Bulletin 168

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CDLA/3908/2001

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

Decision:

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

1.1. The decision of the Darlington appeal tribunal, held on 19th September 2000, is erroneous in point of law.

1.2. I set it aside and remit the case to a differently constituted appeal tribunal.

1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

The tribunal must follow the analysis of the supersession procedure laid down by the Tribunal of Commissioners in *CDLA/3466/2000* and *CI/3700/2000*. The effective date of the decision given on the supersession must be fixed in accordance with section 10(5) of the Social Security Act 1998 and regulation 7 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

It must follow my guidance on the operation of the Tribunal of Commissioners' decisions and on the continuing relevance of *R v Social Security Commissioner, ex parte Chamberlain* given in *CDLA/3912/2001*. **A copy of that decision must be added to the papers for the rehearing.**

The tribunal must accept that the threshold criterion in regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 is satisfied.

The burden is on the Secretary of State to justify the termination of the award. Otherwise, it is on the claimant to show entitlement to a more favourable award.

The appeal tribunal must not take account of circumstances that were not obtaining at the date of the decision under appeal: see section 12(8)(b) of the Social Security Act 1998, as interpreted in *R(DLA) 2 and 3/01*.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave. The Secretary of State's written observations support the appeal.

3. I directed an oral hearing of the appeal to consider the human rights issues raised by the appeal. It was held before me in London on 26th February 2002. The claimant did not attend, but was represented by Mr M Robinson of her local CAB. The Secretary of State was represented by Mr D Forsdick of counsel. I am grateful to them both for their clear and succinct submissions.

The history of the case

4. The claimant had two successive awards of a disability living allowance from 1992 consisting of the care component at the lowest rate. On renewal in 1996, the mobility

component at the lower rate was added. That award was for the period ending on 17th June 2001.

5. In 1999, the claimant applied for a supersession of the decision making the award with a view to obtaining a more favourable award. A claim pack was completed in support of that application. The Secretary of State also obtained a report from the claimant's GP, which was not supportive of an award. The Secretary of State terminated the award from and including 31st March 2000, the date of decision.

6. The claimant exercised his right of appeal to an appeal tribunal and the case was dealt with and the appeal dismissed at a hearing on the papers.

7. Mr Robinson applied for leave to appeal on a number of grounds, one of which concerned Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms. I granted leave to appeal. When the observations had been received, I directed an oral hearing limited to the human rights issue.

8. Before dealing with that issue, I set out the way in which the tribunal went wrong in law and give my conclusions on two of the grounds of appeal that are of general interest.

The error of law

9. The full statement of the tribunal's decision begins:

> 'The Tribunal first satisfied itself that this was an appropriate case for a paper hearing. Having done so it paid particular attention (this being a renewal claim) to the 1996 disability living allowance renewal claim ... and the claim pack relating to the present claim... both of which were seen in the light of the report from Dr A...'

10. That passage shows that the tribunal did not understand the issue before it. It treated the case as if it were concerned with a 'renewal claim'. That was wrong, it was a supersession case. That alone is sufficient to make the decision wrong in law, because the tribunal did not identify and determine the correct legal issues.

Adequacy of reasons for proceeding with a paper hearing

11. One ground of appeal is that the tribunal gave inadequate reasons for considering that the case was suitable for a hearing on the papers.

12. Part of Mr Robinson's case was that the tribunal decided that the case was an appropriate one for a paper hearing by considering the claim packs and the letter from Dr A. That part of his argument relies on the paragraph I have quoted. That is a misreading of that paragraph. It says two separate things. First, the tribunal satisfied itself that the case was suitable for a paper hearing. Second, having done that, it considered the documentary evidence before it.

13. The appeal tribunal had power to proceed by way of a hearing on the papers only if the conditions set out in regulation 39 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 were satisfied. In summary, the case will be dealt with by a

hearing on the papers if (a) none of the parties to the proceedings asks for an oral hearing and (b) a chairman does not direct an oral hearing.

14. As regards (a), the standard procedure for claimants is that an enquiry form is sent asking which form of hearing the claimant wants. The default assumption is that the claimant is satisfied with a hearing on the papers and must opt into an oral hearing. The tribunal has to be satisfied before proceeding with a hearing on the papers that the claimant has been given a chance to opt for an oral hearing and has not done that. As the tribunal before whom a case is listed will not have the tribunal file or access to the tribunal's computer system, the only evidence that the enquiry form has been sent and that the claimant has not opted for a hearing on the papers is the certificate issued by the clerk.

