Breach of natural justice – notice of hearing not received – set aside ot & replaced by right of appeal.

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/303/1999

Starred Decision No: 35/01

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35/01

CIB/303/1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal, brought by the claimant with the leave of a Commissioner, against a decision of the Manchester social security appeal tribunal dated 10 July 1998, whereby they dismissed the claimant's appeal against a decision of an adjudication officer to the effect that the claimant was to be treated as capable of work from 12 February 1998 because he had failed without good cause to submit to a medical examination on 11 February 1998. I held an oral hearing of the appeal. The claimant neither attended nor was represented. The Secretary of State, as successor to the adjudication officer, was represented by Mr Huw James, solicitor, acting as agent for the Solicitor to the Departments of Social Security and Health. I am grateful to Mr James for his helpful submissions.

2. The claimant had requested an oral hearing before the tribunal and notice of the hearing had been sent to him on 28 June 1998 but he had not appeared for the hearing on 10 July 1998. On 11 August 1998, the claimant requested that the tribunal's decision be set aside on the ground that he had not received notice of the hearing. A tribunal consisting of a full-time chairman rejected that request, giving as her reason that none of the grounds set out in regulation 10 of the Social Security (Adjudication) Regulations 1995 was satisfied. How she reached that conclusion is unclear. If she accepted that the claimant had not received the notice of hearing, both the conditions of regulation 10(1)(a) (non-receipt of a document relating to the proceedings – see regulation 10(5) excluding the effect of regulation 1(3)(b)) and regulation 10(1)(b) (non-attendance by the claimant) were satisfied and it is difficult to see how she could properly have decided that it was not "just" to set the decision aside without considering the merits of the claimant's appeal to the tribunal. If that is what she did decide, the reason she gave for her decision was wholly inadequate for compliance with the duty to give reasons under regulation 10(4). If, on the other hand, she did not accept that the claimant had not received notice of the hearing, she failed to explain how she had been able to reach that conclusion. Mr James did not attempt to defend the decision but correctly pointed out that there was no right of appeal against it (see regulation 11(3)). Having failed in his attempt to have the decision of the first tribunal set aside, the claimant applied for leave to appeal against that decision. The application was refused by the chairman but was renewed to a Commissioner who granted leave.

3. The Secretary of State opposes the appeal. In the written submission, it was argued that non-receipt of a notice properly sent did not invalidate proceedings and that the tribunal had not breached the rules of natural justice. Those propositions were supported by reference to R(SB) 55/83. I accept that non-receipt of a notice of hearing does not invalidate proceedings before a tribunal in the sense of rendering the decision of the tribunal a nullity. However, I regret that I do not agree with the Commissioner's conclusion that non-receipt of a notice cannot give rise to a breach of the rules of natural justice in circumstances where a party is thereby deprived of the opportunity of attending a hearing and making submissions or giving evidence at the hearing.

4. In R(SB) 19/83 it was held to be the duty of a tribunal to satisfy itself that a claimant who did not attend had properly been sent the notice of hearing. It is not in dispute that that was done in the present case. In the same case, the Commissioner also said that any complaint by a claimant that he has not received notice of a hearing should be referred to a tribunal for possible setting aside under a forerunner of regulation 10 of the 1995 Regulations. I respectfully agree that setting aside is the most appropriate remedy, but the Commissioner did not say that that was the *only* remedy and, indeed, he allowed the claimant's appeal on the ground that there was no evidence that the notice of hearing had ever been posted. In R(SB) 55/83, however, the Commissioner held that, where a notice of hearing was posted but not received, there was not only no breach of the breach of the procedural regulations but also that there was no breach of the rules of natural justice and that the only remedy for a claimant was an application for setting aside under what became regulation 10.

