

**SOCIAL SECURITY ACT 1986**

**SOCIAL SECURITY ADMINISTRATION ACT 1992**

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

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that the decision of the social security appeal tribunal given on 29 October 1993 is not erroneous in point of law. As a result this appeal fails.
2. This is the adjudication officer's appeal against the decision of the social security appeal tribunal of 29 October 1993, leave having been granted by the tribunal chairman. The appeal was the subject of an oral hearing held before me. The claimant did not attend but was represented by her Son Mr P A Legg. The adjudication officer was represented by Mr R Singh, of Counsel, instructed by the Solicitor's Office of the Departments of Health and Social Security. I am grateful to Mr Singh for his detailed submission.
3. The claimant, a widow, was born on 18 August 1906. In 1985 she sold her house for £32,000. From April 1991 she was in residential care. From 16 April 1992 she has been resident in a nursing home in Oxfordshire. on 10 August 1993 she purchased an annuity from the Commercial Union for £20,000 which produced an income of £432 per month. She claimed income support on 13 August 1993 and declared that her savings were less than £2,500.
4. In the light of the evidence the adjudication officer rejected the claim for income support on the ground that the claimant had actual and "notional" capital resources in excess of £8,000, being the limit prescribed by regulation 45 of the Income Support (General) Regulations 1987 ("The General Regulations"). Thereupon the claimant appealed to the tribunal on the ground that there was no deprivation of capital as the

plan was to use her remaining savings "to provide the maximum financial contribution towards the nursing home fees".

5. In his written observations on the claimant's appeal the adjudication officer took the view that the claimant had deprived herself of £20,000 for the purpose of securing income support in terms of regulation 51(1) of the General Regulations so that the resources fell to be treated as still possessed by the claimant.

6. The claimant did not attend the hearing of the appeal before the tribunal on 29 October 1993. She was represented by her son. The tribunal also received oral evidence from the claimant's other son Mr R Legg. In the event the tribunal allowed the appeal. The findings of fact read:-

"Mrs F J Legg is an 88 year old widow who has been in residential care since April 1991 and has been residing at ... Nursing Home .. Oxfordshire since 16 April 1992. She sold her house in 1985 for a sum of £32,000 and we accept that over the last 2½ years she has used up two thirds of hers and her late husband's savings to support herself in care. By early 1993 she had the sum of £22,000 left. The nursing home fees were £406 per week and at that rate her savings' would all have been spent on those fees within 12 months.

2. Mrs Legg has been suffering from dementia (probably Alzheimer's Disease) since 1991 and she has very poor short-term memory. She is extremely frail both physically and mentally and we accept the evidence of her doctor dated 7 October 1993 (Dr. Ledger) that if she were required to leave the nursing home it would have a devastating effect on her health. He also stated in a report dated 12 May 1993 that she needs guidance and direction with all aspects of care.

3. For many years Mrs Legg's son Mr P A Legg has been advising her on the management of her affairs. However, no enduring Power of Attorney was made in favour of her son and he does not therefore act as her attorney. She continues to carry out transactions herself but does so on the advice of her son, with as much understanding as she is able to muster of what he explains to her.

4. In early or mid-1993 Mr P A Legg made some enquiries of the DSS of whether in the event of Mrs Legg's purchasing an annuity with a view to ensuring that she did not become without both capital and income after the 12 months period in those circumstances she could obtain Income Support to assist in the payment of the nursing home fees. She was told that whilst no decision could be made until a transaction was carried out, nevertheless the Adjudication officer would have to consider Mrs Legg's capital and would have to consider whether any disposition to purchase an annuity was deprivation of her capital to secure Income Support, and that in those circumstances she would be

regarded as still possessing that capital and could not claim income support. Mr Legg was not satisfied with this and made an approach to his MP, Sir Anthony Durrant who wrote to the Benefits Agency on the 15 June 1993 and received replies on the 25 June and on the 30 July 1983 explaining the capital and deprivation of capital rules and making the point that the only way for the advice to be tested would be for the action of purchasing the annuity to take place.

