Commissioner's File: CIS/3283/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 25 February 1997 as that decision is erroneous in law and I set it aside. My decision is that (in relation to the claim made on 13 October 1995) the claimant is not disentitled to Income Support by possessing capital above the prescribed limit, nor is her capital such as to require attribution to her of "tariff" income. The adjudication officer should forthwith assess and award the claimant's Income Support on that basis. Any difficulty etc. can be referred to me or to another Commissioner for Direction or Supplemental Decision.

2. This is an appeal to the Commissioner by the claimant, a woman born on 3 February 1966, who unfortunately suffers from multiple sclerosis. The appeal is against the unanimous decision of a social security appeal tribunal dated 25 February 1997 which dismissed the claimant's appeal against a decision of the adjudication officer issued on 2 November 1995 to the effect that the claimant was not entitled to income support because she had capital exceeding the prescribed limit of £8,000. That capital was said to be because she owned a one-fifth share of a flat in London, the other shares being owned by her step-mother (two shares) and her step brother and step sister (one share each). The overall value of the flat was £100,000. The claimant's share was therefore regarded, under regulation 52 of the Income Support (General) Regulations 1985, S.I. 1987, No. 1967 (as amended by S.I. 1995, No. 2303) as being one-fifth of £1000,000.i.e. £20,000 less 10% expenses of sale i.e. £18,000. My decision, for the reasons given below, is that the value of

her share is in effect less than the £8,000 figure and is also below the "tariff" income limit.

3. This was one of three cases heard by me at a number of oral hearings the last being on 15 April 1998. In the Common Appendix to this decision and the two other decisions, I have held that the 1995 Amendments to regulation 52 of the 1987 Regulations were ultra vires and therefore void. The practical result is that the version of regulation 52 in force prior to the 1995 Amendments (see paragraph 3 of the Common Appendix) is still in force. Therefore the valuation of the claimant's fifth share is to be on the basis indicated by the Court of Appeal and by a tribunal of Commissioners in two decisions on files CIS/391/92 and CIS/417/92. Because of the concession made by Miss Perez, on behalf of the adjudication officer, at the hearing on 15 April 1998, referred to in the Common Appendix, the result is as stated in paragraph 1 of this decision.

(Signed) M J Goodman
Commissioner

(Date) 21 May 1998

APPENDIX

CIS/15936/1996

CIS/263/1997

CIS/3283/1997

1. This is the common Appendix to decisions by me on the three above numbered files. All three cases were the subject of oral hearings before me on 11 November 1997, 17 February 1998, 24 April 1998, and 15 May 1998. After the hearing on 11 November 1997, I gave certain interim directions (e.g. as to joinder of the Moharrer case which was not heard before me on 11 November 1997) . The substantive issues were argued before me at the hearings on 24 April 1998 and 15 May 1998 (after the Chief Commissioner had decided not to appoint a Tribunal of Commissioners to hear these cases) . At the hearing on 17 February 1998, the claimant Wilkinson (file CIS/263/1997) was represented by her Solicitor, Mr D Cameron, who made representations to me on the claimant's behalf. Mr Cameron was not able to attend on 24 April 1998, nor on 15 May 1998, but I have fully taken into account his oral representations at the earlier hearing and his written representations. His representation for the claimant was pro bono and I am grateful to him for his assistance. In the other two cases (Tucker and Moharrer) the claimants were represented by Mr John Howell QC of Counsel. The Adjudication Officer in all three cases was represented by Ms Rachel Perez, of the Office of the Solicitor to the Departments of Health and Social Security. I am also most indebted also to Mr Howell and to Ms Perez for their written and oral arguments to me, which have been of great assistance.

2. The feature common to all three of these cases is that they involve the possible application of regulation 52 of the Income Support (General) Regulations 1987, S.I. No. 1967 ("the 1987 Regulations"), as amended from 2 October 1995 ("the 1995 Amendments") by the Income-Related Benefits Schemes and

Social Security (Claims and Payments) (Miscellaneous Amendments) Regulations 1995, S.I. 1995, No. 2303. The 1995 Amendment is indicated in square brackets in the following citation of the regulation,

> "Capital jointly held
>
> 52. Except where a claimant possesses capital which is disregarded under regulation 51(4) (notional capital), where a claimant and one or more persons are beneficially entitled in possession to any capital asset they shall be treated as each of them were entitled in possession [to an equal share of the whole beneficial interest therein; and the value of that equal share shall be calculated by taking the value of the whole beneficial interest calculated in accordance with the foregoing provisions of this Chapter [including regulation 49 - see below] , as though -
>
> (a) that interest is solely owned by the claimant; and
>
> (b) in the case of a dwelling, none of the other joint owners occupies the dwelling concerned,
>
> and dividing the same by the number of persons who have a beneficial interest in the capital in question.]"

