

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(a)(ii) of the Social Security Act 1998:

I SET ASIDE the decision of the Stevenage appeal tribunal, held on 3 November 2005 under reference U/42/137/2005/00256, because it is erroneous in point of law.

I make findings of fact and give the decision appropriate in the light of them.

I FIND as fact that K was normally a member of the claimant's household.

My DECISION is the claimant is not entitled to a carer's allowance on her claim made on 23 January 2004.

The issue

2. Section 70 of the Social Security Contributions and Benefits Act 1992 provides for a carer's allowance. It is a condition of entitlement that the claimant must not be 'gainfully employed': section 70(1)(b). Section 70(8) provides that

'Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as ... gainfully employed'

The relevant Regulations are the Social Security (Invalid Care Allowance) Regulations 1976. (Carer's allowance was formerly known as invalid care allowance.) Regulation 8 sets a limit on earnings beyond which a claimant is treated as gainfully employed. For the purposes of this case, the limit was £79 a week until April 2005 and £82 a week thereafter.

3. The 1976 Regulations do not provide for how the claimant's earnings are calculated. This is governed by section 3 of the 1992 Act and the Social Security Benefit (Computations of Earnings) Regulations 1996. Schedule 1 to those Regulations lists the sums that are disregarded in calculated earnings. Paragraph 7 covers

'Any payment made by a health authority, local authority or voluntary organisation to the claimant in respect of a person who is not normally a member of the claimant's household but is temporarily in his care.'

4. The issue for me is whether the tribunal directed itself correctly on that paragraph.

How the issue arises

5. The claimant made a claim for a carer's allowance in January 2004. The Secretary of State refused the claim on the ground that the claimant's earnings exceeded the limit set by regulation 8 of the 1976 Regulations. She received her income as a carer on the Adult Placement Scheme. She and her husband cared for a young gentleman whom I shall call K. He was placed with them in 1998. Initially, the placement was for one year, but it was extended subject to regular review. It could be terminated on three months notice by either side. The

ultimate intention was that he should move to live independently when he was able to do so, with appropriate support. In those circumstances, the tribunal found that paragraph 7 applied. I gave the Secretary of State leave to appeal to a Commissioner.

Did the tribunal direct itself correctly in law?

The tribunal's reasoning

6. The tribunal found that the claimant's normal household consisted of herself and her husband, together with their natural and adopted children, but not K. It also found that K was only temporarily in the claimant's care. The tribunal referred to three matters in support of those findings: (i) K was placed with the claimant temporarily with the intention of eventually living independently; (ii) his presence was subject to ongoing review; and (iii) it could be terminated on three months notice.

7. On the law, the tribunal directed itself that 'The most obvious meaning of the word temporary is "not permanent".'

The Secretary of State's grounds of appeal

8. The Secretary of State relied on the decision of Mr Commissioner Levenson in *CIS/17020/1996*. That case concerned paragraph 27 of Schedule 9 to the Income Support (General) Regulations 1987, which was in the same terms as paragraph 7. The relevant paragraphs of Mr Levenson's decision read:

'15. The next ground of appeal relates to the question of whether the claimant was "not normally a member of the claimant's household but temporarily in his care". It is not necessary to comment on the tribunal's approach to this question but it is important to clarify the meaning of the terms in this context. The first question is whether Mr A was a member of the claimant's household. There have been many decisions and a great deal of discussion in social security law on what is meant by the concept of "household". However, in the present case it is quite clear from the terms of the placement that the intention and the actuality was that Mr A was a member of the claimant's household. The next question is what is meant by "normally a member of the claimant's household" in paragraph 27. Mr Walker argued that "normally" referred both to the manner of membership of the household and to the period of membership. He argued that Mr A did not live as a normal member of the household, for example as would a person who was the claimant's "flesh and blood". He was subject to a high degree of supervision on behalf of the County Council with very detailed contingency and breakdown plans. Mr MacEvelly argued that households might have all sorts of domestic arrangements, including supervision of children by social workers and others, and that the phrase "normally a member of the claimant's household" had a temporal meaning only. I was tempted by Mr Walker's argument, but on reflection it seems to me that living arrangements are so varied that it would be virtually impossible to identify a "normal" household or a person who lived normally in a household. Further, paragraph 27 does not refer to a normal member of the household but to a person who is normally a member of the household. On this point I agree with Mr MacEvelly.

'16. The next issue is the relationship between normally being a member of the household and being temporarily in the claimant's care. I think this must refer to whether Mr A is a member of the claimant's household when he is not in the claimant's care. In this case there was no evidence that Mr A was ever a member of the claimant's household except when he was in the claimant's care and it seems to me, although I do not have to finally decide this, that Mr A was not normally a member of the claimant's household. That leaves the question of whether Mr A was temporarily in the claimant's care or was in his care for a period that was other than temporary. A similar question has arisen in relation to the meaning of "temporary absence from Great Britain" in regulation 4(1). Ultimately, this is a question of fact for the tribunal which must take account of the original intention of the parties and the length of the absence. Had the tribunal in this case taken proper account of the letter of 5 September 1996 it would have been entitled to form its own view on whether Mr A was in the care of the claimant temporarily or otherwise. I only comment that an arrangement which is not permanent is not necessarily temporary. It might be indefinite. In this case the County Council described the placement as "long-term" and depending on the facts of any particular case a long-term placement may be described as temporary or not temporary.'

The claimant's response

9. In response, the claimant's representative has repeated the comments she made earlier. She argues that the tribunal did not go wrong in law. It took account of all relevant matters, including the intentions of the parties, asked all relevant questions and made appropriate findings of fact. The tribunal's chairman was experienced and was aware of all the relevant case law.

