

Bulleha 183

(14/11/03)

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSG/336/03

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

Respondent: Secretary of State

Tribunal: Ayr

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal given at Ayr on 14 January 2003 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. In the application for leave to appeal to the Commissioner, the claimant's representatives were advised as being Messrs Brown & Company Solicitors at Legal Services Agency Limited. In the application for leave to appeal an oral hearing of the application was requested. When my brother Commissioner, Mr Commissioner Walker QC granted leave to appeal he refused the request for an oral hearing. After submissions had been received from the Secretary of State the claimant's solicitors were sent an OSSC 3. They made no response to the Secretary of State's submission. They did however request an oral hearing of the appeal. The grounds for that request were:-

"The appeal concerns complex matters of statutory interpretation."

On 4 August 2003, the Legal Officer to the Commissioners granted the request for an oral hearing. On 12 August 2003, the claimant's solicitors were informed in a letter by the Secretary to the Commissioner that the oral hearing request had been granted. In that letter it is said:-

"In order not to delay a Commissioner's decision on a case and to avoid a waste of public time and money, oral hearing dates cannot be changes except in special circumstances. You should inform this office in writing within 14 days of the date of this letter if there are any dates when you would be unable to attend the oral hearing. We are currently listing oral hearings from October onwards."

On 8 September 2003 the particular solicitor from Messrs Brown and Company Solicitors, who was dealing with the appeal wrote to the Office of the Commissioner and indicated that she would be grateful if any dates between 5 December 2003 and 20 January 2004 could be avoided. On 29 October 2003 the Office of the Commissioner wrote to the claimant's solicitor intimating that the hearing would take place on 28 November 2003 at 10.30 am. The claimant was also written to informing him of the date of the hearing. It was also said in the letter to him:-

"Should you fail to appear at the hearing either in person or by representative, the Commissioner may, nevertheless, proceed to decide the appeal."

I have written in similar terms to your representative, Ms Cumming."

The Secretary of State was also informed of the date of the oral hearing.

On 12 November 2003 the Office of the Commissioner was informed in writing that a representative from Brown and Company Solicitors would attend the hearing on Friday 28 November 2003. The Secretary of State also indicated an intention to attend the hearing. After 4 pm on 27 November, the claimant's representatives telephoned the Office of the Commissioner and informed a member of staff that as legal aid had not been granted to the claimant the solicitors would not be appearing at the oral hearing. This was followed by a letter from the solicitors by fax which was in the following terms:-

"I refer to my telephone conversations with Cathy on 27th November 2003. As I explained in that telephone call, we have not been awarded Legal Aid to attend the above Hearing. The confirmation of this only arrived on the afternoon of 27th November 2003 which is why notice is so short. I am extremely sorry for this.

I would respectfully request that the Commissioner either postpone this matter for another Hearing, or, failing which, to decide the matter on the papers before him. I look forward to hearing from you.

Once again I apologise for the lateness of this notice."

The telephone call and subsequent letter on 27 November 2003 were the first occasions on which intimations made to the Commissioner's Office that an application for legal aid had been made.

3. On 28 November 2003 I convened the oral hearing of the appeal. Neither the claimant nor his representative attended. Mr Brown, Solicitor of the office of the Solicitor to the Advocate General appeared on behalf of the Secretary of State. At the hearing I did not accede to Ms Cumming's written request to postpone the hearing. The position of the claimant in the appeal was clearly advanced in the grounds of appeal and there was nothing contained within the letter seeking postponement indicating that there were compelling reasons to postpone the appeal. It should also be noted that as an alternative proposition the claimant's solicitors were content for me to determine the appeal on the papers which in my view demonstrates that the claimant's solicitors considered that his position which concerns a narrow point of statutory interpretation was adequately expressed. Regulation 24(4) of the Social Security Commissioners (Procedure) Regulations 1999 provides:-

"(4) If any party to whom notice of a hearing has been sent fails to appear at the hearing, the Commissioner may proceed with the case in that party's absence, or may give directions with a view to the determination of the case".

In all the circumstances I decided to proceed with the case in the claimant's absence.

4. The claimant appealed to the Commissioner against the decision of the tribunal which is to be found at page 30 and is in the following terms:-

"Appeal is dismissed.

The decision of the Secretary of State issued on 22/10/02 is confirmed.

[The claimant] is not entitled to a funeral payment from the Social Fund in respect of the late [the claimant's late mother] as he is not in receipt of a qualifying benefit."

5. The grounds of appeal were shortly put. They are as follows:-

"In this case the claimant was the son of the deceased. The deceased had no partner and was an adult woman. There were no other "immediate family members". It was therefore

reasonable for the claimant to take on the role of the "responsible person" in terms of 7(1)(e)(iii).

7(3) applies where the responsible person falls within the terms of 7(1)(e)(iii).

7(4) states that paragraph 7(3) does not apply where in terms of 7(4)(a) the person to whom that paragraph would otherwise apply is "a person aged 19 or over but under pensionable age who is attending a full-time course of study at an educational establishment."

In this instance, the claimant is a full time student.

