Death Grant

CPAG 58/92

DGR/SH/16

Commissioner's File: CG/005/1991

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR DEATH GRANT (FUNERAL EXPENSES)

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons set out below, the decision of the social security appeal tribunal given on 2 October 1989 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 2 October 1989. In view of the unpersuasive written submissions of the adjudication officer I directed an oral hearing. At that hearing the claimant was present, but unrepresented, whilst the adjudication officer appeared by Mr N Butt of the Solicitor's Office of the Departments of Health and Social Security.

3. On 8 May 1988 the claimant's partner died. Until then both he and the claimant had been in receipt jointly of housing benefit. However, his demise constituted a material change of circumstances, with the result that with effect from 9 May 1988 the claimant ceased to be entitled to housing benefit. I understand that the local authority made a decision to that effect sometime between 17 August and 12 October 1988. Certainly, in a letter from the local authority dated 12 October 1988, it is specifically stated that housing benefit had ceased "with effect from 9 May 1988". I was told that the claimant had been the sole earner, and that on the death of her partner, whilst her earnings remained constant, the claim for benefit was now only in respect of one person, not two, and hence there was no entitlement.

4. On 10 May 1988 the claimant lodged a claim for a social fund funeral payment. However, if she was to establish entitlement, she had to bring herself within regulation 7 of the Social Fund Maternity and Funeral Expenses (General) Regulations 1987 (S.I. 1987 No. 481). That provided as follows:-

" 7. - (1) Subject to regulations 8 and Parts IV and V

of these Regulations, the social fund payment to meet funeral expenses (referred to in these regulations as a 'funeral payment') shall be made only where -

(a) the claimant or his partner has, in respect of the date of claim for a funeral payment, been awarded either income support, family credit, housing benefit or community charge benefits; and [there then follow certain further conditions which it is not in dispute the claimant satisfied]."

The social fund officer decided that the claimant was not in receipt of any of the qualifying benefits at the date of claim, and accordingly decided that the claimant was not entitled to a funeral payment.

5. In due course, the claimant appealed to the social security tribunal who, after an adjournment of the first hearing on 12 September 1988, at the resumed hearing on 15 November 1988 allowed the appeal and awarded "funeral expenses payable to the extent allowed by Regulations". They decided that, despite the letter of 12 October 1988, they preferred the evidence on the computer that housing benefit had been awarded to the claimant in respect of the period from 1 April 1988 to 31 March 1989. They inferred from this that regulation 7(1)(a) had been satisfied.

6. However, subsequently the adjudication officer received a letter from the local authority dated 24 January 1989 which said, <u>inter alia</u> as follows:-

> "The document enclosed in your letter is a copy of a computer screen which is very much out of date. Rate rebates are granted in advance and, therefore, at the beginning of financial year the computer screen showed a rate rebate for the whole year. Since then the rebate has been withdrawn.
>
> [The claimant] is not currently in receipt of housing benefit and has not been since 9 May 1988."

In the light of that further information the adjudication officer applied to have the decision of the tribunal of 15 November 1988 set aside under regulation 11(1)(c) of the Adjudication Regulations, i.e. on the ground that "the interests of justice so require". It may be that the more apposite regulation was regulation 11(1)(a), but be that as it may the adjudication officer relied on regulation 11(1)(c). In the event, the social security appeal tribunal which sat on 23 May 1989 set aside the decision of 15 November 1988. On 2 October 1988 a new tribunal considered the substantive matter afresh, and decided that the claimant was not entitled to a funeral payment.

7. In the written submissions of the adjudication officer dated 30 April 1991 it was contended that the tribunal of 23 May 1989 had no authority to set aside the decision of the tribunal of 15 November 1988 because regulation 11(1)(c) could only be invoked where there had been some procedural irregularity, and in this case there had been none, and that in consequence the decision of 2 October 1989 was a nullity. The adjudication officer concerned based this viewpoint on what was said in R(SB) 4/90, where the facts were very similar. The learned Commissioner held that, although there was no right of appeal against a determination under regulation 11 of the Adjudication Regulations - see regulation 12(3) - it was still open to the Commissioner to declare that an earlier setting aside decision was ineffective, and in consequence any subsequent rehearing a nullity. Paragraph 15 of R(SB) 4/90 reads as follows:-

