

R(IS) 6/07

**(Secretary of State for Work and Pensions v Morina and Borrowdale
[2007] EWCA Civ 749)**

**CA (Sir Anthony Clarke MR, Arden and Maurice Kay LJJ)
23 July 2007**

**CIS/2322/2005
CIS/1363/2005**

Commissioners' jurisdiction – procedural decision made by legally qualified panel member – whether there is a right of appeal to a Commissioner

In each case the appellant applied to the Commissioner for leave to appeal against a procedural decision made by a legally qualified panel member (LQPM): in Mr Morina's case the decision was to refuse to admit a late appeal that was outside the absolute time limit of 13 months imposed by regulation 32(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 and in Mr Borrowdale's case the decision was to strike out his appeal under regulation 46 for want of jurisdiction as the disputed decision was listed as unappealable in Schedule 2 to the Regulations. The Secretary of State argued that the Commissioner had no jurisdiction to hear either appeal. The Commissioner accepted that he had jurisdiction but dismissed the appeals on their merits. The Commissioner refused the Secretary of State leave to appeal to the Court of Appeal on the ground that the Court should decide whether to grant leave to a successful party. The Secretary of State renewed the application to the Court of Appeal, contending that in making the decisions in question an LQPM was not an appeal tribunal, or alternatively that such decisions were not "decisions" appealable to a Commissioner under section 14(1) of the Social Security Act 1998.

Held, granting permission and allowing the appeal, that:

1. section 15 of the Social Security Act 1998 provided for an appeal to the Court of Appeal on a question of law against "any decision of a Commissioner", rather than "any judgment or order" as in appeals from the High Court, and therefore where, as in these cases, there were in reality two decisions, one as to jurisdiction and the other as to the merits, the Court was not precluded from hearing an appeal by the successful party on the point on which he had lost, although it was to be expected that such appeals would be permitted only where a point of general significance was raised (*Lake v Lake* [1955] P 336 distinguished) (paragraph 10);
2. since decisions to extend time or strike out were inherently judicial rather than administrative and since there was no provision in the 1998 Act empowering the Secretary of State to make regulations which conferred decision-making power in connection with an appeal on any body other than one acting as an appeal tribunal, in making procedural decisions to extend time or to strike out an appeal an LQPM was an appeal tribunal (paragraphs 28 to 30);
3. (*per Kay LJ*) however *Bland v Chief Supplementary Benefit Officer* [1983] 1 WLR 262 (also reported as R(SB) 12/83) and *White v Chief Adjudication Officer* [1986] 2 All ER 905 (also reported as an appendix to R(S) 8/85) were authority for the proposition that some interlocutory decisions were not "decisions" for the purposes of section 14(1) of the Social Security Act 1998, because they did not determine the matter in dispute, and *Rickards v Rickards* [1990] Fam 194 was to be distinguished because there the judge had the power to grant the application whereas in both the present cases the appellant was seeking from the appeal tribunal something it had no jurisdiction to grant (paragraphs 32 to 40);
4. (*per Arden LJ and Sir Anthony Clarke MR*) purely as a matter of statutory construction and applying the purposive approach set out in *Lane v Esdaile* [1891] AC 210 to analogous legislation, section 14(1) cannot apply to a decision by an LQPM that the purported appeal is an appeal that Parliament has provided cannot be made because such a construction would produce diametrically the opposite result from that which was clearly intended by the legislation (paragraphs 42 to 45 and 50).

DECISION OF THE COURT OF APPEAL

Ms Natalie Lieven QC (instructed by the Solicitor, Department for Work and Pensions) appeared for the appellant.

Mr Steven Kovats appeared as Advocate to the Court.

Judgment

LORD JUSTICE MAURICE KAY:

1. In the field of social security, primary and secondary legislation are notoriously labyrinthine. Sometimes the substantive entitlement to a statutory benefit is clothed in complexity and can only be determined after an interpretive journey that few are equipped to travel. These two appeals do not involve complex substantive law. However, they raise procedural and jurisdictional issues of real difficulty.

