Bullets 150

CJSA/1425/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Fox Court appeal tribunal and I substitute my own decision. The appellant and his wife are not entitled to income-based jobseeker's allowance before 22 January 2003 because they had actual capital exceeding £8,000. However, from that date, they may be entitled to income-based jobseeker's allowance on the basis that their capital on that date is to be taken to have been £5,066.25, of which £3,000 was notional capital.

REASONS

2. I held an oral hearing of this appeal. The appellant was represented by Mr F Chaudhary of Messrs Malik and Malik, solicitors, of Willesden, London NW10. The Secretary of State was represented by Mr Leo Scoon of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions.

3. Most of the facts of this case are not in dispute. The appellant was made redundant on 15 October 2002 and was paid £11,690.83 by way of redundancy payment and three months' salary in lieu of notice. On 14 January 2003, he claimed jobseeker's allowance. It appears that his claim was initially processed as a claim for contribution based jobseeker's allowance for himself only but an application for "review" of his entitlement from 31 January 2003 was completed and income-based jobseeker's allowance was subsequently awarded on a joint claim by the appellant and his wife, apparently with effect from 16 January 2003 even though the appellant had not sought benefit on the "review" before 31 January 2003. In effect, the claimant had applied for supersession of the original decision and instead a decision had been made on a new claim. On the "review" form, the appellant stated that he had bank accounts with £100 in them and his wife did not have a bank account. If the form was dated, the date has not been reproduced on the copy in the papers before me but the form was received on 6 February 2003 and, as the appellant says it was filled in at the jobcentre, I am prepared to assume that was the date on which the form was completed. In fact, at that date, the appellant and his wife had £955.66 in a joint account at Lloyds TSB and his wife had a further £251.32 in a separate Lloyds TSB account and £453.11 in a Barclays account.

4. When this came to light in June 2003, it was also revealed that the balance in the joint account had been £23,399.20 on 13 December 2002 and £16,874.37 on or about 20 January 2003. On or about that latter date, £5,500 had been transferred to a Lloyds TSB Mastercard account, virtually eliminating the debt on the card. At the same time, £10,200 was withdrawn and £10,000 of that sum was paid into the appellant's wife's Barclays account. £9,000 was withdrawn in cash from the Barclays account on the following day. £1,500 of that sum was paid to a Barclaycard account, £1,500 to a Bank of Scotland Visa card account, £3,000 to another Barclaycard account and the remaining £3,000 to the appellant's mother.

5. On 12 July 2003, the Secretary of State decided that the appellant had deprived himself of capital for the purpose of obtaining jobseeker's allowance and that £21,259.64 (the balance in the joint account at 13 January 2003, when one of his wife's accounts was withdrawn to almost exactly the same amount that her other account was in credit) should be treated as notional capital. With the appellant's actual savings apparently being £2,066.25, he

was regarded as having capital amounting to £23,325.89, which greatly exceeded the capital limit of £8,000. As is all too often the case, no mention whatsoever was made of revision or supersession but, if the Secretary of State was correct in regarding the appellant as having notional capital, there clearly were grounds for revision of the award of benefit under regulation 3(5)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (S.I. 1999 No. 991) on the ground that the award had been made in ignorance of material facts.

6. The appellant appealed to the tribunal both against the revised decision and against an "overpayment decision" – i.e., a decision that benefit overpaid to the appellant was recoverable from him because he had misrepresented or failed to disclose a material fact (section 71(1) of the Social Security Administration Act 1992) – which for some reason was dealt with separately and has now been adjourned to await my decision.

7. The tribunal allowed the appellant's appeal to the limited extent of finding that he should be treated as having only £14,500, being the sums paid to the various credit card accounts and to his mother. In relation to those sums, the tribunal inferred from the timing of the payments that the appellant and his wife had paid them in order to obtain income-based jobseeker's allowance. The appellant now appeals with my leave. The Secretary of State opposes the appeal but does submit that the tribunal erred in various technical respects.

8. It is convenient first to deal with a minor criticism by the Secretary of State of the tribunal's decision, which appears to me to be well-founded. The tribunal only dealt with the principal point of contention before it, which was whether the appellant had deprived himself of capital for the purpose of obtaining jobseeker's allowance. It failed to record that the appellant and his wife had actual capital exceeding £8,000 until 21 January 2003 and still retained actual capital of £2,066.25 after that date. Therefore, on any view, the appellant was not entitled to income-based jobseeker's allowance until 22 January 2003 and £2,066.25 actual capital had to be added to any notional capital the appellant may have had on that date.

9. The Secretary of State does not challenge the tribunal's finding that, save for the £11,500 paid to credit card accounts and the £3,000 paid to the appellant's mother, the appellant's expenditure before 22 January 2003 was otherwise than for the purpose of obtaining jobseeker's allowance. The appellant, however, argues that the tribunal did err in finding him to have deprived himself of those sums for the purpose of obtaining jobseeker's allowance. That is the principal issue arising on this appeal.

The legislation

10. Section 12(4)(a) of the Jobseekers Act 1995 provides –

> "(4) Circumstances may be prescribed in which –
>
> (a) a person is treated as possessing capital or income which he does not possess".

11. Regulation 113(1) of the Jobseeker's Allowance Regulations 1996 (S.I. 1996 No. 207) provides –

(1) A claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to a jobseeker's allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to or increasing the amount of income support, except –

(a) …; or

(b) to the extent that the capital he is treated as possessing is reduced in accordance with regulation 114 (diminishing notional capital rule); or

(c) …"

12. Regulation 114 in effect provides that the amount of notional capital is to be taken to reduce weekly by the amount of benefit to which the claimant would have been entitled had he not been treated as having the capital. In other words, he is notionally taken to have been supporting himself at benefit levels out of his notional capital.

