

members of same household.
- children could be members of
father's household at weekends
& of mother's during to week.

✓ ★ 22 DEC 1985

JJS/3/LS

Commissioner's File: CSB/944/1985

C A O File: AO 2722/85

Region: Midlands

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Trevor Charlesworth

Social Security Appeal Tribunal: Leicester & District

Case No: 7/92/08

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal, such decision being erroneous in law I set it aside. The case is remitted for determination to a differently constituted social security appeal tribunal.
2. I held an oral hearing of the claimant's appeal. Mr Rowland of counsel appeared for him and Mr Ross of counsel appeared for the adjudication officer.
3. This is a claimant's appeal against the decision of the Leicester and District social security appeal tribunal, given on 4 January 1985, affirming an adjudication officer's decision issued on 23 September 1985, which decided that the claimant's supplementary allowance should be reassessed to allow for his requirements only and that no allowance should be made for the requirements of his children for the periods during which they stayed with him.
4. The facts can be stated briefly. Two children of the claimant's previous marriage stay every other weekend at his home, that is from Friday evening to Sunday evening. They also live with him for one half of each of the school holidays, including half term holidays. The rest of the time they live with their mother, this arrangement commenced in 1983. The claimant has been in receipt of supplementary allowance since 1981 as he is unemployed. The adjudication officer decided that no allowance should be made for the requirements of the children for the periods during which they stayed with the claimant, he did so because, in his opinion, they were not members of the same household as the claimant. In reaching this conclusion the adjudication officer considered the position held by the two children in their mother's household and the fact that she received child benefit for them; she was in receipt of supplementary benefit to cover their requirements as her dependants, and they lived with her for most of the time. He decided that they were not members of the same household as their father simply because they visited him at weekends. The claimant appealed to the tribunal and the adjudication officer's decision was confirmed. In their reasons for decision the members of the tribunal stated that they accepted and adopted the reasons given by the adjudication officer, and they were of opinion that although regulation 4(3) of the Supplementary Benefit (Aggregation) Regulations may apply to children spending extended school holidays with a parent not having care and control, they did not consider that a child staying with such a parent for alternative weekends or for any period less than at least a week could be said to be a member of that household for the

purpose of regulation 4 during such stay.

5. The issue in the appeal to me is whether the claimant is entitled to have his requirements aggregated with those of his children in the circumstances of this case and the issue turns on the question of whether or not a child can be regarded as being a member of two households, and whether the tribunal asked themselves the right questions to determine whether the claimant and his two children were members of the same household.

6. The Supplementary Benefit Act 1976 Schedule 1 paragraph 3 provides for the aggregation of requirements and resources. In so far as the present case is concerned paragraph 3(2) is relevant, it reads as follows:

"(2) where a person is responsible for, and is a member of the same household as, another person and they are not a married or unmarried couple, then -

(a) if the other person is a child or is excluded from entitlement to supplementary benefit by section 6(2) of this Act; or

(b) if the circumstances are such as are prescribed,

their requirements and resources shall be aggregated and treated as those of the first mentioned person."

Regulation 3 of the Supplementary Benefit (Aggregation) Regulations defines when a person is to be treated as responsible for another person for the purpose of paragraph 3(2) of the schedule and it is provided therein, *inter alia*, that a claimant will be treated as responsible for another person where that person is a child and a member of the same household as the first person, and regulation 4 deals with circumstances where dependants are not to be treated as members of the household for the purpose of paragraph 3(2) of Schedule 1 to the Act. The fundamental question therefore is whether the children in the instant case can be said to be members of the same household as the claimant. In England v Secretary of State for Social Services 1981 FLR 222 Woolf J, as he then was, referred to the meaning of the word "household" as used in the Family Income Supplements Act 1970 and 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."

As I have said those words were spoken in respect of the Family Income Supplements Act 1970, but it is to be observed that in Schedule 1 to the Supplementary Benefits Act 1976 the requirement is also membership of the same household. The dictum of Woolf J was referred to by Mr Commissioner Monroe in CSB/943/1984, a case in which a daughter spent five days per week with her mother and the remaining two with her father. The learned Commissioner then went on to say that there was an obvious tie between a child and each of its parents; and in his view 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. He then continued "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 their conclusion in relation to the situation as it had developed by the date of their hearing, when the arrangements had been formalised through the solicitors." Later in the course of the same decision the learned Commissioner approved of the decision in R(SB) 28/84 in the following passage:

"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 [Supplementary Benefit (Determination of Questions) Regulations] 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 requirements (and by parity of reasoning to be debited with a rateable part of the income resources) of the child."

R(SB) 28/84 was a case where the claimant's son was severely mentally handicapped and lived from Monday to Friday in a special school, funded and staffed by the local authority. He was not subject to any type of order made by the courts. The supplementary benefit officer decided that the child was in care of the local authority and that supplementary benefit was only payable for him for the period he was at home at the weekends. On appeal, the tribunal decided that the child should not be deemed to be in the care of the local authority. There was an appeal by the supplementary benefit officer to the social security Commissioner in which it was held inter alia that under regulation 4(3) of the Supplementary Benefit (Aggregation) Regulations the child was to be treated as a member of the claimant's household during the periods he lived with him i.e. Friday to Monday. R(SB) 8/85 was a decision cited by both counsel. In that decision at paragraph 12, the learned Commissioner said, concerning potential membership of two households at the same time for supplementary benefit purposes that:

"it is obvious that, if a person could be simultaneously a member of more than one household (and, accordingly, of more than one assessment unit), that person might well qualify for more than one award in respect of his normal and/or additional and/or housing requirements; or more than one claimant might be entitled to have him treated as a dependant. And it is equally obvious, in my view, that the legislation contemplated no such thing."

That passage was explained by the Commissioner in CSB/894/1985 and he concluded that a tribunal would have to decide on a common sense, factual, basis whether a claimant is a member of his mother's household at weekends bearing in mind that undoubtedly during the week itself he was a member of his father's household.

In my judgment it was necessary for the tribunal in the present case to ascertain whether at the weekends in each fortnight the two children were members of the claimant's household, and if they were, none of the disaggregation provisions applied to him; the claimant then would be entitled to an additional requirement and be credited with a rateable part of the additional requirements on an apportioned basis.

7. The tribunal considered the effect of regulation 4 and their findings in relation thereto have been criticised by both counsels. I agree that it is regulation 3 which deals with the circumstances in which a person is to be treated as being responsible for another person and it is 3(2) which defines responsibility for the children, each is of course a child and if each is a member of the same household as the claimant then he is to be treated as responsible for each. The starting point is whether the children are members of the same household as the claimant. Regulation 4 is a disaggregation regulation and only comes into play when the child or children are to be disaggregated after they have satisfied the provisions of regulation 3 but fall within the special circumstances envisaged by regulation 4 itself.

8. It will be necessary for the differently constituted tribunal, to whom the case is referred, to consider whether the children were members of the claimant's household when they stayed with him, or whether they remained members of the mother's household and

were only visitors during the days they spent with the claimant. The times, which the children spent with the father, have taken place over a considerable period and were on a regular basis, such is evidence which may persuade the tribunal that the children were members of his household at the relevant time, in any event they will have to decide this question on a common sense factual basis. If it is decided that the children are members of the claimant's household, it will be necessary for the tribunal to consider how the benefit should be calculated for the periods when the children are members of such household and to allocate the appropriate proportion of the normal weekly requirement for the children.

(Signed) J J Skinner
Commissioner

Date: 17 December 1986