2. Mr Morina was an asylum seeker. On 28 June 2001 the Secretary of State decided that Mr Morina had been overpaid £417.40 in respect of income support for the period 4 to 25 December 2000 because he had failed to disclose that he had been refused asylum. On 11 June 2004 the Home Secretary granted Mr Morina indefinite leave to remain, as a result of which he became entitled to jobseeker's allowance. However, on 16 August 2004 the Secretary of State informed Mr Morina that he intended to recover the £417.40 by way of set-off against jobseeker's allowance. On 24 August 2004 Mr Morina wrote to the Secretary of State saying that he did not know of the refusal of asylum until he received a letter dated 21 December 2000. This was treated as an application to appeal out of time against the decision of 28 June 2001. On 2 December 2004 a legally qualified panel member (LQPM) of the appeal tribunal refused the application. On 6 July 2005 Mr Morina applied to a Social Security Commissioner for permission to appeal. On 2 September 2005 Mr Commissioner Rowland granted permission to appeal without prejudice to the right of the Secretary of State to argue that the Commissioner lacked jurisdiction. In due course, the Secretary of State argued against jurisdiction but on 12 June 2006 the Commissioner decided that he had jurisdiction. Nevertheless he dismissed Mr Morina's appeal. Mr Morina has accepted that decision and has played no part in proceedings in this court. The Secretary of State, on the other hand, whilst obviously satisfied with the decision of the Commissioner on the merits, has sought permission to appeal to this court on the question of jurisdiction. He was refused permission by the Commissioner on the ground that he had been a successful appellant. His application to this court was considered on the papers by Sir Henry Brooke who adjourned it for an oral hearing on notice, with appeal to follow if permission were to be granted.

3. Mr Borrowdale was a recipient of income support. On 11 January 2005, the Secretary of State notified him that in future his benefit would be paid by cheque. On 19 January Mr Borrowdale gave notice of appeal. He did not challenge the correctness of the amount of the benefit but contended that the Secretary of State had no power to pay it by cheque. The matter was first considered by a clerk to the appeal tribunal but he referred it to an LQPM. On 25 January the LQPM struck the appeal out on the basis that there was no jurisdiction to hear it. Thereafter, events proceeded along the same lines as in Mr Morina's case. Mr Commissioner Rowland granted permission to appeal and held that he had jurisdiction but dismissed the appeal substantively. The case has now reached this court at the behest of the Secretary of State following identical decisions on permission by the Commissioner and Sir Henry Brooke.

4. Thus the central point of law is whether a Social Security Commissioner has jurisdiction to hear and determine an appeal from an LQPM who has refused to

extend time or who has struck out a proposed appeal for want of jurisdiction. The Secretary of State contends that it has always been understood that persons in the position of Mr Morina and Mr Borrowdale have no right to appeal to a Commissioner and that their remedy, if any, is an application to the Administrative Court for permission to apply for judicial review of the decision of the LQPM. If the Commissioner was right to hold that he had jurisdiction, there also arises the question as to whether this court either can or should hear an appeal by the Secretary of State in view of the fact that he was the successful party before the Commissioner in both cases. These are matters of some importance. In view of their complexity and the fact that Mr Morina and Mr Borrowdale have manifested no wish to be involved in the proceedings in this court, we have had the assistance of Mr Steven Kovats as Advocate to the Court. He has provided us with helpful written and oral submissions. His contention is that Mr Commissioner Rowland was right about jurisdiction in both cases and that this court should not feel inhibited from saying so. Also, the Child Poverty Action Group has been permitted to intervene by way of written submissions which support the approach of the Commissioner.

5. In an everyday dispute about substantive entitlement to a social security benefit, a claimant who is not satisfied with a decision of the Secretary of State has a right of appeal to the appeal tribunal. Since the Social Security Act 1998, the unified appeal tribunal has replaced a number of previous tribunals including social security tribunals. There is then a further right of appeal to a Commissioner, but only on a point of law and with the leave of the appeal tribunal or the Commissioner. Subsequent appeal to the Court of Appeal must also be on a point of law and with the permission of the Commissioner or the Court of Appeal. In a typical case, questions of procedure and jurisdiction are tolerably clear. The difficulties arise around the margins where a plethora of statutory provisions may or may not apply, as this case vividly illustrates. Before dealing with the intricacies of the social security legislation, it is logical to resolve the threshold issue of whether this court can or should hear the appeal of the Secretary of State in view of the fact that he was the successful appellant before the Commissioner.

The appeal to this court: jurisdiction and discretion

6. Although we have received no submissions discouraging us from hearing these appeals, it is common ground that our entitlement to do so is not beyond dispute and requires resolution. This is because of the traditional reluctance to permit an appeal at the behest of a litigant who succeeded below and who seeks to take issue with the reasoning of the decision rather than with its outcome.

7. An appeal to the Court of Appeal from a Commissioner is provided for by section 15 of the Social Security Act 1998. It is limited to “a question of law” and relates to “any **decision** of a Commissioner”. This language is at variance with that used in connection with appeal from the High Court to the Court of Appeal which lie against “any **judgment or order** of the High Court”: Supreme Court Act 1981, section 16(1). The approach of the Court of Appeal to appeal from the High Court is illustrated by *Lake v Lake* [1955] P 336 which arose in the context of section 27 of the Supreme Court of Judicature (Consolidation) Act 1925, where the language was also that of “judgment or order”. Mrs Lake’s answer to an allegation of adultery had been one of denial or, in the alternative, condonation. Her husband’s petition was dismissed, the Commissioner finding that there had been adultery but that it had been condoned. She sought to appeal against the finding of adultery but the Court of

Appeal declined to hear such an appeal. It held that “judgment or order” meant “the formal judgment or order which is drawn up and disposes of the proceedings” as opposed to “some finding or statement ... which may be found in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding” (*per* Sir Raymond Evershed MR, at pages 343–344). Hodson LJ agreed, adding (at page 345):

“This is an attempt by a successful party to appeal against an order which she has obtained in her favour. In my judgment, this court cannot entertain such an appeal.”

