

DGR/BDS

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

Decision C.S.B. 9/82

1. I grant the claimant leave to appeal on a point of law against the decision of the supplementary benefit appeal tribunal dated 14 July 1981, and, the claimant and the Secretary of State having consented to my treating the application as the appeal itself, I go on to allow the appeal on the basis that the said decision was erroneous in point of law. I direct that the matter be reheard by a differently constituted tribunal, but subject to the directions specifically set out in the final paragraph of this decision.

2. The background facts of this case are as follows. The claimant, who is now aged about 22, first came to this country in 1975. In 1976 she married a Mr Tariq who unfortunately died in August 1979. The claimant returned to Pakistan in August 1980 and on 24 January 1981 married Mr Jahir Tamil, a student, who apparently was unable to support her in Pakistan. Two months later she returned to England. She was pregnant at the time, not entirely familiar with the English language, and was unable to find employment. Through family connections she was able to obtain free accommodation, and maintained herself through the assistance of others. Her husband made no contribution towards her maintenance. Supplementary allowance was paid temporarily to the claimant from 10 April 1981 to 28 May 1981 while the facts of her case were properly considered.

3. After the matter had been fully investigated the supplementary benefit officer decided that supplementary allowance should not continue in payment because, since the claimant was not estranged from her husband, but merely temporarily separated, she was not entitled to supplementary allowance in her own right. The benefit officer also decided that there was no need for a payment on the basis of urgent needs because she was being supported in this country by relatives.

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4. The claimant appealed against this decision to the supplementary benefit appeal tribunal, but without success. Thereupon she lodged an application for leave to appeal to the Commissioner on the basis that the decision of the tribunal was erroneous in point of law, and she asked for an oral hearing, a request to which I acceded. At that hearing she was represented by Miss P Wood, a solicitor from the Stockwell and Clapham Law Centre, and the Secretary of State by Mr P Milledge of the Solicitor's Office of the Department of Health and Social Security. I am indebted to them both for their helpful submissions.

5. Miss Wood on behalf of the claimant and Mr P Milledge on behalf of the Secretary of State agreed that, if I was prepared to grant leave, then I should go on to consider the appeal itself on the basis of their submissions. In the event, having heard Miss Wood, I decided to grant leave, and thereafter proceeded to hear the appeal itself.

6. Miss Wood referred me to regulation 2(2) and (3)(c) of the Supplementary Benefit (Aggregation) Regulations 1980 (S.I. 1980 No 982). This regulation was subsequently amended by regulation 2(3)(b) of the Supplementary Benefit (Miscellaneous Amendments) Regulations 1981 (S.I. 1981 No 815), but this amendment did not come into effect until 27 July 1981, i.e. after the hearing by the tribunal, and in consequence is irrelevant to my deliberations. Both sets of regulations have subsequently been consolidated by the Supplementary Benefit (Aggregation) Regulations 1981 (S.I. 1981 No 1524). Regulation 2(2) and (3)(c) of the unamended Regulations read as follows:

"2.--(2) Subject to paragraph (3), two persons who are married to each other shall not be treated as having ceased to be members of the same household by reason of any temporary absence the one from the other.

(3) Where two persons are married to each other and, before the occurrence of the circumstances to which this paragraph applies, were members of the same household, and one of them -

.....

(c) is absent from Great Britain while his partner remains in Great Britain, he shall be treated as not being a member of the same household as his partner for any period of that absence which exceeds four weeks, except that this subparagraph shall not apply where the absent partner is a claimant to whom regulations pursuant to section 1(1)A of the Act (entitlement to benefit to continue during prescribed periods of temporary absence from Great Britain) do not apply."

Miss Wood argued that the effect of these provisions was that the claimant could not be regarded as a member of the same household as her husband and was therefore entitled to supplementary benefit in her own right without any question of aggregation of requirements and resources.

7. Miss Wood contended that, as the substantive provisions of paragraph (2) were subject to paragraph (3), any adverse consequences otherwise flowing from paragraph (2) could be circumvented if the claimant could satisfy the provisions of paragraph(3)(c). In Miss Wood's submission, the claimant did satisfy these provisions. Miss Wood realised that the crucial words were "is absent from Great Britain while his partner remains in Great Britain". She contended that the absence need not necessarily presuppose a prior residence in Great Britain. In support of this contention she cited various Commissioners' decisions on the meaning of "is absent from Great Britain", albeit in a different context, to the effect that "the word absent means and is intended to mean not present and is not intended to refer only to persons who have been in this country and have left for some other country" (R(U) 16/62 paragraph 6). I see the force of this, but in the present context the words "is absent" cannot be interpreted in isolation from the further words "while his partner remains in Great Britain", of which the meaning of "remains" is crucial. Notwithstanding Miss Wood's attempt to elicit from the dictionary a suitable meaning for "remains" taken in isolation, I have no doubt that the phrase "is absent from Great Britain while his partner remains in Great Britain" must be construed as a whole, each word influencing the meaning of every other word. In my judgment, paragraph (3)(c) contemplates a situation where a couple have been living together in Great Britain, but one of them has left this country, whilst the other has continued to stay here. The word "remains" contemplates that the person concerned was in Great Britain at the time that the other's absence from Great Britain commenced.

