[2017]AACR 13

(RGS v Department for Social Development (ESA) [2016] NICom 39)

Chief Commissioner K Mullan **C12/14-15(ESA)(T)**
Commissioner O Stockman
7 June 2016

Tribunal practice and procedure – natural justice – whether non-notification of wish to have oral hearing amounts to waiver of right to oral hearing

Human rights – Article 6 ECHR – fair hearing

The appellant was sent a form by the Appeals Service (TAS) in accordance with regulation 39 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). In the form he was asked to indicate whether he wished to have an oral hearing of his appeal or whether he was content for the tribunal to proceed without an oral hearing. The appellant did not return the form within the 14 days specified by regulation 39(3)(a) of the Decisions and Appeals Regulations. A tribunal proceeded to determine his appeal without further notice and disallowed the appeal in his absence. He appealed to the Tribunal of Commissioners who considered whether the tribunal's decision to proceed without an oral hearing of the appeal, in circumstances where the appellant had not expressed an intention by returning the TAS form, amounted to a breach of his right to a fair hearing under Article 6(1) European Convention on Human Rights (ECHR) and/or a breach of the rules of natural justice.

Held, allowing the appeal, that:

1. the principles of Article 6(1) ECHR imply a right to an oral hearing in employment and support allowance appeals and in the present case there were not exceptional circumstances that justified dispensing with an oral hearing within the meaning of *Miller v Sweden* [2005] ECHR 71 (paragraph 38);

2. whereas it is entirely consistent with Article 6(1) that an appellant may waive the right to an oral hearing, as in *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 40, in the present case, as the TAS form was not returned, the appellant had not waived that right (paragraph 39);

3. regulation 46(1)(d) of the Decisions and Appeals Regulations provided for the striking out of appeals where a form was not returned within 14 days, subject to a procedure for re-instatement, but there was no procedural basis for proceeding without an oral hearing in such circumstances (paragraph 44);

4. by the determination of his appeal without an oral hearing, the tribunal had breached the appellant's right to a fair hearing under Article 6(1) ECHR (paragraph 45);

5. following CIB/5227/1999, regardless of the position under Article 6(1) ECHR, the appellant had a right to an oral hearing as a matter of natural justice. The decision of the tribunal was given in circumstances which were procedurally unfair (paragraphs 46 to 48).

DECISION OF A TRIBUNAL OF COMMISSIONERS

1. This is a claimant's appeal from the decision of an appeal tribunal sitting at Belfast.

2. For the reasons we give below, we allow the appeal and set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. We direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The appellant claimed employment and support allowance (ESA) from the Department for Social Development (the Department) from 21 November 2011 by reason of nervous debility, peripheral neuropathy and pain. On 27 April 2012 the appellant completed and returned a questionnaire on form ESA50 to the Department regarding his ability to perform various activities. On 10 August 2012 a health care professional (HCP) examined the appellant and prepared a report on form ESA85 for the Department. On 21 August 2012 the Department considered all the evidence and determined that the appellant did not have limited capability for work (LCW) from and including 24 October 2012, superseding and disallowing his award of ESA. He appealed.

4. The Appeals Service (TAS) wrote to the appellant to ask if he wished to have an oral hearing of his appeal, using a pro forma letter – a Reg2(i)d. He did not respond. TAS listed the appeal for determination by way of a hearing in the appellant's absence without notifying him. The appeal was determined by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 22 March 2013. The tribunal disallowed the appeal and the notice of the tribunal's decision was issued to the appellant on 25 March 2013.

5. On 25 April 2013 the appellant wrote to TAS to explain that he had not been aware of the decision of the appeal tribunal until 22 April 2013 and that he had not received any notice of the tribunal hearing. He stated "I now wish to appeal to the Commissioner". TAS acknowledged his application on 29 April 2013 but indicated that the appellant first needed to request a statement of reasons for the tribunal's decision, that more than one month had passed since the date the tribunal's decision was sent to him, and that he was required to state reasons for the application being late. It was explained to the appellant that the reason why he did not receive an invitation to attend an oral hearing was that TAS did not receive a response to its pro forma letter.

6. The appellant then sent TAS a completed Reg2(i)d pro forma, indicating that he wanted an oral hearing of his appeal. The appellant's letter of 25 April 2013 was treated as an application for leave to appeal to the Social Security Commissioner and was acknowledged as such on 28 July 2013. On 16 September 2013 the LQM rejected the application for the reason that a statement of reasons had not been requested by the appellant. On 23 September 2013 the appellant applied for leave to appeal from a Social Security Commissioner.

