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Judgment: approved by the Court for handing down | *Delivered:* **9/12/10**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF THE SOCIAL SECURITY ACT 1998

AND IN THE MATTER OF A DECISION OF A DEPUTY SOCIAL SECURITY COMMISSIONER DATED 4 MARCH 2009

BETWEEN:

BRIDGET HAMILTON

Appellant;

and

DEPARTMENT FOR SOCIAL DEVELOPMENT

Respondent.

Before: HIGGINS LJ, GIRVAN LJ and COGHLIN LJ

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This matter comes before the court by way of a case stated by the Deputy Social Security and Child Support Commissioner for Northern Ireland ("the Commissioner"). The Commissioner heard an appeal brought by the Department of Social Development ("the Department") against a decision of an appeal tribunal sitting at Londonderry on 3 September 2007 ("the Appeal Tribunal"). The Commissioner concluded that the Appeal Tribunal had erred in law in dismissing the Department's claim to recover certain monies paid to Bridget Hamilton ("the claimant") by way of income support which the Department asserted had been erroneously paid to the claimant over a period of time. He remitted the matter to a fresh tribunal to investigate further the facts the claimant asserting that she had a substantive defence to the Department's claim to recover the monies. In its appeal the claimant asserts that the Commissioner was wrong in law in so concluding.

She sought and was granted by this court leave to appeal against the Commissioner's decision and the court directed the Commissioner to state a case.

[2] The Commissioner posed two questions in the case stated as follows:-

> "(1) Did I err in law in holding that the requirements of Section 69(5)(a) of the Social Security Administration (Northern Ireland) Act 1992) ("the Act") were satisfied in circumstances where a decision superseding the determination in pursuance of which benefit was paid to the appellant was made but was not communicated to the appellant until after a determination that benefit was recoverable from her under Section 69(1) of the Act was made and communicated to the appellant?
>
> (2) Although the specific point was not raised in argument before me, did I err in law in failing to hold that Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998 required the Tribunal not to take into account the communication of the decision superseding the determination under which benefit was paid to the appellant as the communication of that decision was a circumstance not obtaining a the time when the decision appealed against was made?"

[3] On the hearing of the appeal before the court Ms Higgins QC appeared with Mr Stockman on behalf of the claimant. Mr Maguire QC appeared with Mr Coll on behalf of the Department. The court is indebted to counsel for their helpful written and oral submissions.

Factual background

[4] The claimant claimed and became entitled to income support from 5 March 1996. Her entitlement to income support was linked to and dependent upon her entitlement to a carer's allowance on the basis that she was her son's carer. The conditions entitling her to carer's allowance ceased to be satisfied as from 9 August 2004. In consequence under the relevant legislation her entitlement to draw income support ceased as from 4 October 2004. Notwithstanding that she ceased to satisfy the relevant conditions for entitlement to income support the Department continued to pay income support to her for a protracted period. The claimant accepts that she had no legal entitlement to income support as from 4 October 2004.

[5] The Department subsequently realised that the claimant was not entitled to carer's allowance as from 9 August 2004 and thus had not been

entitled to draw income support from 4 October 2004. On 1 June 2006 a decision ("the first entitlement decision") was made within the Department to remove the claimant's entitlement to income support. The departmental computer system could only carry the decision back to 31 January 2006. It was common case that the claimant was duly informed of the decision of 1 June 2006. The standard form of notification included information for the claimant of her right to appeal against the decision.

[6] The claimant did not appeal against the first entitlement decision. It appears to be common case that income support ceased to be paid thereafter.

[7] On 5 June 2006 the Department having realised that the first entitlement decision only related back to 31 January 2006 on the computer records made a manually recorded decision removing entitlement to income support from 4 October 2004 to 30 January 2006 ("the second entitlement decision"). There was no evidence before the Appeal Tribunal or the Commissioner that that decision was brought to the attention of the claimant who claimed to be unaware of it.

