Bulletin 171

[SHORT]

DECISION OF THE SOCIAL SECURITY COMMISSIONER
FILE NO: CDLA 3432 2001

APPLICATION TO SET ASIDE A REFUSAL OF LEAVE TO APPEAL TO THE COMMISSIONER FROM A DECISION OF AN APPEAL TRIBUNAL

1. I refused leave to appeal to the applicant on 4 December 2001, issued on 11 December 2001. The applicant's solicitors asked for a review of that decision by letter dated 18 December 2001, referred to me on 28 February 2002. I directed the Secretary of State to comment in accordance with regulation 31(3) of the Social Security Commissioners (Procedure) Regulations 1999 on 4 March 2002. The submission of the secretary of state's representative was received on 26 July 2002. The comments of the applicant on that submission were received on 8 August 2002, and the matter again referred to me. Neither party asked for an oral hearing.

Who should decide this application?

2. In my direction I set out the terms of regulation 31 of the Social Security Commissioners Procedure Regulations 1999 governing set aside applications. Regulation 31(1) provides that the application is to be decided by the Commissioner who gave that decision. This is subject to the general provision for the transfer of matters between Commissioners in regulation 6. In the comments received on 8 August the solicitors for the applicant argued that it may be appropriate for another Commissioner to handle this case "simply because another Commissioner is more likely to make a detached decision" and "so that the question of bias is reduced". No accusation of bias is made. In my direction I indicated my view that there was no ground to set aside under regulation 31, but directed a submission from the Secretary of State on the question of the application of Article 6 to applications for leave to appeal and to this case. I indicated only the view that "it is not therefore clear that it (Article 6) applies in the way contended by the solicitors." I see nothing in that direction suggesting any prejudgment of the application of the Human Rights Act 1998 to this case, nor any other specific reason to indicate why I should not decide this matter in accordance with regulation 31.

3. The Court of Appeal recently reviewed both the British decisions and those of the European Court of Human Rights on the question of bias in *In re Medicaments and Related Classes of Goods (No 2), [2001] 1 WLR 700.* In its judgment, handed down by the Master of the Rolls, the Court applied a two-fold test (paragraph 85, at p727). First, the court must ascertain all the circumstances. It must then consider whether a fair-minded and informed observer would conclude that there was a real possibility or a real danger of bias. I am not aware of any special circumstances in this case, and the applicant and solicitors have pointed to none. The question is whether the terms of the normal practice in regulation 31 fail that test. Case management considerations make it expedient, in my view, that the Commissioner who refuses an application for leave to appeal should in the usual case also consider any set aside application. The application can be made under regulation 31 and 32 only on specific grounds and the Commissioner who determined the application is best placed to consider those issues.

Commissioners often take a broad view of this power. On that basis, I see no inconsistency between the general practice under regulation 31 and the tests affirmed by the Court of Appeal. The solicitors have made no specific submission on this. Nor have I heard that argument in any other case. Accordingly, I decide the matter myself.

The grounds of the application

4. The original contention of the solicitors for the applicant asking that I review my refusal, was:

> "Additionally, the Human Rights Act 1998 (Article 6) allows people the right to a fair hearing. Refusing leave to appeal where there is a question as to whether or not there has been an error of law breaches Article 6.
>
> We requested leave to appeal because (in our view) the tribunal made an inadequate record of reasons and findings of fact."

The solicitors then set out the reasons for their views. They indicated that they were aware that a decision of a Commissioner refusing reasons could be made the subject of judicial review. As I indicated in my direction of 4 March 2002, whether or not I was right in refusing the solicitors' application, I can "review" that decision only by reference to regulations 31 and 32 of the Social Security Commissioners (Procedure) Regulations 1999. I make no further comment on that aspect of this case.

