943/1984

S.P - furniture for child who lives with claimant 2 days per week. claim 943 doesn't have to be made on a day when child is actually at home.

JGM/AS

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I refuse the adjudication officer leave to appeal against the decision of the social security appeal tribunal dated 27 June 1984 awarding to the claimant single payments for a single bed, a dining chair, sheets, blankets, quilt and pillow cases and curtaining for the claimant's daughter.

2. The claimant became estranged from his wife, though he and his wife for some time before the period now in issue lived under the same roof, being treated as in separate households for the purposes of supplementary benefit. His daughter now aged 5 was at that time included in the wife's assessment unit and not in the claimant's assessment unit.

3. In January 1984 the claimant informed his local office that he had on 9 January moved into separate accommodation and he gave some information about proposals for the daughter's position which at that time were fluid, but which in due course crystallised, first informally, then through solicitors and finally (as I was informed at the hearing before me) embodied in a court order in connection with the divorce which has now been completed. Under these ultimate arrangements the daughter spends five days per week with her mother and the remaining two (from 6 pm Friday to 6 pm Sunday with the claimant). The claimant and his wife (now his former wife) are both in receipt of a supplementary allowance and the daughter has in fact continued to be included in the mother's assessment unit and not in that of the claimant. This it was submitted to me was simply because the claimant had not pressed for any alternative way of dealing with the matter.

4. On 16 January 1984 (according to the form LT205) the claimant claimed single payments for a variety of items including those the subject of this appeal (other than the curtaining). On 31 January he claimed single payments for further items, including the curtaining for the daughter's room. Single payments were awarded for many items, but they were refused for the items in question in this appeal on the ground that the need was that of the daughter and that she was not a member of the claimant's assessment unit. The claimant appealed to the appeal tribunal, who awarded single

payments for the items in question, fixing the amounts of the payments. No question has been raised about the amounts fixed but the adjudecation officer has sought leave to appeal against the award of the payments in question broadly on the ground that the daughter was not a member of the assessment unit. In the meanwhile the Secretary of State for Social Services has suspended payment of the amounts awarded under regulation 8(1) of the Supplementary Benefit (Determination of Questions) Regulations 1980[SI 1980 No 1643]("the DQ Regulations"). In view of the fact that payment of benefit that had been awarded was being suspended I decided that the most expeditious way of dealing with the matter would be to have an oral hearing of the application for leave to appeal. At the hearing the benefit officer was represented by Mr EOF Stocker and the claimant was represented by Mrs B Houlden of the Claimant's Union . I am indebted to them for their submissions. Both consented to my proceeding, if I granted leave to appeal ,to treat the application as an appeal.

5. The question in issue involved the consideration of,in particular, paragraph 3 of Schedule 1 to the Supplementary Benefits Act 1976 ("the Act"), regulations 3(2) and 4 of the Supplementary Benefit (Aggregation) Regulations 1981[SI 1981 No 1524]("the Aggregation Regulations"), regulations4,9,10 and 12 of the Supplementary Benefit (Single Payments) Regulations 1981 [SI 1981 No 1528]("the Single Payments Regulations") and regulation 7 of the DQ Regulations. Relevant parts of these provisions are set out below.

6. The tribunal's grounds of decision included the following:

> "The issue was whether [the daughter] was a member of the assessment unit so that her needs would count under 9(1)(a) [meaning I think, regulation 9(a) of the Single Payments Regulations]. We find that under paragraph 3(2) of Schedule 1 to the Supplementary Benefits Act 1976 the issue is whether [the daughter] is a member of [the claimant's] household. If she is then regulation 4 [of the Aggregation Regulations] does not apply to deem [the daughter] not to be a member of the household during the period during which [the daughter] living with [the claimant]. Applying the test laid down in England v Secretary of State (for Social Services) referred to in R(FIS)3/83 and R(FIS)4/83 [reported in [1981]FLR 222] we find that the ties between [the claimant] and [the daughter] were so close that she is a member of his household when she is there. Therefore she is a member of the assessment unit for those days and [the claimant] is entitled."

