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HOUSING BENEFIT

CHANGES OF CIRCUMSTANCE

Case CH 282 2006 – late notifications of changes of circumstances; when can they be excused?

THE FACTS

Ms S was in receipt of housing benefit. She came into some additional capital as a result of the sale of a property. She should have notified this to her local housing benefit authority within one month of its occurrence, in accordance with the general rule that changes of circumstances should be so notified. Once the new capital was taken into account, the amount of Ms S's housing benefit award was reduced.

Ms S failed to notify her authority within the one month period. When the authority found out, they set about superseding the award so that they could try to recover the overpayment caused by the fact that this new capital had not been taken into account in fixing Ms S's award. The important question for Ms S was the effective date of the change of circumstances for this purpose. She wanted the effective date to be a date later than the actual date because that would reduce the amount that potentially she would have to pay back.

To succeed in this task, Ms S had to bring her case within regulation 9 of the Housing and Council Tax Benefit (Decisions and Appeals) 2001. Under this provision, a claimant can, up to 13 months after the occurrence of a change in circumstance, apply for it to be treated as having occurred on a later date than it in fact occurred. Para. (3) of reg.9 requires the claimant to satisfy the local authority (or on appeal an appeal tribunal) of all the following three conditions:

- "(a) it is reasonable to grant the application;
- (b) the change of circumstances notified by the applicant is relevant to the decision which is to be superseded; and
- (c) special circumstances are relevant and as a result of those special circumstances it was not practicable for the appellant to notify the change of circumstances within one month of the change occurring."

Ms S's local authority refused her application under regulation 9. An appeal tribunal allowed an appeal against that refusal and decided that regulation 9 did apply. It found that it had not been practicable for Ms S to have notified within one month because she had been given misleading information by her local authority about her notification obligations. The local authority appealed to a Social Security Commissioner arguing that the appeal tribunal had erred in law in its application of reg.9.

THE DECISION

The general findings made by the Commissioner were as follows:

- (i) the Commissioner addressed the meaning of sub-para. (c) of reg.9(3), the special circumstances condition. He described it as follows:

"Regulation 9(3)(c) contains three conditions. First, there must be special circumstances. Second, it must not be practicable to notify the change within one month. Third, the impracticability must be a result of the special circumstances. These are issues of fact, although the factors that are or are not relevant are matters of law."

- (ii) what does "practicable" mean? The Commissioner said that "practicability 'involves a test of feasibility, not a test of desirability or convenience or anything of that sort': *Singh v Post Office* [1973] ICR 437 at 440";
- (iii) what can amount to "special circumstances"? The Commissioner said that "special circumstances are not defined, but obviously they must be in some way unusual. Moreover, as the impracticability must result from the special circumstances, it follows that those circumstances must be in some way related to or affect the practicability of reporting the change of time within one month";
- (iv) the Commissioner went on to suggest that ignorance on the part of a claimant as to his or her obligations under the law would not have a bearing on the question of whether notification within one month would have been practicable and that the concept was really addressed to impediments to notification. In the Commissioner's words:

"The opinion expressed in *Dewar & Finlay Ltd v Glazier* [1973] ICR 572 was that ignorance of rights was not a relevant factor. This was based on authorities on workmen's compensation cases. By analogy, ignorance of duties should not be relevant. This accords with the context and the natural meaning of 'practicable'. The context of regulation 9 suggests that it relieves a claimant of a time limit when it would not have been possible to act within that time. And practicability too conveys ability and achievability. That suggests that regulation 9 grants relief when information could not be obtained or could not be conveyed to the local authority."

The findings made by the Commissioner on the facts of the case were as follows:

- (i) the tribunal had erred by considering only whether reg. 9(3)(c) applied. It did not, for example, consider whether it would also be reasonable to allow the application, as required under 9(3)(a). If it had considered reasonableness (as well as 9(3)(c)) it would have to have addressed whether the claimant's view that she had been given inadequate instructions by her authority was a reasonable one for her to have held. Its failure to do so showed that it had not appreciated the need to consider reasonableness as well as 'special circumstances';

KEY POINTS

- A claimant who attempts to show that it was not practicable to notify a change of circumstances due to special circumstances has to show that notification was not feasible
- It seems the concept of non feasibility anticipates cases where information was not available to a claimant or could not be conveyed to the local authority
- A claimant cannot argue that notification was not practicable because s/he was unaware of, or confused about, the duty to notify





- (ii) there were in fact in this case a number of changes to the claimant's capital over a short period of time. The tribunal should have applied the reg.9 criteria to each of these changes separately. Its failure to do so was an error of law;
- (iii) applying his general finding on 'practicability', the Commissioner held that the tribunal erred by assuming that the claimant's misunderstanding as to her notification obligations (brought about by a 'confusing' number of communications from her local authority) was relevant to the question of whether it had been practicable for her to notify within the one month period;
- (iv) the tribunal could also be criticised for having failed to make a causal link, for 9(3)(c) purposes, between the special circumstances found and the practicability of notification.

The case was remitted back to a differently constituted tribunal for re-hearing.

Social Security Commissioner Jacobs gave his decision in case CH 282 2006 on 27 July 2006.

APPEALS

Case [CH 2812 2005](#) – an appeal tribunal can hear a housing benefit appeal even if a local authority has failed to refer the appeal to tribunal administrators

THE FACTS

This case began in the days when there was no right of appeal to an appeal tribunal against local authority housing benefit decisions. At that time quasi-independent Housing Benefit Review Boards, which were not tribunals, would review disputed decisions of local authorities. Review Board decisions could only be challenged by way of judicial review which effectively limited challenges to points of law rather than of fact.

In 2000 the relevant local authority decided that a recoverable overpayment of £20,000 had been paid to Mr X. The basis for this decision was that the rental liability to which the claim related had been designed to take advantage of the housing benefit scheme. This decision was upheld by a Review Board. A claim for judicial review was made. The High Court allowed the claim and quashed the decisions.

In the meantime, new primary legislation had come into force providing for a full right of appeal against most housing benefit decisions to an appeal tribunal. The effect of the associated transitional legislation, and the High Court's decision, was that the claimant was treated as having appealed against the authority's 2000 decision to an appeal tribunal (because matters pending before review boards were treated as appeals pending before the appeal tribunal).

The local authority concerned, however, was of the opinion that the High Court's decision was invalid (it thought the Court had been misled into quashing the decisions on an occasion when it (the authority) had not been represented in court). Because of this, the authority refused to accede to the claimant's request to refer the case to the appeal tribunal. But somehow the appeal tribunal got to know of the case and proceeded purportedly to hear, and allow, the claimant's appeal. The local authority appealed to a Commissioner arguing that the tribunal had no jurisdiction to hear the appeal.

