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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case no: CIS 2537 1997

Non-remit

SOCIAL SECURITY ACTS 1992 - 1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Mr Commissioner David Williams

(2)

Claimant: [redacted]

Benefit: [redacted]

[redacted]

Tribunal: [redacted]

Tribunal case ref: [redacted]

Tribunal date: [redacted]

CIS 2537 1997

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the claimant's appeal in part.

2 The appeal was against the decision of the Sutton social security appeal tribunal on 4 October 1996, after earlier hearings by the tribunal on 17 January 1996 and 5 June 1996. It was brought by leave of the chairman. The decision was that 19, 093.95 pounds, paid to the claimant as income support in the period from 11. 10. 91 to 22. 7. 93, was overpaid, and was recoverable from the claimant by the Secretary of State under section 71 of the Social Security Administration Act 1992. For the reasons given below, the decision was erroneous in law.

3 I therefore set the tribunal decision aside. It is expedient that I substitute for that decision my own decision, which is:

The receipt of the first two portions of the prize of 25,000 pounds did not result in the claimant at any relevant date having capital in excess of the prescribed limit, and did not affect the entitlement of the claimant to income support at any relevant date. There was therefore no overpayment of income support in respect of receipt of those sums and no requirement on the claimant to report receipt of those sums. The Secretary of State is not entitled to recover any sum for that reason.

The receipt of the third portion of the prize resulted in the claimant having capital in excess of the prescribed limit between 26 February 1992 and 2 March 1992 inclusive. Accordingly, her entitlement to income support was removed or reduced during that period. As she was not aware of the material fact that her capital was in excess of the prescribed limit at that time, she did not fail to disclose that fact, and any overpayment of income support for the period is not recoverable by the Secretary of State under section 71 of the Social Security Administration Act 1992.

The reduction in the monthly payments of interest on the claimant's mortgage in December 1991 resulted in an overpayment of income support with effect from 2 December 1991. The claimant failed to disclose that fact on and after 1 January 1992. The overpayment of income support resulting from that failure to disclose is recoverable.

As the Secretary of State was unable to provide a precise figure for overpayment, I cannot decide that sum without adjournment. The case is remitted to the Secretary of State to calculate the amount of overpayment resulting from this decision. If that figure is not agreed, either party may ask for the case to be restored to me for final decision on that sum. I adjourn the case pending such agreement or remission.

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4 I held an oral hearing of this appeal in London on 22 June 2000. The claimant attended and gave evidence under oath. She was also represented by Mr Paul Treloar of the London Advice Services Alliance advocacy team. The Secretary of State was represented by Ms Anna Powick of the Office of the Solicitor to the Department of Social Security. I am grateful to both for their help in this long-drawn-out case.

5 I issued a direction before hearing on 27 October 1999. In this I indicated that I was of the provisional view that the tribunal decision under appeal should be set aside because the tribunal had reached a decision that the prize money was to be taken fully into account from the date of its award, regardless of the fact that it was paid in instalments and the tribunal had made no findings about the claimant being entitled to the sums in advance of payment. I also indicated that, unless I heard submissions to the contrary, I would give a short decision on that aspect of the appeal and deal at the oral hearing with the outstanding issues by way of full rehearing. Both parties agreed with that approach. Accordingly, I confirm my provisional decision and in this decision deal with the outstanding issues by way of a full rehearing of the appeal

Background to the appeal

6 The claimant was an artist, author and designer. Her business proved unsuccessful and she claimed income support with effect from 1 March 1991, having stopped her activities in January 1991. For present purposes it is enough to note that she was paid income support at various rates on a continuing basis from then to 24 March 1994. At that time an investigation was conducted into her entitlement to income support. The result was that benefit was stopped by a decision of an adjudication officer on 12 July 1995. The officer decided that some 28,000 pounds income support had been overpaid of which some 20,000 was recoverable.

