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SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

[ORAL HEARING]

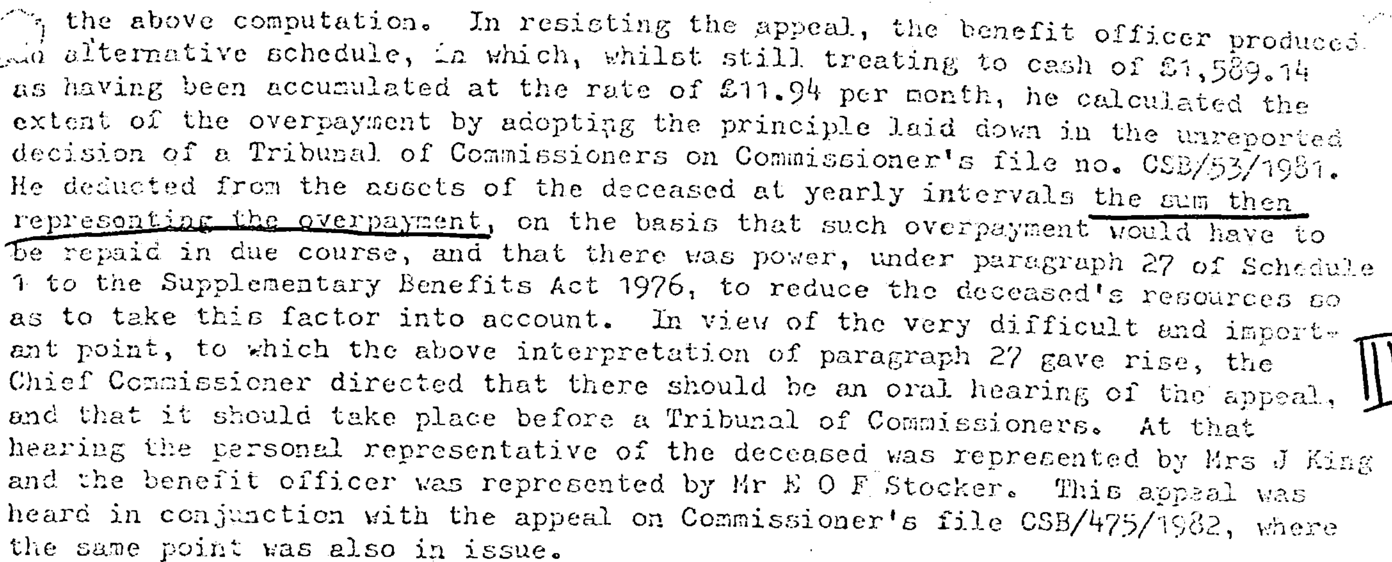
1. For the reasons hereinafter appearing, the decision of the supplementary benefit appeal tribunal given on 18 December 1981 is erroneous in point of law, and accordingly we set it aside. We direct that the matter be re-heard by a differently constituted tribunal.

2. This is an appeal brought, with the leave of a Commissioner, by the legal personal representative of T L deceased ("the deceased") against the decision of the appeal tribunal of 18 December 1981. The deceased had been in receipt of supplementary benefit from 2 March 1970 to 11 May 1981 on the basis of his statement that his only capital consisted of a National Savings Bank account and one Premium Savings Bond. However, after his death it came to light that he had throughout the relevant period been in possession of two Midland Bank accounts and also that he had £1,589.14 in cash at his death. The benefit officer decided that the deceased had, as a result, been overpaid supplementary benefit to the extent of £4,383, and that this sum was recoverable under section 20 of the Supplementary Benefits Act 1976.

3. The figure of £4,383 was arrived at in accordance with a schedule produced by the benefit officer and included in the papers. However, the personal representative appealed to the supplementary benefit appeal tribunal, who in the event upheld the benefit officer, giving as the reasons for their decision the following:

> "The appellant could not provide evidence of how the cash in the house accrued. The Tribunal consider that under the circumstances the Department's method of calculation is a reasonable one".

