Attendance Allowance - removal of entitlement by virtue of Reg's - ultra vires.

TH/SH/4

Commissioner's File: CA/380/1990

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR ATTENDANCE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

ROSS **Name:**

Appeal Tribunal: Birkenhead

Case No: 602:07154

[ORAL HEARING]

1. I disallow this appeal by the adjudication officer. The decision of the social security appeal tribunal dated 2 May 1990 was not erroneous in law.

2. The claimant is the mother of Shane who was born on 20 November 1988. On 20 October 1989 a claim for attendance allowance was received in respect of Shane. By a decision issued on 5 December 1989 the adjudication officer decided that the claimant was not entitled to attendance allowance in respect of Shane from 30 October 1989 to 19 November 1990, both dates included, because Shane had not attained age 2 and was therefore below the age limit by virtue of Social Security (Attendance Allowance) (No. 2) Regulations, regulation 6(2). The claimant appealed. On 2 May 1990 the social security appeal tribunal allowed the appeal and they decided that the claim should be referred to the Attendance Allowance Board. (The appeal tribunal also heard an appeal in the associated case, CA/381/90). The adjudication officer appeals with leave of the chairman of the tribunal.

3. On 17 October 1990 I held an oral hearing of this appeal and also of the appeal in CA/381/90. The adjudication officer in both cases was represented by Mr M R Parkes of the Solicitor's Office, Departments of Health and Social Security. The claimant in both cases was represented by Mr Richard Drabble of Counsel, instructed Mr Nicholas Warren, Solicitor of the Birkenhead Resource Unit. I am grateful to them for their submissions.

4. <u>The law</u>

Section 35(1) of the Social Security Act 1975 provides (in terms which were in operation at the date of the adjudication officer's decision):-

" 35. (1) A person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence or presence in Great Britain and either -

(a) he is so severely disabled physically or mentally that, by day, he requires from another person either -

(i) frequent attention throughout the day in connection with his bodily functions, or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(b) he is so severely disabled physically or mentally that, at night -

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions, or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him."

Sub-section (2) provides for the period for which a person is entitled to an attendance allowance; sub-section (3) deals with the weekly rate and (4) and (4A) deal with the period of claim. Section 35(5) then provides:-

" (5) Regulations may provide that sub-sections (1) to (4) above, and any other provision of this Act so far as the provision relates to any of those sub-sections, shall have effect, in relation to any severely disabled person who is under the age of 16, subject to such modifications as may be prescribed; but nothing in this sub-section authorises any increase in the rate of an attendance allowance."

5. Part IV of the Social Security (Attendance Allowance) (No. 2) Regulations is headed "Modification of section 35(1) to (4) of the Act in its application to children". Regulation 6(2), as amended by S.I. 1988/531, provides that section 35(1) of the

Act shall have effect as if the words set out in paragraphs (a) to (e) were substituted for others in section 35(1). Mr Drabble at the hearing handed in a document (prepared, I think, by Mr Nicholas Warren) showing how section 35(1) reads when effect is given to regulation 6(2) as amended. In other words, section 35(1) of the Act, when subject to the modifications prescribed in regulation 6(2), reads as follows:-

" 35. (1) A person shall be entitled to an attendance allowance in respect of a child who has attained the age of 2 and who satisfies or is treated as having satisfied prescribed conditions as to residence or presence in Great Britain and either -

(a) the child is so severely disabled physically or mentally that by day he requires from another person either -

(i) frequent attention throughout the day in connection with his bodily functions being attention substantially in excess of that normally required by a child of the same age and sex or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others being supervision substantially in excess of that normally required by a child of the same age and sex or

(b) the child is so severely disabled physically or mentally that at night -

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions (being attention substantially in excess of that normally required by a child of the same age and sex) or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him (these

requirements being substantially in excess of the requirements normally placed upon another person by a child of the same age and sex)."

Mr Parkes submitted that there were three modifications effected by regulation 6(2). In fact, strictly speaking, I think that there were four modifications -

(1) Where the person claiming to be entitled to an attendance allowance is under the age of 16, the claimant is not the person under the age of 16 (the child) but some other person on the child's behalf.

(2) The removal of entitlement for children under the age of 2.

(3) The additional requirement that the attention and supervision in respect of a child between the ages of 2 and 16 must be substantially in excess of that normally required by a child of the same age and sex.

(4) The introduction of rules of priority of persons entitled to receive the allowance on behalf of the child.

6. The issue

The question for decision is whether or not regulation 6(2)(a) of the Attendance Allowance (No. 2) Regulations (before its recent amendment by S.I. 1990/581 which removed entitlement for children under the age of 2) was ultra vires. The social security appeal tribunal decided that it was ultra vires; hence the appeal by the adjudication officer. The argument on behalf of the claimant is quite simply that the removal by regulation 6(2)(a) of entitlement for children under the age of 2 was more than a modification - it was an extinguishment of an entitlement - and was, therefore, outside the power conferred by section 35(5); in other words, that it was ultra vires.