8. The procedure and documentation in the context of an appeal to a Social Security Commissioner are not the same as in the High Court. The appeals of Mr Morina and Mr Borrowdale were disposed of in a single document which also refused a third claimant leave to appeal and granted leave to appeal to a fourth. The single document contains paragraph 1, headed “Decision of the Social Security Commissioner”, which, in the cases of Mr Morina and Mr Borrowdale, simply stated with respect to each: “I dismiss the claimant’s appeal”. Paragraphs 2–54, headed “Reasons”, then described the four cases and explained the conclusions reached by the Commissioner.

9. An analysis producing the result that we do not have jurisdiction to hear the Secretary of State’s appeal would take this form: (1) section 15 of the 1998 Act provides for an appeal against “any decision of a Commissioner”; (2) the “decision” in each of these cases is to be found in paragraph 1, dismissing the claimant’s appeal; (3) the Secretary of State is not seeking to challenge that decision; (4) by analogy with *Lake v Lake*, he has no right to challenge the reasoning on an issue upon which he was unsuccessful – jurisdiction – when the ultimate decision was wholly favourable to him.

10. In the present context, I do not consider that analysis to be correct. It is significant that the wording of section 15 of the Social Security Act does not replicate that of section 16 of the Supreme Court Act. It concerns “any decision” rather than “any judgment or order”. To that extent, *Lake* is not applicable as a matter of construction. Nevertheless, the policy aspect of *Lake* as articulated by Hodson LJ has to be borne in mind. Does it apply so as to shut out an appeal by the successful party before the Commissioner? In my judgment, it does not. I find force in Mr Kovats’ submission that the “decision” referred to by the Commissioner in paragraph 1 was in each case and in reality two decisions – first, that he had jurisdiction to hear the appeal and, secondly, that the appeal should be dismissed on the merits. Whilst it is difficult to imagine circumstances in which the Secretary of State, having succeeded on the merits, should be permitted to appeal in relation to some aspect of the reasoning of the Commissioner on the merits, I do not think that that necessarily precludes an appeal by him on the jurisdiction point which he lost. Moreover, as Ms Lieven QC submits, the Secretary of State is seeking to change “the decision” described in paragraph 1. He is seeking to establish that the appeal of the claimants should have been rejected for want of jurisdiction rather than dismissed on the merits. It is mainly for these reasons that I do not consider that we are precluded by law from hearing these appeals. Having said that, however, I am not to be taken to be enabling a whole range of “winners’ appeals”. It is significant that, in the present case, the subject-matter of the proposed appeal to this Court is a ruling by the Commissioner on a fundamental legal issue of jurisdiction and not a finding such as

the finding of adultery in *Lake*. The latter was of interest only to the parties and, as between them, was of no lasting legal significance in view of the finding of condonation. Thus, even where ingenuity can result in the decision of a Commissioner being represented as, in reality, two decisions, I would expect this Court to refuse the successful party below permission to appeal against an immaterial finding of no general significance.

11. It will be seen that I have approached the powers and jurisdiction of this Court strictly on the basis that the answer is to be sought and found within the four corners of section 15 of the Social Security Act. In the course of submissions, we were invited, particularly by Mr Kovats, to bring into the equation some of the authorities on the ambit of appeal to the Commissioner. I shall have to refer to some of them when addressing the substantive issue of the jurisdiction of the Commissioner to hear appeals such as those of Mr Morina and Mr Borrowdale. However, I do not consider that they illuminate the threshold question of who can appeal to this Court pursuant to section 15.

12. I should add that if and to the extent that our considering this appeal rests on an exercise of discretion, it is clearly appropriate to exercise that discretion affirmatively in view of the general importance of the issue. In these circumstances, I would unhesitatingly grant permission to appeal.

Did the Commissioner have jurisdiction to hear these appeals?

13. The decision of the LQPM that the proposed appeal of Mr Morina was out of time and that time could not be extended was made pursuant to regulation 32 of the Social Security and Child Support (Decisions and Appeal) Regulations 1999 (SI 1999/991) (the 1999 Regulations). The decision to strike out Mr Borrowdale's proposed appeal on the ground that the appeal tribunal had no jurisdiction to hear it was made by an LQPM pursuant to regulation 46. It is therefore necessary to consider the issue of whether, in each case, the Commissioner had jurisdiction to hear an appeal against the decision of the LQPM.

