Neutral Citation No. [2013] NIQB 111 | *Ref:* **TRE9044**

Judgment: approved by the Court for handing down | *Delivered:* **11/11/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Nesbitt (David John Edwards)'s Application [2013] NIQB 111

IN THE MATTER OF AN APPLICATION BY DAVID JOHN EDWARD NESBITT, ACTING BY KAREN ELIZABETH NESBITT, HIS MOTHER AND NEXT FRIEND, FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION BY THE PRESIDENT OF THE APPEALS TRIBUNAL FOR SOCIAL SECURITY, CHILD SUPPORT, VACCINE DAMAGE, RECOVERY OF BENEFIT AND HOSPITAL CHARGES FROM COMPENSATORS MADE ON 19 FEBRUARY 2013

TREACY J

Introduction

[1] At the conclusion of the hearing I granted the application, gave brief reasons and indicated more detailed reasons would be provided.

[2] The applicant in this case is David Nesbitt, acting by his mother and next friend. By this application for judicial review the applicant seeks to challenge a decision made by the President of the Appeals Tribunal for social security, child support, vaccine damage, recovery of benefit and hospital charges from compensators ("the President"), made on 19 February 2013.

[3] On that date, the President refused to re-list the applicant's appeal against a decision of the Department for Social Development ("DSD") in relation to entitlement to Disability Living Allowance. In doing so, the President acted contrary to a direction made by the Chief Social Security Commissioner ("the Commissioner") which was made on 21 November 2012.

Order 53 Statement

[4] The grounds on which this application are brought are fully set out in the applicant's Order 53 statement but, briefly summarised are as follows:

(a) In refusing to abide by and give effect to the Commissioner's decision, the President erred in law, he has no statutory jurisdiction to refuse to abide by the decision of the Commissioner as a higher appeal body and thus in so doing he exceeded his jurisdiction;

(b) The President's decision was unreasonable in the *Wednesbury* sense, in that he made a decision which no reasonable decision maker, properly directing himself as to the findings of the Social Security Commissioner as to whether the appeal had been validly withdrawn could have reached;

(c) The President acted in breach of a legitimate expectation, reasonably held by the applicant that if he appealed to the higher body nominated by statute, namely the Social Security Commissioner, the President would abide by the decision of the Commissioner.

Background

[5] The applicant suffers from physical and mental health disabilities and as a result, he had been in receipt of payments in relation to both components of Disability Living Allowance, namely, mobility and care on varying rates. Almost as soon as he turned 18, the applicant lost entitlement to these benefits and stopped receiving any payments. This decision to cease payments was a decision of the DSD. Due to the difficulties the applicant continued to face, the applicant's mother, who is also his appointee in relation to social security benefits, appealed the departmental decision to an appeal tribunal. An appeal tribunal heard this appeal on 15 April 2011 and decided that the applicant was entitled to lower rate mobility payments, however no payments in respect of the care component. The applicant's mother disputed this decision and asked the department to exercise its power to supersede the appeals tribunal decision owing to a change in circumstances. Supersession was refused (and again refused on re-consideration) and the applicant's mother subsequently appealed against the departmental decision to refuse supersession. It was this appeal which was listed before the appeal tribunal on 26 January 2012.

[6] At the hearing on 26 January 2012 the applicant's appeal was withdrawn. Notwithstanding the withdrawal the applicant sought leave to appeal this decision to the Social Security Commissioner. The Social Security Commissioner granted leave to appeal and decided the appeal on the papers, without the need for an oral hearing, by written decision dated 21 November 2012. In his decision the Commissioner decided that the failure to involve the applicant's appointee in the

withdrawal process amounted to a procedural or other irregularity which was capable of making a material difference to the outcome or the fairness of proceedings, sufficient to amount to an error of law. The Commissioner therefore set aside the decision of the appeal tribunal dated 26 January 2012 and directed that a newly constituted appeal panel hear the case again.

[7] On 19 February 2013, the President refused to give effect to that direction because he considered that the Commissioner had no jurisdiction to hear an appeal on the basis that the tribunal of 26 January 2012 did not make a decision and therefore no right of appeal existed. The decision of the President had the effect of frustrating the direction of the Commissioner and bringing the applicant's appeal to an end.

Statutory Framework

[8] The statutory framework for social security decisions in Northern Ireland is found in the Social Security (NI) Order 1998 ("the 1998 Order"). Chapter 2 of Part 2 of the Order, entitled "Decisions and Appeals", provides for a tiered system of decision making. Initially, decisions as to claims for relevant benefits are made by the Department. The Department also has powers to revise or supersede decisions (see Articles 9, 10 and 11 of the 1998 Order).

[9] Under Article 13 of the 1998 Order, departmental decisions can be appealed to an appeal tribunal of which the respondent is the President. Schedule 2 of the 1998 Order provides for decisions against which there is no right of appeal.

[10] Under Article 15, an appeal lies from a decision of the appeal tribunal to the Social Security Commissioner on the ground that the decision of the appeal tribunal was erroneous on a point of law. Article 15 (8) provides the Commissioner with the power to set aside a decision, make findings of fact, impose the decision which he thinks the tribunal should have made, and to refer the case to a tribunal with directions for its determination. Article 15(9) provides that a reference back to a tribunal shall be to a differently constituted tribunal (subject to any direction of the Commissioner).