5. He considered a forerunner of regulation 1(3)(b) of the Social Security (Adjudication) Regulations 1995 which had the effect in the present case that any notice of hearing sent by post to the claimant's last known address was to "be treated as having been ... sent on the day that it was posted". In response to a suggestion by the solicitor for the benefit officer that non-receipt of the notice might nonetheless give rise to a breach of the rules of natural justice, the Commissioner said:

> "The difficulty about this approach is that, in my judgment, the concept of natural justice has to be viewed in the context of the particular proceedings in question which in the present case means the supplementary benefit legislation. In the course of a year, there are hundreds of thousands of claims and a proportion of these are the subject matter of appeal. Necessarily, there has to be a considerable bureaucracy to implement the system and it is desirable that it should be managed with the maximum economy. The instruments which govern its operation are the statutory enactments authorised by Parliament for this purpose. There is nothing intrinsically repellent to natural justice if such enactments provide that proof of the sending of a notice shall be conclusive. Undoubtedly, there will be cases where, notwithstanding that the notice was properly posted, it was never received by the addressee. However, this is, in my view a legitimate concession to the need to run the scheme with the maximum economy. All forms of justice have to be obtained at a price, and if Parliament has decreed that the cost of investigating the non-receipt is too high, so be it! At the end of the day the supplementary benefit scheme is not something to which there is a divine right; it is nothing more than an arbitrary compromise (sanctioned by Parliament) between the demand for benefits on the one hand and the availability of public funds to finance it on the other."

The Commissioner was, of course, right to say that supplementary benefit was not a divine right but was merely a statutory right subject to the limitations imposed by the legislation, but it does not follow that ordinary principles of administrative law have no application. The Commissioner's reasoning does not, in my respectful view, explain why there was no breach of the rules of natural justice in the case before him. It might be thought to explain that such a breach had been made lawful but that is another matter and requires further examination.

6. The Commissioner also relied on the approach of the Court of Appeal in *A/S Cathrineholm v. Norequipment Trading Ltd* [1972] 2 Q.B. 314, where it was held that non-receipt of a writ properly served by post did not entitle a defendant to have a judgment that had been signed in default of appearance set aside on appeal *ex debito justitiae*. The remedy in such a case, it was held, was an application under R.S.C. Ord. 13, r. 9 for judgment to be set aside on the payment of the costs thrown away. The Commissioner noted that the Court of Appeal had not relied on the concept of natural justice and he said that in social security cases claimants could apply for setting aside under what later became regulation 10 of the 1995 Regulations

7. Before I consider those points further, it is convenient to refer to *Regina v. Secretary of State for the Home Department, Ex parte Saleem* (*The Times*, June 22, 2000). In that case, the Court of Appeal held to be *ultra vires* a rule similar to regulation 1(3)(b) of the 1995 Regulations to the extent to which it purported to determine conclusively the moment at which an asylum seeker received notice of an adjudicator's determination for the purpose of starting the five-day period for applying for leave to appeal. It was held that the Secretary of State was not entitled to make a rule that had the effect of depriving an asylum seeker of his right of appeal if a notice of determination went astray in the post, because the rule went further than was reasonably necessary to secure the just, timely and effective disposal of appeals.

8. Mr James argued that *Saleem* was distinguishable from the present case because the regulation 10 of the 1995 Regulations provided an adequate remedy if notice of a hearing went astray, so that regulation 1(3)(b) did not have the unreasonable effect that the rule being considered in that case had had. He submitted that I should follow the approach taken by the Commissioner in R(SB) 55/83 and should ignore the fact that in this particular case the claimant's application for a setting aside had not resulted in a satisfactory decision. The claimant's remedy was, he submitted, an application for judicial review of the full-time chairman's decision.

9. I accept that *Saleem* is distinguishable from the present case because the statutory scheme is different. On my approach to this case, regulation 1(3)(b) is not *ultra vires*. However, the reasoning in *Saleem* supports my view that R(SB) 55/83 was wrongly decided.

10. As I have already indicated, I do not accept that there is no breach of the rules of natural justice in a case where a person does not receive actual notice of a hearing. The consequence of the claimant in the present case not receiving notice of the hearing before the tribunal was that he was unable to put his case as he had expected and so the tribunal did not consider what he had to say. The fact that the tribunal were unaware that the claimant had not received the notice is immaterial because the question is not whether *they* knowingly erred but whether their *decision* was reached in circumstances contrary to the rules of natural justice. As the claimant's case was not heard, through no fault of his own, there was, in my view, a clear, albeit inadvertent, breach of the rules of natural justice. *Catherineholm* is not authority to the contrary. Not only were the defendants at fault in that case because they had not given proper notice of the change of their registered office, but the case was not decided on the basis that there had been no breach of the rules of natural justice. The Court of Appeal were concerned only with the proper procedure to be followed where a writ had not been received.

