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Region: London North

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: J. Gaylor Appointee: on behalf of Elizabeth May Gaylor (Deceased)

Social Security Appeal Tribunal: Luton

Case No: 25/10

Decision

1. My decision is that the decision of the social security appeal tribunal dated 11 December 1985 is erroneous in law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

Nature of the appeal

2. The issue before the tribunal was the extent to which the charges for board and lodging in the W... Nursing Home where the claimant was resident from October 1984 were allowable in calculating the claimant's supplementary benefit entitlement.

The adjudication officer's decision

3. By a decision issued on 18 June 1985 an adjudication officer decided, according to page 1 of form AT2 (the appeal tribunal's papers) as follows:

"Reduction in supplementary pension to £132.90 a week, effective from Thursday pay day in week commencing 29 July 1985, as a result of the withdrawal of attendance allowance disregard."

4. The claimant through her appointee appealed against this decision saying that a letter from the Department dated 18 June 1985 confirmed that her mother's allowances would be reduced by the equivalent of the attendance allowance of £28.60 with effect from 29 July 1985. The basic charge at the W... Nursing Home for her mother's accommodation was £208 a week which was the allowance (excluding personal expenses of £10.55) payable from 29 July and gave a shortfall of £21 per week additional costs due to inflation which would also have to be cut short because the nursing home's trading year did not match the DHSS adjustment dates. As she was assured on 19 March by the DHSS representative on the freephone enquiry number that the attendance allowance did not count as income and therefore did not affect the supplementary benefit and as she and her mother were not party to the DHSS discussions regarding the changed standing of the attendance

allowance, she did not feel that the undertaking given on 1 April 1985 regarding her mother's accommodation could be considered irresponsible.

5. The adjudication officer in his written submission on the appeal stated that the facts before him were that the appellant was 93 years of age and lived in a residential nursing home. She had been in receipt of supplementary benefit since November 1984 and her daughter acted as her appointee. The claimant received retirement pension of £36.05 and attendance allowance of £28.60. The nursing home fees of £187 a week were fully met in the claimant's supplementary benefit assessment. In giving reasons for his decision the adjudication officer stated that regulation 11(4)(a) of the Resources Regulations removed the disregard of attendance allowance with effect from 29 April 1985 for boarders living in residential care homes and nursing homes. However it was also provided that in the case of existing claimants the disregard could be retained until 28 July 1985. In the claimant's case, the adjudication officer decided that as she was receiving supplementary benefit as a resident in a nursing home on 28 April 1985, the disregard on her attendance allowance should continue up to 28 July 1985 and then be withdrawn.

The social security appeal tribunal's decision

6. The tribunal heard the appeal on 7 August and adjourned the hearing. The final hearing before the tribunal took place on 11 December 1985. The tribunal's decision was:

"Adjudication Officer's Decision revised. At the moment the Tribunal finds that there is a Court finding that the 1985 Regulations are not valid. Although subject to appeal that is the position at the moment. Accordingly, any decisions made under those Regulations are invalid. In particular, the Attendance Allowance should not be taken into account and the whole position should be assessed as it would have been before these regulations."

The tribunal's recorded findings of fact were:

"Claimant 94 years of age. Been in nursing home before 29.4.85. and in receipt of Attendance Allowance"

The tribunal's recorded reasons for their decision were:

"The Tribunal has read the Court record of the Judicial Review proceedings in the case of Simon Cotton. He moved the Court on three points all arising from the Supplementary Benefit (Requirements & Resources) Miscellaneous Provisions Regulations of 1985 [which I shall call "the Cotton Regulations"], one of which was that these regulations were unlawful because the Minister had not complied with such enabling powers as he had. The case was fully argued over several days. The judge having come to the conclusion that "the motion was accepted", did not make a specific order because the Minister gave certain undertakings which satisfied Mr Cotton's situation pending an appeal by the Minister. The Tribunal interprets the acceptance of the motion by the Court as meaning it found the whole of the Regulations unlawful. The Tribunal so finds."

Subsequent proceedings

7. The adjudication officer applied for leave to appeal against the tribunal's decision on 10 March 1986 saying that the central issues in the appeal were -

- (1) which parts of the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 were found to be ultra vires by the Court of Appeal; and

- (2) whether or not the claimant was entitled to any transitional protection of her attendance allowance from 29 April 1985.

He submitted that the tribunal in their decision had indicated that they considered the whole of the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 [SI 1985/613] to be unlawful. It was his submission that this was not in fact the case. He submitted that the Court of Appeal found that only paragraphs 6(1) and (2) of Schedule 1A and paragraph 5 of Schedule 2A to the Requirements Regulations were ultra vires at the relevant time. He submitted that these provisions only related to ordinary board and lodging and thus the provisions of regulations 4(6) and (12) of the Miscellaneous Provisions Regulations which added paragraph 17 to regulation 9 of the Requirements Regulations and paragraph (4A) to regulation 11 of the Resources Regulations respectively were not ultra vires. It was his submission that the tribunal erred in law in not considering the foregoing provisions when reaching their decisions. Leave to appeal was granted by a Commissioner on 13 May 1986. The adjudication officer made his written submission on the appeal on 19 June 1986. The Child Poverty Action Group, who by then were representing the claimant, made written comments on the submission on 30 September 1986 stating the questions of ultra vires arose, that they were the subject of decision CSB/0255/86 (which is to be reported as R(SB)9/87), that the arguments of the CPAG had not been accepted and leave was being sought to appeal to the Court of Appeal. It was submitted that the decision on the claimant's case should await the outcome of these proceedings.

