

JGM/LS

Commissioner's File: CSB/510/1985

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Region: Midlands

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Potteries

Case No: 01/10

1. My decision is that the decision of the social security appeal tribunal dated 12 February 1985 is erroneous in point of law and it is set aside. The matter must be referred to another tribunal.

2. The claimant is a man aged over 60 who has lived for many years abroad in Greece and who came to this country with his wife, who is Greek, on 30 July 1984. He made a claim for a supplementary allowance on which the adjudication officer gave a decision that he was not entitled to an allowance from 6 August 1984. The reason for the decision was that the claimant's wife possessed capital resources said to be in excess of £3,000. The resources in question comprised a sum of £3,125.62 in a joint bank account in the name of herself and her son at or about the time of the adjudication officer's decision; and some property in Greece comprising shops and residential premises, which the claimant's wife values at £60,000. This property is said to be derived from the wife's father who occupies a flat in it. The rest of the property is let and yields an income said to be £350 per month.

3. In relation to the money in the bank account it was argued that the money is the property of the son; indeed I think that it was assumed that the son had in fact furnished all the money in the account. But both the claimant's wife and the son were permitted to draw on it.

4. As for the property in Greece various points have been made. There is evidence that money cannot be withdrawn from Greece without the permission of the Bank of Greece and it was at least suggested that this could be difficult to obtain. It was argued further that it constituted the assets of a property business and should be disregarded under regulation 6(1)(a)(v) of the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No 1527] (the Resources Regulations) relating to business assets. There was further a suggestion that the wife's father had retained the property in the premises, or some lesser right over them, eg the right to occupy the flat or the right to the income of the property.

5. The adjudication officer and the appeal tribunal rejected the claim (without going into the question of the benefit otherwise payable) both on the ground that the money in the bank account exceeded £3,000 (the maximum allowed under regulation 7 of the Resources Regulations) and on the ground that the value of the Greek property, should not, he submitted, by now be disregarded under regulation 6(1)(a)(v) even if it constituted business assets. On appeal the tribunal decided the case against the claimant on the basis of the money in the bank account. They considered the Greek property but their expressed reasoning is inconclusive except that they plainly considered that it constituted business assets. The claimant now appeals to the Commissioner. He made a further claim in September 1984 which was likewise refused. And an appeal from it has been adjourned pending this decision. I suggest that it would be appropriate for the appeal to heard together with this case when it is remitted.

6. The claim was for a continuing benefit, which in strictness has to be looked at from week to week, even for a relatively limited period, and where the excess is (as in the case of the bank money) so narrowly over £3,000 there is a real need to look at the matter from week to week before giving a decision which operates as a refusal down to the date of the decision. In this by itself there was an error of law.

7. But the error went deeper than this. The money was in a joint account, and although the claimant's wife had as the tribunal found the power to draw on it without restrictions, this did not by itself make the money her money. The money remained the property of the person or persons to whom it belonged while in the account at least until she actually drew on the account and took the money for herself. I accept the submission made on behalf of the adjudication officer that in the absence of any evidence to suggest otherwise the beneficial interest in property will be taken to follow the legal title to it. In this case the legal title was in two names jointly. Thus the beneficial title was in the absence of any other relevant evidence as to one half in each of them. This by itself would have brought the figure of the wife's interest well below £3,000. But there was actually evidence that the money was derived from the son; and this evidence, if accepted, would have led in the absence of other evidence to a presumption of a resulting trust of the whole in favour of the son (see Halsbury's Laws of England (4th Edition) Vol. 48 paragraph 605).

8. Money paid into a joint account at a bank does however have certain features that distinguish it from other property in joint names, especially where as between the account holders and the bank either can sign cheques and thus give the bank a good receipt for the money. This is often done for pure convenience without any intention of affecting the title to the money for the time being in the account (see Marshall v Crutwell ((1875) LR 20 Eq. 328). Clearly the true owner of the money in the account or any fraction of it can as between himself and the other account holder revoke the right to draw on it; and money actually drawn from it may or may not become the property of the drawer as soon as it is drawn. The evidence in the present case is that it was to be used as living expenses. But it would hardly have been in accordance with the spirit of the arrangement made for the claimant's wife to have withdrawn the whole forthwith and paid it into a fresh account opened in her own sole name; and it is at least questionable whether she would have given herself a good title to the money had she done so. Supposing however that she would, the money

would not even then be one of her resources before she did so; but it would before she did so be a resource that would become available to her on application being made within the meaning of regulation 4(2)(a) of the Resources Regulations which might if in the opinion of the adjudication officer (or on an appeal the appeal tribunal; see Decision R(SB)9/82 at paragraph 9) it was reasonable in the circumstances to do so be treated as an actual resource. If the new tribunal (should they conclude that the money was not or was not wholly an actual resource of the assessment unit) are of opinion that it would have been a breach of the spirit of the arrangement for the claimant's wife to use the fund otherwise than to defray current expenses they can in my judgment properly exercise the discretion under regulation 4(2) to decline to treat the fund as an actual resource. As is indicated in paragraph 13 below different considerations may apply to the bank account under the Supplementary Benefit (Urgent Cases) Regulations 1981 [SI 1981 No 1529] (the Urgent Cases Regulations).

