Bulletin 166
Cttee

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CSDLA/2/01

Starred Decision No: 109/01

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

Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 11th January 2002

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

Commissioner's File: CSDLA/2/01

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY ACT 1998

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

DETERMINATION BY SOCIAL SECURITY COMMISSIONER

ORAL HEARING

1. This is an application to a Commissioner out of time by the claimant for leave to appeal on a question of law in the decision of an appeal tribunal dated 14 September 2000.

2. This application for leave is made late and as I am not persuaded by the explanation tendered that there are special reasons for doing so it is not accepted for consideration and determination.

3. This application came before me for an oral hearing on 7 July 2001. The claimant was represented by Mr Keel, a Welfare Rights Officer, of the City of Glasgow Council. At that date the Secretary of State did not appear. Having heard Mr Keel on that occasion, I adjourned the hearing to 4 September 2001. I issued a direction in relation to the application on 23 July 2001. At the adjourned hearing Mr Keel again appeared to represent the claimant. The Secretary of State was represented by Mr Harvie, Solicitor, of the Office of the Solicitor to the Advocate General.

4. The unusual feature of this case was that before I could make a determination in relation to the application for leave to appeal to the Commissioner, I required to determine which of 2 applications for leave to appeal purported to be lodged on behalf of the claimant was the one which fell to be determined. The first, at page 98, is an application lodged on 5 January 2001 signed by the claimant and authorising Mr Keel, the Welfare Rights Officer of the Social Work Department, Glasgow, to act on his behalf. The second is an application dispatched on 9 January 2001 signed by the claimant indicating that he was represented by Miss Mulholland of Messrs Quinn, Martin and Langan, Solicitors as his representative. The matter was material in respect that if I accepted that the application was that lodged on behalf of the claimant by the City of Glasgow Council it was timeous. On the other hand if it was the application lodged by Messrs Quinn, Martin and Langan it was late.

5. On 17 July 2001 I heard the history of the case from Mr Keel. That history I narrated in my direction of 23 July 2001. Mr Keel at the hearing on 4 September 2001 accepted that narration as accurately reflecting what he told me. I also cited and heard evidence under oath from Miss Mulholland and Mr Renfrew of Messrs Quinn, Martin and Langan. I cited the claimant also to give evidence before me. A medical certificate was produced dated 27 August 2001 which indicated that he was unfit to attend before the Commissioner. I offered a domiciliary hearing of the application. However, that was refused by the claimant. Both parties were in these circumstances content that I determine the issue as to which of the applications fell to be determined on the information placed before me by Mr Keel and the evidence of Miss Mulholland and Mr Renfrew. In the event, having heard evidence and submission, I have reached the conclusion that the application which falls to be determined is that made on the claimant's behalf by Quinn, Martin and Langan on 9 January 2001.

6. The history of the case is that the claimant made a claim for disability living allowance which was unsuccessful and his request for reconsideration of the decision relating thereto was refused by the decision maker on 27 May 2000. The claimant appealed to a tribunal. The claimant's representative before the tribunal was Mr Keel of the City of Glasgow Council. The appeal was unsuccessful.

7. The history given to me by Mr Keel as indicated was set out by me in the direction of 23 July 2001. That history is in the following terms:-

> "4. Mr Keel told me that the decision notice was handed over by the tribunal on the day of the hearing. On 18 September 2000 Mr Keel asked the tribunal to provide a full statement, which was sent to him and was received on 23 October 2000.
>
> 5. Prior to receipt of the full statement, Mr Keel wrote to the claimant in the following terms:-
>
> > "With reference to the Appeal Tribunal Hearing we attended at Wellington House on 14 September 2000. I am writing to inform you that I have requested a full statement of fact and reasons for the Tribunal decision of that date.
> >
> > Once I have received the document referred to above it will be possible for me to establish whether your case can be extended although there is no automatic right of appeal against the Tribunal decision .....
> >
> > I will of course contact you as soon as there is any more progress to report in your case."
>
> 6. Mr Keel then told me that he had submitted an application for leave to appeal to the Commissioner to the Chairman of the Tribunal. That is recorded at page 89. It is said in that letter:-
>
> > "I am authorised by the above named to seek leave to appeal to the Social Security Commissioner in respect of the DAT decision of 14.9.00"

7. Mr Keel said that he received no instructions from the claimant to make the application for leave to appeal. He had no specific instructions to do so. He told me that he did not disclose the terms of the full statement or his proposed grounds of appeal to the claimant before the application. He said there was no record in writing of his having told the claimant about the application, nor any record of notification having been given to the claimant of the action he had taken.