[11] Pursuant to the powers conferred by Article 15(8) the Commissioner purported to make his decision of 21st November 2012. Under Article 17 of the 1998 Order, entitled 'Finality of decisions', any decision made in accordance with the provisions of chapter 2, part 2 of the Order shall be final and any finding of fact is conclusive for the purpose of further decisions. An appeal lies from a Social Security Commissioner's decision to the Court of Appeal in Northern Ireland on a question of law under Section 22 of the Social Security Administration (NI) Act 1992.

[12] There is, as the applicant submitted, no provision of statute providing the President with the power to overturn a decision of a Social Security Commissioner. The President is a creature of statute and his powers are governed by the 1998 Order

thus he can only act pursuant to and in accordance with those powers given by statute. In the absence of statutory power to act as he has done the President has exceeded his powers in making the impugned decision.

[13] The focus of the case narrowed significantly by the time of the hearing. The respondent had been asked on a number of occasions prior to the hearing to indicate the source of the statutory power permitting refusal to comply with a final decision of the Chief Social Security Commissioner. Unfortunately, the respondent did not provide that information when requested to do so by the applicant. Mr O'Reilly, counsel for the respondent, confirmed at the hearing that Art 8 of the 1998 Order is the asserted source of the power. Counsel did not contend that Art 8 contained any express power but that such a power was to be implied.

[14] Art 8 is entitled 'Constitution of appeal tribunals'. Art 8(1) upon which the respondent relies provides that, subject to para (2) an Appeal Tribunal shall consist of one, two or three members drawn by the President from the Panel constituted under Art 7. The respondent submitted at para 11 of its skeleton that "it is implicit in this provision that the procedural requirements for an appeal from a Decision of the Department have been met, and that a Decision by a Commissioner has been made within the Commissioner's jurisdiction … in the present proceedings the Commissioner did not have the jurisdiction to hear or determine the appeal and accordingly that his direction [to rehear] *could not be accepted*" [my emphasis].

[15] I reject this submission. Such an implied power would be inconsistent with the express terms of Art 17 which provides that decisions of the Chief Social Security Commissioner are intended to be final. It is not possible to imply a power for a lower tier tribunal to undermine and refuse to implement a decision of an appellate tribunal intended to be final.

[16] The respondent argued that the Commissioner had no jurisdiction to hear the appeal relying on Rydqvist v Secretary of State foe Work and Pensions [2002] EWCA Civ 947. In that case the Court of Appeal determined that where an appeal to an Appeal Tribunal had been withdrawn a 'further' appeal to a Commissioner could not be pursued as the Commissioner did not have the necessary jurisdiction. No issue is taken with the correctness of that decision and indeed the Commissioner expressly acknowledged in his judgement that if the appeal had been validly withdrawn he would not have had jurisdiction or make an order. He however concluded that for the detailed reasons he gave that the appeal had not been validly withdrawn. The applicant contended that the Commissioner had power to make the decision which he did under Article 15 of the 1998 Order. The Commissioner, it was argued, can consider cases where an appeal tribunal decision is erroneous in law and that may involve the Commissioner considering whether natural justice has been complied with by the appeal tribunal.

[17] Even if the Commissioner had no jurisdiction, it still would not have been open to the respondent to simply reject it and in effect overturn the Commissioner's

decision himself. There is clear authority for the proposition that an ultra vires decision will in the ordinary way take effect until validly challenged. [see Credit Suisse v Allerdale Borough Council [1996] 4 ALL ER 129, per Neill LJ at p156, and De Smiths Judicial Review, 7th Ed., at para 4-059]. In this case there was no challenge by way of judicial review or appeal to the Court of Appeal.

[18] In the absence of adjudication by a court of appropriate jurisdiction on the Commissioner's jurisdiction to hear the appeal his decision remains extant and binding on the respondent regardless of the President's view as to its legality.

[19] By refusing to give effect to the Commissioner's decision, the President put an end to the applicant's appeal. At para 44 of his affidavit, the President notes that "*the appeal was withdrawn by the appellant*" and that he therefore considered that the Commissioner had no right to hear the appeal. In the body of the President's decision, he refers to the record of proceedings which "*records that the appeal was withdrawn by the appointee*". His decision is based on the assumption that the appeal was validly withdrawn.

[20] The President made his decision after he read the Commissioner's written decision dated 21 November 2012. In his written decision the Commissioner specifically considered the question as to whether the appeal had been validly withdrawn. He determined, following an extensive analysis, it had not (see paras 26-44 Commissioner's decision). The Commissioner accepted that where an appeal is validly withdrawn he would have no jurisdiction to consider it.

[21] Despite this the President made his decision on the mistaken premise that the appeal was in fact validly withdrawn. The President disregarded the Commissioner's explicit finding notwithstanding that the President himself never heard any evidence on the issue. The Commissioner made a finding reached after careful consideration of the evidence and which was clearly outlined in his written decision. It was not lawfully open to the President to disregard this finding.

[22] For the above reasons the judicial review is allowed and I quash the impugned decision.