

DGR/SH/11

Commissioner's File: CIS/025/1990

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:

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 25 August 1989 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 25 August 1989. An oral hearing was directed. At that hearing the claimant, who was present, was represented by Mr Mark Rowland of Counsel, instructed by the solicitor for the Child Poverty Action Group, whilst the adjudication officer appeared by Mr J Heath of the Solicitor's Office of the Departments of Health and Social Security.

3. On 22 April 1988 the claimant, then aged 78 claimed income support for himself and his wife. The latter was a year younger. On 12 April 1988 the claimant and his wife had transferred the freehold of their home at 14 Demming Close, Lea to their son and daughter. They had become entitled to income support on the preceding day. In calculating the extent of the claimant's entitlement to benefit his home was, of course, disregarded, pursuant to paragraph 1 of Schedule 10 to the Income Support (General) Regulations 1987. However, on 16 March 1989 the claimant and his wife left their home, and took up residence at the Whinfield Mews Rest Home, from where on 20 April 1989 they were both transferred to the Banksfield Nursing Home. The

claimant had been awarded attendance allowance from November 1987. Shortly after 14 March 1989, the claimant's son became appointee for his father, the latter's health requiring someone to act for him. On 26 May 1989 the adjudication officer decided that the claimant was not entitled to income support from 13 April 1989, because he had capital in excess of the prescribed maximum.

4. In due course, the claimant appealed to the tribunal who in the event upheld the adjudication officer. The tribunal decided that the claimant was caught by regulation 51(1) of the Income Support (General) Regulations 1987. This regulation provides as follows:-

" 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 an increase in the amount of that benefit ..."

It should be borne in mind in connection with this regulation that under regulation 23(1) the reference to 'claimant' must be construed as a reference to his wife, so that regulation 51 applies equally to her. The tribunal took the view that one of the purposes behind divesting themselves of their property was to qualify for income support or an increase thereof, as and when they required the same.

5. The tribunal justified this conclusion on the following grounds:-

"Both members of the Tribunal (only 2 were present) concluded that it was the intent of the claimant and his wife to deprive themselves of a resource and that they must have had it in mind that the effect of so doing would have the effect of making sure that the resource was not considered were they to require Income Support on entering a Rest Home or a Nursing Home. The transfer occurred contemporaneously with the granting of Income Support, while they were living at home, both [the claimant and his wife] were aged 78 and 77 respectively and in receipt of Attendance Allowance.

None of us know whether we shall become dependent on relatives, Rest Homes, Nursing Homes or Hospitals but it is self-evident that many old people do in the twilight of their lives become dependent and do in fact with regularity consider whether their resources can be passed on to their relatives so as to make them dependent on social security. The particular way that they become dependent and the particular time is of course not known to any of us in advance but at 78 most people have given thought to the matter."

6. The tribunal said broadly the same in their findings:-

" (d) However it must have been obvious that there was a real possibility that [the claimant and his wife]

would need to be admitted either to a Rest Home or a Nursing Home. They were both old, both in receipt of attendance allowance; [the claimant] was failing mentally and [the claimant's wife] had physical disabilities.

- (e) ... it must also have been obvious to [the claimant and his wife] that to transfer the house to the son and daughter would have the effect of depriving themselves of resources which might be needed were they to enter a Rest Home or a Nursing Home ..."

7. Mr Rowland emphasised the words "real possibility" in the tribunal's finding (d). He contended that this language did not necessarily impute to the claimant an intention to claim income support or an increase thereof. Taken by themselves, I think this is right. But I have to look at the totality of the tribunal's reasons and findings, and in my judgment they were clearly to the effect that the claimant and his wife had conceived, as a significant operative reason for transferring the property to their children, an intention to render themselves eligible for income support or an increase thereof if and when they entered a rest home or nursing home, an eventuality which they must have considered a real possibility. Moreover, the tribunal were justified on the evidence in reaching that conclusion.