THE DECISION

The Commissioner rejected the local authority's appeal, holding as follows:

- (i) an order of the High Court is valid and binding until it is set aside, even if the Court acted outside its jurisdiction when making the order (*Isaacs v Robertson* [1985] AC 97). If the local authority in this case had wished to challenge the High Court's quashing of the review board's decision it should have done so at the time. The fact that no challenge had been brought meant that the order had to be obeyed and recognised by both the authority and the appeal tribunal;
- (ii) the Commissioner next turned to consider whether the fact that the local authority in this case had not referred the appeal to the tribunal meant the tribunal did not have jurisdiction to hear the appeal. He began by analysing the nature of the local authority's role in the bringing of appeals. Under regulation 20 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, the authority is "to receive the appeal documents and to ensure, as far as it can, that they contain the necessary information" but "it has no power to decide whether the information provided is sufficient"(a). The question of whether the information is sufficient is "for the legally qualified [tribunal] panel member and there is an express duty to refer the issue to that member. The local authority's function is essentially administrative";
- (iii) What, then, was the effect of this local authority's failure to perform the required administrative tasks? The Commissioner said that "an administrative task need not be performed by a particular person or in a particular way. So long as there is an appeal that satisfies the conditions of regulation 20(1)[(a)], the tribunal has jurisdiction to deal with any issues that arise in respect of it, regardless of how they are brought to the tribunal's attention";
- (iv) the Commissioner ended by criticising the approach taken by the authority in this case (to be more accurate, he was critical of the legal advice it had received from its legal department). If it had acted as it should, by referring the appeal to the appeal tribunal rather than by trying to force the claimant to bring fresh judicial review proceedings requiring it to refer, much time and effort would have been saved.

COMMENT

This case should not be viewed as providing a green light to circumvention of the normal procedure whereby a local authority refers the case papers to

KEY POINTS

- An order of the High Court must be obeyed even if the Court was acting outside its powers when making the order
- The jurisdiction of the appeal tribunal is not dependent on the local authority concerned having referred the appeal to it
- Only in unusual cases, however, will it be appropriate for appellants themselves to refer their appeals to the appeal tribunal





the tribunal secretariat. It will only be in unusual cases such as the present that it will be acceptable for claimants / their representatives to refer an appeal to an appeal tribunal. This is what the Commissioner had to say on the point:

"This does not mean that the parties are free to disregard the usual procedures at will. Claimants cannot simply bypass the local authority and lodge appeals with the tribunal. Likewise, they cannot usually expect the tribunal to deal with a case before the local authority has had a chance to prepare the submission and assemble the papers for the parties and the tribunal. But what the tribunal is free to do is to allow matters to be handled differently if circumstances require it. The circumstances of this case did require it for two reasons. First, the local authority was refusing to refer the cases to the tribunal on the basis of an issue which the tribunal had (perhaps exclusive) jurisdiction to decide. Second, the local authority was trying to force the claimant to embark on an expensive legal procedure, which was risky in that the Administrative Court might not accept jurisdiction [- this is a reference to the local authority having told the claimant that if he was unhappy with their refusal to refer to the tribunal he should bring a judicial review claim to challenge that refusal] ."

(a) Reg. 20(1) of the Housing Benefit Decisions and Appeals Regulations provides that:

"(1) An appeal or application for an extension of time must -

- (a) be in writing on a form approved for the purpose by the relevant authority or in such other format as the authority may accept;
- (b) be signed by the person who has a right of appeal under paragraph 6(3) of Schedule 7 to the Act;
- (c) be delivered, by whatever means, to the relevant authority;
- (d) contain particulars of the grounds on which it is made;
- (e) contain sufficient particulars of the decision or subject of the application to enable that decision or subject of the application to be identified."

Social Security Commissioner Jacobs gave his decision on case no. CH 2812 2005 on 27 July 2006.

INCOME SUPPORT

DISABILITY PREMIUM

The High Court, in *R (RJM) v the Secretary of State for Work and Pensions*, holds that the withdrawal of the disability premium from a claimant without accommodation is compatible with human rights laws

The Disability Premium to an award of Income Support (currently £23.95 per week for a single person) is not payable if a person is "without accommodation". The High Court recently rejected a human rights challenge to this situation brought by a rough sleeper whose mental health meant that when he did have accommodation he was entitled to the Disability Premium.

The High Court's reasons for dismissing this challenge were as follows:

- (i) this was a discrimination case – it was argued that the claimant, a rough sleeper, had been discriminated against in the enjoyment of his rights under the European Convention on Human Rights;
- (ii) the first issue, therefore, was to identify the Convention right enjoyment of which was said to have been impaired. This was agreed by the parties to be Article 1 to the First Protocol to the Convention. This Article provides that "everyone is entitled to the peaceful enjoyment of his possessions". Presumably this agreement flowed from the European Court of Human Rights' recent decision that an entitlement to a welfare benefit is analogous to a "possession" for Convention purposes and so within the scope of Article 1 of Protocol 1 for discrimination purposes (see *Stec & Others v the UK*, app'n no's. 65731/01 and 65900/01, which we considered in issue 31);
- (iii) the crux of the case, therefore, was *not* whether the claimant's rights under Article 1, Protocol 1, had been infringed. The claimant accepted that they had not which was realistic in the light of the European Court's comment in *Stec* that Article 1 "places no restriction on the...State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme". The issue at the heart of the case was whether the claimant had suffered discrimination in relation to Article 1, Protocol 1;
- (iv) Article 14 is the Convention's anti-discrimination provision. It provides that enjoyment of the Convention rights shall be secured without discrimination on "any ground such as sex, race, colour [and various other grounds]" or "other status";
- (v) the first question as regards the discrimination aspect of the case was whether the claimant had been discriminated against on the grounds of "other status" (it was clear that none of the listed grounds of discrimination, such as race or sex, could be applicable). This requires the discrimination to be based on a "personal characteristic" (*R(S) v Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196). The High Court dismissed this claim simply because "having or not having something, even something as basic as accommodation, is not a personal characteristic". This meant that any difference of treatment afforded to the claimant as a rough sleeper was not on any ground prohibited by Article 14 and, accordingly, that Article could not apply;
- (vi) even if a difference of treatment is on an Article 14 ground, that does not make it discrimination. A difference in treatment is only discriminatory if "it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (*Stec*). In this case the High Court said that even if the fact that the claimant was without accommodation was a "personal characteristic" so as to bring him within Article 14, he still would not have been discriminated against because the policy of withdrawing the disability premium from such individuals did have an objective and reasonable justification because the State "were entitled to adopt a broad approach, draw the line in the way they did in relation to Income Support and Disability Premium, and to prioritise other measures for addressing the vulnerable position in which the disabled homeless find themselves above giving them enhanced monetary benefits".

The High Court (James Goudie QC, sitting as a Deputy High Court judge) gave its decision in *R (RJM) v the Secretary of State for Work and Pensions* on 13 July 2006: (2006) EWHC 1761 (Admin.)