13. Section 13(2A) and (2B)(a) of the Act provides –

"(2A) … a joint-claim couple shall not be entitled to a joint-claim jobseeker's allowance if the couple's capital, or a prescribed part of it, exceeds the prescribed amount.

"(2B) Where a joint-claim couple claim a joint-claim jobseeker's allowance-

(a) the couple's income and capital includes the separate income and capital of each of them".

14. By virtue of regulation 107(a) of the 1996 Regulations, the capital limit in the present case is £8,000. Regulations 88 and 88ZA have the effect that the capital of the two members of a joint-claim couple is calculated as though each were a "claimant" for the purposes of Part VIII of the Regulations (including regulation 113). Those provisions and section 13(2B)(a) have the effect that no distinction need be drawn between the capital of the appellant and that of his wife.

Case law

15. The earliest decisions of Commissioners relevant to regulation 113(1) of the 1996 Regulations were concerned with regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981 (S.I. 1981 No. 1527), a predecessor of regulation 113. While regulation 4(1) of the 1981 Regulations was in similar terms to regulation 113(1) of the 1996 Regulations, there was a difference because regulation 4(1) conferred, or appeared to confer, an element of discretion on a benefit officer or, on appeal, a tribunal. It provided –

"(1) Any resource of which a member of the assessment unit has deprived himself for the purpose of securing supplementary benefit, or increasing the amount of any such benefit, *may* be treated as if it were still possessed by him" (my emphasis).

16. In R(SB) 38/85, the claimant, who was in receipt of supplementary benefit, had received £18,700 upon the compulsory purchase his home. He claimed to have used that money to repay loans incurred to finance a court case in Pakistan. The tribunal apparently accepted that contention but "therefore" found that the claimant had deprived himself of the £18,700 for the purpose of obtaining further supplementary benefit. Mr Commissioner Hallett

unsurprisingly held the decision to be erroneous in point of law because it was illogical and not supported by findings of fact.

17. In giving directions to the tribunal to whom he was remitting the case, the Commissioner pointed out that the first question that arose was whether the claimant had really deprived himself of the money in question and that the claimant's story required some investigation. If the claimant did not provide a satisfactory account, supported by adequate evidence, the tribunal could conclude that he still had the money "in some form or other". He then went on to say –

> "22. If the tribunal are satisfied that the claimant has deprived himself of a resource, they must then go on to consider whether he deprived himself of that resource for the purpose of securing supplementary benefit or increasing the amount of such benefit. If that was the claimant's purpose, I direct the tribunal that it matters not that he also had another purpose. The tribunal should not accept the suggestion, put forward in numbered decision CSB 28/81 (on Commissioner's file number CSB 31/1981) at paragraph 17 (unreported) that the question to be asked is was the securing of supplementary benefit, or obtaining an increase of such benefit, or obtaining an increase of such benefit, the claimant's predominant purpose? Suppose a claimant on supplementary benefit inherits a large sum of money and proceeds to gamble with it and incur losses. Someone warns him that if he continues in this way he will be back on supplementary benefit and he replies "If I lose, that is my idea". His predominant purpose in gambling with the money would obviously be to win at gambling. But it would be open to the adjudicating authority to decide on these facts that another purpose was to obtain supplementary benefit. Again, suppose that a claimant has assets of, say, £1,000 above the prescribed limit, and applies this money on a buffet wedding party and two days later, having spent sufficient to bring herself just below the prescribed limit, applies for supplementary benefit. The predominant purpose might be held to be to have a wedding party. But a subsidiary purpose could well be held, on these facts, to be to obtain supplementary benefit. After argument Ms Webster, who argued on behalf of the claimant with considerable ability, properly agreed that the application of regulation 4(1) did not turn on whether the claimant's motive of obtaining supplementary benefit, or an increase thereof, was her predominant motive.
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> "23. If the tribunal are satisfied that the claimant has deprived himself of a resource for the purpose of securing supplementary benefit, they must then address their minds to the exercise of the discretion, which they clearly have, as to whether to treat the claimant as still possessed of the resource in question: see the word "may" in regulation 4(1). Ms Webster argued before me that that discretion was not of the "very limited" nature referred to in paragraph 11 of Commissioner's decision CSB 199/1981 (unreported). I agree with her. There is nothing in the language of regulation 4(1) or its context to indicate that the discretion is "very limited". Such a discretion must however, be exercised in a judicial manner, taking into account all the circumstances of the case. It is essential for the tribunal specifically to consider in what way they propose to exercise their discretion and why, and for the chairman to record the way in which it has been exercised, the reasons for doing so and the facts on which the exercise is founded. Actual and notional resources should not be counted twice over. If, therefore, a claimant deprives himself of actual resources which exceed the

prescribed limit and turns that resource into another actual resource of a value which does not bring him above the prescribed limit, if the adjudication authority were to find that the purpose was to secure supplementary benefit and decided to apply regulation 4(1) against the claimant, they should only apply the regulation to treat the claimant as still possessing the balance of the original resource, that is to say the difference between its value and that of the resource which it replaces. Otherwise, there would be double counting. When exercising the discretion, some indication should be given as to the appropriate time for reconsideration of the refusal of supplementary benefit. It should be emphasised however, that the discretion is, in my judgment, quite unlimited, provided that it is exercised judicially.