8. I am aware, of course, that the ostensible reason for the transfer was to dispel from the mind of the claimant the fear that, if property passed absolutely to his wife, the latter might on her death leave it to the daughter, and not both children equally. Moreover, I am prepared to accept that that was the predominant motive behind the exercise - though exactly the same result could have been achieved by an appropriately drawn Will - but it is well established that a claimant will be caught by regulation 51(1) where the intention to claim income support or an increase thereof is merely a co-ordinate purpose (see in this connection R(SB) 38/85). Accordingly, as regards the principal submission of Mr Rowland is concerned, I think it is without substance.

9. However, Mr Rowland went on to argue that evidence had been presented to the effect that the claimant and his wife would never have been expected to have gone into a rest home or nursing home; they would have resided with their son and his wife, who were caring people. The tribunal, needless to say, realised that this in practice never happened, but Mr Rowland contended that what had to be considered was what was in the mind of the claimant and his wife at the time of transfer, and in April 1988 there was in fact no reasonable prospect of the claimant and his wife ending up in a rest home or nursing home. Of course, the tribunal had to make a value judgment, but Mr Rowland's contention was that they should at least have referred to this aspect of the case. If they took the view that the claimant and his wife placed no reliance on the possibility of their living with their son and daughter-in-law, if they became too old to

continue living in their own home, they should have said so. I think there is force in that contention.

10. Further, Mr Rowland, encouraged by Mr Heath's submission that the claimant's mental condition was a relevant factor, argued that the tribunal should have made an express finding as to whether the claimant (or, for that matter, his wife) was capable of forming an intention to claim income support or an increase thereof, if and when this became necessary. Again, I think there is some force in this contention.

11. However, in response to the submission of Mr Heath I would take the matter further. The claimant's mental condition, which apparently involved senile dementia, suggests the possibility that he may never have been able to form the intention to transfer the property in the first place. Moreover, this may have been true of his wife as well. Of course, if there was no valid intention to transfer, the transferees simply held the property on a resulting trust for the benefit of the transferors. If that was the case, the question of notional property pursuant to regulation 51(1) does not arise; the claimant and his wife retained the beneficial interest in the home. And when it was sold, their beneficial interest was merely transferred to the proceeds of sale, proceeds which, for the purposes of claiming income support, far exceeded the statutory maximum. I consider that the tribunal should have gone into this aspect of the case, and failure so to do also constitutes an error of law.

12. Before leaving this matter, I should mention that the tribunal considered the possible application of paragraph 26 of Schedule 10 to the Income Support (General) Regulations 1987. Under the Schedule there will be a disregard of -

" 26. Any premises where the claimant is taking reasonable steps to dispose of those premises, for a period of 26 weeks from the date on which he first took such steps, or such longer period as is reasonable in the circumstances to enable him to dispose of those premises."

The claimant and his wife did not vacate their home and go into a nursing home before 16 March 1989, and I am told that the property was sold on 14 September 1989. It was not actually put up for sale until 18 May 1989, because it was not until that date certain that the claimant and his wife would be precluded from returning. But, in any event, the property was sold within the 26 week period, so that the question of any need for an extension did not arise. However, the tribunal were not prepared to allow a disregard. They said as follows:-

"After a transfer had occurred to [the children], the claimant [and his wife were] in no position to take any steps to dispose of number 14 Demming Close, Lea, and accordingly since they were not in a position to take reasonable steps for the proper disposal, the disregard period under Schedule 10 was not applicable."

I reject that approach on the part of the tribunal. On the basis that the claimant and his wife were regarded as caught by regulation 51(1), they must be treated as still in possession of the property, and if they were in possession, they were at liberty to dispose of it, and they were entitled to the benefit of the relaxation conferred by paragraph 26. Accordingly on any footing, the claimant was entitled to have the property disregarded in calculating his benefit at least up to the date of sale, namely 14 September 1989. The failure on the part of the tribunal to apply the proper principles in this connection also constitutes an error of law.

13. It follows from what has been said above that I must set aside the tribunal's decision, and direct that the appeal be reheard by a differently constituted tribunal who will have regard to all the matters mentioned above.

14. Accordingly I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) 2 January 1992