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Anti text case rule
- whether ECJ/Commissioner
decision a 'relevant determination'

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *40/99

(Commissioner's File No.: CS/632/97)

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

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so as to arrive by 22 SEP 1999 1999

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision:

1. My decision is as follows. It is given under section 23(7)(a)(i) of the Social Security Administration Act 1992.
- 1.1 The decision of the Darlington Social Security Appeal Tribunal held on 20th September 1996 is erroneous in point of law: see paragraph 24.
- 1.2 Accordingly, I set it aside and, as I can do so without making fresh or further findings of fact, I give the decision that the tribunal should have given.
- 1.3 My decision is:

Grounds exist to review the decision of the adjudication officer refusing the claim for a Severe Disablement Allowance from and including 29th November 1984.

The grounds for review are that the decision was erroneous in law.

The revised decision is this. The claimant is entitled to a Severe Disablement Allowance of £38.15 a week for the inclusive period from 16th December 1991 to 15th February 1992, but not for any earlier period.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the tribunal brought by the claimant with the leave of the tribunal's chairman. The adjudication officer submits the the decision was wrong in law, but that the appeal should be dismissed.

The history of the case

3. The claimant was born on 17th February 1932. On 24th October 1984, she claimed a Severe Disablement Allowance with effect from 29th November 1984 (the date of the inception of the Allowance). The claim was refused.
4. In the meantime, the case of Johnson v. Chief Adjudication Officer [1991] European Court Reports I-3723 arose. In that case, the claimant had claimed a Severe Disablement Allowance, but her claim was refused by an adjudication officer and, on appeal, by a Social Security Appeal Tribunal. On appeal to the Commissioner, a Tribunal of Commissioners referred questions to the European Court of Justice for a preliminary ruling under Article 177 of the EC Treaty. On 11th July 1991, the European Court of Justice ruled that the legislation governing Severe Disablement Allowance was in some respects discriminatory against women and in breach of Directive 79/7/EEC. Following the ruling, the case came before a Tribunal of Commissioners, which decided on 16th December 1991 that the decision of the Social Security Appeal Tribunal was erroneous in law: see CS/111/1989. This meant that the decision of the adjudication officer had also been wrong in law.
5. Following that case, the claimant in this case was identified as a person who might have been entitled to a Severe Disablement Allowance. She was invited to make a claim and

her claim form was received on 12th March 1993. The claimant had been awarded a Retirement Pension from and including 17th February 1992.

6. The adjudication officer treated the claim as an application for a review of the decision refusing the claim made in 1984. The officer decided that that decision had to be reviewed and gave a revised decision only for the period from and including 11th July 1991, the date of the ruling by the European Court of Justice in Johnson. The revised decision was that the claimant was entitled to a Severe Disablement Allowance of £38.15 a week for the inclusive period from 11th July 1991 to 15th February 1992.

7. The claimant appealed against that decision to a tribunal. The tribunal confirmed the adjudication officer's decision.

The question for decision

8. The question that I have to decide is: what was the earliest date from which the adjudication officer was entitled to revise the decision refusing the claim for a Severe Disablement Allowance?

9. The answer depends on the interpretation and application of section 69 of the Social Security Administration Act 1992. In simple terms, sections 68 and 69 provide that when a Commissioner or a court determines that the law has previously been misinterpreted, that determination applies to the parties to it with the normal retrospective effect, but applies in any other case with prospective effect only. Section 68 applies to subsequent decisions on claims. Section 69 applies to subsequent reviews and is relevant to this case.

The arguments

10. The claimant's representative argues:

10.1 Section 69 does not apply to Johnson with the result that the only restriction on the earliest date from which the claimant may be awarded a Severe Disablement Allowance is the normal 12 months rule under section 27(2)(b) of the Social Security Administration Act 1992. (It is, rightly, conceded that this rule applies: see the judgment of the European Court of Justice in the subsequent proceedings in Johnson v. Chief Adjudication Officer (No. 2) [1995] All England Law Reports (European Cases) 258.)

10.2 If section 69 does apply, the claimant is denied benefit contrary to the decision of the European Court of Justice in Emmott v. Minister for Social Welfare and the Attorney General [1991] European Court Reports I-4269.

11. The adjudication officer argues:

11.1 Section 69 does apply to Johnson and, therefore, to this case.

11.2 The decision of the adjudication officer and the tribunal were wrong in dating the award from the date of the ruling of the European Court of Justice. The relevant date

was the date of the decision of the Tribunal of Commissioners. Despite this argument, the officer submits that the appeal to the Commissioner should be dismissed.

11.3 The Emmott case is irrelevant to this case.

Section 69

Adjudication authority

12. Section 69(1)(a) provides that the section applies where

“(a) on the determination, whenever made, of a Commissioner or the court (the “relevant determination”), a decision made by an adjudicating authority is or was found to be erroneous in point of law”.