8. The decision of the Court of Appeal in respect of decision CSB/0255/86 (Kilburn) under the name of Kilburn v Chief Adjudication Officer, and two other decisions of the Court of Appeal namely Secretary of State for Social Services v Elkington and London Borough of Camden v Secretary of State for Social Services (Camden) were all decided on 5 March 1987. Further submissions in the light of these decisions were directed by the Commissioner on 12 May 1987. After receiving the submissions of the adjudication officer, the Child Poverty Action Group asked for the appeal to be stood over pending the decision of a Tribunal of Commissioners on the question of ultra vires. Six appeals were heard together by that tribunal and the decisions on all six were given on 11 February 1988. The references to those decisions on Commissioner's file are CSB/842/85, CSB/1085/1986, CSB/1162/84, CSB/0480/1986, CSB/0354/1986 and CSB/1171/86.

Was the tribunal's decision erroneous in law?

9. (1) Yes, it was. No judge or Superior Court has ever held the Cotton Regulations to be entirely invalid. Mr Justice Mann (as he then was) gave judgment in the case of Secretary of State for Social Services ex parte Cotton on 31 July 1985 and in the discussion at the end of his judgment (page 35 of the transcript as approved by the judge) indicated that his decision was only that paragraph 6(2) of Schedule 1A and 5(3) of Schedule 2A of the Requirements Regulations as amended by the Cotton Regulations simply were ultra vires. The Court of Appeal in Cotton decided that paragraph 6(1) and (2) of Schedule 1A and paragraph 5 of Schedule 2A were ultra vires. This is made clear in the transcript of an application made to the Court of Appeal on 17 December 1985 in the Cotton appeal. The question of whether the remaining paragraphs of Schedule 1A were invalid was left open. In Kilburn before the Court of Appeal this question was also left open. The decisions in Kilburn reference CSB/0255/86 and Tyler reference CSB/842/85, both of which are decisions of Tribunals of Commissioners, hold that paragraph 5 of Schedule 1A of the Cotton Regulations is invalid but the remaining paragraphs of Schedule 1A are valid. Kilburn (in the Court of Appeal) held that regulation 11(4A) of the Supplementary Benefit (Resources) Regulations 1981 as amended by the Cotton Regulations were valid.

10. For these reasons, I set aside the decision of the social security appeal tribunal as

erroneous in law. It is not expedient in this case, which involves considerable further fact finding, for me to give the decision myself. The relevant principles are set out in the six decisions referred to in paragraph 8 above. Regulation 11(4A) of the Resources Regulations must be accepted as valid; but other points require to be decided. Accordingly I refer the case to another social security appeal tribunal which should be entirely differently constituted.

11. Directions to the new tribunal

(1) The period in issue

- (a) The decision of the adjudication officer under appeal covered the period starting with 28 April 1985: see paragraph 5 above. The Child Poverty Action Group submits that the period to be dealt with in the appeal should be from 28 April 1985 to the date of the claimant's death namely 26 April 1988. They act for the appointee to continue the proceedings after the claimant's death and also acted for the appointee during the claimant's lifetime.
- (b) The fresh tribunal can, and should, deal with the whole of this period, after ascertaining that they have jurisdiction to do so. The adjudication officer's decision of 18 June 1985 was open-ended and would run on until terminated on review. There is no information before me as to whether there were any review decisions. If there were, the appointee should appeal against the review decisions and arrangements should be made for the appeals to be brought before the tribunal and heard at the same time as the present appeal.

(2) The relevant law

The relevant law covering the periods from 28 April 1985 to 1 April 1986 (apart from the Attendance Allowance provisions) is set out in the Cotton Regulations and the Camden Regulations as amended. From 29 April 1985 to 24 November 1985 the Cotton Regulations were in force. From 25 November 1985 to 11 April 1988 the Camden Regulations, as from time to time amended were in force. But the pre-Cotton Regulations are also relevant because the protected amount referred to in the Cotton and Camden Regulations has to be determined in a case where, as here, the claimant was resident in the home in question prior to 28 April 1985 by reference to the amount actually charged the claimant or, if less, the reasonable amount determined under the pre-Cotton Regulations. All these Regulations are set out so far as likely to be relevant in the present case in the appendices to Tyler reference CSB/842/85, where their effect is explained.

12. As regards the period commencing on 11 April 1988 and continuing to the claimant's death on 26 April 1988, the relevant regulations are the Income Support (General) Regulations 1987.

13. There should be a fresh submission from the adjudication officer now concerned which should cover the entire period in issue. It is apparently not in dispute that the reasonable amount in the claimant's case was £187 for charges for the period up to 28 April 1985. There is no provision for the reasonable amount to exceed the amount actually charged to the claimant immediately before that date and that amount was £187.

14. The Child Poverty Action Group should then make a submission in reply so that any points in dispute are clarified.

15. If both sides are in agreement as to the awards that should have been made, the adjudication officer can consider whether the matters under appeal can be resolved by a

decision or decisions by the adjudication officer on review. If the matter does go to a fresh tribunal, ample time should be allowed for the hearing, if there are any points left in dispute. The relevant law is complex and will require detailed explanation. They will require time to study the six Tribunal decisions referred to in paragraph 8 above. Attention is drawn to paragraphs 22 to 33 of Turner CSB/1085/86.

16. My decision is set out in paragraph 1. In view of the complexity of the matter, I grant liberty to both parties to apply.

(Signed) V.G.H. Hallett
Commissioner

Date: 30 June 1988