

MR/SH/4

Commissioner's File: CIS/072/1994

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

Name: J

Social Security Appeal Tribunal:

Case No:

1. I allow the claimant's appeal. The decision of the Sheffield social security appeal tribunal dated 17 September 1993 is erroneous in point of law. I set that decision aside and give the following decision which I consider the tribunal should have given: the claimant is entitled to income support from 29 April 1993 to 18 May 1993. If there is any dispute as to the amount of benefit payable in consequence of my decision, the case must be restored before me or another Commissioner.

2. Although the adjudication officer supported the claimant's appeal, an oral hearing was directed at the request of the claimant's representative so that the case could be heard with an appeal on file CFC/007/1994. The claimant has throughout been represented by Mr R J Bowles of the Family and Community Services Department of Sheffield City Council. The adjudication officer was represented at the hearing by Mr Jonathan Coggins of counsel instructed by the Solicitor to the Departments of Social Security and Health.

3. On 25 May 1993 the local adjudication officer decided that the claimant was not entitled to income support from 29 April 1993 to 18 May 1993 on the ground that, during that period, she had been one of a married couple and her partner had been in remunerative work. Income support was, however, awarded from 19 May 1993. The claimant appealed against the decision not to award benefit for the earlier period. She submitted that she had not been one of a married couple because she had not been living in the same household as her husband. Section 137(1) of the Social Security Contributions and Benefits Act 1992 provides that, for the purposes of income support, "'married couple' means

a man and woman who are married to each other and are members of the same household". The issue before the tribunal was whether the claimant had been a member of the same household as her husband during the relevant period. There was no significant dispute as to the facts before the tribunal. The claimant's case was that her husband had started drinking heavily (not for the first time) in January 1993 and was failing to support his family financially. The marriage deteriorated and in early March the claimant asked him to leave, but he did not do so. On 3 March 1993 she went to the Department of Social Security and obtained a claim form for income support. She also sought advice about housing but was told that it would be easier to rehouse her husband than her with her two children. In late March or early April she sought advice from a Citizens Advice Bureau about obtaining an injunction to have her husband excluded from her home but was advised that she was unlikely to succeed as the house was rented from the council in their joint names. In late April she returned to the Citizens Advice Bureau and was advised that she could claim income support, which she did on 29 April 1993. By that time there was no family life. Her husband was hardly ever at home during the day. She did not cook or buy food for him. He ate out or catered for himself, depending largely on "take-away" food. She slept in the children's bedroom. She did all the housework. He took his laundry home to his mother, except for his shirts which the claimant washed. He provided the claimant with no money. Rent and fuel arrears were accumulating. The claimant survived on her £18.50 per week child benefit with assistance, financial and other, from her parents and parents-in-law. Eventually, on 19 May 1993, her husband went to live with his parents.

4. The tribunal dismissed the claimant's appeal for the following reasons:-

"Section 124(1)(c) Section 137(1). Tribunal accept that from early 1993 the marriage was becoming intolerable due to the husband's heavy drinking and financial irresponsibility. The Claimant was naturally concerned to bring the relationship to an end and visited the DSS, the Housing Authorities and finally the CAB. On the facts as found they continued together as a married couple sharing the same household until the husband finally left on 19.5.93. Tribunal do not consider that the reasoning in CSB/0463/86 (restating the principle in R(SB)4/83 Paragraph 19) has any relevance to the situation of a man and wife in matrimonial difficulties. They continued to be joint tenants with shared responsibilities (although the husband failed to meet his share). They shared the same household and there is no evidence that a separate household as contemplated in the Regulations or the relevant Commissioners' Decisions came into existence.

It is significant that the Claimant's Representative at no time sought to argue that her right to Income Support should properly be backdated to the original date of claim - when identical conditions of living prevailed. In

reaching their decision the Tribunal have not found it necessary to reach a firm conclusion about the conflict about some details recorded in the interview of 12.5.93 (a record signed by the Claimant). Such differences as were suggested were peripheral to the basic concept of a shared household by a married couple. Throughout the relevant period the Claimant was one of a married couple whose partner was in remunerative work and at no time was a 'separate household' established."

The claimant now appeals against the tribunal's decision with the leave of a Commissioner.