“Adjudicating authority” is defined by section 68(4). The relevant part of the definition is:

“an adjudication officer or, where the original decision was given on a reference under section 21(2) or 25(1) above, a social security appeal tribunal”.

The 1992 Act was a consolidation statute. The previous law was contained in section 165D of the Social Security Act 1975. The wording of the definition of “adjudicating authority” in section 165D(4) differed from the present wording. The relevant part of the definition was:

“an adjudication officer, the Attendance Allowance Board, a social security appeal tribunal or a medical appeal tribunal”.

The difference is that the definition now only applies to social security appeal tribunals when dealing with references, as opposed to appeals.

13. The claimant’s representative argument is this. The decision of the Social Security Appeal Tribunal in Johnson was given on appeal and not on a reference. So, it does not fall within section 69(1)(a), with the result that section 69 does not restrict the earliest date from which a Severe Disablement Allowance may be awarded. The representative elaborated on this argument in response to the adjudication officer’s submission, arguing this. Although the Social Security Appeal Tribunal in Johnson gave the same decision as the adjudication officer, in law it replaced the adjudication officer’s decision and substituted its own decision to the same effect: see the decision of the Tribunal of Commissioners in R(I) 9/63, paragraph 19. So, the Tribunal of Commissioners in Johnson was dealing with a decision by the tribunal and not with a decision by an adjudication officer. As the tribunal was dealing with the case on appeal, it was not an adjudicating authority for the purposes of section 69.

14. I agree that a tribunal’s decision on appeal always replaces the decision of the adjudication officer, even if it is to the same effect. That was decided by the Tribunal of Commissioners in R(I) 9/63, paragraph 19. I, therefore, also agree that the Tribunal of Commissioners in Johnson decided that the tribunal’s decision on the appeal was erroneous in law and set it aside.

15. However, I reject the argument that this is relevant to the interpretation and application of section 69.

15.1 If the representative's argument were correct, it would render the reference to an adjudication officer in the definition of "adjudicating authority" superfluous.

15.2 It would also limit the scope of section 69 to cases involving references to a tribunal. This would be an anomalous limitation, without apparent rationale, to a small percentage of the cases that come before tribunals.

15.3 The wording of section 69(1)(a) is different from that which is used in relation to Commissioners in sections 23(7) and 48(5). There a Commissioner "holds" a decision to be erroneous in law and must "set it aside". This wording could have been adopted in section 69, but it was not. In contrast, section 69 applies where "on the determination ... of a Commissioner ..., a decision ...is or was found to have been erroneous in law". The contrast in wording and the slightly cumbersome phraseology used in section 69(1) suggest that that section is broad in its scope and that the decision that is "found" to have been erroneous in law "on the determination" need not be the decision under appeal to the Commissioner or the court. This is in line with the opinion of Lord Slynn in the House of Lords in *Bate v. Chief Adjudication Officer* [1996] 2 All England Law Reports 790 at page 797: "'Found' is used in the general sense of declared and I decline to draw a legalistic distinction between 'found' for facts and 'held' for law in this particular subsection." That case was decided on the 1975 legislation, but despite the representative's argument that is not sufficient to distinguish it from this case on this point.

16. My conclusion is that the adjudicating authority with which section 69 is concerned is the first tier of adjudication in the case. Usually this will be the adjudication officer, but exceptionally it may be a tribunal on a reference. Section 69 applies where, following a decision by a Commissioner or a court, the first tier decision can be seen to have been wrong in law.

Consolidation Act

17. The claimant's representative argues that the amended definition of "adjudicating authority" went beyond consolidation by introducing an amendment and this "calls into question the validity of section 68 and 69 of the SSAA 1992."

18. The Preamble to the Social Security Administration Act 1992 says that it was "An Act to consolidate certain enactments ... with amendments to give effect to the recommendations of the Law Commission and the Scottish Law Commission." Amendments are, therefore, to be expected in the legislation, although section 69 was not considered in the Law Commission's Report No. 203, referred to in the Preamble.

19. Section 1(1) of the Consolidation of Enactments (Procedure) Act 1949 allows for a consolidation statute to include "corrections or minor improvements", which are defined by section 2 as meaning

“amendments of which the effect is confined to resolving ambiguities, removing doubts, ..., and amendments designed to facilitate improvement in the form or manner in which the law is stated ...”.

If my interpretation of section 69 (paragraph 16) is correct, the original definition of “adjudicating authority” was incorrectly drafted and an amendment was to be expected in order to make clear that the decision that had to be found to be wrong was the original decision rather than a decision on appeal. This amendment is a correction or minor improvement for the purposes of the 1949 Act.

