Reserve, interesting

CPAG

SUPPLEMENTARY BENEFITS ACT 1976

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987
REGULATIONS 24(1)

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER – CORRECTION

Page 4.	Paragraph 9.	Line 2.	Delete Insert	"Inadequate" "adequate"
Page 8.	Line 8.		Delete Insert	"any" "Only"

(Signed) M. Rowland
Commissioner

(Date) 12 January 1995#

Commissioner's File: CIS/643/1993
CIS/644/1993

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Commissioner's File: CIS/643/1993

CIS/644/1993

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. These two appeals by the claimant are allowed. The decisions of the Crewe social security appeal tribunal dated 22 February 1993 are erroneous in point of law. I set those decisions aside and refer the cases to a differently constituted tribunal for determination.

2. The claimant, who did not attend the hearing of her appeal, was represented at the hearing by her husband. The adjudication officer was represented by Mr Leo Scoon of the Office of the Solicitor to the Departments of Social Security and Health. I am grateful to them both for their submissions.

3. The tribunal had before them two appeals against decisions by adjudication officers to the effect that the claimant was not entitled to income support from 11 May 1992 but that she was entitled to income support at the rate of £11.08 from 13 October 1992. A very large number of issues were considered in the submissions to the tribunal but those had been narrowed down to two main issues by the time of the hearing. One issue was concerned with income from a number of properties said to be owned by the claimant's husband. The other issue was concerned with the amount of eligible housing costs. The tribunal's decision in the first appeal (Tribunal Register No.609/02745) was in the following terms:-

> Appeal allowed in part. The adjudication officer's decision regarding income support from 11 May 1992-12 October 1992 should be varied (1) to reduce the appellant's income by £37.50 a week (i.e. the half rental on 42 Broughton Road), and the cost of any mortgage on the rented properties and (2) the housing costs should be increased to appropriate interest on £25,737."

At the end of their reasons, the tribunal added a further note to the following effect:-

> "If the decision appears to entitle the appellant to income support between 11 May 1992 - 12 October 1992 any weeks in which the appellant's husband worked over 16 hours would be ineligible. Also family credit awarded between 11 August 1992 - 8 February 1993 must be taken into account."

In respect of the period from 13 October 1992 the decision was as follows:-

> "Appeal allowed in part. The adjudication officer's decision should be amended in accordance with the decision in 609/02745, and should be further amended to take into account family credit received by the appellant from 13 October 1992."

The claimant now appeals against those decisions with the leave of a Commissioner. Points arise on both the main issues before the tribunal.

Income from property

4. The claimant's husband had an interest in a number of properties which he was trying to sell. The capital value of the properties was disregarded by the adjudication officer under paragraph 26 of Schedule 10 to the Income Support (General) Regulations 1987 but the adjudication officer decided that the claimant's husband had income in respect of four properties which were let to tenants. The adjudication officer was of the view that the claimant's husband owned the properties jointly with his brother and so only half the rent was taken into account. One of those properties was sold on 13 October 1993, reducing the claimant's husband's income, which is why the adjudication officer decided that the claimant became entitled to income support from that date. It appears to have been accepted that the claimant's husband did not receive any capital as a result of the sale because all the proceeds of sale went to his brother in partial settlement of a large debt. The tribunal found as a fact that the claimant did not in fact have an interest in the property at 42 Broughton Road, from which it followed that he was not entitled to the half share in the rent. No complaint is made about that part of the tribunal's decision. Mr Scoon, however, raised three points in respect of the decision that income from the other properties should be taken into account, less the costs

of any mortgage on the rented properties.

5. He first submitted that the tribunal had erred in failing to make adequate findings in respect of the debt owed by the claimant's husband to his brother, because the claimant's husband had alleged that he paid all his share of the rental income to his brother to reduce the debt. If the tribunal were right to regard the rent received as being income, I would reject that submission. The costs of earning income may have to be taken into account in determining what the income actually is, but the mere fact that a claimant incurred a capital debt in acquiring property does not mean that the claimant can have no income from that property until the debt is repaid. Accordingly, if the rent was income, it was unnecessary for the tribunal to make any detailed findings in respect of the debt.

