

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal is erroneous in point of law and accordingly I set it aside. I remit the case for determination to a new social security appeal tribunal who should have regard to what I have said in the course of this decision.

2. I held an oral hearing of this appeal. The adjudication officer was represented by Mr G. Roe and the claimant's case was presented by Mr R.J. Devereux, the administrator of the nursing home in which she resides.

3. This is an appeal brought by the adjudication officer against the decision of the Aldershot social security appeal tribunal, given on 8 November 1993, which decided that the claimant's income support was not to be reduced by tariff income from 15 July 1993.

4. The claimant is an elderly lady. In July 1987 it was necessary for her to move to a nursing home because of a deterioration in her health. Her husband, a Canon of the Church of England, continued to reside in a residential care home. On 4 September 1990 the claimant claimed income support because she could no longer meet the fees of the nursing home from her income and savings. She was awarded income support from 18 October 1990. The claimant was left a legacy of £2,500.00 by her brother-in-law and on 6 March 1993 her husband informed the Department of Social Security of the legacy. The solicitor who was dealing with the brother-in-law's estate invested this money in a life insurance policy. It is clear from the correspondence passing between the solicitor and the claimant's husband that they in any event were aware of the capital rules regarding income support and that they were under the impression that the legacy would not be counted as an asset if it was invested in a

life policy.. The money was invested in a joint life second death policy and I accept that the primary purpose was that it would cover funeral expenses and any debts which might be outstanding at the time of the death of the survivor. It is clear from the correspondence that the husband and the solicitor who advised him knew that the obtaining of income support was a foreseeable consequence of the purchase of the life policy. This was not the primary purpose of the purchase but it seems to me that it was a significant operative purpose. By a decision issued on 1 July 1993 the adjudication officer gave a review decision and decided that the claimant's income support was to be reduced by a tariff income of £9.00 per week from 1 July 1993 and £14.00 per week from 15 July 1993.

5. It is contended on behalf of the adjudication officer that the tribunal erred in law in concluding that the claimant could not be caught by regulation 51(1) of the Income Support (General) Regulations because she still possessed actual capital and that actual capital was such as fell to be disregarded under the provisions of Schedule 10. I am satisfied that the members of the tribunal did err in law in holding as they did. The precursor of regulation 51(1), in the days of supplementary benefit, was regulation 4 of the Supplementary Benefit (Resources) Regulations 1981. That regulation was the subject of elucidation in a number of Commissioners decisions but it is only necessary for me to refer to R(SB) 40/85 where the Commissioner explained that a claimant would have deprived himself of capital even though he still possessed an asset of equal value. I set out what was said by the Commissioner at paragraph 8 of that decision:

"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 a result of his own act he ceased to possess that resource whether or not he becomes possessed of some other resource in its place. He may thus be held to have deprived himself of a resource if he gives it away, if he uses it for a holiday or in any other manner that leaves no resource at the end of the day; or if he uses it to purchase a resource of equal value which will retain its value; or which will rapidly depreciate or which will fall to be disregarded for the purposes of supplementary benefit."

I bear in mind that those words were spoken of regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981 and that there is an important difference in the wording of that paragraph when contrasted with regulation 51(1) of the Income Support (General) Regulations. The supplementary benefit regulation gave a discretion to the adjudicating authorities as to whether or not a claimant could be treated as still possessing the resource. That discretion allowed the adjudicating authorities to avoid double counting. If a claimant deprived himself of a resource by acquiring another resource, then he would not be penalised twice and only the difference between the value of the notional resource and the actual resource would be

held against him under the provisions of regulation 4(1). However the legislature did not provide for a discretion in regulation 51(1) of the Income Support (General) Regulations. It would be grossly unfair to a claimant if he were to be penalised twice and it does not seem to me that it can have been the intention of the framer of the regulation that such should be the case. But such jeopardy does not come about in the instant case because, although the claimant is caught by the notional resource and is to be treated as still possessing it, he cannot be penalised because of the possession of the actual resource, namely the insurance policy or rather its surrender value, that is to be disregarded under the provisions of the Schedule. So I am satisfied that double counting is avoided. It is to be borne in mind that the word "deprive" is used in regulation 51(1) and that that is an ordinary English word and is not to be given any legal definition. I am satisfied therefore that a person deprives himself of a resource if he ceases to possess it regardless of the fact he received some other resource in return. The issue arising under regulation 51 is not free of authority. CIS/809/91 bears directly on it; that was a case where a claimant purchased on mortgage a council house, and then sought to include in his income support entitlement the mortgage interest payable, it was held by the Commissioner that it was not enough for the tribunal to consider solely whether the restrictions imposed by paragraph 10(1) of Schedule 3 to the Income Support (General) Regulations 1987 applied. He emphasised that consideration must also be given to the question of whether the acquisition of the council house activated regulation 51(1) and in consequence whether the claimant ceased to be entitled to income support altogether. In the case before me the claimant acquired an insurance policy but in doing so she deprived herself of £2,500.00 and regulation 51(1) was applicable, provided it could be shown that her purpose was to secure, or increase the amount of income support. In my judgment the tribunal erred in law in deciding that no deprivation had taken place because the claimant had acquired another resource which fell to be disregarded. It is on this ground that I set aside their decision.

6. It is also contended on behalf of the adjudication officer that the tribunal failed to make any findings of fact as to the precise nature of the insurance policy and that this was crucial for proper consideration of the appropriate disregard under Schedule 10. However it is now conceded on behalf of the adjudication officer that it fell to be disregarded under Schedule 10. Consequently I find it unnecessary to direct the attention of the new tribunal to CIS/122/1991.

7. It is also contended that the tribunal erred in failing to address the question of review of the existing award and consequently that they have not complied with the provisions of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986. I remind the new tribunal of the need to deal with this question though it seems to me it will not cause them very much difficulty; the right to review on the basis of the notional capital would arise of the date of the purchase of the

policy. It is unlikely that the adjudication officer will now seek disentitlement on the basis of prior actual capital; if he did then the date is the day upon which the claimant was entitled to demand payment of the £2,500.

8. I direct that the claimant's appeal be reheard by a differently constituted social security appeal tribunal. That body should bear in mind what I have said in the preceding paragraphs in relation to regulation 51(1). It will be necessary for them to consider whether the claimant had a significant operative purpose to secure, or increase the amount of, income support. That of course is a question for them and I simply direct that they consider the relevant evidence relating to it. If the members find that regulation 51(1) is applicable to the claimant then they will have to consider the diminishing notional capital principle as provided for in regulation 51A of the same Regulations.

9. There is a final comment which I should make. The claimant's representative criticises the original submission to the tribunal on the basis that it suggests some dishonourable conduct on the part of the claimant and her husband. I agree that it might have been worded more happily. After perusing all the papers before me, I should say that in my opinion the claimant and her husband have acted honestly and honourably throughout.

(Signed) J J Skinner
Commissioner

(Date) 25 July 1994