

[2010] AACR 30

(R (Wiles) v Social Security Commissioner and another [2010] EWCA Civ 258)

CA (Sedley, Dyson and Longmore LJJ)
16 March 2010

CIB/3357/2007

Jurisdiction – scope of judicial review of refusal of permission to appeal by Social Security Commissioner

The claimant was in receipt of a transitional award of long-term incapacity benefit. In March 2007, the Secretary of State superseded the decision and disallowed her claim. Her appeal was dismissed by an appeal tribunal and in February 2008 a Commissioner refused her permission to appeal to him against the tribunal's decision. The claimant sought judicial review of the Commissioner's decision. The Administrative Court refused permission to apply for judicial review and she appealed to the Court of Appeal against that refusal. It was not in dispute that judicial review lay in principle in respect of a decision by a Social Security Commissioner to refuse permission to appeal from a decision of an appeal tribunal. The issue that arose in the appeal was in what circumstances an application for judicial review should be entertained. It was argued for the claimant that there was a long line of authority (including *Bland v Chief Supplementary Benefit Officer* [1983] 1 WLR 262 (also reported as an appendix to R(SB) 12/83), *In re Woodling* [1984] 1 WLR 348 (also reported as an appendix to R(A) 2/80, published in the 1983/84 volume of Commissioners' Decisions) and *R v Secretary of State for Social Services, ex parte Connolly* [1986] 1 WLR 421) which shows that judicial review lies against the decision of a Social Security Commissioner refusing permission to appeal to correct any material error of law on conventional public law grounds. It was argued for the Secretary of State that the approach adopted in those cases was no longer correct in the light of *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 1 WLR 475 and *R (Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650 and that judicial review should be granted only in exceptional circumstances.

Held, dismissing the appeal, that:

1. it is not possible to find in the relevant legislation any indication that Parliament intended to oust, or even to limit, the common law jurisdiction in the courts to correct legal error by judicial review and it is for the court to determine, as a matter of judicial policy, the scope of its judicial review jurisdiction in the light of all the relevant factors (paragraphs 43 and 44);
2. *Sivasubramaniam* and *Sinclair Gardens* are authority for the proposition that the over-arching question in cases of refusal of permission to appeal is whether the statutory scheme, viewed as a whole, provides a fair, adequate and proportionate protection against the risk that the lower tribunal or court may have fallen into error, but those cases did not necessarily determine the position in relation to refusals of permission to appeal in other contexts (paragraph 52);
3. there was no compelling reason to depart from the approach that had been established and applied by the courts for more than 25 years that judicial review does in principle lie against a Commissioner's refusal of leave to appeal and should be exercised by applying conventional public law principles (paragraph 49);
4. however, the reviewing court should not be astute to find an error of law by the Commissioner in view of the technical expertise of the tribunals and Commissioners in understanding and applying the complex legislation (*Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 (reported as R(DLA) 6/01) followed) (paragraphs 53 to 55);
5. it is not a necessary pre-condition for a decision that there has been a relevant change of medical circumstances that the Secretary of State or tribunal should in every case analyse the evidence and reports which related to the earlier assessment and compare them with the current evidence and reports and, although the decision of the Secretary of State in the present case was confusing, it included an assessment that there had been a relevant change of circumstances by reason of a change in the claimant's medical condition, as did the decision of the tribunal, and did not commit the error of merely re-assessing the claimant's condition as it had been at the time of the superseded assessment (*R v Social Security Commissioner, ex parte Sewell* (Woolf J, 2 February 1985, unreported, considered) (paragraphs 69 to 76, 80);
6. the Secretary of State and the tribunal were entitled to hold that there had been a relevant change in the claimant's medical condition and for that reason the Commissioner was justified in refusing leave to appeal and it followed that the Administrative Court had been right to refuse permission to apply for judicial review (paragraph 77).

DECISION OF THE COURT OF APPEAL

Mr Richard Drabble QC and Mr Tim Buley (instructed by Emma Baldwin of the Free Representation Unit) appeared for the appellant.

Mr James Eadie QC and Mr David Blundell (instructed by the Solicitor, Department for Work and Pensions) appeared for the respondent.

Judgment (reserved)

LORD JUSTICE DYSON:

Introduction

1. By a decision dated 14 March 2007, the Secretary of State for Work and Pensions (the Secretary of State) superseded the decision of 23 October 1993 (the 1993 Decision) and disallowed the claim by Ms Wiles to a transitional award of long-term incapacity benefit with effect from 14 March 2007. Her appeal against this decision was dismissed by the social security appeal tribunal (the SSAT) on 16 July 2007. On 12 November 2007, Mr Commissioner Jacobs refused her permission to appeal to him against the decision of the SSAT. On 21 February 2008, she issued the current proceedings seeking judicial review of the Commissioner's decision. On 30 July 2008, Plender J refused permission to apply for judicial review. She appeals to this court against the decision of Plender J with the permission of Moses LJ.

2. It is not in dispute that judicial review lies in principle in respect of a decision by a Social Security Commissioner to refuse permission to appeal from a decision of the SSAT. The issues that arise in this appeal are (i) in what circumstances should an application for judicial review be entertained; and (ii) in the light of the answer to (i), should the claimant be granted judicial review of the Commissioner's decision in the present case?

The legal framework

3. Incapacity benefit replaced invalidity benefit with effect from 13 April 1995. By regulation 17(1) of the Social Security (Incapacity Benefit) (Transitional) Regulations 1995 (SI 1995/310) (the Transitional Regulations), where a person is entitled to invalidity benefit immediately before the appointed day (13 April 1995), that award "shall have effect" thereafter as if it were an award of long-term incapacity benefit. A person's entitlement to such award is subject to his being incapable of work: see regulation 17(2). Incapacity for work was initially assessed by the "all work test". Since 3 April 2000, it has been assessed by the personal capability assessment (PCA). The PCA is an assessment of a claimant by reference to a number of descriptors of physical functions (such as sitting, standing and so on). Each descriptor is scored. So far as is material for present purposes, a total score of not less than 15 points qualifies for long-term incapacity benefit.

4. Section 10(1) of the Social Security Act 1998 (the 1998 Act) provides that any decision of the Secretary of State under section 8 (which makes general provision for initial decisions by the Secretary of State) may be "superseded". Section 10(3) provides that regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under section 10. Regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) (the 1999 Regulations) prescribes the cases and circumstances

in which a decision may be superseded under section 10 of the 1998 Act. So far as material, regulation 6 provides:

“(2) A decision under section 10 may be made on the Secretary of State’s own initiative or on 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 was made;

...

(g) is an incapacity benefit decision where there has been an incapacity determination (whether before or after the decision) and where, since the decision was made, the Secretary of State has received medical evidence following an examination in accordance with regulation 8 of the Social Security (Incapacity for Work) (General) Regulations 1995 from a doctor referred to in paragraph (1) of that regulation;

...”