4. It is important to note that, in arriving at the figure of £4,383 the benefit officer proceeded on the basis that the cash found at the death of the deceased had been accumulated at a regular rate throughout the entirety of the period under consideration. Accordingly, he divided the £1,589.14 by 133, that being the number of months making up the period, and assumed that the sum in question had been saved up at the rate of £11.94 per calendar month. In his appeal against the tribunal's decision the personal representative of the deceased contended that the benefit officer was not at liberty to deal with the cash found at the deceased's premises on his death in the way actually adopted


the above computation. In resisting the appeal, the benefit officer produced an alternative schedule, in which, whilst still treating to cash of £1,589.14 as having been accumulated at the rate of £11.94 per month, he calculated the extent of the overpayment by adopting the principle laid down in the unreported decision of a Tribunal of Commissioners on Commissioner's file no. CSB/53/1981. He deducted from the assets of the deceased at yearly intervals the sum then representing the overpayment, on the basis that such overpayment would have to be repaid in due course, and that there was power, under paragraph 27 of Schedule 1 to the Supplementary Benefits Act 1976, to reduce the deceased's resources so as to take this factor into account. In view of the very difficult and important point, to which the above interpretation of paragraph 27 gave rise, the Chief Commissioner directed that there should be an oral hearing of the appeal, and that it should take place before a Tribunal of Commissioners. At that hearing the personal representative of the deceased was represented by Mrs J King and the benefit officer was represented by Mr E O F Stocker. This appeal was heard in conjunction with the appeal on Commissioner's file CSB/475/1982, where the same point was also in issue.

5. As to the personal representative's contention that the benefit officer was not entitled to include, in the way he had, the cash discovered at the deceased's death, we consider that we can deal with this matter shortly. There was no evidence before the tribunal as to how the cash came into existence. It was suggested in the submission made to us on behalf of the personal representative that it might be the result of the deceased's selling off certain items of furniture, but this is not a question for us. We are only concerned with matters of law, not of fact. Certainly, at the hearing before the appeal tribunal no suggestion of the kind now postulated had been made, and there simply was no evidence at all as to the actual source of the cash. Now, it must be remembered that, in cases of recovery under section 20 of the Supplementary Benefits Act 1976, the onus of proof rests on the benefit officer (see the decision on Commissioner's file CSB/733/1982 to be reported as R(SB) 34/83). The first sentence of the reasons given by the tribunal for their decision suggests that they misunderstood where the onus of proof properly lay. The implication is that the personal representative of the deceased had to establish where the money came from. But, in any event, the second sentence of the reasons for their decision is wholly unsatisfactory, in that the tribunal have failed to explain why in the circumstances the Department's method of calculation, which proceeded on the basis that cash was accumulated at a regular rate throughout the relevant period, was a reasonable one. The appellant is entitled not to be left in the dark as to the reasons for the tribunal's decision. Moreover, it is incumbent on the tribunal to make appropriate findings of fact on which to base their determination. In the present case, the tribunal failed to comply with their duty in this respect. The tribunal are in clear breach of rule 7(2)(b) of the Appeals Rules. Accordingly, their decision is erroneous in point of law and we must set it aside. We direct that the matter be re-heard by a differently constituted tribunal.

6. However, before leaving the above point, we should emphasise that, when the new tribunal come to consider this matter, they must bear in mind that, where, as here, the deceased has failed to make proper disclosure of his resources (however innocently this may have come about), it is not open to the personal representative to defeat the benefit officer's attempt to arrive at the sum to be recovered under section 20 of the Supplementary Beneifts Act 1976 by the simple device of:

(i) failing to make any or any adequate enquiry as to the time when the deceased first acquired the resources not disclosed, and then

(ii) relying on the principle that the burden of proof falls on the benefit officer.

ersonal representative must make vigorous attempts to ascertain where ash came from. It will not be enough for him merely to sit back and hat he has no information. In the words of paragraphs 9 and 10 of the ion on Commissioner's file CSB/733/1982 (to be reported as R(SB) 34/83):

"It may be that, in the event, [the personal representative] is unable to ascertain anything for certain, but [he] must at least present evidence of all the effort that [he] has made and all the enquiries [he] has undertaken to ascertain the origin of the money in question. If [he] provides no evidence that [he] has done anything, then the position is substantially no different from that of a claimant who is alive and refuses to be forthcoming. The tribunal, which will rehear the appeal, must be satisfied that the [personal representative] has taken all reasonable steps to ascertain the history of the sum in question. They will approach the matter from the standpoint that the deceased was a wrongdoer and that public money is at stake.

