

Commissioners File: CSDLA/71/99

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DETERMINATION BY SOCIAL SECURITY COMMISSIONER

Name:

Disability Appeal Tribunal: Motherwell

Case No: D/51/221/93/0386

[ORAL HEARING]

1. This application for leave to appeal against the decision of the disability appeal tribunal given at Motherwell on 14 October 1996 is made late and it is not accepted for consideration and determination as I do not consider that there are special reasons for doing so.
2. This application came before me for an oral hearing on 20 April 1999. The claimant was represented by Mrs Galloway a Welfare Rights Officer employed by the South Lanarkshire Council. The adjudication officer was represented by Miss Paterson Advocate instructed by Miss Miller of the Office of the Solicitor to the Secretary of State for Scotland.
3. This case has a long history. The claimant made a claim for disability living allowance on 8 February 1993. An adverse decision was made in respect of the claim. Thereafter another adjudication officer reviewed that decision but decided that he could not revise it so as to award benefit. The claimant appealed to a disability appeal tribunal. His appeal was heard on 28 June 1994. It was successful to the extent that the tribunal awarded the lowest rate of the care component from 8 February 1993 for life. The claimant appealed against that decision to the Commissioner. I determined that appeal in favour of the claimant on 8 March 1996. The case was remitted to a freshly constituted disability appeal tribunal for rehearing.
4. The rehearing was held on 14 October 1996. On that occasion the claimant's appeal against the decision of the adjudication officer on review under section 30(1) of the Social Security Administration Act 1992 was successful to the extent that the claimant was given an award of the mobility component at the lower rate from 8 February 1993 for life and the lowest rate of the care component for the same period.
5. The claimant sought leave to appeal against that decision. The grounds of appeal were set out in a statement by the claimant dated 10 January 1997 which is recorded at page 106. That statement accompanied an OSSC1 dated 15 January 1997 which appears to have been received by the Independent Tribunal Service on 16 January 1997. On that form it

was stated that the claimant's representative is Julie Gibson (now Mrs Galloway who appears before me today) the Social Work Department, 9 High Patrick Street, Hamilton.

6. For some inexplicable reason, which does not reflect well upon the Independent Tribunal Service, the claimant's application for leave was not dealt with by the Chairman until 21 December 1998, almost 2 years later. Indeed I consider that it might be appropriate for some investigation to be made by that service into this delay. On 21 December 1998 the Chairman refused leave to appeal.

7. On 4 February 1999 the Office of the Social Security Commissioners received an application for leave to appeal against the tribunal decision. It was on the same form as had been used to make an application to the Chairman and the grounds of appeal consisted of the statement made by the claimant on 10 January 1997 to which I have already made reference. No alteration or additions to these grounds of appeal were made. Accompanying that application was the letter recorded at page 117.

8. On 4 February 1999 the Office of the Social Security Commissioners wrote to Miss Gibson now Mrs Galloway who is named in the OSSC1 form as the claimant's representative at an address in East Kilbride. She had been dealing with the claimant's case on behalf of the South Lanarkshire Council who are the claimant's representative. In that letter it is said:-

"As your client's application was not received in this office within 42 days of the date of the notification of the chairman's decision refusing leave to appeal to the Commissioner, your client's application is late. Regulation 3(5) of the Social Security Commissioners Procedure Regulations 1987 gives the Commissioner power of discretion to accept an application if there are special reasons why you were late in applying. No reasons for lateness have been provided with your client's application. In order for the application to go before a Commissioner, you must provide reasons for lateness in applying to the Commissioner."

9. In response to that letter the Office of the Social Security Commissioners received the copy of the OSSC form which the following box was ticked:-

"I have been refused leave by the Chairman of the Tribunal more than 42 days ago and I give my reasons for my lateness in applying to the Commissioner at Part F below."

In Part F it said:-

“Please see attached.”

10. This attachment consisted of an unsigned statement on notepaper of the South Lanarkshire Council headed Money Matters Advice Service. What was said was:-

“Please note that we did not receive notification that leave to appeal had been refused by the chairman.

It would appear however that the claimant did receive notification and sent it to yourselves. Owing to his illness he was unaware of time limits.

