FL-v-Department for Communities (HB) [2019] NICom 47

Decision No: C2/19-20(HB)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

HOUSING BENEFIT

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 21 November 2016

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 Belfast.

2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The applicant claimed financial assistance by way of housing benefit (HB) and/or rate relief (RR) from Land and Property Services (LPS) from 20 February 2014 in respect of rates for his owner-occupied accommodation in Downpatrick. In the course of his claim the applicant confirmed that he was the joint owner of another property in Belfast. On 24 February 2014 he was asked to supply bank statements for a two month period. A further request was made on 17 May 2014. On 2 June 2014 LPS received a letter from the applicant's accountant, indicating that he became self-employed on 19 August 2013. On 28 October 2014 the claim was disallowed on the basis that the information requested had not been supplied by the applicant.

4. On 12 January 2015 the applicant attended LPS offices and provided bank statements as requested. It was decided by LPS that his previous claim would be "re-opened". On 13 January 2015 LPS requested the applicant to provide his self-employed accounts. On 4 February 2015 the

value of the property owned in Belfast was assessed as £115,000. The applicant did not provide the information requested by 8 April 2015. On 26 June 2015 LPS issued a further decision disallowing a claim for HB/RR on the basis that the applicant had not provided the information requested, without identifying the particular claim giving rise to the decision, but it appears that this purported to also be a disallowance of the claim of 27 January 2014. The applicant appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 21 November 2016. The LQM held that there was no valid appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 4 May 2018. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was refused by a determination issued on 17 July 2018. On 24 July 2018 the applicant applied for leave to appeal from a Social Security Commissioner.

Grounds

6. The applicant, represented by Mr Black of Law Centre NI, submitted that the tribunal had erred in law on the basis that:

   (i) it denied the applicant his right to a fair hearing under Article 6 ECHR;

   (ii) it denied him his right to property under Article 1 of Protocol 1 to the EHCR;

   (iii) it acted irrationally.

7. LPS was invited to make observations on the appellant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of LPS. He submitted that the tribunal had not erred in law as alleged in the grounds of application. However, he submitted that there were procedural errors in the decision and indicated that LPS supported the application and asked for the tribunal decision to be set aside.

The tribunal's decision

8. The legally qualified member 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 LPS submission and a further submission dated 26 August 2015. The applicant attended the hearing and gave oral evidence, represented by Ms McKeith. LPS was represented by Mr Wood, accompanied by Mr Mulholland.

9. The LQM set out the agreed facts, namely that the applicant had claimed HB/RR on 27 January 2014 and had been asked to furnish further evidence by LPS. He provided some evidence relating to joint ownership of a property but not all that was requested, failing to provide banks

statements. His claim was disallowed on 28 October 2014. The applicant did not appeal, but visited the LPS office on 12 January 2015 and provided some more information. LPS then requested further information. The applicant provided a valuation of the property he held but did not provide bank statements as requested. On 26 June 2015 LPS gave a new decision disallowing the applicant's claim to HB/RR. He appealed this decision out of time on 3 August 2015. No information was requested as to why the appeal was late in order that consideration could be given as to whether it should be admitted late. LPS engaged in some further reconsiderations and requests for information before indicating on 29 December 2015 that the applicant's appeal against the decision had not resulted in the decision being changed, and indicated that it was referring his appeal to the Appeals Service.

10. The LQM identified that there was a question as to whether the appeal was valid appeal. She held that there was no valid appeal against the decision of 28 October 2014. She held that any appeal against the decision of 26 June 2015 was late, with no decision to admit the late appeal having been made. Accordingly, she held that there was no valid appeal before the tribunal, declining jurisdiction to hear it.

Relevant legislation

11. HB is established by section 122 and 129 of the Social Security Contributions and Benefits Act (Northern Ireland) 1992. It is a means-tested benefit and the amount of HB payable if any will vary according to the amount of income and capital that a claimant may possess.

12. The legislative provision relied upon by LPS for the decision on 28 October 2014 was regulation 82(1) of the Housing Benefit Regulations (Northern Ireland) 2006 (the 2006 Regulations). This provides:

> 82.—(1) Subject to paragraph (2) and to paragraph 5 of Schedule A1(a) (treatment of claims for housing benefit by refugees), a person who makes a claim, or a person to whom housing benefit has been awarded, shall furnish such certificates, documents, information and evidence in connection with the claim or the award, or any question arising out of the claim or the award, as may reasonably be required by the relevant authority in order to determine that person's entitlement to, or continuing entitlement to, housing benefit and shall do so within one month of being required to do so or such longer period as the relevant authority may consider reasonable.

