

*Y WHOSE HUSBAND WAS DEFERRED (ENTITLED TO INCREMENTS BY REF
CATEGORY B RETIREMENT PENSION DESPITE HAVING RECEIVED GRADUATED RETIREMENT
SECRET.*
JJS/1/LM

Commissioner's File: CP/64/1988

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Ethel Pearse (Mrs)

Appeal Tribunal: Bristol

Case No: 3/24/00246

[ORAL HEARING]

1. My decision is that the decision of the Bristol social security appeal tribunal, given on 5 April 1988, is erroneous in point of law and accordingly I set it aside. In exercise of my jurisdiction I give the decision which the tribunal should have given, namely that the claimant on her husband's retirement became entitled to increments of her Category B retirement pension by reference to her husband's period of deferment of entitlement to his Category A retirement pension.

2. I held an oral hearing of this appeal. The claimant was represented by Mr A King of the Avon and Bristol Community Law Centre. Mr Duncan Ouseley of Counsel, instructed by the Solicitor's Office in the Department of Social Security, appeared for the adjudication officer.

3. This is a claimant's appeal against the decision of the Bristol social security appeal tribunal, given on 5 April 1988, which upheld an adjudication officer's decision that an increase of retirement pension on account of deferred retirement was not payable because there were no days of increment in the claimant's period of deferred retirement. At issue before the tribunal was whether graduated retirement benefit is an excluding benefit by virtue of the provisions of regulation 4(1)(b) of the Social Security (Widows Benefit and Retirement Pension) Regulations 1979, so as the days during which it is received, are not to be treated as days of increment when retirement has been deferred.

4. The claimant, a married lady, had no entitlement to a Category A retirement pension under section 28 of the Social Security Act 1975. On 25 March 1980 she was awarded graduated retirement benefit by virtue of the provisions of regulation 3, as read with Schedule 1, of the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 from and including 26 June 1980 at the weekly rate of £0.36. The benefit was paid to her annually in December of each year. On 11 January 1981 the

claimant's husband reached pensionable age. Instead of then taking his Category A retirement pension, he chose to defer it and applied for a determination of his entitlement to pension payable in the event of his retirement. As her husband had not retired the claimant could not claim her entitlement to Category B pension payable under section 29 of the Social Security Act 1975 and she had to defer receiving this benefit until her husband retired because of the provisions of Schedule 1, paragraph 5, to the Resources Act 1975. The husband retired on 28 June 1985 and he and the claimant were awarded Category A and Category B retirement pensions respectively from that date. Because during the whole of the period of deferred retirement the claimant was in receipt of graduated retirement benefit, the adjudication officer decided that she was receiving a benefit payable under Chapter I of Part II of the Social Security Act 1975 during the entire period of deferred retirement and consequently that there were no days of increment and her Category B retirement pension could not be increased under the provisions of Schedule 1 of the Social Security Act 1975. This decision was confirmed by the tribunal on appeal.

5. The National Insurance Act 1959 made provision for graduated retirement benefit and that provision was continued under the National Insurance Act 1965, the relevant sections being sections 36 and 37. Graduated retirement benefit was an increase in the weekly rate of retirement pension and it was originally calculated in respect of each unit of graduated contributions paid by an employee. Contributions payable since 1975 have not earned entitlement to graduated benefit, but payment of graduated retirement benefit continues to be paid on the basis of the contributions paid before then. The amount is small and in the case of the claimant never exceeded £0.60 a week. After the enactment of the Social Security Act 1975 the conditions of entitlement to a retirement pension were governed by the provisions of that Act. The Social Security (Consequential Provisions) Act 1975 made provisions consequential on and in connection with the Social Security Act 1975; it repealed the National Insurance Act 1965. However sections 36 and 37 of the repealed Act were kept in force, first by the Social Security (Graduated Retirement Benefit) Regulations 1975 and later by the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978, [SI 1978/393] which revoked the earlier statutory instrument and which contain the provisions applicable to the issue before me; these regulations were made by the Secretary of State for Social Services in exercise of the powers conferred on him by section 2(1) of, and paragraphs 3, 7 and 9 of Schedule 3 to, the Social Security (Consequential Provisions) Act 1975 and section 24(1) of the Social Security Pensions Act 1975. In order to appreciate the point of the case it is necessary to read the Social Security (Graduated Retirement Benefit) (No 2) Regulations which, in so far as relevant, I set out below:

"3.-(1) The provisions of this regulation shall have effect for the purpose of securing continuity between the Act and the 1965 Act in the case of persons who had,

immediately before 6th April 1975, rights or prospective rights to or expectations of graduated retirement benefit under sections 36 and 37 of the 1965 Act by preserving those rights and temporarily retaining the effect of those sections for transitional purposes.

