

DETERMINATIONS OF THE SOCIAL SECURITY COMMISSIONER

1. I refuse the claimant leave to appeal against the decisions of the Ashford appeal tribunal given on 6 February 2006 under references U/45/174/2005/00860, 00861 and 01031.

The issues

2. I have to decide two issues. Both concern the actions and motivations of the lady who is now the claimant's partner. I shall refer to her as Ms H. First, did the tribunal go wrong in law in deciding that in disposing of her capital Ms H acted with the significant operative purpose of securing entitlement to income support? Second, does the notional capital rule apply to deprivations made by someone who only later becomes the claimant's partner?

3. I raised another issue before the hearing. This was dealt with by the Secretary of State's representative in paragraphs 10 and 11 of her written submission. This was not the subject of argument at the oral hearing and I need not mention it further.

The oral hearing

4. The applications for leave to appeal in these cases were referred to me and I directed that they be decided at an oral hearing. I held the hearing in the Commissioners' court in London on 25 October 2006. The claimant and Ms H attended. Their solicitors, Kingfords, had secured legal services funding for representation only a few days before the hearing. Fortunately, they were able to instruct Mr Desmond Rutledge, of counsel, in time for the hearing. The Secretary of State was represented by Miss Lisa Busch, also of counsel. I am grateful to both counsel for their interesting and helpful arguments. The local authority informed the Commissioners' office that it would not be represented at the hearing and would rely on the submissions of the Secretary of State. Following the hearing, I received further written submissions from Mr Rutledge and, in reply, from Miss Busch.

The income support claims

5. The claimant was receiving income support when, on 22 December 2003, he telephoned his local social security office and asked how his benefit would be affected if his girlfriend (Ms H) were to move in as his partner on 2 January 2004. He was advised that her entitlement to a jobseeker's allowance would cease and that the value of her house would be taken into account as capital. On the following day, he rang again and said that Ms H would not be moving in with him.

6. Ms H later commented on the claimant's enquiry:

'... please note at that time I had no intention of coming down to Kent and living as a carer in his house since we were merely good friends and being a carer to him was a huge commitment. I also had my own commitments in London where I was living at the time. Our friendship was re-established and we became closer since January this year [2005] but I only decided to move down to Kent in March this year.'

7. On 17 March 2005, the claimant submitted a claim for income support. This claim is the subject of *CIS/1807/2006*. He claimed on behalf of himself and Ms H, declaring only £700 capital. There was no mention of Ms H's house. Ms H explained that she had been employed for three years and had been made redundant in December 2002. She had then received what she called unemployment benefit (actually jobseeker's allowance) until February 2004. She had had to sell her home to clear her outstanding debts in May 2004. Her only income from February 2004 had been the proceeds of sale and she no longer had any savings.

8. Ms H received £151,907.69 from the sale of her house. I do not need to deal with every item of expenditure. It is sufficient to mention that she paid £30,000 to her daughter to meet a student loan and bills and £19,256.30 on a family holiday. Asked to explain, she wrote:

'Being a student my daughter was always deep in debts and prior to the sale of my house I was in no position to help in any way to alleviate her debt burden. However, once I had sold my own house, I felt obliged out of parental duty and love to put her affairs in order hence my gift to her.

'I had not been back to the West Indies since 1999, I also had not been away on any holidays during that five year period. Having the means to travel subsequent to the date [sale?] of my house prompted me to take my immediate family, being my daughter and my sisters and their children to see my mother since my mother had not seen her grand children in a very long time, I do agree, this was a major expenditure but I felt I should treat my own family which was my expression of repaying their kindness to me and my daughter in our years of troubles and difficulties.'

9. The Secretary of State refused the claim on the ground that Ms H had notional capital of at least £49,256.30. The claimant also made another claim for income support on 22 July 2005. This claim is the subject of *CIS/1757/2006*. It was refused on the same ground. The claimant exercised his right of appeal against both decisions.

The housing benefit and council tax benefit claims

10. The claimant received housing benefit and council tax benefit from 1995. On 13 March 2005, he notified the local authority that Ms H was moving in as his partner and carer. The local authority made enquiries and, having learnt of the income support decisions, terminated the awards from 25 July 2005 on the same grounds. The claimant exercised his right of appeal against those decisions. They are the subject of *CH/1822/2006*.