Irregularity

7. It is a requirement of regulation 10(2)(b) of the Social Security Commissioners (Procedure) Regulations (NI) 1999 ("the Commissioners Procedure Regulations") that a written statement of the tribunal's reasons for its decision is included with an application for leave to appeal. The appellant has not enclosed a statement of reasons and therefore his application is irregular. Failure to send a copy of the tribunal's statement of reasons does not invalidate the application, however. In all the circumstances, we waive the irregularity under regulation 27 of the Commissioners Procedure Regulations and treat the application as validly made.

Grounds

8. The appellant submits that the tribunal's decision was wrong on the basis of his having various health problems. Explaining the lateness of his application, the appellant indicated that he did not become aware that the tribunal had heard and made a decision in his case until 26 April 2013.

9. The Department was invited to make observations in relation to the appellant's case. A response to the appellant's submissions was received from Mr Donnan of Decision Making Services (DMS) on behalf of the Department. He submitted that the tribunal had not erred in law as alleged.

The tribunal's decision

10. The appellant has not furnished us with a statement of reasons for the tribunal's decision. Nor has he provided a record of the tribunal's proceedings. We understand that neither document is available to the appellant, as he has not applied for them within the relevant statutory time limits.

11. It is not in dispute that the tribunal conducted a hearing in the absence of the appellant and without notifying him of the time and place of hearing. This type of procedure is known within TAS as a "paper hearing". From its decision notice, we know that the tribunal disallowed the appeal, awarding no points to the appellant on the LCW assessment.

Procedural steps

12. Although the appellant's grounds related to issues of fact, the Commissioner granted leave to appeal in exercise of his inquisitorial function. He observed that the appellant's appeal had been determined by way of a hearing in his absence and without notice to the appellant. He considered that it was arguable that the appellant's appeal had not been decided:

a) in accordance with the provisions governing appeals and, in particular, regulation 39 of the Decisions and Appeals Regulations; and/or

b) in accordance with the requirements of procedural fairness and/or Article 6 of the European Convention on Human Rights (ECHR).

13. The Commissioner directed an oral hearing of the appeal. As the appellant was unrepresented, and the appeal appeared to involve novel points of law, the Commissioner invited Mr Hatton of Law Centre (NI) to act as an *amicus curiae* in order to provide written submissions and oral argument in the proceedings. We are grateful that Mr Hatton agreed to do so and, having done so, for the high quality of his submissions to us.

14. The Chief Commissioner considered that the appeal appeared to involve a question of law of special difficulty and, in accordance with article 16(7) of the Social Security (NI) Order 1998, he directed that the appeal should be dealt with by a Tribunal of two Commissioners.

Errors of law

15. 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.

16. 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."

Relevant legislation

17. The procedure giving the choice to an appellant whether to have an oral hearing of his appeal is derived from the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 ("the Decisions and Appeals Regulations"). Of particular relevance are regulation 39 and regulation 46. These read:

> "**39. –** Choice of hearing
>
> (1) Where an appeal or a referral is made to an appeal tribunal the appellant and any other party to the proceedings shall notify the clerk to the appeal tribunal, on a form approved by the Department, whether he wishes to have an oral hearing of the appeal or whether he is content for the appeal or referral to proceed without an oral hearing.
>
> (2) Except in the case of a referral, the form shall include a statement informing the appellant that, if he does not notify the clerk to the appeal tribunal as required by paragraph (1) within the period specified in paragraph (3), the appeal may be struck out in accordance with regulation 46(1).
>
> (3) Notification in accordance with paragraph (1) –
>
> > (a) if given by the appellant or a party to the proceedings other than the Department, must be sent or given to the clerk to the appeal tribunal within 14 days of the date on which the form is issued to him; or
> >
> > (b) if given by the Department, must be sent or given to the clerk to the appeal tribunal –

(i) in the case of an appeal, within 14 days of the date on which the form is issued to the appellant, or

(ii) in the case of a referral, on the date of referral,

or within such longer period as the clerk may direct.

(4) Where an oral hearing is requested in accordance with paragraphs (1) and (3) the appeal tribunal shall hold an oral hearing unless the appeal is struck out under regulation 46(1).

(5) The chairman or, in the case of an appeal tribunal which has only one member, that member, may of his own motion direct that an oral hearing of the appeal or referral be held if he is satisfied that such a hearing is necessary to enable the appeal tribunal to reach a decision."

