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Commissioner's File: CSB/015/1994

SUPPLEMENTARY BENEFITS ACT 1976
SOCIAL SECURITY ADMINISTRATION ACT 1992
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 7 November 1993. That decision is a nullity being given without jurisdiction: Social Security Act 1992, section 23.

2. This is an appeal to the Commissioner by the adjudication officer from a decision of a social security appeal tribunal dated 7 November 1993 (Case List No. 227/01: Tribunal Registration No. 139/91 - 12344). That decision was given on an appeal by the claimant, a married man then aged 57 years, against the decision of the Supplementary Benefits Commission issued on 30 April 1970 as follows, "The claimant is entitled to a supplementary allowance at a weekly rate of £0.12.0d. [£0.60] from 30.4.70."

3. The object of an appeal made against a decision given so long ago as 30 April 1970 was, to try to persuade the tribunal to re-examine the claimant's entitlement to Supplementary Benefit over the years from 1970 to 1988 (when Supplementary Benefit was succeeded by Income Support). The appeal was, of course, extremely late, the period for a timeous appeal being three months from the date of notification of the adjudication officer's decision. A late appeal cannot be brought unless, under regulation 3 of and Schedule 2 to the Social Security (Adjudication) Regulations 1986, S.I. 1986 No. 2218, the leave of a chairman of a social security appeal tribunal is given "for special reasons" (regulation 3(3)). The phrase "special reasons" is a term of art and does not simply mean "good excuse". Nor does it give a completely open discretion to a tribunal chairman. There must be something unusual in either the history or facts of the individual case that merit what should be the comparatively unusual step of granting leave for a late appeal. The greater the length of time that has elapsed, the less likely

it is that there will in fact be "special reasons".

4. In the present case the tribunal of 7 November 1993 dealt, on the initiative of its chairman, with the question of jurisdiction at the outset of their hearing. The detailed note of evidence by the chairman on this point reads as follows,

"Jurisdiction - whether leave given

Chairman invites argument on the question whether leave has been granted to appeal against the decision of 30.4.70. The letter of appeal of 10.5.91 [reproduced in paragraph 6 below] has been placed before a chairman with Form AT37, completed by the AO and dated 24.11.91, more than 6 months after the date of receipt of the appeal. In Form AT37 the decision appealed against, which is not identified by the letter of appeal [of 10.5.91 - see paragraph 6 below] is stated to be 1.1.91. An appeal was admitted and the decision on the application notified on 31.12.91. The tribunal has no jurisdiction because leave has never been granted to appeal a decision of 30.4.70. [The claimant's representative] - on 10.5.91 we went through a procedure and the leave of 23.12.91 (sic 31.12.91). That related to the decision of 1970. Chairman - What were the special reasons for lateness? [Claimant's representative] - the special reasons were implicit in the appeal. If there is a question the appeal should not have been admitted but there is leave which clearly applies to the decision referred to in the appeal. [The adjudication officer's representative] I took it that leave had been given to admit the appeal of 1970. Refers to the letter of notification of 31.12.91. I did not know this was an issue. I assumed it related to the decision of 30.4.70. Chairman - asks about date of decision being 1.1.91 AT37. [Adjudication Officer's representative] - there is no decision of 1.1.91. My understanding is that there were a number of applications to admit late appeals. Dates varied and it would have taken time to establish the dates of all the original decisions. Before the application was put to a Tribunal Chairman it was agreed between the Local Office (Benefit Office?) and the Tribunal Service to put in a common date of 1.1.91. Chairman - agreed with whom in the Tribunal Service? [The adjudication officer's representative] Agreed with Mr J B a supervisor and Mrs C B a clerk. It was so application should not be delayed that this common date was placed in AT37s. It would clearly not be an appeal against a decision on 1.1.91 as it was referable to a Supplementary Benefit Decision. .. Chairman - on the procedural issue of whether leave has been granted and whether the Tribunal has jurisdiction to determine the decision of 30.4.70, the hearing continues by agreement of the parties."

5. In their reasons for decision, the tribunal said as follows,

"On the question whether leave has been granted to appeal against the decision of 30.4.70, the letter of appeal of 10.5.91 did not identify the decision appealed against. In Form AT37 completed by the AO and dated 24.11.91, the date of the decision is stated to be 1.1.91. How that situation came about will be investigated. The present Chairman considered that leave has been granted to appeal a non-existent decision and the Tribunal has no jurisdiction but that is not the view of the parties to the proceedings. The present Chairman does not grant leave as, in his view, no special reasons for lateness were shown and the matter continues only by agreement of the parties."

