



Commissioner's File: SB/512/1985

C A O File: AO 2587/85

Region: London South

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Rhoda Kathleen McCorquodale (Mrs)

Social Security Appeal Tribunal: Wimbledon

Case No: 19/01/06

[ORAL HEARING]

1. This is a claimant's appeal, brought by my leave, against a decision of the social security appeal tribunal dated 7 January 1985 which confirmed two decisions of the adjudication officer issued on, respectively, 6 February 1984 and 16 February 1984. Let me say at once that the claimant lodged only one notice of appeal to the appeal tribunal. But, since that notice was signed on 17 February 1984, it is legitimate to treat it as applying to both of the aforesaid decisions of the adjudication officer. Certainly that is how the adjudication officer treated it - for he made separate submissions to the appeal tribunal. The relevant form AT3 does not expressly indicate that the appeal tribunal considered itself to be seised of two - as opposed to one - appeals. But its findings and reasons cover the substance of both of the aforesaid adjudication officer's decisions. I approach this case, accordingly, upon the basis that both of the aforesaid decisions of the adjudication officer were before and adjudicated upon by the appeal tribunal.
2. I held an oral hearing of the appeal. The claimant did not attend but she was most ably represented by Mrs E Lakhani of the Child Poverty Action Group. The adjudication officer was represented by Mr E O F Stocker to whom I am also much indebted for the lucidity of his submissions.
3. At the material time the claimant was divorced and living with her dependent son Julien who was born in July 1969. She had been in receipt of supplementary benefit since 19 September 1983. On 7 April 1982 a maintenance order, discharging an earlier order, had been made in the County Court. That later order provided for -
 - (a) periodical payments to the claimant from her erstwhile husband in the sum of £78 per month, payable monthly, from the date of the order until such time as those payments totalled £7,000; and
 - (b) periodical payments to Julien in the sum of £78 per month, payable monthly until Julien should reach the age of 17 or until further order.
4. The exact manner in and extent to which that order was thereafter complied with seems to be a matter of dispute between the claimant and her erstwhile husband - and

certainly does not clearly appear from the papers. In view of the manner in which I have decided that the relevant legislation falls to be applied to this case, that is of less importance than it might otherwise have been. However, in order to render the respective arguments of the parties' representatives fully intelligible, I summarise the situation as recounted by, on the one hand, the claimant's erstwhile husband and, on the other, the claimant herself.

5. On 28 October 1983 the erstwhile husband wrote to the Department of Health and Social Security a letter which contained the following paragraph:

"My ex-wife,....., agreed verbally last year that I should continue to pay our son's school fees instead of the maintenance payments until such a time as I was able to pay maintenance in addition. I have so far not obtained this agreement in writing from [the claimant]."

But on 26 January 1984 the erstwhile husband wrote to the Department:

"I have to inform you that I am paying maintenance as ordered by the Court for my son, [Julien], of £78.00 per calendar month."

And it is common ground that the first such payment was received by the claimant on 20 January 1984. (It appears that at the date of both of those letters the erstwhile husband was living and working in Italy.)

6. For her part, the claimant told the appeal tribunal that what she had in fact orally agreed with her erstwhile husband was that she would forgo payment of the £78 in respect of Julien until the beginning of September 1982. The payment which she had received on 20 January 1984 was the first payment which her erstwhile husband had made pursuant to that part of the order of 7 April 1982 which had referred to Julien. In her view, accordingly, maintenance in respect of Julien was at least 16 months in arrears; indeed, since her erstwhile husband had not paid in full the school fees due in September 1982, it could be argued that he was 21 months in arrears. She regarded the £78 which she received in January 1984 as representing the first instalment - paid exceedingly late - of the payments which the court had ordered in April 1982.

7. It is against that factual background that the law falls to be applied. By his decision of 6 February 1984 the adjudication officer decided that the maintenance payments of £78 per calendar month were "to be taken into account in full against entitlement to supplementary benefit at the rate of £18 a week from the payday Monday in week commencing 23.1.84". By his decision of 16 February 1984 he decided that the sum of £36 had been overpaid and was recoverable from the claimant. Obviously, of course, the second decision hinges upon the first. There is, of course, no suggestion that the claimant has at any time acted with less than full integrity. It appears to be accepted, however, that if the first of the adjudication officer's decisions is correct, she has no effective answer to the second.

