Com. proceedings

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal succeeds. I hold the decision of the South Shields social security appeal tribunal dated 23 September 1998 to be erroneous in law and, accordingly, I set it aside. The case is referred to the tribunal for determination afresh in accordance with the directions below.

2. After the usual written submissions had been lodged, the claimant's representative sought an oral hearing of the appeal which I granted. The request bore to be made so that the claimant should have an opportunity to give certain evidence to me. I should at once indicate that had that been all to it, I should have refused the request. However, it also seemed to me that a question lurked in the case about the competence and the possible effect upon the status of an appeal where there appeared to be neither full findings nor a full statement of facts and reasons. At the hearing the claimant was represented by Mr P McGeever, of the South Tyneside Welfare Rights Service. The adjudication officer was represented by Mr J Brodie, Advocate, instructed by the Solicitor in Scotland to the Department of Social Security. I am indebted to both and in particular to Mr Brodie upon whom, for obvious reasons, fell the main burden of discussing the questions raised by my direction.

3. The appeal raises two questions. The first, which was the basis upon which the chairman granted leave, is as to whether the tribunal decision disclosed an error of law in determining the claimant's case that his claim for income support dated 23 February 1998 and accepted as made on 20 February 1998 could be backdated for a period subject to the limit of three months mentioned in regulation 19/(4) of the Social Security (Claims and Payments) Regulations 1987. That required concentration upon the circumstances specified in paragraph (5) thereof. The second question was the one raised in my direction. In this case the tribunal had completed the "summary of grounds" part of the formal "decision notice" (page 62 of papers) adding at the end this:-

> "This notice includes the full reasons for the tribunal's decision and it's findings and questions of fact material to which regulation 23(3A) of the Social Security (Adjudication) Regulations 1995 refers."

There is in the papers also a record of proceedings but there is no other document which could be regarded as a statement of reasons for the purposes of said regulation 23(3A). The importance of the matter is that the issue of such a statement is one of the successive time triggers in the chain of events which lead to a competent appeal. I must now set them out.

4. Adjudication regulation 23 deals with tribunal decisions and the recording thereof. As in force for this case, regulation 23(2) provided that:-

> "Every decision of an appeal tribunal shall be recorded in summary by the chairman in such written form of decision notice as shall have been approved by the President, and such decision notice shall be signed by the chairman."

The decision notice in this case was on an approved form and it was duly signed.

Paragraph (3) then provides:-

"As soon as may be practicable after a case has been decided by an appeal tribunal, a copy of the decision notice made in accordance with paragraph (2) shall be sent or given to every party to the proceedings who shall also be informed of -

(a) his right under paragraph (3c); and
(b) the conditions governing appeals to a Commissioner."

This decision notice bears to have been issued on the very day of the tribunal hearing and it records that "AR6/Notes" were also then issued. I assume that "AR6/Notes" comply with paragraph 3(a)(b). There then follows paragraph (3A) in these terms -

"A statement of the reasons for the tribunal's decision and of its findings on questions of fact material thereto may be given:-

(a) orally at the hearing; or
(b) in writing at such later date as the chairman may determine."

There is provision for an oral statement to be recorded and there then follows:-

"(3C) A copy of statement referred to in paragraph (3A) shall be supplied to the parties to the proceedings if requested by any of them within 21 days after the decision notice has been sent or given, and if the statement is one to which sub-paragraph (a) of that paragraph applies, that copy shall be supplied in such medium as the chairman may direct.

3(D) If a decision is not unanimous, the statement referred to in paragraph (3EA) shall record that one of the members dissented and the reasons given by him for dissenting."

The importance of those interlocking provisions is that adjudication regulation 24(1), again as in force at the time of the hearing, provided that:-

"Subject to the following the provisions of this regulation, an application to the chairman of an appeal tribunal for leave to appeal to a Commissioner from a decision of an appeal tribunal shall -

(a) be made in accordance with regulation 3 and Schedule 2; and

(b) have next to it a copy of the full statement of the tribunal's decision."