6. However, Mr Scoon also submitted that the tribunal erred in assuming that the rent was income. In CIS/082/1992, a Tribunal of Commissioners has held that an interest in a freehold which is subject to a lease or tenancy is a "reversionary interest" in terms of paragraph 5 of Schedule 10 to the 1987 Regulations. Regulation 48(4) of those Regulations provides:-

> "Except any income derived from capital disregarded under paragraph 1, 2, 4, 6, 12 or 25 to 28 of Schedule 10, any income derived from capital shall be treated as capital but only from the date it is normally due to be credited to the claimant's account."

It therefore follows that rent received under a lease or tenancy is to be treated as capital and does not affect a claimant's entitlement to income support unless it takes the total amount of capital held in any week over the £3,000 threshold set by regulation 53(1). If the rent was used to pay a debt, it would never accumulate. However, it might be necessary to make clear findings of fact about the debt if it were to be suggested that it was not genuine and that the claimant was deliberately depriving herself of income for the purpose of securing entitlement to income support or increasing entitlement to that benefit (see regulation 51(1)). It is also necessary to draw a distinction between rent due under a lease or tenancy, which is income derived from a "reversionary interest", and a payment due under, say, a licence, which is to be regarded as income derived from premises and so may fall to be treated as income if the value of the premises is disregarded under paragraph 26 of Schedule 10.

7. The Chief Adjudication Officer and Secretary of State are appealing against the decision of the Tribunal of Commissioners in CIS/082/1992. However, I understood Mr Scoon to accept that, if I were to decide on other grounds to refer the present case to a tribunal for determination, it would be convenient for me to follow CIS/082/1992, without awaiting the decision of the Court of Appeal. The appeal against CIS/082/1992 is to be heard by the Court of Appeal in December and it will be for the tribunal to decide whether to await the Court's decision, taking

into account the length of time which may be expected to elapse before the decision is available and balancing that against any real hardship likely to result from the claimant from being kept out of benefit to which she is entitled on current authority, bearing in mind that possession proceedings have been issued in respect of the family home. Following CIS/082/1992, I hold that the tribunal did err in law in treating the rent received by the claimant as income rather than as capital. However, the tribunal to whom this case is now referred must, of course, follow the Court of Appeal's decision should that be available when they come to determine the case.

8. Mr Scoon's third submission, adopting a concern voiced by the Commissioner who granted leave, was that the tribunal, having accepted that the rent was income, ought to have made a finding as to whether or not there were in fact any mortgages on the properties, rather than simply saying that the cost of any mortgage should be deducted from the rental income. In principle, a tribunal determining a claim (as opposed to a mere question) should, to use the words of the Commissioner, "translate its findings into sums actually payable by way of income support". In practice, it is sufficient if a tribunal determines all the questions arising on the claim in sufficient detail to enable the parties to be sure how the final calculation should be made, provided that the parties are given the opportunity of having any unexpected dispute resolved by the tribunal. The tribunal's decision is regarded as being completed by the agreement of the parties if there is no such dispute (see CIS/442/1992). A tribunal should not leave a live issue unresolved. In the present case it was not accepted by the adjudication officer that there were any mortgages on the relevant properties, although it was accepted that paragraph 22(2) of Schedule 9 to the 1987 Regulations would have applied if there had been any such mortgages.

9. In the circumstances of this case, it seems to me that the tribunal's apparent failure to make inadequate findings was largely one of style rather than one of real substance. Explaining their decision, the chairman wrote:-

> "The appellant has not proved to the satisfaction of the tribunal that his brother has a mortgage over any of the appellant's husband's property. However the repayments on any mortgage to the bank on any one property would have to be allowed and offset against the income from that property."

I think what the tribunal meant to do, and should have done more clearly, was to make a finding of fact to the effect that there were no mortgages on the relevant properties but to indicate to the claimant that she could always adduce evidence in support of an application to an adjudication officer for a review of the tribunal's decision under section 25(1)(a) of the Social Security Administration Act 1992 on the ground that the decision was given in ignorance of, or was based on a mistake as to, some material fact. If that was the tribunal's intention, they should have

made no reference to the possibility of their being a mortgage when setting out their formal decision in box 3 on Form AT3.

Eligible housing costs

10. The claimant and her husband and their two children live in a property bought for about £12,000 in 1977 with the assistance of a mortgage for £11,350. It was remortgaged in 1982 for £30,000 and in 1986 for £35,000 and finally in 1989 for £135,000. A substantial amount of building work, said to have cost a total of £87,267, has been carried out and the claimant submits that she is entitled to have her mortgage interest met through income support to the extent of the interest on £98,617 - the amount of the original mortgage and the amount of the subsequent building work. It is conceded that the balance of the current mortgage was for raising capital for her husband's business and cannot be met through income support.