8. Accordingly, applying this interpretation to the facts of the present case, as the claimant's husband never was in this country, on no footing can she rely on paragraph (3)(c). In any event, irrespective of the location of the claimant's husband, at the time immediately before the separation the claimant was not herself in Great Britain, so that she could not be said to be remaining there after the claimant's absence. Accordingly, I do not think that the claimant can bring herself within paragraph (3)(c). For completeness I should add that I agree with Miss Wood's submission that paragraph (3)(c) is not excluded from applying to the claimant merely by the terms of the exception there set out. On no footing is the absent partner a claimant.

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9. Miss Wood further contended that, irrespective of paragraph (3), the claimant was not in any event prejudiced by paragraph (2). That provision preserved aggregation only where the separation was temporary. In the present case, as she argued, the absence of the claimant's husband in Pakistan was otherwise than temporary. She submitted that, as the claimant's husband did not hold a British Passport, he would never, under the present immigration rules, be allowed into this country, and accordingly his absence in Pakistan could not be in any meaningful sense a temporary absence. At this point it is perhaps appropriate that I stress that my function is to determine whether or not the appeal tribunal were erroneous in point of law. They found as a fact as follows:

"Her husband Mr Tamil is in Pakistan, and will join her here later. The claimant is temporarily separated from her husband, who is a student".

Miss Wood argued that no tribunal properly instructed as to the law and acting judicially could possibly have reached this conclusion. According to her the tribunal ought to have found as a fact that the claimant and her husband were to be regarded as permanently separated.

10. Now, in considering their decision the tribunal had to view the position against the background that the claimant had only recently married, that she had in no way quarrelled with her husband, that she was pregnant, and that there was nothing to indicate that it was the desire of either party to terminate the marriage. As it is the custom of most newly married couples to wish to live together, it would not be surprising if the tribunal were slow to come to the conclusion that the present separation was to be looked upon as being otherwise than temporary. There would be nothing surprising in the tribunal's concluding that, if for some reason the husband was unable to come to England, in due course the claimant herself would go back to Pakistan. In this event the present separation would only be of a temporary nature. However, it would appear from the findings of fact that the tribunal did not go as far as this, but were content to take the view that the claimant's husband would himself join the claimant in due course in this country. Miss Wood argued that they should not have reached this conclusion.

11. However, the tribunal can only consider the matter in the light of the evidence put before them. Miss Wood pointed to a letter sent to the tribunal by the claimant which, as far as the material passage is concerned, reads as follows:

"My husband cannot join me in this country due to restrictions imposed upon bringing husband into this country".

According to Miss Wood this should have alerted the tribunal to the need to investigate the whole position in detail. Had they done

so, they would have found that the immigration rules prevented the claimant's husband ever coming here. However, the claimant's bare statement was undermined by the ensuing sentence in her letter which reads as follows:

"I must stress here that does not mean we are separated, but in fact it means we are living apart and I cannot give you any length of time when he will be able to join me".

The effect of this further sentence is, in my judgment, to suggest that she thought that the restriction on his entry would not be permanent.

12. But, in any event, the tribunal were not compelled to accept the claimant's bare statement. There is no proper explanation as to why the claimant's husband was not to be allowed into the country. No evidence was apparently put before the tribunal as to his status, ie whether, for example, he had British Citizenship or not. I think that in the absence of more compelling evidence, the tribunal were not obliged by the terms of the claimant's letter to assume that the separation must be permanent, or at any rate something more than temporary. They had to view the position against the background of the short duration of the marriage and the apparent desire of the parties to continue with it. It may be that, in the event, the tribunal reached the wrong conclusion, but I do not think that I can say that it was an unreasonable one. I am not satisfied that they were acting perversely, and accordingly it would be improper of me to interfere. It follows from what has been said that, in my judgment, the claimant cannot rely on regulation 2 of the Aggregation Regulations so as to be treated as an independent person for the purposes of claiming supplementary benefit.