INDUSTRIAL INJURIES AND DISEASES BENEFITS

VIBRATION WHITE FINGER

A Tribunal of Social Security Commissioners, in case [CI 525 2005](#), stresses the limited circumstances in which a Commissioner can interfere with a tribunal's assessment of the extent of a claimant's disablement

It is natural to search for certainty in the application of welfare benefits law – everyone would like to know in advance what their entitlement is. However, we do not have a system that works generally in that precise way. The combination of broadly phrased wording to frame entitlement and the limited grounds on which appeals may be brought mean that in some areas it must just be accepted that materially similar claims may not always result in materially similar awards (the leading case on this point is a DLA case, namely the decision of the Law Lords in *Moyna v the Secretary of State for Work and Pensions* [2003] UKHL 44). In this case, a Tribunal of Social Security Commissioners held that the assessment of disablement under the industrial injuries and diseases schemes is one such area.

THE BACKGROUND

These were cases in which two former miners had been found by appeal tribunals to suffer from prescribed disease "A11", commonly referred to as Vibration White Finger. This is a condition caused by the use of vibrating or percussive tools characterised by blanching (whitening) of the fingers as a result of restricted blood flow.

The issue of contention in these cases concerned the assessment of each claimant's percentage degree of disablement (which would determine the value of the claimants' awards).

In both cases, each tribunal merely recited (and accepted) each claimant's evidence as to disablement following which they merely said that it was satisfied on the basis of that evidence that the claimant had a specified degree of disablement, in one case 4% and in the other 7%. The claimants argued that, in a number of respects, this meant that the tribunals had made errors of law. The claimants had to argue that the tribunals had erred in law because the Social Security Commissioners can only overrule a tribunal decision on the ground that the tribunal made an error of law. Pure errors of fact cannot be appealed – they just have to be put up with.

THE DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

General points

The limited nature of a right of appeal on a point of law

The Commissioners stressed that their jurisdiction does not permit them to reconsider the findings of fact made by an appeal tribunal, nor the tribunal's judgement in applying those facts to the various statutory tests involved in determining entitlement. In the present context, that means a Commissioner cannot simply decide for itself what a claimant's degree of disablement is for the purposes of the industrial injuries benefit scheme.

The Commissioners quoted a useful recent Court of Appeal summary of what constitutes an error of law. This was given in the case of *R (Iran) v the Secretary of State for the Home Department* [2005] EWCA Civ 982, as follows:

"(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters') [In this case, the Commissioners referred to welfare benefits case law in which perversity has been equated with a finding that is "wildly wrong". Another oft-used way of expressing the same concept is to refer to a finding that falls outside the bounds, or 'zone', of reasonableness];

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

Disablement findings were not 'irrational'

The Tribunal of Commissioner found that the percentage disablement assessments made by the tribunals could not be characterised as irrational or "wildly wrong".

Sufficient reasons were given

The DWP were of the opinion that in one of these cases the tribunal had, in fact, given insufficient reasons for its conclusion as to percentage disablement. The Tribunal of Commissioners disagreed. According to the Commissioners, all a tribunal is really obliged to do in such a case is to identify





and record those findings of fact that "were critical to its decision". It is not required to give a lengthy explanation of how those facts fed through into the particular disablement assessment.

The Commissioners also approved the decision of a sole Commissioner in *CI/1802/2001* as regards the giving of reasons in disablement assessment cases. In that case it was held as follows:

"Vibration white finger is not one of those conditions for which there is a prescribed degree of disablement...This indicates the very broad discretion which individual tribunals have in this type of case. In many cases it is simply not possible for a tribunal to give precise reasons for the conclusion which it has reached.

In my judgment, however, as a minimum, the claimant [is] entitled to know the factual basis upon which the assessment has been made; in other words what disabilities were taken into account by the tribunal in concluding that a particular percentage disablement was appropriate.

This can often be simply expressed. In many cases it will be enough to say that the evidence given by the claimant about the effect of a particular accident or disease on his or her daily life has been accepted. In some cases, where the claimant's evidence is for some reason found to be unreliable, it may be that the tribunal will state that it felt able to accept only those disabilities which in its expert opinion were likely to flow from problems disclosed on clinical examination. Other cases may need more detail. But if it is not possible to discern the material on which the assessment is based, then the tribunal's statement of reasons is likely to be inadequate."

In both of the present cases, the tribunals had set out the evidence upon which their percentage disablement findings were based. The Commissioners specifically rejected the DWP's argument that the tribunal should have expressed its disablement finding in words (such as "mild") before proceeding to ascribe a percentage to the degree of disablement found.

Points specific to VWF and industrial injury cases

The statutory description of VWF dictates diagnosis for benefits purposes

The statutory wording of prescribed disease A11 is no longer thought accurately to describe the medical condition referred to by clinicians as Vibration White Finger (VWF). The statutory description requires a specified degree of "episodic blanching [whitening]" to be present in the fingers of a claimant. As the Commissioners pointed out in this case, the statutory description focuses on the vascular symptoms of the condition. The statutory description, therefore, takes no account of neurological symptoms. Current medical knowledge is that some people, as a result of long-term use of percussive tools, suffer a VWF-type condition which presents as serious neurological damage but without associated vascular (blanching) symptoms. The Commissioners confirmed that for such persons it is just bad luck that the statutory wording requires blanching – without blanching there is no entitlement to industrial injury benefit for Vibration White Finger.

This divergence as between the industrial injuries wording and medical understanding explains why some many former miners who have secured compensation in the civil courts for VWF have had industrial injury claims refused.

Neurological symptoms were taken into account

In Commissioner's decision *CI/14532/1996* it was held that the fact that a claimant has been found to suffer from VWF as the condition is described for benefit purposes (i.e. on the basis of vascular symptoms) does not mean that, at the next stage, only vascular symptoms can be taken into account in order to assess percentage disablement. The correct approach to assessing disablement required in law is for the decision maker/tribunal to take into account all aspects of the vibration-induced condition itself (including in particular any and all loss of faculty of a neurological or sensorineural nature such as permanent tingling or numbness, not just that stemming directly from vasospasm). In this case, the Tribunal of Commissioners confirmed that this is the correct, and therefore required, approach in law.

In the present case, the Tribunal of Commissioners rejected the argument that the appeal tribunals had failed to apply the correct approach as described above. Both tribunals referred to the claimants' tingling and numbness and, therefore, can be taken to have included neurological deficits when arriving at their assessment of percentage disablement.

No requirement to take into account judicial guidance on assessment of civil damages

In decision *CI/2553/2001* Commissioner Williams pointed out that in VWF industrial injury cases it can be helpful for decision makers and tribunals to take into account judicial guidance on the assessment of personal injury compensation in the civil courts when assessing disablement. For example, that guidance recommends account is taken of matters such as the length and severity of any attacks.

