

RFMH/SH/5/MD

*widows ben Cohen
+ appeal on literacy*

Commissioner's File: CG/15/1985

C A O File: AO 1010/W/85

Region: London North

**SOCIAL SECURITY ACTS 1975 TO 1985
CLAIM FOR WIDOW'S ALLOWANCE
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: Marion Mary Bruley (Mrs)

Appeal Tribunal: Southend

Case No: 14/10

[ORAL HEARING]

1. My decision is that:-

- (a) the decisions of the insurance officer (now adjudication officer) awarding to the claimant widow's allowance for the inclusive period from 8 March 1983 to 5 September 1983 and widowed mother's allowance from and including 6 September 1983 shall be reviewed because there has been a relevant change of circumstances since the decisions were given; section 104(1)(b) of the Social Security Act 1975 ("the Act");
- (b) the said decisions in respect of the inclusive period from 12 April 1983 to 21 August 1983 shall not be revised so that widow's benefit is payable to the claimant for that period;
- (c) the said decisions shall be revised so that widow's benefit is not payable from and including 22 August 1983 because on that day the claimant and a man to whom she is not married were living together and have continued to live together as husband and wife; section 26(3) of the Act; and
- (c) widow's benefit having been paid to the claimant during the inclusive period from 22 August 1983 to 10 October 1983, an overpayment of benefit was made to her which must be repaid, as I am not satisfied that in the obtaining and receipt of that benefit she has throughout used due care and diligence to avoid overpayment; section 119(1) and (2) of the Act. If the amount of widow's benefit overpaid as a result of this decision cannot be agreed, the matter must be referred back to me for determination.

2. This is an appeal by the claimant against the unanimous decision of the social security appeal tribunal confirming the adjudication officer's decision shown in box 1 of form LT2. The claimant asked for an oral hearing in private of the appeal, a request to which I acceded. At the hearing held before me on 17 April 1986 the claimant attended and was represented by Miss R Cohen of the Child Poverty Action Group. The adjudication officer

was represented by Mr K A Turner of the Chief Adjudication Officer's Office and I received oral evidence from an Inspector of the Department of Health and Social Security ("the Inspector"). I am grateful to Miss Cohen and Mr Turner for their very full and helpful submissions.

3. The claimant was widowed on 4 March 1983. She was then aged 42 and had three dependent children. She claimed and was awarded widow's allowance for the inclusive period from 8 March 1983 to 5 September 1983 and widowed mother's allowance from and including 6 September 1983. Both benefits were paid at the maximum rate allowed and carried increases in respect of the children.

4. Suspicion arose that the claimant was living with a man as his wife in May 1983 and information to that effect was received at the Department's local office. No action was taken by the Department until 18 August 1983 when, in accordance with normal procedure the Inspector visited the claimant to make general enquiries and ensure that she had no problems in respect of the benefit she was receiving. She confirmed that she had no boarders or lodgers, and had read the yellow pages in her order book.

5. On 6 October 1983 the claimant completed form A11 for supplementary benefit and in reply to question 7 "any other persons living in the accommodation occupied by the claimant, including boarders" she replied "None". The following day information was again received at the Department's local office to the effect that Mr B- was living at the claimant's address and had been doing so since at least 24 April 1983.

6. On 10 October 1983 the claimant telephoned the local office to report that her circumstances had changed in that she proposed to live with someone. On 11 October 1983 she signed a statement to the effect that Mr B- had been living at her address from 10 April 1983 and that she would repay any benefit overpaid.

7. On 15 November 1983 the claimant was interviewed by another Inspector from the Department. Unfortunately he was unable to give evidence before me because of ill-health. However the report of the interview is very full and reports that in reply to the question "how long after he moved in would you say they began living as husband and wife" the claimant answered "about two months". The claimant stated that she had not mentioned the fact at the interview of 18 August 1983 because Mr B- was unemployed and could not afford to support her on the amount of his benefit. She stressed that Mr B- had never supported her but bought and paid for only his own food.

8. In the light of the evidence the insurance officer reviewed the original decisions awarding the claimant widow's allowance for the inclusive period from 8 March 1983 to 5 September 1983 and widowed mother's allowance from and including 6 September 1983, because there had been a relevant change of circumstances since the decisions were given. His revised decision was to the effect that widow's benefit was not payable from and including 12 April 1983 because on that day the claimant and a man to whom she was not married were living together and had continued to live together as husband and wife. Further he required repayment of the sum of £1,749.30 representing the amount of benefit overpaid in respect of the inclusive period from 12 April 1983 to 10 October 1983, because he was not satisfied the claimant had throughout that period used due care and diligence to avoid overpayment in obtaining and receipt of that benefit. Thereupon the claimant appealed to the tribunal against those decisions. On 6 November 1984 the tribunal dismissed the appeal and the claimant now appeals to the Commissioner, leave having been granted by the tribunal chairman.

