | The Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 N 162The Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999 No 225The Social Security (Northern Ireland) Order 1998 No 1506Tribunals and Inquiries Act 1992 |
| SPC Act (NI) 02SPC Regs (NI) | The State Pension Credit Act (Northern Ireland) 2002The State Pension Credit Regulations (Northern Ireland) 2003 No 28 |
| SS (IfW) (Gen) Regs (NI) | The Social Security (Incapacity for Work) (General) Regulations (Northern Ireland) 1995 No 41 |
| SS A (NI) Act 92 | The Social Security Administration (Northern Ireland) Act 1992 |
| SS C&B (NI) Act 92 | The Social Security Contributions and Benefits (Northern Ireland) Act 1992 |
| SS (C&P) Regs (NI) | The Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 No 465 |
| CS (NI) Order 91 | The Child Support (Northern Ireland) Order 1991 No 2628 |

Introduction

 **Note:** From 23.5.16, a new appeals system was introduced changing the way appeals are made and lodged. However, the appeals system pre 23.5.16 is still relevant where a claimant appeals a decision notified before 23.5.16. The guidance in this chapter has been amended to reflect the new system and it is made clear in the text when the decision maker should use pre or post 23.5.16 guidance.

Appeals lodged on decisions notified before 23.5.16

6000 For appeals lodged on decisions notified before 23.5.16, claimants can appeal to a tribunal where they are not satisfied with a decision. All decisions appealed, including late appeals, should be reconsidered by the decision maker, so that only unresolved disputes go to appeal. This is also the point at which the decision maker could identify cases that are out of the tribunal’s jurisdiction (see DMG 6150) and apply to the tribunal for strike out. For guidance on reconsidering decisions see DMG Chapter 03.

6001 The tribunal must be confident that the decision maker has thoroughly looked at the decision again, and considers that it is correct. It is not simply a question of taking a more claimant-friendly line (decision makers must still only revise where that is the right thing to do), but the Department has to treat, and to be seen to be treating, this aspect of decision making seriously.

6002 Where an outcome decision has been reconsidered following the receipt of an appeal, but there has been no prior application for revision, and the result of the reconsideration is no change, a decision not to revise has **not** been made, and therefore **no** decision should be recorded. There is no need to inform the claimant; the appeal should be processed in the normal way.

6003 Although no decision has been given it is still necessary to record the result of the administrative process of reconsideration and any suitable format can be used. However, if procedural guidance prescribes a particular form or format, that is the one that should be used.

6004 However, where

1. an outcome decision has been reconsidered following the receipt of an appeal **and**
2. there has been **no** prior application for revision **and**
3. the reconsideration results in an advantageous or disadvantageous change

 a revised outcome decision **has** been made. The revised decision should be notified to the claimant.

6005 Where a decision maker revises the decision which is the subject of the appeal, the appeal lapses if the decision as revised is to the claimant’s advantage1. For guidance on lapsing appeals see DMG 6160 et seq.

1 SS (NI) Order 98, art 10(6); SS & CS (D&A) Regs (NI), reg 30(2)

Appeals lodged on decisions notified on or after 23.5.16

6006 For appeals lodged against decisions notified on or after 23.5.16, claimants can **only** appeal to a tribunal where the decision maker has first considered an application for revision of the original decision1 in dispute (see DMG Chapter 03: Revision). Where a claimant makes an appeal before mandatory reconsideration has been requested then the appeal should be treated as a request for a mandatory reconsideration.

1 SS (NI) Order 98, art 13(3A); SS & CS (D&A) Regs (NI), reg 3ZA

6007 If, following the mandatory reconsideration, the claimant wishes to pursue an appeal then they must send their notice of appeal directly to the Appeals Service1. The Appeals Service will then send the notice of appeal to the Department along with the mandatory reconsideration notice and any supporting documents to request that a response is prepared.

1 SS & CS (D&A) Regs (NI), reg 33(1)(b)

6008 The Department must

 **1.** provide the person with the right of appeal (see DMG Chapter 01) a written notice of the decision including their appeal rights1 **and**

 **2.** tell the person with the right of appeal that where the notice in **1.** above does not include a statement of reasons, they may, within one month of the date of the notification of the decision, request that a statement of reasons is provided2. The statement must be provided within 14 days of the request or as soon as practicable thereafter3.

1 SS & CS (D&A) Regs (NI), reg 3ZA(1); 2 reg 3ZA(3); 3 reg 3ZA(4)

6009 When making their appeal to the Appeals Service, the claimant must include with their notice of appeal, a copy of the notice of the result of the mandatory reconsideration issued by the Department. Where the mandatory reconsideration notice has not been included with the appeal request, the Appeals Service will contact the branch

 **1.** to provide a copy of the mandatory reconsideration notice **or**

 **2.** if no mandatory reconsideration has been made, to forward the appeal request to the branch to treat as a request for a mandatory reconsideration.

6010 Once the decision maker receives the request for an appeal response from the Appeals Service, this is the point at which the decision maker should

 **1.** identify cases that are out of the tribunal’s jurisdiction (see DMG 6150) and apply to the tribunal for strike out **or**

 **2.** revise the decision to the claimant’s advantage1 if further evidence enables them to do so and so lapse the appeal (see DMG 6161).

1 SS (NI) Order 98, art 10(6); SS & CS (D&A) Regs (NI), reg 30(2)

6011 Decision makers are reminded that, where the appeal has been sent to the Appeals Service, they **must** notify the Appeals Service if any decision under appeal is changed by revision or supersession. At the same time the decision maker must tell the tribunal what the effect of the revision or supersession will have on their jurisdiction, for example

 **1.** appeal lapsed

 **2.** appeal now against unfavourable revised decision

 **3.** jurisdiction limited to period/issues not covered by the supersession.

6012 An appeal to the tribunal is a rehearing of the whole outcome decision. The tribunal does not have to consider any issue which is not raised by the appeal. However, as the tribunal exercises an inquisitorial role, it is open to them to look at the whole decision entirely afresh1.

1 SS (NI) Order 98, art 13(8)(a)

6013 Where an issue is raised after the appeal is made, the parties to the appeal should have notice of it and a chance to deal with it.

Changes and further claims during the period before a hearing

6014 Decision makers should note that tribunals may take account of evidence produced after the decision under appeal, where it provides information relevant to that decision1. For example, where the claimant produces a medical report showing a change of diagnosis, the tribunal can consider the report.

1 R(DLA) 2/01 & 3/01

6015 Any circumstances which change after the date of the appealed decision cannot be taken into account by the tribunal1. Any such changes should be referred to the decision maker to consider whether a supersession is appropriate.

1 SS (NI) Order 98, art 13(8)(b)

6016 The decision maker may supersede the decision under appeal before the appeal is heard. However, the appeal does not lapse.

6017 Where a further claim is made and has been determined, the tribunal cannot consider any period after the effective date of the decision on that claim. The tribunal should always be informed in a further response where a further claim is decided before the hearing.

6018 Once the appeal is heard and the tribunal has made a decision, the decision maker may need to revise

**1.** the decision on a further claim **or**

**2.** the superseded decision

 to take account of the tribunal’s decision1. See DMG Chapter 03 for further guidance.

1 SS & CS (D&A) Regs (NI), reg 3(5A)

The rules of natural justice

6019 There is a common law requirement that tribunals should observe the rules of natural justice1. Regulations also embody the principles of natural justice, although the rules are not defined anywhere2. Natural justice is the manner in which justice is expected to be achieved. It can be described as fair play in action3.

1 R(S) 4/82(T); 2 SS & CS (D&A) Regs (NI); 3 R(IS) 5/93

6020 Natural justice relates solely to procedural unfairness. The requirements for the rules of natural justice are

**1.** an absence of personal bias on the part of the tribunal **and**

**2.** an obligation to base their decision on evidence **and**

**3.** whether or not there is an oral hearing, to consider fairly the contentions of all people entitled to be represented1.

1 R(S) 4/82(T)

6021 The duty to ensure a fair hearing includes giving the claimant the opportunity to comment on their observations made during an oral hearing where they intend to rely on them as evidence for the decision. A tribunal must not take account of observations unless they are

**1.** relevant to the issues under appeal or the time of the decision under appeal **or**

**2.** reliable as evidence of the claimant’s condition1.

1 R(DLA) 8/06

 6022 – 6023

The Human Rights Act 1998

6024 If an issue arises regarding the Human Rights Act the case should be referred to the Decision Making Services for guidance.

 6025 – 6028

Further information received

6029 Where further evidence is received at any time before the tribunal gives its decision, e.g. following an adjournment, a further reconsideration of the decision under appeal must be carried out. This is despite there having already been earlier reconsiderations. See also DMG 6011.

 6030 – 6039

Which decisions can be appealed to a tribunal?

6040 Decisions which can be appealed are listed in Annex D to this Volume. They include decisions on claims and supersession whether as originally made or as revised1.

1 SS (NI) Order 98, art 13(1) and Sch 3; SS & CS (D&A) Regs (NI), reg 26

Decisions which cannot be appealed

6041 Claimants may make an appeal against decisions which do not carry the right of appeal1 (see Annex E to this Volume). These are

1. administrative decisions
2. determinations necessary to an outcome decision.

 Where the tribunal has no jurisdiction to hear the appeal, it will be struck out (see DMG 6150 - 6153 and DMG 6230 - 6243).

1 SS (NI) Order 98, art 13(2) & Sch 2

 6042

Decisions not revised

6043 A notification that the decision maker has not

1. revised **or**
2. accepted a late application for revision of

 a decision is not a decision with the right of appeal. Where an appeal is made against these decisions, the decision maker should refer the appeal to the Appeals Service as out of jurisdiction (see DMG 6150 et seq). See DMG Chapter 03 for guidance on when a decision should not be revised.

6044 Where a decision is not revised, it may still be possible to appeal the original decision to a tribunal. See DMG 6065 et seq for further guidance.

Notice of a decision against which an appeal lies

6045 A person with the right of appeal must be

 **1.** given written notice of the decision and their right to appeal the decision **and**

 **2.** told that, where that notice does not include a statement of reasons, they can request one and they must do so within a month of the notification of that decision1.

1 SS & CS (D&A) Regs (NI), reg 28(1)

 6046 – 6049

Who can appeal to a tribunal?

6050 The general rule is that any claimant or person affected by a decision has the right of appeal to a tribunal1. In practice, these are (subject to the mandatory reconsideration already having been completed as in DMG 6006 for decisions notified on or after 23.5.16)

1. a claimant who claims a relevant benefit2
2. a claimant or other person from whom an overpayment of benefit is recoverable3
3. a widow or dependant affected by a decision on Industrial Death Benefit made before 11.4.984
4. a persons who seeks a declaration that an accident was an industrial accident5
5. a claimant affected by a decision on certain contributions questions (see Annex D to this Volume)6.

1 SS (NI) Order 98, art 13(2); 2 art 9(3); 3 art 13(4); SS A (NI) Act 92, sec 69 & 72;
4 SS (NI) Order 98, art 13(5); SS C&B (NI) Act 92, Sch 7, Part VI;
5 SS (NI) Order 98, Sch 3, para 7; 6 paras 16 & 17

6051 Other people can act on behalf of claimants when making an appeal. An appeal should be accepted where it is made by

1. a person appointed by the Department to act on behalf of a claimant1
2. an executor or other person appointed by the Department on the death of a claimant
3. a person given the Power of Attorney or appointed as controller
4. an executor or legal personal representative of a deceased claimant’s estate from which recovery of overpaid benefit is sought
5. a person appointed on the death of a claimant to continue with a claim for benefit made before death2
6. a person appointed after death to make a claim for benefit for the deceased3
7. a person appointed to make a claim for Industrial Injuries Disablement Benefit or Reduced Earnings Allowance for a person who has died4
8. a person who claims Attendance Allowance or Disability Living Allowance on behalf of a terminally ill patient5
9. anyone else, but only where accompanied by the claimant’s written authority6.

1 SS & CS (D&A) Regs (NI), reg 25(a); 2 reg 25(a)(i); SS (C&P) Regs (NI), reg 30(1);
3 SS & CS (D&A) Regs (NI), reg 25(a)(ii); SS (C&P) Regs (NI), reg 30(5) & (6);
4 SS & CS (D&A) Regs (NI), reg 25(a)(iii); SS (C&P) Regs (NI), reg 30(6A) & 6B;
5 SS & CS (D&A) Regs (NI), reg 25(b); SS C&B (NI) Act 92, sec 66(2)(b) & 76(3);
6 SS & CS (D&A) Regs (NI), reg 33(1)(a)(ii)

6052 The decision maker does not have the right of appeal to a tribunal. Where there is any doubt about a decision, the decision maker may revise or supersede it instead.

6053 Where a person who does not have the right of appeal, makes an appeal against a decision, see DMG 6112 et seq.

 6054 – 6059

Making an appeal to a tribunal

Decisions notified before 23.5.16

6060 Notice of an appeal1 must be on an approved form, in writing or in some other approved format. The appeal should

1. give details of the decision appealed against **and**
2. give brief details as to why the decision may be wrong (see DMG 6063) **and**
3. be made by sending or delivering the notice to the appropriate office within the specified time **and**
4. be signed by the person who has the right of appeal or a person listed in DMG 6050 - 6051.

1 SS & CS (D&A) Regs (NI), reg 33(1)

6061 Where the appeal form or letter does not give all the details required, see DMG 6112 - 6118.

6062 An appropriate office is, for an appeal in

**1.** a contributions decision case, any National Insurance Contributions office of Her Majesty’s Revenue and Customs, or any office of the Department1

**2.** any case concerning occupational and personal pension schemes, any National Insurance Contributions office of Her Majesty’s Revenue and Customs2

**3.** in the case where the decision appealed against was a decision arising from a claim made at an office displaying the ONE logo, that office3

**4.** any other case, an office of the Department4.

 **Note:** Where an appeal is received in a different office of the Department and is forwarded to and received by the appropriate office, it should be treated as received in the appropriate office on the date of the receipt in the different office.

1 SS & CS (D&A) Regs (NI), reg 33(1)(b)(i); 2 reg 33(1)(b)(ii); 3 reg 33(1)(b)(iia); 4 reg 33(1)(b)(iii)

6063 The requirement to give particulars of the grounds of appeal should not be applied stringently. In the majority of the cases, it should be accepted that the condition is satisfied. Where a simple unexplained disagreement with the decision is given as the ground of appeal, further information is required to ensure that the appeal is duly made - see DMG 6112 et seq.

 6064

Time limits for appealing to a tribunal

6065 The time limit within which the claimant must make an appeal is the later of

**1.** one month after the date the notification of the decision maker’s decision was sent to the appellant1 **or**

**2.** if a written statement of reasons is requested within that month, 14 days after the later of

**2.1** the end of the month2 **or**

**2.2** the date the written statement of reasons was provided3 **or**

**3.** if the claimant made an in-time application for revision4 of the decision and that application was unsuccessful, one month after the date the notification of refusal to revise was sent to the appellant.

 **Note:** The decision is notified when it is posted or handed to the claimant. The time limit for appealing is calculated in the same way as the revision application period. See DMG Chapter 03 for guidance on rights to request a written statement and time limits.

1 SS & CS (D&A) Regs (NI), reg 31(1)(a); 2 reg 31(1)(b); 3 reg 31(1)(c); 4 reg 3(1), (3) & 3A(1)

6066 Where the decision is handed to the claimant, the Department should ensure that the date of notification is recorded in the claimant’s case papers. The response to the tribunal should include the date notification was handed to the appellant.

Appeals following decisions whether or not to revise

6067 Where the decision maker revises a decision, the right of appeal is against the original decision as revised1. The original decision is treated as made on the date it is revised solely for the purposes of calculating appeal time limits2.

1 SS & CS (D&A) Regs (NI), reg 31(2)(a); R(IS) 15/04; 2 SS (NI) Order 98, art 10(5)

 **Example**

 The decision maker disallows a claim for benefit on 8.9.09 and the decision is notified on the same day. The claimant applies for the disallowance to be revised. On 27.9.09 the decision maker revises the decision of 8.9.09 so as to award benefit. The claimant makes an appeal. The decision under appeal is the decision of 8.9.09 as revised, but the time for appealing starts 27.9.09.

6068 Where

1. the claimant applies for a decision to be revised during the one month application period **and**
2. the decision maker notifies that the decision is not revised

 the time for appealing the original decision is extended, so that the one month period in DMG 6065 begins on the date the claimant is notified that the decision is not revised1.

1 SS & CS (D&A) Regs (NI), reg 31(2)

6069 Where the application is made after the one month period but within 13 months of notification of the original decision, the time for appealing is **only** extended as in DMG 6068 where the decision maker admits the application, but then does not revise the original decision. The time limit is not extended where the decision maker does not revise following an application made more than 13 months after notification. See DMG Chapter 03 for guidance on applications for revision.

