

CIS/16271/1996

Non-remit

CAS (A)  
29/10/98

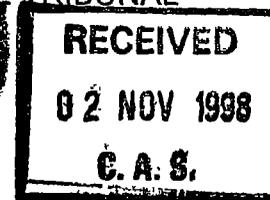
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**THE SOCIAL SECURITY COMMISSIONERS**

Commissioner's Case no: **CIS/16271/1996**

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

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



**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Mr Commissioner David Williams

Claimant :  
Benefit :  
Tribunal :  
Date of hearing :  
Tribunal case no :

1 I allow the claimant's appeal, brought by leave of the chairman, from the decision of the Euston social security appeal tribunal. The decision was that there had been an overpayment of income support to the claimant of £599.60 in respect of the period from 1 February 1995 to 12 September 1995 (both dates included), and this amount is recoverable from the claimant. For the reasons below, that decision is erroneous in law. I therefore set it aside. But I find that the substance of that decision is correct, and accordingly I substitute for that decision my own decision to the same effect, as set out in paragraph 2

2 My decision is that there was an overpayment of income support to the claimant from 1 February 1995 to 12 September 1995 (both dates included) amounting to £599.60, and this amount is recoverable from the claimant.

3 The overpayment arose because, during the period under review in this appeal, the claimant and his wife received both child benefit and the equivalent sum as part of their weekly income support for their two children without the one being offset against the other. The tribunal decision sets out findings of fact and reasons at length. The claimant, by his representative, appealed against the decision on two grounds. The first was that the tribunal failed adequately to explain why it was reasonable that the claimant should disclose receipt of child benefit on the particular facts. The other was the application of regulation 42 of the Income Support (General) Regulations 1987 to the claim. The adjudication officer now acting supports the appeal in relation to regulation 42, but not on the other ground. At a late stage the claimant also raised a point about the review process in the case. The adjudication officer in a further submission did not accept the claimant's point, although the claimant maintained it in further observations. I record my gratitude to both the adjudication officer and the representative for making clear and helpful submissions on the points in dispute in this appeal.

4 Save for the issue of regulation 42, I find no error of law in the tribunal's decision. In particular, I do not find any inadequacy in the clear findings and reasons of the tribunal on the issue of disclosure of the receipt of child benefit. The arguments of the representative are dealt with fully by the tribunal. The findings of fact fully support its decision, and there is clearly evidence for those findings.

5 Nor do I find any substance in the point about review. The provision in question is section 71(5) of the Social Security Administration Act 1992 (in the form operative at the relevant time), requiring a review decision before recovery of an overpayment under section 71(1). The adjudication officer submitted to the tribunal that there had been a review decision, and a copy of that decision (dated 30 November 1995) is in the papers (at page 4A). The review power is, as the tribunal rightly noted, section 25 of the Social Security Administration Act 1992. The decision under appeal is based on that section and cites the basis for review. It covers all previous decisions establishing if an overpayment occurred. There is therefore nothing irregular about the decision on its face. Although no point was taken before the tribunal about it,

the tribunal considered the issue of review and found that the review and revision had been correct. I see no basis to find that the tribunal has erred in law on this point.

6 The question is therefore whether the tribunal rightly dealt with regulation 42(2) of the Income Support (General) Regulations 1987. This provided (at the relevant time):

- (2) Except in the case of-
  - (a) a discretionary trust,
  - (b) a trust derived from a payment made in consequence of a personal injury;
  - (c) unemployment benefit under the Social Security Act [Social Security Contributions and Benefits Act 1992] which may be payable to a claimant who is not required to be available for employment, or
  - (d) an increase of child benefit payable to a claimant under regulation 2(2) of the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976 (rates of child benefit),
  - (e) family credit;
  - (f) disability working allowance,

income which would become available to the claimant upon application being made but which has not been acquired by him shall be treated as possessed by him but only from the date on which it could expected to be acquired were an application made

7 The tribunal decision records the argument of the claimant before it that the Benefits Agency should have operated regulation 42 in this case. If it had done so, it is submitted, then the Agency would have taken the child benefit into account, and the overpayment should not have occurred. It was therefore a departmental error, and not the actions or failures to act by the claimant, that caused the overpayment. The tribunal comments on this:

This was an interesting argument, and possessed considerable force, as regulation 42(2) is mandatory and not permissive. However, in practice this regulation is not applied, probably because it would frequently cause hardship to claimants who had to wait for some considerable time to have their Child Benefit award decided and arrears paid. We were unwilling to disrupt this normally benign practice, and therefore did not accept this argument, although it is the main ground on which the leave to appeal which was sought and granted at the close of the hearing was given.

8 The adjudication officer now acting questions this reasoning. In the view of the adjudication officer the regulation only applies where entitlement is straightforward and it is simply a case of the claimant applying for it. In this case, it is argued, the claim for child benefit was not a formality because the claimant had not satisfied the residence requirements for the claim at that time. The adjudication officer cites the decision of the Commissioner in CIS/503/90 in support.

