WRB — NS

Bulletin 163 [Sitting]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CG/5519/1999

Starred Decision No: 42/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr Damien Abbott,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 17th July 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision:

1. My decision is as follows. It is given under section 14(8)(b) of the Social Security Act 1998.

1.1 The decision of the Cardiff social security appeal tribunal held on 23rd February 1999 is erroneous in point of law: see paragraphs 6 to 8.

1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal to the tribunal, I refer the case to a differently constituted tribunal for determination.

1.3 I direct the tribunal that rehears this case to conduct a complete rehearing. In particular, the tribunal must:

Determine whether the claimant is receiving full-time education. This may be the subject of a concession by the claimant. If it is not, she must produce the details of her course that the tribunal must determine this issue in accordance with my analysis in paragraphs 35 and 36.

Accept my interpretation of the duties in the claimant's order book and in regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987: see paragraphs 44, 45, 50 and 51.

Determine what took place when the claimant visited Heron House and its significance for the duties that she would otherwise be under to disclose changes of circumstances: see paragraph 54.

Determine any other issues raised by the Secretary of State or by the claimant.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the social security appeal tribunal brought by the claimant with the leave of Mr Commissioner Howell. As the Social Security Act 1998 is now in force in respect of invalid care allowance, the Secretary of State, and not the adjudication officer, is a party to the proceedings on this appeal.

3. An oral hearing of the appeal was directed by a Legal Officer to the Commissioners. It was held before me in Cardiff on 17th January 2001. The claimant attended and was represented by Mr Buchanan-Smith of the Speakeasy Advice Centre. The Secretary of State was represented by Mr H James. I am grateful to the representatives for their arguments at the hearing.

The adjudication officer's decision

4. The adjudication officer's decision before the tribunal was a decision, given on review, that the claimant was not entitled to invalid care allowance as she was receiving full-time university education and that, as a result of her failing to disclose that fact, an overpayment had arisen that was recoverable from her.

5. The adjudication officer's submission to the tribunal invited the tribunal to substitute a different decision. Although the suggested decision altered the periods involved, it did not alter the amount of the recoverable overpayment. As far as I can tell from the decision notice, the tribunal confirmed the decision under appeal and did not adopt the suggested substitute decision. It is clear from the full statement of the tribunal's decision that that is what it did.

The errors of law

6. There are at least two errors of law in the tribunal's decision.

7. First, it did not explain why it rejected the decision suggested by the adjudication officer.

8. Second, the tribunal did not deal with all of the arguments put to it by Mr Buchanan-Smith. He set out for me at the oral hearing what his arguments had been. I would not have realised that from the full statement of the tribunal's decision, although it is possible to see each of his arguments in the chairman's record of proceedings. I suspect that the tribunal was confused by a concession that was made at the outset of the hearing. He had conceded that the claimant was receiving full-time education. It seems that the tribunal believed that that concession precluded Mr Buchanan-Smith from relying on some of his arguments. However, whatever the reason, the tribunal did not deal with arguments presented on behalf of the claimant.

The overpayment - full-time education

9. In view of the decision of Mr Commissioner Levenson in CG/4343/1998, Mr Buchanan-Smith withdrew before me his concession that the claimant was receiving full-time education. (That decision had not been given at the date of the hearing before the tribunal.) So, I have to consider that issue.

The legislation

10. Section 70 of the Social Security Contributions and Benefits Act 1992 provides for invalid care allowance. Section 70(3) provides that

> "A person shall not be entitled to an allowance under this section if he is ... receiving full-time education."

Regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976 provides as follows.

> "(1) For the purposes of section 70(3) of the Contributions and Benefits Act, a person shall be treated as receiving full-time education for any period during which he attends a course of education at a university, college, school or other education establishment for twenty-one hours or more a week.
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> (2) In calculating the hours of attendance under paragraph (1) of this regulation-
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> (a) there shall be included the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise,

experiment or project for which provision is made in the curriculum of the course; and

(b) there shall be excluded any time occupied on meal breaks or spent on unsupervised study, whether undertaken on of off the premises of the educational establishment.