5. Following that advice, Mr Legg went ahead and arranged the purchase of an annuity from the Commercial Union 3rd Age Initiative Continuing Care Plan which was originally going to cost £22,000 but was varied during the course of the application to £20,000. The annuity was actually purchased in that sum on the 10 August 19'93. The medical report of 12 may 1993 already referred to forms part of the application for that annuity, and the transaction was actually carried out by Mrs Legg herself on the advice of her son.

6. We find that Mr Legg explained to his mother that she should carry out the transaction because it was designed to make the use of the capital which she had left in her best interest and to enable her to remain at ... Nursing Home. We find that Mr Legg did not explain to his mother anything about income support or the capital or deprivation of capital rules, and we find that Mrs Legg had at the material time no knowledge of these rules, and entered into the transaction on the advice of her son whom she trusted because she felt that it would be in her best interests and not with a view to obtaining income support or increasing income support.

7. Three days later on the 13 August 1993 Mrs Legg made a claim for Income Support and at that time correctly stated that she had capital of less than £8,000. The actual amount of capital at that time is not clear and it may have been more than £3,000."

7. The reasons for decision reads, so far as relevant:-

"By Section 134(1) of the Social Security Contributions and Benefits Act 1992 no person shall be entitled to an income related benefit if their capital or a prescribed part of it exceeds the prescribed limit. By Regulation 45 of the Income Support (General) Regulations 1987, the prescribed amount is £8,000.

2. By Regulation 51(1) of the Income Support (General) Regulations, a Claimant shall be treated as possessing capital of which she has deprived herself for the purposes of securing entitlement to income support or increasing the amount of that benefit except in certain circumstances which do not apply here.

3. By R(SB) 40/85 the word "deprived" is used in its ordinary sense and a deprivation of capital can still take place even if a Claimant acquires another resource in its place. By R(SB) 38/85 and R(SB) 40/85 it is not necessary that for the purpose of securing or increasing benefit shall be the sole purpose of the deprivation of capital but it must be "significant operative purpose".

4. By R(SB) 12/91 a claimant cannot be caught by the deprivation of capital rules unless they had knowledge of the capital limits.

5. In this case we are satisfied that the purchase of the annuity was not carried out by Mr P A Legg on behalf of his mother but by [the claimant] herself albeit acting on his advice and in effect following his guidance. As appears from the findings of fact we are satisfied that [the claimant] did not have any knowledge of the DSS rules, whether of capital limits or of deprivation of capital, and we are satisfied that she did not apply her mind to a claim for Income Support at all. We are satisfied that her main purpose in carrying out the transaction was to follow the advice of her son whom she trusted, and to deal with her capital in her best interest in accordance with that advice. We are satisfied that it was not a significant operative purpose of the purchase of the annuity by [the claimant] that she should obtain income support or increased income support.

6. By paragraph 11 of Schedule 10 to the Income Support (General) Regulations 1987 the value of the right to receive any income under an annuity and the surrender value of (if any) of the annuity has to be disregarded in the calculation of the Claimant's capital. We therefore hold that [the claimant] is not disqualified on the grounds of capital or deprivation of capital from income support

8. Mr Singh submitted that the tribunal had erred in law because having found as fact that the claimant had suffered from dementia since 1991, they failed to consider whether she had the required mental capacity to understand the nature of the transaction for the purchase of the annuity. He accepted that if the contract for purchase of the annuity was made by the claimant during a lucid interval, it would be binding on her notwithstanding that the Commercial Union were in full knowledge of the facts regarding her disability. If however she was suffering from such a degree of mental disability that she was totally unable to understand the nature of the contract, then that contract would be void and of no effect and the doctrine of non est factum applied. Mr Singh referred me to Re Beaney decd (CH.B.) [1978] 1 WLR 770 where Deputy Judge Nourse (as he then was) explained the relevant law as follows:-

"The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a Will the degree

required is always high. In the case of a contract, a Deed made for consideration or a gift Inter Vivos, whether by Deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and the value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his Will or on his intestacy, then the degree of understanding required is as high as that required for a Will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of."