[8] On 14 August 2006 the Department made a decision ("the recoverability decision") concluding that a recoverable overpayment of income support had occurred in the period from 4 October 2004 to 29 May 2006. It calculated the repayment due as £7,142.14 although that calculation was revised on 4 October 2006 to £6,991.74. The claimant was duly notified by letter of the recoverability decision of 14 August 2006 and of the decision amending the payment recoverable.

[9] The first paragraph of its letter dated 8 September 2006 stated:

> "We are writing to you because we have had to look again at your money. We have decided that you have been paid £7,142.24 too much income support from 04 October 2004 to 29 May 2006. This was because your carer's allowance had ended and you no longer satisfied the conditions of entitlement to income support. You need to pay this back."

The letter went on to inform the claimant that if she wanted more information she should get in touch with the Department at the address and phone number shown. The letter also indicated that she had a right to appeal and could obtain a relevant leaflet and appeal form from her local Social Security Office. The letter also recorded details of the sum as calculated. By its further letter of 4 October 2006 the Department stated that that sum had to be reduced by the sum of £150.40 for the period 3 August 2004 to 27 September 2004 at £18.80 per week.

[10] The bundle of papers furnished to the claimant before the hearing included documents entitled "Overpayment Decision" and "Revised Overpayment Decision". These documents referred to the decision of 1 June 2006 as a result of which an overpayment of income support had been made from 4 October 2004 to 29 May 2006 amounting to £7,142.14 as shown in the schedule. More accurately because of the computer problem the decision of 1 June 2006 recorded the overpayment period as running from 31 January 2006 and that decision was manually adjusted on 5 June 2006 to take the overpayment period back to 4 October 2004.

[11] The claimant brought an appeal against the recoverability decision on 18 October 2006. Her ground of appeal was that to the best of her recollection she and the Carer's Allowance Branch had informed Lisnagelvin Jobs and Benefits Office of the cessation of carer's allowance and it was the claimant's case that the subsequent overpayment was the result of the Department's failure to act on the information.

The decision in respect of the appeal

[12] The Appeal Tribunal allowed the claimant's appeal and rejected the Department's claim to recover the overpaid monies on the basis that it was not satisfied that the second entitlement decision had been properly notified to the claimant. It considered that the failure to notify the claimant of that decision meant that the recoverability decision was ineffective. It concluded that "the requirement of Section 65(5A) (sic) of the Social Security Administration (NI) Act 1992 had not been complied with". (Clearly the reference to Section 65(5)(a) was intended to be a reference to Section 69(5)(a) of the 1992 Act.) Because the Tribunal so concluded it considered it unnecessary to consider the claimant's substantive defence that she had informed the Jobs and Benefits Office of the cessation of entitlement.

[13] The Commissioner allowed the Department's appeal against the Appeal Tribunal's decision. He found that the second entitlement decision was valid and had been perfected by subsequent notification to the appellant of the decisions which could be found in the bundle of documents to which she had access before the appeal started. He ordered that a new tribunal should rehear the matter and consider and make findings on the appellant's substantive defence.

The relevant statutory provisions

[14] Section 69 of the Social Security Administration (Northern Ireland) Act 1992 so far as material provides:

"(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure –

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,

the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.

(5A) Except where regulations otherwise provided, an amount shall not be recoverable under subsection (1) above or under Regulations under subsection (4) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under Article 10 or superseded under Article 11 of the Social Security (Northern Ireland) Order 1998.

[15] Article 11 of the Social Security (Northern Ireland) Order 1998 provides:

"(1) Subject to paragraph (3) and Article 36(3), the following, namely –

(a) any decision of the Department under Article 9 or this Article, whether it is originally made or revised under Article 10; and

(b) any decision under this chapter of an appeal tribunal or a Commissioner,

may be superseded by a decision made by the Department, either on an application made for the purpose or on the Department's own initiative.

……..

> (5) Subject to paragraph (6) and Article 27, a decision under this Article shall take effect as from the date on which it is made, or where applicable the date on which the application was made.
>
> (6) Regulations may provide that, in prescribed cases or circumstances, a decision under this article shall take effect as from such other date as may be prescribed."