7. Preliminary points

In opening the appeal before me, Mr Parkes made two preliminary points. First, he pointed out that section 84(1) of the Social Security Act 1986 provided a definition of "modifications" as follows:-

> "'Modifications' includes additions, omissions and amendments, and related expressions shall be construed accordingly."

But he emphasised that that definition applied to that Act and to that Act alone. However, Mr Drabble submitted that that definition was a guide and was consistent with the approach of Megarry, J, (as he then was) in Legg v. Inner London Education

Authority [1972] 1 WLR 1245 (see below). Mr Parkes conceded that it would be anomalous to have the same word applied in different senses in different Acts but contended, nevertheless, that that statutory definition did not apply to section 35 of the Act of 1975. Secondly, he pointed out that children under the age of 2 are now eligible to receive attendance allowance by virtue of S.I. 1190 No. 581 which came into operation on 9 April 1990 and amended regulation 6(2)(a) by deleting any reference to the need for the child to have attained the age of 2 before he can be entitled to attendance allowance. That amendment however, operated only from 9 April 1990 and was not, he said, retrospective.

8. Modification

In his search for the proper meaning of "modification" Mr Parkes referred to four cases. He referred to Northern Assurance Company Ltd v. Farnham United Breweries Ltd [1912] 2 CH. 125. That case dealt with what was permissible as modification of a debenture trust deed. I was doubtful whether a case dealing with modification of a debenture trust deed under a resolution of debenture holders would assist in the determination of what was permissible under the power of a statutory modification. However, Mr Drabble relied upon the words of Joyce J in that case at page 134 as showing that "modification" could not describe something which amounted to the destruction of individual debenture holder's rights.

9. In Stevens v. General Steam Navigation Company Ltd [1903] KB 890 the Court of Appeal had to determine the meaning of "modification" in the Interpretation Act 1889, section 38(1). The question was whether the Factory and Workshop Act 1901 which repealed and replaced previous legislation had modified the definition of a "factory". Sir Richard Henn Collins, MR, said [1903] 1 KB at page 893:-

> "... the Act of 1901 seems to me to have been passed with the intention of altering the existing state of things by a modification of the Factory Act of 1895. This intention the Interpretation Act, 1889, enabled the Legislature to carry out in the way in which it has been carried out, for in my opinion there is no reason to limit the word 'modification', which is equally applicable whether the effect of the alteration is to narrow or to enlarge the provisions of the former Act."

That case was referred to by Megarry, J, (as he then was) in Legg v. Inner Education Authority [1972] 1 WLR 1245. At page 1255 Megarry, J, said:-

> "I turn to the second main point. In relation to ceasing to maintain the Strand School, does the Secretary of State's approval fall within section 13(4) of the [Education] Act of 1944, relating to modification? The sub-section provides that 'any proposals' submitted by the Secretary of State under the section 'may be approved by him after making such

modifications therein, if any, appear to him to be desirable' ... Now the word 'modification' is somewhat indefinite in its ambit, and though there has been some argument on the point, neither Mr Settle nor Mr Nourse was able to offer much assistance from the authorities. They did not appear to think much of the relevance of Stevens v. Steam Navigation Company Ltd [1903] 1 KB 890, which I ventured to mention to them; and I readily accept that the subject matter in that case was very different. Nevertheless, both initially and on reflection, the case seems to me to provide some assistance in what is otherwise barren territory."

The learned Judge referred to the case of Stevens and then continued at page 1256:-

"The process involved in 'modification' is thus one of alteration, and it must be considered how radical that alteration is. The alteration may consist of additions or subtractions or other changes in what is already there, or, no doubt, any combination of these. But throughout, there must, I think, be a continued existence of what in substance is the original entity. Once one reaches a state of wholesale rejection and replacement, the process must cease to be one of modification ... [He continued at page 1257]. To some extent the matter must be one of impression. Nevertheless, however widely one construes 'modification' it seems to me that the difference between the proposals is so great that one cannot reasonably regard the second as a 'modification' of the first. ... For one proposal to be fairly regarded as a modification of another proposal, one must be able to perceive enough in it of that other to recognise it as still being that other proposal, even though changed. The temptation is into metaphysics, into considering how much a table can be changed or replaced or modified without ceasing to be the same table, and so on. The line may well be hard to draw but there comes a point where the modifications have swamped or eaten away so much of the original that it is impossible to regard what is there as still being the original in a modified form."

Mr. Parkes also referred to Souter v Souter (1921) NZLR 716, a case concerning a will.

10. In the present case, regulation 6(2)(a) removed or extinguished, in relation to a child under the age of 2, the entitlement to benefit which had been provided by section 35(1) of the Act. Mr Parkes conceded that if the regulation had removed from the provisions of the Act all children under the age of 16, that would have gone too far and would not have come within the term "modification". When I asked him what the position would have been if the regulation had removed all children under the age of 6, he merely replied that it was a question of where the balance tilted. He emphasised that the scheme must be viewed as a whole and a comparison made between all adult claimants on the one hand, and children under the age

of 16 on the other and he submitted that the limitation by removal of entitlement for children under 2 was a narrowing of the scheme of section 35 of the Act; in other words, that it was a modification and not a fundamental change.

