

Meaning of supervised
study in reg 5(2) CPAG
CB Regs.

95/92



JM/1/LM

Commissioner's File: CF/009/1991

CHILD BENEFIT ACT 1975
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

INTERIM DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 11 September 1990 which confirmed a decision issued by the adjudication officer on 15 December 1989. My decision is that the aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside. For reasons which appear below, I carry my decision no further at this stage than to direct the adjudication officer as set out in paragraph 19 below.

2. The benefit involved is child benefit. The relevant child is Sarah, who was born on 7 August 1971. The central issue is whether Sarah was at the material time receiving full-time education within the meaning given to that term by the child benefit legislation.

3. I held an oral hearing of the appeal. The claimant, Sarah's mother, attended - and I heard evidence from her. She was ably represented by Mr G Tait, a welfare rights officer of the Social Services Department of the Wolverhampton Metropolitan Borough Council. The adjudication officer was represented by Mr N Butt, of the Office of the Solicitor to the Departments of Health and Social Security. I am as well acquainted with Mr Butt as Mr Butt is with the complexities of social security law.

4. In June 1989 Sarah, then at a Wolverhampton school ("the School") and aged just under 18, sat her 'A' levels. She was hoping to proceed to university. Unfortunately, however, her grades in two subjects, geography and history, fell short of expectations. At least three things are clear from the evidence:

- (a) The School had a conscientious and caring headmaster.
- (b) The claimant enjoyed a good relationship with that

headmaster. (Sarah had been head girl.)

- (c) The School was blessed with staff imbued with the old-fashioned teaching virtues.

It was decided that, in furtherance of her university aspirations, Sarah should resit geography and history.

5. At the beginning of the autumn term in 1989 the claimant went to see the headmaster. It would have been perfectly feasible for Sarah to have returned to the School for another year as an ordinary pupil. Unsurprisingly, however, it was decided that that would not be in her best educational interests. Her aim was to improve grades which she had already attained at a lower level than the universities required. Much time would have been unfruitfully spent had she returned to classrooms in which the whole of the final year in the respective subjects was gone through from beginning to end. Accordingly, special arrangements were made for her; and those arrangements took account of the importance of continuity in a pupil's instruction. Her two tutors in the respective subjects had retired at the end of the summer term in 1989. They were both prepared, however, to help Sarah towards her goal.

6. I summarise the arrangements that they came to:

- (a) Once a week Sarah went to the respective homes of the two retired tutors and received, at each, one hour of tuition in the respective subject. Some holidays from that were taken; but I understand that they did not extend to the full normal school holidays.
- (b) For one hour a week during term-time, Sarah attended for personal tuition with the master who had taken the place of the retired history tutor (who is a lady). That tuition was given on the School's premises. The claimant told me that the retired history tutor was "in continual liaison" with the history master who had taken her post at the School.
- (c) All three tutors were ready to speak - and did speak - with Sarah by telephone when she had any problems or queries whilst she was studying in her own home.
- (d) Sarah had unrestricted access to the School's library. She spent perhaps two hours a week there, researching and studying.
- (e) A rigorous programme of work was drawn up. It involved four essays a week and the preparation of the work to be discussed at the respective tutorials.

The claimant, who was obviously a sincere and truthful witness, told me that, in the course of a week, Sarah put in as many hours of work as she would have done had she been attending the School

as an ordinary pupil.

7. Whatever be the outcome of these proceedings in terms of child benefit, the story has a happy ending. When she resat 'A' levels in 1990, Sarah achieved the required grades in geography and history. She duly passed on to Nottingham University.

8. I turn to the relevant legislation. I set out so much of sections 1 and 2 of the Child Benefit Act 1975 as are material to this appeal:

"1(1) Subject to the provisions of this Part of this Act, a person who is responsible for one or more children in any week beginning on or after the appointed day shall be entitled to a benefit (to be known as "child benefit") for that week in respect of the child or each of the children for whom he is responsible.

.....

2(1) For the purposes of this Part of this Act a person shall be treated as a child for any week in which -

(a) he is under the age of sixteen; or

(aa) he is under the age of eighteen and not receiving full-time education and prescribed conditions are satisfied in relation to him; or

(b) he is under the age of nineteen and receiving full-time education either by attendance at a recognised educational establishment or, if the education is recognised by the Secretary of State, elsewhere.

