* 79/94

Commissioner's File: CI 079/1990

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR SPECIAL HARDSHIP ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONERS

C1/79/90 (T) - Dermody
Reg 11 of Adj Regs
Setting Aside
proper approach
para 27/38

Name: William Harry Dermody

Appeal Tribunal: Lewisham

Case No: 7/12/90093

1. The adjudication officer's appeal is allowed. The decision of the Lewisham social security appeal tribunal dated 14 September 1989 is erroneous in point of law, for the reasons given below, and we set it aside. We consider it expedient to give the decision which the appeal tribunal should have given, which is that the appeal tribunal had no jurisdiction to entertain the claimant's appeal from the decision of the adjudication officer dated 7 August 1986 because that appeal had already been determined by a social security appeal tribunal in its decision of 14 May 1987 and that decision has not been set aside.

The history of the claim

2. On 23 June 1965, when he was working as a storeman, the claimant sustained an industrial accident. He claimed disablement benefit on 13 August 1981. The initial assessment of disablement was 8% from 8 July 1965 for life. On appeal the assessment was increased to 10% from 8 July 1965 to 7 March 1986, and that assessment was later extended for further periods. On 12 June 1984 he made a claim for special hardship allowance ("SHA"), backdated to 13 August 1981. On 7 August 1986 the adjudication officer disallowed that claim. He decided that there was no continuous good cause for the delay in claiming for the period from 13 August 1981 to 11 March 1984. For the period from 12 March 1984 onwards (for which the claim made on 12 June 1984 was in time) the adjudication officer decided that the claimant was not incapable of employment of an equivalent standard to his regular employment and so did not meet the condition of entitlement in section 60(1)(b) of the Social Security Act 1975.

3. On 29 August 1986 the claimant appealed against the adjudication officer's decision. The social security appeal tribunal ("SSAT 1") heard the appeal on 14 May 1987. The claimant attended the hearing accompanied by his wife and gave evidence. Only the chairman and one wing-member of the appeal tribunal were present, but the claimant signed the consent to

a hearing by an incomplete appeal tribunal on the front of the form AT3. SSAT 1 disallowed the appeal, confirming both parts of the adjudication officer's decision, although referring to the claim for SHA as having been made on 28 March 1986. In a letter addressed to the chairman of SSAT 1 and received on 5 August 1987 the claimant applied for the decision of SSAT 1 to be set aside. The letter reads:

> "I wish to request the setting aside of the tribunal's decision made on 14.5.87 for the following reason. There was a misunderstanding concerning my case and I was not represented as a result. Also there was an incomplete panel and I did not realise I could choose to postpone the hearing until a full panel was present.
>
> I also would like to point out some errors in the evidence. I did not apply for Special Hardship Allowance before March 1986. The date of my claim was 12.6.84. If my representative had been present I believe that they would have pointed this out. As to the delay in claiming, my claim for Disablement Benefit was the subject of a Medical Appeal Tribunal till March 84. Until I received the results of the MAT I thought that Special Hardship Allowance would be linked to the Disablement Benefit claim. I was advised that it was necessary to submit a separate claim and I did so on 12.6.84.
>
> On 13.8.84 I received a letter from the DHSS asking for further information in relation to the Special Hardship Allowance.
>
> There is also a misunderstanding about the comparison of wages, which had my representative been present would not have occurred.
>
> Please consider my request for setting aside the decision favourably as I believe that because of misunderstanding an injustice has occurred."

4. In response to that letter the clerk to the appeal tribunal wrote to the claimant on 21 August 1987. It is not clear whether the lady who wrote that letter was the person who acted as the clerk at the hearing by SSAT 1. Nor is it clear whether she wrote on her own authority or on the instructions or advice of any other person. The letter reads:

> "In reply to your letter regarding a setting aside procedure, I wish to make the following points.
>
> (a) You were shown a letter from your representative stating you had withdrawn your appeal. This you said you knew nothing about and in spite of the representative not attending you wished the appeal to go ahead.

(b) It was pointed out to you that the Tribunal was incomplete but you were very anxious for your appeal to go ahead and you signed the AT3 to that effect (copy enclosed).

(c) A copy of the appeal papers was sent to you on 2.3.87 - the Tribunal did not hear your case until 14.5.87, if you thought the evidence contained in the papers was incorrect why did you not contact the Tribunal Clerk or your representative earlier to arrange for the new information to be submitted or inform the Tribunal on 14.5.87 that you thought the dates were incorrect.

Before a 'setting aside of an Appeal Tribunal decision' can be considered, it must be satisfied that the decision was given in ignorance of relevant facts.

We would be grateful for your observations on the above and any confirmation of any new evidence that you can supply."

The claimant replied in a letter dated 24 August 1987:

"Thank you for your letter of the 21st August 1987 in reply to my letter of the 16th July 1987, relative to my claim for Special Hardship Allowance. I will now try to answer the points you have raised.

(a) I agree that I was shown the letter stating my withdrawal of appeal, but would deny that my representative had been given the authority to do so on my behalf and, in fact at the subsequent hearing, [...], the chairman, agreed that it should be withdrawn, and also [illegible] my reason for attending the hearing.

(b) Following the hearing, I was advised by my Welfare Rights representative that I should have asked for a deferment.

(c) I did not feel it necessary to contact the Tribunal Clerk prior to the 14th May 1987, because the information up to that time was actually correct."

5. An appeal tribunal ("SSAT 2") sat to determine the claimant's application on 24 March 1988. The chairman was the same person who had chaired SSAT 1. It appears that as well as the claimant's application for setting aside, SSAT 2 may have had before it the letters of 21 August 1987 and 24 August 1987, but the records leave that open. There is no record in the papers before us of a copy of the application to set aside having been sent to the adjudication officer or of any observations by the adjudication officer on the application. SSAT 2 determined that the decision of SSAT 1 should not be set aside. The recorded reasons were:

"The claimant cannot satisfy the requirements of Reg 11 Adjudication Regs.

The rights of the claimant were fully explained to him by the Clerk and he signed the AT3 agreeing to an incomplete Tribunal. The wages slips were inspected and the claimant's representative did not attend as he had in fact withdrawn the appeal. The interests of justice do not justify the setting aside of the original decision of the Tribunal."

