THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIB/4833/98

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM THE SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER. J.P POWELL

Appellant: *Respondent: Tribunal:*

Tribunal Case No: Commissioner's File·

1. I have before me an application for leave to appeal against the decision of the social security appeal tribunal (the "appeal tribunal") given on 27th February 1998 The appeal tribunal dismissed the claimant's appeal against the decision of the adjudication officer, dated 14th October 1997, that the claimant, a woman now aged 50, did not satisfy the all work test and was not incapable of work. A copy of the full decision will be found at page 5B of the papers The chairman refused the claimant's application for leave to appeal to a Commissioner, That application has been renewed and is now before me

The application

2. For reasons that will become apparent, it was directed that there be an oral hearing of the application. The hearing took place before me on 9th November 1999 The Secretary of State was represented by Ms Angela Main Thompson from the Office of the Solicitor to the Department of Social Security. The claimant did not appear and was not represented at the hearing. She has been represented throughout the proceedings by her husband He indicated that he would be unable to attend the oral hearing and did not wish to do so The claimant has, however, signed a form of consent indicating that she was agreeable to the application for for leave being treated, if leave was granted, as the appeal itself Ms Main Thompson, for whose assistance I am grateful, submitted that, for reasons I am about to give, I had no option but to allow both the application and the appeal if I decided that I had jurisdiction to consider the application.

3 In the second part of this decision, I do decide that I have such jurisdiction. I allow both the application and the appeal. I set aside the decision of the appeal tribunal and remit the matter for a complete rehearing by a differently constituted tribunal (the new tribunal") I allow the appeal for reasons that are not the fault of either the appeal tribunal or the chairman.

4 I allow the appeal because the claimant was entitled to a document which, for convenience, I shall call the "full statement", which is described in the relevant regulations as a "statement of the reasons for the tribunal's decision and of its findings on questions of fact material thereto" and also as "the full statement of the tribunal's decision", provided she applied within the time specified. Although there was, at least at one stage, some doubt as to whether the application was made in time, the circumstances are such that fairness to the claimant requires me to resolve that doubt in her favour. Ms

Main Thompson submitted that this was the appropriate way to proceed. The full statement is an important part of the appeal process because, without it, a Commissioner or any other body dealing with an appeal against the decision of a tribunal will frequently be unable to adjudicate because the facts found and the reasons for the decision will not usually be discoverable. The present case is just such a case That being so, justice and fairness require me to allow the appeal and set aside the decision of the appeal tribunal. Had it not been for the reason just given, I would not have given leave to appeal.

The history of the present matter

5. In its early stages, this matter took a familiar course. The claimant became incapable of work on 26th October 1992, the cause of incapacity being certified by her general practitioner as depression In due course she became subject to the all work test introduced by section 171C of the Social Security Contributions and Benefits Act 1992 as amended An assessment was carried out in 1997 In July of that year, a report was obtained from her general practitioner On 5th August 1997, she completed an incapacity for work questionnaire. On 22nd September 1997, she was examined by a doctor from the Benefits Agency's Medical Service. The adjudication officer then considered the evidence and made his decision. He decided that the claimant scored no points in respect of physical descriptors. He went on to decide that she scored 9 points in respect of the mental health descriptors Such a score is one point short of the number needed to satisfy the test on the basis of mental health descriptors alone. The adjudication officer therefore decided that the claimant did not satisfy the all work test.

6 The claimant the appealed to a social security appeal tribunal. She elected for a paper hearing but put in very little evidence in support of her appeal Apart from the documents relating to the all work test, the evidence consisted of a medical certificate signed by her general practitioner on 30th October 1997, advising her to refrain from work on the grounds of depression and back pain, her letter of appeal dated 22nd October 1997, which is not a long document, and a letter from her general practitioner dated 4th November 1997 This evidence, although not unhelpful, did not take matters very far In particular, the letter of 4th November 1997, conveyed only a limited amount of information and was not directed to the all work test. It is, therefore, not surprising that the appeal was dismissed. The decision notice, which is a document which records the decision of the appeal tribunal, will be found at page 60 of the papers The specified time for requesting a full statement is a period of 21 days after the decision

notice has been sent or given. In this case, the decision notice is dated 27th February 1998, and states that it was sent to the claimant on 3rd March 1998. Since receiving the decision notice the claimant and her representative have subjected both the decision notice and the report of the examining medical officer to sustained and detailed criticism These criticisms do not, for the most part, afford the claimant grounds for appeal A social security appeal tribunal is a judicial body In general, it can only proceed on the basis of the material placed before it. Its decision is final unless overturned on appeal. A Commissioner can only interfere with the decision of a tribunal if he is satisfied that the tribunal fell into error of law He cannot interfere with it because he might have decided the facts differently himself or because there is material before him, which was not before the tribunal, which suggests that the tribunal reached the wrong conclusion on the facts. It is not an error of law on the part of a social security appeal tribunal to take no account of evidence which they were not told about or which was not placed before them

7 I appreciate that the claimant and her husband are probably not conversant with such matters However, I make the point because the case is going back for a rehearing and the claimant will have another chance to remedy matters. She is not obliged to attend the rehearing and her attendance at it will not guarantee success. However, the likely outcome, if she fails to attend, is that her appeal will be dismissed again I would also suggest, although it is a matter for her, that she submits further medical evidence bringing matters up to date This is important because, in his letter of 4th November 1997, her general practitioner wrote that her depressive illness had "actually got worse over the past 1 to 2 months". The new tribunal will want to know what has happened since the claimant's general practitioner wrote that letter.