Regulation 46 provides as follows.

"**46. –** Appeals which may be struck out

(1) Subject to paragraphs (2) and (3), an appeal may be struck out by the clerk to the appeal tribunal –

…

(d) for failure of the appellant to notify the clerk to the appeal tribunal, in accordance with regulation 39, whether or not he wishes to have an oral hearing of his appeal.

(2) Where the clerk to the appeal tribunal determines to strike out the appeal, he shall notify the appellant that the appeal has been struck out and of the procedure for reinstatement of the appeal as specified in regulation 47.

(3) The clerk to the appeal tribunal may refer any matter for determination under this regulation to a legally qualified panel member for decision by that panel member rather than the clerk to the appeal tribunal."

Hearing

18. We held an oral hearing of the appeal. The appellant did not attend and was not represented. The Department was represented by Mr Donnan of DMS. Mr Hatton of Law Centre (NI) appeared as *amicus curiae*. We are grateful to Mr Donnan and to Mr Hatton for the considerable assistance which they have given us with their written and oral submissions.

19. The appellant's formal grounds of application for leave to appeal essentially re-stated his health problems. Mr Donnan for the Department submitted that the issue before the tribunal was whether the appellant had LCW in accordance with section 8(2) of the Welfare Reform Act 2007 and regulation 19 of the Employment and Support Allowance Regulations (NI) 2008 ("the ESA Regulations"). This in turn defined LCW in terms of a claimant's capability to perform the activities prescribed in Schedule 2 of the ESA Regulations. He submitted that the tribunal correctly addressed the effects of the appellant's conditions on his ability to perform the relevant

range of activities. He further submitted that the appellant had not identified a point of law upon which the tribunal erred.

20. Mr Hatton addressed us on the procedural aspects of the appeal. He outlined that regulation 39 of the Decisions and Appeals Regulations requires an appellant to notify the clerk to the tribunal, on the appropriate form, whether he wants an oral hearing of the appeal or whether he is content for it to be determined without an oral hearing. The form used by TAS in Northern Ireland is the pro forma letter called a Reg2(i)d, which had been sent to the appellant on 28 January 2013. This form asks an appellant to select one of three options by way of tick boxes. The options are:

- I want an oral hearing of the appeal
- I am content for the appeal to proceed without an oral hearing
- I have decided to withdraw my appeal.

21. Mr Hatton observed that a failure to return the Reg2(i)(d) form either at all, or within the time limit prescribed by regulation 39(3) of the Decisions and Appeals Regulations, permitted the appeal to be struck out under regulation 46. The Reg2(i)d carries a warning to this effect. He observed that regulation 46(1)(d) of the Decisions and Appeals Regulations catered expressly for circumstances where an appellant has failed to notify the clerk to the appeal tribunal whether or not he wishes to have an oral hearing.

22. If his appeal had been struck out, the appellant would have received notice of this in accordance with regulation 46(2) and would have been advised of his rights to apply for reinstatement of the appeal. Where an appeal is struck out under regulation 46(1)(d), the clerk to the tribunal may reinstate it under regulation 47. Additionally and alternatively, an LQM has power to reinstate an appeal which has been struck out under any of the grounds in regulation 46(1).

23. Mr Hatton observed that, prior to December 2013 (and therefore at the time of the present case), the practice of TAS was always to proceed to a "paper hearing" where no response was received to the Reg2(i)d. While the practice appeared to have the appellant's interests at heart, Mr Hatton observed that it appeared to have no basis under regulation 39(1), which gave the choice to the appellant whether to elect for an oral hearing or to waive that right, not to TAS. Mr Hatton observed that there is nothing express in the legislation which requires the approach adopted by TAS. That approach, however, potentially prejudices the appellant either in terms of natural justice, procedural fairness or his Article 6 rights under the ECHR.

24. In support of this proposition, Mr Hatton referred us to the case of *Elo v Finland* (*Application No 30742/02)* before the European Court of Human Rights ("the ECtHR"). This case involved a determination of entitlement to a Finnish social security benefit for those who had suffered accidents at work. At paragraph 34, the ECtHR stated that, unless there are exceptional circumstances that justify dispensing with a hearing, the right to a public hearing under Article 6(1) implies a right to an oral hearing at least before a tribunal of first instance in such a case. Whereas the ECtHR in *Elo v Finland* had found that an oral hearing was not required in the particular exceptional circumstances, he observed that the ECtHR in *Miller v Sweden (Application No 55853/00)* had made a decision that an oral hearing was required in circumstances which were closer to the case of ESA appeals. Mr Hatton observed that the ECtHR does, nevertheless, expressly refer to the possibility of a person waiving the right to an oral hearing.

