

Post - DATE (LA) Application for LATE

WEBSTER

Appl to Commissioner

Late Appeal  
Special reasons  
CPAG Case

- Granted

RAS/4/LM

Commissioner's File: CIS/147/95

SOCIAL SECURITY ACT 1986  
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A  
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. This is an application by the claimant for leave to appeal against the decision of the Leicester social security appeal tribunal given on 19 August 1994. Their decision was to the effect that the claimant was entitled to add to his basic amount of income support an amount in respect of a severe disability premium for the period 11 April 1988 to 10 November 1991 but not thereafter because he then no longer satisfied the conditions of entitlement to the premium.

2. I held an oral hearing of the application. The claimant, who was not present, was represented by Mr R. Drabble Q.C. and Mr R. Killingbeck of Leicester City Council Welfare Rights Unit. The adjudication officer was represented by Mr S. Cooper of the Solicitor's Office, Departments of Health and Social Security.

3. The claimant, now in his early 40s, is severely disabled I think both mentally and physically. He has for many years been in receipt of an attendance allowance and has been in receipt of income support since the income support scheme began on 11 April 1988. In certain circumstances a severely disabled person is entitled to an addition to his income support called a severe disability premium. The conditions of entitlement to this premium are in paragraph 13 of Schedule 2 to the Income Support (General) Regulations 1987. Most of the conditions relate directly or indirectly to disability. Such conditions were satisfied by the claimant. But it was said that he did not satisfy the condition imposed by paragraph 13(2)(a)(ii) that (as then in force) -

"(ii) subject to sub-paragraph (3), he has no non-dependents aged 18 or over residing with him ...".

"Non-dependant" for this purpose is defined in regulation 3 of

the General Regulations. The definition has been amended so many times that most people concerned with the matter have lost count. And the complexities of the amendments have been such that a body of case law has been developed which has had to deal with such diverse topics as the liability of licensees in respect of their occupation of premises, the status of contracts in English and Scottish law when "made" by a person of limited or no capacity, the English law of trusts and the Scottish law of recompense. It will however suffice for present purposes to say that paragraph 3(1) of regulation 3 of the definition defines "non-dependant" as meaning any person who "normally resides with a claimant" while paragraph (2) contains a long list of exceptions. The presence (to use a neutral word) of such a person as is described by paragraph (1) will disentitle the claimant to the premium unless the person is on the paragraph (2) list. The case law to which I have referred has evolved in respect of the paragraph (2) list.

4. In the present case an adjudication officer decided that the claimant was not entitled to the premium because of the non-dependant condition; he lived with his parents and in the adjudication officer's view they were "non-dependants" as defined by regulation 3(1) and were not excluded from that status by any item on the paragraph (2) list. The tribunal took a different view. They accepted that the parents were "non-dependants" as defined by paragraph (1) in that they normally resided with the claimant but, applying the various decisions of the Commissioner in relation to the much amended paragraph (2) list, they concluded that the parents were not non-dependants for various periods of time as the list changed down to 11 November 1991; then a further requirement was added, by amendment, which the tribunal decided altered the position conclusively against the claimant as from that date. The tribunal's decision was apparently officially notified to the claimant when it was sent to him on 13 September 1994. The claimant and his representatives were satisfied that the tribunal had correctly applied the law as it was then understood. The decision was accepted. There was no appeal.

5. On 30 November 1994 judgment was delivered by the Court of Appeal in Bate and Chief Adjudication Officer and Secretary of State for Social Security. That case concerned entitlement to the severe disability premium. The Court of Appeal decided that, where the claimant lived with his or her parents and they were the householders, the claimant "normally resided" with them but they did not "normally reside" with the claimant. The outcome was that the claimant, Miss Bate, had no non-dependants aged 18 or over residing with her and the condition imposed by paragraph 13(2)(a)(ii) of Schedule 2 to the General Regulations was satisfied. It is I think fair to say that that was a surprising outcome in that it had never been contended in the many cases, no doubt thousands, in which paragraph 13(2)(a)(ii) had arisen that "normally resides" had the meaning given by the Bate case and until the Court of Appeal drew attention to the point it had not even been argued by Counsel for Miss Bate. I should say that the case is now on appeal to the House of Lords.