In the present case the two entitlement decisions were decisions superseding the earlier departmental decision that the claimant was entitled to income support.

[16] Article 13 deals with appeals to Appeal Tribunals and in sub-section 8 provides:

> "(8) In deciding an appeal under this article an appeal tribunal:
>
> (a) need not consider any issue that is not raised by the appeal; and
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."

[17] Regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 so far as material provides:

> "(2) A decision under Article 11 may be made on the Department's own initiative or an application made for the purpose on the basis that the decision to be superseded:
>
> (a) is one in respect of which.
>
> (i) there has been a relevant change of circumstances since the decision had effect or, in the case of an advance award under Regulation 13, 13A or 13C of the Claims and Payments Regulations, since the decision was made."

[18] Regulation 7(2) of the same Regulations provides:

> "Where a decision under Article 11 is made on the ground that there has been, or it is anticipated that there will be a relevant change of circumstances since the decision had effect or, in the case of an advance award since the decision was made, the decision under Article 11 shall take effect –
>
> (c) where the decision is not advantageous to the claimant –
>
> …….
>
> (v) in any other case except in the case of a decision which supersedes a disability benefit decision, from the date of the change."

[19] Regulation 28 of the Regulations provides:

> "(1) A person with a right of appeal under the Order or these Regulations against any decision of the Department shall –
>
> (a) be given written notice of the decision against which the appeal lies;
>
> (b) be informed that, in a case where that written notice does not include a statement of the reasons for that decision he may, within one month of the date of the notification of that decision, request that the Department provide him with a written statement of the reasons for that decision; and
>
> (c) be given written notice of his right of appeal against that decision.
>
> (2) Where a statement of the reasons for the decisions not included in the written notice of the decision and is requested under paragraph (1)(b), the Department shall provide that statement within 14 days of receipt of the request as soon as practicable afterwards."

Regulation 28 came into play in the present instance because the claimant had a right of appeal against the written notice of the decision (Article 13 of the 1998 Order).

[20] Regulation 31 of the 1999 Regulations provides:

> "(1) Where an appeal lies from a decision of the Department to an appeal tribunal, the time within which appeal shall be brought is, subject to the following provisions of this part –
>
> (a) subject to regulation 9A(3) one month of the date of notification of a decision against which the appeal is brought;
>
> (b) where written statement of the reasons for that decision is requested and is provided within the period specified in sub-paragraph (a), 14 days of the expiry of that period; or
>
> (c) where a written statement of the reasons for that decision is requested and is provided after the period specified in sub-paragraph (a), 14 days of the date on which this statement is provided.
>
> (2) Where the Department –
>
> (b) supersedes a decision … …under Article 11,
>
> the period of one month specified in paragraph (1) shall run from the date of notification of the revision or supersession of the decision …"

The parties' contentions

[21] Ms Higgins argued that the decision that benefit was recoverable under section 69 of the 1992 Act could have no legal effect unless there had been a prior valid decision superseding entitlement to the benefit for the relevant period. For there to be a prior valid decision it was necessary to establish communication to the claimant of the decision superseding entitlement to benefit. She argued that the Department had no power to make the recoverability decision since it was a prerequisite to a valid recoverability decision for there to be a communicated prior decision that there was no entitlement to the applicable benefit during the relevant period. Counsel relied in particular on R v Secretary of State for Home Department

(ex parte Anufrijeva)[2003] UKHL 36 ("Anufrijeva") which she argued clearly established the need for communication of a decision before it becomes an effective decision.

[22] Ms Higgins further argued that Article 13(8)(b) of the 1998 Order precluded the Appeal Tribunals from having regard to circumstances not obtaining at the time the decision under appeal was made. The tribunal could only consider matters as they stood at the date on which the recoverability decision was made namely 14 August 2006. As at that date the entitlement decision had not been communicated and was thus not effective and could not be taken into account. The claimant only became aware of the question mark over her right to income support after she was made aware of the recoverability decision.

