Bulletin

170 [Short]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since I do not consider it expedient to make the findings of fact which I consider to be necessary to decide the claimant's entitlement of benefit. I refer the case for re-hearing before a differently constituted tribunal.

2. The claimant is a married man with 11 children, who claimed a jobseeker's allowance on 11 February 2000 after being made redundant the previous year. The claimant owns two three-bedroomed houses in the same street, which are separated from each other by two other houses. At the time of the relevant decision, the claimant, together with his wife and their eight dependant children was said to occupy one house, while the claimant's two non-dependant twin daughters, and occasionally his non-dependant eldest son, were said to occupy the second.

3. On 22 March 2000 it was decided that the value of the claimant's second house could not be disregarded in determining his entitlement to a jobseeker's allowance. Since the value of that house exceeded the capital limit, the claim for benefit was disallowed. The claimant appealed on 3 April 2000, on the ground that one house was not big enough to house all his children. On reconsideration of the refusal decision on 7 April 2000, the reconsidering officer concluded that the house occupied by the claimant and his dependant children was not statutorily overcrowded, and the decision refusing benefit was not revised. On 5 May 2000 the claimant's representative submitted that there was, in fact, statutory overcrowding on the basis of the room areas of the house occupied by the claimant and his wife and dependant children. Although the decision maker accepted that as being the position, his submission to the tribunal was that there was nevertheless no provision for the value of the claimant's second house to be disregarded. The tribunal upheld that submission and dismissed the appeal, and it is against the tribunal's decision that the claimant, with my leave, now appeals.

4. Section 13(1) of the Jobseeker's Act 1995 provides that no person shall be entitled to an income-based jobseeker's allowance if his capital exceeds the prescribed amount. By regulation 108(1) of the Jobseeker's Allowance Regulations 1996, that amount is £8.000.00, but regulation 108(2) provides that there shall be disregarded from the calculation of a claimant's capital any capital specified in Schedule 8. By paragraph 1 of Schedule 8, the capital to be disregarded includes:

> **"The dwelling occupied as the home but, notwithstanding regulation 88, (calculation of income and capital of members of claimant's family and of a polygamous marriage), only one dwelling shall be disregarded under this paragraph."**

The definition of "dwelling occupied as the home" is in Regulation 1:

> **""dwelling occupied as the home" means the dwelling together with any garage, garden and outbuildings, normally occupied by the claimant as his home including any premises not so occupied which it is impracticable or unreasonable to sell separately, in particular, in Scotland, any croft land on which the dwelling is situated."**

5. In *R(SB) 10/89* it was held that two separate houses could constitute "the home" for the purposes of regulation 2(1) of the Supplementary Benefit (Resources) Regulations 1981, but in *CIS/081/1991* (starred decision *73/93*) it was held that only one unit of accommodation could be disregarded for the purposes of income support. The tribunal in this case applied *CIS/081/1991*, and held that paragraph 1 of Schedule 8 of the 1996 Regulations prevented the value of more than one of the claimant's houses from being disregarded. The basis of the claimant's appeal to the Commissioner is that that approach was wrong in law.

6. In *CIS/081/1991* the claimant owned two houses in the same street. The claimant lived in one house with his wife and younger children, while the second house was occupied by the claimant's eldest sons. The claimant failed to disclose his ownership of the second house when claiming income support, and transferred that house to his oldest son while in receipt of benefit. The Commissioner held that capital disregards could be applied to notional as well as to actual capital, but that the house occupied by the claimant's sons could not be disregarded.

7. The claimant's argument in *CIS/081/1991* that the value of both houses could be disregarded was based on the definition of "dwelling" in section 84(1) of the Social Security Act 1986:

> **""dwelling" means any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises;"**

Applying section 11 of the Interpretation Act 1978, the Commissioner held that that definition applied to the definition of "dwelling occupied as the home" in regulation 2 of the Income Support (General) Regulations (which is identical to the relevant definition in regulation 1 of the Jobseeker's Allowance Regulations 1996), but rejected the argument that a single dwelling could be spread over separate buildings:

