

JGMI/HJD

Commissioner's File: CIS/209/89

SOCIAL SECURITY ACTS 1975 - 1990

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL
TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name

Soci

Case No: 1916

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 21 April 1989 is erroneous in law and is set aside. The decision which I give in its place is that the claimant is not disentitled to income support by reason of section 20(3)(c) of the Social Security Act 1986 in respect of her claim made from 15 September 1988.

2. This is an appeal by the claimant with leave on a question of law against the above-mentioned tribunal decision of 21 April 1989. The appeal was dealt with at an oral hearing held before me in Liverpool at which the claimant, who did not attend, was represented by Mr D Moore of Kirklees Welfare Benefit, Batley, and the adjudication officer was represented by Mr J Reid of the Office of the Chief Adjudication Officer, Southampton. The claimant's appeal was supported by the adjudication officer.

3. The claimant is a young married woman. She was born in Pakistan but has spent most of her life in Britain. She went back to Pakistan in 1985 and married there. In July 1988 she returned to Britain from Pakistan. She was expecting a child. On 15 September 1988 she claimed income support. Her husband was said to be in low-paid but full-time employment in Pakistan and unable to support her. She was living with an uncle in Oldham. The intention of the claimant and her husband was for him to join her in Britain as soon as that could be arranged. After some considerable time the claimant's husband did in fact manage to join the claimant. In the meantime however an adjudication officer refused the claim for income support on 5 October 1988 on the ground that the claimant's husband was engaged in remunerative work. The claimant appealed to a social security appeal tribunal.

4. Section 20 of the Social Security Act 1986 contains conditions for entitlement to income support. Section 20(3)(c) provides:-

"(3) A person in Great Britain is entitled to income support if -

- (c) he is not engaged in remunerative work and, if he is a member of a married or unmarried couple, the other member is not so engaged; ..."

Section 20(11) provides that "a married couple" means a man and woman who are married to each other and are members of the same household. Section 20(12)(k) empowers the making of regulations as to circumstances in which persons are to be treated as being or not being members of the same household.

5. Regulation 16 of the Income Support (General) Regulations 1987 contains the following material provisions:-

"16. - (1) Subject to paragraphs (2) to (5), the claimant and any partner and, where the claimant or his partner is treated as responsible under regulation 15 (circumstances in which a person is to be treated as responsible or not responsible for another) for a child or young person, that child or young person and any child of that child or young person shall be treated as members of the same household notwithstanding that any of them is absent from the dwelling occupied as his home.

(2) Paragraph (1) shall not apply in respect of any person referred to therein who is not treated as occupying a dwelling as his home because he fails to satisfy the conditions in sub-paragraph (8) of paragraph 4 of Schedule 3 (housing costs) unless that person has been a patient within the meaning of regulation 2(3) for a period in excess of 52 weeks and is not a member of a couple or of a polygamous marriage."

None of the provisions of paragraphs (3) to (5) are of relevance in this case. The claimant's husband is her "partner" in terms of regulation 2(1).

6. Having regard to the above quoted provisions the tribunal was concerned to consider whether the claimant and her husband, who was admittedly in remunerative work, fell to be regarded as members of the same household. The tribunal unanimously decided that they did and upheld the decision of the adjudication officer. The tribunal made the following findings of fact:-

"1. The Claimant, Mrs Parveen, is married and aged 18.

2. She is the holder of a British passport and although stated to be born in Rawalpindi appears to have spent much of her life in Great Britain.

3. She was living with her own family and went to Pakistan in 1985 where she married and returned back to Britain in July 1988.

4. She returned to Britain to have her child and has stated that she had no intention of returning to Pakistan but efforts would be made for her husband to be permitted to enter Britain.

5. [The claimant's] husband was working in Pakistan, 8 hours per day and his earnings were stated to be 800 rupees per month.

6. [The claimant] and her husband are not estranged. Their separation is simply due to her desire to return to England to have her child and that they should resume living together as soon as she is able to arrange permission for him to come to this country."

7. The tribunal gave the following reasons for their decision:-

"The Tribunal did find this case difficult and considered very carefully the arguments that had been put forward by both sides. It could not be accepted as illogical that [the claimant] should be treated as entitled to income support based solely on the fact that her husband was unable to support her. There is nothing to be found in the Regulations to provide any kind of means test in this situation.