9. It is almost certain that when this matter comes up before the new tribunal that tribunal will have to look further into the position of the Greek property. The beneficial ownership of this property is a matter of Greek law. But if the title is vested in the claimant's wife and Greek law is not shown to be different from English law in this respect, beneficial ownership will be assumed to follow the strict title. Moreover evidence that the property came from the wife's father will not raise any inference that the father retained the beneficial ownership as he will be assumed in the absence of evidence to the contrary to have intended to benefit his own daughter. It could however be proved by evidence (under English law at least) that at the time of the transaction the father reserved some interest to himself or his wife (see Halsbury's law of England (4th Ed) Vol 16 paragraph 1309); more improbably the claimant's wife may subsequently have conferred some interest on her father and mother. But these matters would have to be proved by evidence. If it were established that the beneficial interest in the Greek property remained with the wife's father the property would be ignored as not belonging to the assessment unit. If it should emerge that the father had reserved a life interest to himself or to himself and his wife, the claimant's wife's interest would be reversionary and, as such, would be disregarded under regulation 6(1)(a)(vi). If the father has retained for himself and his wife some lesser rights this may have an effect on the value of the property, a question to which I shall return.

10. Assuming that it is found that the claimant's wife had a beneficial interest in the Greek property, the next question is whether it can be disregarded under regulation 6(1)(a)(v) on the basis that it constitutes the assets of a business owned in whole or in part by a member of the assessment unit. The last tribunal held that it was an asset of a business so owned; and there clearly was evidence on which they could so find (cf Commissioner of Income Tax v Hanover Agencies [1967] 1 AC 682. And it may well be that the new tribunal will reach the same conclusion. If they do the property will fall to be disregarded as a resource for such period as in the opinion of the benefit officer (now the adjudication officer) or on appeal of the tribunal it is reasonable to do so.

It is clear that the opinion should be formed by the balancing of (1) the consideration that it is undesirable to force a person into selling his means of livelihood even if that is not enough to bring his resources above his requirements, and (2) the consideration that supplementary benefit is not intended for those who have substantial assets locked up in a business that does not yield sufficient profits to bring his resources above his requirements. I must leave that to the new tribunal. They should however indicate in their decision that they have given consideration to the question and the period (if any) for which they exercise the discretion in favour of the claimant.

11. If at the end of this the tribunal reach the conclusion that there is an asset that is not to be disregarded, they will come on to the question of valuation. This is affected by the Greek laws restricting the right to remove capital from Greece. There is nothing in the regulations to say that capital resources in a foreign country that prohibits or restricts the export of capital are to be disregarded. And there is nothing limiting capital resources to these that are available. But there is no provision that a person lawfully in this country can be required to go to a territory where he can enjoy his capital resources instead of claiming supplementary benefit here. In my judgment the asset has to be valued under regulation 5 of the Resources Regulations at its current market value; and this means its current market value in this country. If property is situated in a country that places no restriction on the export of capital then its market value in this country will not be different from its market value in the country where it is situated. But if there are restrictions which are not being relaxed or as to which the extent of relaxation is uncertain, the value is the price that someone would pay in this country for the right to have the property without the buyer's necessarily being able to take the proceeds of sale (should he wish to sell it) out of Greece. My conclusion on this point differs slightly from that reached by the Commissioner in Decision CSB 1248/84 (not reported).

12. If the tribunal reaches a conclusion that for any period the claimant is not by virtue of regulation 7 of the Resources Regulations precluded from being awarded a supplementary allowance they will have to go on to consider whether the income resources of the assessment unit fall short of their requirements. For this purpose they will have to take into account the net income derived from the property, if and so far as they find that it belongs to the claimant's wife. There was at the date of claim nothing in the regulations that confines that which is to be taken into account to "available" income resources. Income resources that cannot be remitted here remain income resources of the assessment unit (cf Decision R(P) 1/70). But a new sub-paragraph (10(3)(g)) was introduced in the Resources Regulations with effect from 5 August 1985 by SI 1985 No 1246 which provides for the disregard of :

"any income which falls to be treated as earnings under the preceding paragraphs, and which is payable in any country outside the United Kingdom, for such period during which those earnings may not be remitted to the United Kingdom by virtue of any legislative or administrative prohibition."

This provision from the date that it came into force would enable the

earnings from the Greek property to be disregarded if they can be treated as earnings of an employment. The new tribunal may reach the same conclusions as the old on the question whether the Greek property constitutes business assets. But it does not necessarily follow from such a conclusion that the income arising from such business assets constitutes earnings of an employment. But as there is no comparable exemption in relation to other non-remittable income, the tribunal may have to decide whether the income from the property constitutes earnings of an employment. This is a question of fact. But in reaching a conclusion on it (if they have to) the new tribunal may be assisted by Decision CP 5/75 (not reported) where the question in issue was whether the earnings of a business owned by a claimant constituted his earnings for the purpose of what is now represented by section 30(1) of the Social Security Act 1975. The question turned on the amount of work that the person concerned put into the management of the business.

13. If for any period no or no sufficient supplementary allowance is payable without reference to the Urgent Cases Regulations, consideration will have to be given in the last resort to the possibility that the payment of a supplementary allowance could perhaps be made out under regulation 24(b) of these Regulations. In connection with that regulation the availability of resources becomes material (see regulation 3 of those regulations), under which, I think, the claimant's wife's access to the money in the Bank will be relevant.

14. The claimant's appeal is allowed.

(Signed): J G Monroe
Commissioner

Date: 18 December 1985