6. On 6 January 1995 the claimant's representative completed an application to the Commissioner for leave to appeal against the tribunal's decision. The grounds were these -

"I appeal on the basis of the decision in Bate -v- Chief Adjudication Officer decided on 30 November 1994. My grounds of appeal are that I had no non-dependants living with me up until that date because I resided with the adults living in the same dwelling. They did not reside with me.

REASONS FOR LATE APPEAL IF APPLICABLE

The reason that I am making an appeal out of time is because prior to the Court of Appeal decision in Bate, no-one could have foreseen that regulation 3(1) had the meaning it was given in that decision. Neither the Department of Social Security nor other bodies had considered this interpretation until the ruling was given. Indeed the regulations governing who is or is not a non-dependent were later amended by the Government on the basis that regulation 3(1) had a meaning contrary to that given by the Court of Appeal.

Because of this information produced by the Department of Social Security and that given by advice agencies was misleading.

In these circumstances I could not have reasonably foreseen that I may have had an entitlement to the premium, or that I had an arguable case concerning this premium."

Appeal to the Commissioner from the decision of a social security appeal tribunal requires the consent of the tribunal chairman application for which must be made within 3 months of the date when the applicant was given a copy of the tribunal's decision: section 23(9) of the Social Security Administration Act 1992 and Schedule 2 to the Social Security (Adjudication) Regulations 1986. There was no application to the chairman in this case. Regulation 3(1) of the Social Security Commissioners Procedure Regulations 1987 provides that, subject to paragraph (2), application to a Commissioner for leave to appeal against a tribunal's decision may be made only if a chairman has refused leave. Paragraph (2) however provides that -

"(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".

The question in this case is whether, on the facts to which I have referred, there are "special reasons" such as will require me to exercise the discretion conferred by regulation 3(2) in favour of the claimant.

7. There are numerous cases in which the facts relevant to the exercise of such a discretion have been considered. Mr Cooper, who declared himself to be neutral in relation to the outcome of this application, did not disagree with Mr Drabble's analysis of the cases. I will refer briefly to several of the cases where leave to appeal out of time was sought after a superior court had declared the relevant law to be different from what it had earlier been thought to be.

8. In re Wigfull [1919] 1 Ch. 52 application was made for an order enlarging the time for appealing to the Court of Appeal in a trade mark case after the Court of Appeal in another case had taken a different view of the law. The application was made pursuant to Order LVIII r.15. An earlier version of that provision had required "special leave". Swinfen Eady M.R. at pages 58 to 59 said this -

"It was urged that in any question now of enlarging the time, regard must be had to the altered language of Order LVIII., r.15. Under the rule before it was altered the language was that no appeal should be brought except by special leave of the Court of Appeal; and it was urged that the grounds for special leave must have been greater and more weighty than the grounds for enlarging the time. In my judgment, where an application is made to enlarge the time for appeal, there must be some proper grounds for supporting it. It is not enough to say that the time has expired; it expired more than 2 years ago, and therefore I cannot appeal without the time being enlarged; because it has expired, therefore I ask that it may be enlarged. That alone is no ground. In my judgment also, it is not necessarily a ground for enlarging the time that in some subsequent case a different view is taken of the construction of an Act of Parliament. ... In In re Manchester Economic Building Society 24 Ch. D. 488, the language used by Brett M.R. in stating what the rule should be is almost in identical terms with what Mr Kerly contended the practise should be under the rule as it now stands. His contention was this: that there is a judicial discretion in the Court to enlarge the time, and that the question to which the Court ought to address itself is this, and this only: Is it just to extend the time for appeal?. Brett M.R. in In re Manchester Economic Building Society, put it this way. He said: 'I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that the leave should be given'. For this purpose I see no distinction between granting special leave to appeal and enlarging the time for appealing. That rule is equally applicable to both. In my opinion the Court has power to enlarge the time for appealing if it is just that, under the circumstances, an Order enlarging the time should be made".

Thus, whether or not the rule required "special leave" (which may

perhaps be equated to "special reasons") the test was that of what was just in the circumstances, the different view of the law being a factor but not a conclusive factor.

