Bellah, 193

CIS/1363/2005
CIS/2322/2005
CJSA/3742/2005
CHR/3855/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. (a) In CIS/1363/2005, I dismiss the claimant's appeal.

(b) In CIS/2322/2005, I dismiss the claimant's appeal.

(c) In CJSA/3742/2005, I refuse the claimant leave to appeal.

(d) In CHR/3855/2005, I grant the claimant leave to appeal and give further directions in paragraph 54 below.

REASONS

2. These four cases raise a common question: is there a right of appeal to a Social Security Commissioner against a decision made by a legally qualified panel member under the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991)?

3. I held an oral hearing in CIS/1363/2005, at which the claimant neither appeared nor was represented and the Secretary of State was represented by Mr Prakash Raithatha of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions. That case was then joined with the three other cases and I held a further oral hearing. Again, the claimant in CIS/1363/2005 neither appeared nor was represented. The claimants in CIS/2322/2005 and CJSA/3742/2005 both appeared in person. The claimant in CHR/3855/2005 was represented by Mr D J Lowrie of Stockton-on-Tees Borough Council's Welfare Rights Service. The Secretary of State was represented in the first three cases by Mr Stephen Cooper of the Solicitors' Office and in the fourth case by Ms Carine Patry of Counsel, instructed by the Solicitor to Her Majesty's Revenue and Customs.

The facts

4. The background to CIS/1363/2005 is the policy decision of the Secretary of State to cease issuing order books to claimants of income support. The Secretary of State has been trying to encourage claimants to accept payments by credit transfer directly into a bank or building society account, which he regards as both more secure and more efficient than other payment methods. For those who are unable or unwilling to accept such direct payments, payments are instead now all made by cheque. The claimant has objected to credit transfer payments and to the withdrawal of order books and so, when he was informed on 11 January 2005 of the new rate of benefit payable to him from 12 April 2005 and that the amount would "be paid every week by cheque", he appealed, stating: "The amount is correct. I Appeal the Decision to pay by cheque (as opposed to Order Book)." The claimant submitted that the discontinuance of payment by order book was "a purely arbitrary administrative decision" and he challenged the local benefits office to tell him of any statutory basis for the decision. This the office was unable to do. However, when the office submitted the appeal to the clerk to the appeal tribunal, it stated that the appeal was outside the tribunal's jurisdiction and cited "SS

Act 1998 Schedule 2, D+A Regs, Schedule 2 + DMG vol 1 Annex E". On 25 January 2005, a legally qualified panel member struck out the appeal on the ground that it was outside the tribunal's jurisdiction. The claimant was informed of that decision in a letter from the clerk, which simply reiterated that the appeal was outside the tribunal's jurisdiction but gave no reason. The claimant protested to the clerk and, on 16 February 2005, sought to appeal to a Commissioner. On 27 May 2005, I granted leave to appeal, without prejudice to the Secretary of State's right to argue that a Commissioner had no jurisdiction to entertain the appeal.

5. In CIS/2322/2005, the Secretary of State issued a decision on 28 June 2001 to the effect that £417.40 income support had been overpaid to the claimant from 4 to 25 December 2000 and was recoverable from the claimant because he had failed to declare that he had been refused asylum. On 11 June 2004, the claimant was given exceptional leave to remain in the United Kingdom and he claimed jobseeker's allowance. On 16 August 2004, he was informed that the overpayment of income support would be recovered from his jobseeker's allowance. The claimant protested, saying that he had not been aware that he had been refused asylum until notified by letter dated 21 December 2000 that he was no longer entitled to income support on that ground and that he had immediately surrendered his order book as instructed. The letter was treated as a letter of appeal against the decision dated 28 June 2001 and, on 2 December 2004, a legally qualified panel member refused to extend the time for appealing on the ground that she could not do so because the appeal had been brought more than a year late. On a form received in about July 2005, the claimant sought leave to appeal to a Commissioner. On 2 September 2005, I granted leave to appeal, without prejudice to the Secretary of State's right to argue that a Commissioner had no jurisdiction to entertain the appeal.

6. In CJSA/3724/2005, the Secretary of State informed the claimant on 20 June 2005 that payment of jobseeker's allowance had been suspended because he had not attended two interviews and that it would remain suspended until he did attend an interview. The claimant submitted an appeal against that decision. When the local office sent the appeal to the clerk, it said that it considered the appeal to be outside the tribunal's jurisdiction because the award had merely been suspended and there was no decision to appeal against. On 8 August 2005, a legally qualified panel member struck the appeal out without giving any further reason. The clerk informed the claimant of that decision, adding that there was no right of appeal against a decision of the Secretary of State to suspend jobseeker's allowance where doubts over availability for employment were concerned. The claimant sought leave to appeal from the legally qualified panel member. There is no evidence in the tribunal file that he received any response. He now seeks leave to appeal to a Commissioner.