The tribunal's decision

11. The claimant's appeals came before the tribunal at the same hearing. The claimant and Ms H attended and gave evidence. They were accompanied by their representative from the County Council Social Services Department. He argued that Ms H had not acted with the purpose of securing entitlement to benefit. He also argued that the notional capital rule did not apply as, at the time she had spent the proceeds of sale of her house, she had not been the claimant's partner.

12. The tribunal dismissed the appeals. The chairman provided a single full statement of the tribunal's decisions. The tribunal accepted that Ms H had not been aware of the claimant's telephone enquiry in December 2003.

13. The statement dealt with the purpose for which Ms H had spent her capital:

'8. [Ms H] is an intelligent lady. She knew that the way she was spending the good times would come to an end. After that it would be work or back to benefit. It was not until the money was gone that she elected to live with [the claimant]. It is her thinking beforehand that is relevant though as to [the claimant] he was to her knowledge not a man who could support her from his own resources.

'9. It is against this background that I consider that the expenditure on other people primarily [Ms H] but all those taken on holiday as well was incurred with a return to benefit as a significant operative purpose. I acknowledge of course the natural inclination of a mother to help her daughter but there was no legal liability and this was a large percentage of the post debt repayment money. The expenditure hastened the day when it would be new work or new benefit. I accepted [Ms H] took courses to improve her skills but no work was found. There was always the distinct possibility of further benefit. That would have to support her just as it had for two years or so from January 2002.

'10. I have therefore essentially confirmed the decisions save that had the holiday to the West Indies been for two weeks for [Ms H] alone I think that that could have been accepted as reasonable and not badged with an operative purpose of returning to benefit. I appreciate that all expenditure hastened the exhaustion of the money but I think that a reasonable holiday (and after many years away from her country of origin two weeks for [Ms H] would have been reasonable) should not have attributed to it any intention other than deriving refreshment from it. Taking a broad brush and allowing for holiday spending money as well as fares and accommodation I have allocated £1756.30 to that reducing the notional capital to £47,500 (£30,000 [Ms H's daughter] and the remaining £17,500 holiday expenditure).'

14. The statement also dealt with the representative's argument that the notional capital rule did not apply:

'12. I see no ground for departing from the standard approach to a claim for a man and his partner. There is first a consideration of the income that either of them has and then of the capital that either of them has including notional capital. In the case of a partner it is her purpose when spending the money that is relevant. [The claimant's] thinking did not come into the case but his partner's did.'

15. The Secretary of State's written submission to me raised the issue whether Ms H had disposed of her capital as she claimed. The tribunal did not expressly deal with actual capital. However, paragraph 12, which I have just quoted, shows that the tribunal had both actual and notional capital in mind. The tribunal found that Ms H had spent the money as she claimed, and in particular that she had paid her daughter's debts and paid for a family holiday. That is sufficient to show that the tribunal dealt with the actual capital issue.

The legislation

16. Income support, housing benefit and council tax benefit are governed by the Social Security Contributions and Benefits Act 1992. They are all income-related benefits (section 123(1)(a), (d) and (e)).

17. Section 134(1) provides that claimants are not entitled to income-related benefits if their capital exceeds a prescribed amount. Section 136(1) provides that, in determining a claimant's capital, the capital of members of the claimant's family is to be aggregated:

'(1) Where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of that person.'

'Family' is defined in section 137. There is no dispute that the claimant and Ms H are now members of the same family. Nor is it suggested that they had formed a family before March 2005.

18. Section 136(5) provides for regulations to be made on matters relevant to capital. Only one is relevant:

'(5) Circumstances may be prescribed in which-

(a) a person is treated as possessing capital or income which he does not possess'.

19. Regulations have been made under section 136(5)(a). I shall adopt the practice of counsel at the oral hearing and refer only to the income support legislation. The housing benefit and council tax benefit legislation is in the same terms. The relevant income support provision is regulation 51 of the Income Support (General) Regulations 1987:

'Notional capital

51.-(1) A claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to income support or increasing the amount of that benefit ...'

20. 'Claimant' is defined by regulation 2(1):

"'claimant' means a person claiming income support'.

That does not take us very far. But regulation 23(1) is important, because it provides that the capital of a partner is to be calculated in the same way as the claimant's own capital.

'(1) Subject to paragraph (4), the income and capital of a claimant's partner which by virtue of section 136(1) of the Contributions and Benefits Act is to be treated as income and capital of the claimant, shall be calculated in accordance with the following provisions of this Part in like manner as for the claimant; and any reference to the

“claimant” shall, except where the context otherwise requires, be construed, for the purposes of this Part, as if it were a reference to his partner.’