9 The representative observed that regulation 42(2) should have been applied in this case because there was no question that child benefit would become available upon application after 6 months residence. It was also observed that if regulation 42(2) was applicable to the case then its operation was mandatory. In a further submission, the adjudication officer replied that

regulation 42(2) was dealing with the case where a claimant had failed to make a claim for a benefit. The claimant claimed child benefit shortly after the income support claim. The adjudication officer submitted that once the child benefit claim was made, regulation 42(2) had no further application. In response, the representative argued that regulation 42(2) operates from the time the income is acquired, not the time when the application is made

10 The representative commented with some justification that there was some difficulty with the wording of regulation 42(2). This doubt is shared by the authors of *Mesher and Wood, Income Related Benefits: The Legislation*. The comment on regulation 42(2) (at p 203 of the 1997 edition) is that:

It is not at all clear that [social security benefits generally] "would become available upon application being made" if an award had not already been made. The words "would become" may be broad enough to cover that process, but that could only be the case where entitlement is straightforward."

11 Regulation 42(2) was considered by a Commissioner in CIS/503/90. In that case the Commissioner found that the tribunal erred in law on grounds not relevant here. The adjudication officer had invoked regulation 42(2) to take account of an alleged entitlement of the claimant (who was on income support) to invalidity benefit. It appeared that the adjudication officer and claimant had agreed at some stage that the claimant would not claim invalidity benefit, and would get more income support instead. The adjudication officer had later sought to review the matter under regulation 42(2) on the ground that the claimant should be treated as having the invalidity benefit. The tribunal found that the claim for invalidity benefit would be "in the nature of a formality and not an intervening step of uncertain outcome" and that regulation 42(2) was therefore rightly invoked. The Commissioner agreed with the tribunal, in the circumstances of that case. I am not aware of any other decision dealing with this provision.

12 In this case there had been no claim for child benefit when the original income support claim was made. Income support was claimed when the claimant and family arrived here in June 1994. The child benefit claim was made, so the tribunal found, when relevant forms were sent to the claimant, without request, some months after arrival. Child benefit was awarded after the claimant (or, I assume, his wife) satisfied the six-month qualification period. It was then paid continuously through the relevant period.

13 I agree with the assumption in *Mesher & Wood* that regulation 42(2) applies to social security benefits generally save for the specific exceptions set out in the regulation. The regulation as a whole deals with notional income to be treated as income other than earnings under regulation 40 of the Income Support (General) Regulations 1987 and for the purposes of inclusion in the calculation of income under regulation 29 of those regulations. Although this provision has been amended several times since it was first introduced in 1987, it has since its first version specifically referred to the increase in child benefit as excluded along with at least one other

social security benefit. Benefits generally are therefore, in my view, clearly within the general terms of the provision.

14 The issue is therefore to identify for what periods a benefit is to be treated as part of a claimant's notional income when it is not part of actual income and is not specifically excluded. I agree with the approach taken by the Commissioner in CIS/503/90 on this point. The regulation applies to social security benefits generally (subject to the specific exclusions) where no "application" has been made. Operation of the regulation is mandatory, and not a matter of discretion. But it only applies where entitlement is straightforward and the claim is the only formality preventing the claimant obtaining the benefit. That was clearly the case in CIS/503/90. It is not the case here. An adjudication officer could not award child benefit until the residence condition had been satisfied. That was not automatic. It might be that the claimant (or his wife) decided to leave the country before the residence test was met, or that the children went elsewhere, or that some other aspect of the claim, or the identity of the proper claimant, changed.

15 The adjudication officer raises another point of uncertainty. It might be, it was submitted, that a child benefit adjudication officer could decide if the claim would be met were it made, but an income support adjudication officer could not be expected to know whether this is the case. In the view of the adjudication officer now acting, the income support adjudication officer "could not be expected to be sufficiently aware of the conditions of entitlement to child benefit to be able to decide that an application by the claimant was a mere formality and from what date payment would be made". I have some sympathy with this point, not least because there can be more than one claimant for child benefit for a particular child. An adjudication officer dealing with one of the claimants is not in a position to know about any other claims or the likely outcome of a contested claim. The issue of payment dates may also give rise to uncertainty. However, this raises issues that I do not need to determine here, as the claim for child benefit in this case was made at a time when there was no prospect of payment until other uncertainties had been resolved.

16 The adjudication officer and representative also disagreed about the time when regulation 42(2) would cease to apply. The adjudication officer argued that it cannot apply once the claimant (or his wife) made the claim for child benefit. The representative argued that the regulation operates until the income is acquired. I can see strength in the argument for the claimant as a general approach because it is often not clear that there is any benefit to award until the award is made. The adjudication officer answered by the words of the provision itself. It applies to income "which would become available upon application being made". Once the application is made, it is submitted that the regulation ceases to apply. Any income resulting from the application will then fall to be considered as part of gross income under regulation 40.

17 My own view is that two separate considerations interact on this point. If it is not clear that a claim would give rise to a benefit, then regulation 42(2) does not apply in any event, whether or not a claim has been made. That is the position in this case. If it is clear that the only requirement for a claimant to receive benefit is that a claim is made, then the regulation operates until the claim is made and no longer. In this case, the claim for child benefit was made before entitlement could arise, and the benefit was awarded from the time when entitlement did first arise. There is no period to which regulation 42(2) could apply. The claimant is therefore not to be regarded as receiving child benefit as a notional income for any period.

18 I therefore accept the submissions of both parties that the tribunal erred in law in the reasons it gave for not applying regulation 42(2), although it was right in not applying the regulation. I must therefore find that the tribunal erred in law and set aside the decision. However, as I have made clear above, there is no other basis on which the tribunal decision is erroneous in law. Accordingly, save for the points made in this decision, I adopt the findings of the tribunal and make the decision set out in paragraph 2.

David Williams  
Commissioner

27 October 1998