8. We are, of course, in the realm of "Payments made by or derived from liable relatives". The oft-amended regulation 13 (of which those words are the title) of the Supplementary Benefit (Resources) Regulations 1981 [SI - 1981 - No 1527] has - by reason of its tortuous complexity - received its full share of obloquy from the Commissioner. But most of the regulation is devoted to the manner in which "lump sum payments" are to be treated - and, for present purposes, I need quote only paragraph (1):

"13. - (1) Any periodical payment, including any arrears paid periodically, and, subject to paragraph 4(a), any lump sum payment, including any arrears paid by way of a lump sum, made, whether in pursuance of a court order or otherwise, to a member of the assessment unit, by or derived from a liable relative shall be taken into account in full as income."

There is no dispute that in the case before me the claimant's erstwhile husband is "a liable relative". There is no dispute that the monthly sum of £78 is to be regarded as a "periodical payment". But beyond that there is controversy.

9. Mrs Lakhani puts the claimant's case this way. Granted that regulation 13 of the Resources Regulations has the effect that the maintenance payments in respect of Julien fall to be "taken into account in full as income", the question then arises as to the particular week or weeks to which, for supplementary benefit purposes, that income is to be attributed. The answer - she submits - is to be found in regulation 9(2)(b) of the Resources Regulations:

"(2) Earnings and other income shall be calculated on a weekly basis and, except in so far as regulations 3(2)(d)(i) [which has no bearing on this case] and 13 provide otherwise, payments shall be attributable as follows:-

.....

- (b) a payment of income shall be treated as paid on -
 - (i) in the case of a payment which falls to be taken into account but which is payable before the first benefit week pursuant to the claim, the date on which it is payable,
 - (ii) in any other case, the first day of the benefit week in which it is payable or the earliest succeeding benefit week in which, having regard to the the method by which pension or allowance is payable in the particular case, it would be practicable to take it into account...." (My underlining)

10. Applying that to this case - submits Mrs Lakhani - results in the total exclusion of the sum of £78 which was paid on 20 January 1984 from the calculation of any supplementary benefit to which the claimant was entitled at or about that time. That sum represented one month's maintenance for Julien which, pursuant to the aforesaid court order, was due in April 1982 or, at the latest, October 1982. It was, accordingly, in one or other of those months that it was "payable". It is both a travesty of justice and a flagrant breach of the regulations - urges Mrs Lakhani - to treat the long-overdue payment of £78 as affecting the resources of the claimant in January 1984.

11. Pausing there, it is to be observed that if Mrs Lakhani's submission is well founded, the resulting situation is surprising indeed. Unless and until the claimant's erstwhile husband clears off the alleged arrears, every monthly payment of £78 will fall for attribution to a week lying many months before such payment - and will, consequently, have no effect upon the claimant's then current entitlement to supplementary benefit. But - submits Mrs Lakhani - any absurdity is more apparent than real. Section 12(1A) of the Supplementary Benefits Act 1976 provides as follows:

" (1A) Where -

- (a) a payment by way of prescribed income is made after the date which is the prescribed date in relation to the payment; and
- (b) an adjudication officer determines that an amount which has been paid by way of supplementary benefit would not have been paid if the said payment had been made on the date aforesaid,

the Secretary of State shall be entitled to recover that amount from the person to whom it was made."

So, says Mrs Lakhani, it will all work out in the end. The time would come when - having worked off the arrears prior thereto - the erstwhile husband would pay a sum of £78 which would fall to be attributed to January 1984. The adjudication officer could then invoke section 12(1A) - with the consequence that the Secretary of State would be entitled to recover from the claimant the resulting overpayment; and so on week by week thereafter, until liability to make the maintenance payments ceased. I am bound to observe that if that is an abatement of the initial absurdity, the degree of abatement is somewhat marginal.

12. Of course, if Parliament has clearly legislated for an anomaly - or, even, an absurdity - it is not for the courts or any other judicial authority to come to the rescue (see, for example, the House of Lords case of Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231). But is that really what has happened here?

13. Towards the end of decision R(SB)32/85 the Commissioner said this:

"Whilst I am satisfied that I should for the assistance of the tribunal rehearing the appeal arrive at and express the conclusions I have above expressed upon the proper construction of regulation 13 of the Resources Regulations, I would nevertheless commend to the Department of Health and Social Security that the present text of regulation 13 be re-appraised with a view to legislative amendment directed to greater clarity and a more readily assimilable structuring and text." (Paragraph 19)

That appears to have fallen on deaf ears. Obscurity remains. But, after much consideration, I have come to the conclusion that the absurdity to which I have adverted in paragraph 11 above is not forced upon me by the combined reading of regulation 9(2)(b)(ii) and regulation 13 of the Resources Regulations.