Submissions of the parties

5. I am now asked to consider if the Human Rights Act 1998 and European Convention on Human Rights extend the grounds on which I may set aside my refusal of leave to appeal. This raises the question whether the procedures laid down in the Social Security (Procedure) Regulations 1999 ensure that the rights given to the applicant in Article 6 of the Convention are properly applied to this case both in my refusal of permission to appeal and in considering setting aside that decision. Those procedures are in regulations 9-11 of the Social Security Commissioners (Procedure) Regulations 1999 and then in regulations 31 and 32. Regulations 9-11 make provision under section 14(1) of the Social Security Act 1998 that an appeal lies to a Commissioner on the ground that the decision of the tribunal was erroneous in law, to the requirement in section 14(10) that leave to appeal is required, and to section 14(11) making provision for applications be made for leave to appeal.

6. The solicitors made no supporting submissions in connection with their reference to Article 6 of the European Convention on Human Rights beyond invoking it. In my direction I drew attention to a relevant decision of the European Court of Human Rights: *Monnell and Morris v United Kingdom*, 2 March 1987. I also drew attention to the recent judgment of David Steel J in *Mousaka v Golden Seagull Maritime* [2002] 1 WLR 395. The submission of the Secretary of State's representative accepts that Article 6(1) is engaged in this application. He adopts the arguments of David Steel J in his judgment (in the papers). He submits that my decision to refuse the application is not in breach of Article 6(1). The solicitors for the applicant make no further references to the jurisprudence of the European Court, or of the British courts, in their

reply. They "agree with the gist of" the Secretary of State's representative's submission, but "cannot agree" with the following parts of the submission of the Secretary of State's representative:

> "That point aside, I submit that the Commissioner's refusal of leave does not breach the article" (second sentence of paragraph 12).
>
> "The Commissioner then, finding that there were no arguable grounds for appeal, refused the application in terms, and for reasons, that did not breach the claimant's Article 6(1) rights" (last sentence of paragraph 16)."

The solicitors then submit that "If a Commissioner makes an unfair decision obviously their right to a fair hearing has been denied" and restate the earlier contention that "regulations must be disregarded where they breach the Human Rights Act 1998". The solicitors then ask for the Secretary of State's representative to comment further on the application. Given the failure of the solicitors to make specific submissions on the application of Article 6(1) to this case, I see no reason to continue the rounds of submissions in this case.

7. I am helpful in this case by the analysis of the Secretary of State's representative building on the case law to which I drew attention. Despite two detailed submissions from the solicitors to the applicant, I have received from them no specific analysis of the requirements of Article 6(1). Nor have they at any point suggested how and to what extent regulation 9 to 11 or regulations 31 and 32 are to be disapplied in this case. Their submissions amount only to unsupported assertion and do not assist my decision. Nevertheless, it is my duty under section 3 of the Human Rights Act 1998 to apply the European Convention on Human Rights, Article 6(1) "so far as it is possible to do so".

Giving reasons

8. It is my invariable practice, as it is of all other Commissioners, to give reasons for a decision refusing an application for leave to appeal. I did that in the case within a week of the matter being referred to me. The former practice of Commissioners was not to give reasons. That former practice was authorised by an exemption order made by the Lord Chancellor under the Tribunals and Inquiries Acts. SI 1980 No 1637, as amended by SI 1991 No 2742, excluded decisions by Commissioners on applications for leave to appeal from appeal tribunals from the general duty under section 10 of the Tribunals and Inquiries Act 1992 to give reasons for all decisions. That exemption order was not renewed or amended by the Lord Chancellor when the tribunals were reconstituted under the Social Security Act 1998. Accordingly, it does not apply to applications from those tribunals. My duty to give reasons when refusing leave derives directly from that Act. If my reasons indicate that I have erred in law, the remedy under English and Welsh law, as the solicitors in this case are aware, are an application to me to set aside my decision under regulation 31 and an application for judicial review of my decision refusing leave. An applicant also has a right to ask a Commissioner for an oral hearing of an application. I was not asked for an oral hearing in this case.