> **"...Mr McCaul and Mr Cooper both relied on the definition of "dwelling" in the Act, in particular the words "whether or not comprising separate and self-contained premises". They contended that separate and self-contained meant that the dwelling could be spread over separate buildings. If the phrase in question were "separate or self-contained there might possibly have been more force in that argument; as it is I cannot see why if, "separate" means "in a separate building", such separate accommodation should also have to be self-contained. My guess is that the draftsman might have had the Rent Acts in mind. For a tenant to be protected under that legislation the premises had to be let as a "separate" dwelling but it was not necessary for each dwelling to be self-contained or partitioned off and fine distinctions were made between essential and non-essential living rooms; where an essential living room was shared there was no separate dwelling and the premises were outside the scope of protection...So in using the words "whether or not comprising separate and self-contained premises" the draftsman, it seems reasonable to suppose, was saying no more than that it did not matter whether the accommodation was shared regardless of the distinction between essential and non-essential living rooms and regardless of whether it was self-contained or not, thus avoiding the complexities of the Rent Act on this point. That is the sense in which I interpret "separate and self-contained"."**

8. The claimant's representative has attacked the decision in *CIS/081/1991* on a number of grounds. He submits that the fact that regulation 1 of the 1996 Regulations uses the term "dwelling", rather than "dwelling-house", indicates that a single dwelling may consist of more than one unit of accommodation. If the claimant's second house

is not a dwelling, then it is submitted that it constitutes premises which it is impracticable or unreasonable for the claimant to sell separately, because he requires it to accommodate members of his family. The claimant's representative also submits that *CIS/081/1991* leads to illogical and unjust results, since it would allow only one of two buildings in the same grounds, both occupied by a claimant as his home, to be disregarded; but allow each of two adjacent buildings similarly occupied to be disregarded if the owner created a doorway through the dividing wall. Finally, it is submitted that *R(SB)8/81* laid down a just and common-sense approach, which has not been affected by the change from supplementary benefit to income support and income-based jobseeker's allowance.

9. I have come to the conclusion that the claimant's representative is correct in submitting that, for the purposes of income support and income-based jobseeker's allowance, a dwelling can consist of more than one building. The Commissioner in *CIS/091/1991* considered that the words "only one dwelling shall be disregarded" precluded the disregard of more than one building from the calculation of capital, but I take the view that paragraph 1 of Schedule 8 of the 1996 Regulations is not concerned with the physical composition of a dwelling. Regulation 88 of the 1996 Regulations, to which paragraph 1 refers, provides for cases where the capital of members of a claimant's family or of other members of a polygamous marriage is to be treated as the claimant's own capital, and in such cases the concluding words of paragraph 1 operate to prevent the disregard of the dwelling of such a family member, in addition to the claimant's own dwelling. If the claimant has more than one unit of accommodation, which he occupies as separate dwellings, only one such dwelling can be disregarded, but I can find nothing in paragraph 1 of Schedule 8 to prevent more than one building or other unit of accommodation from forming a single dwelling.

10. As the Commissioner pointed out in *CIS/081/1991*, the definition of "home" in the 1981 Resources Regulations was wider than the definition of "dwelling occupied as the home" in regulation 1 of the 1996 Regulations, but I do not agree that that difference leads to the conclusion that only one unit of accommodation can be disregarded under the income support and jobseeker's allowance regulations. The approach taken by the Commissioner in *R(SB) 10/89*, under regulation 2(1) of the 1981 Resources Regulations, was to consider whether both houses concerned were normally occupied by the members of the assessment unit (paragraph 10), and then to consider (paragraph 14) the factors necessary to decide whether the assessment unit occupied the accommodation in question as "the home". Under paragraph 1 of Schedule 8 of the 1996 Regulations, the question to be considered is whether the dwelling in question is occupied by the claimant and, if so, whether it is occupied by the claimant as his home. Although the test has changed, I see no reason why paragraph 1 of Schedule 8 cannot be applied to more than one unit of accommodation, in accordance with the approach taken under the earlier legislation in *R(SB) 10/89*.