In the present case, the Tribunal rejected the argument that there was any requirement in law to take into account that guidance. The task for a tribunal is to assess disablement and taking into account the judicial guidance, produced for a different purpose, is in no way a pre-requisite to the making of a lawful decision under the industrial injuries scheme. In fact, it seems the Commissioner thought Commissioner Williams' approach might be positively unhelpful because towards the end of their decision they said that this guidance provided "very little assistance" in benefits cases.

Tribunal's acceptance of DTI medical reports did not undermine disability assessments

The claimants in this case have also pursued compensations claims under the DTI's scheme for former mine workers. In connection with those claims, medical reports were produced which considered their symptoms against something called the Stockholm scale which grades VWF neurological symptoms according to their severity. In this case the tribunals accepted the conclusions of those reports. That acceptance, however, did not bind the tribunals in any way as to their assessment of disablement. The Tribunal of Commissioners pointed out that the Stockholm scale does not assess functional disablement, which is a characteristic of an individual that can only be considered on a case by case basis in the light of an individual's circumstances.

Guidance on assessing disability in VWF cases

Despite the point just noted (that assessment of disability is a case by case matter), the Commissioners did proceed to provide some very general guidance as to the assessment of disability, the key points of which are as follows:





- (i) the Commissioners did point out that in limited respects statute directs the approach to be taken in assessment. Under Schedule 6(1) to the Social Security Contributions and Benefits Act 1992: (a) all disabilities incurred as a result of the relevant loss of faculty must be taken into account; (b) the loss of both hands is, under the statutory scheme, equivalent to 100% functional disablement, and other lesser degrees of disability are to be assessed "accordingly";
- (ii) for certain injuries, statute does confer a specified degree of disablement, e.g. amputation of an index finger equates to a functional disablement of 14%. The Tribunal of Commissioners were asked to what extent, if at all, should these specified degrees of disablement be taken into account in the assessment of disablement for VWF purposes. The Commissioners said that the assistance to be derived from the specified disablements is "relatively small" and that "functional disablement depends upon the facts of an individual case; and the activities affected by the loss of one important finger are entirely different from those affected by impaired sensation in the fingertips. One is not comparing like with like"; and
- (iii) the Commissioners nonetheless noted the "cogency" of the medical evidence that the loss of an index finger (14% disablement) is always (in the opinion of the particular clinician) more severe in disability terms than "permanent vibration white finger sensorineural symptoms in all fingers of one hand resulting in an inability to pick up nuts and bolts and similar fine dexterous activities".

The relevance of the DWP's internal guidance

The Tribunal of Commissioners also warned against elevating the DWP's own industrial injuries guidance for its decision makers to an unwarranted status. On this point, the Tribunal stated:

"it is not part of the tribunal's function to apply, or even necessarily to take into account, anything contained in any internal guidance circulated by the [DWP] to its own medical assessors or decision making staff. It is of course entirely proper for there to be such guidance within the Department in the interests of promoting clarity and consistency of approach, but nothing in it can bind or need concern a tribunal: it records only one side's view - that of the executive Government - of what the law and good practice may require. Where a tribunal does take such guidance into account at all, it must bear that in mind."

Date of onset

In one technical respect, one of the tribunals involved in these cases erred in law. This concerned the complicated issue of date of onset (which we looked at in more detail in issue 14). In one of the present cases the tribunal decided that the claimant had begun to suffer from VWF in 1985. However, he had made previous claims for VWF which had been rejected, the last of which was in 1999. The industrial injuries legislation then in force had the effect that the 1999 determination was conclusive for all purposes. Accordingly, this later decision could not give rise to a date of onset earlier than that in the 1999 determination and it was an error of law for the tribunal to have purported to have done so. The Tribunal of Commissioners corrected its decision so that the date of onset was moved forward to 1999(a).

(a) Note that under the legislation now in force it is not the case that such determinations are conclusive for all purposes. This explains why the same claimant's later rejected claim (in 2001) did not prevent this decision from deciding that the VWF date of onset preceded that 2001 decision.

A Tribunal of Social Security Commissioners gave its decision in case CI 535 2005 on 27 April 2006. The Tribunal was comprised of Judge Hickinbottom (Chief Commissioner) and Commissioners Howell and Lloyd-Davies.

VIBRATION WHITE FINGER

The Court of Appeal, in Westgate v the Secretary of State for Work and Pensions, holds that a person who has developed VWF through use of metal staple guns is not entitled to benefit

Industrial injuries benefit is only available if a person who suffers from 'statutory' Vibration White Finger does so as a result of having worked in a "prescribed occupation". The prescribed occupation includes "the use of hand-held percussive metal-working tools". The short issue in this case was whether, as a matter of law, it was possible for the use of an automatic metal staple gun (known in the trade as a "rammer") to be the use of a hand-held percussive metal working tool. The claimant in question had used such a tool for many years (to fix bedsprings to the base of a bed) and it was accepted that this has led him to develop Vibration White Finger to the extent necessary under the industrial injuries legislation, and that the rammer was a percussive tool. The claim, however, would fail unless he could show that the rammer was a metal-working tool.

A Social Security Commissioner held that the rammer was a metal-working tool and, accordingly, the claimant was entitled. The Court of Appeal, however, allowed the DWP's appeal. It held that "a metal-working tool is a tool that works metal. It is not a sufficient or correct definition to describe it as a tool for working with metal". Accordingly, held the Court of Appeal, the Social Security Commissioner had got it wrong. A 'rammer' cannot be a metal-working tool because it does not work metal(a). The claimant's claim failed despite it being clear that he had developed Vibration White Finger as a result of industrial work.

This case illustrates one of the oft-encountered deficiencies of the industrial injuries scheme. Sometimes the statutory wording which sets out entitlement gets left behind by medical or technological developments. That is just a fact of the statutory scheme which leads to seemingly anomalous results such as that encountered in this case.

(a) It should be noted, however, that the prescribed occupation for VWF is not limited to the use of percussive metal-working tools. For example, it also includes work that involves the holding of metal that is being worked by percussive tools.

The Court of Appeal gave its decision in Westgate v the Secretary of State for Work and Pensions on 5 April 2006: [2006] EWCA Civ 725. The Court was comprised of Buxton and Moses LJ and Sir Peter Gibson.





STATE PENSION CREDIT

SHELTERED HOUSING

Social Security Commissioner case [CPC 1820 2005](#) – meeting the costs of a warden service under an award of State Pension Credit

This was an important decision for the funding of sheltered housing schemes, in particular charges levied for warden services, where residents of the schemes are in receipt of State Pension Credit (the income maintenance benefit for pensioners). The decision shows that provided the landlords of such schemes are willing to spend time supplying evidence as to nature of the work actually done by wardens, a proportion of the costs levied in respect of the warden should be met by residents' State Pension Credit awards.