9. Miss Cohen submitted that the tribunal's decision was erroneous in law because it failed to comply with the requirements of regulation 19(2) of the Social Security (Adjudication) Regulations 1984 in that the material recorded facts were inadequate so that it was impossible to ascertain whether the tribunal had applied the law correctly. Mr Turner

rightly supported the appeal on this ground. The tribunal's decision was clearly erroneous in law and I have no alternative but to set it aside. However, an appeal to the Commissioner constitutes a complete rehearing on questions of fact and law, so that it is open to me to determine the appeal finally myself (R(U)3/63), which course I propose to adopt.

10. At the commencement of the proceedings Miss Cohen accepted that the insurance officer's reviewed and revised decision issued on 23 March 1984 was valid and that the amount of overpayment in issue was £1,749.30 in respect of the inclusive period from 12 April 1983 to 10 October 1983. She stated that her submissions would be limited to the period in issue and whether the claimant had used due care and diligence in the obtaining and receipt of benefit overpaid, if any.

11. Section 104(1)(b) of the Act provides that a decision of an insurance officer can be reviewed at any time if there has been a relevant change of circumstances since the original decision was given. In May 1983 the Department was notified that the claimant might be living with Mr B- as his wife. Subsequent interviews and statements supported the contention. Accordingly the conditions for a review were satisfied.

12. Sections 24(2) and 25(3) of the Act provide that widow's allowance and widowed mother's allowance are not payable for any period during which the claimant and a man to whom she is not married are living together as husband and wife. The relevant law relating to what constitutes living together under the provisos to section 24(2) and 25(3) are set out in the adjudication officer's written submission to the tribunal and I see no merit in my repeating what he has said in different words. In my judgment, the most succinct statement of the principles to be adopted is set out in paragraph 5 of Decision R(G)3/71, and the criteria there laid down has been repeatedly approved by Commissioners' decisions (see for example R(G)1/79 paragraph 8). Paragraph 5 of Decision R(G)3/71 reads as follows:-

"It is generally accepted that the question whether a woman is cohabiting with a man as his wife, within the meaning of the statute, requires examination of three main matters: (1) their relationship in relation to sex; (2) their relationship in relation to money; and (3) their general relationship. Although all three are as a rule relevant, no single one of them is necessarily conclusive."

There is of course no distinction between "cohabiting" and "living together".

13. In Decision R(G)3/81 the Commissioner approved the criteria to be considered in determining whether or not a man and a woman were living together as husband and wife as set out in the Supplementary Benefits Handbook. The relevant criteria in the present case comprise: whether they were members of the same household; the stability of the relationship; the financial support of one party by the other or sharing of household expenses; the sexual relationship although its absence did not necessarily prove that they were not living as husband and wife and whether the couple represented themselves to other parties as husband and wife although "the fact that they retained their identity publicly as unmarried persons does not mean that they cannot be regarded as living together as husband and wife".

14. The claimant told me that Mr B- had been a friend of the family for approximately twelve years prior to the period in issue. Her husband had been ill for ten years suffering from asthma, bronchitis and a heart condition and Mr B- had helped the family generally and taken her husband to hospital by car when he became too ill to go alone. He had also helped her with her three small children as she was extremely busy caring for her husband who became a complete invalid. At that time Mr B- was living with his wife and daughter and the two families were on friendly terms. The claimant told me that Mr B- was employed as a car checker but had become unemployed following redundancy. On 10 April 1983 he told her that his wife had "thrown him out of the house" and that he proposed to return to live

with his relations in Scotland and seek work there. She was reluctant to allow him to sleep in his car and offered him the settee in her lounge. The claimant told me that in the event Mr B- did not go to Scotland but decided to seek work locally. He claimed and was awarded unemployment benefit and continued to sleep on the settee, although he was always absent during the day. He left early in the morning and so far as she was aware spent his day with a friend who was also unemployed. He had all his meals out and seldom returned before midnight. However following a change in Mr B-'s friend's domestic arrangements early in June 1983 Mr B- started to return home earlier, although he still ate his meals out. He bought his own food and although he offered to contribute towards her expenses she refused. In the middle of August 1983 he took her out for a drink and they discussed the possibility of a stable relationship. They made a final decision on 24 September 1983 and she readily accepted that they had lived as husband and wife since that date. Mr B- had asked her to marry him but she was undecided.

15. Miss Cohen submitted that although the claimant made a statement on 11 October 1983 that she was living with Mr B- as from 10 April 1983, she was unaware of what constituted living together as husband and wife for social security benefit purposes. Miss Cohen stated that there was no sexual relationship before 24 September 1983, Mr B- did not contribute towards household expenses and prior to the middle of August 1983 he had a life completely independent from the claimant and her children, albeit that he slept under the same roof. She conceded that from the middle of August 1983, the claimant and Mr B- had socialised but she invited me to find that they were not living together as husband and wife within the terms of the criteria set out in Decision R(G)3/81.

