Child does not have to stay overnight to be member of household.

RAS/5/LS

Commissioner's File: CSB/1377/1986

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Region: London North

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 dated 26 June 1986 is erroneous in law and I set it aside. I direct that the case be reheard by a differently constituted tribunal.

2. The claimant and her husband from whom she has for sometime been separated are the parents of three children, Darren, Lee and Claire. They all live with their father. The mother has access to them pursuant to a court order made on 4 September 1985 as follows -

> "Darren; "between the hours of 9.00 am and 5.00 pm on Saturdays subject to the child playing football and subject to [the father's] visits to his parents on 7 days notice to [the claimant's] solicitors and staying access every fourth weekend between 9.00 am on Saturdays and 7.00 pm on Sunday"
>
> Lee and Claire; "between the hours of 9.00 am and 5.00 pm on every alternate Saturday."

By a decision issued on 1 November 1985 an adjudication officer decided that the claimant who had been in receipt of supplementary benefit for a number of years was entitled in effect to an increase of her benefit for the overnight stays made by Darren calculated on the basis of the then weekly scale rate of £10.10 divided by 7 and then divided by 4. But nothing was payable in respect of the other periods Darren and Lee and Claire spent with their mother. The reason for the decision was that on the occasions of the overnight stay Darren was, in the adjudication officer's view, a member of his mother's household and therefore regulation 3 of the Supplementary Benefit (Aggregation) Regulations 1981 applied. But on the occasions of the 9 to 5 stays that was not the case. The claimant appealed. The tribunal after adjusting the figures in respect of Darren appear to have upheld the adjudication officer's decision. This present appeal is with my leave. The claimant attended the oral hearing which she had requested and was represented by Mrs M. MBatha of Counsel instructed by the Ealing Community Law Centre. The adjudication officer was represented by Mr J. Coggins of Counsel instructed by the Solicitor, Department of Health and Social Security.

3. It is not clear from the findings of fact made by the tribunal, the reasons for their decision or from the decision itself that the tribunal considered whether during the period of

the 9 to 5 stays the children could be members of their mother's household so as to satisfy the relevant provisions of the Aggregation Regulations. They referred to the access arrangements and the hardship arising from the fact that the claimant received nothing in respect of the cost of providing for the children during the access periods. But the only matter they seem to have dealt with was the calculation of the amount allowed for Darren for his overnight stays. They seem to have accepted the adjudication officer's proposition that while, during the period of an access visit involving an overnight stay, a child could be (and was in this case) a member of the access parent's household, if there were no overnight stay he could not be. That is the matter in issue in this appeal.

4. The starting point is paragraph 3(2) of Schedule 1 to the Supplementary Benefits Act 1976 which provides, so far as relevant to this case, for the aggregation of a child's resources and requirements with those of the claimant where the claimant is responsible for the child and they are both members of the same household. Then regulation 3(2) of the Aggregation Regulations prescribes the circumstances in which a claimant is to be treated as responsible for a child. But it does not advance the matter greatly because the two conditions for aggregation which are imposed where the other person is a child viz that the claimant and the child should not be a married or unmarried couple and that they should be members of the same household are already imposed as conditions of aggregation by paragraph 3(2) of Schedule 1 to the Act. So, what it all comes to in a case such as the present, is that the circuit of the Schedule and the Regulations leads to the one point that for aggregation purposes the parent and the child should be members of the same household.

5. Following on from what, in a different context, Woolf J. (as he then was) said in England v Secretary of State for Social Services (1981) FLR 222 viz that by using the word "household" instead of providing a requirement of "living with" Parliament intended that in appropriate cases, if a sufficient tie remained, children should still qualify if away from home as long as the separation was temporary, the Commissioners in some recent decisions have held that where a child moves between its separated or divorced parents' homes on a regular basis the child can be regarded as a member of the household in which he or she is for the time being: CSB/943/84, CSB/1246/85, CSB/138/86 and CSB/196/86. In all these cases it was accepted that a child could be a member of a parent's household for part of a week and that for that part the parent should in effect be credited with a rateable proportion of the child's normal requirements. That is the principle which the adjudication officer accepted in this case in relation to the one visit a month by Darren which involved an overnight stay.

6. There is no definition in the legislation of "household" or "member of the same household"; those terms do not have a technical meaning; they are not terms of art; they are to be given their normal everyday meaning; and the question whether a person is a member of another's household is a question of fact for the tribunal: R(SB) 4/83. Now it was open to the tribunal in this case to decide on the facts in relation to the periods when the children were with their mother that they were not members of the mother's household. I do not express any view as to what the decision should have been. I do not have the facts which would enable me to do so. It was however in my view not open to the tribunal to decide, as they appear to have done, that a child could never be a member of his parent's household for any period he was with that parent that did not involve an overnight stay. That in my view was an error of law. It seems to me that once it is accepted that a child who goes between parents can in effect have the benefit week apportioned between them as he moves between their two households it is always for consideration whether, during the periods the child is away from the parent with whom he is for most of the week, he becomes a member of the other parent's household for the period he is with that parent. The adjudication officer now concerned with the case contends that an overnight stay is a necessary ingredient. He submits that if that were not so "the child would have his own 'separate home', as described in R(SB) 4/83 and would not be a member of the household he is visiting". Now it is correct that in R(SB) 4/83 the Commissioner said that a person who has, and lives, in his own separate home cannot reasonably be regarded as a member of someone else's household. But