14. Decisions by the Secretary of State under the Social Security Act 1998 are dealt with in section 8, which provides:

“(1) Subject to the provisions of this Chapter, it shall be for the Secretary of State –

- (a) to decide any claim for a relevant benefit;
- (b) ...
- (c) ... to make any decision that falls to be made under or by virtue of a relevant enactment.”

15. Section 12 then provides for appeal to an appeal tribunal in these terms:

“(1) This section applies to any decision of the Secretary of State made under section 8 ... which –

- (a) is made on a claim for, or on an award of, a relevant benefit, and does not fall within Schedule 2 to this Act;
- ...

(2) In the case of a decision to which this section applies, the claimant ... shall have a right to appeal to an appeal tribunal, but nothing in this

subsection shall confer a right of appeal in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision.

...

(4) Where the Secretary of State has determined that any amount is recoverable under or by virtue of section 71 or 74 of the Administration Act, any person from whom he has determined that it is recoverable shall have the same right of appeal to an appeal tribunal as a claimant.

...

(7) Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought.

...”

16. Mr Morina was affected by section 12(4). Section 12(7) provided the *vires* for the provisions in the 1999 Regulations dealing with time limits. The primary time limit under regulation 31(1) fixes the time within which an appeal must be brought as “within one month of the date of notification of the decision against which the appeal is brought”, subject to extension under regulation 32. Regulation 32 permits time to be extended, subject to satisfaction about reasonable prospects of success and the interests of justice (regulation 32(4)). However, “no appeal shall in any event be brought more than one year after the expiration of the last day for appealing under regulation 31” (regulation 32(1)). In other words, there is no jurisdiction to extend time if more than 13 months have expired since the notification of the decision. Moreover, an application for an extension which has been refused cannot be renewed (regulation 32(9)).

17. Regulation 32(2) provides:

“An application for an extension of time under this regulation ... shall be determined by [an LQPM] ...”

18. Mr Borrowdale’s proposed appeal was struck out under regulations 46 and 47. His problem was not the time limit but the absence of a right of appeal against a decision to pay an undisputed benefit by cheque. The relevant provisions state:

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

- (a) where it is an out of jurisdiction appeal and the appellant has been notified by the Secretary of State that an appeal brought against such a decision may be struck out;

...

(2) Where the clerk to the appeal tribunal determines to strike out the appeal, he shall notify the appellant that his 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 [an LQPM] for decision by the panel member rather than the clerk to the appeal tribunal.

...

47.—...

(2) A [LQPM] may reinstate an appeal which has been struck out in accordance with regulation 46 ... where –

(a) the appellant has made representations or, as the case may be, further representations in support of his appeal with reasons why he considers that his appeal should not have been struck out, to the clerk to the appeal tribunal, in writing within one month of the order to strike out the appeal being issued, and the panel member is satisfied in the light of those representations that there are reasonable grounds for reinstating the appeal;

...

(c) the panel member is satisfied that the appeal is not an appeal which may be struck out under regulation 46;

... ”

19. Thus, the clerk has jurisdiction to strike out an appeal but, if he does so, the appeal may still be reinstated by the LQPM. Alternatively, instead of deciding the issue himself, the clerk may refer it to the LQPM for a decision. This is what happened in Mr Borrowdale’s case.

20. Two further statutory provisions need to be referred to at this stage. Schedule 1 to the Social Security Act is headed “Appeal tribunals: Supplementary Provisions”. Paragraph 12, under the sub-heading “Delegation of certain functions of appeal tribunals”, provides:

“(1) The Secretary of State may by regulations provide –

(a) for officers authorised by the Secretary of State to make any determinations which fall to be made by an appeal tribunal and which do not involve the determination of any appeal, application for leave to appeal or reference;

(b) for the procedure to be followed by such officers in making such determinations;

(c) for the manner in which such determinations by such officers may be called in question.

(2) A determination which would have the effect of preventing an appeal, application for leave to appeal or reference being determined by an appeal tribunal is not a determination of the appeal, application or reference for the purposes of sub-paragraph (1) above.”

21. Finally, section 14(1) of the Social Security Act, which provides for appeal to the Commissioners, states that an appeal lies to a Commissioner

“from any decision of an appeal tribunal under section 12 ... on the ground that the decision of the tribunal was erroneous in point of law.”

The status of the LQPM

22. Ms Lieven’s first submission is that a Commissioner has no jurisdiction in relation to an appeal from an LQPM because the jurisdiction conferred by section 14(1) of the Social Security Act is to hear appeals “from any decision of an appeal tribunal under section 12” and a decision of an LQPM alone under regulation 32(2)

or regulation 46(3) is not a “decision of an appeal tribunal”. His decision is therefore unappealable under the Act and can only be challenged by way of judicial review.

