

Inability to sell house ^C & buy another is a "relevant factor" ^{A S} in considering whether to restrict housing costs.

JM/3/MD

IDENTIFIABLE DECISION
NOT TO BE SENT OUT OF
THE DEPARTMENT

Commissioner's File: CIS/434/1992

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

FOR THE ATTENTION OF: EMMA KNIGHTS,
welfare rights worker

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RECEIVED
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C.A.S.

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 4 June 1991 which varied (in the claimant's favour) a decision issued by the adjudication officer on 7 March 1991. My own decision is as follows:

- (1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.
- (2) Without making fresh or further findings of fact I can give the decision which the appeal tribunal should have given.
- (3) No restriction falls - or has at any time fallen - to be made in respect of the housing costs included in the applicable amount carried into the calculation of the claimant's income support.

2. I held an oral hearing of the appeal. The claimant attended and was represented by Ms D R Johnson, of counsel, from the Free Representation Unit. In the event, Ms Johnson had an untaxing morning. The claimant's appeal had been supported by the adjudication officer now concerned. Before me, the adjudication officer was represented by Mr J Pollard, of the Central

Adjudication Service; and Mr Pollard - very properly, in my view - also supported the appeal. Indeed, had I had my wits more sharply about me, I should have, at the close of the hearing, requested the written consent of the parties to my giving a decision without reasons (cf regulation 22(2) of the Social Security Commissioners Procedure Regulations 1987). But I omitted so to do. It will now be quicker for me to give the reasoned decision rather than to the parties written to with requests for regulation 22(2) consents. I do not intend to establish any new principle of law. I do not intend that this decision shall be invoked as a precedent. In the circumstances, accordingly, I trust that no party will take it amiss if I dispose of this appeal rather more cursorily than I should do were the outcome in dispute.

3. The case is of a type which is, alas, all too common in these days of collapsed property values and severely reduced opportunities of earning a living. The claimant is a divorced man now aged 53. He lives by himself in a two-bedroomed house which he bought in 1987 for £115,000 with the aid of a 100% mortgage. At that time, of course, the property market was buoyant. Incredible as it may seem now - and incredible as it seemed then to people of my own generation - there were not only purchasers who gladly saddled themselves with 100% mortgages; there were also highly reputable building societies (in this case the Alliance and Leicester) which cheerfully offered such mortgages. At the time, however, all seemed well enough. The claimant was employed on the sales and marketing side of the computer industry. He could afford the mortgage repayments. His future looked assured.

4. But in the autumn of 1988 things started to go wrong for the claimant. On 20 September 1988, whilst on holiday in Tenerife, he ruptured his left Achilles tendon. He was unable to return to work after his holiday. As a direct consequence, in October 1988 his employers made him redundant. His damaged ankle is still giving him trouble. He has never worked since the injury.

5. The claimant had taken out an insurance policy in consequence of which his mortgage repayments were met until the end of December 1989. But funds to meet his other (inevitable) expenses ran out. On 3 October 1989 he claimed income support. At that date the outstanding balance on his mortgage was £114,000. On 18 January 1990 the adjudication officer wrote to inform him that his full housing costs would be allowed for an initial period of six months. On 1 May 1990 the adjudication officer reviewed her decision and decided that, with effect from 4 October 1990, the claimant's housing costs should be restricted to the interest payable on a mortgage of £60,000. By an administrative oversight, no review was in fact carried out in October 1990. The reduction of his income support was not effected until 5 March 1991. Unsurprisingly, no attempt was made to recover the intervening overpayment of benefit. (There were other adjustments to the claimant's income support in respect of service charges. I need not go into these here.) It was on

7 March 1991 that the adjudication officer issued the decision which lies at the forensic root of this appeal. The claimant appealed to the appeal tribunal.

6. Before the appeal tribunal the claimant was represented by Ms J Pearson, a friend of the claimant and a chartered surveyor. (She is employed by a local authority.) Ms Pearson went into various figures; and it is quite clear from the relevant form AT3 that the appeal tribunal approached its task with conscientious care. Since the appeal before me is no longer contentious, I quote only the two last findings of fact recorded:

"9. Because of the state of the housing market the Claimant has been unable to sell house which has been on the market at £145,000 initially. An estate agent, Cornerstone has advised that the market for this type of property has disappeared and unless the property is greatly reduced to around £80,000 it will not sell for some time. In any event, any sale of property in the foreseeable future is unlikely to produce sufficient to discharge the existing mortgage and the legal costs of the sale would leave the Appellant with an outstanding debt that he could not discharge and make it practically impossible for him to purchase another property.

10. There is alternative accommodation nearby which would be suitable for the Claimant in every respect in the price range £60,000 to £80,000."

The tribunal's unanimous decision was that, with effect from 4 October 1990, the claimant's housing costs were to be restricted "to the interest payable on £70,000 at 14.35 per cent less miras at £30,000".

7. It is manifest that the appeal tribunal bent over backwards to do as much as it considered that it properly could to assist the claimant. Nevertheless, its resolution of the problem was wholly detached from reality. On the one hand was the hypothesis that the claimant could purchase a suitable house in the £60,000 to £80,000 bracket. On the other hand was the finding that any sale of his present house by the claimant, in the foreseeable future, would leave him with an outstanding debt that he could not discharge and make it practically impossible for him to purchase another property. That last clause can be expanded. With the claimant left in substantial debt to his erstwhile mortgagee, no purchase would be possible without another 100% mortgage. Where would a mortgagee be found who was willing to afford such a mortgage to a heavily indebted man in receipt of income support and with no real prospects of remunerative employment?