9. Mr Smith stressed that a finding on the claimant's mental capacity was crucial because if the contract was void and of no effect the sum of £20,000 fell to be taken into account in calculating the claimant's actual capital. The relevant law of restitution then applied.

10. Mr Singh referred me to the Law Commission Consultation Paper No. 119, where at page 19 of the purpose of the discussion on the concept of capacity was "to explain and illustrate the variety of legal and other approaches to the definition of incapacity based on mental state;" at paragraph 2.10 it was stated:-

"Legal incapacity arises whenever the law provides that a particular person is incapable of taking a particular decision undertaking a particular juristic act, or engaging in a particular activity. Incapacity can arise from a variety of conditions;... under the modern law, a great many different approaches have been developed to the question of capacity based on mental state. Generally, there is a presumption that the person is capable until proved otherwise, and capacity is judged in relation to the particular decision, transaction or activity involved..."

11. In my view the tribunal did not err in law on this ground. The tribunal found as fact that the claimant "has very poor short-term memory". That is not the same as saying that he was unable to understand the nature of the contract at the time of signing, albeit that she might have forgotten about it shortly after. The tribunal also found as fact that the transaction "was actually carried out by Mrs Legg herself on the advice of her son ... whom she trusted because she felt it would be in her best interest ... ". Although the tribunal did not specifically refer to the claimant's capacity to enter into the transaction, the findings of fact clearly indicate that the tribunal considered that the claimant had the required mental capacity to understand the nature of the transaction at the time of signing. It is important to note that the claimant did not divest herself of her only asset in favour of a third person but that the purchase of the annuity was "with a view to ensuring that she did not become without both capital and income after the 12 month period". In

other words she entered into a transaction which in her view was financially advantageous to her. The tribunal proceeded on the basis that the contract for the purchase of the annuity was valid and I see no error of law on this ground.

12. Section 134(1) of the Social Security Act 1992 provides that no person shall be entitled to an income related benefit if her capital or a prescribed part of it exceeds the prescribed amount. Regulation 45 of the General Regulations provides that the prescribed amount is £8,000.

13. Regulation 51 (1) of the General Regulations provides so far as relevant:-

“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...”

It will be noted that two elements are necessary - that the person has deprived herself of actual capital and that her purpose was to secure entitlement to or increase the amount of income support. The provisions are mandatory and there is no discretion.

14. The word "deprive" is an ordinary English word whose meaning is not a question of law. In decision R(SB) 40/85 the Commissioner considered the meaning of the word, albeit for supplementary benefit purposes, and held at paragraph 8:-

“In my judgement it does not change its meaning by reference to the consequences of deprivation. It is in my judgement perfectly proper for an adjudication officer or tribunal to conclude that a person has deprived himself of a resource if as the result of his own act he ceases to possess that resource whether or not he becomes possessed of some other resource in its place. ...”

15. The tribunal found as fact that by early 1993 the claimant's actual capital amounted to £22,000 and that she purchased the annuity for £20,000 on 10 August 1993. The tribunal had regard to decision R(SB) 40/85 and the reasons for decision show that they took the view that the claimant had deprived herself of that sum for the purposes of regulation 51(1) of the General Regulations. I see no error of law on this ground.

16. The tribunal proceeded to consider whether the claimant had deprived herself of this sum "for the purpose of securing entitlement to income support or increasing the amount of that benefit". In decision R(SB) 40/85 the Commissioner held that whether the purpose of deprivation was to secure or increase benefit was ordinarily a matter of inference from the primary facts. Findings were essential on the reasons tendered by the claimant for the expenditure and the extent of the claimant's knowledge of the capital limits. At paragraph 10

