Bulletin 168 [5 Hart]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/557/01

Starred Decision No: 142/01

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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 6th March 2002

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

1. My decision is that the determination of the appeal tribunal dated 28 September 2000 is not a decision within the meaning of section 14 of the Social Security Act 1998 and consequently I do not have jurisdiction to entertain any appeal from that determination.

2. This purported appeal is taken by the claimant, with the leave of a District Chairman of the Appeal Service, against the tribunal's adjournment, with directions, of its hearing of the claimant's appeal against the rates of Disability Living Allowance awarded to him with effect from 5 July 1994.

3. The claimant had been awarded the higher rate of the mobility component Disability Living Allowance for the period from 5 July 1993 to 4 July 1994. On 17 February 1994 he made a renewal claim. On 22 February 1994 an adjudication officer decided that the claimant was entitled to the higher rate of the mobility component and the lowest rate of the care component from and including 5 July 1994. The claimant submitted a further claim pack together with a claim for Severe Disablement Allowance. By 5 April 2000 the functions of the adjudication officer had been transferred to the Secretary of State by section 1 of the Social Security Act 1998 and the relevant commencement order. On that date a Secretary of State's decision maker, in the light of a report by a Benefits Agency visiting doctor superseded but did not revise the decision of 22 February 1994. The claimant appealed that last decision to the appeal tribunal.

4. It would seem that in the course of hearing the claimant's appeal on 28 September 2000 the tribunal conceived the suspicion that the claimant was not entitled to the rates of Disability Living Allowance which had been awarded to him. The tribunal adjourned the hearing with the following directions:-

> "Please relist as soon as possible after a period of 30 days.
>
> (2) The same members of the tribunal to hear the resumed hearing.
>
> Adjournment is ordered because:
>
> [The claimant] was put on notice to show cause why his benefit should not be reduced or taken away.".

5. Document 5 of the appeal bundle seems to be part of a statement of the tribunal's findings in fact and reasons for its adjournment decision. It is in the following terms:-

> " 18. Stops in bed most nights.
>
> 19. Always painful.
>
> 20. Can't do anything about the pain.
>
> 21. Covers fall off 3-4 times a week, doesn't sleep.
>
> 22. New drug has not helped.
>
> 23. MIMS says that it helps people in dressing, hair washing etc.

24. When the above was put to [the claimant], his reply was 'you don't believe everything you read.'.

By reason of the above, the tribunal ordered an adjournment for [the claimant] to show cause why the existing benefit that he was receiving should not be removed.

Reasons for Tribunal's decision

The Tribunal's view of the current legislation is that they are still able to investigate any aspect of the disputed decision that they think is irrelevant. Baroness Hollis of Heigham in Hansard HLDebs Volume 854 Col 1208 January 15 1998 states:-

> 'What we are not doing is requiring them to consider every aspect even if it is not relevant on all occasions'.

The Tribunal felt that as [the claimant] is able to drive a vehicle, shower twice a day and dry himself, dress, make a cup of tea, is able to go to places such as Withernsea and Beverley and is receiving treatment from his GP which assists him in doing these functions, then the Tribunal has an inherent jurisdiction to be able to consider every aspect where it is relevant. [The claimant] has appealed against the decision not to grant him a higher rate than the lower rate care component. Furthermore the new drug, on the balance of probabilities, should be able to assist him with his mobility.".

6. The claimant was represented at the hearing on 28 September 2000. After the hearing his representative applied to the chairman for leave to appeal against the tribunal's adjournment decision. In her application the representative states that at the end of the tribunal hearing she argued that:

(1) to lower the rates of benefit currently awarded the tribunal would have to conduct its own supersession which it did not have the jurisdiction to do,

(2) the tribunal did not know the terms of the awarding decision or know on what test benefit had been awarded and, therefore, had no starting point from which to consider a reduction in benefit and

(3) even if the tribunal disagreed with her on those points, in the interests of natural justice an adjournment should be given to allow the appellant to address the new issue raised by the tribunal.