Regulation 3 and Schedule 2 provide the location for the lodgement of an application for leave to appeal and that that must be done within three months:-

"...beginning with the date when a copy of the full statement of the tribunal decision was given or sent to the applicant."

And the "full statement" therein referred to is that mentioned in said regulation 23(3A).

5. Mr Brodie's opening shot on the jurisdiction question was that in this case there could have been no valid refusal of leave to appeal by the chairman - leave was in fact given by Mr Commissioner Rowland - because the chairman had had no jurisdiction to entertain such a request in the absence of the full statement. He regarded that as an essential to a competent application. The practical consideration involved, I would suspect, is that a chairman should only be asked to consider leave where he was able to review the facts found and reasons given and take a view, amongst other things, as to whether they were sufficient to comply with the law. In any event, regulation 23 clearly separated the decision notice and the full statement. Mr Brodie accepted, in part relying upon the final sentence quoted above from the decision notice, that Mr McGeever at the conclusion of the hearing before the tribunal had requested a full statement. That was no doubt competent, but Mr Brodie's point was that it had never been produced and of course the time for seeking leave could not start to run until there was a definitive date "when" a copy of the full statement had been given or sent to the applicant. I understood Mr Brodie's position to be that it would even now be competent for the chairman to issue the full statement in which case the appeal process would go back on the rails. Mr Brodie then turned to certain decisions by Commissioners upon this matter in an effort to persuade me that, so far as against his argument, they had not fully explored or dealt with the basic issues that arose. He gave notice of a subsidiary argument, to which I return later, that even if the "decision notice" at page 62 of papers should be regarded as "a full statement of tribunal's decision" it was not sufficient to comply with the relevant legal requirements.

6. Mr Brodie first drew attention to decision CDLA/5793/97 by Mr Commissioner Rowland. The regulations there were different in identity but mirrored precisely those set out above. That claimant had simply lodged an application for leave to appeal. It had been made within the 21 days allowed for requesting a full statement. There arose a question whether the application for leave should have been treated as implying a request for such a statement. The Commissioner referred to an earlier decision of his wherein he had held that a chairman did not have jurisdiction to consider an application for leave to appeal where no full statement had been issued but that, although not every application for leave made within 21 days was necessarily to be treated as such a request, there could be cases where the terms of an application necessarily implied such a request. The essential part of that, for this case, is the view that the chairman did not have jurisdiction to consider leave where there was no full statement of reasons. Mr Commissioner Rowland went on to decide that he could allow the claimant's appeal without a full statement in circumstances where he did not consider that the chairman was required to issue a full statement or, alternatively, that the decision issued was rendered erroneous by reason of there not having been such a full statement. As Mr Brodie pointed out, however, the Commissioner gave no clear indication of authority or principle for holding, as he appeared to have done, that the Commissioner per contra had jurisdiction in the absence of the full statement. He emphasised that the time for applying for leave was only triggered by the issue of the full statement under the provisions of regulation 24 and Schedule 2. In respect of the Commissioner an application for leave could only be made, according to regulation 3(1) of the Social Security Commissioners Procedure Regulations 1987, where an applicant had been refused leave by the chairman - which he emphasised must mean where the applicant had "competently" been refused leave. Paragraph (2) provides for some relief where there was a failure to apply within the specified time to the chairman but, submitted Mr Brodie, that provision could not operate because the specified

time had not begun to run. Furthermore, under regulation 4 leave to appeal required to be brought by a notice containing certain particulars -

> ".....and the notice shall have annexed to it a copy of the full statement of the tribunal's decision against which leave to appeal is being sought."

"Full statement of the tribunal's decision" is defined as the same as in the adjudication regulations. Likewise regulation 6 reflected a similar provision in regard to the lodgement of an appeal. Accordingly, said Mr Brodie there was no competent application to the Commissioner in this case.

7. Mr Brodie referred me to another decision of Mr Commissioner Rowland, in CIS/3299/97 and another, both *70/98, in which he accepted, at paragraph 15, that without a full statement of reasons a chairman had no jurisdiction to entertain an application for leave. The Commissioner contrasted the position in employment law with this jurisdiction. Rule 39(3) of the Employment Appeal Rules 1993 had allowed:-

> "....the institution of an appeal notwithstanding that the period prescribed in Rule 3(2) may have not commenced."