13. Miss Wood went on to complain that the tribunal had failed to give any consideration to the claim for an urgent needs payment under the Supplementary Benefit (Urgent Cases) Regulations 1980 (S.I. 1980 No. 1642) (in particular regulation 22) or, at any rate, had failed to give reasons for their not regarding the claimant as entitled to payment under those regulations. I think it may well be the case that the tribunal did consider the matter. The benefit officer had taken the view that a payment on this basis was inappropriate because the claimant was being supported in this country by relatives, and it may be that the tribunal came to the same conclusion themselves. However, whether or not they did consider the matter, the fact is that they did not record their reasons for refusing an award under these regulations. Under regulation 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 (S.I. 1980 No. 1605) the tribunal are required to include in every record of their determination a statement of the reasons for their determination and of their findings on material questions of fact. I do not know, of course, whether the matter was ever argued before the tribunal, but in any event they should have dealt with this particular issue. Accordingly, to this extent their decision is erroneous in

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point of law and I am compelled to set it aside, and direct that the matter be re-heard by a differently constituted tribunal.

14. However, it does not follow from this that there must, or ought to be, a complete re-hearing. In the words of paragraph 17 of Unreported Decision C.S.B. 8/81 (to be reported as R(SB) 6/81):

"Does this mean, then, that in every case in which the Commissioner finds that there has been an error of law he must refer the case for a complete re-hearing by the fresh tribunal? I think not. No express fetter is put upon the Commissioner's power to give directions to the fresh tribunal. From this it must follow that, in appropriate cases, the Commissioner is empowered to direct, inter alia, that:

- (a) the fresh tribunal determine the case upon the basis of the facts as found by the original tribunal; or
- (b) a fresh tribunal re-hear and determine only part of the case and determine the remainder in accordance with the relevant part of the decision of the original tribunal."

In the present case it is appropriate that I should direct in accordance with (b) above.

15. Accordingly, I direct that the appeal tribunal hear or re-hear and determine de novo the claimant's claim for an urgent needs payment under the Supplementary Benefit (Urgent Cases) Regulations 1980 but that, subject to their so doing, they disallow the claimant's appeal.

Signed: D G Rice
Commissioner

Date: 22 March 1982

Commissioner's File: C.S.B. 493/1981
C SBO File: 648/81

CSB 493/1981

DGR/BDS

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

Name: Jabeen Shahida (Mrs)

Supplementary Benefit Appeal Tribunal: South London

Case No. 11/35

reputed

493/1981

ORAL HEARING

Decision C.S.B. 9/82

1. I grant the claimant leave to appeal on a point of law against the decision of the supplementary benefit appeal tribunal dated 14 July 1981, and, the claimant and the Secretary of State having consented to my treating the application as the appeal itself, I go on to allow the appeal on the basis that the said decision was erroneous in point of law. I direct that the matter be reheard by a differently constituted tribunal, but subject to the directions specifically set out in the final paragraph of this decision.

2. The background facts of this case are as follows. The claimant, who is now aged about 22, first came to this country in 1975. In 1976 she married a Mr Tariq who unfortunately died in August 1979. The claimant returned to Pakistan in August 1980 and on 24 January 1981 married Mr Jahir Tamil, a student, who apparently was unable to support her in Pakistan. Two months later she returned to England. She was pregnant at the time, not entirely familiar with the English language, and was unable to find employment. Through family connections she was able to obtain free accommodation, and maintained herself through the assistance of others. Her husband made no contribution towards her maintenance. Supplementary allowance was paid temporarily to the claimant from 10 April 1981 to 28 May 1981 while the facts of her case were properly considered.

3. After the matter had been fully investigated the supplementary benefit officer decided that supplementary allowance should not continue in payment because, since the claimant was not estranged from her husband, but merely temporarily separated, she was not entitled to supplementary allowance in her own right. The benefit officer also decided that there was no need for a payment on the basis of urgent needs because she was being supported in this country by relatives.

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4. The claimant appealed against this decision to the supplementary benefit appeal tribunal, but without success. Thereupon she lodged an application for leave to appeal to the Commissioner on the basis that the decision of the tribunal was erroneous in point of law, and she asked for an oral hearing, a request to which I acceded. At that hearing she was represented by Miss P Wood, a solicitor from the Stockwell and Clapham Law Centre, and the Secretary of State by Mr P Milledge of the Solicitor's Office of the Department of Health and Social Security. I am indebted to them both for their helpful submissions.

5. Miss Wood on behalf of the claimant and Mr P Milledge on behalf of the Secretary of State agreed that, if I was prepared to grant leave, then I should go on to consider the appeal itself on the basis of their submissions. In the event, having heard Miss Wood, I decided to grant leave, and thereafter proceeded to hear the appeal itself.

