



RFMH/SH/3

Commissioner's File: CIS/259/1990

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:

IDENTIFIABLE DECISION
NOT TO BE SENT OUT OF
THE DEPARTMENT

[ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal dated 22 January 1990 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to make fresh findings of fact and to give the appropriate decision in the light of them, I further decide that the claimant is not entitled to income support from 12 April 1989. This is because she is treated as possessing capital which exceeds the prescribed amount of £6,000.

2. This is the adjudication officer's appeal against the decision of the social security appeal tribunal of 22 January 1990, leave having been granted by the tribunal chairman. At the oral hearing held before me the claimant was represented by Mr D Underwood from Bury Welfare Rights Service. The adjudication officer was represented by Mr P M Stevens from the Chief Adjudication Officer's Office. I received oral evidence from the claimant, her daughter and her elder son.

3. The claimant was born in Ireland on 10 July 1920. Her husband died in 1968. She was awarded a widow's pension. She was then living with her two sons and daughter in her own house in Dublin. In 1983 she decided to come to England to start a new life. She sold her house and in October 1983 completed the purchase of a three bedroomed semi-detached house in England. The purchase price was £23,000 and the claimant required no mortgage. She lived there with her two sons and her daughter.

4. On her arrival in England the claimant and her daughter went

to the local Office of the Department of Social Security and the claimant claimed supplementary benefit. She received leaflets as to her entitlement to such benefit. On the basis of the information she supplied, the claimant was awarded supplementary benefit from 31 October 1983.

5. In 1987 the claimant decided to sell her house because her daughter was getting married. The claimant's children had contributed towards the upkeep of the home and the claimant felt that she was unable to manage financially once any of them left home. On 27 March 1987 she sold the house to her elder son for £27,500. On the same day she instructed her solicitors to give her elder son the sum of £6,715 before accounting to her for the net proceeds of sale. On 6 April 1987 the solicitors paid £20,785.50 into her current account. On the same day she drew a cheque in favour of her younger son for £7,000 in order to help him with his business and she instructed her bank to issue a draft in favour of her daughter for £9,560.64 to pay for her wedding and honeymoon. This left the claimant with £4,224.86 from the net proceeds of sale. She then transferred £2,000 from her current account to a high interest deposit account. On 23 March 1987 she was overdrawn £1,211.93 on her current account so that on 6 April 1987 she was left with a balance of £1,012.93 on her current account. That balance and the amount on the high interest deposit account totalled £3,012.93, just above the capital limit prescribed for supplementary benefit purposes. She did not advise the Department of the transactions so that supplementary benefit continued in payment until 6 March 1988.

6. The claimant continued to live with her elder son in the house until 7 October 1987, when it was considered advisable for her to go and live with her married daughter so that she would not be alone during the day. In December 1987 the claimant's daughter notified the local office that the claimant was staying with her on a temporary basis.

7. On 2 March 1988 an officer of the Department visited the claimant at her daughter's home to ascertain whether her change of address was temporary. The claimant stated that she had sold her house to her elder son in April 1987 for £27,000 and divided the money between her three children. She later stated she had kept about £4,000. As this was above the prescribed capital limit, the adjudication officer decided that the claimant was not entitled to supplementary benefit from 6 March 1988.

8. The claimant claimed income support from 12 April 1989. Initially she failed to reply to enquiries concerning the verification of her savings, sale of her house and the disposal of the proceeds of sale. However, on 16 June 1989 she submitted an affidavit stating that she had given £7,000 to each of her children leaving herself with a balance of £7,000.

9. On 30 June 1989 the adjudication officer rejected the claim for income support on the ground that the claimant had actual and "notional capital resources" in excess of £6,000, being the limit prescribed by regulation 45 of the Social Security Income Support

(General) Regulations 1987 [S.I. 1987 No. 1967] ("the Income Support General Regulations") at the relevant time. Thereupon the claimant appealed to the tribunal.