7. In CHR/3855/2005, the claimant was informed on 13 October 2004 that she would qualify for a Category A retirement pension at 93 per cent. of the standard rate. She appealed, seeking to be treated as having been "precluded from regular employment by responsibilities at home" (see paragraph 5(7)(b) of Schedule 3 to the Social Security Contributions and Benefits Act 1992) in respect of the period from June 1970 when her first child was born to 5 April 1978, so as to obtain a pension at the standard rate but, on 5 January 2005, the Secretary of State refused to revise or supersede the decision of 13 October 2004. However, following further correspondence, the issue was referred to the Inland Revenue, who had an arrangement under section 17 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 to make decisions concerning home responsibilities protection on behalf of the Secretary of State. On 29 March 2005, the Inland Revenue refused to treat the claimant as having been

precluded from regular employment by responsibilities at home in respect of any tax year before 6 April 1978 on the simple ground that the scheme did not come into force until that year. It appears that, on 7 June 2005, the claimant's adviser contacted either the Department for Work and Pensions or Her Majesty's Revenue and Customs (who by then had taken over the functions of the Inland Revenue) and, during a conversation, told them that the letter of 29 March 2005 had not been received by either the claimant or him. A form for appealing was issued on the same day and was returned a week later. It was argued that failing to treat the claimant as having been precluded from regular employment by responsibilities at home in respect of years before 6 April 1998 amounted to indirect discrimination, contrary to Directives 79/7/EEC and 76/207/EEC and also Article 14 of the European Convention on Human Rights, read with Article 1 of Protocol 1 and, moreover, that since 1994 there had been nothing in domestic legislation to prevent the claimant being treated as having been precluded from regular employment by responsibilities at home in respect of periods before 6 April 2004. It was also submitted that the appeal should be accepted on the basis that the claimant had in fact tried to appeal against the original decision awarding retirement pension and that she had been unable to appeal earlier against the decision of 29 March 2005 because she had not received notice of the decision. On 13 July 2005, a legally qualified chairman refused to extend the time for appealing because the appeal had no reasonable prospects of success and that none of the special circumstances specified in the legislation as justifying the admission of a late appeal existed and neither did any other exceptional circumstances. The claimant protested but the legally qualified panel member merely made another decision to the same effect on 25 July 2005. The claimant sought leave to appeal but that was refused on 15 August 2005 by another legally qualified panel member who said there was no right of appeal. On 9 November 2005, the claimant applied to a Commissioner for leave to appeal. I directed that there be an oral hearing of the application.

8. Insofar as there is no statement of reasons in the first three cases, I have waived the irregularity because no reasons are necessary for the proper determination of the cases. Insofar as the claimants in those three cases have not applied to a legally qualified panel member for leave to appeal before applying to me, or have not received a response to an application, I have waived that irregularity also because, in the absence of statements of reasons, the applications were bound to be rejected and would serve no purpose, quite apart from the fact that applications would probably have resulted in unproductive correspondence as to whether there was any right of appeal, which is the very issue I must determine.

The legislation

9. The legislation relevant to the common issue arsing in these cases is to be found in the Social Security Act 1998 and the 1999 Regulations which, so far as is material to these cases, are made under that Act. Tribunals are constituted under Chapter I of Part I of the Act. The framework for social security adjudication is established by Chapter II of Part I.

10. In Chapter I of Part I, section 7(1), (2), (6)(a) and (7) of the 1998 Act provides –

> "(1) Subject to subsection (2) below, an appeal tribunal shall consist of one, two or three members drawn by the President from the panel constituted under section 6 above.

"(2) The member, or (as the case may be) at least one member, of an appeal tribunal must –

(a) have a general qualification (construed in accordance with section 71 of the Courts and Legal Services Act 1990); or

(b) be an advocate or solicitor in Scotland.

...

(6) Regulations shall make provision with respect to –

(a) the composition of appeal tribunals;

(b) ...

(c) ...

"(7) Schedule 1 to this Act shall have effect for supplementing this section."

11. The provisions in Schedule 1 that are material to these cases are paragraphs 6 and 12, which provide –

"6. The Secretary of State may appoint such officers and staff as he thinks fit for the President and for appeal tribunals.

...

"12.(1) The Secretary of State may be regulations provide –

(a) for officers authorised by the Secretary of State to make any determinations which fall to be made by an appeal tribunal and which do not involve the determination of any appeal, application for leave to appeal or reference;

(b) for the procedure to be followed by such officers in making such determinations;

(c) for the manner in which such determinations by such officers may be called in question.

" (2) A determination which would have the effect of preventing an appeal, application for leave to appeal or reference being determined by an appeal tribunal is not a determination of the appeal, application or reference for the purposes of sub-paragraph (1) above."

12. In Chapter II of Part I of the 1998 Act, section 8(1) provides –

"Subject to the provisions of this Chapter, it shall be for the Secretary of State –

(a) to decide any claim for a relevant benefit;

(b) ...;

(c) subject to subsection (5) below, to make any decision that falls to be made under or by virtue of a relevant enactment."

Subsection (5) has the effect that decisions that fall to be made by Her Majesty's Revenue and Customs are excluded from the scope of subsection (1)(c).

13. Section 12(1), (2) and (7) provides –

"(1) This section applies to any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above) which –

(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or

(b) is made otherwise than on such a claim or award, and falls within Schedule 3 to this Act.

"(2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to an appeal tribunal, but nothing in this subsection shall confer a right of appeal in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision.

...

"(7) Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought."

14. Section 14(1) and (10) provides –

"(1) Subject to the provisions of this section, an appeal lies to a Commissioner from any decision of an appeal tribunal under section 12 or 13 above on the ground that the decision of the tribunal was erroneous in point of law.

...

"(10) No appeal lies under this section without the leave –

(a) of the person who constituted, or was the chairman of, the tribunal when the decision was given or, in a prescribed case, the leave of such other person as may be prescribed; or

(b) subject to and in accordance with regulations, of a Commissioner."

15. Section 16 and Schedule 5 make provision for procedure regulations, including, by virtue of paragraph 2 of Schedule 5, "provision as to the striking out or reinstatement of proceedings".