There has been considerable procedural delays and complications with this case and I would ask for this to be taken into account when considering the late application.”

11. What is contained in that statement was inconsistent with the document produced at page 117 of the bundle which is a letter from the Independent Tribunal Service addressed to Miss Gibson in which it is said that the Chairman had refused leave to appeal, that the application was being returned and that if it was wished application for leave to appeal could be made to the Commissioner. There are stamps on that letter which indicate that it had been received by the South Lanarkshire Council in December 1998. The date of notification of the refusal of leave was 23 December 1998.

12. On 23 March 1999 the Nominated Officer directed an oral hearing of the application.

13. Regulation 3(5) of the Social Security Commissioners Procedure Regulations 1997 gives me discretion to proceed to consider and determine a late application if for special reasons I think fit. Mrs Galloway in seeking to persuade me to accept the application said that the local authority, whom she accepted were the claimant’s representatives and not her as an individual, had made an error but that the application was only one day late. It was her submission that the claimant should not be prejudiced by the error of his representative. It was said that the claimant himself had a mental health problem and that he was not able to deal with matters himself. She submitted that there had been an excessive delay in passing the request for leave to appeal to the chairman of the tribunal. She indicated that she herself had gone on leave from March to October 1998 and had telephoned the Independent Tribunal Service and had told them that she personally had moved from Hamilton to East Kilbride. She submitted the fact that the application was received late this could amount to special reasons. She referred me to what was said by the Master of the Roles Lord Denning in Regina v Secretary of State for Home Department, Ex Parte Mehta 1975 [2 All ER] 1084 at 10891 where it was said:-

“One of the special circumstances here was the fact that the omission was the mistake of Miss Mehta’s solicitors. It was said that the mistake of her solicitors could not amount to “special circumstances” within rule 11. I do not agree. In applying rule 11. I should have thought that the appellate authority might well adopt the practice which we adopt in this Court of Appeal here.....We never let a party suffer because his solicitors make a mistake and are a day or two late in giving notice of appeal. We

always treat it as a ground for extending the time..... If it appears to be a case which is strong on the merits and which ought to be heard, in fairness to the parties, we may think it is proper that the case should be allowed to proceed, and we extend the time accordingly”.

14. Mrs Galloway then referred me to what was said in respect of that case in the context of the Commissioners Procedure Regulations by Mr Commissioner Monroe in R(M) 1/87. In dealing with the case of Mehta he said in paragraph 5:-

“In that case the Immigration Appeal Tribunal (who have power to proceed with an appeal which was out of time if it is “of the opinion that, by reason of special circumstances, it is just and right so to do”) had refused to proceed with such an appeal, affirming the view of an adjudicator who had similarly refused to proceed with the case on the ground that under the regulation he was concerned only with special circumstances that prevented the appellant or her representative from giving notice of appeal; in time. The Court of Appeal held this to be an erroneous view, using language that indicated that they considered that there was virtually no restriction on the circumstances that might be regarded as special circumstances. I should be reluctant to limit the meaning of special reasons, inasmuch as claimants in practise are found much more often than the insurance officer or the Secretary of State to be asking for an extension of time.”

He then went on to say:-

“6. For myself I see no ground for distinguishing between the “special circumstances” of the Mehta case and the “special reasons” of the present case. I think the two phrases equally wide and I hold that I am not limited to the consideration of special reasons relating to the delay that has taken place. I note the Tribunal of Commissioners in Decision R(U) 8/68 regarded the fact that the insurance officer supported the application for an extension of time as a special reason.”

15. In light of paragraph 6 of R(M)1/87 it was also her submission that in the exercise of his discretion the Commissioner is not restricted to considerations relating to the delay itself. If there was an arguable case on the merits of the appeal that could also amount to special reasons. Reference was also made to what was said by the Tribunal of Commissioners in paragraph 14 of R(U) 8/68 where it was said:-

“14. We must draw attention pointedly to a matter of procedure. This appeal was out of time. The local tribunal’s decision was given on 27th September 1967. The appeal was not received before 3rd January 1968, a few days out of time. The statute provides that an appeal to the Commissioner must be brought within three months from the date of the decision of the local tribunal, “or such further period as the Commissioner may in any case for special reasons allow.....” (National Insurance Act 1965 section 70(2)). The association’s only grounds for requesting an extension of time are that it was necessary to obtain further information from one of their offices. It would have been perfectly simple for them to submit a notice of appeal in time but subsequently ask to abandon it if further information warranted that course. By failing to give notice within the generous time limit of three months, the association

were unwarrantably imperilling their member's interests. In the present case we should not have felt justified in granting the extension but for the fact that the application for it was supported by the insurance officer."