6. The claimant's original letter of appeal on a 'pro-forma' dated 10 May 1991, made through his representative, names the claimant and then continues,

"The above person wishes to seek leave for late appeal against the amount of benefit awarded when National Assistance/Supplementary Benefit was first awarded to them. My grounds of appeal are that the medical condition of myself (or a member of my family) give rise to a number of weekly 'additional requirements' which were not awarded to me when I first claimed benefit or, if they were awarded, were insufficient."

That letter was therefore both an appeal and an application for a late appeal to be admitted.

7. On 20 December 1991 the clerk of the social security appeal tribunal put to a tribunal chairman (not the chairman of the present tribunal) the appeal and application for it to be considered despite lateness, in a written document dated 10 December 1991 as follows,

"The attached papers show that the appeal/application is late.

AO Decision issued 01/01/91. Appeal lodged 10.05.91. Reason for lateness requested. Reply attached - no reply received. May I therefore ask you to decide whether under the Social Security (Adjudication) Regulations 1986, the appeal/application can be admitted because there were special reasons for delaying it. (Regulation 3(3))."

On 20 December 1991 the chairman gave on that document his signed decision by a rubber stamp, "Receive Late".

8. As explained above the only decision which could be or was appealed against was in fact the decision of the Supplementary Benefits Commission issued as long ago as 30 April 1970. At this point, I should commend to tribunal chairmen, when applications for admission of late appeals are put before them, the words of

another Commissioner in paragraph 25 of a decision on file CSB/123/93 (starred as 49/94) as follows,

"I say a word about the role of appeal tribunal chairman in the admission of late appeals. ... it does seem to me that a chairman - when confronted with so grossly delayed an application for the admission of a late appeal - ought to seek from the relevant claimant written particulars of the 'special reasons' which are alleged to justify the favourable exercise of the chairman's discretion; and I mean, of course, something which goes well beyond a common-form document. And it almost goes without saying, that, the older the decision appealed against, the more reluctant should a chairman be to exercise his discretion."

9. I entirely agree with those comments of the learned Commissioner and they apply of course to this case. I note that the chairman of the tribunal said that this matter would be investigated. That is as well because I cannot conceive how a procedure should come to be devised that allowed an application for a late admission of an appeal from a decision in 1970 to be put before a chairman of the tribunal as being an application for leave against a 'fictitious' decision issued in January 1991. It does not matter, in my view, that one could deduce that a decision in January 1991 probably would not relate to supplementary benefit. Neither does it matter that apparently it was a matter of administrative convenience that the date 1 January 1991 was inserted. Moreover, the document that was actually put before the tribunal chairman (see paragraph 7 above) looked as if it was in fact a bona fide application for admission of a late appeal, since the application was more than 3 months after a 'decision' issued on 1 January 1991.

10. I now turn to the legal position arising from the above state of affairs. I should say at once, for the reasons which I set out in detail below, that I agree with the tribunal chairman in this case that there was in fact no leave ever given for a late appeal against the decision of the Supplementary Benefits Commission on 30 April 1970. Consequently, there was no valid appeal before the tribunal, with the result that it had no jurisdiction. I would say further that, in my judgment, as yet no valid application has been made to a tribunal chairman for leave to admit a late appeal from the decision of 30 April 1970. The claimant's representative's letter of 10 May 1991 certainly does not suffice for this purpose - it does not in any way indicate the date of the decision appealed against or even seek to identify it. The use of the words "... appeal against the amount of benefit awarded when national assistance/supplementary benefit was first awarded" certainly will not suffice.

11. The propositions which I have outlined above are to a large extent self-evident but, if authority were needed for them it is in my view to be found, first, in the fact that if a chairman is to be asked to hold that there are "special reasons" for delay he cannot conceivably do so unless he knows the date of the decision against which it is sought to obtain leave for late

appeal. Moreover, I note that the point is now in fact made explicit in an addition to regulation 3(5) of the Social Security (Adjudication) Regulations 1986. The original version of regulation 3(5) simply read,

" 3. (5) Any application, appeal or reference under these regulations shall contain particulars of the grounds on which it is made or given."

That in itself would imply that an indication should be given of the date of the decision against which it is sought to obtain leave to make a late appeal since how can it otherwise be said that the "grounds" are stated?

12. However, there has now been added, by regulation 3(2) of S.I. 1990 No. 603 as from 6 April 1990 (and thus in force at the relevant time), the additional phrase, "... and, in the case of an appeal, shall include sufficient particulars of the decision under appeal to enable that decision to be identified." What was involved here was a combined appeal and application for late appeal to be admitted. Consequently, there applied the mandatory requirement, under the current version of regulation 3(5) of the 1986 Regulations, that the application, in so far as it embodied an appeal, (which in principle any application for leave to make a late appeal must) had to "... include sufficient particulars of the decision under appeal to enable that decision to be identified." That was not done here. It follows that there was no valid application to a chairman for an extension of time for appeal. In any event, because of the material irregularity of the wrong date (1991 instead of 1970) being given, the extension of time granted by the chairman would be a nullity. On any count, therefore, the decision of the social security appeal tribunal was given without jurisdiction and was also a nullity.