the Commissioner reaffirmed paragraph 22 of decision R(SB) 38/85, that the purpose of securing benefit or increasing the amount thereof need not be the sole purpose, though it must be a significant operative purpose. The tribunal found as fact that Mr Legg advised the claimant to purchase the annuity "because it was designed to make the use of the capital which she had left in her best interests". They found that Mr Legg "did not explain to his mother anything about Income Support or the capital or deviation of capital rules". They further found that the claimant had "at the material time no knowledge of these rules, and entered into the transaction on the advice of her son whom she trusted because she felt it would be in her best interest and not with a view to obtaining income support or increasing income support". In the light of those findings of fact the tribunal concluded that the claimant's purpose "in carrying out the transaction was to follow the advice of her son whom she trusted and to deal with her capital in her best interests in accordance with that advice. We are satisfied that it was not a significant operative purpose of the purchase of the annuity by [the claimant] that she should obtain income support or increased income support". I find no error of law in that conclusion based on the evidence before the tribunal and their findings of fact.

17. It is not in dispute that there was no power of attorney in favour of Mr Legg and that he was not formerly appointed by the Secretary of State to be the claimant's appointee for the purposes of claiming income support. The tribunal found as fact that Mr Legg had made some enquiries as to whether the claimant could be awarded income support to assist in the payment of nursing home fees if she purchased the annuity. Mr Singh submitted that the tribunal erred in law in failing to consider whether Mr Legg had acted as the claimant's agent with the result that Mr Legg's knowledge of the capital limits and his intention to purchase the annuity "for the purpose of securing entitlement to income support or increasing the amount of that benefit" could be imputed to her. I reject that submission. In their reasons for decision the tribunal concluded "that the purchase of the annuity was not carried out by Mr P A Legg on behalf of his mother but by [the claimant] herself albeit acting on his advice and in effect following his guidance". In the light of that conclusion I do not consider it was incumbent on the tribunal to proceed to consider the question of agency. There was no evidence before the tribunal to indicate that at the date of the purchase of the annuity the claimant had entrusted her affairs entirely to Mr Legg. I find no error of law on this ground.

18. For the reasons stated above the tribunal did not err in concluding that the claimant was not caught by the provisions of regulation 51 (1 ) of the General Regulations with the result that she was "not disentitled to income support from 13 August 1993 on the grounds of having capital which exceeds the prescribed limit as a result of depriving herself of such capital .." The tribunal rightly referred to paragraph 11 of Schedule 10 to the General Regulations which provides for the disregard of the value of the right to receive any income under annuity and the surrender value (if any) of such an annuity.

19. Mr Legg told me that the contract for the purchase of the annuity contained an opting out clause which had to be exercised within three months from the effective date of the contract i.e. 10 November 1993. The tribunals decision in the claimant's favour was not issued until 16 November 1993. In view of the adjudication officer's decision and with no certainty as to the outcome of the tribunals decision, it was decided to exercise the option although a penalty was payable. There is nothing to indicate that the relevant document was not signed by the claimant. She received approximately £17,000 after the deduction of the penalty and refund of all payments made to her under the terms of the contract. It was agreed that the inclusive period before me for decision was from 13 August 1993 to 9 November 1993 and I have limited my decision to that period accordingly.

20. The record of the proceedings show that the tribunal took considerable care with this case. They recorded full findings of fact and applied the law correctly to those findings. The decision complied with the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 and I find no error of law on this ground.

21. Before leaving this case I feel I must comment on certain matters. At the material time the claimant was elderly and in poor health. She was happy and well cared for in the nursing home. The amount of her capital would only have allowed her to stay there for a further year. She could have claimed income support seven months later when her capital was below the prescribed limit of £8,000. By purchasing the annuity the potential burden on the National Insurance fund would have been greatly reduced. I consider it significant that the claimant was prepared to use the whole of her capital to purchase the annuity and not merely £14,000 so as to bring her capital within the prescribed limit. Mr Legg has throughout used his best endeavours to give the claimant sound financial advice and ensure that she could continue to enjoy the comforts of the nursing home. The claimant will no doubt submit a further claim for income support when her actual capital falls below the prescribed limit.

22. The adjudication officer's appeal is dismissed and I give the decision set out in paragraph 1.

**(Signed)** R F M Heggs  
**Commissioner**

**(Date)** 20 June 1994