BACKGROUND FACTS

This case concerned claims for State Pension Credit (SPC) made by two 80 year old claimants who lived in leasehold sheltered accommodation. Service charges were payable in respect of the accommodation being charges which were referable to: (i) the services provided by an on-site warden; and (ii) general administration and management. Both claimants, by virtue of their low incomes, were entitled to the guarantee credit element of SPC and were therefore entitled to have their eligible housing costs met as part of their SPC award. The point of dispute was to what extent were the service charges eligible housing costs and, therefore, to be met under the claimants' SPC award.

KEY POINTS

- Service charges can be met under an award of State Pension Credit provided that they relate to services provided in connection with the provision of adequate accommodation
- It should not be assumed that because an activity is not funded by Supporting People it must be a service in connection with the provision of adequate accommodation
- It is for claimants (with the assistance of landlords) to provide evidence to prove that a warden is providing a service in connection with the provision of adequate accommodation
- The Social Security Commissioner suggested a less time-consuming way of providing the necessary evidence than had been advised in an earlier Commissioner decision

THE LEGAL ISSUE

An award of SPC (guarantee credit element) also entitles the recipient to an amount in respect of certain housing costs that the claimant (or partner) is liable to pay in respect of the home occupied by the claimant. The housing costs so allowed are specified in Schedule 2 to the State Pension Credit Regulations 2002. In so far as relevant for present purposes, the somewhat complex rules in Schedule 2 work as follows:

- (i) the general position is that "service charges" are allowed (paragraph 13(1)(b) of the Schedule);
- (ii) para. 13(2) of the Schedule sets out the deductions to be made from a claimant's service charges. The amount to be met by the award is the amount of service charges that remain following the para. 13(2) deductions;
- (iii) one deductible category are payments in respect of "ineligible service charges". The meaning of "ineligible service charge" is to be found in the Housing Benefit Regulations. Those regulations list a number of services charges in respect of which are ineligible, the most relevant for present purposes being:
 - (a) "charges in respect of general counselling or other support services". This item was added to the list of ineligible charges in April 2003 when the Supporting People scheme went live. This was because as from that date such services were funded by local authorities under the Supporting People scheme and not via enhanced payments of various income-related benefits; and
 - (b) any other service charges "which are not connected with the provision of adequate accommodation";
- (iv) the above is really a roundabout way of saying that, generally, the only service charges which are payable under an award of State Pension Credit are those which are connected with the provision of adequate accommodation;
- (v) there are special rules about separating out ineligible service charges from eligible service charges:
 - (a) where the housing costs payable by the claimant are inclusive of ineligible service charges, the amounts attributable to those ineligible charges is to be deducted; or
 - (b) where the amount attributable to the ineligible charges is not separately identified within the housing costs payable by the claimant, what must be deducted is such part of the costs as is "fairly attributable" to the provision of the ineligible services "having regard to the costs of comparable services" (para. 13(2)(b)).

THE DECISIONS UNDER APPEAL

The SPC decision maker (within the Pensions Service) allowed a proportion of the general management charges claimed by the claimants but decided that all the charges levied in respect of the scheme warden were ineligible and therefore would not be met under the claimants' SPC awards. The claimants, with the assistance of the housing association that managed their supported housing scheme, appealed to an appeal tribunal against that part of the decision that concerned charges in respect of the warden service.

On appeal, the housing association that ran the sheltered housing scheme supplied evidence to the appeal tribunal about the work undertaken by the scheme warden. However, this evidence was rather limited. It consisted of documentation produced in the run-up to the implementation of the Supporting People scheme in order to illustrate how much of the warden's time was spent on general counselling and support (29%). This then formed the basis of the housing association's Supporting People contract (which funds the warden's general counselling and support activities). The tribunal's approach was to say that because 29% of the warden's time was spent on general counselling and support then the rest of his time must be spent





providing services charges which were eligible. On this basis, the tribunal decided that 71% of the service charges levied upon the claimants were eligible and therefore to be met under their SPC awards. The practical affect of this was to increase the claimants' awards by around £20 per month.

The local authority appealed to a Social Security Commissioner arguing that the tribunal had erred in law.

THE COMMISSIONER'S DECISION

The Commissioner allowed the appeal and remitted the matter back to another tribunal for re-determination. The key points made by the Commissioner were as follows:

- (i) there was insufficient evidence before the tribunal for it lawfully to have concluded that everything done by the warden, that wasn't done for Supporting People purposes, was done in connection with the provision of adequate accommodation. The Commissioner noted that "nowhere in the papers...was there any reference to what the scheme managers actually did in connection with the provision of adequate accommodation";
- (ii) while there was one document before the tribunal which set out the role of the warden, some aspects of which did appear to be related to the provision of adequate accommodation, this was an improper basis for the finding that everything that was not done for Supporting People services must have been done in connection with the provision of adequate accommodation. This was because:
 - (a) the tribunal did not appear to have based its decision upon that document (it was not referred to in the tribunal's decision);
 - (b) the document did not set out how much of the warden's time was spent on the activities described; and
 - (c) the document was not handed in until the day of the tribunal hearing. This meant the Pensions Service had no opportunity to address its contents and decide whether to make submissions about it. Therefore, if the tribunal had relied on the document, to have done so without having given the Pensions Service adequate time to address it was a breach of natural justice;
- (iii) the Commissioner rejected the claimant's arguments based on the decision of the Law Lords in *Kerr v the Dep't for Social Development* (N.I.) [2004] UKHL 23. That case concerned the respective responsibilities of claimants and the benefits authorities to provide the information necessary to determine entitlement. The claimants argued that, by virtue of *Kerr*, it was for the Pensions Service to disprove their (the claimants') assertion that 71% of the warden's time was spent in connection with the provision of adequate accommodation. The circumstances in this case were quite different from *Kerr*, held the Commissioner. Evidence about what the warden did was not within the Pension Service's knowledge. It was something that only the claimants (and their housing association) could provide details of. The Commissioner held that "it is clear from the decision of the Court of Appeal in *R v. Stoke-on-Trent City Council ex p. Highgate Projects* [1997] 29 HLR 271 that the burden of proving that services charges are eligible as housing costs falls on the claimant".

The case was remitted back to a different tribunal for reconsideration.

