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Commissioner's File: CSB/0255/1986
C A O File: AO Not Known
Region: London North

SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Dr. J M A Kilburn (Appointee) for Amanda Kilburn
Social Security Appeal Tribunal: Milton Keynes
Case No: 10/13

[ORAL HEARING]

1. Our decision is that the decision of the social security appeal tribunal dated 31 January 1986 was erroneous in point of law and we set it aside. We consider it expedient to give the decision that the tribunal should have given (as we are empowered to do by regulation 27(a)(i) of the Social Security (Adjudication) Regulations 1984 [SI 1984 No. 451]), as amended and we hold accordingly that with effect from 29 July 1985 the attendance allowance paid to the claimant fell to be treated as an available resource of hers. This decision has effect for the period from the above date until the revocation on 25 November 1985 of The Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 [SI 1985 No. 613], ("the April 1985 Regulations"). The position thereafter must be the subject of another decision.

2. The claimant is a young woman who suffers from Down's syndrome. She is aged 21; so that a supplementary allowance can be claimed for in her own right and not as a dependant. She resides in a community which is acknowledged to be a residential care home as that term was defined in paragraph 7 of Schedule 1A to the Supplementary Benefit (Requirements) Regulations 1983 [SI 1983 No. 1399] ("the Requirements Regulations") which was introduced into those regulations by regulation 4(8) of the April 1985 Regulations.

3. A claimant is entitled by way of supplementary benefit to a weekly sum equal to the amount by which his or her weekly requirements (computed in accordance with the Requirements Regulations) exceed his or her weekly resources (computed in accordance with the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No. 1527] as amended) ("the Resources Regulations"). The claimant in the present case, as a resident in a residential care home was, in terms of the Requirements Regulations, a boarder. And her requirements fell to be computed in accordance with regulation 9 of those regulations. This was by way of exception from the basic provisions for the assessment of a person's requirements laid down in Schedule 1 to the Supplementary Benefits Act 1976 as amended ("Schedule 1") and in particular in the table in paragraph 2 thereof ("the table"). These indicate, subject to modification by regulations, the ordinary amount of a person's weekly requirements.

4. The claimant however, as a resident in a residential care home, was classified as a boarder to whom the special provisions of regulation 9 of the Requirements Regulations

applied. In particular her weekly requirement included a weekly amount for board and lodging and a weekly allowance for personal expenses under regulation 9(1), which was and is in the following terms:

> "(1) Where the claimant and any other members of the assessment unit are boarders paragraphs 1 to 4 of the table and paragraphs 1 to 3 of Schedule 1 (amounts of normal requirements) shall have effect as if for the amounts for the time there specified there were substituted -
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> (a) a weekly amount for board and lodging which, subject to paragraph (11), shall be determined in accordance with paragraph (4) but, subject to paragraph (10), shall not exceed the maximum amount in respect of the assessment unit as a whole referred to in paragraph (6); and
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> (b) a weekly allowance for personal expenses determined in accordance with paragraph (12);"

There follows a qualification of the foregoing which is not relevant to the present appeal.

5. The foregoing paragraph contains references to other paragraphs of the regulation. It is not necessary to say anything more about paragraphs (10) and (11). But paragraph (4), which operates subject to the maximum in paragraph (6), provides that where the charge for board and lodging includes all meals (which was the case here) the weekly amount shall be the full weekly amount of the charge. Paragraph (6) as it stood in the original Regulations broadly imposed a maximum of the amount estimated by the adjudicating authority as representing a reasonable weekly charge for the relevant area. Paragraph (12) provides for computation of the weekly allowance for personal expenses in a variety of cases. In relation to a single non-dependent person of the claimant's age it provided at the time in question for a long-term weekly rate of £10.30 and a short-term rate of £9.25.

6. The claimant's requirements were immediately before the coming into force of the April 1985 Regulations computed at (a) a weekly amount for board and lodging of £103.12, the full amount of the weekly charge made, the maximum provisions not being invoked, together with (b) a weekly allowance for personal expenses of £8.50. This amount was not the subject of any argument at the hearing before us, and we do not confirm it in our decision as we do not follow how it was arrived at. The matter should be reconsidered by the adjudication officer before implementing our decision.