8. As I shall briefly demonstrate, the appeal tribunal's hands were not as tightly bound as the tribunal considered them to be. I essay here no detailed summary of the relevant legislation. I refer only to so much of that legislation as will suffice to

render this decision intelligible. Housing costs are the subject of Schedule 3 to the Income Support (General) Regulations 1987. Paragraph 10 of that schedule is headed "Restriction on meeting housing costs under this Schedule". Sub-paragraph (3) provides thus:

"(3) Where the amounts to be met under paragraph 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 (6A)."

Sub-paragraph (4) sets out the circumstances in which the amounts to be met are to be regarded as excessive. But sub-paragraph (5) offers claimants a possible escape route:

"(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 sub-paragraph (3)."

And we go to sub-paragraph (7) for the relevant factors:

"(7) In sub-paragraph (5) '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)."

9. In the case before me the appeal tribunal in no way overlooked sub-paragraphs (5) and (7) of paragraph 10 of Schedule 3; but it felt unable to construe those sub-paragraphs in a way which would assist the claimant. I quote from the reasons recorded on the relevant form AT3:

"The Appellant has submitted that the practical impossibilities of selling the house and buying another is a relevant factor which is rejected by the Tribunal as not within the definition of a relevant factor set out in paragraph 10(7) of Schedule 3. In particular there is nothing in the age, state of health and employment prospects of the Claimant to make his present property equally suitable for him."

The tribunal was there misdirecting itself. It overlooked the phrase "including in particular" where it features in sub-paragraph (7)(b). In regulation 21 of the erstwhile Supplementary Benefit (Requirements) Regulations 1983 -

- (a) paragraph (3) was identical to the sub-paragraph (5) quoted by me in my paragraph 8 above, save that "the assessment unit" appeared where "the claimant and his family" now features; and
- (b) paragraph (5) was identical to the sub-paragraph (7) quoted by me in my paragraph 8 above, save that -
 - (i) "the assessment unit" appeared where "the family" now features; and
 - (ii) the provisions in respect of the effect on the education of any dependants were somewhat more terse.

It was, accordingly, very pro per that the adjudication officer now concerned should have, in his written submission, referred to R(SB) 6/89 and R(SB) 7/89, each of which appeals turned upon regulation 21 of the Requirements Regulations. I need not go into the facts of either of those cases. I content myself with the quotations set out in my next paragraph.

10. "As far as the points taken by Mr Johnson [the claimant's solicitor] were concerned, it is unnecessary to say more than the tribunal should have considered the relevant factors which he urged before them on behalf of his client. Clearly they are circumstances of the assessment unit and such circumstances are not limited to age and state of health and the other examples given in paragraph (5)(b). It is conceded, and rightly so, that these were 'relevant factors' as envisaged by regulation 21(5)(b) and should have been considered." (From paragraph 8 of R(SB) 6/89).

"14. At paragraph 11 of R(SB) 6/89 the Commissioner says that 'the purpose of regulation 21 is not to force a claimant to sell the existing home' and that 'the intention of the regulation is that supplementary benefit is to be limited to what is necessary to cover the outgoings on accommodation which is reasonable for the claimant's needs'. If I may say so, that is plainly correct. Equally it is plain that the regulation requires a realistic assessment to be made under paragraph 5(b) of the claimant's circumstances, the instances given there being examples and by no means exhaustive or complete.

15. In my judgment the circumstances in regulation 21(5)(b) must include the claimant's ability to obtain other accommodation, in the present case by purchasing another house which of necessity would entail his obtaining a mortgage. The new tribunal will accordingly have to decide whether they were satisfied that he would obtain a mortgage

or whether, as he says, that would be impossible."
 (Paragraph 14 and part of paragraph 15 of R(SB) 7/89)

11. I respectfully agree with all that is said in those passages - and they are, of course, fully applicable to the comparable income support provisions. I have no hesitation in myself giving the decision which the appeal tribunal should have given - and merely add two observations:

- (a) I was told at the hearing - and readily accept - that the present mortgagees of the claimant's house "will not consent to a sale". That, of course, is a slightly inept way of putting the position in law. The mortgagees cannot forbid a sale. But what they can do is to refuse to relinquish their charge upon the house until they have been paid the secured sum in full; and that, in practice, comes to much the same thing.
- (b) We are in the realm of what are - by modern standards - relatively modest sums. The income support fund is not being required to keep a claimant in "millionaire's row".

12. The interest payments on the mortgage which the claimant has been unable to pay in consequence of the aforesaid restriction have, of course, now been added to the outstanding capital. I am told that the mortgage debt is currently in the region of £130,000. As a result of this decision, the claimant will be able to resume interest payments - but only to the extent of the "eligible interest" as defined in paragraph 7(3) of Schedule 3. I explained at the hearing that the legislation does not permit the adjudicating authorities (of which I am one) to do anything to assist the claimant in respect of the extra interest consequent upon the recent substantial increase in the capital sum secured on his house. I advised him to seek extra statutory relief from the Secretary of State; and I repeat that advice here. I can do no more for him. Moreover, I am quite unable to forecast the outcome of such course.

13. The claimant's appeal is allowed.

(Signed) J. Mitchell
 Commissioner

(Date) 30 November 1992