 **Note:** The decision maker should consider supersession where the time for appealing is not extended when a decision is not revised (see DMG Chapter 04).

Decisions notified on or after 23.5.16

6070 Notice of an appeal1 must be on an approved form, in writing or in some other approved format. The appeal should

 **1.** give details of the decision appealed against **and**

 **2.** give brief details as to why the decision may be wrong (see DMG 6063) **and**

 **3.** be made by sending or delivering the notice to the appropriate office within the specified time **and**

 **4.** be signed by the person who has the right of appeal or a person listed in DMG 6050 - 6051.

1 SS & CS (D&A) Regs (NI), reg 33(1)

 **Note:** Where the appeal form or letter does not give all the details required, see DMG 6112 - 6118.

6071 Along with the notice of appeal, the appellant must also provide

 **1.** a copy of the mandatory reconsideration notice

 **2.** any statement of reasons that the appellant may have

 **3.** any documents the appellant has to support their case that have not already been sent to the Department1.

 **Note 1:** Where the appeal form or letter does not give all the details required, see DMG 6112 - 6118 below.

 **Note 2:** The guidance in this paragraph is not supported by legislation in Northern Ireland but is procedural and for this reason it has been decided to keep it in the DMG.

Time limit for appealing to the tribunal

6072 The time limit within which the claimant must make an appeal to the tribunal is one month after the date the appellant was sent the decision maker’s mandatory reconsideration notice1.

 **Note:** The decision is notified when it is posted or handed to the claimant. For guidance on rights to request a written statement and time limits, see DMG Chapter 03: Revision.

1 SS & CS (D&A) Regs (NI), reg 31(1)

6073 Where the decision is handed to the claimant, the Department should ensure that the date of notification is recorded in the claimant’s case papers. The response to the tribunal should include the date notification was handed to the appellant.

Appeals following decisions whether or not to revise

6074 Where the decision maker revises a decision, the right of appeal is against the original decision as revised1. The original decision is treated as made on the date it is revised solely for the purposes of calculating appeal time limits2.

1 R(IS) 15/04; 2 SS (NI) Order 98, art 10(5)

Late appeals

Decisions notified before 23.5.16

6075 The time limit for appealing can be extended by a decision maker or legally qualified panel member where the conditions in DMG 6076 - 6077 are satisfied. Where the decision maker admits a late appeal, the decision should be reconsidered in the normal way (see DMG Chapter 03). Where

**1.** the decision maker does not admit a late appeal **and**

**2.** the decision cannot be revised1

 the application for extending the time for appealing or appeal should be forwarded to the Appeals Service.

 **Note:** The provision allowing a decision to be revised at any time before an appeal is heard2 cannot be applied if neither the decision maker nor the legally qualified panel member admits the late appeal.

1 SS & CS (D&A) Regs (NI), reg 3; 2 reg 3(4A)

6076 A late appeal can be admitted where

**1.** the application for an extension of time is made within one year of the last day for appealing in DMG 60651 **and**

**2.** the application contains the grounds on which the extension is sought including details of any special circumstances2 **and**

**3.** the legally qualified panel member only is satisfied that there is a reasonable prospect that the appeal will be successful3 (the decision maker cannot admit a late appeal on this ground) **or**

**4.** the decision maker or legally qualified panel member is satisfied that it is in the interests of justice for the application to be granted4.

1 SS & CS (D&A) Regs (NI), reg 32(1); 2 reg 32(3); 3 reg 32(4)(a); 4 reg 32(4)(b)

6077 The procedure for making an application for an extension of time is the same as that for making an appeal1. This includes the requirement that the application is made to an appropriate office in writing and is signed by the appellant, and that any request by the decision maker for further information is made in writing. See DMG 6060 - 6063 and 6112 for further details.

1 SS & CS (D&A) Regs (NI), reg 32(2)

6078 It is “In the interest of justice” where special circumstances, which are relevant to the application, have prevented the application being made on time. Special circumstances are defined as

**1.** the applicant, partner or dependant has died or suffered serious illness

**2.** the applicant is not resident in the UK

**3.** normal postal services were adversely affected **or**

**4.** some other special circumstances exist which are wholly exceptional and are relevant to the application1.

1 SS & CS (D&A) Regs (NI), reg 32(5) & (6)

6079 A partner1 is

**1.** a member of a couple **or**

**2.** where the appellant is polygamously married to two or more members of the household, any such member.

1 SS & CS (D&A) Regs (NI), reg 1(2)

6080 A “couple” means1 two people who are

1. married and are members of the same household
2. living together as husband and wife
3. civil partners of each other and who are members of the same household
4. not civil partners of each other, but are living together as civil partners.

1 SS & CS (D&A) Regs (NI), reg 1(2)

 **Note:** Two people should be regarded as living together as civil partners if they would be regarded as living together as husband and wife if they were two people of the opposite sex.

6081 The decision maker or legally qualified panel member will take into account the time that has elapsed between the end of the one month time limit for making an appeal and the date the late appeal was made. The longer the delay, the more compelling should be the special circumstances1.

1 SS & CS (D&A) Regs (NI), reg 32(7)

6082 An appeal cannot be treated as made in time in the interests of justice if the only reason for the request is that

**1.** the applicant or representative was unaware of or misunderstood the law that applied to their case **or**

**2.** a Commissioner or Court has taken a different view of the law from that previously understood or applied1.

1 SS & CS (D&A) Regs (NI), reg 32(8)

6083 Where an application is considered by a legally qualified panel member the determination must be recorded in writing. This must be sent or given to each party to the proceedings as soon as practicable after the determination is made1.

1 SS & CS (D&A) Regs (NI), reg 32(10) & (11)

6084 An application for an extension of time which has been refused may not be renewed1. There is no right of appeal to the Commissioner against a refusal to extend the time for appealing2. There is no jurisdiction for the decision maker to reconsider such a refusal3.

1 SS & CS (D&A) Regs (NI), reg 32(9); 2 R(I) 44/59; R(I) 6/73; R(SB) 24/82; 3 R(U) 21/64

6085 The absolute time limit for making an appeal cannot be extended any further1. The time limits in DMG 6065 begin when the decision is notified. It is therefore important to ensure, especially in cases where it is alleged that the decision notice has not been received that the decision has been notified correctly. See DMG Chapter 01 for guidance on how a decision is notified.

1 Denson v Secretary of State for Work and Pension [2004] EWCA Civ 462 (R(CS) 4/04)

6086 The following are examples of other special circumstances when it might be appropriate for the decision maker to admit a late appeal in addition to those at DMG 6078 **1.** - **3.**

1. difficulty in getting an appointment with a representative (especially in rural areas)
2. problems in writing the appeal for a blind person living alone
3. difficulty in obtaining an appeal form
4. allegation that the decision notice was not received
5. inability to read, write or understand English where the appellant lives alone
6. change of address during one month period
7. allegation that an earlier appeal was made
8. inability to understand the decision notice where the person has a mental disability or learning difficulties and lives alone.

 **Example 1**

 The appeal is made three months after the decision notice on a renewal claim for Disability Living Allowance is issued. The claim was disallowed. The claimant explained that she did not know that the decision had been made until benefit payments to her bank account stopped when the previous award expired. She said that she had not received the decision notice. The Disability Living Allowance file shows that she had phoned up a week before the appeal was made to ask when a decision would be made on her renewal claim. The decision maker accepts that she had not received the decision notice, and admits the late appeal.

 **Example 2**

 The claimant is in receipt of Income Support and Incapacity Benefit and has mental health problems. He lives alone and does not have an appointee. Both benefits are stopped after application of the personal capability assessment. The late appeal is accompanied by a letter from the community psychiatric nurse explaining that he did not understand the significance of the decision, and had not kept appointments with the nurse due to memory problems. The decision maker accepts that there are special circumstances and admits the late appeal.

6087 The list at DMG 6086 is intended only as a guide to the type of circumstances when a late appeal should be treated as in time. For example, a person might not be living alone, but the other people in the house may not be willing to help. Alternatively, a person living alone may have family or friends who visit regularly to check post. Each case should be considered on its merits.

 6088 – 6090

Decisions notified on or after 23.5.16

6091 Where an appeal is made to the tribunal outside normal time limits, the appellant must include a request for an extension of time and the reason why it is late1. If the appellant does not then the Appeals Service will request reasons.

1 SS & CS (D&A) Regs (NI), reg 32(3)

6092 The time limits in DMG 6072 begin when the decision is notified. It is therefore important to ensure, especially in cases where it is alleged that the decision notice has not been received, that the decision has been notified correctly. For guidance on how a decision is notified see DMG Chapter 01: Principles of decision making and evidence.

6093 The following are examples of special circumstances when it might be appropriate for the decision maker to not object to The Appeals Service accepting an appeal as made in time

**1.** difficulty in getting an appointment with a representative (especially in rural areas)

**2.** problems in writing the appeal for a blind person living alone

**3.** difficulty in obtaining an appeal form

**4.** allegation that the decision notice was not received

**5.** inability to read, write or understand English where the appellant lives alone

**6.** change of address during one month period

**7.** allegation that an earlier appeal was made

**8.** inability to understand the decision notice where the person has a mental disability or learning difficulties and lives alone.

6094 The list at DMG 6093 is intended only as a guide. For example, a person might not be living alone, but the other people in the house may not be willing to help. Alternatively, a person living alone may have family or friends who visit regularly to check post. Each case should be considered on its merits.

 6095 – 6099

Action when an appeal is made

Decisions notified before 23.5.16

6100 When an appeal is made, or further evidence is obtained after an appeal is made, the decision maker should consider whether the original decision should be revised and the appeal lapsed1. This applies even if the decision has been reconsidered and not revised before the appeal was made.

1 SS (NI) Order 98, art 10(6)

 6101

Identifying the decision appealed against

6102 In most cases an appeal is made against the last decision made on a claim or application. However, claimants may make an appeal against an earlier decision which has been revised or superseded. Where the appealed decision has been

**1.** revised, the claimant should be advised that this decision has been amended by the later decision. See DMG 6160 et seq for further action **or**

**2.** superseded, the claimant has the right of appeal against the previous decision if the superseded decision does not entirely replace it. For example, there may be a limitation on payability of arrears.

6103 Where it is not clear which decision the claimant is appealing against, the decision maker may need to

**1.** ask the claimant for more information **or**

**2.** treat the appeal as made against more than one decision.

 For example, the claimant may make a general appeal where a decision has been made superseding and terminating entitlement to a benefit, and a decision refusing to backdate a further claim to the same benefit. Where the appeal is in time for each decision, and the termination has not been reconsidered in the light of the request for backdating, the decision maker should treat the appeal as made against both decisions.

 **Example**

 A claimant in receipt of Incapacity Benefit is found to be not incapable of work following application of the personal capability assessment and the award terminated on supersession. He makes a new claim two weeks later, which is disallowed using the same evidence as for the previous decision. His letter of appeal gives the date of the decision under appeal as the second decision, but his ground of appeal refers to stopping benefit. As no award of benefit was made on the second claim, the appeal is treated as against both decisions.

Decisions by Her Majesty’s Revenue and Customs

6104 Since 5.7.99, Her Majesty’s Revenue and Customs has been responsible for making decisions on National Insurance contributions issues previously determined by the Department1. A list of these, together with exceptions, is at Annex C to this Volume.

 **Note:** Decisions notified before 5.7.99 remain the responsibility of the Department and cannot be changed by Her Majesty’s Revenue and Customs.

1 SSC (ToF) Act 99, sec 7(1)

6105 Entitlement to Social Security contributory benefits depends on the contribution conditions being satisfied. In practice the National Insurance contribution record is usually obtained and any decision is based on the assumption that the record is factually correct. However, where there has been a dispute about the record, the matter must be referred by the Department to Her Majesty’s Revenue and Customs for a formal decision. See DMG Chapters 03 and 04 for guidance on references following an application for revision or supersession.

Issue raised after appeal lodged with the Appeals Service

6106 In some cases it may not be apparent that an issue should be referred to Her Majesty’s Revenue and Customs until after the appeal has been sent to the Appeals Service. A legally qualified member may identify that an issue should be referred before a hearing takes place, or the issue may be raised at a hearing. In either case, the legally qualified member or tribunal

1. refers the appeal to the Department **and**
2. requires the Department to refer the issue to Her Majesty’s Revenue and Customs1.

1 SS & CS (D&A) Regs (NI), reg 38A(1)

6107 The decision maker can revise or supersede the decision under appeal on any other issue while Her Majesty’s Revenue and Customs is awaited1.

1 SS & CS (D&A) Regs (NI), reg 38A(2)

6108 When Her Majesty’s Revenue and Customs’ final decision is received, the decision maker should revise or supersede the decision under appeal if appropriate. The appeal should be forwarded to the Appeals Service unless the decision under appeal can be revised to the claimant’s advantage1.

1 SS & CS (D&A) Regs (NI), reg 38A(3)

6109 A final decision of Her Majesty’s Revenue and Customs includes a decision on an appeal against a decision of Her Majesty’s Revenue and Customs1.

1 SS & CS (D&A) Regs (NI), reg 11A(5)

Decisions notified on or after 23.5.16

6110 When an appeal is made, or further evidence is obtained after an appeal is made, the decision maker should consider whether the original decision should be revised and the appeal lapsed once they are passed the papers by the Appeals Service. This applies even though a mandatory reconsideration will have already been done.

Identifying the decision appealed against

6111 In most cases an appeal is made against the last decision made on a claim or application. However, claimants may make an appeal against an earlier decision which has been revised or superseded. Where the appealed decision has been

 **1.** revised, the claimant should be advised that this decision has been amended by the later decision. See DMG 6160 et seq for further action **or**

 **2.** superseded, the claimant has the right of appeal against the previous decision as the superseded decision does not entirely replace it. For example, there may be a limitation on payability of arrears.

Appeal not duly made

Decisions notified before 23.5.16

6112 Where an appeal does not give all the details required (see DMG 6060) and they have not been provided during the reconsideration process, the decision maker may

**1.** return the appeal form for completion1 **or**

**2.** request the person making the appeal to provide further information2.

Where the form is returned, a copy should be retained by the decision maker.

1 SS & CS (D&A) Regs (NI), reg 33(2); 2 reg 33(5)

6113 The decision maker will normally give the claimant 14 days from the date the form is returned or the information is requested to reply1. Exceptionally the decision maker can give a longer period for reply, for example, where the decision maker knows that the claimant lives abroad, is in hospital, or that there is some other compelling reason why the claimant will need more time to provide the information2. The decision maker must tell the claimant the date that the information is required when they request the further information.

1 SS & CS (D&A) Regs (NI), reg 33(6)(a); 2 reg 33(6)(c)

6114 Where the claimant responds within the time given for reply the date of the appeal will be the date the form is returned or further information is provided, and the time limit for making the appeal can be extended.

 **Example - Appeal in time**

 Decision issued 17.10.09

 Appeal period 18.10.09 - 17.11.09

 Appeal received (not duly made) 15.11.09

 Reconsideration (no change) 18.11.09

 Further information requested regarding appeal 19.11.09

 Date claimant required to respond 3.12.09

 Further information received from appellant 30.11.09

 Date of appeal 30.11.09

6115 Special arrangements apply where the end of the 14 days period falls within the one month time limit for making an appeal. This is likely to be rare but may happen where the claimant makes an immediate appeal and the decision maker actions the appeal quickly. In these cases the one month time limit takes priority. This is because the claimant has one month in which to make a duly made appeal.

 **Example - Appeal in time**

 Decision issued 17.10.09

 Appeal period 18.10.09 - 17.11.09

 Appeal received (not duly made) 19.10.09

 Reconsideration (no change) 19.10.09

 Further information requested regarding appeal 19.10.09

 Date claimant required to respond 17.11.09

 (i.e. end of appeal period)

 Further information received from appellant 12.11.09

 Date of appeal 12.11.09

6116 If the claimant does not return the form or reply to the request, the papers (including a copy of the form where appropriate) should be sent to the Appeals Service so that the legally qualified panel member can decide whether or not the appeal is duly made1. If the legally qualified panel member accepts that the appeal is duly made, the Appeals Service will refer back to the Department to prepare a full response.

1 SS & CS (D&A) Regs (NI), reg 33(7)

6117 Where the claimant returns the form or provides the further information outside the 14 days (or longer period) and the papers have already been passed to the Appeals Service, the form or further information should be passed to the Appeals Service who will decide

**1.** the duly made issues **and**

**2.** if the late appeal can be accepted1.

1 SS & CS (D&A) Regs (NI), reg 33(8)

6118 Where the claimant returns the form or provides the further information outside the 14 days (or longer period) and the papers have not been sent to the Appeals Service, the decision maker should

**1.** accept the appeal as duly made

**2.** record the date of appeal as the date the form or further information is received

**3.** apply the late appeal rules (see DMG 6075 - 6082).

Decisions notified on or after 23.5.16

6119 An appeal against an outcome decision should be made in writing on the NOA1 appeal form, include a copy of the mandatory reconsideration and should be sent to the Appeals Service. If an appeal is not made on the standard form, it may be accepted if all the relevant details are included and it is in writing.

