

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS**Starred Decision No: *69/99****(Commissioner's File No.: CSIB/257/1999)**

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SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPLICATION FOR LEAVE TO APPEAL ON A QUESTION OF LAW FROM A DECISION OF AN APPEAL TRIBUNAL

DETERMINATION BY SOCIAL SECURITY COMMISSIONER

ORAL HEARING

Name:

Appeal Tribunal of : 30 March 1998 at Dundee

Case No: S/05/0089/1997/00595

1. This is an application by the claimant for leave to appeal on a question of law against the decision of a social security appeal tribunal given at Dundee on 30 March 1998. For the reasons set out below I dismiss the application.

2. An oral hearing was directed by the Legal Officer to the Commissioner. The oral hearing took place on 15 September 1999. The claimant was represented by Mr Kinghorn, Solicitor, the Dundee North Law Centre. The adjudication officer was represented by Mr Armstrong, Advocate, instructed by Miss Ferrier of the office of the solicitor to the Advocate General. The claimant appealed to a social security appeal tribunal against a decision of an adjudication officer recorded at page 87. The claimant's appeal was heard by a tribunal on 30 March 1998. Her appeal was unsuccessful as can be seen from the decision notice recorded at page 95. It is not disputed in this application that the claimant, who represented herself before the tribunal, did not ask for a statement of reasons for the tribunal's decision or of its findings on questions of fact material thereto within the 21 days referred to in Regulation 23(3C) of the Social Security (Adjudication) Regulations 1995.

3. The claimant was clearly dissatisfied with the decision of the tribunal in respect that she sought advice from Mr Kinghorn. Mr Kinghorn on 14 May 1998 wrote to the Clerk of the Tribunal and indicated that he would be grateful if the tribunal would consider letting him have a statement explaining the tribunal's findings on questions of fact. In that letter he indicated that he appreciated that this was outwith the 21 day period referred to in the regulations. Mr Kinghorn in addition on 20 May 1998 wrote to the Clerk of the Tribunal and indicated that he was also instructed to apply to have the decision of 30 March 1998 set aside.

4. The tribunal Chairman in a letter dated 7 July 1998 said that he did not propose to produce such a statement. It was accepted that this was a matter within his discretion. The application for set aside came before a differently constituted tribunal on 30 March 1998.

The application for set aside was refused. It appears to have been intimated to the claimant on 19 January 1999. The claimant through, Mr Kinghorn, on 6 April 1999 on an OSSC1 dated 2 April 1999 made an application for leave to appeal to the Commissioner to a Chairman. He received a telephone call from the independent tribunal service on 9 April 1999, a full-time Chairman decided that the application should go straight to the Commissioner's office. It was said by Mr Kinghorn that the papers do not make it clear what the full-time Chairman did. It was Mr Kinghorn's submission that the full-time Chairman was asked to consider the application for leave to appeal. He accepted that the full-time Chairman did not specifically grant the application for leave. However he submitted that the tribunal Chairman did not in terms refuse it. The application for leave to appeal to the Commissioner was received by the Office of the Social Security Commissioners on 12 April 1999. In that application which is dated 2 April 1999 it is said that the claimant was too late to apply to the Chairman of the tribunal. It was in these circumstances that this application came before me.

5. The principal issue before me was whether the application is inept because of the failure of the claimant to obtain from the Chairman a full statement of facts and reasons in accordance with the regulations to which I have referred because she did not apply within the 21 days from receipt of the notice of decision for such a statement and the refusal of the Chairman to supply such a statement out of time.

6. In determining that question it is important to set out the relevant statutory provisions. Regulations 23(2) to (4) of the Social Security (Adjudication) Regulations provide:-

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

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

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

(3A) A statement of the reasons for the tribunal's decision and of its findings on questions of fact material thereto may be given -

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

(3C) A copy of the statement referred to in paragraph (3A) shall be supplied to the parties to the proceedings if requested by any of them within 21 days after the decision notice has been sent or given, and if the statement is one to which

sub-paragraph (a) of that applies, that copy shall be supplied in such medium as the chairman may direct."