(2) Paragraph (3) below shall have effect so that notwithstanding their repeal by the Social Security Act 1973 those sections shall, for the purpose aforesaid, continue in force subject to the making in them of the modifications required -

(a) to bring them into conformity with the provisions of the Act and the Pensions Act and to enable them to have effect as if contained in the scheme of social security benefits established by those Acts;

(b) to replace section 36(4) of the 1965 Act (increase of graduated retirement benefit in cases of deferred retirement) with provisions corresponding to those of paragraphs 2 to 3 of Schedule 1 to the Pensions Act; and

(c) to extend section 37 of the 1965 Act (increase of woman's retirement pension by reference to her late husband's graduated retirement benefit) to men and their late wives.

(3) On and after 6th April 1979 those sections shall continue in force in the modified form in which they are set out in Schedule 1 to these regulations, but not so as to save the National Insurance (Graduated Retirement Benefit and Consequential Provisions) Regulations 1961, so far as deemed to have been made under those sections, from being invalidated by the repeal; and section 118(1) of the 1965 Act (short title) shall also continue in force."

Section 36 in its modified form is in Schedule 1 to the Regulations and I set out the material parts thereof:

"36.-(1) Subject to the provisions of the Act, graduated retirement benefit shall be payable to any person who is over pensionable age and who (except as mentioned in section 37(1) below) has retired from regular employment, and shall be an increase in the weekly rate of his retirement pension equal to 5.39 pence for each unit, ascertained in accordance with subsections (2) and (3) of this section, of the graduated contributions properly paid by him as an insured person, the result being rounded to the nearest whole penny, taking $\frac{1}{2}$ p as nearest to the next whole penny above.

(2)-(6)

(7) A person who has attained pensionable age and retired from regular employment, but is not entitled to

a retirement pension, shall be treated for the purposes of the foregoing provisions of this section as receiving a retirement pension at a nominal weekly rate:

Provided that -

(a) this subsection shall not confer any right to graduated retirement benefit on a person who would be entitled to a retirement pension but for some provision of the Act or of regulations disqualifying him for receipt of it; and

(b) regulations may provide that any right by virtue of this subsection to benefit at less than a specified weekly rate shall be satisfied either altogether or for a specified period by the making of a single payment of the prescribed amount.

(8)

(9) This section and section 37 below and the Act shall be construed and have effect as if this section and section 37 below were included in Chapter I of Part II of that Act (contributory benefits); and references to that Chapter, that Part or that Act in any other enactment or in any instrument shall be construed accordingly:

Provided that nothing in this subsection shall affect the construction of any reference to section 36 or 37 of this Act or of that Act or to any of the subsections of those sections; and any increase in the weekly rate of a person's retirement pension, to the extent that it is attributable to subsection (4) of this section, shall be left out of account in determining the weekly rate of pension for the purposes of sections 14(6) and 15(4) of the Act (rate of unemployment benefit, sickness benefit or invalidity pension for persons over pensionable age).

(10)"

6. The ground upon which the claimant's disallowance was made was that during her husband's period of deferment she had been in receipt of the graduated retirement pension. Under Schedule 1 of the Social Security Pensions Act 1975 a person is entitled to an increment calculated by reference to each complete "incremental period" in his or her "period of deferment". "Incremental period" is defined in paragraph 2(2)(a) of the Schedule as:

"any period of 6 days which are treated by regulations as days of increment for the purpose of the Schedule in relation to the person and the pension in question."