10. The claimant attended the hearing of her appeal before the tribunal on 22 January 1990. She was represented by Mr Underwood and oral evidence was received from the claimant's daughter. In the event the members of the tribunal allowed the appeal, albeit for different reasons. The minority view was that "On the balance of probability the evidence was insufficient to show that in depriving herself of her capital the appellant did so for the purpose of bringing herself within the capital limits". The majority gave the following reasons for their decision, so far as relevant to the present appeal:-

"At the time of the sale in April 1987, the Supplementary Benefit system was in operation and the appellant was in receipt of Supplementary Pension. The evidence pointed to depriving of property for the purpose of securing a Supplementary Benefit. (See Resources Regulations Reg 4(1)), But by April 1988 the Income Support Scheme had been introduced and in 1989 the appellant applied for Income Support some 2 years after the act of depriving. The depriving of property in 1987 was not effected with Income Support in mind with the result that reg 51(1) is not satisfied as it requires the act to have been done for the purpose of securing Income Support. On the evidence available it could not be said that the appellant also had income support in mind."

11. With effect from 11 April 1988 supplementary benefit was replaced by income support pursuant to the Social Security Act 1986 and to the Income Support General Regulations. It is not in dispute that on 27 March 1987 the claimant sold her house to her elder son for £27,500 and from that sum she "deprived" herself of £23,275.64, being £6,715 to her elder son, £7,000 to her younger son and £9,560.64 to her daughter. The question at issue is whether the claimant's purpose in depriving herself at the date of deprivation can be "carried forward" for the purposes of regulation 51(1) of the Income Support General Regulations in respect of a claim for income support. This regulation provides, so far as relevant to the present appeal:-

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

12. In Decision R(IS) 1/91 a Tribunal of Commissioners considered the interpretation of regulation 51(1), which they decided must be applied to the circumstances that existed as at the date of claim. In that context they stated at paragraph 22:-

" 22. That involves deciding whether or not the claimant deprived himself of any part of the £8,400 "for the

purpose of securing entitlement to income support or increasing the amount of that benefit". In so doing the existing case law in Commissioners' decisions on the meaning of "deprive himself for the purpose of securing entitlement" in regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981 will still apply. It must be ascertained whether or not the spending of the whole or part of the £8,400 had as a "significant operative purpose" for securing of entitlement to income support or the increasing of income support entitlement (see R(SB) 40/85, paragraphs 9 and 10, and compare R(SB) 38/85). ..."

13. Mr Underwood stated that at the date of deprivation the claimant believed that the payment of a supplementary pension was the same as the payment of a widow's pension in Ireland. The operative word was "pension". She believed entitlement depended on her status as a widow and was not calculated by reference to her requirements and resources. She had disposed of capital resources solely to avoid the payment of death duties. Nevertheless he reluctantly accepted the tribunal's majority decision that the claimant had deprived herself of capital resources for the purposes of regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981. However he argued that such "purpose" could not be "carried forward" for income support purposes. The claimant's act of deprivation was 12 months before the Income Support General Regulations came into force and at that date she had no knowledge of the proposed replacement of supplementary benefit by income support. As a result it was impossible to conclude that there was any nexus between her act of deprivation and her subsequent claim for income support. To conclude otherwise would give retrospective effect to regulation 51(1) of the Income Support General Regulations. Further, Mr Underwood submitted that the legislation clearly indicated that, subject to the provisions of the Income Support (Transitional) Regulations 1987, supplementary benefit and income support were two separate and distinct schemes. The provisions of regulation 51(1) of the Income Support General Regulations were specifically limited to issues of entitlement to income support. There was no reference to supplementary benefit. Such omission was intended. He found support for this by referring to Schedule 10 to the Income Support General Regulations which listed capital to be disregarded. Paragraph 10 provides:-

"Any personal possessions except those which had or have been acquired by the claimant with the intention of reducing his capital in order to secure entitlement to supplementary benefit or income support or to increase the amount of that benefit."