5. Whether two people are members of the same household depends very much on the particular circumstances of the case. The extent to which assistance can be derived from Commissioners decisions in other cases varies according to the degree of similarity between the facts of those cases and the facts of the case under consideration. I think that the tribunal were quite justified in deciding that CSB/0463/86 and R(SB) 4/83 were not particularly helpful. However, in my view, the tribunal placed too much weight on the fact that the claimant and her husband "continued to be joint tenants with shared responsibilities". A joint household is shown by the way people actually live, coupled with the necessary attitude of mind (i.e., an acceptance by at least one party that the marriage is in truth at an end - see Santos v. Santos [1972] Fam 247), but it does not depend on their legal liabilities. The respective legal liabilities of the parties may throw some light on their attitude of mind but that depends on the extent to which there are alternative explanations for the existence of joint (or separate) liabilities. Where a relationship has only recently broken down, I do not consider that the failure of the parties to sort out their legal liabilities is of great significance, particularly when, as here, there is clear evidence that the claimant was taking active steps to try and ensure that she and her husband had separate housing.

6. Mr Bowles also complained that he was not given the opportunity by the tribunal to explain why the claimant had not sought to argue that her right to income support should be "backdated to the original date of claim". I think the tribunal were referring to 3 March when the claimant had obtained her claim form. Plainly, Mr Bowles ought to have been given that opportunity. He told me that it simply had not occurred to the claimant or to him to seek backdating. I would add that it is by no means certain that the claimant would have been able to show continuous good cause for her delay in claiming, as required by regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987. The significance of the failure to argue the point - or, perhaps more accurately, the failure to make an earlier claim - depends on the inferred reasons for the failure, as to which the tribunal recorded no findings.

7. Mr Coggins accepted that the tribunal had erred in law and was content that, in view of the relatively small amount of money at stake and the detail of the recorded evidence, I should

determine the question whether the claimant was living in the same household as her husband rather than referring that question to another tribunal. He also conceded that the case against the claimant was very weak.

8. The only finding of the tribunal suggesting that the claimant and her husband were maintaining a common household within their home was that she washed his shirts. Mr Bowles told me that she had done that to stop him running up electricity bills by using the washing machine for single shirts. It seems to me that that limited co-operation is insufficient to show that the claimant and her husband were living together, if in all other aspects they were living apart.

9. I have given careful consideration to the visiting officer's note made following the visit to the claimant on 12 May 1993. The visiting officer's conclusion is set out at the end of the note:-

".... on balance I do not consider that they are maintaining separate households. The finances are still in joint names plus [the claimant] still does all the housework including her husband's laundry. He prepares his own meal in the evening but this is due to his working hours. Also he is supportive financially when not drinking. So in conclusion, I do not consider them to be separated in the same household."

Clearly, the visiting officer meant by the last sentence that he or she did not consider them to be living in separate households in the same house. I have already stated that I do not regard the fact that "finances" were in joint names was significant. The tribunal plainly accepted that only laundry that the claimant did for her husband consisted of washing his shirts. Mr Bowles made the point that it was necessary for the claimant to do all the other housework because, whether or not her husband lived there, she and her children had to live in the home. The adjudication officer may have been right that the claimant's husband would have cooked for himself in any event and that the claimant was not assisted by the fact that he cooked separately. However, if that is so, this is not a fact that assisted the adjudication officer either; it was neutral. Whether the claimant's husband still supported the claimant financially in the three weeks in question seems doubtful, even on the visiting officer's own note of the interview, although if financial support were relevant I accept that one might need to look over a longer period. However, financial support is not fatal to the claimant's case. A husband and wife may decide to live apart in their matrimonial home and the fact that the husband is properly maintaining his wife does not mean that they are any less separated.

10. The visiting officer's note includes the following passage:-

"Apparently 3 weeks ago [the claimant's husband] accepted that the relationship had broken down and applied for

another property with South Yorkshire housing and they have promised to provide one within the next 3 weeks but he cannot take any tenancy until the rent arrears are cleared.

[The claimant] stated that they have never discussed divorce or approached any solicitors as both hope that [her husband] can get over his problems and that they will be reconciled.

I asked if she had considered moving herself but she explained that there simply was not room at her parents home for them to move into."

It seems to me that by 29 April 1993, both parties had accepted that the marriage was at an end. Any thought of reconciliation was a "mere hope" as opposed to a "reasonable expectation". The parties intended to live apart, were taking active steps to obtain separate accommodation and were living separate lives in their existing accommodation.

11. I am satisfied that the claimant was not living in the same household as her husband from 29 April 1993 to 18 May 1993.

(Signed) M. Rowland
Commissioner
(Date) 10 October 1994