A copy of that determination was sent to the claimant on 7 April 1988.

6. On 29 June 1988 an application for leave to appeal to the Social Security Commissioner was received at the office of the clerk to the appeal tribunal, with a covering letter from the Welfare Rights Unit of North Lewisham Law Centre. The form on which the application was written referred to the decisions of both SSAT 1 and SSAT 2. The application reads:

"I apply for leave to appeal on the ground that the decision of the Social Security Appeal Tribunal was wrong in law because--

1) The interests of justice so require (Reg 11). I was not represented at the Tribunal, nor advised by a representative on the day. The Tribunal was incomplete, and was to be shown a letter stating that I wished to withdraw my Appeal. The letter was written without my authorisation by someone from the Free Representation Unit. The overwhelming consideration was that I should go in and explain to the Tribunal that I was not withdrawing my Appeal.

2) I am not qualified and do not understand the complexities of the case, but the Tribunal heard the case without regard to the correct facts as to the date of my claim for Special Hardship Allowance.

3) The reasons for the decision does not refer to any efforts made by myself to pursue my claim for Special Hardship Allowance which I undertook in June 1984 when it was discovered that the claim for Disablement Benefit was not also a claim for Special Hardship Allowance, and yet there are letters from the DHSS asking me for further information in regard to the 1984 claim. There is a duty on the Adjudication Officer to ascertain my needs, but I was not advised by the DHSS or any other body."

Following the receipt of that application, a letter, apparently from the clerk to the appeal tribunal, was sent to the claimant in July 1988 in the following terms:

"In the light of the information provided by the Welfare Rights Unit on 28th June 1988, the Chairman has reconsidered his decision not to 'set aside' the Tribunal decision of 14th May 87. He has now agreed that it may be placed before a Tribunal for a second consideration of your application to set aside.

I will arrange for this to be listed at the earliest possible opportunity."

7. The claimant's application to set aside was put before another appeal tribunal ("SSAT 3") on 11 November 1988. The membership of SSAT 3 was entirely different from that of SSAT 2 or SSAT 1. Once again there is no evidence in the papers before us of a copy of the application having been sent to the adjudication officer or of any observations by the adjudication officer on the application. The chairman's note of evidence records that "all relevant papers" were considered, in particular the AT3 completed by SSAT 1, the letter from the clerk to the appeal tribunal dated 21 August 1987 and the claimant's letter applying for the setting aside. SSAT 3 may well, therefore, not have known of the previous determination by SSAT 2 or of the process by which the claimant's application came before it. SSAT 3 set aside the decision of SSAT 1 because it appeared just to do so on the ground that the claimant's representative was not present at the hearing (Social Security (Adjudication) Regulations 1986, regulation 11(1)(b)). The reasons were recorded as follows:

"1. It appears that claimant agreed that the original tribunal hearing should continue notwithstanding absence of representative.

2. Nevertheless claimant subsequently states that there was a misunderstanding and as a result he was not represented.

3. Tribunal have heard no direct evidence and cannot exclude the possibility that as respects representation there was a genuine misunderstanding."

8. A further appeal tribunal ("SSAT 4") accordingly sat to hear the claimant's appeal on 14 September 1989. The claimant attended and was represented by Ms Sarah Chandler of the Welfare Rights Unit of North Mitior Law Centre. No question as to the appeal tribunal's authority to proceed to decide the appeal was raised by any party. After what was obviously a highly detailed hearing, SSAT 4 allowed the claimant's appeal and awarded special hardship allowance (of an amount to be calculated by the adjudication officer) from 12 March 1984 onwards. However, it found that the claimant had not proved continuous good cause for the delay in claiming until 12 June 1984 and disallowed the appeal from 13 August 1981 to 11 March 1984. There is no need to give any further details of SSAT 4's decision.

9. On 3 November 1989 the adjudication officer applied for leave to appeal to the Social Security Commissioner on the ground that SSAT 4 was not entitled to hear the appeal, since the application to set aside SSAT 1's decision had been refused by SSAT 2. The chairman of SSAT 4 granted leave on 10 January 1990. In written submissions, it was argued for the adjudication officer that there is no provision for a setting aside decision, once issued, to be reversed. Thus the decision of SSAT 4 was a nullity, leaving outstanding the claimant's application for leave to appeal to the Commissioner against the decision of SSAT 1. After various delays in the exchange of submissions and a postponement of an oral hearing, there was an oral hearing before Mr Commissioner Goodman on 1 July 1992. At that hearing the adjudication officer's representative submitted for the first time that R(SB) 4/90 (a decision of Mr Goodman's) was wrongly decided and that the decision on Commissioner's file CG/5/1991 (a decision of Commissioner Rice, subsequently reported under the reference R(G) 2/93) to the contrary was right. R(SB) 4/90 had decided that a Social Security Commissioner, on appeal from a social security appeal tribunal, has power to declare that a preceding setting aside determination made outside the powers conferred by Parliament was a nullity, so that the decision under appeal is a nullity. R(G) 2/93 had decided that a Social Security Commissioner had no power in such circumstances to examine the validity of the preceding setting aside decision. The oral hearing was adjourned for further written submissions. A detailed submission was received in July 1992 from the adjudication officer's representative, as well as observations from Ms Chandler. A second oral hearing took place on 26 November 1992 before Mr Goodman. That hearing was adjourned for the adjudication officer to consider whether to request leave to withdraw the appeal against SSAT 4's decision and for the claimant to consider whether to request leave to withdraw the application for leave to appeal to the Commissioner against the decision of SSAT 1. On 16 April 1993 a submission was received to the effect that the adjudication officer did not wish to request leave to withdraw his appeal. The claimant was therefore not prepared to withdraw his application for leave to appeal against the decision of SSAT 1.