7 The adjudication officer gave several reasons for the decisions to stop income support and recover the overpayment. One was that the claimant had received, but had failed to disclose, a 25,000 prize. A second reason was that the claimant had failed to disclose changes in the rate of interest payable on her mortgage. A third reason was that she had failed to disclose royalties on books she had written. There were other issues about the sales of paintings. But, it also appeared, that she had been underpaid income support totalling in excess of 7,000 pounds.

8 The multiple reasons for overpayment, combined with the underpayment, meant that the resulting decisions of the adjudication officer were somewhat complex. Further, as often happens in such cases, the amount of overpayment and underpayment were miscalculated, and the decision put before the tribunal on appeal was different to that against which the claimant appealed. In the outcome, the tribunal agreed with neither the original decision or the revised decision, but reached a third decision. It is that third decision which is now under appeal. The parties told me that only two strands of the original decision on recoverability and setoff were still in issue: the effect of the 25,000 pound prize, and the issue about changes in mortgage interest payments. I therefore deal only with these issues.

The prize

9 The claimant won the 25,000 pound cash prize in 1991. She did not apply for it or take any action to solicit it, and only found out about it when approached by an official on behalf of the Japanese foundation that had awarded it to her. The first she knew was when someone telephoned her to ask to come to see her about the prize and accompanying arrangements. The arrangements were that she was to make two trips to Japan to receive the prize and talk about her work as an artist, and also to provide some pictures for exhibition. The trips took place between 5.9.91 and 19.9.91 and 20.4.92 and 26.4.92. Her expenses were paid by the foundation. During the trips she engaged in public relations activities with the foundation. The prize was paid in pounds sterling direct to her bank account in three portions. She received 10,000 on 17.12.91, 5,000 on 10.2.92 and 10,000 on 25.2.92. She clearly gave the foundation her bank details, but she reached no agreement about, and was not informed in advance of, the individual payments. She therefore only knew about the cash when it had been paid into her bank account and she obtained statements confirming this.

The arguments of the parties

10 The basis for the decision by the adjudication officer was that the prize money was capital received by the claimant. It was relevant to her income support entitlement. This was because it increased her capital assets to above the prescribed amount, thereby removing her entitlement to income support. Therefore she was under a duty to disclose the sum to the Benefits Agency. She had not done so and had failed to disclose a material fact. The income support paid as a result was recoverable under section 71 of the Social Security Administration Act 1992 as all the requirements of the section (set out in R(SB) 54/83, and listed in the submission to the tribunal) were met.

11 The claimant challenged this on the ground that the prize money was of no relevance at all to her income support entitlement. This was because she never, in any real sense, had any of the money. The prize money was paid into a bank account that was heavily overdrawn. Indeed, the bank manager had personally warned the claimant of a threat of foreclosure if she did not reduce the overdraft. The sums reduced the overdraft but did not remove it (save for the third portion which, it was conceded did give the claimant a credit balance in her account for a few days). The claimant only knew about the payments in after they had been absorbed into the overdraft, without removing it. The reason the overdraft was so large is that it was linked to a loan account which had financed buying her home, and money from the account .

Receipt of the prize money

12 I found the claimant's evidence about what happened to the prize money on receipt somewhat confused, although I recognise it was now almost nine years ago. It is clear from the appeal papers that the claimant maintained both a current account and a loan account at her bank, and that these were linked. She insisted that this was one account, but I find it to be two separate accounts. The effect of the payment in of the first two instalments of the prize money was to reduce the amount of overdraft on

the current account. But, on both occasions, the account remained overdrawn throughout. When the final portion was paid in, the balance of the account changed to a credit balance of over 8,000 pounds. This was on 25 February 1992. It fell below that sum on 2 March 1992, and also below 3,000 on the same day, when 6,100 pounds was transferred from that account to the linked loan account by internal transfer. Of this, 1,100 pounds represented the regular monthly debit to the current account for credit to the loan account, and the 5,000 was a capital sum. The claimant told me that both transfers were made by the bank without reference to her. There is no evidence to contradict this statement. I did not see the agreements between the claimant and the bank on which the two accounts were operated, but accept that it would not be unusual for a bank to have and use such authority where, as here, the accounts were overdrawn and in arrears and where the customer had only limited sources of income.

