Bulletin 177
[Start]

DECISION OF SOCIAL SECURITY COMMISSIONER

Case Reference No.:CSIS 1009 2002

1. The decision of the Glasgow appeal tribunal (the tribunal) held on 11 June 2002 is not erroneous in point of law.

The issue in dispute in this appeal

2. The appellant has been represented throughout the proceedings by Mr Christopher Orr, a Welfare Rights Officer of the Glasgow City Council. Mr Orr's application for leave to appeal to the Commissioner succinctly sets out the issue:-

> "...the tribunal have erred in law by taking over three months to issue a full statement. In the attached decision [CDLA/1761/2002] the Commissioner indicates that a delay beyond three months may count as an error of law (paragraph 7)."

3. Paragraph 7 of Mr Commissioner Williams' decision in CDLA/1761/2002 reads as follows:-

> "7. There is a relevant statutory provision in regulation 53(4) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. A copy of a full statement is to be sent to every party "as soon as may be practical". That should be read alongside the need to make the request for it within one month, or within three months at the longest (regulation 54). If longer than three months is never allowed to a party, how can Parliament be credited with the view that it may be impracticable for the tribunal to produce the statement in less than that time? If the tribunal has failed to produce a statement in that time, has it erred in law in any event? That was not considered in R(IS) 11/99 and has not been raised by the parties here, so I note but do not decide it."

Statutory provisions

4. As Mr Orr has pertinently spotted, regulation 53 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (the regulations) was amended on 19 June 2000 by the Social Security and Child Support (Miscellaneous) Amendments Regulations 2000 (S.I. 2000 No. 1596). The relevant text of the original version is this:-

> **"Decisions of appeal tribunals**
> 53.– ......
> (3) As soon as may be practicable after an appeal or referral has been decided by an appeal tribunal, a copy of the decision notice prepared in accordance with paragraph (1) and (2) shall be sent or given to every party to the proceedings who shall also be informed of–
> (a) his right under paragraph (4); ......
> (4) A party to the proceedings may apply in writing to the chairman, or in the case of a tribunal with only one member, to that member, for a copy of a statement of the reasons for the tribunal's decision within one month of the sending or giving of the decision notice to every party to the proceedings or within such longer period as may be allowed in accordance with regulation 54. ....."

5. However, paragraph (4) of regulation 53 was amended from 19 June 2000 (the 2000 amendment) to read:-

> "(4) A party to the proceedings may apply in writing to the chairman, or in the case of a tribunal with only one member, to that member, for a statement of the reasons for the tribunal's decision within one month of the sending or giving of the decision notice to every party to the proceedings or within such longer period as may be allowed in accordance with regulation 54 and following that application the chairman or, as the case may be, that member, shall record a statement of the reasons and a copy of that statement shall be sent or given to every party to the proceedings as soon as may be practical."

6. I also now note that from 20 May 2002 regulation 53(4) has been further amended, by the Social Security and Child Support (Decisions and Appeals) (Miscellaneous Amendments) Regulations 2002 (S.I. 2002 No. 1379) (the 2002 amendment), and currently reads:-

> "(4) A party to the proceedings may apply in writing to the clerk to the appeal tribunal for a statement of the reasons for the tribunal's decision within one month of the sending or giving of the decision notice to every party to the proceedings or within such longer period as may be allowed in accordance with regulation 54 and following that application the chairman, or in the case of a tribunal with only one member, that member shall record a statement of the reasons and a copy of that statement shall be given to every party to the proceedings as soon as may be practicable."

7. The requirement to apply to the clerk was introduced to link with the terms of regulation 2 of the regulations, which has throughout had the heading "Service of notices or documents". This regulation re-enacts regulation 1(3) of the Social Security (Adjudication) Regulations 1995 and provides that, for the purposes of the statutory provisions, where:-

> "(a) any notice or other document is required to be given or sent to the clerk to the appeal tribunal.... that notice or document shall be treated as having been so given or sent on the day that it is received by the clerk to the appeal tribunal.... and
> (b) any notice...or other document is required to be given or sent to any person other than the clerk to the appeal tribunal....that notice or document shall, if sent by post to that person's last known address, be treated as having been given or sent on the day that it was posted."

