

EHO/RC/7

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIS/7249/1999

SOCIAL SECURITY ACTS 1992 - 1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MISS DEPUTY COMMISSIONER E H OVEY

Claimant :

Tribunal :

Tribunal Case No :

1. This is an appeal by the claimant against the majority decision of the Workington Social Security Appeal Tribunal given on 9th June 1999. By that decision the tribunal confirmed the decision of the adjudication officer made on 14th January 1999 that the claimant was not entitled to income support from 16th December 1998 because she was living with another person as what was described as a member of an unmarried couple. The appeal is supported on behalf of the Secretary of State in a submission which contains careful and helpful consideration of a number of relevant authorities. I accept the submission that the decision of the tribunal was erroneous in point of law. In the present state of the evidence it would not be appropriate for me to substitute my own decision for that of the tribunal and accordingly the matter must be referred for hearing by a fresh tribunal constituted under Chapter 1 of the Social Security Act 1998. My reasons are set out below.

2. I begin by setting out the statutory background. By section 24(1) of the Social Security Contributions and Benefits Act 1992, a person in Great Britain is entitled to income support if he or she satisfies a number of conditions, which include a condition that he or she has no income or income which does not exceed the applicable amount. By section 136(1), if a person claiming an income-related benefit (such as income support) is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of that person. By section 137(1), "family" means among other things a married or unmarried couple and "unmarried couple" means "a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances". It has not been suggested that there are any relevant prescribed circumstances in this case. It follows that if the claimant is one of an unmarried couple within that definition, the income and the capital of her partner will be treated as her income and capital for the purposes of the claim to income support which has led to the present appeal.

3. At this stage the facts may be sufficiently summarised as follows. The claimant is a woman aged 57 at the time of her claim who claimed income support from 16th December 1998, having recently been discharged from hospital. She lives in the house of her former husband, from whom she was divorced in 1988, but whom for the sake of brevity I will call simply "the husband". At the time of the claim virtually all the household duties were carried out by the husband, because of the claimant's

state of health. He also paid all the bills, because she had no income. Both parties had lived in the house since about 1970, when they were first married, apart from a break of some months on the claimant's part in 1988, at about the time of the divorce, and apparently a further break of rather uncertain duration in the 1990s, when the claimant went to live with her daughter for a time. The husband's income is such that if it is treated as the claimant's she will not be able to establish entitlement to income support.

4. The claimant has made previous claims to income support, the details of which are not entirely clear from the papers. It seems, however, that the claimant must have been in receipt of income support from a period after the divorce until 15th December 1992, from which date she and the husband were determined to have been living together as husband and wife, their situation having developed to that point after the claimant returned to the former matrimonial home for what was originally regarded as temporary accommodation only. The claimant appealed against that decision, but it was upheld by the tribunal on 14th April 1993. It apparently led to the claimant's moving out to live with her daughter in December 1992, following which she was again awarded income support in January 1993. She moved back to live with her husband, possibly in March 1995, and a further determination was made on 8th October 1996 that from 3rd March 1995 she and the husband were again living together as husband and wife. The claimant again appealed, but the decision was upheld by the tribunal on 29th January 1997. The claimant on that occasion neither sought leave to pursue a further appeal nor moved out, but remained at the property, apparently resigned to her lot, until she made the claim which is the subject matter of the present appeal.

5. I should add that the papers include at pages 23-24 a decision by an adjudication officer which seems to be described in the schedule of evidence as the decision appealed against (of which the only other trace is in the statement made in the submission to the tribunal), but which is to the effect that the claimant and the husband have been living together since 1st December 1988. Unfortunately, the date, which has been altered, is illegible. It would be surprising in some ways if it were indeed the decision appealed against, since there is nothing in the contents of the decision which would explain why the period during which the claimant was living with her daughter is to be ignored, but the decision does refer to the claimant's state of health,

which suggests that it is of recent origin. As explained below, this will need to be clarified if possible.

6. The material before the adjudication officer making the present decision consisted of the claim form and the record of an interview on 5th January 1999, together with what might be gathered from the files. In the claim form, the claimant answered "Yes" to the question "Do you ... live with parents, relatives or friends as part of their family" and identified the husband as the head of the household. In the interview notes it was recorded that the property was owned by the husband, that they had separate bedrooms, that they did not take their meals together, that the husband did the household duties and paid the bills, that they did not spend leisure time together either at home or outside but had done so when they were married, that they had represented themselves as husband and wife when they were married and had used the same surname since their marriage. It was further noted that neither of them would move out if income support was refused, but also that the claimant had a separate, external relationship with a man whom, to avoid any apparent judgment of an undetermined issue, I will call "the friend".

7. The claimant appealed against the decision that she and the husband were again, or still, living together as husband and wife by notice of appeal dated 25th January 1999. She stated that she did not spend very much time at the property because she spent a lot of time at her daughter's and with other relatives and that she and the husband did not do any socialising together at any time.

