Bulletin 194

CH/2812/2005

# DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It is:

   The decision of the Fox Court appeal tribunal under reference U/42/242/2004/03855, held on 11 November 2005, is not erroneous in point of law.

## The issues

2. There are two issues in this case. Did the tribunal have power to disregard an order of the High Court that decisions of the local authority's be quashed on judicial review? And did the tribunal have power to act until the local authority has referred the cases to it?

## Background

3. In June and October 2000, the local authority made two decisions in respect of the claimant's entitlement to housing benefit. The first was a recoverable overpayment decision in the amount of £21,693.65. The ground for recovery was that the claimant's tenancy was created to take advantage of the housing benefit scheme. The second was a refusal of a claim on the same ground. (There is some confusion about the date of the second decision. I have followed the tribunal, for the reasons it gave, in dating it to October.)

4. When the original decisions were made, there was no appeal to an appeal tribunal against the decisions. Any challenge was dealt with by way, first, of internal review and, then, by the local authority's Housing Benefit Review Board. The claimant sought a judicial review of the review decisions.

5. The claimant and the local authority reached a written agreement. The Secretary of State was also a party to the proceedings and the agreement. There is a dispute about what the agreement meant. The local authority says that it was an agreement on the disposal of the case, provided that the judge of the Administrative Court gave permission. The claimant says that it was an agreement for permission to be granted and the decisions quashed. The agreement was sent to the Court on 10 May 2001.

6. Meanwhile (on 9 May 2001) and unknown to the parties, Mr Justice Richards had refused permission on paper on the grounds of delay. However, on 6 July 2001, Mr Justice Turner, in open court and without the attendance of the parties, ordered that the claim for judicial review be allowed and the decisions quashed.

7. The local authority has been suspicious of how the case came to be before Mr Justice Turner. Although it is not necessary for me to deal with these matters, it may help to dispel at least some of that suspicion if I say how I believe this came about. Mr Justice Richards refused permission on paper. Within days of his order, the Administrative Court office received the consent agreement. It probably treated that as an application to renew the application at an oral hearing. It was put before Mr Justice Turner on that basis. Given the terms of the agreement, the parties did not need notice of the hearing. The agreement was

stamped by the Court office next to each signature and the date of stamping inserted next to each stamp. The different numbers on the two orders is simply a mistake; we know that because the Court office has said so. It is undoubtedly true that it was for the court to decide whether or not to grant permission for judicial review. However, it is not unusual for parties, in maintenance proceedings for example, to come to agreement on matters that are actually for the court to decide. The agreement is put to the court, which is free to accept or reject it. Mr Justice Turner probably saw no reason not to accept what the parties had agreed could happen.

8. The effect, and the intended effect, of quashing the decisions was to allow them to be taken on appeal to an appeal tribunal, which acquired jurisdiction from 2 July 2001. If the order had been implemented, the local authority would have referred the claimant's appeals to the tribunal. However, the local authority considered that Mr Justice Turner's order was not valid and was not binding. It simply ignored it.

9. The tribunal became aware of the appeals and a district chairman gave a series of directions with a view to the cases being listed for hearing. The local authority applied for an adjournment and did not attend the hearing. The tribunal decided that Mr Justice Turner's order was binding and that it had jurisdiction to hear the appeals. It refused the application for adjournment and allowed the appeals. As the local authority had not provided any documentation to support its decision, that outcome was not surprising.

10. The local authority sought leave to appeal, which I granted. In view of the issues raised by the appeal, I directed an oral hearing. After a substantial delay, the case came before me on 21 July 2006 at the Commissioners' court in London. The local authority was represented by Mr Wayne Beglan of counsel, who was accompanied by the appeals officer for the local authority, Mrs J Grehan. The claimant was represented by Mr Simon Cox of counsel. I am grateful to counsel for their arguments.