 On receipt of an appeal application, the Appeals Service will check if the appeal is in time, has been signed and includes a copy of the mandatory reconsideration.

 **Note:** The Appeals Service will **NOT** check if the appeal letter includes the issues under dispute/grounds. If the mandatory reconsideration is attached to the appeal application, the Appeals Service will assume that grounds were established by the Department at the mandatory reconsideration stage of the process.

 Where the appeal is not in time, has not been signed or does not include a copy of the mandatory reconsideration notice the Appeals Service will take action as per Chapter 2 paragraph 4.4 of the Code of Appeal Procedures guide.

 Once the appeal is accepted as duly made by the Appeals Service, they will forward the appeal application with all the relevant documentation to the Department and request an appeal response.

 6120 – 6149

Appeals outside tribunal jurisdiction

Decisions notified before 23.5.16

6150 The legally qualified panel member or tribunal clerk decides whether an appeal is within the tribunal’s jurisdiction. Decisions or determinations that are non appealable are listed in Annex E to this Volume. On decisions where there is no right of appeal to a tribunal1, the decision maker should

**1.** refer the matter to the Appeals Service by minute stating why the decision maker considers the matter outside the tribunal’s jurisdiction and quoting the relevant legislation

**2.** ensure that the decision in dispute is identified

**3.** complete form AT39 as appropriate.

1 SS (NI) Order 98, Sch 2; SS & CS (D&A) Regs (NI), Sch 1

6151 A notification that the decision maker has not revised a decision or admitted an application for supersession is not a decision with the right of appeal. Where an appeal is made giving the letter of notification as the decision under appeal, the decision maker should refer the appeal to the Appeals Service. The response to the tribunal should explain that the matter is outside the tribunal’s jurisdiction because

**1.** in the case of revision, there is no right of appeal1

**2.** in the case of supersession no decision under relevant legislation2 has been made.

1 R(IB) 2/04; R(IS) 15/04; 2 SS (NI) Order 98, arts 11 & 13(1);
Wood v Secretary of State for Work and Pensions [2003] EWCA CIV 53

Decisions notified on or after 23.5.16

6152 The tribunal has the authority to decide whether an appeal is within the tribunal’s jurisdiction. The Appeals Service will only send the appeal to the Department once they have accepted it. However, this does not prevent the decision maker from referring a case back to the tribunal if the decision maker considers the matter outside the tribunal’s jurisdiction because of information they hold that the Appeals Service may not be aware of. Decisions or determinations that are non-appealable are listed at DMG Annex E1.

1 SS (NI) Order 98, Sch 2; SS & CS (D&A) Regs (NI), Sch 1

6153 The mandatory reconsideration notice issued by the decision maker will state what decision the claimant can appeal to the tribunal. Without this notice, the Appeals Service may not progress the appeal.

 6154 – 6159

Lapsing an appeal

6160 Where

 **1.** the decision maker revises the decision under appeal (for decisions notified before 23.5.16) **or**

 **2.** the appeal is accepted by the Appeals Service, the decision maker can still consider revising the decision under appeal (for decisions notified on or after 23.5.16)

 the outcome determines whether the appeal lapses. An appeal should be lapsed where the revised decision is to the claimant’s advantage1.

 **Note:** An appeal cannot be lapsed where the decision is superseded.

1 SS (NI) Order 98, art 10(6)

6161 The purpose of lapsing an appeal is to prevent unnecessary appeals going ahead. The power to revise is discretionary rather than mandatory, and should not be used in order to prevent an appeal being heard. Decision makers are therefore advised to consider whether a decision under appeal should be revised where

**1.** the revision does not address the issue which is the subject of the appeal **and**

**2.** it is clear that a further appeal will be made.

 **Note:** Once the decision maker actually makes that revised decision then the appeal must lapse so it is important that the decision maker considers whether revision is the appropriate course of action to take.

6162 So where a revision would not give the claimant all they are asking for in the appeal, the decision maker may contact the claimant before revising to ask them if they would still want to appeal if the revised decision were made. If the claimant says they would

 **1.** still appeal, then the decision would not be revised and the appeal goes ahead with our response including details of the revised decision and that we cannot revise the decision as this would mean the appeal would have to lapse **or**

 **2.** be happy with the revised decision, the decision maker would make that revised decision and lapse the appeal. The claimant would be informed of their appeal rights against the revised decision.

 **Note:** If the claimant cannot be contacted then the appeal should not be lapsed.

 **Example 1**

 The decision maker decides that a claim for Income Support should be disallowed from and including 17.1.09 on the grounds that the claimant’s income exceeds. The decision is reconsidered on appeal, the issue being whether the claimant has income. The decision maker notices that the date of disallowance is incorrect, and should have been 19.1.09. The decision maker does not revise the decision, and the appeal goes ahead.

 **Example 2**

 The decision maker decides that an overpayment of benefit of £10,855 is recoverable. The decision is reconsidered on appeal, the issue being whether the overpayment is recoverable. The decision maker notices that the amount of the overpayment has been incorrectly calculated, and should be £10,835. The decision maker does not revise, and the appeal goes ahead.

 **Note:** It is important to remember that appeals should only lapse when the appeals officer knows that to revise will address the claimant’s grounds of appeal in full. In cases where it is not appropriate to lapse the appeal any reconsideration of the decision should not lead to a revision. Guidance at DMG 6162 should be followed.

 **Example 3**

 The decision maker decides that an overpayment of benefit of £10,855 is recoverable. The decision is reconsidered on appeal, the issue being whether the amount of the overpayment is correct. The decision maker notices that the amount of the overpayment has been incorrectly calculated, and should be £10,835. The decision maker revises, and the appeal is lapsed.

 **Example 4**

 The decision maker makes an advance award of the lowest rate of the care component of Disability Living Allowance, deciding that the qualifying period was not satisfied at the date of the claim. The claimant appeals on the ground that the award should have started on the date of claim, and should have been at the middle rate. The decision maker accepts that the qualifying period was satisfied at the date of claim, revises the decision and lapses the appeal.

6163 Where the decision is not revised, but the decision maker considers it to be incorrect, the response should

**1.** advise the tribunal why the decision is not revised **and**

**2.** request that the correct decision is substituted for that of the decision maker.

6164 A decision is to the claimant’s advantage1 when the outcome is that

**1.** an award of benefit is made, increased or the period extended **or**

**2.** an amount of benefit is greater but is not payable, or has been suspended, or the claimant is disqualified from receiving it **or**

**3.** a decision that benefit is payable to a third party is reversed **or**

**4.** a refusal to give an industrial accident declaration is reversed (see DMG 3300 for full guidance on revision and supersession of accident questions) **or**

**5.** the amount of a recoverable overpayment is reduced or is no longer recoverable **or**

**6.** a sanction is lifted or the period reduced.

 **Note 1:** An increase in an assessment of disablement for Industrial Injuries Benefit which does not result in an award of benefit on its own or on aggregation is not advantageous.

 **Note 2:** This list is not exhaustive and each case should be considered on its facts.

1 SS & CS (D&A) Regs (NI), reg 30(2)

 Example 1

 A claimant is awarded lowest rate care component and lower rate mobility component of Disability Living Allowance. They appeal on the grounds that they satisfy the conditions for higher rates of both components. The decision maker revises the decision to award the middle rate care component but does not change the award of the mobility component. The appeal lapses.

 **Example 2**

 A claimant is awarded lowest rate care component and lower rate mobility component of Disability Living Allowance. They appeal on the grounds that they satisfy the conditions for higher rates of both components. The decision maker finds they could revise the decision awarding benefit at the same rates but from three weeks earlier. The decision maker does not revise and the appeal goes ahead.

6165 Where an appeal is lapsed because the decision is revised, the new outcome decision carries a new dispute period and appeal rights. For decisions notified made before 23.5.16 the claimant and the Appeals Service where the appeal has been sent to them, should be notified that the appeal has lapsed. For decisions notified on or after 23.5.16 the claimant and the Appeals Service should be notified that the appeal has lapsed.

Decisions not to the claimant's advantage

6166 Where the revised decision is not to the claimant’s advantage, the appeal should be treated as made against the decision as revised1. The claimant is also invited to make further representations within one month of notification of the revised decision2. For appeals on decisions notified before 23.5.16, the appeal is not referred to the Appeals Service at this stage and the decision is implemented. If however, the appeal has already been referred to the Appeals Service then a further response based on the additional facts should be prepared.

1 SS & CS (D&A) Regs (NI), reg 30(3); 2 reg 30(4)

6167 If the decision is not revised following reconsideration, the reconsideration is **not** a decision. The appeal continues and the decision maker prepares the appeal response to be sent to the Appeals Service.

 **Example**

 On 27.5.00 a claimant is awarded the lowest rate care component of Disability Living Allowance. He appeals on the grounds that he satisfies the conditions for the middle rate care component. On 27.6.00 the decision maker reconsiders the above decision but does not change it. The appeal continues against the decision dated 27.5.00.

6168 After the end of that period, or within that period if the claimant consents in writing, the appeal to the tribunal must proceed, except where

**1.** the decision maker further revises the decision in light of further representations from the claimant **and**

**2.** that decision is more advantageous to the claimant than the decision before it was revised1.

1 SS & CS (D&A) Regs (NI), reg 30(5)

6169 The appeal lapses where

1. the claimant provides further information **and**
2. the revised decision can be revised again **and**
3. the effect of the new decision is that the conditions in DMG 6161 are satisfied for the original decision1.

1 SS & CS (D&A) Regs (NI), reg 30(5)

 **Example**

 The decision maker awards Income Support of £40. The claimant appeals and the decision maker revises the decision to award £35. The claimant provides more information as a result of which the decision maker is able to revise again and award £40.50. The appeal lapses.

6170 Where the result of the further revision is not to the claimant’s advantage, the appeal proceeds to the Appeals Service with a response in the normal manner.

 6171 – 6179

Appeal awaiting outcome of other proceedings

Industrial or other tribunal pending

6180 Where an appellant has already appealed to another tribunal or authority (including an appeal tribunal) on a matter connected to the present appeal, the Appeals Service should be asked to delay or postpone the present appeal hearing to await the outcome of the other proceedings.

Criminal proceedings contemplated or pending

6181 If an appeal is connected to matters that may result in criminal proceedings against the appellant, no mention of this should be made in the written response or oral submission. However, this matter should be brought to the attention of the Appeals Service to allow them to consider whether the appeal should be delayed.

6182 The response should not be delayed where criminal proceedings are being brought by the Department against the appellant. The matter should be brought to the attention of the Appeals Service with details of how far those proceedings have progressed. A legally qualified panel member decides whether the tribunal hearing should be delayed or postponed.

Appeals that may be affected by an appeal in another case

6183 An appeal to a tribunal or to a Commissioner may be affected by the outcome of an appeal to a Court against a Commissioner’s decision on the same subject. The decision maker can require the tribunal or Commissioner to

**1.** not determine the appeal, but refer the case to the decision maker1 **or**

**2.** stay the appeal until the appeal to the Court is decided2 **or**

**3.** decide the appeal as if the appeal to the Court had been decided unfavourably to the appellant where the tribunal or Commissioner considers this to be in the interests of the appellant3.

 Appeals where this might apply will be identified by Decision Making Services.

 For further guidance on staying appeals, see DMG 6800 et seq.

1 CS (NI) Order 91, art 28ZB(2)(a); SS (NI) Order 98, art 26(2); 2 art 26(4)(a); 3 art 26(4)(b)

 6184 – 6189

Withdrawing an appeal

Decisions notified before 23.5.16

6190 An appeal may be accepted as withdrawn by the decision maker or the clerk to the tribunal depending on when the application is made.

6191 The decision maker can discontinue action on an appeal (i.e. it is not forwarded to the Appeals Service) where

1. the appellant or an authorised representative gives written notification **and**
2. the appeal has not been sent to the Appeals Service1.

1 SS & CS (D&A) Regs (NI), reg 33(9)

6192 Once an appeal has been lodged with the Appeals Service, an appeal may be withdrawn by the appellant or representative

1. at an oral hearing **or**
2. in writing at any other time before the appeal is determined1.

1 SS & CS (D&A) Regs (NI), reg 40

6193 The tribunal clerk will inform all parties to the proceedings when an appeal lodged with the Appeals Service has been withdrawn.

6194 Once an appeal has been withdrawn, it cannot be reinstated1. It may be possible to appeal the decision again where the time limits in DMG 6065 et seq have not expired.

1 Rydqvist v Secretary of State for Work and Pensions [2002] EWCA Civ 947; [2002] 1 WLR 3343

 6195 – 6209

Decisions notified on or after 23.5.16

6210 Once an appeal has been lodged with the Appeals Service, it may be withdrawn1 by the claimant or representative

 **1.** in writing to the tribunal **or**

 **2.** at an oral hearing but only where the tribunal agree to the withdrawal.

1 SS & CS (D&A) Regs (NI), reg 40

6211 The withdrawal of an appeal to the tribunal made

 **1.** before a hearing begins **or**

 **2.** during an adjournment of proceedings

takes effect automatically.

6212 The Appeals Service will inform all parties to an appeal when an appeal lodged with the Appeals Service has been withdrawn.

 6213 – 6229

When is an appeal struck out?

6230 A tribunal clerk, or a legally qualified panel member1, may strike out an appeal where

**1.** the appeal is not duly made (see DMG 6112 - 6118)

**2.** the appeal is not made within the 13 month time limit

**3.** the appeal is late and a late appeal has not been accepted (see DMG 6075 - 6087)

**4.** the tribunal has no jurisdiction to hear the appeal (see DMG 6150 - 6151)

**5.** the appellant fails to proceed with the appeal at any stage, for example by failing to respond within 14 days to any direction or request made in connection with the appeal.

1 SS & CS (D&A) Regs (NI), reg 46

6231 The tribunal clerk or legally qualified panel member may decide that the appeal should not be struck out, and should be listed for hearing. A full response on the merits of the decision under appeal should be prepared.

6232 Where the tribunal clerk or legally qualified panel member decides to strike out the appeal, the appellant is

**1.** notified that the appeal has been struck out

**2.** given details of the right of reinstatement1.

1 SS & CS (D&A) Regs (NI), reg 46(2)

6233 While it is only the tribunal who have the authority to strike out proceedings, the decision maker is able to apply to the tribunal for cases to be struck out. So where the decision maker identifies a case that they think is outside of the tribunal’s jurisdiction, they should take action as per DMG 6150 for decisions notified before 23.5.16 or DMG 6152 for decisions notified on or after 23.5.16.

 6234

6235 The tribunal clerk or legally qualified panel member may decide that the appeal should not be struck out, and should be listed for hearing. All parties are advised of the decision.

6236 The decision maker

**1.** should revise the decision where appropriate (see DMG Chapter 03) **or**

**2.** prepare and send a full response on the merits of the decision under appeal to the Appeals Service.

 6237 – 6239

Reinstatement of an appeal

6240 A tribunal clerk or legally qualified panel member may decide that an appeal can be reinstated where

**1.** the appellant has made representations within one month of the date of notification to strike out was given or sent to them

**2.** in the light of correspondence received from the appellant there are reasonable grounds for doing so **or**

**3.** the appellant was not notified that the appeal had been struck out **or**

**4.** the appeal is not an appeal which should be struck out **or**

**5.** it is not in the interests of justice for the appeal to be struck out1.

1 SS & CS (D&A) Regs (NI), reg 47

6241 If the appeal is reinstated the legally qualified panel member may decide the appeal forthwith or issue further directions so that the appeal may be dealt with quickly1.

1 SS & CS (D&A) Regs (NI), reg 38

6242 An appeal which has been struck out in accordance with DMG 6230 may be reinstated1 where the legally qualified panel member is satisfied that

**1.** the appeal should not have been struck out in the light of representations made by the appellant in writing within one month of the issue of the strike out order **or**

**2.** the appeal was not one which could have been struck out **or**

**3.** although the appeal could have been struck out, it is not in the interests of justice for it to be struck out.

1 SS & CS (D&A) Regs (NI), reg 47(2)

6243 If the appeal is reinstated the legally qualified panel member may decide the appeal forthwith or issue further directions so that the appeal can be dealt with quickly.

 6244 – 6269

Pre-hearing enquiries

6270 Where an appeal is going ahead, the Appeals Service issue a hearing type enquiry form. This form asks about

**1.** an oral hearing

**2.** availability

**3.** representation.

 The appellant returns the form directly to the Appeals Service. The Department completes form AT38 to indicate the case type (see Code of Appeals Procedures).

