MJG/SH/1

Commissioner's File: CFC/010/1989

FAMILY CREDIT (GENERAL) REGULATIONS 1987

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 4 January 1989 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions of this decision, to a differently constituted social security appeal tribunal: Social Security Act 1975, section 101 (as amended).

2. This is an appeal by an adjudication officer from the unanimous decision of a social security appeal tribunal dated 4 January 1989. That decision allowed the appeal of the claimant (a married woman now aged 44) against a decision of the local adjudication officer issued on 5 September 1988 in the following terms,

> "Family credit is not payable because a condition of entitlement is that the claimant and/or her partner must not have capital valued at more than £6,000 on the date the claim was made. This condition was not met. Social Security Act 1986, section 22(6). Family Credit (General) Regulations 1987, regulations 10, 28 and 29."

3. The appeal was the subject of an oral hearing before me in Cardiff on 10 January 1990 at which the claimant and her husband were present and addressed me. They were represented by Mr Allsop of the National Association of Citizens Advice Bureaux (Specialist Support Unit). The adjudication officer was represented by Mr Jobbins of the Office of the Chief Adjudication

Officer. I am indebted to all those persons for their assistance to me at the hearing.

4. The reason why the claimant and/or her husband were regarded as having capital valued at more than £6,000 on the date (25 June 1988) when the claim was made was that at that time they owned the freehold of premises which combined a retail food shop on the ground floor and a flat on the floor above. The shop and the flat were integrated and were in fact part of a row of terraced houses. The claimant and her husband had previously lived in the flat and been proprietors of the shop but in December 1987 they agreed to let the shop and the flat to a Mr and Mrs C. Mr and Mrs C were to carry on running the shop business and to live in the flat. They wished to become purchasers of the shop and flat but had not sufficient money to do so outright. The result was that the shop was leased to Mr and Mrs C by a lease dated 1 December 1987 for the period of five years. By a separate agreement dated 26 November 1987 the claimant and her husband granted an option to Mr and Mrs C to purchase the whole of the shop and flat premises at a valuation. It was further agreed orally that Mr and Mrs C would take all of the produce from the separate market gardening business carried on by the claimant and her husband and sell it in the shop. Conversely it was agreed that the claimant and her husband would sell all their market gardening produce through Mr and Mrs C's shop. Mr and Mrs C were granted by the claimant and her husband a shorthold residential tenancy of the flat and there was a separate apportionment of rent for the flat and for the shop respectively. Mr and Mrs C paid some £7,000 for the goodwill of the business. That was paid to the claimant and her husband personally and was placed in an investment account in the husband's name in the National Savings Bank. However the claimant's husband explained that in fact the sum of £7,000 was used for business purposes eg. buying a rotovator.

5. Neither the claimant's original appeal to the social security appeal tribunal nor the submission of the local adjudication officer to that tribunal originally took the point that is in issue in this case. That question is whether the value of the shop and flat was to be disregarded under paragraph 6 of Schedule 3 to the Family Credit (General) Regulations 1987 which provides as follows,

> "CAPITAL TO BE DISREGARDED
>
> .....
>
> 6. The assets of any business owned in whole or in part by the claimant and for the purposes of which he is engaged as a self-employed earner or, if he has ceased to be so engaged, for such period as may be reasonable in the circumstances to allow for disposal of any such asset."

6. The social security appeal tribunal went into this matter in considerable detail. It is clear that they exercised the inquisitorial function which such a tribunal should exercise.

For example reported Commissioner's Decision R(SB) 4/85 appears to have been raised by the tribunal of its own volition. Moreover the tribunal's record of decision on Form AT3 was completed in commendable detail. It is only after considerable thought that I have come to the conclusion that I must hold their decision to be erroneous in law.

7. I have done so because when the tribunal considered whether or not the shop and flat were business assets, in accordance with paragraph 6 of Schedule 3 to the Family Credit (General) Regulations 1987, it appears to have held that because the claimant and her husband in their business as market gardeners were in partnership and were not a limited company then that of itself made those premises business assets of the claimant and her husband. They reached this conclusion (after citing R(SB) 4/85) because creditors could seize the shop and flat premises etc. in satisfaction of debts. They did not limit this to business creditors but obviously considered also personal creditors of the claimant and her husband.

8. The tribunal said in its reasons for decision,

> "As this was a partnership and not a limited company, should [the claimant and her husband] be declared insolvent, then the bank could go against the shop premises, owned by them and leased to Mr and Mrs C. Although [the claimant's husband] was self-employed as a market gardener there was no division in his accounts for Income Tax purposes, VAT purposes etc etc, between the market gardening business and income from the leased shop through which he sold his produce. The tribunal therefore, regarded the market garden business and the leased shop as one, and as a whole as a 'business asset' and, as such 'at risk' should the business fail. Thus, ... following the Commissioner's Decision R(SB) 4/85 we decided that this asset could be disregarded for the purposes of family credit."