Application of the Human Rights Act 1998

9. The question in this case is whether the fundamental rights confirmed by Article 6(1) of the European Convention on Human Rights, as applied by the Human Rights Act 1998, give an applicant to a Commissioner for leave to appeal to the Commissioner any procedural rights additional to those under the Social Security Commissioners (Procedure) Regulations 1999, together with the duty to give reasons and the right to apply for judicial review if the refusal is thought to be wrong in law.

Relevant jurisprudence

10. *Monnell and Morris* was heard by the European Court of Human Rights in 1987. It concerned applications for leave to appeal to the Court of Appeal against sentence. It involved consideration of Article 5 (the right of liberty), Article 6(3) (rights of fair hearing in criminal cases) and Article 14 (discrimination) of the European Convention, as well as Article 6(1). The particular issue was that the applicants to the Court were given an extension to their custodial sentences imposed by the courts below by the Court of Appeal issuing a loss of time order because their applications for leave to appeal were considered to be without merit, although the parties did not appear in person before the Court of Appeal when it was making that decision. The European Court referred to its judgment in *Delcourt* in 1970 to confirm that:

> "The Convention does not, it is true, compel the Contracting States to set up Court of Appeal or of cassation. Nevertheless, a State which does constitute such courts is required to ensure that persons amenable to the law shall enjoy before those courts the fundamental guarantees contained in Article 6".

11. The European Court considered how Article 6 was to be applied to the case. It noted that both the single judge and the full Court gave brief reasons for the refusals and the loss of time orders (paragraphs 13-16 and 20-22). It held that the principle of equality of arms was respected because neither party appeared before the Court of Appeal (paragraph 62). It noted that the applicants had the right to make written submissions. It also concluded that the interests of justice and fairness could be met without an oral hearing (paragraph 68). It had "no cause to doubt" that the Court of Appeal's decision to refuse the applicants leave to appeal and also to impose loss of time orders was based on a full and thorough evaluation of the relevant factors (paragraph 69). Notwithstanding, therefore, that the applicants had the protection of Article 6(3) as well as Article 6(1), the European Court found that the United Kingdom had not deprived the applicants of any rights under Article 6. That was a majority decision. One judge dissented because the Court was considering deprivation of liberty. The other dissenting judge felt that Article 6 did not apply to this stage of judicial proceedings. Neither dissent therefore gives ground to expand the operation of Article 6(1) on this application.

12. The judgment of David Steel J in *Mousaka v Golden Seagull Maritime*, gives, if I may respectfully say so, a thorough and most useful review of relevant jurisprudence on the operation of Article 6(1) on applications for leave to appeal. The immediate context of that case was an application for permission to appeal from decisions of arbitrators, but the decision extends more generally to the issue of handling

applications in the light of Article 6. The particular challenge was to the approved practice under the Arbitration Act 1979 of not giving reasons for refusing permission to appeal. I repeat a citation from one of the decisions of the European Court to which the learned judge referred (*Tolstoy Milaslavsky v United Kingdom*, [1995] 20 EHRR 422, 475):

> "It follows from established case law that Article 6(1) does not guarantee a right of appeal. Nevertheless, a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy the rights before the appellate courts the fundamental guarantees in Article 6. However, the manner of application of Article 6 to the proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein".

13. At paragraph 24 of his judgment, David Steel J sets out the following propositions:

> "1. Article 6 obliges Courts to give reasons. The extent of this duty varies according to the nature of the decision and the circumstances involved.
>
> 2. Full reasons should be given for a decision on the merits, although even then it is not necessary to provide a detailed answer to every argument.
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> 3. Although Article 6 applies to the appeal process, it does not guarantee a right of appeal; nonetheless any limitation on the right of appeal must be imposed pursuant to a legitimate aim, proportionately applied.
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> 4. If a right of appeal is rejected, the applicant must be made aware of the grounds on which the decision was reached: in many cases this may take the form of an endorsement of the lower Court's decision.
>
> 5. Where there are legitimate constraints on a right of appeal, such as the need for it to be a matter of general importance, it is sufficient for the Court to refer to these limitations."

