DGR/SH/8

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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. My decision is that the decision of the social security appeal tribunal given on 14 February 1989 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 14 February 1989. The claimant asked for an oral hearing, a request which was acceded to. At that hearing the claimant was represented by Mr G Harbottle of Counsel, from the Free Representation Unit, whilst the adjudication officer appeared by Mr M Jobbins of the Chief Adjudication Officer's Office.

3. On 19 March 1985 the adjudication officer decided that the claimant was not entitled to supplementary benefit from 4 March 1985, as his resources were sufficient to meet his requirements. The adjudication officer reached this conclusion on the basis that the claimant's wife had, from working in their daughter's shop, a notional income, after making all relevant deductions, of £80.78 per week. Although, in calculating any possible entitlement to benefit, £4 of this had to be disregarded pursuant to regulation 10(5)(a) of the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No.1527], nevertheless there had to be included in the calculation child benefit at the rate of £6.85 per week. The effect of this was that the claimant's total weekly resources amounted to £83.63, and as this

exceeded his requirements, the adjudication officer decided that there was no entitlement to supplementary benefit. In due course, the claimant appealed to the tribunal.

4. The tribunal allowed the appeal in part. They decided that the claimant was not caught by regulation 4(3) of the Resources Regulations. Although the claimant's wife received for her services in the shop "a payment less than that paid for comparable employment", the means of the daughter, who owned the shop, were such that she could not afford to pay her mother more than £15 per week, which was the amount the latter actually received. If this sum was used in the calculation, then, in the judgment of the tribunal, the claimant's resources did fall short of his requirements, and in consequence as from 4 March 1985 he was, subject to the capital limit, entitled to supplementary benefit. The tribunal also found that as from 15 February 1988 the claimant was entitled to a special diet addition and a heating addition. However, as from 14 March 1985 the tribunal decided that the claimant ceased to be entitled to benefit. They based this conclusion on a point not hitherto taken, namely that, as from that date, the claimant had capital resources in excess of the statutory maximum of £3,000. He would not become entitled to benefit until such time as, in accordance with the diminishing capital rule, his capital resources were reduced below the statutory maximum.

5. The circumstances in which the claimant came to have capital resources in excess of £3,000 arose by reason of the fact that on 13 March 1985 he paid into his current account at Lloyd's Bank the sum of £3,847.30, being the net proceeds of a maturing policy of insurance. His total capital resources as at 14 March 1985 came to £4,444.54, reducing to £4,252.24 on 19 March 1985. (Moreover, except for interest of £23.71, accruing on the claimant's Halifax Building Society paid-up Share Account on 31 July 1985, the assessment unit received no further capital addition.) However, on 19 March 1985 the claimant withdrew from his account at Lloyd's Bank the sum of £3,700 in cash, and gave £3,655 of it to his daughters, £1,900 to Sandhya and £1,755 to Sumi. The tribunal decided that the claimant was caught by regulation 4(1) of the Resources Regulations, which provided as follows:-

> " 4. - (1) Any resource of which a member of the assessment unit has deprived himself for the purpose of securing supplementary benefit, or increasing the amount of any such benefit, may be treated as if it were still possessed by him."

The tribunal were of the view that the claimant had deprived himself of the £3,655, and that he had done this for the purposes of securing supplementary benefit. Accordingly, he should be treated as possessed of this sum, and as a result disentitled to benefit until such time as, pursuant to the diminishing capital rule, his capital resources fell below the statutory limit.

6. The crucial question for the tribunal - for it was not in dispute that the claimant had deprived himself of the relevant sum - was whether the purpose behind such deprivation was to secure supplementary benefit. In his appeal to the Commissioner, the claimant made no complaint about any feature of the tribunal's decision other than their determination that he was caught by regulation 4(1).

7. The basis on which the tribunal reached the conclusion that the claimant deprived himself of resources "for the purpose of securing supplementary benefit" is set out in the reasons for their decision:-

> "Following the Commissioner's decision R(SB) 40/85, if the obtaining of benefit was a foreseeable consequence of the transaction then it could be concluded that this was the person's purpose unless there is a satisfactory reason put forward. As already stated the Tribunal considered that [the contention that] the repayment of a loan to the two daughters [was] a deep moral obligation was not a satisfactory reason. The claimant must have been aware that as he was claiming Supplementary Benefit he was under an obligation to disclose any resources which came into his possession to take him over the limit of £3,000. He had been in receipt of Supplementary Benefit for several years previously. He had seen an officer from the Department at his interview of 6 March 1985 which was only a short time before. The payment of such a large sum to his two daughters was in the opinion of the Tribunal foolhardy and indeed reckless. He should have sought advice before taking such a step."

