

CPAL

MJG/SH/7

Commissioner's File: CSB/258/1990

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the appeal of the claimant's appointee against the decision of the social security appeal tribunal dated 12 December 1989 as that decision is erroneous in law and I set it aside. My decision is that an overpayment to the claimant of supplementary benefit and income support totalling £4,778.90 for the inclusive period from 4 April 1985 to 21 April 1988 is not recoverable from the claimant's appointee because the appointee neither misrepresented nor failed to disclose any material fact: Social Security Act 1975, section 101 (as amended) and Social Security Act 1986, section 53(1).

2. This is an appeal to the Commissioner by the claimant's appointee. The claimant was the father of the appointee, in his late seventies at the relevant time and having since died, on 18 October 1991. The appointee is his son under a Certificate of Appointment on form BF56 dated 8 May 1984.

3. On my direction the appeal was the subject of an oral hearing before me on 30 January 1992. The claimant's appointee, the son, was present and gave evidence to me. He was represented by Mr D Brock of Counsel. The adjudication officer was represented by Mr S M Jones of the Office of the Chief Adjudication Officer. I am indebted to all those persons for their assistance to me at the hearing.

4. This is a difficult case and my decision depends entirely on its own special facts (see below). Those facts were found in considerable detail, together with a detailed note of evidence given, by the social security appeal tribunal, whose record of decision (on Form AT3) was completed in exemplary detail. Shortly, the facts are that the overpayment referred to in paragraph 1 above arose because the Department of Social Security

were not during the relevant time aware that the claimant (the father) was in receipt of a Royal Air Force pension. Nor it seems were they initially aware of the fact that the father remarried on 12 March 1988, to a woman whose assets were such as to disentitle the father to any benefit (and that accounts for an additional overpayment at the end of the relevant period). So far as the fact of the remarriage is concerned, it was common ground between Mr Brock and Mr Jones that the appointee, the son, made no misrepresentation about that nor did he fail to disclose it (see section 53 of the Social Security Act 1986 - below) because the proprietress of the residential home in which the father was then living had told the son that she herself would report the fact of the marriage to the Department, she in fact having the book of payable orders.

5. There therefore remains of course the large part of the overpayment which results from the fact that the Department were not told of the receipt by the father of the RAF pension. The law on this subject is contained in section 53(1) and (2) of the Social Security Act 1986 which provide as follows,

" 53. (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure -

(a) a payment has been made in respect of benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

(2) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it."

6. It is therefore clear that recovery of overpaid benefit can be obtained not only from the claimant but also from any other person whose misrepresentation or failure to disclose a material fact causes the overpayment. That he is clearly capable of applying to an appointee, who by the very nature of his appointment will be under a duty to disclose and not to misrepresent all material facts in connection with the benefit paid or payable to the person for whom he is acting.

7. The question is therefore whether in connection with the

overpayment of benefit there was in this case any material non-disclosure or misrepresentation by the son, as the claimant's appointee. Again it was common ground that there was no failure to disclose as such since the appointee not only did not know of the existence of this RAF pension for his father but also had been actively misled by his father as to the non-existence of any income other than the father's State retirement pension (see below). It is of course well known that one cannot fail to disclose a material fact of which one neither has nor ought to have any knowledge nor ought to have any knowledge and that is the position so far as the son is concerned.

8. The only remaining question therefore is whether the claimant's appointee misrepresented any material fact. Mr Jones submitted that the appointee had done so because on 12 April 1985 (about a year after he had been appointed) the appointee signed a "Statement by claimant for supplementary benefit" on form All, when he was asked to do so by an officer of the Department on behalf of his father. Part 6 of that form asked for particulars of any income of the claimant. The only income shown was "retirement pension" (i.e. State retirement pension). There was no reference to the RAF pension. The form of "claimant's declaration" at the end of form All states "I DECLARE that the information given by me and recorded in sections 1 to 10 of this form has been read over to me and is true and complete. There has been no change except as reported since my last declaration". Prima facie of course that form signed by the appointee does constitute a misrepresentation by the claimant's appointee as to there being no income other than the State retirement pension. The form of declaration does not contain some such qualifying words as "so far as I am aware". It is absolute in its terms.

9. However in paragraph 10 of R(SB) 18/85 the Commissioner stated,

"There were no findings of fact relating to any other circumstances surrounding the signing of the relevant forms. This is unfortunate, in that I consider these circumstances may be crucial. Although the adjudication officer's representative argued that such circumstances were immaterial, in that the claimant had made a positive misrepresentation in the written documents and that was the end of the matter, I do not think that the case can be disposed of so simply. The tribunal had to consider not merely the written documents, but any oral observations made by the claimant which accompanied them. Suppose, for example, the claimant either before or after having signed one of the forms All qualified it by word of mouth, stating that the Department should also have regard to his army pension. In that hypothetical situation, the tribunal could not simply direct their attention to the written document alone, but must construe it in the light of the oral qualification. I will take the matter further. If the claimant without using express words nevertheless by his actions e.g. by producing his army pension book, indicated

that the legal effect of the pension should be taken into

account, then, in my judgment, the written document should be regarded as qualified accordingly."