10. That was the state of affairs when a third oral hearing was directed to take place on 4 November 1993. Since the correctness of his decision in R(SB) 4/90 was directly in issue, the hearing was not taken by Mr Goodman, but by another Commissioner. By the date of that oral hearing it was known that Mr Rice's decision in CG/5/1991 was to be reported as R(G) 2/93. The claimant's representative maintained that R(SB) 4/90 was correct. The adjudication officer's representative maintained that there was a question which had to be resolved as to which of two conflicting reported decisions of individual Commissioners was correct. He considered that the approach of R(G) 2/93 was more consistent with the terms of the relevant legislation. With the agreement of both representatives, the oral hearing was adjourned for

consideration of whether a Tribunal of Commissioners should be appointed. The Chief Commissioner directed that there should be a hearing before a Tribunal of Commissioners, which took place on 7 April 1994.

Submissions to the Tribunal of Commissioners

11. At the oral hearing the adjudication officer was represented by Miss Naomi Mallick of the Office of the Solicitor to the Department of Social Security. She adopted a written submission prepared by Mr David Hart of counsel, who had been expected to represent the adjudication officer at the hearing. In the event, Mr Hart was unable to be present because of illness, but Miss Mallick stepped into the breach most ably. The claimant was represented by Mr Simon Cox, of the Free Representation Unit. He had prepared a most helpful skeleton argument and chronology before the oral hearing of 4 November 1993, and has consistently addressed the essential questions since becoming associated with the case. We have been greatly assisted by the high quality of the submissions made to us at the oral hearing.

12. Miss Mallick referred first to the principle of res judicata - that once a case has been determined by a court of competent jurisdiction it cannot be redetermined by another court at the same level. She submitted that the Commissioners, when considering an appeal from the decision of SSAT 4, could determine whether SSAT 4 had no jurisdiction to deal with the case before it as the result of the application of the principle. To that extent, R(SB) 4/90 should be followed in preference to R(G) 2/93. The Commissioners have power to determine whether a decision determining the case already exists where that is incidental to the determination of an appeal tribunal's jurisdiction. Following the approach of the House of Lords in Chief Adjudication Officer v Foster [1993] AC 754, it does not matter that the Commissioners cannot make declarations in the exercise of a judicial review jurisdiction. But where the application of the principle of res judicata rests on an appeal tribunal's decision (in the present case, of SSAT 1) not having validly been set aside by another appeal tribunal (in the present case, SSAT 3), Commissioners are restricted to considering whether the intervening appeal tribunal had jurisdiction (in the narrow meaning adopted by Lord Reid in Anisminic v Foreign Compensation Commission [1967] 2 AC 147) to make the setting aside determination. If the intervening appeal tribunal made an error of law within jurisdiction, that did not prevent its setting aside determination from having its normal effect that the decision set aside ceased to exist. Miss Mallick referred to the well-known passage in Lord Reid's judgment in Anisminic v Foreign Compensation Commission [1967] 2 AC 147, 171, where he said:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has

been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provision giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account."

She submitted that the effect of Anisminic described by Lord Diplock in In re Racal Communications Ltd [1981] AC 374, 383, that "as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished", was restricted to the exercise of the court's judicial review jurisdiction. The broad Anisminic principle does not apply to the statutory jurisdiction of the Social Security Commissioners. If it did it would undermine the provision in regulation 12(3) of the Social Security (Adjudication) Regulations 1986 that there is to be no appeal against a determination on an application to set aside under regulation 11 of those Regulations. The validity of intervening decisions should be examined only where strictly necessary, for instance where there has to be a choice between two extant decisions or where the wrong body makes a decision.

13. In consequence, Miss Mallick submitted that R(SB) 4/90 was wrong on its facts, because the Commissioner investigated the grounds of a setting aside decision made within jurisdiction. He concluded that the ground relied on, that the first appeal tribunal had accidentally omitted to consider the correct regulation, was one on which the appeal tribunal considering the application to set aside had no power to rely, because it was not connected with a procedural defect or irregularity. Miss Mallick said that that was an error within jurisdiction which did not prevent the decision of the first appeal tribunal from ceasing to exist. Thus the Commissioner should have decided that the appeal tribunal which reheard the appeal after the setting aside determination did have jurisdiction. By the same token, she submitted that R(G) 2/93 reached the right result on its facts, because there the intervening appeal tribunal had jurisdiction to set aside the first appeal tribunal's decision, although it relied on an inadmissible ground. Therefore, the proper approach would have

led to the conclusion that the third appeal tribunal was not precluded from determining the appeal by the principle of res judicata.

14. In relation to the decisions and determinations in the present case, Miss Mallick's conclusions were as follows. SSAT 2 had jurisdiction to deal with the claimant's application to set aside the decision of SSAT 1. Therefore, SSAT 3 had no jurisdiction to deal with the application, which had already been determined. The question of whether an appeal tribunal can reconsider a determination made under the setting aside procedure does not arise, because SSAT 3 did not purport to act in that way. Therefore, the decision of SSAT 1 remained extant and the SSAT 4 had no jurisdiction to consider the appeal. The claimant's application for leave to appeal against the decision of SSAT 1 remains undetermined.

5. For the claimant, Mr Cox agreed that the Commissioners have power to consider whether SSAT 4 had jurisdiction. He submitted that, following Chief Adjudication Officer v Foster, an appeal tribunal decision given without jurisdiction is erroneous in point of law in the ordinary meaning of the words and that the context of section 23 of the Social Security Administration Act 1992 does not require any restricted meaning. An appeal tribunal must expiscate its jurisdiction (CI/78/1990). He submitted that SSAT 4's jurisdiction did not turn on the principle of res judicata, but on whether SSAT 1's decision was final within section 60 of the Social Security Administration Act 1992 and had not been effectively set aside. Thus, the Commissioners had power to consider the validity of intervening setting aside determinations. He submitted that any error of law would make such a decision invalid – not merely the absence of jurisdiction in the narrow sense put forward by Miss Mallick. He relied on R(S) 12/81, R(SB) 4/90 and CI/78/1990, where Commissioners had adopted that approach, and on Anisminic v Foreign Compensation Commission, In re Racal Communications Ltd and Wade, Administrative Law (6th ed), at p.299, as authority that any error of law takes a statutory tribunal outside its jurisdiction. It would be narrow and unrealistic to require a person to apply to the Divisional Court for judicial review to deal with perversity or errors of law within jurisdiction in determinations under the setting aside procedure.