8. Further, in the course of their findings, the tribunal spoke of the claimant's purpose under regulation 4(1) in the following terms:-

> "The tribunal does not consider that a deep moral obligation to make payment is a sufficiently strong predominant purpose to overcome the deprivation of this resource at that particular time. [The claimant] was aware that his claim for Supplementary Benefit was under review as he had been interviewed by an official from the DHSS on 6 March 1985. His business accounts were investigated on 19 March 1985. Therefore the obtaining of Supplementary Benefit was a foreseeable consequence of him paying this large sum to his daughters and it can be concluded this was his purpose."

9. Mr Harbottle contended that the reasons given by the tribunal, in support of their conclusion that the claimant gave away the money for the purpose of obtaining supplementary benefit, were wholly inadequate. There was no evidence bearing on what was discussed at the local office of the Department on 6 March 1985, or for that matter, on any other occasion. And if the claimant was to be caught by regulation 4(1), he had at least to know that there was a capital limit, and, in Mr Harbottle's submission, there was no evidence that he had such knowledge.

The fact that he had been in receipt of supplementary benefit for several years previously did not necessarily establish the requisite knowledge. But, irrespective of this, Mr Harbottle contended that the issue was put beyond doubt by the observation of the tribunal that:-

> "The payment of such a large sum to his two daughters was in the opinion of the tribunal foolhardy and indeed reckless. He should have sought advice before taking such a step."

If the claimant needed to take advice, and without such advice his action was foolhardy and reckless, then clearly the claimant did not know of the capital limit. That was the effective finding of the tribunal. I see the force of that contention, and accept in accordance with my starred decision CIS/124/1990 that, without knowledge of the capital limit, a claimant cannot be caught by regulation 4(1). Moreover, in his submissions Mr Jobbins acknowledged that the weak point in his argument, in support of the contention that the tribunal did not err in point of law, was his inability to establish that the claimant was aware of the capital limit. I accept Mr Harbottle's submission, and am satisfied that the tribunal gave insufficient reasons for their conclusion that the claimant had deprived himself of the proceeds of the insurance policy for the purpose of securing supplementary benefit.

10. It follows from what has been said above that I must set aside the tribunal's decision, and direct that the appeal be reheard by a differently constituted tribunal. In setting aside the decision, it must be realised that the <u>whole</u> decision is set aside, and it will be necessary for the new tribunal to consider all the aspects of the case on which the tribunal have made their determination. I appreciate that it will be necessary for the new tribunal to go into matters which have not been the subject of submissions to me. As I have in any event to set aside the tribunal's decision, it has been unnecessary for me to consider whether the tribunal were right to conclude that the earnings of the claimant's wife, for the purpose of calculating possible entitlement to benefit, should be limited to £15 per week, and likewise it has been unnecessary for me to consider whether the claimant was entitled to a special diet addition and a heating addition. Mr Harbottle suggested that the parties might be able to come to some agreement on these issues, and avoid their having to be ventilated again, leaving the new tribunal merely to consider the question of the applicability of regulation 4(1). However, it must be remembered that this is an inquisitorial, not an adversarial jurisdiction, and it is not open to the parties to settle matters between themselves. Once a decision has been given by an adjudication officer, that stands unless and until overturned by a tribunal, and such tribunal must be satisfied that the decision of the adjudication officer requires to be overturned or varied before they consent to that course. Accordingly, in the present case the new tribunal must consider the entire decision, and before they reach their determination they must receive evidence on which to base it, and they must

give reasons for their determination. There can be no deals between the parties.

11. However, as regards the matter which has been ventilated before me, I consider that I should give some directions by way of guidance to the new tribunal. The first question is whether or not the divesting by the claimant of the sum of £3,655 in favour of his two daughters was in reduction or discharge of debts owed to them or whether in the alternative it was by way of gift. Although the tribunal did not make the position perfectly clear, it would seem that they regarded this divesting as being in reduction or discharge of indebtedness. If this was their view, it is difficult to see why they reached that conclusion. Originally, the business carried on on the ground floor of the premises, where the claimant lived, belonged to the claimant. A balance sheet for 31 December 1981 was produced to the tribunal, and this showed, amongst other things, that Sandhya had lent the business £6,545 and Sumi £7,153. Apparently, it was agreed that from 1 January 1982 Sumi would take the business over and run the shop. A opening account has been produced, which shows that, in consideration of the transfer of the assets of the business to Sumi, she assumed all its liabilities. Naturally enough, Sumi ceases to appear in the capital account as a creditor, whilst Sandhya is now the creditor of her sister for the £6,545. The important point, for the present appeal, is that there is no evidence in this account, or, for that matter in any other of the accounts relating to the business produced from time to time, suggesting that in any way either of the two sisters were creditors <u>of the claimant</u>. In short, the only evidence that I can see for the contention that the claimant owed his two daughters money is the bare assertion to that effect by the claimant, possibly backed up by similar oral evidence on the part of Sumi. But, no explanation appears to have been given as to the amount of the two debts alleged to be owed by the claimant to his two daughters, still less how they were created, and when. It cannot be over-emphasised that bland allegations of this nature, unsupported by any documentation or any particularity, should be approached with grave suspicion.

