

DGR/OG

SUPPLEMENTARY BENEFITS ACT 1976

APPLICATION FOR LEAVE TO APPEAL AND APPEAL FROM DECISION OF SUPPLEMENTARY
BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

*Whether borrowing mats
allowed is a question of
fact not law*

CSB 236/1981

R(S-B) 24/83

ORAL HEARING

1. For the reasons set out below I grant the claimant's application for leave to appeal against the decision of the supplementary benefit appeal tribunal of 27 March 1981, and as both the claimant and the benefit officer have consented to my treating the application as the appeal itself, I go on to set aside the tribunal's decision on the ground that it is erroneous in point of law. I direct that the matter be re-heard by a differently constituted tribunal.
2. On 5 December 1980 the claimant, then aged 26 and living alone with her one year old son, made an oral claim for a single payment to cover a single bed for her son, carpets, a wardrobe, two electric fires and the cost of a three-piece suite sold to her by a certain Mrs Ashford. The oral claim was accepted by the Secretary of State as a proper claim, and the claimant was visited on 6 February 1981. On 19 February 1981 the benefit officer decided that the claimant was not entitled to a single payment, because she did not satisfy the conditions for an award. On 2 March 1981 the claimant lodged an appeal to the tribunal and in his written submissions the benefit officer contended that a single payment could not properly be made because the conditions of regulations 3 and 6 of the Supplementary Benefit (Single Payments) Regulations 1980 [S.I. 1980 No 985] were not satisfied.
3. In the event, the tribunal decided to award a single payment in respect of vinyl floor covering, curtains and an electric fire for the child's bedroom. However, they did not make an award covering the cost of a single bed, a wardrobe, an electric fire for the living room, or a three-piece suite, on the grounds that the claimant had these items available to her on loan.
4. Thereupon the claimant sought leave to appeal to the Commissioner against the decision of the tribunal, and asked for an oral hearing of her application, a request to which I acceded. In the event, the claimant did not appear at the oral hearing, but the benefit officer was

represented by Mr R A Birch of the Solicitor's Office of the Department of Health and Social Security. At an early stage during the course of the hearing, it became apparent that the claimant had an arguable case, and I granted leave to appeal. As both the claimant and the benefit officer had consented to my treating the application for leave to appeal as the appeal itself, I then proceeded to hear the actual appeal.

5. Regulation 3(2) of the Social Security (Single Payments) Regulations 1980 (now 1981) reads as follows,

"A single payment shall be made only where -

- (a) there is a need for the item in question; and
- (b) in a case in which the payment would be in respect of the purchase of a particular item, the assessment unit does not already possess that item or have available to it a suitable alternative item, and has not unreasonably disposed of, or failed to avail itself of, such an item".

6. The difficulty that faces the claimant is that she had available to her the items in respect of which the tribunal refused to award a single payment. Prima facie, then, she is caught by regulation 3(2), in that she had no need of the items in question. The claimant's answer is that the relevant items were possessed by her on loan only, and at least in the case of some of them, they were as at 25 February 1981 being demanded back by the rightful owner.

7. The legal position where the claimant has available items, which are borrowed, has already been considered in two Commissioners' decisions. In R(SB) 10/82, which concerned the borrowing of a coat during the claimant's pregnancy, the learned Commissioner observed (at paragraph 14) as follows,

"The suggestion that a borrowed overcoat does not meet 'need' in terms of regulation 3(2)(a) of the Single Payments Regulation is unsupported by any authority..... Under paragraph (a), it is stipulated that a single payment shall only be made where 'there is a need for the item in question'. That need must be an exceptional need in circumstances to which Parts II to Part VIII of the regulations apply: see regulation 3(1). Where a member of the assessment unit (in the present case, the wife of the claimant) needs new or replacement clothing and that need has arisen because of pregnancy, the combined effect of regulation 3(1) and (2) and regulation 27(1)(a)(i) is that such a payment shall be made. It is for the tribunal, in a case under appeal to them, to decide whether there is such a need.... it was entirely open to the tribunal to decide (as they did), that since the claimant had the use of a borrowed overcoat she did not have a need for new or replacement clothing on account of pregnancy. There may be cases where a borrowed item does not satisfy a need. But where the situation giving rise to the need is pregnancy, which is obviously a temporary condition, a borrowed item may well be capable of satisfying the temporary need.

It is for the tribunal to decide, on the particular facts before them, whether the express prohibition of a single payment where there is no need for the item in question which is contained in regulation 3(2)(a) of the Single Payments Regulations is applicable in the case under appeal. In doing so, they should bear in mind that the clothing was borrowed and any terms of the borrowing or other facts before them".

8. However, the above case was dealing with a transitory state. The position was considered more generally in unreported Decision C.S.B. 13/82 where at paragraph 9 the learned Commissioner observed as follows

"Mr Birch submitted that borrowing to meet a need is a legitimate method of providing for the 'need' and that in itself extinguishes the need. I do not accept that wide interpretation of borrowing in relation to 'need' in regulation 3(2) or the generalisation that borrowing satisfies the need in relation to clothing and footwear. In my opinion, it is a question of fact in the circumstances of each case rather than an issue of law. Borrowing a pair of shoes is a temporary expedient to overcome a need for shoes. Can it seriously be contended that the son should have returned to school bare-footed? There is an inevitable lapse of time before a 'need' is met due to the procedure for claiming, waiting for an award to be made and receipt by a claimant of the money in order to purchase an item. In my judgment, borrowing an item for an immediate need does not extinguish a need or amount to a person being in possession of the item or having available a suitable alternative item."

9. In the present case, what the claimant has borrowed does not consist of clothing. However, the extent to which there was a pressing need for the items in question is a matter of fact. More important, and equally a matter of fact, is the length of time for which the borrowed items were likely to be available to the claimant. Was the relevant period a matter of days, months or years? These are issues which fell within the exclusive province of the benefit officer in the first instance, and, on appeal, of the tribunal. They are matters of fact, and not of law. I consider that if the tribunal took the view that borrowed items were available to the claimant on an indefinite basis then the need had been extinguished, so that there was no entitlement under the relevant regulations. If, however, they concluded on the facts that the availability was such that it should not be relied upon otherwise than as a short-term emergency expedient, then in those circumstances the need had not been satisfied. The tribunal had to consider all the evidence, and in the light thereof decide as a fact whether as at the date of claim the need had been satisfied or whether it was still subsisting. It is only when this matter had been resolved that they could make or, as the case may be, refuse an award.

10. In the event, the tribunal refused a single payment in respect of the items borrowed, but have not explained why it is that they considered in accordance with the principles set out above the need had been satisfied. In my judgment, the claimant has been left in the dark, and accordingly the decision must be set aside for failure to meet fully the requirements of rule 7(2)(b) of the

Supplementary Benefit and Family Income Supplement (Appeals) Rules 1980 (S.I. 1980 No 1605). There can be no question of my giving the decision which the tribunal should have given, in that there are questions of fact which have yet to be resolved, and these fall within the exclusive province of the tribunal. Accordingly, I must send the matter back to the tribunal and I direct that the tribunal be differently constituted.

11. I allow this appeal.

(Signed) D G Rice
Commissioner

Date: 12 January 1983

Commissioner's File: C.S.B./236/1981
C SBO File: 272/81