15. As regards (b), the only power to direct an oral hearing is given by regulation 39(5). It only applies if an oral hearing 'is necessary to enable the appeal tribunal to reach a decision.' Clearly, 'necessary' cannot be interpreted as 'essential', because it is always possible to reach a decision by relying on the burden of proof. Nor can it be read as allowing a free discretion to direct an oral hearing when it might be helpful. That would render the provision effectively redundant, because it is almost always helpful to hear evidence from, and have a chance to question, the claimant. 'Necessary' must obviously be qualified in some way. The usual qualification is to read in a requirement of reasonableness. I interpret 'necessary' to mean 'reasonably necessary in the circumstances of the case'.

16. The standard record of proceedings issued to chairmen for hearings on the papers contains a **Pre-hearing Check List** to consider before hearing a case to tick to show that relevant matters have been considered. It provides a useful checklist for the chairman to ensure that: (a) there is a signed certificate of service by a clerk; (b) there are no outstanding interlocutory matters; (c) the case is not appropriate for an oral hearing; and (d) additional documentary evidence has been noted in the box provided. In many cases, the ticks against that list will be sufficient to deal with the matters covered without further explanation. The circumstances of a case may require further explanation in the body of the tribunal's decision, but there is nothing in this case that required that.

17. Mr Robinson argued that there were matters that the tribunal should have investigated and that it should have adjourned for that purpose. I accept that the tribunal could have investigated some matters further. But that does not mean that the threshold in regulation 39(5) for directing an oral hearing was met. Moreover, even if that threshold is satisfied, there is a discretion whether or not to direct an oral hearing. It is always a consideration relevant to the exercise of that discretion that the claimant has not opted for an oral hearing. Indeed, in this case the claimant expressly opted for a hearing on the papers.

18. There is no error of law on this count.

Delay in providing reasons

19. Another ground of appeal is the delay in providing the reasons for decision. Mr Robinson says that they were first requested on 25th September 2000, but not provided until 11th July 2001. The latter date is the date of issue; the chairman's signature is against a date of 21st June 2001.

20. I dealt with this issue in *CJSA 322/2001, paragraphs 7 to 11*:

'7. When directing an oral hearing, I asked whether the delay in writing the full statement of the tribunal's decision was an error of law. The hearing was held on 1st December 1998, but the statement was not written until 27th September 2000. I know from my own experience that delays in providing statements are not always the fault of the chairman. However, a delay did occur and that raises the question: could the chairman write an accurate statement so long after the event? Hence my direction.

'8. I had in mind the decision of the Administrative Court in *Nash v Chelsea College of Art and Design* [2001] EWHC Admin 538 (11th July 2001). Mr Justice Stanley Burnton considered the lawfulness of reasons that were given later.

'9. I accept the Secretary of State's submission that there is no error of law in this case on that account and that the lateness of reasons is not automatically an error of law. The issue is whether the delay in writing the reasons indicates that they are unreliable as an accurate statement of the tribunal's reasoning. If they are unreliable, the reasons are inadequate.

'10. The reasons for some cases are easily reproducible long after the event. For example, the reason why a tribunal dismissed an incapacity benefit appeal at a paper hearing in which there was a conflict between the evidence of the claimant and of the examining doctor is probably obvious to the chairman. In more complex cases, the notes of proceeding may be sufficient to allow the chairman to reproduce the tribunal's reasoning. Chairman also have personal notebooks, which may contain sufficient details of the tribunal's reasoning for a statement to be written. It would not be appropriate to find an error of law on the basis of delay in providing written reasons without giving the chairman the chance to explain how the reasoning was reproduced.

'11. In this case, the record of proceedings was sufficient to allow the chairman fairly and accurately to state the reasons many months later.'

21. I adopt that reasoning in this case. The case was dealt with by the tribunal at a paper hearing. The tribunal confirmed the Secretary of State's decision. The key documents were a claim pack and a factual report from the claimant's GP. That is the sort of case in which it should be possible for a chairman to reproduce the tribunal's reasoning long after the decision was made.

22. There is no error of law on this count.

The oral hearing

23. Mr Robinson argued that

'in superseding an existing ongoing entitlement, in this case, the tribunal is in effect removing a possession of the claimant's (i.e. entitlement to benefit) within the meaning of Article 1 Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms.'

This was the subject of the oral hearing.