16. Mr Cox also submitted that an appeal tribunal has power to reconsider a setting aside determination. He relied on the principle of R v Kensington and Chelsea Rent Tribunal, ex parte Macfarlane [1974] 1 WLR 1486, that where a procedural irregularity of which an authority is unaware prevents justice being done the authority may reopen the matter at the request of the person affected. He also referred to R v County of London Quarter Sessions Appeals Committee, ex parte Rossi [1956] 1 QB 682, R v Rent Officer for the London Borough of Camden, ex parte Felix [1988] EGLR 132 and to the decision on Commissioner's file CIS/93/1992, in which the Commissioner held that a chairman of an appeal tribunal could, on the

provision of further information by the claimant, reconsider a determination that an extension of time for the making of an appeal to the appeal tribunal should not be granted. However, Mr Cox accepted that SSAT 3 did not effectively reconsider the claimant's application in the present case. He submitted that SSAT 2's determination was flawed, because of the improper letter from clerk to the appeal tribunal and because no copy of the application was sent to the adjudication officer. Thus, SSAT 3 had jurisdiction to deal with the application to set aside SSAT 1's decision, but its determination was also flawed by the failure to send a copy to the adjudication officer. That led to the following conclusions about the decisions and determinations in the present case. SSAT 2's determination was flawed and ineffective. SSAT 3 was therefore not precluded from considering the application to set aside by SSAT 2's determination, but its determination was also flawed and ineffective. Therefore SSAT 1's decision has never been set aside and SSAT 4 had no jurisdiction to entertain the appeal by virtue of section 60 of the Social Security Administration Act 1992.

17. That left the claimant's application for leave to appeal to the Commissioner against SSAT 1's decision outstanding. Mr Cox had written to the chairman of SSAT 1 before the oral hearing asking him to make a determination on the application. The chairman had declined to do so until the position was clarified by the Commissioners. Mr Cox submitted that the Commissioners had power to grant leave to appeal without a determination having been made by the chairman of SSAT 1 or, in the alternative, that the refusal by the chairman to make a determination for over 5 years amounted to a refusal of leave, so that an application for leave could be directed to the Commissioners under regulation 3(1) of the Social Security Commissioners Procedure Regulations 1987. The Commissioners may waive irregularities under regulation 21 of those Regulations. Mr Cox invited us to accept an application for leave to appeal against the decision of SSAT 1, to grant leave and to deal with the merits of the appeal. Miss Mallick did not object to a waiver of irregularities so as to allow us to grant leave to appeal and to consider whether SSAT 1 had erred in law. We indicated at the oral hearing that we declined to take that course and therefore did not hear any submissions as to whether SSAT 1 erred in law or not.

The decision of the Tribunal of Commissioners

18. Our decision is that the decision of the social security appeal tribunal of 14 September 1989 is erroneous in point of law as the appeal tribunal had no jurisdiction to entertain and determine the claimant's appeal. The appeal tribunal should have investigated, on the material before it, whether it had jurisdiction to hear the appeal from the adjudication officer's decision of 7 August 1986. In the words used in the decision on Commissioner's file CI/78/1990, it failed to expiscate (ie establish by strict examination) its jurisdiction. However, given the complexity and irregularity

of the previous proceedings and the difficulty of the legal issues involved none of the members of the appeal tribunal can be faulted in a personal sense for that failure. If the appeal tribunal had investigated the matter and applied the law as we have determined it to be, it could only have come to one conclusion - that it did not have jurisdiction to hear the appeal. We have accordingly given our decision to that effect in paragraph 2 above. Although the appeal tribunal's decision was one which was invalid or vitiated it retains sufficient legal existence to be susceptible to appeal (Calvin v Carr [1980] AC 574, applied in paragraph 6 of R(S) 13/81) until set aside by our decision.

19. We now proceed to explain our reasons for our decision. Miss Mallick and Mr Cox reached the same conclusion as to the jurisdiction of SSAT 4, but by different routes. We have preferred Miss Mallick's route, but in view of the complexity and importance of the issues involved, we set out our own views in some detail.

Res judicata or finality of decisions

20. It was common ground before us that if SSAT 1's decision was still in existence, then SSAT 4 had no power to entertain or to hear or to determine the appeal that had been decided by SSAT 1. Miss Mallick put that on the basis of the principle of res judicata. Mr Cox put it on the basis of section 60(1) of the Social Security Administration Act 1992 (section 117(1) of the Social Security Act 1975), which provides:

> "(1) Subject to the provisions of this Part of this Act, the decision of any claim or question in accordance with the foregoing provisions of this Part of this Act shall be final; and subject to the provisions of any regulations under section 58 above, the decision of any claim or question in accordance with those regulations shall be final."

The difference in approach is perhaps more apparent than real. In many ways the two approaches show different sides of the same coin. Although section 60(1) makes decisions within its scope "final", some explanation is needed of what legal consequences flow from that. The principle of res judicata is primarily concerned with the legal consequences of a final decision when an issue or question which was part of that decision is raised in other proceedings. But, as it is put in paragraph 974 of Volume 16 of Halsbury's Laws of England (4th ed), the "doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation". Here, we are not concerned with the effect of the decision of SSAT 1 in other proceedings or where there is another claim. SSAT 4 purported to hear and decide the same appeal as had been determined by SSAT 1 in a final decision. Unless SSAT 1's decision had been set aside through the statutory process of review or appeal or by the setting aside procedure under

regulation 11 of the Social Security (Adjudication) Regulations 1986 ("the Adjudication Regulations"), then the effect of that fundamental doctrine is that another appeal tribunal has no authority or jurisdiction to determine the appeal the subject of that decision. That is such a fundamental matter that we do not need to discuss earlier Commissioners' decisions referring to res judicata in dealing with the dates to which decisions of adjudicating authorities relate.