What was the nature of the prize money?

13 When I first received the papers, I formed an initial view (which I put to the parties in my direction) that the prize money might be regarded as earnings by the claimant from self-employed employment. Both parties maintained before me that the claimant was not engaged in any professional activity in receiving her prize, and it did not constitute earnings. In particular, I was offered no evidence by the Secretary of State (upon whom the burden of proof fell) that the claimant had earned the prize as part of her activities as an artist. I accept, on the facts, that the prize was not earnings.

14 The submission put to me was that the prize was not income at all, but capital. That was the basis of the adjudication officer's decision under appeal. This submission was supported by reference to *R v Supplementary Benefits Commission ex parte Singer* [1973] 1 WLR 713, a case about the distinction between capital and income for legal aid purposes. The test propounded by the Divisional Court, and cited to me, is:

> "the essential feature of receipts by way of income is that they display an element of periodic recurrence. Income cannot include ad hoc receipts."

It was put to me by both parties that the prize was an ad hoc receipt, in this sense, and was therefore capital.

15 It is somewhat surprising, given the importance of the distinction of income and capital to the income-related social security benefits that the case cited to me is one about legal aid, and that there is limited authority on the meaning of the term in the benefits legislation. I accept that this is the usual authority cited for the general proposition (*Mesher and Wood, Income-related Benefits; The Legislation, 1999*, p 186). The assumption is that "capital" and "income" are terms with no special meaning for social security law. The decision of the Court of Appeal in *Lillystone v SBC* [1982] 3 F.L.R. 82 is cited for the proposition that the question whether a sum is income or capital is a question of law. Were it central to this case, I would have asked that this issue be further explored as there has been a line of cases in recent years making it clear that for income tax and similar purposes, the principal guide to whether something is income or capital is by reference to accounting principles (the judge being

guided by expert evidence of the application of those principles). The case law includes in particular the decision of the Court of Appeal in *Gallagher v Jones* [1994] Ch 107, and is reviewed extensively by Lloyd J in *Herbert Smith v Honour* [1999] STC 173. That recent authority would seem to me to apply here. In this case, I accept that the prize is capital, whether that be a question of law or of fact.

16 Aside from general principle, I was referred to regulation 48 of the Income Support (General) Regulations 1987. Regulation 48(9) provides that "any charitable or voluntary payment which is not made, or not due to be made, at regular intervals ... shall be treated as capital." Without deciding whether the prize was a "voluntary payment" (which the claimant's representative pressed me to decide), this in my view confirms the general approach I have followed in deciding that the prize was capital.

17 Should the prize money be deemed to be income by reason of regulations 40 and 41 of the Income Support (General) Regulations 1987? The concession by the Secretary of State prevents regulation 41(5) applying (earnings to the extent that they are not a payment of income are to be treated as income). Regulation 41(1) (capital payable by instalments) does not in my view apply on the facts, because the sums paid to the claimant were never "outstanding". This is because she had no entitlement to them, and there is no evidence of receivability before receipt.

18 It follows that the prize money was capital, and the relevant amounts should be taken into account as received under regulation 46, unless they are to be disregarded under Schedule 10. Paragraph 16 of Schedule 10 (value of right to receive any outstanding instalment) is not relevant for the reason just given. I see no other disregard of possible relevance.

How much capital did the claimant have?

19 Receipt of the first two portions of prize money left the claimant with a continuing current account overdraft, but the third portion put the claimant briefly into credit. I should add that it was not in dispute before me that the claimant had no other assets of relevance. It appears that the paintings and book rights were dealt with separately. The question in this case is confined to the effect on her total assets of receiving the prize money.