16. The phrase "legally qualified panel member" is not used in the 1998 Act but is defined in regulation 1(3) of the 1999 Regulations in such a way as to refer to a panel member falling within the scope of section 7(2) of the Act.

17. The first of the substantive provisions in the 1999 Regulations that is relevant to these cases is regulation 27, which provides that there is no right of appeal against decisions set out in Schedule 2 to the Regulations. Whether that provision is made under paragraph 9 of Schedule 2 to the Act or under section 12(2) is not material in these cases. The relevant paragraphs of Schedule 2 are –

"5. A decision, being a decision of the Secretary of State ..., under the following provisions of the Claims and Payments Regulations –

...

(l) regulation 26 (manner and time of payment of income support);

...

"24. A decision of the Secretary of State relating to the suspension of a relevant benefit or the payment of such a benefit which has been suspended under Part III."

18. Regulations 31 and 32 are concerned with the bringing of appeals. Regulation 31(1)(a) provides that, in the ordinary case where no request for revision or a statement of reasons is made, an appeal must be brought "within one month of the date of notification of the decision against which the appeal is brought". Provision for late appeals is made by regulation 32 in the following terms –

"(1) The time within which an appeal must be brought may be extended where the conditions specified in subsections (2) to (8) are satisfied, but no appeal shall in any event be brought more than a year after the expiration of the last day for appealing under regulation 31.

"(2) An application for an extension of time under this regulation shall be made in accordance with regulation 33 and shall be determined by a legally qualified panel member ...

"(3) ...

"(4) An application for an extension of time shall not be granted unless –
(a) the panel member is satisfied that, if the application is granted, there are reasonable prospects that the appeal will be successful; or
(b) the panel member ... are [sic] satisfied that it is in the interests of justice for the application to be granted.

"(5) For the purposes of paragraph (4) it is not in the interests of justice to grant an application unless the panel member ... is satisfied that –
(a) the special circumstances specified in paragraph (6) are relevant to the application; or
(b) some other special circumstances exist which are wholly exceptional and relevant to the application,
and as a result of those special circumstances, it was not practicable for the application to be made within the time limit specified in regulation 31.

"(6) For the purposes of paragraph (5)(a), the special circumstances are that –
(a) the applicant or a partner or dependant of the applicant has died or suffered serious illness;
(b) the applicant is not resident in the United Kingdom; or
(c) normal postal services were disrupted.

...

"(9) An application under this regulation for an extension of time which has been refused may not be renewed.

"(10) The panel member who determines an application under this regulation shall record a summary of his decision in such written form as has been approved by the President.

"(11) As soon as practicable after the decision is made a copy of the decision shall be sent or given to every party to the proceedings."

19. Provision for the composition of appeal tribunals is made by regulation 36, paragraph (1) of which provides –

"Subject to the following provisions of this regulation, an appeal tribunal shall consist of a legally qualified panel member."

20. Provision for striking out and reinstating appeals is made by regulations 46 and 47. So far as is relevant to these cases, they provide –

"**46.**(1) Subject to paragraphs (2) and (3), an appeal may be struck out by the clerk to the appeal tribunal –

(a) where it is an out of jurisdiction appeal and the appellant has been notified by the Secretary of State that an appeal brought against such a decision may be struck out; ...

"(2) Where the clerk to the appeal tribunal determines to strike out the appeal, he shall notify the appellant that his appeal has been struck out and of the procedure for reinstatement of the appeal as specified in regulation 47.

"(3) The clerk to the appeal tribunal may refer any matter for determination under this regulation to a legally qualified panel member for decision by the panel member rather than the clerk to the appeal tribunal.

"**47.**(1) ...

"(2) A legally qualified panel member may reinstate an appeal which has been struck out in accordance with regulation 46 where –

(a) the appellant has made representations, or as the case may be, further representations in support of his appeal with reasons why he considers that his appeal should not have been struck out, to the clerk to the appeal tribunal, in writing within one month of the order to strike out the appeal being issued, and the panel member is satisfied in the light of those representations that there are reasonable grounds for reinstating the appeal;

(b) *(revoked)*

(c) the panel member is satisfied that the appeal is not an appeal which may be struck out under regulation 46; or

(d) the panel member is satisfied that notwithstanding that the appeal is one which may be struck out under regulation 46, it is not in the interests of justice for the appeal to be struck out."

By regulation 1(3), the phrase "out of jurisdiction appeal" used in regulation 46(1)(a) is defined as one specified in Schedule 2 to the Act (so that no appeal lies against it because it is

excluded from the scope of section 12 by subsection (1)(a)) or prescribed by regulation 27 (which introduces Schedule 2 to the Regulations) as an decision against which no appeal lies. Regulation 46(b) to (d) permits an appeal to be struck out where an appellant has failed to take necessary action in connection with the appeal.

The jurisdiction of a Commissioner

21. Two of the cases before me arise out of decisions not to admit late appeals, made by legally qualified panel members under regulation 32, and two of them arise out of decisions to strike out appeals, made by legally qualified panel members under regulation 46(3).

22. The Secretary of State submits that no appeal lies against any decision of a legally qualified panel member because section 14(1) provides only for an appeal from a decision of an "appeal tribunal". It does not in express terms provide for a right of appeal against a decision of a legally qualified panel member. The Regulations, he submits, draw a very clear and consistent distinction between a decision of an appeal tribunal and a decision of a legally qualified panel member. Although the term "legally qualified panel member" is not used in the Act, the Act also distinguishes between panel members and tribunals.