7. It is in my judgment clear that the tribunal correctly identified the real issue. Nevertheless the appeal raised a number of issues. In the first place Mr Stocker submitted that the tribunal lost sight of the fact that on a claim for a single payment the matter had to be looked at as at the date of claim (see Decisions R(SB) 26/83). The real question was thus whether at the date of claim the daughter was a member of the assessment unit. But the tribunal's findings were not in any way directed to the question whether the arrangements in relation to the

daughter were sufficiently crystallised at the date of claim to enable them to hold that she was then a member of the assessment unit. I have not set out the findings of fact but I have to accept that it is arguable that they were inadequate in this respect; and I may add that nothing that I was told at the hearing would have strengthened the case for suggesting that arrangements had sufficiently crystallised by that date.

8. But the more important matter of principle involved is whether the child of separated parents can ever be treated as being a member of the assessment unit of one of those parents with whom the child is living for part of the week while being treated as a member of the assessment unit of the other of those parents with whom the child is living for the rest of that week. Mr Stocker addressed to me an argument on this aspect of the case, based I think on an interpretation currently being placed on the regulations within the Department of Health and Social Security. This conclusion advocated by him was beneficial to the claimant and he suggested that if I accepted it it would be clear and that, whether or not the claimant was entitled to the relevant single payments at the date of claim, he would (if Mr Stocker's submission were accepted) have been entitled if he had postponed his claim and indeed would still be entitled if he made a fresh claim. In these circumstances he suggested that it would be unprofitable to set aside the existing decision in order to enable it to be ascertained whether the claim as made was premature, since any prematureness could be overcome by a fresh claim. He suggested therefore that if I accepted his submission on the present issue I should refuse leave to appeal as even a successful appeal by the adjudication officer would lead to the same end-result as if leave to appeal were refused and the tribunal decision left standing. I shall consider his two points in turn.

9. Regulation 9(a) of the Single Payments Regulations defines "essential furniture and household equipment" (in respect of which a single payment may be made) as including sufficient beds and mattresses, and dining and easy chairs for all the members of the assessment unit. Regulation 9(g) includes curtaining (previously curtains) and fittings. Regulation 12(1) provides for a single payment for bedding where the assessment unit's stock is inadequate for its needs. It follows that in respect of all the items in issue, other than the curtaining, the needs of the assessment unit (as opposed to those of the claimant personally) are specifically referred to. It thus becomes essential to decide whether the daughter was at the relevant time a member of the claimant's assessment unit.

10. "Assessment unit" is defined in regulation 2(1) of the Single Payments Regulations as meaning the claimant and any partner and dependant of the claimant; while "dependant" is there defined as meaning a person whose requirements and resources, by virtue of paragraph 3(2) of Schedule 1 to the Act, are or would be (my underlining) aggregated with and treated as those of the claimant. The "claimant" is defined in regulation 4 of the same regulations as a person who claims a single payment and in respect of the day on which the claim is made either is entitled to a

pension or allowance or would be entitled to a pension or allowance if he made a claim for it and satisfied certain conditions there mentioned. The reference in the definition of dependant to a person whose resources and requirements "would be" aggregated with those of the claimant is in my judgment clearly an echo of the inclusion in the definition of "claimant" of one who would be entitled to a pension or allowance if he claimed it. Accordingly a person is a dependant if his or her requirements and resources are aggregated with those of the claimant or would be so aggregated if he claimed that they should be.

