

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PENSION CREDIT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 5 December 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Omagh.
2. For the reasons I give below, I grant leave to appeal. For technical legal reasons, I allow the appeal and I set aside the decision of the appeal tribunal. Unfortunately, this does not benefit the appellant for the reasons I set out below.
3. Under Article 15(8)(a) of the Social Security (NI) Order 1998, I make the decision the tribunal should have made. I decline to consider the appeal on the basis that I have no jurisdiction to do so. This is because the appellant had appealed a decision against which no appeal lies.
4. This is doubtless a frustrating outcome for the appellant. He has been drawn into these proceedings after being given misleading information in decisions from the Department to the effect that he had a right of appeal. However, I consider that no other outcome is possible.

REASONS

Background

5. The appellant claimed state pension credit (PC) from the Department for Social Development, subsequently known as the Department for Communities (the Department), from 11 June 2012. On 20 November 2011 the Department decided that the appellant was entitled to PC. The

Department awarded an element of housing costs, from 14 December 2012, based on entitlement to assistance with an element of £100,000 of a total outstanding mortgage of £115,000.

6. On 8 June 2017 the Department superseded the appellant's award of PC on the basis of a relevant change in circumstances, following a reduction in the standard interest rate from 3.12% to 2.61%. (The standard interest rate is the average mortgage rate published by the Bank of England which changes from time to time when there is a change in the average mortgage rate of 0.5% or more). As a result of the Department's decision, the housing costs element of the appellant's PC was reduced from £60 per week to £50.20 per week. The appellant was notified of the change in a decision letter which advised him of the right to appeal the decision once a mandatory reconsideration had been sought. The appellant requested a reconsideration of the Department's decision, and on 13 August 2017 the decision was reconsidered but not revised. The reconsideration decision gave details of how to appeal. The appellant duly appealed, requesting an oral hearing of the appeal.
7. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 30 March 2018. The appellant applied to the LQM for leave to appeal to the Social Security Commissioner, but this was refused in a determination issued on 15 May 2018. On 23 October 2018 the appellant applied to a Social Security Commissioner for leave to appeal.
8. The application to the Social Security Commissioner was late having been made some four months after the expiry of the relevant time limit. In view of the age of the appellant, I consider that I can admit the late appeal under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999 for special reasons.

Grounds

9. The appellant's initial application, submitted on 23 October 2018, raises general issues around austerity cuts, lack of legal aid for representation at tribunals, whether civil servants have experienced wage cuts in the past three years, the refusal of an adjournment of his appeal hearing, the fact that he had to attend a hearing when unwell and that he had been told that the tribunal would proceed in his absence if he did not attend. He was invited to submit an application on the OSSC1 form, which he did, attaching further material on 30 November 2018. The further material included a submission dated 23 March 2016 to the tribunal.
10. The Department was invited to make observations on the appellant's grounds. Ms O'Connor of Decision Making Services (DMS) responded on behalf of the Department. Ms O'Connor submitted that the matter that the tribunal had considered was one on which there was no right of

appeal to a tribunal, referring to paragraph 6 of Schedule 2 to the Social Security (NI) Order 1998. She submitted that the tribunal had erred in law on this basis. However, she indicated that the Department did not support the application on the grounds advanced by the appellant.

11. I sought clarification of the Department's position, asking why the Department did not support the application on any grounds notwithstanding that it had identified an error of law in the tribunal's decision. Ms O'Connor responded, indicating that the Department submitted that the tribunal had determined an appeal that was outside its jurisdiction, but the fact that the tribunal had determined a matter which was not within its jurisdiction, while an error, was not an error of law.

The tribunal's decision

12. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, and a submission from the appellant. The appellant attended the hearing and gave oral evidence. The Department was represented at the hearing by Mrs Gordon. The decision under appeal was the decision of the Department to supersede the appellant's award of on the basis that there had been a reduction in the standard interest rate from 3.12% to 2.61%.
13. The appellant had indicated that he had previously sought a postponement due to ill health, which was refused by a tribunal clerk, but felt capable of proceeding on the day. He raised the issue of reduction of benefit rates and government policy. The LQM found that the reduction in the appellant's housing costs resulted from changes to the standard interest rate, and that the law had been properly applied in the appellant's case. He therefore disallowed the appeal.

Relevant legislation

14. The grounds of entitlement to PC were established by section 1 of the State Pension Credit Act (NI) 2002. This reads:

1.—(1) A social security benefit to be known as state pension credit shall be payable in accordance with the following provisions of this Act.