25. Therefore, Mr Hatton observed, the obligation under Article 6(1) ECHR to hold a public hearing is not an absolute one. A hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary. A waiver can be done explicitly or tacitly, for example, by refraining from submitting or maintaining a request for a hearing. In *Schuler-Zgraggen v Switzerland*, *(Application No 17/1992/362/436),* the general practice in Switzerland was that appeals would be heard without an oral hearing and it was expected that an appellant should apply for one. The failure of the appellant in that case to do so was found to be an unequivocal, albeit tacit, waiver of the right to a public and oral hearing.

Assessment

26. The appellant, in the grounds he has submitted, has essentially re-stated his health problems. He does not attempt to identify an error of law in the tribunal's decision. While we have not had sight of the record of proceedings or a statement of reasons for the tribunal's decision, we consider on the balance of probabilities that the tribunal has based its decision on the evidence before it and applied the correct statutory test. In any event, in the absence of the record of proceedings or a statement of reasons, the appellant cannot establish to us that it has not. As far as this aspect of the appeal is concerned, we accept the submission of Mr Donnan that the appellant has not established an arguable point of law on the grounds which he has advanced.

27. The appellant stated that he was unaware of the tribunal hearing until he received the tribunal's decision. He described particular difficulties in his household arising from the fact that his mother suffered from Alzheimer's Disease and would put away his post "for safe-keeping" without telling him. It is not in dispute that the appellant was sent a Reg2(i)d form by TAS. It is not in dispute that the appellant did not return it to TAS within the period specified on the form. For the purpose of our decision, the actual circumstances in which the form was not returned are not material. It is enough that it was not received by TAS. The focus of our decision is directed to the procedural requirements around the holding of tribunal hearings where a form is not returned.

28. The Reg2(i)d is a form approved by the Department for the purposes of regulation 39(1) of the Decisions and Appeals Regulations. The form provides the mechanism for an appellant to notify the clerk to the tribunal whether he wishes to have an oral hearing of an appeal or whether he is content for the appeal to proceed without an oral hearing. By regulation 39(2) and 39(3), the form must warn an appellant that, if he does not notify the clerk of his wishes within 14 days, the appeal may be struck out in accordance with regulation 46(1). The Reg2(i)d form contains such a warning.

29. The question which arises in the present appeal is what should happen when the appellant does not return the completed Reg2(i)d form within 14 days, as required by regulation 39(2) and (3). On the face of it, the appeal may be struck out. However, where the appeal is not struck out, yet the appellant has not indicated whether or not he wishes to have an oral hearing of the appeal, how should the appeal proceed?

30. Article 6(1) of the ECHR provides as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an

> independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

31. It is not disputed that Article 6(1) of the ECHR has application to social security appeals, as conceded by the Great Britain Secretary of State for Work and Pensions in *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53, reported as R(DLA) 1/03. However, under the jurisprudence of the ECtHR, where a system of social security appeals is established, entitlement to an oral hearing may vary according to the subject matter of the dispute and the nature of the issues to be addressed. In terms of the rights which arise from Article 6(1) of the ECHR, in *Miller v Sweden* [2005] ECHR 71, the ECtHR held at paragraphs 29–30 as follows:

> "29. The Court reiterates that in proceedings before a court of first and only instance the right to a 'public hearing' under Article 6 § 1 entails an entitlement to an 'oral hearing' unless there are exceptional circumstances that justify dispensing with such a hearing ….
>
> The exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases. For example, the Court has recognised that disputes concerning benefits under social-security schemes are generally rather technical, often involving numerous figures, and their outcome usually depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument. Moreover, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in social-security cases…".

32. Social security schemes will vary greatly between the different Member States of the Council of Europe in relation to which the ECtHR has jurisdiction. Nevertheless, the key element in determining whether an oral hearing is necessary is the nature of the issues to be decided. In the present case, the issue was entitlement to ESA.

