

MJG/SH/6

Commissioner's File: CSB/1074/1989

SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the claimant's appeal from the decision of the social security appeal tribunal dated 13 February 1989 as that decision is erroneous in law and I set it aside. My decision is as follows:-

- (a) For the inclusive period from 16 January 1986 to 21 January 1988 the claimant had a resource for supplementary benefit purposes consisting of income from rent of a house 174 P Avenue;
- (b) As the claimant failed to disclose the material fact of his entitlement to such income, a resulting overpayment of supplementary benefit for the said period is recoverable by the Secretary of State from the claimant. The amount of the repayment must be calculated by the adjudication officer, in the light of the guidance given in this decision.

Social Security Act 1975, section 101 (as amended).

2. This is an appeal to the Commissioner by the claimant, a married man, aged 35 at the relevant time. The appeal is against the unanimous decision of a social security appeal tribunal dated 13 February 1989, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 22 July 1988 in the following terms,

"I have reviewed the decision of the Adjudication Officer

awarding Supplementary Benefit for the period 16.1.86 to 21.1.88. I am satisfied that the decision was given in ignorance of a material fact. This was that [the claimant] owned property at 174 P Avenue .. and rent was payable to him. My revised decision for the period from and including 16.1.86 is that Supplementary Benefit is payable at a reduced rate as shown on the Schedule, and from 25.6.87 benefit was not payable at all. As a result an overpayment of Supplementary Benefit has been made amounting to £3,748.40. On 13.1.86 [the claimant] failed to disclose the material fact that he was the owner of 174 P Avenue .. Accordingly Supplementary Benefit amounting to £3,748.40 from 16.1.86 to 21.1.88 (both dates included) is recoverable from [the claimant]."

3. The appeal was the subject of an oral hearing before me on 8 January 1992 at which the claimant was present, gave evidence to me and made representations to me. The adjudication officer was represented by Mr M D Jobbins of the Office of the Chief Adjudication Officer. I am indebted to the claimant and to Mr Jobbins for their assistance to me at the hearing.

4. The following statement of the facts is taken from the submission of the local adjudication officer to the social security appeal tribunal,

"On 13.1.86 [the claimant] made a claim for Supplementary Benefit on form B1 and declared that he had no other income. On 6.6.86 [the claimant] completed a further B1 form again declaring that he had no other income. On 1.6.87 the Department reviewed [the claimant's] circumstances on form A2 and he again declared that he had no other income. In November 1987 information was received by the Department from [a District Council] .. that [the claimant] was the owner of a property at 174 P Avenue .. the Council also confirmed that they were awarding Housing Benefit to 2 tenants at the property a Mr. A. J., who is the father of the appellant and to a Mr. A. J., who is the brother of the appellant. It was also stated that due to rates arrears on the property the Housing Benefit payable to the appellant's father and brother was being paid into the rates account of [the claimant] the owner and landlord of 174 P Avenue. The amount of Housing Benefit awarded by the [District Council] was £41 weekly. The actual rent charged by [the claimant] was £35 for his father and £14 weekly for his brother, £49 weekly in total. On 25.5.88 and 1.6.88 [the claimant] was interviewed by an officer of the Department. [The claimant] stated that he was the owner of 174 P Avenue. He purchased the house from his brother in 1974 and lived himself at this address until 1981. [The claimant] agreed that he was legally the owner of the house and that he was aware of the fact that his father and brother had both claimed Housing Benefit on the strength that [the claimant] was the landlord charging them rent."

5. The following additional facts were also before the tribunal or emerged at the hearing before me. Over the period from 7 September 1983 to 16 November 1987 the District Council had overall paid housing benefit payments of £9,285 based on information given to the District Council by the claimant and by his father and brother that rent was being charged to the father and brother by the claimant. The claimant however reiterated what he had told the social security appeal tribunal namely that in fact there was no cash payment by the father and brother to himself in respect of the so-called rent and that the father used all of the money for defraying payments on a mortgage, which the claimant as mortgagor had entered into in 1983 as well as defraying the costs of repairs maintenance etc. I have set the tribunal's decision aside for error of law because I accept the concurring submissions of Mr Jobbins and the claimant that the social security appeal tribunal did not in their decision advert to this particular contention, which was central to the claimant's appeal.

6. At the hearing before me Mr Jobbins submitted for my consideration that it could be that in the circumstances the claimant was not receiving "rent" at all or was not entitled to it. The claimant told me in detail of the reasons why the house had remained in his name and the mortgage had been taken out by him, namely that he could get a mortgage on more advantageous terms and for a longer period than his father. Mr Jobbins asked me to consider whether or not the claimant was truly the beneficial owner as well as owning the legal title to the house. Both Mr Jobbins and the claimant asked me to decide the case myself and not to remit it to a differently constituted social security appeal tribunal. I indicated at the hearing that I would do so and that I would exercise my power to make the appropriate findings of fact.

7. In exercise of that power, I find as fact that a bona fide tenancy was entered into between the claimant as landlord and his father and brother as joint tenants of the house. A rent book was prepared to record the tenancy and representations were made to the District Council that the rent was due, so that housing benefit could be obtained by the father and brother. I am aware that the legal nature of a transaction is not governed solely by the label that the parties attach to it. However, in my view the substance of the matter here was undoubtedly that there was intended to be set up a tenancy and the claimant was entitled to the rent of £49 per week.

8. That means that, in my view, the rent must be taken into account as income of the claimant for supplementary benefit purposes. In my judgment it comes within regulation 11(2)(n) of the Supplementary Benefit (Resources) Regulations 1981, which provides, so far as is relevant, as follows,

" 11. (2) There shall be treated as income and taken into account in full -

(a)-(m)

- (n) any income from capital which falls to be disregarded by virtue of regulation 6(1)(a) .. (iv) .., except that where such capital, if it were not so disregarded, would fall to be disregarded under regulation 6(2), ..."