(2) A claimant is entitled to state pension credit if—

(a) he is in Northern Ireland;

(b) he has attained the qualifying age; and

(c) he satisfies—

(i) the condition in section 2(1) (guarantee credit); or

(ii) the conditions in section 3(1) and (2) (savings credit).

(3) A claimant who is entitled to state pension credit is entitled—

(a) to a guarantee credit, calculated in accordance with section 2, if he satisfies the condition in subsection (1) of that section; or

(b) to a savings credit, calculated in accordance with section 3, if he satisfies the conditions in subsections (1) and (2) of that section,

(or to both, if he satisfies both the condition mentioned in paragraph (a) and the conditions mentioned in paragraph (b)).

The calculation of the amount of guarantee credit to which a claimant may be entitled is governed by section 2 which provides:

2.—(1) The condition mentioned in section 1(2)(c)(i) is that the claimant—

(a) has no income; or

(b) has income which does not exceed the appropriate minimum guarantee.

(2) Where the claimant is entitled to a guarantee credit, then—

(a) if he has no income, the guarantee credit shall be the appropriate minimum guarantee; and

(b) if he has income, the guarantee credit shall be the difference between the appropriate minimum guarantee and his income.

(3) The appropriate minimum guarantee shall be the total of—

(a) the standard minimum guarantee; and

(b) such prescribed additional amounts as may be applicable.

(4) The standard minimum guarantee shall be a prescribed amount.

(5) The standard minimum guarantee shall be—
(a) a uniform single amount in the case of every claimant who is a member of a couple; and

(b) a lower uniform single amount in the case of every claimant who is not a member of a couple.

...

The housing costs element of PC is governed by section 2(3)(b) above and regulation 6(6)(c) of and Schedule 2 to the State Pension Credit Regulations 2003. Regulation 6(6)(c) reads:

(6) Except in a case to which paragraph (3) applies, an amount additional to that prescribed in paragraph (1) shall be applicable—

...

(c) except where paragraph (7) applies, in accordance with Schedule 2 (housing costs);

...

Paragraph 3 applies to prisoners and fully maintained member of religious orders and therefore has not relevance to this case. Paragraph 7 concerns persons detained in custody and, again, does not apply to the facts of this case.

Schedule 2 sets out the method for the calculation of housing costs. The key paragraphs of Schedule 2 applying in this case are as follows:

7.—(1) The weekly amount of housing costs to be met under this Schedule in respect of a loan which qualifies under paragraph 11 or 12 shall be calculated by applying the formula—

$A \times B \div 52$

where—

A = the amount of the loan which qualifies under paragraph 11 or 12;

B = the standard rate for the time being applicable in respect of that loan.

8.—(1) Where for the time being a loan exceeds, or in a case where more than one loan is to be taken into account, the aggregate of those loans exceeds the appropriate amount specified in sub-paragraph (2), then

the amount of the loan or, as the case may be, the aggregate amount of those loans, shall for the purposes of this Schedule, be the appropriate amount.

(2) Subject to sub-paragraphs (3) to (8), the appropriate amount is £100,000*.

...

9.—(1) The standard rate is the rate of interest applicable per annum to a loan which qualifies under this Schedule.

(2) Subject to the following provisions of this paragraph, the standard rate is to be the average mortgage rate published by the Bank of England in August 2010.

(2A) The standard rate is to be varied each time that sub-paragraph (2B) applies.

(2B) This sub-paragraph applies when, on any reference day, the Bank of England publishes an average mortgage rate which differs by 0.5 percentage points or more from the standard rate that applies on that reference day (whether by virtue of subparagraph (2) or of a previous application of this subparagraph).

(2C) The average mortgage rate published on that reference day then becomes the new standard rate in accordance with sub-paragraph (2D).

(2D) Any variation in the standard rate by virtue of sub-paragraphs (2A) to (2C) comes into effect—

(a) for the purposes of sub-paragraph (2B) (in consequence of its first and any subsequent application), on the day after the reference day referred to in sub-paragraph (2C);

(b) for the purpose of calculating the weekly amount of housing costs to be met under this Schedule, on the day specified by the Department.

(2E) In this paragraph—

“average mortgage rate” means the effective interest rate (non-seasonally adjusted) of United Kingdom resident banks and building societies for loans to households secured on dwellings published by the Bank of England in respect of the most recent period for that rate specified at the time of publication;

“reference day” means any day falling after 1st October 2010.