"24. Ms Webster gave a helpful list of the facts which it is desirable that the tribunal should find, when considering the question whether the claimant who had deprived himself of a resource had the purpose of obtaining supplementary benefit or increasing it, and, if this is established, when deciding how the discretion under section 4(1) should be exercised. I agree with her and the following is based on her submissions from which Mrs. Stockton did not dissent. Findings should be made on the following:

(1) On how the deprivation actually occurred. While not accepting that there is any actual presumption that a gift of a resource should be taken to be for the purpose of obtaining supplementary benefit or that payment for a service (e.g. a surgical operation) should be taken to have no such object, these are clearly material facts. Findings as to what actually happened, with dates and amounts are clearly material.

(2) The personal circumstances of the claimant. For example, his age, state of health, and his future employment prospects may affect the conclusion reached as to the claimant's objects in repaying loans, or otherwise disposing of his resources, and the way in which the adjudicating authority's discretion is exercised. He may have urgent requirements which can only be met out of his capital and in no other way.

(3) The reason why the claimant acted in the way that he did, in depriving himself of the resource in question. For example, where a loan is repaid, was there any pressure being applied to repay? Where a gift is made, why was it made at that time?

(4) The dates and period over which the disposal occurred. The nearness, or distance, from the date of claim has obvious relevance."

18. That decision was followed, a month later, by Mr Commissioner Monroe in R(SB) 40/85. As in the present case, the claimant had received a substantial sum of money in connection with the termination of employment and his capital was reduced to an amount below the capital limit by a substantial withdrawal from his bank account a week after he claimed benefit. The decision does not reveal exactly what the claimant said he had spent the money on save that part of it was spent on a holiday. The Commissioner said:

"9. ... It is not normally possible to ascertain a person's purpose from direct evidence, as of contemporary letters written by him. Ordinarily the purpose is a matter

of inference from primary facts found. The present case is one where there are facts which if they stood alone might lead to the legitimate conclusion that the claimant had deprived himself of cash resources for the purpose of securing, or increasing the amount of, supplementary benefit. But there are other facts, which may be taken as pointing the other way. And it will be for the tribunal to indicate all the relevant facts (including both admitted facts and facts as to which findings need to be made) that they have taken into account in reaching their conclusion on the purpose of any transaction. Facts should be included whether they tell for or against the conclusion reached and some indication should be given of those to which weight has been attached. For instance the amount that the claimant received in connection with the termination of his employment and the manner in which he spent a substantial part of it will probably not be in dispute. The claimant has tendered reasons for various items of expenditure, such as his wife's state of health, and the fact that he had booked the holiday before he was made redundant. Findings are essential on these matters. Again some question has been raised as to the state of the claimant's knowledge of the capital limits and a finding will be necessary, though one might think that it was common knowledge that supplementary benefit was a means-tested benefit and that there must be some limit on one's capital holding above which supplementary benefit was not payable. It is certainly possible for a person without knowledge of the details of the restriction to have the purpose of depriving himself of resources with a view to securing, or increasing the amount of, supplementary benefit.

"10. It is not necessary that the purpose of securing, or increasing the amount of, supplementary benefit shall be the sole purpose, though it must be a significant operative purpose. For instance one can visualise a case of a man possessed of say £1,000 over the statutory limit whose resources fall short of his requirements to an extent that this £1,000 would make up the deficiency for 12 months. He might conclude that if he forthwith spent the £1,000 on carpeting his home from wall to wall he could start drawing supplementary benefit at once and thus be no worse off incomewise and have the benefit of the carpeting. It would be legitimate to conclude that if such was his purpose he had deprived himself of the £1,000 for the purpose of securing supplementary benefit, notwithstanding that another purpose was to have the house carpeted. In practice the case is unlikely to be so clear cut, and a claimant with mixed purposes is unlikely to concede that the securing of supplementary benefit was an important purpose. Nevertheless if the evidence showed that the transaction had had the effect of securing this (part from regulation 4(1)) and that this was the foreseeable consequence of it and there was nothing more, a tribunal could legitimately conclude that the person's purpose was to secure supplementary benefit. But there may well be other evidence, e.g. that the existing floor covering was worn out, or that a member of the assessment unit was allergic to dust to an extent that wall to wall carpeting was medically advisable. I draw attention to paragraph 22 of the above mentioned Decision R(SB) 38/85 in connection with the points made in this paragraph."

19. The Commissioner also said that the discretion whether to treat a claimant as still possessing a resource of which he had deprived himself "should ordinarily be exercised to put the claimant vis-à-vis supplementary benefit as nearly as practicable in the position in which he would have been if the transaction had not been entered into, but not to penalise him further". On one hand this led the Commissioner to conclude that it would "be normal for a

tribunal where it finds the conditions for the exercise of the discretion are satisfied to exercise it so as to treat the resource of which the claimant has deprived himself for either of the above purposes as still possessed by him". On the other hand, it led to the development of a "diminishing capital rule", analogous to one applied by Commissioners in the context of overpayments (R(SB) 15/85 and R(SB) 3/86), so that it was assumed that, if the claimant had not deprived himself of capital, he would have used it for reasonable living expenses and the amount he would be treated as possessing would gradually diminish.

20. R(SB) 9/91 was also not a case that concerned the payment of a debt. The claimant, who had been in receipt of supplementary benefit, suffered a stroke and while in hospital she gave her interest in her home to her two daughters who subsequently sold it. Upon permanently entering a nursing home, she claimed supplementary benefit again. It was not in dispute that the claimant had been aware that she would have ceased to be entitled to supplementary benefit had she retained her home or sold itself and retained the proceeds of sale. Mr Commissioner Rice held that the tribunal had erred in its approach to regulation 4(1) of the 1981 Regulations. He said–

> "8. ... I do not think that it was enough for the tribunal merely to say that 'the natural *consequence* [the Commissioner's emphasis] of the gift was to secure an allowance'. A positive *intention* to secure benefit has to be shown. ..."