Those arguments, says the claimant's representative, were not recorded by the tribunal and, although they are reflected in the notice of the adjournment decision, their omission from the record is an error in law. The claimant's representative argues further in her statement of grounds of appeal that the tribunal's direction that the claimant was put on notice to show cause why his benefit should not be reduced or taken away mis-states the burden of proof. If an existing award of benefit is to be removed the onus of showing that the claimant is no longer entitled to benefit rests on the Secretary of State. The tribunal had not informed the appellant as to why his benefit should be reduced or removed or the evidential basis on which that could be done. Clarification of the tribunal's reasons had been refused by the chairman.

7. On the question of whether or not a tribunal's adjournment decision is appealable the claimant's representative argues that she is supported in her view that such a decision is appealable by Commissioners decisions CSIS/118/90 and CSIS/110/91 but that the deciding authority is the Court of Appeal's decision in the case of In re Yates Settlement Trust [1954] 1 All ER in which it was held that an order to adjourn is a judicial act and subject to appeal.

8. In granting leave to appeal the District Chairman observed that following the repeal of Part II of the Social Security Administration Act 1992 (which repeal removed the power to terminate an award of Disability Living Allowance conferred on tribunals by section 33(6) of that Act) the powers of supersession seem to be vested only in the Secretary of State. He observed also that there was a question as to whether or not an adjournment decision of a tribunal is an appealable decision.

9. The first issue for me is whether or not a Social Security Commissioner has jurisdiction to entertain an appeal against a tribunal's decision to adjourn. As I am answering that question in the negative I have no jurisdiction to deal with the other questions raised by the claimant's representative and the District Chairman as to the legality of the tribunal's directions and as to whether the tribunal has the power to reduce the existing award of benefit. However, as the claimant's representative's point that the adjournment decision is appealable was arguable and might have been decided in the claimant's favour I directed that the submission for the Secretary of State should include arguments on the other issues identified by the claimant's representative. I also directed an oral hearing of the appeal. The claimant's representative then stated that the claimant does not wish an oral hearing. As I have accepted the Secretary of State's representative's argument that the tribunal's adjournment decision is not appealable there is no need for me to hear oral submissions from her. I, therefore, rescind my direction of 27 June 2001.

10. In CSIS/118/90, the first of the two Commissioner's decisions on which the claimant's representative founds her argument that the tribunal's adjournment decision is appealable, Commissioner Walker decided not to follow the decision of the Tribunal of Commissioners which decided the appeal in CA/126/89. The case before the Tribunal of Commissioners concerned an overpayment of Attendance Allowance. The adjudication officer had decided that the overpayment was recoverable from the claimant by reason of her appointee's failure to disclose a material fact affecting entitlement to benefit. Seemingly, there was a question before the tribunal as to whether the Secretary of State's power of recovery was to be found in section 53 of the Social Security Act 1996 or in section 119 of the Social Security Act 1975 which, by the date of the adjudication officer's decision, had been repealed. The tribunal adjourned sine die, stated that on a preliminary question of law it found that section 53 of the 1986 Act was the relevant recovery provision and granted leave to appeal on that preliminary question of law.

11. The Tribunal of Commissioners referred to section 101(1) of the Social Security Act 1975 which provided:-

> "Subject to the provisions of this section, an appeal lies to a Commissioner from any decision of a Social Security Appeal Tribunal on the ground that the decision of the tribunal was erroneous in point of law.".

In deciding that the word "decision" in section 101(1) had to be construed as meaning "final decision", being such a decision which finally disposes of the relevant proceedings before the

appeal tribunal, the Tribunal of Commissioners approved of the decision R(I) 6/81 in which the Commissioner said that there was a distinction in all types of litigation between a final decision or judgment and an interlocutory (or interim) order. The final decision or judgment constitutes "res judicata" and the only method of altering it thereafter is by a review or appeal, whereas an interlocutory or interim order is susceptible of being revoked or varied on an application by the parties during the course of the proceedings leading up to the final decision or judgment. The Tribunal of Commissioners decided that in the case with which it was concerned there had been no final decision or judgment, as, indeed, appeared expressly from the Form AT3 on which the decision of the tribunal below had been issued.