 6271 – 6274

Oral hearings

6275 The appellant is asked on the pre-hearing enquiry form

**1.** whether they want an oral hearing of the appeal1 **and**

**2.** if there are any dates or times which are not suitable.

1 SS & CS (D&A) Regs (NI), reg 39(1)

6276 The form explains that, where the appellant fails to return the hearing type enquiry form on time, the appeal may be struck out (see DMG 6230 - 6243).

6277 The appellant is given 14 days from the date the hearing type enquiry form is sent, to opt for either an oral or paper hearing and provide the information needed to process the appeal1. Exceptionally the tribunal clerk may give a longer period for reply, for example where the appellant lives abroad, is in hospital or some other compelling reasons exists which would prevent the appellant from replying on time. If the decision maker is aware of any reason that might prevent the appellant from replying on time, this must be clearly marked on the AT38.

1 SS & CS (D&A) Regs (NI), reg 39(3)

6278 The decision maker can also request an oral hearing on form AT38 within 14 days of the date the hearing type enquiry form is issued to the appellant1. An oral hearing should only be requested where the decision maker considers that a presenting officer should attend the hearing.

1 SS & CS (D&A) Regs (NI), reg 39(3)(b)

6279 Where an oral hearing is requested by any party to the proceedings, the tribunal must have an oral hearing of the appeal unless it is struck out1.

1 SS & CS (D&A) Regs (NI), reg 39(4); reg 46(1)

 6280 – 6285

Evidence

6286 All evidence

1. relevant to the appeal **and**
2. available to the decision maker

 should be available to the tribunal and disclosed to the other parties or their representative1 except medical evidence that is harmful to the appellant2 (see DMG 6409 and Agency guidance).

 **Note:** Advice on the law, such as guidance on an individual case, is not evidence and should not be disclosed to the appellant, representative or tribunal. See DMG Chapter 01 for further details.

1 R(S) 1/58; 2 SS & CS (D&A) Regs (NI), reg 42

Non disclosure of medical advice or evidence

6287 Where medical advice or medical evidence relating to a person has not been disclosed to him and, in the opinion of the legally qualified panel member, disclosure would be harmful to his health, this advice or evidence is not required to be disclosed1. This evidence must also not be disclosed to anyone acting for or representing the person to whom it relates (or to the claimant where the claim refers to the disability of a person other than the claimant) unless the legally qualified panel member is satisfied that it is in the interests of the person to whom the advice or evidence relates to do so2.

 **Note:** The tribunal are not precluded from taking such undisclosed advice or evidence into account3.

1 SS & CS (D&A) Regs (NI), reg 42(1); 2 reg 42(2); 3 reg 42(3)

 6288 – 6291

6292 The appellant may be asked to produce any relevant documents which a tribunal considers necessary to enable it to reach a decision, for example, business accounts1.

1 SS & CS (D&A) Regs (NI), reg 38(2)

6293 Evidence that is difficult to read should be typed, but the original document should be available at the hearing.

Extracts from documents

6294 The Department may submit extracts from lengthy documents, for example, a set of accounts. The response writer should

1. indicate which part of the document is to be copied by the Department and ensure that the typed extract is clearly headed “Extract from...” giving the necessary identifying details
2. ensure that the complete document or a copy of it is available at the hearing
3. provide a transcript and ensure the original tape is available at the hearing where an interview has been tape recorded.

 **Note:** Extracts should never be taken from interviews under caution. The whole document should be provided1.

1 R(I) 10/58

 6295 – 6303

Copyright

6304 Permission is not needed to reproduce printed material covered by copyright for an appeal to a tribunal or Commissioner1. If an extract of printed material is needed for a response, the document can be photocopied and its source noted on the copy.

1 Copyright Act 56, sec 6(4)

Presentation of statements

6305 The Department should ensure that

1. written statements are signed with an explanation of why they were made unless the reason is self-evident1
2. all evidence that is hard to read, especially records of interviews or phone calls, is typed and signed
3. the original documents are available at the hearing where practicable
4. the advice in DMG Chapter 01 about evidence given in confidence is followed where the evidence refers to imprisonment
5. anonymous letters are not included
6. anonymous witness statements are not routinely included. Generally a witness should not be anonymous unless there are special circumstances requiring anonymity and that would be a matter for the tribunal chairman to decide
7. if redacted documents are included in the papers, an unredacted copy in a sealed envelope should be made available to the tribunal chairman.

1 R(G) 1/63

Overpayments

Warnings and instructions issued to claimants

6306 If an appeal is made against a recoverable overpayment, the evidence should include

1. the warnings and instructions in a printed form
2. a copy of any leaflet sent to the claimant if the advice in that leaflet is relevant.

 If the particular print of a form or leaflet is no longer available, the nearest equivalent should be included. If there have been any changes to the warnings and instructions to the claimant then the decision maker should include an explanation as to the effect, if any, those changes have on the case.

Disclosure not made to administering office

6307 Where

1. the appeal is against a recoverable overpayment decision **and**
2. the ground of appeal is that disclosure was made to another office or part of another office of the Department.

 The decision maker should include evidence of Departmental procedures for links between sections, whether by computer or otherwise, and whether they broke down during the period of the overpayment. For example, where an Income Support claimant is also in receipt of Child Benefit, and only reports the fact that the child has left home to the Child Benefit Office the decision maker should give evidence on the links between Child Benefit Office and the Social Security Office and whether they were effective in the case.

Rehabilitated offenders

6308 It is a criminal offence for anyone whose official duties involve access to official records to disclose information about spent convictions of rehabilitated offenders outside the course of those duties. In this connection the response writer should note that

**1.** evidence referring to a spent conviction should only be included where justice can **only** be done by doing so

**2.** if it is essential to refer to a period when the claimant has been in prison but has not been convicted of an offence, for example on remand, this should be made clear in the response.

Incapacity for work cases

6309 In a case where, following a second or subsequent personal capability assessment, the decision maker determines that the claimant is not incapable of work, the previous personal capability assessment may not have been considered1. However, on appeal the last personal capability assessment should be made available to the tribunal.

1 SS & CS (D&A) Regs (NI), reg 6(2)(g)

Employment and Support Allowance cases

6310 Where, following a second or subsequent limited capability for work/limited capability for work related activity assessment, the decision maker determines that the claimant does not have limited capability for work/limited capability for work related activity, the previous limited capability for work/limited capability for work related activity assessment may not have been considered1. However on appeal the last limited capability for work/limited capability for work related activity assessment should be made available to the Tribunal.

1 SS & CS (D&A) Regs (NI), reg 6(2)(q)

Exchange of medical reports

6311 When a claimant disputes or appeals a decision and argues that a medical report produced for another benefit is more favourable to them, the decision maker should, if possible, obtain a copy of the other report and take it into account when reconsidering the decision. The decision may need to be revised or superseded in the light of the other report. See DMG Chapters 03 and 04 for guidance on revision and supersession.

6312 The decision maker may also use a report produced for another benefit as evidence, for example where it is sent by another part of the Department.

6313 If an appeal proceeds, include a copy of the other report in the appeal documents and refer to it in the appeal response.

6314 The decision maker should also ensure that the tribunal is made aware of any decision making and appeals process which may have followed the production of the report. For example, where

 **1.** a report is produced for the purposes of the personal capability assessment **and**

 **2.** the Incapacity Benefit decision maker decides that an award of Incapacity Benefit or credits should be superseded and terminated **and**

 **3.** the claimant appeals the Incapacity Benefit decision **and**

 **4.** the report is used as evidence when deciding a claim for Disability Living Allowance

the tribunal should be informed about this, and of the result of the appeal, including where this is known after the response is sent to the Appeals Service.

 6315 – 6319

Witnesses

6320 Any person with a right to be present and heard (see DMG 6395) at an oral hearing has the right to call witnesses and put questions directly to another person called as a witness.

6321 A legally qualified panel member or tribunal may issue a summons to any person in Northern Ireland requiring them to attend a tribunal hearing as a witness in order to answer questions or produce evidence1. Although there is no penalty for failure to attend, ignoring a summons is likely to result in the legally qualified panel member viewing this in an unfavourable light.

1 SS & CS (D&A) Regs (NI), reg 43

 6322

No power to compel attendance

6323 The following general points apply to the attendance of witnesses

1. a tribunal cannot compel a person to attend a hearing as a witness though the tribunal can arrange through the Crown Office for a writ of subpoena if necessary
2. a appellant does not have the right to demand the presence of an officer whose evidence is unfavourable to him or her1
3. if a appellant wants to question a witness not present at the hearing to resolve a conflict in evidence, the presenting officer should not object to a request for an adjournment to allow that witness to attend2.

1 R(SB) 1/81; 2 R(SB) 10/86

6324 If it is likely that the evidence obtained by a visiting officer, special investigator or other officer will be challenged, the Agency should arrange for that officer to attend. Witnesses can give direct evidence and give the appellant (or their representative) an opportunity to question that evidence1.

1 R(SB) 10/86

Attendance of employers

6325 The Agencies should **not** normally ask an **employer** to attend as a witness or send a representative except

1. where there is a material conflict between the employer’s written evidence and that of the appellant **or**
2. where the employer could otherwise make a material contribution to the tribunal’s consideration of the case **or**
3. in Jobseeker’s Allowance misconduct cases if appropriate (see DMG 6328).

6326 Where a witness is required, the witness should have first-hand knowledge of the relevant facts. For example if the evidence of overtime disclosed on wages records is to be questioned, the witness should be the person who made up the wage records, not the office manager who was not personally involved.

6327 In Industrial Injuries cases where the question before the tribunal is whether

1. there was an industrial accident **or**
2. an employed earner’s employment was a prescribed occupation

 the decision maker should always consider whether a witness is required. In these cases it is important that the person attending should as far as possible have first-hand knowledge of the facts.

Employer’s attendance in Jobseeker’s Allowance misconduct cases

6328 In some Jobseeker’s Allowance misconduct cases, the employer or their representative should be invited to attend. In some cases it is essential to have a witness from the employer who has first-hand knowledge of the matters being considered. For example, where a claimant was dismissed for using abusive language or for refusing to obey an order, the employer, or where the employer does not have first hand knowledge of the incident, the person who was actually involved in the incident should be asked to attend.

 6329

Writing the response to the tribunal

6330 The main purpose of the written response is to provide the tribunal and the other parties with a comprehensive explanation of the reasons for the decision maker’s decision. It should always contain

1. the appellant’s personal details
2. details of the decision appealed to the tribunal
3. the appellant’s letter of appeal
4. a summary of the relevant facts of the case
5. relevant law and case law
6. relevant evidence.

6331 The response should

1. focus on the circumstances that existed at the time that the appealed decision was made **and**
2. deal solely with the issues raised by the appeal.

6332 The response writer should adopt the role of friend of the court1. This means that the response should

1. give proper emphasis to points in the appellant’s favour **and**
2. deal with any unresolved points put forward by the appellant or the respondent. Account should be taken of these even if they are, in the response writer’s opinion, only vaguely relevant to the question at issue.

1 R(I) 4/65, Appendix

6333 **[See DMG Memo 1/112]** Along with the appeal response, the decision maker must also provide

**1.** a copy of any written record of the decision and subsequent mandatory reconsideration and any statement of reasons for those decisions **and**

**2.** copies of all other relevant documents that the Department holds.

6334 Unless the Tribunal has made an order prohibiting the disclosure of certain documents (see DMG 6286 et seq), the decision maker must provide a copy of the appeal response and any other papers to each other party to the appeal. If the party has a representative then they must be provided with a copy of any papers and therefore there is no need to provide them to the party. If they wish, the appellant can then make a written submission or supply other documents in reply to the decision maker’s appeal response.

Recommendation to the tribunal

6335 In order to assist the tribunal to take the most appropriate course of action, the response to the tribunal should indicate whether, if the appeal succeeds on the issue raised, there are other issues which require determination. If so, the response should also state whether the Department considers that the tribunal should deal with them, or whether they should decide the issue under appeal and refer the case to the decision maker for a final outcome decision to be made.

Outcome decision required

6336 The following examples are where the response writer may wish to request that the tribunal give an outcome decision.

 **Note:** If the tribunal does not accept the recommendation, the decision maker must comply with the tribunal’s directions.

 **Example 1**

 The decision maker decides that a claim for Income Support is disallowed because the claimant has no right to reside in the UK. The claim form has given sufficient information to decide all other conditions of entitlement. The response requests the tribunal to give an outcome decision on entitlement if the appeal on the issue of the right to reside is allowed.

 **Example 2**

 The decision maker disallows a claim for Industrial Injuries Disablement Benefit on the grounds that the claimant is not suffering from a prescribed disease. The response requests the tribunal to assess the degree of disablement if the appeal on the issue of diagnosis is allowed.

 **Example 3**

 The decision maker disallows a Disability Living Allowance claim because the claimant failed to attend a medical examination without good cause. The response asks the tribunal to consider whether the claimant satisfies the conditions for an award of Disability Living Allowance if they find that there was good cause.

 **Example 4**

 The decision maker disallows a claim for Carer’s Allowance because the claimant is in gainful employment with earnings above the National Insurance lower earnings limit. The decision maker is satisfied that all other conditions of entitlement are satisfied. The response asks the tribunal to give an outcome decision on entitlement if the appeal on the issue of earnings is allowed.

 **Example 5**

 The decision maker disallows Employment and Support Allowance following a limited capability for work determination. The decision maker’s response includes a recommendation that if the tribunal decide that the claimant has limited capability for work they should go on to decide whether or not they have limited capability for work related activity.

Outcome decision not required

6337 The following examples are where the response writer may wish to request that the tribunal refers the case for the decision maker to give an outcome decision.

 **Example 1**

 The decision maker disallows a claim for Industrial Injuries Disablement Benefit on the grounds that the claimant was not in a prescribed occupation. The response requests the tribunal to remit the claim to the decision maker to deal with the diagnosis and disablement questions if the appeal on the prescribed occupation issue is allowed.

 **Example 2**

 The decision maker disallows a claim for income-based Jobseeker’s Allowance on the ground that the claimant has excess capital. There is no entitlement to contribution-based Jobseeker’s Allowance. The claim form indicates that the claimant’s partner may be in remunerative work which requires further investigation. The response requests the tribunal to refer the claim to the decision maker to make a decision on entitlement if the appeal on the excess capital issue is allowed.

 **Example 3**

 The decision maker disallows a claim for Carer’s Allowance on the grounds that the claimant has not satisfied the prescribed conditions as to residence and presence in Northern Ireland. The claim form indicates that the claimant may also be in full-time education. The response request the tribunal to refer the claim to the decision maker to make a decision on entitlement if the appeal on residence and presence is allowed.

Completion of appeal responses

6338 Appeal responses are made in a standard format depending on the focus of the response. For general advice on the contents of responses, see DMG 6330 et seq. Detailed guidance on the completion of appeal responses can be found in the Code of Appeal Procedures.

Personal details

6339 The response should contain

1. the appellant’s name and national insurance number
2. their address
3. benefit in payment
4. the date the decision appealed was made
5. the date the decision was notified to the appellant (see DMG 6065 - 6066)
6. the date the mandatory reconsideration was undertaken (for decisions notified on or after 23.5.16)
7. the date the mandatory reconsideration notice was sent to the claimant (for decisions notified on or after 23.5.16).

 Any further information is provided at the discretion of the Department.

The decision

6340 The exact wording of the decision as notified to the claimant should be included. The response writer should not paraphrase or make corrections to the decision.

 Decision makers should ensure that the outcome is recorded, and not the determination which is the issue under appeal.

Claimant's letter of appeal (where decision notified before 23.5.16)

6341 Where the appellant’s letter is legible, a copy is attached to the response. If not, the wording of the appeal should be entered exactly as written except for the omission of phrases such as “Dear Sir” and “Yours faithfully”.

Summary of facts

6342 The summary should

1. be a plain statement of facts in a simple narrative form
2. contain only those facts relevant to the case
3. exclude opinions or assumptions not supported by the evidence.

6343 The facts of the case should also include an explanation of the reasons for the decision and the reconsideration/mandatory reconsideration process as appropriate. The explanation of the decision should cover the outcome and how the issues under appeal were decided. The reconsideration process should include details of information supplied by the claimant and its consideration.

6344 Where the facts refer to a particular document, an appropriate cross-reference to the tab number should be made.

Law and case law

6345 The response should list

1. the sections of Acts
2. the articles of Orders
3. the numbers of Regulations
4. any European legislation, for example Regulations and Directives
5. relevant case law

 used to make the decision about the issues under appeal.

Commissioners’ decisions

6346 Decisions of the Northern Ireland Commissioner which deal with the issue under appeal are binding on tribunals in Northern Ireland. Decisions of the Great Britain Commissioner Upper Tribunal may be persuasive but are not binding on the decision making authorities in Northern Ireland1. However, where the relevant statutory provisions are identical, the same interpretation should be applied by the judicial authorities throughout the UK2.