My conclusion

10. I respectfully agree with Mr Levenson at paragraph 16 of his decision that 'an arrangement which is not permanent is not necessarily temporary.'

11. That statement is supported by the reasoning of the Court of Appeal in *Chief Adjudication Officer v Balmer*, reported as Appendix 3 to *R(S) 1/96*. The issue in that case was whether the claimant was 'temporarily absent from Great Britain'. For convenience, I quote the relevant paragraphs from the judgment of the Court:

'We would agree with Mr. Justice Hodgson that an absence may be temporary even though the intended date for return remains uncertain, and we would not wish to cast any doubt on the correctness of the decision in *Akbar* itself. We are satisfied, however, that for the purpose of construing regulation 2(1) it is wrong to treat "temporary" as being synonymous with "not permanent". The task to be performed is to apply the words of the regulation "temporarily absent" to the facts of the particular case.

'It is therefore necessary to consider whether this court can give any guidance to the tribunal which would be of assistance when these three cases are reheard. We would suggest that the correct approach to a case involving regulation 2(1) is on the following lines:

- ‘(1) It is necessary to look at the facts at the date of the relevant decision. In some cases (for example, where the decision has to be made by a local social security officer) the absence will be wholly in the future. In other cases the claimant will have been away for a period and will not yet have returned. In yet other cases the claimant may have returned and a decision may have to be made as to what part, if any, of his absence abroad could be regarded as having been temporary.
- ...
- ‘(3) The quality of the absence may change with the passage of time. A claimant may go abroad for a comparatively short period of treatment intending to return after, say, three or four months. But the position may alter and as time passes it may become more and more difficult to show that he is only temporarily absent.
- ‘(4) The fact that no date is fixed for the claimant’s return does not prevent the absence being temporary. For example, it may be uncertain at the outset whether the treatment is likely to be for a short time at a single hospital or other institution or whether it may involve more prolonged and extensive treatment at perhaps different hospitals.
- ‘(5) The intention expressed by the claimant will always be relevant although it is not decisive. As time goes by it is likely that his plans for the future will have to be more and more closely scrutinised. It is also to be remembered that, whatever his intention, a claimant may be prevented from returning by circumstances beyond his control.
- ‘(6) The period of absence, if any, before the date of the decision will be relevant as will the intended or likely period of absence thereafter. The two periods will have to be looked at together.
- ‘(7) ... it would be unwise for this court to attempt to lay down any rules as to what “temporarily” means. Much will depend on the facts of the particular case. Nevertheless the word “temporarily” connotes that, though the date of return may remain uncertain, the absence contemplated is an absence for a limited period only. ...
- ‘(8) We are unable to accept Mr. Drabble’s primary submission that an absence can continue to be temporary provided there is a sufficiently clear prospect of it ending, however long the absence and however distant that prospect may be. Nor are we able to accept his slightly different alternative submission that an absence can remain temporary even though it has continued for a period of several years provided the prospect of return has not become too remote. It will be for the fact finder to apply the words to the particular circumstances, but it seems to us that save in an exceptional case, it would be difficult for a claimant to establish that he was only temporarily absent within the meaning of regulation 2(1) once the absence had become a matter of years rather than months.’

12. Although *Balmer* involved a different statutory provision from this case, I consider that the Court of Appeal’s analysis is equally applicable.

13. It is true that some dictionaries give 'not permanent' as one definition of 'temporary'. But in general use, it does not extent to everything that involves any lack of permanence. Certainly, the examples cited in the Shorter Oxford English Dictionary involve something more passing than that. I also note the connection in paragraph 7 between being 'not normally a member of the claimant's household' and being 'temporarily in his care'. The connotation of that combination suggests something more restricted than just a lack of permanence.

14. Accordingly, the tribunal misdirected itself by interpreting 'temporary' as 'not permanent'.

Disposal

15. How should I dispose of the case? I must set aside the tribunal's decision, because it misdirected itself on the law. Having done that, I could direct a rehearing or substitute the decision that the tribunal should have given. It is, I suppose, just possible that a tribunal properly directed on the law might find that K was temporarily in the claimant's care. However, that is not the only relevant element of paragraph 7. That paragraph only applies if K is not normally a member of the claimant's household. On the evidence, the only possible conclusion that a tribunal could reach is that K was normally a member of the claimant's household. He had lived with the claimant since 1998. I accept that he was being prepared to live independently, but by the time the claimant made her claim for a carer's allowance, K had lived with her for over five years. That is more than ample time for him to become normally a member of her household. I also accept that he might have to leave on three months notice. But that did not prevent him normally being a member of the household until that happened. I find as a fact that he was normally a member of the claimant's household at the time of the claim and the Secretary of State's refusal of the claim. That is fatal to the application of paragraph 7. Accordingly, the Secretary of State was right in law to refuse the claim and a rehearing would be pointless. I substitute a decision restoring the refusal of the claim.

16. The claimant and her family have performed a valuable service in caring for K and helping to prepare him for a more independent life. However, these are not matters that affect entitlement to carer's allowance. I have refused the claim for that allowance because the claimant receives income over the amount that is permitted for a claimant of carer's allowance. The Revenue does not treat that income as earned income and it is understandable why the claimant believes that the same should hold for carer's allowance. However, the law can define income in different ways for different purposes and it is the social security meaning of earnings that I have to apply, not the income tax law. That is why her income is different from that used by the Revenue.

**Signed on original
on 06 September 2006**

**Edward Jacobs
Commissioner**