

WIDOW'S BENEFIT

Living together as husband and wife—criteria whether consideration is being given to a claim to supplementary benefit or a claim to widow's benefit.

The claimant became a widow on 30.7.72 and was awarded widow's pension from 30.1.73. In May 1979 enquiries were made on suspicion that she was living with Mr H, a widower for 5 years, as his wife. He stated that he provided the claimant with free accommodation in return for her services as a housekeeper. The cost of food was shared equally between them and the claimant contributed £5 per week towards other expenses and paid for the telephone, which she had had installed. There was no sexual relationship nor an intention to marry.

Held that —

1. the expression 'living together as husband and wife' found in paragraph 3(1)(b) of the First Schedule to the Supplementary Benefits Act 1976 (as amended) has the same effect as the corresponding expression in the proviso to section 26(3) of the Social Security Act 1975 (paragraph 4);
2. High Court decisions bearing on the expression 'living together as husband and wife' with reference to claims to supplementary benefit are of relevance when consideration is being given to the expression as found in the Social Security Act 1975 and are not at variance with the interpretation of the expression adopted by Commissioners (paragraphs 4 and 5),
3. regard should be paid to the conduct of the people concerned since their intention cannot be ascertained without regard to that (paragraph 8);
4. the same criteria, which also appear in R(SB) 17/81, apply whether or not consideration is being given to a claim to supplementary benefit or to widows benefit (paragraph 11);
5. on the evidence as a whole the claimant and Mr H were not living together as husband and wife (paragraph 17),
6. the decision awarding widows benefit from 30.1.73 should not be reviewed and that such benefit was payable (paragraph 1).

1. My decision is that the original decision of the insurance officer awarding widow's benefit from and including 30 January 1973 should not be reviewed, and accordingly such benefit is payable. It follows that there can be no question of any repayment of benefit overpaid.

2. The claimant, now aged 61, was widowed on 30 July 1972. She claimed and was awarded widow's allowance and widow's supplementary allowance from 1 August 1972 to 29 January 1973 and widow's pension from 30 January 1973. However, in May 1979 it was suspected that she might be living with a certain Mr H. . . . y ("Mr H") as his wife. The claimant was seen by an officer of the Department at her home on 24 September 1979, when she admitted that she had not read the instructions in her order book and was unaware that she would not be entitled to widow's pension if she lived with a man as his wife. At that time she was residing at the house of Mr H. At the end of the interview, during which the circumstances leading to her taking up residence with Mr H were investigated, she was advised not to cash any further orders in her widow's pension book. The book was in fact withdrawn, and the claimant and Mr H were seen again by an officer of the Department on 25 October 1979. They both denied that they were living together within the meaning of the relevant statutory provision, and said that the claimant had moved to Mr H's bungalow purely in the capacity of a housekeeper.

3. However, the insurance officer was not satisfied that the claimant and Mr H were not living together as man and wife, and accordingly he reviewed and revised his original decision awarding widow's benefit so as to disallow the same from and including 25 July 1978. Furthermore, he required repayment of the benefit overpaid, not being satisfied that the claimant had

throughout used due care and diligence to avoid such overpayment. After an unsuccessful appeal to the local tribunal the claimant lodged an appeal to the Commissioner, and asked for an oral hearing, a request to which I acceded. The initial hearing took place on 25 June 1981 when the claimant was represented by Mr A. P. S. De Freitas of Counsel (instructed by Messrs Tuckey and Rylatt, Solicitors) and the insurance officer by Mr D. Barlow of the Chief Insurance Officer's Office. Unfortunately neither the claimant nor Mr H attended that hearing, and after the case had proceeded some way it was evident that the appeal would be prejudiced by their absence. Accordingly I acceded to Mr De Freitas's application for an adjournment to enable them to attend. The second hearing took place on 25 September 1981 when the claimant was again represented by Mr De Freitas, but this time the insurance officer appeared by Mr P. Milledge of the Solicitor's Office of the Department of Health and Social Security. I am grateful to both gentlemen for their assistance.

4. There have been certain recent decisions of the High Court bearing on the meaning of the expression "living together as husband and wife" as used in paragraph 3(1)(b) of the First Schedule to the Supplementary Benefits Act 1976 as amended by section 14(7) of the Social Security (Miscellaneous Provisions) Act 1977. Until the jurisdiction was taken over by the Social Security Commissioners with effect from 24 November 1980 appeals on matters of law lay from the supplementary benefit appeal tribunal to the High Court, and a certain amount of case-law has evolved directed to consideration of what constitutes living together as man and wife. Of course, the High Court was only concerned with construing the relevant statutory provision relating to *supplementary* benefit, and not with the equivalent provision under the Social Security Act 1975 which is concerned with *contributory* benefits. However, in my judgment, the relevant enactment under the Social Security Act 1975, to be found in the proviso to section 26(3), has exactly the same effect as the corresponding expression in paragraph 3(1)(b) of the First Schedule to the Supplementary Benefits Act 1976 (as amended). The proviso in question reads as follows:—

"Provided that the pension shall not be payable for any period after the widow's remarriage or for any period during which she and a man to whom she is not married are living together as husband and wife."

