

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 20 September 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. Both parties have expressed the view that the decision appealed against was erroneous in point of law.
2. Accordingly, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.
3. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Employment and Support Allowance (ESA) remains to be determined by another appeal tribunal.
4. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
 - (i) The decision under appeal is a decision of the Department, dated 9 November 2021 which decided that the appellant was not entitled to ESA from and including 5 June 2012 as she had failed to provide the necessary information which would enable the Department to determine her correct entitlement to Income-related ESA from this date.
 - (ii) The Department is directed to provide details of any subsequent claims to ESA and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is

directed to take any evidence of subsequent claims to ESA into account in line with the principles set out in *C20/04-05(DLA)*.

- (iii) **The appeal papers and this determination is to be forwarded to the salaried Legally Qualified Panel Member (LQPM) of the Appeal Tribunals or the President of Appeal Tribunals for more detailed directions as to the further submissions which it requires from the Department in relation to the issues now identified by the Department as arising in the appeal, as set out below;**
- (iv) The Department's further submissions are then to be shared with the appellant for her consideration.

Background

- 5. On 9 November 2021 a decision maker of the Department decided that the appellant was not entitled to ESA from and including 5 June 2012 as she had failed to provide the necessary information which would enable the Department to determine her correct entitlement to Income-related ESA from this date. Following a request to that effect, the decision dated 9 November 2021 was reconsidered on 22 January 2022 but was not changed. An appeal against the decision dated 9 November 2021 was received in the Appeals Service (TAS) on 19 February 2022.
- 6. Following an earlier adjournment, the appeal tribunal hearing took place on 20 September 2022. The appeal proceeded by way of a 'paper hearing'. The appellant had signed Form REG 2(i)d on 14 July 2022 on which she ticked a box to indicate that she wished to have her appeal dealt with by way of a paper determination. The relevant form was received in TAS on 19 July 2022. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 9 November 2021.
- 7. On 25 November 2022 an application for leave to appeal to the Social Security Commissioner was received in TAS. On 14 December 2022 the application for leave to appeal was refused by the LQPM.

Proceedings before the Social Security Commissioners

- 8. On 24 January 2023 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 25 January 2023 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations on the application dated 2 March 2023, Mr Robinson, for DMS, supported the application for leave to appeal on grounds identified by him.
- 9. The written observations were shared with the appellant on 2 March 2023. On 6 March 2023, the appellant forwarded email correspondence in response. On 1 August 2023 I granted leave to appeal. When granting leave to appeal I gave as a reason that the Department had identified

grounds of appeal which were arguable. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

10. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
11. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (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.”

Disposal

12. The most expeditious method of disposal of this appeal is by the application of Article 15(7) of the Social Security (Northern Ireland) Order 1998.
13. In his written observations on the application for leave to appeal, Mr Robinson set out the following:

'Observations

In the Statement of Reasons, the Tribunal stated that it had carefully read all the evidence submitted in the papers before making its decision.

This evidence included documentation from the Driver and Vehicle Licensing Agency showing Mr ... address as ... ((the appellant's) address) and a Bank of Ireland credit card application (dated 10 July 2014) which also shows his address ... and on which Mr ... stated he had lived at this address for 23 years as does evidence received from HMRC in relation to Mr ... self-employed earnings (which states that he has lived at this address since 01 June 2004).

As can be seen from paragraph 21 above, the crux of (the appellant's) application for leave to appeal is, that despite the fact that Mr ... is living in her property (although (the appellant) failed to declare this), he only stays there as a friend and they live separate lives.

The Tribunal stated in its statement of reasons:

“There is an obligation on claimants of benefit to give the correct information and to report changes in the circumstances that could affect their entitlement. It is clear from the above that the appellant has failed to provide a consistent and credible account about her relationship with Mr The evidence does indicate they have been living together as if husband and wife for many years. On this basis she would not be entitled to the benefit as a single person and their combined income and savings should be taken into account. The Department calculates Mr ... has, for an extended period, been in full time remunerative employment which would mean there is no underlying entitlement to this means tested benefit.

The Department requested further bank statements from ... and were advised he was not agreeable. Because of this the Department could not complete its assessment.