 **Note:** See Annex K (Neutral citation) for details of how reported and unreported decisions are now numbered.

1 R(S) 5/85; 2 R(SB) 1/90

Use of unreported Commissioners’ decisions

6347 The response writer should note the following points on unreported Commissioners' decisions

1. response writers should only rely on Northern Ireland unreported decisions as authority or refer them in responses when there is no Northern Ireland reported decision covering the issue involved
2. response writers should not normally rely on unreported Great Britain Commissioners’ decisions as authority or refer to them in responses; this is because such decisions are only persuasive and not binding in Northern Ireland. GB decisions should only be used where there is no Northern Ireland equivalent and Decision Making Services agree with the underlying principle of the decision
3. the response writer must take account of an unreported decision if a claimant refers to it
4. copies of Northern Ireland unreported decisions are available from the Northern Ireland Digest of Case law. Copies of GB Upper Tribunal unreported decisions are available from Decision Making Services
5. if the facts are clearly distinguishable so as to make the legal principles in the unreported case inapplicable, the response writer should say so in the response
6. reported decisions which clearly cover the point at issue should be included because they take precedence over unreported decisions.

6348 Where

1. the claimant cites an unreported decision after the response is sent to the Appeals Service **and**
2. there is insufficient time to prepare a supplementary response

 the presenting officer should cover the matter in the oral presentation to the tribunal, or request an adjournment.

 6349

Relevant evidence

6350 The response should contain the relevant evidence that was available to the decision maker when the decision was made. All the relevant evidence before the decision maker should be presented to the tribunal. See DMG 6286 et seq and DMG Chapter 01 for further guidance on evidence.

6351 The relevant evidence should be listed on the schedule, with the documents themselves numbered by page or cross-reference.

 6352 – 6359

Tribunal procedures

6360 A tribunal’s procedure is decided by the sole member or chairman within a framework laid down in regulations1. The presenting officer should be aware of procedures. Commissioners’ decisions on tribunal procedures are summarised in Neligan2. Failure to observe proper procedures or established rights may leave the tribunal’s decision open to challenge on grounds of natural justice (see DMG 6019 - 6021).

1 SS & CS (D&A) Regs (NI), reg 38(1);
2 Neligan SS Case Law Digest of Commissioners’ Decisions

 6361 – 6364

Composition of the tribunal

6365 The appeal tribunal may consist of one, two or three members drawn by the President of the Appeals Service from the panel of persons appointed by the Lord Chancellor1. At least one member must be legally qualified2, so where a tribunal consists only of one member, that member must be legally qualified.

1 SS (NI) Order 98, art 8(1); 2 art 8(2); SS & CS (D&A) Regs (NI), reg 36(1)

6366 Where the tribunal consists of more than one member, the President nominates one of the members as chairman. This is usually the legally qualified member. Decisions in these tribunals are made by a majority of votes. The chairman has a casting vote1.

1 SS (NI) Order 98, art 8(3)

6367 Tribunals may have more than one member up to a maximum of three with relevant qualifications or experience depending on the issue raised by the appeal1.

1 SS (NI) Order 98, art 8(6); SS & CS (D&A) Regs (NI), reg 36

6368 A tribunal consists of a legally qualified panel member except where the appeal is about any of the issues in DMG 6370 - 6380. Appeals about industrial accident questions1 are heard by a legally qualified panel member.

1 SS & CS (D&A) Regs (NI), reg 36(1) & (2)(b)(i); SS (NI) Order 98, art 29(2)

 6369

Medical issues

6370 The tribunal consists of a legally qualified person and a medically qualified person where

1. the issue or one of the issues raised is about the personal capability assessment1
2. there is a dispute about whether compensation was awarded for the same condition as benefit was paid2.

1 SS & CS (D&A) Regs (NI), reg 36(2)(a)(i); 2 reg 36(2)(a)(ii)

6371 A medical member is not required where the **sole** issue is whether the claimant is subject to the personal capability assessment but can be treated as incapable of work under specific legislation.

1 SS (IfW) (Gen) Regs (NI), reg 10

6372 The tribunal consists of

1. a legally qualified person and 1 or 2 medically qualified persons **or**
2. a legally qualified person, a medically qualified person and an additional person (see DMG 6380).

6373 Where the appeal is about whether the appellant

1. has an industrial disease **or**
2. has a disablement for the purposes of Industrial Injuries Benefit or Severe Disablement Allowance **or**
3. where the appeal is made under section 4 of the Vaccine Damages Payment Act.

 The tribunal will consist of a legally qualified person sitting alone when the sole issue is whether there should be a declaration of an industrial accident under the Order2.

1 SS & CS (D&A) Regs (NI), reg 36(2)(b)(i); 2 reg 36(2)(b)(ii)

Medically qualified panel member

6374 A person cannot act as a medically qualified member of a tribunal if he has at any time

1. advised **or**
2. prepared a report on **or**
3. regularly attended on

any person whose medical condition is relevant to the issue under appeal1.

1 SS & CS (D&A) Regs (NI), reg 36(8)

 6375

Financial issues

6376 The tribunal consists of a legally qualified person and a financially qualified person1 where the President of the Appeals Service considers that the issues are difficult and the appeal involves the interpretation of business accounts.

Interpretation of business accounts is required where a tribunal needs to consider2

1. profit and loss accounts, revenue accounts or balance sheets
2. an income and expenditure account of an enterprise not trading for profit
3. a trust fund account.

 **Please note**: The President of the Appeals Service may determine in some cases that the tribunal consists of only a legally qualified member.

1 SS & CS (D&A) Regs (NI), reg 36(3); 2 reg 36(3)(b)

Medical and financial issues

6377 The tribunal consists of

1. a legally qualified person
2. a medically qualified person
3. a financially qualified person

 where the appeal relates to both a medical issue and in the opinion of the President, a difficult financial issue1.

1 SS & CS (D&A) Regs (NI), reg 36(4)

 6378 – 6379

Disability issues

6380 The tribunal consists of

1. a legally qualified person **and**
2. a medically qualified person **and**
3. a person with experience of disability issues

 when the appeal relates to Attendance Allowance or Disability Living Allowance1.

1 SS & CS (D&A) Regs (NI), reg 36(6)

 6381 – 6384

Additional member

6385 An appeal tribunal may consist of an additional member1. This will happen where the President considers that an additional member

1. will gain further experience by sitting on the tribunal **or**
2. will assist the President in the monitoring of standards of decision making by panel members.

1 SS & CS (D&A) Regs (NI), reg 36(5)

Oral hearings and notice given

6386 When an oral hearing is to be held (see DMG 6275 - 6279), reasonable notice of at least 14 clear days, giving the time and place of the hearing, must be given to each party to the proceedings1. Any party may waive their right to be given notice, when the appeal may proceed in their absence2. Where reasonable notice has not been given to someone to whom it should have been given, the tribunal cannot proceed with the hearing without the consent of that person3.

1 SS & CS (D&A) Regs (NI), reg 49(2); 2 reg 49(3); 3 reg 49(2)

6387 Where reasonable notice has been given and a party to the proceedings does not attend the hearing, the sole member or chairman of the tribunal

1. may proceed with the hearing **or**
2. give directions with a view to

**2.1** the determination of the case **or**

**2.2** the conduct of the hearing

 even if parties to the proceedings have not said whether they are available for the hearing1.

1 SS & CS (D&A) Regs (NI), reg 49(4)

6388 Under the European Convention on Human Rights all hearings are open to the public, except where the law provides otherwise. The legally qualified panel member or chairman may decide to hear all or part of an appeal privately1

1. where it is in the interests of national security, morals, public order or children **or**
2. for the protection of private or family life of one or more parties to the proceedings **or**
3. where a public hearing would prejudice the interest of justice.

1 SS & CS (D&A) Regs (NI), reg 49(6)

6389 Any person may attend a public hearing, subject to the sole member or chairman’s general control of the proceedings1. Public hearings can also be reported in the press.

1 SS & CS (D&A) Regs (NI), reg 49(9)(d)

 6390 – 6394

Right to be heard

6395 The following1 are entitled to be present and be heard at tribunal hearings

1. the appellant
2. the decision maker
3. any other person who in the opinion of the sole member or chairman has an interest in the proceedings, for example a member of the family of the appellant.

1 SS & CS (D&A) Regs (NI), reg 49(7)

6396 Any person entitled to be present and heard at a tribunal may be accompanied or represented by another person1. This applies whether or not the representative has professional qualifications. The representative has the rights and powers to which the person represented is entitled.

1 SS & CS (D&A) Regs (NI), reg 49(8)

6397 Any person entitled to be present and heard at a tribunal hearing may1

1. address the tribunal
2. give evidence
3. call witnesses
4. put questions directly to any other person called as a witness.

1 SS & CS (D&A) Regs (NI), reg 49(11)

6398 Parties entitled to be present at oral hearings, that is

1. the appellant or appointed representative
2. the presenting officer
3. panel members, except the legally qualified panel member

 do not have to be physically present, but can attend by a live television link, but only where the chairman gives permission1. An example of a live television link is a video conference facility.

1 SS & CS (D&A) Regs (NI), reg 49(7) & (13)

Right to be present

6399 The following people1 have the right to be present at any oral hearing, even if it is held in private, although they are not allowed to take part in the proceedings

1. the President of the Appeals Service
2. any person undergoing training as a panel member or clerk to a tribunal
3. any person training or supervising panel members on behalf of the President of the Appeals Service
4. any person monitoring standards of decision making by panel members on behalf of the President of the Appeals Service
5. any other person, with the permission of the sole member, or chairman and everyone entitled to be heard and actually present.

1 SS & CS (D&A) Regs (NI), reg 49(9)

 6400 – 6403

Presence while tribunal consider their decision

6404 Once the tribunal has heard all the oral evidence they will consider the appeal in private. The sole member or chairman asks the appellant, the presenting officer, any people accompanying them, and witnesses and observers to leave1. The presenting officer should leave at the same time as the appellant2.

1 SS & CS (D&A) Regs (NI), reg 49(12); 2 CP 127/49(KL)

Use of experts

6405 Where the tribunal

1. has a question of fact of special difficulty **and**
2. needs additional expertise to determine the question

 one or more other panel members with relevant knowledge or experience may be asked to assist in an expert capacity1. Other experts may also be called as witnesses2.

1 SS (NI) Order 98, art 8(4) & (5); 2 Sch 4, para 5

Reference for medical examination and report

6406 Where an appeal is against a decision on a claim for or entitlement to a relevant benefit in DMG 6407 the sole member or chairman of the tribunal may refer an appellant to a medical practitioner for examination and report where it is considered necessary to determine the appeal1.

1 SS (NI) Order 98, art 20(1) & (2); SS & CS (D&A) Regs (NI), reg 41

6407 The relevant benefits and the prescribed circumstances relating to them are

|  |  |
| --- | --- |
| Relevant benefit | Prescribed circumstance |
| Attendance Allowance1 | **1.** Disability conditions of entitlement**2.** Rate or period payable |
| Disability Living Allowance2 | **1.** Disability conditions of entitlement**2.** Rate or period payable |
| Incapacity Benefit3 | **1.** Incapable of work conditions of entitlement |
| Industrial Injuries Disablement Benefit4 | **1.** Assessment and extent of disablement**2.** Whether claimant suffers loss of physical or mental faculty as a result of industrial accident**3.** Prescribed disease or injury |
| Workmen’s Compensation5 | **1.** Payment |
| Employment and Support Allowance6 | **1.** Limited capability for work or limited capability for work related activity - conditions of entitlement |

1 SS & CS (D&A) Regs (NI), reg 41(a)(iii), (b) & (c); 2 reg 41(a)(i)(ii), (b) & (d);
3 reg 41(dd); 4 reg 41(f); 5 reg 41(i); 6 reg 41(j)

6408 Except where DMG 6410 applies, where there is an oral hearing, the tribunal may not

1. carry out a physical examination of the appellant1 **or**
2. require the appellant to undergo any physical test to determine walking ability for the purposes of the mobility component of Disability Living Allowance2.

1 SS (NI) Order 98, art 20(3)(a); 2 art 20(3)(b)

Disclosure of medical information

6409 Where, at any point in the appeal process, there is medical evidence or evidence which, if disclosed to the person whom it concerns would, in the opinion of the legally qualified panel member, be harmful to that person's health, that information need not be disclosed1. The tribunal may use the evidence when determining the appeal2. See DMG Chapter 01 for details of procedures.

1 SS & CS (D&A) Regs (NI), reg 42(1); 2 reg 42(3)

Medical examination by the tribunal

6410 The medically qualified panel member of the tribunal may carry out a physical examination of the appellant1 where the appeal concerns

**1.** Industrial Injuries Disablement Benefit where there is a question of disablement, or a prescribed disease or injury is involved **or**

**2.** Severe Disablement Allowance where there is a question of disablement.

1 SS & CS (D&A) Regs (NI), reg 52

6411 Clinical findings following examination by the medical member are not evidence from or observations by the tribunal, but part of the judicial process of deciding an appeal.

Directions

6412 Parties to the proceedings must comply with any directions that the sole member or chairman or the tribunal clerk where authorised may give, including where the legally qualified panel member directs that a presenting officer attends an oral hearing. At any stage in the proceedings the chairman may, at their own instance or on request from any party to the proceedings, give directions to ensure that the proceedings are conducted justly, effectively and efficiently1. Failure to comply with a direction may result in the appeal being struck out (see DMG 6230 et seq).

1 SS & CS (D&A) Regs (NI), reg 38

 6413 – 6417

The tribunal hearing

Attendance of presenting officer at the hearing

6418 Where there is an oral hearing any person, including the decision maker, may be represented by another person at the tribunal. The decision maker who made the decision under appeal can attend the hearing and present the case personally. However, the decision maker is usually represented by the presenting officer. The presenting officer as the decision maker’s representative has all the same rights and powers as the decision maker who gave the decision1.

1 SS & CS (D&A) Regs (NI), reg 49(8)

6419 Decisions on attendance of the presenting officer at oral hearings are made by the Department. But see DMG 6412 where a legally qualified panel member directs that a presenting officer attends an oral hearing.

Function of a tribunal

6420 The tribunal’s function is inquisitorial not adversarial1. It is not a matter of the decision maker versus the appellant. The tribunal should make a full investigation into the matter under appeal and not just rely on evidence presented to them by the parties2.

1 R(SB) 2/83(T); 2 R(SB) 12/85

6421 The tribunal's jurisdiction on appeal is to make any decision the decision maker could have made, whether on a claim or an application for revision or supersession. However, a tribunal is not required to substitute an outcome decision for that under appeal. The power enabling them to deal only with the issues raised by the appeal1 does not have the effect that they have to make a decision on every issue if there is a more appropriate way of dealing with those issues.

1 SS (NI) Order 98, art 13(8)(a); R(IS) 6/07

Options open to the tribunal

6422 The tribunal has the power to

**1.** dismiss the appeal **or**

**2.** allow the appeal on the issue **and**

**2.1** substitute an outcome decision **or**

**2.2** substitute an outcome decision subject to matters of calculation referred to the decision maker **or**

**2.3** refer the case back to the decision maker to make an outcome decision **or**

**3.** adjourn to enable further information to be obtained before making a decision as in **1.** or **2.** above.

6423 When deciding which option in DMG 6422 **2.** or **3.** above applies, the tribunal will take into account

**1.** the difficulty of outstanding issues

**2.** the likelihood of a further appeal

**3.** whether the Department is better placed

**3.1** to decide the issue

**3.2** to get further information

**4.** the wishes of the parties.

6424 The tribunal should bear in mind that an appeal against a tribunal decision cannot be made on a question of fact.

Tribunal's power to substitute decisions

6425 The appeal tribunal has the power to substitute a decision for that of the decision maker, in order to correct defects or change the grounds for revision or supersession where appropriate. It can also substitute a revision for a supersession, and vice versa, within limited circumstances (see DMG 6422 **2.1** and **2.2**). Generally this is where a ground is required for revision, which overlaps with a ground required for supersession, ie in cases of ignorance of or mistake as to some material fact, and error of law or official error1. See DMG 6515 where a tribunal decision is incomplete.

1 R(IB) 2/04

 **Example 1**

 The decision maker superseded and terminated an award of Incapacity Benefit on the ground of a relevant change of circumstances, that after the original award was made the claimant had started work which was not exempt. The tribunal finds that the claimant was working at the date of the original decision, and had not declared this fact to the Department. A determination about working is not an incapacity determination for the purposes of revision and supersession1. The tribunal substitutes a revised decision for the supersession decision.