23. Nothing turns on the fact that the decisions are those of a single member of the appeal tribunal because, by section 7(1) of the 1998 Act, a tribunal “shall consist of one, two or three members drawn by the President from the panel constituted under section 6”. The panel is constituted by the Lord Chancellor and includes “persons possessing such qualifications as may be prescribed by ... regulations”: section 6(3). By section 7(2):

“The member, or (as the case may be) at least one member, of an appeal tribunal must –

- (a) have a general qualification (construed in accordance with section 71 of the Courts and Legal Services Act 1990);

...”

24. Plainly, therefore, the Act contemplates some decisions of the appeal tribunal being made by a single, legally qualified member. It follows that Ms Lieven’s submission can only be that **some** decisions of an LQPM alone are not decisions of the appeal tribunal.

25. Although the Social Security Act paved the way for LQPMs, the term does not expressly appear on the face of the Act. Pursuant to his powers under the Act, the Lord Chancellor promulgated the 1999 Regulations. Regulation 1(3) defines an LQPM as a panel member who satisfies the requirements of paragraph 1 of Schedule 3 which again cross-refers to the qualifications recognised in section 71 of the Courts and Legal Services Act 1990.

26. It is implicit in Ms Lieven’s submission that regulation 46(3) in relation to striking out and regulation 32(2) in relation to extension of time provide for a decision-making framework wholly outside that of the appeal tribunal. In these circumstances, it is necessary to delve a little more deeply into the origins and context of regulation 46 and regulation 32. Ms Lieven submits that the *vires* for regulation 46 lie in Schedule 1, paragraph 12(1), of the Social Security Act. Paragraph 12 appears under the heading “Delegation of certain functions of appeal tribunals”, which I have set out in paragraph 19, above.

27. I acknowledge that Schedule 1 to the 1999 Regulations includes paragraph 12(1) of Schedule 1 to the Social Security Act in the list of enabling provisions behind the Regulations but I do not accept that it was the source of the *vires* for the part of regulation 46 which provides for the making of a decision on striking out by an LQPM. Paragraph 12 is solely concerned with delegation to “**officers** authorised by the Secretary of State”. I agree with the conclusion of Mr Commissioner Rowland that “officers” are civil servants and that an LQPM is not an “officer” in that sense. “Officers” are appointed by the Secretary of State pursuant to paragraph 6 of Schedule 1 to the Social Security Act, whereas LQPMs are appointed by the Lord Chancellor under section 6. A clerk to the appeal tribunal who strikes out an out of jurisdiction appeal pursuant to regulation 46(1) is an officer whose power is enabled by paragraph 12 of Schedule 1 but his determination is not necessarily final because an LQPM may reinstate the appeal under regulation 47(2). Moreover, even when a clerk determines to strike out, I do not consider that he is acting otherwise than on behalf of the appeal tribunal. The enabling provision in paragraph 12 of Schedule 1 concerns “any determinations which fall to be made by an appeal tribunal”. As

Arden LJ observed, that language implies that the determination remains one of the appeal tribunal – if it did not, the language would be more likely to be “determinations which **otherwise** fall to be made by an appeal tribunal”.

28. It seems to me that these points of construction militate tellingly against the approach for which Ms Lieven contends. The position becomes even clearer when one stands back and considers it in the round. A decision to strike out for want of jurisdiction is inherently judicial rather than administrative in its nature. Leaving aside the possibility of its being made by a clerk pursuant to regulation 46(1) – a decision which, in any event, need not be final by reason of regulation 47 – it is allocated to an LQPM. Of what is an LQPM a member? The answer is the appeal tribunal, outside which he has no statutory existence. If it is the case (as I have held it to be) that paragraph 12 of Schedule 1 has no relevance to decisions of LQPMs, then I can find nothing in the enabling provisions of the Social Security Act which empowers the Secretary of State to make regulations which confer decision-making power in relation to or in connection with a section 12 appeal on any person or body other than one acting as an appeal tribunal. In this context, Mr Commissioner Rowland said:

“Where Parliament has conferred a right of appeal to an appeal tribunal and has enabled the Secretary of State to make procedure regulations for the appeal tribunal under which interlocutory and other decisions may be made, the implication is that Parliament intended that those decisions would be made by the appeal tribunal save where specific provision is made to the contrary.”

29. I agree. The Secretary of State has no implied power to outsource decisions which relate to or are connected with appeal under section 12. He has correctly positioned the decision-making power in the appeal tribunal, albeit differently constituted for different purposes.