(1A) The Secretary of State may recognise education provided otherwise than at a recognised educational establishment for a person who, in the opinion of the Secretary of State, could reasonably be expected to attend such an establishment only if the Secretary of State is satisfied that education was being so provided for that person immediately before he attained the age of sixteen.

(1B) Regulations may prescribe the circumstances in which education is or is not to be treated for the purposes of this Act as full-time."

And I quote one definition from section 24:

"'recognised educational establishment' means an establishment recognised by the Secretary of State as being, or as comparable to, a university, college or school;".

9. Section 2(1B) of the 1975 Act takes us to regulation 5 of the Child Benefit (General) Regulations 1976 (which is headed

"Circumstances in which education is to be treated as full-time education"):

"5(1) For the purposes of the Act the education which is specified in paragraph (2) shall be treated as full-time education.

(2) The education referred to in paragraph (1) is education received by a person attending a course of education at a recognised educational establishment and in the pursuit of that course, the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise, experiment or project for which provision is made in the curriculum of the course, exceeds 12 hours per week, so however that in calculating the time spent in pursuit of the course, no account shall be taken of time occupied by meal breaks or spent on unsupervised study, whether undertaken on or off the premises of the educational establishment."

10. I think that it was common ground before me that in the academic year which began with the autumn term in 1989 Sarah was "a person attending a course of education at a recognised educational establishment". I myself was a member of the Tribunal of Commissioners which, in R(SB) 26/82, gave detailed consideration to (inter alia) the meaning to be given to "attending a course of education" (see paragraphs 16 to 27 of our decision). That was in the context of regulation 7(2) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 - and we were specifically considering the phrase "attending for not more than 21 hours a week a course of education at an establishment recognised by the Secretary of State as being, or as comparable to, a college or school ... etc". Regulation 5(2) of the Child Benefit (General) Regulations (cf the quotation in paragraph 9 above) has rendered much more specific the criteria by which the relevant number of weekly hours are to be ascertained. I am confident, however, that (leaving aside the issue of weekly hours) Sarah was, in the academic year 1989/90, in sufficient contact with the School to be properly regarded as attending a course of education thereat.

11. But if the claimant is to avail herself of regulation 5(2) of the Child Benefit (General) Regulations, she must establish that Sarah, in pursuit of her course, spent more than 12 hours per week "receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise, experiment or project for which provision [was] made in the curriculum of the course". And here, of course, we run up against the meaning to be given, in this context, to the word "supervised". "Supervised" urged Mr Butt, imports the presence, or close proximity, of a teacher or tutor; and he referred me to the phrase "contact hours" in the note to regulation 5 in "Non-Means Tested Benefits: The Legislation", Bonner, Hooker and White, 1991 Editn, page 588. No so, contended Mr Tait. "Supervised" falls to be given a less rigid meaning.

Study can be properly described as "supervised" if it is pursued in accordance with precise instructions or guidance issued by a teacher or tutor; and especially so where that teacher or tutor, whether by reading or hearing an essay or by subsequent tutorial, carefully ascertains the degree to which have been followed the instructions and guidance.

12. I confess that I do not find this an entirely straightforward issue to decide. "Supervise" is not a term of art. It is an ordinary, everyday English word. But it can - in ordinary, everyday English - bear somewhat different meanings. I quote all of the meanings given in the Shorter Oxford English Dictionary:

- "1. To look over, survey, inspect; to read through, peruse. To read through for correction; to revise.
2. To oversee, have the oversight of, superintend the execution or performance of (a thing), the movements or work of (a person)."

(All the meanings given under head 1 are marked as obsolete.) Those meanings are in no way decisive of the issue before me; although I must confess that they strike me as tending more towards Mr Tait's construction than towards Mr Butt's. But - as so often is the case when one is seeking the appropriate meaning to be attributed to a word which can carry somewhat varying meanings - it is helpful to set "supervised" in its full context.