11. The adjudication officer decided that the interest on £11,350 was eligible interest under paragraph 7 of Schedule 3 to the 1987 Regulations. He further decided that interest on £12,666 could be met under paragraph 8. On appeal, the tribunal varied the decision by deciding that interest on a further £1,721 could be met under paragraph 8 so that interest could be met on a total of £25,737. They gave the following explanation for their decision not to allow any further interest to be met through income support:-

> "The tribunal do not feel that the other improvements listed in paragraph 16 of the statement of facts were to maintain the fabric of the building or reasonably necessary to improve its fitness for occupation (Income Support (General) Regulations 1987, Schedule 3, paragraphs 8(3) and 8(3)(k).
>
> Schedule 3, paragraph 10(3) is not relevant because the housing costs are not excessive."

12. The last sentence of the tribunal's explanation was intended to deal with an argument advanced on the claimant's behalf both before the tribunal and before me. The claimant's husband submitted that the part of the mortgage referrable to buying the house and improving it was "excessive" as that term is defined in paragraph 10(4) of Schedule 3 to the 1987 Regulations and that, because the circumstances outlined in paragraph 10(6) applied, he was entitled to have interest met on the whole of the £98,617. That argument is wholly misconceived and ignores the structure of paragraph 10. Sub-paragraph (3) provides:-

> "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 (6A)."

Sub-paragraph (3) is therefore concerned with the imposition of a restriction of the amounts that would otherwise be met under

paragraphs 7 to 9, in a case where those amounts are excessive. Sub-paragraph (4) begins with the words "The amounts to be met shall be regarded as excessive where - ...." and that is clearly a reference back to sub-paragraph (3) and the words "the amounts to be met under paragraphs 7 to 9". Sub-paragraph (6) has the effect that, where certain conditions are satisfied, "no restriction shall be made under this paragraph". It therefore has the effect only of removing the restriction which would otherwise apply by virtue of sub-paragraph (3). I therefore reject the submission that housing costs can be met under paragraph 10 if the total payments are excessive even though those costs could not be met under paragraphs 7 to 9. Paragraph 10 is concerned only with the circumstances in which amounts that would otherwise be met under paragraphs 7 to 9 can be restricted. If the claimant's husband were right, the result would be that interest not met under paragraphs 7 to 9 could be met under paragraph 10 if it was excessive but could not be met if it was reasonable. That would be absurd.

13. The real reason why the claimant failed to obtain all she sought from the tribunal in this case was that the tribunal held that the bulk of the interest could not be met under paragraphs 7 to 9. The tribunal presumably had in mind the interest on £25,737 when they said that "the housing costs are not excessive", because that was the amount they considered should be met under paragraphs 7 to 9. In my view, the issue in this case is whether the tribunal's approach to paragraph 8 was correct.

14. There were five disputed items of expenditure which might have been relevant to the application of paragraph 8. £1,113 was said to have been spent on incorporating the coal house into the wash house, which appears to have made the wash house more accessible from the main house. £1,200 was said to have been spent on putting a sink and fitted units in the main bedroom. £1,100 was said to have been spent on a porch to give the front of the house some protection from the elements. £19,750 was said to have been spent on a double garage and driveway. £49,700 was said to have been spent on an extension which included a lounge, sitting room, three bedrooms and a bathroom. It was said that the extension was built so that the claimant's parents or parents -in-law could live there, but they never did and, indeed, the extension was never completed.

15. Paragraph 8 of Schedule 3 to the 1987 Regulations provides:-

" (1) There shall be met under this paragraph an amount in respect of interest payable on a loan which is taken out, with or without security, for the purpose of -

(a) carrying out repairs or improvements to the dwelling occupied as the home; or

(b) paying off another loan but only to the extent that interest on that other loan would have been met under this paragraph had

the loan not been paid off,

and which is used for that purpose or is to be so used within six months of the date of receipt or such further period as is reasonable, and the amount to be met under this paragraph shall be calculated as if the loan were a loan to which paragraph 7 applied.