11. Paragraph 3(2) of Schedule 1 to the Act provides that where a person is responsible for, and is a member of the same household as, another person and they are not a married or an unmarried couple then, if the other person is a child, their requirements and resources shall be aggregated and treated as those of the first mentioned person. [illegible] that the resources and requirements of the claimant and the daughter fell to be aggregated if the claimant and the daughter were at the relevant time members of the same household and the claimant was responsible for the daughter. Regulation 3(2) of the Aggregation Regulations makes it clear that in the circumstances of this case the claimant was responsible for the daughter if they were members of the same household; and a key question, as the appeal tribunal appreciated, was whether at some relevant time the claimant and the daughter were members of the same household. The tribunal found that they were members of the same household during the two days per week that the daughter was living with the claimant; and I think that they would have held, had it been necessary for them to do so, that the daughter and her mother were members of the same household during the other five days per week. I was informed at the hearing that it is the practice in a situation like this to split the normal requirements of the child between the two persons with whom he or she is alternatively living in proportion to the number of days that the child is with each. Indeed Mrs Houlden informed me that it would be inaccordance with her experience of the practice for the mother's 7/7ths share of the daughter's normal requirements to be reduced to 5/7ths not only if the claimant were to apply for his daughter's requirements to be aggregated with his to the extent of 2/7ths but also if the claimant ceased to be entitled to a supplementary allowance. The mother, she said, was only being credited with the full amount of those requirements because in effect the claimant was allowing her to have them instead of himself.

12. The practice I was told was based on regulation 4 of the Aggregation Regulations. Paragraph (1) of that regulation indicates that it applies for the purposes of paragraph 3 of Schedule 1 to the Act where a claimant (in the regulation referred to as A) is (or but for this regulation would be) responsible for and would but for this regulation be a member of the same household as another person (in regulation referred to as B) and by virtue of paragraph 3(2) B's requirements would but for the regulation fall to be aggregated with and treated as A's. Paragraph (2)

lists a series of cases (which I am prepared to assume include the present) in which A and B are not to be treated as members of the same household, even though they otherwise would be. Paragraph (3) provides however that in certain cases (including those that I am assuming apply) B is nevertheless to be treated as a member of the same household as A for any period that B is living with A.

13. It is said that this last provision enables the daughter (in the role of B) to be treated as a member of the same household as the claimant while she is living with her. There is however a difficulty about this. The daughter can only be treated as a member of the same household as the claimant under regulation 4(3) if, but for the provisions of the regulation, she and the claimant would have been members of the same household; similarly she can be treated as a member of the same household as her mother under regulation 4(3) only if but for the provisions of the regulation as a whole she was a member of the same household as her mother. There is thus a question whether the precondition in regulation 4(1) can be satisfied simultaneously in relation to both the claimant and the mother, since it has been held (in the decision on file CSB 98/84 to be reported as R(SB) 8/85) that a person cannot simultaneously be a member of two households. But if the daughter can for five days be a member of the household of the mother and for two days as a member of the same household of the claimant, the difficulty can be surmounted.

14. I have reached the conclusion that this can be done. Although section 34(3) of the Act authorises the making of regulations providing for the circumstances in which a person is to be treated or is not to be treated as a member of the same household as another person there is not in the regulations that have been made any comprehensive definition of such circumstances, and subject to the regulations that have been made one is free to interpret the expression according to its ordinary meaning. The appeal tribunal in the grounds of their decision referred to England v Secretary of State for Social Services 1981 FLR 222, in the course of which Woolf J (in a decision on the meaning of the word "household" in the Family Income Supplements Act 1970 where there is no definition at all) said:

> "By using the word 'household' instead of providing a requirement of 'living with', Parliament intended that in appropriate circumstances, if a sufficient tie remained, children should still qualify if away from home as long as the separation was temporary" (from R(FIS)4/83 paragraph 5).

There is an obvious tie between a child and each of its parents; and it is my view that where a child moves between its parent's homes on a regular basis that child can properly be regarded as a member of the household in which he or she is for the time being. And, although there may be some question whether the tribunal's findings of fact were sufficient to warrant the conclusion that at the date of the claim the daughter was a member of her father's household for two days per week, they were

in my judgment entitled to reach that conclusion in relation to the situation as it had developed by the date of their hearing, when the arrangements had been formalised through solicitors.