8. So far as the new tribunal is concerned, it should be noted that the claimant's score in respect of mental health descriptors is only one point short of the 10 which are needed to satisfy the test. The new tribunal should consider all the mental health descriptors, save for those which are clearly not in issue, and should indicate in their decision that they have done so. The new tribunal should also bear in mind that the appeal was brought before 21st May 1998, and that it must accordingly consider matters down to the date of its decision.

9 Although I find the claimant's own grounds of appeal unpersuasive for the most part, that is not an end of the matter. The claimant exercised her right to ask for a copy of the full statement and did so within 21 days after the decision notice had been sent to her Notwithstanding her request, and the fact that it was in time, she has never received a copy. The reason why are best explained in the words of the chairman which appear at pages 62 and 63 of the papers. They are contained in a document headed "Statement of material facts and reasons for the tribunal's decision" but, as the chairman makes absolutely clear, that document is not intended to be a full statement The document is dated 23rd October 1998 and has been signed by the chairman. It reads as follows.

> "A request for a full statement of facts was sent to the Chairman with notification that it was outside the 21 day time limit. The request was refused. The original file was mislaid by the administration. The appellant's husband applied for a setting aside on the grounds of clerical error on the medical report This was refused, as was leave to appeal
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> [The claimant's husband, who is her representative] wishes to apply to the Commissioner but is unable to do so as he does not have a full statement. The administration now state that the request for full statement was within the 21 day time limit.
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> The Tribunal was held on 27.2 98 This request was received on 21.10.98. The Chairman has no recollection whatsoever about this case, but notes that the initial request was date stamped received on 24.3.98 and that she had prepared an immediate decision notice but as [the claimant] did not attend, the decision was not issued to her until 3.3.98 it [i.e. the request for a full statement] therefore was within time. The original record of proceedings is not available to the Chairman and therefore she has no information as to whether this was a paper hearing or a non-attendance of the appellant at an appeal listed for an oral hearing.
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> In order to progress this case I suggest that the appellant treat the short decision completed by the Chairman on 27.2 98 as a full decision although this appears to be much briefer than a full statement would have been."

10. I allow the appeal because the claimant had an absolute right to a copy of the full statement but did not receive one. Further, it is not possible to dispose of all her grounds of appeal fairly without knowing what findings the appeal tribunal made and what their reasons were. The absence of a full statement is not due to any fault on the claimant's part or, indeed, on the part of the chairman However, without it, justice cannot be done As the adjudication officer officer pointed out in paragraph 15 of her submissions to the Commissioner dated 8th June 1999, this is not one of those cases where the material contained in the decision notice is sufficient to enable the appeal to be considered and determined fairly Ms Main Thompson agreed, indeed she submitted, that the only fair way of dealing with the appeal was to allow it and remit the matter for a complete rehearing I agree and accordingly take that course

General matters

11. That is sufficient to dispose of this appeal and I now turn to certain more general matters. They are the reason why an oral hearing was directed. This part of my decision is lengthy because it deals with matters which, while they will probably be of little interest to the claimant and have no bearing on the rehearing, are of considerable importance to others. However, before leaving the facts of the present case, it may be worth drawing attention to the following points. First, what has occurred has involved no fault on the part of the chairman She is to be commended for the investigations which she carried out in October 1998, and the clear record which she made as a result of them. She was wrongly told that the request for a full statement was out of time Later, on 21st October 1998, almost exactly eight months after the hearing, she was told that the request had been in time and that the information originally given to her had been wrong. It is not entirely clear what papers she had before her in October 1998, but they did not include the record of the proceedings which she had made. Not surprisingly, after such a long time, she had no recollection of the matter and, without the record and unsure as to the nature of the hearing, rightly felt unable to construct a full statement

12. The second point which I wish to make is that what happened in this case is not an isolated or rare occurrence. A significant number of applications for leave to appeal are received by the Commissioners where, through no fault of the applicant, there is either no full statement at all or else the chairman has had to construct a full statement many months after the hearing and sometimes without a full set of the papers. In one case where I gave leave, the chairman had not even been approached nearly a year after

the hearing because the case papers were still missing notwithstanding the intervention of the applicant's MP and of a senior official of the Department of Social Security Ms Main Thompson told me that the Department itself has experienced great difficulties in obtaining full statements in a number of cases where the Secretary of State wished to appeal to a Commissioner. Whilst this decision was in draft form, I dealt with another case where a chairman refused to provide a full statement, which had been requested by the adjudication officer, because he was wrongly told that the request was out of time. Although the request was subsequently renewed, and the chairman was told that it had originally been made in time, the papers before me did not include a full statement and I therefore assumed that it had not been provided