8. It was Mr Keel's submission to me that he did not require a mandate for the purposes of an appeal to the Commissioner from the claimant. It was, he considered, contained in the initial mandate provided by the claimant to the City of Glasgow Council prior to the tribunal hearing.

9. Separately from the actings of Mr Keel, it is apparent from a letter contained at pages 86-88 that Messrs Quinn, Martin & Langan also submitted an application for leave to appeal to the Commissioner on the claimant's behalf. That letter appears to have been signed by he claimant and contains the statement at the end of it:-

> "I authorise Quinn, Martin & Langan Solicitors to act on my behalf. Please ensure they are notified of any decision taken as a result of this request."

Mr Keel, although now representing the claimant in the appeal before me, in the circumstances which will become apparent, did not know how it was that Quinn, Martin & Langan came to make the application for leave to appeal. It was his suggestion that when the claimant went to see Quinn, Martin & Langan about making a fresh claim, an application for leave to appeal to the Commissioner against the decision of the tribunal may have arisen.

10. Of the two applications for leave to appeal which were submitted to the tribunal, it is apparent from a letter to the appeal service at page 130 that it was the application from Quinn, Martin & Langan which was dealt with by the Chairman. In a letter at page 130 it is said:-

> "On 10/11/2000 I received an application for permission to appeal to the Commissioner against the tribunal's decision made on 14/09/2000.
>
> The Chairman has considered the application and decided to refuse permission to appeal against the tribunal's decision."

Mr Keel's application was made on 11 November 2000. Notwithstanding that, the Appeal Service sent intimation of the refusal to the Glasgow Welfare Rights Office.

11. The refusal of leave to appeal by the Chairman is recorded at pages 92 and 93 of the bundle.

12. Mr Keel then went on to tell me that he thought that it was his application for leave to appeal which had been refused. In these circumstances it is apparent that he prepared an application for leave to appeal direct to the Commissioner following the refusal by the Chairman. That application is recorded at page 98 of the bundle. It is undated and is signed by the claimant personally. It appears to authorise Mr Keel to act on the claimant's behalf. It was apparently transmitted by fax to the office of the

Social Security Commissioners on 5 January 2001. Mr Keel was unable to tell me when the undated letter signed by the claimant, which formed the basis of the application for leave to appeal, was sent to the claimant or when it was returned to him. There is, according to Mr Keel, no supporting correspondence."

8. The position in respect of the application for leave both to the Chairman and the Commissioner from Messrs Quinn, Martin and Langan was given by Miss Mulholland, Solicitor and Mr Renfrew who is a trainee solicitor with the firm. I fully accepted their evidence.

9. Miss Mulholland in her evidence relating to the initial application for leave to appeal to the Chairman indicated that the claimant had come to her office subsequent to the tribunal decision. It was said by her that he was angry because prior to the tribunal hearing Quinn, Martin and Langan for a fee had obtained evidence from a consultant neurologist for the use at the appeal hearing. The claimant told her that the Chairman of the tribunal had indicated that the evidence of the neurologist was worthless as he was a consultant neurologist. Miss Mulholland indicated that she was prepared to submit grounds of appeal against the decision of the tribunal in an application for leave to appeal to the Commissioner to the Chairman. The grounds of appeal which she drafted are contained in the letter dated 9 November 2000 signed by the claimant and recorded at pages 99-101. Miss Mulholland gave evidence that she told the claimant that she would make the application for leave for a £50 fee. This the claimant paid. She gave evidence to the effect that she did not check with the claimant as to whether Mr Keel was acting for him. She pointed out that in the application for leave the Appeals Service were asked to ensure that they notified any decision taken in response to the request to Quinn, Martin and Langan. It appears that they did not do so. However, the claimant was notified.