14. For the purposes of determining this application, in the light of Ms O'Connor's submissions, it is also necessary to have regard to the provisions governing rights of appeal. The right of appeal to a tribunal is given by Article 13 of the Social Security (NI) Order 1998. So far as relevant, this provides:

13.—(1) This Article applies to any decision of the Department under Article 9 or 11 (whether as originally made or as revised under Article 10) which—

(a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2; or

(b) is made otherwise than on such a claim or award, and falls within Schedule 3.

(2) In the case of a decision to which this Article applies, the claimant and such other person as may be prescribed shall have a right to appeal to an appeal tribunal, but nothing in this paragraph shall confer a right of appeal—

(a) in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision, or

(b) where regulations under paragraph (3A) so provide.

Schedule 2 of the 1998 Order lists the decisions against which no appeal lies. These include, at paragraph 6:

6. A decision as to the amount of benefit to which a person is entitled, where it appears to the Department that the amount is determined by—

(a) the rate of benefit provided for by law; or

(b) an alteration of a kind referred to in—

(i) section 139(1)(b) of the Administration Act (income support);

(ii) section 139A(1)(b) of that Act (jobseeker's allowance);

(iii) section 139B(1)(b) of that Act (state pension credit);

(iv) ...

By section 139B(1)(b) of the Social Security Administration (NI) Act 1992 (the 1992 Act):

139B.—(1) Subject to such exceptions and conditions as may be prescribed, subsection (2) or (3) below shall have effect where—

(a) an award of state pension credit is in force in favour of any person (“the recipient”); and

(b) an alteration—

(i) in any component of state pension credit,

(ii) in the recipient’s benefit income,

(iii) in any component of a contribution-based jobseeker’s allowance,

(iiia) in any component of a contributory employment and support allowance; or

(iv) in the recipient’s war disablement pension or war widow’s or widower’s pension,

affects the computation of the amount of state pension credit to which he is entitled.

(2) Where, as a result of the alteration, the amount of state pension credit to which the recipient is entitled is increased or reduced, then, as from the commencing date, the amount of state pension credit payable in the case of the recipient under the award shall be the increased or reduced amount, without any further decision of the Department, and the award shall have effect accordingly.

By section 139B(6) of the 1992 Act:

“component”—

(a) ...;

(b) in relation to state pension credit, means any of the sums specified in regulations under section 2, 3 or 12 of the State Pension Credit Act (Northern Ireland) 2002;

Assessment

15. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the

party who wishes to bring an appeal must first obtain leave to appeal.

16. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

17. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

18. The appellant has raised a number of points in his appeal to the tribunal and in his grounds to me. I would characterise these as political points addressed to the policy of austerity, including cuts to legal aid, and to the distribution of wealth in society, particularly between the working population and the elderly. Whatever validity these points may have in the political domain, they are addressed to the appellant's views on how the law should be and not how it is.

19. As a judicial office holder, it is not my function to be concerned with how the law should be. I am concerned with the law as it is. I can only engage with issues of fact or law relevant to the adjudication of the particular benefit and the appellant's entitlement to it. I am satisfied that the appellant does not demonstrate an arguable error of law in relation to the issue of his entitlement to PC. In short, the decision under appeal could not have been made in any way differently on the facts and the law as they stood. Therefore, I must refuse leave to appeal on the grounds he has advanced.

20. The appellant makes further submissions about a tribunal clerk's refusal to postpone his hearing. The appellant has stated that he did not seek postponement, but adjournment. For clarity, I would indicate that the term postponement properly refers to cancellation of a hearing in advance of the time agreed for that hearing, whereas the term adjournment refers to a decision to defer a hearing to another day which is made at the hearing itself.

21. The appellant states that he attended his hearing despite being ill. I accept that this was because he had been refused postponement. However, he did not then

seek an adjournment from the tribunal on the day and the tribunal hearing proceeded with his consent. He attacks the earlier refusal of the postponement of his appeal by a tribunal clerk in the context of his ill health. However, this is entirely academic in the circumstances. It is also not a matter within my jurisdiction, but a matter for complaint to the President of Appeal Tribunals. I am confined to a consideration of the conduct of the tribunal and the issue of whether the tribunal proceeded fairly. The tribunal had no responsibility for what occurred prior to the hearing. Once the appeal proceeded on the date of hearing, with the appellant's consent, I can see no unfairness arising. I consider that I must also refuse leave to appeal on this basis.