Section 20 of the Act states that a person in Great Britain is entitled to income support if he is not engaged in remunerative work and if he is a member of a married or unmarried couple the other member is not so engaged. Section 20 of the Act states that a married couple means a man and a woman who are married to each other and are members of the same household. Regulation 16(1) of the General Regulations provides that the claimant and any partner shall be treated as members of the same household notwithstanding that any of them is absent from the dwelling occupied as their home. There are other exceptions not material to this case.

Commissioner's decision R(SB) 12/82 indicates that it is not unreasonable for a Tribunal to conclude that a claimant was only temporarily separated from her husband where the separation set against the background that they had only recently married had not quarrelled, was pregnant, there was no indication that either party wished to terminate the marriage.

All of these circumstances apply in this case. The household that [the husband and claimant] share is in Pakistan. Their intention is to move the household to Britain. [The claimant] has now come here to live with the intention that her husband should join her. They are not estranged. They now have a child and their separation from each other can only be regarded as being temporary. Whether the household were to be regarded now as being in England or in Pakistan, it still follows that the other is only temporarily absent from it. It follows from this finding that because [the claimant's] husband is working more than 24 hours per week, notwithstanding the level of his earnings, that she is not entitled to income support."

8. Before me it was accepted by Mr Reid on behalf of the adjudication officer that the claimant and her husband were not in fact members of the same household at the date of claim. The question accordingly was whether they fell to be treated as such under the relevant regulations. The tribunal who clearly considered the claimant's case with great care obviously found that a matter of some difficulty as indeed I have, and the tribunal's position is not made entirely clear. Although they appear to consider regulation 16(1) of the Income Support (General) Regulations to be applicable their real reasoning appears to be based upon the concept that a temporary separation did not affect the position that the claimant and her husband remained members of a household either in Pakistan or in Britain. In adopting that approach the tribunal relied upon observations in reported decision R(SB) 12/82 on the expression "temporarily separated". That decision was, however, concerned with the wording of regulation 2 of the Supplementary Benefit (Aggregation) Regulations 1980 which contained the following provision:-

"2. - (2) Subject to paragraph (3), two persons who are married to each other shall not be treated as having ceased to be members of the

same household by reason of any temporary absence the one from the other."

It may well be that if those had been the provisions applicable in the present case the tribunal would have been entitled to reach the conclusion which they did. Their reasoning however does not deal adequately with the different wording of regulation 16(1) of the Income Support (General) Regulations, nor does it take account of the possible application of regulation 16(2). In particular they did not in my judgment give adequate consideration to the distinction between the concept of a temporary absence of one spouse from another dealt with in regulation 2(2) of the Aggregation Regulations and the concept of absence from the dwelling occupied as their home contained in regulation 16(1). As a result the decision of the tribunal must be held to be erroneous in law.

9. The decision of the tribunal accordingly falls to be set aside. It is both possible and appropriate for me to exercise the power to substitute my decision for that of the tribunal. For that purpose it is necessary to consider the relevant regulations in more detail. Looking to the wording of regulation 16(1), Mr Reid, on behalf of the adjudication officer submitted that "absent" merely had the meaning of "not being there". He sought to apply this to the home occupied by the claimant in Britain and submitted that paragraph 16(1) could be applied notwithstanding the absence of the claimant's husband although he recognised that there was a difficulty caused by the reference to the "dwelling occupied as his home" and the definition in regulation 2 of a "dwelling occupied as the home" as meaning the dwelling "normally occupied" by the claimant as his home. He did not suggest that the regulation could be applied to the claimant notwithstanding her absence from her husband's home in Pakistan.

10. Having submitted that regulation 16(1) applied, Mr Reid turned to regulation 16(2). After examining those provisions, together with the provisions of sub-paragraph (8) of paragraph 4 of Schedule 3 referred to therein however, he was constrained to submit that regulation 16(2) applied to disapply regulation 16(1). He regarded the person dealt with in regulation 16(2) as being in the present instance the claimant's husband provided he was not treated as occupying a dwelling as his home because he failed to satisfy the conditions in paragraph 4(8) of Schedule 3.

11. Paragraph 4 of Schedule 3 to the Income Support (General) Regulations contains the following material provisions:-

"4. - (1) Subject to the following provisions of this paragraph, a person shall be treated as occupying as his home the dwelling normally occupied as his home by himself or, if he is a member of a family, by himself and his family and he shall not be treated as occupying any other dwelling as his home.