1 SS (IfW) (Gen) Regs (NI), regs 16 & 17; SS & CS (D&A) Regs (NI), regs 3(5)(b) & 7(a)(i)

 **Example 2**

 The decision maker revised a decision awarding Disability Living Allowance for ignorance of a material fact, determining that the claimant knew the fact and could reasonably be expected to know that it was relevant to the decision. Entitlement was removed from the date of claim. The tribunal finds that the claimant did not and could not reasonably be expected to know the fact. The tribunal substitutes a supersession decision for the revised decision.

Tribunal's power to correct decisions

6426 Where a tribunal upholds the outcome of a decision which is otherwise defective, they only need correct it if

1. it is wrong in some way, eg relying on an incorrect ground for supersession **or**
2. there is likely to be some practical benefit to the appellant or the decision making process in the future1.

1 R(IB) 2/04

6427 Exceptionally, the tribunal may decide that the decision is so fundamentally flawed that it cannot be corrected. In such cases the decision is invalid and the appeal should be dismissed on the grounds that no proper decision has been made. The decision maker should make the decision again ensuring that the flaws are not repeated1.

1 R(IS) 13/05

 **Example**

 A claimant is in receipt of Income Support as a lone parent. Following an investigation, the decision maker makes a determination that she is living together as husband and wife with her partner. No findings are made about whether they are entitled to Income Support as a couple, nor when they began to live together. The award of benefit is ended. The determination is notified with appeal rights. On appeal, the tribunal decide that they have no jurisdiction to hear the appeal as no valid decision has been made, nor is it clear whether the awarding decision should have been revised or superseded.

Tribunal's power to make less favourable decisions

6428 An appeal tribunal has the power to make a decision which is less favourable than that made by the decision maker. Alternatively, they could exercise their discretion and leave it to the Department to consider whether to make that decision. However, if a tribunal substitutes a decision on supersession which is less favourable than that made by the decision maker following an application by the appellant, the tribunal's decision is regarded as made on the Department's own initiative. It will take effect from

1. the date the claimant could reasonably be expected to report the change in disability or incapacity cases1 **or**
2. the date of change2 **or**
3. the date of the decision maker's decision under appeal if none of the exceptions applies3. See DMG Chapter 03 for further guidance.

1 SS & CS (D&A) Regs (NI), reg 7(2)(c)(ii); 2 reg 7(2)(c)(iii); 3 SS (NI) Order 98, art 11(5); R(IB) 2/04

Responsibility of the appellant

6429 Appellants should state why they wish to appeal to a tribunal. However as appellants, in general, are not familiar with the law, tribunals should consider the appeal without insisting that the appellant points to the precise legal provision under which the appeal is made.

Presenting officer’s role at the hearing

6430 The role of the presenting officer is to present the Department’s case and support the Tribunal to make the right decision based on the conditions set out in legislation. The presenting officer should not

1. put questions to any of the other parties or a witness in a hostile manner
2. think in terms of “winning” the case. The objective should be to assist the tribunal to assess the facts, relevant law and case law relating to the case.

 This is done by highlighting the questions to be decided and by clarity in the presentation, evidence, argument and advice to the tribunal. The presenting officer’s functions before the tribunal are to

**1.** Give a summary of the Department’s case as set out in the appeal response.

**2.** Assist the tribunal with oral submissions on the law.

**3.** Question the appellant’s case.

**4.** Draw the tribunal’s attention to new points in the appellant’s favour, in particular where the appellant is unrepresented.

**5.** Assist the tribunal to focus on the questions to be considered.

 The presenting officer may also be called upon to

**6.** Describe Departmental procedures where these have a bearing on the appeal.

**7.** Provide information about earlier claims/decisions.

**8.** Deal with new points as directed (obtaining advice from Decision Making Services during an adjournment if necessary).

 Detailed guidance on the role of the presenting officer can be found in the Code of Appeal Procedures Appendix 7.

Conduct of the presenting officer

6431 The presenting officer should not

1. discuss the case with the tribunal when a party to the appeal is absent unless directed to do so because the appeal is to proceed in their absence
2. address the tribunal about the case before the arrival of any of the other parties1
3. enter the tribunal room before or leave after any of the other parties2
4. discuss the merits of individual cases with the other parties or their representatives either before or after the hearing.

 Failure to observe these simple rules may result in an application being made to set aside the decision of the tribunal on the grounds of a breach of the rules of natural justice.

1 CP 127/49(KL); 2 R(U) 44/52

Order of proceedings

6432 Tribunals do not have the strict rules and atmosphere of formal legal proceedings. The sole member or the chairman decides whether the appellant or the presenting officer is invited to speak first and how their presentation should be made.

Presenting the appeal

6433 The presenting officer should not read out the response word for word unless asked to do so, but should

1. state, as fully as possible, the grounds for the appellant’s appeal
2. describe the appellant’s circumstances at the date of the decision and try to ensure that all the relevant facts are made known, particularly where the appellant does not attend the hearing
3. explain the legal basis for the decision
4. assist the tribunal to focus their attention on the issues raised by the appeal.

What standard of proof is required?

6434 A tribunal should not require the same high standard of proof as is required in criminal cases1. The standard of proof required is that of a balance of probabilities. The appellant’s evidence should be accepted unless it is self-contradictory or inherently improbable2.

 **Note:** Where the revision or supersession was requested by the Agency, the burden of proof is with the decision maker.

1 R(I) 32/61; 2 R(I) 2/51

What evidence is admissible?

6435 The tribunal may consider any evidence, direct or circumstantial, first-hand or second-hand (hearsay), directly or indirectly relevant to the question for determination. But note that

1. a bald assertion of fact, unsupported by personal knowledge is not evidence. This applies to an assertion by a presenting officer
2. presenting officers can only give evidence if they have some personal knowledge of the facts which they obtained when acting for the Department, for example by interviewing the appellant. The presenting officer would then assume the role of a witness1 and would be open to questioning
3. an assertion of fact by an appellant’s representative is not evidence unless backed up by a witness with personal knowledge. Often that witness is the appellant in which case the presenting officer should get confirmation of the assertion. The appellant or the respondent then becomes a witness and is open to questioning2.

1 R(SB) 10/86; 2 R(I) 36/61

Questioning witnesses

6436 A presenting officer should not question any witness in a hostile or disbelieving manner. The presenting officer should be calm, polite and unruffled. Courtesy is proper before the tribunal; any other approach is unlikely to be effective in obtaining helpful answers from the witness.

6437 The presenting officer should never accuse a witness of giving untruthful evidence but should suggest that

1. the witness is mistaken
2. the tribunal might find it difficult to reconcile the witness’s statement with the other known facts or statements.

6438 Where

1. the tribunal does not give the presenting officer the chance to question a witness **or**
2. the presenting officer does not accept the oral evidence

 the presenting officer should ask the tribunal for permission to put questions. If the evidence obtained differs substantially, the tribunal may pursue the matter themselves. If they do not, the presenting officer may need to question the witness more closely to resolve discrepancies and test the truth of the evidence.

6439 If, despite a request to question a witness, the presenting officer is not allowed to exercise that right, the presenting officer should not pursue it further at the hearing but should ask the tribunal to include in the record of proceedings a note of the request and of the refusal.

Recall of witnesses

6440 A witness may be recalled to give further evidence by

1. the presenting officer or any other party
2. the tribunal even after the parties have retired and the tribunal has begun its deliberations.

 Where the tribunal has recalled a witness, all parties should return to the tribunal before the further evidence is heard.

Introduction of new material

By the presenting officer

6441 The presenting officer should avoid raising new points or introducing new evidence not included in a written response. If the presenting officer is forced to do so at the hearing, they should

1. explain the reason and suggest an adjournment for the other parties to have an opportunity to consider the matter
2. seek an adjournment if any of the other parties do not attend. This will allow a further written response to be made and give the other parties an opportunity to respond to the fresh points.

By the appellant

6442 The presenting officer should not object to new evidence or points being introduced by the other parties. Documents submitted as evidence by an appellant or employer or other witnesses for the first time at a hearing should be included in the tribunal record or copied. The presenting officer should ask the tribunal, if the appellant or the respondent does not attend, to record the contents of the document and if possible have it copied before returning it to the person who produced it.

6443 If the new evidence raises issues of fact or law not reasonably foreseeable at the time the response was prepared, the presenting officer should establish details of the new material and its precise legal effect. The presenting officer should then

1. decide whether a response can be made at the hearing on the basis of the new material or legal position arising **or**
2. seek an adjournment to give the presenting officer the opportunity to deal with the fresh material1.

1 R(F) 1/72

6444 If the material produced concerns a matter that is outside the jurisdiction of the tribunal, the presenting officer should submit that the tribunal should disregard it.

 6445

Unreported decisions produced at the hearing

6446 If an unreported decision is produced without warning at the hearing, the presenting officer and tribunal should read and consider it. See DMG 6347 - 6348 for guidance on the use of unreported decisions. If the appellant or a tribunal member merely quotes an unreported decision not available to the tribunal, an adjournment should be sought so that a copy can be obtained and made available to all parties.

Summing up

6447 In the summing up the presenting officer should

1. remind the tribunal of the questions for determination
2. readily suggest a change in the ground of the original decision if further evidence or argument has been put forward justifying that approach
3. submit the appellant’s appeal should succeed if the new evidence or argument justifies this.

Adjournments - presenting officer at the hearing

6448 The tribunal decides whether to adjourn a hearing1. The presenting officer or the appellant can request an adjournment.

1 SS & CS (D&A) Regs (NI), reg 51(4)

6449 Since a presenting officer is expected to prepare in advance the ground for an effective hearing, the tribunal is usually slow to grant an adjournment. There are a number of facts it normally takes into account

1. there has to be a new relevant issue arising in the course of the hearing (or exceptionally just before it) which could not reasonably have been foreseen and needs further enquiries or consideration
2. whether the adjournment would cause any of the other parties to the proceedings hardship or prejudice their case.

6450 A presenting officer might ask initially for a very short adjournment, for example to read an unreported Commissioner’s decision produced by the appellant for the first time at the hearing. This may lead to a request for further adjournment to another date. If the presenting officer’s request for an adjournment is refused the tribunal should be asked to note the request on the record of proceedings.

Action following an adjournment

6451 Following an adjournment, the legally qualified panel member must direct on the record of the adjournment notice the enquiries to be made. The notice should clearly set out all the tribunal’s requests and directions including who should obtain the relevant information.

Reconsideration following an adjournment

6452 Where further evidence is submitted after the hearing is adjourned, it may be sufficient to enable the decision maker to

1. revise1 the decision **or**
2. supersede2 the decision.

1 SS & CS (D&A) Regs (NI), reg 3(4A); 2 reg 6

Decision revised

6453 If the decision is revised in the appellant’s favour, the appeal lapses (see DMG 6160 - 6162).

6454 Where the decision is revised but not to the appellant’s advantage, the appellant and the Appeals Service should be notified of the revised decision. The appeal continues but is treated as though it was against the decision as revised.

Decision superseded

6455 If the decision is superseded, the appellant and the Appeals Service should be notified of the new decision. The appeal against the previous decision continues.

 6456 – 6459

Resumed hearings

6460 A resumed hearing before a single legally qualified panel member can usually be heard by the same person. When a two or three person tribunal has adjourned, it is rarely possible to arrange for the appeal to continue before the same chairman and members. If at the subsequent hearing the tribunal is differently constituted, the proceedings are a complete rehearing of the case.

6461 The following general points apply to resumed hearings

1. all evidence should be heard again and recorded by the sole member or chairman
2. oral evidence need not be given again at the rehearing. Although the matter is considered again the tribunal can accept the recorded evidence of a witness from the original hearing, provided the rules of natural justice are not infringed1
3. the legally qualified panel member or chairman may ask questions based on the record of evidence given at the previous hearing, but it is not sufficient to simply read over the record of the evidence and ask the other parties to confirm that it is correct2
4. all members of the new tribunal should have the opportunity to ask questions about the evidence presented.

1 R(U) 3/88; 2 R(S) 1/87

6462 A further response should be made to the tribunal if

1. the presenting officer or decision maker wishes to comment on further evidence received
2. there are other aspects that the presenting officer or decision maker wishes the tribunal to consider.

 6463 – 6469

Appeal outstanding at appellant’s death

6470 When an appellant dies while an appeal is outstanding, the Department can appoint a person to proceed1 with the appeal. Or the executors may agree to continue with it, in which case the appeal should take its normal course.

Such an appointment will continue even if a grant of probate confirmation or letters of administration to the estate of the deceased appellant have been taken out.

1 SS & CS (D&A) Regs (NI), reg 34

6471 If the Department does not appoint a person to proceed with the appeal and any executors or personal representatives do not wish to proceed, the legally qualified panel member or tribunal chairman should decide how the appeal should be dealt with. The presenting officer should suggest the following

1. where there are executors to the deceased’s estate, the appeal should be determined even though the executors have refused to proceed with it1
2. where there are no executors the appeal should be abated2. The appeal is then suspended but can be revived3.

1 R(P) 2/62; 2 R(SB) 25/84; 3 R(I) 2/83

 6472 – 6479

Report of any exceptional incidents

6480 When the hearing is completed, the presenting officer should make a note of any exceptional incidents, for example where the tribunal does not allow the presenting officer to question a witness. The presenting officer should draw the attention of the decision maker who prepared the response to any difficulties met at the hearing. This may help the decision maker to decide whether an appeal to the Commissioner is appropriate when the tribunal decision is received.

 6481 – 6499

The tribunal’s decision

Decision notice

6500 The legally qualified panel member or chairman records the decision of an Appeal Tribunal, and signs it. This decision notice is in a format approved by the President. A copy of the decision notice is sent or given to every party to the proceedings1. The tribunal’s decision notice should explicitly record what it has decided, and make it clear whether

**1.** an outcome decision has been made (including those subject to calculation by the decision maker) **or**

**2.** the final decision on entitlement has been remitted to the decision maker2.

1 SS & CS (D&A) Regs (NI), reg 53(1) & (2); 2 R(IS) 6/07

6501 The decision notice may be sent by electronic mail. When calculating time limits for

1. requesting a statement of reasons
2. making a late application for a statement of reasons
3. requesting the record of proceedings
4. making an application for the tribunal’s decision to be set aside for procedural reasons, including a late application

 a decision notice is sent when it is properly addressed and sent by electronic mail1.

1 SS & CS (D&A) Regs (NI), reg 57B

Statement of reasons

6502 A party to the proceedings may request a statement of the reasons for the decision. The request must be made in writing within one month of the date the decision notice was given or sent1. The decision maker should not request a statement unless the case is being considered as a potential appeal to the Commissioner.

1 SS & CS (D&A) Regs (NI), reg 53(4)

6503 In calculating this one month period no account is to be taken of time that elapses before the day on which notice was given of

1. a correction of a decision notice **or**
2. a refusal to set aside on procedural grounds, except where a late application is not admitted1.

1 SS & CS (D&A) Regs (NI), reg 53(4A)

Late application for statement of reasons

6504 A legally qualified panel member may decide to extend the time for an application to be made where

1. a request for an extension is made in writing and explains why the application is late **and**
2. it is in the interest of justice to grant the application (see DMG 6075 et seq).

 No application can be made more than three months after the date the decision notice was issued (but see DMG 6505). An application for an extension that has been refused cannot be renewed1.

1 SS & CS (D&A) Regs (NI), reg 54

6505 In calculating this 3 month period no account is to be taken of time that elapses before the day on which notice was given of

1. a correction of a decision notice **or**
2. a decision to refuse to set aside on procedural grounds, except where a late application is not admitted1.

1 SS & CS (D&A) Regs (NI), reg 53(4A) & 54(1)

6506 Decision makers should not obtain statements of reasons unless an appeal to the Commissioner is being considered.

6507 If a decision is not unanimous, the decision notice records that fact. The statement of reasons, if requested, explains the reasons for the dissent1.

1 SS & CS (D&A) Regs (NI), reg 53(5)

Record of proceedings

6508 The legally qualified member or chairman is required to make a record of the hearing sufficient to indicate the evidence taken. It can be in whatever form the chairman may direct, for example on audio tape1.

1 SS & CS (D&A) Regs (NI), reg 55(1)

6509 The clerk to the tribunal must keep a copy of

1. the record of proceedings
2. the decision notice
3. any statement of reasons for the tribunal’s decision

 for a period as in DMG 65101.

1 SS & CS (D&A) Regs (NI), reg 55(2)

6510 The period is1

1. six months from the date of

**1.1** the tribunal’s decision

**1.2** any statement of reasons for the tribunal’s decision

**1.3** any correction of the decision notice

**1.4** a refusal to set aside the decision for procedural reasons

**1.5** a determination of an application for leave to appeal to the Commissioner **or**

1. until the date when the documents in DMG 6509 are sent to the Office of the Social Security and Child Support Commissioners in connection with an appeal or an application for leave to appeal if that is within the six months in **1.**.