The Human Rights Act 1998

24. The Secretary of State's decision was given before the Human Rights Act 1998 came into force on 2nd October 2000.

25. Mr Robinson nonetheless argued that the Act applied in this case. His argument at the oral hearing was that the supersession process and the appeal to the tribunal and the Commissioner were part of a single proceeding that was instigated by the Secretary of State. On this argument, the case fell within section 7(1)(b) of the Act:

> '(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.'

26. The Act, therefore, applied by virtue of section 22(4), which provides:

> '(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.'

27. Mr Robinson's argument, of course, assumes that the termination of the claimant's award was effected on the Secretary of State's own initiative and not on the claimant's application. Mr Forsdick did not take any point on that.

28. Mr Forsdick argued that the Act did not apply to the Secretary of State's decision in this case. He argued that the supersession process was not a 'proceeding' for the purposes of section 7 of the Act. He relied on *Jones v Department of Employment* [1988] 1 All England Law Reports 725 as authority that the decisions of the adjudication officer, now taken by decision-makers in the name of the Secretary of State, were administrative actions, not legal judicial proceedings.

29. I accept Mr Forsdick's argument for two reasons.

29.1. First, I consider that it is correct in law. The word 'proceedings' carries connotations of legal proceedings in courts and tribunals. It is not apt to described the action of a decision-maker, which is administrative.

29.2. Second, the clear trend of the decisions both of Commissioners and the higher courts is that the legislation is not applicable to events that occurred before 2nd October 2000. See the decision of the Commissioners in *CG/2356/2000*, *CIS/1077/1999* and *CSDLA/1019/1999*, and the decisions of the House of Lords in *R v Lambert* [2001] 3 All England Law Reports 577 and *R v Kansal (No 2)* [2002] 1 All England Law Reports 257.

Article 1 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms

30. Even if the Human Rights Act 1998 did apply in this case, I would nevertheless have concluded that the claimant was not protected by Article 1 of Protocol 1. As I heard detailed argument, I explain why.

31. That Article provides:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

32. Mr Robinson argued that an award of a disability living allowance was a possession. The definition was fluid and developing. The Convention was a living instrument. The decrease in reliance on contributory benefits justified taking a fresh look at whether or not an award of a non-contributory benefit was a possession. An award was not necessarily a possession, but an award for a period was an asset which gave the claimant a legitimate expectation on which to rely. An award could be terminated, but only if it was done proportionately and a fair balance was struck between the right to quiet possession by the claimant and the Secretary of State's right to terminate the award. He then analysed the evidence to show that the Secretary of State had acted on inadequate and insufficient evidence in terminating the award. By the end of the hearing, I believe it is fair to say, he accepted that his argument could also have been presented in terms of domestic law.

33. Mr Forsdick argued that: (a) the award of disability living allowance was not a possession; (b) if it was, it was conditional, and (c) its removal was not a deprivation, but a confirmation of the basis upon which it was given.

34. I accept Mr Forsdick's arguments. My reasons are these.

Possessions in European jurisprudence

35. I must take into account the European jurisprudence in interpreting and applying the Convention rights under the Human Rights Act 1998: see section 3(1) of the Act. I accept Mr Robinson's argument that the Convention is a living instrument. I also accept that the application of Article 1 has developed over the years in order to reflect the varying nature of the possessions to which it has been applied. However, I do not accept his argument that the increasing reliance in domestic law on non-contributory benefits can affect the meaning of possession.

36. The European jurisprudence emphasises the nature of the benefit rather than the nature of the award. In interpreting and applying that jurisprudence, I have to bear in mind that the scope of Article 1 varies according to the nature of the basis of the case. If a case is directly concerned with Article 1, the scope of that Article has to be precisely defined. If instead the case is concerned with discrimination under Article 14 of the Convention in conjunction with

Article 1 of Protocol 1, it is only necessary to decide whether the case falls within the ambit of Article 1: see *Rasmussen v Denmark* (1984) 7 European Human Rights Reports 371. (If it had to fall precisely within it, there would be no need for Article 14 or scope for it to operate.) It is, therefore, only to be expected that those cases involving Article 14 may give a wider meaning to 'possession' than those that do not.

37. The clear trend in both lines of the European jurisprudence is that an award of a non-contributory benefit is not a possession. These payments are treated as paid out of social solidarity and not as of right. A clear statement is this from the admissibility decision in *Coke v United Kingdom* (Application No 38696/97). The cases covered by that application concerned retired officers and the widows of officers. The issue was the availability and amount of pensions payable to widows. The Commission rejected the applications on the grounds that any entitlement to a pension was limited by the extent to which contributions had been made for a widow's pension. The Commission emphasised that the legitimate expectations of the widows were limited by the amount of those contributions. On one class of applicant, the Commission decided (paragraph 2 of THE LAW):

> 'none of the widows ever contributed to the pension scheme. Indeed, as their position as regards their entitlement was clear when they married, they never even had an expectation that they would be eligible for a pension.'