7. The claimant's resources at the time were computed at £21.50 per week, the amount of the severe disablement allowance that she was receiving. At the time regulation 11(2)(a) of the Resources Regulations provided that, except as otherwise provided, any benefit under the Social Security Act 1975 shall be taken into account in full as a resource but attendance allowance (to which also the claimant was entitled at the lower rate) was, by way of exception, disregarded under regulation 11(4)(b). This was no doubt because, as was said in Regina v National Insurance Commissioner, Ex parte Secretary of State for Social Services [1974] 1 WLR 1290 at page 1292, the purpose of the Act introducing the allowance was to ensure that people who required the attention (or supervision) in question had extra money to pay for it, and it was considered that the normal requirements of claimants for supplementary benefit did not include provision for such attention or supervision. It seems later to have been thought that in making this exception the draftsman had overlooked that the requirements of boarders in residential care homes and nursing homes as laid down in regulation 9 did extend to cover the cost of such attention or supervision and that there would be duplication if the attendance allowance was not counted as a resource. And regulation 4(12) of the April 1985 Regulations introduced into regulation 11 of the Resources Regulations a new paragraph (4A), which, so far as material, provides as follows:

"4A (a) Subject to the following sub-paragraphs of this paragraph, income resources to which paragraph (4)(b) applies which are paid or payable to a boarder in accommodation to which paragraphs 1, 2 and 3 of Schedule 1A (residential care homes and nursing homes) to the Requirements Regulations relate, shall not be disregarded.

(b) .....

(c) Sub-paragraphs (a) and (b) above shall not have effect before 29th July 1985 in the case of such a person who was in receipt of supplementary benefit immediately before 29 April 1985 or ....."

8. It is not in dispute that this alteration, if effective, had the effect that from 29 July 1985 at least until the April 1985 Regulations were revoked, the claimant's attendance allowance fell to be taken into account as one of her weekly resources. Accordingly the adjudication officer gave a decision issued on 31 July 1985 to the effect that from 29 July 1985 the claimant's allowance was payable at a reduced rate by virtue of the claimant's attendance allowance being treated as an available resource.

9. The claimant appealed against this decision, basing her appeal on the proposition that because certain of the provisions of Schedule 1A to the Requirements Regulations were invalid as having been beyond the powers of the regulation-making authority, such invalidity tainted the new paragraph 11(4A) in the Resources Regulations. This contention was accepted by the appeal tribunal who allowed the appeal. The adjudication officer now appeals to the Commissioner. The appeal was heard by us at a hearing at which the adjudication officer was represented by Mrs G. S. Kerrigan of the Solicitor's Office of the Department of Health and Social Security; the Secretary of State was represented by Mr John Laws as so instructed; and the claimant was represented by Mr Richard Drabble instructed by Messrs. Sinclair, Taylor and Martin, Solicitors.

10. The foundation of the appeal tribunal decision was that as the Court of Appeal had in the case of Secretary of State for Social Services v Cotton (11 December 1985 not reported) decided in relation to paragraph 6(2) of Schedule 1A to the Requirements Regulations, paragraph 5(2) of that Schedule was ultra vires. It was held by the appeal tribunal in effect that the voidness of that paragraph indirectly vitiated the provisions of regulation 11(4A) of the Resources Regulations also introduced by the April 1985 Regulations. It is therefore necessary to consider that paragraph in its context.

11. Regulation 4(1) of the April 1985 Regulations replaced paragraph (6) of regulation 9 of the Requirements Regulations (imposing a maximum on the amount allowable to boarders as a weekly allowance for board and lodging) with a new paragraph in the following terms (so far as material):

"(6) Subject to paragraphs (7) and (17), the maximum amount in respect of the assessment unit as a whole referred to in paragraph (1)(a) shall be the aggregate of the following amounts -

(a) in respect of each member of the assessment unit who is a dependant aged less than 11.....

(b) in respect of each other member of the assessment unit, the appropriate amount specified in, or as the case may be determined in accordance with, Schedule 1A."

12. Schedule 1A (introduced by regulation 4(8) of the April 1985 Regulations) comprised seven paragraphs. Paragraph 1 was expressed to operate subject to paragraphs 3 and 5 and set out the appropriate amount referred to in the new regulation 9(6) in relation to persons

in residential care homes. In particular it set the appropriate amount in relation to persons in such a home for persons in need of care by reason of mental handicap at £140 per week. Paragraph 2, which was likewise expressed to operate subject to paragraphs 3 and 5 made comparable provision in relation to nursing homes. Paragraph 3 concerned the adjustments in the case of homes that were both nursing homes and residential care homes. Paragraph 4 stated a single fixed appropriate amount for hostels. Paragraph 5 provided as follows:

> "5. (1) Any amounts specified in paragraphs 1, 2 or 4 shall cease to be applicable if having regard to prevailing conditions and circumstances such amount is no longer appropriate, in which case the appropriate amount for the purposes of those paragraphs shall be the amount determined in accordance with sub-paragraph (2) below.
>
> (2) Any question as to whether any amount is no longer appropriate or as to the appropriate amount for the purposes of sub-paragraph (1) above shall be determined by the Secretary of State in his discretion; and his decision of such questions -
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> (a) shall be given generally and not in relation to a particular case;
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> (b) may be revised from time to time as he considers desirable
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> (c) may make different provisions for different classes of case or otherwise for different circumstances;
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> (d) shall be published in such form as he considers suitable; and
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> (e) shall be conclusive for the purposes of this Schedule."

