CH 155/87

VGHH/18/LM

In the matter of an application by the claimant under regulation 25(1)(c) of the Social Security Commissioners Procedure Regulations 1987.

1. This is an out of time application by the claimant to set aside my determination dated 14 September 1987 refusing him leave to appeal against the decision of a social security appeal tribunal dated 31 March 1987. The application is made on the grounds that "the interests of justice so require". An extension of time in which to bring this application has been granted by a nominated officer.

2. The power to set aside determinations under regulation 25(1)(c) of the Social Security Commissioners Procedure Regulations in "the interests of justice" is (as explained in the Appendix) limited to procedural irregularities.

3. There is nothing in the claimant's observations, nor in the case papers (which I have examined with care), which suggests that there was any procedural irregularity in connection with my determination. The application is therefore refused.

(Signed) V G H Hallett
Commissioner

Date: 9 December 1988

Please circulate - to be reported as R(U) 3/89

Chris.

A good read. See ~~para~~ parts on inherent powers to set aside decisions. Suggest that Chairmen of SSATs have similar powers and they could use these to 'set aside' refusals to admit late appeals on grounds that 'hostile' DSS observations were not sent to our side for comment.

[illegible]

APPENDIX

The new powers

1. Regulations 24, 25 and 26 of the Social Security Commissioners Procedure Regulations 1987 provide:

"Correction of accidental errors in decisions

24.-(1) Subject to Regulation 26, accidental errors in any decision or record of a decision may at any time be corrected by the Commissioner who gave the decision.

(2) A correction made to, or to the record of, a decision shall become part of the decision or record thereof and written notice thereof shall be given by the office of the Social Security Commissioners to any party to whom notice of the decision had previously been given.

Setting aside of decisions on certain grounds

25.-(1) Subject to this Regulation and Regulation 26, on an application made by any party a decision may be set aside by the Commissioner who gave the decision in a case where it appears just to do so on the ground that -

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or his representative or was not received at an appropriate time by the Commissioner; or

(b) a party or his representative had not been present at an oral hearing which had been held in the course of the proceedings; or

(c) the interests of justice so require.

(2) An application under this Regulation shall be made in writing to a Commissioner, within 30 days from the date on which notice in writing of the decision was given by the office of the Social Security Commissioners to the party making the application.

(3) Where an application to set aside a decision is made under paragraph (1), each party shall be sent by the office of the Social Security Commissioners a copy of the application and shall be afforded a reasonable opportunity of making representations on it before the application is determined.

(4) Notice in writing of a determination of an application to set aside a decision shall be given by the office of the Social Security Commissioners to each party and shall contain a statement giving the reasons for the determination.

Provisions common to Regulations 24 and 25

26.-(1) In Regulations 24 and 25 the word "decision" shall include determinations of applications for leave to appeal as well as decisions on appeals and on references.

(2) Subject to a direction by a Commissioner to the contrary, in calculating any time for applying for leave to appeal against a Commissioner's decision there shall be disregarded any day falling before the day on which notice was given of a correction of a decision or the record thereof pursuant to Regulation 24 or on which notice was given of a determination that a decision shall not be set aside under Regulation 25, as the case may be.

(3) There shall be no appeal against a correction or a refusal to correct under Regulation 24, or a determination given under Regulation 25.

(4) If it is impracticable or likely to cause undue delay for a decision or record of a decision to be dealt with pursuant to Regulation 24 or 25 by the Commissioner who gave the decision, the Chief Commissioner or another Commissioner may deal with the matter."

2. Regulation 27(5) of the same Regulations provides:

"(5) Nothing in these Regulations shall be construed as derogating from any inherent or other power which is exercisable apart from these Regulations"

3. Regulation 25(1)(c) of the Social Security Commissioners Procedure Regs 1987 is, like the parallel provision in regulation 11(1)(c) of the Social Security (Adjudication) Regulations 1986 relating to adjudicating authorities other than the Commissioner, a new provision which came into force on 6 April 1987. In the case of the Social Security Commissioners Procedure Regulations the whole of regulations 24 and 25 are now extended to include applications for leave to appeal as well as appeals: see regulation 26(1).