23. I accept that the distinctions to which the Secretary of State refers are drawn and that, if the Regulations conferred a right of appeal from a decision of an appeal tribunal, it clearly would not, in its context, encompass an appeal from a decision of a legally qualified panel member. However, the right of appeal is conferred by the primary legislation and, save in section 14(10)(a) and paragraph 12 of Schedule 1, the primary legislation does not confer on the Secretary of State any power to make regulations having the effect that decisions on, or in connection with, an appeal to an appeal tribunal under section 12 are to be made by anyone who does not constitute an appeal tribunal. Where Parliament has conferred a right of appeal to an appeal tribunal and has enabled the Secretary of State to make procedure regulations for the appeal tribunal under which interlocutory and other decisions may be made, the implication is that Parliament intended that those decisions would be made by the appeal tribunal save where specific provision is made to the contrary. Any other approach would be inconsistent with the distinction that the Secretary of State correctly submits that the primary legislation draws elsewhere between appeal tribunals and panel members. Moreover, it cannot be right that the Secretary of State can undermine the scope of the right of appeal in the primary legislation by providing, without express authority, that appeals before an appeal tribunal may be disposed of otherwise than by the tribunal. If such specific provision had been made, it might be clear that a further right of appeal expressed as being a right of appeal from a decision of an appeal tribunal would not confer a right of appeal against a decision by, say, a panel member as might be permitted by that specific provision. However, in the absence of such specific provision, all decisions made under the procedure regulations must be regarded as decisions of the appeal tribunal.

24. Mr Cooper placed a great deal of reliance on paragraph 12 of Schedule 1 to the 1998 Act. However, paragraph 12(1) plainly is not of direct application because it provides for the delegation of decisions to "officers". Panel members are not officers. Officers are civil servants who may be appointed for appeal tribunals under paragraph 6. Regulation 46 is made under both paragraph 12 of Schedule 1 and paragraph 2 of Schedule 5. Insofar as regulation 46(3) permits an officer to refer a case to a legally qualified panel member for decision, it may be made under paragraph 12 of Schedule 1 but, to the extent that it empowers a legally

qualified panel member to make a decision upon such a reference, it is made only under paragraph 2 of Schedule 5. Similarly, the provision made by regulation 47(2) for a legally qualified panel member to reinstate an appeal is not made under paragraph 12(1)(c) in a case where the appeal was struck out under regulation 46(3). Therefore, paragraph 12(1) does not, in my judgment, advance the Secretary of State's case. Paragraph 12(2) positively undermines it. The fact that it is necessary to provide that, for the purposes of sub-paragraph (1), "a determination which would have the effect of preventing an appeal ... being determined by an appeal tribunal is not a determination of the appeal" implies that for other purposes striking out an appeal would be a determination of the appeal, which it plainly is in substance, being a summary dismissal of the appeal. If Parliament had intended that the Secretary of State should be able to make regulations providing for the summary determination of appeals by someone other than an appeal tribunal with the result that the determinations would be unappealable, it would have said so in clear terms.

25. I acknowledge that paragraph 12(1)(c), which enables, or perhaps requires, regulations to provide "for the manner in which such determinations by such officers may be called in question" does not expressly require that a decision in respect of such a challenge should be made by an appeal tribunal, but that is again implicit and the paragraph is concerned with the manner of making a challenge rather than with by whom any decision is made. In any event, the point does not arise directly here because the appeals in the two relevant cases before me were not struck out by clerks.

26. Ms Patry argued that section 12(7) was sufficient authority for the making of regulations under which legally qualified panel members, as opposed to tribunals, could make decisions as to whether to admit late claims. However, like paragraph 2 of Schedule 5, section 12(7) does not entitle the Secretary of State to make regulations conferring the function of making decisions on anyone other than the appeal tribunal to whom the appeal is brought and, like paragraph 12(c) of Schedule 1, it is not concerned with the making of decisions at all. Ms Patry also submitted that regulation 32(9), prohibiting a renewal of an application for an extension of time, prohibited an appeal. I disagree. Apart from the fact that a renewed application and an appeal are two very different things, one comes back again to the simple point that, if primary legislation provides an unfettered right of appeal, subordinate legislation can reduce the scope of that right of appeal only if the regulation-making powers in the primary legislation are in terms that permit it to do so.

27. In my judgment, all the provisions in the 1999 Regulations that provide for decisions to be taken by legally qualified panel members must be taken to be made, to that extent, under section 7(6)(a) and to supplement regulation 36 so that those procedural issues are all dealt with by legally qualified panel members even where the substantive appeal would be heard by a tribunal with other members among its constitution.

28. I am therefore satisfied that decisions made by legally qualified panel members under the 1999 Regulations are to be regarded as decisions of appeal tribunals. However, it does not follow that they are all appealable by virtue of section 14.

29. A decision of a Commissioner refusing of leave to appeal is not an appealable decision for the purposes of section 15 (which provides for a further appeal to the Court of Appeal) because the view is taken that the whole point of providing that leave to appeal be obtained

would be undermined if the refusal itself were appealable. In *Lane v. Esdaile* [1891] A.C. 210, 212, Lord Halsbury L.C. said –

> "Now let us just consider what that means, that an appeal shall not be given unless some particular body consents to it being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any court of review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal?"

A similarly pragmatic approach has been applied in *Bland v. Chief Supplementary Benefit Officer* [1983] 1 W.L.R. 262 (also reported as R(SB) 12/83) so as to prevent an appeal to the Court of Appeal where a Commissioner refuses leave to appeal under section 14(10)(b) from a decision of an appeal tribunal.

