S.S. LAW P.A.

THE SOCIAL SECURITY LAW PRACTITIONERS' ASSOCIATION

Social Security Law Practitioners' Association
Minutes of meeting held on
6th February 2007

Present.

Desmond Rutledge	Garden Court Chambers (Chair)
Stuart Wright	CPAG (Speaker)
Tom Killick	Lambeth Law Centre
Finola O'Neill	Wandsworth and Merton Law Centre
Anthony Beresford-Chambers	Blackfriars Advice Centre
Simone Howells	Blackfriars Advice Centre
Martin Williams	LASA
Joanna Newth	Mary Ward Legal Centre
Miranda Bayliss	Commissioners' Office
Maggie Phelps	Commissioners' Office
Arnold James	Commissioners' Office
May May Teo	Commissioners' Office
Jan Luba	Garden Court Chambers
Adrian Berry	Garden Court Chambers
Emma Baldwin	FRU (Caseworker)
Alban Hawksworth	RNIB
John Rahman	LB Redbridge
Polly Glynn	Pierce Glynn Solicitors
Adam Hundt	Pierce Glynn Solicitors
Leroy Pitter	Paddington Law Centre

Apologies

Jackie Starling	TV Edwards
Jo Silcox	Hertfordshire Money Advice

Guest Speaker: Stuart Wright
Subject: Social Security Update

The Speaker distributed a detailed handout at the meeting (attached). It was not possible to cover all of the cases at the meeting so the speaker selected a number of cases for comment.

CSDLA/133/2005 – Prompting and thinking

This was the most important rent case on DLA in which a Tribunal of Commissioners considered 'prompting and thinking' as a bodily function. Building on the line of Commissioners' decisions (*R(DLA) 3/06*, R*(DLA) 4/06* and *R(DLA) 6/06*) on the scope of the disability test in DLA, the Commissioners held that as 'disability' is defined in terms of a person's power to do things, a disability relating to a deficit in the function of the brain or mind should not be excluded. Cases suggesting the contrary, mainly decisions of Mr Commissioner May QC

should not be followed (*CSDLA/867/1997*, *CSDLA/832/1999* and *CSDLA/860/2000*).

The Commissioners confirmed that where a claimant was suffering from a condition (e.g. depression) which has a lack of motivation as a component, then prompting or encouragement from another person to overcome it was capable of constituting attention.

The Commissioners said that the tribunal had misunderstood *R(DLA) 3/03* when it concluded that it was authority for holding that 'communication' and 'social integration' were excluded as they were activities rather than bodily functions. In *R(DLA) 3/03* Mr Commissioner Howell QC had examined the claimed loss of function and made a finding that he was in fact able to communicate without assistance, save that his manner of communicating was different from others. The claimant therefore had no relevant disablement. *R(DLA) 3/03* did not hold that communication could not be a bodily function for the purposes of the statutory provisions.

CISB/803/2005 and CSIB/818/2005 - Howker again

In *CISB/803/2005* and *CSIB/818/2005* a Tribunal of Commissioners considered the application of *Howker (R(IB) 3/03)* to other provisions brought in by the 1997 changes to the PCA. *R(IB) 3/04* had suggested that it was sufficient if the effect of the amended provision was described as 'neutral'. The Commissioners said that this was not the correct approach. The test was whether, looking at all of the relevant material, and bearing in mind that the SSAC had expertise in social security matters; was there a real possibility that the information might have misled the SSAC?

Levy v SSWP - proving date claim received

In *Levy v SSWP* [2006] EWCA Civ 890 (reported as *R(G) 2/06*) a claim for Widow's Benefit had been sent in time but never reached the DWP in the post. The Court rejected arguments based on 'deemed receipt' associated with service of documents holding that the words in the regulations (6(1) of the SS (Claims and Payments) Regs 1987 plainly referred to the date on which the claim form was actually received in the DWP office. The case, in effect, confirms that there is one rule for the DWP and another for the claimant; i.e. a document posted by the DWP will be treated as having been sent on the date it was posted whereas a document or claim posted by the claimant will only be treated as 'received' on the date it is actually received by the DWP. The Speaker referred to another case in which the Court of Appeal appears to accept that a document had been notified to the claimant even when there was no proof of posting (*SSWP v Roach* [2006] EWCA Civ 1746, 19-27).