30. So far, I have considered Ms Lieven’s submission in the context of a strike-out decision under regulation 46(3). The position in relation to an extension of time under regulation 32(2) is essentially similar. For the same reasons, the LQPM is acting as the appeal tribunal and in no other capacity, regardless of whether the *vires* behind regulation 32 are to be found in section 12(7) of the Social Security Act (“provision as to the manner in which, and the time within which, appeals are to be brought”), section 79(6) (“such incidental, supplementary, consequential or transitional provision as appears to [the Secretary of State] to be expedient for the purpose of [the] regulations”), or a combination of them both. Ms Lieven favours section 79(6) but I do not consider that that enables her to escape the conclusion that the decision about extending time is that of the appeal tribunal, save in a case where the Secretary of State himself agrees to an extension under regulation 32(2).

31. In my judgment, if the Commissioners lack jurisdiction to hear an appeal in a case such as that of Mr Morina or Mr Borrowdale, it is not because the LQPM is acting in a capacity outwith the appeal tribunal.

“Appealability”

32. Ms Lieven’s alternative submission is that, even if the LQPM is acting *qua* appeal tribunal, some decisions are just not susceptible to appeal. She relies on two decisions of this Court made under earlier social security legislation. In *Bland v Chief Supplementary Benefit Officer* [1983] 1 WLR 262 (also reported as R(SB)

12/83), the statutory context was that of the Social Security Act 1980 and the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980. The appellant had been refused entitlement to a particular benefit and his appeal to the supplementary benefit appeal tribunal had failed. Under the Rules, he needed leave to appeal to a Commissioner on a question of law but the Commissioner refused leave. By section 14 of the Act, an appeal lay from “any decision of a Commissioner” to the Court of Appeal, but only with the leave of the Commissioner or of the Court of Appeal. The appellant unsuccessfully sought the leave of the Commissioner to go to the Court of Appeal and thereafter made an application to the Court of Appeal for leave to appeal the refusal of leave. The Court held that it had no jurisdiction because, although section 14 referred to “any decision”, the refusal of the Commissioner to grant leave to appeal from the tribunal was not a “decision” because, in the context of section 14, “decision” applied only to a decision “which determines the matter in dispute” (*per* Sir John Donaldson MR at page 267H). This conclusion has its roots in *Lane v Esdaile* [1891] AC 210. Clearly it would subvert the purpose of a leave requirement if a refusal of leave were itself appealable. To this day, a refusal by a Commissioner to grant leave to appeal from an appeal tribunal is challengeable only by way of an application for judicial review.

33. *Bland* was applied in *White v Chief Adjudication Officer* [1986] 2 All ER 905 (also reported as an appendix to R(S) 8/85). Mrs White was refused an invalidity pension by an insurance officer. She appealed to a Commissioner who dismissed her appeal. Some time later, the House of Lords in *Insurance Officer v McCaffrey* [1984] 1 WLR 1353 declared the law to be such as would have supported Mrs White’s case. She then applied to the Commissioner for leave to appeal out of time to the Court of Appeal. The Commissioner refused leave, whereupon Mrs White applied to the Court of Appeal to appeal the refusal to extend time. The Court of Appeal held that a refusal by the Commissioner to extend time was not a “decision” under section 14 of the 1980 Act because it was not an order which determined the outcome of the appeal and that, accordingly, the Court had no jurisdiction. Lawton LJ (at page 909e) considered a refusal to extend time to be “much less a decision of the Commissioner than any refusal of leave to appeal”.

34. Ms Lieven submits that this line of authority has not been doubted in later cases under the social security legislation and that it establishes that the refusal to extend time in Mr Morina’s case and the strike-out in Mr Borrowdale’s case are, by parity of reasoning, not appealable decisions.

35. The response of Mr Kovats is that, in the context of the present appeal, *Bland* and *White* must now be considered in the light of the later decision of this Court in *Rickards v Rickards* [1990] Fam 194, [1989] 3 WLR 748. In matrimonial proceedings in the county court, the husband, seeking to appeal from an order made by the registrar, failed to file a notice of appeal within the prescribed time limit. The judge refused his application for leave to appeal out of time but granted him leave to appeal against that refusal to the Court of Appeal which held, distinguishing *Lane v Esdaile*, that the grant or refusal of an application to extend the time limit for taking a step in proceedings, including giving notice of appeal, was not analogous to the grant or refusal of an application for leave to appeal, nor was it inherently unappealable. There was therefore jurisdiction to hear the husband’s appeal. Although *White* was not referred to, *Bland* was. Revisiting his judgment in *Bland*, Lord Donaldson remained of the view that a refusal of leave to appeal “is not the kind of decision

which ... section 14 [of the Social Security Act 1980] contemplates” but he added (at page 203A–B):

“In retrospect I regret that I added the sentence: ‘That section relates to a decision which determines the matter in dispute.’ This is wrong, since a truly interlocutory or procedural decision could give rise to an appealable question of law, even if it is unlikely that leave to appeal would be given.”