5. It is common ground that an “incapacity benefit decision” (as defined in regulation 7A of the 1999 Regulations) does not include awards of long-term incapacity benefit made pursuant to the Transitional Regulations: see *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495 at [39] (reported as R(IB) 4/07). In fact, the definition of “incapacity benefit decision” in regulation 7A has been amended with effect from 24 September 2007 so as to include a transitional award of long-term incapacity benefit. But that amendment is not material to the present case. Accordingly, regulation 6(2)(g) of the 1999 Regulations was not available to the Secretary of State as a ground of supersession in the present case, since the decision was made on 14 March 2007.

6. Section 12(2) of the 1998 Act provided that in the case of a decision under section 10, the claimant shall have the right to appeal to the SSAT. Section 14(1) provided that an appeal to a Commissioner from any decision of the SSAT can be made on the ground that the decision was erroneous in point of law. Section 14(10) provided that no appeal lies under section 14 without the leave, among others, of a Commissioner. Section 15 provides that an appeal on a question of law shall lie (for present purposes) to the Court of Appeal.

In what circumstances should an application for judicial review in principle be entertained?

7. It is important to emphasise at the outset that we are concerned with the regime that was in place before the enactment of the Tribunals, Courts and Enforcement Act 2007 (TCEA). The TCEA introduced a fundamentally different regime. In *R (Cart) v The Upper Tribunal and The Special Immigration Appeals Commission* [2009] EWHC 3052*, the Divisional Court (Laws LJ and Owen J) was concerned with judicial review challenges to decisions of the Upper Tribunal and the Special Immigration Appeals Commission. The court had to decide whether there is

* Upheld by Court of Appeal [2010] EWCA Civ 859, 23.07.10. Appeal pending in the Supreme Court.

jurisdiction to grant judicial review of such decisions and, if so, in what circumstances it should be exercised.

8. Laws LJ considered some of the pre-TCEA authorities and acknowledged that they showed that there had been jurisdiction to grant judicial review of decisions made by tribunals in the pre-TCEA era. At [93] of his judgment, however, he said that the advent of the Upper Tribunal and the First-tier Tribunal “now commends a different outcome”. He went on to hold at [99] that under the new regime there is jurisdiction to grant judicial review (i) where the tribunal acts outside its jurisdiction in the narrow pre-*Anisminic* sense: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; and (ii) where there has been such procedural unfairness that “the judicial process itself has been frustrated or corrupted”.

9. The Divisional Court’s decision as to the scope of the judicial review jurisdiction in relation to decisions made by tribunals made under the new regime has no direct relevance to the present case. But the decision, if it is right, is important for present purposes for two reasons. First, it decides that the change of regime has brought in its train a change in the court’s approach to the scope of its judicial review jurisdiction. Secondly, in the present case we are being asked to determine the location of those boundaries in relation to a regime which will soon be of historical interest only.

10. The following is no more than the barest outline of the submissions of Mr Drabble QC and Mr Eadie QC. Mr Drabble submits that there is a long line of authority which shows that judicial review lies against the decision of a Social Security Commissioner to refuse permission to appeal generally to correct errors of law on conventional public law grounds. He says that judicial review is in principle available not only in cases of jurisdictional error of law in the pre-*Anisminic* sense and procedural unfairness so extreme as to come within Laws LJ’s category of frustration or corruption of the process itself. He submits that any material error of law is enough.

11. Mr Eadie contends for a far narrower test. As I have said, he accepts that there is no jurisdictional bar to judicial review of a decision by a Social Security Commissioner to refuse permission to appeal. But he submits that judicial review should only be granted in “exceptional circumstances”. His primary position is that exceptional circumstances should be confined to the two categories identified by Laws LJ in *Cart* as applying in relation to the TCEA regime. His alternative position is that exceptional circumstances are those two categories as extended by Neuberger LJ in *R (Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305; [2006] 3 All ER 650 at [57] to include the case where there is a difficult point of law of general application on which different views have been expressed by different tribunals.

12. Before I come to the submissions in more detail, I need to refer to some of the authorities on which counsel rely. I start with the authorities relied on by Mr Drabble as showing that it has long been established law that judicial review lies against a decision by a Social Security Commissioner to refuse permission to appeal where there is any material error of law in the decision which it is sought to appeal.

13. In *Bland v Chief Supplementary Benefit Officer* [1983] 1 WLR 262 (also reported as an appendix to R(SB) 12/83), the Commissioner refused leave to appeal against a decision of the supplementary benefit appeal tribunal (the predecessor of the SSAT). The Court of Appeal held that it had no jurisdiction to grant leave to appeal from the Social Security Commissioner’s refusal of leave to appeal. Having reached this conclusion, Sir John Donaldson MR said at 276H:

“If necessary, the applicant should seek judicial review”. Kerr LJ agreed saying at 268E that any remedy “can only be sought by means of judicial review and not by appeal to this court.” No reasons were given for these statements. It seems that they were regarded as axiomatic and self-evidently correct.

14. *In re Woodling* [1984] 1 WLR 348 (also reported as an appendix to R(A) 2/80 in the 1983/84 volume of Commissioners’ Decisions) is a decision of the House of Lords. The Social Security Commissioner refused leave to appeal against the decision of the attendance allowance board, stating that no error of law was apparent from the case papers. An application for judicial review was dismissed by Woolf J, who certified that a point of law of general public importance was involved and that the point was one in respect of which he was bound by previous Court of Appeal authority. The House of Lords decided the point of law and dismissed the appeal. It might be said that this case comes within the expanded category of “exceptional circumstances” identified by Neuberger LJ at [57] in *Sinclair Gardens*, since it involved a point of law of general public importance. But it is clear that this is not the reason why Woolf J entertained the application for judicial review, and there is nothing to indicate that the House of Lords considered that the only justification for entertaining the application was that it involved a point of law of general importance.

15. In *R v Secretary of State for Social Services, ex parte Connolly* [1986] 1 WLR 421, the Social Security Commissioner refused leave to appeal without giving any reasons. The judge refused an application for judicial review of the decisions of the attendance allowance board and the Commissioner. The applicant appealed to the Court of Appeal. At 430D, Slade LJ (with whom Neill and May LJJ agreed) identified the primary question as being whether “this is a proper case for the court, in the exercise of its discretion, to grant judicial review of the Commissioner’s ruling refusing leave to appeal”. That question, he said, gave rise to three issues:

“(1) Should the Commissioner in refusing leave have given reasons for his refusal? (2) What is the proper inference to be drawn from the omission of a Commissioner to give reasons in refusing leave in cases such as this? (3) In the light of the answers to the first two issues, is this a proper case for the court to interfere with the ruling of Mr Commissioner Monroe?”