(3) In determining the duration of a period of full-time education under paragraph (1) of this regulation, a person who has started on a course of education shall be treated as attending it for the usual number of hours per week throughout any vacation or any temporary interruption of his attendance until the end of the course or such earlier date as he abandons it or is dismissed from it."

11. The relevant parts of regulation 5 are similar to provisions in the supplementary benefit and child benefit legislation.

Education and courses of education

12. Before considering the decisions of the Commissioners, I consider the approach that I would take to this legislation if I were free from authority.

13. The purpose of education is to help the student to acquire knowledge and skills. They are acquired in two ways. In part, teachers impart information and instruct in skills. In part, students assume responsibility for their own learning. The balance between the contributions of the teachers and the students varies according to the nature and level of the education.

14. The same language is used of all types of education at all levels. But its meaning varies with the context. So, the nature of supervision varies. A teacher "supervising" children at nursery school would need to be present in the room with the children, but a lecturer "supervising" a doctoral research student would not. Likewise, what is involved in "attending" a course varies.

15. Invalid care allowance may be awarded to anyone who has attained the age of 16. So, the legislation has to be applied to the range of courses that might be taken from that age. Given the way that the language of supervision and attendance varies in its meaning, the proper approach is to emphasise the application of the legislation rather than its interpretation. It is not appropriate to impose on the language an interpretation that is relevant to one particular type or level of education. Rather it is appropriate for the language to float free of definition so that it can be applied according to the context.

16. That was the approach which underlay my decision as a Deputy Commissioner in CG/16491/1996. I have to reconsider that approach now in view of CG/4343/1998. At the oral hearing, Mr James told me that his instructions were neither to support nor to challenge that decision. I was invited to give my own view. That is in contrast to the view taken by the officers representing the Secretary of State in written submissions; they rely on that decision as correctly stating the law.

The decisions of the Commissioners

17. R(SB) 26/82 is a decision of a Tribunal of Commissioners. It concerned the Supplementary Benefit (Conditions of Entitlement) Regulations 1980. This case was relied on

by Mr Commissioner Levenson, who adopted its reasoning as a definition of supervised study.

18. The case concerned a 16 year old who was studying O levels at a school. The issue was whether he was entitled to supplementary benefit. The structure of the legislation was complex, but in essence it was this. (a) The claimant was not entitled to the benefit if he was receiving full-time education by attendance at an educational establishment. (b) Regulations could provide for circumstances in which a claimant was not treated as receiving full-time education. (c) Regulations provided that the claimant could still be entitled to the benefit despite receiving full-time education, if he was "attending for not more than 21 hours a week a course of education at an establishment".

19. The Tribunal of Commissioners' reasoning was this. (a) The 21 hour exception did not apply unless the claimant was receiving full-time education by attendance at an education establishment. (b) Full-time education could only be judged by reference to the number of compulsory hours of attendance at the establishment. (c) A claimant could only be attending an establishment when either physically present there or participating in some compulsory activity directly controlled by the establishment. (d) The hours when the claimant was attending the course formed a subset of the hours when he was attending at the establishment. (e) That subset contained only hours (i) spent under the instruction or supervision of a teacher or (ii) engaged in compulsory pre-determined periods of private study.

20. With respect to Mr Commissioner Levenson, there are significant differences between legislation involved in that case and the invalid care allowance provisions. There are also differences between the facts of that case and this.

21. First, that case involved O level education. The reasoning was not limited to that level of education, but it may have been influenced by it. This case involves university education.

22. Second, in the invalid care allowance legislation, the 21 hour rule is not an exception to a rule, but a definition of full-time education. So, the Tribunal of Commissioners' reasoning on attendance and the identification of the relevant 21 hours does not apply.

23. Third, there was no equivalent to the detailed provisions of regulation 5(2). In particular, there was no reference in the legislation to supervised and unsupervised study. The Tribunal of Commissioners was not defining those words.

24. In my opinion, this decision is distinguishable for those reasons and is not a relevant authority on the interpretation or application of the invalid care allowance legislation.