7. As amended by regulation 3 of the Social Security (Adjudication) Commissioners Procedure and Child Support Commissioners (Procedure) Amendment Regulations 1997, regulation 24(1) of the 1995 Regulations provide as follows:-

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

- (a) be made in accordance with regulation 3 and Schedule 2; and
- (b) have annexed to it a copy of the full statement of the tribunal's decision".

Regulation 3 of the Social Security (Adjudication) Regulations 1995 provides:-

3(1) Any application, appeal or reference mentioned in column (1) of Schedule 2 shall be in writing and, in the case of an appeal, shall be in a form approved by the Secretary of State and shall be made or given by sending or delivering it to the appropriate office within the specified time.

A specified time is defined in regulation 3(2) and is said to mean the time specified in column (3) of the Schedule opposite the description of the relevant application, appeal or reference so listed.

In paragraph 7 of Schedule 2 it is said that the application is that to a Chairman for leave to appeal to a Commissioner from the decision of an appeal tribunal and the specified time given is:

"3 months beginning with the date when a copy of the full statement of the tribunal's decision was given or sent to the applicant"

8. As amended regulations 3 and 4 of the Social Security Commissioners (Procedure) Regulations 1999 are in the following terms:-

"3.-(1) Subject to paragraph (2) of this Regulation, an application may be made to a Commissioner for leave to appeal against a decision of an appeal tribunal or a medical appeal tribunal only where the applicant has been refused leave to appeal by the chairman of an appeal tribunal or, as the case may be, of a medical appeal tribunal.

(2) Where there has been a failure to apply to the chairman for such leave within the specified time, an application for leave to appeal may be made to a Commissioner who may, if for special reasons he thinks fit, accept and proceed to consider and determine the application.

(3) An application for leave to appeal under paragraph (1) above must be made within 42 days from the date on which notice in writing of the refusal of leave to appeal was given to the applicant.

(4) ...

(5) A Commissioner may accept and proceed to consider and determine an application for leave under paragraphs (1) and (4) above notwithstanding that the period specified for making the application has expired, if for special reasons he thinks fit.

4.-(1) Subject to the following provisions of this Regulation, an application to a Commissioner for leave to appeal shall be brought by a notice to a Commissioner containing:

- (a) the name and address of the applicant;
- (b) the grounds on which the applicant intends to rely;
- (c) an address for services of notices and other documents on the applicant;

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

(2) Where the applicant has been refused leave to appeal by the chairman of an appeal tribunal or of a medical appeal tribunal the notice shall also have annexed to it a copy of the decision refusing leave and shall state the date on which the applicant was given notice in writing of the refusal of leave."

9. Mr Kinghorn in his submission submitted that in this case the Chairman had refused the application for leave to appeal. The basis upon which he made this submission was that the application put before him had not been granted. In respect of the failure to comply with regulation 24(1) of the 1995 Regulations in making the application it was said that I could simply waive this failure as there was nothing in the procedure regulations to say that I could not. He also referred me to paragraph 8 of CSI/591/98 where Mr Commissioner Mitchell said:-

"So far as applications to a Commissioner are concerned, regulation 3(1) of the Commissioner's Procedure Regulations makes it perfectly clear that an application may be made to a Commissioner "only where the applicant has been refused leave to appeal by the chairman". In my judgment it is the absence of such a refusal and not the absence of a full statement that precludes resort to that paragraph."

10. Mr Armstrong's submission was that in this case there had been no refusal of leave by the Chairman. There is no document demonstrating a refusal of the application. He submitted that the application made by the claimant to the Chairman did not comply with the mandatory requirement to produce with it a copy of the full statement of the tribunal's

decision. Such a full statement did not exist. The application was therefore inept. It was further submitted that in any event the response to the communication seeking leave was a phone call to the effect that the papers were being transmitted from the Independent Tribunal Service to the Commissioners office. It was said that a decision was taken not to consider the matter. Mr Armstrong referred me to regulation 4(2) and indicated that there was an absence of the document referred to in that regulation.

