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CIS/3299/1997
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DECISIONS OF THE COMMISSIONER

1. I heard these two appeals together because they both raise the question 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. At the same time, I also heard two applications for leave to appeal against decisions of disability appeal tribunals (CDLA/5424/97 and CDLA/642/98) and one application for leave to appeal against a decision of a medical appeal tribunal (CI/33/98). My decisions on those applications are given separately. None of the claimants appeared or was represented at the hearing before me. The adjudication officers and the Secretary of State, who was the respondent in CI/33/98, were represented by Ms Rachel Perez of the Office of the Solicitor to the Departments of Social Security and Health. I have been greatly assisted by Ms Perez's clear submissions.

2. Before I turn to the individual cases, I shall consider the jurisdictional issues in general terms. They arise out of amendments made in 1996 to the Social Security (Adjudication) Regulations 1995 (hereinafter "the 1995 Regulations") and further amendments made in 1997 to both those Regulations and to the Social Security Commissioners Procedure Regulations 1987 (hereinafter "the 1987 Regulations"). These appeals are brought against decisions of social security appeal tribunals and I shall refer only to the provisions relevant to those tribunals, but the provisions relevant to disability appeal tribunals and medical appeal tribunals are indistinguishable.

The 1996 Amendments

3. When the 1995 Regulations first came into force, regulation 23(2)(b) required that the record of every tribunal's decision should include a statement of the tribunal's findings and reasons. There was no express statutory duty imposed on a chairman to make a record of the proceedings before the tribunal but it was the general practice to do so and it had been held in CSSB/212/87 that a decision might be erroneous in point of law if there were no record of proceedings. A copy of the record of the proceedings was normally issued to the parties as part of the record of decision. By regulation 2 of the Social Security (Adjudication) and Child Support Amendment Regulations 1996, the 1995 Regulations were amended from 28 February 1996 by the insertion of regulation 23(4), requiring a chairman to make a record of proceedings and requiring a clerk to keep it for 18 months and supply a copy for the parties on request. By regulations 11 of the Social Security (Adjudication) and Child Support Amendment (No. 2) Regulations 1996, the 1995 Regulations were further amended from 21 October 1996 to remove the general duty to include in the record of the tribunal's decision a statement of the tribunal's findings and reasons. As amended on the two occasions, regulation 23(2) to (4) of the 1995 Regulations provides:-

> "(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 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."

A statement of the tribunal's reasons for their decision and their findings of fact within regulation 23(3A) is known as a "full statement of the tribunal's decision" (see regulation 2(2) of the 1995 Regulations and regulation 2 of the 1987 Regulations) and that is the term I shall generally use.

4. In considering the effects of there being no full statement of the tribunal's decision if a party wishes to appeal, it is important to bear in mind that an appeal to a Commissioner under section 23(1) of the Social Security Administration Act 1992 lies only on a point of law. Any attempt to list the circumstances in which an error of law may be revealed is bound to be incomplete and at the same time to identify overlapping categories but the following list is fairly conventional and will be sufficient for the purposes of this decision. An error of law may be revealed if a tribunal (a) have recorded a false proposition of law in their reasons for decision, (b) have reached a decision that is supported by no evidence, (c) have found facts such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal, (d) have taken into account matters which they ought

not to have taken into account, (e) have refused to take into account or neglected to take into account matters which they ought to have taken into account, (f) have failed or neglected to ask material questions in pursuance of their duty to act inquisitorially (see paragraph 31 below). A decision will also be erroneous in point of law if (g) there has been a breach of the rules of natural justice or (h) there has been a *material* breach of the other procedural rules, statutory and implied, that must be followed by tribunals, chairmen and clerks.

5. It will be apparent from a consideration of that list that an appeal may be brought under head (b) or (f) without there being any indication whatsoever of the tribunal's findings of fact or reasoning, although it will usually be necessary for the Commissioner to have a copy of the record of proceedings. There are also many circumstances in which an appeal could be brought under head (g) or (h) without there being any indication of the tribunal's findings or reasoning. However, it is impossible to bring an appeal under head (a), (c), (d) or (e) without there being at least some indication of the tribunal's findings and reasoning.

6. 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 of 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. There may be cases where the circumstances are such that a chairman could not reasonably refuse reasons even though the request was late but I do not need to consider here whether there are such cases or, if so, what the consequences would be of a refusal to give reasons in such a case. In most cases there can be no doubt that a tribunal chairman is perfectly entitled to take the view that reasons should not usually be given if requested more than 21 days after the decision. It is obvious that reasons should be given quickly. However, the power conferred on a chairman by the broad terms of regulation 23(3A)(b) to give reasons notwithstanding that more than 21 days have elapsed since the decision is one that must be exercised judicially. A chairman will presumably have regard to any compelling explanation advanced for the delay in the request and may, in any event, more readily give reasons on a late request if the decision turned entirely on a short arguable point of law that cannot be identified from the "summary of grounds" than if the case turned on the evaluation of evidence.