9. Wigfull was considered in In re Berkeley [1945] 1 Ch. 1. Lord Greene M.R. referred to the passage from the judgment of Swinfen Eady M.R. quoted above and said (page 4) -

"I find no difficulty in reconciling the statement that the different decision is not necessarily a ground for enlarging the time with the statement that the Court can enlarge the time if it is just in the circumstances to do so. It seems to me that the principle to be extracted is that it is not sufficient for a party to come to the Court and say that a subsequent decision of a superior court has determined that the principle of law on which his case was decided was wrong. The Court will say to him: "That bald statement is not enough. What are the facts?. What is the nature of the judgment?. Who are the parties affected?. What, if anything, has been done under it?" and so forth. In other words, the whole of the circumstances must be looked at. If the Court, in the light of those circumstances, considers it just to extend the time, then it will do so. That seems to me to be the proper principle ...".

That statement was approved in Property and Reversionary Investment Corporation Ltd v Templar [1977] W.L.R. 1223, the Court of Appeal concluding that while it was not sufficient to show that a later decision of a superior court showed the present case might have been wrongly decided, the continuing contractual relationship between the parties (which would otherwise be governed by what had been declared to be bad law) provided the "special circumstances which justify leave to appeal out of time".

10. It seems to me that, from the passages quoted, those cases in the Court of Appeal, and others to which I have not referred, proceed on the premise that "special reasons" or something akin to that, have to be shown even when such words do not actually appear in the provision. It follows in my view that regulation 3(2) of the Commissioners Procedure Regulations, which of course expressly refers to "special reasons", demands much the same test. In R(S) 8/85 the Commissioner, referring to Wigfull and Berkeley and other cases concluded that something extra was required over and above a different view of the law by a superior court. In R(M) 1/87 the Commissioner took the view, applying what was said in Reg. v Home Secretary ex parte Mehta [1975] 1 W.L.R. 1087, that it was appropriate to consider, among other factors, the merits of the case in deciding whether there were special reasons for extending time. The same view was taken in R(I) 5/91.

11. Mr Cooper drew attention to the notes to Order 59 rule 4 of the Rules of the Supreme Court (1995) in which it is stated that -

"It is entirely in the discretion of the Court to grant or refuse an extension of time. The factors which are normally taken into account ... are:

- (1) the length of the delay;
- (2) the reasons for the delay;
- (3) the chances of the appeal succeeding if time for appealing is extended; and
- (4) the degree of prejudice to the potential respondent if the application is granted".

Now, while the relevant Rules of the Supreme Court do not contain any expression equivalent to the "special reasons" in regulation 3(2) of the Commissioners Procedure Regulations, it seems to me that the relevant factors, as shown by the cases to which I have referred and the notes to Order 59 rule 4, are essentially the same as are relevant to the "special reasons" in regulation 3(2). Mr Drabble and Mr Cooper agreed that that was so.

12. Mr Drabble relied on these matters.

- (a) The claimant is severely mentally disabled.
- (b) The Department of Social Security gives advice on matters of entitlement; they unquestionably took the view that the claimant was not entitled from 11 November 1991 because, following the amendment from that date (to exclude close relatives), the claimant's parents were residing with him and were no longer excluded from the definition of "non-dependants" by virtue of the list in regulation 3(2) of the General Regulations. The outcome of Bate in the Court of Appeal, which showed that view to be wrong, took everyone by surprise.
- (c) If the claimant had not appealed to the tribunal from the adjudication officer's decision he would have been in a better position because, after Bate, an adjudication officer could have reviewed the original decision for error of law; section 25(2) of the Social Security Administration Act; it was wrong that the claimant should be in a worse position because he had expeditiously pursued his remedies.
- (d) The delay, of about 27 days, was minimal.
- (e) As the law stands on the basis of Bate, the merits of the case are overwhelming, in the claimant's favour.
- (f) There is no room for doubt as to the claimant's entitlement on the basis of Bate in the Court of Appeal. In R(S) 8/85, where leave was refused, the

effect of the Court of Appeal's decision in McCaffrey, so far as the claimant in that case was concerned, was far less clear.

(g) No question of prejudice arises.

Mr Cooper did not disagree with any of those propositions.

13. On the basis of the factors identified by Mr Drabble I am left in no doubt that "special reasons" are shown in this case and I accordingly determine this application in the claimant's favour. This appeal may proceed.

14. Bate as I have said is on appeal to the House of Lords. There are many cases awaiting the outcome and this case will now join those. There is also a number of severe disability premium cases in which application has been made for leave to appeal out of time in much the same circumstances as those in this case. Consideration will of course be given to each of those cases individually but, unless there is some exceptional factor, it is, I would think, likely that leave will be given.

(Signed) R A Sanders  
Commissioner

Date: 9 October 1995