

Non-Formal

Commissioner's File: CIS/13805/1996

**SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992**

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

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C. A. S.**

Claimant's name:
Tribunal venue:
Tribunal number:

DECISION OF THE SOCIAL SECURITY COMMISSIONER

- 1. My decision is as follows:
 - 1.1 The decision of the Social Security Appeal Tribunal held at Cardiff on 3rd October 1995 is erroneous in point of law: see paragraphs 14 to 21 below.
 - 1.2 Accordingly I set it aside and, as I can do so without making fresh or further findings of fact, I give the decision which the tribunal should have given.
 - 1.3 My decision is:

From and including 20th March 1995 the claimant is not to be treated as a member of the same household as her husband and she is not, therefore, barred from entitlement to Income Support on account of the fact that her husband is in remunerative work.

I have given a decision on the only issue before me. The adjudication officer must now decide whether the claimant has any entitlement to Income Support and, if so, in what amount and for what period or periods.

See paragraphs 21 and 22 below.

2. The claimant claimed Income Support on return from a visit to her husband in Pakistan. He had applied for permission to enter the United Kingdom, but it had not yet been granted. He was in remunerative work in Pakistan, but his income was very low and, after taking account of exchange rates, it was not worth sending any money to his wife. The claim was refused on the ground that she was to be treated as living in the same household as her husband who was in remunerative work. She appealed to a tribunal which decided that she was not entitled to Income Support from the date of her claim. From that decision she has appealed to the Commissioner, leave having been granted by the tribunal's chairman. The adjudication officer supports her appeal.

3. There is no dispute in this case that the claimant's husband is in remunerative work, as that term was defined at the relevant time. Accordingly, the claimant is debarred from Income Support if she and her husband are a married couple: see section 124(1)(c) of the Social Security Contributions and Benefits Act 1992. A "married couple" means "a man and a woman who are married to each other and are members of the same household": see section 137(1) of that Act. In the circumstances of this case, the partners are clearly not living in the same household. However, in some cases persons are treated as members of the same household although they are not in fact so living.

4. The provisions which deal with cases in which persons are treated as being members of the same household are contained in regulation 16 of the Income Support (General) Regulations 1987. The relevant parts of that regulation are as follows. There is a basic rule which is set out in regulation 16(1). I shall refer to it as "paragraph (1)". Stripped of the verbiage which is irrelevant in the circumstances of this case, it reads:

"The claimant and any partner shall be treated as members of the same household notwithstanding that any of them is temporarily living away from the other members of his family."

This rule is disapplied in a number of cases. In view of my decision on this case, I need only set out one of them. It is contained in regulation 16(2)(a). I shall refer to it as "paragraph (2)". It provides:

"Paragraph (1) shall not apply to a person who is living away from the other members of his family where that person does not intend to resume living with the other members of his family".

The tribunal did not refer to this paragraph.

5. The original submission to the Commissioner by the adjudication officer now concerned with the case was that the case fell within paragraph (2). He argued that this case was governed by Commissioner's Decision CIS/508/1992. Unfortunately, that decision was not drawn to the tribunal's attention. The facts were comparable to those in the case before me in that one partner was in this country while the other was abroad and seeking permission to enter. The Commissioner was concerned with an earlier version of the Income Support (General) Regulations. The provision with which he was there concerned provided that a person was to be treated as temporarily absent from his home if "he intends to return to occupy the dwelling as his home". The Commissioner held at paragraph 7 of his decision that

"the intention must, in my judgment, be without any form of qualification. In other words, it is not enough for the person concerned to have a contingent intention i.e. an intention dependent upon the outcome of an event. There must be an intention to return come what may."

The adjudication officer in the case before me initially submitted that, despite the different legislative wording, the same interpretation should be given to "intend" in paragraph (2). On this basis, the officer argued that the intention of the claimant's husband to resume living with her was dependent on his application for permission to enter being successful. It was, therefore, only a qualified intention and the case fell within the exception with the result that

the claimant and her husband were not to be treated as living in the same household.

6. However, a nominated officer issued a direction requiring a further submission from the adjudication officer. The reason for the request was that paragraph (2)

"is now framed on an intention not to resume living with the family.

"Does it not follow that if the clt's intention is anything other than not to resume, i.e. to resume... , or to resume... subject to the outcome of a contingency, then [paragraph (2)] is not fulfilled?"

7. A further submission was received from the adjudication officer, although written by a different person from the one who wrote the original submission. This officer argued that paragraph (2) did not apply, saying

"it is the intention of the claimant's husband to join as soon as possible. There is no intention not to resume living with the family."

8. In reply the claimant's representative submitted that the case did fall within paragraph (2), arguing that CIS/508/1992 applied and that in the circumstances the claimant's husband could not have an unqualified intention to resume living with his wife.

9. At first glance the latest position of the adjudication officer may appear to give a simple structure to the interrelationship between paragraphs (1) and (2) and to produce sensible results. Paragraph (1) creates a basic rule which applies so long as the parties' separation is temporary and until one of the parties decides not to resume living with the other, at which point paragraph (2) displaces paragraph (1) to reflect the reality that the parties are not living in, and will never return to, the same household. However, there are three problems with this interpretation.