3. The words in square brackets inserted by the 1995 Regulations took the place of the words which I have underlined in the following citation of regulation 52 as it had hitherto been (including an amendment, shown in square brackets, made by regulation 13 of Amendment Regulations of 1988, S.I. 1998, No. 1445 from 12 September 1988),

> "Capital jointly held
>
> 52. Except where the claimant possesses capital which is disregarded under regulation 51(4) (notional capital), where a claimant and one or more persons are beneficially entitled in possession to any capital asset they shall be treated as if each of them were entitled in possession to the whole beneficial interest therein in an equal share [and the foregoing provisions of this Chapter shall apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess]."

Prior to 12 September 1998, the regulation ended with the words "in an equal share" and the words (in square brackets) inserted by the 1988 Regulations did not exist.

4. In Chief Adjudication Officer and Secretary of State for Social Security v Dowell, Palfrey, and Others, 8 February 1995, the Court of Appeal upheld the decision

of a Tribunal of Commissioners on files (inter alia) CIS/391/92 (Palfrey) and CIS/417/92 (Dowell). The Tribunal of Commissioners had held that the version of regulation 52 in force between 12 September 1988 and 1 October 1995 (i.e. before the 1995 Amendments) (see para 3 above) was neither ultra vires nor void for irrationality. The Tribunal also held that it was inappropriate to value capital jointly held as if each joint owner had a freely realisable share in the property. They said that the correct method of valuation was under the general principles in regulation 49 of the Income Support (General) Regulations 1987 - cited below. That could mean that in some cases because of difficulties of realisation of a share in capital jointly held and in particular in land and houses, that the value of the share was a small amount or even nil. In upholding the Tribunal of Commissioners' decision the Court of Appeal upheld the Tribunal's rulings on the question of valuation but did not comment on the question of whether or not the regulation in its then form was ultra vires or void for irrationality. I am of course absolutely bound by the rulings of the Court of Appeal and (subject to exceptions which I hold do not apply in this case - see paragraph 21 of R(I) 12/75) by the decision of a Tribunal of Commissioners. I am therefore bound by the Tribunal's decision that regulation 52 in its form then in existence was not ultra vires nor void for irrationality.

5. However, it was argued before me on behalf of the claimants that the 1995 Amendments (see para 2 above) were either ultra vires in the strict sense or were void for irrationality. For the reasons which I give below, I accept the contention that the 1995 Amendments are ultra vires in the strict sense and reject the contention of Ms Perez to the contrary. The practical consequence is that regulation 52 of the 1987 Regulations must be read as if the amendments made by the 1995 Regulations to it were null and void. The result is that the decisions of the Tribunal of Commissioners and of the Court of Appeal in the Palfrey etc. cases still stand since the only valid version of regulation 52 is that in force at the time of their decisions. The practical consequences are dealt with further below and in the individual parts of my decisions on these three appeals.

6. The reason why I have held that the 1995 Amendments to regulation 52 are ultra vires is because I consider that the statutory powers contended as authorising them do not have that effect nor are there any other statutory powers that assist. The powers in question are contained in section 136 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") subsections (2) , (3) and (5), which are in fact cited in the preamble to the 1995 Amendment Regulations. Section 136(2)(3) and (5) reads as follows,

"Income and capital

136. (1)..........

(2) Regulations may provide that capital not exceeding the amount prescribed under section 134(1) above but exceeding a prescribed lower amount shall be treated, to a prescribed extent, as if it were capital of a prescribed amount.

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

(4).........

(5) 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) income is to be treated as capital;

(d) capital is to be treated as income." (my underlining).

7. In addition, reference should be made to section 134(1) of the 1992 Act which reads,

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

8. Looking at section 136 of the 1992 Act cited above, the Tribunal of Commissioners in the Palfrey etc. cases held that the then version of regulation 52 (see para 3 above) was empowered by subsection 5(a) of section 136 which allows regulations to prescribe circumstances, "in which - - a person is treated as possessing capital or income which he does not possess;". I am normally of course bound by a ruling of a Tribunal of Commissioners. I have borne in mind Mr Howell's submission (at the hearing on 15 May 1998) that I should be prepared to depart from that particular Tribunal ruling decline to do so, because I can see no "compelling reasons" (R(I) 12/25, para 21) why I should do so.