9. In R(SB) 4/85, the learned Commissioner was considering a regulation relating to supplementary benefit (Regulation 6(1)(a)(v) of the Supplementary Benefit (Resources) Regulations 1981), the terms of which were, so far as the present appeal is concerned, identical with those of paragraph 6 of Schedule 3 to the Family Credit (General) Regulations 1987. At paragraphs 10 and 11 of R(SB) 4/85 the learned Commissioner stated as follows,

> "The claimant and [the adjudication officer's representative] put forward diametrically opposed and extreme alternative solutions. The claimant submitted that as a creditor of a business could have recourse to all a trader's assets, all were business assets. [The adjudication officer's representative] submitted that everything that was in the trader's name was a personal asset. I reject both these submissions. The claimant's submission would mean that the assets of the claimant who

owned a business could all be disregarded however prosperous it was. And I do not consider that it makes a difference that in this case the business was insolvent. This factor does not make, say, the claimant's toothbrush into a business asset. Conversely [the adjudication officer's representative's] submission would mean that no asset would be a business asset unless it was put into some other name other than that of its owner. The question is one that has arisen in other contexts, as where a person leaves his business by will to A and his other assets to B (see Re Rhagg [1938] Ch 828 and Re White [1958] Ch 762). It has arisen also in relation to income tax where the question is whether income is income from an investment or earnings of the business. In this last connection it has even arisen in relation to social security (see decision R(U) 3/77 at paragraphs 14 and 15), where the income tax cases are considered and it was said (adopting the phraseology of one of the cases cited) that the test was whether the relevant income was 'fruit derived from a fund employed and risked in the business'. In the case of a capital asset it has to be considered whether the asset is part of the fund employed and risked in the business. Findings of fact should be directed to this issue. It emerges from the above decision also that the manner in which the item is treated or not treated in the accounts (if any) of the business is not conclusive."

10. It is plain to me that the tribunal had regard to those statements in R(SB) 4/85, but I nevertheless consider that the tribunal seem to have decided that, just because the shop and flat premises could be seized by creditors of the claimant or her husband, that of itself made those premises a business asset. Certainly parts of their reasons for decision read in that way. As there is some ambiguity about the matter, I consider, not without some considerable thought, that I must set their decision aside as being erroneous in law. Also in my view the tribunal appear to have attached too much importance to the income tax and accounting position. Those factors have some evidential value but are not conclusive.

11. Another matter emerged at the hearing before me on 10 January 1990, namely that the tribunal do not appear to have considered the fact that part of the premises was the flat and did not seem to have made any findings as to whether the flat had a realisable value separately from the shop. The tribunal seem to have assumed that they were all "shop premises" and thus a business asset. But the flat of itself was not a business asset of the claimant and it may have had a separate value. On the other hand, on the facts, the flat might have been so irretrievably part of the shop business that it had to be regarded as inseparable from it. The new tribunal should make findings of fact on this point.

12. The new tribunal will therefore wish to reconsider all the evidence in this case and indeed take fresh evidence itself. It will of course have regard to the test elaborated in R(SB) 4/85

and I leave entirely to the tribunal what decision on the facts it ultimately makes, as appeal to the Commissioner lies only on a question of law. It should be borne in mind that the claimant and her husband were the previous proprietors of the shop and that there was a close commercial link between them and Mr and Mrs C who took over the shop in that there was what presumably was a binding oral agreement for the sale by the shop of the market garden produce of the claimant and his wife, who in turn agreed to sell their produce only to the shop. It is not therefore inconceivable that the shop, even after the lease of it to Mr and Mrs C, remained a business asset of the claimant. However, that is ultimately a matter for the new tribunal.

13. It was suggested for the first time by the adjudication officer, on appeal to the Commissioner, that there could possibly be some question of deprivation by the claimant and her husband of their capital (see regulation 34(1) of the above cited Family Credit (General) Regulations). That is raised because the original tribunal appear to have made an actual award of family credit to the claimant. The adjudication officer suggests that they ought therefore to consider all relevant matters including the possible question of deprivation of capital. On the other hand I note that, in his submission to the tribunal, the local adjudication officer stated,

> "No other aspect of family credit entitlement is in dispute."

14. The claimant and her husband stated at the hearing before me that in fact all this had been gone into by the local adjudication officer (ie. the withdrawal of two sums of £2,000 each from the claimant's husband's National Savings Bank Investment Account some eight weeks and some eight days respectively before the date of claim) and cleared by the local adjudication officer, hence his statement to the tribunal. It seems to me that this may well have been so but nevertheless in exercise of its inquisitorial jurisdiction the new tribunal ought to look into this particular matter. I should record, though, that the claimant and her husband protested strongly about this and stated that the withdrawals had been made in consequence of expenditure in the market gardening business eg. to buy a rotovator and other matters which they doubtless will describe to the new tribunal. Paragraph 7 of Schedule 3 to the above-cited General Regulations (disregard of certain proceeds of sale of business assets) may be relevant in this context.

15. I should note that the favourable decision of the social security tribunal dated 4 January 1989 (against which this appeal has now been made by the adjudication officer) was in fact implemented by the Department and 26 weeks' family credit were paid to the claimant. Those payments of family credit are not recoverable from the claimant (see section 53 of the Social Security Act 1986). However, after the expiry of that 26 weeks' award, the Department refused to pay any further family credit to the claimant. That refusal is currently, I was given to understand at the hearing, the subject of a further appeal to a

social security appeal tribunal. That tribunal may well wish, given the opportunity, to take account of what I have said in this decision. Indeed it possibly would be administratively convenient to arrange the hearing by that tribunal and the rehearing directed by my decision at the same time.

16. Lastly I ought perhaps to mention that the claimant's original appeal was not on the ground that the shop and flat were a business asset but on the ground that, having leased both to Mr and Mrs C, they were not realisable assets since Mr and Mrs C were hoping ultimately to buy the whole premises. However, there is in fact no provision in the family credit legislation allowing the disregard of an asset simply because one has leased it or even granted an option to buy it. In such circumstances the asset then has to be taken into account at its value, reduced by the fact that there is a subsisting lease and/or option. But in this case it is clear even with such a reduced valuation of the property, the value would be well over the £6,000 capital limit.

(Signed) M.J. Goodman
Commissioner

(Date) 19 February 1990