DISCUSSION – PROVING WHICH ELEMENTS OF SERVICE CHARGES ARE ELIGIBLE

The Commissioner in this case proceeded to give guidance about how claimants/their landlords should go about proving which elements of service charges are eligible on the basis that they relate to the provision of adequate accommodation(a):

- (i) the Commissioner made the important point that this question must be addressed by reference to the evidence of what a warden does at a particular development. This is because the legislation is claimant-specific. Averaging out over a number of different developments is not acceptable. This point is worth noting because it differs from the approach that was often taken under Supporting People to quantify the amount of Supporting People funding for a particular social landlord. What often happened there was that an average of the time spent on general counselling and support across a number of different supported housing scheme was calculated in order to arrive at an average for each scheme and upon which Supporting People funding was based;
- (ii) the Commissioner addressed the earlier guidance given in case *CIS 2901 04* about how to isolate eligible service charges. That decision caused some concern in the sector because of the time taken to perform the task there said to be required(b). Here, the Commissioner thought it was not always necessary to follow the laborious process described in that decision. He pointed out that in some cases landlords might not be willing to perform the time-consuming task of trawling through documents in order to extract the necessary information (for example, where only 2 or 3 residents in a scheme comprised of 30 or so residents were claiming State Pension Credit) and it could appear unreasonable to expect elderly claimants to identify this information themselves. As an alternative, the Commissioner here said that:

"I concur with the remark of the Commissioner in paragraph 9 of CPC/968/2005 that a "broad approach" is called for: for example, a decision-maker or tribunal supplied with the terms of the lease relating to services and service charges, a breakdown of the service charges, details of what service charges (if any) are met by the Supporting People programme, and a statement from the scheme manager as to how his working time is usually divided up should normally be able to make a reasoned estimate of how much of the service charges in dispute are eligible or ineligible. Each case will, however, inevitably turn on its own facts and evidential requirements will vary."

(a) For a discussion of the services which, as a matter of law, might constitute services in connection with the provision of adequate accommodation, see *R v Housing Benefit Review Board for Swansea, ex parte Littler* [1998] EWCA Civ 1214.

(b) In that case the Commissioner said:

"... a sufficiently accurate assessment of how much of [service charge] expenditure is attributable to accommodation related services cannot be made by simply looking at job descriptions. It is necessary to establish the number of hours per week spent by the employees on providing those services. The part of the salaries bill which is attributable to the provision of accommodation related services can then be calculated. The staff administration costs such as staff advertising, employers liability insurance and personnel management attributable to accommodation related services should be calculated by applying to them the ratio of hours spent on accommodation services to hours spent on support services. That will be, I have little doubt, a very time consuming process for the management."

Social Security Commissioner Lloyd-Davies gave his decision in case CPC 1820 2005 on 28 July 2006.





WELFARE BENEFITS – GENERAL ISSUES

MALADMINISTRATION

Parliamentary Commissioner for Administration: Annual Report

What follows are brief highlights of those aspects of the Parliamentary Ombudsman's latest report in so far as it concerns social security benefits. These reports are a useful negotiating tool when trying to persuade the DWP that they should compensate a claimant for deficient handling of a claim.

Failure to give effect to underlying entitlement – £18,000 compensation

The facts

Mr M made a claim for income support in 1999. Jobcentre Plus overlooked the fact that he had an underlying entitlement to carer's allowance and therefore failed to award him either income support or the carer's premium to which he was entitled. As from 2003, the claim was properly paid. However, Jobcentre Plus failed to make a decision on Mr M's application for a 'special payment' to make up for the four years' loss of entitlement. He complained to the Parliamentary Ombudsman.

The decision

The Ombudsman decided that there had been maladministration. Following the Ombudsman's intervention, Jobcentre Plus agreed to pay Mr M £18,000 compensation in respect of the loss in benefit and the linked loss of other advantages, such as free school meals, help with school uniform costs and entitlement to council tax benefit. They also agreed to pay £700 in respect of the distress and inconvenience caused to Mr M.

The decision of the Parliamentary Commissioner for Administration on complaint no. PA-3173 is reported in the Commissioner's 05/06 annual report, published in July 2006.

Unreasonable pursuit of tax credit overpayment – £7,500 overpayment written off

The facts

Mr and Mrs B were awarded child tax credits in March 2003. In May 2003, Mrs M stopped work and began to claim contributions-based jobseeker's allowance. This type of JSA does not carry with it an automatic entitlement to any sort of tax credit. Income-based JSA, however, does.

Mrs M telephoned a tax credits official and informed him that she was now in receipt of JSA. The official did not ask her what type of JSA award she had. Instead, the official assumed it was an income-based award and awarded tax credits accordingly. An award notice was sent out which stated that Mrs M was in receipt of income-based JSA. Mrs M rang the tax credits line to query whether the award was correct and was informed that it was. Mrs M was unaware that contributions-based and income-based JSA had different consequences for tax credit entitlement.

In 2004, the Inland Revenue informed Mrs M that she had been overpaid £7,500 as a result of their erroneous assumption that she had been in receipt of income-based JSA. The Inland Revenue insisted on repayment arguing that it was unreasonable for Mrs M to have failed to notice that her award notice stated that she was receiving income-based JSA. Mrs M complained to the Ombudsman.

The decision

The Ombudsman concluded that "Mr and Mrs B could not be expected to appreciate the difference between different types of jobseeker's allowance or the likely impact of that on their tax credit claim". As a result, the Inland Revenue agreed to write off the overpayment and also pay £50 compensation for inconvenience caused and £25 in respect of their delay in dealing with the matter.

The decision of the Parliamentary Commissioner for Administration on complaint no. PA-1384 is reported in the Commissioner's 05/06 annual report, published in July 2006.

Failure to communicate appropriately with deaf claimant – £9,500 compensation

The facts

Mr A was profoundly deaf and communicated using British Sign Language. In addition he had difficulty reading (which the Ombudsman said is often the case with profoundly deaf people). As a minor, Mr A had been awarded DLA. He made a renewal claim upon reaching 16, but it was refused. He made another claim 2 years later which was also refused. 2 years after that, he made a successful claim.

A voluntary organisation complained to the Ombudsman on Mr A's behalf pointing out that he was not able to read the letters sent to him refusing his claims and explaining his appeal rights. It was for this reason that he failed to exercise his rights of appeal.

The decision

Following the Ombudsman's intervention, the Disability and Carers Service of the DWP agreed that the two DLA refusals were official errors because the decision maker "did not fully take into account the fact that Mr A was still in full time education and used BSL as a first language". They agreed to pay him £9,500 representing the DLA that he should have been awarded plus interest. In addition they paid him £250 compensation in respect of the inconvenience caused.

The decision of the Parliamentary Commissioner for Administration on complaint no. PA-363 is reported in the Commissioner's 05/06 annual report, published in July 2006.





ANTI-TERROR RULES

M, A & MM v H.M. Treasury – welfare benefit payments do fall within the UN Resolution restricting the provisions of funds for, or for the benefit of, individuals suspected of supporting Al Qaeda

The claimants in this case were the wives of, and lived with, men who were listed in UN Resolution 1390 (2002) whose purpose is to cut off the supply of funds to Al Qaeda and the Taliban. The resolution enjoins UN member states to ensure that, amongst other things, no "funds" are made available "directly or indirectly, for such persons benefit", subject to humanitarian exceptions. National implementing legislation(a) provides that it is a criminal offence to make available to, or for the benefit of, a listed person any funds *unless* the person making the funds available is acting under the authority of a licence granted by HM Treasury.

