

Case No: C1/2012/2786



Neutral Citation Number: [2013]
IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE HADDON-CAVE)

EWCA Civ 376
(CIVIL DIVISION)
COURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL
Friday, 1st March 2013

Before:

LORD JUSTICE AIKENS

-

**The Queen on the Application of
NICHOLAS**

Appellant

- and -

**UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER) & ANR**

Respondents

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Desmond Rutledge (instructed by Plumstead Law Centre) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

Judgment
(As Approved by the Court)
Crown Copyright©

Lord Justice Aikens:

1. This is a renewed application for permission to appeal following a refusal on paper by Richards LJ on 5 December 2012.
2. The matter concerns a claim by the applicant, who I will call Janet for present purposes, for incapacity benefit. There is no need to go into the history for present purposes except to say that she undoubtedly suffered an accident, became incapacitated for work purposes, had incapacity benefit for some long time and then had a further medical examination and as a result of a decision taken after that examination the incapacity benefit was stopped.
3. That decision was appealed to the First-tier Tribunal, and at the First-tier Tribunal the question arose as to the whether or not the Tribunal had the notes of all the medical examinations that the applicant had previously undergone. It seems that they did not, and the chairman asked whether or not the applicant wanted an adjournment to get them and she said no. The FTT then rejected the appeal. The Upper Tribunal Judge refused permission to appeal.
4. Subsequently Foskett J granted permission to apply for judicial review of that Upper Tribunal Judge's decision. He did so on the basis of the recent Supreme Court decision in Cart [2011] UKSC 28, saying that it was at least arguable that there had been a "collapse of fair procedure" such that there was a "compelling reason" to review the decision to refuse permission to appeal from the FTT's decision.
5. The judicial review hearing was before Haddon-Cave J on 26 July 2012 and he dismissed the claim for judicial review, saying that there had been no unfairness at the FTT hearing. He also referred to the "Cart test", if I can call it that for short, but he did so, I am quite satisfied, in a manner which was obiter and not necessary for his decision.
6. Today Mr Rutledge submits that there is a reasonable prospect of a successful appeal from Haddon-Cave J's decision based not only on established case law but also on a very recent case which is the decision of the Upper Tribunal in ST v Secretary of State for Work and Pensions (IB) [2012] UKUT 469 (AAC), a decision which was handed down on 5 December 2012 and therefore was not before Haddon-Cave J.
7. ST, as with previous case law, deals with the question of the duty of a decision maker acting on behalf of the Secretary of State when there is an appeal to a tribunal which is effectively an inquisitorial tribunal when dealing with such things as e.g. incapacity benefit or equivalents. In the judgment of Upper Tribunal Judge Wright in ST, he put forward the proposition at paragraph 25 that the Secretary of State's decision maker is

under a legal obligation to provide the First-tier Tribunal with copies of all documents relevant to the case that he has in his possession. Further in the judgment it is stated that if this obligation has not been fulfilled then this may result in the First-tier Tribunal being unable to decide those types of appeal properly and fairly.

8. Accordingly, the argument that Mr Rutledge submits has a reasonable prospect of success is that in the present case the decision maker for the Secretary of State should have ensured that the FTT did not accede to the wish of the applicant not to adjourn and carry on without relevant medical reports because, it is submitted, it was the duty of the decision maker to ensure that those documents were all in the possession of the FTT in order that it could make a proper decision.
9. It seems to me that there is a reasonable prospect of success on this argument. It also seems to me that the decision in ST v Secretary of State for Work and Pensions is one which has quite far-reaching consequences and it is proper for this court to consider it.
10. So for those two reasons I am going to grant permission to appeal. I do not grant permission on what I have called “the Cart issue”, which was raised, as Mr Rutledge very properly put it, as a fallback argument.
11. Accordingly I am granting permission in respect of grounds of appeal (i), (iii) and (by amendment) (iv). The time estimate will be half a day. Three Lords Justices and one to have public law experience.

Order: Application granted in part