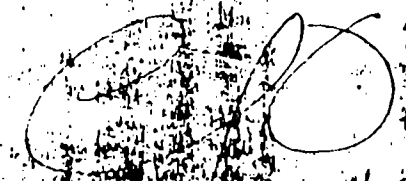


Commissioner  
trans forms reg 14  
transitional. ~~XXXX~~  
No erosion of  
T.A. on coming  
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Commissioner's File: CS15/30/89

SOCIAL SECURITY ACTS 1975 TO 1988

APPEAL TO THE COMMISSIONER FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: . . . . .

Social Security Appeal Tribunal: Glasgow East

Case No: 554 09952

[LOCAL HEARING]

1. I find no error of law in the decision of the Glasgow East Social Security Appeal Tribunal dated 20 March 1989 such as to warrant my interference therewith. The adjudication officer's appeal against that decision is therefore dismissed.

2. This case came before me by way of an oral hearing at which the adjudication officer was represented by Mr Nissem Buff, Solicitor, of the Office of the Solicitor to the Departments of Health and Social Security. The claimant was represented by Miss Alison Gillies, an advice worker with the Haghill Initiative, Glasgow.

3. The case raises a pure question of law, in the form of the interpretation of the word "increase" as it occurs in regulation 14(1)(a) of the Income Support (Transitional) Regulations 1987. The facts were never in dispute and so it is not surprising that the tribunal simply adopted them as recorded by the adjudication officer in the document containing his submission to them - form AT2. It stated that the claimant, his wife and four dependent children lived

... in local authority accommodation. He has been in receipt of income support which included a transitional addition of £15.18 weekly since 11.4.88.

2. On 22.11.88 his wife ... had been in hospital for six weeks and his personal allowance for self and wife was reduced by £8.25 a week to £43.20. When his wife was discharged from hospital on 9.1.89 his applicable amount increased by £8.25 and his transitional addition was therefore reduced by £8.25 to £6.93.

4. It is convenient next to note some history. Prior to April 1988 the claimant must have been in receipt of supplementary benefit. When income support then replaced that benefit there was introduced a transitional allowance, the purpose of which, broadly, and I hope neutrally for the moment, was to avoid beneficiaries under the old scheme from the risk of a sudden drop in cash income because of the difference in the way in which the new benefit was to be administered. But, in the nature of being "transitional", that allowance was designed to be erodable.

5. It is necessary next to quote the particular provisions upon which this case depends. Section 89(1) of the Social Security Act 1986 gave power for the making of regulations to provide for such transitional and consequential matters as the Secretary of State considered necessary or expedient in preparation for or in connection with the coming into force of the new scheme of Income Support. The Income Support (Transitional) Regulations 1987 were so made and regulation 10(2) then provided, so far as this case is concerned, that the claimant was entitled to a transitional addition in the amount of the difference "between his total benefit income in his first and second benefit weeks." And regulation 2(1) defined those weeks as being, respectively, the benefit week beginning on a day during the period of 7 days commencing 4 April 1988 and the benefit week beginning on a day during the period of 7 days commencing 11 April 1988. In short the claimant's transitional addition was the difference between the last amount of supplementary benefit and the first amount of income support to which he was entitled. There was and is no provision for the transitional addition to be increased. But there was and is provision for its reduction and termination. This case concerns reduction and the relevant regulation is 15(1). It provides -

"The amount of a claimant's transitional addition shall be reduced -

- (a) If, in respect of any benefit week subsequent to his second benefit week, he is entitled to income support as well as a transitional addition and his applicable amount under Part IV of the General Regulations increases, by the amount of that increase ..."

6. The Income Support (General) Regulations 1987 provide the mechanisms by which entitlement to income support is determined and the bases upon which the amount thereof falls to be calculated. Part IV is headed "Applicable Amounts" and provides at regulation 17, so far as relevant, -

"... a claimant's weekly applicable amount shall be the aggregate of such of the following amounts as may apply in his case:

- (a) An amount in respect of himself or, if he is a member of a couple, an amount in respect of both of them, determined in accordance with paragraph 1(1), (2) and (3), as the case may be, of Schedule 2;

I do not trouble with the provisions in respect of the dependent children. The case turns upon that part dealing with the claimant's entitlement as a member of a couple. Turning then to Schedule 2 and the part thereof referred to, the appropriate amount is to be found in the second column. (There is no dispute about any of the figures in this case.)

