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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

<i>Ref: MCCD3210</i>

<i>Delivered 04.07.2002</i>

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THOMAS FRANK KERR

V

THE DEPARTMENT FOR SOCIAL DEVELOPMENT

McCOLLUM L J

This appeal by way of case stated arises from an application for a payment from the Social Fund to meet the funeral expenses occasioned by the interment of Mr Hugh Kerr who died on 19th July 1999. The funeral took place on 27th July 1999 at a cost £1,172.58 and an application for payment was made to the Department for Social Development ("the respondent") by a surviving brother of the deceased Mr Thomas Frank Kerr ("the appellant").

Such payments are authorised by section 134(1) of the Social Security Contribution and Benefits (Northern Ireland) Act 1992 ("the Benefits Act"). Section 36(1) of the Social Security Administration (Northern Ireland) Act ("the Administration Act 1992") provided for the appointment of adjudication officers to determine such claims. Under section 3(b) of the Social Security

(Northern Ireland) Order 1998 the functions of that officer were transferred to the Department of Health and Social Services, whose functions in this respect are now exercised by the respondent.

The financial sum at issue in this appeal is a modest one, but the decision may have implications which would affect numerous applications for Social Security Benefit. The imposition of an onus of proof on the Respondent could have profound consequences for the determination of cases and, therefore I feel compelled to express my dissent from the basis upon which the matter has been determined by my learned colleagues.

Application for a funeral payment is made by completing a form which consists of 20 pages and poses many questions, necessitated by the various amendments to the conditions of eligibility which have been made in the light of the experience of the respondent in dealing with claims of this nature.

Part 4 of the form required a reply to the question "are there any other surviving close relatives of the person who died?"

A further requirement in that part of the form was "we need to know if you had more or less or about the same amount of contact with the person who has died than the other surviving close relatives you have told us about."

As brother of the deceased the Appellant was a "close relative" for the purpose of the relevant regulations, as were any other brothers or sisters.

One perceived abuse of the system is that where, for example, a deceased person is survived by a number of siblings, some of whom may be financially capable of meeting the funeral expenses a claim for payment may

nonetheless be made by another who qualifies for assistance because he or she is in receipt of a relevant benefit.

In the present case the application form omitted to state that in addition to the applicant his father and a brother and sister had also survived the deceased. It was said on his behalf that the form had been completed by the undertaker, (who is the true beneficiary of this kind of benefit.) If so, that fact should have been declared on the form, but was not so declared.

The Respondent became aware of the existence of the other relatives when the application was being determined in the first instance, but it appears that the officer dealing with the claim reached the mistaken impression that a niece, Diane, was a sister of the deceased. She was not in receipt of a qualifying benefit and accordingly, he disallowed the claim by reason of paragraph 6(6)(b) of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987, which provides that the "responsible person", ie the Appellant should not be entitled to a funeral payment where there was "another close relative in equally close contact with the deceased and neither he nor his partner had been awarded a relevant benefit."

The true position apparently became known at some later date. It is not apparent how this occurred but clearly the Respondent accepted that Diane was not a sister and was not therefore an equally close relative.

The appropriate course in those circumstances would appear to be that the decision should have been reviewed under Article 10 of the Social Security (Northern Ireland) Order 1998.

However, an appeal was brought by the appellant, the precise grounds of which are not apparent, but in the course of which all issues were addressed by means of an oral hearing. The respondent put forward the new case that it was not reasonable for the appellant to have taken responsibility for the funeral expenses because he had no contact with the deceased for over 20 years.

The conduct of appeals is regulated by Article 10 of the 1998 Order which provides as follows:-

“10(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.”

These provisions suggest to me that the Respondent’s role in proceedings before the appeal tribunal is limited in general to upholding the basis for its decision while the claimant is generally limited to establishing that his claim as it was advanced should have been determined in his favour.

The extent to which those provisions were considered in the course of the appeal is not clear, but the decision of the Appeal Tribunal was recorded by the Commissioner as being:

“...the claimant is not entitled to a funeral payment from the Social Fund in respect of the expenses arising from the funeral of his late brother Mr Hugh Kerr. Whilst it was reasonable for the claimant to have accepted responsibility for the funeral. The deceased had other close relatives, namely a brother Billy and sister Jean. They had equal contact with deceased as had the claimant and it has not been established that they are in receipt of a relevant benefit nor has it been established what capital they have, if any”.