On another class of applicant, the Commission decided (paragraph 3 of THE LAW):

> 'The amount of pension which these applicants receive therefore reflects the amount of contribution made by their late husbands. The applicants never had any expectation to receive more than that limited amount.'

38. *Coke*, like most of the cases, involved an argument that entitlement to a future award was a possession. But the reasoning is not so limited and at least one case involved the removal of an existing award. See the case of *Domalewski v Poland* (Application No 34610/97), cited by Mr Justice Moses in paragraphs 42 and 43 of his judgment in *Hooper and others v Secretary of State for Work and Pensions* on 14th February 2002. In that case, the loss of veteran status carried with it the loss of an award of additional benefit. That benefit was non-contributory and was held not to be a possession.

39. The case most favourable to the claimant is *Gaygusuz v Austria* (1996) 23 European Human Rights Reports 364. Its advantage to the claimant lies in the obscurity of one part of its reasoning. It was a discrimination case. So, it was sufficient to show that the benefit in question merely came within the ambit of Article 1. The alleged discrimination concerned the right to an emergency payment which could only be paid to someone who had contributed to the unemployment insurance fund. The European Court of Human Rights decided that

> '39. The Court notes that at the material time emergency assistance was granted to persons who had exhausted their entitlement to unemployment benefit and satisfied the other statutory conditions laid down in section 33 of the 1977 Unemployment Insurance Act.
>
> Entitlement to this social benefit is therefore linked to the payment of contributions to the unemployment insurance fund, which is a precondition for the

payment of unemployment benefit. It follows that there is no entitlement to emergency assistance where such contributions have not been made.'

The passage that is most helpful to the claimant in this case is in paragraph 41 of the Court's judgment:

'The Court considers that the right to emergency assistance – in so far as provided for in the applicable legislation – is a pecuniary right for the purposes of Article 1 of Protocol No 1. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions".'

40. Mr Justice Moses gave his view of the reference to contributions in the final sentence of that passage in paragraph 49 of his judgment. My view is that there is another explanation. It lies in the reasoning of the Commission. It relied on the final sentence in Article 1, which refers to 'the payment of taxes or other contributions or penalties.' The Commission reasoned in paragraph 47 (quoted on page 376 of the Report) that this showed that any connection to a contribution was sufficient, quoting *Danby v Sweden* (1991) 13 European Human Rights Reports 774 at paragraph 30. It is this reasoning which explains the final sentence in paragraph 41 of the Court's judgment. It is saying that this line of reasoning is not necessary in order to bring the case within the ambit of Article 1, because the benefit could not have been awarded unless contributions had been made.

41. So, an award of a non-contributory benefit is not treated under the European jurisprudence as a possession, even under the wider view taken when Article 1 is used in conjunction with Article 14.

42. There is another line of European authority that is also relevant. The nature of all awards is that they are conditional. First, they are conditional on the claimant having satisfied the conditions of entitlement at the date of claim and throughout the period of the award. The latter point is embodied in regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987. Second, they are subject to the Secretary of State's right to investigate whether the claimant remains entitled. Duties are imposed on claimants to co-operate in this process: see, for example, the duty in regulation 32 of the 1987 Regulations. And the claimant may be liable to have an award suspended or terminated for failure to co-operate: see, for example, sections 21 to 24 of the Social Security Act 1998.

43. If the claimant has a legitimate expectation of an award of a non-contributory benefit, it is subject to those conditions. In the case of a non-contributory benefit, the award is more akin to a conditional possession, which is not a possession under Article 1. See, for example, the decision in *Gudmunsson v Iceland* (1996) 21 European Human Rights Reports (Commission Decision) 89, cited by Mr Forsdick. The case concerned the withdrawal of a taxi licence. The Commission decided that

'a licence-holder cannot be considered to have a reasonable and legitimate expectation to continue his activities if the conditions attached to the licence are no longer fulfilled or if the licence is withdrawn in accordance with the provisions of the law which were in force when the licence was issued .... As regards expectations for future earnings, the Commission also recalls its previous case law to the effect that future income could

only be considered to constitute a "possession", if it had already been earned or where an enforceable claim existed to it ....'

That passage applies equally to an award of disability living allowance.

