

Housing costs - relief under
Sch 3 para 10(5) applied to whole of para (10)
up to 9/10/89.

JJS/1/LM

Commissioner's file: CIS/95/89

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: Swansea

Case No: Not Known

1. My decision is that the decision of the social security appeal tribunal is erroneous in point of law and accordingly I set it aside. I remit the case to a new social security appeal tribunal for determination in accordance with the directions contained in this decision.

2. This is a claimant's appeal against the decision of the Swansea social security appeal tribunal, given on 15 February 1989, which decided that the amount of mortgage increase payable to the claimant, following the acquisition of her home, was to be restricted to the amount of eligible rent for the purpose of housing benefit immediately before the acquisition.

3. Regulation 17 of the Income Support (General) Regulations 1987 deals with the applicable amounts which make up income support. One of the categories relates to housing costs which it specifies are to be determined in accordance with Schedule 3 of the Regulations. Paragraph 7 of Schedule 3 deals with interest on loans to acquire an interest in the dwelling house occupied as the home. Paragraph 10 places restrictions on meeting housing costs under this Schedule in certain circumstances. In order to appreciate the point of the case it is necessary that I set out paragraph 10 in its entirety:

"10.-(1) Subject to sub-paragraph (2), where -

(a) the dwelling occupied as the home is occupied with security of tenure, that is to say -

(i) under a protected or statutory tenancy for the purposes of the Rent Act 1977 or the Rent (Scotland) Act 1984, excluding any case in which the tenant has been given a notice to which any Case in Part II of Schedule 15 to the Act of 1977 or, as the case

may be, Part II of Schedule 3 to the Act of 1984 (cases in which Court must order possession where dwelling-house subject to regulated tenancy) applies;

- (ii) under a secure tenancy for the purposes of Chapter II of Part I of the Housing Act 1980 or Part II of the Tenants' Rights Etc (Scotland) Act 1980 (security of tenure of public sector tenants);
 - (iii) where the tenant is a protected occupier or statutory tenant for the purposes of the Rent (Agriculture) Act 1976; or
 - (iv) under a crofting tenancy for the purposes of the Crofters (Scotland) Acts 1955 and 1961;
- (b) the claimant or, if he is a member of a family, any member of the family acquires some other interest in the dwelling occupied as the home; and
- (c) in consequence of the acquisition the aggregate of any amounts which would, but for this paragraph, be applicable under paragraphs 7, 8 and 9 exceed the amount of the eligible rent for the purposes of regulation 10 of the Housing Benefit (General) Regulations 1987 (rent) immediately before the acquisition.

the aggregate amount so applicable shall initially be restricted to the amount of the eligible rent immediately before the acquisition and shall be increased subsequently only to the extent that this is necessary to take account of any increase, after the date of the acquisition, in expenditure on any housing costs.

- (2) Sub-paragraph (1) -
- (a) shall not apply where the claimant or the member of the family became liable to complete the acquisition at a time when income support was not payable in respect of him;
 - (b) shall cease to apply if its application becomes inappropriate by reason of any major change in the circumstances of the family affecting their ability to meet expenditure on housing costs;
 - (c) shall cease to apply where income support ceases

to be payable in respect of the claimant or his family except that it shall reapply wherever income support again becomes payable within a period of eight weeks or less.

(3) Where the amounts to be met under paragraphs 7 to 9 and, subject to any deduction applicable under paragraph 11 are excessive, they shall be subject to restriction in accordance with sub-paragraphs (4) to (6).

(4) Subject to sub-paragraphs (5) and (6), the amounts to be met shall be regarded as excessive and shall be restricted and the excess not allowed, if and to the extent that -

- (a) the dwelling occupied as the home, excluding any part which is let or is normally occupied by persons in board and lodging accommodation, is larger than is required by the claimant and his family and any child or young person to whom regulation 16(4) applies (foster children) and any other non-dependants having regard, in particular, to suitable alternative accommodation occupied by a household of the same size; or
- (b) the immediate area in which the dwelling occupied as the home is located in more expensive than other areas in which suitable alternative accommodation exists; or
- (c) the outgoings of the dwelling occupied as the home in respect of which the amounts to be met under paragraphs 7 to 10 are higher than the outgoings of suitable alternative accommodation in the area.

(5) Where, having regard to the relevant factors, it is not reasonable to expect the claimant and his family to seek alternative cheaper accommodation no restrictions shall be made under this paragraph.

(6) Where sub-paragraph (5) does not apply and the claimant (or other member of the family) was able to meet the financial commitments for the dwelling occupied as the home when these were entered into, no restriction shall be made under this paragraph during the first six months of any period of entitlement to income support nor during the next six months if and so long as the claimant uses his best endeavours to obtain cheaper accommodation.

(7) In this paragraph "the relevant factors" are -

- (a) the availability of suitable accommodation and the level of housing costs in the area; and

(b) the circumstances of the family including in particular the age and state of health of its members, the employment prospects of the claimant and, where a change in accommodation is likely to result in a change of school, the effect on the education of any child or young person who is a member of his family, or any child or young person who is not treated as part of his family by virtue of regulation 16(4) (foster children)."

Paragraph 10(5) was amended by the Income Support (General) Amendment No. 3 Regulations 1989 (SI 1989 No. 1678) with effect from 9 October 1989, I set out that sub-paragraph in its amended form

"(5) Where, having regard to the relevant factors, it is not reasonable to expect the claimant and his family to seek alternative cheaper accommodation no restriction shall be made under sub-paragraph (3)."

However the relevant law to be considered by the tribunal was contained in paragraph 10 of the Schedule in its unamended form.