7. It is the commendable practice of chairmen to give a short statement of reasons for a decision under the heading "summary of grounds" when issuing any decision notice but such a summary is not to be confused with a full statement of the tribunal's decision. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478, Megaw J. said:-

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

That applies whenever a document purporting to be a full statement of the tribunal's findings and reasoning is issued under regulation 23(3A), whether or not it is issued pursuant to the duty imposed by regulation 23(3C), but I do not consider that a "summary of grounds" can be challenged on the ground of inadequacy because, in my view, such a summary cannot be regarded as purporting to be a *full* statement. In CI/33/98, it was submitted on behalf of the

claimant that the refusal to issue full reasons because the request was made after 21 days suggested that the chairmen believed that the "summary of reasons" amounted to "proper, adequate reasons". I do not accept that submission. A chairman has a broad discretionary power to refuse to supply full reasons if the request is late.

8. On the other hand, a "summary of grounds" is not to be disregarded. The matters contained in it are reasons for the tribunal's decision, notwithstanding the fact that they are not intended to be a complete account of the reasoning. Therefore, if the "summary of grounds" in fact contains everything that the parties could properly have expected from a full statement of the tribunal's decision, as is often the case, a failure of a chairman to issue a document formally identified as a full statement when there is a duty to provide a full statement, will not, in my view, render the decision of the tribunal erroneous in point of law. Equally, even a very brief "summary of grounds" may give a sufficient indication of the tribunal's reasoning to enable an appeal to be brought under heads (a), (c), (d) or (e) of the possible grounds of appeal on a point of law I have identified in paragraph 4 above. Although such summary reasons cannot be criticised for inadequacy and a Commissioner is not entitled to infer that a matter has not been considered from the mere fact that it is not mentioned in those summary reasons, there is no reason at all why a plainly bad reason given in the summary should not be relied upon by an appellant as a ground upon which the tribunal's decision may be set aside on appeal.

9. It is therefore clear that, in practice, a person may be able to show an error of law without there being any full statement of the tribunal's decision, either because the point of law is justiciable without there being any evidence of the tribunal's reasoning or because sufficient evidence of their reasoning can be gleaned from the "summary of grounds". It cannot be said that the 1996 amendments in any way reduced the Commissioners' jurisdiction to hear appeals, although they may have reduced the number of justiciable appeals because some would-be appellants have failed to ask for full statements of tribunals' decisions soon enough and are therefore restricted as to the points they can take.

The 1997 Amendments

10. The suggestion that neither a tribunal nor a Commissioner has jurisdiction to entertain an application for leave to appeal to a Commissioner arises from further amendments made to the 1995 Regulations and to the 1987 Regulations with effect from 28 April 1997 by the Social Security (Adjudication) and Commissioners Procedure and Child Support Commissioners (Procedure) Amendment Regulations 1997. Plainly, if the Commissioners who granted leave to appeal in the cases before me had no power to do so, I can have no jurisdiction to consider these appeals.

11. As amended by regulation 3 of the 1997 Regulations, regulation 24(1) of the 1995 Regulations provides:-

> "(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."

By regulation 6 of the 1997 Regulations, Schedule 2 to the 1995 Regulations was amended so that the three month time limit for making an application to a chairman for leave to appeal to a Commissioner, which had previously run from the date when notice of the tribunal's decision was given to the applicant, now runs from "the date when a copy of the full statement of the tribunal's decision was given or sent to the applicant". The obvious purpose of this amendment was to prevent an applicant from being prejudiced by any delay between a request for a full statement of a tribunal's decision being made and the full statement being issued.

12. By regulation 8 of the 1997 Regulations, regulation 4 of the 1987 Regulations was also amended with effect from 28 April 1997 so as to provide that an application to a Commissioner for leave to appeal to a Commissioner should have annexed to it a copy of the full statement of the tribunal's decision. No amendment was made to regulation 3 of the 1987 Regulations. So far as is material, regulations 3 and 4 of the 1987 Regulations now provide:-

"3. - (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.

(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.

(3) An application for leave to appeal under paragraph (1) above must be made within 42 days from the date on which notice in writing of the refusal of leave to appeal was given to the applicant.

(4) ...

(5) A Commissioner may accept and proceed to consider and determine an application for leave to appeal under paragraphs (1) and (4) above notwithstanding that the period specified for making the application has expired, if for special reasons he thinks fit.

4. - (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) an address for services 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) .... ,

the notice of application for leave to appeal shall, in addition 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."

The unconventional punctuation and use of capital letters are in the legislation. By regulation 2, "the specified time" means the time specified under the 1995 Regulations for applying to a chairman for leave to appeal to a Commissioner.

13. In CI/33/98, the Secretary of State's representative initially submitted that the mere absence of a full statement of the tribunal's decision had the effect "that the purported application for leave to appeal to the Commissioner cannot be valid as it does not comply in full with the requirements of regulation 4(1) of the Social Security Commissioners Procedure Regulations 1987 (as amended)". Ms Perez resiled from that submission and submitted that the 1997 amendments did not remove the jurisdiction of either a chairman of a tribunal or a Commissioner to entertain an application for leave to appeal to a Commissioner in a case where no full statement of the tribunal's decision had been issued.