14. As was said by the Commissioner in R(SB)32/85:

"One may helpfully approach this issue equipped with a recognition that supplementary pension and allowance are in concept weekly benefits and may conceptually be awarded a week at a time (although administratively and in practice normally awarded upon an open-ended continuing basis subject to control by subsequent review)." (Paragraph 14)

So, with that in mind, I rehearse the immediately relevant words of regulation 13(1):

"(1) Any periodical payment, including any arrears paid periodically.... made, whether in pursuance of a court order or otherwise, to a member of the assessment unit, by or derived from a liable relative shall be taken into account in full as income."

So "arrears paid periodically" are in direct contemplation. Is it really to be understood that the intention of Parliament was that such arrears should be brought into contemplation solely so that - in due course - section 12(1A) of the 1976 Act should bite upon them? For if Mrs Lakhani is right, that is what it comes to. I have reached the conclusion that Parliament's intention went beyond that narrow and highly inconvenient effect. As I read regulation 13 as a whole, I construe its intention to be that "Payments made by or derived from reliable relatives" should have an immediate effect upon a claimant's entitlement to supplementary benefit - notwithstanding that, in the case of lump sums, that immediate effect may be continued and prolonged well into the future. To put it another way, I regard the provisions of regulation 13 as being to a substantial extent a self-contained code for the treatment and application of payments made by or derived from liable relatives. The consequence of that is - in my view - that any periodical payment from a liable relative falls to be treated as income paid in the week in which it is received and projected forward for a period equal to the length of the period represented by the payment.

15. Mr Stocker submitted that an alternative route towards that goal would be to apply regulation 9(2)(b)(ii) (see paragraph 9 above) and to say that, in the case of periodical

payments by liable relatives, the only criterion by which "payable" can properly be assessed is the date of payment itself. That may possibly be so. But I regard it as a casuistic - even cynical - evasion of grasping the nettle of saying that regulation 13 operates independently of the scope of regulation 9(2)(b)(ii).

16. I am aware that the conclusion to which I have come is at variance with that which the Commissioner reached in decision on Commissioner's file CSB/342/1982. Although that decision treated of the somewhat differently worded 1980 version of what is now regulation 9 in the 1981 version of the Resources Regulations, I cannot pretend that the difference in wording is material to present purposes. Not to mince words, I have formed a different view of the relevant law from that taken in CSB/342/1982.

17. In this case the appeal tribunal did its best to look at the history of the manner in which the court order of 7 April 1982 was implemented. It then came to the conclusion that the payment of £78 received by the claimant on 20 January 1984 was intended to be - and represented - a payment in respect of the calendar month commencing on 20 January 1984. That was, in essence, a decision of fact rather than of law - and to it the claimant takes the gravest exception. The appeal tribunal - she urges - paid no heed at all to her account of the scope and outworking of the oral agreement for the suspension of maintenance payments in respect of Julien. By January 1984 - she says - those payments were unquestionably in arrears and it was her right to appropriate subsequent payments to the discharge of those arrears. All that, of course, would plunge the adjudicating authorities into the murky waters of appropriation of payments by debtors and creditors respectively (the field of Leeson v Leeson [1936] 2 KB 156 and similar cases). I find it difficult to imagine that Parliament envisaged that that complex corner of the law should be imported into the treatment of maintenance payments in the calculation of supplementary benefit. If nothing else, the conclusion to which I have come obviates that. It also obviates the anomaly of affording fundamentally different treatment to, on the one hand, "arrears paid by way of a lump sum" and, on the other hand, "arrears paid periodically".

18. It is, perhaps, not without interest that as long ago as 1968, albeit in a case concerning increase of sickness benefit for dependent children, the Commissioner said:

"While no general rule can be formulated for the allocation of payments made under a Magistrates' Court Order, there are in my view reasons why the statutory authorities should not too readily allocate a payment to arrears."

He then sets out three such reasons. (Paragraph 21 of unreported decision CS/2/68.)

19. As I have indicated above, there is no serious challenge to the claimant's liability to repay the sum of £36 in the event that the main issue should go against her. The appeal tribunal decided the main issue against her and I have reached the same conclusion, albeit by a different route in law. It follows, accordingly, that the claimant's appeal is disallowed.

(Signed) J. Mitchell
Commissioner

Date: 5th September 1986