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Commissioner's File: CSB/167/1990

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the two decisions dated 1 March 1990 of the Stanley social security appeal tribunal are erroneous in point of law. Accordingly I set them aside and remit those cases for rehearing by a differently constituted appeal tribunal. Such cases to be heard together.

2. This is an appeal by the claimant to the Commissioner against the above decisions. As the decisions are in respect of an overpayment of supplementary benefit which became in due course an overpayment of income supplement and the law applying to each case is the same as regards method of calculation and recovery I deal with both cases together as if they were one case. This is a course that has conveniently been taken by the adjudication officer in both cases and I think it right to follow that approach although the original adjudication officer and the appeal tribunal treated each payment as a separate case.

3. The facts of the case are dealt with in box 5 of the submission of the adjudication officer originally involved in these appeals. In respect of those matters and of the submission dated 26 July 1990 the claimant has through his representatives had the opportunity to comment and I have their observations dated 23 October 1990 where inter alia the claimant's representative adopts the approach of the adjudication officer in making observations on the appeals as if they were one case. As indicated above that is a course which I follow. The nominated officer on 19 November 1990 made the direction there set out and in response to that direction I have the further submission of the adjudication officer in response to that direction dated 21 December 1990. The claimant's representatives had the opportunity to comment thereon and I have their observations dated 7 February 1991 which are as follows:-

"In the light of the information now produced by the AO the claimant accepts the submission that the AO's decision should be declared invalid by the Commissioner is rebutted.

However the issue raised and the papers now produced should have been before the tribunal."

In respect of all of the above matters as indicated above the claimant's representatives have had the opportunity to comment. No useful purpose would be served by my setting out these matters afresh here. However in the light of the claimant's representatives comments to me dated 7 February 1991 no useful purpose would be served by my pursuing the issues raised by the direction dated 19 November 1990 in response to which the submission of the adjudication officer now concerned in these appeals dated 21 December 1990 was made, further here.

4. The relevant law (both statutory and otherwise) is adequately referred to in the submission of the adjudication officer dated 26 July 1990. Nothing is to be gained by my rehearsing that law here.

5. In my judgment the decisions of the appeal tribunal are erroneous in point of law on the grounds given in paragraphs 5 and 6 of the submission dated 26 July 1990 of the adjudication officer now concerned in these appeals. I have given careful consideration to the grounds of appeal to me and the notice of application for leave to appeal dated 10 April 1990 but for the reasoning set out in paragraph 3 of the submission dated 26 July 1990 of the adjudication officer now involved in these appeals I do not see that such grounds would warrant my setting aside the decision of the appeal tribunals as erroneous in point of law. However the appeal tribunal erred in point of law on the reasoning given in paragraph 4 of the submission dated 26 July 1990 as the calculations of the adjudication officer did not accord with the relevant Regulations that is the Social Security (Payment on Account, Overpayments and Recovery) Regulations accordingly the appeal tribunal erred in law in adopting the adjudication officer's determination as their own.

In regard to the calculation of the actual overpayment itself there is a discrepancy between the facts of the case as found by the appeal tribunal and the reasoning they gave. The claimant stated in evidence that Neil went to his grandmother on a temporary basis on 6 July 1987. It was not clear at the time that the absence would be permanent. It was found as fact that he had left home on a temporary basis, which proved to be permanent. The appeal tribunal reasoned that the claimant should have disclosed the fact of Neil's going to his grandmother even though this may have been for a temporary period. This they described on the face of their record as a "material fact". Accordingly they confirmed the adjudication officer's decision that benefit paid for Neil from 6 July 1987 onwards was overpaid from the outset. This is incorrect. Neil's stay with his grandmother was initially ruled as temporary - and this is common

ground. The decision must as a question of fact have been reached at some stage that Neil would stay with his grandmother permanently or at least that he would not return to his mother. Until the point at which it became clear that Neil would not return to his mother he was de facto temporarily absent from home. The Supplementary Benefit (Aggregation) Regulations 1981 provide by regulation 3(2) that the claimant should be treated as responsible for a dependent if the latter were a member of his household. Exceptions provided in regulation 4 do not apply in the instant case. Being a member of the same household as another person is a looser concept than for example living with them and the term allows for absences for various reasons such as work, education and holidays. I need only in this regard refer to the decision of Woolf J (as he then was) in England v. Secretary of State for Social Services [1981] 3 FLR 222 where he dealt with the claim for family income supplement.

In paragraph 8 of the decision of the Commissioner being Decision R(SB) 14/87 the Commissioner referring to the judgment above referred to, decided that membership of the household in a temporary absence case had to be decided on a common sense, factual basis. The decision of the appeal tribunal as that of the adjudication officer first involved in these appeals appear to have been made in the light of hindsight when it was known that Neil's absence in due course became permanent. Such an approach is in my judgment erroneous in point of law.

6. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. I direct that the new tribunal to whom I remit this case in rehearing the case shall pay particular attention to all the aspects to which I have referred in paragraph 5 above of this decision. They shall further consider carefully the exact wording of the relevant statutory provisions and make and record their findings on all the material facts and give reasons for their decision. As indicated in paragraph 1 above the two decisions of the appeal tribunal on whom these appeals emanate to me dealing respectively with supplementary benefit and income support have conveniently been dealt with by the adjudication officer in the submissions in both cases dated 26 July 1990 together - a course I have followed in my decisions in the two cases - and in my view both cases can conveniently be reheard by the same tribunal to bring finality to the issues involved.

7. Accordingly the claimant's appeal is allowed.

(Signed) J.B. Morcom
Commissioner

(Date) 3 February 1992