16. When he came to deal with the second issue, Slade LJ said at 432F:

“In a case where a Commissioner has refused leave to appeal without giving reasons and an applicant seeks to challenge such refusal by way of judicial review, the onus must, in my judgment, lie on the applicant to show either (a) that the reasons which in fact caused the Commissioner to refuse leave were improper or insufficient, or (b) that there were no good grounds upon which such leave could have been refused in the proper exercise of the Commissioner’s discretion. He may well discharge this onus by showing that the decision sought to be challenged was on the face of it clearly erroneous in law or, alternatively, gave rise to a substantially arguable point of law. However, if it can be seen that there are still good grounds upon which the Commissioner would have been entitled to refuse leave in the proper exercise of his discretion, the court should, in my opinion, assume that he acted on those grounds unless the applicant can point to convincing reasons leading to a contrary conclusion.”

17. It can be seen that the alleged error of law in *Connolly* did not come within any of the three categories of “exceptional circumstances” to which I have referred. Challenges to decisions on the grounds that they were not supported by any or any sufficient reasons are routine in the

Administrative Court. The failure by a decision-maker to give adequate reasons is one of the most common alleged errors of law relied on in judicial review challenges. Not only did the Court of Appeal in *Connolly* entertain the claim for judicial review on the grounds of a reasons challenge; but the court went on to say what an applicant had to do in order to succeed in such a challenge. Mr Drabble's primary position is that *Connolly* is authority (binding on this court) for the proposition that judicial review lies on conventional public law grounds against a refusal of leave to appeal by a Commissioner for any material error of law. I accept that it is highly persuasive. But I do not consider that it binds this court. There appears to have been no issue in *Connolly* (or in any of the other cases relied on by Mr Drabble) as to whether judicial review lies for any material error of law on conventional public law grounds. It seems to have been assumed that judicial review will in principle lie in such a case. What Slade LJ was doing at 432F was saying what an applicant had to prove to make good such a challenge (a challenge which, he accepted, could in principle be made).

18. The other cases to which Mr Drabble referred are *R v Social Security Commissioner, ex parte Sewell* (Woolf J, 1 January 1985, unreported), *R v Social Security Commissioner, ex parte Akbar* (1992) 4 Admin LR 602, *R v Social Security Commissioner, ex parte Pattni* [1993] 5 Admin LR 219 and *R v Social Security Commissioner, ex parte Chamberlain* (CO/1988/1999, Lightman J, unreported 7 July 2000). I shall return to *Chamberlain* later in another context. At this stage, it is sufficient to say that in *Chamberlain* the Commissioner refused leave to appeal against the decision of the SSAT which upheld the decision of the adjudication officer that the applicant was not entitled to long-term incapacity benefit. The applicant sought judicial review of the refusal of leave to appeal. Lightman J applied 432F of Slade LJ's judgment in *Connolly*. The Commissioner's decision was quashed for error of law on standard public law grounds.

19. It is on the basis of decisions such as these that Mr Drabble submits that it has been clearly established since the 1980s that judicial review will in principle lie where, in refusing leave to appeal, a Commissioner commits a material error of law. Some of these authorities were cited to the Divisional Court in *Cart*. At [90], Laws LJ said that he accepted "without cavil" the submission that these authorities "exemplify what was at the time a useful application of the judicial review jurisdiction which kept or put the law on the right track and (so far as can be seen) ran into no countervailing logistical difficulties". At [93], he said of the pre-TCEA era:

"I acknowledge the clear force of Mr Drabble's submission that the decision sought to be reviewed by Mr Cart was of a type accepted, for good reason, as fit for judicial review when taken by a Commissioner (*Woodling, Connolly*). But I consider that the advent of UT and FTT now commends a different outcome".

It will be seen from what I have said thus far that I agree with this summary of the pre-TCEA position.

20. It may, therefore, be asked: why are these authorities not determinative of the first issue that arises on this appeal? Mr Eadie's first response is that there is no single authority which, as part of its ratio, has determined the scope of the jurisdiction to grant judicial review in such cases. I accept this. As I have said, the point now argued by Mr Eadie has never been raised in relation to a refusal of leave to appeal in a pre-TCEA case.

21. Secondly, and more positively, Mr Eadie submits that he derives support for the proposition that the scope of the jurisdiction should be narrowly circumscribed from two more recent decisions: *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475 and the *Sinclair Gardens* case.

22. In *Sivasubramaniam*, both applicants brought proceedings in the county court. Their claims were dismissed by the district judge and the circuit judge refused permission to appeal. They had no further right of appeal under the statutory scheme. They applied for judicial review of the circuit judges' decisions. Both applications were dismissed. Their appeals to this court were also dismissed.

23. It is of some significance that the Social Security Commissioner cases relied on by Mr Drabble were not cited to the court. The court was, however, aware of the fact that judicial review applications were routinely determined on usual public law grounds in asylum cases. At [52], the court said:

“There are, in our judgment, special factors which fully justify the practice of entertaining applications for permission to claim judicial review of refusals of leave to appeal by the [Immigration Appeal] Tribunal. In asylum cases, and most cases are asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture. The number of applications for asylum is enormous, the pressure on the Tribunals immense and the consequences of error considerable. The most anxious scrutiny of individual cases is called for and review by a High Court Judge is a reasonable, if not essential, ingredient in that scrutiny.”

24. At [54], they said:

“This scheme we consider provides the litigant with fair, adequate and proportionate protection against the risk that the Judge of the lower court may have acted without jurisdiction or fallen into error. The substantive issue will have been considered by a Judge of a court at two levels. On what basis can it be argued that the decision of the Judge of the appeal court should be open to further judicial review? The answer, as a matter of jurisprudential theory, is that the Judge in question has limited statutory jurisdiction and that it must be open to the High Court to review whether that jurisdiction has been exceeded. But the possibility that a Circuit Judge may exceed his jurisdiction, in the narrow pre-*Anisminic* sense, where that jurisdiction is the statutory power to determine an application for permission to appeal from the decision of a District Judge, is patently unlikely. In such circumstances an application for judicial review is likely to be founded on the assertion by the litigant that the Circuit Judge was wrong to conclude that the attack on the decision of the District Judge was without merit. The attack is likely to be misconceived, as exemplified by the cases before us. We do not consider that Judges of the Administrative Court should be required to devote time to considering applications for permission to claim judicial review on grounds such as these. They should dismiss them summarily in the exercise of their discretion. The ground for so doing is that Parliament has put in place an adequate system for the [*sic*] reviewing the merits of decisions made by District Judges and it is not appropriate that there should be further review of these by the High Court. This, we believe, reflects the intention of Parliament when enacting s.54(4) of the 1999 Act. While Parliament did not legislate to remove the jurisdiction of the High Court judicially to review decisions of County Court Judges to grant or refuse permission to appeal, we do not believe that Parliament can have anticipated the spate of applications for judicial review that s.54(4) appears to have spawned.”