13. In my view, the most vital element in that context is that we are in the realm of schools and similar educational environments. Those in receipt of "advanced education" are expressly excluded from the child benefit sphere - see regulation 7A of the Child Benefit (General) Regulations; and in regulation 1(2) "advanced education" is defined to include, broadly speaking, all education above 'A' level, ordinary national diploma and Scottish Higher Certificate. I understand that at Cambridge the term "supervisor" is - or may be - applied to those who at Oxford are termed "tutors"; and that those so styled discharge functions comparable to the functions discharged by Sarah's tutors during her studies for her resitting of the two 'A' level subjects. But I think that - where schools are concerned - "supervised", when applied to "study, examination or practical work" would ordinarily be understood to import the presence or close proximity of a teacher or tutor; someone at hand, not only to preserve order and enhance diligence, but also to render such assistance to the students as might be appropriate.

14. I consider, too, that the historical context is also of relevance. In relation to one form of wording or another, this issue - or something very like it - has arisen before. Mr Tait referred me to the unreported decision on Commissioner's file C.F. 38/83. He cited a lengthy passage from paragraph 5, from which I have extracted the following sentences:

"I consider that when determining whether a claimant is to be regarded as receiving full-time education by attendance at a recognised educational establishment, one has to be satisfied that he attends at such an establishment. If he does, it is then necessary to determine whether the education he receives by such an attendance is full-time education, not being advanced education. In determining whether it is full-time education regard should be had, in particular, to (a) the time he devotes to this educational activity and (b) whether the studies undertaken by him are regarded by the educational establishment as being full-time or part-time. When considering (a), I am satisfied that it is necessary to take into account (i) the hours spent receiving instruction at the establishment; and (ii) the hours spent on private study, whether at the establishment or elsewhere, for example at home. I am also satisfied that in considering (i) and (ii), one should have regard to the time spent voluntarily, for example on home studies, as well as the time spent compulsorily, for example on compulsory attendance at the establishment to receive instruction, or the carrying out of work set by the instructors, for example the writing of essays In many cases it might well be thought fit to attach greater significance to the hours of actual attendance at the establishment concerned and less to the hours spent in voluntary studies at home. In any event, regard should only be had to those hours spent in voluntary studies at home which can properly be regarded as appropriate in relation to the educational activities undertaken by the claimant."

15. That passage, of course, furnishes substantial comfort to Mr Tait. But it cannot be overemphasised that it was delivered against a very different legislative background from that which governs the case now before me. At that time section 2(1) of the Child Benefit Act 1975 simply provided thus:

"2(1) For the purposes of this Part of this Act a person shall be treated as a child for any week in which -

- (a) he is under the age of sixteen; or
- (b) he is under the age of nineteen and receiving full-time education by attendance at a recognised educational establishment."

Moreover, regulation 5 of the Child Benefit (General) Regulations (which was then headed "Circumstances in which a person is to be treated as receiving full-time education") prescribed no more than this:

"5. A person shall be treated for the purposes of the Act as receiving full-time education if he is receiving -

- (a) primary or secondary education in England or Wales otherwise than at school under special

arrangements made under section 56 of the Education Act 1944; or

- (b) education in Scotland elsewhere than at an educational establishment under special arrangements made under section 14 of the Education (Scotland) Act 1962."

A glance at my quotations in paragraphs 8 and 9 above will show the extent to which the relevant legislation has been amended and expanded since the decision in C.F. 38/83 was given. The material amendment and expansion of section 2 was effected by section 70(1) of the Social Security Act 1986. The substitution of regulation 5 took effect from 6 April 1987.

16. Mr Tait also referred me to R(F) 2/85, a decision of a Tribunal of Commissioners (of which, again, I happened to be a member). He expressly prayed in aid what we said in paragraph 17(2):

"(2) As we have already stated (see paragraph 13 above) the question whether a person is receiving full-time education (within the meaning of that term as used in the CB Act) is a question of fact. The correct approach is to look to the substance of the situation overall - and beyond the form alone. We re-affirm what we said in paragraph 12(3) of our decision on Commissioner's File No CWSB/49/84 as to the undesirability - indeed impropriety - of an adjudicator's attempting to prescribe what the legislature has refrained from prescribing or has omitted to prescribe. Accordingly, we make no attempt to define exhaustively the circumstances which might properly be taken into account - or the weightings to be attributed to any particular factor." (We heard the appeal in CWSB/49/84 on the same day as we heard the appeal which gave rise to the decision reported as R(F) 2/85. Our decision in CWSB/49/84 is reported as R(SB) 22/85.)

