

from and including 14 May 1984. In view of that favourable decision the period covered by the present appeal terminates on 13 May 1984.

10. In substance the appeal of the adjudication officer is upheld.

(Signed) J. G. Mitchell
Commissioner

R(F) 4/85

25.5.82

CHILD BENEFIT

One parent benefit—"permanent absence" under regulation 11 of the Child Benefit (General) Regulations.

The claimant remarried on 29 October 1980 whilst in receipt of an increase of child benefit (known as one parent benefit). Her husband was serving a term of imprisonment when the marriage took place and was not due to be released until January 1982 at the earliest.

Held by the Court of Appeal (affirming the decision of the Commissioner that the award of one parent benefit should be revised on review with effect from 4 November 1980) that:

The claimant fell to be treated as residing with her spouse under regulation 11 of the Child Benefit (General) Regulations 1977.

The Court considered that the regulation in prescribing the circumstances in which persons are to be treated as "residing together" prescribed also the circumstances in which one of them is to be treated as "residing with" the other.

The decision of the Commissioner in Northern Ireland, R 2/78 (I.V.B.), distinguished.

1. My decision is:—

- (a) that the decision awarding to the claimant the increase of child benefit generally called one parent benefit is to be reviewed on the ground that there has been a relevant change of circumstances (i.e. the marriage of the claimant) since the decision was given;
- (b) that on review that decision is to be revised so as to provide that from and including 4 November 1980 such increase was not payable.

2. The claimant as a single parent was awarded one parent benefit in respect of her child Ceri. This benefit is payable to a person (subject to exceptions) in respect of the eldest or only child in respect of whom he or she is entitled to child benefit if he or she has no spouse or is not residing with a spouse.

3. The circumstances of this case are unusual. The claimant remarried on 29 October 1980, her husband was then in prison, the earliest possible date for release being January 1982. It seems that the authorities made it possible for the marriage to be celebrated while her husband was still in prison.

4. In these circumstances one might think that the claimant was not while her husband remained in prison, residing with her spouse. The matter is however affected by regulation 11 of the Child Benefit (General) Regulations 1977 which define the circumstances in which a husband and wife are to be regarded as residing together. In particular this regulation provides that two spouses are to be regarded as residing together if their absence from one another is not likely to be permanent. It was at the time probable that the claimant and her husband would come together after the claimant's husband came out of prison and this in fact happened when he was released on 4 January 1982. On the other hand they had never previously resided together. The claimant met her husband during his sentence when she was his prison visitor.

5. I appreciate that when there is a question whether persons are residing together one ignores temporary periods when they are physically absent from one another. But (in the absence of special provisions governing the matter) one would not naturally regard people as residing together who had never resided together, however soon one might expect them to come together. The regulation with which I am concerned specifically states that two persons are to be regarded as residing together if their absence from one another is not likely to be permanent. It seems to me to be undeniable that at the time with which this appeal is concerned the absence of the claimant and her husband from one another was not likely to be permanent, although they had never resided together at all.

6. In considering this appeal I came however upon a decision of the Commissioner in Northern Ireland, R 2/78(I.V.B.), where in somewhat similar circumstances a claimant was held to be entitled to an increase of invalidity benefit for her son when under the relevant Act and in the other relevant circumstances of the case she was entitled to the increase only if she was not residing with her husband. As in this case, her husband was in prison. She had married him while he was in prison and they had never resided together at any time. As here, there was a regulation about persons residing together. It provided that two persons should not be treated as having ceased to reside together by reason of any temporary absence the one from the other. Of this the Commissioner said: "At no time has she resided with her husband, and accordingly there is no question of her having ceased to reside with him." In other words the regulation did not bite in her case. The decision was in accordance with the usual view that one cannot be regarded as having ceased to do something which one has never begun doing (cf *Salton v New Beeston Cycle Co* [1899] 1 Ch 775). There is nothing in the regulations with which I am concerned about ceasing to reside together and I feel bound to distinguish Decision R 2/78(I.V.B.) and to apply the regulation. I dismiss the claimant's appeal.

(Signed) J. G. Monroe
Commissioner