7. But then General Regulation 21 provides for what are called "Special cases". It provides, again so far as relevant, this -

- "(1) ... in the case of a person to whom any paragraph in column (1) of Schedule 7 applies (applicable amounts in special cases,) the amount included in the claimant's weekly amount in respect of him shall be the amount prescribed in the corresponding paragraph of column (2) of that Schedule; ..."

In that Schedule, in column (1), occurs this -

"Patients

- 1. ... a person who has been a patient for more than six weeks and who is -

(c) a member of a couple -

- (1) where only one of the couple is a patient ..."

And then opposite, in column (2), occurs this -

- 1(c)(1) The amount applicable in respect of both of them under regulation 17(1) reduced by ..."

8. Having regard to these provisions, and also to section 104(1)(b) of the Social Security Act 1975, the adjudication officer, on the expiry of the claimant's wife's six weeks in hospital held there to have thereby occurred a "relevant change of circumstances" and reviewed the then running decision conferring benefit and made the appropriate reduction in terms of paragraph 1(c)(1) of column 2 in Schedule 7 of the General Regulations, as then in force. When the wife was discharged from hospital he regarded that as another

relevant change of circumstances, reviewed the then pending decision and revised it, this time restoring, to use a neutral verb, the reduction so that the amount of income support calculated in terms of Schedule 2 to the General Regulations returned to what it had been before her hospitalisation. But he then regarded that as an "increase" in terms of regulation 14(1) of the transitional regulations and reduced the addition by the same amount. The claimant appealed to the tribunal.

9. It is quite clear that before the tribunal what took place was a debate as to the proper meaning of the word "increase" in the circumstances. The unanimous decision of the tribunal was to overturn that of the adjudication officer so as to "restore the claimant's transitional addition". They gave the following reasons:-

"The adjudication officer had correctly decided the case under regulations 2 and 14 of the Transitional Regulations but in relation to regulation 14, paragraph 1(a), he had decided that the change in benefit from £43.20 to which it had been temporarily reduced while the claimant's wife was in hospital, to £51.45 which is the standard rate for a married couple, was an "increase". The tribunal consider that the word "increase" is not defined by the Regulations and therefore must have its normal meaning. In this case the amount of Income Support for a married couple was not increased but simply restored to the amount on his wife's return from hospital. The Tribunal were strengthened in this opinion by the fact that the transitional payment of £15.18 weekly which had been paid to the claimant from 11/4/88, had not altered to take account of the temporary reduction in income and therefore should not alter when that was restored."

10. Before me it was accepted that where, in the opening words, the adjudication officer is said to have "correctly" decided the case, that referred merely to a proper determination that regulations 2 and 14 were those which applied. That must be so. It was also not disputed that the last sentence of the reasoning was somewhat difficult to understand. For my part, I suspect that it was a somewhat involved way of referring to what was described by the claimant as one of the absurdities if the proper interpretation was other than that upon which the tribunal had had determined. But I agree that the wording is not clear. As already noted, there was no power to make any increase in the transitional addition. However it was not suggested, and I would have hesitated to have accepted, that these matters were of sufficient importance to obscure the essential reasoning or thereby to amount to an error in law in the decision.

11. The issue before the tribunal and, stripped of the various ways in which it was clothed in submission before me, was simply this: does "increase" in transitional regulation 14(1) mean any change upwards at all and for whatever reason in the amount to which a claimant, week by week, is entitled. And, of course, if "not" then to what does it relate?

12. The adjudication officer's position, reinforced by Mr Butt's submissions, was that it meant just what I have set out in the first part of the preceding paragraph - namely that any upward alteration in the amount of money to which a claimant was entitled by way of income support, week on week, for whatever reason was an "increase" for the purposes of Transitional Regulation 14(1). Miss Gillies responded to that by pointing to the generally understood purpose of the transitional provisions, but I feel I can take no more from the White Paper and the speeches by a Minister put before me, than that which I have set out above. That is that what I understand to have been the primary potential mischief against which these provisions were directed was the consequence upon individual claimants from suffering a sudden and to them unpredictable drop in the actual cash received week by week. The provisions had then to avoid a potential consequential mischief, namely the creation of two classes of persons on the same benefit separated by a cash difference. So there was provided a phasing-out provision for the relief from the first mischief so that ultimately all beneficiaries would have their money calculated on the same basis. Broadly the mechanism for the latter was that as income support increased or there were changes of circumstances so there would be erosion of the transitional relief. I quite accept Miss Gillies' point that changes of circumstances for the purpose of section 104 are not necessarily changes of circumstances for transitional purposes.