I have emphasised the passage in the penultimate sentence of that quotation to explain why the amendments and expansions to which I refer in paragraph 15 above came as no surprise to the members of the Tribunal of Commissioners who gave the decision in R(F) 2/85.

17. The history preceding the amendments and expansions, accordingly, reinforces my conclusion that, in regulation 5 of the Child Benefit (General) Regulations, "supervised" imports the presence or close proximity of a teacher or tutor. In the early 80s the adjudicating authorities were much exercised in attempts to distinguish full-time education from part-time education. I am, for my part, satisfied that one of the purposes underlying the amendments and expansions was to introduce an element of certainty (even precision) into what had been a most inexact investigation. Given the meaning which I have attributed to "supervised", the relevant hours of "study, examination or practical work" are susceptible of ready and reliable

ascertainment. That cannot be said of hours spent at home or in a library. I am aware that that consideration is in no way decisive when we are in the realm of statutory construction. But in paragraph 13 above I have endeavoured to demonstrate that my interpretation of "supervised" accords with that words's ordinary meaning in the context of school life; and in paragraphs 14 to 16 I have sought to demonstrate no more than that there is good reason for supposing that my interpretation accords with what Parliament is likely to have intended.

18. But there is another side to the coin. The amended section 2(1)(b) and the inserted section 2(1A) now confer upon the Secretary of State a power to accord to education recognition which will bring the recipient of such education within the ambit of child benefit. I am in little doubt but that that power was conferred as a quid pro quo for the amendments which gave precision to the basic ascertainment of "full-time education by attendance at a recognised educational establishment". Prior to the amendments, much latitude was available to the adjudicating authorities - and in plainly deserving cases the Commissioner would take advantage of that latitude to assist the claimant. (The decision in C.F. 38/83 is an example.) That latitude is now gone. But the Secretary of State can be asked to assist. He is not in this case fettered by the current regulation 5(2) of the Child Benefit (General) Regulations. As is pointed out by Bonner etc, op cit page 176, regulation 5(2) is directed solely to "education received by a person attending a course of education at a recognised educational establishment"; and in this case, of course, the great bulk of Sarah's education in the relevant year was not so received.

19. At the hearing before me, Mr Butt was inclined to agree that the appeal tribunal fell into error of law by finally deciding the case against the claimant without adjourning so that the case might be referred to the Secretary of State. I myself am satisfied that that does amount to vitiating error of law. It is not, however, too late. I myself direct the adjudication officer to -

- (a) refer to the Secretary of State the question of whether he recognises, within the meaning of section 2(1)(b) of the Child Benefit Act 1975, the education received by Sarah in the academic year which commenced with the autumn term of 1989; and
- (b) communicate to the Office of the Social Security Commissioners the outcome of such reference.

I have had some experience of the delays which frequently seem to surround such references. Accordingly, I have set no time limit. I am sure, however, that the adjudication officer will use all due diligence in his part in the matter. A copy of this decision should accompany the reference. My own final decision in this appeal must await the outcome.

20. The view which the Secretary of State takes of this matter is, of course, his concern and not mine. I trust, however, that I shall not be regarded as speaking out of turn if I draw to his attention the following points:

- (a) There was nothing in the nature of a charade about the arrangements made in respect of Sarah. They were made in close consultation with Sarah's headmaster and in Sarah's best educational interests.
- (b) During the relevant year there was no other social security benefit of which either the claimant or Sarah herself could properly avail themselves. (Sarah was not, of course, available for employment.)
- (c) Had Sarah returned to the School as an ordinary pupil (cf paragraph 5 above), the claimant's entitlement to child benefit would have been beyond all doubt.

21. At this stage, the claimant's appeal has been neither allowed nor disallowed.

(Signed) J Mitchell
Commissioner

Date: 23 October 1992