10. First, the grammatical structure of paragraph (2) is clear: "not" relates to "intend" rather than to "resume".

11. Second, the position of "not" has practical significance. There are some cases in which the meaning of a sentence does not depend upon the order of the words. This is not one of them. The reason is that in this context it is possible for a person to have no intention one way or the other. An obvious example would be where a couple whose relationship is going through a rough patch agree to live apart for a couple of months before making a decision about a permanent separation. In such a case neither has an intention to resume living with the other, but equally neither has an intention not to do so. They simply have open minds about it. Paragraph (2) would apply differently to such a case according to the order of the words. As the paragraph stands in the legislation, the couple could claim the benefit of it (as neither intends to resume living with the other) and they would not be treated as members of the same household. However, if the word "not" were moved, the paragraph would not apply (as neither has formed an intention not to resume living with the other) and the couple would be treated as in the same household.

12. Third, as a party cannot be forced to share a household with another, it follows that as soon as an intention not to resume living with the other is formed, the separation can no

longer be temporary. So at the point that paragraph (2) displaces paragraph (1), paragraph (1) ceases to apply anyway. Paragraph (2), therefore, has no function and is unnecessary. At most it provides a partial definition of "temporary".

13. I now consider how the two paragraphs operate if paragraph (2) is given its natural meaning. I will not interpret that paragraph as suggested by the adjudication officer, if its natural meaning gives a coherent structure to the paragraphs and produces sensible results.

14. Paragraph (1) creates a rule which applies where the partners are not in fact living in the same household. It treats the partners as if they were so living, provided that the separation is temporary. This rule is disapplied in the circumstances specified in paragraph (2). Clearly paragraph (2) need only be considered where paragraph (1) could otherwise apply. As noted above, a party cannot be forced to share a household with another, so as soon as one party intends not to resume living with the other, the separation ceases to be temporary, paragraph (1) ceases to apply and paragraph (2) accordingly never falls to be considered.

15. Where all the parties are intending to resume living with each other, the case clearly falls within paragraph (1) for so long as the separation is only temporary. Paragraph (2) does not operate in such a case. It only disapplies paragraph (1) if a person does not intend to resume living with the other. In this example all the parties do intend to do so, so paragraph (2) clearly does not apply.

16. This leaves paragraph (2) to apply where neither party has decided against resuming living with the other, but they are not agreed on resuming doing so or, in other words, where one of the parties has an open mind. This is exactly the case which falls within the wording of paragraph (2), that is, where a person does not intend to resume living with the other members of his family. This is also a case to which paragraph (1) could otherwise apply on its wording and there is scope for a provision which disapplies that paragraph. Where one of the parties is not definitely intending to return, it is not unreasonable to treat the parties as not living in the same household.

17. Accordingly, the natural meaning of the wording of paragraph (2), when considered in conjunction with paragraph (1), produces sensible results and a coherent structure for the interrelationship between the paragraphs. I hold that the paragraph means what it says.

18. In the circumstances of this case, at the time of the tribunal hearing the claimant and her husband were still hoping to obtain permission for him to join her in this country. There is no evidence that either party had formed an intention not to resume living in the same household. Therefore, if both intended to resume living in the same household, the rule in paragraph (1) will apply and if one or both did not so intend, the rule in paragraph (2) will apply. On the facts they intended to resume, provided permission is obtained for the claimant's husband to join her. I must, therefore, decide whether such an intention counts for the purposes of paragraph (2).

19. This brings me to CIS/508/1992. If it applies to paragraph (2), the intention to resume must not be a contingent one. If the intention must not be contingent, then in the circumstances of this case the claimant must fall within the paragraph, because of the circumstances in which she and her husband find themselves. She will not, therefore, be

barred from entitlement to Income Support by paragraph (1).

20. Subsequently, but without reference to CIS/508/1992, another Commissioner reached the same conclusion on the same provision in CIS/484/1993. In that case, the claimant and his wife moved out of his flat in Blackpool to live with the wife's mother. The claimant started a training course. He put the flat on the market for sale. However, he said that if he obtained employment in the Blackpool area before the flat was sold, he would return to live there. The Commissioner held that the claimant did not intend to return within the meaning of the provision, but was merely reserving his position until the end of his employment training. The Commissioner adopted by analogy the reasoning in two Court of Appeal decisions which considered the meaning of "intend" in the context of the landlord and tenant legislation. The decisions establish two propositions. First, the intention has to be "a firm and settled intention not likely to be changed": see Fleet Electrics Ltd. v. Jacey Investments Ltd. [1956] 3 All England Law Reports 99 at page 102 per Lord Evershed M.R. Second, the intention must not be a contingent one: see Cunliffe v. Goodman [1950] 2 King's Bench 237, where Asquith L.J. said at page 254:

"Not merely is the term 'intention' unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while."

21. Both these Commissioners' Decisions concerned a different provision from that with which I am concerned. The Commissioner's reasoning in CIS/508/1992 was naturally particularly related to the terms of the legislation which he was interpreting. However, the reasoning in CIS/484/1993 shows that the interpretation of "intend" as meaning an intention that is not contingent is more broadly based than an analysis of the word in the context of the particular provision with which the Commissioners were concerned. I can see no material distinction between the provision with which the Commissioners were concerned in those cases and the one before me. Accordingly, I hold that the intention to resume which must be formed in order for the exception to cease to apply must be one that is not contingent.

22. The tribunal failed to consider and apply paragraph (2). Its decision was, therefore, erroneous in law and must be set aside. The decision which the tribunal should have given is clear and requires no further findings of fact. I can, therefore, give the decision which the tribunal should have given. It is set out in paragraph 1.3 above.

Signed: Edward Jacobs
 Deputy Commissioner

Date: 10 November 1997