Paragraph 10 of Schedule 10 specifically referred to the intention to deprive in respect of both benefits. In his view the tribunal had rightly concluded that regulation 51(1) of the Income Support General Regulations applied to acts of deprivation done for the purpose of securing entitlement to income support only. As a result that regulation did not apply to the facts of

the present case.

14. The Social Security Act 1986 was enacted on 25 July 1986. Section 20(1) of Part II of the Act provides that prescribed schemes shall provide for "income-related benefit" of which income support is one. Section 20(3) provides that a person in Great Britain is entitled to income support if "he has no income or his income does not exceed the applicable amount" subject to certain conditions which are not relevant to the present appeal. Section 22(1) provides that "the applicable amount shall be such amount or the aggregate of such amounts as may be prescribed". Section 22 further provides, so far as relevant to the present appeal:-

" 22. (2)-(5) ...

(6) No person shall be entitled to an income related benefit if his capital or a prescribed part of it exceeds the prescribed amount.

(7)

(8) Income and capital shall be calculated or estimated in such manner as may be prescribed.

(9) Circumstances may be prescribed in which -

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

(b) capital or income which a person does possess is to be disregarded;

(c)-(d) ..."

15. The replacement of supplementary benefit by income support at some future date became law on 25 July 1986. Part II of the Social Security Act 1986 provided the outline of the terms and conditions of entitlement to "income-related benefits". Section 22(6) restricted entitlement to an income related benefit if a person's capital exceeded the prescribed amount. Section 22(9) provided for circumstances to be prescribed in determining whether a person was to be treated as possessing capital or income which she did not possess. The Income Support General Regulations made pursuant to the Act came into force on 11 April 1988. Regulation 45 provided that for the purposes of section 22(6) of the Act the prescribed amount at the relevant time was £6,000. Regulation 51 provided for the calculation of "notional capital". Mr Underwood argued that at the date of deprivation the claimant had no knowledge of income support.

16. I agree with Mr Stevens that although the claimant may have been unaware of the precise details of the conditions of entitlement to income support, at the date of deprivation she knew that the existing means-tested benefit was being replaced by another means-tested benefit. Further, she was aware of the consequences of depleting her resources with regard to her entitlement to a means-tested benefit. In Decision R(SB) 40/85 (paragraph 10) albeit for supplementary benefit purposes, the Commissioner explained the position as follows:-

"10. It is not necessary that the purpose of securing, or increasing the amount of, supplementary benefit shall be the sole purpose, though it must be significant operative purpose ... a claimant with mixed purposes is unlikely to concede that the securing of supplementary benefit was an important purpose. Nevertheless if the evidence showed that the transaction had had the effect of securing this (apart from regulation 4(1) and that this was the foreseeable consequence of it and there was nothing more, a tribunal could legitimately conclude that the person's purpose was to secure supplementary benefit .."

Mr Underwood's submission that it was impossible for the claimant to have any knowledge of income support as a means-tested benefit is based on the false proposition that the Social Security Act 1986 was not already law at the date of deprivation. The date on which the prescribed scheme came into force is not material. In my view the claimant deprived herself of capital for the purpose of securing entitlement to income support or increasing the amount of that benefit and as a result she is caught by regulation 51 of the Income Support General Regulations. The claimant is of course entitled to give money to her children if she so wishes, but she cannot then expect the social security system to subsidise her generosity, when she finds herself with insufficient money to meet her requirements.