14. Ms Perez acknowledged that the difficulty facing her with respect to a chairman's power to consider an application in the absence of a full statement of the tribunal's decision lies in the new time limit in Schedule 2 to the amended 1995 Regulations. She submitted that, if there was no full statement of the tribunal's decision, there was either no time limit for making an application to a chairman for leave to appeal to a Commissioner or else the time limit was either three months or three months and 21 days from the date of the tribunal's decision. However, it is perfectly clear from regulation 3(3) of the 1995 Regulations and from regulation 3(1) and (2) of the 1987 Regulations that a chairman has no power to admit an application outside the time limit imposed by Schedule 2 to the 1995 Regulations and has no power to extend that time limit. The Schedule must be construed strictly. I know of no

canon of construction that would allow me to, in effect, rewrite Schedule 2 of the 1995 Regulations in the manner Ms Perez suggested.

15. My view as to that is reinforced by having regard to the position under the legislation governing appeals from industrial tribunals to the Employment Appeal Tribunal which I imagine was the model for both the second 1996 amendment and the 1997 amendment to the 1995 Regulations. Where an industrial tribunal have given only summary reasons for a decision, there is a right to request extended reasons within 21 days of the summary reasons being sent to the parties. By rule 3(2) of the Employment Appeal Tribunal Rules 1993 (formerly rule 3(1A) of the 1980 Rules), the time for appealing to the Employment Appeal Tribunal (no leave is required) is 42 days from the date when the extended reasons were sent and, by rule 3(1)(c) (formerly rule 3(1)(c) of the 1980 Rules) a copy of the extended written reasons must be served with the notice of appeal. However, rule 39(3) (formerly rule 32(3) of the 1980 Rules) provides that the power to vary the requirements of the Rules extends "to authorising the institution of an appeal notwithstanding that the period prescribed in rule 3(2) may not have commenced". In *William Hill Organisation Limited v Gavas* [1990] I.R.L.R. 488, 490 (C.A.), decided under the 1980 Rules, Lord Donaldson of Lymington M.R. said:-

> "The singular relevance of rule 32(3) is that the time for an appeal under rule 3(1A) is 42 days from the date of full reasons, so that rule 32(3) clearly contemplates that there will be circumstances in which it would be appropriate for the Employment Appeal Tribunal to hear an appeal without full reasons."

In *Wolesley Centers Limited v Simmons* [1994] I.C.R. 503, the Employment Appeal Tribunal admitted such an appeal, saying, at page 507, that they agreed with counsel for the appellant:-

> ".... that there is no general principle that the absence of full reasons makes an appeal non-justiciable, and that the effect of non-compliance with rule 3(1)(c) depends on the circumstances of each case."

However, it is implicit in those decisions that, in the absence of what is now rule 39(3), it would have been impossible for the Employment Appeal Tribunal to admit the appeal because, inter alia, it would not have been brought within the prescribed time. There is no equivalent of rule 39(3) of the 1993 Rules in the 1995 Regulations and, in those circumstances, I do not consider that any chairman of a social security appeal tribunal has jurisdiction to entertain an application for leave to appeal to a Commissioner in a case where no full statement of the tribunal's decision has been given. In such a case, "the specified time" never starts to run.

16. 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 effect, it contains an equivalent to rule 39(3) of the Employment Appeal Tribunal Rules 1993.

17. 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 would infer that the legislators intended to remove from Commissioners the power that they undoubtedly had between October 1996 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. Therefore, I do not consider that the provisions of regulation 4 of the 1987 Regulations, as amended, should be read as implying a limit to the power of a Commissioner to admit an application under regulation 3(2). In my view, those provisions are merely directory and could be waived by a Commissioner even if there were no express power to waive irregularities conferred by regulation 21. Like the Employment Appeal Tribunal in *Simmons*, I consider that a failure to comply with such procedural requirements does not invalidate the application but has practical consequences that depend on the circumstances of each case. It may delay consideration of the application (while the necessary particulars are obtained) or it may make the application less likely to succeed but it does not prevent a Commissioner from considering the application at all.

18. It is possible that the draftsman overlooked the possibility of a party having an arguable case for applying for leave to appeal without having first obtained a full statement of the tribunal's decision but, whether wittingly or not, it is my view that the consequence of following the model of appeals from industrial tribunals has been that a Commissioner is placed in the same position as the Employment Appeal Tribunal and is able to grant leave to appeal in a case which is justiciable, i.e., where there is sufficient material upon which it can be determined, notwithstanding the lack of a full statement of the tribunal's decision.

19. Ms Perez pointed out that one of the consequences of that approach is that there is no clear time limit within which an application to a Commissioner must be made in a case where there is no full statement of the tribunal's decision. It may therefore be helpful if I indicate that, if an applicant has failed to apply in time for a full statement of the tribunal's decision so that the "specified time" has never started to run, I will usually find special reasons for admitting the application from the facts that the applicant could not have applied within the "specified time" and that there has been no undue delay. If there has been undue delay, I will require rather more by way of special reasons. I will judge the question whether there has been undue delay by reference to the statutory time limits for applications and appeals. Thus, if the applicant has applied to the chairman for a full statement of the tribunal's decision or for leave to appeal within three months of the date on which the original notice of decision was issued, I will usually admit the application for leave if it has been made within six weeks of the chairman refusing to supply a full statement or refusing leave. If no application has been made to the chairman, I will usually admit the application for leave if the application has been made within three months of the original notice of decision being issued.