Paragraph 6 provided for the Secretary of State to determine any question as to the location of board and lodging areas and the amount appropriate in relation to each area, where the accommodation provided was not in a residential care home, a nursing home or a hostel. Sub-paragraph (2) of the paragraph contained provisions for the Secretary of State to determine these questions in the same way as was provided in the five sub-sub-paragraphs of paragraph 5(2). Paragraph 7 contained among other things the definitions of "nursing home" and "residential care home".

13. The Court of Appeal in the Cotton case held that paragraph 6(2) was beyond the powers conferred on the Secretary of State by section 2(1A) of the Supplementary Benefits Act 1976 as amended, broadly on the ground that whereas that section empowered him to make regulations giving himself power to adjudicate on questions arising in individual cases of the kind mentioned in section 2(1), it did not enable him to give himself power to make general decisions akin to subordinate legislation. Of course he could do this latter by further regulation, which in this particular instance would, under section 33(3) of the Act, be effective only after being laid before Parliament and approved by affirmative resolutions of both Houses of Parliament.

14. The argument that commended itself to the apeal tribunal was that this invalidity vitiated also the new regulation 11(4A) of the Resources Regulations. The reasoning must have proceeded in steps as follows:

(1) If paragraph 6(2) was void for the reasons above mentioned then so also was paragraph 5(2) and with it the whole of paragraph 5.

(2) If paragraph 5 was void, then paragraph 1 (relating to residential care homes), which is expressly subject to paragraph 5, was also void.

(3) If paragraph 1 was void then regulation 11(4A) of the Resources Regulations applying as it does to accommodation to which paragraph 1 relates is also void at least in relation to residential care homes.

It is obvious, and it was conceded, that the first step in the above argument is correct. But Mr Laws attacked each of the other two steps. In that connection he invited us to consider various authorities on the question of the severability of the good from the bad in instruments and enactments.

15. It was at one time thought that there was an acid test (sometimes called the "blue pencil test") for determining the validity of the unoffending part of an instrument containing an offending provision. Under this, if it was possible to excise the offending words and to leave behind a meaningful provision then and then only could the unoffending part of the provision take effect. The satisfaction of the blue pencil test was on this basis a sufficient and also a necessary condition of severability. It was clear however at least as long ago as the decision in Dyson v Attorney General [1912] 1 Ch 158 that the bare fact that what is left behind makes grammatical sense is not sufficient. More recently it has been found possible to enforce a provision, so far as it did not offend, even where it was not possible to apply what has been called "judicial surgery".

16. On this issue we were referred to three recent decisions of the Courts viz. Dunkley v. Evans [1981] 1 WLR 1522 ("Dunkley") Thames Water Authority v Elmbridge Borough Council [1983] QB 570 ("Elmbridge") and Regina v Secretary of State for Transport, Ex parte Greater London Council [1985] 3 WLR 574 ("GLC"). The decisions in each of these three cases included the following citation from the judgment in the Australian case Olsen v City of Camberwell [1926] VLR 58 at page 68 (see Dunkley at pages 1524-5, Elmbridge at page 578 and GLC at page 586):

> "If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject matter dealt with by what remains from what it would be with the omitted portions froming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail."

In view of the fact that this passage received approval in all the above cases we treat it as indicating the circumstances in which the invalidity of part can vitiate the remainder even though the blue pencil test is satisfied. The circumstances in which conversely parts can stand even where the blue pencil test is not satisfied is illustrated by Dunkley, approved in this respect by Elmbridge and also we think in the social security case of Regina v National Insurance Commissioner, Ex parte Warry reported as an Appendix to Decision R(S)1/80. We do not however consider that we are here concerned with this aspect of the matter and we say no more about it.

17. It is the claimant's case in step (2) of the argument summarised above, that because paragraph 5 of Schedule 1A is void so also is paragraph 1 of that Schedule, which is expressly subject to paragraph 5. Paragraph 1 states the maximum amount that can be allowed for a boarder in a residential care home. Paragraph 5, if valid, would have allowed the Secretary of State by a stroke of the pen to vary the maximum; and indeed to fix different maximums in different classes of case, eg in different areas. As paragraph 5 is invalid the Secretary of State has no such power but the maximums could remain if paragraph 5 and the reference to it in paragraph 1 are excised. In that case he could more slowly and more cumbrously secure the variation of the maximums by introducing an amending regulation and securing its confirmation by resolutions of both Houses of Parliament. It is clearly possible to excise the paragraph and reference and leave behind a coherent schedule. And we have to ask ourselves whether, if one does so, what remains will be so radically or substantially different from what it would have been with the omitted portion there that the whole must fall.