22. The Department has, nevertheless, raised another issue. Ms O'Connor has directed me to the legislation governing the right of appeal to a tribunal. She submits that the tribunal has acted in error by proceeding to hear and determine the appeal. She submits that the Departmental decision in the appeal was one which does not give rise to any right of appeal. Therefore the tribunal should not have considered the appeal and was in error when it did so.

23. I observe that the decision issued by the Department to the appellant on 8 June 2017 referred to appeal rights, subject to mandatory reconsideration. Once a mandatory reconsideration had been carried out on 13 August 2017 the Departmental decision notice similarly informed the appellant that he had a right of appeal. Ms O'Connor's submission implies that this was wrong.

24. I also observe that the Department made a submission to the tribunal. The submission to the tribunal asked it to affirm the Department's decision. Therefore, the tribunal was at no time asked to consider whether or not it had jurisdiction or whether the appeal was validly made. I have some sympathy for the tribunal in these circumstances, as no question of the jurisdiction of the tribunal was raised before the appeal was decided.

25. Nevertheless, Ms O'Connor refers me to Schedule 2 to the Social Security (NI) Order 1998 which is headed "Decisions against which no appeal lies". Among the decisions against which no appeal lies are a decision as to the amount of benefit to which a person is entitled, where it appears to the Department that the amount is determined by the rate of benefit provided for by law or an

alteration of a kind referred to in section 139B(1)(b) of the 1992 Act.

26. An alteration of that kind is “an alteration of any component of state pension credit”. Component is defined, and “in relation to state pension credit, means any of the sums specified in regulations under section 2, 3 or 12 of the State Pension Credit Act (Northern Ireland) 2002”. By section 2(3) of that Act, “the appropriate minimum guarantee shall be the total of (a) the standard minimum guarantee; and (b) such prescribed additional amounts as may be applicable. Prescribed has the general meaning prescribed by regulations. The State Pension Credit Regulations (NI) 2003 make provision for the housing costs element of PC. It appears to me that the housing costs provided for in regulation 6(6)(c) and Schedule 2 of those regulations are clearly encompassed by the expression “such prescribed amounts as are applicable”. The change in the rate of housing costs payable to the appellant, following the alteration of the standard interest rate, is an alteration of a component of state pension credit.

27. It follows that I consider that Ms O’Connor is correct to submit that the decision making an alteration to the appellant’s housing costs is not an appealable decision. The legislative route to this conclusion, as set out above, is relatively convoluted. However, the change in the average mortgage rate as assessed by the Bank of England was a universal factor affecting all claimants with an element of housing costs based upon that rate. This is an alteration similar to the annual uprating in the standard rates of benefit entitlement. An appeal against a decision based on change in the annual benefit rates has no prospect of success, as those rates are prescribed by law and do not vary, and similarly the standard interest rate is prescribed by law and does not vary. It is not difficult to understand why such a decision would not carry a right of appeal.

28. Ms O’Connor submits that a tribunal hearing an appeal without jurisdiction has made an error, but not an error of law. She refers to the list of errors of law set out in *R(Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, which do not include the current situation. On the basis that the tribunal has not erred in law, she submits that I should refuse leave to appeal. However, I consider that Ms O’Connor’s submission to this effect is clearly wrong.

29. While the examples the Ms O'Connor has cited from *R(Iran)* may be examples of the errors of law most commonly encountered in practice, it is not an exhaustive list. It is manifestly an error of law for a tribunal to determine a matter over which it does not have any jurisdiction (see, for example, *R(Bunce) v Pension Appeal Tribunal* [2009] EWCA Civ 452). The right of appeal to the tribunal is defined by Article 13 of and Schedule 2 to the Social Security (NI) Order 1998. The particular tribunal did not have jurisdiction to consider the appeal because the appellant had no right of appeal. This was not just an error, but an error of law.

30. As indicated above, I have sympathy for the tribunal in the circumstances, as the Departmental submission did not query the right of the appellant to appeal. I also have sympathy for the appellant himself, who has been unnecessarily drawn into a pointless exercise. However, it is clear that no appeal lies against the sort of decision made in the appellant's case. The tribunal had no jurisdiction to deal with his appeal. As it has exceeded its jurisdiction I must find that it has acted in error of law and I must set aside its decision.

31. Under Article 15(8)(a) of the Social Security (NI) Order 1998 I have the power to give the decision that the tribunal should have given. I decide that the tribunal had no jurisdiction to determine the appeal and I decline to consider the appeal as I, similarly, have no jurisdiction to do so.

(signed): O Stockman

Commissioner

22 July 2019