(2) [Revoked]

(3) In this paragraph 'repairs and improvements' means major repairs necessary to maintain the fabric of the dwelling occupied as the home and any of the following measures undertaken with a view to improving its fitness for occupation –

(a) installation of a fixed bath, shower, washbasin, sink or lavatory, and necessary associated plumbing;

(b) damp proofing measures;

(c) provision or improvement of ventilation and natural lighting;

(d) provision of electric lighting and sockets;

(e) provision or improvement of drainage facilities;

(f) improvement in the structural condition of the dwelling occupied as the home;

(g) improvements to the facilities for storing, preparing and cooking food;

(h) provision of heating, including central heating;

(i) provision of storage facilities for fuel and refuse;

(j) improvements to the installation of the dwelling occupied as the home;

(k) other improvements which are reasonable in the circumstances."

The tribunal's decision was based on their understanding of sub-paragraph (3). Mr Scoon submitted that a tribunal considering whether items fall within sub-paragraph (3) have to make broad value judgments as to the reasonableness of the expenditure and that that was what this tribunal had done. When asked why the bedroom sink should not fall within paragraph 8(3)(a), Mr Scoon submitted that the expenditure on it

was unreasonable. However, the word "reasonable" appears in paragraph 8(3)(k) but not in any of the other heads and it seems to me that the items falling in heads (a) to (j) are assumed to be reasonable. The only words limiting the application of heads (a) to (j) are those providing that the measures should have been "undertaken with a view to improving [the dwelling's] fitness for occupation". There is nothing to suggest that those words should be construed narrowly so that any improvements likely to stop the dwelling from being unfit for human habitation are covered. Indeed there seem to me to be strong contrary indications, suggesting that the words should be construed very broadly and that a tribunal should be very slow to hold that any building work other than a simple repair does not improve the dwelling's fitness for occupation. It is important to bear in mind that, although the use of the present tense in paragraph 8(1) suggests that the draftsman had in mind the possibility of people already receiving income support having to take out loans, the paragraph has always been construed as also applying to people who had taken out loans long before claiming income support.

16. A narrow construction of the phrase "measures undertaken with a view to improving [the dwelling's] fitness for occupation" produces inequity between claimants. A person who buys a luxury house is entitled under paragraph 7 to have interest on a loan taken out for the purpose of the purchase included in his or her applicable amount, subject only to a restriction under paragraph 10. So too is a person who buys a plot of land and then builds a luxury house on it (see CIS/687/92). I do not see why a person who buys a cheaper house and turns it into a luxury house by improving it, at a time when he or she could afford to do so, should be in any different position. Housing costs under paragraph 8 are subject to the same restriction under paragraph 10 as are those under paragraph 7.

17. Further, a narrow construction of that phrase produces enormous practical difficulties for adjudicating authorities and for claimants. These difficulties are compounded by the approach normally taken to the word "reasonable" in paragraph 8(3)(k). Investigations as to the desirability of carrying out building work 10 years, say, before a claim was made for benefit are likely to lead to arbitrary value judgments being made on a basis of inadequate evidence. Mr Scoon suggested that it would never be "reasonable" to have gold taps on baths or washbasins and that the cost of such items should always be deducted from the total cost of building works. In my view it is quite unrealistic to expect adjudication officers and tribunals to obtain from claimants the sort of detailed evidence that would allow them to judge the reasonableness of each individual item of building expenditure and to impose, 10 years after the event, a standard of quality.

18. These considerations lead me to the conclusion that a very broad view should be taken of the words "measures undertaken with a view to improving [the dwelling's] fitness for occupation". In effect my approach is the same as that in CIS/749/91 where the Commissioner said that the test is "subjective". If the claimant

thought that the work would improve the property, a view evidenced by his willingness to take on a financial liability, the adjudicating authorities should accept that the work was done "with a view to improving [the dwelling's] fitness for occupation" in all save the most exceptional cases.

19. In the present case, I take the view that all the disputed expenditure was capable of improving the fitness of the premises for occupation. That extensions can be improvements within paragraph 8(3)(k) has been accepted in CIS/453/1993. I do not think that it matters that the extension was not completed provided that the loan was taken out and used for the purpose of building the extension. Some of the expenditure related to a garage and drive. The definition of "dwelling occupied as the home" in regulation 2(1) of the 1987 Regulations includes a garage and, if the interest on a mortgage taken out to require a new house with a double garage and drive can be met under paragraph 7, building a double garage and laying a drive is an improvement capable of falling within paragraph 8(3)(k).