In this jurisdiction there is no direct equivalent. Mr Commissioner Rowland then held that similarly a Commissioner would have no jurisdiction to consider an application for leave to appeal under regulation 3(1) of the Commissioner's regulations. But he continued:-

> "However, it seems to me that it also follows that a Commissioner is entitled to consider such an application under regulation 3(2). There is nothing within regulation 3(2) to suggest that it is applicable only in the case of late applications and not also in the case of those that are made too early. In effect, it contains an equivalent to rule 39(3) of the Employment Appeal Tribunal Rules 1993."

At paragraph 17 he concluded from the amendment to regulation 4(1) about the need for a full statement of tribunal reasons and the last part of regulation 4(3) which was unamended:-

> ".... that the draughtsman had in mind that the applications would be made only after a full statement of the tribunal's decision had been issued."

He required, he said, a much stronger indication before he could infer that the legislators had intended to remove from Commissioners a power to consider an application in a case where, not withstanding the lack of a full statement, the tribunal could be shown to have erred in law. That was supported by the consideration that the lack of a full statement would not inhibit the powers of the court on an application of judicial review. He concluded that the provisions in regulation 4 were:-

> "....merely directory and could be waived by a Commissioner even if there were no express power to waive irregularities conferred by regulation 21." [Of the Commissioners 1987 Regulations because it deals only with failures to comply with those Regulations.]

At paragraph 21 he noted that he would have preferred to reject a hopeless application on its merits rather on procedural grounds and indicated that where there was no full statement and no undue delay he would always waive any irregularity due to the failure strictly to comply with the requirements of Commissioners regulation 4. He noted that in both the cases before him leave to appeal had been granted by a Commissioner (and so presumably he was contemplating regulation 6 rather than 4) and said that he was satisfied that the Commissioners had had that jurisdiction and so in turn he himself had jurisdiction over the appeals. Mr Brodie again observed that no legal principal or authority was mentioned and turned to the competing authority, CIS/591/98.

8. Decisions CIS/591/98 was by Mr Commissioner Mitchell QC. It post-dated both decisions by Mr Rowland. Decisions *70/98 were clearly before him. At paragraph 8 Mr Commissioner Mitchell declined to comment on the observations made regarding the powers of a tribunal chairman and concentrated upon the position of applications to a Commissioner. Dealing with Commissioners Procedure Regulation 3, he observed that it was the refusal of a tribunal chairman to grant leave that opened the door to regulation 3(1). Thus the absence of such a refusal and not the absence of a full statement precluded resort to that paragraph. So far as regulation 3(2) was concerned the Commissioner had difficulty in accepting that its effect was truly analogous to the employment tribunal rule. He observed that that rule had expressly provided for the premature institution of an appeal and said that:-

> "On a natural reading of its terms and its context, paragraph 3(2) on the contrary, as the sole exception to the pre-requisite in regulation 3(1) of a refusal of leave by the chairman, clearly implies in my judgement the loss through lateness of the opportunity to obtain the chairman's decision on leave to appeal."

9. Mr Commissioner Mitchell at paragraph 9 went on to deal with the circumstances of the case before him, where an adjudication officer had sought but failed to obtain a full statement, despite a reminder, and had lodged an application to the Commissioner because the expiry of the Secretary of State's suspension of the award was imminent. He said:-

> "...As at the date of the present application on 30 October 1998 the full statement had not been provided but had not been refused. There is a mandatory obligation on a tribunal chairman under regulation 23(3C) of the adjudication regulations to provide such a statement if timeously requested. The adjudication officer would have a period of three month from the date of issue of the full statement in which to apply to the chairman for leave to appeal. I am quite unable to hold that as at 30 October 1998 when the time allowed for compliance had not begun to run, there had been any failure to apply to the tribunal chairman for leave to appeal within the specified period as stipulated in regulation 3(2)."