Previous law

(a) Inherent powers

4. Prior to the coming into operation (on 12 May 1975) of the Social Security (Correction and Setting Aside of Decisions) Regulations 1975 [SI 1975 No. 572] ("the 1975 Regulations") it was necessary to rely on the Commissioner's inherent power to control his own procedure in order to rectify procedural mishaps.

5. (1) Every court (including a county court) has an inherent power to control its own procedure even though there is nothing in the rules about it; see Reg v Bloomsbury County Court ex parte Villwerwest [1976]1 1 W.L.R. 362 per Lord Denning. The reason for this, as Lord Justice Roskill explained, is that "it is necessary for him [the county court judge] to possess it in order to do justice between the parties" (page 367).

(2) The Commissioner and Deputy Commissioner have always exercised, and been entitled to exercise, the like power. It was exercised by him prior to the coming into operation of the 1975 Regulations in, for example, the following cases:

(i) Setting aside decision CU 73/49. Due to a mishap, a request for an oral hearing had not reached the Commissioner's office so that the Deputy Commissioner had not had the opportunity of considering the request as he was required to do by Regulation 16(1) of the National Insurance (Determination of Claims and Questions) Regulations 1948 (SI 1948 No. 1144) before determining the case without an oral hearing. The Deputy Commissioner's decision was therefore set aside as a nullity: see Decision CU 248/49 KL (reported).

(ii) Setting aside decision CI 109/51, in which a Deputy Commissioner had dismissed an appeal. It was later discovered that through a misunderstanding the Deputy Commissioner was not informed, before he gave his decision, that the claimant had in effect requested an oral hearing; so that he was not able to consider that request in accordance with Regulation 22(1) of the National Insurance (Industrial Injuries) (Determination of Claims and Questions)

Regulations 1948 (SI 1948 No. 1299). His decision was therefore set aside: see Decision R(I) 39/51 (reported).

(iii) Setting aside a decision by a Deputy Commissioner disallowing a claimant's appeal where by some mishap the claimant was not notified that he had a right to apply for an oral hearing before the Commissioner and, if his request was granted, to be represented by a barrister or solicitor. This omission was a breach of regulation 14(3) of the National Insurance (Determination of Claims and Questions) Regulations 1948. The Deputy Commissioner's decision was therefore set aside: see numbered decision CU 81/52 (reference CU 242/52 on Commissioner's file).

(iv) Setting aside a decision given by a Deputy Commissioner who gave his decision under the erroneous impression that no further evidence or statement was to be submitted on behalf of the claimant: see decision number CS 54/52 (decision CS 136/52 on Commissioner's file).

(3) The first three of the above-mentioned cases would, if they had arisen after 12 May 1975, have fallen within the terms of the 1975 Regulations. (There is some doubt as to whether the fourth case would have been so covered).

6. The Commissioner's inherent power to rectify procedural mishaps has also been exercised, since 12 May 1975. Thus:-

(1) In decision R(S) 6/83, the Commissioner considered whether his inherent powers had been taken away by the 1975 Regulations and concluded that they had not. In that case the claimant wished to make observations in the event of his request for an oral hearing being refused, as indeed it was. He received the Commissioner's decision at the same time as the oral hearing was refused so that he had no opportunity to make further observations. The Commissioner accepted that he could set aside his own decision where there had been such a breach of natural justice, notwithstanding that the case did not fall within the provisions of the 1975 Regulations. Nothing in the 1975 Regulations is to be construed as derogating from any power to correct errors or set aside decisions which was exercisable apart from the regulations: see regulation 4(5).

(2) In respect of decision R(SB) 21/85 (Commissioner's reference CSB/991/1984). In March 1986 the claimant applied to have this decision set aside and on 11 March 1987 it was set aside by the Chief Commissioner under the Commissioner's inherent powers. The case had been decided by another Commissioner on a new point not raised by the parties nor put to them before the decision was given, so that the parties had no opportunity to make submissions on it and this appeared in the circumstances to be a breach of natural justice.

(b) statutory provisions

7. Provisions for the correction and setting aside of decisions were first made by the 1975 Regulations under enabling powers conferred by section 6 of the National Insurance Act 1974. The 1975 Regulations remained in force from 12 May 1975 until 23 April 1984 when the Social Security (Adjudication) Regulations 1984 came into force. The 1984 regulations remained in force until they were replaced by the Social Security (Adjudication) Regulations 1986 and the Social Security Commissioners Procedure Regulations 1987 both of which came into operation on 6 April 1987. (All these regulations contained a specific saving for the Commissioner's inherent powers).