HM Treasury has taken the view that the payment of welfare benefits is caught by the UN resolution and the domestic legislation. They have issued a licence entitling the welfare benefits authorities to make payments to the wives in respect of their expenditure on "basic expenses". It seems that the sums so allowed are less than the amount that the wives would otherwise have been entitled to under the welfare benefits legislation.

The High Court recently rejected a challenge to the Treasury's application of the UN resolution and domestic legislation. Those instruments catch not only direct payments to the listed individuals, but also payments, such as benefit payments to spouses, which might indirectly benefit the individuals. Accordingly, the Treasury had been correct to apply the instruments to spousal payments of welfare benefits. A subsidiary challenge was that the terms of the Treasury's licence were too vague in that there was said to be little indication of what constituted "basic expenses" payments in respect of which were permitted under the licences. This was also rejected by the High Court. Certain items are expressly included as constituting basic expenses and there is provision for application to be made for funds in respect of other unlisted expenditure that a claimant asserts constitutes "basic expenses".

(a) The Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (S.I. 2002/111).

The High Court (Kenneth Parker QC, sitting as a Deputy Judge of the High Court) gave its decision in *M, A & MM v HM Treasury and Others* on 22 September 2006: [2006] EWHC 2328 (Admin.).

SOCIAL WELFARE SERVICES FOR PERSONS FROM ABROAD

FAILED ASYLUM SEEKERS

The High Court, in *R (Binomugisha) v Southwark LBC*, considers when a local authority might be required to accommodate a destitute failed asylum seeker

THE FACTS

Mr B was a Ugandan national. In October 2002, aged 15, he arrived in the UK. He entered the UK on a false passport and, accordingly, was (and is) in the UK in breach of the immigration laws (which takes on particular relevance when we come to consider his support entitlements).

For Mr B's first year in the UK, he was entirely dependent upon the charity of the London Ugandan community. In October 2003, aged 16, he claimed asylum. He was referred to Southwark LBC who decided that they were obliged to accommodate him under s.20 of the Children Act 1989 (which sets out when a local authority must accommodate a child in need within their area, for example a child who has attained the age of 16 and whose welfare the authority consider is likely to be seriously prejudiced unless accommodation is provided).

In December 2003, Mr B's claim for asylum under the Geneva Refugee Convention was refused, as was his claim that to remove him from the UK would violate his rights under the European Convention on Human Rights ("the Convention"). This, however, had no immediate impact upon Southwark's duties towards him because the support restrictions imposed upon failed asylum seekers by Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (NIA 2002), and which are looked at in more detail below, do not apply to children. Whilst a child, therefore, Mr B remained entitled to accommodation under the Children Act 1989 on the same terms as any other child in England and Wales.

Mr B turned 18 in December 2004. At that point he ceased to be entitled to accommodation under s.20 of the Children Act 1989. This event coincided with a deterioration in his mental health. Subsequently, in August 2005 he was hospitalised for a week and, upon discharge, prescribed Olanzapine (an anti-psychotic).

But for his immigration status, Mr B's period as a looked after child would have entitled him to various leaving care services, and it would have been possible for accommodation to have been provided as such a service. However, the leaving care provisions of the Children Act 1989 are included within Schedule 3 to the NIA 2002. The general position under that Schedule is that a person falling within an ineligible category is barred from receiving support or assistance under an enactment listed in the Schedule. Mr B fell within one of the ineligible categories under that Schedule because he was no longer an asylum seeker and he was in the UK in breach of the immigration laws (as noted above, he initially entered on a false passport and was not subsequently given leave to enter or remain)(a). Accordingly, under the general position Mr B could not access accommodation under the Leaving Care legislation. In addition, mainstream social housing is entirely closed off to a person in Mr B's position as is entitlement to welfare benefits including housing benefit.

KEY POINTS

- A failed asylum seeker who makes a purported new claim that to remove him/her from the UK would violate Article 8 of the European Convention on Human Rights (right to respect for private and family life) is to be treated in the same way as a person who makes a purported fresh asylum claim
- It seems that, in advance of a decision on the claim by the immigration authorities, in many cases where the individual was accommodated by a local authority when an asylum seeker, s/he will have to be provided with accommodation once more unless the purported fresh claim is manifestly unfounded
- A local authority should not address whether the purported fresh claim would succeed; it should merely address whether it is manifestly unfounded





But for Mr B's immigration status, another option would have been the provision of accommodation under s.21 of the National Assistance Act 1948 (NAA) (which is the provision we have considered at length in earlier editions and is the usual legal basis for the provision of local authority accommodation to vulnerable asylum seekers and certain vulnerable failed asylum seekers: see issue 32 for a full run down of the use of s.21 NAA in this context). This is another provision included within Schedule 3 to the 2002 Act and so Mr B was, on the face of it, also ineligible for s.21 NAA accommodation.

The Schedule 3 NIA 2002 bar on the provision of support and assistance is lifted in certain circumstances. Of relevance for present purposes is that Schedule 3 does not prevent the provision of support or assistance, such as accommodation, to the extent necessary to avoid a breach of a person's rights under the European Convention on Human Rights ("the Convention"). Mr B's case was that he had to be provided with accommodation in order to avoid a breach of his rights under the Convention and, accordingly, the prohibition on providing him with accommodation under either the leaving care legislation or s.21 NAA was lifted.

After intermittently providing accommodation for Mr B following his eighteenth birthday, in March 2006 Southwark squarely addressed the application of Schedule 3 to the NIA to his circumstances. By this time, Mr B's solicitors had made a further application to the Immigration Service for leave for Mr B to remain in the UK. The application was made on the basis that to deport Mr B would amount to an unjustified interference with his rights under Article 8 of the European Convention on Human Rights (his right to respect for his private and family life). At the date of Southwark's decision, this application was un-determined. Southwark's conclusion was that it was not necessary for them to provide accommodation in order to avoid a breach of Mr B's Convention rights. They concluded that Article 8 did not prevent Mr B's removal from the UK. Flowing from this, they decided that because it was open to Mr B to access National Asylum Support Service (NASS) accommodation under s.4 of the Immigration and Asylum Act 1999, any deterioration in his physical or mental condition through lack of accommodation would not be due to anything that Southwark had done or refused to do and, accordingly, it was not necessary for them to provide accommodation to avoid a breach of Mr B's human rights. S.4 accommodation would have been made available to Mr B if he were "taking all reasonable steps to leave the UK" (regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (in other words, if he were making himself available for deportation).

Mr B claimed judicial review of Southwark's refusal. Pending the determination of the claim, an interim order required Southwark to provide him with accommodation.