25. CSB/1010/1989 concerned regulation 7(4)(a) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. That provision was similar to regulation 5(2) of the Invalid Care Allowance Regulations, but different from the provisions of the 1980 Regulations that were considered in R(SB) 26/82.

26. The claimant was an A level student at a Technical College who had a set number of contact hours each week and was, in addition, expected to undertake further hours of what the Commissioner called "private study". At paragraph 5 of the decision, the Commissioner said:

> "It is to be noted that regulation 7(4)(a) excluded 'unsupervised study'. However, unsupervised study must not be confused with study done in the absence of the physical presence of a supervisor. Study can perfectly well be supervised if work is set by a supervisor and is to be done privately by the student in his own time. Most University degree courses proceed on this basis."

27. R(F) 1/93 concerned regulation 5 of the Child Benefit (General) Regulations 1976. The structure of the legislation is comparable to the invalid care allowance legislation. The Commissioner was one of the members of the Tribunal of Commissioners who decided R(SB) 26/82. The Commissioner referred to that decision, commenting at paragraph 10 that regulation 5 of the Child Benefit Regulations (comparable to regulation 5(2) of the Invalid Care Allowance Regulations) had "rendered much more specific the criteria by which the relevant number of weekly hours are to be ascertained."

28. The issue in this case was whether the claimant's daughter was undertaking supervised study. She was an A level student who was studying to retake her examinations under special arrangements made with the teachers at her school. The Commissioner commented at paragraphs 12 and 13:

> "12. ... 'Supervise' is not a term of art. It is an ordinary, everyday English word. But it can, in ordinary everyday English, bear somewhat different meanings. ... But as so often is the case when one is seeking the appropriate meaning to be attributed to a word which can carry somewhat varying meanings, it is helpful to set 'supervised' in its full context.
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> "13. In my view, the most vital element in that context is that we are in the realm of schools and similar educational environments. ... But I think that, where schools are concerned, 'supervised', when applied to 'study, examination or practical work' would ordinarily be understood to import the presence or close proximity of a teacher or tutor; someone at hand, not only to preserve order and enhance diligence, but also to render such assistance to the students as might be appropriate."

29. C2/97(ICA) is a decision of the Chief Commissioner in Northern Ireland. It concerned the equivalent to the British legislation on attending a course of education.

30. This case involved a university student. The Chief Commissioner analysed CSB/1010/1989 and R(F) 1/93, concluding in paragraph 18:

> "However, in the present case, there is no question of the claimant attending a school or similar establishment. She is attending a University. It seems to me appropriate to look at the words 'supervised' and 'unsupervised' ... in that context. This will result in the word 'supervised' having a different meaning for a person studying at an education establishment such as a school compared to a person studying at a University. However, it seems to me that Mr Commissioner Rice's decision in CSB/1010/89 (Star 41/90) ... accords with commonsense and reality. I agree that study can perfectly well be supervised at University level if work is set by a supervisor and is to be done privately in his own time. In addition I do not consider that because study is done in private that it becomes unsupervised in a University context."

31. CG/4343/1998, concerned the interpretation of regulation 5 of the Invalid Care Allowance Regulations and its application to a student taking a degree course.

32. Mr Commissioner Levenson considered all the relevant decisions of Commissioners. On R(SB) 26/82, he emphasised that it was the only decision that had considered the meaning of attendance. I agree, but for the reasons I have explained the issue arose in a different legislative framework. On CSB/1010/1989, he noted that the Commissioner had referred to study done in private rather than study done at home. I agree, but the overall impression from that decision is that the Commissioner considered it irrelevant where the private study was undertaken. On R(F) 1/93, he commented that although the Commissioner limited his reasoning to schools, that does not prevent it also applying to other levels of education. I agree, but that does not mean that the same reasoning does apply to those levels. On C2/97 (ICA), he commented that although private study could be supervised, that did not mean that all private study was supervised. I agree; the Chief Commissioner did not suggest otherwise.