30. At the conclusion of the hearing of these cases it seemed to me that a refusal to admit a late appeal was equivalent to a refusal of leave to appeal and that the same approach should be applied in such cases too. Moreover, there seemed to me to be some force in Mr Cooper's submission that striking out a case performed the same function of weeding out unmeritorious cases as a refusal of leave. However, immediately after the hearing, my attention was fortuitously drawn in connection with another case to *Rickards v. Rickards* [1990] Fam 194 in which *Lane v. Esdaile* and *Bland v. Chief Supplementary Benefit Officer* were distinguished and it was held that an appeal does lie against a refusal to admit a late appeal. I invited further written submissions on this point.

31. Mr Cooper observed that, since *Rickards v. Rickards* was decided, the approach taken in *Bland v. Chief Supplementary Benefit Officer* has been reaffirmed in *Kuganathan v. Chief Adjudication Officer* (*The Times*, March 1, 1995), where the Court of Appeal again held that it had no jurisdiction to hear an appeal from a Commissioner's refusal of leave to appeal from a decision of an appeal tribunal. However, that seems to me not to be relevant, because *Rickards v. Rickards* distinguished *Bland v. Chief Supplementary Benefit Officer*, rather than disapproving it. The whole point of the decision in *Rickards v. Rickards* is that the Court of Appeal drew a distinction between a refusal of leave to appeal and a refusal to extend the time for appealing. The basis of the distinction is that the approach taken in *Lane v. Esdaile* is applicable only where a provision such as a requirement for leave entitles a court or tribunal to filter out unmeritorious cases and that no similar filtering process is involved in determining whether time should be extended or not or, if it is, it does not play such a fundamental part in the determination.

32. . In *Rickards v. Rickards*, Lord Donaldson of Lymington MR also regretted saying in *Bland v. Chief Supplementary Benefit Officer* that the forerunner of the present section 14 "relates to a decision which determines the matter in dispute", by which he may have meant a decision that deals with the merits of the appeal. He said –

> "This is wrong, since a truly interlocutory or procedural decision could give rise to an appealable question of law, even if it is unlikely that leave to appeal would be given."

However, in the context of social security adjudication, Lord Donaldson's new approach must be regarded as having been qualified by the decision of the Court of Appeal in *Carpenter v.*

Secretary of State for Work and Pensions [2003] EWCA Civ 33 (reported as R(IB) 6/03), which seems to me also to have overtaken the Commissioners' decisions in CSIS/118/90 and CSIS/110/91 to which Mr Cooper very properly drew my attention. The necessary implication of *Carpenter v. Secretary of State for Work and Pensions* (arising because of the relationship between the right to have reasons for a decision and the right of appeal) is that there is no right of appeal against a refusal to adjourn, although such a refusal may be material on an appeal against the final decision of the tribunal. This approach is certainly welcome on pragmatic grounds. Truly interlocutory appeals in social security cases, where hearings before tribunals seldom last much more than an hour or so and cases are listed for hearing relatively quickly, would be disproportionately time consuming and are really not practical, whereas, in the courts and some other tribunal jurisdictions, although they may be discouraged, they can result in the saving of time and money in a significant proportion of cases.

33. *Carpenter v. Secretary of State for Work and Pensions* was, however, concerned only with "a determination of any matter along the way leading to a decision". It seems to me that wholly different considerations apply where a decision that might be classed as interlocutory in some contexts amounts to a final disposal of the appeal. A refusal to admit a late appeal (but not an acceptance of a late appeal) and a decision to strike out an appeal (but not a refusal to strike out an appeal) both amount to final decisions and, in my judgment, it is clearly the consequence of *Rickards v. Rickards* that they are appealable decisions within the scope of section 14(1) of the 1998 Act, even though leave to appeal will seldom be given. I suggest that this is right in principle. There is no practical difference to a claimant in having an appeal struck out for want of jurisdiction and having it dismissed for want of jurisdiction. Nor is there any practical difference to a claimant between having an appeal struck out for want of jurisdiction and having a late appeal rejected because the statutory conditions for acceptance have not been met. Moreover, despite Mr Cooper's submissions to the contrary, in my judgment there *is* a difference in this jurisdiction between striking out an appeal and refusing leave to appeal. Insofar as regulation 46(1)(a) is concerned, the power to strike out is confined to cases where there is no jurisdiction to hear the case. Insofar as regulation 46(1)(b) to (d) is concerned the power is confined to cases where a claimant has failed to take appropriate action in connection with the appeal. In neither instance do the broader merits of the case by themselves permit a decision to be made against the appellant, whereas the rationale of *Bland v. Chief Supplementary Benefit Officer* is that they can lead to a refusal of leave to appeal because a Commissioner is not bound to grant leave to appeal even where an error of law in a tribunal's decision is apparent.

34. I am therefore satisfied that in each of the four cases before me, the claimant has a right of appeal to a Commissioner, subject to leave being granted. I stress that I have taken this view by construing the primary legislation. I do not accept Mr Lowrie's submission that judicial review would not provide an adequate remedy. The Administrative Court may be less user-friendly than Commissioners but I agree with Ms Patry that judicial review provides much the same remedy as an appeal on a point of law to a Commissioner and Parliament could legitimately have decided that the proportion of meritorious challenges to the striking out of appeals or the rejection of late appeals was too small to make the more accessible procedure desirable. On the other hand, there is nothing unreasonable in there being a right of appeal. Acknowledging the existence of a right of appeal may have a desirable impact on the quality of decision-making of legally qualified panel members and is unlikely to cause major difficulties, although the tribunals may need to reconsider some of their procedures and standard letters.

