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DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the York appeal tribunal dated 3 February 2004 is erroneous in point of law, as there was no decision before it against which an appeal could be made, and I set it aside. I substitute the decision that the appeal tribunal should have given (Social Security Act 1998, section 14(8)(a)(i)). The decision is that the appeal tribunal had no jurisdiction to hear the appeal purportedly before it, as no decision capable of appeal had been made, and I declare that no decision has as yet been made revising or superseding the decisions under which payment of income support was made to the claimant in the period from 8 April 2002 to the day before a decision apparently made on 26 February 2003 took effect (if such a decision was made). I deal in paragraph 15 below with the effect that my conclusions have on the overpayment recoverability decision dated 9 May 2003.

2. This is a case involving an alleged overpayment of income support for a period of about a year. It has been the subject of extensive and detailed investigation, but I am afraid that the result is a legal and administrative mess. Unfortunately, the full extent of that mess did not strike me when I first gave directions on the claimant's appeal against the decision of the appeal tribunal of 3 February 2004, made with the leave of a district chairman. I directed a further submission from the Secretary of State on 21 October 2004 and in the light of the response dated 17 November 2004 I can deal with the case before me relatively briefly. The claimant is understandably fairly bemused by the Secretary of State's suggestions about the outcome and has asked for some assurances about where she now stands and what could happen next. I attempt to explain the position in paragraphs 15 to 18 below.

3. The claimant was awarded income support on a claim received on 22 February 2001 in which she said that she had separated from her husband (Mr A), who had left the family home on 17 February 2001. She was living with her son, then aged about two and a half. She changed address on 8 April 2002 to a village that I shall call B. In September 2002 an allegation was apparently made that Mr A was living with the claimant and investigations began. The claimant was interviewed on 20 January 2003. In the course of the interview, the claimant said that Mr A had stayed with her for some days a week, a couple of times a week before November 2002 and three or four times from then onwards. Further investigations revealed that Mr A was on the electoral register at the claimant's address and that the telephone and electricity accounts were in Mr A's name (until the latter was transferred to the claimant on 20 January 2003). The water charges were in joint names until 10 February 2003, when they were put into the claimant's name alone. The claimant was interviewed again on 28 February 2003.

4. On 20 March 2003 a decision maker signed a decision which set out an analysis of various information and evidence received and included the following conclusions:

"I consider taking all of the above information into account that [the claimant] and [Mr A] have been living together as husband and wife since at least 8 4 02 when they

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moved into the [B] property.

I am therefore satisfied that they have been living together as husband and wife since at least 8 4 02. I have used the 8 4 02 date in my decision as this is a definite date that I accept that they were both together at the [B] address."

A note at the bottom of the page, after the end of the decision itself, indicated that the claimant had been notified on 25 March 2003 on form DLIS 465A (adapted).

5. At my request, the representative of the Secretary of State has now supplied a copy of a letter to the claimant dated 26 March 2003 in form DL/IS 465A. The letter was headed "About your Income Support" and continued:

"I am writing to tell you that we have decided that you and [Mr A] are living together as husband and wife. We have made this decision using the information you gave us on 28 2 03.

When two people live together as husband and wife, we work out their Income Support as if they are a married couple. This means that from 8 4 02 we cannot pay you Income Support as a single person.

The Income Support Decision maker is treating you as having been living together as husband and wife from 8 4 02.

As [Mr A] is claiming Jobseekers Allowance for all of you, your current entitlement to benefit will be unchanged.

However, as I am sure that you are aware, the fact that a claim was made by you as a lone parent, when this was not the case has resulted in a considerable overpayment, which we will be writing to you about in due course.

If you want a further explanation of this decision, please see the final page of this letter. It explains what to do if you disagree with this decision."

The representative of the Secretary of State has confirmed, after contacting the local office concerned, that no other decision apart from that dated 20 March 2003 had been made that altered the claimant's past income support entitlement.