25. At [56], under the heading “Exceptional circumstances”, they said:

“The possibility remains that there may be very rare cases where a litigant challenges the jurisdiction of a circuit judge giving or refusing permission to appeal on the ground of

jurisdictional error in the narrow, pre-*Anisminic* sense, or procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing. If such grounds are made out we consider that a proper case for judicial review will have been established.”

26. In *Sinclair Gardens*, there was a dispute between a landlord and two of its tenants about service charges. The tenants challenged the charges by application to a leasehold valuation tribunal (LVT) which disallowed certain of the items charged by the landlord. The LVT refused permission to appeal to the Lands Tribunal and the Lands Tribunal also refused permission to appeal. The landlord applied for judicial review on the grounds that the decision of the Lands Tribunal was wrong in law. The judge dismissed the application. On appeal, this court considered whether judicial review was available in respect of a refusal by the Lands Tribunal to grant permission to appeal from a determination by the LVT.

27. Neuberger LJ (with whom Laws and Auld LJJ agreed) said:

“40. In the end, the question which needs to be determined in this case is whether the statutory scheme contained in the 1949 and 1985 Acts, and the regulations made thereunder, for appealing decisions of the LVT on service charge issues can be said to amount to what this court variously described in paragraph [54] of *Sivasubramaniam* (echoed in the passage I have quoted from paragraph [23] in *R (G) –v – IAT*) as ‘an adequate system for reviewing the merits’ of the first instance decision, and ‘fair, adequate and proportionate protection against the risk that [the first instance tribunal] acted without jurisdiction or fell into error’. If the statutory scheme satisfies that test, as in the case of the scheme for appealing District Judges’ decisions, judicial review of a refusal of permission to appeal will only be granted in the ‘exceptional circumstances’ as identified in paragraph [56] of *Sivasubramaniam* and explained in *Gregory*. If the statutory scheme does not satisfy the test, as in relation to the scheme for appealing special immigration adjudicators’ decisions where the IAT refuses permission to appeal, then the ‘exceptional circumstances’ hurdle will not apply, although it seems to me that one might still have to consider whether it is appropriate to have any, and, if so, what, fetter on the court’s ability to grant judicial review.

41. The reasoning in *Sivasubramaniam* and *R (G) –v – IAT* indicates, to my mind, that the resolution of the question at issue must be resolved by reference to (a) the generic nature of the issues involved (in this case, residential service charge disputes), (b) the effect of the statutory procedures concerned, particularly those relating to appeals (in this case, section 31A of the 1985 Act, section 3 of the 1949 Act, rules 5C and 5D of the 1996 Rules, and paragraphs 2.1 and 5.6 of the [April 2001 practice] Direction), (c) the nature and constitution of the tribunals involved in those procedures, and (d), in so far as it can be ascertained, the legislative intention (which in this case is also to be gleaned from the aforementioned statutes and regulations). These factors must be assessed (a) against fundamental policy considerations, namely the desirability of finality, with the minimising of delay and cost, and the desirability of achieving the legally correct answer, and (b) against the practicalities, such as the burdens on the Administrative Court and, in this case, the pressures on the Lands Tribunal.”

28. He then applied this approach to the statutory context under consideration in that case. At [44], he said:

“The intention of the legislature does indeed appear clear. As Mr Karas points out, appeals to the High Court from the LVT are specifically precluded by paragraph 2 of Schedule 22

to the 1980 Act (now section 175(9) of the 2002 Act). This is a clear indication that the legislature intended the High Court to be kept out of the procedure. Further, as pointed out by Laws LJ during argument, the very fact that there is no right of appeal to the court under section 3(4) of the 1949 Act against a decision of the Lands Tribunal to refuse permission to appeal, suggests that there should not, save in exceptional circumstances, be a right to seek a judicial review of a refusal of permission to appeal. After all, there is not much difference between appealing a refusal on a point of law, and seeking to have it judicially reviewed on the basis that it was wrong in law.”

29. He continued:

“45. The nature of the dispute in question, relating as it does to service charges claimed under the terms of residential tenancies, is significant in two respects. First, while disputes relating to residential service charges are of importance to the parties involved, they normally involve questions of detail and often will raise points which turn very much on the particular factual details of the case. Secondly, the disputes will only very rarely involve significant sums of money from the point of view of each tenant. Even from the perspective of the landlord, or of the tenants as a whole, the amount which ultimately turns on a point of law will often be small, especially when compared with the costs of the hearing before the LVT. All the more so if one takes into account the costs of any appeal.”

30. At [47], he took account of the fact that any point of law will have been considered by three members of an LVT (one of whom will normally be a qualified lawyer) and a member of the Lands Tribunal (who must have legal qualifications or be a person who has experience in valuation of land appointed after consultation with the President of the Royal Institution of Chartered Surveyors).

31. At [48], he considered the nature of the interests at stake. He said:

“The ‘fundamental human rights’ involved in most asylum cases, which clearly carried a lot of weight with the Court of Appeal in *Sivasubramaniam* as a reason for justifying a right to judicial review of an IAT’s refusal of permission to appeal, do not arise here. As Sullivan J said in paragraph [36] of his judgment, while ‘property rights are important’, they cannot be ‘equated with the fundamental human rights that are in issue in asylum cases’. Nor does the Lands Tribunal suffer from the ‘immense pressure’ which is placed on the IAT, although, as the judge said, it does have a substantial workload”

32. In his discussion of the question whether judicial review should be granted in the instant case, he gave further guidance as to what amounted to “exceptional circumstances” in these terms:

“56. I turn to Mr Letman’s main point. I do not accept that the mere fact that a decision of the Lands Tribunal refusing permission to appeal was obviously wrong in law would be sufficient to justify its being judicially reviewed. Such a basis for judicial review would fly in the face of the conclusion and reasoning in *Sivasubramaniam* and in *Gregory*, which appear to me to be applicable in this case for the reasons given above. Before permission to seek judicial review could be granted, it would not be enough to show that the refusal of permission to appeal was plainly wrong in law. It would also have to be established that the error was sufficiently grave to justify the case being treated as exceptional.

57. I think it is appropriate to say, that there could, in my view, be cases, which would be wholly exceptional, where it would be right to consider an application for judicial review of such a decision on the basis of what could be said to be an error of law. A possible example would be if the Lands Tribunal, despite being aware of the position, refused, without any good reason, permission to appeal on a difficult point of law of general application, which had been before a number of different LVTs which had taken different views on it, and which cried out for a definitive answer in the public interest. In that connection, it seems to me that one could say that it was not so much the point of law itself which justified judicial review, but more the failure of a public tribunal to perform its duty to the public, as well as what one might call its duty to the parties in that particular case.”