1 SS & CS (D&A) Regs (NI), reg 55(3)

6511 Any party to the proceedings may apply in writing for a copy of the record of proceedings within the time limit in DMG 6510, and a copy must be sent to the party1.

1 SS & CS (D&A) Regs (NI), reg 55(4)

 6512 – 6514

Consideration of the tribunal decision

Decision incomplete

6515 Where the tribunal decision is incomplete the decision maker should refer the case back to the tribunal immediately for a decision to be made. The decision maker should explain that all matters raised by the appeal have not been decided1. However the decision maker should be aware that tribunal does have the power to just decide on certain issues (see DMG 6422 **1.**, **2.1** and **2.2**).

1 R(S) 9/81

Case remitted to decision maker

6516 If the case is remitted to the decision maker, a new outcome decision should be made incorporating the tribunal’s decision. The tribunal’s decision is binding on the decision maker, subject to supersession or appeal. (See DMG Chapter 01 for guidance on finality of decisions and Chapter 04 for guidance on supersession.)

6517 The decision maker’s new decision will itself have a right of appeal. However, the claimant cannot use this appeal to re-open the issue decided by the tribunal, unless there are grounds to supersede.

 **Example**

 A claim for Income Support is disallowed on the grounds that the claimant has capital in excess of £16,000. On appeal, the tribunal decides that the capital is £9,500, and remits the claim to the decision maker. The decision maker makes a further decision on the claim taking into account the amount of capital as decided by the tribunal, which results in a further disallowance as income exceeds the applicable amount. On a further appeal, the claimant cannot raise the issue of the amount of capital as decided by the tribunal, unless they can show that the tribunal was ignorant of material facts.

Liberty to apply

6518 Where the tribunal allows the appeal, but remits calculation to the decision maker, any dispute about further calculation by the decision maker should be referred back to the same tribunal. This is known as “liberty to apply”1. See the Code of Appeals Procedure for further information. There is no further right of appeal against the decision maker’s calculation, but the tribunal’s decision about the calculation can be appealed to the Commissioner.

1 R(IS) 2/08

 6519

Where a party thinks the decision is wrong

6520 There are a number of options available to the appellant and decision maker if they think the tribunal’s decision is wrong. The decision notice issued by the tribunal clerk includes information to the appellant and the decision maker to encourage them to choose the correct option. The different options open to the appellant and the decision maker are set out below.

Accidental error

6521 The clerk to the tribunal or the legally qualified panel member may correct accidental errors in the tribunal’s decision such as a “slip of pen” at any time1. If the error is corrected, a copy of the corrected decision is sent to all parties to the appeal2. The time limit for applying for a full statement or a set aside runs from the date of issue of the corrected decision3.

1 SS & CS (D&A) Regs (NI), reg 56(1); 2 reg 56(2); 3 reg 53(4A)

6522 There is no right of appeal against a correction or a refusal to make a correction1.

1 SS & CS (D&A) Regs (NI), reg 57A(2)

 6523 – 6529

Setting aside - procedural grounds

6530 The appellant or decision maker can apply for a tribunal decision to be set aside where

1. a document relating to the appeal was not sent to or received at an appropriate time by

**1.1** a party to the proceedings **or**

**1.2** the party’s representative **or**

**1.3** the tribunal **or**

1. a party to the proceedings had requested an oral hearing but was not present during the hearing1.

1 SS (NI) Order 98, art 28; SS & CS (D&A) Regs (NI), reg 57

6531 Exceptionally a legally qualified panel member may allow a set aside application where the party to the proceedings was not present at the hearing and had not indicated that they wished to be present. In these cases the legally qualified panel member must be satisfied that the interests of justice obviously support acceptance of the set aside application1.

1 SS & CS (D&A) Regs (NI), reg 57(2)

6532 Applications for set aside on procedural grounds must be made in the form of a written application and received by the Appeals Service within one month of the date the decision notice was issued. Late applications may be accepted by a legally qualified panel member who will apply the same considerations that apply to late appeals1 (see DMG 6075 et seq).

1 SS & CS (D&A) Regs (NI), reg 57(3) & (6) - (11)

6533 Once an application for an extension of time has been refused it may not be renewed1.

1 SS & CS (D&A) Regs (NI), reg 57(12)

6534 The tribunal clerk sends a copy of any request for a set aside to all other parties to an appeal before the set aside request is decided. The other parties are given a reasonable time to make any representations1.

1 SS & CS (D&A) Regs (NI), reg 57(4)

6535 A copy of the legally qualified panel member’s determination on the set aside request is sent to all parties to the appeal1. If the request is successful the original tribunal’s decision is set aside and referred to another tribunal for a full hearing. The decision maker should reconsider the original decision in the light of any new evidence (see DMG Chapter 03 for guidance on revisions).

1 SS & CS (D&A) Regs (NI), reg 57(5)

6536 There is no right of appeal against a determination of a set aside request1.

1 SS & CS (D&A) Regs (NI), reg 57A(2)

6537 Where the legally qualified panel member refuses to set aside the decision on procedural grounds, the legally qualified panel member may treat the application as a request for a statement of reasons for the tribunal’s decision where it is made within the time limits1. See DMG 6502 - 6503 for further details.

1 SS & CS (D&A) Regs (NI), reg 57(4A)

 6538 – 6549

Decisions that cannot be implemented

6550 There may be instances where it is impossible to implement the decision of the tribunal. In these cases, the decision maker should consider whether the decision can be corrected or set aside by the tribunal.

6551 If

1. the decision cannot be corrected or set aside **or**
2. there has been no factual mistake which gives grounds for supersession

 the only course open to the decision maker is an appeal, with leave, to the Commissioner. See DMG 6557 - 6563 for guidance on potential appeals and time limits.

6552 In some cases the tribunal refers cases back to the decision maker, for example to recalculate a recoverable benefit overpayment. If there is then a dispute between the decision maker and the appellant, the decision maker should put the case before the tribunal again so that they can finally determine the appeal1.

1 R(SB) 11/86

 6553 – 6556

Potential appeals to the Commissioner

6557 An appeal to a Commissioner can be made only on a point of law1, with the leave of the tribunal chairman, or another legally qualified panel member or a Commissioner. The time limits for applying for leave to appeal are

1. to the legally qualified panel member - within one month of the date the written statement of the reasons for the decision was sent to the applicant2
2. to a Commissioner

**2.1** within one month of the date a legally qualified panel member’s decision refusing leave was sent to the applicant3

**2.2** if there are special reasons4 no later than 13 months from the date the tribunal decision was sent **or**

**2.3** the date the statement of the reasons for the decision was issued where the statement was issued separately from the decision.

1 CS (NI) Order 91, art 25(1); SS (NI) Order 98, art 15(1);
2 SS & CS (D&A) Regs (NI), reg 58;
CS Commissioners (Procedure) Regs (NI), reg 10(1), (2);
3 SS Commissioners (Procedure) Regs (NI), reg 9(1), (2);
CS Commissioners (Procedure) Regs (NI), reg 11(1), (2);
4 SS Commissioners (Procedure) Regs (NI), reg 9(3), (4);
CS Commissioners (Procedure) Regs (NI), reg 11(3), (4)

Late applications

6558 If an application is not made within the time limits, an application for an extension of the time can be made to the legally qualified panel member. The appellant can apply to the Commissioner if the legally qualified panel member does not accept the application. Special reasons for the delay in applying should be given. For further guidance see DMG 6645 - 6647.

 6559

6560 Where the decision maker thinks that a tribunal’s decision is wrong on a point of law, the case should be identified as a potential appeal to the Commissioner and sent to Decision Making Services as soon as possible. Before sending the case, the decision maker should obtain the statement of the reasons from the Appeals Service (see DMG 6501). The request must be made within one month of the decision notice being given or sent. See DMG 6501 - 6504 for further guidance.

 **Note:** Where suspension is appropriate, see DMG 6570 et seq.

6561 Applications for leave to appeal on behalf of the Department are made by Decision Making Services. Decision makers, appeals officers and presenting officers should note that only officers of the Department employed at Decision Making Services are authorised to make applications on behalf of the Department. For further guidance see DMG 6600 et seq.

6562 An application for leave to appeal against a tribunal decision that would be supported by the decision maker before the Commissioner cannot be made, even though the decision maker may wish to obtain authority in an area of the law that is open to dispute1.

1 R(I) 68/53(T)

6563 Where the tribunal decision is not in the appellant's favour, but the decision maker believes that the decision is in error of law, the decision maker should consider sending the case to Decision Making Services, who will then decide whether to make an application for leave to appeal in order that

1. the appellant's interests are protected **or**
2. the law on a particular point is established.

 **Note:** This only applies where the error of law is significant. Decision makers should ensure that the appellant does not intend to make an application for leave to appeal.

6564 – 6569

Suspension of payment of benefit

6570 The decision maker can suspend payment of benefit awarded by a tribunal whilst an appeal to the Commissioner is considered1. The suspension is imposed on receipt of the tribunal’s decision notice. The decision maker has one month from receipt of the decision notice to inform the appellant that a statement of the reasons for tribunal’s decision is to be requested, with a view to appealing to the Commissioner. If the appellant is not told within that month the suspension must be lifted.

1 SS (NI) Order 98, art 21; SS & CS (D&A) Regs (NI), reg 16 & 20

6571 The suspension is maintained if, within one month of receiving the statement of reasons, the decision maker informs the appellant that an application for permission to appeal to a Commissioner has been made. The written notice must be

1. issued after the application for permission has been sent to the chairman of the tribunal **and**
2. posted to the appellant within the time limit.

6572 Where such an application is made, the suspension may continue until the application and any consequent appeal are decided.

6573 For further guidance on suspension see DMG Chapter 04.

 6574 – 6584

Appeals remitted by the Commissioner

6585 Where each of the principal parties to appeal expresses the view that a tribunal’s decision is erroneous in point of law, the Commissioner may (but not must) set it aside1 and if it does must either2

**1.** remit the case to another Tribunal with different members to the first with directions for its reconsideration3 **or**

**2.** re-make the decision by making any decision which the Tribunal could make if it were re-making the decision and make any appropriate findings of fact4.

 **Note:** The Commissioner need not set aside a decision, even where there is an error of law, if the error makes no difference to the outcome.

1 SS (NI) Order 98, art 15(7); 2 art 15(8); 3 art 15(7) & (8)(b); 4 art 15(8)(a)

6586 When the Commissioner sets aside the tribunal’s decision, but does not replace it, the effect is to remove the tribunal decision. The only decision remaining is the disputed decision by the decision maker.

6587 The Commissioner’s decision and a copy of all the documents available to the Commissioner is sent to the decision maker via Decision Making Services. The decision may contain directions from the Commissioner to the new tribunal to help them decide the appeal.

6588 A new response is only required if the Department is directed to produce one by a Tribunal or the Commissioner, or on the advice of Decision Making Services.

6589 Whether or not a new response has been requested, the decision maker should inform the tribunal of any events such as a decision on a claim or supersession made since the decision went under appeal.

6590 The proceedings should be by way of a complete rehearing and all the evidence should be taken again (see DMG 6460 - 6462)1.

1 R(S) 1/87

6591 Where the decision maker receives an application to reconsider the disputed decision before the rehearing, the application should be considered as in DMG 6452.

Supersession of tribunal decision

6592 The decision maker can supersede the decision of a tribunal in the same way as a decision of another decision maker, with one important exception1. This is where the decision maker considers that the tribunal’s decision was erroneous in law. In such cases, the decision maker should consider whether an application for leave to appeal to the Commissioner is appropriate (see DMG 6600 et seq). For guidance on supersession see DMG Chapter 04.

1 SS (NI) Order 98, art 11(1)(b)

 6593 – 6599

Appeals to the Commissioners and the Courts

6600 Decision makers should note that all action on these appeals is taken or directed by Decision Making Services. No other officer of the Department is authorised to represent the Department by making or commenting on applications for leave at any stage.

6601 An application for leave to appeal to a Commissioner can only be made on the ground that the decision of the tribunal is erroneous in point of Iaw1.

1 CS (NI) Order 91, art 25; SS (NI) Order 98, art 15

6602 Where Decision Making Services applies for leave to appeal, the Appeals Service

1. sends a copy of the application to other parties to the appeal1
2. gives the other parties one month in which to make representations on the application.

1 SS & CS (D&A) Regs (NI), reg 58(2)

6603 On expiry of the one month time limit, a legally qualified panel member considers whether the decision is wrong in law and should be set aside if it can the decision is set aside and remitted to a new tribunal1. If this is not appropriate, the legally qualified panel member decides whether or not to grant leave to appeal.

1 SS (NI) Order 98, art 14(2)

6604 Where the appellant and Decision Making Services on behalf of the Department apply for leave to appeal the legally qualified panel member shall set the decision aside1 for rehearing without considering whether it is erroneous in law.

1 SS (NI) Order 98, art 14(3)

6605 The tribunal clerk sends a copy of the legally qualified panel member’s decision to each party to the appeal.

 6606 – 6619

Who can appeal to the Commissioner?

6620 An appeal may be made with leave from the decision of a tribunal by

1. the Department1
2. a claimant who claimed relevant social security benefits2
3. any trade union or association that has the right of appeal3 (see DMG 6621)
4. the person from whom an amount is recoverable where a recoverable overpayment is involved4
5. a person whose right to Industrial Injuries benefit is affected by the decision appealed against5
6. a partner required to take part in a work-focused interview6.

1 SS (NI) Order 98, art 15(3)(a); 2 art 15(3)(b); 3 art 15(3)(c); 4 art 15(3)(d);
5 art 15(4); 6 SS & CS (D&A) Regs (NI), reg 58A

6621 A trade union or association has the right of appeal where

1. the claimant is a member at the time of the appeal and was a member immediately before the question arose1
2. the question relates to a deceased person who was a member of the union at the time of death2
3. in Industrial Injuries cases the claimant or for Industrial Death Benefit, the deceased, was a member of the union at the time of the relevant accident3.

1 SS (NI) Order 98, art 15(5)(a); 2 art 15(5)(b); 3 art 15(5)(c)

6622 Any association which exists to promote the interests and welfare of its members has the same right of appeal as a trade union1.

1 SS (NI) Order 98, art 15(6)

 6623 – 6639

Application for leave to appeal to the Commissioner

Application to the tribunal

6640 An application for leave to appeal to the Commissioner should

1. be sent to the clerk within one month of the date the written statement of reasons was sent **and**
2. be in writing and signed by the appellant or authorised representative **and**
3. contain details of the grounds on which it is intended to rely **and**
4. contain sufficient particulars of the decision of the appeal tribunal to enable the decision to be identified **and**
5. if late, contain grounds for lateness1.

1 SS & CS (D&A) Regs (NI), reg 58(1)

6641 Where the statement of reasons has been sent to the parties and

1. the decision notice is corrected **or**
2. an application for set aside on procedural grounds is refused, other than a refusal to admit a late application

 the time limit to DMG 6640 **1.** begins when notice of correction or refusal is sent1.

1 SS & CS (D&A) Regs (NI), reg 58(1A)

6642 If the application for leave is made by the Department, the clerk sends a copy of it to every other party to the proceedings1.

1 SS & CS (D&A) Regs (NI), reg 58(2)

6643 An application made outside the period in DMG 6640 **1.** or 6641, but within one year of the end of those periods, can be considered by a legally qualified panel member if there are special reasons1.

1 SS & CS (D&A) Regs (NI), reg 58(5)

6644 Where the decision was made by a fee paid legally qualified panel member, the application may be determined by a salaried legally qualified panel member1. An application may be determined by another legally qualified panel member if it is impracticable or would cause undue delay for it to be considered by the original legally qualified panel member2.

1 SS & CS (D&A) Regs (NI), reg 58(6)(a); 2 reg 58(6)(b)

Application to the Commissioner

6645 Where an application has been refused by the sole member or the chairman of the tribunal, an application for leave to appeal may be made in writing to the Commissioner1. The application must be made to the Commissioner within 1 month of the refusal being given to the appellant2. The Commissioner may accept the application after that time if there are special reasons3.

1 SS Commissioners (Procedure) Regs (NI), reg 9(1);
2 SS Commissioners (Procedure) Regs (NI), reg 9(2);
3 SS Commissioners (Procedure) Regs (NI), reg 9(3) & (4)

6646 If an appellant fails to apply to the tribunal chairman or sole member within one month, a late application may be made. If the chairman or sole member does not accept that there are special reasons for the delay, the appellant may apply to the Commissioner1.

1 SS & CS (D&A) Regs (NI), reg 58(5);
SS Commissioners (Procedure) Regs (NI), reg 9(3)

6647 Where the decision maker applies to the Commissioner for leave, a copy of the application should be sent to the respondent1. (See Code of Appeal Procedures for guidance on referring potential Commissioner appeals to Decision Making Services.)