Power to examine the validity of intervening decisions and determinations

21. In the present case, the last appeal tribunal determination, in terms of dates, before SSAT 4's hearing, was that of SSAT 3 which purported to set aside SSAT 1's decision under regulation 11 of the Adjudication Regulations. Must we accept that as a result SSAT 1's decision ceased to exist, or may we, in the course of establishing whether SSAT 4 had jurisdiction, examine whether SSAT 3's determination was effective to set aside SSAT 1's decision? That is the central question before us. Before examining the existing Commissioners' decisions it is convenient to set out the relevant parts of regulation 11 of the Adjudication Regulations. Paragraphs (1) to (3) provide:

> "(1) Subject to regulation 12 (provisions common to regulations 10 and 11), on an application made by a party to the proceedings, a decision may be set aside by the adjudicating authority who gave the decision or by an authority of like status in a case where it appears just to set the decision aside on the ground that--
>
> (a) a document relating to the proceedings in which the decision was given was not sent to, or was not received at an appropriate time by, a party to the proceedings or the party's representative or was not received at an appropriate time by the adjudicating authority who gave the decision; or
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> (b) a party to the proceedings in which the decision was given or the party's representative was not present at a hearing or inquiry relating to the proceedings; or
>
> (c) the interests of justice so require.
>
> (2) An application under this regulation shall be made in accordance with regulation 3 and Schedule 2.
>
> (3) Where an application to set aside a decision is entertained under paragraph (1), every party to the proceedings shall be sent a copy of the application and shall be accorded a reasonable opportunity of making representations on it before the application is determined."

The effect of regulation 3 and Schedule 2 is that an application to set aside must be in writing, stating grounds, and be delivered to an appropriate office within a specified time. Under regulation 12, paragraph (3) provides:

> "(3) There shall be no appeal against a correction made under regulation 10 or a refusal to make such a correction or against a determination given under regulation 11."

22. In R(SB) 4/90 a social security appeal tribunal ("SSAT A") awarded the claimant a single payment for miscellaneous furniture and household equipment on taking up a tenancy of unfurnished accommodation. The adjudication officer's written submission to SSAT A had failed to mention a provision of the relevant Regulations which deprived the claimant of entitlement as having been a tenant of unfurnished accommodation in her previous home. The adjudication officer applied for the decision of SSAT A to be set aside under regulation 11 on the ground that it "accidentally omitted to consider" that provision. The claimant made written representations against setting aside. An appeal tribunal ("SSAT B") set aside SSAT A's decision "to enable another tribunal to reconsider the decision". The matter came before a further appeal tribunal ("SSAT C"), which after a full investigation of all the circumstances, decided that the claimant was not entitled to the single payment. The claimant appealed against that decision to the Commissioner. Mr Commissioner Goodman held that SSAT C's decision was a nullity. The ground for setting aside specified in regulation 11(1)(c) was limited to "procedural irregularities" (R(U) 3/89), which could not cover the ground relied on by SSAT B. The Commissioner then continued, in paragraph 11:

> "It follows that any tribunal's purported determination to set aside for error of law unconnected with a procedural defect under the head 'the interests of justice so require', or any other head, is given outside the powers conferred by Act of Parliament."

It was argued for the adjudication officer that since no appeal lay to the Commissioner against a setting-aside determination (regulation 12(3)) a defective determination could only be set aside by an order of certiorari in the High Court. The Commissioner, after citing the passage from Lord Reid's speech in the Anisminic case set out in paragraph 12 above, wrote (in paragraph 17):

> "The passages I have underlined in that citation apply, in my judgment, to the purported setting-aside determination of the social security appeal tribunal in this case. The tribunal may have had 'jurisdiction' in the narrow sense but its decision was nevertheless a nullity in accordance with the underlined words. Despite the provision of regulation 12(3) prohibiting appeals, I am empowered to declare that the setting-aside

determination was a nullity, just as the House of Lords in the Anisminic case could declare as a nullity the purported determination of the Foreign Compensation Commission, despite the provision in section 4(4) of the 1950 Act that such a determination should "not be called into question in any court of law"."

23. The decision in R(SB) 4/90 has been followed in a number of other decisions. In CI/78/1990 a medical appeal tribunal ("MAT 1") had made an assessment of disablement on the basis that the claim for disablement benefit was made after 1 October 1986. Later an adjudication officer accepted that the claim was to be treated as having been made before that date. The adjudication officer applied for the decision of MAT 1 to be set aside. The application came before a second medical appeal tribunal ("MAT 2") which set aside the decision of MAT 1 in "the interests of natural justice". When the appeal came before a further medical appeal tribunal ("MAT 3"), some questions of law were referred to the Social Security Commissioner under a procedure then available to medical appeal tribunals. Mr Commissioner J G Mitchell accepted what he described as common ground, that MAT 2 did not have jurisdiction to set aside MAT 1's decision. The main area of discussion was to what extent an appeal tribunal in the position of MAT 3, rather than a Commissioner considering an appeal from that appeal tribunal, could investigate the validity of an intervening setting aside determination in establishing its own jurisdiction. The Commissioner concluded that an appeal tribunal could disregard an intervening setting aside determination which was "plainly invalid", but otherwise should accept such determinations at face value. That approach was affirmed by Mr Commissioner Goodman in R(SB) 1/92, where he stressed again what he saw as the more extensive power of the Commissioner to investigate and adjudicate on whether or not an intervening setting aside determination comes within the terms of regulation 11(1) of the Adjudication Regulations.

24. In R(G) 2/93 Mr Commissioner Rice held that R(SB) 4/90 was wrongly decided in so far as it suggested that a Social Security Commissioner has the power to make a declaration as to the validity or otherwise of a decision of an administrative authority from which there is no appeal. A social security appeal tribunal ("SSAT A") had awarded the claimant a social fund funeral payment, having found on the basis of a computer record that she had been awarded housing benefit for a period including the date of claim. The adjudication officer then received information from the local authority that the computer record that had been relied on was out of date and applied for SSAT A's decision to be set aside. A second appeal tribunal ("SSAT B") set aside SSAT A's decision under regulation 11(1)(c) (the interests of justice so require). The appeal was reheard by a third appeal tribunal ("SSAT C"), which decided that the claimant was not entitled to a funeral payment. The claimant appealed and the adjudication officer submitted that SSAT B had no authority to set aside SSAT A's decision. The Commissioner held that, as a

consequence of his inability to declare SSAT B's determination a nullity, SSAT C had no power to proceed on the basis that SSAT B's determination was without effect and was at liberty to consider the whole matter afresh. There was no error of law in its finding that the claimant was not entitled to housing benefit on the date of the funeral payment claim.