20. Ms Perez submitted that a Commissioner should not find special reasons for admitting an application for leave to appeal for consideration and determination in a case where there

was no full statement of a tribunal's decision unless it was *clear* that the tribunal had erred in law. I accept that the proportion of successful applications is likely to be far smaller among cases where there is no full statement of the tribunal's decision than among cases where there is a full statement. If there is a full statement of the tribunal's decision, a Commissioner is likely to grant leave to appeal if it is arguable that the applicant will be able to show that the tribunal *may have* erred in their approach to the case. That is because it would be arguable that either the tribunal did err in their approach or, in the alternative, that the reasons recorded for their decision were inadequate because the chairman left it unclear whether there was such an error and, in either event, the decision would be erroneous in point of law. If there is no full statement of the tribunal's decision and there was no duty to provide one, a Commissioner is likely to grant leave to appeal only if it is arguable that the applicant will be able to show that the tribunal *have* erred in their approach. The alternative argument that the tribunal chairman has recorded an inadequate statement of reasons for their decision would not be open to the applicant.

21. However, it seems to me that those considerations go to the question whether an application should be allowed rather than to the question whether it should be accepted for consideration. I accept that the merits of an application are relevant to the question of whether there are special reasons for accepting a late application for consideration (see R(M) 1/87), but, where no full statement of the tribunal's decision has been issued and where there has been no undue delay, I would always waive any irregularity due to the failure strictly to comply with the requirements of regulation 4 of the 1987 Regulations and would generally admit the application for consideration under regulation 3(2). In practical terms, my approach may amount to much the same thing as Ms Perez's, but I prefer to reject a hopeless application on its merits rather than on procedural grounds.

22. In both the cases before me, leave to appeal was granted by a Commissioner. I am satisfied that the Commissioners had jurisdiction to grant leave and that I have jurisdiction to consider the appeals. I will consider each of the cases in turn.

CIS/3299/1997

23. This is an appeal, brought by the claimant with the leave of Mr Commissioner Goodman, against a decision of the Harrow social security appeal tribunal dated 11 April 1997. The tribunal's decision notice was in the following terms:-

> **"Unanimous decision of the tribunal**
>
> [The claimant] is not entitled to income support because he does not satisfy the conditions of entitlement in being in the exempt categories.
>
> **Summary of grounds**
>
> [The claimant's wife] is in receipt of mobility component only and to fall into the exempt category in regulation 35 she must be in receipt of the care component at the relevant rate. [The claimant] is therefore not within the provisions of reg. 35."

The claimant's application for leave to appeal was received on 18 April 1997 and was refused by the chairman on 23 May 1997 without, so far as I can see, any consideration being given to the issue of a full statement of the tribunal's decision.

24. The claimant was self-employed and he lived with his wife who was disabled and in receipt of both severe disablement allowance and disability living allowance. He himself suffered from epilepsy and said that he was therefore unable to take paid employed earner's employment. He was in receipt of family credit until July 1996, by which time his son had left school. He wished to claim disability working allowance but was told that he could not do so as he had not been entitled to a qualifying benefit. Income support is one such benefit. On 16 August 1996, he applied for income support stating:-

> "Due to my condition (epilepsy) I am forced to be self employed. However, recently due to the demands of my wife's condition, lack of work, and clients refusing to pay - I am working *virtually unpaid* and last week I worked less than 16 hours!"

The claimant appears to have been given information about income support, which told him that a claimant was entitled to income support if:-

> "You or your partner have a mental or physical disability which means that you (or your partner) are only able to earn 75% or less of what a person without that disability would be expected to earn."

There had been some discussion between the claimant and the Benefits Agency about what he might do and, on 23 September 1996, he wrote:-

> "I personally suffer from epilepsy which prevents me from obtaining any decent job - let alone 75% less!"

However, by then, the claimant's claim, which was treated as made on 2 July 1996, had been rejected on 9 September 1996 on the ground that the claimant was neither available for work nor exempt from the requirement that he should be available for work.

25. In due course, he appealed against the adjudication officer's decision. The adjudication officer's submission outlined the circumstances in which a person is not required to be available for employment and set out the whole of Schedule 1 to the Income Support (General) Regulations 1987. The adjudication officer submitted:-

> "The claimant has not registered as unemployed at the Employment Services Jobcentre and therefore cannot be treated as available for work. He does not fall into any category in Schedule 1 and is therefore not excluded from the requirement to be available for work. The claimant does not satisfy the qualifying conditions for entitlement to Income Support. I ask the tribunal to confirm the decision."

In the adjudication officer's summary of facts, it was recorded:-

> "5.3 The claimant is an epileptic and states that he is unable to take up employment because of this.

