

MH/1/LM

Commissioner's File: CIS/004/90

SOCIAL SECURITY ACT 1986**APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW****DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name:

Social Security Appeal Tribunal:

Case No:

**IDENTIFIABLE DECISION
NOT TO BE SENT OUT OF
THE DEPARTMENT**

1. My decision is that this appeal must be allowed. The case must be remitted to a separately constituted social security appeal tribunal for reconsideration.

2. On 9 September 1988, an adjudication officer had decided that the claimant was not entitled to income support from 3 September 1988 because her capital exceeded the prescribed level of £6,000.00. The claimant appealed to the Exeter social security appeal tribunal. In a submission to the tribunal, the adjudication officer stated the following facts:-

- "5.1. [The claimant] is a single woman aged 61. She lives alone in rented accommodation at 3 K., B T. She has lived at this address since at least 1977.
- 5.2. [The claimant] owned a property known as H Cottage, B F which she purchased early in 1978. However, she could not move into the property as repairs needed to be done and there were lengthy proceedings regarding vehicular access to the cottage.
- 5.3. The property was disregarded as an asset for some considerable time for Supplementary Benefit purposes as it was considered the claimant's intention was to eventually occupy the cottage as her home. This decision was reviewed on 29 4 86 when it was determined the cottage should be treated as a capital asset. [The claimant] no longer qualified for Supplementary Benefit as the cottage was valued well in excess of £3,000.
- 5.4. In March 1988 the cottage was put on the market to be sold and the property was again disregarded and [the claimant] qualified for Income Support. The property was disregarded in accordance with paragraph 26 to Schedule 10 of the General

Regulations.

- 5.5. The cottage was sold and on 2 9 88 the completion statement for the sale of the cottage was seen and recorded. It showed that £38,804.39 was realised from the sale. The Adjudication Officer has determined that the claimant's capital cannot be disregarded and she was therefore no longer entitled to Income Support."

3. The appeal tribunal, in its decision of 18 April 1989, held by a majority that the claimant was not entitled to income support because her capital exceeded the prescribed level of £6,000.00. The relevant part of the reasons given by the majority of the tribunal were:-

"the principal matter which the Tribunal had to consider was whether or not it could be said that the claimant and/or her mother had occupied H Cottage as their home. They had both lived permanently throughout the period of ownership of H Cottage at 3 K, B T. It was true that when they had purchased H Cottage originally they had hoped to move in but this because of the various vicissitudes that had occurred had not happened and eventually the property had been sold. This being so it was not possible for the Tribunal to find that the proceeds of sale of H Cottage could be disregarded for the purpose of assessing her capital ... "

The dissentient member was satisfied that the claimant had occupied the premises as her home, this principally in view of the fact that the claimant and her mother had intended to occupy it as such and would have done so had there not been the problems described in the case papers.

4. In addition to the facts stated above submitted by the adjudication officer, the following facts appeared in the relevant findings of the tribunal:-

"The most furniture that was ever put into the cottage was a chair and a table at one time. There was never any bed placed in the cottage. The cottage was occasionally visited by the claimant and/or her mother and they sometimes kept china there for the purposes of having picnics in the cottage. The water was cut off because of the fear of flooding. The property was to an extent and from time to time vandalised and doors were removed. They never kept any clothes at the cottage."

The relevant regulation is paragraph 3 of Schedule 10 to the Income Support (General) Regulations 1987. It reads:-

"3. Any sum directly attributable to the proceeds of sale of any premises formerly occupied by the claimant as his home which is to be used for the purchase of other premises intended for such occupation within 26 weeks of the date of

sale or such longer period as is reasonable in the circumstances to enable the claimant to complete the purchase."

The submission on behalf of the claimant before me were based on similar provisions of the supplementary benefit regulations, which were not in force at the material time, and accordingly I do not find it necessary to consider those submissions further. The adjudication officer, in a written submission before me, however submits that the appeal should be allowed on the ground that the majority of the tribunal misdirected themselves in law. The misdirection is submitted to be that they understood the words "the premises formerly occupied by the claimant as his home" as requiring proof that the claimant had physically resided in the premises in question. This appeal arises because it was stated to the appeal tribunal, and not apparently contested, that the claimant intended to apply the sum in excess of £38,000.00 which was the net amount realised on the sale of the cottage, to the purchase of another home. Accordingly paragraph 3 should have had the result that that sum should be disregarded for income support purposes, provided the claimant established that she had "occupied as her home" the cottage. The meaning of the word "occupy" in the present context has been considered in two decisions of Commissioners, and, in other contexts, several reported cases in the High Court. The majority of the appeal tribunal had considered the Commissioner's decision R(SB) 27/84, where, in paragraph 11(1) it was apparently stated that there could be no occupation unless a claimant had occupied the property. However I have been referred by the adjudication officer to the later case of CSSB/34/87, where, in paragraph 3, it was stated as follows:-

"It is still necessary to consider whether on the facts the claimant did occupy the accommodation and that seems to me to be a different question from whether he ever resided in it."

The Commissioner then referred to the cases of R v. St. Pancras Assessment Committee (1877) 2QBD 581 and Eve v. Garland (1934) Ch 620, which had the result that a person may be in occupation of premises without residing in them; the two quoted authorities related to cases where a property was liable to pay rates, in which case the question whether it is furnished or not furnished may be a crucial one.

5. In my view, the submission of the adjudication officer is a correct one, and the consequence is that the appeal tribunal did make an error of law. This is an exceptional case, in which a claimant can "occupy" an intended home without in fact ever residing in it. The question must depend upon the facts, and in particular whether in the opinion of the body considering the matter the claimant has done enough to constitute an occupation of the premises, short of actually residing there. In the present case, although no perceptible amount of furniture was put into the building, there was good reason for that, in view of the state of repair and the vandalism which had taken place. I have

reconsidered the facts stated, and in particular the statement of the claimant's solicitor in relation to the disputes with the neighbouring farmers over the question of access. It is possible that the tribunal deciding this question afresh will consider that such questions did amount to sufficient occupation in relation to the property, which is unquestionably owned by the claimant, to constitute an occupation for the purpose of the income support regulations. However, I must stress that this question must be for the new tribunal to consider, and I do not wish to be taken as expressing any opinion as to whether or not the claimant satisfied the provisions of paragraph 3 of Schedule 10.

6. In the circumstances, the appeal is allowed on the ground of the error of law stated above, and the case must be remitted for reconsideration by a differently constituted appeal tribunal.

(Signed) M Heald
Commissioner

Date: 2 October 1990