6. It does, though, look from the computer records of letters and notes about the case (pages 89 to 91) as if a supersession decision had been made earlier, on 26 February 2003, terminating the claimant's entitlement to income support either from that date or from 12 February 2003. The notes record a telephone call from the Scarborough jobseeker's allowance (JSA) office on 26 February 2003 to say that the claimant was included in a JSA claim by Mr A from 12 February 2003. A letter is then recorded as having been sent to the claimant on 26 February 2003, with the codes "CoC's, EOC (INF1, 2, 4)". That obviously means change of circumstances, and "EOC" might well stand for "end of claim". The other

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references are to information documents and three might well have been sent out if, say, there was an instruction to send back an order book.

7. The claimant submitted an appeal form on 22 April 2003, clearly identifying the date of the letter about the decision against which she wished to appeal as 26 March 2003. In the accompanying letter she said that she wanted to appeal against the decision that she and Mr A had been living together as husband and wife since 8 April 2002. On reconsideration on 25 April 2003 the decision was not changed.

8. On 9 May 2003 a decision maker signed the following decision:

"As a result of the decision dated 25 April 2003, an overpayment of Income Support has been made from 08 April 2002 to 24 March 2003 (both dates included) amounting to £4415.91.

On 08 April 2002, or as soon as possible thereafter, [the claimant] failed to disclose the material fact that she was living as husband and wife with [Mr A] and therefore failed to satisfy the conditions of entitlement to claim Income Support as a lone parent.

As a consequence, Income Support amounting to £4415.91 from 08 April 2002 to 24 March 2003 (both dates included) was paid which would not have been paid but for the failure to disclose.

Accordingly, that amount is recoverable from [the claimant]."

A schedule of overpayment was attached, showing the claimant's correct entitlement as nil for the period identified. No separate appeal has been made against that decision.

9. In the Secretary of State's written submission to the appeal tribunal, the decision under appeal was described as being that from 8 April 2002 the claimant was not entitled to income support as a lone parent, as from that date she was treated as living together as husband and wife with Mr A. The submission rightly, since the claimant and Mr A were married to each other, referred to the relevant test of whether the claimant had a partner for income support purposes as being whether she and Mr A were members of the same household (see the definition of "married couple" in section 137(1) of the Social Security Contributions and Benefits Act 1992). The submission once again went through the evidence said to support the conclusion that the claimant and Mr A were members of the same household in the period in question. All that was said on the question of whether the claimant was entitled to income support in that period was this:

"Where two people are a married couple, entitlement to benefit by the claimant is dependent upon those persons satisfying the conditions of entitlement as specified in the relevant legislation. In this case [Mr A] has made a claim to Jobseeker's Allowance for the family as a whole."

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10. There was then a section headed "The overpayment decision maker's submission", in which it was stated (without any basis so far as I can see) that it was not in dispute that income support had been paid at an incorrect rate and that an overpayment had occurred. It was submitted that the original award of income support to the claimant had been superseded on 26 February 2003 when her income support claim was ended following a jobseeker's allowance claim from Mr A for the family unit from 12 March 2003 (probably a typing error for 12 February 2003). It was said that it had been decided that the overpayment was recoverable from the claimant because she had failed to disclose that she was living as husband and wife with Mr A.

11. The claimant did not attend the hearing on 3 February 2004, but was represented by Mr A. The appeal tribunal dismissed the appeal. On the decision notice the decision of 20 March 2003 was confirmed and it was said that the appeal tribunal was satisfied that the claimant and Mr A had been living together as husband and wife since 8 April 2002, that she had failed to disclose that fact and that as a consequence failed to satisfy the conditions of entitlement to income support as a lone parent. The statement of reasons described the issues before the appeal tribunal as including that of whether an overpayment was recoverable, but its conclusions seem to have been restricted to saying that there was a ground for supersession on change of circumstances and that the claimant had been overpaid income support of £4,415.91 for the period from 8 April 2002 to 24 March 2003.

12. An application for leave to appeal was made on behalf of the claimant, which essentially challenged the appeal tribunal's evaluation of the evidence and also alleged an impropriety in one of the interviews with the claimant. A district chairman granted leave saying that the appeal tribunal dealt with the decision under appeal (living together as husband and wife), but then proceeded to deal with the overpayment decision, which was not before it. I am not at all sure that that was so when the terms of the decision notice and the whole of the statement of reasons are examined. Even if it was so, it does not seem a good reason to overturn the decision on the application of the claimant.