The current statutory enabling provisions affecting the Commissioner

8. These are set out in the Schedule to the Social Security Commissioners Procedure Regulations 1987. The relevant provisions are section 6 of the National Insurance Act 1974 and section 115(1) of the Social Security Act 1975 as amended.

9. Section 6 of the National Insurance Act 1974 as amended and in force on 6 April 1987 (when the Social Sescurity Commissioners Procedure Regulations 1987 came into operation) provides:-

Minor supplementary provisions and amendments of certain social security enactments.

"6.-(1) The Secretary of State may by regulations make provision with respect to -

(a) the correction of accidental errors in any decision or record of a decision given with respect of a claim or question arising under or in connection with any relevant enactment by a body or person authorised to decide the claim or question; and

(b) the setting aside of any such decision in a case where it appears just to set the decision aside on the ground that -

(i) a document relating to the proceedings in which the decision was given was not sent to, or was not received at an appropriate time by, a party to the proceedings or the party's representative or was not received at an appropriate time by the body or person who gave the decision, or

(ii) a party to the proceedings in which the decision was given or the party's representative was not present at a hearing related to the proceedings;

and in this subsection "relevant enactment" means any enactment contained in the National Insurance Acts 1965 to 1974, the National Insurance (Industrial Injuries) Acts 1965 to 1974, the Industrial Injuries and Diseases (Old Cases) Acts 1967 to 1974, the Child Benefit Act 1975, the Supplementary Benefits Act 1976, the Family Income Supplements Act 1970, the Social Security Act 1973,

the Social Security Acts 1975 to 1986 or the Industrial Injuries and Diseases (Old Cases) Act 1975 or the Social Security Pensions Act 1975 ... .

(2) .....

(3) The powers to make regulations conferred by the preceding provisions of this section -

(a) shall be exercisable by statutory instrument: and

(b) include power to make different provision for different circumstances:

and any statutory instrument made by virtue of this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament, but nothing in subsection (1) of this section shall be construed as derogating from any power to correct errors or set aside decisions which is exercisable apart from regulations made by virtue of that subsection.

(4) Where any provisions of Part II of the Social Security Act 1973 allows for specified matters to be dealt with by, or determined in accordance with, regulations made by the Secretary of State or by him and the Minister for the Civil Service jointly, any regulations made by virtue of that provision may provide for those matters to be dealt with by the Occupational Pensions Board in their discretion, or to be determined in accordance with the exercise by the Board of a discretion vested in them by the regulations, and for the Board's discretion to be exercised either generally in regard to those matters or differently in regard to particular cases or classes of case; and this subsection shall be deemed always to have had effect.

(5) ....."

10. Section 115(1) and (2) of the Social Security Act 1975 (as amended) provide:

"115.-(1) Regulations may, for any purpose of this Part of this Act, make any such provision as is specified in Schedule 13 (procedure, evidence, hearings, forms of documents and other matters relating to adjudication).

(2) Regulations made by virtue of subsection (1) above are referred to in this Act as "procedure regulations"; and in Schedule 13 "competent tribunal" means a Commissioner, a social security appeal tribunal, a medical appeal tribunal, or an adjudicating medical practitioner."

11. Schedule 13, paragraph 1 provides:

"SCHEDULE 13

PROVISION WHICH MAY BE MADE BY PROCEDURE REGULATIONS

1. Provision prescribing the procedure to be followed in connection with the consideration and determination of claims and questions by the Secretary of State and a competent tribunal, or in connection with the withdrawal of a claim."

Validity of the new powers

12. I had some doubt as to whether regulation 25(1)(c) and 26(1) were valid and authorised by the powers under which the regulation purported to be made and accordingly directed an oral hearing requiring argument, on these points:

(1) What statutory power authorised the extension by regulation 26(1) of the provisions in paragraph (c) of regulation 25(1) of the 1987 Regulations to applications for leave to appeal, which are not decisions at all: see R v Chief Adjudication Officer ex parte Bland [1983] 1 W.L.R. 262?