9. However, the words introduced and substituted by the 1995 Regulations (see para 2 above) were clearly introduced to 'reverse' the decision of the Court of Appeal in the Palfrey etc. cases. These new words mean that not only is a person

deemed to possess a share in capital jointly held which in fact he does not possess (see e.g. the Moharrer case) but also that that share shall be valued as if there were no difficulty of realisation because there were other co-owners. They deem the share to be as freely realisable as if the claimant in question were the sole owner of the capital, valuing the share merely by dividing the capital value of the whole by the number of joint owners. It is common ground that this could produce an artificially high valuation of the share of a joint owner of capital, particularly land and houses, far in excess of the kind of valuation that the Tribunal of Commissioners envisaged (see eg. their comments in the Dowell case - CIS/417/92). Indeed in the three cases before me such a valuation has either meant that the claimant has been credited with 'tariff' income (see section 134(2) of the 1992 Act and regulation 53 of the 1987 Regulations) on a greater amount of capital than in fact is owned (the Tucker case) or is treated as having capital in excess of the permitted limit (see regulation 45 of the 1987 Regulations).

10. As I understand it, the argument for the adjudication officer is that because the deeming provision of regulation 52 (as in essence it has always been) allows a claimant to be treated as possessing an equal share when he does not, it is also then competent to regulation 52 to provide for a notional or artificial valuation of that deemed share. The adjudication officer contends that section 136(3) of the 1992 Act, which provides that ".. capital shall be calculated or estimated in such manner as may be prescribed", when read together with section 136(5)(a) (possessing capital not possessed) authorises the 1995 Amendments and in effect enables one deeming to be added to another.

11. At this point, I should note that the normal method of valuation of capital is contained in regulation 49 of the Income Support (General) Regulations 1987 which provides so far as is relevant in this case as follows,

> "Calculation of capital in the United Kingdom
>
> 49. Capital which a claimant possesses in the United Kingdom shall be calculated -
>
> (a)... at its current market or surrender value, less -
>
> (i) where there would be expenses attributable to sale, 10%; and
>
> (ii) the amount of any incumbrance secured on it;"

it will readily be seen that the 1995 Amendments to regulation 52 (see para 2 above) derogate considerably from

the general principles in section 49 which are all related to the actual value rather than any deemed value. This is so despite the words "calculated in accordance with the foregoing provisions of this chapter" in the new part of regulation 52. Moreover, regulation 52, as it now is, makes no express provision for deduction of incumbrances on the whole of the capital in which the claimant possesses a share, though Miss Perez argued that such deduction is implied. Mr Howell argued that there was no such implication. I hold that such an implication is justified but because of the other features of the 1995 Amendments to regulation 52, they are nevertheless ultra vires (see below). The same is true of another 'bone of contention' between Mr Howell and Miss Perez, i.e. as to whether the new regulation 52 would require a share in capital held in reversion on, e.g. an earlier life interest, to be valued as if the share were in possession. In my judgement, regulation 52, as it now is, would not have that result. The valuation of the share would be subject to a substantial discount because of its being only in reversion. However, that does not save the 1995 Amendments from being ultra vires.

12. Clearly, regulation 49 (para 10 above) is properly made in pursuance of the power in section 136(3) of the 1992 Act, which provides that 11.. capital shall be calculated or estimated in such manner as may be prescribed". I take that power in section 136(3) to mean that regulations can provide (as indeed regulation 49 does) for calculation or estimation of values because of course there may well be difficulties of valuation of various types of property. Regulation 49 of the 1987 Regulations very properly deals with those matters. However, in my judgement, section 136(3) of the 1992 Act does not authorise a departure from the normal principle that a valuation of property of whatsoever nature must bear some relationship to its actual value. The 1995 Amendments violate that principle fundamentally in that they provide for a method of valuation of shares in capital jointly held which has no relationship to the sum which may actually be realisable for that share. That would be so even if there were not the double deeming i.e. the earlier deeming in regulation 52 of the possibility that a person may possess a greater share than in fact he possesses. That merely compounds the invalidity but the invalidity is there independently. For that reason I am not bound, in so far as the 1995 Amendments are concerned, by the Tribunal of Commissioners' decision in Palfrey etc. that the previous version of regulation 52 was not ultra vires. The Tribunal did not, of course, rule on the 1995 Amendments.