21. However, he commented –

> "12. ... What would have been exceedingly interesting to know is what would the claimant's answer have been to the full and frank question 'if you give away your home to your daughters instead of selling it and receiving the money for it, what will you live on?' If this question had been put, it is difficult to avoid the conclusion that she would have in effect said either 'I never thought of that, I had better not give my property away' or alternatively, 'I will live on supplementary benefit, as I always have done since my husband died'."

22. The Commissioner went on to hold that regulation 4(1) applied on the facts of the case. He said –

> "14. ... In the present case, the predominant motive was doubtless to advance the claimant's children. But a significant operative purpose was also to obtain supplementary benefit in the same exercise. In other words, the claimant's intention was to kill two birds with one stone, to accelerate the daughters' inheritance and at the same time to claim supplementary benefit. There were two co-ordinate purposes."

23. In R(SB) 12/91, the claimant had received the proceeds of a maturing insurance policy and had then paid a substantial sum of money to his two daughters. A tribunal found that he had deprived himself of that sum for the purpose of obtaining supplementary benefit. Mr Commissioner Rice first held –

> "9 ... without knowledge of the capital limit, a claimant cannot be caught by regulation 4(1). ..."

24. He then went on to consider the position of loans:

"11. ... the only evidence I can see for the contention that the claimant owed his two daughters money is the bare assertion to that effect by the claimant, possibly backed up by similar oral evidence on the part of Sumi. But no explanation appears to have been given as to the amount of the two debts alleged to be owed by the claimant to his two daughters, still less how they were created, and when. It cannot be overemphasised that bland allegations of this nature, unsupported by any documentation or any particularity, should be approached with grave suspicion.

"12. ... the tribunal must go through this matter thoroughly. Of course, it is enough, if they are sufficiently persuaded, to accept merely the word of the claimant, with or without the oral evidence of his two daughters. But they should be slow so to do, unless the alleged loans are backed up by written evidence, or are at least particularised and, on the face of it, at least appear feasible.

"13. The importance of the point is that, if the tribunal are satisfied that the payment of £3,655 was properly made in reduction or discharge of debts owed by the claimant to his daughters, then in my judgment, regulation 4(1) cannot apply on any footing. A person has to pay his debts. He has no choice in the matter and if he has no choice, then any divesting of capital resources in pursuance of the reduction or discharge of his indebtedness cannot be for the purpose of securing supplementary benefit or any increase thereof. Such a motive cannot direct or influence his course of action. There can only be one purpose governing his conduct, namely the need to meet his indebtedness.

"14. Of course, the above principle only applies where the relevant debt is immediately payable. If the obligation to repay does not mature for several years, or, as in the case of the usual mortgage of house property, there is no need to repay the sum borrowed, provided the agreed interest and capital repayments are kept up, then any premature repayment of indebtedness will be a voluntary act constituting a deliberate choice. And if there is a choice then the question will arise as to whether a significant operative purpose albeit not necessarily the predominant purpose, was to secure supplementary benefit or any increase thereof (R(SB) 38/85; R(SB) 40/85).

"15. In the present case, if the tribunal find as a fact that the claimant was genuinely indebted to his daughters, and they must be satisfied that there was a legal debt capable of enforcement in the courts, and if they are satisfied that such debt was immediately repayable, then as regards any sum employed in reduction or discharge of that indebtedness, regulation 4(1) will have no application. But if the new tribunal are not so satisfied, and consider that there was no such indebtedness enforceable at law, or, if there was, that it was not immediately repayable, they must then go on to consider whether a substantive reason for the payment to the daughters was to secure supplementary benefit. Of course, normally in any given case there is no direct evidence on this particular point and accordingly the tribunal are required to consider all the circumstantial evidence, including the claimant's familiarity with the supplementary benefit system. In particular, they must be satisfied, if regulation 4(1) is to apply, that the claimant realised that there was a capital limit, which his capital resources could not exceed without depriving him of entitlement to benefit. In deciding whether the claimant knew of the limit, the fact that, as in the present case he

was in receipt of form B3, which in turn refers to form UBL18 and SB9, will be a material consideration. A further factor to be taken into account in the present instance will be that the claimant is an accountant, with a corresponding educational standing. If at the end of the day the new tribunal are satisfied that the claimant did know of the capital limit, then they must determine, making appropriate findings of fact and giving adequate reasons, whether a significant operative purpose for his action, over and above the advancement of his daughters, was the securing of supplementary benefit. They will have to look at all the surrounding circumstances, and make appropriate inferences."

25. Meanwhile, with the replacement of supplementary benefit by income support, regulation 51(1) of the Income Support (General) Regulations 1987 came into force, providing –

"(1) A claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to income support or increasing the amount of that benefit except ..."

26. Thus the discretionary "may" in regulation 4(1) of the 1981 Regulations was replaced by a mandatory "shall" which is also now to be found in regulation 113(1) of the 1996 Regulations. In R(IS) 1/91, it was argued that the new provision was *ultra vires* because the effect of the mandatory "shall" was unreasonably to prevent any diminishing capital rule from being applied. The Tribunal of Commissioners rejected that submission on the ground that, as the Secretary of State had submitted, the new legislation did not prevent a diminishing capital rule from being applied. Shortly afterwards, a statutory diminishing capital rule (equivalent to that to be found in regulation 114 of the 1996 Regulations) was introduced and it was held in R(IS) 9/92 that that is to be applied in preference to the Commissioners' rule.