On the one hand, I would agree that the clauses of 7 are ostensibly cumulative. On the other hand, my reading of 7(a) and 7(e) is that they are mutually exclusive. It is quite clear that 7(a) demands that the "responsible person" be in receipt of one of the various benefits listed in its two sub clauses.

However, 7(3) in combination with 7(4) and 7(3) has the effect of making eligible various persons who are not in this category eligible for funeral payments, including full time students not entitled to other benefits.

I would submit that this at least merits the attention of the Commissioners for Social Security."

The regulations referred to in the grounds of appeal are the Social Fund and Maternity and Funeral Expenses (General) Regulations 1987.

6. The Secretary of State did not support the appeal as can be seen from his written submission at page 64. That submission was in the following terms:-

4. Regulation 7(1) of the SFMFE Regulations provides for the conditions of entitlement for a FP. I submit that **all** five conditions must be satisfied to qualify for a FP. In the instant case, regulation 7(1)(a)(i) is not satisfied and therefore the claimant is not entitled to a FP.
5. What is in dispute in this appeal is the phrasing of regulations 7(3) and 7(4) of the SFMFE Regulations. The claimant maintains that the reference to "immediate family member" (IFM) in regulations 7(3) and 7(4) includes himself as an IFM.
6. In granting leave to appeal, the Commissioner has asked "whether the "immediate family member" in regulation 7(4)(a) refers to the "responsible person" in regulation 7(3) and so regulation 7(1)(e)(iii) as well as IFM referred to in regulation 7(3)(a)(b) and (c) or only to the latter".
7. In CIS/1218/1998 (copy attached for information) the Commissioner states that the interpretation of IFM's in regulation 7(3) does not include the responsible person. The Commissioner goes on to say in paragraph 6 of that decision that regulation 7(4) taken with regulation 7(3) clearly shows a distinction between the responsible person and the other IFM's.
8. I submit that for the purpose of the regulations, the claimant of a FP is referred to a "the responsible person". In this case therefore as the claimant is the responsible person any

reference to IFM other than that in 7(1)(a)(iii) means someone other than the responsible person/claimant.

9. I submit that the interpretation of regulation 7(3) provides that the responsible person shall not be entitled to a FP if he is an IFM and there are other IFM's who are not in receipt of a qualifying benefit and not estranged from the deceased. I further submit that regulation 7(4) overrides 7(3) when those other IFM's fall within any of the categories of person in 7(4)(za) to (d).
11. I submit that in the instant case, regulations 7(3) and 7(4) are not open to consideration as regulation 7(1)(a)(i) is not satisfied and so there is no requirement to go any further. Regulations 7(3) and 7(4) are not satisfied. Therefore the claimant is not entitled to a FP."

7. The claimant was given the opportunity to respond to that submission but no further submission was received from his representatives.

8. At the oral hearing before me Mr Brown on behalf of the Secretary of State reiterated the submission made by the Secretary of State in writing and invited me to dismiss the appeal. It was his position that in order to satisfy the statutory conditions for a funeral payment the five qualifying conditions contained in regulation 7(1)(a) to (e) all had to be met. It was accepted by him that in this case the qualifications contained in (b), (c) and (e) were met. This was he submitted insufficient as the conditions set out in regulation 7(1)(a) were not met. That was the position adopted by the tribunal and was the basis upon which they dismissed the appeal to them. It is not contested that the condition contained in regulation 7(1)(a) is not met. The position adopted by the claimant's representatives is that the conditions contained in 7(1)(a) are mutually exclusive to those contained in 7(1)(e).

9. I am satisfied that there is no merit in the claimant's grounds of appeal and I find myself in agreement with the Secretary of State's submission. In my view the conditions set out in regulation 7(1)(a) to (e) all require to be satisfied. That is indeed apparent as Mr Brown pointed out by the use of the word "and" at the end of sub-paragraph (d) in brackets. I am satisfied that the Secretary of State is right in his submission that regulation 7(3) is to prevent the qualification for a funeral payment even if the conditions in 7(1) are satisfied by there being others related to the deceased of the description set out in sub-paragraph (a), (b) and (c). Regulation 7(4) provides for the non-application of paragraph (3) if certain other circumstances apply. However, paragraphs (3)(a), (b) and (c) and (4)(a) to (d) relate to persons other than the claimant, who is referred to in the regulations as "the responsible person". As pointed out by Mr Brown and the Secretary of State in his written submission CIS/1218/1998 is authority for the proposition that persons of the type described in paragraphs (3)(a), (b) and (c) and (4)(a) to (c) do not include the claimant. I accept that proposition which is plainly obvious on reading the regulations.

10. I have one further observation which I wish to make. I am somewhat concerned that responsible solicitors should make applications for oral hearings without any intimation that if an oral hearing is granted they may not be funded to appear. In my view it would be good practice for solicitors appearing in appeals before the Commissioner to indicate when requesting oral hearings whether they have applied for legal aid and the outcome of that

application. Such solicitors should also, when intimation of an oral hearing date has been sent to them, indicate the position in respect of the legal aid application at that stage and indicate if there is any doubt about their potential appearance.

11. The appeal fails.

(Signed)
D J MAY QC
Commissioner
Date: 1 December 2003