12. I wondered whether I should consider setting aside the tribunal's decision on the basis that their acceptance of Sandhya's and Sumi's alleged loans to their father was not sustainable, but on balance I thought it was safer, as I have not seen or heard the claimant or his daughters, and as I have in any event to set aside the tribunal's decision on other grounds, to make no firm determination on this issue. However, the new tribunal must go into this matter thoroughly. Of course, it is enough, if they are sufficiently persuaded, to accept merely the word of the claimant, with or without the oral evidence of his two daughters. But they should be slow so to do, unless the alleged loans are backed up by written evidence, or are at least particularised and, on the face of it, at least appear feasible.

13. The importance of the point is that, if the tribunal are satisfied that the payment of £3,655 was properly made in

reduction or discharge of debts owed by the claimant to his daughters, then, in my judgment, regulation 4(1) cannot apply on any footing. A person has to pay his debts. He has no choice in the matter, and if he has no choice, then any divesting of capital resources in pursuance of the reduction or discharge of his indebtedness cannot be for the purpose of securing supplementary benefit or any increase thereof. Such a motive cannot direct or influence his course of action. There can only be one purpose governing his conduct, namely the need to meet his indebtedness.

14. Of course, the above principle only applies where the relevant debt is immediately payable. If the obligation to repay does not mature for several years, or, as in the case of the usual mortgage of house property, there is no need to repay the sum borrowed, provided the agreed interest and capital repayments are kept up, then any premature repayment of indebtedness will be a voluntary act constituting a deliberate choice. And if there is a choice, then the question will arise as to whether a significant operative purpose, albeit not necessarily the predominant purpose, was to secure supplementary benefit or any increase thereof (R(SB)38/85; R(SB)40/85).

15. In the present case, if the tribunal find as a fact that the claimant was genuinely indebted to his daughters - and they must be satisfied that there was a legal debt capable of enforcement in the courts - and if they are satisfied that such debt was immediately repayable, then as regards any sum employed in reduction or discharged of that indebtedness, regulation 4(1) will have no application. But if the new tribunal are not so satisfied, and consider that there was no such indebtedness enforceable at law, or, if there was, that it was not immediately repayable, they must then go on to consider whether a substantive reason for the payment to the daughters was to secure supplementary benefit. Of course, normally in any given case there is no direct evidence on this particular point, and accordingly the tribunal are required to consider all the circumstantial evidence, including the claimant's familiarity with the supplementary benefit system. In particular, they must be satisfied, if regulation 4(1) is to apply, that the claimant realised that there was capital limit, which his capital resources could not exceed without depriving him of entitlement to benefit. In deciding whether the claimant knew of the limit, the fact that, as in the present case he was in receipt of form B3, which in turn refers to form UBL18 and SB9, will be a material consideration. A further factor to be taken into account in the present instance will be that the claimant is an accountant, with a corresponding educational standing. If at the end of the day the new tribunal are satisfied that the claimant did know of the capital limit, then they must determine, making appropriate findings of fact and giving adequate reasons, whether a significant operative purpose for his action, over and above the advancement of his daughters, was the securing of supplementary benefit. They will have to look at all the surrounding circumstances, and make appropriate inferences.

16. Finally, although the matter was not argued before me, it would seem that, as regards the period from 4 March 1985 to 13 March 1985, the claimant was, in addition to possessing any other capital, possessed of the market value of his policy. To a purchaser it must have been worth something significantly approaching its maturity value a week or so later. Of course, no one would purchase the policy without a discount to compensate him for his trouble. But it would seem to me highly likely that the value of the policy, in the hands of such a purchaser, would be worth something in excess of £3,000. Moreover, in so far as it fell short of that figure, if the claimant's other resources were added to it, they might well in total exceed £3,000. This is something which the new tribunal will have to go into. If they are satisfied that the claimant had resources in excess of £3,000 during the period from 4 March 1985 to 13 March 1985, the claimant will be disentitled to benefit.

17. I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) **14 March 1991**