11. I accept Mr Armstrong's submission on this issue. It is borne out by the circumstances which are disclosed upon perusing the case papers and by the absence of a written notice of refusal. It also does not follow that because an application is not granted it is refused. It obviously may not be dealt with and I am satisfied that this is the position here.

12. Mr Kinghorn in his submission indicated that he did not accept what was said by Mr Commissioner Rowland in CIS/3299/1997, starred decision 70/98, when he said in paragraphs 15 and 16:-

"15.I do not consider that any chairman of a social security appeal tribunal has jurisdiction to entertain an application for leave to appeal to a Commissioner in a case where no full statement of the tribunal's decision has been given. In such a case, "the specified time" never starts to run.

16. It follows that, if there is no full statement of the tribunal's decision, a Commissioner has no jurisdiction to consider an application for leave to appeal under regulation 3(1) of the 1987 Regulations."

13. In his submission this view was supported by Mr Commissioner Mitchell where he said in paragraph 8 of CSL/591/98:-

"8. I do not accept that the Commissioner's observations in the above case provide an authority upon which the adjudication officer is entitled to rely in the circumstances of this case. The Commissioner was dealing with the question of the jurisdiction of Commissioners to entertain appeals or applications in the absence of a full statement of the tribunal's findings and reasons. I do not propose to comment on the Commissioner's observations regarding the powers of a tribunal chairman. So far as applications to a Commissioner are concerned, regulation 3(1) of the Commissioner's Procedure Regulations makes it perfectly clear that an application may be made to a Commissioner "only where the applicant has been refused leave to appeal by the chairman". In my judgment it is the absence of such a refusal and not the absence of a full statement that precludes resort to that paragraph".

14. I do not consider that Mr Kinghorn's submission on that issue is sound. It will be noted that in the case dealt with by Mr Commissioner Mitchell QC, the situation was that the Chairman had been asked timeously for a statement of reasons which had not been provided. In this case the Chairman had declined to provide a statement out of time. Thus on this issue I am inclined to follow Mr Commissioner Rowland on the basis set out by him. It follows from that that I accept Mr Armstrong's submission that the application to the Chairman was inept and that in any event as I have indicated as a matter of fact the Chairman did not purport to refuse what was an inept application, it was simply passed to the Commissioner.

15. Mr Kinghorn submitted that if I was against him in relation to his principal submission the absence of a full statement of reasons did not take away from the claimant her right to make an application under regulation 3(2) of the Commissioner's Procedure Regulations 1987 as amended.

16. He relied in support of that submission what was said by Mr Commissioner Rowland in paragraph 17 of CIS/3299/1997. In that decision he said:-

"17. It seems clear from the amendment to the last part of regulation 4(1) of the 1987 Regulations and the failure to amend the last part of regulation 4(3) that the draftsman had in mind that applications would be made only after a full statement of the tribunal's decision had been issued. However, I would require a much stronger indication before I would infer that the legislators intended to remove from Commissioners the power that they undoubtedly had between October 1996 and April 1997 to consider an application in a case where, notwithstanding the lack of a full statement of the tribunal's decision, the tribunal could be shown to have erred in law. The lack of a full statement of the tribunal's decision would not remove the power of the High Court or the Court of Session to quash such a tribunal's decision on an application for judicial review and I consider it unlikely that the legislators thought that a more appropriate path for would-be applicants to follow. Therefore, I do not consider that the provisions of regulation 4 of the 1987 Regulations, as amended, should be read as implying a limit to the power of a Commissioner to admit an application under regulation 3(2). In my view, those provisions are merely directory and could be waived by a Commissioner even if there were no express power to waive irregularities conferred by regulation 21. Like the Employment Appeal Tribunal in *Simmons*, I consider that a failure to comply with such procedural requirements does not invalidate the application but has practical consequences that depend on the circumstances of each case. It may delay consideration of the application (while the necessary particulars are obtained) or it may make the application less likely to succeed but it does not prevent a Commissioner from considering the application at all."