> " 15. Nevertheless the provision of regulation 12(3) that there shall be no appeal, although preventing the Commissioner from entertaining a direct appeal from a determination to set aside or not to set aside as the case may be, does not prevent the Commissioner from adjudicating on the validity of a setting aside determination when it is material to an appeal validly before him as is the case here. The ultimate social security appeal tribunal decision (of 17 June 1988) is in fact under appeal to me. To consider whether that tribunal had jurisdiction I have to consider whether the first tribunal decision had been validly removed by a setting aside decision (compare a decision of a Tribunal of Commissioners in R(S) 12/81 where the tribunal considered the validity of a setting aside decision as part of their determination of an appeal)."

8. The learned Commissioner then sought to derive support for his proposition from a decision of the House of Lords in Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147. He said as follows:-

> " 16. A helpful authority is the decision of the House of Lords in Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147, where a statutory provision that the determination by the Commission .... shall not be called in question in any court of law' (Foreign Compensation Act 1950, section 4(4)) was held not to prevent investigation by the Courts in a case where a decision of the Commission was a nullity. Lord Reid said (at page 171).
>
> > 'It has sometimes been said that it is only where a tribunal acts with[out] jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although

the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. <u>It may have made a decision which it had no power to make</u>. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provision giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. <u>Or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account.</u>'

17. The passages I have underlined in that citation apply, in my judgment to the purported setting aside determination of the social security appeal tribunal in this case. The tribunal may have had 'jurisdiction' in the narrow sense but its decision was nevertheless a nullity in accordance with the underlined words. Despite the provision of regulation 12(3) prohibiting appeals, I am empowered to declare that the setting-aside determination was a nullity, just as the House of Lords in the <u>Anisminic</u> case could declare as a nullity the purported determination of the Foreign Compensation Commission, despite the provision in section 4(4) of the 1950 Act that such a determination should 'not be called in question in any court of law'. My having so held does not delegate from the ruling in R(SB) 23/83 that the prohibition of a <u>direct appeal</u> to the Commissioner is not <u>ultra vires</u>."

9. An analysis of what Lord Reid meant in the <u>Anisminic</u> case can conveniently be found in the opinion of Lord Diplock <u>In re Racal Communications</u> [1981] 2 A.C. 374 at pages 382, 383:-

"I turn next to the question of the availability of judicial review instead of appeal as a means of correcting mistakes of law made by a court of law as distinct from an administrative tribunal or other administrative authority, however described, when it is exercising quasi-judicial functions. In <u>Anisminic</u> [1969] 2 AC 147 this House was concerned only with decisions of administrative tribunals. Nothing I say is intended to detract from the breadth of the scope of application to administrative tribunals of the principles laid down in that case. It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been

so defined, and if there has been any doubt as to what the question is this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So, if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires confer on administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so. The break-through made by Anisminic [1969] 2 A.C. 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision then reached would be a nullity. The Tribunals and Enquiries Act 1971, which requires most administrative tribunals from which there is not a statutory right of appeal to the Supreme Court on questions of law, to give written reasons for their decisions, now supplemented by the provisions for discovery in applications for judicial review under RSC Ord 53, facilitates the detection of errors of law by those tribunals and by administrative authorities generally."

10. It is clear from the opinion of the House of Lords that, where a decision of an administrative authority is made from which there is no appeal, as in the case of applications under regulation 11(1)(c), the jurisdiction of the Supreme Court is not ousted where the administrative authority have made an error of law. Judicial review is available (re: Racal Communications) and, in addition, it is open to the Supreme Court to make declarations as to the validity or otherwise of a decision of an administrative authority where it is contended that an error of law was made (Anisminic). However the Commissioner is not the Supreme Court. He has no powers other than those conferred by statute. He cannot usurp the function of the Supreme Court. He cannot exercise judicial review (CF. Chief Adjudication officer v Foster, [1991] 3 W.L.R. at p.484 B - "The distinction between an appellate and a judicial review jurisdiction is well known and the latter is strictly confined to the High Court") and he cannot make a declaration. Insofar as R(SB) 4/90 would suggest the contrary, I regret that I must dissent therefrom. Accordingly, it is not open to me to declare the decision of the tribunal of 23 May 1989 setting aside the tribunal's decision of 15 November 1988 to be invalid. That was something that could only be done by the High Court. Similarly of course, the tribunal of 2 October 1989 had no power to proceed on the basis

that the decision of 23 May 1989 was without effect.