Background

8. The adverse decision under appeal to the tribunal was an overpayment of income support, in excess of £5,000, based on misrepresentation. A decision in the claimant's favour by an earlier tribunal on 21 January 2000 was successfully appealed to the Commissioner by the Secretary of State. The tribunal decision is the outcome of the directed rehearing. The appellant was present at the hearing with Mr Orr. The tribunal dismissed the claimant's appeal. By that stage the file, including supplementary submissions, ran to 282 pages.

9. By letter dated 26 June 2002, the clerk to the tribunal sent Mr Orr a copy of the tribunal's decision notice, signed by the chairman on the date of the hearing. On 1 July 2002, on the appellant's behalf, Mr Orr requested a copy of the record of proceedings and a full statement of the reasons for the tribunal decision. It so happens that the chairman had already decided to prepare such a statement before the application was made so that the recording did not literally follow the application but, rightly, no point has been taken on that.

10. What happened next is not disputed by the parties and is set out by the clerk to the tribunal in a letter of 30 October 2002:-

"The statement was received on tape from the chairman on 26/06/02 and this was sent for typing on 27 June 2002.

When this had been actioned we sent the statement back to the chairman for his signature on 27/07/02.

We then sent reminders on 14/08/02, 27/08/02, 01/10/02 and finally on 10/10/02 and on receipt of the signed statement on 29/10/02 this was immediately posted to all parties."

Appeal to the Commissioner

11. In his written submission, the Secretary of State does not support the appeal and that position is not resiled from at the oral hearing. Reliance is placed on CSIB/973/99, in which at paragraph 14 Mr Commissioner May QC said:-

> "I do not consider that Mr Orr has demonstrated any error in law on the part of the tribunal due to the delay in issuing the statement of facts and reasons to the claimant. There is nothing on the face of it to demonstrate that the statement of facts and reasons is not what it bears to be. The regulations as Miss McLaughlin pointed out do not set any time limit for their preparation and production. Further the claimant has been able to identify and articulate from the statement asserted errors in law which the tribunal has (sic) said to have made. He has thus in no way been disabled from presenting his appeal on material points which he wished to make. I thus consider that there is no substance or basis for the appeal on these grounds."

12. In response, Mr Orr points out a suggested further error of law. The hearing was 11 June 2002. The tape reached the typing section on 27 June 2002. The typed statement was sent back for signature on 27 July 2002. It was returned by the chairman as a signed statement on 29 October 2002. However, the manuscript signature has the typed date "27.6.02" by it. This is clearly incorrect and "in signing that date as the date of the full statement the chairman has misled the claimant .....".

Oral hearing

13. The case came before me for an oral hearing on 31 July 2003. As noted, the appellant was represented by Mr Orr. The Secretary of State was represented by Mr Brodie, Advocate, instructed by Mr Brown, Solicitor, of the Office of the Solicitor to the Advocate General. I am grateful to them both for their helpful submissions.

The arguments

For the appellant

14. Mr Orr accepts that there is no inadequacy of reasoning, in particular no real doubt as to whether the statement does in fact represent what were the reasons for the decision. Nor does he suggest that the appellant has been prejudiced by any delay. He submits, however, that there is a free-standing error of law when a full statement is not issued "as soon as may be practical" and that this necessarily occurs when it takes over three months to do so.

15. CSIB/973/99 is not in point because the statement was issued in June 1999, when the original version of regulation 53(4) applied. Two decisions of Mr Commissioner Jacobs are

arguably to the contrary but neither of them note that words had been added to regulation 53(4) by the 2000 amendment. In the combined case CJSA/322 and 1452/2001, Mr Commissioner Jacobs was considering a hearing held on 1 December 1998 and a statement not written until 27 September 2000. He nevertheless held that that delay was not an error of law:-

> "9. I accept the Secretary of State's submission that there is no error of law in this case on that account and that the lateness of reasons is not automatically an error of law. The issue is whether the delay in writing the reasons indicates that they are unreliable as an accurate statement of the tribunal's reasoning. If they are unreliable, the reasons are inadequate.
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> 10. The reasons for some cases are easily reproducible long after the event. ...... In more complex cases, the notes of proceeding may be sufficient to allow the chairman to reproduce the tribunal's reasoning. Chairman (sic) also have personal notebooks, which may contain sufficient details of the tribunal's reasoning for a statement to be written. It would not be appropriate to find an error of law on the basis of delay in providing written reasons without giving the chairman the chance to explain how the reasoning was reproduced.
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> 11. In this case, the record of proceedings was sufficient to allow the chairman fairly and accurately to state the reasons many months later."