33. Standing back from the detail of earlier decision, Mr Levenson commented in paragraph 7 on the relevance of the invalid care allowance context:

> "It is important to note that these provisions have to be construed in the context of invalid care allowance and that the exclusion from the allowance of those receiving full-time education is influenced by the desire that the allowance be restricted to people who are genuinely caring for the disabled person as required. However, there is no specification in the law of how the 35 hours weekly is to be made up. It is also clear that a person can be studying at home and at the same time be caring for a disabled person in the sense of being on call or being able to interrupt the study to do whatever has to be done."

34. I agree that the context of the legislation is relevant to its interpretation. However, too much must not be made of the possibility of combining study at home with caring for the disabled person. That proves too much; a claimant could still satisfy the 35 hours requirement even if the hours of supervised study exceeded 21 hours. The legislation could have laid this down as the test, but did not.

My analysis of the legislation

35. For the reasons I have given, I disagree with Mr Commissioner Levenson's interpretation of the legislation and his analysis of the previous decision. I respectfully decline to follow his decision. I respectfully agree with the reasoning in, and follow, CSB/1010/1989, R(F) 1/93 and C2/97(ICA).

36. My analysis is this. "Attends" and "supervised study" are ordinary English words. They do not require to be interpreted; they have to be applied. What is involved in attending a course or undertaking supervised study will vary depending on the nature and level of the course. Examples are more likely to cause problems in later cases than to assist in understanding how to apply the legislation to the facts of a particular case. So, I resist my natural inclination and refrain from giving any. The best advice I can give the tribunal is this. The nature of the course and the claimant's studies must be investigated in detail. Findings must be made on all matters of fact that are relevant to whether the claimant is attending the course and the number of hours relevant to regulation 5(2). Finally, the tribunal must apply the language of section 70(3) and regulation 5 to those facts.

37. It is not possible to lay down rigid rules, as each case will depend on its own circumstances. But in the case of an undergraduate arts degree, here is a rough guide to how a tribunal could determine the number of hours of supervised study. The obvious starting point is the number of contact hours for lectures, tutorials and so on. That will be shown by the student's timetable. Then the tribunal must consider the work set as preparation for discussion in class or for written work. That will probably count as supervised study. Next, there is the work done as a follow-up to classes or as part of the general background reading for the subject. It is probably at this point that the issue of whether or not the work is supervised becomes difficult.

The facts of this case

38. Before the tribunal, Mr Buchanan-Smith conceded that the claimant was receiving full-time education for the purposes of section 70(3) and regulation 5. He only withdrew that concession before me because of CG/4343/1998. I have declined to follow that decision and directed the tribunal to take a different approach. So, it is possible that at the rehearing the concession will again be made. That is for the claimant and her representative to decide. If the concession is not made, the tribunal must deal with the issue in accordance with my analysis of the legislation.

Recoverability of the overpayment

39. If the claimant was receiving full-time education, she was overpaid invalid care allowance. The issue then arises whether that overpayment is recoverable. This breaks down into a number of questions.

The order book

40. The first recoverability question concerns the terms of the duty to report set out in the yellow pages of the claimant's order book.

41. Mr Buchanan-Smith argued that the overpayment was only recoverable if it arose as a result of the claimant's failure to disclose a material fact. I accept that argument; it is what section 71(1) of the Social Security Administration Act 1992 says. The material fact is the number of hours of attendance calculated under regulation 5(2).

42. Mr Buchanan-Smith identified the relevant note in the order book as the direction to report if

> "You start a full-time education course or go on a course of full-time instructions."

He then argued that that note did not identify a material fact. He made two points. First, all that the claimant could do was to give her opinion of whether her course was full-time. And an opinion was not a fact. Second, whether a course was full-time was a matter of inference, rather than a primary material fact.

43. I do not need to deal with these arguments, because they overlook two factors.

44. *First factor* The note identified by Mr Buchanan-Smith must not be read in isolation and without regard to its purpose. The note is one of a large number containing guidance on

matters that must be reported. However, the purpose of the notes in order books is to alert claimants to the sort of information that has to be reported. They are not, and do not purport to be, precise statements of material facts that have to be reported. All that the notes can reasonably do is to alert claimants to the possibility that something may be relevant. The notes in the claimant's order book did that by giving a general instruction and then giving more detailed examples. The opening instruction read:

> "You must write and tell us **straight away** ..., if anything changes about yourself or the disabled person you are looking after."