The relevant defining regulation is regulation 4(1) of the Social

Security (Widows Benefit and Retirement Pension) Regulations 1979, [SI 1979/642]. This provides that a day, other than a Sunday, in a person's period of deferment is a day of increment if certain conditions are satisfied. I must set out the material parts of the paragraph

"4.-(1) For the purposes of paragraph 2 of Schedule 1 to the Pensions Act a day shall be treated as a day of increment in relation to any person if it is a day in that person's period of deferment, other than a Sunday, in respect of which -

(a) if that person had retired from regular employment on attaining pensionable age, or in the case of a married woman and her category B retirement pension or section 10(2) increase, if she and her husband had retired from regular employment on attaining pensionable age, that person would have been entitled to a Category A or a Category B retirement pension (and would not have been disqualified for receiving it by reason of imprisonment or detention in legal custody); and

(b) that person had not received any of the following benefits -

(i) any benefit under Chapters I and II of Part II of the Act other than child's special allowances, attendance allowance, mobility allowance and guardian's allowance; or

(ii) injury benefit or an unemployability supplement; and

(c)

It is to be noted that regulation 4(1)(b) provides that a day in a period of deferment is not a day of increment if a benefit under Chapters I and II of Part II of the Act (other than the benefits excluded by the paragraph) have been received in respect of that day. Section 36(9) of the 1965 Act provides that that section and section 37 are to be construed and have effect as if they were included in Chapter I of Part II of the Social Security Act 1975.

7. Mr King's argument is founded on the decision given by a Commissioner on Commissioner's file CSP/4/86. This decision concerned an appeal heard by a social security appeal tribunal in Scotland where the initial decision was given by an adjudication officer in Northern Ireland. The Commissioner's interpretation related to the primary and secondary legislation in Northern Ireland, but that legislation is in pari materia with the Acts and regulations enacted in respect of Great Britain to which I have referred earlier. It is clear from reading of the Commissioner's decision that he was of opinion that British law

led to the same result. The Commissioner held that because regulation 3 of the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 keeps alive and incorporates into the Social Security Act 1975 the sections of the National Insurance Act 1965 relating to graduated retirement benefit for limited purposes only, those sections are not to be treated as being incorporating into the later Act for the purpose of regulation 4 of the Social Security (Widows Benefit and Retirement Pension) Regulations 1979. The Commissioner rejected a contrary view argued on behalf of the adjudication officer in that case. The adjudication officer appealed to the Court of Session and that Court refused to entertain the appeal because in their view it raised an academic question. But that, as I understand it, depended on the circumstances pertaining in that case at the time it came before the Court. In the case before me the issue is a live one.

8. Mr King argues that the Commissioner in CSP/4/86 was right in law in holding that the deeming provisions of regulation 3 of the 1978 Regulations were limited to the purposes set out in sub paragraphs (1) and (2) of that Regulation. He maintains that the purposes were, in summary, to preserve rights or prospective rights of graduated retirement pension conferred by the earlier legislation. The Commissioner relied upon Ingle v Farrand [1927] AC 417 and held that, as the regulations themselves expressed the purpose for which a hypotheses is to be made, then the effect was that the hypotheses is not to be made for all purposes but only for the purposes indicated; and he found that the purpose was only to preserve the rights or prospective rights to graduated retirement benefit.

9. Mr King further cites that decision as authority for the proposition that regulation 16 of the Social Security (Widows Benefit, Retirement Pensions and Other Benefits) Transitional Regulations 1979, (which gave relief to certain claimants who might otherwise have lost entitlement to increment) was of no assistance because there was no ambiguity in the provisions of regulation 3 of the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 and he relied on the reasoning of the Commissioner in paragraphs 18 and 19 of CSP/4/86. The Commissioner found that there was no ambiguity in the earlier enactment and had regard to the words of Lord Buckmaster in Ormond Investment Company v Betts [1928] AC 143 at page 150 where it was said that a later enactment did not have effect on the construction of an earlier Act unless there was ambiguity in the earlier enactment. Mr King further argued that the purpose of regulation 4(1)(b)(i) of the Social Security (Widows Benefit and Retirement Pensions) Regulations 1979 was to avoid a duplication of benefits which might otherwise arise if a claimant were to qualify for both benefit paid upon retirement and increments gained by deferred retirement. He says that the intention was that a claimant will have entitlement to one or the other and be able to chose. He contends that to deprive claimants of both benefits was contrary to the intention of the legislature. He contends that the amount of the graduated retirement benefit is so small as to have that consequence.