Jurisdiction - the problem

13 The chairman, for the reasons which she explained, was unable to supply a full statement. The appendix to this decision ("the appendix") sets out the parts of the Social Security (Adjudication) Regulations 1995 (SI 1995/1801) and the Social Security Commissioners Procedure Regulations 1987 (SI 1987/214) in the form in which they applied when the claimant applied for leave to appeal I shall refer to these sets of regulations as the "Adjudication Regulations" and the "Commissioners Procedure Regulations". They appear to say that a party, whether an individual claiming benefit or the Secretary of State, cannot apply for leave to appeal to a Commissioner unless that party can produce a full statement If that is the correct view of the regulations, it follows that even where leave has been granted an appeal must be dismissed if there is no full statement with the papers.

14 One of the provisions set out in the appendix is regulation 23 of the Adjudication Regulations which, in its amended form, introduced the concept of a full statement My understanding of the way paragraphs (2) to (3D) of regulation 23 is as follows.

> (1) The decision is recorded in a document which is called a decision notice; see paragraph (2) The operative part of the form now in use is divided into two parts. The first part records the decision of the tribunal. It is analogous to the operative part of a court order. The second part records reasons for the decision. These are normally brief and rarely comprehensive

(2) Copies of the decision notice are either given to the parties at the hearing or are sent to them within a day or so. If the parties have attended an oral hearing, such copies will usually be handed to them at the conclusion of the hearing. In all other cases, and in particular paper hearings, such copies will be sent to them by post.

(3) Paragraphs (3A) and (3C) are the paragraphs which deal with the full statement This document is the judgment or reasoned decision of the tribunal. There is no set form but it must deal with the matters in issue and show that the tribunal, whose functions are inquisitorial (see R -v- DEPUTY INDUSTRIAL INJURIES COMMISSIONER ex parte MOORE [1965] QB 546, and especially Diplock LJ at page 486) has properly investigated the facts. The full statement must record the findings which the tribunal makes about any disputed facts and explain how conflicts of evidence were resolved Finally, it must explain the process of reasoning by which the tribunal reached its conclusion. In short, the full statement is the means by which the tribunal explains to the parties and any appeal body how, and why, they have dealt with the appeal

(4) Paragraph (3A) says that such a statement may be given orally at the hearing. If that is done, then the full statement "shall be recorded in such medium as the chairman may determine" I think that what is envisaged by those words is that the chairman will deliver the full statement orally, just like an ordinary extempore judgement, but that arrangements will be made to record it on tape. It could, no doubt, be recorded in shorthand but this is something which, if it happens at all, does so only rarely. In any event, as matters are organised at the moment, I understand that chairmen rarely give a full statement orally for a number of reasons One of these being that recording facilities are not normally available.

(5) If the full statement is not given orally it "may be given . in writing at such later date as the chairman may determine"; paragraph (3A)(b). The use of the word "may" appears to give the chairman a complete discretion in the matter However, this is subject to paragraph (3C) In practice, it is rare for a chairman to give a full statement unless one is requested. Occasionally a chairman may go to the trouble of preparing a full statement, without being requested to do so, for one of a number of

reasons. For example, because he anticipates that a request will be made and he prefers to write it while the facts and arguments are still fresh in his mind. Again, where the nature or the circumstances of the hearing have been such that it is important to record the tribunal's findings of fact and reasons at the earliest opportunity even though it is not certain that a request for a full statement will be made

(6) Paragraph (3C) is the paragraph which enables any of the parties to request a full statement "within 21 days after the decision notice has been sent or given" It is curiously worded because it refers to a "copy of the statement" which strongly suggests that the chairman is to provide a full statement in all cases - something which is reinforced by the closing references to paragraph (3A)(a). It may be that, when these rules were drawn up, of those involved in the drafting may have thought that, in every case, the chairman would either dictate a full statement or else prepare one in, at least, draft or note form. However, it is no part of my function in this appeal to consider the matter I simply state what I understand to be the current practice which is that it is rare for a full statement to be written unless a request is made.

(7) If a request is made within the specified 21 days, the chairman is bound to write and supply a copy of the full statement. If a request is made after the 21 days has elapsed, the request is out of time. The chairman has a discretion to extend time. He must exercise that discretion judicially although, if current practice is correct and he does not have to write the full statement until a request is made, one of the factors to be taken into account is that unless the request is not greatly out of time, the chances of his being able to produce a satisfactory full statement are diminished, and will continue to diminish, with the passage of time. Indeed, where the request is made towards the end of the 21 days, it must often be difficult for chairmen to recall the matter, even with the aid of their notes, when they have heard a great many cases in the meantime.