17. Mr Armstrong in his submission pointed me to clear authority to the contrary. In paragraph 8 of CSI/591/98 Mr Commissioner Mitchell said:-

"As regards regulation 3(2) I have difficulty in accepting that its effect is truly analogous to the Employment Appeal Tribunal rule permitting the institution of an appeal before the commencement of the prescribed period. The Employment Appeal Tribunal rule expressly covers a premature institution of an appeal. On a natural reading of its terms in its context, paragraph 3(2), on the contrary, as the sole exception to the prerequisite in regulation 3(1) of a refusal of leave by the chairman, clearly implies in my judgment the loss through lateness of the opportunity to obtain the chairman's decision on leave to appeal."

18. He also directed me to what was said by Mr Commissioner Walker QC in CIS/4437/98. In paragraph 14 of his decision he said:-

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

19. It was Mr Armstrong's submission that in this case it cannot be said that there was a failure to apply to the Chairman for leave within the specified time which is the prerequisite for the operation of regulation 3(2) in circumstances where the specified time in accordance with regulation 3, Schedule 2, paragraph 7 had never commenced. Mr Armstrong submitted that as the claimant had failed to apply within 21 days for a full statement of reasons her application was inept. That failure to apply for a full statement meant in effect that the right of appeal had been lost as the application for leave under regulation 3(1) is inept. Mr Armstrong also submitted that in respect of the decision of Mr Commissioner Walker QC in CIS/4437/98 was determined on a factual basis which was different to the present case. In that case the tribunal had purported to provide a full statement of facts and reasons in the decision notice. For myself I make no comment on the result reached by Mr Commissioner Walker in substantially different circumstances to the present, other than to note that the decision he reached does not in my view sit easily with his rigorous analysis of the statutory provisions. I am however persuaded by Mr Armstrong's arguments that the application in the instant case is inept. There is I consider an inevitability about that conclusion and it is consistent with the views of Mr Commissioner Mitchell and Mr Commissioner Walker set out above and with which I agree. I do not accept Mr Commissioner Rowland's analysis for the reasons given by my brother commissioner in Scotland. Mr Rowland acknowledges that there is no statutory basis for waiving the requirement for a full statement. I do not consider that the Commissioner can do so on an extra statutory basis particularly when the statement of facts and reasons is an essential prerequisite to enable the Commissioner to determine whether there has been any error in law on the part of the tribunal. The supervisory jurisdiction of the superior courts is one which is exercised upon very different principles to appeals before the Commissioner. If the Chairman had been disposed to provide a statement out of time it seems to me that the claimant could have made an application which was not inept. However the Commissioner has no supervisory jurisdiction over the exercise of a discretion by the Chairman on such a matter. It is not for me to contemplate whether the

Court of Session would have such a jurisdiction on a judicial review of the chairman's discretion.

20. If I had been disposed to accept the application and determine it I would have been inclined to refuse it. The application for leave to appeal sought to demonstrate an error of law on the merits upon the basis that the tribunal failed to deal adequately with the activity of continence and the appropriate descriptor relating thereto. This was on the basis as I understood Mr Kinghorn that the tribunal did not deal with the claimant's evidence of deterioration. I do not consider that his grounds of appeal are arguable upon the basis that the tribunal accepted the BAMS report which reached the same conclusion as to the appropriate descriptor in relation to continence as the claimant in her incapacity for work questionnaire. Insofar as her evidence before the tribunal differed from the BAM's report and her replies to the questionnaire the tribunal had not accepted her evidence for the reasons set out by them in their decision notice. Thus I consider no arguable error in law has been identified.

(Signed)
D J MAY QC
Commissioner
Date: 22 September 1999