20 It may seem surprising that someone could receive an unexpected large cash sum, not know when it was received, and then only discover that it had been received after it had already, so to speak, disappeared again by some process not actively involving the claimant. The essence of the argument for the claimant was that this "surprising" situation is valid in income support law if not in common sense. On the somewhat unusual facts, the claimant had no entitlement to the sums before payment, never handled the cash in a physical sense, nor held any bill of exchange or other documentary form of entitlement to the sums. The money went into her bank account electronically and out the same way without any action on her part. Further, once the money had merged into the overdraft, it was not a separate asset, but part of a liability. The only effect of the payments in was to reduce the net value of the liability.

21 The general rules about capital and the calculation of capital are, to my mind, remarkably thin in the Income Support (General) Regulations 1987 and similar regulations. Regulation 46 states only that the capital to be taken into account is "the whole of the capital". Regulation 49 adds only that "capital which a claimant possesses .. shall be calculated ... at its current market value..." (subject to exceptions of no relevance here). In this case the asset was money which merged, when paid into the account, into the net liability of the claimant's two bank accounts. It was no longer a separate asset and nothing in income support law required it to be treated as such. It had no positive market value. The well-known decision of R(SB) 2/83 (indebtedness to be ignored in assessing gross assets), to which the tribunal turned, is of no assistance to the Secretary of State where the "asset" *is* a liability. I can only echo the disquiet of the Tribunal of Commissioners deciding that case nearly 20 years ago that "it is unfortunate in the extreme that the regulations do not define in unequivocal terms the meaning of capital resources".

Did she intentionally deprive herself of the capital?

22 The final fall-back position of the Secretary of State in defending the decision to recover the income support, was to invoke regulation 51 (notional capital). In my view, that also fails to attach any capital to the claimant. Regulation 51 provides that:

> "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."

Did the claimant deprive herself of the prize money? I have no hesitation in saying that she did. Did she do it to claim income support? I have no hesitation in saying she did not. I base both those findings on the arrangements applying to the claimant's bank accounts, and her attitudes to them.

23 The claimant told me that she was not particularly good at money, and that she kept only one bank account to keep things simple. She paid everything into, and out of, the one account. She had no building society or other accounts, and she did not use credit cards. I accept that evidence and record my more general impression from that and other evidence before me that, to put it bluntly, the claimant was financially naive. But everything that went into and out of her accounts must have been authorised by her. I do not accept that the bank would have acted outside its authority. The transfer of the capital out of the account was therefore a self-deprivation. That is the approach of R(SB) 40/85, which I follow.

24 But I also accept that the deprivation was not for income support-related purposes. The claimant was questioned directly about the application of regulation 51 to her case. I accept the reasons why the claimant would not have thought about creating a new account to avoid the agreements applying to her current account. With regard to those accounts, the agreements under which the money was taken by the bank were authorised before the claimant claimed income support and while she was

still carrying on business. The sums taken out under more direct instruction and transferred to the loan account were taken out to avoid foreclosure by the bank manager, not least because he was a personal friend. That was her main purpose.

25 Was it her only purpose? It is for the Secretary of State to establish that this is not so, and that may be done by any relevant evidence. Again, I follow R(SB) 40/85, together with the test from R(SB) 9/91 that it must be shown that reduction of income support is a significant operative purpose to be relevant. I see no evidence that this was so regardless of the evidential burden. Miss Powick submitted that, following the reasoning of R(SB) 9/91, I should find that a significant purpose of the claimant was to obtain income support. I have carefully considered the report of R(SB) 9/91 since the oral hearing, but I am unable to draw that conclusion, or the conclusion of R(SB) 38/85 cited in that decision, on the facts of this case. R(SB) 9/91 was the not uncommon case of someone who gave away assets and then expected to claim benefit. There was no element of "giving away" in this case. It is nearer the factual picture in R(SB) 12/91, where capital was used to pay debts that were due immediately. As the Commissioner put it in that case:

> "A person has to repay his debts. He has no choice in the matter, and if he has no choice, then any divesting of capital resources in pursuance of the reduction or discharge of his indebtedness cannot be for the purpose of securing [benefit]..."