33. ESA was established under the provisions of the Welfare Reform Act (NI) 2007 (the 2007 Act). The core rules of entitlement were set out at sections 1 and 8 of the 2007 Act. These provide for an allowance to be payable if the claimant satisfies the condition that he or she has LCW. The ESA Regulations provide for a specific test of limited capability for work. In particular, regulation 19(2) provides for a LCW assessment as an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 of the ESA Regulations, or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

34. The evidence involved in such cases invariably includes an ESA50 – a self-assessment questionnaire, completed by the claimant, in which he indicates the relevant functional limitations which arise from disablement. It also invariably includes an ESA85 – a report completed by an approved healthcare professional (HCP) which reports on the HCP's clinical examination of the claimant and gives an opinion as to the likely functional limitations in his

case. A tribunal hearing gives an appellant a further opportunity to give oral evidence to explain the claimed functional limitation, to present further evidence and to make submissions on the evidence, and gives a tribunal an opportunity to test the oral evidence against the statutory conditions of entitlement.

35. While formal evidence was not presented to us to this effect, we take judicial notice of statistics concerning social security appeals which demonstrate that a higher percentage of appeals attended by appellants result in a favourable outcome compared to those where the appellant does not attend. For example, in its evidence to the Council on Tribunals' Consultation Paper on the use and value of oral hearings in the administrative justice system, citing quarterly statistics from the Department for Work and Pensions, the Advice Services Alliance submitted at paragraph 6.2 that:

> "The latest statistics highlight a long-standing difference between the results of oral and paper hearings conducted by the Appeals Service. They show that, in the quarter ending December 2004, of the 29,440 appeals cleared at an oral hearing, 53% were decided in favour of the appellant. By contrast, of the 10,420 paper hearings, only 22% were decided in favour of the appellant".

36. These figures pre-date ESA. We also recognise that such figures have the potential to contain an inherent bias from a process of appellants self-selecting paper hearings due to a subjective, but accurate, perception of the weakness of their case. However, this factor cannot explain such a great discrepancy in outcomes between oral and paper hearings.

37. While we have not been shown any directly relevant statistical evidence, we have no reason to think that outcomes for ESA would be dissimilar. It appears to us that ESA appeals have characteristics which mean that they are more accurately determined on the basis of oral evidence together with documentary evidence than on the basis of documentary evidence alone.

38. They involve the appellant giving oral evidence about functional restrictions resulting from physical or mental disablement. They provide an opportunity for the introduction of further corroborating medical evidence. They enable the tribunal to assess the appellant's credibility by observation and by putting unfavourable evidence for comment. They are not among those types of appeal indicated by the ECtHR in *Miller v Sweden* which may turn on "numerous figures" and the written opinions given by medical doctors. We consider that the principles of Article 6(1) ECHR imply a right to an oral hearing in ESA appeals and we further accept in general terms that there are not exceptional circumstances that justify dispensing with an oral hearing within the meaning of *Miller v Sweden.*

39. However, as indicated by the ECtHR in *Schuler-Zgraggen v Switzerland*, it is entirely consistent with the Article 6(1) right that an appellant may waive the right to an oral hearing. As indicated above, such a waiver should be unequivocal, although it can be given explicitly or tacitly, such as by failing to request an oral hearing. The default position for the authority responsible for appeals in *Schuler-Zgraggen v Switzerland* was for a hearing not to be held, and the applicant in that case did not request a hearing. As stated by the ECtHR at paragraph 58:

> "In the instant case the Federal Insurance Court's Rules of Procedure provided in express terms for the possibility of a hearing 'on an application by one of the parties or of [the presiding judge's] own motion' (Rule 14 para. 2 - see paragraph 38 above). As the proceedings in that court generally take place without a public hearing, Mrs Schuler-

> Zgraggen could be expected to apply for one if she attached importance to it. She did not do so, however. It may reasonably be considered, therefore, that she unequivocally waived her right to a public hearing in the Federal Insurance Court."

40. Unlike the case in *Schuler-Zgraggen*, oral hearings are systematically held for social security appeals in Northern Ireland. Here, the standard procedure is to put an appellant on election as to whether he does or does not want an oral hearing. Where an appellant elects for a hearing in accordance with regulation 39(1), the appeal will be determined by way of an oral hearing. There is no provision to allow an appellant's stated wish for an oral hearing to be overridden.

41. The mechanism for giving an unequivocal indication that an appellant waives the right to an oral hearing is the Reg2(i)d form. In order for the right to an oral hearing to be waived, the form must be completed by the appellant and returned to TAS. The appellant did not respond, not having received the Reg2(i)d on his account of the facts. However, as indicated above, his reasons for not returning the Reg2(i)d are not in fact relevant.