35. It would already be good practice for a legally qualified panel member to give a brief reason for a decision – it is noteworthy that regulation 32(11) actually requires that the claimant be sent a copy of the decision rather than merely a letter from the clerk saying what the decision is – and reasons for these sorts of decision can be expressed very shortly, usually in a sentence or two, so that there should be no need for separate statements of reasons to be issued under regulation 53(4). Where an appeal has been struck out on the ground of lack of jurisdiction, a single sentence will usually be sufficient. As the legally qualified panel member ought to have addressed his or her mind to the provision of Schedule 2 to the 1998 Act or Schedule 2 to the 1999 Regulations by virtue of which there is no right of appeal to the tribunal, no great effort should be involved in recording that as the ground of the decision (particularly if the Secretary of State also tried to identify more precisely the relevant provision when suggesting that an appeal should be struck out). However, in practice, it may be that leave to appeal against a decision of a legally qualified panel member will seldom be granted because, if a Commissioner finds there to be an error of law, he or she may substitute a decision for that of the legally qualified panel member. As most decisions of legally qualified panel members on procedural issues are made without an oral hearing, a Commissioner may be slow to grant leave to appeal if he or she would, on the papers, reach the same conclusion as the legally qualified panel member, albeit perhaps by a different path, and can say as much by way of reasons for refusing leave.

36. I also observe that, although a legally qualified panel member is entitled, under regulation 47(2), to reinstate an appeal struck out under regulation 46(3), clerks seem to take the view that the requirement in regulation 46(2) that a claimant be told of the right to apply for reinstatement applies only where an appeal is struck out by a clerk. I am not sure that that is correct but, in any event, in the two cases here where appeals were struck out, I have considered it proper to regard the striking out as the final decision against which an appeal may be brought to a Commissioner. In the future, it is to be hoped that a legally qualified panel member will consider reinstatement as an alternative to a grant of leave to appeal and that claimants will be told about their rights in respect of both procedures. If a legally qualified panel member refuses to reinstate an appeal at the same time as refusing leave to appeal against the striking out, any additional reasons given at that time might well be taken into account by a Commissioner. If a claimant does seek reinstatement of an appeal that has been struck out, it seems to me that he or she should not be prejudiced by not seeking leave to appeal against the striking out and would be able to seek leave appeal against the refusal to reinstate the appeal instead.

Conclusion in CIS/1363/2005

37. The Secretary of State accepts that the claimant should have received an answer from the local office to his question about the statutory basis for the withdrawal of order books, although I dare say that the local office would have had to seek advice before being able to provide the answer. He has also not been given any detailed reason for his appeal being struck out by a legally qualified panel member.

35. The answer to the claimant's question is that regulation 26(1) of the Social Security (Claims and Payments) Regulations 1987 (S.I. 1987 No. 1968) introduces Schedule 7 to those Regulations and paragraph 1 of Schedule 7 provides that, "income support shall be paid ... by means of an instrument of payment", except where the Regulations provide otherwise by, for

instance, providing for direct credit transfer. Both cheques and orders in order books are instruments of payment and so it is left to the Secretary of State's discretion whether to issue books of orders or cheques. Thus, there was never any statutory right to an order-book and the Secretary of State was entitled to make an administrative decision to make future payments by cheque. As the claimant acknowledged in his appeal to the tribunal, that decision did not affect his entitlement to benefit.

36. Mr Cooper submits that a decision to make a payment by way of cheque is a decision within the scope of section 8(1)(c) of the 1998 Act, because the 1987 Regulations are made under the Social Security Administration Act 1992, which is a "relevant enactment" for the purposes of the 1998 Act by virtue of section 8(4). Although a choice as to what type of instrument of payment to use when paying income support is not made "under" the 1987 Regulations, he submits that it is made "by virtue of" them. He also submits that it is a decision made "on an award" of income support, which is a relevant benefit for the purposes of the 1998 Act, by virtue of section 8(3)(c). If that is correct, the decision would fall within the scope of section 12(1)(a) so that there would be a right of appeal to a tribunal, were it not for the fact that it falls within the scope of paragraph 5(l) of Schedule 2 to the 1999 Regulations. If there is no right of appeal by virtue of regulation 27 of, and paragraph 5(l) of Schedule 2 to, the 1999 Regulations, the legally qualified panel member was clearly entitled to strike out the appeal because it fell within the scope of regulation 46(1)(a).

37. The only part of Mr Cooper's submission about which I have some doubt is whether a choice as to what type of instrument of payment to use when paying income support is made by virtue of the 1987 Regulations or is made outside the statutory scheme altogether. If it is made outside the statutory scheme, the decision is not within the scope of regulation 8 and is therefore also not within the scope of section 12(1). The consequence would be that there would be no right of appeal but there would also be no power to strike out the appeal (due to the limited scope of the definition of "out of jurisdiction appeal") and the appeal would have instead to be dismissed for want of jurisdiction. It is unnecessary for me to resolve this issue at this level because, if I must set aside the decision of the appeal tribunal (given by the legally qualified panel member) to strike out the appeal, it would be appropriate for me to substitute a decision dismissing the appeal from the Secretary of State's decision for want of jurisdiction. The claimant has had ample opportunity in the proceedings before me to argue that there was jurisdiction and also to make submissions as to the merits of his appeal and so the lack of an opportunity to attend an oral hearing before the appeal tribunal is no longer material. Accordingly, the claimant's appeal is unsuccessful however the case is approached.