33. We were referred to other decisions in which the effect of *Sivasubramaniam* has been considered. For example, *Gregory v Turner* [2003] EWCA Civ 183; [2003] 1 WLR 1149 and *R (Strickson) v Preston County Court* [2007] EWCA Civ 1132. But these are both cases where a circuit judge had refused permission to appeal against a decision of a district judge. In both cases, therefore, the principles enunciated in *Sivasubramaniam* were directly in point.

34. Mr Eadie submits that the approach adopted in the line of cases relied on by Mr Drabble is no longer good law in the light of *Sivasubramaniam* and *Sinclair Gardens*. He submits that it is in these authorities that we now find the relevant principles for the exercise of the judicial review jurisdiction in cases where an appellate body (whether court or tribunal) refuses permission to appeal to itself. He submits that the older cases such as *Connolly* are inconsistent with the approach prescribed in the more recent jurisprudence, where, unlike in the earlier cases, the principles to be applied (and the reasons for doing so) have been the subject of detailed analysis. For that reason, the older cases should no longer be followed.

35. He submits that the statutory scheme that applies to appeals against adverse social security decisions is fair, adequate and proportionate. Applying the analysis propounded by Neuberger LJ in *Sinclair Gardens*, Mr Eadie submits as follows.

36. First, as regards the generic nature of the issues involved, social security cases cannot be compared with asylum cases where special factors exist as identified at [52] in *Sivasubramaniam*. Human rights issues may arise, but not with the frequency or intensity with which they arise in asylum cases. In particular, issues concerning the right to life or the prohibition on torture are very unlikely to arise in a social security case.

37. Secondly, the statutory system involves multiple layers of protection against error. Error by the Secretary of State (whether of fact or law) can be corrected by the SSAT. Errors of law by the SSAT can be corrected by the Commissioners. Errors of law by the Commissioners can be corrected by the Court of Appeal. Moreover, there is considerable scope for oral hearings.

38. Thirdly, the SSAT and the Commissioners are experienced and specialist. They are also legally qualified. Unlike the situation with the LVT in *Sinclair Gardens*, but like the situation with the county court, by the time the decision under challenge is made, the case will have been considered by at least two legally qualified persons.

39. Fourthly, Parliament has specifically legislated so as to make the availability of an appeal before a Commissioner subject to the grant of leave. That requirement acts as a filter to dispose of unmeritorious claims where there is no arguable error of law. To permit a parallel procedure whereby such decisions were themselves subject to conventional review for error of law would circumvent the protection on the use of this procedure which has been enacted by Parliament.

40. Fifthly, the statutory scheme itself is evidence that Parliament did not intend the High Court to play a role in the regulation of social security disputes. The appeal from the Commissioner is to the Court of Appeal on a point of law. No provision is made for the High Court to play any role in the appeal process. Given the significant similarities between an appeal on a point of law and judicial review, this is a significant factor weighing in favour of a test of exceptional circumstances: see the last sentence in [44] of Neuberger LJ's judgment in *Sinclair Gardens*.

41. Sixthly, the desirability of finality, minimising delay and cost and reducing the burdens on the Administrative Court also points to the conclusion that judicial review should only lie in exceptional circumstances. One of the aims of a statutory code involving a two-tier system of specialist appeal tribunals and Commissioners is to achieve certainty and finality without recourse to the higher courts and to do so in an accessible, simple and inexpensive way. There is no less a need for finality in social security cases than in county court disputes or valuation disputes of the kind that are dealt with by the LVT.

42. For these reasons, Mr Eadie submits that judicial review should only lie in exceptional circumstances. He contends that these should be confined to the two categories referred to at [8] above, or alternatively to these categories and the additional category identified at [57] in *Sinclair Gardens*.

Discussion

43. I do not accept that it is possible to find in the relevant legislation any indication that Parliament intended to oust, or even to limit, the common law jurisdiction in the courts to correct legal error by judicial review. There is nothing in the statutory scheme which indicates any Parliamentary intention to exclude judicial review; and nothing which suggests that Parliament intended that judicial review should lie only in exceptional circumstances.

44. It is true that in *Sivasubramaniam* at [54] and in *Sinclair Gardens* at [44], the court found in the statutory scheme under consideration in those cases an indication that Parliament intended to exclude review by the High Court. But if that had been a decisive factor, it would have been a short answer to the judicial review question, and there would have been no need to consider whether the statutory scheme provided fair, adequate and proportionate protection against the risk of legal error. Secondly, as an answer, it proves too much: this court recognised that, even in the context of the issues in play in those two cases, there was scope for judicial review in exceptional circumstances. I think that this is why Mr Eadie accepted during the course of argument that it is for the court to determine, as a matter of judicial policy, the scope of its judicial review jurisdiction in the light of all the relevant factors.

45. If the scope of the jurisdiction to grant judicial review in respect of a refusal by a Commissioner to grant leave to appeal had not been established for almost 30 years, I would have been inclined to adopt a position somewhere between those contended for Mr Drabble and Mr Eadie. I would reject Mr Eadie's primary position. I can see no good reason why the court should not have power to grant judicial review of a refusal of leave to appeal in a case which involves a difficult point of law of general importance. It is clearly in the public interest that the court should be able to decide such issues. Accordingly, if exceptional circumstances were the correct test, I would be inclined to include in the category of exceptional circumstances those cases which raise a point of law of general importance (not necessarily circumscribed in the way suggested by Neuberger LJ in *Sinclair Gardens* at [57]).

46. But in my judgment, there is considerable force in the submission that the categories of case in which judicial review should in principle lie in respect of a refusal of leave to appeal by a Commissioner should not be limited to exceptional circumstances. In *Sivasubramaniam* it was accepted by the court that the practice of entertaining applications for permission to apply for judicial review of refusals of leave to appeal by the now defunct immigration appeal tribunal (IAT) was justified. The “special factors” justifying this practice were identified at [52]. I accept the submission of Mr Drabble that the nature and functions of the Social Security Commissioners are closer to those of the IAT than to either the county court or the Lands Tribunal. They are an administrative tribunal, frequently called upon to adjudicate on significant legal issues which have far-reaching consequences well beyond the individual case, including important issues of human rights and EU law. I accept that issues such as the right to life and the right not to be tortured are unlikely to arise in a social security case. But a social security case may well involve the right of a claimant to subsistence income and so directly affect their access to the most fundamental necessities of life.

47. It seems to me that there is much to be said for opening the door somewhat wider than Mr Eadie would allow to reflect the fact that (i) issues that arise in social security cases may affect the lives not only of the individual claimant, but of many others who are in the same position, some of whom are among the most vulnerable members of our society; and (ii) the issues may be of fundamental importance to them, sometimes making the difference between a reasonable life and a life of destitution.

48. For these reasons, if the matter were free from previous authority, I would have been inclined to hold that the door to judicial review should be opened wider than Mr Eadie has submitted, even on his alternative argument. How much wider? In my judgment, there is much to be said for the criteria which the court applies in deciding whether to give permission to appeal for a second appeal. Section 55(1) of the Access to Justice Act 1999 provides that no appeal may be made unless it is considered that “(a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it.” It seems to me that this formula would strike a fair balance between the competing considerations which arise where a Commissioner refuses leave to appeal.