44. So, the European jurisprudence shows that an award of a non-contributory benefit is not a possession and does not form the basis for any legitimate expectation that can control its continuance.

Possessions – domestic law

45. This conclusion is supported by the reasoning of Mr Justice Moses in *Hooper*. The case concerned allegations of discrimination in the benefits available to widowers. Article 1 of Protocol 1 is discussed in paragraphs 36 to 52 of the judgment. Mr Justice Moses concluded that the refusals of the claims in that case did not fall within Article 1, but his views are expressly not part of his binding decision in that case (see paragraph 36).

46. My conclusion is also in line with the decisions of Mr Commissioner Rice in *CIS/295/1989* and Mr Commissioner Goodman in *CIS/250/1992*.

47. *Deprivation*

48. If I am wrong and the award of disability living allowance was a possession under Article 1, its termination was in accordance with the remainder of the Article.

49. It is in the public interest that claimants should not continue to receive awards of benefit to which they are not entitled. I am not sure that this type of case involves a control of the use of a possession for the purposes of the final sentence of Article 1. If it does, it is also in the general interest that only those who are entitled should receive and retain awards of benefit.

50. Also, the termination of the award was in accordance with 'conditions provided for by law'. That requires that the termination was authorised and effected under domestic law, which it was. But it also required that the domestic law attain a particular standard or quality: see paragraph 67 of the judgment of the European Court in *Malone v United Kingdom* (1984) 7 European Human Rights Reports 14. That standard is laid down by the Court in *The Sunday Times v United Kingdom* (1979) 2 European Human Rights Reports 245 at paragraphs 46 to 53 of its judgment. The relevant domestic law meets that standard. The conditions of entitlement are contained in statute and subordinate legislation, as interpreted by the decision of the Commissioners and the courts, which are available to the public. Those conditions may involve issues of judgment, but they are not discretionary. Claimants have access to free legal advice from those familiar with the operation of that law from organisations like the CAB, which represents the claimant in this case. The legislation sets out the ways in which decisions of the Secretary of State may be challenged.

51. The substance of Mr Robinson's argument on legitimate expectation was directed in part at least to the procedural expectations to which a claimant was entitled. I accept that there if an award is a possession, there is a procedural aspect to the protection given by Article 1. This is inherent in the requirements of proportionality and fair balance recongised by the European Court in *AGOSI v United Kingdom* (1986) 9 European Human Rights Reports 1 at paragraph 52. That includes (paragraph 55)

'whether the procedures in question afforded the applicant claimant a reasonable opportunity of putting its case to the responsible authorities. In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures.'

52. In this case, there was no formal hearing before the Secretary of State and the claimant had no warning that his existing award might be terminated. The claimant was able to make written representations to the Secretary of State and to submit evidence, but the value of those possibilities was limited as he did not know that the termination of his existing award was in issue. However, once the Secretary of State's decision was known, the claimant was able to challenge it. He was able to apply for a revision of the decision under section 9 of the Social Security Act 1998 and had the right of appeal to an appeal tribunal. The burden remained on the Secretary of State at all stages of the challenge. Before the appeal tribunal, the claimant was entitled to an oral hearing and the evidence was subject to the scrutiny of panel members who have experience in law, medicine and disability. From the appeal tribunal, an appeal lies with leave on points of law to a Commissioner and from there to the Court of Appeal. Taken together with the normal standards of proof and evaluation of evidence, the claimant was afforded sufficient procedural safeguards.

Protection for claimants

53. My analysis does not leave claimants unprotected. The Secretary of State cannot terminate an award at whim. It can only be terminated if the conditions of entitlement are not satisfied. That has to be proved on the balance of probabilities on evidence that is sufficient for that purpose, and the burden of failing to achieve that standard of proof is on the Secretary of State. The decision is subject to one appeal as of right and to further appeals with leave on points of law.

54. Section 32(4) and 33(6) of the Social Security Administration Act 1992 have been repealed. They were often referred to as providing protection for claimants. However, they only limited the powers of the adjudication officer and the tribunal. They did not prevent the Secretary of State from obtaining evidence on which to base an application for a review and revision. In operation, they were as much concerned with relieving the inquisitorial duty on adjudication officers and tribunals as they were with protecting claimants. That relief from the rigours of the full inquisitorial role has been replaced by sections 9(2) and 10(2) of the Social Security Act 1998 for decision-makers and by section 12(8)(a) of that Act for appeal tribunals. That relief also provides some spin-off protection for claimants.

Signed on original

Edward Jacobs
Commissioner
4th March 2002