16. Mr Commissioner Jacobs adopted the same reasoning and reached the same conclusion in CDLA/3908/2001, where reasons were requested on 25 September 2000 but not issued until 11 July 2001. That case was dealt with by a tribunal at a paper hearing and the Commissioner confirmed that "[t]hat is the sort of case in which it should be possible for a chairman to reproduce the tribunal's reasoning long after the decision was made".

17. It is Mr Orr's submission that Mr Commissioner Jacobs addressed delay solely in the context of adequacy of reasons. To so limit its ambit makes the introduction of the additional words, which must have had a purpose, appear redundant. Therefore, the approach of Mr Commissioner Williams is to be preferred. It is the only case directly in point.

For the Secretary of State

18. On behalf of the Secretary of State, Mr Brodie submits that the comments by Mr Commissioner Williams are, firstly, *obiter* and, secondly, unjustifiable insofar as they attempt to draw an analogy with time limits imposed on claimants.

19. Mr Brodie further submits that "as soon as may be practical" does not impose a legislative requirement, rather its purpose is to emphasise what is undeniably good practice. In contrast to prescribed time limits which are elsewhere included in the regulations, the relevant phrase has deliberately been left vague. A time limit would have been imposed if a legislative fetter was intended as distinct from an exhortation.

20. In any event, from its context, placing and wording, "as soon as may be practical" does not apply to the chairman's participation in the statement making process but only to the role of the administration when issuing it.

21. If, contrary to his submission, there is the requisite breach of a statutory rule that must be followed by tribunals, panel members and clerks, rather than a mere matter of practice, Mr Brodie acknowledges from R(IS) 11/99 that such a breach may render a decision erroneous in

point of law. However, in R(IS) 11/99, Mr Commissioner Rowland emphasised the requirement for a **material** breach of procedural rules. It was accepted that the failure to provide any statement of reasons in pursuance of the statutory duty was a breach of that type.

22. In Mr Brodie's submission, the lack of a statement is material because it prejudices an appellant as he has no sufficient indication of the tribunal's findings and reasons. There is no prejudice suffered by this appellant. His appeal to the Commissioner was not prevented, either by the incorrect date on the statement or by any delay. The time for applying for leave to appeal commences when the applicant is sent a written statement of reasons not from the date that it was signed. By virtue of the decision notice, he knows the nature of the decision made. He is not deprived of any benefit and, as the subject of an overpayment decision, he benefits from any delay in recovery. There has been no breach of the rules of natural justice because nothing has been asserted which could infringe the right to a fair hearing.

Response on behalf of the appellant

23. Mr Orr disputes that a material breach necessitates prejudice. The word may simply mean "significant". Applying the test "as soon as may be practical" is no more difficult than determining whether or not reasons are adequate. All must depend upon the circumstances, for example how long the period of delay is, whether there is more than one member of the tribunal etc.

My conclusion and reasons

24. I granted leave to appeal in order to consider further the points made by Mr Commissioner Williams. However, having heard full argument, I prefer the submissions of Mr Brodie.

Statutory breach

25. The 2000 amendment aligned the legislative provisions on sending or giving a copy of the statement of reasons with what already existed for a copy of the decision notice. No set time limit for the preparation, production and issue of the statement was introduced, which contrasts markedly with time limits otherwise applicable within the regulations. This distinction seems rather to underscore that the words added merely set a benchmark.

26. It is noteworthy that the 2000 amendment was introduced after the passing of the Human Rights Act 1998 but before the Convention rights were introduced into domestic law on 2 October 2000. Under Article 6(1), there is a right to "a fair and public hearing within a reasonable time....". Delay in delivering reasons for judgement *may* infringe that requirement.