27. More recently, the Court of Appeal has considered regulation 51(1) of the 1987 Regulations in *Jones v. Secretary of State for Work and Pensions* [2003] EWCA Civ 964 (unreported). In that case, the claimant had received a large sum of money from the sale of some land and, after paying off a number of commercial debts used another £13,520 to buy a car. The claimant's case was that the she and her husband had owed £17,000 to a Mr Smith, that Mr Smith wanted either the sum to be repaid or to have some form of security and that it was agreed that the claimant would buy a car as a security on the basis that Mr Smith could ask for the car at any time but that the claimant and her husband would have the use of it in the meantime. In deciding that regulation 51(1) applied, the decision-maker had pertinently pointed out that there seemed no reason why the claimant had not just paid the money to Mr Smith since she and her husband already had two cars and the debt appeared still to be outstanding, but he appears not to have drawn the conclusion that the story was false. On appeal, the tribunal too accepted the claimant's story but nonetheless decided that she had deprived himself of the £13,520 for the purpose of obtaining income support because Mr Smith stopped pressing for the repayment of the debt once the car had been bought. Mr Commissioner Jacobs dismissed the claimant's appeal but the Court of Appeal reasoned that either (a) the tribunal's acceptance of the claimant's case meant that the car was in fact Mr Smith's and the debt had been repaid at least to that extent so that the fact that Mr Smith had ceased pressing for repayment after the purchase of the car was irrelevant or (b) the car remained the claimant's but was subject to a charge of £17,000 and so had no value. The

Court therefore decided that the claimant should not be treated as possessing capital to the value of the car.

28. I respectfully agree with the Court's criticism of the tribunal's reasoning but the Court's own reasoning raises some difficulties. If the second of the alternative approaches of the Court was correct – and all three members of the Court accepted that the documentary evidence pointed in that direction – the claimant had deprived herself of a form of capital asset that disentitled her from income support in order to obtain a form of asset that fell to be disregarded for income support purposes. Mr Commissioner Monroe would have regarded that as a deprivation of a resource that potentially fell foul of what is now regulation 51 of the 1987 Regulations (see paragraph 8 of R(SB) 40/85) and, in the absence of any good answer to the points made by the decision-maker, he would probably have concluded that the deprivation was for the purpose of obtaining income support.

29. However, it is unnecessary for me to consider that part of the Court's decision further. What is more important is that the Court made some observations on the repayment of debts. Schiemann LJ said –

> "41. I record that I am not presently persuaded that a debtor who repays a debt repayable on demand but which has not in fact been demanded, e.g. a bank overdraft, must by virtue of Regulation 51 necessarily be treated as possessing that sum as capital."

30. Dyson LJ said –

> "52. In my judgment, it is a question of fact whether a person acquiring a personal possession (para 10 of Schedule 10) or depriving himself of capital (regulation 51(1)) does so for the Forbidden Purpose. If the payment is made in satisfaction of a debt, the fact-finder will not usually conclude that, in making the payment, the debtor's purpose was to secure an entitlement to income support, rather than simply to repay the debt.
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> "53. The phrase 'an immediately repayable debt' has assumed significance in the jurisprudence in this area. In R(SB) 12/91, Mr Commissioner Rice sought to give some guidance.
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> [Dyson LJ then set out most of paragraphs 13 to 15 of R(SB) 12/91.]
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> "54. As Mr Broatch points out, this passage addresses the legal nature of the debt, rather than the particular creditor's subjective intention in relation to its enforcement. If an immediately repayable debt is repaid, the fact-finder will almost always conclude that the payment was not made for the Forbidden Purpose. But I cannot agree with Mr Commissioner Rice that, even in such a case, the payment 'cannot be for the purpose of securing supplementary benefit or any increase thereof'. It will be a question of fact in every case. Thus, for example, there might be evidence that the debtor thought that the creditor would not call in an immediately repayable debt for some time, and that he repaid the loan when he did for the purpose of becoming entitled to income support. Conversely, and perhaps more realistically, even if the debt is not immediately repayable, the repayment of it by a debtor will not necessarily have been made for the

Forbidden Purpose. This is the point made by Mr Commissioner Rice at paragraphs 14 and 15, and I agree with him.

> "55. In the present case, the loan was immediately repayable. Mr Smith could have issued proceedings for the £17,000 at any time. In my judgment, there was no evidence which could reasonably justify the finding that the car transaction (however it is characterised) was made for the Forbidden Purpose. Although the fact that the loan was immediately repayable was not, as a matter of law, conclusive, it was very cogent evidence that the transaction was *not* made for that purpose. There was no evidence going the other way. ... In my judgment, in the unusual circumstances of this case, the fact that Mr Jones was permitted by Mr Smith to use the car could not reasonably be regarded as relevant to the question of whether the transaction was entered into for the Forbidden Purpose."

31. Buxton LJ agreed with both Schiemann LJ and Dyson LJ.

The issues arising on this appeal

32. Mr Chaudhary correctly submitted, in the light of R(SB) 9/91, that a person could not deprive himself of capital for the purpose of obtaining benefit unless he knows that amount of capital he holds might affect entitlement to benefit and so can form the necessary intention. He further submitted that the tribunal erred in finding the appellant and his wife to have the necessary knowledge of the rules of entitlement to benefit, given his lack of experience of claiming benefit. However, I agree with Mr Scoon on this issue. As he submitted, whether or not the appellant and his wife had the necessary knowledge was a question of fact for the tribunal and, in R(SB) 40/85, it has been held that detailed knowledge of the rules is not required. The tribunal's reasoning may not have been particularly clear but it seems to me that the very reason that the tribunal inferred from the timing of the payments that the appellant and his wife intended to obtain benefit was that the tribunal also inferred from the timing that they knew very well that possession of capital would be fatal to the application for "review". They did not pay their debts as soon as the appellant received his redundancy payment. They paid them after he had first claimed jobseeker's allowance and just before he applied for the "review" of the decision only to consider contribution-based jobseeker's allowance. Mr Chaudhary may be right in suggesting that the appellant did not know about the capital rule when he first claimed jobseeker's allowance but the payments were made before he applied for the "review".