The respondent was entitled to conclude there was no entitlement because the underlying circumstances could not be properly investigated.”

There seems to be two matters that need to be addressed, the disallowance decision and whether or not (the appellant) and Mr ... are living together as husband and wife.

The decision to disallow benefit

From the case papers supplied (the appellant) made Mandatory Reconsideration requests against two decisions; on the 21 September 2021 she requested a reconsideration against a decision dated 08 October 2020 which determined that she and Mr ... were living together as husband and wife.

And on the 11 November 2021 she requested a reconsideration against the decision of the same date which held that as the Department could not ascertain Mr ... capital, she was no longer entitled to ESA from 05 June 2012.

From the information supplied, the Department has responded to the second Mandatory Reconsideration request (on 22 January 2022) but has failed to respond to the initial request regarding the decision that she was living together as husband and wife.

The Tribunal subsequently supported the Department's decision to disallow ESA back to 05 June 2012 on the grounds that (the appellant) had failed to supply information required to make a decision on her entitlement.

When the Department made its initial determination on 18 September 2019, that (the appellant) and Mr ... were living together as husband and wife, it concludes that (the appellant) was not entitled to ESA from 05 June 2012, it does not say on what basis (the appellant) is no longer entitled (however, it does direct for an ESA 3 to be issued).

A further determination was then made on 19 August 2020, stating that Mr ... self-employed income should be taken into account in the assessment, however, as his income was lower than the earnings threshold, ESA remained in payment to (the appellant).

On the 09 November 2011, the Department made an outcome decision to disallow (the appellant's) entitlement to ESA, on the basis that she had not complied with the

Department's request to supply further information (in relation to Mr ... savings).

This outcome decision states that the legislation used to make this decision is Regulations 7 and 32 of the Social Security (Claims and Payment) Regulations (Northern Ireland) 1987, Regulation 7 states:

Evidence and information

7.—(1) Subject to paragraph (7), every person who makes a claim for benefit 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 or, in a case where regulation 4A applies, the relevant authority and shall do so within one month of being required to do so or such longer period as the Department may consider reasonable.

As can be seen above, Regulation 7 is only relevant in the provision of information and evidence to support a new claim. I therefore submit that it has no relevance to a claimant who has an ongoing award of benefit – as (the appellant) had. Furthermore, the time limit set by regulation 7 (requiring such information to be provided within one month or such longer time as considered reasonable) which was applied by the decision maker in this case, was not appropriate. Again it relates to a fresh claim situation.

Regulation 32 (more appropriately) concerns the requirement for a benefit claimant to provide information and evidence the Department may require in connection with their award of benefit. It states:

Information to be given and changes to be notified

32.—(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or evidence as it may

require in connection with payment of the benefit claimed or awarded.

As per my underlining for emphasis, reference is made to regulation 17(4) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, which states (my emphasis):

(4) A person to whom paragraph (2) refers shall either—

(a) supply the information or evidence within—

(i) a period of 14 days beginning with the date on which the notification under paragraph (3) was sent to him or such longer period as the Department allows in that notification, or

(ii) such longer period as he satisfies the Department is necessary in order to enable him to comply with the requirements; or

(b) satisfy the Department within the f5 period applicable under sub-paragraph (a)(i) that either—

(i) the information or evidence required of him does not exist, or

(ii) that it is not possible for him to obtain it. f6 (4A) In relation to a person to whom paragraph (2)(ca) refers, paragraph (4)(a)(i) has effect as if for “14 days” there were substituted “7 days”.

(5) The Department may suspend payment of a relevant benefit, in whole or in part, to any person to whom paragraph (2)(b) to (e) applies who fails to satisfy the requirements of paragraph (4).

I have again underlined as above to emphasise that the correct approach the ESA decision maker needed to take in (the appellant's) case (on 11 November 2021) was to instead suspend payment of her ESA when the requested information had not been supplied.