Overpayments - Failure to disclose

The Speaker referred to two decisions by Mr Commissioner Howell QC in which the Commissioner expressed his dissatisfaction with the state of the law following the ruling in *B v SSWP*.[1]

In *CIS/4422/2002* the Commissioner held that where the overpayment arises because a change in one DWP benefit affects another DWP benefit, but both benefits are administered by the same office, then there will be no failure to disclose unless there are (a) instructions to the effect that there are two separate offices in the same building or (b) this would have been obvious to the reasonable claimant. The Commissioner added that following *B v SSWP* there did not appear to be any room for a 'continuing duty to disclose' (R(SB) 54/83 para 18) as the claimant either had a duty or they did not. If the claimant reported a change then they could no longer be in breach of the duty.

In *CIS/1996/2006* the Commissioner accepted that a claimant's partner had worked without her knowledge. The Commissioner held that there could be no recovery for failure to disclose because (a) the claimant did not know the material fact and (b) Reg 32(1B) did not place the partner under any duty to report or disclose any change in his circumstances. The speaker suggested that the duty under Reg 32(1B) might not apply to appointees.

Right of appeal against tribunal chair's decision

In *CIS/1363/2005* the Commissioner decided that, in principle, an appeal can lie to the Commissioners from the decision of a legally qualified panel member on either a strike-out decision or a decision refusing to extend time for appealing, though leave to appeal will seldom be given. The Secretary of State has appealed. The Speaker pointed out that none of the Respondents have any interest in the appeal. This means the SofS will be making submissions to the CA unopposed (cf *SSWP v Chiltern DC* [2003] EWCA Civ 508 (R(H) 2/03)).

Whether tribunal is obliged to substitute another 'outcome' decision

In *CIS/624/2006* a Tribunal of Commissioners considered whether when allowing an appeal against an 'outcome' decision, an appeal tribunal must substitute another 'outcome' decision. The dispute concerned whether the claimant had notional capital, actual capital or no capital at all. The claimant owned a property but the claim was refused based on notional capital. The tribunal's decision notice just said "appeal allowed". It was not clear whether tribunal had decided both issues. If the claimant was not disentitled due to notional capital did this mean they were not entitled on actual capital as well? The Commissioners gave the following guidance. A tribunal should set out the alternatives. The tribunal

[1] B –v- Secretary of State for Work and Pensions [2005] 1 WLR 3796 (R(IS)9/06).

should explicitly record what has and has not been decided and whether it has made an outcome decision or has remitted the final decision on entitlement to the Secretary of State.

Pension age and sex discrimination

The ECtHR ruled in three cases which argued that the linking of benefit entitlement to the differential pensionable age for men and women was discriminatory:

- In *Barrow –v- United Kingdom* (Application No 42735/02), 22nd August 2006, unreported (ECtHR), Mrs Barrow complained that the UK rule prevented her from continuing to get invalidity benefit beyond the age of 60;

- In *Pearson –v- United Kingdom* (Application No 8374/03), 22 August 2006, Mr Pearson challenged the rule which meant that he would not qualify for a state retirement pension until he was 65 whereas at his age (63) a woman would qualify for a state retirement pension;

- In *Walker –v- United Kingdom* (Application No 37212/02), 22 August 2006, Mr Walker complained that the UK rule requiring him to pay national insurance contributions whilst he was working between the ages of 60 and 64, whereas a woman in the same situation would not have to pay such contributions.

The ECtHR followed *Stec* in finding that the linkage of the cut-off age to the notional end of working life or the state pension age had to be regarded as pursuing a legitimate aim and as being reasonably and objectively justified. There was therefore no breach of Article 14.

Denial of disability premium to street homeless

In *R(RJM) –v- Secretary of State for Work and Pensions* [2006] EWHC 1761 (Admin) the claimant had mental health difficulties and received the disability premium in his award of IS when he was in accommodation but not when he was homeless. The claimant argued that the non-payment of the disability premium when he was sleeping rough was contrary to Art. 14 in conjunction with A1/P1. The court concluded that Art. 14 was not engaged because having no accommodation, as compared with having accommodation, was not a "personal characteristic" for the purposes of Art. 14. CPAG has appealed and the case is due to be heard by the Court of Appeal on the 22nd or 23rd of May 2007.