13. The statutory framework for decision making in relation to HB is set out in the Housing Benefit (Decisions and Appeals) Regulations (NI) 2001 (the 2001 Regulations).

Submissions and hearing

14. This case was one which involves clearly arguable errors of law that are acknowledged by both parties and therefore I grant leave to appeal. While there was consensus between the parties that a number of errors of law appear in the first instance decision making, the analysis of the parties on the implications for the tribunal's decision vary. I therefore decided to hold an oral hearing. Mr Black of Law Centre NI appeared for the applicant. Mr Clements of DMS appeared for LPS. I am grateful to both for their assistance with the case.

15. Mr Black submitted that the tribunal had erred in law by declining to consider the appeal. He indicated that there was agreement with Mr Clements about the basic facts of the case. These began with the initial claim received on 20 February 2014. This falls to be treated as made on 27 January 2014 under regulation 81(5)(d) of the 2006 Regulations. Following a number of requests for information in support of the claim which were not answered in full, LPS disallowed the claim on 28 October 2014, citing regulation 82 of the 2006 Regulations. No appeal was made against that decision. However, relying on C1/18-19(HB) – a decision of Chief Commissioner Mullan – Mr Black submitted that the decision of 28 October 2014 was plainly wrong in law and invalid.

16. Mr Black submitted that LPS had, after 12 January 2015, conducted a late revision of that decision when it "re-opened" the initial claim. He submitted that the adjudication process that led to the decision of 26 June 2015 was a valid one. He submitted that the tribunal had erred in law when, finding that the appeal from that decision was late, it did not either seek reasons for lateness and deal with the question of admitting the late appeal or send the appeal back to LPS to instigate that process. It disallowed the appeal instead in a manner that was procedurally unfair and thereby erred in law.

17. Mr Clements' analysis differed from that of Mr Black. He also submitted that the adjudication of 28 October 2014 was flawed, referencing C1/18-19(HB) and R(H)3/05. However, he did not accept that there could have been a revision of that decision by way of the "re-opened" claim and that the purported decision of 26 June 2015 was invalid. Nevertheless, in the light of all the adjudication errors that appeared in the case he submitted that I should refer the case back to LPS for redetermination. Mr Black concurred with that proposal.

18. In terms of my powers to do what the parties asked me to do, I further asked them to address me on the decision of the Court of Appeal in *JG v Upper Tribunal (Immigration and Asylum Chamber)* [2019] NICA 27, at paragraph 39 of McCloskey J's judgment. In that case, the Court of Appeal found that, under section 14 of the Tribunals, Courts and Enforcement Act 2007 on an appeal from the Upper Tribunal, it was not within the Court of Appeal's powers to remit to the first instance decision maker. Similar provisions applied to the Upper Tribunal under section 12

of the 2007 Act and to the Social Security Commissioner under Article 15 of the Social Security (NI) Order 1998. Mr Black sought to distinguish the position of the Social Security Commissioner from that of the Upper Tribunal and Court of Appeal.

Assessment

19. It appears to me that the decision making by LPS reveals ignorance of some of the basic principles of adjudication in social security law. The decision of 28 October 2014 was premised on the proposition that a failure on the part of a claimant to provide requested information could lead to a disallowance of a HB claim for that reason alone. However, as long ago as 2005 it was held by a Tribunal of Great Britain Commissioners that a failure to provide evidence or information requested after the receipt of a claim does not render the claim defective (see reported decision R(H)3/05). While a decision of a Great Britain Social Security Commissioner is not technically a binding authority in Northern Ireland, I am not aware of any contrary decision in Northern Ireland that would justify a different approach. In a similar case to the present one, C1/18-19(HB), Chief Commissioner Mullan has reaffirmed the correctness of R(H)3/05, although too late to have affected the adjudication process in this case.

20. It is axiomatic, as stated by Baroness Hale at paragraph 61-62 of *Kerr v. Department for Social Development* [2004] UKHL 23, that the process of benefits adjudication is inquisitorial rather than adversarial. In determining entitlement to benefit, both the claimant and the decision making authority must play their part. The decision making authority is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information.