33. Mr Chaudhary's other submission was that the appellant and his wife had acted reasonably in paying their credit card debts, given that a high rate of interest would be charged if they did not do so, and that the tribunal had erred in taking account of the fact that they were not being pressed for payment. Mr Scoon, however, relied upon Dyson LJ's judgment in *Jones* and argued that there was no necessity for them to pay their debts when they did, except for the minimum payments required on the credit card bills, and that the tribunal was entitled to find that the reason they paid his debts early was to obtain entitlement to income-based jobseeker's allowance.

34. Consideration of these submissions requires an analysis of the case law to which I have referred.

Analysis of the case law

35. Like all judicial pronouncements on the law, Commissioners' decisions are not to be read like statutes. Statements as to the law must be read in their context and not unthinkingly applied to different contexts. It seems to me to be of some significance that none of the cases to which I have referred above was concerned with an ordinary commercial debt. R(SB) 38/85 was concerned with alleged private debts and the examples used by the Commissioner when discussing mixed motives for expenditure were gambling and simple profligacy. R(SB) 40/85 was also concerned with whether expenditure was profligate. R(SB) 9/91 was concerned with a gift. R(SB) 12/91 was concerned with alleged private debts and so was *Jones* in the Court of Appeal. Careful consideration must be given to the extent to which what was said in those cases has any bearing on the present case insofar as it relates to the credit card debts.

36. I draw a distinction between private debts and commercial debts, not because they are different in law, but because there is often considerable doubt in cases of alleged private debts as to whether there is really any debt at all. Even if it is accepted that the person to whom the money has been paid by a claimant had earlier paid a similar amount to the claimant, it does not necessarily follow that the claimant was under any legal obligation to repay the money, either at all or at any particular time or in any particular circumstances. A person may feel under a moral obligation to repay money even though there is no agreement to repay. There may also be an equitable obligation to repay money that does not amount to a straightforward debt. Even when a person does have some expectation of being repaid, it may be implicit that the obligation to repay will not arise until the claimant is sufficiently well off to be able comfortably to afford the repayment. As was pointed out in both R(SB) 38/85 and R(SB) 12/91, there is a tendency of decision-makers too readily to accept a claimant's assertion that a debt has been repaid and that it had to be repaid when it was. However, as is also clear from those decisions, once it has properly been found that there was a debt and the terms on which the debt was repayable have also been ascertained, any distinction between private debts and commercial debts disappears.

37. The suggestion that a person may have more than one motive for making a payment can be seen to have arisen originally in the context of gambling or profligacy. Those are cases where a claimant has a choice as to how money is spent. It is quite clear from paragraph 22 of Mr Commissioner Hallett's decision in R(SB) 38/85 and paragraphs 9 and 10 of Mr Commissioner Monroe's decision in R(SB) 40/85 that the question whether expenditure is to be regarded as having been incurred for the purposes of obtaining benefit when it is known that the consequence of the expenditure may be the necessity of claiming benefit is simply whether the expenditure was reasonably incurred given that consequence. Mr Commissioner Rice's approach to debts in R(SB) 12/91 follows those decisions. As he said, a person has no choice but to pay his debts and so, subject to the question of timing, repayment of a debt is always reasonable and is not to be taken to be for the purpose of obtaining benefit, even if that is the consequence. It is the question of timing that causes the problem that arises in this case.

38. A commercial contract usually makes provision as to when payments must be made and it is unsurprising that Mr Commissioner Rice's example of a debt that was not immediately repayable was in the context of a conventional mortgage. What Dyson LJ's judgment in *Jones* makes clear is that the question whether or not a debt is immediately repayable is not, as a strict matter of law, determinative of the question whether repayment of

the debt is for the purpose of obtaining benefit. However, that does not undermine Mr Commissioner Rice's points that, if the debtor has no practical choice but to pay his debt, the repayment of the debt cannot reasonably be regarded as having been for the purpose of obtaining benefit and that, normally, if a debt is immediately repayable, the debtor has no practical choice. Furthermore, Dyson LJ did not quite go as far as saying that the fact that a debtor thought that the creditor would not call in a loan for some time would necessarily mean that payment of the debt would be for the purpose of obtaining benefit and Schiemann LJ expressly declined to go that far. As Buxton LJ agreed with both judgments, they cannot be inconsistent. I, too, find it difficult to envisage a case where it would be unreasonable for a claimant to pay a debt that had become due, merely because the creditor had decided not to enforce it for the time being, unless, perhaps, the decision not to enforce the debt was entirely unconnected to the claimant's lack of means and amounted, in effect, to a variation of the terms upon which the debt became repayable.

39. As importantly, Mr Commissioner Rice did not say that the fact that a debt was not immediately repayable necessarily meant that payment of it was for the purpose of obtaining benefit. He merely said that, in those circumstances, "a question would arise " as to whether a significant operative purpose was to secure supplementary benefit. Dyson LJ expressly agreed with him on that issue. Thus, the fact that there is some element of practical choice open to a claimant in the way he uses capital that is available to him does not mean that using it for a purpose other than maintaining himself necessarily shows that it was used for the purpose of obtaining benefit.

40. The effect of all these decisions is therefore that, if a claimant realised that one consequence of depriving himself of capital was that he might become entitled to jobseeker's allowance or income support and he nonetheless deprived himself of that capital, there arises the question whether obtaining benefit was a significant operative purpose of the deprivation. Because there will almost always be some other purpose as well, that question is determined by deciding whether, given his knowledge, it was reasonable in all the circumstances for him to act as he did, bearing in mind not only his obligation to tax payers to support himself, but also his obligations to other people. Moreover, insofar as his obligation to support himself is concerned, it is necessary to have regard to the long term as well as the short term.