6. Miss Wood referred me to regulation 2(2) and (3)(c) of the Supplementary Benefit (Aggregation) Regulations 1980 (S.I. 1980 No 982). This regulation was subsequently amended by regulation 2(3)(b) of the Supplementary Benefit (Miscellaneous Amendments) Regulations 1981 (S.I. 1981 No 815), but this amendment did not come into effect until 27 July 1981, i.e. after the hearing by the tribunal, and in consequence is irrelevant to my deliberations. Both sets of regulations have subsequently been consolidated by the Supplementary Benefit (Aggregation) Regulations 1981 (S.I. 1981 No 1524). Regulation 2(2) and (3)(c) of the unamended Regulations read as follows:

"2.-(2) Subject to paragraph (3), two persons who are married to each other shall not be treated as having ceased to be members of the same household by reason of any temporary absence the one from the other.

(3) Where two persons are married to each other and, before the occurrence of the circumstances to which this paragraph applies, were members of the same household, and one of them -

.....

(c) is absent from Great Britain while his partner remains in Great Britain, he shall be treated as not being a member of the same household as his partner for any period of that absence which exceeds four weeks, except that this subparagraph shall not apply where the absent partner is a claimant to whom regulations pursuant to section 1(1)A of the Act (entitlement to benefit to continue during prescribed periods of temporary absence from Great Britain) do not apply."

Miss Wood argued that the effect of these provisions was that the claimant could not be regarded as a member of the same household as her husband and was therefore entitled to supplementary benefit in her own right without any question of aggregation of requirements and resources.

7. Miss Wood contended that, as the substantive provisions of paragraph (2) were subject to paragraph (3), any adverse consequences otherwise flowing from paragraph (2) could be circumvented if the claimant could satisfy the provisions of paragraph (3)(c). In Miss Wood's submission, the claimant did satisfy these provisions. Miss Wood realised that the crucial words were "is absent from Great Britain while his partner remains in Great Britain". She contended that the absence need not necessarily presuppose a prior residence in Great Britain. In support of this contention she cited various Commissioners' decisions on the meaning of "is absent from Great Britain", albeit in a different context, to the effect that "the word absent means and is intended to mean not present and is not intended to refer only to persons who have been in this country and have left for some other country" (R(U) 16/62 paragraph 6). I see the force of this, but in the present context the words "is absent" cannot be interpreted in isolation from the further words "while his partner remains in Great Britain", of which the meaning of "remains" is crucial. Notwithstanding Miss Wood's attempt to elicit from the dictionary a suitable meaning for "remains" taken in isolation, I have no doubt that the phrase "is absent from Great Britain while his partner remains in Great Britain" must be construed as a whole, each word influencing the meaning of every other word. In my judgment, paragraph (3)(c) contemplates a situation where a couple have been living together in Great Britain, but one of them has left this country, whilst the other has continued to stay here. The word "remains" contemplates that the person concerned was in Great Britain at the time that the other's absence from Great Britain commenced.

8. Accordingly, applying this interpretation to the facts of the present case, as the claimant's husband never was in this country, on no footing can she rely on paragraph (3)(c). In any event, irrespective of the location of the claimant's husband, at the time immediately before the separation the claimant was not herself in Great Britain, so that she could not be said to be remaining there after the claimant's absence. Accordingly, I do not think that the claimant can bring herself within paragraph (3)(c). For completeness I should add that I agree with Miss Wood's submission that paragraph (3)(c) is not excluded from applying to the claimant merely by the terms of the exception there set out. On no footing is the absent partner a claimant.

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9. Miss Wood further contended that, irrespective of paragraph (3), the claimant was not in any event prejudiced by paragraph (2). That provision preserved aggregation only where the separation was temporary. In the present case, as she argued, the absence of the claimant's husband in Pakistan was otherwise than temporary. She submitted that, as the claimant's husband did not hold a British Passport, he would never, under the present immigration rules, be allowed into this country, and accordingly his absence in Pakistan could not be in any meaningful sense a temporary absence. At this point it is perhaps appropriate that I stress that my function is to determine whether or not the appeal tribunal were erroneous in point of law. They found as a fact as follows:

"Her husband Mr Tamil is in Pakistan, and will join her here later. [The claimant] is temporarily separated from her husband, who is a student".

Miss Wood argued that no tribunal properly instructed as to the law and acting judicially could possibly have reached this conclusion. According to her the tribunal ought to have found as a fact that the claimant and her husband were to be regarded as permanently separated.