10. Mr Ouseley accepts that if CSP/4/86 is right then the claimant's appeal in the case before me must be allowed. However he challenges the correctness of the decision. He points to the claimant having received graduated retirement benefit during a period of deferment and poses the question whether this benefit is a benefit under Chapters I and II of Part I of the Social Security Act 1975. He argues that such benefit can only be paid under the provisions of that part of the Act and points to section 36(9) of the 1965 Act (as perpetuated) which provides that the section is to be construed and have effect if it were included in Chapter I of Part II of the Social Security Act 1975; he maintains that the question, which he posed, should only be answered in the affirmative. He then went on to deal with the limiting words of regulation 3 of the 1978 Regulations. He criticises the Commissioner's findings that the provisions of the Schedule to those Regulations were only to have effect in so far as they ensured continued entitlement and that they had no other implication at all. He submits that once a provision was incorporated into legislation it has effect for all purposes unless there is some limitation. He maintains that the words used in regulation 3(1) of the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 did not provide a limitation. He argues that the purpose of those regulations are satisfied in their entirety by the provision for payment of graduated retirement benefit; section 36 (as perpetuated) does no more than provide for entitlement and it says nothing at all about the effect of payment arising from such entitlement. Regulation 4 of the Social Security (Widows Benefit and Retirement Pension) Regulations 1979 is not concerned with entitlement, it is concerned with what happens as a result of the receipt of benefit, and he emphasises that nothing in regulation 3 of the 1978 Regulations is going to affect the effect of a payment and it does not limit the scope of other legislation. Mr Ouseley also takes the point that regulation 3(1) must not be looked at in isolation but as part of a series of interlocking Acts and regulations. He points to the 1978 Regulations as being made under the Social Security (Consequential Provisions) Act 1975 and argues that regard must be had to paragraph 9 of Schedule 3 to that Act, which allows regulations to be made for facilitating the introduction of the scheme of social security contributions and benefits established by the 1975 Act and that the 1978 Regulations must be construed as part of a scheme. Mr Ouseley emphasised that if you have a provision dealing with entitlement on one set of regulations, it does not limit other regulations from dealing with the consequences of that entitlement, and submits that the Commissioner dealt with one part of the scheme in isolation.

11. I have given anxious consideration to CSB/4/86. I bear in mind that a single Commissioner in the interests of comity and to secure certainty and avoid confusion on questions of legal principle normally follows the decision of an other single Commissioners, but I recognise that a slavish adherence to this would lead to the perpetuation of error and that I am not bound to do so. While I bear in mind that the Commissioner who gave that decision was a Commissioner of great experience I would not

follow him, if I thought the decision was wrong. However I find myself coming to the same conclusion as did the Commissioner in that case and my process of reasoning differs to some small degree only from his. I accept that one must not look at regulation 3 of the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978 in isolation. It is to be borne in mind that those regulations form part of the present system of social security which is embodied in the Social Security Act 1975 to 1978 and the various regulations made under the authority of those Acts and the Social Security (Consequential Provisions) Act 1975. However it is to be remembered that the National Insurance Act 1959 had made provision for graduated retirement benefit and that provision was continued under the provisions of the National Insurance Act 1965. As I have explained earlier, graduated retirement benefit was an increase in the weekly rate of retirement pension and it was calculated in respect of each unit of graduated contributions paid by an employee. On the repeal of the National Insurance Act 1965 graduated retirement benefit became a dead benefit but, as various people had paid contributions which would entitle them to it in the past, the benefit was preserved and they continued to be entitled to it on the basis of the past contributions. The Social Security (Consequential Provisions) Act 1975 repealed the National Insurance Act 1965 and empowered the making of regulations with respect to the transition from the operation of the National Insurance Act; Schedule 3 to the Social Security (Consequential Provisions) Act 1975, in Part I relates to the supersession of the National Insurance Acts and paragraph 7 thereof allows of provisions to be made by regulation for continuing in force such provisions of various repealed Acts, including the National Insurance Act 1965, as the Secretary of State considered appropriate "for the purpose of preserving rights to benefit under that Act or those enactments in those cases (if any) in which in his opinion adequate alternative rights to benefit under the new Act were not conferred in pursuance of paragraph 3 above, or for temporarily retaining the effect of those provisions for transitional purposes". It was in pursuance of the power contained in that paragraph, as well as the powers conferred in paragraphs 3 and 9 of the same Schedule, that the Secretary of State made the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978. Sections 36 and 37 of the National Insurance Act 1965, the sections which related to graduated retirement benefit, were continued by regulation 3. But the purpose for which they were to continue in force was that set out in regulation 3(1), namely "for the purpose of securing continuity between [the Social Security Act 1975] and the 1965 Act in the case of persons who had, immediately before 6th April 1975, rights or prospective rights to or expectations of graduated retirement benefit under sections 36 and 37 of the 1965 Act, by preserving those rights and temporarily retaining the effect of those sections for transitional purposes". It is to be noted that the wording of regulation 3(1) closely follows the wording of paragraph 7 of Schedule 3 to the Social Security (Consequential Provisions) Act 1975.