41. This meets the problem caused by the use of the word "purpose" in the legislation in a context where it is possible to have more than one motive and where it is not always reasonable to assume that a person desires or intends the natural consequences of his actions. There is, in truth, no other practical test that could be applied. The test was clearly appropriate in relation to the supplementary benefit scheme, which appeared to confer an element of discretion on those making the decisions. I do not consider any different approach is intended under the present legislation, which must have been enacted with R(SB) 38/85 and R(SB) 40/85 well in mind. Although, in R(SB) 38/85, Mr Commissioner Hallett described the discretion in the supplementary benefit legislation as "unlimited", he qualified that by saying that it had to be exercised judicially and Mr Commissioner Monroe's view in R(SB) 40/85 was effectively that it was difficult to see how, once it had been decided that a claimant had deprived himself of a resource for the purpose of obtaining benefit, the discretion could properly be exercised in favour of the claimant, save to permit a non-statutory diminishing capital rule. Since the Tribunal of Commissioners has held in R(IS) 1/91 that even the non-statutory diminishing capital rule did not depend on the discretion, it seems to me that the discretion was more apparent than real and its removal has not made much practical

difference. What the mandatory "shall" requires is merely due attention to the proper test of reasonableness for determining a person's intention, as explained in R(SB) 38/85 and R(SB) 40/85, with proper weight being given to the interests of the general body of tax payers and not just the interests of the claimant or his family and friends.

The payment of the credit card debts

42. My analysis of the case law makes it less necessary than it might otherwise have been to analyse the terms and conditions under which the credit cards operated. A simple summary of the effect of the Bank of Scotland terms and conditions will suffice. Using a credit card to make a purchase from a shop defers the holder's liability to pay for the goods and transfers it to the Bank. In place of that liability, the holder becomes liable to make payments to the Bank under the terms of the agreement. The Bank issues a monthly statement of the holder's account and requires the holder to make a minimum payment (the greater of £5 (or the balance, if less) or 5 per cent. of the balance) by a certain date, but the holder may choose to pay more. Unless the holder pays the whole amount outstanding and also did so the previous month, the Bank charges interest from the date the card transaction is debited to the account, which is added to the account and appears on the next statement. There is no date by which the balance over and above the minimum payment must be repaid, but there is a credit limit which the account balance may not exceed. If the credit limit is exceeded, the excess is payable immediately, as of course are any arrears due from previous demands.

43. In his written submission dated 5 July 2004, the Secretary of State conceded that, as a minimum balance would have been due when the appellant and his wife paid their credit card bills, the amount of the minimum balances for the four cards should be regarded as having been paid otherwise than for the purpose of obtaining benefit, notwithstanding the tribunal's finding that they had intended by paying his bills to become entitled to jobseeker's allowance. However, although the Secretary of State further conceded that the appellant and his wife could properly have decided to pay their credit card bills in order to avoid paying interest without regard to securing income-related benefits, he submitted that the tribunal was entitled to find that they had intended to secure entitlement to jobseeker's allowance in the present case, given that the bills were not paid until shortly before the claim for "review". Mr Scoon was unmoved by my suggestion that the provision made by regulation 114 of the 1996 Regulations for determining the rate at which a claimant's capital is deemed to have diminished, would wholly fail to have regard to the fact that, had the appellant and his wife not paid as much of the credit card debts as they did, they would have been faced the following month with new statements, including additional interest on the unpaid balance, together with further demands for minimum payments and so on for many months. Nor was he moved by my suggestion that, even if his submission was otherwise correct, it might be right to draw a distinction between payment in respect of transactions made in the last month and payment of the unpaid balance from the previous statement.

44. Mr Chaudhary, on the other hand, submitted that a distinction fell to be drawn between the mortgage that Mr Commissioner Rice took in R(SB) 12/91 as an example of a loan that was not immediately payable and a credit card debt because, he submitted, the former was a long-term debt with a low rate of interest and the latter was a short-term debt with a high rate of interest. In his submission it was reasonable for the appellant and his wife to pay off their credit card debts, even if, contrary to his primary submission, they were aware that the

consequence would be that they would be more likely to become entitled to income-based jobseeker's allowance.

45. I entirely accept the Secretary of State's submission that the tribunal was entitled to form the view that the appellant and his wife paid their credit card bills when they did because they knew that that would reduce their capital to a level that would entitle them to benefit. Indeed, that is my own view. As the Secretary of State points out, they did not make the payments as soon as the appellant received the money from his employers but did so after his claim for benefit in January 2003 and before his application for "review". Furthermore, as the tribunal noted, the appellant had understated his capital even in his claim for benefit before he and the wife had paid their bills. I have no doubt that the he and his wife were aware in general terms that the amount of capital they had was relevant to their entitlement to benefit.

46. However, the flaw in the Secretary of State's argument is that, assuming that the appellant and his wife did have in mind becoming entitled to benefit, it does not follow that they did not intend to pay their bills in order to settle their debts and avoid the interest that would be charged on them. If a claimant has mixed motives, the question whether the purpose of obtaining benefits is a significant operative purpose is to be determined by deciding whether it was reasonable for the claimant to act in the way that he did.