Paragraph (4) is not relevant to this case. Regulation 51 is in the same Part of the Regulations as regulation 23 and is, therefore, subject to it. Consequently, a partner can have notional income in the same way that a claimant can.

21. The other relevant provision is regulation 51A. This provides that the amount of the notional capital reduces in line with the amount of income support that would have been awarded if notional capital had not been taken into account.

The first issue

22. This is: did the tribunal go wrong in law in deciding that in disposing of her capital Ms H acted with the significant operative purpose of securing entitlement to income support? My answer is: no.

23. The tribunal accepted Ms H’s evidence that she had spent the money and how she had spent it. She denied that her purpose was related to benefit entitlement. The issue for the tribunal was whether to accept her word on that. In other words, the issue was the credibility of her assertion. The tribunal did not accept her word. Issues of credibility are essentially matters for the tribunal. The claimant is still entitled to an adequate explanation of why the tribunal made the decision. But I have to recognise that there is a limit to which a finding on credibility can be explained. It does not just involve an assessment of the evidence. It may depend on the way in which the evidence was given, which involves factors that do not appear in a record of proceedings and may not even register consciously in the chairman’s mind.

24. Mr Rutledge argued that the tribunal’s reasons were inadequate to justify its findings that both the discharge of debts and the payment for the family holiday were undertaken for the purpose of securing entitlement to benefit. He said everything that could fairly be said in support of those arguments. He took me through the evidence that was before the tribunal. He also cited authorities to show that entitlement to benefit is always a background factor in expenditure and that the context had always to be taken into account. But I was not persuaded.

25. The tribunal’s reasons do not refer to every consideration that the tribunal took into account. The matters identified by Mr Rutledge were obviously relevant factors in the context of this case and it was not necessary for the tribunal to mention every one of them to show that it took them all into account. What the tribunal had to do was to explain why it did not believe Ms H when she said that she did not act with the purpose of securing future entitlement to benefit. I consider that the reasons, which I have quoted, are adequate for that purpose. I accept that it is possible to give each of the matters mentioned by the tribunal a different significance. But that is the nature of the exercise that the tribunal had to undertake. It had to consider the relevant factors and make a judgment on the significance of each in the context of all the others. To say that each could be given a different significance identifies the difficulty for the tribunal, not an error in its reasoning or an inadequacy in its explanation.

The second issue

26. This is: does the notional capital rule apply to deprivations made by someone who only later becomes the claimant's partner? My answer is: yes.

27. I first consider the interpretation of the legislation on normal principles. I am satisfied that the tribunal interpreted the legislation correctly. Regulation 51 operates at the time when entitlement is in issue. At that point, there is either a claim or an award. It is appropriate to refer, as the regulation does, to a claimant. But viewed from that point, the focus of the regulation is on the purpose of a past disposal, whether in the immediate past or the more distant past. At that time, there may not have been a claim or an award. So the reference to the claimant is a reference to the person's status at the time the issue arises for decision, not to the person's status at the time of the disposal. And what is so for the claimant is equally so for a partner as a result of regulation 23(1).

28. Mr Rutledge argued that the claimant could not deprive himself of capital that he never had. I accept that. He then argued that, on that basis, section 136(5)(a) did not apply to the circumstances of this case. I reject that argument. It fails to take account of the effect of section 134(1). The 'person' mentioned in section 136(5)(a) refers both to the claimant and, by virtue of section 134(1), a partner. Those two provisions, read in combination, have the effect that the enabling provision in section 136(5)(a) applies to a claimant's partner as much as it applies to the claimant. Mr Rutledge's argument overlooks the combined effect of those provisions.

29. Mr Rutledge next argued that the legislation was not authorised by statute to extend to the circumstances of this case and that it was in violation of article 8 of the European Convention on Human Rights in failing to show respect for the claimant's family life and home. That raises issues of the validity of the regulations I have cited and whether it is necessary or possible to interpret the legislation to avoid those consequences.