16. I have considered all the evidence with care and in applying the criteria set out in Decision R(G)3/81 I find that the claimant and Mr B- were members of the same household. However in Decision R(SB)35/85, the Commissioner decided, albeit for supplementary benefit purposes, that although the fact that a man and a woman lived in the same household might raise the question as to whether they were living together as husband and wife, it was necessary in each case to find out why they lived in the same household. If there was an explanation that they were not there because they were living together as husband and wife, they could not be so described for supplementary purposes. I have applied the same principle in the present case and in my judgment I accept that initially the claimant and Mr B- lived in the same household for reasons which would warrant a finding that they were not living together as husband and wife, in that because of matrimonial difficulties Mr B- had nowhere else to go and the claimant wished to repay for his past kindness. However I do not accept that those reasons persisted. In my view the relationship developed and changed so that by the middle of August 1983 they were living together as husband and wife for the purposes of determining the claimant's entitlement to widow's benefit. Neither the claimant nor Miss Cohen were able to pinpoint a date and on the evidence I consider 22 August 1983 to be fair. By that date the relationship was stable, there was a limited element of sharing household expenses, they socialised together, they discussed and contemplated a sexual relationship and told the claimant's family that they proposed living together as husband and wife. Further by that date Mr B- had lived in the claimant's house for more than 4½ months and, for whatever reasons, had not sought alternative accommodation. Accordingly the insurance officer correctly revised his decisions so that widow's benefit was not payable from and including 22 August 1983 because on that day the claimant and a man to whom she was not married were living together and had continued to live together as husband and wife.

17. The decisions to pay the benefit to the claimant were made by the insurance officer and for the reasons above stated were correctly revised on review so that widow's benefit was not payable from and including 22 August 1983. Under section 119(1)(2) of the Act repayment must be required unless the claimant can show to the satisfaction of the person or tribunal determining the appeal or review that in obtaining and receipt of the benefit the claimant has throughout used due care and diligence to avoid overpayment.

18. Each time the claimant cashed a serial order to obtain payment of widow's benefit she signed a declaration that she had read and understood the instructions in her order book. Amongst these instructions was one which informed her that if she lived with a man as his wife, she should not cash any more orders but return the book to the Department and report the facts. The claimant told me she was illiterate but never referred to it as she was ashamed. She relied on a friend for all information and although she was aware that there were instructions in her order book she had not read them. Further she argued that she had answered correctly to all the questions put to her by the Inspector at the interview on 18 August 1983, in that at that date Mr B- was not her "boyfriend" and was not in her view a boarder or lodger because he did not pay for the accommodation provided. The claimant gave various explanations to justify the fact that she had not reported that Mr B- was living in her house but in my view these do not assist her. The instructions in the order book are clear and if the claimant had any difficulty about reading or understanding them it was incumbent upon her to get someone to read the relevant documentation to her and explain the meaning. Illiteracy is a handicap and not a privilege and having seen and observed the Inspector I have no doubt that if the claimant had explained her predicament she would have advised her fully on the position at the interview on 18 August 1983. I appreciate that at that date the claimant did not consider Mr B- her "boyfriend" but nevertheless she should have ascertained that she was justified in her belief that his presence in her house did not have to be reported to the Department. Unfortunately the Inspector who interviewed the claimant on 15 November 1983 was unable to give evidence before me and after some hesitation, I have accepted the claimant's explanations of her replies to various questions. However I have no hesitation in concluding on the evidence before me that as from 22 August 1983 the claimant failed to exercise the appropriate standard of care and diligence required in the receipt of the benefit. Her assumption that she had nothing to report was not based on reasonable grounds and the fact that she did not wish Mr B-'s wife to know of his whereabouts did not relieve the claimant of the responsibility. It follows that repayment of benefit overpaid for the inclusive period from 22 August 1983 to 10 October 1983 must be repaid. In reaching this conclusion I must emphasise that there is no question of the claimant's integrity being called into question. However that is not enough. In the words of paragraph 11 of Decision R(G)1/79:-

"The statutory language does not necessarily import considerations of honesty or good faith but a standard of care and diligence which it is expected will be exercised. It involves not merely refraining from carelessness, neglect, inattention or indolence in regard to the conditions and circumstances of entitlement to benefit. It signifies also positive action, such as furnishing full information to enable entitlement to benefit to be correctly ascertained and finding out by enquiry the conditions and circumstances of such entitlement."

19. As stated the claimant must repay benefit overpaid for the inclusive period from 22 August 1983 to 10 October 1983. If the amount overpaid cannot be agreed, the matter must be referred back to me for determination.

20. The claimant's appeal is allowed in part and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs
Commissioner

Date: 21st May 1986