The issue which has been raised, therefore, is whether in the absence of confirmation of a possible disqualifying factor the Respondent, or as the case may be, the Appeal Tribunal should decide the application on the basis that the factor exists or does not exist.

My colleagues have taken the view, as argued by the appellant that this question is decided by the onus of proof, which, it was submitted, lies upon the Department to establish the existence of any factor which would disqualify the application.

The concept of burden of proof was referred to by Mr Commissioner Henty in decision CIS/5321/98 when he remarked

“Insofar as the burden of proof plays any part in the matter, marginally it lies on the AO. However, in my view as a general rule, appeals should not be decided by reference to the burden of proof”.

It is clear that Mr Commissioner Henty was approaching the issue of burden of proof with some diffidence. It is my view that a forensic onus of proof does not exist in relation to the presentation or consideration of a claim for Social Security Benefit.

THE CLAIM

In the first instance, when determining the claim the respondent is not in the position of a litigant since its function is to decide the matter on the basis of the information provided by the applicant (see Article 9 of the 1998 Order) which provides,

“Subject to the provisions of this Chapter it shall be for the Department:-

- (a) to decide any claim for a relevant benefit;
- (b) to decide any claim for a Social Fund payment mentioned in section 134(1)(b) of the Contributions and Benefits Acts;
- (c) subject to paragraph 5, to make any decision that falls to be made under any relevant statutory provision; and
- (d) subject to and in accordance with regulations to decide to any issue arising as to or in connection with entitlement to Statutory Sick Pay or Statutory Maternity Pay.”

It is clear therefore, that there cannot be an onus of proof upon the Department at that stage.

Moreover, the procedure for deciding a claim is an administrative one, rather than judicial.

The applicant presents the facts and circumstances required for qualification for benefit to the Respondent. If he satisfies the statutory tests benefit is payable; if not, it is not payable.

The conditions of entitlement to benefit are prescribed by Section 1 of the Administration Act 1992, which provides:

“1.-(1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied –

(a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or

(b) he is treated by virtue of such regulations as making a claim for it.”

The prohibitory nature of the wording of this provision leads me to the view that (i) unless a person establishes that his situation satisfies all the conditions relating to that benefit whether by showing compliance with qualifying conditions or by negating the existence of disqualifying conditions, and (ii) has completed his claim in the manner prescribed, than he is not entitled to benefit.

Most benefits are payable to meet a need; therefore the need must be established.

Completion of the prescribed form for the claim is not merely a matter of completing each section. The information sought in the form must be provided and the replies must be substantially correct and accurate.

No doubt a degree of indulgence is allowed to those who may make errors through infirmity, misunderstanding or failure of recollection, but in my view, until a form has been satisfactorily and accurately completed, if necessary with the help of an officer of the respondent, the legislation disentitles an applicant from payment of benefit.

Moreover I cannot construe the provision in such a way as to suggest that Parliament intended that any onus lay upon the Respondent under Section 1(1) of the Administration Act 1992 to establish satisfaction of any of the conditions relating to entitlement to benefit or to negative the existence of disqualifying conditions.

THE APPEAL

Article 13(7) of the 1998 Order empowered the making of regulations to make provision as to the manner in which and the time within which appeals were to be brought, and the relevant regulations are the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999.

To a degree these regulations provide that an appeal should have some of the characteristics of judicial proceedings including the fact that in the definition clause “party to the proceedings “means” the Department and any person who is an appellant for the purpose of Articles 14 and 15 (of the 1998 Order.)”

However, two paragraphs of the Order are significant.

“38(1) The procedure in connection with the consideration and determination of an appeal or a referral shall, subject to the following provisions of these regulations, be such as a legally qualified panel member shall determine”

and paragraph 43(1) provides:-

“43(1) A chairman or in the case of an Appeal Tribunal which has only one member, that member, may by summons require any person in Northern Ireland to attend as a witness at a hearing of an

appeal, application or referral at such time and place as shall be specified in a summons and, subject to paragraph 2, at the hearing to answer any question or produce any documents in his custody or under his control which relate to any matter in question in the appeal, application or referral..."

In my view these provisions strongly support the view that the Appeal Tribunal hearing is an inquisitorial hearing rather than an inter-parties adversarial hearing.