**Collateral challenge to the High Court order**

11. The issue for me is: did the tribunal have power to disregard the order of Mr Justice Turner?

12. Mr Beglan's argument was this. It was permissible to raise the validity of Mr Justice Turner's order by way of collateral challenge before the appeal tribunal and cited authorities in which this had been allowed. On that basis, the tribunal should have disregarded the order for two reasons. First, the proceedings had been disposed of by Mr Justice Richards' order. Second, Mr Justice Turner's order was manifestly inconsistent with the earlier refusal of permission on the grounds of delay. Anyway, there were various deficiencies in the order and the proceedings leading to it.

13. Mr Cox's argument was this. The tribunal had to accept Mr Justice Turner's order as valid. There was no authority to support the local authority's argument and ample authority to the contrary. The cases where a collateral challenge had been allowed were ones that concerned laws, such as byelaws and statutory instruments. The reasoning in these cases did not apply to court orders.

14. Two days before the hearing, the case of *DPP v T* was published in [2006] 3 All 471. I gave a copy to each counsel before the hearing. That decision, and the authorities cited in it, destroyed Mr Beglan's argument.

15. Mr Beglan applied for an adjournment for further efforts to be made to obtain relevant documents. He suggested that the Secretary of State, who had been a party to the judicial review application and to the agreement, might have documents that were not available to me. I refuse that application, because I have sufficient information to know that those documents could not affect the outcome of this appeal.

16. In *Hadkinson v Hadkinson* [1952] P 285, Lord Justice Romer said (at 288):

> 'It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged.'

This was approved by the Privy Council in *Isaacs v Robertson* [1985] AC 97, which decided (at 101) that

> 'an order made by a court of unlimited jurisdiction ... must be obeyed unless and until it has been set aside by the court.'

Those authorities determine this issue. The tribunal had to accept that Mr Justice Turner's order was valid.

17. In some cases, it is possible to challenge the order of a court in other proceedings. This is called a collateral challenge. Such a challenge is only permissible in limited circumstances. Mr Beglan on a number of authorities, principally *Boddington v British Transport Police* [1999] 2 AC 143. In that case, a person convicted of an offence was allowed to challenge the validity of the byelaw that created the offence. This case was discussed in *Director of Public Prosecutions v T*. The court decided (at paragraph 26) that the key consideration was that the person concerned would not otherwise have had a fair opportunity to challenge the validity of the byelaw. In this case, the local authority had a fair opportunity to challenge the order as soon as it was made.

18. An order will still be valid until set aside, even if the court did not have jurisdiction to make it. The order may have been on terms that were not permissible, as in *In re Gale deceased* [1966] Ch 236. Or it may have been made in respect of parties over whom it had no jurisdiction, as in *Re B (Court's Jurisdiction)* [2004] 2 FLR 741. Mr Cox took me in some detail through the procedural requirements for an application for judicial review. I do not need to deal with those. Even if there were procedural irregularities in the proceedings that led Mr Justice Turner to make the order, they do not affect its validity.

19. Mr Cox argued that it was only necessary for the order to have been made by a judge of the High Court. That may go too far. On the authority of the Tribunal of Commissioners in *R(I) 7/94*, an order is only valid if the court was entitled to enter on the consideration of the matter. It may be that *R(I)7/94* is limited to the validity of decisions by tribunals. It may be that the principles do not apply to High Court orders. However, I will assume in the local authority's favour that the decision does apply. In this case, there was an agreement between

the parties, which was placed before the court and on the basis of which the order was made. On the basis of *R(I) 7/94*, that was sufficient connection with the court for the order to be valid.

20. It is correct, as Mr Beglan pointed out, that this case is different from *DPP v T* and the cases cited therein. In all those cases, there was only one order. In this case, there are two. Mr Beglan argued that the two orders are inconsistent. I reject that argument. They are compatible, because the procedure for applying for a judicial review allows an application to be renewed. As Mr Cox argued, they are no more incompatible than a refusal of leave by a district chairman and a later grant of leave in the same case by a Commissioner.

**Referral of an appeal to the appeal tribunal**

21. The issue for me is: did the tribunal have power to deal with the cases until the local authority had referred it to the tribunal?