13. Miss Gillies next pointed to a number of provisions of Schedule 7 of the General Regulations, which, broadly, provide for changes in an individual's circumstances from the standard catered for under Schedule 2 to those catered for under Schedule 7. A study of column (2) of Schedule 7 shows that a number of different ways are provided for calculating the applicable amount in special cases. Sometimes it is a base rate plus an amount otherwise applicable - as in the case of patients who have been in hospital for more than six weeks and who are single or lone parents. In other cases, such as the present, it is the "amount applicable" subject to a reduction. Sometimes it is a specified amount and sometimes it is an amount that is "reasonable" or one of the results of two different methods of calculation. I have not attempted an exhaustive comparison, but that is enough to demonstrate the variety of ways by which an individual's applicable amount may change. Miss Gillies pointed powerfully to the practical problem that would arise if it was the case that transitional addition would automatically be lost in the case of couples if one of them had to be in hospital for more than six weeks. There could then be an unfortunate concern, if not actual effort, to obtain discharge before the expiry of that period. Other similar problems were figured in regard to certain other special cases, not least, for example, under paragraph 11 of Schedule 7 where the situation was postulated about a member of a couple who had had to go abroad for compassionate reasons. Then after four weeks there would be a change in the calculation of income support such that if the absent partner later returned there would be, on the adjudication officer's approach, "an increase" which would erode transitional support. These considerations have persuaded me that it is not helpful to seek to interpret the concept of an "increase" in the Transitional Regulations by reference to how special cases may occur under the

General Regulations. But I think I can take from it that at least that on the adjudication officer's approach if an "increase" includes what I might call a return to normality after a reduction because of a special case, and most of the paragraphs seem to envisage a reduction, any given case must be at risk of a somewhat erratic and unpredictable erosion of the transitional allowance. I therefore approach the problem having in mind that such an apparently random consequence, looking to the principles of certainty of the law and so of its application to cases, should only be preferred if the provision unambiguously requires that effect.

14. I approach the task having equally in mind that there tends to be a presumption against the removal of an existing right unless that is the clear intention of the legislation. But I am mindful that what I am considering is not so much the removal by legislation of an existing right, but the operation of a provision designed to remove by degrees a transitional and exceptional right.

15. This brings me to what was really Miss Gillies's primary response to Mr Butt, namely a submission that, looking only at the terms of transitional regulation 14(1)(a) there is no immediate and clear base by which is to be judged when or whether there has occurred an increase. If the provision had been that "if in any week a claimant's applicable amount increases" that might have tended to suggest an increase one week as against the preceding week. But the formula is rather different. It is - "if, in respect of any benefit week subsequent to his second benefit week ..." that suggests a reading that if in respect of any week subsequent to the first week on income support the claimant's applicable amount increases ... and that, in turn, tends to suggest a base for the comparison in the form of the first week on income support - that is the second benefit week. There does not otherwise appear, to me, any obvious reason to refer to "the second benefit week"; any change in the amount of income support would of necessity be after that. I am persuaded that that is the correct interpretation of the provision, for three reasons.

16. The first reason is that such an approach seems to me to be the more likely intention of the legislation given the purpose of avoiding a sudden or unpredictable drop in real income for those previously on supplementary benefit.

17. The second reason is that the interpretation offered by the adjudication officer would seem to leave too much to fate rather than to properly pre-defined circumstances. And fate being what it is the probability must be that, as in this case, those who, at least on equitable grounds, least require to have their allowance eroded, would be the ones so to suffer. The approach which I have adopted, and in particular my concern about an orderly as against a chance operation of the provisions, may get some confirmation from the provisions about income in Chapter II of the General Regulations. There, for example, self employed earners are to have their income averaged. Perhaps even more so at regulation 12(6) which deals with what is to be taken as a claimant's income where it fluctuates and has changed more than once.