12. What prompted Commissioner Walker to decline to follow CA/126/89 was the fact that although it had been drawn to the attention of the Tribunal of Commissioners the tribunal did not appear to have considered the decision of the Divisional Court of the High Court in the case *of The Queen v. The Medical Appeal Tribunal (Midland Region) Ex parte Carrarini* [1966] 1 WLR 883. In that case a medical appeal tribunal had refused to adjourn for the production of a further medical report, because it thought that no good purpose would be served by allowing such an adjournment, and proceeded to decide the appeal. A Deputy Social Security Commissioner dismissed the claimant's appeal against the tribunal's decision. On an application for an order of certiorari the Court held that the Deputy Commissioner had misdirected himself in law when he decided that, in the circumstances, the medical appeal tribunal was entitled to refuse to adjourn. The Court quashed the decisions of both the Deputy Commissioner and the tribunal.

13. Commissioner Walker acknowledges that what was quashed by the court in the Carrarini case, and what the Court said the Deputy Commissioner should have set aside, was the medical appeal tribunal's decision containing a determination of all of the issues in the case: but he posed a question as to why, if a refusal to adjourn which caused a breach of the rules of natural justice or a miscarriage of justice gave rise to a right of appeal on a point of law, a simple decision to adjourn which had the same effect should not give rise to the same right of appeal. He took the view that the main basis of the decision of the Tribunal of Commissioners was the tribunal's view that what was appealable was a "decision" within the meaning of section 101(1) of the 1965 Act. The Tribunal had construed "decision" as "final decision". It was easy to appreciate what the tribunal meant but its view of what constituted an appealable decision would exclude the type of decision, commonly encountered, where the tribunal dealt with the real points before it and remitted some minor aspect of the case to the adjudication officer with leave to the parties to refer the case to the tribunal again in the event of there being a dispute about the proper resolution of those minor matters. The common example of that was, said Commissioner Walker, the case where the tribunal decides that an overpayment of benefit is recoverable from the claimant but remits the exact calculation of the recoverable amount to the adjudication officer.

14. However, the point which, for Commissioner Walker, was finally decisive was that section 101(1) provided for an appeal against a tribunal decision. The tribunal decision was a decision on an appeal under section 100(1) against the decision of an insurance officer. Section 98 of the 1975 Act provided for claims and questions to be submitted to an adjudication officer but subsection (3) of that section provided that:-

> "Different aspects of the same claim or question may be submitted to different adjudication officers under the foregoing provisions of this section; and for that purpose those provisions and the other provisions of this part of this Act with respect

to the determination of claims and questions shall apply with any necessary modifications.".

From that Commissioner Walker took it that a claim or question could be divided into parts, each part to be dealt with by a different adjudication officer, and any one part could be carried through the appeal process to the Court. If a matter could be divided up in that way at the beginning he could not see any reason why a whole claim or question could not, for reasons of convenience, administrative efficiency or plain fairness to the claimant be divided at a later stage and still go through the same appeal procedure. If that was so he could see no reason why a case such, as the one before him where most of the issues had been disposed of, could not be adjourned and the parts of the case which had not been decided carried on appeal to a Commissioner.