THE HIGH COURT'S DECISION

The High Court quashed Southwark's decision and ordered them to reconsider B's application for assistance. The key points in the Court's decision were as follows:

- (i) the Court began by referring to the recent High Court decision in *R (AW) v Croydon LBC* [2005] EWHC 2950 (QB) (which we considered in issue 30). That case concerned the support position in relation to failed asylum seekers who try to make a fresh claim for asylum in advance of a decision from the immigration authorities as to whether to accept it as a fresh claim. The High Court in that case held that where the supposed fresh grounds for asylum were "manifestly nothing of the sort" then a local authority considering whether an applicant's human rights required accommodation to be provided (i.e. when considering whether the Schedule 3 NIA 2002 bar was to be lifted) could in limited cases ignore the purported new claim and operate on the assumption that there is no impediment to the individual leaving the UK. However, it went on to say that "it is only in the clearest cases that it will be appropriate for the public body concerned to refuse relief on the basis of the manifest inadequacy of the purported fresh grounds". It seems that where the purported new asylum claim cannot be ignored then the support position is similar to that which applies in respect of asylum seekers proper: in *R (Adam) v the Home Secretary* [2005] UKHL 66 the Law Lords held that sooner or later a destitute asylum seeker would have to be provided with support, for example basic accommodation, in order to avoid a breach of Article 3 of the European Convention on Human Rights, the right not to be subjected to inhuman or degrading treatment. In this case the High Court held that the *Croydon* approach applied despite the fact that B was not making a fresh claim for asylum (he was making a claim to the immigration authorities that to remove him from the UK would unjustifiably interfere with his rights under Article 8 of the Convention, his right to respect for his private life here in the UK);
- (ii) when Southwark considered B's application for assistance, they came to their own view as to whether his rights under Article 8 would prevent his deportation from the UK (and decided that they would not). This was an error of law. Southwark should have restricted themselves to considering whether or not B's Article 8 claim was manifestly unfounded;
- (iii) the High Court did not accept that to remit the matter back to Southwark would be pointless because they would inevitably find that B's Article 8 claim was manifestly unfounded. This was for the following reasons:

there were unresolved questions as to the nature of the psychotic episode that led to B's hospitalisation, in particular as to whether it was constitutional in origin or had been precipitated by excessive cannabis consumption. Allied to this, there had been no investigation of what mental health services might be available to B in Uganda;

at a relatively late stage in proceedings, it became apparent that B also had hypertension which is unusual in one so young. His consultant's opinion was that it would be unsafe for him to leave the UK until his blood pressure had been reduced;

an immigration hearing in 2004 had concluded that to deport B would amount to an interference with his right to respect for his private life given the community ties he had developed in the UK and the lack of such ties in Uganda. Whilst the immigration judge had on that occasion decided that the interference occasioned by deportation would be justified, the fact that the judge had decided that B's Article 8 rights were then engaged was an "important factor" to be taken into account when deciding if B's current immigration claim was manifestly unfounded particularly in the light of the fact that over the last two years B's attachment to the UK, and the connections he had made here, had, if anything, grown stronger;

under Article 8, for an interference with a person's right to respect for his private or family life to be justified it must be proportionate. The High Court pointed out that this is essentially a judgement to be made by the immigration authorities. It said that "there is no doubt that part of the immigration policy which the Home Office operates is concerned with the burden which would be placed on local authorities if people without resources of their own were granted leave to enter or remain. But this is only part of a wider picture. Taking a view about these matters is quintessentially a task for the immigration authorities rather than local authorities. This is further support for the





proposition...that a local authority such as Southwark should only make its decisions on the basis that a person such as the Claimant is free to go back to his own country if an outstanding human rights claim to remain in the UK is manifestly unfounded."

- (iv) if B's human rights do call for him to be provided with accommodation, who is to provide it? This was not the subject of a ruling by the High Court in the present case but it seems likely that it would be Southwark LBC rather than the National Asylum Support Service (NASS). A failed asylum seeker can potentially access what is called 'hard cases' NASS accommodation (provided under s.4 of the Immigration and Asylum Act 1999(b)). Where the failed asylum seeker's human rights call for the provision of accommodation, therefore there are potentially two sources of support – local authority and hard cases. In the *Croydon* case, the High Court held that in respect of persons who, as adult asylum seekers, were accommodated by local authorities under s.21 of the National Assistance Act 1948, rather than by NASS, on account of their vulnerability it is for local authorities and not NASS to provide the accommodation necessary in order to avoid a breach of Convention rights. Given B's mental health history, it would appear likely that he falls within this group of more vulnerable asylum seekers, and failed asylum seekers, who are to look to local social services authorities for accommodation, rather than to NASS acting under s.4 of the 1999 Act. This probably explains why Southwark's counsel informed the High Court in the present case that it would not seek to argue that NASS should accommodate B if his human rights called for someone to provide him with accommodation.

DISCUSSION – WHEN IS A CLAIM MANIFESTLY UNFOUNDED?

To permit a local authority (with social services responsibilities) to ignore a "manifestly unfounded" claim does not actually make life any easier for the authority. Leaving aside the obvious case of a purported fresh claim which relies on materially the same grounds as an earlier rejected claim, in order for an authority to decide whether a claim is manifestly unfounded, the authority must have an idea of what amounts to a good claim.

What are the categories of fresh claim that are likely not to be manifestly unfounded?

Obviously, something must have changed as between the decision on the initial claim and the date of the purported fresh claim in order for it truly to be a fresh claim. This may be a change in the circumstances of the applicant's home country such as to raise questions as to whether the Geneva Convention on refugees might now be applicable. Perhaps more commonly encountered would be a change in the personal circumstances of the applicant over the period since the initial rejected claim. The well-documented relaxed attitude of the immigration authorities to enforcement over recent years may come to assist claimants in this respect. As roots are established and social and family connections are made and/or deepened in the period following a rejection of an immigration claim, the Article 8 (the right to respect for private and family life) picture alters. In such cases it may well be difficult for a local authority to style an Article 8 claim as manifestly unfounded: the present case is a good example of that. This is not to say that the immigration claim based on Article 8 will ultimately succeed, that is a different question to be decided in due course by immigration decision makers. Another reasonably common change of circumstances relates to a deterioration in an applicant's health, whether physical or mental, a feature also present in this case. Such a change will make it difficult for a local authority to reject the purported fresh claim as manifestly unfounded. Again, this is not to say that such a change is likely to lead to a successful immigration application, but merely that it makes it difficult for a local authority to proceed for support purposes on the basis that the purported fresh claim is manifestly unfounded and therefore can be ignored.

(a) If Mr B had claimed asylum as soon as he arrived in the UK back in 2002 he would not have fallen within an ineligible category upon becoming a failed asylum seeker. A person who claims upon arriving in the UK is not in the UK in breach of the immigration laws (as was explained in the *Croydon* case). This means s/he does not fall within an ineligible category until such time as s/he fails to comply with removal directions.

(b) The Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 set out the cases in which s.4 'hard cases' support is to be provided. They include the case where "the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights".

The High Court (Andrew Nicol QC, sitting as a Deputy Judge of the High Court) gave its decision in *R (Binomugisha) v Southwark LBC* on 18 September 2006 [2006] EWHC 2254 (Admin.).







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