10. Now, in considering their decision the tribunal had to view the position against the background that the claimant had only recently married, that she had in no way quarrelled with her husband, that she was pregnant, and that there was nothing to indicate that it was the desire of either party to terminate the marriage. As it is the custom of most newly married couples to wish to live together, it would not be surprising if the tribunal were slow to come to the conclusion that the present separation was to be looked upon as being otherwise than temporary. There would be nothing surprising in the tribunal's concluding that, if for some reason the husband was unable to come to England, in due course the claimant herself would go back to Pakistan. In this event the present separation would only be of a temporary nature. However, it would appear from the findings of fact that the tribunal did not go as far as this, but were content to take the view that the claimant's husband would himself join the claimant in due course in this country. Miss Wood argued that they should not have reached this conclusion.

11. However, the tribunal can only consider the matter in the light of the evidence put before them. Miss Wood pointed to a letter sent to the tribunal by the claimant which, as far as the material passage is concerned, reads as follows:

"My husband cannot join me in this country due to restrictions imposed upon bringing husband into this country".

According to Miss Wood this should have alerted the tribunal to the need to investigate the whole position in detail. Had they done

so, they would have found that the immigration rules prevented the claimant's husband ever coming here. However, the claimant's bare statement was undermined by the ensuing sentence in her letter which reads as follows:

"I must stress here that does not mean we are separated, but in fact it means we are living apart and I cannot give you any length of time when he will be able to join me".

The effect of this further sentence is, in my judgment, to suggest that she thought that the restriction on his entry would not be permanent.

12. But, in any event, the tribunal were not compelled to accept the claimant's bare statement. There is no proper explanation as to why the claimant's husband was not to be allowed into the country. No evidence was apparently put before the tribunal as to his status, ie whether, for example, he had British Citizenship or not. I think that in the absence of more compelling evidence, the tribunal were not obliged by the terms of the claimant's letter to assume that the separation must be permanent, or at any rate something more than temporary. They had to view the position against the background of the short duration of the marriage and the apparent desire of the parties to continue with it. It may be that, in the event, the tribunal reached the wrong conclusion, but I do not think that I can say that it was an unreasonable one. I am not satisfied that they were acting perversely, and accordingly it would be improper of me to interfere. It follows from what has been said that, in my judgment, the claimant cannot rely on regulation 2 of the Aggregation Regulations so as to be treated as an independent person for the purposes of claiming supplementary benefit.

13. Miss Wood went on to complain that the tribunal had failed to give any consideration to the claim for an urgent needs payment under the Supplementary Benefit (Urgent Cases) Regulations 1980 (S.I. 1980 No. 1642) (in particular regulation 22) or, at any rate, had failed to give reasons for their not regarding the claimant as entitled to payment under those regulations. I think it may well be the case that the tribunal did consider the matter. The benefit officer had taken the view that a payment on this basis was inappropriate because the claimant was being supported in this country by relatives, and it may be that the tribunal came to the same conclusion themselves. However, whether or not they did consider the matter, the fact is that they did not record their reasons for refusing an award under these regulations. Under regulation 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 (S.I. 1980 No. 1605) the tribunal are required to include in every record of their determination a statement of the reasons for their determination and of their findings on material questions of fact. I do not know, of course, whether the matter was ever argued before the tribunal, but in any event they should have dealt with this particular issue. Accordingly, to this extent their decision is erroneous in

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point of law and I am compelled to set it aside, and direct that the matter be re-heard by a differently constituted tribunal.

14. However, it does not follow from this that there must, or ought to be, a complete re-hearing. In the words of paragraph 17 of Unreported Decision C.S.B. 8/81 (to be reported as R(SB) 6/81):

"Does this mean, then, that in every case in which the Commissioner finds that there has been an error of law he must refer the case for a complete re-hearing by the fresh tribunal? I think not. No express fetter is put upon the Commissioner's power to give directions to the fresh tribunal. From this it must follow that, in appropriate cases, the Commissioner is empowered to direct, *inter alia*, that:

- (a) the fresh tribunal determine the case upon the basis of the facts as found by the original tribunal; or
- (b) a fresh tribunal re-hear and determine only part of the case and determine the remainder in accordance with the relevant part of the decision of the original tribunal."

In the present case it is appropriate that I should direct in accordance with (b) above.

15. Accordingly, I direct that the appeal tribunal hear or re-hear and determine de novo the claimant's claim for an urgent needs payment under the Supplementary Benefit (Urgent Cases) Regulations 1980 but that, subject to their so doing, they disallow the claimant's appeal.

Signed: D G Rice
Commissioner

Date: 22 March 1982

Commissioner's File: C.S.B. 493/1981
C SBO File: 648/81