(8) That brings me to an extremely important point which will be familiar to anyone who has had to write a judgement, decision or full statement. This is that the process becomes increasingly difficult to carry out the more time that elapses between the hearing and the time when one

first puts pen to paper or sits down in front of a computer. I am referring to cases where, as I understand is usually the case, there has been no previous work done on producing the full statement After a relatively short period of time it becomes difficult to remember all that the witnesses said even where a proper note of their evidence has been kept Although one can generally, with the aid of notes, recall the arguments that were put, there is still the danger that points will be overlooked. The position is quite different where the document already exists in draft or in the form of extensive notes and all that is needed is further work to polish and complete it.

(9) Chairmen of tribunals also face the problem that their workloads are heavy I understand that when taking oral hearings, they frequently have to deal with six or more appeals per day, and may have to deal with a number of interlocutory matters and paper appeals. When dealing with pure paper appeals, they must normally get through many more appeals in the course of the day It must be hard to distinguish one paper appeal from another.

(10) Unless the chairman sits alone, the decision is a joint decision. A chairman trying to write a decision long after the event is trying to recall the reasons which him and two others, either or both of whom may have been medical practitioners or be possessed of other expertise, to reach the decision which they did

15 Proceeding on the assumption that a full statement does not have to be written in every case, the framers of the rules must have assumed that in every case where a timeous request was made, that the request would be put before the relevant chairman within a matters of days after it had been received and would be dealt with promptly. Unfortunately, this has proved not to be the case. It is within the experience of all Commissioners, and appears to be the experience of the Department of Social Security as well, that this is not so with the result that there are a considerable number of cases where, despite a request being made within 21 days, no full statement is forthcoming There are a number of reasons for this. Among the most common, and it is surprisingly common, are that the file containing the case papers has been lost with the result that, when the chairman is finally asked to write the statement many months will have passed and it has become impossible for the chairman to recall the particular case Another common

reason is that, although the request is made in time, it is not put before the chairman until several months have elapsed. Although the chairman will have the case papers, he or she is unable to recall anything significant about the case and is unable to write a full statement. Then there are cases where various procedural mishaps or confusions occur. In particular, where an applicant applies to set aside the decision of the tribunal on the limited grounds set out in regulation 10(1) of the Adjudication Regulations, the case papers will almost certainly be sent in the first instance to the tribunal which deals with the set aside application and only when that application has been disposed of, will the case papers become available to the chairman to write the full statement. By that time, several months may have elapsed and he or she will have forgotten all about the matter In other cases the chairman, who may be a part-time chairman, may have died, retired otherwise ceased to be a chairman. See decision CIS/2132/98, where the chairman had ceased to be a chairman.

16. Mr Commissioner Rowland dealt with the point in the decision which he gave following an oral hearing of two appeals numbered CIS/3299/97 and CIB/4189/97, which he heard in conjunction with a number of applications for leave to appeal. As I need to make a number of references to his decision and to consider a number of subsequent decisions, it is convenient to refer to it as the "original decision". It is a carefully constructed and argued decision which I shall attempt to summarise. It is, however, a decision which repays study and my summary is no substitute for a reading of the relevant passages

(1) In paragraph 1 of the original decision, Mr Commissioner Rowland identified the issue before him as being "... whether a Commissioner has jurisdiction to hear an appeal from a social security appeal tribunal if an appellant has not obtained a full statement of the tribunal's decision and, if so, the further question how such an appeal should be approached." His decision was not, however, confined to social security appeal tribunals.

(2) In paragraph 2, he explained that the problem arose because of amendments made in 1996 to the Adjudication Regulations and further amendments made in 1997 to the Adjudication Regulations and to the Commissioners Procedure Regulations. In paragraphs 3 to 9 he analysed the effect of the 1996 amendments in detail and in paragraphs 10 to 12 he analysed the 1997 amendments

(3) In paragraph 6 he said:

> "It is the removal of the general duty to give reasons, including a statement of findings, for a decision that is the most significant consequence for the October 1996 amendments. The duty is curtailed so that there is now generally a duty to give full reasons only where a party requests them within 21 days of the decision being given, although there is a power to give reasons where there has been no request or where the request is made late."

(4) In paragraph 14, he decided that a chairman had no power to admit an application outside the time limit imposed by schedule 2 to the Adjudication Regulations and had no power to extend that time limit (i.e three months beginning with the date when a copy of the full statement was given or sent to the applicant) In paragraph 15, he decided that a chairman did not have jurisdiction to consider an application for leave to appeal to a Commissioner in a case where no full statement had been given.

(5) He then went on to hold that a Commissioner had no power to consider an application under regulation 3(1) of the Commissioners Procedure Regulations - the normal rule. However, regulation 3(2) of those regulations provides:

> "(2) Where there has been a failure to apply to the chairman for such leave [i.e. for leave to appeal against a decision of an appeal tribunal or a medical appeal tribunal] within the specified time, an application for leave to appeal may be made to a Commissioner who may, if for special reasons he thinks fit, accept and proceed to consider and determine the application "

See also regulation 21 of the Commissioners Procedure Regulations.