27. With respect, I am unable to follow the reasoning of Mr Commissioner Williams which is relied on. Asking for a statement of reasons requires only a sentence. Producing the necessary statement is a very different task, varying according to the complexity of the case and how long has elapsed before the chairman even receives the request. Comparison therefore appears inappropriate as the time limit imposed on a claimant in requesting a statement seems to have no logical connection with how soon the tribunal may be expected to produce it. The imposition of a set time limit in the one case and not in the other is surely deliberate.

28. I also agree with Mr Brodie that any obligation arising under regulation 53(4) lies only on the clerk. In regulation 53(3), "sent or given" and "as soon as may be practicable" clearly relate to the clerk, because the text has always assumed a decision notice already prepared. Since 2000, regulation 53(4) substantially mirrors that wording. The 2002 amendment has replaced "practical" with "practicable" but in any event each alternative seems to mean "what is possible in practice".

29. Moreover, regulation 2 of the regulations uses the concept of giving or sending with regard to documents which the clerk to the appeal tribunal (amongst others) requires to serve. Curiously, regulation 2 refers to "given or sent", whereas regulation 53(3), and 53(4) after the 2000 amendment, use those activities in the opposite order. Moreover, after the 2002 amendment, only "given" is retained in regulation 53(4). But I do not consider that anything turns on such oddities. The mandatory obligation on the chairman or member to record the statement of reasons is kept distinct by the statutory wording from the requirement to send or give a copy of it "as soon as may be practical" or "as soon as may be practicable". The link between regulation 2 and regulation 53, and the separation in the latter regulation between "recording" and "giving", suggest that the phrase "as soon as may be practical/practicable" does not apply at the stage of recording the statement.

Material breach of a procedural regulation

30. Even if I am wrong in the above, I accept Mr Brodie's submission that there must be a **material** breach of a procedural rule to constitute an error of law, and that this does not arise on the present facts. Mr Commissioner Rowland emboldened the word "material" at paragraph 4(h) of R(IS) 11/99. Whether one defines that term as "prejudicial" or "significant", the point is that a mere breach of a procedural rule is insufficient. I agree with the comment at page 186 of volume 111 of the 2002 edition of the annotated Social Security Legislation. This suggests that the breach must be of such a nature that a rehearing is the only way of remedying it:-

> "For this reason, a failure to keep a record of proceedings will render a decision erroneous in point of law if the lack of a record makes it difficult to determine whether or not the tribunal has provided an adequate statement of reasons for the decision (CDLA/16902/96). On the other hand, a failure to provide any summary of reasons in a decision notice will not render the decision erroneous in point of law because the remedy is to apply for a full statement of reasons (CIB/4497/98)".

Is delay by a chairman in producing a statement ever relevant?

31. It may be so in one of two ways. Firstly, it may form part of an infringement of Article 6(1) of the Convention. Nothing like that is suggested here. If a claimant is allowed one month merely to ask for a full statement, then even a delay by the chairman of nearly four months, whether in preparing the statement or in checking and signing it, is not sufficiently serious to give rise to an issue under Article 6(1). But if it took four years, that could be very different.

32. Secondly, Mr Commissioner Jacobs points out that the delay in producing reasons may indicate that they are unreliable as an accurate statement of the tribunal's reasoning. Delay is therefore relevant to adequacy of reasoning. It is rightly not contended in this case

that the reasoning is inadequate. There is nothing whatsoever which suggests that the chairman has not fairly and accurately stated the tribunal's reasoning.

Summary

33. As no error of law has been demonstrated with respect to the tribunal decision, my own decision is as set out in paragraph 1 above.

34. Nothing I have said relates to the distinct issue of good practice in recording a decision. As *Nash v Chelsea College of Art & Design* [2001] EWHC Admin 538 (11 July 2001) illustrates, even if reasons given late are an accurate account of the reasons, they appear less credible and can therefore more easily be attacked as inadequate. Moreover, it seems a basic precept of justice that reasons are communicated promptly. I appreciate, from personal experience, the heavy workload which falls on legally qualified tribunal panel members. But it is important that the Appeals Service encourages a system whereby chairmen consider the timeous production of requested statements to be a very high priority.

(Signed)
L T PARKER
Commissioner
Date: 5 August 2003