The Commissioner in that case adopted a sceptical approach to the proof of such debts. In this case, again, the documentary evidence of the overdraft is in the file, and I accept the claimant's evidence of the pressing need to reduce it. As a result, obtaining benefit was, simply, not seen as a relevant factor by the claimant even if others might have - indeed, probably would have - seen it in that way. I reach that conclusion because I accept her evidence about these transactions as essentially honest if (perhaps inevitably given when the events occurred) somewhat uncertain and confused.

26 My conclusion is that, save for a brief period from 26 February 1992 as a result of the third portion of prize money being received, the claimant did not have assets exceeding 3,000 pounds at any relevant time. The first two receipts of portions of the prize money were of no relevance to the claimant's income support entitlement and she was therefore under no obligation to report them, so could not have failed to disclose them nor have misrepresented them within the meanings of those terms in section 71. Only the receipt of the third portion of prize money produced, for a short period, a sum to be reported.

Should the claimant have reported the third portion of the prize money?

27 Yes. The reason for this is that, if only for a few days, she had capital exceeding the prescribed limit. When she found that out (which I accept on the evidence was not until after the sum had reduced to below the prescribed limit), she was under a duty to report it. Failure to do so amounted to a failure to disclose a material fact which, in my view, it was reasonable to expect the claimant to disclose. But did it meet the other

tests in R(SB) 54/83 to qualify as a failure that gives rise to a right of recovery under section 71 of the Social Security Administration Act 1992? It did not meet them all because the evidence is that the claimant did not know about the credit balance in her account until after it had reduced back below the prescribed limit. As a result, although the duty to report remained, the Secretary of State cannot show that there was any overpayment of income support resulting from the failure to report once she knew about the material fact.

The mortgage interest payments

28 The other issue in dispute related to an overpayment arising from a non-declaration of changes in the interest rates. It is fair to say that neither party focused on this at the oral hearing, although both at my invitation made brief submissions about the point. The bank statement show the claimant making a monthly payment from her current account of 1,100 pounds, reducing in December 1992 to 1,000 a month. The tribunal accepted that she was not aware of changes in the interest rate until that change in the level of payment from her current account to her loan account, and decided that she became aware of this when she received the December 1992 bank statement. No precise date was put on that, but I take it to be before 1 January 1993. The bank statement in the papers shows that the claimant received a loan from her mother of 1,000 which was credited to the account as cash or a cheque on the same day as that payment of 1,000 was deducted from her current account. That suggests at least that the claimant was actively handling her account at that time, even if the two sums of 1,000 pounds were coincidentally the same, and that there was certainly evidence on which the tribunal could reach the decision that it did.

29 The tribunal explained in full the basis on which it reached its conclusion that there was an overpayment of income support caused by the change in interest payments, and that the resulting overpayment was recoverable from the claimant under section 71. That explanation meets the requirements of R(SB) 54/83 on the grounds that the claimant failed to disclose the change of the interest rate from at least the time she was aware that the monthly payment decreased. This is not affected by the error of law for which I set aside the decision of the tribunal, nor by any errors relating to receipt of the prize money. The claimant's ground of appeal on this issue was essentially based on questions of fact, not of law. None of the submissions for the adjudication officer or Secretary of State assist the claimant on this issue. I find that the tribunal did not err in law on this aspect of its decision. As I am taking my own decision, I adopt as the relevant part of my decision the decision and reasoning of the tribunal, taking the operative date as 1 January 1993 as stated above. My formal decision is at the top of this decision.

The amount to be recovered

30 The Secretary of State was unable to tell me the amount that should be recoverable on the basis of this decision. As the precise amount to be repaid is in issue in the appeal, I adjourn the case and refer the matter to the Secretary of State to calculate the sums recoverable from the claimant in the light of this decision. It is to be

hoped that that sum can be agreed by the parties. If it cannot, then the case should be remitted back to me to decide the amount of overpayment.

David Williams
Commissioner

19 July 2000