(6) Mr Commissioner Rowland considered that that did confer the necessary power to consider a application even though the application did not have annexed to it a copy of the full statement At paragraph 16, he said·

> "It follows that, if there is no full statement of the tribunal's decision, a Commissioner has no jurisdiction to consider an application for leave to appeal under regulation 3(1) of the 1987 Regulations However, it seems to me that it also follows that a Commissioner is entitled to consider such an application under regulation 3(2) There is nothing within regulation 3(2)

to suggest that it is applicable only in the case of late applications and not also in the case of those that are made too early. ..."

In the following paragraph, he said

"It seems clear from the amendment to the last part of regulation 4(1) of the 1987 Regulations and the failure to amend the last part of regulation 4(3) that the draftsman had in mind that applications would be made only after a full statement of the tribunal's decision had been issued. However, I would require a much stronger indication before I infer that the legislators intended to remove from the Commissioners the power that they undoubtedly had between October 1996 [when full statements ceased to be given in all cases] and April 1997 to consider an application in a case where, notwithstanding the lack of a full statement of the tribunal's decision, the tribunal could be shown to have erred in law The lack of a full statement of the tribunal's decision would not remove the power of the High Court or the Court of Session to quash such a tribunal's decision on an application for judicial review and I consider it unlikely that the legislators thought that a more appropriate path for would be applicants to follow . "

17. As Mr Commissioner Rowland explained, the problem had arisen because of a gap which had opened up following two sets of amendments It was a gap which has unfortunate consequences for all applicants for leave, whether individuals claiming benefit or the Secretary of State. Mr Commissioner Rowland identified a solution which I find convincing and which I adopt Ms Main Thompson on behalf of the Secretary of State pressed me to adopt it.

Subsequent criticism

18 The solution put forward in the original decision has not, however, been universally accepted. It is, therefore, necessary for me to consider the subsequent decisions

19 The first of these, CSI/591/98, is a decision of Mr Commissioner Mitchell QC, which involved an application for leave to appeal to a Commissioner by an adjudication officer The facts are unusual. On 3rd April 1999, a social security appeal tribunal allowed an individual's appeal against the decision of an adjudication officer. The

decision notice was issued on the day of the hearing. The adjudication officer requested a full statement 11 days later on 14th August 1998 The Commissioner found that the request was renewed by a reminder sent on 14th October 1998. There was no response from the Independent Tribunal Service and on 30th August 1998, a little over two weeks after the reminder, the adjudication officer made a application direct to a Commissioner for leave to appeal and relied on the original decision as enabling him to do so without a full statement At that point in time, 30th October 1998, the request for a statement had yet to be dealt with and had not been outstanding for an excessive amount of time Since the statement had not been issued, there had been no application to the chairman for leave to appeal

20 The application was, therefore, somewhat premature A reason for its being made was given Namely: "Application without full statement of the facts and reasons being made because the Secretary of State's suspension under regulation 37 of the Claims and Payments Regulations will expire on 5 11.98. ..." In those circumstances it is hardly surprising that Mr Commissioner Mitchell dismissed the application on the ground that it was prematurely made However, an oral hearing had taken place and submissions had been addressed to him based on the original decision In paragraph 8 of his decision he said·

> "I do not accept that the Commissioner's observations in the above case provide an authority upon which the adjudication officer is entitled to rely in the circumstances of this case. . ."

That was sufficient to enable him to dispose of the application before him.

21. However, in the same paragraph, he went further and said that he did not accept the solution put forward by Mr Commissioner Rowland. In paragraphs 10 and 11 he said

> 10. In the course of the hearing I referred to a recent case before me of a claimant who had applied to the tribunal chairman for leave to appeal but who, on receiving no decision on his application after 8 months, made a direct application to the Commissioner for leave to appeal. In that case (on Commissioner's file CSDLA/574/98) I was constrained to dismiss the application as incompetent upon the grounds that in terms of regulation 3(1) and (2) application to a Commissioner for leave to appeal can be made in only two circumstances, namely (1) where an application has been made to the chairman and that application has been refused or (2)

where there has been a failure to apply to the chairman for such leave within the specified time. The claimant's attempted application did not fall within either category and could not be entertained by me.

11 Consistently with that approach the adjudication officer's application in the present case, which admittedly does not fall within regulation 3(1) and which I hold does not fall within regulation 3(2) either, should not be entertained."

22 The next case, CDLA/4278/98 was another decision of Mr Commissioner Rowland who had before him a copy of Mr Commissioner Mitchell's decision I shall not analyse this decision. It is sufficient to say that Mr Commissioner Rowland adhered to the views he had expressed in the original decision. He indicated that he would have dismissed that application which had been made to Mr Commissioner Mitchell and he attempted to reconcile his views and those of Mr Commissioner Mitchell. See, in particular, paragraph 5 of the decision It should, of course, be remembered That Mr Commissioner Mitchell had gone a little further than he needed to for the purposes of disposing of the original decision

23 The next decision was CIS/4437/98, which was a decision of Mr Commissioner Walker QC He had before him the original decision and Mr Mitchell's decision CSI/591/98 but not, I think, CDLA/4278/98. He was of the view that a full statement was required before a valid application for leave to appeal could be made. The essence of his decision on the point is contained in paragraph 14.