That was a case where at the time a claimant signed form All declaring that he had no other income the claimant had produced his army pension book to the departmental officer but because of the misapprehension no reference had been made about the Army pension in the form All. For the reasons set out below, I consider that though the facts of R(SB) 18/85 are different, the principle applies to the facts of this case.

10. Evidence was given to me by the appointee at the hearing on 30 January 1991 to confirm and elaborate on evidence given to the social security appeal tribunal (see below), to the effect that shortly before the claimant's appointee signed form All on 12 April 1985 (at his home when visited there by an officer of the local office in his home area) the claimant's appointee and his father had been interviewed at the place where the father was living (some distance from the claimant's appointee's own home) by an officer of the local department there, in connection, it seems, with the father's imminent entry into a residential home. The officer there had gone orally through the father's various assets, income, etc and the answers given to the officer of the Department were either given by the father or if given by the son were heard by the father who expressly or impliedly assented to those answers. The background circumstances are set out in considerable detail in the social security appeal tribunal's decision and are wholly unusual.

11. The tribunal held, to quote their reasons for decision, that the son was "in effect duped by his father who knowingly allowed his son to misrepresent his income in order that the father should gain financially. He did this by failing to disclose his RAF pension. The tribunal were satisfied that the son did not have any financial gain from this transaction and although he is technically liable, it seems by any standards unfair that he should suffer for accepting his father's evidence. There was, after all, no way in which he could have corroborated it or enquired behind it, since the problem was that his father had simply suppressed the evidence".

12. The chairman's note of evidence on this particular happening reads as follows,

"[The son's father] always refused to discuss his financial circumstances and would walk out of the room as soon as money was mentioned. He was never senile [that is a reference to senility being given as the reason for the appointment whereas in fact the father suffered from a drink problem]. [The son] and his father were interviewed by a lady at the Department of Social Security and his father was perfectly capable of answering the questions, except that he had no vocal cords (the result of an earlier cancer operation). His father had allowed him to believe that he [the son] was answering all the questions correctly in stating that his father's only source of income was his retirement pension. This he had

subsequently represented when completing form All and signing it in good faith as a true and complete statement."

All of those findings of fact and recording of evidence are accepted by the adjudication officer now concerned.

13. In the unusual circumstances of this case, I hold, applying R(SB) 18/85, that the only misrepresentation (causing the overpayment) was that made by the father who in effect in answer to an oral question at the interview "Have you any other income?" in effect answered "No". He certainly, whether or not there was misrepresentation, failed to disclose the material fact of the RAF pension. At that stage, certainly, the son made no misrepresentation nor of course did he fail to disclose any matter.

14. When shortly thereafter the son was asked to sign what in effect amounted to a confirmation of the interview on form All by an officer from a different local office, the son was doing no more than in effect confirming what had taken place at the interview with him and his father shortly before. There had been no change so far as he was concerned and for him the information given was "true and complete". Normally, of course, signature by an appointee of form All containing a misrepresentation would cause an overpayment to be recoverable from an appointee, however innocent he was in the matter. But in the special circumstances of this case, I hold that the signature of the form All must be looked at in the entire context of the oral interview of the son and the father shortly beforehand (cf. para. 10 of R(SB) 18/85 - cited above). Consequently there was no misrepresentation in the light of all the circumstances. It follows that as the whole case for recovery depends on showing a misrepresentation by the son (see above), there is no liability on him as appointee to repay the overpayment to the Secretary of State and I have so declared in paragraph 1 above. It was common ground at the hearing before me that the fact that the son subsequently signed the common form of declaration when cashing orders for benefit did not make him liable since they also had to be qualified in the light of the first interview.

15. However, I should say that I am conscious of the fact that the fact that an appointee has been constituted should not mean that public money (of a considerable amount in this case) which has been paid to a claimant not entitled to it should not be recovered. That is certainly not my decision. Normally an appointee would be liable to refund the money to the Secretary of State, even though he had had no financial gain, if he misrepresented or failed to disclose a material fact. The circumstances of this case are special and my decision depends entirely on them.

16. I note from the chairman's note of evidence at the social security appeal tribunal the following passage,

"The Presenting Officer explained that the original decision had been that there had been an overpayment which was

recoverable from [the father - the claimant], but when it was realised that throughout the period of the overpayment his son was his appointee, it was submitted that the overpayment was recoverable from [the son]. Thus his name is now substituted as that of the appellant."

17. It would appear therefore that there is still an extant decision of an adjudication officer requiring recovery from the father the actual claimant. It is entirely of course a matter for the Secretary of State but if that is so I would have thought that attempts should now be made to recover this large overpayment from the estate of the father (if the estate contains any assets to meet the repayment). But my decision is that no recovery can be made from the son.

18. Lastly, I should say that, I have held the tribunal's decision to be erroneous in law because it wrongly interpreted the law in R(SB) 18/85 etc. in its application to the facts by this case. But that does not derogate from the fact that the tribunal clearly took the utmost care with this difficult case.

(Signed) M.J. Goodman
Commissioner

(Date) 14 February 1992