He also referred to his own decision CSDLA/574/98 where a claimant had sought leave to appeal from a tribunal chairman but, having received no decision thereon for some eight months had applied direct to the Commissioner. In that case he had held the application incompetent because it fell neither under regulation 3(1) where an application had been made to the chairman and that application had been refused, or under regulation 3(2) where there had been a failure to apply to the chairman for such leave within the specified time. And I note in that case that counsel for the adjudication officer had argued strongly in favour of

decision *70/98 being correct. Before me, counsel for the adjudication officer argued strongly that Mr Commission Mitchell's approach was correct. But, of course, there was an important difference between that case and the present one.

10. That important difference was that CIS/591/98 was an application to the Commissioner. The question was whether the application was competent and should be granted or refused. Mr Commissioner Mitchell dismissed the application as incompetent. In the present case Mr Commissioner Rowland had granted leave, no doubt, as Mr Brodie pointed out, upon the basis of the passage in paragraph 22 of *70/98 that he had been satisfied that a Commissioner had had jurisdiction to grant leave. But, continued Mr Brodie, there was no reasoning to support that conclusion nor was any principle, from which with any satisfaction it could be derived, indicated. I understood Mr Brodie to suggest that since in *70/98 leave had already been granted the passage in question was strictly obiter. On the other hand, at the same time Mr Commissioner Rowland was dealing with applications for leave to appeal which he noted in *70/98 - namely CDLA/5424/97, CDLA/642/98 and CI/33/98. In them, however, he simply accepted that he had jurisdiction to consider the applications for the reasons given in *70/98. For what difference it may make, I am disinclined to regard the observations in *70/98 as obiter.

11. Nonetheless, Mr Brodie went on to develop an argument about the validity of the determination by the Commissioner in granting leave in the present case. If, as Mr Commissioner Mitchell QC held, the obtaining of the full statement is mandatory, then, he submitted, it would be pars judicis to notice the point as going to jurisdiction. That raises a question as to whether the parties could confer jurisdiction by implied waiver, as it were, or prorogue jurisdiction which in turn would require some active steps which were missing in the present case. Alternatively, he suggested, it may be that if such an issue was now to be raised it should be challenged other than by a Commissioner, thus by way of judicial review. Mr Brodie submitted that Mr Commissioner Rowland's position was somewhat opaque as to its reasoning although he clearly did decide that a Commissioner could have jurisdiction. It was equally clear that Mr Commissioner Mitchell's view was that the Commissioner would not have jurisdiction. He finally pointed to the possibility that the grant of leave carried no implication about jurisdiction. In that event the matter would be open before me. Otherwise it might appear that I was hearing an appeal from a fellow Commissioner. He pointed out that, for example, in petition procedure in the Court of Session a first order, for example in a case of interdict, might be made. That could be said to imply jurisdiction. But later another Lord Ordinary might well have to recall the grant, an issue of jurisdiction by then having been properly raised and determined. I have found, although it was not referred to before me, that in CDLA/925/98 Mr Commissioner Rowland again dealt with an appeal where there had been no full statement. He noted that when granting leave Mr Commissioner Heald QC had asked the adjudication officer to make a submission as to whether the Commissioner had jurisdiction to entertain an appeal where there was no full statement. The adjudication officer had responded, in line with his then position, that there was such jurisdiction, Mr Commissioner Rowland endorsed that by reference to his *70/98.

12. I have come to the conclusion that a grant of leave amounts to no more than an acceptance by a Commissioner that there is a point of law worthy of argument. It could be a point of jurisdiction. No doubt in that event other procedure would allow it to be thrashed out at a hearing on the application. But I see no reason in principal why any issue of law, even

jurisdiction or competency, cannot be raised later. It may be preferable if such fundamental points are thrashed out at the application stage. To hold that they are thereafter barred would mean that the Commissioner's investigative jurisdiction could be stifled. Moreover, the proponer of no jurisdiction might not be in the appeal at that stage. A party, then, on the restrictive approach could not raise an issue fatal to competency, or jurisdiction. Indeed such issues need not or even could not, have been foreseen at the application stage. Either way, it seems to me there would an unnecessary fetter upon the Commissioners' jurisdiction in terms of the legislation to consider the whole soundness in law of tribunal decisions. As Mr Brodie pointed out, any alternative would require the use of judicial review. If a Commissioner had refused to consider a point of law simply because it might be thought that another Commissioner - or indeed the chairman - granting leave had already determined that matter, and there was no written reasoning for the determination so saying, would I think receive short shrift - certainly in the Inner House of the Court of Session. On the judicial review point it would seem to me to be an unnecessary complication to have to give parties an opportunity to consider such a course at almost any stage of the subsequent proceedings.