18. Mr Drabble submitted that, if it cannot be safely said that the Secretary of State would have inserted the same rates if he had known that the power for him readily to change them would not be valid, then the whole must fail. He pointed to the length of time that it would take to secure amendment by fresh regulation especially when Parliament was not sitting; and submitted that increases in the rates might be urgently needed not only in the event of a sudden increase in the rate of inflation, but to correct underestimates of the appropriate maximums either generally or in relation to particular areas. Mr Laws on the other hand urged that, if one could only sever the good from the bad where it can be said with assurance that the enactment would have been exactly the same (apart from the offending provisions) if it had been known that the offending provisions would be found invalid, then nothing could ever be severed, and that it was clear on the authorities that in appropriate cases severance was allowed. He submitted that the alternative of striking out those parts of paragraph 1 which were expressed to be subject to paragraph 5 would lead to the more extravagant result of there being no maximum at all, (unless perhaps the former regulation 9(6) was left standing).

19. Mr Laws pointed also to the tendency of the Courts to adopt a "benevolent approach", by giving place to what Stephenson L.J. in Elmbridge (at page 585) referred to as the common sense principle preserved in Latin as "ut res magis valeat quam pereat". And he referred to a further citation from Olsen mentioned in GLC (at page 587), which reads as follows:

> "We quite agree with the contention of counsel for the applicant that the conclusion at which the Court is to arrive must in such a case as the present be drawn from a notional comparison of two documents one containing and the other omitting the invalid portions, and cannot depend on what may be called outside speculations as to what the members of the legialative body would or would not be likely to do. But it would seem, from the cases we have mentioned, that the expressed intentions of the legislative body should be preserved as far as possible, and that before giving effect to the applicant's contention the Court should be satisfied that the parts are so interwoven that the rest should fall with the admittedly invalid part."

In that case McNeill J held that the parts were not severable, but we conceive that he accepted the correctness of the last citation.

20. In our judgment paragraph 1 can properly be allowed to stand even shorn of the qualifications in paragraph 5. We do not consider that the result of omitting paragraph 5 (in the language of the Olsen decision) is to make so radically or substantially a different law as to warrant a belief that the Secretary of State would not, if all could not be carried into effect, have enacted paragraph 1 (or 2 or 3 or 4) independently ie. without qualifying it by paragraph 5. He is familiar with the need for an annual uprating by regulations to take account of, among other things, inflation and the fact that his proposed method of by-passing the need for up-rating regulations in the present context was unsuccessful does not in our judgment mean that the whole fails. In our view paragraph 1 can stand.

21. This makes it strictly speaking unnecessary to go on to consider the question whether, if paragraph 1 cannot stand, regulation 11(4A) of the Resoures Regulations must fail also. We understand that it was conceded by the adjjudication officer at the hearing before the appeal tribunal that it would so fail. However having regard to the inquisitorial nature of our jurisdiction we do not believe that the adjudication officer and the Secretary of State can be held to this concession on a point of law; and Mr Laws addressed argument to us on this aspect of the case. Mr Drabble did not ask for an adjournment to consider it. Regulation 11(4A) refers to accommodation to which paragraphs 1, 2 and 3 of Schedule 1A of the Requirements Regulations relate. The argument is that if paragraph 1 of Schedule 1A is invalid then there is no accommodation to which it relates. We consider however that even if the paragraph is invalid as being ultra vires it still has some existence and that the words in question are no more than a definition provision indicating the kind of

accommodation to which regulation 11(4A) applies, viz. that defined in Schedule 1A, paragraph 7 of which contains definitions of the terms used in paragraphs 1, 2 and 3. In our judgment regulation 11(4A), as a matter of construction and irrespective of the question of the invalidity of paragraph 1, applies to all accommodation so defined mentioned in paragraphs 1, 2 and 3, whether or not those paragraphs actually affect the particular accommodation. It is not confined to accommodation where the maximums apply. In other words the accommodation to which paragraph 1 relates for the purposes of regulation 11(4A) is not just accommodation whose charges are such as to bring the maximum (if effective) into play, but any accommodation within the definition in paragraph 7 of Schedule 1A. The definition would thus be unaffected by any invalidity in paragraph 1. For this reason also we consider that the adjudication officer's appeal should be allowed.

22. We should mention that in Cotton there was a challenge to the validity of the April 1985 regulations as a whole on the ground, as was contended, that the Secretary of State had not properly complied with the requirements of section 10 of the Social Security Act 1980 as to consultation with the Social Security Advisory Committee and associated matters. This challenge was rejected at first instance by Mann J, and by a majority of the Court of Appeal. We are plainly bound by this conclusion and Mr Drabble did not seek to suggest otherwise; and we mention the point in case he wishes to reserve it if the appeal goes higher.

23. The adjudication officer's appeal is allowed.

(Signed) J G Monroe
Commissioner

(Signed) D G Rice
Commissioner

(Signed) R F M Heggs
Commissioner

Date: 15 May 1986