1 SS Commissioners (Procedure) Regs (NI), reg 10(3)

 6648 – 6649

Decision of the Commissioner on application for leave

6650 The Commissioner is required to give reasons for refusing leave to appeal1, and will normally give reasons when granting leave.

1 Tribunals & Inquiries (SS Commissioners) Order

6651 There is no right of appeal against a refusal of the Commissioner either to grant leave to appeal to the Commissioner1 or to accept an application made out of time2. The Court of Appeal has no jurisdiction to grant leave to appeal if the Commissioner refuses leave3. The appellant may apply for judicial review (see DMG 6900).

1 R(SB) 12/83; 2 R(S) 8/85; 3 R(SB) 12/83, Appendix

 6652 – 6654

Notice of appeal

6655 Where leave is granted by the Commissioner, the application for leave is deemed to be notice of appeal unless the Commissioner directs otherwise1. In any other case the notice of appeal must be sent to a Commissioner within 1 month from the date when leave to appeal was given to the appellant2. The Commissioner may accept notice of appeal after that time if there are special reasons3.

1 SS Commissioners (Procedure) Regs (NI), reg 11(2);

2 SS Commissioners (Procedure) Regs (NI), reg 13(1);
3 SS Commissioners (Procedure) Regs (NI), reg 13(2)

6656 The notice of appeal should contain

1. the name and address of the appellant **and**
2. the date when notification of leave to appeal was given or sent to the appellant1.

1 SS Commissioners (Procedure) Regs (NI), reg 12

6657 A copy of notice of the appeal is sent to each respondent. A respondent in a social security benefit appeal, who wishes to make written observations on the appeal must do so within one month of being sent a copy of the appeal1.

 Decision Making Services makes observations on an appeal or presents an appeal on behalf of the decision maker.

1 SS Commissioners (Procedure) Regs (NI), reg 18(1) & 16(b)

 6658 – 6659

Tribunal of Commissioners

6660 The Chief Commissioner may arrange for a question of law of special difficulty arising on an

1. application for leave to appeal to the Commissioner **or**
2. appeal to the Commissioner

 to be dealt with by a Tribunal of Commissioners1. If the decision of a Tribunal of Commissioners is not unanimous, the decision of the majority, or the presiding Commissioner where the votes are equally divided, is the decision of the Tribunal2. A Tribunal of Commissioners may consist of two or more Commissioners.

1 SS (NI) Order 98, art 16(7); 2 CSI 23/50(KL); R(I) 3/51; R(I) 12/75

Withdrawal of applications and appeals

6661 A person who has applied to the tribunal chairman, sole member or Commissioner for leave to appeal may withdraw the application any time before it is decided by giving written notice to the clerk to the tribunal or the Commissioner1.

1 SS Commissioners (Procedure) Regs (NI), reg 26(1)

6662 An appeal to a Commissioner can only be withdrawn with the approval of a Commissioner1.

1 SS Commissioners (Procedure) Regs (NI), reg 26(2); R(I) 41/61

 6663

Consideration of decision under appeal

6664 If the decision maker considers the tribunal’s decision, should be superseded1, Decision Making Services should be contacted urgently.

1 SS (NI) Order 98, art 11(1)(b)

 6665 – 6669

Death of an appellant

6670 The death of an appellant does not automatically stop an appeal to the Commissioner. A personal representative or an appointee can pursue an appeal. A personal representative is

1. an executor, where there is a will
2. an administrator, appointed by the Court.

 If there is no personal representative or the Department is unable to appoint a person to proceed with the appeal, the Commissioner decides whether the appeal should be decided or abated. An appeal which is abated may be revived if the Department subsequently appoints someone to act, otherwise the matter is regarded as closed1.

1 R(I) 2/83; R(SB) 25/84

 6671 – 6679

Striking out of proceedings

6680 The Commissioner may strike out an appeal or application. Any party to the proceedings has the opportunity to show why the appeal or application should not be struck out, or may apply later to have the proceedings reinstated1.

1 SS Commissioners (Procedure) Regs (NI), reg 5(3-5)

 6681 – 6684

The Commissioner’s decision

6685 Commissioners may form their own views on the issues arising from appeals and are not restricted to what is said by the parties to the proceedings1.

1 R v Deputy II Commissioner ex parte Moore [1965] IQB 456;

R(I) 4/65 Appendix

6686 A Commissioner who holds that the decision of a tribunal was wrong in point of law

1. gives the decision which the tribunal should have given as long as it is possible to do so without making fresh or further findings of fact **or**
2. makes findings of fact and gives a decision in light of them **or**
3. sets the decision aside and refers the case to a tribunal, giving directions for its determination. The tribunal should be differently constituted from the one that gave the wrong decision, unless otherwise directed by the Commissioner1.

1 SS (NI) Order 98, art 15(8) & (9)

 6687

Supported appeals to the Commissioner

6688 Where the principal parties to an appeal to the Commissioner are of the view that the tribunal’s decision was erroneous in law, the Commissioner may set aside the decision and remit the case for rehearing with directions for its determination1. The Commissioner may still choose to decide the case himself as in DMG 6686.

1 SS (NI) Order 98, art 15(7)

Parties to an appeal

6689 The principal parties to an appeal are

1. the Department
2. the claimant in cases involving social security benefits
3. the person from whom an amount is recoverable where a recoverable overpayment is involved
4. a person whose right to Industrial Injuries benefit is affected by the decision appealed against
5. and in certain cases a trade union1.

1 SS (NI) Order 98, art 14(4)

Correction and setting aside

6690 A Commissioner may correct or set aside his own decision at any time. A decision may be corrected if it contains an accidental error1 and may be set aside if the Commissioner considers that it is in the interest of justice to do so and that one or more of the following conditions are satisfied

1. a document relating to the proceedings was not available at the appropriate time **or**
2. a document relating to the proceedings was not sent to the Commissioner at an appropriate time **or**
3. a party or his representative was not present at an oral hearing **or**
4. there was a procedural irregularity2.

1 SS Commissioners (Procedure) Regs (NI), reg 30;
2 SS Commissioners (Procedure) Regs (NI), reg 31(1)

6691 Any application to set aside a decision given by a Commissioner must be

1. in writing **and**
2. within one calendar month from the date on which the Commissioners’ office gave notice of the decision1.

 For further guidance on the correction and setting aside of decisions, see DMG Chapter 05.

1 SS Commissioners (Procedure) Regs (NI), reg 31(2)

 6692 – 6699

Appeals to the Court of Appeal

6700 An appeal against a decision of a Commissioner on a question of law should be made to the Court of Appeal1. All action on appeals to the Courts will be taken by Decision Making Services.

1 SS A (NI) Act 92, sec 22

Who may apply for leave?

6701 Application for leave to appeal from a Commissioner’s decision1 may be made by

1. any person who was entitled to appeal against the tribunal’s decision
2. any other person who was a party to the tribunal proceedings.

1 SS A (NI) Act 92, sec 22(3)

Leave to appeal

6702 An appeal to the Court of Appeal can be made only

1. with the leave of the Commissioner who gave the decision1
2. with the leave of the Chief Commissioner in certain cases
3. if the Commissioners refuse leave, with leave of the appropriate court2.

1 SS Commissioners (Procedure) Regs (NI), reg 33(1); SS A (NI) Act 92, sec 22(2)(a); 2 sec 22(2)(b)

6703 It is for the Commissioner to specify the appropriate court to which the appeal should be made1.

1 SS A (NI) Act 92, sec 22(4)

6704 If the Commissioner refuses leave to appeal the application can be renewed before the Court of Appeal. There is no right of appeal against a refusal of a Commissioner to accept an application made out of time, and it cannot be renewed before the court1.

1 R(SB) 12/83; R(SB) 8/85

6705 If the Chief Commissioner considers it impracticable or likely to cause undue delay for the Commissioner who gave the decision to consider the application for leave, the application will be decided as follows

1. where the decision was given by an individual Commissioner, by the Chief Commissioner or a Commissioner he selects
2. where the decision was given by a Tribunal of Commissioners, by a differently constituted Tribunal of Commissioners selected by the Chief Commissioner.

Time limits

6706 The applicant has three months from the date of notification of the written Commissioner’s decision to apply for leave to appeal1.

1 SS Commissioners (Procedure) Regs (NI), reg 33(1)

6707 The time for

1. appealing if leave is granted **or**
2. renewing an application if leave is refused

 is 6 weeks from the date of the Commissioner’s decision.

Suspension of benefit

6708 As with tribunals’ decisions, the decision maker can suspend payment of benefit resulting from a Commissioner’s decision. For further guidance, see DMG Chapter 04.

 6709 – 6799

Staying where an appeal is pending before a court in another case

Stayed decisions

6800 The decision maker may decide not to make a decision where an appeal is pending before a Court in another case if the decision maker is considering

1. determining an application for benefit or credits
2. revising a claim to benefit
3. superseding a claim to benefit **and**
4. is aware that there is an appeal pending before a court in another case **and**
5. that the outcome of the appeal may affect the decision in some way1.

1 CS (NI) Order 91, art 28ZA; SS (NI) Order 98, art 25(5)

6801 The case on appeal at a court is known as **the lead case**. The case that is stayed is known as **the look-alike case**.

 6802 – 6809

When is an appeal pending?

6810 An appeal is pending where

1. an appeal has been made, but has not yet been decided **or**
2. an application for leave to appeal has been made, but a decision on whether leave is to be granted has not yet been made **or**
3. an application for leave to appeal has been granted, but the appeal has not yet been made and the time limit for making it has not expired **or**
4. the Department certifies in writing that it is considering an appeal against a decision **and**
5. the decision maker considers that such an appeal may affect the decision in the look-alike case
6. the time limit for making an application has not yet expired1.

1 SS (NI) Order 98, art 25(5); SS & CS (D&A) Regs (NI), regs 21 & 23

6811 Decision Making Services will identify lead case appeals that are pending and will issue notifications detailing the point of law in dispute and the type of benefits which are affected by the decision. The Department will issue a certificate when considering an appeal.

 6812 – 6829

Which courts are involved?

6830 The courts before which relevant applications for leave to appeal, or appeals, can be pending are

1. the High Court in Northern Ireland
2. the Court of Appeal in Northern Ireland
3. the Supreme Court
4. the European Court of Justice.

Cases where the decision maker should stay making a decision

6831 The decision maker may stay making a decision, because an appeal is pending in another case, when considering

1. a claim to benefit **or**
2. an application for credits **or**
3. revising or superseding an existing award of benefit or credits

 and the decision maker considers that the effect of the likely outcome of the appeal is that there would be no entitlement to benefits or credits or the likely result of the appeal would affect the benefit decision or credits in some way1.

1 SS (NI) Order 98, art 25

 6832 – 6839

Staying decisions where the likely outcome of the lead case would result in no entitlement to benefit or credits

6840 If the outcome of the lead case is likely to mean that there would be no entitlement to benefit or credits, the decision maker will stay the decision until the outcome of the lead case is known1.

1 SS (NI) Order 98, art 25(3)

6841 In exceptional circumstances, a decision maker may decide cases where staying would otherwise be appropriate. This is where the claimant would suffer hardship as a result of staying the decision. For example where

1. the amount of benefit involved is likely to be significant **or**
2. the lead case will not be resolved for some considerable time.

 **For advice on issues to be taken into account when considering hardship - see benefit specific guidance.**

 6842 – 6849

Staying where the likely outcome of the lead cases would affect the benefit decision in some other way

6850 In deciding whether the lead case will affect the decision in some other way, the decision maker must determine the claim or application as if the lead cases had already been decided and that the outcome was the most unfavourable to the claimant1.

1 SS & CS (D&A) Regs (NI), reg 21(3)

 **Example**

 The lead case concerns the payment of disability premium. A decision maker has before him a look-alike case that involves the same premium. Using staying provisions he identifies that even if the lead case were decided in most unfavourable terms, the claimant would be entitled to a personal allowance, but not the premium. Only the payment of the premium is in doubt.

 The decision maker decides and awards the personal allowance. The decision on the disability premium will be stayed until the lead case is decided.

 6851 – 6859

Stayed appeals

6860 The arrangements for staying also apply to look-alike appeals that depend on the outcome of a lead case on appeal to the courts.

6861 The Department can direct a tribunal or Commissioner not to hear a look-alike appeal. In these cases the appeal is returned to the decision maker to hold, pending the outcome of the lead case1.

 **Note:** In practice, the Department does not exercise this power. Please see CAP Guide Chapter 4 paragraph 58 for the procedure to be followed in look-alike appeals.

1 SS (NI) Order 98, art 26(2)

6862 Where the Department decides that the look-alike appeal should not be returned the tribunal or Commissioner may

1. stay the decision on the look-alike case pending the outcome of the lead case **or**
2. where it is in the interests of the claimant, determine the look-alike case as if the lead case had been decided in the most unfavourable terms for the claimant1.

1 SS (NI) Order 98, art 26(4)

 6863 – 6869

Look-alike appeals not yet lodged with the Appeals Service

6870 Appeals officers should check all responses for potential look-alike appeals. Where a look-alike appeal is identified the appeals officer will refer the appeal response to the tribunal in the normal way and note the AT38 asking for the appeal hearing to be deferred pending the decision on the lead case. The Appeals Service will notify all parties to the proceedings if the hearing is deferred. This guidance applies to cases where

1. the outcome of the lead case is likely to mean that there will be no entitlement to benefit
2. the issue or issues raised in the look-alike appeal relate wholly to the point(s) of law in dispute in the lead case **or**
3. the additional issues raised in the appeal are non-appealable decisions.

 6871 – 6874

Look-alike appeals already lodged with the Appeals Service

6875 The Department will send the Appeals Service and the Commissioners’ Office a copy of the lead case certificates. Separate arrangements have been agreed with the Appeals Service for the handling of look-alike appeals that have already been lodged with them (see CAP Guide Chapter 4).

 6876 – 6879

What happens if the claimant challenges the decision to stay a look-alike claim or appeal?

6880 There is no right of appeal against a decision to stay a look-alike claim or a look-alike appeal1.

1 SS & CS (D&A) Regs (NI), Sch 2, para 7

6881 The decision maker can reconsider the decision in the light of all the available facts that may be presented by the claimant, and if appropriate make a decision on the case (see DMG 6841 for guidance on hardship).

 6882 – 6884

What happens when the lead case is decided?

6885 Decision Making Services will notify the outcome of the lead case.

6886 Claimants might approach the decision maker for a decision on their stayed appeal immediately following the Court’s decision. Decision makers should not take any action to decide the stayed case until they have received formal notification and guidance on the outcome of the lead case.

 6887 – 6889

Action by decision makers

6890 Decision makers should identify all look-alike cases and appeals returned to them by the Appeals Service.

6891 Decision makers decide the claim where the decision was stayed in full.

6892 Where the lead case has been decided in a way which changes the interpretation of the law, decision makers should revise or supersede the decision1. The decision will be revised where

1. only part of the decision was stayed2
2. the Appeals Officer decided not to forward a look-alike appeal to the Appeals Service
3. the Appeals Service returned a look-alike appeal on the request of the decision maker (see DMG Chapter 03 for guidance on revision).

1 SS (NI) Order 98, art 25(4); 2 art 26(3)

6893 Where the look-alike appeal was forwarded to the tribunal and they decided the appeal, the decision maker should supersede the decision1 (see DMG Chapter 04 for guidance on supersession).

1 SS (NI) Order 98, art 26(5)

6894 Decision Making Services will give guidance following the determination of lead cases on whether revision or supersession is required.

 6895 – 6899

Judicial review

6900 The decision-making authorities are subject to judicial review, that is the controlling jurisdiction of the High Court, because the High Court has legal authority to decide questions affecting peoples’ rights1.

1 [1924] 1KB, 171, 205

6901 The result of judicial review differs from that of an appeal. An appeal

1. examines the decision under appeal, and decides whether it is one which could be made on the basis of the facts found and the relevant law **and**
2. if the decision is found to be erroneous, either refers it back to be made again, or substitutes a fresh decision.

6902 A judicial review considers a case to find out if there is fault in the decision making process. If a fault is found the court usually

1. quashes the decision **and**
2. makes an order for the decision making authority to consider the question again.

 In exceptional cases, the court may make its own decision.

Judicial review of a Commissioner’s decision

6903 The court exercises its jurisdiction to quash a Commissioner’s decision by way of judicial review only if there are compelling reasons in the interest of justice1. In approaching such cases the Court takes account of

1. the existence of the right of appeal on a question of law to the Court of Appeal
2. the fact that Parliament has set limits to this right.

1 R(A) 5/83, Appendix; R(SB) 12/83, Appendix

Action on receipt of a claim for judicial review

6904 All action on claims for judicial review is taken by the Departmental Solicitors Office, Victoria Hall, 12 May Street, Belfast BT1 4NL. Where a claim for judicial review, including a proposal to bring a claim for judicial review, is received, it should be forwarded to the above address immediately.

 6905 – 6999