5.4 The claimant states that he is required to stay and look after his wife.

5.5 The claimant has been advised on several occasions that in order to qualify for Income Support he has to either be available for work and register at an Employment Services Jobcentre or submit medical certificates and claim as sick or his wife can make a claim instead of him. He has also been advised that details of his hours of work and his self employed accounts will have to be seen in order to determine any entitlement to benefit."

For reasons that are obscure, but which seem to have had something to do with a dispute between the claimant and the London Borough of Harrow in whose premises the tribunal was to sit, the claimant decided not to attend the hearing before the tribunal, but he put in a written submission which contained the following comments on the adjudication officer's "summary of facts":-

"5-3 Due to my condition and age, I have discovered it is impossible for me to gain employment paying the average weekly wage, or less.

5-4 My wife requires care during the day. That is why she is in receipt of Mobility and Severe Disablement Allowances: re: section 37ZB(3) surely takes into account "the care component" of the Severe Disablement Allowance? (Persons caring for another Person)

5-5 The DHSS has *never* mentioned that my wife can make a claim for Income Support (instead of myself)
Would this come under...Persons Incapable of Work Schedule (1) section 5?
Also, I can honestly state that I have *never* been requested/asked to supply details of work, self employed accounts... '*in order to determine any entitlement to benefit*'
Please Note these would be the same details/documents that have been accepted by the Inland Revenue, Council Housing Benefit and prior to this claim: Family Credit."

26. In his application to the chairman for leave to appeal against the tribunal's decision, the claimant submitted that the adjudication officer and the tribunal had both ignored two components of his claim: his limited income and his medical condition. The adjudication officer now concerned with this case supported the claimant's appeal, submitting:-

"6. The tribunal have only considered the condition of entitlement in paragraph 4 of Schedule 1 [to the Income Support (General) Regulations 1987]. For this reason they have erred in law. The decision that the claimant's entitlement was subject to the condition that he was available is flawed. The tribunal were firstly required to see whether the claimant might satisfy another provision exempting him from the availability requirement. The tribunal were required to consider whether **due to his disability** his working hours and earnings satisfied regulation 6(a) of the General Regs and therefore exempted him from the requirement to be available. The claimant stated that his working capacity was affected by his epilepsy. The tribunal should have considered whether the provisions of Schedule 1, paragraph 6 applied to the claimant. If this applied the claimant is not treated as being in remunerative work. In

order to satisfy the provision the claimant's earnings must be reduced to 75 per cent. or less of what a person without that disability and working the same number of hours would reasonably be expected to earn in that employment or in comparable employment in that area or his number of hours of work must be 75 per cent. or less of what a person without that disability would reasonably be expected to undertake in that employment in that area. I submit that this applies to employed earner's employment and to self-employment. The claimant would be required to furnish evidence both of his earnings and his hours so that a determination on the facts could be made around regulation 6(a) of the General Regs.

7. If the claimant satisfied this prescribed category he would still be required to provide evidence of his income (Section 124(1)(b) of the C&B Act). Any income would fall to be taken into account and if his income was greater than his applicable amount he would not be entitled to income support.

8. In conclusion I submit that the tribunal have not given sufficient reasons and findings of fact in support of their decision and have therefore breached regulation 23(2)(b) of the Adjudication Regs."

27. Ms Perez conceded that the adjudication officer had overlooked the fact that regulation 23(2)(b) of the 1995 Regulations had been removed in the 1996 amendments some six months before the tribunal gave their decision and some 18 months before the adjudication officer wrote his submission. She accepted that, in a case where there is no full statement of the tribunal's decision it simply is not arguable that the tribunal chairman has recorded an inadequate statement of the tribunal's findings and reasoning, unless it can be shown that the chairman was in breach of a duty to give a full statement of the tribunal's decision following a request. Nevertheless, she supported the claimant's appeal on broadly the grounds set out in paragraph 6 of the adjudication officer's submission.

28. The issue before the tribunal was whether or not the claimant was exempt from the requirement to be available for work and, save for immaterial exceptions, the grounds upon which a person may be exempt from that requirement are to be found in Schedule 1 to the Income Support (General) Regulations 1987. Like the adjudication officer, Ms Perez submitted that the tribunal had probably had regard to paragraph 4 of that Schedule. The tribunal did not refer to that paragraph and instead made a reference to "regulation 35". Ms Perez could think of no relevant regulation 35 but she submitted that the tribunal meant to refer to section 35 of the Social Security Act 1975. Paragraph 4(1)(a)(i) of Schedule 1 contains a reference to both section 35 and section 37ZB(3) of that Act. The chairman recorded the adjudication officer as having referred to "regulation 35" and I agree with Ms Perez that it is probable that the chairman misunderstood the adjudication officer's statutory reference. It is clear that what the chairman was trying to explain was that it was only the highest or middle rate of the *care* component of disability living allowance - and not the *mobility* component - that fell within the scope of paragraph 4 and that the care component mentioned in that paragraph is an element of disability living allowance and not of severe disablement allowance as the claimant had suggested in his written submission. In correspondence before the hearing, the claimant had accepted that his wife was in receipt only of the mobility component of disability living allowance and therefore it is clear that he could not succeed under paragraph 4 of Schedule 1 to the Income Support (General) Regulations

1987. Therefore, despite the inaccurate statutory reference, I agree with Ms Perez that it cannot be said that the tribunal's "summary of grounds" reveals an error of law.