11. I have considered whether the definition of "dwelling occupied as the home" in regulation 1 of the 1996 Regulations can be applied only to a single building, but I have concluded that that is not the case. As the claimant's representative has pointed out, the definition of "dwelling occupied as the home" uses the term "dwelling", rather than "dwelling-house" (a term well-understood in the law of landlord and tenant), and I can see no reason why the definition in regulation 1 cannot be applied to a single dwelling which consists of more than one dwelling-house. Although the

definition of "dwelling" in section 137(1) of the Social Security Contributions and Benefits Act 1992, which is the same as the definition in section 84(1) of the Social Security Act 1986, has not been included in the Jobseeker's Act 1995, the definition of "dwelling occupied as the home" is the same in the income support and jobseeker's allowance regulations, and I see no reason why the meaning should not be the same in both Regulations. I agree with the Commissioner in *CIS/081/1991* in saying that the purpose of the words "any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises", now in section 137(1) of the 1992 Act, was probably to bring within the scope of the definition premises which would have been outside Rent Act protection. The intention of the provision therefore seems to me to be essentially inclusionary, and I see no reason to construe it as excluding a dwelling consisting of residential accommodation in more than one building.

12. I have therefore been persuaded by the claimant's representative that a "dwelling occupied as the home" may comprise more than one building, but it seems to me that the number of cases in which more than one unit of accommodation can qualify for capital disregard under the income support and jobseeker's allowance provisions may be few. Paragraph 1 of Schedule 8 of the 1996 Regulations contains no reference to the claimant's family, and requires personal occupation of the dwelling as his home by the claimant. The facts of *R(SB) 10/89* were unusual in that, although the houses in question were 3/8 of a mile apart, the claimant slept in one house with his two elder sons, but returned for meals to the house where his wife, two daughters and youngest son lived. In concluding that the requirement for occupation by the assessment unit as "their home" was satisfied in that case, the Commissioner had regard to the fact that neither property was capable of accommodating all members of the assessment unit, that the mode of life of the assessment unit was such that one house was an "extension" or "annexe" of the other, that the two houses were within walking distance of each other, and that neither had been purchased as an investment.

13. However, I have concluded that, in applying *CIS/081/1991* the decision of the tribunal was erroneous in point of law, and it is therefore necessary for me to decide how to dispose of the appeal. On the basis of the evidence before the decision maker, I would have thought that the tribunal was bound to conclude that the claimant did not occupy the second house as his home. The two houses were certainly sufficiently close to each other to be occupied together as a single home, and I consider that the claimant's representative had successfully established that neither house was large enough to accommodate the claimant, his wife and their dependant children. The claimant had stated that he was trying to persuade his thirteen year old son to stay at the second house with his elder brother and two eldest sisters, but there was no evidence before the decision maker of actual occupation of the second house by anybody other than the claimant's non-dependant children. On that evidence, the claimant's domestic arrangements were not such that it could be said that either house was, in effect, an "annexe" or "extension" of the other, and although it could be argued that the claimant occupied the second house by proxy through the occupation of the house by his eldest children, I do not consider that there was any basis for concluding that such occupation of the second house by the claimant was as his home. However, as the claimant's representative has pointed out, he gave evidence to the tribunal that the claimant and one of the his younger children had stayed at the second

house, and there appears to me to be sufficient uncertainty about the facts of the case to require it to be remitted for rehearing before a differently constituted tribunal.

14. The new tribunal should apply the approach of the Commissioner in paragraph 13 of *R(SB) 10/89* to the facts as they were at the date of the decision under appeal, and consider in particular whether the claimant's arrangements were such that one house was, in effect used as an annexe of the other, or to put it another way, whether this was a single home on a split site. Occasional use of the second house by the claimant or his dependant children will not assist him, because the tribunal must be satisfied that the second house was "normally" occupied by the claimant as his home.

15. The claimant's representative has submitted that the second house fell within regulation 1 of the 1996 regulations because it was land which it was unreasonable or impracticable to sell, having regard to the claimant's need to house his growing children. I reject that argument, because I regard it as clear that the words "unreasonable or impracticable to sell" refer to difficulty in selling land resulting from its physical relationship to the dwelling. The new tribunal should therefore not take account of the claimant's intentions for the future, but have regard to the arrangements which were actually in place when the decision refusing benefit was made.

(Signed) **E A L Bano**
Commissioner

23 May 2002