38. In substance, the claimant's appeal must be dismissed.

Conclusion in CIS2322/2005

39. In this case, the legally qualified panel member's decision to reject the claimant's appeal was plainly correct. The appeal was brought more than thirteen months after the date of the decision against which the claimant wished to appeal and so, by virtue of regulation 32(1) of the 1999 Regulations, the legally qualified panel member had no power to extend the time for appealing and so to accept the appeal.

40. However, the claimant may have a justifiable complaint about the decision dated 28 June 2001. His assertion that he was unaware that he had been refused asylum until he was

informed by the Benefits Agency appears consistent with the procedure described in *Regina (Anufrijeva) v. Secretary of State for the Home Department* [2003] UKHL 36; [2004] A.C. 604 and it is difficult to see how there can be either a misrepresentation or a failure to disclose in respect of a fact of which the claimant could not possibly have been aware. The Secretary of State is right to point out that the claimant had a solicitor and it is possible that his solicitor was informed of the rejection of the asylum claim, but there is at least an issue to be investigated. This is still possible. As the Secretary of State submits, the claimant may apply for supersession through his local office. If the Secretary of State refuses to supersede the decision, the claimant will then be able to appeal against that decision. The claimant has never objected to the supersession of his original award. He wishes to challenge only the decision that the overpayment is recoverable because, on his account, he was unable to obtain other help while he was unknowingly receiving income support to which he was not entitled. Indeed, even when payment of benefit was terminated, he says that he was left destitute for some while before he obtained help from the local social services department, but he has no remedy in respect of that period.

Conclusion in CJSA/3724/2005

41. Here, the legally qualified panel member was plainly entitled to strike out the claimant's appeal to the tribunal because the decision against which he had brought the appeal fell within the scope of paragraph 24 of Schedule 2 to the 1999 Regulations. It is not entirely clear whether the legally qualified panel member in fact had paragraph 24 of Schedule 2 in mind or whether he thought that the decision against which the claimant had tried to appeal was not a decision within the scope of section 8 or 10 of the 1998 Act and that therefore the tribunal lacked jurisdiction on that ground. As I have already pointed out, the legally qualified panel member would not in fact have been entitled to strike out the appeal if the claimant had been endeavouring to appeal against a decision that did not fall within the scope of sections 8 or 10 but I do not consider that it matters that the legally qualified panel member's reasoning may have been faulty. There were proper grounds for striking out the appeal and, when an appeal may be stuck out because it falls within the scope of regulation 46(1)(a), it is usually appropriate to strike it out.

42. There was nothing unfair about striking out the claimant's appeal. The decision against which the claimant had sought to appeal was a mere "suspension", presumably under regulation 16 of the 1999 regulations, which falls within Part III of those Regulations. Suspension is appropriate where a question has arisen as to whether a person is entitled to benefit and it is not appropriate to revise or supersede the award without first making further enquiries, which might include interviewing the claimant so as to give the claimant an opportunity of putting forward his or her point of view. Following a suspension, either payment of the benefit should be reinstated, with the payment of any arrears due in respect of the period of suspension, or else there should be a revision or supersession decision and the claimant should be informed of the right of appeal that arises in consequence of the decision. Suspension, therefore, does not actually affect entitlement to benefit, which is why it is quite appropriate for there to be no right of appeal against it.

43. The claimant's complaint was that he had not received notice of the interviews that he did not attend. His appeal was premature, He had no need to appeal if benefit was reinstated with the arrears and he had a separate right of appeal if the award was revised or superseded. He therefore had to wait to see what happened. Although the claimant is indignant about the

way he was treated by the Appeals Service, I think his legitimate grounds for complaint are limited. Within this file, the Appeals Service had no knowledge of a decision apart from the suspension and, in denying the existence of a right of appeal to a Commissioner against a decision of a legally qualified panel member, the Appeals Service was merely advancing the conventional view, although it seems to me that the claimant was entitled to a proper rejection of his application for leave to appeal. I do not consider that the Appeals Service was being deliberately obstructive.

44. If the claimant does have legitimate grounds for complaint against anyone, it is against the Jobcentre. An award of jobseeker's allowance cannot be terminated without being properly revised or superseded. If, as the claimant suggested to me, the Jobcentre neither paid the arrears nor issued a supersession or revision decision stating that he had a right of appeal as a result of it, a decision ought now to be made. If, on the other hand, a supersession or revision decision was issued, the claimant may be able to obtain an extension of time for appealing, provided he acts quickly. Mr Cooper told me a decision was issued on 8 August 2005, but there is no documentary evidence before me and I note that that is the date on which the legally qualified panel member made his decision. If the claimant wishes to pursue the question of the jobseeker's allowance that he says he has lost, he must check with the Jobcentre whether a supersession or revision decision was issued and then take the appropriate action, either insisting on a decision being made or else asking for an extension of time for appealing. He cannot pursue the lost benefit though an appeal against a suspension.

45. I refuse leave to appeal because it is not arguable that the legally qualified panel member reached the wrong conclusion in striking out the claimant's appeal.

Conclusion in CHR/3855/2005

46. This case requires consideration of the inordinately complicated provisions within regulation 32 setting out in considerable detail how applications for extensions of time for appealing are to be approached. The complexity of the provisions seem to me to increase the likelihood of legally qualified panel members being found to have erred in law and, indeed, they raise some interesting questions of law upon which Commissioners will no doubt be required to express views in due course.