" . the adjudication regulations as constructed for the purposes of the present appeal, seem to me to provide for a series of triggers The summary reasons are to be issued in all cases, and one can understand why so. There is then a time limit for seeking a copy full statement which itself is triggered by the sending or giving of the decision notice. Then there is the further time limit for seeking leave to appeal which is triggered by the date of issuance of the statement of reasons That seems to me to be a deliberate sequence of triggers which were not intended to be activated, any two of them, at the same time For my part, I see no provisions, which can properly be made equivalent to the anticipatory provisions for initiating an appeal in employment law Indeed, the absence thereof, given that precedent, and given that they may have been the basis for our

procedures as Mr Rowland felt, all suggest to me that such a short circuit was not here intended. As I have noted, Mr Commissioner Rowland referred to no principle or authority for his interpretation other, perhaps, than the pragmatic one of making progress. In so far as Mr Mitchell QC disagreed, I prefer his approach I too am in favour of the pragmatic approach but I am equally suspicious that unnecessary confusion and difficulty can be caused if clear procedural provisions are not followed with precision."

24. I am afraid that, in the circumstances, I find that reasoning unconvincing I find the relevant procedural provisions far from clear and, unless sensibly interpreted, capable of working serious injustice - to both individuals and the relevant authority We are dealing with matters of procedure and I have always understood that procedural rules should, so far as possible, be interpreted to enable the parties, and the court or tribunal seised of the matter, to make progress and to identify the real - as opposed to the procedural - issues which require adjudication and to enable the parties to resolve their difficulties. Rules of procedure should not be interpreted so as to erect a series of barriers or obstacles which the parties must overcome successfully before being entitled to have the case - or appeal - heard.

25 Mr Commissioner Walker went further. The decision notice which had been issued at the end of the hearing before the tribunal concluded by stating that it included the full reasons for the tribunal's decisions and its findings of fact material thereto. At paragraph 15, the Commissioner said:

"15. Thus it is in the present case. Adjudication regulation 23(2) refers to the summary decision being in a form of a notice approved by the President There is, I have assumed, one here In my opinion it tends to prevent any proper statement of findings of fact and reasons being incorporated by reason of the very limited space allowed I have concluded, accordingly, that it is contrary to the spirit and intendment of the adjudication regulations to concertina the decision notice and the full statement and that an attempt to do so will not produce a valid full statement, however much it may be an adequate summary decision."

Again, I respectfully beg to differ. I do not wish to encourage such "concertina" documents because I consider that they are difficult to produce satisfactorily. However, I am not aware of anything which prevents the use of a continuation sheet with a decision

notice It would be quite absurd to prevent their use. There will be occasions when a proper record of the decision of the tribunal will require more space than is allotted on the form Further, these documents are handwritten and it is not, so far as I am aware, a requirement of appointment that a chairman's handwriting should be small. There are many cases, such as those involving a short point of law, where the reasons for the decision can be shortly stated I have from time to time seen decision notices which say everything which needs to be said.

26 The decisions of Mr Mitchell and Mr Walker were followed by Mr Commissioner May QC in decision CSIB/257/99. At paragraph 5, the Commissioner said.

> "5. The principal issue before me was whether the application is inept because of the failure of the claimant to obtain from the Chairman a full statement of facts and reasons in accordance with the regulations to which I have referred because she did not apply within the 21 days from receipt of the notice of decision for such a statement and the refusal of the Chairman to supply such a statement out of time."

He answered that question in the following terms in paragraph 18.

> " . I am however persuaded by Mr Armstrong's arguments that the application in the instant case is inept. There is I consider an inevitability about that conclusion and it is consistent with the views of Mr Commissioner Mitchell and Mr Commissioner Walker set out above and with which I agree I do not accept Mr Commissioner Rowland's analysis for the reasons given by my brother commissioner in Scotland. Mr Rowland acknowledges that there is no statutory basis for waiving the requirement for a full statement. I do not consider that the Commissioner can do so on an extra statutory basis particularly when the statement of facts and reasons is an essential prerequisite to enable the Commissioner to determine whether there has been any error of law on the part of the tribunal. The supervisory jurisdiction of the superior courts is one which is exercised upon very different principles to appeals before the Commissioner If the Chairman had been disposed to provide a statement out of time it seems to me that the claimant could have made an application which was not inept However the Commissioner has no supervisory jurisdiction over the exercise of a discretion by the Chairman on such a matter. It is not for me to contemplate whether the Court of Session would

have such a jurisdiction on a judicial review of the chairman's discretion."