[23] Mr Maguire argued that the first entitlement decision took effect from 31 January 2006 and the second entitlement decision took effect from 4 October 2004 in accordance with Regulations 6 and 7 of the 1999 Regulations. The original decision granting income support had been superseded for the purposes of Section 69(5A). The time limit for appeal did not run until a decision was notified to the claimant. The relevant statutory provisions do not indicate that an un-notified decision had no legal effect and Article 11(5) and Regulation 7 of the 1999 Regulations make clear that a supersession decision has effect from the date of the change of circumstances. The claimant had been notified of the second entitlement decision before the Appeal Tribunal sat because it formed part of the papers submitted to her. Article 13(8)(b) refers to factual circumstances and the word circumstances should not be interpreted so as to encompass an issue outwith the factors which went towards the making of the substantive decision. In any event there had been substantial compliance with the requirement to communicate the relevant decisions to the claimant in the present instance. The claimant knew that the Department had decided she was not entitled to income support following cessation of her entitlement to carer's allowance. The claimant on her own case did not challenge the Department's conclusion that she was no longer entitled to income support from 4 October 2004. Her defence was that she had brought the matter to the attention of the Department.

The decision in Anufrijeva

[24] The question which arose in that decision was whether income support should have been payable to the claimant as an asylum seeker between 10 December 1999 and 25 April 2000. This turned on the question whether on or before 10 December 1999 she had ceased to be an asylum seeker. This in turn depended on whether her claim for asylum had been recorded as determined

other than on appeal for the purposes of Regulation 70(3A) of the Income Support General Regulations 1987. In that case the responsible officer in the Home Office had concluded that the claimant had failed to establish a claim to asylum and her case was recorded as determined. The Home Office decided that she was no longer an asylum seeker and thus did not qualify for income support. The appellant was not informed directly of the determination that her asylum had been refused or when and for what reasons.

[25] The majority view in the House of Lords was that the right of access to justice was a fundamental principle which carried with it the necessity of giving notice of a decision before it could have the character of a determination with legal effect because the individual concerned had to be in a position to challenge the decision in the courts. The constitutional principle required the rule of law to be observed and it required the state to accord to individuals the right to know of a decision before their rights could be adversely affected. It was an unjust proposition that an uncommunicated decision could bind an individual. Parliament had not in that case expressly or by necessary implication legislated to displace the applicable constitutional principle.

[26] Lord Steyn stated that:

> "The principle requires that a constitutional state must accord to individuals the right to know of decisions *before their rights can be adversely affected*……
> (The decision) is in effect one involving a binding determination as to status. It is of importance to the individual to be informed of that so that he or she can decide what to do." (italics added)

[27] The majority view was that the impugned decision was a *provisional* one. To understand the meaning of that term it must be borne in mind that in that case the impugned decision had purported to determine the status of the claimant and thus it purported to reach a conclusion which had legal consequences for her but in respect of which she had had no opportunity to challenge its legal correctness. The majority view that the decision was only *provisional* must be interpreted as meaning that the decision represented the respondent's decided view which would be binding unless the claimant successfully challenged the lawfulness of the decision. Since fairness requires the communication of a decision having in itself legal consequences for a party, legal effect cannot properly be given to such a decision until that party has been made aware of the decision so as to be able to exhaust a challenge to the lawfulness of the decision before the legal consequence can take effect.

[28] Anufrijeva shows that in the present case there are two key questions:

(a) Does the relevant legislation expressly or by necessary implication displace the generally applicable principle that a decision purporting to determine a person's legal entitlement must be communicated to the person affected before it becomes a decision determinative of his rights?

(b) To that question there is in fact a prior question. Did the second entitlement decision in fact purport to determine conclusively the right to income support from 4 October 2004 to 30 January 2006 or put another way did the decision of itself adversely affect the claimant?