15. I note that in Decision R(SB) 28/84 a child in care, who was allowed home at week-ends was held to be a member of his parents' household for the days that he was home (which were held to include the two travelling days); and that this conclusion was reached under regulation 4(3) of the Aggregation Regulations. The present case concerns single payments and I am not directly concerned with the question of the attribution of travelling days to between individual claimants, but I should in fact have some difficulty in attributing the same travelling day to both the claimant and the mother, and I should like to reserve that question for consideration when it arises. The decision shows that it is permissible to regard a person as a member of a household for part of a week; and also for the proposition that a person be credited with a fraction of the normal requirements of a child corresponding to the fraction of the week for which that child is living with him.

16. How then is this to operate in the present circumstances? If the claimant was entitled to be credited with 2/7ths of the normal weekly requirements of the daughter only in respect of the two days on which the daughter is living with him, then unless the claim for a single payment in respect of her needs was made on such a day would he be entitled to a single payment for her? This would have the unfortunate affect that the claim for the single payment would have to be made on such a day (in this case possibly Saturday or Sunday). I do not consider it to be the right approach. Regulation 7 of this DQ Regulations contains provisions, under which normally a person's pension or allowance is computed for a week at a time and paid on the weekly pay day, and under which changes that occur between one pay day and the next do not lead to the review of an award until the next following pay day (see in particular regulation 7(1)(b)). This really rules out the crediting of 1/7th of a week's requirements to the person with whom a child is living for each day on which he is so living, followed by a switch to some other person on the child's moving to live with the other person during the week followed possibly by a switch back within the week, Instead, on this analysis, the person with whom the child was living on pay day would be entitled to be credited with the normal requirements of that child for the whole week.

17. I have, however, accepted the principle that emerges from Decision R(SB) 28/84 that it is possible for a person who regularly has a child living with him or her for a portion of the week to be credited with a rateable proportion of that child's normal requirements. Having regard to regulation 7 the only acceptable rationalisation of this is that where, on a regular pattern, a child's alternates in living in the household of two different persons there is not a change of circumstances each time he switches from one to another, but there is a continuous situation under which each of the persons with whom he lives is, when it is relevant to consider his entitlement to a supplementary pension or allowance, entitled in respect of each week while the pattern persists to be credited with a rateable part of the normal require-

ments (and by parity of reasoning to be debited with a rateable part of the income resources) of the child. Such a person is for purposes of the Single Payments Regulations entitled throughout each week during which the pattern persists to have the child treated as a member of his assessment unit. It follows that since the daughter is a person whose resources and requirements would if the claimant so claimed be aggregated (albeit only on a rateable basis) with his own she falls, while those arrangements persist, to be treated as a member of his assessment unit. I realise that in reaching this conclusion I am placing something of a gloss on what was said in papagraph 12 of the decision to be reported as R(SB) 8/85 and that it can give rise to situations in which a child who regularly switches from one household to another may have a need for two of certain items where most people would have a need for only one. This must I think be accepted.

17. It follows from the above that the tribunal in this case were right in principle, though arguably wrong on a point of detail, in that they made insufficient findings about the precise situation at the date of claim. Furthermore if further evidence were adduced and the resulting findings showed that at the date of claim the conditions were not satisfied the claimant could remedy this by the making of a fresh claim on which a decision similar to that already given could be given. In these circumstances it would seem a waste of time and effort to grant to the adjudication officer leave to appeal, if I can properly refuse leave in a case where at first sight there appears to have been inadequate findings. I consider that it follows from what was said by Kerr L J in Bland v Chief Supplementary Benefit Officer 1983 1 WLR 262 at page 268 (also reported as an appendix to Decision R(SB)12/83 at page 7) that it is, in appropriate cases, permissible to refuse leave to appeal against a decision notwithstanding that there are grounds for thinking that the decision was erroneous in point of law. This is a case in which for reasons already outlined I think it appropriate to refuse leave to appeal and I refuse leave accordingly.

(Signed) J G Monroe

Commissioner

Date:

Commissioner's File: CSB/943/1984

C A O File: ALC/1142/84

Region: North Eastern