27 I reject the reasoning in CSI/591/98, CIS/4437/98 and CSFB/257/99. I do so with some diffidence because I am aware that the Commissioners who gave those decisions are far more experienced than I am Nevertheless, I do so because such reasoning appears to me to lead to injustice and I consider that, where possible, procedural rules and regulations should be interpreted so as to provide justice. Appeals, or applications for leave to appeal, should if at all possible be determined on their merits and not on technical points. The basis on which all three Commissioners reached their conclusions is that an application for leave to appeal to a Commissioner is invalid, or inept, unless a full statement has been issued by the chairman and a copy of that statement is attached to the application There will be many instances where that rule will work serious injustice. I will take three examples. The second is, in my experience, surprisingly common.

(1) The claimant, or the Secretary of State, applies for a full statement within the 21 days, but the chairman dies before he or she can issue one

(2) The claimant, or the Secretary of State, applies for a full statement within the 21 days but either the case papers have gone missing or, as here, there are administrative errors which are not the fault of either the parties or the chairman but which result in such delay that the chairman is unable to provide a full statement.

(3) A full statement is requested and provided but, before any copies are sent to the parties and without any fault on the part of the chairman, the file, together with the full statement, is lost. Without the case papers, the chairman is unable to assist further

In all three cases, if the original decision is wrong, no party can apply for leave to appeal because that party is, although entirely blameless, unable to produce a full statement. That, if right, appears to me to be an injustice. All the more so where it is evident from either the decision notice or other material that the party seeking leave has an arguable case There are appeals, for example, those that turn on points of law, where it is readily apparent from the decision notice that the tribunal has got the law wrong and that an appeal against the tribunal's decision must be allowed

28. I would find it bizarre to be faced with an application for leave where it was quite clear that the tribunal had erred in law but be obliged to refuse the application for want of a full statement I repeat, the purpose of the rules of procedure is to enable matters of substance to be decided. One obvious case where the appeal is entitled to succeed is where a full statement has not been provided, although requested in time, and it is not possible to adjudicate on the grounds of appeal without one That is the present case and the reason why I have allowed the claimant's appeal.

29. Any suggestion that a party who wishes to appeal has a remedy because he or she can apply for judicial review is almost a reductio ad absurdum (reduction to absurdity) There is really no point in seeking judicial review if the chairman is dead or is otherwise unable to produce a statement The remedy is of little use if the chairman, whilst wishing to be helpful, simply cannot remember the case because either the case papers are missing or because there has been considerable delay in placing the request before him or her. I have no wish to trespass on the jurisdiction of either the High Court or the Court of Session but it does not seem appropriate for one category of applications for leave to appeal - that is, those without a full statement - to be dealt with by those courts on one set of principles while all other applications for leave are dealt with by the Commissioners on rather different principles.

30. I know nothing of work loads in the Court of Session, but I understand that, in London, the Crown Office is faced with an ever increasing number of applications for judicial review, many of which must be determined with urgency. Additional work, diverted from the Commissioners, is unlikely to be welcome. Further, so far as individuals are concerned, the costs of applying for judicial review are substantial and the grant of Legal Aid is by no means certain. The great majority of applicants for benefit are simply not in a position to pay substantial legal fees out of their own pockets. The Secretary of State faces a different problem to which Ms Main Thompson drew my attention without, however, investigating it The Appeal Service is part of the Department of Social Security Ms Main Thompson submitted that there would be serious practical, if not constitutional, problems if the Secretary of State applied for judicial review against his own department. Particularly in cases where the chairman would like to provide a full statement but is unable to do so.

31. Finally, this whole application has been argued under the Commissioners Procedure Regulations With effect from 1st June this year, those regulations were replaced by the Social Security Commissioners (Procedure) Regulations 1999 (SI 1999/1495) I asked Ms Main Thompson at an early stage whether I should not be dealing with the matter under the new regulations She responded with two submissions. First, that this matter was at an advanced stage and fell to be determined under the Commissioners Procedure Regulations She secondly submitted, without going into detail, that the new regulations cured any defect and that under them a Commissioner could entertain an application for leave even though the full statement was missing. On the basis of those submissions I agreed to deal with the matter under the Commissioners Procedure Regulations.

Conclusion

32. I therefore hold that I have jurisdiction to determine the claimant's application for leave. I grant leave and go onto allow the appeal The matter is remitted for a complete rehearing before a differently constituted tribunal.

(Signed) J P. Powell
Commissioner

Dated. 22nd December 1999

Appendix

A. In 1996 and 19997, the Adjudication Regulations and the Commissioners Procedure Regulations were amended by the following three sets of regulations. The Social Security (Adjudication) and Child Support Amendment Regulations 1996 (SI 1996/182), the Social Security (Adjudication) and Child Support Amendment (No 2) Regulations 1996 (SI 1996/2450) and the Social Security (Adjudication) and Commissioners Procedure and Child Support Commissioners (Procedure) Amendment Regulations 1997 (SI 1997/955). From 28th April 1997, the recording of tribunal decisions and Appeals to the Commissioners were dealt with by the following regulations.