47. In support of his submission to the contrary, Mr Scoon referred me to CIS/264/1989, in which Mr Goodman approved a passage from the Department's internal guidance, which was in the following terms –

> "The timing of the disposal of an asset is an important consideration. In R(SB) 40/85 the Commissioner said that it might be assumed to be common knowledge that for a means-tested benefit there must be some limit to the amount of capital above which the benefit was not payable. Nevertheless, with or without that knowledge it is still possible for a claimant to have deprived himself for the purpose of securing income support. Where a person makes a claim for income support soon after disposing of capital the timing of the claim may be an indication that securing or increasing entitlement to income support is at least a secondary and significant motive. However, if the deprivation took place at a time well before the claim was made for income support, it is less likely that the action will have been for the purpose of obtaining income support."

In that case, the claimant had made a gift to her son of £26,000, which represented the proceeds of sale of her former home some four years before she claimed income support upon entering a nursing home. During the intervening years she had lived with her son and daughter-in-law in a property he purchased using the gift. The Commissioner found that the claimant had not deprived herself of the £26,000 for the purpose of obtaining income support.

48. In my judgment, the third of the sentences in the guidance considered in that case cannot stand with Mr Commissioner Rice's statement in paragraph 9 of R(SB) 12/91 to the effect that, without some appreciation that there is a capital limit, a claimant cannot be regarded as depriving himself of capital for the purpose of obtaining benefit. Consequently, while I accept that timing is an important consideration, it is not quite for the reason implicit in the guidance. The true significance is that the closer the deprivation was to the date of claim, the stronger the inference will be that the deprivation was made in the expectation that

there would be a claim and with the knowledge that the deprivation would affect the claimant's entitlement to benefit.

49. That, indeed, is the inference that I have accepted is to be drawn in the present case. However, even if the appellant's forthcoming application for "review" prompted him into paying his credit card debts when he did, that merely suggests that obtaining benefit was one purpose behind the payments and that takes one back to the question whether it was a significant operative purpose which, for the reasons I have given, is to be determined by considering whether making the payments was reasonable. If it would have been reasonable for the appellant and his wife to pay their credit card debts in November 2002, the fact that they were prompted to make the payments in January 2003 by a desire to obtain benefits does not necessarily mean that it was any less reasonable for them to make those payments in January 2003 than it would have been two months earlier. In other words, although the appellant's desire to obtain benefit may explain the timing of the payments, it is not necessarily to be taken to have been a significant operative purpose behind the making of the payments.

50. In my judgment, it would be perverse in this case to find the appellant and his wife to have acted unreasonably, whether the debts were paid in November 2002 or January 2003. This is not because I accept Mr Chaudhary's distinction between long-term and short-term debts. That distinction is based on Mr Commissioner Rice's example of a mortgage as a debt that was not immediately repayable, which, the Court of Appeal has held in *Jones*, is not the determinative test. Mr Commissioner Rice's example of "the usual mortgage of house property" is nonetheless instructive. He would have had in mind that the interest payments on a mortgage taken out for the purpose of acquiring an interest in the home would have been met under the income support scheme and it would usually have been possible to persuade a lender to defer the payment of capital while the claimant was in receipt of income support. Thus, it seems reasonable to suspect that Mr Commissioner Rice's example was taken because not only would there have been no formal liability to repay the debt but also there would have been no financial pressure to do so. In my judgment, the threat of having to make high-interest payments is just as capable of making it reasonable to pay a debt as the threat of enforcement of a liability to repay.

51. Moreover, any other view would be contrary to public policy as expressed in section 94 of the Consumer Credit Act 1974, entitling a debtor under a regulated consumer credit agreement at any time to discharge his indebtedness under the agreement by giving notice to the creditor and paying what is owed. The plain purpose of that provision is to allow a debtor to escape further interest payments. It would be anomalous if the benefit system were to require people to incur additional liability for interest. I can see no reason why the benefit system should treat differently a person who has just cleared his debts to avoid them growing and a person who never had any debts.

52. Therefore, although I accept that the appellant and his wife were prompted largely to settle their credit card bills at the particular time that they did so by their desire to claim income-based jobseeker's allowance, I am satisfied that the payment of those debts, which is well documented by bank statements and credit card statements, was in any event reasonable because it was for the purpose of avoiding further substantial liabilities for interest payments. Accordingly, I am satisfied that paying the bills was not for the purpose of obtaining jobseeker's allowance or income support or increasing their entitlement to those benefits and

that the tribunal erred in law in finding otherwise. (It has not been suggested that the expenditure on the credit card accounts was for the purpose of obtaining benefit.)

The appellant's payment to his mother

53. The tribunal accepted that the appellant had paid £3,000 to his mother. However, it did not accept that there was "any pressing need (legal or otherwise) to pay this money". There was before the tribunal a letter from the appellant's mother indicating that she had told him that she needed back money she had lent him but the appellant himself told the tribunal that "[i]t wasn't a loan but I felt obliged to give it back when she asked". In those circumstances, the tribunal's finding seems entirely justified, given that it was satisfied that the appellant knew that the amount of his capital would affect his entitlement to benefit. It is easy to sympathise with the appellant's desire to repay the money but it was not reasonable for him to repay the money when he was not obliged to do so and he needed it to maintain himself rather than becoming a burden on the benefit system.

54. I heard evidence from the appellant but am not persuaded to reach a different conclusion from the tribunal. The appellant told me that he had wanted to buy various items and that his mother had given him money because he could not afford them and had said she would need it back at some stage. I found the appellant's evidence to be somewhat vague and, even if his mother did give him some money, I am not satisfied that there was any intention to create a legal liability to repay it. I find that it was not reasonable for the appellant to pay the £3,000 to his mother and that he did so for the purpose of increasing his entitlement to income-based jobseeker's allowance. He is therefore to be taken to have notional capital of £3,000.

(signed on the original) **MARK ROWLAND**
Commissioner
22 June 2005