22. Mr Beglan argued that it did not. He argued that the referral of the cases to the appeal tribunal by the local authority was a condition precedent to the tribunal having jurisdiction. The legally qualified panel member had no power to issue the directions he had under regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 in order to avoid a mandatory requirement that the case be referred. The proper course for the claimant, as his solicitor had threatened but not pursued, was to apply for a judicial review of the local authority's failure or refusal to refer.

23. I suggested to Mr Beglan that there was a contradiction in his attitude to a tribunal's powers. When it came to the order made by Mr Justice Turner, the local authority was entitled to disregard it and raise its validity before the tribunal. But when it came to the local authority's withholding of the cases from the tribunal, the claimant had to apply for a judicial review and could not raise the matter before the tribunal. Mr Cox, with greater consideration and a more subtle command of language, said that there was a tension between Mr Beglan's arguments on the two issues.

24. Mr Cox argued that the tribunal did have power to deal with the case. He dealt with the issue as a breach of a procedural requirement to refer. The significance of that procedure had to be determined in accordance with the decision of the Court of Appeal in *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231.

25. Mr Beglan's argument assumed that the Administrative Court would accept jurisdiction over the referral issue. The usual principle is exclusivity of jurisdiction. If an issue is allocated to a judicial body, only that body has jurisdiction over it. This principle dates at least to the decision of the House of Lords in *Barraclough v Brown* [1897] AC 615. That decision was followed and applied by the Court of Appeal in *Argosam Finance Co Ltd v Oxby (Inspector of Taxes)* [1965] Ch 390 and reaffirmed by the House of Lords in *Autologic Holdings plc v Inland Revenue Commissioners* [2005] 4 All ER 1141. The principle is reflected in the reluctance to allow judicial review if there is a right of appeal: *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2003] 2 All ER 160 at paragraph 47.

26. A tribunal always has power to determine whether it has jurisdiction in a particular case: *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* [1951] 1 All ER

482. If the exclusivity principle applies, the tribunal should decide if it has jurisdiction and any challenge should be by appeal to the Commissioners and from them to the Court of Appeal. Perhaps the challenge to Mr Justice Turner's order would have persuaded the Administrative Court to accept jurisdiction. But that does not mean that the tribunal did not have jurisdiction, unless the tribunal's jurisdiction was dependent on the local authority referring the case to it. Was it so dependent?

27. Mr Cox relied on *R v Immigration Appeal Tribunal, ex parte Jeyeanthan.* Since that case, the proper approach to a failure to comply with a procedural requirement has been restated in different language by the House of Lords in *R v Soneji* [2005] 4 All ER 321:

> '23. ... the rigid mandatory and directory distinction, and its many technical refinements have outlived their usefulness. Instead, ... the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.'

28. I doubt whether the outcome differs according to which authority I use. I have asked myself: as a matter of statutory construction, what was the effect of a failure to refer the claimant's appeal to the appeal tribunal?

29. From 2 July 2001, the appeal tribunal had jurisdiction to hear appeals against housing benefit and council tax benefit decisions of local authorities. Cases that were pending before Housing Benefit Review Boards were treated as appeals to the appeal tribunal: see regulation 4(3) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) (Transitional and Savings) Regulations 2001. The procedure for handling the appeal is the same as that for appeals made after 2 July 2001. which are governed by regulation 20 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001.

30. The appeal is lodged with the local authority, not with the appeal tribunal itself. Regulation 20(1) sets out the conditions that must be satisfied that must be satisfied if there is to be an appeal. It deals with matters both of form and content. It makes detailed provision for what is to happen if those conditions are not met. The local authority is given power to investigate and is then required to refer the case to a legally qualified panel member. That member must decide if the conditions in regulation 20(1) are satisfied.