15. In the second of the cases founded on by the claimant's representative, CSIS/110/91, Commissioner Mitchell followed CSIS/118/90. The only difference in reasoning between the two Commissioners is a reference in CSIS/110/91 to In re Yates' Settlement Trusts. The Yates case concerned a settlement designed to minimise tax liability. To be effective it had to be approved by the High court before the death of the settlor. The settlor was aged 80 and in poor health. The judge before whom the application for approval of the settlement was listed adjourned the case pending the decision of the House of Lords in an other case, In re Chapman's Settlement Trusts. The terms of the Yates settlement complied with the law as pronounced by the Court of Appeal in the case of In re Downshire Settled Estates but it was feasible that the House of Lords decision in the Chapman case might have a bearing on the grounds on which the Court of Appeal decided the Downshire case. The decision to adjourn the Yates case was appealed to the Court of Appeal. The Court of Appeal emphasised that generally whether or not to adjourn a case was a question wholly within the discretion of the judge in the Court below and the Court of Appeal would not normally intervene. However, the Court of Appeal considered that there was the risk of a substantial injustice if the Yates settlor died before the settlement could be approved by the High Court. Irrespective of the outcome of the Chapman case in the House of Lords, until that House's judgment was issued the law applicable to the Yates case was to be found in the Court of Appeal's decision in the Downshire case and, in the circumstances, to avoid risk of the injustice which could result from the death of the Yates settlor before the settlement was approved by the High Court, the judge should have proceeded with the case rather than adjourn.

16. In the Yates case the Court of Appeal approved of the dictum of Farwell, J. in the case of *Hinckley and South Leicestershire Permanent Building Society v. Freeman* [1941] Ch. 32. Farwell J. said that no doubt a person aggrieved by an unreasonable decision to adjourn by a High Court Master or Judge which was likely to defeat the ends of justice would have a right of appeal to the Court of Appeal and possibly to the House of Lords. Also, in the Yates case the Court of Appeal followed its own judgment in the case of *Maxwell v. Keun* [1928] 1 K.B. 645. Maxwell sued in the High Court for libel. He was a serving army officer stationed in India. When the case was due to come on in the High Court he was still in India and there was no possibility of him being in London on the due date. If he did not attend the trial of his action he could not succeed. The Lord Chief Justice dismissed his application to postpone the hearing and ordered the applicant to pay the costs of the application. The Court of Appeal decided that the judge's dismissal of the application and his order for costs was a judgment or order within the meaning of section 27(1) of the Supreme Court of Judicature (Consolidation) Act 1925 which was appealable. The Court of Appeal decided also that although it would be slow to interfere with the discretion of a judge's to adjourn or not to

adjourn a case in his list it would interfere if the judge's refusal of an application for an adjournment would result in the defeat of the rights of the applicant altogether and so result in an injustice to one or other of the parties to the action. In such a case the Court of Appeal had the power to review the order and had a duty to do so.

17. There is no difference in substance between section 14(1) of the Social Security Act 1998 and section 101(1) of the 1975 Act. Both provide that there is a right of appeal to a Commissioner against a tribunal's decision. In her written submission of 15 August 2001 the Secretary of State's representative argues that there is no right of appeal against a tribunal's determination to adjourn. She relies on Commissioner's decision CIS/260/93 and on CIS/628/92 which the author of CIS/260/93 followed. Commissioner Mesher who decided CIS/628/92 declined to follow CSIS/118/1990 because he did not agree that section 20(5) of the Social Security Administration Act 1992, which replaced section 98(3) of the 1975 Act, allowed for the splitting of decisions. He was satisfied that to be appealable a tribunal decision had to be a final decision for the purposes of section 101(1) of the 1975 Act. The difficulty was to decide what was a final decision. In the case of *Riches v. Social Security Commissioner* the Inner House of the Court of Session decided, on 4 May 1993, that where a Social Security Appeal Tribunal decided that overpaid benefit was recoverable from the claimant but remitted the calculation of the overpayment to the adjudication officer the tribunal's recoverability decision is appealable. Commissioner Mesher accepted that there may be other questions of calculation or quantification which could be left unresolved by a tribunal without detracting from the standing of its determination of the substantive issues as an appealable decision. However, he did not accept that in the case before him the tribunal's determination that a claimant was in receipt of a qualifying benefit for the purposes of regulation 7(1)(a) of the Social Fund Maternity and Funeral Expenses Regulations together with a reference back to the adjudication officer to quantify the amount of "any funeral payment now payable as a result of this decision" constituted a final decision which could be the subject of an appeal to a Commissioner. The tribunal's determination had left substantial issues unresolved.