Subsequently regulation 18 of the Decisions and Appeals Regulations, then provides further information regarding the termination of an award:

Termination in cases of failure to furnish information or evidence

18.—(1) *Subject to paragraphs (2) to (4), the Department shall decide that where a person—*

(a) whose benefit has been suspended in accordance with regulation 16 and who subsequently fails to comply with an information requirement made in pursuance of regulation 17; or

(b) whose benefit has been suspended in accordance with regulation 17(5).

Furthermore, when terminating (the appellant's) award of ESA, the Department has ended her entitlement back to 05 June 2012. However, in the absence of evidence needed to decide entitlement for a past period, the correct route for the Department to take should instead have been suspension and termination (as set out above).

As the Department has stated that the ground for termination is (the appellant's) failure to supply information, then if it had followed the legislation correctly and suspended (the appellant's) entitlement before termination, then the earliest date it would have been able to terminate from would be the date of suspension as per Article 23 of the Social Security (Northern Ireland) Order 1998 (my emphasis):

Termination in cases of failure to furnish information

23 . *Regulations may provide that, except in prescribed cases or circumstances, a person—*

(a) whose benefit has been suspended in accordance with regulations under Article 21 and who subsequently fails to comply with an information requirement; or

(b) whose benefit has been suspended in accordance with regulations under Article 22 for failing to comply with such a requirement,

shall cease to be entitled to the benefit from a date not earlier than the date on which payments were suspended.

The fact that Mr ... possessed capital in excess of the ESA threshold at one point during the duration of (the appellant's) award, does not in itself allow the Department to supersede for the duration of (the appellant's) award. In the GB Upper

Tribunal decision CIS/1369/2013 at paragraph 15, Judge Ward held an allegation of capital was not enough to supersede: see para 15:

15. The present case gives rise to two difficulties in applying these principles:

(a) Whereas Kerr concerned a claim for benefit, where, in the normal way, it was for the claimant to establish entitlement, the present case was one where it was the Department who needed to assert grounds for supersession or revision.

(b) Even if one assumes, as appears to be the case, that the appellant was not at that point impaired by his cognitive difficulties in coming up with the evidence, how far does the ability to decide matters against him when he fails to do so stretch? The principle was set out in CIS/5321/1998 in terms that:

“a claimant must to the best of his or her ability give such information to the adjudication officer as he reasonably can, in default of which a contrary inference can always be drawn.”

But what contrary inference? Here the Department had come up with minimal evidence as to the existence of two accounts, on which known amounts of interest had been paid in (as was to be inferred, and is now known), one tax year...

I would therefore respectfully submit the principles applied here by Judge Ward are equally relevant to (the appellant's) case – i.e. there may be an indication that capital may be in excess of the allowed limit at certain points in her award – but the onus is on the Department when it comes to asserting grounds for supersession (or revision). I submit that the ESA office had not established sufficient grounds for altering (the appellant's) entitlement from 05 June 2012 (or at any particular date since).

Whether (the appellant) is living together as husband and wife.

From the case papers supplied (the appellant) initially stated during her interview with Standards Assurance Unit on 14 May 2018, that she did not know Mr She then recanted when contacted by the Department on 18 May 2018, to state that she did know Mr ... and he had moved in with her but

he only stayed with her “2 or 3 times a week” as he worked in a local school but that they were not in a relationship together.

During her BIS interview, (the appellant) changed this declaration and stated that ... lived in the property 5 or 6 days and had done so since Christmas 2018.

(The appellant) has argued against this by stating that if they were living together as husband and wife, there would be children, she would have caught Covid when Mr M did and then finally that she is in fact gay.

I respectfully submit that the above arguments are; in the first two respects, not necessarily supporting an assertion they would not be a couple. Furthermore, the suggestion that a relationship could not exist because of her sexuality, has not been supported in any way by (the appellant).

It is also worth pointing out that following the determination that (the appellant) and Mr ... had been living together as husband and wife, (the appellant) was initially still entitled to ESA and did not ask for a reconsideration of this decision until the Department had become aware of Mr ... capital and had contacted her informing her that her award may be terminated if she failed to supply additional bank statements in regards to Mr

(The appellant) has also failed to notify the Department of various changes in circumstances in relation to Mr M and also her capital. When questioned why she failed to notify these changes and when shown various documents that she had signed confirming that she would notify the Department of any changes in circumstances, (the appellant) simply states that she was waiting for the Department to tell her what to say.