36. Mr Kovats submits that this passage is highly relevant to the present appeal. Indeed, it expressly informed the conclusion of Mr Commissioner Rowland that he had jurisdiction to hear the appeal of Mr Morina and Mr Borrowdale.

37. I cannot accept Mr Kovats’ submission that, in the light of *Rickards*, we should not follow *White*. Our concern is with the question of what is an appealable “decision” under section 14(1) of the Social Security Act 1998. In *Rickards*, the husband was seeking to appeal a decision which the registrar had had jurisdiction to make and in respect of which the judge had had a discretionary power to grant an extension of time. The position in Mr Morina’s case is quite different. Once the prescribed period of one month (regulation 31) and the additional extension period of 12 months (regulation 32) had expired, no one could enable Mr Morina to appeal against the decision of the Secretary of State. There is no general power to extend time which continues after the thirteen months have expired. In the case of Mr Borrowdale, he never did have a right to appeal against the decision of the Secretary of State to pay his income support by cheque. This is because (1) by section 12(1) of the 1998 Act, Schedule 2 to the Act renders certain decisions unappealable; (2) by paragraph 9 of Schedule 2, the list of unappealable decisions may be added to; and (3) by paragraph 5 (j) and (l) of Schedule 2 to the 1999 Regulations, decisions as to the manner and time of the payment of benefits have been added to the list of unappealable decisions. They are, within the meaning of the Regulations (regulation 1(3)), “out of jurisdiction appeals”. Thus, just as Mr Morina was seeking from the appeal tribunal something that it had no jurisdiction to grant, so too was Mr Borrowdale.

38. This is the context in which regulation 32 and regulation 46 have provided that certain decisions of the tribunal are allocated to an LQPM. They relate to unappealable or no longer appealable decisions of the Secretary of State. In the overwhelming majority of cases, they will be plainly recognisable as such when they arise and there are perfectly good and obvious policy reasons why no further avenue of appeal should be provided. I acknowledge that there may be a few cases in which there may be room for debate over, say, whether the thirteen months had truly expired or whether a decision really related to “the manner and time of the payment”. That is no doubt why provision is made for the decision to be taken by the LQPM. One must allow for the possibility that he may get it wrong but that does not necessarily mean that his decision must be considered to be an appealable one under section 14.

39. In my judgment, it is neither necessary nor desirable to import the *Rickards* reasoning into the field of the Social Security Act, particularly when the decisions sought to be appealed are the subject of unencumbered appellate exclusions. Where a Commissioner in the normal way refuses leave to appeal against a substantive tribunal decision, his refusal is susceptible to judicial review. It is common ground in the present case that, if a decision of the LQPM is unappealable to the Commissioners, it is susceptible to judicial review. Mr Kovats submits that that is a

less attractive remedy than the “more accessible” right to apply for leave to appeal to the Commissioners. I do not accept this submission. I tend to the view that the number of potential cases is relatively small and the potentially meritorious ones even smaller. In my experience, the Administrative Court is not greatly burdened by the number of applications for permission to challenge refusals by the Commissioners of leave to appeal. I see no reason why a claimant who has been shut out of an appellate remedy by the decision of an LQPM in circumstances such as these should be provided with a more “accessible” remedy than judicial review. To the extent that the Commissioners may be more accessible, there are countervailing policy reasons why they should be shielded from ill-founded applications and appeals in cases which are unappealable or no longer appealable to the appeal tribunal.

40. It is expressly provided that some of the decisions of the Secretary of State are not appealable to the appeal tribunal (section 12(1) and Schedule 2) and it is settled law that some decisions made within the appellate structure are not further appealable. I have made a number of references to the decision of a Commissioner refusing leave to appeal against a decision of the appeal tribunal (*Bland*). In addition to *White*, concerning the unappealability of a refusal to extend time, it is appropriate to refer also to *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33 (reported as R(IB) 6/03), in which it was held that a refusal of an adjournment by the appeal tribunal is not appealable to the Commissioners because “there is a plain distinction between a decision (that is, a decision upon the actual question whether a claimant is entitled to a particular benefit or not) and what may conveniently be called a determination (that is, a determination of any matter along the way leading to a decision, including a determination of a procedural issue such as an application for an adjournment)”: *per* Laws LJ at paragraph 14. I acknowledge that a refusal of an adjournment is not precisely comparable with an “out of jurisdiction” decision. However, *Carpenter* does support the proposition that there are instances of unappealability within the Social Security Act which may not be manifest on the face of the legislation. As Mr Kovats concedes, it is difficult to draw a bright line between the differential uses in the Act and the Regulations of the words “decision” and “determination” because, to some extent, the uses are not deployed with consistency. Moreover, it seems to me that in *Carpenter* Laws LJ was not limiting his distinction to the situations in which the Act or the Regulations use the word “determination”.

