



THE SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's Case No: CIS/0345/2003

Sofia Salah v Secretary of State for Work and Pensions

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF MR COMMISSIONER JACOBS

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.
 - 1.1. The decision of the Leicester appeal tribunal under reference U/42/038/2002/01044, held on 30th October 2002, is erroneous in point of law.
 - 1.2. I set it aside and remit the case to a differently constituted appeal tribunal.
 - 1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

It may be that the decision-maker in the local office will decide to revise the decision refusing the claimant's claim for income support, thereby rendering a rehearing unnecessary.

If a rehearing is necessary, the Secretary of State will have to make a fresh submission to the tribunal. The Secretary of State's representative at the oral hearing before me disowned the written submission that was made to the tribunal on 30th October 2002.

The tribunal will find helpful this passage from the Secretary of State's written observations to the Commissioner. Those observations were written by an officer from the Adjudication and Constitutional Issues Branch in Leeds. The officer wrote:

'It is to be hoped that the Secretary of State's representatives in the claimant's local social security office will in the meantime reconsider its refusal to provide to the tribunal the evidence on which its refusal of the claimant's claim under section 1(1B) of the Social Security Act 1998 [was based]. If not, the new tribunal will, in my submission, be at liberty firstly to direct the Secretary of State to produce the evidence in question and secondly, in the event of a refusal to comply with that direction, to consider whether the Secretary of State is thereby seeking to shelter from scrutiny an indefensible decision.'

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of a district chairman of tribunals.
3. In view of the issues raised by the appeal, I directed an oral hearing. It was held before me in London on 15th April 2003. The claimant was represented by Mr Khan of Hitslink Management Co-operative Ltd. The Secretary of State was represented by Mrs Swainson of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to them both for their submissions.

The issue

4. The issue in this case is whether a claimant who is refused income support on account of having no national insurance number has the right of appeal to an appeal tribunal.

Background

5. On granting leave, the district chairman invited the Commissioner to hear the appeal urgently because:

'There are many hundreds of claimants in Leicester of Somali origin being refused benefit on grounds of insufficient evidence to award N.I. number.'

6. At the oral hearing, Mr Khan gave a more detailed background. The problem arose with the local benefit office in Leicester and was limited in his experience to claimants who were ultimately of Somali origin. The problem arose from the strictness with which the office interpreted and applied its guidance on the issue of national insurance numbers. In the year 2001 to 2002, it refused 10% of applications. In some cases, it refused to give any explanation at all. In other cases, it gave only general reasons. It relied on the Data Protection Act 1998. It also refused to monitor its refusals on race grounds. Recently, there has been a change of practice and Mr Khan reported that there was now a good relationship with the local office.

The history of the case

The claimant's claims

7. The claimant came to the United Kingdom on 10th March 2001. She made a claim for income support from 24th July 2001 and applied at the same time for a national insurance number. As the Secretary of State was not satisfied by the claimant's evidence of her identity, a national insurance number was not allocated to her. The decision-maker for the Secretary of State gave this decision:

'[The claimant] is not entitled to Income Support for her claim from July 2001, because she does not satisfy the conditions specified by Section 1(1A) to (1C) of the Social Security Administration Act 1992.'

8. A number was allocated on 20th March 2002 in connection with a later claim for income support from 16th January 2002. However, that does not help the claimant on her earlier claim.

The appeal

9. The claimant appealed to an appeal tribunal against the decision refusing her first claim.

10. The Secretary of State submitted to the appeal tribunal that there was no right of appeal against the refusal to allocate a national insurance number. It provided no evidence in support of the refusal.

11. Mr Khan represented the claimant. He was able to persuade the tribunal that it did have some jurisdiction by relying on the decision of the Commissioner in *CIS/3692/2001*. The Commissioner decided that an appeal tribunal had no jurisdiction to assess the quality of the evidence, but did have jurisdiction to determine whether the evidence was sufficient to enable a national insurance to be allocated. The tribunal dismissed the appeal.

How the tribunal went wrong in law

12. The tribunal went wrong in law, because it relied on the decision in *CIS/3692/2001*. With respect to the Commissioner concerned, that decision was wrong. Obviously, the tribunal cannot be criticised for doing its best to interpret and apply that decision.

National insurance numbers – the legislation

13. In most cases, a claim is necessary in order to establish entitlement to a benefit. See section 1(1) of the Social Security Administration Act 1992.

14. The claimant claimed income support. As that is not one of the exceptions, a claim is necessary. So, section 1(1A) applied. It provides:

‘(1A) No person whose entitlement to any benefit depends on his making a claim shall be entitled to the benefit unless subsection (1B) below is satisfied in relation both to the person making the claim and to any other person in respect of whom he is claiming.

15. As the claimant did not have a national insurance number at the date of her claim, section 1(1B)(b) applied. It provides:

‘(1B) This subsection is satisfied in relation to a person if-

...

- (b) the person makes an application for a national insurance number to be allocated to him which is accompanied by information or evidence enabling such a number to be allocated.’

16. The allocation of national insurance numbers is governed by section 182C of the Social Security Administration Act 1992. The relevant regulations are the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, specifically regulation 9.

Is the refusal to allocate a national insurance number appealable?

17. Mrs Swainson argued that this issue could come before an appeal tribunal in one of two ways. Mr Khan agreed with her submissions.