For completeness I was also referred to what was said by Mr Commissioner Hoolahan QC in paragraph 11 of R(I) 5/91 where he said:-

"11. There can be no doubt, for the reasons which I set out below, that the decision of the MAT was erroneous in law. They made assessments for the period from 20 June 1976 to 25 October 1987 for which there was no entitlement. In my judgment, applying the observations of the Commissioner in R(M) 1/87 at paragraph 6 to which I have referred above, it is right to take that factor into account. In my judgment, the reasons for lateness set out in form OSSC1 Part F would not have sufficed to extend the time for the application but taking into account the clear error in the decision, I have come to the conclusion that it is right and proper to extend the time and grant the application for leave to appeal notwithstanding that it is out of time."

16. It was argued by Mrs Galloway that the proposed grounds of appeal and the submission made to me by her on the merits of the case disclosed that there had been an error in law on the part of the tribunal. In the grounds of appeal it is stated:-

"My grounds of appeal are that there have been inadequate reasons for the decision and that I am unclear from the reasons given why some evidence has satisfied the tribunal and some has not.

I also believe there has been a failure to adequately record findings of fact."

17. Having heard both Mrs Galloway and Miss Paterson, who indicated that if leave were granted the adjudication officer would support the appeal, I can indicate that I would have been disposed to grant leave to appeal had the application been made timeously. I consider that there is an arguable case that the tribunal erred in law in relation both to the supervision and attention conditions of the care component. There certainly appears to be an apparent contradiction in their treatment of the attention conditions in paragraph 4 of their findings. However while I would have been disposed if the application had been in time to have granted leave to appeal I express no concluded view as to whether the appeal would have succeeded. In addition I noted that the support of the adjudication officer was said by Miss Paterson to be related to failure to state adequate facts and reasons for the decision. I was not to infer that if the support for the appeal was accepted by me the adjudication officer was conceding entitlement to the allowance at the rates sought by the claimant and that the extent of the support would be that the case should be sent to another tribunal for a rehearing of the merits.

18. I explored with Mrs Galloway in greater detail the circumstances in which the application for leave to appeal was submitted late.

19. According to what I was told "welfare rights" in the South Lanarkshire Council were transferred from the Social Work Department to the Housing Department and operate under

the name of "Money Matters". There are offices at Hamilton and East Kilbride and Mrs Galloway herself had been transferred from Hamilton to East Kilbride. It was also apparent however that the Social Work Department retained three welfare rights officers. Mrs Galloway indicated that she herself had not received the intimation of refusal of leave to appeal. She made investigations with the Manager of the office in Hamilton, who she said had been dealing with the claimant's case but indicated that she was told that they did not have the notice of refusal either. It was accepted by her that she should have made further enquiries before setting out in writing the reasons for lateness. She indicated that she should have contacted the Social Work Department. She accepted that someone in South Lanarkshire Council knew that the claimant had been refused leave to appeal. It was accepted by her that the statement contained at page 111 was not accurate. She accepted that the Social Work Department had got a copy of the refusal of leave by the chairman. Further it is apparent that they requested a copy of the tribunal decision from the Independent Tribunal Service. It was accepted that this was sent to them by fax on 8 January 1999 as can be seen from the copy of the tribunal decision which was submitted with the application for leave to appeal at page 113. The fax details are set out at the top of that document.

20. Mrs Galloway indicated that she sought to establish from the Social Work Department why the application for leave to appeal had been lodged late. She did this with the Welfare Rights Officer in question a Mrs E Smith. I was told that that Welfare Rights Officer was unable to account for the delay. It is to be noted that the grounds of appeal submitted with the application for leave consisted, as I have indicated, of the same statement bearing to be from the claimant dated 10 January 1997 and that these grounds had not been expanded or altered in any way.