(2) In determining whether a dwelling is the dwelling normally occupied as the claimant's home for the purposes of sub-paragraph (1) regard shall be had to any other dwelling occupied by the claimant or by him and his family whether or not that dwelling is in Great Britain.

(8) A person shall be treated as occupying a dwelling as his home for a period not exceeding 52 weeks while he is temporarily absent therefrom only if -

- (a) he intends to return to occupy the dwelling as his home; and
- (b) the part of the dwelling normally occupied by him has not been let or, as the case may be, sub-let; and
- (c) the period of absence is unlikely to exceed 52 weeks, or, in exceptional circumstances, (for example where the person is in hospital or otherwise has no control over the length of his absence) is unlikely substantially to exceed that period."

12. Mr Reid submitted that the claimant's husband could not be treated as occupying a dwelling house in Britain as his home under the provisions last quoted because he was occupying a dwelling in Pakistan as his home, and equally he could not be intending to return to a dwelling after a temporary absence as mentioned in paragraph 4(8) if he had never previously lived there. He accordingly submitted that regulation 16(2) applied to disapply regulation 16(1) with the result that the claimant and her husband were not to be regarded as members of the same household and his being engaged in remunerative work was not therefore a bar to the claimant's right to income support.

13. Mr Moore on behalf of the claimant, although willing to adopt Mr Reid's submissions and conclusion, was personally of the view that regulation 16(1) did not apply. The claimant's husband occupied a dwelling in Pakistan. The definition "dwelling occupied as the home" included the concept of what was normally occupied as the home. This coloured the "absence" provision with an implication of previous occupation. The claimant's husband had never occupied a dwelling in Great Britain.

14. In my judgment regulation 16(1) is framed on the basis that the members of the household concerned normally occupy a dwelling together as their home. Absence of a member from the dwelling is to be treated as not severing that person's membership of the household. Unlike the provisions of regulation 2(2) of the Aggregation Regulations, which merely directs attention to the nature of the separation of the couple concerned, the terms of regulation 16(1) make it applicable only if, when the question is raised, there is a dwelling which can be regarded as normally occupied as their home by the couple concerned. In the circumstances of the present case I think that that condition is not satisfied. Plainly the accommodation occupied by the claimant at her uncle's house in Britain could not be regarded as being at the material time the dwelling normally occupied as their home by the couple. The claimant's husband had never occupied that home. Equally I do not consider that in the circumstances here it is reasonable to regard the dwelling occupied by the claimant's husband in Pakistan as being at the material time the home normally occupied by the claimant. Indeed, as mentioned above it has not been suggested that she could be regarded as a person absent from that

dwelling. In these circumstances therefore I conclude that regulation 16(1) does not apply to cause the claimant and her husband to be treated as remaining members of the same household.

15. However lest I should be wrong about that conclusion I propose to consider briefly whether regulation 16(2) is applicable to disapply regulation 16(1) as Mr Reid submitted. The possible application of regulation 16(2) to the case of the claimant's husband has already been examined and discarded by Mr Reid and I accept his submission on that score. It appears to me that regulation 16(1) could only conceivably apply if the claimant were the person regarded as absent, i.e. absent from a dwelling normally occupied by the couple in Pakistan. As already mentioned that has not been suggested but in any event if it were, the claimant would in my view be a person who failed to satisfy the conditions of paragraph 4(8) of Schedule 3 in respect that, in particular, the evidence in the case as found by the tribunal is that the claimant did not intend to return to occupy the dwelling in Pakistan as her home. See paragraph 4(8)(a).

16. In the result therefore I conclude that the claimant and her husband were not to be treated as remaining members of the same household under regulation 16 and as they had in fact ceased to be members of the same household at the material time the claimant's right to income support was not affected by the consideration that her husband was engaged in remunerative work in Pakistan. I think it right to emphasise that my conclusion upon that matter is dependent upon the facts established in this case and may not necessarily be of general application.

17. My decision is as set forth in paragraph 1 above. Whilst the present case was under consideration by me the claimant very properly informed the Office of the Social Security Commissioners that her husband had in fact joined her and was in employment and she thought it right to apply to withdraw this appeal. However she took that course without seeking the advice of her representative and having subsequently obtained that advice at my suggestion, she withdrew the application.

18. The appeal of the claimant is allowed.

(signed) J G Mitchell
Commissioner
Date:

25 JUN 1991