29. A person who works, even on a self-employed basis, cannot be regarded as incapable work for the purposes of paragraph 5 of that Schedule, save in circumstances that do not arise here. The only other provision of Schedule 1 that there was any reason to suppose might apply to the claimant's case was paragraph 6 which provides that there shall be exempted from the requirement to be available for work:-

> "A person to whom regulation 6(a) (persons not treated as engaged in remunerative work) applies."

Regulation 6(a) applies to a person who:-

> ".... is mentally or physically disabled, and by reason of that disability -
>
> (i) his earnings are reduced to 75 per cent. or less of what a person without that disability and working the same number of hours would reasonably be expected to earn in that employment or in comparable employment in that area; or
>
> (ii) his number of hours of work are 75 per cent. or less of what a person without that disability would reasonably be expected to undertake in that employment or in comparable employment in that area."

The question on this appeal is whether or not there is any error of law in the tribunal's decision arising out of their failure to make any specific reference to paragraph 6 of Schedule 1 to the Income Support (General) Regulations 1987.

30. I cannot infer from the lack of any reference to paragraph 6 in the "summary of grounds" given by the chairman of the tribunal that the tribunal did not have paragraph 6 in mind. Quite apart from the fact that a "summary of grounds" cannot be criticised for inadequacy, the chairman might have taken the view that, there being no clear evidence that the claimant satisfied the provision, there was no more need to mention it than there was to mention, say, paragraph 1 which refers to lone parents and obviously could not relate to the present case. Nor can it be said that the tribunal's decision was one that was not supported by the evidence. There was no adequate evidence that paragraph 6 of Schedule 1 did apply to the claimant and, as the burden of proof was on him, the lack of evidence would naturally lead to the determination of the point against him. The best evidence was in the claimant's letter of 23 September 1996 but even that was an insufficient basis for concluding that his circumstances did fall within paragraph 6 of Schedule 1.

31. There does, however, arise the question whether the tribunal erred in law by failing to act inquisitorially. In *Regina v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 Q.B. 456 (C.A.) (also reported as an appendix to R(I) 4/65), Diplock L.J. said:-

> "In dealing with appeals of these kinds, the insurance tribunal, namely the local appeal tribunal or the Commissioner or Deputy Commissioner as the case may be, is

exercising quasi-judicial functions, for at this stage it has conflicting contentions before it, those of the claimant and those of the insurance officer who has disallowed the whole or part of the claim. But there is an important distinction between the functions of an insurance tribunal and those of an ordinary court of law, or even those of an arbitrator. As was pointed out by the Divisional Court in *Regina v Medical Appeal Tribunal (North Midland Region), ex parte Hubble* [1958] 2 Q.B. 228, 240, a claim by an insured person to benefit is not strictly analogous to a *lis inter partes*. Insurance tribunals form part of the statutory machinery for investigating claims, that is, for ascertaining whether the claimant has satisfied the statutory requirements which entitle him to be paid benefit out of the fund. In such an investigation neither the insurance officer nor the Minister (both of whom are entitled to be represented before the insurance tribunal) is a party adverse to the claimant. If an analogy be sought in ordinary litigious procedure, their functions most closely resemble those of *amici curiae*. The insurance tribunal is not restricted to accepting or rejecting the respective contentions of the claimant upon the one hand and of the insurance officer or Minister on the other. It is at liberty to form its own view even though this may not coincide with the contentions of either."

In *Hubble*, the Divisional Court had used the analogy of an inquest rather than an action. It seems to me that there is clearly a duty upon a tribunal to ensure that all relevant questions have been asked of a claimant. It could not be otherwise, given the complexity of social security law and the fact that few claimants have advisors and that many are poorly educated. The asking of questions is largely achieved by ever-more sophisticated claim forms but even the income support claim form, which runs to several pages, cannot ask all possibly relevant questions. Some questions are designed merely to illicit an answer which will reveal whether further questions need be asked later. When a case goes on appeal, it seems to me that a tribunal are not bound to ask questions that have already been asked by the Secretary of State or by an adjudication officer, unless the points have been put in issue, but they are obliged to ask those questions that have not previously been asked but which should have been asked.

32. In the present case, I agree with the adjudication officer now concerned that the claimant had raised, through the information he had given, the serious possibility that paragraph 6 of Schedule 1 to the Income Support (General) Regulations 1987 applied to him, even though he had not provided sufficient information to enable that question to be determined in his favour. The local adjudication officer appears to have overlooked that fact and consequently did not ask questions calculated to elicit the relevant evidence from the claimant. That burden accordingly fell upon the tribunal. However, the tribunal were unable to put the questions to the claimant because he did not appear before them. In those circumstances, the tribunal had only two options: to decide the point against the claimant or to adjourn the proceedings to enable the claimant to provide the relevant information. It seems to me, therefore, that the tribunal may be said to have erred in law in failing to act inquisitorially only if the circumstances were such that they could not reasonably do other than adjourn the proceedings. There may be cases where fairness demands an adjournment but I do not consider that this was one of them. The claimant was not wholly unaware of the relevant issue, even if he did not fully understand it, and, looking at the evidence as a whole, the tribunal would have been entitled to take the view that the likelihood of the claimant satisfying the condition of paragraph 6 of Schedule 1 (or, indeed, some of the further conditions for entitlement to income support that he would have had to satisfy) was not high

and was not sufficient to justify an adjournment, given that he had chosen not to appear before the tribunal. Accordingly, I am not satisfied that there was any error of law arising out of any failure by the tribunal to exercise an inquisitorial role at the hearing.