25. We agree with the reasoning in R(G) 2/93 to this extent, that it is clear, and has been put beyond doubt by the decision of the House of Lords in Chief Adjudication Officer v Foster [1993] AC 754, that the Social Security Commissioners cannot exercise a judicial review jurisdiction and have no power to make declarations as to the validity or otherwise of decisions or determinations of appeal tribunals which are not under appeal to the Commissioners. Thus, the language used in paragraph 17 of R(SB) 4/90, where the Commissioner said that he was empowered to declare the setting aside determination in that case a nullity, is too wide. However, we do not agree that that conclusion of law means that appeal tribunals and the Commissioners, in the process of determining whether an appeal tribunal has jurisdiction, in the light of the broad principle of res judicata, to entertain and hear an appeal, may not determine whether an appeal tribunal's setting aside determination has been effective or not. In our view, there is a very close analogy to the approach of the House of Lords in Foster. It may be noted that R(G) 2/93 was decided before the House of Lords in that case reversed the Court of Appeal's ruling on the power of the Commissioners to consider whether provisions in regulations are ultra vires. Lord Bridge said this (at [1993] AC 764):

> "It is said that, if the Commissioner were intended to have power to hold a provision in a regulation to be ultra vires and to determine whether or not it was severable, one would expect to find that he was also empowered to make a declaration to that effect, which he is not. This, again, I find quite unconvincing. The Commissioner has no power and no authority to decide anything but the issue which arises in the case before him, typically, as in this case, whether in particular circumstances a claimant is or is not entitled to the benefit claimed. If the success of the claim depends, as here, on whether a particular provision is both ultra vires and severable, the Commissioner's decision of that question is merely incidental to his decision as to whether the claim should be upheld or rejected. If not appealed, his opinion may be followed by other Commissioners, but it has, per se, no binding force in law. To my mind, it would be very surprising if the Commissioners were empowered to make declarations of any kind and the absence of such a power does not, in my opinion, throw any light on the question presently in issue."

If Commissioners may, incidentally to determining the issue before them, pronounce on the validity of provisions in

regulations, so must they be able to pronounce on the validity of decisions of other administrative bodies.

26. In our view, the facts of the present case show particularly starkly the difficulties of the approach adopted in R(G) 2/93. Here, there is not one setting aside determination, but two. SSAT 2's determination did not disturb SSAT 1's decision. SSAT 3's determination set aside SSAT 1's decision. How is SSAT 4 to know which determination should be accepted without the ability to investigate the validity of both determinations? There is no argument in principle or logic for accepting SSAT 3's determination simply because it is more recent in time. We reject the legal basis on which the decision in R(G) 2/93 was reached. However, as will emerge below, we consider that the result reached in the circumstances of that case was the right one.

27. Thus, we agree with R(SB) 4/90 and the decisions following it to the extent that we hold that the Commissioners may investigate the validity of prior decisions or determinations of appeal tribunals where that is necessary in order to determine whether the appeal tribunal whose decision is under appeal had jurisdiction to entertain the appeal. In Foster, the House of Lords recognised that if the Commissioners had the power to pronounce on whether a provision of a regulation was ultra vires or not, then appeal tribunals and adjudication officers would also have that power. In the present context, we accept the approach of CI/78/1990 and R(SB) 4/92 that an appeal tribunal must, in the course of establishing whether it has jurisdiction to entertain an appeal, in the light of the broad principle of res judicata, be able to investigate whether an earlier decision of an appeal tribunal on the same appeal has been effectively set aside. However, we are unable to accept the distinction drawn in those cases between the investigation which may be made by an appeal tribunal of the validity of decisions or determinations of another authority of equal status and the investigation which may be made by a Commissioner on appeal from the decision of the appeal tribunal. Commissioners only have power to set aside an appeal tribunal's decision on appeal under section 23(7) of the Social Security Administration Act 1992 if they have first held the decision to be erroneous in point of law. There seems to us to be considerable difficulty in a Commissioner holding that an appeal tribunal has erred in law in hearing an appeal over which it had no jurisdiction when that appeal tribunal has made the fullest investigation of its jurisdiction allowed by the approach of CI/78/1990 and R(SB) 4/92. If the appeal tribunal has faithfully complied with the legal obligations and restrictions on it, how can it be said that it has erred in law? In our view, the Commissioners and appeal tribunals must adopt the same legal basis for determining whether earlier decisions or determinations are valid or not, in the course of establishing whether or not the appeal tribunal has jurisdiction.

28. That is one reason, and a powerful one, why we accept Miss Mallick's submission that, in determining whether an earlier appeal tribunal's decision or determination is valid or not, Commissioners and appeal tribunals may only consider whether the earlier appeal tribunal had jurisdiction in the narrow sense of being entitled to enter on the consideration of the matter before it (and therefore to determine that matter). In consequence, we hold that R(SB) 4/90, CI/78/1990 and R(SB) 4/92 were wrong in adopting a wider approach. The effect of requiring an appeal tribunal, in establishing its own jurisdiction, to determine the validity of earlier decisions or determinations of appeal tribunals, is that the appeal tribunal may have to impugn the decision of an authority of equal status to itself. Such an effect cannot be entirely avoided, because if SSAT B wrongly sets aside the decision of SSAT A, following which the appeal is referred to SSAT C, then whatever SSAT C does involves impugning either SSAT A or SSAT B. However, the power to determine the validity of another appeal tribunal's decision or determination should be kept within narrow bounds.