10. Of course, if the [personal representative] has made every reasonable effort to find out where the money came from, and the tribunal are wholly satisfied that [he] is unable to discover anything that resolves the matter, then the benefit officer will not have discharged the burden of proof laid on him".

the present case the origin of the cash cannot be determined, notwith- ding proper efforts have been made to ascertain its source, then there is cessary reason why the cash should have existed at any earlier time than ate of the deceased's death, and the consequence is that it must not be into account in determining the amount of benefit to be recovered.

9. However, the really difficult question at issue in this case is whether enefit officer was entitled to make the concession he did in his second d of calculating the amount of benefit overpaid. Under this method the it officer deducted from the capital resources of the deceased with annual the amount of benefit overpaid. The correctness of this approach depends the correctness of the decision on which it was based, namely CSB/53/1981. was a decision of a Tribunal of Commissioners, which was considered in ction with R(SB) 2/83. The real issue which fell to be determined by ibunal of Commissioners in those two cases was whether or not, in computing lement to supplementary benefit, a deduction could be made from capital rces to take account of liabilities. In the event, the Tribunal decided the relevant statutory provisions did not allow a deduction of this kind. er, after the hearing it transpired that, although the Tribunal of sioners had directed their minds to the effect of the Supplementary its Act 1976 as amended by the Social Security Act 1980, the relevant d falling for determination in the case of CSB/53/1981 extended from rch 1969 to 5 November 1979, and accordingly fell partly within the sions of the Supplementary Benefits Act 1976 as originally enacted and y within the Supplementary Benefit Act 1966 which it replaced. Accordingly,

it became necessary to consider the effect of paragraph 27 of Schedule 1 to the 1976 Act and paragraph 26 of the 1966 Act, both of which read as follows:

"Any resources not specified in the [foregoing] [preceding] provisions of this Schedule may be treated as reduced by such amount (if any) as may be reasonable in the circumstances of the case."

8. As in the present appeal, the issue there was the extent to which any overpayment could be recovered under section 20 from the estate of a deceased claimant. No submissions were directed at this point during the hearing before the Tribunal of Commissioners, and at the time it was thought that the relevant provision had become obsolete by the operation of the 1980 legislation which came into force on 24 November 1980. As was said in paragraph 12 of that decision:

"The point on paragraph 26 (and 27) was not canvassed at the hearing, and we have considered whether it would be right to give the benefit officer an opportunity of making a submission on it. Had the paragraph or one like it been still in force, we should have regarded it as necessary to do this. But we are dealing with provisions that are now obsolete, we think it best to deal with the matter ourselves without more delay. We consider further that this is a case in which it is appropriate for us, who have all the relevant facts before us, to determine the matter ourselves. So determining it we think that it would have been right had the existence of the premium bonds been before the determining authority at a time when it was known that the claimant had been overpaid, but had not yet repaid the amount found to be overpaid, for them to treat his resources as reduced by the amount he was bound to [repay]."

9. It has since been brought to the Commissioners' attention by the Department that in fact millions of pounds are involved in the failure of deceased claimants to disclose the full extent of their resources, and that, although paragraph 27 has not been re-enacted in the subsequent legislation, it is still operative in respect of the estates of deceased claimants who failed to make proper disclosure of their resources prior to 24 November 1980, and therefore its construction remains of paramount importance. It is against this background that we are invited to consider the correctness or otherwise of CSB/53/1981.