Accordingly what has been decided by the High Court with reference to claims to supplementary benefit are of great persuasive force in my construction of the meaning of the equivalent phrase under the Social Security Act 1975.

5. It is perhaps surprising to find that apparently no attempt was made to bring to the attention of the High Court Commissioners' decisions relating to the meaning of living together as man and wife, so that the High Court has reached an independent interpretation of that expression. Fortunately, the decisions of the High Court would not appear to be at variance with the interpretation adopted by the Commissioners, so that the same criteria can be applied whether or not the claim is for supplementary benefit or for widow's benefit.

6. Mr Milledge drew my attention first to the decision of *Crake v The Supplementary Benefits Commission* and *Butterworth v The Supplementary Benefits Commission* (unreported), where Mr Justice Woolf said with reference to the criteria to be considered in determining whether or not a man and a woman were living together as husband and wife as follows

"...there is a Supplementary Benefits handbook which sets out guidance to claimants and that, very conveniently, has paragraphs dealing with the problem as to when couples should be treated as living

together as husband and wife. At page 17 it sets out no doubt what the Tribunal were referring to as criteria. They are an admirable signpost to help a Tribunal or indeed the Commission to come to a decision whether in fact the parties should be regarded as being within the words 'living together as husband and wife'. They are: whether they are members of the same household; then there is a reference to stability of the relationship; then there is a question of financial support; then there is the question of sexual relationship; the question of children; and public acknowledgement. Without setting out the part of the handbook in full in this judgment, it seems to me that the approach indicated in that handbook cannot be faulted."

7. In view of the importance of the criteria to be applied I think it is worthwhile my setting out exactly what the particular handbook referred to does say. The criteria read as follows:—

“(a) *Members of the same household.* The man must be living in the same household as the woman and will usually have no other home where he normally lives. This implies that the couple live together wholly, apart from absences necessary for the man’s employment, visits to relatives etc.

(b) *Stability.* Living together as husband and wife clearly implies more than an occasional or very brief association. When a couple first live together, it may be clear from the start that the relationship is similar to that of husband and wife, e.g. the woman has taken the man’s name and has borne his child, but in cases where the nature of the relationship is doubtful the Commission will be prepared to continue the woman’s benefit for a short time in order to avoid discouraging the formation of a stable relationship.

(c) *Financial Support.* In most husband and wife relationships one would expect to find financial support of one party by the other, or sharing, of household expenses, but the absence of any such arrangement is not conclusive.

(d) *Sexual Relationship.* A sexual relationship is a normal and important part of a marriage and therefore of living together as husband and wife. But its absence does not necessarily prove that a couple are not living as husband and wife, nor does its presence prove that they are. The Commission’s officers are instructed not to question claimants upon the physical aspect of their relationship, though claimants may choose to make statements about it.

(e) *Children.* When a couple are caring for a child or children of their union, there is a strong presumption that they are living as husband and wife.

(f) *Public Acknowledgement.* Whether the couple have represented themselves to other parties as husband and wife is relevant, but many couples living together do not wish to pretend that they are actually married, and the fact that they retain their identity publicly as unmarried persons does not mean they cannot be regarded as living together as husband and wife.”

8. Mr Milledge also brought to my attention the case of *Robson v Secretary of State for Social Services* (unreported) decided by Mr Justice Webster. In the course of his judgment the learned Judge expressed the following view:

“Often it is only possible to decide [the issue] by considering the objective facts, because usually the intention of the parties is either unascertainable, or, if ascertainable, is not to be regarded as reliable.

But if it is established to the satisfaction of the Tribunal that the two persons concerned did not intend to live together as husband and wife and still do not intend to do so, in my judgment it would be a very strong case indeed sufficient to justify a decision that they are, or ought to be treated as if they are, husband and wife.”

The learned Judge suggests the above approach by way of guidance to Supplementary Benefit appeal tribunals. I am afraid that I do not think it will be of any real assistance to them, in that, apart from the fact it presupposes that the two persons concerned have the same intention—and often they do not—I do not see how a person’s intention can be ascertained otherwise than by what he or she does and says at the relevant time. It is the conduct of the person concerned to which regard has to be paid. In my judgment, an intention cannot be ascertained without regard to such conduct. However, the actual decision of *Robson v Secretary of State for Social Services* would appear to be consonant with what Mr Justice Woolf said in the earlier case.

9. Mr Milledge referred me to the various relevant Commissioners’ decisions relating to what constitutes living together under the proviso to section 26(3). In my judgment, the most succinct statement of the principles to be adopted is set out in paragraph 5 of Decision R(G) 3/71, and the criteria there laid down have been repeatedly approved in Commissioners’ decisions (see for example R(G) 1/79 paragraph 8). Paragraph 5 of Decision R(G) 3/71 reads as follows:

“It is generally accepted that the question of whether a woman is cohabiting with a man as his wife, within the meaning of the statute, requires an examination of three main matters: (1) their relationship in relation to sex: (2) their relationship in relation to money: (3) their general relationship. Although all three are as a rule relevant, no single one of them is necessarily conclusive.”