17. I now turn to Mr Underwood's argument that if I "carried forward" the purpose of an act of deprivation, which was effected prior to the coming into force of the Income Support General Regulations, i.e. 11 April 1988, it would give those Regulations retrospective effect. He stressed that it was a fundamental rule that no legislation should be construed so as to have a retrospective operation unless its language was such as plainly to require such a construction. Regulation 51(1) contained no such language. I accept this. Nevertheless I am entitled to consider events prior to the coming into force of the Income Support General Regulations in determining whether or not regulation 51(1) applies. I find support for this in re: a Solicitor's Clerk [1957] 1 W.L.R. 1219 where it was decided that a solicitor's clerk was disqualified from acting as such in future under the provisions of an Act of 1956 because of a conviction in 1953. In his judgment Lord Goddard CJ held:-

"But in my opinion this Act [1956] is not in truth retrospective. But it enables an Order to be made

disqualifying the person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the Order, but the Order has no retrospective effect."

Similarly in the present case the decision that the claimant deprived herself of capital for the purposes of regulation 51(1) of the Income Support (General) Regulations has no retrospective effect. My conclusion as to what happened in the past "is the cause or reason" for my reaching such a decision. As a result in my view the purpose of the claimant's deprivation in March and April 1987 must be taken into account in ascertaining whether regulation 51(1) applies. It follows that it is immaterial that the reference to supplementary benefit was omitted from regulation 51(1) as I am only concerned with deprivation for the purposes of securing entitlement to income support or increasing the amount of that benefit. It also follows that the inclusion of those words in paragraph 10 of Schedule 10 to the Income Support General Regulations does not affect the interpretation of regulation 51(1).

18. For the reasons stated above the claimant's actual resources amounted to £3,012.93 and her notional resources amounted to £23,275.64, totalling £26,288.57. The claimant continued to be in receipt of supplementary benefit until 6 March 1988. Following his decision to withdraw her entitlement to supplementary benefit, the adjudication officer applied the "diminishing capital principle". In his written submission to the tribunal he submitted that as at 10 April 1989 the claimant's capital resources were depleted by £2,490.60. He set out the calculation in detail and I see no merit in my repeating such calculation here. I accept it as correct. It follows that as at 10 April 1989 the claimant had actual and notional capital resources of £23,797.94. As this amount was in excess of £6,000 being the limit prescribed by regulation 45 of the Income Support General Regulations at that date, the claimant is not entitled to income support from 12 April 1989. In the Tribunal of Commissioner's Decision R(IS) 1/91 it was held that a rule analogous to the "diminishing capital rule" applied in the case of income support. At paragraph 16 it was stated:-

"Nevertheless we consider that in fact the same result (ie the application of a rule analogous to the diminishing capital rule) is arrived at on general principle. This arises simply from the provisions of regulation 51(6) that, when calculating the amount of notional capital it must be calculated "as if it were actual capital which [the claimant] does possess". If a claimant in fact had actual capital of a sum and at the time of the first claim this exceeded the prescribed amount (£6,000 at the relevant time) then he would not be entitled to income support. However, if after reasonable expenditure on living and other sensible expenses (which we do not consider need be limited to the relevant amount of income support - a point which Mr Butt conceded at the hearing), the claimant's actual capital became reduced to below the limit of £6,000, then there is

no doubt that the claimant would then be entitled to income support. In our judgment regulation 51(6) envisages that precisely the same situation should occur if what the claimant has initially is not actual capital but notional capital. Just as under regulation 51 (the claimant is treated as still possessing such capital) so he is also entitled in our view under regulation 51(6) to be deemed to diminish that capital by reasonable expenditure related to his own particular financial and other circumstances (not necessarily the same as the amount of income support that he would receive). When such notional expenditure from his notional capital has reduced the notional sum to below the prescribed limit (then £6,000, now £8,000) then the claimant will be entitled to reclaim income support and this particular bar on entitlement to that benefit would have ceased to exist."

No doubt the adjudication officer will apply the above rules if and when the claimant submits a renewed claim for income support.

19. For the reasons stated above, the tribunal's decision was erroneous in law. As I consider it expedient to exercise the power conferred on me by section 101(5)(a)(ii) of the Social Security Act 1975 I give the decision set out in paragraph 1.

20. The adjudication officer's appeal is allowed.

(Signed) R.F.M. Heggs
Commissioner

(Date) 4 December 1990