20. Anyway, the question for me is the interpretation of section 69, not its validity. What a statute says cannot be unlawful: see the judgment of Mr Justice Ungood-Thomas in Cheney v. Conn [1968] 1 All England Law Reports 779 at page 782. Furthermore, neither the courts nor the Commissioners have power to disregard a statute or to go behind the passage of a statute by Parliament in order to decide whether it was correctly passed: see the decision of the House of Lords in Pickin v. British Railways Board [1974] 1 All England Law Reports 609.

What was the relevant determination for the purposes of section 69?

21. The adjudication officer and the tribunal treated the relevant determination in this case as the ruling of European Court of Justice in Johnson. The adjudication officer submits to the Commissioner that the relevant determination was the decision of the Tribunal of Commissioners following that ruling. The difference means 5 months of entitlement to a Severe Disablement Allowance for the claimant.

22. The ruling by the European Court of Justice was given on a reference for a preliminary ruling under Article 177 of the EC Treaty. The purpose of these references is to obtain a ruling on points of European law. The Court does not concern itself with the application of the law to the facts of the case. That is left to the national court. It is for this reason that the Court always decides that

“Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.”

This is in contrast to decisions in cases which come before the European Court of Justice by way of appeal. In those cases the Court is concerned with both facts and law, giving a final decision in the case.

23. In Johnson, the European Court of Justice ruled that a person fell within the scope of Directive 79/7/EEC if he or she was seeking employment at the time that one of the risks covered by the Directive intervened to prevent the person undertaking employment. The Court expressly stated in paragraph 22 of its judgment that

“In this regard, it is for the national court to determine whether the person concerned was actually seeking employment at the time when he or she was affected by one of the risks specified in the directive by looking to see in particular whether that person

was registered with an employment organisation responsible for dealing with offers of employment or assisting persons seeking employment, whether the person had sent job applications to employers and whether certificates were available from firms stating that the person concerned had attended interviews.”

The Tribunal of Commissioners considered the evidence given to the Social Security Appeal Tribunal and on the basis of that evidence determined that the claimant did fall within the scope of the Directive.

24. It was only after the decision of the Tribunal of Commissioners that it could be seen that the decision of the adjudication officer had been wrong in law. All that could be said after the decision of the European Court of Justice was that the adjudication officer's decision might have been wrong in law. It follows that the relevant determination for the purposes of section 69 was that of the Tribunal of Commissioners on 16th December 1991 and not that of the European Court of Justice on 11th July 1991. So, the tribunal's decision was erroneous in law for using the earlier date.

25. I leave open the question whether a ruling by the European Court of Justice on a reference under Article 177 could be a relevant determination for the purposes of section 69 if its terms made clear that the decision of the adjudication officer (or the tribunal on a reference) must be wrong in law.

Consent orders

26. In CFC/2298/1995, the Commissioner held that sections 68 and 69 did not apply to consent orders. The decision of the Tribunal of Commissioners on 16th December 1991 coincided with the submissions of the parties on the law. However, it was not a consent order. Commissioners have no power to give consent orders. Anyway, it is clear from the decision that the Tribunal of Commissioners considered and accepted those submissions and that they went on to make findings of fact.

Conclusion on section 69

27. I reject the argument of the claimant's representative in so far as it relates to section 69 and accept the argument of the adjudication officer.

The Emmott case

28. The ruling of the European Court of Justice in Emmott v. Minister for Social Welfare was distinguished in the subsequent case of Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen [1993] European Court Reports I-5475. Their combined effect was considered by the European Court of Justice in Johnson v. Chief Adjudication Officer (No. 2). The position is this. National procedural rules, including time limits, may not be relied on in cases involving European law (a) if they are less favourable than the rules that apply to cases involving purely domestic law or (b) they bar virtually or completely the exercise of rights under European law.

29. In this case, neither of these conditions is satisfied. Section 69 does not discriminate against European cases, as it applies alike to all cases regardless of whether a point of European law is involved. It does not operate as a bar to reliance on European rights, as it only limits the period for which an award may be made.

30. So, I reject the argument of the claimant's representative in so far as it relies on the Emmott case and accept the adjudication officer's argument that it is irrelevant in this case.

Summary

31. As I have decided that the tribunal's decision is erroneous in law, I must set it aside. I, therefore, have power either to refer the case to another tribunal or to give a decision myself, with or without further findings of fact. It is not necessary for me to make further findings of fact as I can give the decision which the tribunal should have given on its findings of fact. That decision is set out in paragraph 1.3. The effect of that decision is that the claimant has been overpaid benefit. The overpayment will not be recoverable from her.

Signed: **Edward Jacobs**
 Commissioner

Date: **27th May 1999**