33. The final ground upon which it could be suggested that the tribunal had erred in law arises out of the failure of the chairman to supply a full statement of the tribunal's decision, notwithstanding the fact that the claimant applied for leave to appeal within 21 days of the decision being given. The question is whether an application for leave to appeal implies a request for a full statement of the tribunal's decision. It is, I believe, now the practice of chairmen to consider any application for leave to appeal made within 21 days of the tribunal's decision being issued as though it were a request for a full statement of the tribunal's decision. That seems to me to be a very desirable practice and, indeed, it seems to me that *every* application for leave to appeal should be treated as a request for a full statement of the tribunal's decision although, of course, there will seldom be any obligation on the tribunal chairman to provide such a statement if the implied request is late. More importantly, every request for a full statement of the tribunal's decision should be treated also as a request for a copy of the record of proceedings.

34. Nevertheless, however desirable the practice may be, it is not required in all cases as a matter of law unless either there is a statutory provision expressly to that effect or it is the necessary implication of other statutory provisions. If I had found that no application for leave to appeal to a Commissioner could be entertained by anyone in the absence of a full statement of reasons, I would readily find it to be implied that any application for leave should be treated as a request for a full statement of the tribunal's decision, if such a full statement had not already been issued. However, as a full statement of the tribunal's decision is not always a necessary prerequisite of a successful appeal, I do not consider that every application for leave to appeal must, as a matter of law, be regarded as a request for a full statement of the tribunal's decision.

35. On the other hand, I do not agree with Ms Perez's submission that express words are required for there to be a request for a full statement of the tribunal's decision. Such legalism can bring the administration of justice into disrepute. It is particularly unattractive when it appears to be relied upon by a chairman of an independent tribunal in circumstances in which a disinterested bystander might consider that the chairman was preventing an appeal against a decision to which he or she was a party, although I hasten to add that that would not be a reasonable interpretation in the present case. In my view, there are many cases where the terms of an application for leave to appeal, or the circumstances in which it is made, necessarily imply a request for a full statement of the tribunal's decision and, as I have said, it would be preferable for all applications for leave to be treated as requests for full statements.

36. In the present case, the claimant's application for leave to appeal once again stated that no-one had ever sought details of his income. The explanation for that is that the adjudication officer was satisfied that the claimant was neither available for work nor exempt from the requirement to be available for work and therefore would not be entitled to income support however low his income might have been. However, the adjudication officer had overlooked the relevance of the claimant's income to the consideration of paragraph 6 of Schedule 1 to the Regulations. The claimant also referred again to his epilepsy which he said "together with my age makes finding average to well paid employment impossible" which

again calls for consideration of paragraph 6 of Schedule 1. It seems to me that that application for leave to appeal should have been regarded as a request for reasons dealing with paragraph 6 of Schedule 1.

37. In one sense, it is arguable that the "summary of grounds" did deal with paragraph 6 of Schedule 1. It may have contained an inaccurate statutory reference but, against the background of the submission by the local adjudication officer, the decision notice did make it clear that the tribunal had found that none of the provisions under which a person might be exempted from the requirement to be available for work was satisfied and that that was why his claim had failed. Had the adjudication officer's submission to the tribunal dealt properly with paragraph 6 of Schedule 1, I would have taken the view that the "summary of grounds" contained everything the claimant could properly have expected from a full statement of the tribunal's decision. Not only was there no other decision to which the tribunal could have come on the evidence before them, but it would have been difficult to see what else the chairman could usefully have said in a full statement of the tribunal's decision. However, although the adjudication officer had set out the whole of Schedule 1 in his or her submission to the tribunal, paragraph 6 is unintelligible unless it is read with regulation 6(a) and the terms of the latter provision were not explained anywhere in the submission. In those circumstances, I take the view that it was necessary for full reasons for the tribunal's decision to explain properly that the claimant's evidence was not sufficient to show that he fell within the terms of regulation 6(a) and that the "summary of grounds" cannot be regarded as having been sufficient to constitute full reasons. In other words, the inquisitorial role of the tribunal that must be exercised when an adjudication officer has overlooked a point means not only that the tribunal must ask relevant questions if the claimant attends the hearing but that the chairman must draw the claimant's attention to the overlooked point in the statement of the tribunal's decision if the claimant does not attend the hearing. The claimant had only himself to blame for the dismissal of his appeal because he had decided not to attend the hearing, but there was no reason why he should have been left in ignorance of a matter that might have been relevant to his current and future entitlement to benefit. It would, of course, have been an error of law for the tribunal themselves to have overlooked paragraph 6 of Schedule 1 altogether.