10. Mr Renfrew gave evidence to the effect that on 5 January 2001 the claimant came to see him at Quinn, Martin and Langan's office. Mr Renfrew dealt with the claimant as Miss Mulholland was on leave. The claimant told Mr Renfrew that he had to get an appeal to the Commissioner in. He said that he only had one month and that time was very tight. In these circumstances, Mr Renfrew got the claimant to sign an OSSC1 form which is recorded at page 94 and which is dated 5 January 2001. When Mr Renfrew got the claimant to sign the OSSC1 the claimant did not give any indication of having consulted anyone else in respect of the appeal other than Quinn, Martin and Langan. Having obtained the signature of the claimant and having seen him, Mr Renfrew passed the papers on to Miss Mulholland who saw them on her return to the office on 9 January 2001. Mr Renfrew was given no explanation from the claimant as to why he had not attended to the application for leave sooner. He gave no indication that he had been represented by Mr Keel. Mr Renfrew knew nothing about the application which was transmitted to the Commissioner's office by Mr Keel on 5 January 2001. He indicated that he was not shown the notice refusing leave which was issued on 7 December 2000. Mr Renfrew said that the claimant said that he had one month and it would be the 9th.

11. When Miss Mulholland saw the application on the 9th she submitted the application. It was her view that she had full authority to act on behalf of the claimant. It was her position that the submission of the application was done without fee and on a pro bono basis. She indicated the claimant had given her no indication as to why he had delayed in pursuing the matter. When I granted the claimant's request for an oral hearing the claimant was told of the likely cost to him of appearance by Quinn, Martin and Langan at such a hearing. A

discussion ensued between them, the upshot was that Quinn, Martin and Langan ceased to act for the claimant and he was represented at the oral hearing by Mr Keel.

12. It was accepted by Mr Keel and Mr Harvie that the claimant could not have in the appeal 2 separate representatives and 2 separate grounds of appeal. In his submission to me on 4 September 2001, Mr Keel initially said that the claimant had made an explicit choice of representative and that he had opted for Quinn, Martin and Langan. He submitted that he had no locus. However, in the course of his submission he did not maintain that position and submitted that the application on page 98 was a valid application appointing him as the claimant's representative and that it was the application which should be determined by me. Mr Harvie on behalf of the Secretary of State, also adopted that position. If I acceded to these submissions then the application would be one which was timeous. In the event, although the application on page 98 was on the face of it a valid application with a mandate to Mr Keel to act on his behalf, I do not accept that Mr Keel was the claimant's representative, nor do I accept that the application on page 98 was the application which falls to be determined. I take that view because the whole actings of the claimant, notwithstanding what is contained in these grounds of appeal, runs contrary to that position. It can be seen from the narration of events given to me by Mr Keel on 17 July 2001, that he never discussed with the claimant the appeal to the Commissioner nor the application for leave to appeal to either the Chairman or Commissioner. I refer in particular to paragraph 7 of my direction and also paragraph 12. From what is said in paragraph 12 of the direction, it is apparent that the claimant was presented with a piece of paper to sign and did so. If the claimant had thought that he was represented by Mr Keel it is extremely unlikely that he would have paid Quinn, Martin and Langan £50 for a submission of an application for leave to appeal to the Chairman. It is unlikely in the extreme that he would have instructed Quinn, Martin and Langan to make both applications for leave to appeal to the Chairman and direct to the Commissioner. It is also extremely unlikely that he would have had the consultation he had with Mr Renfrew on 5 January 2001. It is also extremely unlikely that Quinn, Martin and Langan would have had no knowledge whatsoever of representation by Mr Keel on the claimant's behalf. In these circumstances, I consider that the initial submission of Mr Keel is the correct analysis of the position. I hold that it is the application made to Messrs Quinn, Martin and Langan which falls to be determined.