21. In exercising my discretion as to whether or not to allow the application to be received late I start on the basis that there is a statutory time-limit which requires to be adhered to. That statutory time-limit can only be departed from if for special reasons I think fit to accept the application. I accept following what was said by Mr Commissioner Monroe in R(M) 1/87 that special reasons are not restricted to consideration only of the circumstances in which the application came to be made late. However I do not consider that merely because an application is lodged only a short time after the expiry of the time-limit that of necessity amount to special reasons. Equally the fact that there is an arguable case that a tribunal erred in law will not of itself and in all circumstances amount to special reasons. That was certainly not the position adopted by Mr Commissioner Monroe in R(M) 1/87. I refer in that connection to paragraph 7. Indeed it is apparent both in R(M) 1/87 and R(I) 5/91 that decisions have been made in respect of entitlement for long periods which were not warranted in law and that this was a factor which was clearly persuasive in the exercise of the Commissioner's discretion. To hold that in all circumstances an application lodged slightly late or one which disclosed an arguable case that a tribunal erred in law established special reasons would deprive the Commissioner of his judicial discretion and would subvert the statutory limitation. They are however factors which are weighed by the Commissioner with other factors in determining whether or not to accept the application. The asserted errors of the tribunal in law in this case were not of the same nature as those in R(M) 1/87 and R(I) 5/91.

22. In my view it is necessary to consider all the relevant circumstances. I have concluded having done so that special reasons for the late acceptance of the application have

not been made out and in the exercise of my discretion I decline to accept the application. The claimant's representatives initially submitted to the Commissioner as reasons for lateness a statement which was now admitted by Mrs Galloway to be inaccurate. It therefore cannot form the basis for special reasons for lateness. No explanation has been tendered for the lateness. The same grounds of appeal were submitted to the Office of the Commissioner as have been submitted to the chairman of the tribunal when making the application to him for leave to appeal. The claimant's representatives had in their possession as from the fax of the tribunal's decision to them on 8 January 1999 all that they needed to make the application for leave to the Commissioner. They have been unable to explain why in these circumstances the application was not made timeously. While there is an argument that the tribunal whose decision is sought to be appealed against erred in law, and one which if the application had been made in time I would have been disposed to grant leave to appeal against, the nature of the asserted error was such that if the appeal to the Commissioner had been successful that did not of necessity mean that the claimant would have been found entitled to the benefit he sought. Indeed the support of the adjudication officer was restricted to the claimant "being given another shot" before a differently constituted tribunal. While a refusal to accept the late application will inevitably result in the claimant not being able to seek to persuade the Commissioner to allow his appeal and if that was successful another tribunal to allow his claim and entitlement on the merits it cannot be said that he is bound to succeed on the question of entitlement. As I have indicated the mere fact that the claimant's application was only marginally late does not of necessity amount to special reasons. Taking all these factors into account I am not persuaded that special reasons have been made out with particular reference to the absence of a reason for lateness and in the exercise of my discretion I refuse to accept the application.

23. I must also express my concern that a wholly inaccurate reason in writing was submitted to the Commissioner by the claimant's representatives. It was not accurate to say that the claimant's representative, South Lanarkshire Council had not received notification that leave to appeal had been refused by the chairman. The inference in the second paragraph is that it was the claimant himself who had submitted the application for leave to appeal and it was asserted that due to his illness he was unaware of time limits. Clearly if that had been the position I would have been receptive to such an argument constituting special reasons. It was only because of the date stamps on the letter intimating that the chairman had refused leave, recorded at page 117, that I was alerted to the fact that the reasons submitted for lateness might not be accurate. But for that the Commissioner would have determined the application upon an inaccurate basis. It must be appreciated by representatives that they owe not only a duty to their clients but also to the judicial authorities such as the Commissioner to whom appeals and applications are presented. The Commissioner is entitled to rely on information being placed before him being accurate. Sadly such reliance was not possible in this case.

(Signed)
D J MAY QC
Commissioner
Date: 28 April 1999