The Speaker referred to the fact that the Secretary of State was refusing to accept that IS came within the scope of A1P1 in the light of *Stec* on the grounds that there was contrary dicta in *Campbell v South Northamptonshire D C* [2004].[2] The Department rely on *Kay v. Lambeth LBC* [2006] UKHL 10, in which the

[2] [2004] EWCA Civ 409, [2004] 3 All E.R. 387, R(H) 8/04.

House of Lords held that a court must follow a binding domestic authority even if inconsistent with an ECHR authority. This argument was accepted in *R (Couronne and others)v Crawley BC (1), SSWP and The First Secretary of State (3)* [2006] EWHC Civ 1514 (Admin) where Mr Justice Bennett concluded that he was bound by *Campbell* to hold that HB and income-based JSA, as non-contributory benefits, do not come within A1/P1. This means that all challenges relying on A1/P1 coupled with Article 14 have to be 'parked' until *Campbell* is overruled.[3]

Right to reside

(1) Parents of qualifying children

In *W(China) and X(China) v SSHD* [2006] EWCA Civ 1494, 9 November 2006, W and X argued that since their child Q was an Irish citizen, and since she could not assert her rights of free movement within the EU without her parents' assistance, W and X were themselves legally entitled to bring Q here for that purpose, and to stay here. The CA rejected this submission holding that where a child who is an EU citizen is brought to the UK from another EU state (Ireland) by her parents, who themselves lack EU status, (stayed in Ireland for birth of child) both the child *and* her parents each had to demonstrate possession of medical insurance as well as sufficient resources to avoid becoming a burden on the social assistance system of the host state. In *Chen* the parents had been self-sufficient as they had private means.

(2) Temporary incapacity for work must be due to claimant's illness

In *CIS/3182/2005*, the Commissioner rejected an argument that a person remains a qualified person when temporarily off work to look after their sick child. The justification accepted by the Tribunal of Commissioners in CIS/3573/2005 (prevention of benefit abuse) applies to those who have been economically active for only a short period (here 2 months) and who no longer have a right of residence because they have ceased to be in the job market or are temporarily incapable of work. The Commissioner held that the incapacity in regulation 5(2)(a) of Immigration (EEA) Regs 2000 had to be due to an illness or accident suffered by the person who claimed to be a worker and not any child of that person.

The Speaker pointed out that under domestic law it is possible to claim IS if someone is incapable of work because of their pregnancy or there are 11 weeks or less before the baby is due. Why is there no similar protection for EU citizens who become pregnant? The Speaker also suggested that there may be potential human rights arguments based on the difference in treatment between a female with a child and other claimants (see also case below).

[3] See discussion in "Arguing shared-care cases after Stec in Welfare Rights Bulletin 194, Oct 2006, page 8.

(3) Genuine and effective work

The appeal in *CIS/3315/2005* concerned a Dutch single parent with two young children who had come to the UK on the 8th of March 2004. She had been awarded income support up until July 2004, but she then worked from July to October 2004. Her further claim for income support (and housing benefit) was rejected on the basis that she did not have a right to reside. On her claim for income support she said that she was looking for work of 2 or 3 hours a day to fit in with her childcare arrangements. The Commissioner held that the claimant did not remain a qualified person as she could not show that the work she was seeking was "effective" and, based on these facts, she did not have a reasonable prospect of securing work. The Commissioner went on to hold that the judgment in *Kempf* (Case C-139/85) did not preclude a national court from considering whether work was "effective" by reference to the extent to which the claimant had recourse to social assistance. According to the Commissioner, a claimant could only be regarded as retaining the status of a worker while unemployed if they were seeking work that, with working tax credit, would produce an income equivalent to their applicable amount for IS/JSA purposes, plus their rent (or HB) (para 28). The Speaker said the Commissioner's approach was contrary to the overall *ratio* of *Kempf* which seems to be that work is not rendered ineffective simply because it is supplemented by social assistance. The Speaker also suggested that given the Commissioner's finding that the claimant had no reasonable prospect of securing the work she was seeking, his ruling on effective work may be regarded as *obiter* (i.e. not binding on tribunals).

Brown v Secretary of State for Work and Pensions - on whether Secretary of State entitled to offset arrears due to claimant for one period against non-recoverable overpayment for another period was heard on 14 February 2007: neutral citation [2006] EWCA Civ 89. The CA ruled in favour of the claimant.

Next Meeting – Benefit Fraud and Overpayments – 7 March 2007.

Minutes prepared by
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Wednesday, 07 March 2007