29. A second reason is that the question must be approached within the statutory framework of social security adjudication. It has already been established that the Commissioner is not exercising a judicial review jurisdiction. Therefore, the principles established in the Anisminic and Racal Communications cases for determining when a decision of an administrative authority is or is not a nullity do not automatically apply. Regulation 12(3) of the Adjudication Regulations provides that there is to be no appeal from a setting aside determination. If a later appeal tribunal or a Commissioner were able to determine that a setting aside determination was a nullity by reference to the full range of grounds mentioned by Lord Reid in Anisminic (see paragraph 12 above), that would be tantamount to allowing an indirect right of appeal on a point of law to the later appeal tribunal and through that appeal tribunal to the Commissioners. That would undermine the effect of regulation 12(3). If the basis on which the jurisdiction of the appeal tribunal to make the setting aside determination can be impugned is confined to its narrowest extent, then there is no incompatibility with regulation 12(3). On that basis, but on that basis only, we agree with the proposition put forward in R(SB) 4/90 that the prohibition on appeals against a setting aside determination does not prevent a Commissioner considering an appeal against the decision of a later appeal tribunal (and we would add, that appeal tribunal itself) from adjudicating on the validity of the setting aside determination. That conclusion does not deprive claimants of the protections afforded by the judicial review process and the Anisminic principles. A setting aside determination will remain susceptible to judicial review, and may be challenged in that way on the basis of any kind of error of law.

Setting aside applications and jurisdiction

30. We have concluded that, in establishing its own jurisdiction, an appeal tribunal may and must disregard any earlier decision or determination of an appeal tribunal which was made without jurisdiction, in the sense of having been made without jurisdiction to entertain the proceedings and to make the determination in question at all. Lord Bridge in In re McC [1985] AC 528, 536, described such a meaning of "without jurisdiction or in excess of jurisdiction" as being at one end of the spectrum of shades of meaning. In order to apply that conclusion to the circumstances of the present case we must set out what in our view are the essential elements which must be present in order for an appeal tribunal to have jurisdiction to entertain and determine a setting aside application. We consider that there are four essential elements:

(a) that there is a valid application by a prescribed person;

(b) that, subject to the possibility of reconsideration (see paragraph 35 below), the application has not already been determined by another appeal tribunal;

(c) that a properly constituted appeal tribunal sits and considers the application; and

(d) that the appeal tribunal makes a determination on the application.

31. Element (a) reflects the restriction in regulation 11(1) of the Adjudication Regulations that a decision may be set aside only "on an application made by a party to the proceedings". There is a definition of "party to the proceedings" in regulation 1(2) of the Adjudication Regulations. An appeal tribunal may not consider or determine a setting aside of its own motion or at the instance of a chairman or any other person not a party to the proceedings. The document (see regulations 11(2) and 3(1)) constituting the application must either expressly or by necessary implication contain a request to set aside an appeal tribunal's decision under the procedure of regulation 11, rather than through the procedure of direct appeal. The application must also be made within the time limit prescribed in Schedule 2 to the Adjudication Regulations, subject to possible extension under regulation 3(3). Element (b) reflects the broad principle of res judicata summarised in paragraph 20 above. If a valid application has been already been determined by an appeal tribunal within its jurisdiction, there is no jurisdiction for another appeal tribunal to entertain the application. That is subject to the possibility that an appeal tribunal may have the power to reconsider its setting aside determination, as is mentioned in paragraph 35 below. Element (c) reflects the requirement in regulation 11(1) that a decision of an adjudicating authority may only be set aside by the authority

which gave the decision or another authority of like status. Thus in the case of a decision of a social security appeal tribunal, any setting aside determination must be made by a social security appeal tribunal. Three people only constitute a social security appeal tribunal if the requirements of section 41 of the Social Security Administration Act 1992 are complied with. Thus there must be a properly appointed chairman and two members drawn from the appropriate panel. We note that the provision in regulation 24(2) of the Adjudication Regulations allowing a case, with the consent of the claimant, to proceed in the absence of one member of an appeal tribunal other than the chairman only applies to oral hearings of appeals or references. It does not apply to the determination of an application to set aside. Element (d) is partly a logical extension of element (c). The body which makes the determination must be the same body which properly entertained the proceedings. But its permissible final determinations are limited to setting aside the appeal tribunal's decision or determining not to set it aside.

32. That approach means that the existence of any errors of law made by an appeal tribunal acting within its setting aside jurisdiction does not entitle a subsequent appeal tribunal to disregard the setting aside determination. If an appeal tribunal finds that circumstances which have nothing to do with procedural irregularities justify setting aside because "the interests of justice so require" or even does not purport to rely on any ground specified in regulation 11(1) of the Adjudication Regulations at all, that does not take it outside its jurisdiction, for present purposes. Nor does a breach, however gross, of the principles of natural justice.

33. We have considered very carefully whether a failure to follow the procedure of sending a copy of the application to set aside to all other parties to the proceedings and giving every party an opportunity to comment on the application deprives an appeal tribunal of jurisdiction to entertain and determine the application. We are mindful that in R(S) 12/81 a Tribunal of Commissioners expressed the opinion in relation to a forerunner of regulation 11 of the Adjudication Regulations that it

> "is an indispensable requirement, and particularly if the application is being dealt with without a hearing, that every person interested in the decision should have the opportunity to make representations upon the application before it is determined. In the case of an insurance officer, he may very well have important representations to make, based upon his personal knowledge of, or enquiries regarding, the circumstances arising under regulation 3(1)(a) or (b) which are founded upon by the claimant. We were informed that insurance officers had indicated that they did not, in general, wish an opportunity to make such representations. In our opinion however it is of importance to the reaching of a just determination upon a claimant's application under these

Regulations that the insurance officer should, wherever possible, make representations upon the application indicating whether the knowledge or information in his possession is consistent with the case put forward by the claimant and, if appropriate, express support for or opposition to the application."