11. Accordingly, I am satisfied that the tribunal of 2 October 1989 were at liberty to consider the whole matter afresh, the earlier decision of 15 November 1988 having been effectively set aside by the tribunal of 23 May 1989. It now falls to me to consider whether, in reaching the decision they did, the tribunal of 2 October 1989 erred in point of law.

12. It is not in dispute that the claimant did not make her claim until 10 May 1988. The claimant's case as put to the tribunal was that as at 10 May 1988, and, for that matter, for a considerable time thereafter, she continued to be entitled to housing benefit, and consequently fell within regulation 7(1)(a). However, the initial proposition was wrong. She was not entitled to housing benefit as at 10 May 1988. Because of the changed circumstances following the death of her partner, she ceased from 9 May 1988 to qualify for housing benefit, and the subsequent decision by the local authority to that effect had retrospective effect. In other words, when the entitlement, which had originally been awarded was withdrawn, it was withdrawn as from 9 May 1988. It follows that on 10 May 1988 she simply did not satisfy regulation 7(1)(a). The tribunal correctly analysed the position and, I think, explained it with sufficient clarity.

13. However, the claimant considers the matter wholly unjust. Her partner had died on 8 May 1988 which was a Sunday. There could be no question of her applying to the local office for a funeral payment on that day - the office was simply not open. Moreover, as regards the following Monday, apart from the natural grief and shock to which she was understandably subjected, she had other more pressing matters to attend to (eg. the obtaining of a death certificate and arranging the funeral) than lodging a formal claim to a funeral payment. Nevertheless, she visited the local office, but at a time later than 3.30 when the doors were closed. She was first in the queue on the following Tuesday morning. She argued before me that she could not on any footing be considered to have delayed in making her claim. I agree. But I do not think that the claimant is looking at the matter in the right way. There is no suggestion that the claimant lost an entitlement by reason of her failure to claim within a specific number of days. There was no objection to her having left her claim to 10 May, or, for that matter, to any later date that was in the circumstances reasonable. But she had, at the date of claim, whenever that should be, to bring herself within regulation 7(1)(a), and, unfortunately for her, there was no day after 8 May 1988 when she did fulfil the requisite conditions. Manifestly, as on the death of her partner the claimant ceased to qualify for housing benefit, it was not within the contemplation of the legislation that she should be entitled to a funeral payment. This situation arose immediately on the death of the partner, but as the social security legislation takes no account of parts of a day, although from the moment of death the claimant ceased to have the necessary qualification for housing benefit, and in consequence for a funeral payment, she nevertheless retained her rights during the course of 8 May. And

if she should have succeeded in making a claim on that day, she would have been able to take advantage of a technical loop-hole in the regulations. She would have become entitled to something which she was not really qualified to receive.

14. However, the circumstances in which a claimant could take advantage of this loop-hole are necessarily restricted. The death would have had to have been at a time when the claimant could have applied for a funeral payment. A death on a Sunday would have in itself have been fatal to the exercise. So too would a death on a working day after the close of business. So too in practice would a death which did not allow sufficient time thereafter to make a claim at the local office before it closed. Indeed, some might say it was unseemly that, immediately following the death, the lodging of a claim should take priority over all other necessary activities consequent on the death. It follows that it was never contemplated by the legislature, in a case like the claimant's, that she would ever be in a position to make a claim. Although, had the claimant's partner died on a different day, a claim might, depending upon the hour of demise, have been lodged, and entitlement established, these circumstances would have been freakish. It was not a case of the claimant's having lost something to which she was properly entitled by the accident of timing of her partner's death; it was a case where had the death occurred at a different time, she might conceivably have got something to which, but for the disregard of part of a day, she was not entitled.

15. It follows from what has been said above that the tribunal did not err in point of law, and accordingly I have no hesitation in dismissing this appeal.

(Signed) D G Rice
Commissioner

(Date) **20 August 1992**