42. When the Reg2(i)d form is not returned by an appellant, the procedural rules provide for the possibility of striking out the appeal, subject to a right to apply for re-instatement. However, TAS did not strike out the appeal. Rather, it convened a hearing in the appellant's absence and determined the appeal without further notice to him.

43. In a system which does not routinely hold oral hearings, it can reasonably be required of an appellant that he should apply for an oral hearing. This was the case in *Schuler-Zgraggen,* where the appellant did not make such an application, and where the ECtHR found that she had tacitly waived the right to a hearing. However, the system that we are concerned with is more generally directed toward the holding of hearings as of right. It is reasonable that an appellant should be given the choice of waiving the right to an oral hearing. However, because he did not return the Reg2(i)d form, the appellant in the present case did not exercise choice. It is clear that the appellant had not unequivocally waived his right to an oral hearing in these circumstances. There was no follow up correspondence when the appellant failed to return the Reg2(i)d form, which might have alerted the appellant to the course of events which was unfolding. Whereas his case was listed as a "paper" hearing, he was not notified of that fact and was not aware of the progress of his appeal until a decision notice was received.

44. The Decisions and Appeal Regulations provide in such cases for striking out an appeal, notifying the appellant of that fact and, thereby, giving him a chance to apply for re-instatement under regulation 39(5). Nevertheless, the Decisions and Appeals Regulations are silent on what should happen if the power to strike out an appeal is not exercised. The practice adopted by TAS in the present case was to proceed to a paper hearing in the appellant's absence without notifying him of time and place of hearing. However, there is no procedural basis for holding such a hearing in these circumstances under the Decisions and Appeals Regulations. In the absence of procedural rules governing the circumstances, it would have been equally valid to have listed the appeal as an oral hearing with notification to the appellant.

45. Whereas the Decisions and Appeals Regulations are silent on which of these options should have been followed, we consider that the jurisprudence of the ECtHR points to a conclusion. On the basis of *Miller v Sweden*, we conclude that the appellant had a right to an oral hearing in the context of the system of ESA appeals. On the basis of *Schuler-Zgraggen v Switzerland* we consider that the appellant could have waived his right to an oral hearing by an

unequivocal statement to that effect. In all the circumstances of the case, the fact that the appellant did not return the Reg2(i)d to TAS meant that he had not unequivocally waived his right to a hearing. We conclude that the determination of his appeal without an oral hearing, in the absence of an unequivocal waiver of his right to an oral hearing, violated the appellant's right to a fair hearing under Article 6(1) of the ECHR.

46. Looking at the matter in terms of the requirements of natural justice, or procedural fairness, we note that a similar situation to the present case arose, prior to the commencement of the Human Rights Act 1998, in the case of CIB/5227/1999 before a Great Britain Social Security Commissioner. That case was concerned with the Social Security (Adjudication) Regulations 1995 and the requirement to indicate a choice for an oral hearing, against a similar background of the appropriate form not being delivered to the claimant. Mr Commissioner Rowland said at paragraph 7:

> "The claimant in the present case was entitled to an opportunity to require there to be an oral hearing at which he could put forward his contentions. He did not have that opportunity and the consequence was that the tribunal was unable to listen to those contentions. Regulation 1(3) of the 1995 Regulations provided that where 'any notice or other document is required to be given or sent to him in person, that notice or document shall, if sent by post to that person's last known or notified address, be treated as having been given or sent on the day it was posted'. That may have the effect that the claimant is deemed to have received the clerk's direction but such deemed receipt is not the same as actual receipt. The claimant is unable to reply to a document that he is merely deemed to have received. The effect of regulation 1(3) is that neither the tribunal nor the regional chairman can be criticised for the approaches they took on the evidence before them. However, had the tribunal been made aware that the claimant had not actually received the clerk's direction, it would have been wholly wrong for him to proceed with the appeal at a paper hearing".

47. This approach was endorsed recently by the Chief Commissioner in *SD v Department for Social Development* (ESA) [2015] NI Com 32.

48. In applying the principles to the present case, we agree with Mr Commissioner Rowland's statement of the law in CIB/5227/1999. Regardless of the position under Article 6(1) of the ECHR, we consider that the appellant had a right to an oral hearing as a matter of natural justice in the absence of receiving the Reg2(i)d. We are therefore further confirmed in our view that the decision of the tribunal in the present case was given in circumstances which were procedurally unfair.

49. For these reasons, we find that the decision of the appeal tribunal was in error of law. We allow the appeal and set aside the decision of the appeal tribunal.

50. We direct that the appeal shall be determined by a newly constituted tribunal.