that case concerned an adult claimant living in a rented house and another adult who came to live in that house. The question was whether that other adult was a member of the claimant's household. It was decided that as she had established her own home within the house she was not a member of the claimant's household. Those facts and the context in which the Commissioner made the remarks referred to by the adjudication officer are very different from those with which I am concerned. Furthermore the decision came before the principle of moving between households had been established in relation to parents and their children. And, in any event, the test is not whether someone has a "home" but whether, at the time in question, he is a member of a particular household. I do not doubt that in the moving between household cases if the child were asked where his home was he would give the address where he lived most of the time. But as I say that is not the test. So I do not think that the adjudication officer has really given any satisfactory reason for saying that there must be an overnight stay.

7. Mrs MBhata pointed out that in general it is during the day that a child costs most and needs most care and attention. Reference was also made at the hearing to the principle that the welfare of the child comes first and that, where as in this case, there is a court order for access it is right to do what assists to give effect to that order and not to hinder it. While all that may very well be true I do not find that it helps to determine whether a child has become a member of his mother's household when he is there between 9.00 am and 5.00 pm. I would approach the problem in this way. There are a number of matters which are relevant. Firstly there is the relationship of parent and child. I take the view that when a child stays for a period with a parent it is much easier to say that for that period the child is a member of the parent's household than it would be in the case of say an adult parent and adult 'child' or of unrelated adults. The parent and child relationship is a special ingredient in this context. It is relevant to consider the age of the child. That may have a bearing on whether he has passed into the parent's household at any given time. Next there is the regularity of the stays including whether as in this case there is a system. Here the system is defined by a court order. Then there is the length of the stays including of course whether the child stays overnight which will no doubt be of considerable importance and in some cases crucial. The provision made for the child is also a factor. What meals are provided? What toys, games, personal possessions are kept or made available? What actually happens on each stay? It seems to me that when consideration is given to these various matters it could be that a child can just as much be a member of a parent's household during a stay which does not include overnight. It is a question of fact in each case. It follows therefore that in my view the tribunal was wrong in law to assume that the absence of an overnight stay was fatal. There may not be a crucial difference between say a stay between 6.00 pm in the evening and 10.00 the next morning on the one hand and 9.00 to 5.00 during the day on the other. It is a question of degree, taking account of matters such as those I have mentioned.

8. It was said at the hearing that it would be difficult if not impossible to make the necessary calculation of the appropriate proportion of the child's normal requirements if one did not deal in sevenths of a week as the cases have so far done. I would agree that this is a problem. The two households may both be on supplementary benefit. Or, as I understand the position in this case, the parent with whom the children stay from time to time is on supplementary benefit but the other is not. The calculation could not it seems to me be different in the two cases. In both cases the appropriate proportion of the requirements (and resources) of the child would have to be determined. Now almost certainly the supplementary benefit scheme was not really designed for such calculations. Nevertheless they have been made on the one seventh for each overnight stay basis. That of course must be a very rough calculation because the fact that a child stays with one parent one day (including overnight) out of seven does not mean that expenditure on that child's normal requirements follows that pattern. But the one seventh basis has been accepted; maybe that was the best that could be done in the case of an overnight child. One cannot get total precision. However if one seventh is appropriate for each overnight stay it would not seem to me to be too difficult to say that if a child were a member of a parent's household for a

day of each week that would be something in the region of one fourteenth of the weekly normal requirements, perhaps adjusted up or down to take account of what is actually provided in respect of normal requirements. I should say in connection with the calculation that I accept the point made in paragraph 12 of the submissions of the adjudication officer that in the case of one overnight stay per month the aggregation of the requirements and resources of the child arises in the week that he stays and not every week. There is however the further point in the case of Darren's overnight stays which are between 9.00 am on Saturdays and 7.00 pm on Sundays. If I am right in my approach to this problem as set out above there can be no reason in principle why a further proportion should not be allowed to the claimant in respect of Darren for the Sunday of each overnight stay. The tribunal were therefore also wrong in law on this aspect in that they seem to have taken the one seventh over the 4 weeks and they did not consider the position on the Sundays that Darren stayed with his mother.

9. For the reasons I have mentioned the tribunal's decision was wrong in law and is set aside. The new tribunal must give their decision on the basis of findings of fact and reasons which take account of the matters to which I have referred and of course any other matters that are put before them. It is perhaps fair to the tribunal for me to say that they recognised the difficulties and in the reasons for their decision mentioned that there was no authority on the point and suggested that the case was suitable for appeal to the Commissioner.

(Signed) R A Sanders
Commissioner

Date: 24 June 1987