47. Regulation 32(4) has the effect that an extension of time may not be granted unless either the appeal has reasonable prospects of success or it is in the interests of justice that the application be granted. The mere fact that an appeal has reasonable prospects of success does not necessarily mean that an extension of time should be granted. It may be refused because, for instance, there was no good reason for the delay. On the other hand, it is difficult to see how an extension of time can be refused if it is in the interests of justice to grant it. Such factors as whether there was a good reason for the delay have to be taken into account *before* deciding whether it is in the interests of justice that the extension be granted. The existence of special circumstances falling within the scope of regulation 32(5) do not necessarily mean that it is in the interests of justice to grant an extension of time but are likely to do so.

48. One issue that arises in this case whether the reasonableness of the prospects of an appeal is related to the other merits of the application for the extension so that the less good the reasons for delay the stronger the claimant's case needs to be to fall within regulation

32(4)(a) and, conversely, the better the reasons for delay the more difficult it is to justify finding that the appeal does not have reasonable prospects.

49. When protesting about the decision dated 13 July 2005, the claimant's representative asked the legally qualified panel member to confirm that his decision contained all his reasons and took account of the various points that had been made in the application for an extension of time and it seems to me that the subsequent decision on 25 July 2005 must be taken to be a statement of reasons. Regulation 32(9) prohibited a new decision and the representative's letter plainly implied a request for any reasons that had not already been given.

50. The claimant's representative had said that neither he nor the claimant had received a copy of the decision dated 29 March 2005, against which she wished to appeal. The legally qualified panel member has not recorded a finding on that point and the only justification for not doing so that I can see at the moment is that he thought it was unnecessary because, even if that point were decided in favour of the claimant, the application was still bound to fail because the appeal had no reasonable prospects of success and there were no special circumstances within regulation 32(5). Ms Patry argued that the terms of regulation 32(6)(c) implied that an inability to appeal within the prescribed time due to non-receipt of a decision for reasons other than normal postal disruption could not be a special circumstance falling within regulation 32(5)(b). It seems to me that that proposition is justifiable – if it is justifiable at all – only if regulation 32(4)(a) is construed so that, in such a case, an extension of time may be granted unless the appeal has absolutely no prospects of success whatsoever.

51. It also seems to me to be arguable that the legally qualified panel member was wrong to say that the claimant's appeal had no reasonable prospects of success. Presumably, as the point in issue on the appeal to the tribunal was primarily a point of law, the legally qualified panel member can be shown to be wrong in law if the claimant was right on the law. I have some doubt as to the prospects of success of her arguments based on indirect discrimination. The retirement pension scheme is contributory and it is to be expected that those who have paid fewer contributions should receive a lower pension. If that affects more women than men, that unequal impact may nonetheless be justifiable, or have been regarded as justifiable in the past, because it will have been open to the women to pay Class 3 contributions voluntarily. Moreover, to the extent to which the introduction of home responsibilities protection reduces the impact of legislation that may once have been acceptable but is not now, the Government may have a wide margin of appreciation in relation to the extent to which it removes the current effects of the past legislation (and see Article 7(1)(e) of Directive 79/7/EEC). However, there is some force in the claimant's submission that, since 1994, the domestic legislation has not entitled the Secretary of State to refuse to treat a person as having been precluded from regular employment by responsibilities at home in respect of periods before 6 April 1978. His refusal appears not to be justified by any express provision. The legally qualified panel member appears to have relied on the presumption against retrospectivity. However, it is arguable that, if the legislation has the effect contended for by the claimant, it would not be truly retrospective because it is concerned with current entitlement to a Category A retirement pension (and certain other benefits) and, it would not confer additional entitlement to any benefit in respect of any period before 6 April 1994, when the Social Security Pensions (Home Responsibilities) Regulations 1994 (SI 1994/704) came into force.

52. If a Commissioner accepts that the claimant's appeal to the tribunal did have reasonable prospects of success, or that non-receipt of the decision under appeal could amount to a special circumstance within regulation 32(5)(b), the Commissioner is likely to wish to decide whether to grant the extension of time for appealing to the tribunal and to give a final decision on the appeal. It will therefore be necessary for him or her to make a finding as to whether or not the decision of 29 March 2005 was received by the claimant or her representative before 7 June 2005 unless he or she considers that the late appeal should be admitted in any event.

53. It is also arguable that, although a decision in respect of home responsibility provision may be the subject of a free-standing appeal, by virtue of paragraph 16 of Schedule 3 to the 1998 Act, that does not preclude the issue from being dealt with within an appeal concerned with entitlement to retirement pension. The legally qualified panel member did not address the point that, if the late appeal in this case were rejected, the Secretary of State would merely be required to submit to the tribunal the claimant's appeal against the award of retirement pension, which appears to have been put on one side while a specific decision in respect of home responsibilities provision was sought.

54. For all these reasons, I am satisfied that it is arguable that the legally qualified panel member's decision is erroneous in point of law and I grant leave to appeal. I give the following directions –

(a) The Appellant shall, within one month of the date this decision is sent to her representative, make a further written submission on the appeal, indicating whether she wishes to pursue arguments based on discrimination and, if so, setting them out more fully and, in particular, dealing with the points I have raised in paragraph 51 above. She may wish to seek legal advice before making such a submission.

(b) The Respondent shall, within one month of being sent a copy of the Appellant's further written submission, make a written submission in response to the appeal, dealing with all the points that arise.

(c) The Appellant may, if she wishes, make a final written submission within one month of being sent a copy of the Respondent's submission.

(d) Both parties should indicate in their written submissions whether they wish there to be an oral hearing of the appeal.

(e) This appeal will not be dealt with under section 14(7) of the 1998 Act.

(signed on the original) **MARK ROWLAND**
Commissioner
12 June 2006