However, despite such inconsistencies, I feel that there is simply not enough evidence to support the initial decision that (the appellant) and Mr ... were living together as husband and wife from 05 June 2012; and indeed that the Department can be satisfied there are grounds to remove entitlement from 05 June 2012 on that basis.

The Department has demonstrated in its investigation that Mr ... lives with (the appellant) (something that (the appellant) has now admitted to) from the date of her ESA entitlement (05 June 2012), but does not possess enough evidence to prove that they are living together as husband and wife.

In the GB Upper Tribunal decision CF/1195/2011 Judge Lane stated at paragraphs 6 and 7:

“The issue I raised in giving permission to appeal was whether the tribunal erred in law by failing to make any findings or give any explanation of the basis on which it found that the daughter was living with her boyfriend as his spouse. In their response to the appeal, the respondent submitted that, in circumstances like these, it would be difficult for them to determine when a relationship had become akin to marriage, or whether enough of the ‘usual signposts’ pointing towards such a relationship, such as stability, public acknowledgement and so on, were shown. They therefore assume that the couple are cohabiting from the outset. The tribunal made the same simple assumption. It is not right to substitute assumption for analysis.

I have come to the conclusion that the tribunal did err in law in all the circumstances. It cannot be assumed without more, as the respondent and the tribunal did, that a person who moves in with a boyfriend/girlfriend/same-sex friend is living with them as if they were spouses from the outset, or at all. The burden of proof is on the respondent to prove that this element of their case, on balance of probability, if that is the basis upon which they are seeking to deny or remove entitlement.”

Based on this, the burden of proof is on the decision maker to show that on the balance of probabilities (and based on the evidence available) that two people are part of a relationship similar to marriage, as a result of which the evidence must be strong enough to come to that conclusion.

Although the evidence held shows irrefutably that (the appellant) and Mr ... are living in the same property (a determination that has now been confirmed by (the appellant)), when deciding if a couple are living together as husband and wife certain circumstances should be considered including; sexual relationship, financial arrangements, stability, children and public acknowledgment.

This is summarised within a reported decision of a Great Britain Commissioner as R(SB) 17/81 where at paragraph 11 Commissioner Rice states:

“First, it is axiomatic that the man and woman concerned must be living in the same household. This requirement is not spelt out specifically in Decision R(G) 3/71, but only, in my judgment, because it is self-evident. The second requirement contained in the handbook, namely “stability” is covered by the parties’ “general relationship”. As for “financial support” and “sexual relationship” these are manifestly covered by criteria (2) and (1) respectively of Decision R(G) 3/71. The existence of children is indicative of a sexual relationship and/or the general relationship of the man and woman. As regards “public acknowledgement” this again goes to their general relationship. Accordingly, in my judgment, exactly the same criteria apply whether or not consideration is being given to a claim to supplementary benefit or to widow’s benefit, and this same approach has been adopted in R(G) 3/81..”

It is my view that there is very little evidence to support the above. Both parties have shown a financial independence, (the appellant) has stated that they both buy their own groceries, and she pays the utility bills, however, Mr ... does pay a percentage of the electricity in his role as a house guest.

The criteria regarding the existence of a sexual relationship could be dispelled by (the appellant)’s statement regarding her own sexuality (albeit this argument may need further support) and furthermore there does not seem to be any proof of ‘public acknowledgement’ as to their relationship, for example social media posts.

Conclusion

Therefore, I respectfully submit that I support (the appellant’s) application for leave to appeal on the grounds that the Tribunal’s decision is erroneous in point of law. This is because it failed to adequately investigate whether or not her relationship is one of living together as husband and wife. Also, it failed to confirm the validity of the disallowance decision (which for the reasons I have set out, is based on

incorrect application of the legislation which applies to the provision of evidence).’

A handwritten signature in black ink, appearing to read "Kenneth Mullan", is centered on a light gray rectangular background.

(Signed): K MULLAN

CHIEF COMMISSIONER

9 October 2024