20. The more complicated question is how reasonableness should be judged for the purposes of paragraph 8(3)(k). In CIS/749/1991, the Commissioner held the test to be "objective". It is not easy to see what factors he took into account in applying the test, but he appears to have had regard to the particular needs of the claimant and his family. In CIS/453/1993, the Commissioner said:-

> "Although the approach in CIS/749/91 is simple and straightforward, I am inclined to doubt its appropriateness in the context of paragraph 8(3)(k). It would seem to me that reasonableness should not be construed solely from either a subjective or objective standpoint. Whether a particular improvement was reasonable should, in my view, be judged by balancing the advantage to the person carrying out the improvement against the consequences viewed objectively. Thus, if a person extended the property in circumstances where such extension would not be reflected in the comparable increase in its value, but did so because he had a large young family, and was likely to live there for many years, it could be said that overall the exercise was reasonable. But if the owner carried out such an extension to such a property to accommodate his family, but the children were on the point of leaving home, then it could be said, looking at the picture overall, that the exercise was not reasonable. Accordingly, I consider that the relevant project must be viewed not solely from a subjective or objective standpoint, but overall in the broadest possible fashion.
>
> 9. Manifestly, in the present case the extension was clearly an improvement as far as the claimant was concerned, but whether it was reasonable, in the light of the definition I have tried to give the term, would depend in part on other considerations, such as the increased value (if any) given to the property, and the length of

time he and his family were likely to live there. These are matters which need to be investigated by a tribunal."

I do not think that there is really any significant difference between the approaches of the two Commissioners. Words such as "subjective" and "objective" are notoriously vague. For myself, I would characterise the approach taken in CIS/453/1993 as being "objective", notwithstanding that regard was had to the particular circumstances of the claimant. In any event, I agree that one must balance the "advantage" to the claimant against broader "consequences".

21. However, I find myself differing as to what must be regarded as material consequences. In my view, while the increase or decrease in value in the property may possibly be relevant to the question whether the claimant has derived any advantage from the work, the relevant consequence in the context of this legislation is that the claimant has a financial liability which he or she cannot meet without recourse to public funds. The question must be: is it reasonable that interest payments on a loan taken out for this particular improvement should be met through income support?

22. That, in turn, requires consideration of two separate issues. The first is whether, when the building work was done, the claimant reasonably expected to be able to meet his or her financial liabilities without recourse to income support. If the claimant did reasonably expect to be able to meet his or her commitments, it seems to me that considerations of equity with those whose housing costs are met under paragraph 7 lead to the conclusion that all "measures undertaken with a view to improving [the dwelling's] fitness for occupation" must be regarded as "improvements which are reasonable in the circumstances". If the costs are excessive, paragraph 10 provides a remedy. On the other hand, if when the building work was carried out, the claimant was already receiving, or could reasonably have expected to be obliged to claim, income support, then one must consider the second question which is whether the advantage to the claimant justifies the cost of taxpayer.

23. In the present case, the tribunal have not set out their reasoning at great length but it is implicit that they did not consider that it was relevant whether or not the claimant and her husband could expect to be able to meet their liabilities when the building work was done . Their decision is therefore erroneous in point of law in that respect. The tribunal to whom this case is now referred must be provided with some fairly clear evidence as to when the improvements were carried out and whether, at that time, the claimant and her husband reasonably expected to be able to meet their financial liabilities without recourse to income support. I suspect that the tribunal will conclude that the improvements all fall within paragraph 8(3).

24. However, that would be by no means the end of the case. Another reason why the tribunal must be provided with evidence as to when the improvements were carried out is that it is not

clear that the fundamental conditions of paragraph 8(1) are satisfied in this case. It is not enough that building work should have been carried out while the claimant has been in the property. A loan must have been taken out for the purpose (at least in part) of carrying out the improvements and it must have been used for that purpose within six months or a further reasonable period. The dates of the loan and of the work are both important. There really must be a proper connection between the expenditure and the loan. If there is a lot of money at stake, as there is in this case, it is not unreasonable to expect a claimant to produce documentary evidence in support of his or her claim. Claimants may not always retain relevant documents but it does not follow that they cannot obtain them. A lender will often be able to supply relevant documents (including a copy of any application forms showing the purpose of the loan) and contractors or banks may be able to supply copy letters or statements which may show when the work was done or when payments were made in respect of the work. The burden of proof rests on the claimant.

25. I allow these appeals.

(Signed) M. Rowland
Commissioner

(Date) 30 June 1994