11. It appears clear from *Saleem* that regulation 1(3)(b) of the 1995 Regulations would be *ultra vires* if it permitted a breach of natural justice without there being an adequate remedy. I accept Mr James' submission that the implication of regulation 1(3)(b) is that the claimant is deemed to have received what was sent. For that reason, regulation 10(5) specifically disapplies regulation 1(3)(b) for the purposes of regulation 10(1)(a). However, is deemed receipt under regulation 1(3)(b) to be equated to actual receipt for the purpose of considering whether there has been a breach of the rules of natural justice ? I do not consider it is, because the concept of natural justice is concerned with real fairness – fair play in action - and deemed receipt of notice of a hearing simply does not have the same practical effect as actual receipt. I do not accept the argument loosely based on administrative convenience that appears to be the main ground of the decision in R(SB) 55/83. The present case concerns only a few days' benefit but some cases involve thousands of pounds and the Commissioner's approach in that case appears wholly at odds with the approach of the Court of Appeal in *Saleem*. This means that regulation 1(3)(b) does not of itself prevent a claimant from having a decision set aside on appeal to a Commissioner on the ground that it is erroneous in point of law because it was made in breach of the rules of natural justice.

12. What, then, of the argument that setting aside provides an adequate and exclusive remedy ? In *Saleem*, Roch LJ said that section 20(1) of the Immigration Act 1971 provided that any party to an appeal to an adjudicator might, if dissatisfied with his determination, appeal to the appeal tribunal and that that presupposed that the party had had notice of the adjudicator's determination. The right of appeal was a fundamental or basic right akin to the right of unimpeded access to a court and it followed that any infringement of that right must be either expressly authorised by Act of Parliament or arise by necessary implication from such an Act. It seems to me that the same approach applies in the context of the present case. Section 23 of the Social Security Administration Act 1992 provided that a party to proceedings relating to incapacity benefit before a social security appeal tribunal had a right of appeal to a Commissioner against the decision of the tribunal. There was nothing in the Act permitting the Secretary of State to limit that right of appeal by regulations. It follows that the provision in regulations of a right to apply for setting aside cannot limit the right of appeal to the Commissioner. It might, perhaps, be otherwise if there were a right of appeal against a refusal to set aside a decision. However, regulation 11(3) specifically excluded such a right and I presume that the thinking behind that provision was precisely that the appropriate remedy would always be an appeal against the original decision. The existence of a theoretical right to apply to the High Court for judicial review of a tribunal's refusal to set aside a decision of another tribunal is not to be considered as comparable to a right of appeal to a Commissioner, given how much less accessible the High Court is for claimants, and I also doubt that, if it were more accessible, the High Court would welcome the extra work. *Cathrineholm*, on which the Commissioner relied in R(SB) 55/83, is to be distinguished because, not only is the factual and statutory context of the High Court different from that of a social security appeal tribunal, but also there was a right of appeal against a refusal to set aside a decision.

13. In my view, the claimant in the present case is entitled to challenge the tribunal's' decision by appealing to a Commissioner. I see no reason to doubt his

assertion that he did not receive notice of the hearing before the tribunal. In those circumstances, there was a breach of the rules of natural justice rendering the tribunal's decision erroneous in point of law.

14. None of what I have said is intended to undermine the advice given in R(SB) 19/83 that an application for setting aside is the appropriate procedure when a decision has been made at a hearing of which a party had no notice. Such an application is intended to provide a more expeditious remedy than an appeal but, if for any reason, it is ineffective, the right of appeal is not lost.

15. I have considered whether to give a final decision in this case rather than refer it to another tribunal. In view of the claimant's absence, such a decision would probably have been unfavourable to him. However, he is not in particularly good health, all the submissions on this appeal have been devoted to legal issues and he may not have appreciated that I could determine any factual issue on which he might have made a useful submission. In all the circumstances, I consider that I should refer the case to another tribunal.

16. I allow the claimant's appeal. I set aside the decision of the Manchester social security appeal tribunal dated 10 July 1998 and I refer the case for determination by an appeal tribunal, constituted under regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 by panel members who were not members of the tribunal whose decision I have set aside.

M. ROWLAND
Commissioner
22 February 2001