21. However, while the claimant may be directed to provide particular information, there is nothing in regulation 82 of the 2006 Regulations to empower the decision maker <u>automatically</u> to disallow the claim if the information is not provided, any more than a failure to comply with regulation 32 of the Social Security Claims and Payments Regulations (NI) 1987 would lead to a similar consequence in the context of other social security benefits. If a claimant fails to provide requested information the proper course is to determine the claim on the basis of the information that is known. If that is insufficient to allow the decision maker to be satisfied that the conditions of entitlement are met then the consequence will be disallowance of the claim on its merits. That might mean that the decision maker indicates that it has not been established on the balance of probabilities that the claimant has income below the applicable amount, or whatever. It cannot be based on a failure on the part of the claimant to provide evidence of income.

22. Whereas R(H)3/05 was decided under the Housing Benefit (General) Regulations 1987, Chief Commissioner Mullan in C1/18-19(HB) has applied the same principles to the 2006 Regulations. The decision to disallow the claim cannot lawfully be grounded on the fact that the claimant did not supply requested evidence. Therefore, the starting point of my analysis is that the decision of 28 October 2014, being grounded on regulation 82 of the 2006 Regulations alone, was wrong in law as it was not based on a valid reason for disallowing a claim.

23. The applicant did not appeal that decision, however. Instead, some months later he visited the LPS office to express disappointment at the outcome. What happened then appears rather extraordinary to those of us who are accustomed to a social security adjudication system based on the rule of law. A staff member in LPS decided to "reopen the claim". I am not sure if that person instinctively understood that the decision of 28 October 2014 was wrong in law and therefore sought to remedy matters. However, it appears more likely to me that this also resulted from ignorance of the legal principles that underpin social security adjudication.

24. The processes of claim, decision, revision, supersession and appeal are the building blocks of the social security system. Adherence to such technical procedures, or their predecessors, has been a vital part of social security adjudication since 1948. They are carefully prescribed by legislation and they have the effect of avoiding arbitrary and ad hoc decision making. They ensure a system of social security that is based on the citizen having certain guaranteed rights and safeguards. The decision of a staff member to "reopen a claim" must be rooted in one of the adjudication procedures prescribed by legislation, or else it amounts to an arbitrary and unlawful action.

25. The analyses of Mr Black and Mr Clements of the decision to "reopen the claim" and the course of events that followed, and which led to the appeal from a decision of 26 June 2015, diverge at this point. However, both of them recognise the need to try to fit what occurred into the statutory framework of adjudication. To this end, Mr Black submits that it was an instance of a late revision of the earlier decision. Mr Clements submits that this amounted to making, unlawfully, a decision on a claim that had already been determined.

26. The events that followed the "reopening" of the claim mirrored earlier events somewhat. The applicant was asked to provide further information by LPS. He did not provide all the information requested. In consequence, a decision was given on 26 June 2015 stating that the applicant's claim had been disallowed under regulation 82 of the 2006 Regulations and notifying him of a right of appeal within one month of the date of the letter. He appealed on 3 August, which was more than one month after the date of the letter and therefore out of time.

27. The appeal was late and therefore not validly made. However, it was made within the maximum statutory time limit for applying for an extension of time to admit the late appeal. The applicant should have been invited to submit reasons for lateness. However, LPS passed the invalid appeal to the Appeals Service without addressing the issue or pointing it out in its submission to the tribunal. The tribunal was alert to the problems with the case that came before it. The LQM observed that there was no valid appeal from the decision of 28 October 2014. She observed that, accepting the appeal against the decision of 26 June 2015 at face value, that the appeal was late and no extension of time had been sought. She observed that the issue of lateness by her was raised at an earlier adjourned hearing on 16 August 2016 but that an extension had not been sought by the date of hearing on 30 April 2018. When the appeal next came before her, she held that there was no valid appeal and declined jurisdiction.