13. I notice, moreover, that adjudication regulation 23, as amended, provides at paragraph (3C) for the supply of a copy of the full statement as above noted. But it is a "copy" that is to be supplied. I note that paragraph (3 A) provides that a statement of the reasons and of the tribunal's findings maybe given in writing at such later date as the chairman may determine. There is then provision, at (3 D), for the recording any oral statement given at the hearing to be recorded in such medium as the chairman may determine. I am uncertain as to whether the logic of those provisions does not mean that there ought to be a statement in all cases in order that a copy may be supplied when and if requested. There is something faintly illogical about the concept of requesting a copy if at that time an original does not exist. It may be that the wording of (3A) (b) possibly allows for such illogicality.

14. That aside, the adjudication regulations as constructed for the purposes of the present appeal, seem to me to provide for a series of triggers. The summary reasons are to be issued in all cases, and one can understand why so. There is then a time limit for seeking a copy full statement which itself is triggered by the sending or giving of the decision notice. Then there is the further time limit for seeking leave to appeal which is triggered by the date of issuance of the statement of reasons. That seems to me to be a deliberate sequence of triggers which were not intended to be activated, any two or more of them, at the same time. For my part, I see no provisions, which can properly be made equivalent to the anticipatory provisions for initiating an appeal in employment law. Indeed, the absence thereof, given that precedent, and given that they may have been the basis for our procedures as Mr Rowland felt, all suggest to me that such a short circuit was not here intended. As I have noted, Mr Commissioner Rowland referred to no principle or authority for his interpretation other, perhaps, than the pragmatic one of making progress. In so far as Mr Mitchell QC disagreed, I prefer his approach. I, too, am in favour of the pragmatic approach but I am equally suspicious that unnecessary confusion and difficulty can be caused if clear procedural provisions are not followed with precision.

15. Thus it is in the present case. Adjudication regulation 23(2) refers to the summary decision being in a form of a notice approved by the President. There is, I have assumed, one here. In my opinion it tends to prevent any proper statement of findings of fact and reasons being incorporated by reason of the very limited space allowed. I have concluded,

accordingly, that it is contrary to the spirit and intendment of the adjudication regulations to concertina the decision notice and the full statement and that an attempt to do so will not produce a valid full statement, however much it maybe an adequate summary decision.

16. The question that follows from that, however, is as to whether, Mr Commissioner Rowland having granted leave in this case, it is open to me to give effect to the opinion set out above. For the reasons already explained I am inclined to think that it must be so. I regard the jurisdictional question as properly valid and now before me. It could be that the claimant should go back and seek a full statement which might or might not adequately deal with his case. I am persuaded, on the other hand, that what the tribunal was seeking to do here was as part of their operation of the procedure to concertina the two stages and over-ride, or fail to follow at least, the Adjudication Regulations referred to. That is a breach of the regulations and, procedurally, an error in law. That is sufficient to entitle me to set aside their decision, as I have done. The whole case must go back for determination afresh.

17. Finally on the merits, as it were, I am entirely satisfied that the limited "statement of reasons and findings of fact" set out in the limited space of the summary of decision on this file is quite insufficient for it to be supportable or as giving the claimant a full and complete indication of what was made of his various points or of the facts which the tribunal found in those regards, the conclusions which they reached thereon and the reasons for their decision in light thereof. Had it been necessary, I would have given a decision remitting the case for rehearing on that basis.

18. For the foregoing reasons this appeal must be allowed and the case is remitted accordingly.

(signed)
W M WALKER QC
Commissioner
Date: 30 July 1999