45. The note referred to by Mr Buchanan-Smith gave an example of what had to be reported. It did not limit the general opening instruction. The claimant had to report any change about herself. The more detailed note told her that a full-time course was relevant. But that was just an example. It did not exclude from the duty to report, any course that was not in her view full-time.

46. Mr Buchanan-Smith suggested that the note should have directed the claimant to report if she started a course of education. When the notes are read as a whole, that is what the claimant was in effect told.

47. *Second factor* The other factor overlooked by Mr Buchanan-Smith's argument is that there is a duty in addition to that imposed by the notes in the order book. That duty is imposed by regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987. This raises the second recoverability question.

Regulation 32

48. The second question is whether that paragraph imposes one duty or two.

49. In the adjudication officer's decision, recoverability was based on a failure to disclose a material fact. That duty ultimately derives from regulation 32(1). For convenience, I will divide the paragraph into two parts to explain Mr Buchanan-Smith's argument. It provides:

> Part 1
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> "every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such certificates or other documents and such information or facts affecting the right to benefit or to its receipt as the Secretary of State may require (either as a condition on which any sum or sums shall be receivable or otherwise),"
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> Part 2
>
> "and in particular shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence".

50. Mr Buchanan-Smith argued that this imposed one duty not two. He argued the note instructing the claimant to report if she started a full-time course contained the claimant's only duty to disclose information that was relevant in this case. I drew his attention to Part 2 of regulation 32(1). He argued that Part 1 authorised the notes in the order book and that Part 2 merely contained some specific provisions that might be included in those notes. Part 2 did not, he argued, impose a duty additional to Part 1.

51. I reject that argument. The natural reading is that it imposes two duties. Part 1 is very broad. It is broad enough in its terms to embrace everything that would be covered by Part 2. However, there is one respect in which Part 2 is wider than Part 1. Part 1 envisages that the Secretary of State will specify the matters that must be reported. Part 2 requires a claimant to report certain changes of circumstances regardless of whether the Secretary of State has specified that they must be report. The words "in particular", relied on by Mr Buchanan-Smith, do not limit Part 2 to being merely an example of the scope of Part 1.

52. So, the claimant may be in breach either of the duty to disclose as specified in her order book or of the duty based directly on Part 2 of regulation 32(1). Even if her circumstances were not covered by the notes in the order book, she was caught by the duty to report "any change of circumstances which he might reasonably be expected to know might affect the right to benefit". Questions were asked on the claim form for invalid care allowance dealt about education. Those questions put her on notice of the relevance of a change. So, she should have known its relevance. Whether or not the it was reasonable to expect her to report raises he third recoverability question.

The claimant's visit to Heron House

53. The third question concerns the claimant's visit to Heron House.

54. Heron House is an office of the Department of Social Security near the centre of Cardiff. The claimant visited and discussed her course. That office does not deal with invalid care allowance. So, nothing she said at that visit would amount to disclosure to the relevant office, which was the ICA Unit. Nor has it been suggested that Heron House offered to pass information on to that Unit. I do not know exactly what she said on that visit. The claimant may have asked general questions about entitlement to invalid care allowance if she started a university course. Or she may have set out the details of her course. Nor do I know what information she was given. It is possible the officers there may not be familiar with the details of invalid care allowance. It is possible that she was not given accurate advice. That could have made it reasonable for her to believe that the course she was undertaking did not affect her right to invalid care allowance. If it did, it would also qualify her duty under the order book. These issues were not investigated before the tribunal.

Summary

55. As the appeal tribunal's decision is erroneous in law, it must be set aside. I cannot give my own decision, because further investigation of the facts is needed. There must, therefore, be a complete rehearing of this case before a differently constituted appeal tribunal. The appeal tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions.

56. As my jurisdiction in this case has been limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the appeal tribunal on the law to apply.

Signed on original

Edward Jacobs
Commissioner
15th February 2001