12. In my judgment regulation 3(1) states unambiguously the purpose of the regulation; and, like the Commissioner in the earlier case, I am satisfied that I have to give effect to those limiting words. Sections 36 and 37 are not continued in force for all purposes but are to preserve the rights of persons who had entitlement to graduated retirement benefit, and in that way to secure continuity between the Social Security Act 1975 and the National Insurance Act 1965. The right to the payment of graduated retirement benefit was preserved for people who had paid contributions entitling them to such benefit under the provisions of the earlier Act. In order to operate that perpetuated entitlement provision had to be made for it to be incorporated into the new scheme of administration provided for by the Social Security Act 1975. The law relating to such administration is contained in Chapter VI of Part II of the 1975 Act; the provisions relating to administration of benefit under Chapters I to VII are contained there. Chapter I of Part II provides for the various contributory benefits under the Act. In my view section 36(9) does no more than provide for the administration of the perpetuated benefit which was to continue.

13. I accept Mr Ouseley's argument that if you have a provision dealing with entitlement, it does not limit other regulations when dealing with the effect of payment arising from such entitlement. But in my judgment the disqualifying regulations must cover the case of a person who has such an entitlement and regulation 4 of the Social Security (Widows Benefit and Retirement Pensions) Regulations do not do so in so far as graduated retirement benefit is concerned.

14. Like the Commissioner in CSP/486 I have difficulty in understanding how it can be suggested that a provision for establishing continuity between the Social Security Act 1975 and the National Insurance Act 1965 can be said to be relevant to the provisions of the Pensions Act. As was pointed out by the Commissioner the Pensions Act was not on the statute book when the Social Security (Graduated Retirement Benefit) Regulations 1975 (the precursor of the 1978 Regulations) were made.

15. It has been argued that regulation 16 of the Social Security (Widows Benefit, Retirement Pension and Other Benefits) (Transitional) Regulations 1979 can be used as an aid to the construction of the earlier regulations because it is said that the draftsman of those regulations took the view that the Social Security (Widows Benefit and Retirement Pensions) Regulations 1979 had the effect of causing a loss of days in the deferred period when a person was in receipt of graduated retirement benefit and provided against it for certain women. That case was made to the Commissioner in CSP/4/86 and rejected by him. I feel I cannot do better than to borrow and adopt his words. He said at paragraph 19

"19. This argument raises the question as to the effect of the interpretation of an earlier enactment adopted by the draftsman of a later enactment. The law reports contain

many instances of cases where a later Act has purported to relieve in a limited class of cases from the provisions of an earlier Act, where, but for the later provision, one might have thought that there was nothing to relieve from either in the limited class of cases or at all. Can this have an effect on the construction of the earlier Act? The leading case is Ormond Investment Company v Betts [1928] AC 143, where the above question was answered "No, unless there is an ambiguity in the earlier enactment". (see per Lord Buckmaster at page 150). I do not here consider that there was any ambiguity in the earlier enactment. I think that it was probably overlooked by the draftsman of the 1979 transitional regulations that the "deeming" provision of the modified section 35(9)(NI) or 36(n)(GB) of the National Insurance Act was itself subject to the overriding limiting purpose for which it was kept alive as expressed in regulation 2(NI) and regulation 3(GB) of the 1978 regulations."

Like the Commissioner I have already come to the conclusion that regulation 3(1) of the 1978 Regulations is unequivocal.

(Signed) J J Skinner
Commissioner

Date: 11 March 1991