10. Mr Stocker was in the somewhat embarrassing position of having to repudiate the written submissions of the benefit officer, and to contend that the second method of computation adopted by the benefit officer was erroneous. It was, he submitted, erroneous because the decision CSB/53/1981, on which it was based, proceeded on a misinterpretation of the effect of paragraph 27 of Schedule 1. He argued that there was no power under paragraph 27 to reduce the value of resources, whether such resources were capital or income, but that this particular provision was there as a long-stop to catch items, which, for some reason or other, had not already been included in the resources previously mentioned in this Schedule. He had in mind casual receipts, eg birthday presents, or winnings on football pools or horse racing.

11. In support of his contention Mr Stocker cited a decision of Sir Douglas Frank, QC, sitting as a Deputy Judge of the Queen's Bench Division of the High Court in Musgrove v The Secretary of State for Social Services. This case was decided on 3 July 1981 in exercise of the jurisdiction now falling to be exercised by the Social Security Commissioners. Before 24 November 1980 appeals from supplementary benefit appeal tribunals lay in England to a judge of the High Court and in Scotland to a judge of the Court of Session pursuant to section 15

of the Tribunals and Inquiries Act 1971, but since that date the relevant jurisdiction has been exercised by the Social Security Commissioners. Accordingly, although the Musgrove case is a decision of the High Court, it arises out of a co-ordinate and not a superior jurisdiction, and is therefore not binding upon us. There is no statute or common law rule by which one Court is bound to abide by the decision of another Court of co-ordinate jurisdiction (The Vera Cruz (No 2) (1884) 9 PD 96 at 98 CA; Palmer v Johnson ([illegible]) 13 QBD 351 at 355, CA; Chapman v Goonvean and Rostowrack China Clay Co Ltd [1973] 1 All ER 218 at 223, 224 (affirmed [1973] 2 All ER 1063, CA); Portec (UK) Ltd v Mogensen [1976] 3 All ER 565 at 568, EAT). In our view, the weight to be attached to the decision in the Musgrove case is the same as the weight attaching to any previous decision of a Commissioner. It has a persuasive, but not a binding, force. We regret that in the present instance we are unable to follow Sir Douglas Frank QC's decision.

12. In the course of his judgment Sir Douglas Frank, QC observed as follows:

> "It seems to me that it is clear from the scheme of the Schedule that what paragraphs 17 onwards are doing are to set out what resources shall or shall not be taken into account, and there is there a reference to capital resources. The reason for the opening words of paragraph 20 'Capital resources taken into account' is to exclude the capital resources comprising the claimant's own dwelling. That is why it is phrased in that way, otherwise it is clear to me that all capital resources are to be taken into account.
>
> Paragraph 27 just refers to any resources, and of course it can mean capital or income. One of the fallacies of the Appellant's argument would be that if the argument is right then any resources, whether they be capital or income, would first have to be considered under paragraph 20 [presumably an error for 27] unless there is a mandatory provision as, for example, under paragraph 21 which says: 'For the purposes of this Schedule a person's net weekly earnings shall be calculated or estimated in such manner as the Secretary of State may, by regulations made under this paragraph, prescribe.' Again, applying [the appellant's] argument, before paragraph 21 could be looked at you would first have to say how much would have to be taken into account.
>
> Be that as it may, I think that paragraph 27 is no more than a long stop, that it would apply to cash earnings as opposed to weekly income. In my judgment that is the effect of the purposes of paragraph 27 and accordingly this appeal must fail".

13. It may be that, when the learned judge made reference to "cash earnings", he meant "casual earnings", but in any event earnings of any sort must be income resources, and earnings are specified in paragraph 22 of the Schedule. Probably, the learned judge meant, not earnings, but receipts. Presumably, he had in mind casual receipts, such as birthday presents or winnings from gambling. However, here again these receipts will in the hands of the recipient become, in our judgment, capital resources; they may not be particularly large, but they will still take upon themselves this nature and, if Sir Douglas Frank, QC is right in his earlier assertion that "Capital resources taken into account" comprise all capital resources save and except a claimant's home, then "casual receipts" must necessarily have been specified in the Schedule.