11. Mr Drabble, on the other hand, submitted that section 35(5) must be given its full meaning and effect. It expressly stated that regulations may provide that section 35(1) to (4) "shall have effect, in relation to any severely disabled person who is under the age of 16, subject to such modifications as may be prescribed ..." In other words, in relation to any severely disabled person under the age of 16, section 35 must have some effect. He submitted that it was not legitimate to introduce by regulation a provision that for children under the age of 2 section 35 should have no effect. Mr Drabble referred to the definition of "modification" in the Shorter Oxford English Dictionary which includes the following meanings:-

> "The action of modifying; a limitation, restriction, qualification ... Determination of a substance into a particular mode or modes of being ... the action of making changes in an object without altering its essential nature; the state of being thus changed; partial alteration ..."

It will be noted that the definition includes "restriction" but not "exclusion" or "extinguishment".

12. Stroud's Judicial Dictionary defines "modification" in relation to an Act of Parliament as an extension as well as a narrowing and cites the case of Stevens above.

13. As Megarry, J, said in the Legg case, to some extent the matter must be one of impression. Section 35(1) of the Act gives an entitlement to an attendance allowance to any person who satisfies the medical conditions. Any person who satisfies the prescribed condition as to residence or presence in Great Britain and satisfies the medical conditions "shall be entitled to an attendance allowance". Section 35(5) provides that regulations may provide that that sub-section "shall have effect" in relation to any severely disabled person who is under the age of 16 "subject to such modifications as may be prescribed". In my judgment, the exclusion by regulation 6(2)(b) of children under the age of 2 is not a "modification" of section 35. It is, in fact, beyond the power given by section 35(5). It is more than a modification; it is an exclusion. In other words, regulation 6(2)(a) takes away from children under the age of 2 the entitlement to attendance allowance which they would otherwise have had under section 35(1).

14. Mr Parkes raised a further point. He referred to the preamble to the Social Security (Attendance Allowance) (No. 2) Regulations and pointed out that the regulations were made in exercise not only of the power conferred by section 35, and other sections but also in exercise of "all other powers enabling her in that behalf". Bearing that phrase in mind he referred to section 166(2) which provides:-

" (2) Except in so far as this Act otherwise provides, any power conferred thereby to make an Order in Council, Regulations or an Order may be exercised -

(a) either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case;

(b) so as to make, as respects the cases in relation to which it is exercised -

(i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise) ..."

He submitted that section 166(2)(b)(i) enabled lesser provision to be made for children under the age of 2. In other words, although section 66(2) was not "free-standing" it was necessary to look at section 35(5) and section 166(2) together to see what exceptions might be allowed. He submitted that the power of modification had been exercised legitimately in relation to persons under the age of 16 and that section 166(2)(b)(i) gave power to make a lesser provision for children under the age of 2. He accepted that the question for decision was whether "any less provision" meant less provision for persons to whom provision was made, or whether it meant that there was power to withdraw or exclude provision altogether - in other words to take away entitlement. I have come to the conclusion, as I have stated above, that section 35(5) did not give power by regulation to exclude from entitlement under section 35 children under the age of 2. In my judgment section 166(2)(b)(i) does not, so to speak, bridge the gap. It does not give power to exclude from entitlement to benefit children under the age of 2.

15. Mr Drabble submitted that if there were any ambiguity in the power conferred by section 35(5), he would rely upon the decision of the Court of Appeal in McKiernon v. Secretary of State for Social Security (26 October 1989). The Court of Appeal there decided, in the words of Lord Donaldson, MR, that -

"if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach."

In my judgment, there was no ambiguity about the scope of the power conferred by section 35(5) with or without section 166(2). If there were any ambiguity or doubt about the scope of the power, the decision of the Court of Appeal would require me to resolve it by a restrictive approach. A restrictive approach would lead me to conclude that the exclusion of children under the age of two was beyond the power conferred.

16. In their reasons for their decision in Form AT3, box 4 the social security appeal tribunal stated:-

> "S.35(5) SSA 1975 authorises regulations to be made applying the earlier parts of this section to persons under the age of 16 subject to modifications that may be prescribed. The tribunal determines that such authority does not authorise the exclusion of the allowance to a person because of age. The amount of the allowance could be reduced, but would be a modification. To say 'you cannot be considered for an allowance because of your age' amends the primary legislation it does not modify it."

For the reasons that I have given I agree with the decision of the appeal tribunal. In my judgment, there was no error of law in that decision. Regulation 6(2)(a) (before its amendment) was, in my judgment, ultra vires.

17. For those reasons I disallow this appeal.

(Signed) A.T. Hoolahan
Commissioner

(Date) 2 November 1990