13. I do not need to go into the initial submissions made on the appeal. I agree with the Secretary of State's submission of 17 November 2004 that there was no decision before the appeal tribunal that was capable of being appealed. If a decision had actually been made in the form described in the letter of 26 March 2003 (paragraph 5 above) or in the Secretary of State's written submission to the appeal tribunal, that could have been accepted as in substance a supersession decision on the ground of relevant change of circumstances, with the superseding decision being that the claimant was not entitled to income support from and including 8 April 2002. The deficiencies of an absence of any express mention of powers of supersession or of any explanation of why not being a lone parent meant that the claimant could not be entitled to income support would not have affected the substance. There would, in the current jargon, have been an "outcome decision" affecting entitlement to benefit that was capable of appeal under section 12(1) of the Social Security Act 1998. But the documents clearly show that no such decision was ever made with effect from 8 April 2002. The "decision" of 20 March 2003 on page 81 merely determined one question, one building block, that would have been necessary along with the determination of other questions for a decision altering entitlement from 8 April 2002 to have been made. It was not a decision within the

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meaning of section 12(1) and therefore was not capable of being appealed.

14. For that reason, the appeal tribunal of 3 February 2004 had no jurisdiction to make any substantive decision, as there was no appeal properly before it. All it could properly have done was declare that to be the legal position. It erred in law by purporting to make a decision. In paragraph 1 above I have therefore set aside its decision and substituted what should have been done.

15. The upshot for the claimant is this. First, no decision has been made that takes away her entitlement to income support from 8 April 2002 to the date before any decision made of 26 February 2002 (see paragraph 6 above: the details of any such decision remain to be investigated). Thus no overpayment for that period can yet be identified. Second, there was no legal basis for the overpayment recoverability decision of 9 May 2003. The condition in section 71(5A) of the Social Security Administration Act 1992 (amount not be recoverable under section 71(1) unless the determination in pursuance of which benefit was paid has been revised or superseded) was not met. Although the decision of 9 May 2003 is not before me and I have no power to make any formal ruling about it, the conclusion above seems to follow as a matter of law and to be accepted by the Secretary of State in the submission of 17 November 2004.

16. There is nothing in law to stop the Secretary of State from taking action now to make a proper supersession decision in relation to the period from 8 April 2002, building on the determination of 20 March 2003. Before doing so, the Secretary of State would need to consider all the evidence afresh in the light of the proper question - whether the claimant and Mr A were members of the same household from 8 April 2002 - rather than in the light of the wrong question - whether they were living together as husband and wife. There does seem to be a lack of specific evidence about the household, domestic and financial arrangements in the claimant's home at B. But it seems clear that, if for any part of the period the claimant and Mr A constituted a "married couple" as defined in section 137(1) of the Social Security Administration Act 1992, the claimant would no longer fall within any of the categories of person qualified for income support set out in Schedule 1B to the Income Support (General) Regulations 1987 regardless of Mr A's income or whether he was working or not (as she would no longer have been a lone parent under paragraph 1). The Secretary of State would also have to establish whether and, if so, from what date the claimant's entitlement to income support has already properly been terminated by the decision of 26 February 2003.

17. If the Secretary of State does make a proper supersession decision with effect from 8 April 2002, he may also consider making an overpayment recoverability decision, probably after revising the decision of 9 May 2003 for official error. Again, prior careful consideration of all the circumstances would be necessary. The circumstances would include whether income support in fact continued to be paid to the claimant down to 24 March 2003 in the light of the decision of 26 February 2003 and whether the claimant could be said to have failed to disclose any primary material facts after either the interview of 20 January 2003 or the interview of 28 February 2003.

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18. If the Secretary of State does make either a proper supersession decision or/and an overpayment recoverability decision (which could be combined in one), the claimant will have a fresh right of appeal. She should be careful, if separate decisions are made, rather than a combined one, that all decisions which she wishes to challenge are specifically covered by an appeal.

(Signed) J Mesher
Commissioner

Date: 7 January 2005