JNBP/SB

Commissioner's File: CSB/150/1985

C A O File: AO 2329/85

Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Nora Patricia Lush (formerly Byrne)

Social Security Appeal Tribunal: Portsmouth

Case No: 15/06/08

1. My decision is that the decision of the supplementary benefit appeal tribunal ("the tribunal") dated 31 August 1984 is erroneous in law and is set aside. In place of the said decision I give the decision that the tribunal should have given, namely, that supplementary benefit did not cease to be payable to the claimant on the ground that the claimant and Mr L were living together as husband and wife.

2. This is an appeal brought by the claimant with my leave against the above-mentioned decision of the tribunal which confirmed the decision of the adjudication officer issued on 11 June 1984 that supplementary benefit was no longer payable to the claimant because the adjudication officer considered that Mr L and the claimant were living together as husband and wife. It followed from that decision that for the purposes of supplementary benefit the requirements and resources of Mr L and the claimant would have had to be aggregated.

3. In his submission to the tribunal the adjudication officer said that in reaching his conclusion he had had regard to Commissioner's decision R(SB) 17/81 where, in paragraph 7, the Commissioner cited the criteria to be applied in deciding whether two persons are living together as husband and wife. Those criteria are given in the decision under the following heads:-

> "(a) Members of the same household
>
> (b) Stability
>
> (c) Financial Support
>
> (d) Sexual Relationship
>
> (e) Children
>
> (f) Public Acknowledgement
>
> [I have not included the comments which were given under each criteria]

The adjudication officer, having considered the facts before him in relation to the relevant provisions of the Supplementary Benefits Act 1971 and the above criteria, decided, on the balance of probabilities, that the claimant and Mr L

were living together as husband and wife with the consequence mentioned at the end of paragraph 2 above. He said that he considered that although the claimant did not agree she was living together with Mr L and that this would be forbidden in the eyes of the Church, there was quite definitely a pooling of resources and sharing of household duties and they were living together in every respect except sleeping together.

4. The tribunal recorded their findings of fact as follows:-

> "[The claimant] is a single woman aged 29. She lives in privately rented accomodation which she shares with [Mr L] and 2 other girls. On 4 June 1984 [the claimant] was visited at her home to establish the nature of her relationship between herself and [Mr L] in so far as it affected her Supplementary Benefit entitlement. [The claimant] and [Mr L] are engaged to be married. [Mr L] moved into a house which [the claimant] shared with 2 other girls in January 1984 when one of the 4 bedrooms was vacated. The house has a communal lounge, kitchen/diner and toilet. Each bedroom has its own fuel meters. [The claimant] and [Mr L] paid separate rent. They pooled money together for food which they ate together. They each did separate laundry. They had a joint bank account at that time in which they saved money towards their marriage. They are both Mormons and are forbidden by their religion to have a sexual relationship before marriage. [The claimant] was visited on 4 June 1984 after which her benefit was stopped. [Mr L] subsequently left the household and now lives in bed & breakfast accomodation"

After giving their decision confirming the decision of the adjudication officer the tribunal stated their reasons for decision as follows:-

> "After careful consideration of the evidence presented the Tribunal decided that for the purposes of the Supplementary Benefit Act the couple were, during the period in question, effectively living together as husband and wife by virtue of the facts that:-
>
> 1) they pooled money together for food
>
> 2) cooked and ate meals together
>
> 3) had a joint bank account in which they pooled their savings
>
> 4) neither party had any other 'home' than the household in which they lived together and shared communal facilities
>
> 5) had a stable relationship acknowledged by outside parties
>
> 6) spent leisure time together and would spend holidays together if the opportunity arose.
>
> (They were however satisfied that a sexual relationship did not exist in this case)
>
> The couples resources were therefore correctly aggregated."

5. The tribunal obviously gave very careful consideration to the case. However, it appears that their attention was not drawn to a passage in the judgment

of Woolf J in the cases of Crake and Butterworth v SBC 1980 (reported as SB/38 page 309 - to which I shall refer below as "the Crake case".) The Crake case was considered in decision R(SB) 17/81, to which the adjudication officer did refer the tribunal, but it was there considered only in relation to what Woolf J said about the criteria mentioned above and not in relation to the following passage:-

> "...it is not sufficient in order to establish that a man and a woman are living together as husband and wife to show that they are living in the same household. If there is the fact that they are living in the same household, that may raise the question whether they are living together as man and wife. Indeed, in many circumstances it may be strong evidence to show that they are living together as man and wife. But in each case it is necessary to go on and ascertain in so far as this is possible why they are living together and in the same household. If there is an explanation which indicated that they are not there because they are living together as man and wife, then the position would be that they would not fall within paragraph 3(1); they are not two persons living together as husband and wife.
>
> It is impossible to categorise all the explanations which would be sufficient to mean that paragraph 3(1) is inapplicable. But it seems to me that if the reason that someone goes to live in the same household as another person is to look after that person because they are ill or incapable for some other reason of managing their affairs, that, in ordinary parlance is not what you would describe as going to live together as husband and wife as required by the paragraph."

In the above passage the reference to paragraph 3(1) was to paragraph 3(1) of Schedule 1 to the Act, which provides for aggregation.

6. In not considering the quoted passage the tribunal in my view erred in law but I hasten to add that that was not through any fault on their part. If they had considered it, they would, I am sure, have appreciated that it was open to them to consider what was the explanation of why the claimant and Mr L were living in the same household and that it was not appropriate to consider the criteria as a kind of score card from which the answer to the problem before them could be read straight off. As it was, I think that they must have felt imprisoned by the criteria which, incidentally, were referred to by Woolf J only as "an admirable signpost to help a Tribunal.....to come to a decision" and were not in fact referred to by him until after he had reached his conclusion on the cases before him, following the approach indicated in the above passage. The view I have expressed above as to the significance of that passage is substantially that adopted in decision R(SB) 35/85, which was published after the tribunal's decision, and which referred to the passage as "affording helpful guidance."

7. Since the tribunal erred in law their decision must be set aside and I have to consider whether it is expedient for me to give myself the decision that the tribunal should have given. In the present case I am satisfied that it is expedient. In a letter dated 14 August 1984, which was before the tribunal the claimant stated how it came about that Mr L went to live in the flat. It is clear that the tribunal accepted the claimant as a truthful witness - otherwise they would not have accepted that she and Mr L did not have a sexual relationship -

and I have no doubt that, if they had considered it necessary to make a finding as to whether they accepted the explanation given in her letter, they would have accepted it. In my view, no reasonable tribunal, who accepted that explanation and also accepted that there was in fact no sexual relationship, could come to any other conclusion than that the explanation indicated that the claimant and Mr L were not in the same household because they were living together as husband and wife.

8. The same conclusion can, I think be reached by a different and simpler route. There are doubtless many different reasons why married couples may refrain from having any sexual relationship either at all or at particular times or in particular circumstances but I have never heard of a married couple refraining altogether on principle and I think it would be an abuse of language to describe two unmarried persons, who refrained on principle, as living together as husband and wife, however similar they might be to a married couple in other respects.

9. For the foregoing reasons the appeal is allowed and my decision is as set forth in paragraph 1 above.

(Signed): J N B Penny
Commissioner

(Date): 1 October 1986