31. Regulation 20 does not deal with a challenge by the local authority to the tribunal's jurisdiction. However, its structure is relevant to the issue I have to decide. First, so long as regulation 20(1) is satisfied, the appeal tribunal has jurisdiction. Second, the only role of the local authority is to receive the appeal documents and to ensure, as far as it can, that they contain the necessary information. It has no power to decide whether the information provided is sufficient. That is for the legally qualified panel member and there is an express duty to refer the issue to that member. The local authority's function is essentially administrative.

32. As I have said, a tribunal has power to decide whether a particular case is within its jurisdiction. The legislation provides for some clear cases where the tribunal does not have jurisdiction. They are listed in the legislation and are dealt with by the clerk to the tribunal, who is authorised to strike out the appeal, subject to the issue being referred to a legally qualified panel member: regulation 46(1)(a) and (3) of the Social Security and Child Support

(Decisions and Appeals) Regulations 1999. Other cases have to be decided by the appeal tribunal itself.

33. If the appeal were lodged with the tribunal, there would be no problem. However, as the appeal is lodged elsewhere, there has to be a procedure by which it comes to the notice of the clerk or the tribunal. It is possible for legislation expressly to provide for an appeal that is lodged with one body to be referred to the tribunal. In the case of housing benefit, there is no express provision. The referral is but one of the many necessary administrative steps that have to be taken to bring a case before a tribunal. Others include the notification of sittings to the members of a tribunal and the photocopying and sending of the papers to the members. Most of these tasks are not spelt out in the legislation. They are assumed as necessary to allow the statutory powers and duties of the tribunal to operate. In legal terms, that assumption takes effect by implication, either as a general duty and power or as a series of specific duties and powers. It is not rational to interpret the legislation as making the tribunal's jurisdiction depend on a particular exercise of these administrative tasks. That would be incompatible with their function, which is to ensure that the tribunal established by the legislation can discharge its statutory function and do so efficiently and effectively. They are supportive not jurisdictional.

34. In other words, an administrative task need not be performed by a particular person or in a particular way. So long as there is an appeal that satisfies the conditions of regulation 20(1), the tribunal has jurisdiction to deal with any issues that arise in respect of it, regardless of how they are brought to the tribunal's attention. This does not mean that the parties are free to disregard the usual procedures at will. Claimants cannot simply bypass the local authority and lodge appeals with the tribunal. Likewise, they cannot usually expect the tribunal to deal with a case before the local authority has had a chance to prepare the submission and assemble the papers for the parties and the tribunal. But what the tribunal is free to do is to allow matters to be handled differently if circumstances require it. The circumstances of this case did require it for two reasons. First, the local authority was refusing to refer the cases to the tribunal on the basis of an issue which the tribunal had (perhaps exclusive) jurisdiction to decide. Second, the local authority was trying to force the claimant to embark on an expensive legal procedure, which was risky in that the Administrative Court might not accept jurisdiction.

**Other issues**

35. No other issues have been pursued. Just for completeness, I will say this. The chairman's decision not to adjourn is beyond reproach. He gave a detailed explanation of why he did so. He clearly took account of every relevant consideration – he ran out of letters of the alphabet when setting them out and had to begin again with (aa). I find nothing irrelevant in the matters he took in account. He was entitled to decide to proceed with the hearing. Given that decision, it was almost inevitable that the claimant would succeed, because the local authority had not provided any case to support its decision or a presenting officer to argue that case.

**Conclusion**

36. Mr Beglan warned me of the dangers of hindsight. He was right to do so, but even so the course taken by the local authority was a bold one. Surely the obvious thing to do when it received Mr Justice Turner's order was to write at once to the Administrative Court to clarify

what had happened. That was the proper course, even if (especially if) the two orders were inconsistent. Instead the local authority chose to ignore the order and tried to force the claimant to take the matter before the Administrative Court by refusing to refer his cases to the tribunal. If it had acted as it should have, a great deal of work would have been saved for the local authority, the claimant, the tribunal and the Commissioner. I must absolve Mrs Grehan from any blame for this. The documents show that she acted in accordance with advice from the authority's legal services.

37. I dismiss the appeal.

**Signed on original**
**on 27 July 2006**

**Edward Jacobs**
**Commissioner**