(2) What statutory power authorised the insertion of paragraph (c) in regulation 25(1)

of the 1987 Regulations and in regulation 11(1) of the Social Security (Adjudication) Regulations 1986? The enabling powers in section 6(1)(b) of the National Insurance Act 1974 are very specific. They authorise paragraphs (a) and (b) which also appear in the Social Security (Adjudication) Regulations 1984 and in the Social Security (Correction and Setting Aside of Decisions) Regulations 1975. But where is the authority for paragraph (c)?

13. The adjudication officer was represented at the hearing by Mr M. R. Parke of the Solicitor's Office, Department of Health and Social Security acting for the Chief Adjudication Officer's Office. The claimant did not attend. He had received due notice of the hearing but indicated that he would not attend. He did not ask for a postponement. I accordingly proceeded with the hearing of the case, in exercise of the discretion conferred by regulation 17(3) of the 1987 Regulations.

14. Mr Parke accepted that section 6 of the National Insurance Act 1974 did not authorise the insertion of paragraph (c). In his submission that provision (and regulation 26(1)) was authorised by section 115(1) of the Social Security Act 1975 (which was specifically referred to in the list of enabling powers) read with subsection (2) and paragraph 1 of Schedule 13 to that Act.

15. I agree with Mr Parke's submission. Section 6 of the National Insurance Act 1974 authorises the making of regulations to deal with accidental errors and with two specific types of procedural irregularity namely, cases where it would be just to set aside a decision because a relevant document had not been received or a party or his representative was not present at a hearing. The 1975 Regulations are made solely under the powers conferred by the 1974 Act. The Social Security (Adjudication) Regulations 1984, although made under powers which include those conferred by section 115 of the Social Security Act 1975, does not extend the categories of case where a decision may be set aside.

16. The new sub-paragraph (c) in regulation 25(1) of the Social Security Commissioners Procedure Regulations 1987 does extend these categories. But it relates only to procedural matters. It is aptly included in Procedure Regulations and is authorised by para 1 of Schedule 13 of the Social Security Act 1975, which covers all procedural matters relating to the determination of claims and questions. (Decisions R(S) 6/83 and CSB/991/1984 referred to in paragraph 6 above both afford examples of cases formerly dealt with under the Commissioner's inherent powers but which now aptly fall within the new sub-paragraph (c)).

17. This interpretation of the purpose of the new sub-paragraph (c) and the mischief it was designed to meet is consistent with the approach adopted by other Commissioners. In decision CS 31/87 (unreported), a Commissioner refused an application to set aside a substantive decision of his own under sub-paragraph (c) on the grounds that the application did not relate to procedural matters and accidental errors. He gave, instead, leave to appeal from his decision to the Court of Appeal. By contrast, the Commissioner who gave a second decision in case CSB/991/1984 (after the original decision, as noted in paragraph 6 above had been set aside under the inherent powers) set aside his own second decision under sub-paragraph (c) because, after it had been given, it was discovered that the claimant (who had declined attending an oral hearing) had never received the written submission of the adjudication officer. This was a clear procedural irregularity.

18. Paragraph 26(1) of the 1987 Procedure Regulations extends the power to set aside "decisions" to determinations (i.e. rulings) made on applications for leave to appeal. Such rulings cannot (any more than substantive decisions, which are governed by the "finality" provisions of section 117 of the Social Security Act 1975) be altered because the Commissioner has changed his mind on the merits: see decision R(U) 10/55 where the Commissioner stated, at paragraph 6:

"The power to grant or refuse leave to appeal is intended to be exercised once for all:

and I do not consider either that the tribunal had power to reverse their previous decision refusing leave, or that I have power to reverse the Deputy Commissioner's decision to the same effect".

[Note: subsequent application by a different party for leave was entertained]

The new power is limited, like the power to set aside decisions of the Commissioner, to procedural irregularities. Both are authorised by section 115(1) and para 1 of Schedule 13 of the Social Security Act 1975.