49. But I do not find it necessary to reach a concluded view on this, since I am persuaded by Mr Drabble that we should not depart from the approach (most clearly and fully articulated in *Connolly*) that has been established and applied by the courts for more than 25 years. I have reached this conclusion for the following reasons.

50. First, so far as I am aware, the policy has been applied consistently throughout this period. For that reason alone, a compelling reason for change is required, particularly in the light of the changes to the regime heralded by the TCEA. No such compelling reason has been advanced by Mr Eadie.

51. Secondly, far from there being a compelling reason for change, there is no evidence that the approach that has been adopted since the 1980s has given rise to any problems. It is not suggested that there has been a flood of applications for judicial review of refusals of leave to appeal by Commissioners, unmeritorious or otherwise. This is not surprising. One would expect a Commissioner, who is legally qualified, usually to be able to spot an appeal which raises a point a law in respect of which leave should be given.

52. Thirdly, none of the authorities on which Mr Drabble relies was cited in *Sivasubramaniam*. It is true that *Bland* was cited in *Sinclair Gardens*, but only for the purpose of showing that the

Lands Tribunal's refusal of permission to appeal was not a "decision" susceptible to an appeal to the Court of Appeal. None of the other cases relied on by Mr Drabble was cited in *Sinclair Gardens*. I do not consider that this line of cases must be taken to have been overruled, or even doubted, by *Sivasubramaniam* or *Sinclair Gardens*. These two decisions are authority for the proposition that the over-arching question in all these cases is whether the statutory scheme, viewed as a whole, provides a fair, adequate and proportionate protection against the risk that the lower tribunal or court may have fallen into error. In my judgment, in answering that question, it is necessary to consider all the relevant factors applying the general guidance given by Neuberger LJ in *Sinclair Gardens*. *Sivasubramaniam* has determined the position in relation to refusals of permission to appeal in the county court. *Sinclair Gardens* has determined the position in relation to refusals of permission to appeal from the LVT to the Lands Tribunal. But these decisions do not necessarily determine the position in relation to refusals of permission to appeal in other contexts. There is no blueprint which works for all cases. That is plainly demonstrated by the fact that it was acknowledged in *Sivasubramaniam* that a refusal of leave to appeal to the IAT could be the subject of a judicial review challenge for any material legal error on conventional public law grounds.

53. Finally, the concerns that are implicit in the case advanced by Mr Eadie may be exaggerated. *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 (reported as R(DLA) 6/01) was an appeal against the dismissal of an appeal by a deputy Social Security Commissioner from a decision of a disability appeal tribunal. Hale LJ referred to section 55(1) of the Access to Justice Act 1999. Having made the point that the second appeal criteria specified in section 55(1) did not apply to an appeal from a Commissioner, she said at [14] that many of the reasons underlying section 55(1) "apply with equal force in these circumstances, and indeed some might think them stronger". She went on at [15] to give her reasons for this view. First, this is a highly specialised area of law. Secondly, there is an independent two-tier appellate structure. Thirdly, it is essential that the tribunal structure is sufficiently expert to be able to take an independent and robust view. At [16] she said:

"But the ordinary courts should approach such cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the Social Security Commissioner will have got it right."

54. Thus, in seeing whether it can detect some error of law by the Commissioner who has refused leave to appeal, the reviewing court should not be astute to find such error. This is a further reason why there need be no real concern that the established approach to judicial review in these cases would lead to an opening of the floodgates.

55. For all these reasons, I would hold that judicial review does in principle lie against a Commissioner's refusal of leave to appeal. It should be exercised by applying conventional public law principles, but tempered as stated in *Cooke*.

Should judicial review have been granted in this case?

The facts

56. The claimant has suffered from back pain since 1993. She was found to be incapable of work on 25 October 1993 and awarded invalidity benefit from that date. This was converted into long-term incapacity benefit as from 17 April 1995 pursuant to regulation 17 of the Transitional Regulations. She underwent the all work test in 1998 and the PCA in 2001. On both occasions, she was found to be incapable of work. She scored 15 points in the PCA.

57. She was required to undergo the PCA again in February 2007. In his report dated 21 February, Dr Gaskell, the examining medical officer, accepted that she suffered from a degree of back pain, but concluded that she only satisfied one of the PCA descriptors (“4f standing”) and she scored only three points. She needed 15 points to qualify for an award. The doctor said in his report:

“Based on the history, observation and examination, in my opinion, the above descriptors apply. This is because she has simple mechanical back pain with no evidence of sciatica.

Summary of Functional Ability

Despite complaining of Back Pain, based on the history, examination and informal observations, the customer has for the majority of the time, only mild (not functionally relevant) restriction of sitting, rising and bending or kneeling. Although the history statements, examination findings and informal observations are not all consistent, having carefully weighed all the evidence, I believe that the descriptors I have chosen represent the customer’s true level of function.

The level of disability claimed would only occur in very severe acute disc prolapse with severe sciatica and she does not have this.”

58. On 14 March 2007, the Secretary of State superseded the claimant’s award of incapacity benefit with effect from that date. The decision stated:

“I have superseded the decision, dated 25.10.1993, which awarded incapacity benefit from and including 11.08.1992. The decision awarding [invalidity benefit] IVB is superseded on the grounds that there has been a relevant change of circumstances since the decision was made, namely that [*sic*] the change in legalisation repealing IVB.

This is because the Secretary of State has received medical evidence following an examination on 21.02.2007 by an approved doctor, since that decision was given.

The test of incapacity for work in respect of Jane Wiles is the personal capability assessment and she has been assessed and had not attained the required number of points, the total points were 3.

As a result Jane Wiles is not entitled to incapacity benefit from and including 14.03.2007.

59. The claimant appealed to the SSAT. The Secretary of State then reviewed his decision himself. At paragraph 20 of the review, he wrote:

“In this case there has been a relevant change of circumstances on 14 03 07 which was that Miss Wiles does not reach the threshold of incapacity required for the personal incapacity assessment. She is therefore capable of work from and including 14 03 07. The decision maker decided that Miss Wiles was entitled to incapacity benefit from and including 25 10 93 and this decision had been superseded from 14 03 07”.

He concluded that there was no evidence in the appeal to support the award of further points and that the threshold of incapacity had not been reached.

60. She obtained a letter from her GP dated 1 June 2007 which confirmed that she suffered from chronic severe low back pain, radiating down her right leg, that this was a disabling condition and was unlikely to change.

