Case No: C1/2009/2281

Neutral Citation Number: [2010] EWCA Civ 361
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
(UPPER TRIBUNAL JUDGE D J MAY QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 15th March 2010

Before:

SIR SCOTT BAKER

- -

Between:

SANDHU

Appellant

- and -

THE SECRETARY OF STATE FOR WORK AND PENSIONS **Respondent**

- -

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

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved by the Court)

Sir Scott Baker:

1. This is a renewed application for permission to appeal following refusal on paper by Thomas LJ. The decision under challenge is that of the Upper Tribunal Judge D J May QC dated 20 July of last year, in which he dismissed the appellant's appeal against a First Tier Tribunal decision that he did not qualify for the mobility component of disability living allowance at the higher rate.

2. The grounds of appeal concern the correct construction of the phrase 'unable to walk or virtually unable to walk' in regulation 12(1)(a)(i) of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890). Mr Rutledge, who has made a persuasive submission on the part of the appellant, submits that where the Tribunal went wrong was that once it had made a finding as appears in paragraph 3 that the claimant could not walk, notwithstanding its acceptance of his evidence that he could not put any weight or stand in any way on his right leg, the Tribunal did not go on to say how in those circumstances it could be concluded that he was able to walk in the true sense of the word.

3. Mr Rutledge referred me to two decisions: first, the Tribunal decision of R (M) 2/89; second, the unreported decision of reference CDLA/97/2001. He submits that the conclusion to be drawn from these decisions is twofold: first, that both legs are required for walking; and secondly, that it is necessary to have one leg at all times touching the ground and for it to be able to bear some weight. I was also referred to Lees v Secretary of State for Social Services [1985] 1 AC 920 and the reference by Lord Scarman at page 934 C-D where he said:

> "One could be forgiven for thinking that the effect of regulation 13(1) [on medical questions] is that the question in this appeal is to be treated as a medical question and not a question of law. But this should be an over-simplification. Whether a claimant for the allowance is suffering from a physical disablement, and the nature and physical consequences of any such disablement, are clearly to be treated as medical questions. But the question of whether the disablement is such that a claimant is unable to walk, or virtually unable to do so, cannot be answered without knowing what the statute means by 'walk' and 'walking': and the latter question, being one of construction of the statute, is a question of law. It is, therefore, necessary to determine the question of law in order to answer the medical question."

The House of Lords was there considering a broader question than that in the present case, but Lord Scarman's observations are nevertheless pertinent.

4. It seems to me that Mr Rutledge has an arguable case that there is here an error of law and that there is an important point of principle or practice that warrants the decision of this court. It seems to me that it is arguable, first of all, that the Tribunal misdirected itself on walking, and Mr Rutledge's fall back position is that even if they got that right, they made a decision that was outside the bounds of reasonableness.

5. In the end, however, the point that seems to me to be important is that this court should consider what is the correct meaning of walk, unable to walk or virtually unable to do so in the context of the regulations in question. It seemed to me at first blush that if Mr Rutledge's submissions are right, that would open up a large number of people for eligibility under the relevant regulation, but Mr Rutledge points out that in any event the condition has to have been such that the applicant has had it for at least three months and continues to have it at the time of the hearing.

6. Accordingly I have decided to allow this appeal to go forward. I grant permission to appeal. It seems to me that it is an appeal that ought to be heard by three Lords Justices or two Lords Justices and one High Court judge. The estimated length is half a day, Mr Rutledge to confirm or vary that estimate in writing to the court prior to the hearing.

Order: Application granted