Construction

(a) "where it is just so to do"

19. The decision of any claim or question in accordance with the Social Security Act 1975 is final, subject only to the provisions of that Act and section 14 of the Social Security Act 1980 (appeal from the Social Security Commissioners etc. on a point of law); and, subject to the provisions of any regulation under section 114 of the Social Security Act 1975, the decision of any claim or questions in accordance with those regulations is also final: see section 117 of the Social Security Act 1975. "Final" was held by an unanimous Court of Appeal to mean "without appeal" but not without a right to apply for certiorari (now judicial review): see in Regina v Medical Appeal Tribunal ex parte Gilmore [1957] 1 Q.B. 574. Lord Justice Denning (with whom the other Lord Justices were in agreement, said (at page 585)

> "In my opinion, therefore, notwithstanding the fact that the statute says that the decision of the medical appeal tribunal is to be final, it is open to this court to issue a certiorari to quash it for error of law on the face of the record. It would seem to follow that a decision of the national insurance and industrial insurance commissioners is also subject to supervision by certiorari (a point left open by the Divisional Court in Reg v National Insurance Commissioner, Ex parte Timmis); but they are so well versed in the law and deservedly held in such high regard that it will be rare that they fall into error such as to need correction."

There are statutory rights of appeal from an adjudication officer (section 100), and (with leave) from a social security appeal tribunal, to a Commissioner (section 101(5A)) and (with leave) to the Court of Appeal (section 14, Social Security Act 1980); and section 104 of the 1975 Act contains provisions for the review of decisions. But the provisions as to the finality of decisions exclude any alternative remedy other than judicial review and those provided for in the statutory provisions against, for example, an adjudication officer with whose decision a claimant is dissatisfied: see Jones v Department of Employment [1988] 1 All E.R. 725.

20. It would be contrary to the finality provisions of section 117, which are paralleled by similar provisions in social security legislation right back to the National Insurance Act 1946, section 44(1), and the National Insurance (Industrial Injuries) Act 1946 section 53(1) (at which time there was no right of appeal from the Commissioner or Deputy Commissioner), for a Commissioner to change his mind and recall his decision, because he considered his original decision was wrong. The House of Lords in Brown v Dean [1910] AC 373 emphasised the extreme value of the old doctrine "Interest reipublicae sit finis litium" (It is in the public interest that there should be an end to litigation). The fact that the judge may have changed his mind, or have doubts about his original decision, is not a ground for exercising his power to order a new trial "if he shall think just". A man is not to be deprived of a judgment without very solid grounds. The words "if he shall think just" do not give him an arbitrary discretion because whereas he [the judge] was then inclined to decide in favour of the plaintiff, but was not very sure, he now inclines to think that he may not decide in favour of the defendant but is not very sure. "Anything less satisfactory as an

exercise of discretion, or anything more illustrative of the danger of departing from the ordinary rules of justice. I can hardly figure" (see page 376, per Lord Shaw of Dunfermline).

21. In my view, the reference to "it appears just to do so" in the opening words of regulation 25(1) must be construed in accordance with the decision in Brown v Dean: and should be given the same construction in relation to rulings to which regulation 25(1) (by virtue of regulation 26(1)) extends: see paragraph 24 below. The discretion must be exercised judicially and not in an arbitrary manner (e.g. just because the Commissioner has doubts about the correctness of his original decision): cf Brown v Dean supra.

(b) where the interests of justice so require

22. The expression "where the interests of justice so require" relates to those rules of natural justice of a procedural nature, which apply in proceedings before the Commissioner and other statutory authorities. Thus the Commissioner must comply with the rule of natural justice that the Commissioner must, in determining an appeal - or an application for leave - give fair consideration to the contentions of all persons who are entitled under the Act and regulations to make representations to him, in other words, that he must listen fairly to all sides: see Reg v Deputy Industrial Injuries Commissioner ex parte Moore [1965] 1 Q.B. 450 at pages 489 to 490 applying Board of Education v Rice [1911] A.C.. Failure to do so is a procedural irregularity and can be set aside under regulation 25(1)(c). (This applies equally, in my view, to the power to social security appeal tribunals to set aside their own decisions which since 6 April 1987 is contained in regulation 11(1)(c) of the Social Security (Adjudication) Regulations 1986). I am fortified in this conclusion by decision CS/31/1987 where the Commissioner decided, after considering the authorities relating to industrial tribunals, that the reference to "the interests of justice" applied only to obvious mistakes or procedural mishaps. He relied, in particular, on Flint v Eastern Electricity Board [1975] I.C.R. 395. See also Boyle v Union Cold Storage Co [1935] 28 Butterworth's W.C. cases 49 which decides that while an extension of time in which to entertain an application for a new trial, having once been refused, may be granted when new facts come to light, consideration of the merits of the application is intended to be once for all.