34. We endorse the importance attached to making an opportunity to make representations on an application available to other parties. We understand that the practice of insurance officers changed following the decision in R(S) 12/81 and that adjudication officers now, if given notice of an application to set aside an appeal tribunal's decision, will either put forward representations or indicate that they do not wish to comment on the particular application. However, we have concluded that R(S) 12/81 does not make the sending to other parties to the proceedings of a copy of the application an essential precondition, without which the appeal tribunal has no jurisdiction to entertain and determine the setting aside application. Although the Tribunal of Commissioners described the sending of a copy as an indispensable requirement, it immediately qualified that statement by adding "particularly if the application is being dealt with without a hearing". If a requirement is an essential precondition to jurisdiction it cannot be more essential in some circumstances than in others. In R(S) 12/81 the failure to send the insurance officer a copy of the claimant's application occurred before an attempt to deal with the application by obtaining the separate written views of the chairmen and members of the appeal tribunal without reconvening the appeal tribunal. Because one member did not agree to the setting aside, the appeal tribunal was reconvened, and there was a hearing at which the claimant was certainly present, and we presume a representative of the adjudication officer as well. That leaves it rather unclear whether the Tribunal of Commissioners was emphasising the importance of obtaining the insurance officer's views where there was no hearing at all, or equally where there is a hearing at which the claimant and the adjudication officer are not invited to be present. At any rate, while we accept that the requirement is mandatory and that it is an error of law for an appeal tribunal to entertain and determine a setting aside application without being satisfied that a copy of the application has been sent to all other parties to the proceedings, who have had an opportunity to make representations, we conclude that such an error does not go to the appeal tribunal's jurisdiction. We make some further observations on the setting aside procedure in paragraph 38 below.

The results in the present case

35. We now set out how the conclusions of law which we have reached apply to the decisions and determinations in the present case.

* The decision of SSAT 1 was given within jurisdiction and disposes finally of the claimant's appeal unless it has been set aside under regulation 11 of the Adjudication Regulations, has been reviewed or has been set aside by a Social Security Commissioner on appeal. Neither of the latter two alternatives are currently applicable.

* The determination of SSAT 2 was made within jurisdiction. There was a valid application by the claimant. The application had not already been determined by another appeal tribunal. A properly constituted appeal tribunal was convened to consider the application and it determined that the decision of SSAT 1 should not be set aside. Although there is no evidence that a copy of the claimant's application was sent to the adjudication officer or that the adjudication officer had an opportunity to make representations on the application, that does not mean that SSAT 2 had no jurisdiction to entertain and determine the application. Neither does the fact that there were serious irregularities in the letter of 21 August 1987 from the clerk to the appeal tribunal.

* The determination of SSAT 3 was made without jurisdiction, in that the claimant's application had already been determined by SSAT 2 acting within jurisdiction. The claimant's application for leave to appeal to the Commissioner against the decision of SSAT 1 was (despite its misguided reference to regulation 11 of the Adjudication Regulations) not a request for reconsideration of his application to set aside the decision of SSAT 1. The chairman of SSAT 1 and SSAT 2 clearly had no authority to treat it as such, or to reconsider himself the determination of SSAT 2. We do not need to decide whether Mr Cox is right that there is a power for an appeal tribunal to reconsider a setting aside determination, because in all the authorities which he cited there was a request by the person affected for a reconsideration to take place and we consider that there could only possibly be a power to reconsider following on such a request. Thus, if such a power exists, SSAT 3 could not have exercised it, and indeed did not purport do so.

* Accordingly, SSAT 4 had no jurisdiction to entertain and determine the appeal. SSAT 1's decision stood and finally disposed of the appeal.

36. The decision of SSAT 4 was therefore erroneous in point of law, and we must set it aside. We substitute our decision set out in paragraph 2 above.

37. In consequence, the claimant's application for leave to appeal against the decision of SSAT 1 remains outstanding. We consider that a refusal of leave by the chairman of SSAT 1 cannot be implied from his failure to give a ruling on the application since it was made on 29 June 1988. In the absence

of an adverse ruling by the chairman, an application for leave to appeal made within the prescribed period cannot be considered by a Commissioner consistently with the terms of regulation 3(1) of the Social Security Commissioners Procedure Regulations 1987. We decline to consider granting leave in the exercise of our power under regulation 21 of those Regulations to waive irregularities. There have been far too many irregularities already in the treatment of the claimant's case. Things should now be dealt with properly. We therefore request that as soon as possible after the issuing of this decision, the claimant's application for leave to appeal against the decision of SSAT 1 should be referred to the chairman of SSAT 1, or if that is impracticable or would be likely to cause undue delay, to another chairman of social security appeal tribunals, and that a ruling should be made. We express the hope that matters will now proceed with the minimum of further delay, so that the claimant can receive a final resolution of his appeal, which has now been proceeding for well over seven years.

The setting aside procedure

38. We cannot leave the present appeal without making some general observations on the nature of the setting aside procedure. We wish to emphasise as strongly as we can that decisions of appeal tribunals and adjudication officers may only be set aside under regulation 11 of the Adjudication Regulations where one of the carefully defined conditions in paragraph (1) exists and where the adjudicating authority is satisfied that it is just to set the decision in question aside. It is a judicial procedure, not an administrative procedure to be invoked whenever it appears convenient or where some doubt is felt about the merits of the decision in question. It is intended to provide a short, simple and speedy alternative to the inevitably slow and complex process of appeal where something has gone wrong with the procedure leading to the decision in question. But in order to maintain the proper division between the two processes, setting aside under regulation 11 must be kept within its narrow bounds. We have already mentioned the necessity of a copy of the application being sent to all other parties to the proceedings, who must have an opportunity to make representations on the application. Although there is no statutory requirement for the obtaining of further observations, we consider that the principles of natural justice require that where another party makes representations (beyond indicating that the other party does not wish to comment or provide information) a copy of those representations must be sent to the applicant, who must be given an opportunity of making observations in reply, either in writing or by attending a hearing before the adjudicating authority. Where, for instance, a claimant applies for an appeal tribunal's decision to be set aside, an adjudication officer may well be able to make important representations based on personal knowledge of or enquiries made concerning the circumstances, as recognised in paragraph 10 of R(S)

12/81. However, it is not satisfactory that an appeal tribunal should proceed to determine the application without seeking the views of the claimant on what may be new points and, as we understand is the normal practice, at a hearing to which neither the applicant nor any other party to the proceedings is invited. Since it is not practicable to distinguish between situations in which the representations of another party to the proceedings raise a new point and situations in which they do not, the requirement of reference to the applicant must apply whenever representations are made.

Conclusion

39. The adjudication officer's appeal is allowed.

(Signed) Kenneth Machin
Chief Commissioner

(Signed) A.W.E. Wheeler
Commissioner

(Signed) J. Mesher
Commissioner

(Date) 7th June, 1994