There is, of course, no distinction between “cohabiting” and “living together”.

10. I take the view that the above succinct statement corresponds with the criteria set out in the Supplementary Benefits handbook. In the latter case there is some expansion, but the same essential approach is being applied. It may be helpful if I specifically compare the criteria contained in the Supplementary Benefits handbook with the yardstick adopted in Decision R(G) 3/71.

11. First, it is axiomatic that the man and woman concerned must be living in the same household. This requirement is not spelt out specifically in Decision R(G) 3/71, but only, in my judgment, because it is self-evident. The second requirement contained in the handbook, namely “stability” is covered by the parties’ “general relationship”. As for “financial support” and “sexual relationship” these are manifestly covered by Criteria (2) and (1) respectively of Decision R(G) 3/71. The existence of children is indicative of a sexual relationship and/or the general relationship of the man and woman. As regards “public acknowledgement” this again goes to their general relationship. Accordingly, in my judgment, exactly the same criteria apply whether or not consideration is being given to a claim to supplementary benefit or to widow’s benefit, and this same approach has been adopted in R(SB) 17/81.

12. I should also say for completeness that the decisions of the High Court referred to above proceeded on the basis of the Supplementary Benefits Act 1976 as it stood prior to its amendment in 1980. As a result of such amendment the relevant statutory provisions are now paragraph 3(1)

of Schedule 1 to, and section 34 of, the Act. These provisions read as follows:

- “3.—(1) Where two persons are a married or unmarried couple, their requirements and resources shall be aggregated and treated,
- (a) until the prescribed date [no date has so far been prescribed], as those of the man; and
 - (b)

Section 34(1)

“ ‘unmarried couple’ means a man and a woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances.”

The “prescribed circumstances” are those specified in regulation 6 of the Supplementary Benefit (Aggregation) Regulations 1980 and deal with very exceptional cases, which are not normally applicable. Although there have been these changes to the Act, they effect no material alteration to the law.

13. Mr De Freitas submitted that on the facts of the case the claimant and Mr H did not satisfy the criteria for concluding that they were living together as man and wife. He pointed out that there was no sexual relationship whatsoever. Indeed, they did not even kiss or hold hands, and on his putting the suggestion to them in turn when they came to give evidence, they rejected the suggestion with something approaching abhorrence. I am fully satisfied that there was no sexual relationship whatsoever.

14. As regards their financial relations Mr De Freitas pointed out that their evidence showed that they divided the cost of food equally, and that as regards other bills they provided a box, into which the claimant put £5 a week and Mr H somewhat more. In the event Mr H discharged all the bills with the exception of the telephone account, for which the claimant assumed sole responsibility—she had had the telephone installed in her bedroom on her arrival at the bungalow—and, to the extent that the claimant’s contribution to these bills was inadequate, the shortfall was made up by Mr H.

15. As regards their general relations Mr De Freitas submitted that the evidence was that Mr H, who had been a widower for about 5 years, was in need of a housekeeper to look after his bungalow and was willing to provide accommodation to someone who was willing to carry out the functions of a housekeeper. At the same time he was anxious to have the companionship of someone in the house. The desire for companionship is perhaps suggestive of a relationship other than that of a housekeeper in the strict sense of the word, but, on balance, I think he was only really concerned with the presence of another human being in an otherwise lonely establishment. Of course, it is somewhat unusual, if the claimant was to be a housekeeper in the normal sense that she was not paid any regular salary. However, against that Mr H was in no position to pay any such salary, and he regarded the provision of free accommodation as a sufficient *quid pro quo*. In any event the relations between the claimant and Mr H seemed to have been somewhat formal, in that normally they would refer to each other by their respective surnames prefixed by “Mr” or “Mrs”, as the case might be. Nearly every Saturday morning the claimant went to stay with her son or daughter until Sunday evening, and she had no dealings other than of a purely formal nature with Mr H’s two daughters. Furthermore, Mr H had never visited the homes of the claimant’s daughter or son.

16. I should also say that there was no public acknowledgement of any relationship as husband and wife, and indeed both the claimant and Mr H

were at pains to point out that the relationship was totally different from that which they had previously enjoyed with their respected spouses, and they certainly had no intention of marrying, nor did they entertain any serious thought about it. Mr De Freitas contended that they could not in common parlance be regarded as husband and wife, and that whether one applied the criteria laid down in the handbook or the principle enunciated in Decision R(G) 3/71 the claimant and Mr H could not be regarded as living together as husband and wife. Their arrangement was too businesslike, and in particular it was odd in the extreme that the claimant had arranged for the installation of a telephone in her own room, a practice which would not normally be adopted in the case of a husband and wife.

17. Cases of the kind under consideration are always difficult, and often borderline. However, on balance I am satisfied that Mr De Freitas has made out his case. I am satisfied that the claimant and Mr H have not been living together as man and wife, and accordingly I allow this appeal.

(Signed) D. G. Rice
Commissioner