5. The facts of the case, in so far as they are necessary for the determination of this appeal, can be stated briefly. The claimant is a married woman living with her husband and children. She has been in receipt of income support for some years. Prior to 13 October 1988 she was a council tenant and her eligible rent and rates on the home were met through housing benefit. In October 1988 the claimant and her husband bought from the council the house which they occupied and in order to do so they took out a mortgage on the house to secure an amount of £21,008.00. The adjudication officer ascertained that the eligible rent for housing benefit purposes was £22.16 per week; acting under the provisions of paragraph 10(1) of the Schedule, he restricted the amount payable in respect of the interest on the mortgage to £22.16 per week, which of course was considerably less than the amount actually paid as interest by the claimant.

6. The claimant appealed to the tribunal. She was represented by Mr Bowen and he submitted that the restriction under paragraph 10(1) of the Schedule should not apply because of the provisions of sub-paragraph (5) of the same paragraph; and he referred to the claimant's health as being "a relevant factor" for the purpose of paragraph 10(7). However this argument was rejected by the members of the tribunal and they confirmed the decision of the adjudication officer. They gave their reasons for so doing in the following passages

"We had difficulty in construing paragraph 10 of Schedule 3. Paragraph 10(3) appears to contain a misprint and we assumed that the word "and" should be deleted. The key question was whether 10(5) could apply to 10(1). The wording of 10(5) suggested that it should apply to the whole of paragraph 10. However, it was clear that paragraph 10 was a modern version of Regs 20 and 21 of the

Supplementary Benefit Requirement Regulations. Sub paragraphs (1) and (2) of paragraph 10 related to Requirement Regulation 20 and sub paragraphs (3) - (7) related to Requirement Regulation 21. We, therefore, concluded that paragraph 10 fell into two quite separate and distinct parts and the sub paragraphs of one part could not affect the other part. Therefore, sub paragraph (5) could not apply to sub paragraph (1).

Further, we found that the mortgage repayments were normal and could not be deemed "excessive". Therefore, sub paragraph (3) could not apply.

We, therefore, found that the restrictions under 10(1) had to be applied, but we had enormous sympathy for [the claimant]."

The chairman of the tribunal granted the claimant leave to appeal to the Commissioner.

7. The claimant's solicitor, Mr I. Bowen of Messrs Keith Thomas & Partners, has submitted written argument on behalf of the claimant in which he urges the correctness of the argument which he put before the tribunal and submits that the members were wrong in law in the interpretation which they placed on sub-paragraph (5). The adjudication officer now concerned submits that that the sub-paragraph is intended to cover the situation where the claimant's accommodation is unduly expensive and it does not apply to a situation where the claimant purchases his home and is restricted under the provisions of sub-paragraph (1). However he supports the appeal on the ground that the record of the tribunal failed to comply with the provisions of regulation 25 of the Social Security (Adjudication) Regulations.

(9)

8. The short point for me to decide is whether the relief granted by sub-paragraph (5) can be prayed in aid by a claimant where his housing costs have been restricted under the provisions of sub-paragraph (1) of paragraph 10 of Schedule 3 to the Income Support (General) Regulations 1987. Manifestly after 9 October 1989 that relief only applies where there has been a restriction on the grounds that the accommodation is too large or expensive. The Income Support (General) Amendment No. 3 Regulations 1989 deleted the words "under this paragraph" and substituted therefor the words "under sub-paragraph (3)". However my task is to construe Schedule 3 in the form in which it was prior to the amendment. In my judgment the words of sub-paragraph (5) are in themselves precise and unambiguous; and when I expound them in their natural and ordinary sense I can come to no other conclusion than that they are applicable to the two grounds for restriction in the amount of housing costs. It is urged by the adjudication officer now concerned that the sequence in which the sub-paragraphs appear in paragraph 10 commands a different interpretation. I do not agree. When I look at the sub-paragraph in the context in which it appears, and in the light of the words used in the other sub-paragraphs, I see

no need to alter the view I have taken. It is true that there are two different reasons for restriction provided for in the paragraph and that sub-paragraph (5) is more often likely to be relevant to cases where the accommodation is too expensive, as is illustrated by the opening words of sub-paragraph (4) and sub-paragraph (6); but it does not appear to me that the application of sub-paragraph (5) is limited to that type of case only. The adjudication officer now concerned, also, relies on the legislative history and refers to regulation 20 and regulation 21 of the Supplementary Benefit (Requirements) Regulations 1983 which dealt with restriction of housing costs under the supplementary benefit legislation. Regulation 20 dealt with restrictions where a council or private tenant bought his house and regulation 21 provided for a restriction where the amounts were excessive. Regulation 21(3) dealt with the situation where it was not reasonable to expect the assessment unit to seek alternative cheaper accommodation, and clearly there the relaxation was limited to cases where the accommodation was too large or expensive. There would have been some force in this argument if I was satisfied that there were two meanings to the words used in paragraph 10(5) of Schedule 3 but, as I have already said, in my judgment there is a clear and unambiguous meaning to the words used in sub-paragraph (5), and I again emphasise the phrase "... no restriction shall be made under this paragraph", and the derogation applies to the two different grounds for restriction provided for by paragraph 10. If the intention of the maker of the statutory instrument had been otherwise, it would have been very easy for the draftsman to give expression to such a wish. Strictly therefore I should not have regard to the legislative history because the meaning of paragraph 10 of the Schedule is plain. But if it had been necessary for me to look to it, I would not have been persuaded that the intention was to adopt the same formula as had been adopted in the Supplementary Benefit (Requirements) Regulations.

9. It will be necessary for the new tribunal to consider the whole case again and when doing so to give effect to the provisions of paragraph 10(5) of Schedule 3 to the Income Support (General) Regulations 1987 as unamended and in doing so to have regard to "the relevant factors" which are specified in sub-paragraph (7).

(Signed) J J Skinner
Commissioner

Date: 27 September 1990