13. I now turn to the question of whether the agreement of the parties could alter the position in any way, as seems to have been assumed to be the case here. In my judgment, in the present context, the agreement of the parties cannot possibly confer a jurisdiction on the tribunal which it would not, under the legislation, otherwise have. The jurisdiction of the social security appeal tribunal is derived entirely from statute. It is not possible to extend that jurisdiction by agreement between the parties. Nevertheless, paragraphs 11-13 of a written submission by the adjudication officer now concerned, dated 14 January 1994, submit that the tribunal here did have jurisdiction despite the irregularities I have detailed above. The adjudication officer's submission is on the ground that "neither party objected to the lack of jurisdiction at the appropriate time".

14. The adjudication officer's submission elaborates this proposition as follows,

"The facts are that the appeal against the decision made on 30.4.70 was put before a chairman on the basis that the

decision was made on 1.1.91 .. the claimant played no part in this. Although the chairman did not know the true date of the claim he must have realised it was not made on 1.1.91 since the claim related to Supplementary Benefit (abolished 1988) and was for 'the amount of benefit awarded when National Assistance/Supplementary Benefit was first awarded'. That made it clear that the determination sought to be appealed was of many years standing."

I have already indicated above that I do not consider that that argument can in any circumstances succeed.

15. The adjudication officer's submission continues,

"The chairman granted leave to appeal on or around 23.12.91. No challenge was made to that decision at the time, or between that date and the tribunal hearing on 22.10.93. It is a fundamental principle of administrative law that 'no consent can confer on a court or tribunal with limited jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from submitting only that such court or tribunal has acted without jurisdiction': Essex Incorporated Congressional Church Union v. Essex County Council [1963] A.C. 808 cited in Wade Administrative Law 6th Edition page 265. But there are some conditions which are jurisdictional only if pleaded at the right time. Jurisdiction is lost if the objection is raised at the right time but not otherwise. But jurisdiction is sometimes contingent; in such a case, if the defendant does not by objecting at the proper time 'exercise his right of destroying the jurisdiction, he cannot do so afterwards': Jones v. James [1850] 19 LJQB 257 cited in Wade op cit page 266. This principle seems to have been applied by the Tribunal of Commissioners in R(SB) 9/84."

16. Although the statement of principle thus referred to by the adjudication officer now concerned is correct, it is entirely clear that the present case is not one to which the ruling in Jones v. James and other similar cases is applicable. The relevant passage in Wade's Administrative Law makes it clear that Jones v. James and similar cases (eg. Moore v. Gamage (1890) 25 QBD 244) apply to a cases where a court or tribunal will have jurisdiction only if one of the parties is prepared to consent to it (eg. jurisdiction against a person residing outside the court's normal area). Of course, in such a case if no objection is actually made throughout the hearing, such consent may be implied. However, here, section 22(4) of the Social Security Administration Act 1992 provides that "Regulations may make provision as to the manner in which, and the time within which appeals are to be brought" (my underlining). The provisions of regulations made thereunder cannot be circumvented by any agreement by the parties. The decision of a Tribunal of Commissioners in R(SB) 9/84, cited by the adjudication officer, concerns appointments on behalf of disabled claimants and does not bear on the present point. It follows that I must reject the

submission of the adjudication officer now concerned. There is absolutely no doubt in the present case (i) that the tribunal had no jurisdiction and (ii) that none could be conferred upon the tribunal by agreement of the parties.

17. Lastly I should say that I have viewed the facts of this case with considerable concern. The result of what has occurred is that there has been an actual or potential expenditure of a considerable sum of public money, in pursuance of a decision by a social security appeal tribunal which was a complete nullity. Moreover, the procedures which led to the tribunal having to deal with the case contain elements which, to say the least of it need detailed investigation. Moreover, it follows from my decision that in all other similar cases, of which there may have been many, social security appeal tribunals may well have given decisions which are in fact nullities. That is a serious situation and no doubt the Chief Adjudication Officer will wish to look closely into them with a view to appeals to the Commissioner by the adjudication officer from such decisions, wherever considered appropriate. That is particularly so, bearing in mind that, although those decisions may well be nullities, they will not be treated as such, unless they are declared to be so by a Commissioner on appeal.

(Signed) M.J. Goodman
Commissioner
(Date) 8 December 1994