30. These arguments were based in part on the circumstances of the disposals in this case and in part on their consequences for the claimant. The tribunal found that in this case the money has been disposed of. That removes the doubt, which may exist in other cases, whether money has not been merely secreted away. Nor, as far as I know, is there any chance that those who have benefited from Ms H's generosity will reimburse her. As to the circumstances of the disposals, Mr Rutledge pointed out that they were made at a time when the claimant and Ms H were not members of the same family and at a time when the claimant had no control over Ms H's actions. He emphasised that the claimant was in no way complicit with what Ms H did. I accept that, on the evidence, he is correct to make those points. As to the consequences, Ms H's notional capital will, subject to regulation 51A, be aggregated with the claimant's capital for so long as they remain members of the same family. If the claimant wishes the relationship to continue, he will not be entitled to income-related benefits and will be unable to pay his rent. Possession proceedings have already been brought against him, but were adjourned at the date of the oral hearing. The couple could separate; then the claimant's entitlement to benefit will be based on his capital alone. But separation can not relieve Ms H of the notional capital until it reduces, by operation of regulation 51A, below the capital threshold for any income-related benefit.

31. Miss Busch accepted these consequences. She was prepared to characterise them as unfair to the claimant and admitted that ultimately the only recourse for the claimant and Ms H might be the limited provisions of the National Assistance Act 1948. However, she argued that unfairness could also arise within a family. I accept that point. Partners frequently have separate capital and it is not unusual for them to act independently of each other in deciding how to dispose of it. They may be unaware of what the other holds and unable to influence their actions if they are.

32. Mr Rutledge relied on the circumstances and consequences in this case to argue that it would be oppressive, irrational and disproportionate for the notional capital rule to apply. He suggested two possible distinctions on which the legislation should be based. He began by drawing a distinction between cases where the partners were a couple at the time of the disposal and those where they came together later. He then accepted that it was permissible to prevent fraud and drew a distinction between cases where there was collusion and those where there was not.

33. Miss Busch argued that the legislation was not oppressive, irrational or disproportionate. She emphasised that this was a case in which, on the tribunal's findings, there had been a deliberate course of conduct in spending money with the purpose that it should not be taken into account on a claim for benefit in the future. She also mentioned that the provisions had an anti-avoidance function.

34. I reject Mr Rutledge's arguments and accept those of Miss Busch. It is in principle neither oppressive nor irrational to take account of disposals of capital made by a person before becoming the claimant's partner. Quite the reverse. Both in aggregating the capital of the members of a family and in taking account of notional capital, the legislation fulfils an anti-avoidance function. If notional capital were not aggregated, a future partner could dispose of capital before coming to live with the claimant or couples could separate in order to dispose of capital before reuniting. It is a legitimate function of legislation to prevent an obvious means of avoidance. And the legislation does so in a proportionate way. The notional capital rule will only apply to a future partner when there has been conduct that is related to future entitlement to benefit either for the person alone or as a member of a family. That will limit the circumstances in which the rule applies and restrict it to those cases in which a course of conduct has been directed at future benefit entitlement. Moreover, on the interpretation of the Commissioners, a purpose is only relevant for regulation 51 if it is a significant operative purpose (*R(SB) 40/85*). That further controls the scope of the provision.

35. Mr Rutledge was only able to present his argument with the force that he did because of the particular circumstances of this case, specifically the amount of Ms H's notional capital and the period for which the couple will be affected by the decision. I can see no way to hold that the legislation was valid or invalid according to the effect that it has in a particular case. Nor can I say that it is not valid at all just because it can have serious consequences in individual cases. Nor can I see any way to interpret the clear language of the statute and regulations to avoid the meaning I have given it and its effect for the claimant and Ms H.

36. I come now Mr Rutledge's human rights argument. Article 8 provides:

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the preservation of order or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

37. I will assume that article 8 is engaged in this case in respect of both the claimant’s family life and home. So long as his relationship with Ms H continues, he is unable to pay his rent and may lose his home. And he can only avoid this by ending the family life which he and Ms H have established together.

38. However, the interference is authorised by article 8(2). The notional capital rule is contained in legislation. It is, therefore, in accordance with law. It is part of the law governing the social security benefits, which are part of the welfare state. A welfare state is an integral part of the democratic societies that are parties to the European Convention on Human Rights and Fundamental Freedoms. Expenditure on income-related benefits is one of the major items in the national budget. The combined cost of income support, housing benefit and council tax benefit alone was more than £27,000,000,000 in the last financial year. It is necessary in the interests of the economic well-being of the country to ensure that the large but limited funds available for public financial support are targeted at those most in need. That includes, as I have said, a legitimate anti-avoidance function.