28. On the issue of where the tribunal had erred in law in these circumstances, Mr Black submitted that it had an obligation to address the issue of lateness itself as a matter of procedural fairness. I have some sympathy with this argument, except that the applicant appeared and was represented at the previous hearing where the question of validity of the appeal was raised. He was aware of the difficulty but made no application for his appeal to be admitted late. It is clear from regulation 19 of the Housing Benefit (Decisions and Appeals) Regulations (NI) 2001 that an application must be made for an extension of time. Such an application must follow certain formalities set out in paragraph 19(4) and regulation 20, notably that it should be in writing. An application falls to be determined by an LQM or the relevant authority, which is LPS in this case.

29. It seems that LPS failed to observe that the appeal was late - and therefore invalid – yet it progressed the file to the Appeals Service, presumably oblivious to the problems that would result. It did not raise the issue of lateness with the applicant when it received his purported appeal, which I consider would have been an appropriate course of action. The fact that LPS had power under regulation 19(3) to admit late appeals indicates to me that it also had an implied duty to raise the need for an application with the applicant, asking him for reasons for the lateness of the appeal, which it evidently failed to do.

30. I think that a similar obligation to raise the issue of lateness falls on the tribunal. However, I consider that Mr Black's submission that the tribunal erred in law by not deciding whether to admit the appeal late, goes too far. The tribunal raised the issue of lateness at an adjourned hearing on 16 August 2016 in the presence of the applicant and his representative. That was enough to invite an application for the appeal to be admitted late. In the light of the formalities required by regulations 19 and 20, an ex tempore determination on whether to admit the late appeal was not something that the tribunal was obliged, or indeed empowered, to give. I do not consider that it erred in law on the grounds of procedural fairness.

31. Mr Black made a further submission that the very fact that the tribunal convened a hearing meant that an appeal had been admitted late. He refers to no authority for this proposition, which had no merit in my view. The terms of the tribunal decision make it clear that it was not holding an appeal hearing, when it stated in the AT3 summary decision "There is no valid appeal that would enable the hearing to proceed further".

32. An appeal lies to me under paragraph 8 of Schedule 7 to the Child Support, Pensions and Social Security Act (NI) 2000 on grounds that the decision of an appeal tribunal was erroneous in point of law. I have accepted that there is an arguable case and I have granted leave to appeal. However, I consider that the tribunal has not erred in law by declining jurisdiction to decide the appeal in the circumstances outlined above and I disallow the appeal.

Further remarks regarding the onward progress of this case

33. Mr Clements had offered support to the application for the reason that there were multiple obvious failings in the adjudication of the case by LPS. These included:

- The disallowance of a claim by reference to regulation 82 alone;
- The administrative decision to "reopen" a claim which had already been determined;
- The general lack of adherence to legislation governing HB adjudication;
- The failure to deal with the lateness of the applicant's appeal;

34. There were some differences between the parties as to whether the decision of 26 June 2015 was a valid decision, depending on whether the provisions regarding revision were properly applied. Mr Black argued that they were, while Mr Clements submitted that they were not. I did not need to resolve the difference between the parties to determine this appeal.

35. Both parties urged me to remit the appeal to LPS in order to remedy the evident injustice and failings in the case to date. To that end, further analysis of the decision of the Court of Appeal in *JG v Upper Tribunal (Immigration and Asylum Chamber)* [2019] NICA 27, on the issue of whether the Commissioner can remit to a first instance decision maker, will have to take place on another occasion. This is because, once I disallow an appeal, my statutory powers to remit an appeal under Article 15(8) of the Social Security (NI) Order 1998 are redundant.

36. However, it does appear to me that a number of things are evident. Firstly, a decision was made by LPS on 28 October 2014 which is generally accepted as erroneous in law. Secondly, on 3 August 2015, an appeal was submitted in general terms by the applicant against the

decision “to disallow me housing benefit”. Thirdly, regardless of the status of any adjudication that led to a purported decision on 26 June 2015, the appeal was made within the absolute time limit of one year and one month for applying for a late appeal from the decision of 28 October 2014. Fourthly, LPS has never sought reasons for lateness, although obliged to do so, and whether it is in the interests of justice for the late applicant’s appeal to be admitted.

37. It appears to me that following the dismissal of the present appeal, the proper course of action is for LPS to consider the question of whether the late appeal can now be admitted. It also occurs to me that those now representing the applicant should be in a position to advise him on what information is required in order to determine his claim for HB/RR from 27 January 2014 and to assist him to provide same.

(signed): O Stockman

Commissioner

13 August 2019