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14. Mr Stocker freely accepted that the judgment left much to be desired. However, he contended that historically, ie from 1948 onwards, paragraph 27 and its statutory predecessors had always been given by the Secretary of State the same interpretation as that adopted by Sir Douglas Frank, QC. But against this it must be remembered that the Secretary of State's interpretation had never, we understand, been tested in the Courts prior to the Musgrove case, and in any event the Secretary of State had always been able to rely on paragraph 4(1)(b) of the Schedule for the elasticity which Mr Stocker contended was not available under paragraph 27.

15. Mr Stocker argued that the assets not disclosed by the deceased, namely his Midland Bank accounts and, in so far as it is relevant the cash, were capital resources, and that such resources were specifically mentioned in the Schedule prior to paragraph 27. He contended that, as a result, they could not fall within paragraph 27 and therefore could not in any way be reduced in value. The difficulty about this contention is that, if the words "any resources not specified in the foregoing provisions of this Schedule" are to be construed as meaning only resources not included in the resources referred to in the previous part of this Schedule, then it is difficult to see what resources could possibly fall within paragraph 27. Undoubtedly, the earlier provisions of this Schedule referred to capital resources, albeit indirectly, and to income resources. Mr Stocker's approach means that paragraph 27 cannot take in anything that is a capital resource or an income resource, and although he endeavoured to follow Sir Douglas Frank, QC by saying that paragraph 27 was a long-stop embracing receipts, which do not fall within either of the foregoing types of resources, for the reasons already set out we do not accept that casual receipts can be other than capital resources. In other words, the effect of Mr Stocker's submission is to render paragraph 27 of no practical effect.

16. Although the drafting of paragraph 27 leaves much to be desired, nevertheless we think that the proper interpretation to be given to it, the interpretation which was in effect adopted by the Tribunal of Commissioners in CSB/53/1981, is to regard the words "any resources not specified in the foregoing provisions of this Schedule" as meaning any resources not specifically catered for in the foregoing provisions of this Schedule. A close examination of the Schedule shows that certain specific resources are to be dealt with in a specific fashion. For example, the capital value of a dwelling occupied by the claimant will be disregarded. So too will any maternity grant, any death grant or any sums payable to any person as a holder of the Victoria Cross or the George Cross. Again, capital resources below £1,200 are to be disregarded. Furthermore, there are specific provisions dealing with how earnings are to be computed, and again there is a disregard of £4 a week from certain forms of income, and in addition there is a limited disregard of occupational pensions. Moreover, paragraph 26 deals with certain specific resources falling to be treated as income. However, in our view, where there is no specific provision dealing with a specific resource, then paragraph 27 allows that resource to be "reduced by such amount (if any) as may be reasonable in the circumstances of the case". This way meaning is given to paragraph 27.

17. Accordingly, in our judgment, the resources not disclosed by the deceased in the present case, namely his Midland Bank accounts (or, for that matter, the cash found on his death, if this proves as a matter of fact to be a relevant consideration) are "not specified in the foregoing provisions of [the] Schedule", and it will be open to the new tribunal, when they come to consider this appeal

afresh, to treat such resources, if they are so minded, as reduced by such amount as may be reasonable in the circumstances of the case. It will be a matter entirely for them. It may be that what is reasonable in the circumstances of this case is to do what the benefit officer did in his second computation, namely to reduce on an annual basis the capital resources of the deceased by deducting therefrom the amount of accrued overpayment. It may be that the tribunal will take the same view as the benefit officer, and regard the liability to make repayment pursuant to section 20 as something which can properly be deducted from the deceased's resources pursuant to paragraph 27. However, this is a matter for the tribunal, and not for us. It must, of course, be remembered that paragraph 27 can only apply in respect of the period up to and including 23 November 1980. For the period thereafter regard will have to be had to the relevant provisions of the Supplementary Benefit (Resources) Regulations 1980 in accordance with the principles expounded by a Tribunal of Commissioners in their decision on Commissioner's file CSB/531/1982.

18. Our decision is as set out in paragraph 1.

Signed: I O Griffiths
Chief Commissioner

Signed: V G H Hallett
Commissioner

Signed: D G Rice
Commissioner

Date: 25 July 1983

Commissioner's file: CSB/338/1982
C SBO file: SBO 916/82
Region: London North