18. The third reason is that unlike sub-paragraph (a), sub-paragraphs (b) and (c) of transitional regulation 14(1) speak of a reduction in transitional provision occurring in the event of any increase in income. I observe, again, that the formula of words used in the opening of these two paragraphs is the same as in (a): namely - "if, in respect of any benefit week subsequent to the second benefit week ...". Then there is simply to be a reduction "by the amount of any increase in his income". To my mind that seems more appropriate to refer to any increase, benefit week upon benefit week. It is again logical and necessary to limit that to a period after the start of income support. But that is not then inherently so. Hence the use, in these paragraphs of the common opening words. This interpretation gives some, albeit not identical, content to these words in each of the three paragraphs. The provisions in regulation 14(1), (d) and (e) seem to support the idea of a general and orderly tacking off of transitional allowance rather than a desire to reduce it by any chance fluctuation income. That seems to me to be further reinforced by paragraph (4) which provides, in certain circumstances, for the possible restoration of a transitional addition after having ceased to be entitled to it.

19. I should record that Miss Gillies submitted an ingenious argument having regard to the specific terms of paragraph 1(c)(1) of column 2 to Schedule 7 of the General Regulations. What happened after the claimant's wife came home, she said, was not an increase in the amount applicable to the claimant but merely a cessation of the reduction provided for thereunder. She pointed to the opening words "the amount applicable in respect of both of them under regulation 17". That applicable amount remained the same through the benefit weeks in question. The reduction went to what fell to be paid and not to what was the applicable amount. Otherwise, said she, it would be tortuous to provide that an applicable amount was to be the applicable amount subject to a reduction. The concept was familiar in other spheres. If goods were reduced in price pending a sale, or someone's income was reduced to allow him to pay for some damage or the like, no-one would talk of the cessation of that reduction as being an "increase" in the price of the goods or the individual's wages. I appreciate the force of that but, on a careful analysis of the regulations, am unable to accept that submission.

20. As it seems to me the scheme of the General Regulations is to provide by regulation 17 what amounts are to be aggregated to discover the weekly applicable amount for a claimant. But that is expressly subject to, amongst others, regulation 21. It permits only to be included "in the claimant's weekly amount" that amount which is allowed in Schedule 7 as applying to him whilst he is a special case. It is notable that that part of the regulation does not refer to "the amount to be included in the claimant's weekly applicable amount". "Applicable" is conspicuous by its absence. At first I thought that the omission helped Miss Gillies. But I am satisfied that the three phrases used in the regulations have another significance. They

are "weekly applicable amount", "weekly amount" and "amount". An amount is what is to be ascertained in terms of the schedules and it is then to be taken as a weekly amount for the purposes of aggregation under regulation 17 in order to find the weekly applicable amount. In other words the weekly applicable amount falls to be ascertained as the sum of amounts which are to be taken as weekly amounts and they in turn may require to be calculated from certain factors. So, in the present case, what happened, and would have happened to any income support beneficiary in the same circumstances, was that the claimant's weekly applicable amount prior to and in the early part of his wife's hospitalisation required to have included in the aggregation exercise a sum of Ex for himself as a member of a couple and that under general regulation 17(a) and Schedule 2; then after six weeks of hospitalisation his weekly amount as a member of a couple fell, for that reason, to be calculated by reference to Schedule 7 instead of 2, by the intervention in the circumstances of regulation 21, as Ex-y. Finally after the wife's return home the claimant's weekly amount as a member of a couple, for the purposes of calculating his weekly applicable amount, switched back to Schedule 2 and to the figure of Ex. Whether these fall to be described properly as reductions, increases or just variations seems to me to be beside the point. That was the mechanism, albeit a rather tortuous one to follow, by which, week on week, the claimant's weekly applicable amount had to be calculated. But it does not seem to me to offer help as to the correct interpretation of a word in a different body of regulations designed to avert at least some of the consequences of the introduction of the regulations containing the very provisions referred to. It all seems to go no further than to say that the claimant's income support went down and then up in terms of numbers of pounds sterling; but that begs the question whether that was an increase for the purposes of transitional regulation 14. I have already sought to give my answer to that, the real, question.

21. The appeal fails.

(signed) W H Walker  
Commissioner  
Date: 8 August 1990