Conclusion

41. For all these reasons I have come to the conclusion that claimants in the position of Mr Morina and Mr Borrowdale do not have a right to seek leave to appeal from an LQPM to the Commissioners and the Commissioners do not have jurisdiction to entertain such appeal. Such decisions of an LQPM are unappealable, even though they are decisions of the appeal tribunal. A claimant who is aggrieved by such decisions is limited to relief by way of judicial review.

LADY JUSTICE ARDEN:

42. I agree with Maurice Kay LJ that this appeal must be allowed. I agree with all that he has said save that I would approach the third issue (appealability) as purely one of statutory interpretation. Putting the third issue in question form, the issue is: does section 14(1) of the Social Security Act 1998 (set out in [21] above) apply to

decisions by an LQPM that the purported appeal is an appeal which Parliament has provided cannot be appealed?

43. Maurice Kay LJ has explained in [37] above that neither Mr Morina nor Mr Borrowdale ever had a right of appeal. He has set out the provisions of the Social Security and Child Support (Decisions and Appeal) Regulations 1999 that are relevant and I would add simply that section 14(11) of the 1998 Act enables regulations to be made as to the time within which appeals are to be brought and applications made for leave to appeal.

44. Section 14 of the 1998 Act and regulations 31, 32, 46 and 47 of the 1999 Regulations together constitute the statutory framework for appeals which are outside the maximum time period and “out of jurisdiction” appeals (as described by Maurice Kay LJ above). In my judgment, this statutory framework is closely analogous to that considered by the House of Lords in *Lane v Esdaile* [1891] AC 210. The question was whether the House had jurisdiction to hear an appeal against the refusal of the Court of Appeal to grant permission to appeal. The Appellate Jurisdiction Act 1876 provides that “an appeal shall lie to the House of Lords from any order or judgment of” the Court of Appeal. The House of Lords unanimously rejected the argument that the refusal of leave to appeal to the Court of Appeal was an “order or judgment” of the Court of Appeal for this purpose. Lord Halsbury LC held that he would have hesitated to hold that an appeal did not lie if he had looked simply at the language of section 3, but he held that the answer was clear when the statutory framework was considered as a whole (page 212):

“ ...[W]hen I look not only at the language used, but at the substance of the meaning of the provision, it seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal – that there should not be an appeal unless some particular body pointed out by the statute (I will see in a moment what that body is), should permit that an appeal should be given. Now let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeal it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called itself. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? ”

45. So too here the word “decision” in section 14(2) of the 1998 Act looks all-embracing but it has to be given a purposive interpretation. Mr Morina’s case falls within regulation 32 of the 1999 Regulations which provides that appeals cannot be more than one year after the expiration of the last date for appealing under regulation 31. Mr Borrowdale’s case falls within regulation 46 because it is an out of jurisdiction appeal. To interpret the word “decision” as including a decision that either of these appeals cannot be brought would be to subvert the provision that an appeal does not lie. It would produce diametrically the opposite result from that which was clearly intended by the 1999 Regulations.

46. Mr Kovats submits that, applying Article 6 of the European Convention on Human Rights (right of access to a court), the court should proceed on the assumption that a right of appeal is conferred. This submission contrasts with the

second sentence of Lord Halsbury's speech in *Lane* that "an appeal is not to be presumed but must be given". There has been no analysis of the precise respects in which a decision of the LQPM would not satisfy Article 6, but, taking the submission on its face, I would hold that the right of access to court is not excluded by the statutory framework in question here. That is because it is always open to an appellant who contends that his case has been wrongly struck out or dismissed, in circumstances where under the regulations there is no appeal, to bring judicial review proceedings. The grounds for judicial review may be more limited but it has not been suggested that judicial review proceedings would not satisfy any right under Article 6. Accordingly, this is not a case for a strained interpretation under section 3 of the Human Rights Act 1998.

47. As this question is to be decided by reference to the words used by Parliament, I consider that the observations of Lord Donaldson MR in *Rickards v Rickards* do not assist in the instant case.

48. For these reasons, I agree with Maurice Kay LJ on the "appealability" issue.

SIR ANTHONY CLARKE MR:

49. I agree that this appeal should be allowed for the reasons given by Maurice Kay and Arden LJ. I do not wish to add anything except on the appealability point.

50. I add a few words only to emphasise the point made by Arden LJ that the question is entirely one of statutory construction of a particular statutory provision, namely section 14 of the Social Security Act 1998. In some contexts the word "decision" might well include an interlocutory decision such as a refusal of an adjournment or an order to disclose documents. All depends upon the particular circumstances. In the particular context of section 14 of the 1998 Act, I agree that neither of the decisions complained of was appealable.