13. As I have said, section 136 (3) of the 1992 Act does not, in my judgement, authorise methods of valuation that have no relationship to the actual value of the property. That is equally so whether that property is owned individually, is owned jointly, or is notionally owned. The rule in each of those cases must under section 134(1) and 136(2) and (3) of

the 1992 Act, be that the valuation although it may be an estimation or a calculation, eg. a rounding up or expert guesswork, should relate to the actual value of the property in question. That principle is properly enshrined in regulation 49 of the 1987 Regulations. Moreover, the power in subsection 5(a) of the 1992 Act for Regulations to prescribe circumstances ".. in which .. a person is treated as possessing capital or income which he does not possess" does not authorise the 1995 Amendments. Those Amendments relate to valuation. They do not relate to the actual capital or income which a person does or does not possess. I should add that I do not accept Ms Perez' s argument that the Court of Appeal in the Palfrey case indicated that words like those in the 1995 Amendments would be 'all right' and therefore not ultra vires. I do not consider that the Court of Appeal were considering vires at all.

14. In view of my finding that the 1995 Amendments were ultra vires in the strict sense, there is no need for me to decide whether or not in the broader sense of ultra vires the 1995 Amendments are void for irrationality. Mr Howell submitted that they are irrational, whatever the exact caselaw test of irrationality (see e.g. R v. Secretary of State for the Home Department, ex PI Brind [1991] A.C. 696) I express no opinion on that point nor on the extent of the jurisdiction of Commissioners to take such a point (see Foster v. Chief Adjudication Officer [1993] A.C. 754).

15. At the hearing before me on 15 April 1998, Ms Perez stated that, if the vires issue were decided against the adjudication officer, she was instructed to concede that in all three cases the value of the claimant's share in land and buildings was either nil or too low to justify either a disentitlement for exceeding the capital limit or the attribution of tariff income. My individual decisions in those three cases reflect my acceptance of that concession.

16. Strictly speaking, there is therefore no need in the context of the present appeals for me to decide the further question that was argued before me, namely does regulation 52, in whatever form, apply only to joint tenants (with right of survivorship) or does it also apply to tenants-in-common (who own undivided shares)? I should make it clear that my decision that the 1995 Amendments to regulation 52 are ultra vires applies whether or not regulation 52 is restricted to joint tenants.

17. Subject to that caveat, I should indicate, in case these appeals go further, that in my view regulation 52, in all its forms (see above) applies both to joint tenants and to tenants-in-common. Mr Howell argued that regulation 52 applied only to joint tenants and did not apply to tenants-in-common, because each of the latter owned an actual undivided share and no deeming under regulation 52 was therefore

necessary. He prayed in aid the starred decision of another Commissioner (on file CIS/7097/95 - Hodgson) where, in the context of the true ownership of money in a joint bank account, the Commissioner appears to have held that regulation 52 (before amendment in 1995) applied only to joint tenants and did not apply to tenants-in-common (see particularly paras 13-21 of that decision) . I have perused that decision with care but in my view it is distinguishable from the typical case of co-ownership of land (and buildings) by its very special facts relating to a joint bank account, containing also third party's moneys. In any event, I respectfully dissent from any statements of general import in that decision confining regulation 52 to joint tenancies.

18. In short, I consider that regulation 52 applies to all kinds of co-ownership, including joint tenancies and tenancies-in-common, because its language is broad enough to cover them all. The use of the words "jointly held" (heading to regulation 52) and "joint owners" (1995 Amendment) have a general import, akin to "co-ownership". With respect to the Commissioner who decided the Hodgson case (above) I do not think it necessary, desirable, or practicable to try, in the context of regulation 52, to distinguish between the various kinds of co-ownership. Regulation 52, in all its forms, applies, in my judgement, to all kinds of co-ownership. If this means that an owner of an undivided share is regarded as possessing a greater share than in fact he does, then that is in my view an inescapable result of the application of regulation 52, as adjudicated on by the Tribunal of Commissioners in the Palfrey and Dowell cases. The Dowell case concerned a tenancy-in-common and the Tribunal appear to have taken for granted that regulation 52 applied to it.