

ICA 537(5) hindungentitlement to pensionable age is discomm.  
in breach of EEC Directive 79/7/EEC. Women entitled if satisfy  
conditions before reaching 65. see CG/29/1987

VGHH/19/LM

Commissioner's File: CG/12/1988

Region: North Western

**SOCIAL SECURITY ACTS 1975 TO 1986  
CLAIM FOR INVALID CARE ALLOWANCE  
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

**Name:** Sarah Murphy (Mrs)

**Appeal Tribunal:** Liverpool

**Case No:** 606/02580

**[ORAL HEARING]**

1. My decision is

- (1) The decision of the social security appeal tribunal dated 6 August 1987 is erroneous in law
- (2) It is expedient that I should make fresh and further findings of fact and give the appropriate decision in the light of them
- (3) My decision is that the claimant is entitled to invalid care allowance (ICA) from 20 June 1986 to 6 September 1986.

2. The present appeal was listed for hearing on the same date as CG/29/1987 (Cooze) and CG/036/1988 (Beard) but was not reached and, as indicated at the hearing, I am giving my decision on the case papers.

3. The claimant was unrepresented and the Equal Opportunities Commission has, with my leave, made written submissions on her behalf. I am much indebted to them for taking this course. The adjudication officer and the Secretary of State were again represented by Mr R. Plender of counsel, instructed by the Solicitor's Office of the Departments of Health and Social Security.

Nature of this appeal

4. The present appeal is against the decision of a social security appeal tribunal affirming an adjudication officer's decision that section 37(5) of the Social Security Act 1975 precludes the claimant from obtaining ICA.

5. The sole question in this appeal is whether by reason of Directive 79/7/EEC of the Council of European Communities ("Directive 79/7") the claimant is entitled to ICA notwithstanding section 37(5) of the Social Security Act 1975. The answer to this question turns on whether Article 7(1)(a) of Directive 79/7 excludes section 37(5) from the scope of Directive 79/7.

The relevant law

6. This is the same as that referred to in paragraphs 16 and 17 of decision CG/29/1987 (Cooze).

### The adjudication officer's decision

7. The following decision of an adjudication officer was issued on or about 29 January 1987

"The claimant is not entitled to invalid care allowance because she has attained pensionable age and was not entitled, and cannot be treated as having been entitled, to invalid care allowance immediately before attaining that age. (Social Security Act 1975 section 37(5) and the Social Security (Invalid Care Allowance) Regulations reg 10)."

8. The appeal was heard on 6 August 1987. The claimant was present and gave evidence. The chairman's note states:

"Facts presented as in AT2 - presenting officer pointed out that due to an error wrong dates had been included - in para 4 dates should be 13.11.86 and 13.11.85, in para 5 13.11.85 and in para 6 for 11.9.85 read 13.11.85.

The appellant explained that she had not known that she could make a claim until 13.11.86 after the death of her husband."

The summary of facts in the case papers stated that on 13 November 1986 the claimant made a claim for ICA on the ground that she had been caring over 35 hours per week for her late husband. Attendance allowance was in payment to him to his death. On the claim form the claimant gave her date of birth as 25 March 1924. On or about 19 January 1987 [sic] the adjudication officer disallowed the claim. On 6 September 1986 the claimant's husband died.

9. The tribunal's decision was:

"The appeal is disallowed - the appellant is not entitled to invalid care allowance."

Their recorded findings of fact were:

"Facts found as stated."

Their recorded reasons for their decision were:

"Since claim was not made until 13.11.86 payment could only have been made from 13.11.85 (S.165A Social Security Act 1975). On the latter date the appellant was already over pensionable age (born 25.3.24) and is therefore not entitled by virtue of Sec. 37(5) of the Act."

### Was the tribunal's decision erroneous in law?

10. Yes, it was. For the reasons set out in my decision CG/29/1987 (Cooze) Article 7(1)(a) of Directive 79/7 does not exclude section 37(5) of the Social Security Act 1975 from the scope of Directive 79/7. Because that Directive is directly applicable, section 37(5) of the Act (on which the tribunal relied) is overridden by the provisions of the Directive, the claimant is entitled to ICA on the same terms as men and continues to be eligible for ICA up to the age of 65.

### The facts

11. The claimant was born on 25 March 1924 and attained the age of 60 on 25 March 1984. On 13 November 1986 she claimed ICA in respect of her husband. Attendance allowance was payable to the claimant from 20 June 1986. He died on 6 September 1986. The claimant had given up work at the age of 54 to look after her husband, who had to retire on

medical grounds. She had been caring for her husband since 1978.

12. It is now common ground that the claimant is not entitled to ICA under United Kingdom (or, more accurately) the legislation of Great Britain alone by reason of section 37(5) of the Social Security Act which provides that "a person who has attained pensionable age shall not be entitled to an allowance under this section unless he was entitled (or is treated by regulations as having been so entitled) immediately before attaining that age". Pensionable age is 65 for a man and 60 for a woman. Since attendance allowance did not become payable to the claimant's husband until 20 June 1986, by which time the claimant had attained the age of 60 years, and entitlement to ICA only began in respect of this claimant as from the date when attendance allowance became payable (see section 37(1)(c) read with section 37(2) of the Social Security Act 1975), section 37(5) operates to disentitle the claimant to ICA unless it is overridden by the provisions of Directive 79/7.

The decision which should have been given

13. Mr Piender's argument that Directive 79/7 does not apply in respect of section 37(5) is the same as that advanced in his argument in CG/29/1987 (Cooze) and I reject it for the reasons set out in my decision in that case. Because Directive 79/7, as explained in that decision, is directly applicable, the claimant is entitled to ICA on the same terms as men and continues to be eligible for ICA up to the age of 65. Her entitlement begins on 20 June 1986 (when attendance allowance first became payable to her husband), as explained in paragraph 12 above. It terminates on his death, because after that the claimant was no longer caring for a severely disabled person in terms of section 37(1) of the Social Security Act 1975 and she is not assisted by section 37(6) of the Act and regulation 11 of the Social Security (Invalid Care Allowance) Regulations, which enables ICA to be continued after the claimant has reached retiring age (65 for a woman) because she had not reached that age by the time of her husband's death.

14. My decision is set out in paragraph 1.

(Signed) V G H Hallett  
Commissioner

Date: 6 April 1989