18. The Commissioner who decided CIS/260/1993 said that, given the differences between the law of England and the law of Scotland on the appealability of procedural decisions mentioned by Commissioner Walker in CSIS/118/90, how he would decide such a case would depend upon whether the case emanated from England or from Scotland. As the case before him emanated from England he followed CIS/628/1992.

19. Despite my great respect for the learned, and unfortunately now deceased, author of CIS/260/1993 I have to disagree with his view that the answer to the question of whether or not a particular tribunal's decision to adjourn depends on whether the tribunal was sitting in England or sitting in Scotland. It is probably inevitable that differences between the two jurisdictions in respect of family, property and contract law will give rise to occasional variations as between the two jurisdictions in the effect of the Social Security legislation but I do not think that differences in purely procedural matters can be routinely accepted. At the risk of being accused of taking a too broad brush approach to the matter I have come to the view that there is no reason to think that there is any difference between the two jurisdictions as to the law relating to the appealability of tribunals' decisions to adjourn or that the law relating to that question cannot be understood from the, at first sight, conflicting authorities which I have recounted above.

20. Firstly, I agree with Commissioner Mesher that what is and always has been appealable is a decision under section 14 of the Social Security Act 1998 or one of its predecessors and I agree also that to come within the meaning of those provisions a decision has, or had, to be final. I do not think that there can be any doubt that, in the light of the ruling of the Court of Session in the case of Riches, a decision by which a tribunal has decided the substantial points in issue and left it to the parties to settle between them minor questions of fact or arithmetic, subject to recourse to the same tribunal in the event of difficulty, constitutes such a final and appealable decision. The Yates, Maxwell and Hinckley Etc. Building Society cases seem to me to establish the principle that an adjournment decision which, if allowed to stand, will inevitably or, at least, very probably lead to a particular outcome of the case is appealable because it is in effect a final decision the result of which the aggrieved party will have no opportunity to mitigate if he cannot appeal it. Such a decision made by a tribunal would, to my mind, be a decision within the meaning of section 14 of the 1998 Act. What I deduce from the English and Scottish authorities referred to in the foregoing paragraphs is that in both jurisdictions a final decision within the meaning of section 14 and its predecessors is a decision which disposes of all the substantive points which were before the tribunal, or makes some interim disposal of the case which either makes it more than likely that the case will be disposed of finally in a particular way or leaves one of the parties with no means of ensuring that there will be a final disposal of the case, or leaves one of the parties at the risk of an injustice.

21. In the instant case the tribunal's decision to adjourn does not come into any of those categories. There is nothing in the terms of the tribunal's decision to adjourn to suggest that there will not be in due course a decision as to whether or not the claimant is entitled to benefit or to any particular rate of benefit. Despite the terms of the tribunal's decision the final outcome of the case is not inevitable. That outcome can still be influenced by arguments for the Secretary of State or for the claimant. My conclusion is, therefore, that in this particular case the decision to adjourn is not a final decision for the purposes of section 14 of the 1998 Act and, therefore, is not appealable. Consequently I have no jurisdiction to consider the purported appeal. The effect of that is, of course, that I have no jurisdiction to decide the questions as to whether the tribunal has the power to terminate the claimant's entitlement to the benefit which the Secretary of State has already awarded and as to whether or not the tribunal is misdirecting itself on the question of the burden of proof. The tribunal will, no doubt, have regard to the submissions which the Secretary of State's representative has made to me on those questions. The case should now go back to the tribunal which adjourned it as that tribunal reserved jurisdiction to itself.

(Signed) R J C Angus
Commissioner

(Date) 27 November 2001