38 I need not consider whether the chairman would have had a duty to draw the claimant's attention to the overlooked point even if the claimant had not implicitly requested a full statement of the tribunal's decision. In this particular case, the tribunal's decision is erroneous in point of law because the claimant had implicitly asked for a full statement of the tribunal's decision within 21 days of the decision being given and no such full statement was provided. The tribunal could not have allowed the claimant's appeal on the evidence before them but it would be unjust if I were to give a decision to the same effect as the tribunal's because the failure of the tribunal chairman to draw the claimant's attention to the terms of regulation 6(a) of the Income Support (General) Regulations 1987 has deprived the claimant of the opportunity of making an effective new claim in May 1997. A new claim made now would entitle the claimant to benefit only for a very limited period. I will therefore refer the case to another tribunal, but the claimant should not assume that he will be successful before that tribunal. The adjudication officer should obtain the necessary information from the claimant and make a new submission to the tribunal, dealing with paragraph 6 of Schedule 1 to the Income Support (General) Regulations 1987.

39. I allow the claimant's appeal. I set aside the decision of the Harrow social security appeal tribunal dated 11 April 1997 and I refer the case to a differently-constituted tribunal for determination.

CIB/4189/1997

40. This is an appeal, brought by the claimant with the leave of Mr Commissioner Sanders, against the decision of the Rochdale social security appeal tribunal dated 7 May 1997, whereby they decided that the claimant did not satisfy the "all work test" from and including 23 January 1997. The chairman gave the following brief "summary of grounds":-

> "The tribunal accept as correct the findings of the BAMS examining doctor as set out in the report and find that the award of 12 points was correct."

The claimant's application for leave to appeal was dated 30 June 1997. The chairman refused leave. There is no indication that he considered whether to issue a full statement of the tribunal's decision but, as the application was made more than 21 days after the tribunal's decision and no reason was advanced to explain the delay, there is no reason why the chairman should have issued a full statement.

41. An appeal to a Commissioner lies only on a point of law. The claimant's grounds of appeal, which I need not set out here, essentially raise only points of fact, save in as much as she submits that "they just missed the question on lifting and carrying and using my hands and also sitting in a chair" which is arguably a complaint that the tribunal failed to consider those issues. I do not accept that that ground is made out. The claimant had said in her incapacity for work questionnaire that she had no difficulties in sitting in a chair and she did not suggest otherwise to either the Benefits Agency Medical Service doctor or to the tribunal and so I do not consider that there was any obligation on the tribunal to ask her further questions about that activity. The record of proceedings shows that the tribunal did ask questions relating to lifting and carrying and manual dexterity and so it cannot be said that they overlooked those activities. For those reasons, I do not accept the claimant's submission.

42. In his written submission, the adjudication officer now concerned with the case supported the claimant's appeal on the ground that the tribunal had failed to give adequate reasons for their decision. When I directed the oral hearing, I indicated that I had reservations about that submission and Ms Perez resiled from it. She submitted that, in the absence of a full statement of the tribunal's decision and of any duty to supply one, the tribunal's decision could not be impugned for inadequacy of reasons. I agree.

43. In fairness to the adjudication officer, I should record that there is in the papers what looks at first sight like a full statement of the tribunal's decision. When a chairman does not issue a full statement of the tribunal's decision under regulation 23(3A) of the 1995 Regulations immediately after a hearing, he or she usually makes notes to enable a full statement to be drawn up later if one is requested. In this case, the chairman unwisely wrote his aide memoire on a spare standard-form continuation sheet headed "Statement of Material Facts and Reasons for the Tribunal's Decision", intended to form part of a full statement of a

tribunal's decision, and he left it in the tribunal file. Consequently, when the file was received at the Office of the Social Security and Child Support Commissioners, a clerk assumed that the aide memoire was a full statement of the tribunal's decision and added it to the file. It was only because it was illegible and the chairman was asked to decipher it that the chairman was able to made the position clear by adding a note, which the adjudication officer appears to have overlooked, to the typed version. I agree with Ms Perez that the chairman's aide memoire cannot be regarded as a full statement of the tribunal's decision even though it was written on a relevant form. It was neither intended to be, nor issued as, such a statement. In fact, even if it had been a full statement, I am not sure that I would have agreed with the adjudication officer as to its inadequacy because it seems to me that it made it abundantly clear that the claimant's evidence was not accepted and why it was not accepted and so implicitly explained why the Benefits Agency Medical Service doctor's view, which the tribunal did accept, was preferred.

44. The decision the tribunal reached was one they were entitled to reach on the evidence before them. It was consistent with the Benefits Agency Medical Service's doctor's report. I can see no procedural error or any other arguable point of law that arises out of their decision. Accordingly, I am not satisfied that the decision of the Rochdale social security appeal tribunal dated 7 May 1997 is erroneous in point of law.

45. I dismiss the claimant's appeal.

M. ROWLAND
Commissioner
1 October 1998