Discussion

[29] Under the relevant legislation in the present instance there is a duty imposed upon the Department to bring to the attention of a claimant any decision which determines his entitlement to receive benefits when he has a right of appeal. The duty is to give written notice of the decision against which the appeal lies and to give written notice of the right to appeal. Regulation 28 of the 1998 Regulations indicates that the written notice of the decision does not have to give the reasons. The claimant may ask for the reasons within one month of the date of notification. They must then be given within 14 days. The appeal must be brought within one month of the notification or within 14 days of the receipt of the reasons when requested. Regulation 7 makes clear that a supersession decision takes effect "from the date of change" of circumstances giving rise to the supersession. Hence, the Regulations envisage that such a decision takes effect before notice is actually given to the claimant. In the absence of a regulation under Article 11(6) varying the date of effectiveness of a decision, Article 11(5) would have provided that the decision takes effect on the date in which it is made (which may not be the date on which it comes to the notice of the claimant). Regulation 7 is intra vires for the 1998 Order authorises regulations specifying a date for a decision taking effect which is different from the date on which it is made. As noted, Anufrijeva recognises that Parliament may make clear that an administrative decision takes effect before notice of the decision comes to the attention of the party affected. In the present instance, the Order and Regulations do spell out that such a decision will take effect in this case from the date of the relevant change of circumstances. It is thus clear that when the recoverability decision was made the relevant entitlement decision was effective from 4 October 2004 being the date of the relevant change of circumstances and the recoverability decision, accordingly, had been validly made.

[30] The letter of 8 September 2006 makes clear that the Department had decided two things. Firstly, it had decided that the claimant's entitlement to income support had ceased from 4 October 2004 because her carer's

allowance had ceased. Secondly, it had decided that the sum of £7,142.14 was recoverable. Inasmuch as the claimant had been previously made aware of the first entitlement decision taking the period of non-entitlement back to 4 October 2004 beyond the date of 31 January 2006 (of which decision the claimant was aware) the letter of 8 September 2006 itself brought to the claimant's notice the effect of the second entitlement decision. The letter of 8 September 2006 accordingly satisfied the requirements of Regulation 28 in that it gave her written notice of the decision as well as notice of her right to appeal and her right to ask for reasons. Anyone receiving the letter would have known that they could appeal against the decisions that the moneys were recoverable and that they were recoverable from 4 October 2004.

[31] We must reject the claimant's contention that because the second entitlement decision had not been brought to her notice prior to the recoverability decision there was no operative recoverability decision. Insofar as the second entitlement decision indicated that the claimant had not been entitled to income support from 4 October 2004 to 30 January 2006 it was not in itself a decision having the character of a determination with binding legal effect and consequences. For the decision to have a legal outcome for the claimant it had to be followed by a decision that the sum in question was recoverable from the claimant. There was no reason why the Department could not at the same time decide (a) that the claimant was not entitled to the benefit from a given date and (b) that a sum was recoverable. Such a two pronged decision made at the same time would be both logical and administratively sensible. There is no logical reason why the Department must decide that the claimant was not entitled to a benefit from a given date, give notice of the decision to the claimant and await the outcome of an appeal before moving to the stage of deciding whether the moneys are recoverable, a stage which might never be reached if the Department concluded that recovery was inappropriate. In that event the supersession decision would ex hypothesi have no legal outcome for the claimant. A claimant faced with such a two pronged decision could appeal both decisions at the one time. The tribunal would logically have to decide the validity of the supersession decision first before moving to the question whether the moneys were recoverable. Thus communication of the supersession decision contemporaneously with the recoverability decision in no way prejudices the claimant whose appeal rights are protected. The claimant in this case had a full opportunity to challenge the correctness of the second entitlement decision as a necessary first question in relation to her challenge to the recoverability decision. As has been noted, the claimant does not in fact challenge the correctness of the second entitlement decision.

Disposal of the appeal

[32] For these reasons we must answer the first question posed in the case stated "No". The second question does not arise in view of the conclusions we have reached.