B Regulation 23 of the Adjudication Regulations governed the recording of decisions

"(1) The decision of the majority of the appeal tribunal shall be the decision of the tribunal but, where the tribunal consists of an even number, the chairman shall have a second or casting vote

(2) Every decision of an appeal tribunal shall be recorded in summary by the chairman in such written form of decision notice as shall have been approved by the President, and such notice shall be signed by the chairman

(3) As soon as may be practicable after a case has been decided by an appeal tribunal, a copy of the decision notice made in accordance with paragraph (2) shall be sent or given to every party to the proceedings who shall also be informed of -

(a) his right under paragraph (3C), and

(b) the conditions governing appeals to a Commissioner

(3A) A statement of the reasons for the tribunal's decision and of its findings on questions of fact material thereto may be given -

(a) orally at the hearing, or

(b) in writing at such later date as the chairman may determine.

(3B) Where the statement referred to in paragraph (3A) is given orally, it shall be recorded in such medium as the chairman may determine

(3C) A copy of the statement referred to in paragraph (3A) shall be supplied to the parties to the proceedings if requested by any of them within 21 days after the decision notice has been sent or given, and if the statement is one to which sub-paragraph (a) of that paragraph applies, that copy shall be supplied in such medium as the chairman may direct.

(3D) If a decision is not unanimous, the statement referred to in paragraph (3A) shall record that one of the members dissented and the reasons given by him for dissenting.

(4) A record of the proceedings at the hearing shall be made by the chairman in such medium as he may direct and preserved by the clerk to the tribunal for 18 months and a copy of such record shall be supplied to the parties if requested by any of them within that period."

C Applications to a chairman for leave to appeal to a Commissioner were dealt with by regulation 24(1) of the Adjudication Regulations.

(1) Subject to the following provisions of this regulation, an application to the chairman of an appeal tribunal for leave to appeal to a Commissioner from a decision of an appeal tribunal shall -

(a) be made in accordance with regulation 3 and Schedule 2; and

(b) have annexed to it a Copy of the full statement of the tribunal's decision

D Paragraph (1) of regulation 3 of the Adjudication Regulations provided that:

"(1) Any application, appeal or reference mentioned in column (1) of Schedule 2 shall be in writing .. and shall be made or given by sending or delivering it to the appropriate office within the specified time "

Paragraph (2)(b) of the same regulation went on to state.

"(b) "the specified time" means the time specified in column 3 of [Schedule 2] opposite the description of the relevant application, appeal or reference so listed."

E. Paragraph 7 of Schedule 2 to the Adjudication Regulations refers to:

"7. Application to the chairman for leave to appeal to a Commissioner from the decision of an appeal tribunal (regulation 24(1)."

The time limit in column 3, opposite that description is stated to be:

"3 months beginning with the date when a copy of the full statement of the tribunal's decision was given or sent to the applicant."

F Paragraph (1) of regulation 3 of the Commissioners Procedure Regulations provided.

"(1) Subject to paragraph (2) of this Regulation, an application may be made to a Commissioner for leave to appeal against a decision of an appeal tribunal or a medical appeal tribunal only where the applicant has been refused leave to appeal by the chairman of an appeal tribunal or, as the case may be, of a medical appeal tribunal "

G. Paragraph (2) of the same regulation then set out an exception to the general rule contained in paragraph (1).

"(2) Where there has been a failure to apply to the chairman for such leave within the specified time, an application for leave to appeal may be made to a Commissioner who may, if for special reasons he thinks fit, accept and proceed to consider and determine the application."

H Paragraphs (1) to (3) of regulation 4 of the Commissioners Procedure Regulations are as follows

(1) Subject to the following provisions of this Regulation, an application to a Commissioner for leave to appeal shall be brought by a notice to a Commissioner containing

(a) the name and address of the applicant;

(b) the grounds on which the applicant intends to rely,

(c) the address for service of notices and other documents on the applicant;

and the notice shall have annexed to it a copy of the full statement of the tribunal's decision against which leave to appeal is being sought.

(2) Where the applicant has been refused leave to appeal by the chairman of an appeal tribunal or of a medical appeal tribunal the notice shall also have annexed to it a copy of the decision refusing leave and shall state the date on which the applicant was given notice in writing of the refusal of leave

(3) Where the applicant has failed·

(i) to apply within a specified time to the chairman of an appeal tribunal or of a medical appeal tribunal for leave to appeal or;

(ii) to comply with Regulation 3(3) above, or

(iii) [not relevant for present purposes]

the notice of application for leave to appeal shall, in addition in to complying with paragraphs (1) and (2) above, state the grounds relied upon for seeking acceptance of the application notwithstanding that the relevant period has expired.

I Finally, regulation 21 of the Commissioners Procedure Regulations provided

"21. Any irregularity resulting from failure to comply with the requirements of these Regulations before a Commissioner has determined the application, appeal or reference shall not by itself invalidate any proceedings, and the Commissioner, before reaching his decision, may waive the irregularity or take such steps as he thinks fit to remedy the irregularity whether by amendment of any document, or the giving of any notice or directions or otherwise "