DECISION C.S.B. 226/1981 (PRIME)

This decision is "starred" because:-

i. it considers the rule of natural justice applicable to a case where a party arrives only after the tribunal hearing, and a re-hearing then takes place before the same tribunal;

ii. it holds that there is no "decision" within the meaning of the Correction and Setting Aside of Decisions Regulations 1975, until the determination of the tribunal has been duly communicated in writing to the parties, i.e. 'promulgated'.

June 1982

M J Goodman

MJG/JCB

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the supplementary benefit appeal tribunal and I set aside that decision as being erroneous in law. I remit the case to a differently constituted supplementary benefit appeal tribunal for rehearing: Supplementary Benefits Act 1976, section 15A and the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No 1605] regulation 10(8) (as amended by S.I. 1982 No 40, rule 6).

2. The claimant is a divorced woman, aged approximately 46, who lives with her two non-dependent children in local authority accommodation. She appealed to the supplementary benefit appeal tribunal against the amount of assessment of her weekly supplementary benefit. However, in this case I am not concerned with whether or not that assessment was correct, and I leave to the new tribunal that rehears this case the problems that she has raised in her grounds of appeal as to the amount of the assessment. The reason that I have set aside the supplementary benefit appeal tribunal's decision is because I consider, for the reasons given below, that the procedure adopted for the hearing of the appeal was in breach of the rules of "natural justice". Those rules are applicable to all persons and bodies making judicial decisions, by reason of the rules of common law formulated over a long period of time by the Courts. They supplement anything that is said in specific procedural rules or regulations as to the procedure to be adopted by tribunals.

3. One of the rules of natural justice is that a party before a Court or tribunal must be given a proper opportunity to present his or her case. In this particular case, the claimant applied to the Commissioner for leave to appeal against the decision of the supplementary benefit appeal tribunal, asserting that it was wrong in law because,

> " ... it was held in my absence even though I had sent to say that I would like it changed [from one named city to another named city] because of all the travelling involved and I could not get to [the city where the tribunal was in fact held] on time even with leaving home at 8.00 am".

4. As a result of that, the clerk to the tribunal made a written statement (dated 13 May 1981) as follows,

> "This lady arrived at the Tribunal approximately 1 hour after her appointment and the Tribunal had heard the case in her absence. However they decided that rather than adopt the setting aside procedure they would rehear the case, because of the travelling involved.
>
> [The claimant] was told that the case had been heard in her absence but that exceptionally it would be reheard. She was given a full and comprehensive hearing".

The claimant, although she has had the opportunity to comment on that statement, has in fact made no comment on it. I have no reason to doubt the accuracy of the statement made by the clerk of the tribunal.

5. Nevertheless, it seems to me that, although the tribunal acted in what they considered to be the best interests of the claimant, they may have given an appearance of injustice. In the (Divisional Court) case of Regina v Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256 at page 259, Hewart L.C.J. said,

> " ... justice should not only be done, but should manifestly and undoubtedly be seen to be done".

6. In this present case I consider that justice was not "manifestly and undoubtedly ... seen to be done". That is because the claimant would have arrived at the tribunal's sitting, only to be told that the tribunal had already decided the case. She may well have been told or have surmised that they had decided it adversely to her. She would then have been invited to tell the tribunal what she wished to say in support of her appeal. She could easily have thought that the tribunal had already made their minds up on the subject, even though they did give her what the clerk describes as "a full and comprehensive hearing", as I am sure was the case. She should, in my view, have been asked by the tribunal whether she wished to have the case reheard by a differently constituted tribunal or whether she was willing to have a rehearing by the tribunal as it then was. Had she consented to the latter course, there could be no complaint.

7. The possible appearance of injustice is strengthened by the fact that there is in the appeal papers only one form LT 235 (record of tribunal's proceedings) on which the decision to dismiss the appeal is given. That form LT 235 would appear to have been the one originally used for the first decision arrived at before the claimant came to the hearing. Moreover, it may be (judging by the handwriting on it) that it was completed by the clerk of the tribunal and only signed by the chairman. If so, that is in my view incorrect, unless the chairman (who has responsibility for the contents of form LT 235) had dictated the contents to the clerk. Moreover, all that has apparently been done subsequently is that that part of the form, originally stating that the appellant was not present, has been altered to make it read that the

appellant was present, which must strengthen an impression that the tribunal merely 'rubber-stamped' their earlier decision. I note that in answer to an enquiry by the clerk of the tribunal, the chairman of the tribunal stated (by letter dated 19 February 1982),

> "This is to confirm our telephone conversation ... that the original decision of the ... tribunal on the appeal of /the claimant/ on 24 April 1981 is identical to the one now held on record".