61. The SSAT dismissed the appeal, although they held that the claimant satisfied four descriptors. In a decision supported by detailed reasons, they awarded her 12 points. They questioned her closely about whether, and if so when, her condition had changed (paragraph 8 of the reasons). They found her answers vague and inconsistent. She gave inconsistent and incredible evidence about bending and kneeling (paragraph 9). They rejected her evidence that she could not walk up and down stairs without holding on (paragraph 10). They rejected her evidence about how far she could walk (paragraph 12). After comparing what she was recorded as having told Dr Gaskell with the assessment they made on the basis of their own observation of her at the hearing of the appeal, they concluded at paragraph 17:

“Although, as we have stated, we did not find the appellant to be a reliable witness, based on our own evaluation of the evidence we make the following findings. We find that she told the EMO that she usually sat to watch TV for about 2 hours before having to move. However, on the basis of that and the medical evidence, we accept that she cannot sit comfortably for more than 2 hours without having to move (Descriptor 3e: 3 points). Although we found her evidence in terms of her ability to rise from sitting and to bend and/or kneel not to be credible, nevertheless, given the medical evidence from her GP, we are prepared to accept, on the balance of probabilities, that sometimes she cannot rise from sitting to standing without holding on (Descriptor 5c: 3 points); and that sometimes she cannot either bend or kneel or bend and kneel as if to pick up a piece of paper from the floor and straighten up again (Descriptor 6c: 3 points). We also confirm the EMO’s finding that she cannot stand for more than 30 minutes before needing to move around (Descriptor 4f: 3 points). However, for the reasons we have given above, we find that, in terms of the available descriptors, she has no walking problem and no problem in walking up and down stairs.”

62. She then requested leave to appeal to Mr Commissioner Jacobs. Her detailed grounds of appeal may be summarised as follows. First, the SSAT failed to give adequate reasons for dismissing the appeal (paragraph 5). Secondly, the Secretary of State’s decision was flawed because it purported to supersede a decision dated 25 October 1993 which awarded incapacity benefit, but incapacity benefit was not introduced until 13 April 1995 (paragraph 10). Thirdly, the medical evidence relied on did not relate to a relevant change in circumstances, since a new medical opinion does not constitute a change in circumstances (paragraph 11). The change from invalidity benefit to incapacity benefit ceased to be a relevant change in circumstances because the claimant had twice been the subject of a previous PCA (paragraph 12).

63. On 19 June 2007, Mr Commissioner Jacobs refused leave to appeal. His reasons were:

“I have considered the argument put by your representative and accept that it is correct. However, that does not mean that you must be given leave to appeal. Leave is only appropriate if the mistake affected the outcome of the appeal. I do not consider that it did. The fact that you were found to be capable of work under the personal capability assessment was a change of circumstances. That by itself was a ground for supersession independent of regulation 6(2)(g) of the Social Security (Incapacity for Work) (General) Regulations 1995. Accordingly, the tribunal’s mistake did not affect the outcome.

I have considered whether the tribunal made any other mistake in law, but have concluded that it did not. The tribunal analysed the evidence rationally. It made all the necessary findings of fact material to its decision. Its analysis of the evidence supported each of those findings. On those findings of fact, the tribunal was entitled to make the decision that it did. There is nothing to suggest that the tribunal misunderstood or misapplied the law. The full statement of the tribunal's decision contains a clear and detailed explanation of why the tribunal made the decision that it did. There was no breach of the principles of natural justice."

Was there a relevant change of circumstances within the meaning of regulation 6(2)(a) of the 1999 Regulations in this case?

64. Two potential relevant changes of circumstances have been identified in this case: (i) the medical opinion indicating that the claimant was capable of work; and (ii) the change in the test of capacity for work.

65. For reasons that will become apparent, I do not find it necessary to decide whether the change in the test for capacity for work is capable of being a relevant change of circumstances within the meaning of regulation 6(2)(a) of the 1999 Regulations. In my judgment, this appeal can be decided by considering whether the medical opinion relied on by the Secretary of State entitled him to conclude that there had been a relevant change of circumstances.

66. This issue raises the question of what is the correct approach to fresh medical evidence which suggests that the claimant is not incapable of work. Mr Drabble relies on what was said by Lightman J on this question in *ex parte Chamberlain* at [9]:

"It is essential to recognise that a later different view of the circumstances or condition which prevailed at the time of an earlier decision does not found jurisdiction to review. Different markings on the 'all work' test and different overall assessments whether an applicant has satisfied the 'all work' test do not necessarily establish that there has been such change of relevant circumstances or any ignorance of, or a mistake as to, a material fact on the part of the decision-maker when he made the previous decision. The difference may be consistent with a change of material circumstances or such ignorance or mistake, but it may equally be consistent with a difference in the viewpoint and subjective judgment of the medical advisers who conducted the tests. It is for this reason essential to distinguish the two distinct, albeit related, exercises to be undertaken by an adjudicating officer and tribunal, namely to determine first whether there is a change of material circumstances or whether the previous decision was given in ignorance of, or was based on a mistake as to, some material fact, (the positive finding of which is a precondition to exercise of the jurisdiction to review) and secondly whether (assuming that jurisdiction exists) the 'all work' test is or is not satisfied."

67. At [14], Lightman J said:

"To establish the existence of the change of circumstances as a jurisdictional basis for a review, it is not ordinarily satisfactory to rely merely on different test results at the different points of time. As Mr Commissioner Mesher says in the passage which I have quoted, the question of change of circumstances requires a separate exercise directed to analysing the claimant's condition at the two points of time (which includes examining the medical officer's reports and other available evidence as to the claimant's condition at the date of the earlier decision) and identifying the relevant differences. Regulation 23 requires

the decision to state the fact that the issue of change of circumstances has been addressed, the conclusion reached and the reasons for reaching, and the findings of fact relied on to reach, that conclusion.”

68. This approach was approved in *Cooke*: see the judgment of Hale LJ at [9]. As she pointed out, on the facts in *Chamberlain*, there was nothing to suggest that there had been a change in circumstances or a mistake: “There were simply two different assessments on the same set of facts”.

69. It is self-evident that mere reliance on a later medical report which provides an opinion which differs from an earlier opinion on the same set of facts is not sufficient to form the basis of an inference that the facts have changed. If the facts are the same, then by definition they have not changed. The question in every case is whether the later opinion is indeed on the basis of the same set of facts as the earlier one or on the basis of the facts existing at the time of the later opinion. In my judgment, it is not a necessary pre-condition for a decision that there has been a relevant change of medical circumstances that the Secretary of State (and the SSAT in the event of an appeal) should in every case analyse the evidence and reports which related to the earlier assessment and compare them with the current evidence and reports. To the extent that Lightman J suggested that such a comparative exercise is required in every case, I think he went too far. There may be cases where that is necessary. But I see no warrant for holding that it is required in every case. It is for the examining medical officer to assess the current state of health of a claimant. It is then for the decision-maker to determine whether the medical report which results from that assessment contains evidence of a relevant change of circumstances so as to justify a decision to supersede.