39. Even if there were a violation of article 8, I have no power that would allow me to provide the claimant with a remedy. I have a duty under section 3 of the Human Rights Act 1998 to interpret legislation, in so far as it is possible, in a way that renders it compatible with the claimant’s Convention rights. However, there is no way in which I could interpret the legislation to avoid the consequences that it has for the claimant and Ms H while also maintaining the legitimate anti-avoidance function. That would require the legislation to be rewritten to the extent that I would be legislating rather than interpreting. That I have no power to do.

40. Mr Rutledge sought to rely on the decision of the European Court of Human Rights in *Stec v United Kingdom* in its judgment given on 12 April 2006 on Applications 65731/01 and 65900/01. Section 2 of Human Rights Act provides that courts and tribunals must take account of judgments and decisions of the European Court. However, the House of Lords has decided in *Lambeth London Borough Council v Kay* [2006] 4 All ER 128 that this duty has to be applied within the domestic doctrine of precedent. Accordingly, in so far as *Stec* differs from the decisions of the Court of Appeal and House of Lords in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2003] 3 All E.R. 577 and [2005] 4 All E.R. 545, I must follow the latter. Mr Rutledge did not, thereafter, pursue an argument on *Stec*.

41. After the hearing, I received written submissions on the relevance of the decision of Mr Commissioner Mesher in *CIS/5479/1997*. The issue in that case was whether an Italian pension that had been suspended to allow the recovery of an overpayment on an occupational pension was nonetheless income for the purposes of the Income Support (General) Regulations 1987. The Commissioner decided that it was not. He said:

‘11. ... If a claimant who has not actually received income is to be treated as having that income, that has to be achieved by a specific provision in the legislation. That is

why, for instance, in addition to the regulations mentioned in paragraph 9 above, there has to be specific provision for circumstances in which payments are made to a third party in respect of a claimant or a member of the family. That does not mean that there are no controls over abuse of the system, as the provisions on notional income will be relevant, as discussed in paragraphs 14 and 15 below.'

42. I have to confess that I do not follow how that case helps Mr Rutledge or the details of the argument that he has based on it.

43. As to Mr Rutledge's argument, he first referred to the natural meaning of the word 'capital' and to the fact that the claimant never possessed any of the capital that was disposed of. This is correct in so far as it goes, but it overlooks the provisions that aggregate the capital of members of a family. Mr Rutledge tried to avoid this by arguing that regulation 23 is a deeming provision and, as such, to be construed strictly. For the latter proposition, he cited the judgment of Lord Justice Evans in *Chief Adjudication Officer v Woods* reported as *R(DLA) 5/98*:

'A deeming provision such as section 69(2) [of the Social Security Administration Act 1992], which provides what the law shall be in certain specified circumstances, is relatively innocuous, because it is no more than a legislative technique. It does not embark on the potentially dangerous course, from the constitutional point of view, of deeming as a matter of law that the facts of a case are otherwise than they are. Nevertheless, in my judgment, a statutory deeming provision should be strictly construed, because it requires matters, even matters of law, to be regarded differently from what they are.'

From this, Mr Rutledge argued that the regulation 23 should be interpreted in a way that is proportionate, linking back to his argument at the oral hearing.

44. Miss Busch argued in response that *CIS/5479/1997* was irrelevant. Mr Mesher recognised the possibility of specific legislative provision, which is present in this case. And he recognised the role of notional income, which is the issue in this case. Finally, he was not concerned with regulation 23, which is important in this case. I also add that Mr Mesher recognised the role of notional capital as a control over abuse, a point that Miss Busch made at the hearing.

45. I accept Miss Busch's argument and reject Mr Rutledge's argument for these reasons. First, I can see no way to interpret regulation 23 to reduce its scope. Its meaning is clear. Second, I can see no reason to do so. It performs a legitimate function in a proportionate way. Third, I do not accept that the regulation is a deeming provision. Section 134(1) of the 1992 Act uses the words 'treated as', but that does not necessarily make it a deeming provision. What it does is to provide for the resources of the members of a family to be aggregated. In other words, for income-related benefits the family is treated as a single economic unit. Regulation 23 gives effect to that. It is merely a drafting device, akin to a definition provision, that allows the remaining regulations to be written in terms of the claimant only but to apply to all members of the claimant's family. That contributes to the clarity and simplicity of those regulations. There is no deeming there. There is, of course, deeming in regulation 51, authorised by section 136(5)(a). But there is, as I have said, no scope for interpreting those provisions to mean anything other than what they clearly say.

Disposal

46. As the tribunal did not go wrong in law, I refuse the claimant leave to appeal.

**Signed on original
on 29 November 2006**

**Edward Jacobs
Commissioner**