8. In my judgment, although I well appreciate the care and trouble taken by the tribunal and its chairman on this occasion, there has been a breach of the rules of natural justice since the procedure adopted could well cause the claimant to think that the tribunal had already made up their minds on the issues in question before she was allowed to address the tribunal. I consider that what should have happened is that, if the claimant requested a rehearing before a differently constituted tribunal (see above), the tribunal should have set its determination aside (see below) and ordered a rehearing by a different tribunal. There could then have been no possible appearance of bias or pre-judgment. I am of course not suggesting for one moment that the tribunal was in any way biased or did in fact pre-judge the issue, but the reported cases on this rule of natural justice stress that what matters equally as much as whether bias or pre-judgment exists is whether there would be, to a reasonable person, an appearance of bias or pre-judgment. It is for this reason that I am compelled to set aside the decision dated 21 April 1981 of the tribunal and to order a rehearing of the case. The hearing must be by a differently constituted tribunal as is required by rule 10(8) of the above cited Appeals Rules. This is not, for the reasons set out in paragraph 2 above, a case appropriate for me to give the decision which the tribunal itself should have given, as I have power to do under the amended rule 10(8).

9. The supplementary benefit officer now concerned, in a written submission dated March 1982, does not raise the point as to natural justice. That officer's submission on the procedure adopted by the tribunal is as follows (paragraphs 4 and 5),

> "It is submitted that in following this course, and giving the claimant an opportunity to state her case, the tribunal adopted a commonsense approach. However, it is accepted that the claimant should have been advised to submit a written application to the tribunal requesting that their first decision that day should be set aside. It is submitted that the tribunal should have heard that application (which they could have done the same day) before going on to rehear the appeal with the claimant present (regulation 3 of the Social Security (Correction and Setting Aside of Decisions) Regulations, (1975 S.I. 1975 No 572)). It is submitted that for the above reason the tribunal's eventual decision was erroneous in point of law and therefore the supplementary benefit officer supports the claimant's appeal to the Commissioner".

10. In view of what I have said above about the desirability in accordance with natural justice of having had this case reheard by a differently constituted tribunal, if requested by the claimant, (even though I appreciate that would have meant adjourning the case to another day), I do not need to comment in detail on the submission of the insurance officer. Of course it is desirable that a tribunal should adopt a commonsense approach and it may be that there are circumstances (e.g. consent by the party) where the rules of natural justice would not be offended by an immediate rehearing. However, in my judgment, in such circumstances or when it is necessary to 'set aside' the decision so that another tribunal can hear the case the Correction and Setting Aside of Decisions Regulations would not have to be used, since those Regulations (which contain substantive and procedural limitations) apply only to the setting aside of "a decision".

11. The word "decision" is defined in regulation 1(2) of those Regulations as meaning,

> "A decision given with respect to a claim or question /relating to social security benefits or supplementary benefits/".

Regulation 1(2) provides also that "record of the decision" shall be construed accordingly. In my judgment, although the matter is not made explicit in that definition of "decision", there is no "decision" until a copy of the written record of the determination of the tribunal has been given to each interested person in accordance with the requirements of rule 7(3) of the above-cited Appeals Rules 1980 (relating to supplementary benefit tribunals - a similar rule is made applicable to national insurance local tribunals by regulation 12(3) of the Social Security (Determination of Claims and Questions) Regulations 1975, S.I. 1975 No 558). Until copies of the written record have been "given" or "sent" (the slightly different wording of the two sets of regulations), there is no "decision", in my view, within the meaning of that word in the Correction and Setting Aside of Decisions Regulations. What is sometimes known as "promulgation" is essential for the completion of a decision. Before that time, the determination of the tribunal, be it supplementary benefit or national insurance local tribunal, can be revoked or varied informally - see reported Commissioner's Decision R(I) 14/74, paragraph 14, and compare the analogous rule in relation to industrial tribunals - Hanks v Ace High Productions Ltd /1978/ ICR 1155, EAT. Consequently, because their 'decision' had not been promulgated, the determination of the tribunal in the present case could have been revoked informally without need to resort to the Correction and Setting Aside of Decisions Regulations, as the 'decision' had not been promulgated in the sense defined above.

(Signed) M J Goodman
Commissioner

Date: 30 June 1982

Commissioner's File: C.S.B. 226/1981
CSBO File: 262/81