Applying Article 6 to this application

14. I adopt those principles as the approach to be taken here. In my view, a Commissioner who offers an applicant the opportunity of an oral hearing if there is reason for one, who ensures that the procedure in regulations 9 to 11 of Social Security Commissioners (Procedure) Regulations 1999 are followed, who properly considers and then gives reasons for any refusal of leave, and who considers any proper application to set aside that decision for procedural reasons under regulation 31 and 32, has fulfilled the duty on her or him both under British law and under Article 6 of the European Convention on Human Rights.

15. I was asked by the solicitors in general terms to ignore the Social Security Commissioners Procedure Regulations 1999 and to set aside my refusal of leave because the solicitors considered there were grounds of appeal. I reject that. The European Court of Human Rights has repeatedly made it clear that Article 6 does not

give anyone a general right of appeal. Parliament has made it clear that there is no right to appeal from a tribunal to a Commissioner. I see no inconsistencies between those provisions. A claimant is not deprived of any rights under Article 6 by being required to apply for, and then being refused, permission to appeal from a tribunal. Article 6 applies the process of hearing and deciding such applications, but does not impose any specific outcome. I therefore see no arguable case for broadening the procedures under regulation 31 and 32 in the way the solicitors appear to suggest.

16. In taking that view, I take into account the context of the application to me in this case and the principles stated by David Steel J. The original decision is the decision of the Secretary of State. The decision of the appeal tribunal is an appeal decision, and no permission is required to appeal to the tribunal. The tribunal heard the case at an oral hearing, and the applicant applied, as is his right, for permission to appeal. When the chairman refused that application, the applicant applied again to the Commissioner. The chairman did not give reasons for refusing permission to appeal. I did.

17. In addition to applying for permission to appeal to the Commissioner, a claimant who is dissatisfied with a decision of an appeal tribunal can apply to have that decision set aside under section 13(2) or (3) of the Social Security Act 1998 or under regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

18. The application to a Commissioner for permission to appeal is, in effect, an open appeal from the decision of the chairman who refuses permission to appeal. Any failure to give reasons by the chairman does not affect consideration by a Commissioner. A decision of a Commissioner who confirms the decision of the tribunal chairman refusing permission to appeal is itself open to review by the Court on judicial review proceedings. There would certainly be grounds for such an application if both the chairman and the Commissioner refused to give reasons. The Court on judicial review can consider the adequacy of reasons.

19. The limited power of a Commissioner to set aside his or her decision refusing permission to appeal is in regulations 31 and 32 of the Social Security Commissioners (Procedure) Regulations 1999. The limitation of the power to procedural issues is in my view a legitimate restriction precisely focusing that remedy on breaches of the rules of a fair hearing (because of the absence of parties or papers or the presence of procedural errors). In other words, it exists as an additional safeguard to protect the right to a fair hearing that Article 6 is also there to protect. If there is an error of law of other kinds by the Commissioner, a judicial remedy is available. I do not see how in this context it can be argued that the provisions of regulations 31 and 32 are disproportionate because they prevent a set aside application being used as a third opportunity to make an application for leave on general issues of law. Accordingly, I reject the argument that the Human Rights Act 1998 and European Convention on Human Rights call into question the provisions in regulations 31 and 32 of the Social Security Commissioners (Procedure) Regulations 1999.

The correctness of my decision refusing leave

20. I have not considered the further representations of the solicitors for the applicant, or the submissions of the Secretary of State's representative, about whether my original decision to refuse permission to appeal was correct. Those submissions are not

relevant to regulations 31 and 32. They are only relevant if I see grounds under those regulations (or under the Human Rights Act 1998) for setting aside my decision refusing leave. I see no such grounds. The solicitors are, as they are aware, at liberty to apply for judicial review of my decision refusing permission to appeal if their client so instructs them. They may also consider judicial review of this decision.

David Williams
Commissioner

19 August 2002

[Signed on the original on the date shown]

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