70. I accept the submission of Mr Eadie that a new medical opinion given several years after the earlier medical opinion and which reaches a different conclusion as to capacity to work will often be sufficient to demonstrate a change of circumstances without more. The position is likely to be different in the case of medical conditions which do not change. But this will often be possible in the case of a medical opinion about a condition which is capable of changing and where several years have elapsed since the earlier medical opinion was given.

71. In my judgment, the medical report of Dr Gaskell in February 2007 revealed clinical findings which were, as a matter of law, capable of amounting to a “relevant change of circumstances”. The conclusions of the doctor (and the SSAT) were not only based on the claimant’s medical history, but also on their own observation and examination of her.

72. Against that background, I accept the submission of Mr Eadie that there was ample evidence on which the Secretary of State and the SSAT could conclude that there had been a relevant change of circumstances since the earlier assessment was made.

73. Mr Drabble submits that the decisions of the Secretary of State and the SSAT did not identify any medical change in circumstances. He contends that there is a real risk that the later decisions were no more than re-assessments of the claimant’s condition as it had been at the time of the superseded assessment.

74. I cannot accept this submission. It is true that the decision of the Secretary of State was confusing. The first reason that the decision purported to give was that there had been a change in circumstances by reason of the change in legislation. It went on to explain that this was because the Secretary of State had received medical evidence following an examination by an “approved doctor”. This would appear to be a reference to the doctor referred to in regulation

6(2)(g). But it is common ground that regulation 6(2)(g) could not be invoked here. In my judgment, however, it is also clear from the decision of 14 March 2007 (and the confirmation of that decision on review) that the Secretary of State was saying that there had been a relevant change of circumstances because there had been a change in the claimant's medical condition since the previous PCA had been made. That is why there was a reference to the current assessment and the fact that she had only scored three points; and why the review document referred to the fact that on the current assessment she had not scored sufficient points to reach the threshold for an award of benefit.

75. Although the supersession decision was muddled in some respects, in my judgment it included an assessment that there had been a relevant change of circumstances by reason of a change in the claimant's medical condition. So too did the decision of the SSAT, although I accept that it did not expressly refer to the earlier PCA: it merely stated that the claimant's current condition was such that she scored 12 points.

76. In my judgment, there is nothing to show that either the Secretary of State or the SSAT were committing the error of revising the assessment of the claimant's condition as it had been in 2001. The decisions of both the Secretary of State and the SSAT were based on the medical report of Dr Gaskell of February 2007. They represented their assessment of the claimant's current condition. They did not commit the *Chamberlain* error. Nor do I accept that the fact that the SSAT decided that the claimant scored 12 points provides any basis for believing that they may have committed the *Chamberlain* error. In my judgment, the fact that the score resulting from a later assessment is close to the score resulting from a previous assessment tells one nothing about whether the later assessment is or is not based on the circumstances that existed at the time of the earlier assessment.

77. I conclude, therefore, that the Secretary of State and the SSAT were entitled to hold that there had been a relevant change in the claimant's medical condition. For that reason, Mr Commissioner Jacobs was justified in refusing leave to appeal. It follows that Plender J was also right to refuse permission to apply for judicial review.

Overall conclusion

78. For all these reasons, I would dismiss this appeal.

LORD JUSTICE LONGMORE:

79. I agree with Dyson LJ that the comparatively long line of authority permitting the court to grant judicial review on orthodox grounds of a decision by a Social Security Commissioner to refuse to give permission to appeal to himself from a decision of the SSAT should not be disturbed at this late stage in its existence. Now that the Commissioners have become part of the Upper Tribunal, no doubt the forthcoming decision of this court in *Cart* will be applicable in future and there may be a shift in the judicial review perspective. If there is, I would warmly endorse Dyson LJ's view that it might be appropriate to adopt a similar test to that imposed by statute on the Court of Appeal in respect of second appeals.

80. I also agree that, on the facts of this case, there is no evidence that the Tribunal (or the Commissioner in refusing permission to appeal from their decision) committed the *Chamberlain* error. The current position is that determined by the SSAT; that is different from the position as it was assessed to be six years earlier in 2001. If that is not a relevant change of circumstances

within regulation 6(2)(a)(i) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, it is difficult to see what would be a relevant change.

LORD JUSTICE SEDLEY:

81. I too agree with both the analysis and the conclusion of Lord Justice Dyson in relation to the availability of judicial review of Commissioners' decisions.

82. I would add that the time has long gone when the floodgates argument can properly be advanced on jurisdictional issues of public law. I know of no instance in which the courts have accepted jurisdiction in a novel field of public law and been overwhelmed by a consequent deluge of litigation. In *R v Deputy Governor of HMP Parkhurst ex parte Leech* [1988] AC 533; [1988] 2 WLR 290, in which it was argued that to expose prison governors for the first time to public law remedies was to introduce a Trojan horse from which an army of disgruntled prisoners would spring armed with originating applications, Lord Bridge said (at 566):

“In a matter of jurisdiction it cannot be right to draw lines on a purely defensive basis and determine that the court has no jurisdiction over one matter which it ought properly to entertain for fear that acceptance of jurisdiction may set a precedent which will make it difficult to decline jurisdiction over other matters which it ought not to entertain. Historically the development of the law in accordance with coherent and consistent principles has all too often been impeded, in diverse areas of the law besides that of judicial review, by the court's fear that unless an arbitrary boundary is drawn it will be inundated by a flood of unmeritorious claims. If there are other circumstances beyond those arising from a governor's disciplinary award where the jurisdiction of the court may be invoked to remedy some injustice alleged to have been suffered by a prisoner consequent upon an abuse of power by those who administer the prison system, I am content to leave those claims for decision as they arise with every confidence in the court's ability to protect itself from abuse by declining jurisdiction where no proper basis to establish jurisdiction is shown or by the exercise of discretion to refuse a discretionary remedy for claims within jurisdiction but without substance.”

History has proved him right.

83. A better principle is that enunciated by Holt CJ in *Ashby v White* (1703) 2 Lord Raymond 938; 92 ER 126, a case in which the court was warned of a deluge of litigation if it started to intervene in corrupt elections by entertaining claims of misfeasance in public office:

“[I]t is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; ...”

84. What concerns me more is the proper disposal of this case. The quality of decision-making recounted in Lord Justice Dyson's judgment leaves a great deal to be desired. It is only by reading the material decisions as if they said what they should have said rather than what they actually said that they become defensible. There is thus an argument for allowing the appeal to the extent of remitting the case for re-determination; but since a re-determination would be carried out in the light of the existing material, and since – as I agree – this material represents not a retrospective appraisal of Ms Wiles' initial condition but a fresh appraisal of her current condition, the test of change of circumstances is met and remission would be a paper exercise with a foregone conclusion.

85. I therefore agree that the correct course is to dismiss this appeal.