There is certainly nothing to suggest that consideration of the issues on appeal should be on a different basis from consideration of the claim by the Department in the first place.

If the applicant fails to establish all the relevant conditions for a claim by claiming ignorance of his or her spouse's financial situation, for example, must the claim be allowed because the onus of proof is on the Respondent to prove the disqualifying factor?

If the Respondent were to hold that benefit was not payable because this factor had not been addressed, would the applicant be bound to succeed on appeal because the Respondent could not know the spouse's income?

The following considerations occur to me:-

1. It is quite impracticable for the Department to prove many of the matters, which, if established, effectively disqualify a claim.

For example, it could never be within the knowledge of the Department whether another close relative was in closer contact with the deceased than the responsible person.

In the present case, armed only with the names of the surviving brother and sister it would be a monumental, not to say impossible task, for the respondent to discover that neither of them nor either's partner was in receipt of one or other of the qualifying benefits.

2. Article 7(1) of the Social Security Claims and Payment (Northern Ireland) Regulations 1987 provides as follows,

“7(1) Every person who makes a claim for benefits shall furnish such certificates, documents, information and evidence in connection with the claim or any question arising out of it as may be required by the Department and shall do so within one month of being required to do so or such longer period as the Department may consider reasonable.”

In my view this provision is incompatible with an intention on the part of Parliament that the Respondent should be required to establish facts independently of the applicant for benefit.

No sanction for failure to comply with this requirement is provided, nor is any means of enforcing it. The only reasonable conclusion that can be drawn therefore is that failure to comply with it may be dealt with by refusing the claim.

It is clear that the obligation does not terminate with the making of the application but remains current throughout all stages of the consideration of the application.

It appears to me to be inconsistent that a party, that is, the Respondent, which is entitled to require another to furnish information or evidence of an

unlimited nature in connection with a claim should itself be subject to the onus of proving any part of that information as against the other party.

3. The nature of the appeal proceedings is in view inquisitorial and not adversarial.

The tribunal is in a position to obtain for itself any information it requires, either by questioning the parties or if necessary summoning any witness or requiring the production of any document. The only available sanction would appear to be an adverse finding on the outcome of the appeal.

It appears to me that the existence of these powers enables the Appeals Tribunal to determine the matters on which it requires to be satisfied and to require the person or party in the best position to provide the necessary information to do so. In the present case the appellant was in the best position to provide the necessary information or at any rate the key to its discovery.

4. The provisions of Section 1(1) of the Administration Act provide that “no person shall be entitled to benefit” unless certain specified conditions “in addition to any other conditions relating to that benefit being satisfied” are met.

This suggests that failure to establish any relevant condition, (and no distinction is made between positive and negative conditions) results in non entitlement to benefit.

5. The requirement under Paragraph 7 of the Social Security Claims and Payments (Northern Ireland) Regulations 1987, does not to my mind amount

to the imposition of an onus of proof upon an applicant. It is simply a requirement to provide material upon which the adjudication of his claim is to be made. Thus an applicant who does not appear, and is not represented at an appeal, does not automatically lose on the basis that he has not satisfied the Appeal Tribunal on some factual matter. The Tribunal is entitled to make its own investigation of the facts using such information as has been made available to it in the application form together with such further information as it requires.

6. It would be unfortunate and detrimental to the relationship between the Respondent and a claimant if they were to be regarded as opposite parties with the respondent striving to resist or defeat a claim, even at the appeals stage when the Respondent is simply seeking to explain and uphold its original decision.

It is my view that the appellant is not entitled to receive a funeral grant since he –

(1) failed to complete the application form properly so that it contained all relevant and material information;

(2) failed to provide such evidence or information to the Respondent or the Appeals Tribunal to enable determination of the fact that of the other close relatives of the deceased who were in equally close contact with the deceased

(a) each or his partner has been awarded a relevant benefit; or

(b) each or his partner does not possess capital greater than that of the Appellant which, in the case of any who or whose partner is aged 60 or over, exceeds £1,000 and in the case of any who and whose partner are aged 60 or under, exceed £500.

I would therefore answer questions 1 and 2 as framed by the Lord Chief Justice in the affirmative and would dismiss the appeal.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

THOMAS FRANK KERR

V

THE DEPARTMENT FOR SOCIAL DEVELOPMENT

J U D G M E N T O F

McCOLLUM LJ