13. That application is late and in these circumstances, the question arises as to whether there are special reasons for late admission of the appeal. It was Mr Keel's submission that no culpability could be attached to Quinn, Martin and Langan for lateness. In the event, I am not satisfied that special reasons have been set out for the application to be admitted late. It is quite apparent from what was said by Mr Renfrew that the claimant was aware of the time limit for making applications for leave to the Commissioner. That is abundantly clear from what was said by the claimant to Mr Renfrew. The claimant was also aware that time was tight. No explanation was given as to why the claimant did not act sooner, though no culpability can be attached to Quinn, Martin and Langan for they did not receive a copy of the Chairman's determination refusing leave. Further, at no time did the claimant explain to Messrs Quinn, Martin and Langan that he had signed an application authorising Mr Keel to act for him. If he had done that, then the matter could have been checked out by Quinn, Martin and Langan with Mr Keel. Further, as the claimant was himself aware of the time limits, it was for him, having received the Chairman's refusal of leave, to ensure that if he wished Quinn, Martin and Langan to act on his behalf to consult them in good time to make a timeous application. In considering the question as to whether there were special reasons for acceptance of the late application, I also considered whether there was any merit in the

grounds of appeal. It was both Mr Keel and Mr Harvie that the grounds were arguable. I am myself not satisfied that they demonstrate any arguable error in law on the part of the tribunal, nor demonstrate any issues that would be of likely benefit to the claimant. If the tribunal were entitled to make the findings in respect of walking ability maintained in finding in fact 1, the claimant would not satisfy the statutory conditions for higher rate mobility. The tribunal have assessed the evidence and have set out a reasoned basis for their view upon it. I am therefore not satisfied that there would be any basis for the Commissioner to interfere. I do not see how the claimant can argue that he is virtually unable to walk and then seek to suggest that he was entitled to the lower rate of the mobility component. If he has substantial physical restriction in walking, guidance or supervision would not remedy that. In my view, the tribunal have given a sufficient, reasoned assessment of the evidence in the case including that of Dr Durward. The claimant may not agree with that assessment but that is a matter for the tribunal. The GP's report on pages 72-76 is not supportive of satisfaction of any of the statutory conditions in their terms. In particular it would not form the foundation of satisfaction of the supervision condition. It follows that I also consider that the written support by the Secretary of State does not demonstrate any arguable error in law. In any event, the asserted errors in law are essentially on "a facts and reasons basis". Thus, even if the case went to a freshly constituted tribunal, there is no certainty that the claimant would at the end of the day, succeed with his appeal to the extent of being awarded benefit. That in my view is a factor which can be taken into account when determining whether to admit a late application. In all these circumstances, I have reached the conclusion that I have.

14. At the commencement of the adjourned hearing on 4 September, Mr Keel apologised to me for not having sent more explicit correspondence to the claimant making his position to the claimant clear. I am grateful to Mr Keel for these remarks. It appears to me that there are two general lessons to be learned from the sorry state of the applications in this case. First, applications for leave to appeal to the Commissioner should not be made by representatives without discussing the proposed course with claimants along with the proposed grounds of appeal. If Mr Keel had fully discussed the question as to whether to appeal to the Commissioner and on what grounds with the claimant, both at the stage of the application for leave to the Chairman and the stage of the direct application to the Commissioner, the current state of affairs would not have arisen. It is proper professional practice to do so and it is one which professional representatives are expected by the Commissioners to adhere to.

The second is that there must be a clear and new mandate given by claimant to representatives, other than solicitors, following upon adverse decisions of tribunals, for the purpose of appeals to the Commissioner.

A general mandate for representation before tribunals must in effect terminate when the tribunal gives its decision. Appeal to the Commissioner is a separate process and the Commissioner has to be satisfied that the representative has authority to act. The assumptions of mandate to act before the Commissioner at the time of the application was clearly misplaced with the wholly unsatisfactory consequences flowing therefrom.

(signed)
D J MAY QC
Commissioner
Date: 6 September 2001