9. Regulation 6(1)(a)(iv) of the Resources Regulations provided as follows,

" 6. (1) In calculating a claimant's capital resources the following shall be disregarded:-

(a) the value of -

(i)-(iii)

(iv) any premises of which the whole or part is occupied by an aged or incapacitated relative of any member of the assessment unit .."

10. There is no doubt that 174 P Avenue came within regulation 6(1)(a)(iv), in that the premises were occupied by the claimant's aged father and incapacitated brother (who was suffering from mental illness). In my view on the facts of this case, whether or not the claimant could be described as beneficial owner of the home, the payments to which he was entitled under the tenancy agreement with his father and brother came within regulations 6(1)(a)(iv) and 11(2)(n). They were treated for housing benefit purposes as income. The claimant intended them to be so treated and the relevant arrangements had been made including the preparation of a rent book.

11. I therefore reject the submission by Mr Jobbins that possibly these payments ought not to have been regarded as income at all in that they did not truly represent "rent" and in any event the claimant did not actually receive any money from them. The position is that the claimant was legally entitled to payment of the rent and, if he authorised the tenants to use the funds to which he was entitled to defray some debts of his eg. his debts due as mortgagor or any of his landlord's responsibilities for repair of the premises, that did not alter the fact that the payments are to be taken into account as income of the claimant. I have so declared in paragraph (1)(a) of my decision.

12. It therefore follows that there must be some recoverable overpayment due to the Secretary of State, since it is quite clear that the claimant failed to disclose the material facts that he was the owner of 174 P Avenue and that he was entitled to rent income from it. I do not understand the claimant to dispute that and in any event the evidence shows it to be so. The question is, however, as to the amount of the recoverable

overpayment.

13. As I understand it, the overpayment was calculated on the basis that the full £49 weekly rent was to be taken into account as an income resource of the claimant. I do not regard that as necessarily being the correct position. Regulation 9(1) of the Resources Regulations provides as follows,

"Calculation of Income Resources

9. (1) Except in so far as regulations 10, 11 and 12 provide that certain payments shall be deducted and that certain payments shall be disregarded, the amount of a claimant's income resources to be taken into account shall be -
- (a) [relates to earnings - not relevant in this case]
 - (b) the whole of any other income of the assessment unit calculated in accordance with regulations 4, 11, 12 and 13." (My underlining.)

14. Regulation 10 relates to earnings. Regulation 11 is headed "Calculation of other income". It provides for (i) categories of income which are to be taken into account in full; (ii) categories that are to be disregarded and (iii) income to be taken into account subject to a £4 a week disregard. I have already demonstrated above that I consider that the rental income in this case has to be taken into account in full since it is so provided by regulation 11(2)(n). However it is not indicated with precision in the Regulations what is meant by the word "income". It is only "income" that is to be taken into account in full. If under normal accounting etc procedures deductions may legitimately be made, eg. for income tax purposes, from gross receipts to ascertain "income" then they can equally be made for supplementary benefit purposes. I do not consider that reported Decision R(SB) 7/83 cited to me by Mr Jobbins is to the contrary effect.

15. In that case the Commissioner was concerned with an assertion that mortgage interest could be deducted from rent to ascertain the amount of the rental income. That particular contention was rejected by the Commissioner. At paragraph 7 of that decision the Commissioner stated "... that regulations 9, and 11 contemplate that there should be no deductions from income except payments actually made out of and attributable to that income and specifically referred to in regulation 11." However, in paragraph 8 of that decision the Commissioner said "I would however be prepared to agree that the use of the word 'income' might involve the deduction from 'gross' income of reasonable expenses incurred in its collection."

16. That decision in R(SB) 7/83 was given before the Court of Appeal gave its decision in Chief Adjudication Officer v. Hogg

(reported as an Appendix to Commissioner's Decision R(FIS) 4/85 and also reported at [1985] 2 All E.R. 897). There the Court of Appeal held that, even though the relevant family income supplement legislation referred to "gross income", deductions could be made from actual receipts for eg. tax allowable deductions in order to arrive at the figure for a "gross income". In my view that principle applies equally to ascertaining the amount of income from rent. There could be deducted from the rent of £49 per week here any sums which were directly due from the claimant by virtue of his obligations as a landlord eg. any obligation to effect landlords' repairs or to pay rates if that was the obligation of the landlord as distinct from that of the occupier (which is possibly unlikely). Only expenses attributable to the claimant's legal obligations, express or implied, as a landlord could however be deducted from the gross rent to arrive at the figure for "income". In particular repayments of mortgage capital or interest would not come under this category as they are obligations of the landlord in his position as mortgagor not as landlord. However, in working out this part of my decision, the local adjudication officer may wish also to look into the question whether or not the claimant is entitled to some 'reimbursement' of the mortgage interest for the appropriate period under regulation 15 of the Supplementary Benefit (Requirements) Regulations 1983, because the fact that those payments were in fact made by the father out of rental income does not alter the fact that they were payments made on behalf of the claimant and part of his legal responsibility.

17. The local adjudication officer will therefore need to recalculate the amount of the overpayment in the light of what I have said above. He will no doubt wish to take into account any representations made to him by the claimant on the question of permissible deductions from the gross rental income of £49 per week, in accordance with the guidance on the law as I have given it above. If any difficulty or problem arises in relation to this calculation the parties are at liberty to refer the matter to me for Supplemental Decision.

(Signed) M.J. Goodman
Commissioner

(Date) 21 January 1992