23. There have been many unreported cases where a Commissioner has, since 1980, on procedural grounds and in exercise of his inherent jurisdiction, reversed his determination on an application for leave to appeal. If, for example, some important letter from the claimant or his solicitors is, through inadvertence in the office, not put before the Commissioner when he is asked to rule, that ruling can be set aside under the rule of natural justice, that the claimant should have an opportunity of being fairly heard.

24. The extension by regulation 26(1) of the 1987 Procedure Regulations of the Commissioner's power (there is no like provision relating to social security appeal tribunals in the 1986 Regulations) to set aside his determination on an application for leave to appeal on the same three procedural grounds as apply in the case of his decisions on an appeal itself, namely absence of documents, non-appearance of the claimant or where the interests of justice so require. The expression "the interests of justice so require" is limited, as are the whole of the Social Security Commissioners Procedure Regulations, to procedural matters. This provision is authorised under paragraph 1 of Schedule 13 of the Social Security Act 1975. It does not extend further than procedural irregularities (e.g. the infringement of the rule of natural justice requiring the parties to be fairly heard mentioned in paragraph 22 above). It makes statutory provision for the practice adopted by the Commissioner in exercise of his inherent powers.

25. It follows that applications to set aside a Commissioner's determination on grounds that "the justice of the case so require", but which particularise no procedural irregularity (and in which none is evident on inspection of the case papers) in respect of the grant or refusal of leave to appeal, should be refused, because the Commissioner has no jurisdiction

to set aside his ruling on other grounds. Nor is he required to give reasons for his original refusal of leave. His reasons for refusing the application to set aside which are required under regulation 25(4) of the Social Security Commissioners Procedure Regulations 1987, do not require him to give his reasons for his original refusal or grant of leave to appeal and do not enable the applicant to circumvent the decision of the Court of Appeal in Regina v Secretary of State for Social Services ex parte Connolly [1986] 1 WLR 421 that such reasons need not be given.

The present case

26. In the present case, notwithstanding that I am not required to, and did not, initially give my reasons for refusing leave to appeal, it is convenient to do so now. The claimant became unemployed on 31 December 1986. He claimed unemployment benefit on 1 January 1987. His contribution qualification fell to be determined by reference to his contributions made in the last complete tax year namely before the benefit year when the claim was made. That tax year was 1984-1985. The claimant did not dispute that in that tax year he had not paid sufficient contributions of the relevant class to obtain benefit. (The computer print-out of the contributions paid by him were before the local tribunal). Since the claimant did not dispute the contributions said to have been paid there was no "contributions question" for the Secretary of State to determine. Nor was it disputed that the relevant tax year was 6 April 1984 to 5 April 1985. The claimant's complaint was that the law was unjust since if he had claimed on 5 January 1987 instead of on 1 January 1987 he would have obtained benefit. A benefit year commences on the first Sunday in the calendar year (see section 13(7) of the Social Security Act 1975) namely in the year 1987 on 4 January 1987. A claim made on 5 January 1987 would have been made in the 1987 benefit year so that the relevant tax year would have been 6 April 1985 to 5 April 1986. In that year the claimant had paid sufficient contributions of the relevant class to obtain benefit.

27. The claimant's complaint of injustice is against the law enacted by Parliament. None of the statutory adjudication authorities (the adjudication officer, the social security appeal tribunal and the Commissioner) has any power to modify that law. The decision of the appeal tribunal was clearly correct and the record of their decision amply satisfied the requirements of regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984, which were then in force. Any appeal was accordingly hopeless and would fall squarely within the intention of the statutory provisions requiring leave to appeal, namely to act as a check to "unnecessary or frivolous appeals": see Laine v Esdaile [1894] A.C.210 at page 212 (per Lord Halsbury); Ex parte Stevenson [1892] 1 Q.B. 609 (C.A.) at page 612; Bland v Chief Supplementary Benefit Officer [1983] 1 WLR 262. It is for these reasons that leave to appeal was refused.