As a decision

18. First, Mrs Swainson argued that the refusal was a decision that was directly appealable under section 12(1) of the Social Security Act 1998. I accept this argument.

19. The claimant has a right of appeal against ‘any *decision* of the Secretary of State’. See section 12(1) of the Social Security Act 1998. That right applies to any decision ‘under section 8’. Section 8 (1)(c) applies to ‘any decision that falls to be made under or by virtue of any relevant enactment’. The 1992 Act is a relevant enactment. See section 8(4). The allocation of national insurance numbers is governed by section 182C of that Act. So, a

refusal to allocate a number is a decision made under section 8 and subject to the right of appeal under section 12(1).

As a determination

20. Second, Mrs Swainson argued that, if the refusal to allocate a national insurance number was not a decision, it was nonetheless a determination that was challengeable on an appeal against the outcome decision. I accept this argument in the alternative.

21. The social security legislation distinguishes between a decision and a determination. Section 12(1) gives a right of appeal against the former. The legislation does not define these terms. I attempted to distinguish them in *CIB/2338/2000*. In paragraph 22, I wrote:

‘Without attempting a definition, the nature of a determination is that it is a building block of a decision. Take as an example an award of income support. The findings of fact on which the award is based are all determinations. So are the conclusions on the individual components of the calculation that lead to an award, like the amount of the eligible housing costs and the premiums that are included in the applicable amount. The decision – that the claimant is entitled to income support of a specific amount from and including a particular date – is the result of combining those determinations. (There are also determinations that are conclusions on procedural matters, but they are not relevant to this case.)’

22. Lord Justice Laws has given a similar description of a procedural determination – a refusal to adjourn. In *Carpenter v Secretary of State for Work and Pensions*, reported as *R(IB) 6/03*, he said:

‘16. Section 12 of the Act of 1998 provides for a right of appeal to an appeal tribunal against any decision of the Secretary of State under section 8. In my judgment the class of decisions which might be made under section 8 includes only what have been called outcome decisions (that is, decisions upon the actual question whether an applicant is entitled to this or that benefit) and this is in contrast to the many determinations which will fall to be made along the way to such a decision and which will inform it or indeed may determine it.’

23. If a refusal of a national insurance number is not a decision, it is a determination. That determination is not directly appealable, because it is not a decision for the purposes of section 12(1) of the 1998 Act. The refusal of the income support claim was a decision that was based on that determination. The claimant had a right of appeal against that decision. Why should the claimant be denied the right to challenge the determination on which it was based? The claimant was entitled to raise as an issue on the appeal whether the refusal to allocate a national insurance number was correct in fact and law.

CIS/3692/2001

24. Mrs Swainson argued that this decision was wrong. Mr Khan agreed with her submissions.

25. Mrs Swainson referred to the distinction between (a) assessing the quality of evidence, which the Commissioner decided was outside a tribunal’s jurisdiction, and (b) whether the

evidence was sufficient to allow a national insurance number to be allocated, which was within the tribunal's jurisdiction. Surely, she argued, the quality of evidence has to be assessed before its sufficiency for any particular purpose can be determined? I accept that argument. With respect to the Commissioner, the distinction is very fine; indeed, it is so fine that it is, with respect, meaningless. In fairness to the Commissioner, the decision was in short-form, albeit that the Commissioner substituted a decision for that of the appeal tribunal and devoted 1½ pages to explaining the decision.

26. Mrs Swainson also referred to the Commissioner's reliance on paragraph 5 of Schedule 2 to the Social Security and Child Support (Decisions and Appeals) Regulations 1999. Schedule 2 contains a list of decisions that do not carry the right of appeal to an appeal tribunal. Paragraph 5 prohibits appeals against most decisions under the Social Security (Claims and Payments) Regulations 1987. She argued that this was wrong for two reasons.

27. First, she argued that the right of appeal in respect of a refusal to allocate a national insurance number was preserved by section 12(3) of the 1998 Act. Section 12(2) enables regulations to prescribe that no appeal lies against certain decisions or determinations. However, section 12(2) provides:

'Regulations under subsection (2) above shall not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required.'

A claim is required for income support. Section 1(1) of the 1992 Act provides for the making of a claim. It is linked to the Social Security (Claims and Payments) Regulations 1987. Section 1(1A) and (1B) are additional to that. They assume a valid claim and impose a condition of entitlement to any benefit for which a claim is required, including income support. I accept that argument.

28. Second, Mrs Swainson argued that, for the reasons just explained, the allocation of a national insurance was not governed by the 1987 Regulations. It was governed by the 2001 Regulations. I accept that argument also.

29. With respect to the Commissioner, I do not understand what the Social Security (Claims and Payments) Regulations 1987 have to do with this issue. The decision was made on a claim, but it was not made under any specific provision in those Regulations.

CIS/2650/2000

30. I find support for the conclusions I have reached in this decision of Mr Commissioner Powell. He dealt with an issue under section 1(1B) and substituted a decision for that of the appeal tribunal. He did so in a fully reasoned decision without any suggestion that some aspects of the issue might be outside his jurisdiction and that of the appeal tribunal. However, it appears that the issue was not raised before him.

Conclusion

31. I allow the appeal.

32. At the oral hearing, I suggested that I might substitute a decision for that of the tribunal. Both Mrs Swainson and Mr Khan opposed that idea and united in inviting me to direct a rehearing. I do so.

Signed on original

**Edward Jacobs
Commissioner
15th April 2003**