8. The claimant attended at the tribunal hearing, together with the husband and the friend, and was represented by the Citizens' Advice Bureau. She gave evidence that she had been having a relationship with the friend since 1989, that she spent the day from about 12.30 or 1 p.m. with her daughter and the evening until about 10.30 with the friend, that having lived at the property for 30 years she regarded it as her own although the tenancy had been transferred to the husband when they were divorced, that years ago she and the husband used to have meals together and (I think) that she and the friend spent six or seven hours a day together and were happy with the arrangements as they were. The husband gave evidence that he had made a will leaving the house to his sister and daughter with a right for the claimant to live there for her life (this implies of course that the husband has acquired the property since the divorce), that he did all his own washing, cooking and shopping,

that he had to pay the bills anyway so he did not mind paying, that he had got used to it, that he was easygoing and liked the company and that he had bought everything in the house and the furniture was his. The record of proceedings then has a note which appears to read "R(SB) 17/81 check list", following which the claimant gave evidence that she had had no sexual relationship for a long time with the husband.

9. The tribunal, as stated in paragraph 1 above, was unable to reach a unanimous decision on the evidence before it. The following points emerge from the statement of material facts and reasons:

- (1) all the members of the tribunal accepted the evidence that there was no sexual relationship between the claimant and the husband;
- (2) all the members accepted that there was stability in the relationship between the claimant and the husband;
- (3) all the members accepted that the claimant spent part of the day and part of the evenings away from the property but that she had no other home;
- (4) the majority found that the husband had provided financial support and intended to continue doing so on an unlimited basis;
- (5) the majority found that the claimant lived wholly at the property and would do so for the rest of her life. The will showed that the arrangement currently in existence was intended to be permanent;
- (6) the majority found that the claimant continued her association with the husband by continuing to use her married name;
- (7) the majority described the claimant as anxious to state that she did not intend to form a more permanent relationship with the husband and had no intention to co-habit with him;
- (8) the dissenting member found that the time spent by the claimant at the property was minimal and accordingly it could not be said that she and the husband were living together wholly;
- (9) the dissenting member found that the financial support from the husband was minimal, accepting that the claimant received financial support from the daughter;
- (10) the dissenting member found that the claimant was providing a "service" for the husband by her company.

On the basis of their respective findings, the majority concluded on a balance of probability that the claimant

and the husband were living together as husband and wife and the dissenting member concluded that on a balance of probability they were not.

10. The claimant (who had made greater progress than at either of the previous tribunals, both of which gave unanimous decisions) then sought leave to appeal on 15th September 1999. The grounds of appeal were in substance that it could not be held that two persons were living together as husband and wife if there was no sexual relationship between them, unless they refrained from conducting a sexual relationship on religious or moral grounds or were prevented from doing so by physical or psychological problems. The decision of the majority was said to contravene that principle. Leave to appeal was granted by the chairman on 11th October 1999.

11. The submission on behalf of the Secretary of State in response to the appeal was slightly late, but after the grant of an extension was received on 31st March 2000. Reference was made to the following cases: *R(G) 3/71*; *R(SB) 17/81*; *R(SB) 35/85*; *CSB/150/85*; *CIS87/93*; *CIS/371/94*; *CP/8001/95*; and *CIS/898/98*. The effect of those cases was then summarised broadly as follows:

- (1) the first step is to determine as a separate issue whether the parties are members of the same household. Only if the answer is "yes" can the tribunal go on to consider whether the parties are living together as husband and wife;
- (2) the further a particular relationship differs from that which would reasonably be expected of a normal married couple, the more compelling must be the evidence that they are nevertheless living together as husband and wife;
- (3) the question must be determined by having regard to the general nature of the relationship. The factors set out in *R(SB) 17/81* as relevant are "admirable signposts", but should not be considered to the exclusion of consideration of the relationship's general nature;
- (4) that inquiry involves consideration of the less observable side of the relationship and the reasons why the parties are living in the same household in the way that they are;
- (5) if the parties give evidence that they did not intend to live together as husband and wife and give a credible alternative explanation for the common household, they are not living together as husband and wife;

(6) it is possible for parties who were once living together as husband and wife to cease to do so. It was then submitted that when the facts of the present case are considered in the light of those principles, the general relationship was such that compelling additional matters would be required to enable the conclusion to be reached that the claimant and the husband were living together as husband and wife, and that the majority had given no sufficient reasons for reaching that conclusion. Instead, they appeared to have confined their consideration of the facts to the matters set out in R(SB) 17/81 and not to have considered the general relationship. The submission then went on to draw attention to particular matters which it is said should have been covered. The precise grounds of the appeal were not supported, but it was said that there was an error of law on the basis indicated.

12. The submission elicited further observations from the claimant's representative, dated 25th April 2000, in which it is stated that it is not contended that the absence of a sexual relationship is determinative but that it provides strong evidence that the parties are not living as husband and wife. The ground of appeal is restated as being that the tribunal did not fully explain what the evidence was to account for the absence of a sexual relationship and why its absence was of little or no significance. The representative then suggests that it would be highly unlikely for a couple to be living as husband and wife if there was no sexual relationship and the reason for its absence was not that of religious objection or physical or psychological difficulty. Towards the end of the observations he seems to suggest that a tribunal should take the six "admirable signposts" as criteria and should give first place to the question whether or not there is a sexual relationship, but should also "retain" the other questions to apply to any subjective circumstances remaining to be considered. The point is made that "only the sexual relationship is relatively free of any ambiguity when applied to 'cohabitation' cases".

13. In so far as the claimant's representative is inviting me to depart from the approach indicated by the various decisions listed above by reformulating the questions to be asked as:

- (1) was there a sexual relationship?
- (2) if not, are there any other factors, primarily as indicated by the remaining five "criteria", which provide compelling evidence that the

parties were nevertheless living together as husband and wife?

I decline to do so. In the first place, I do not think that it would be helpful to tribunals to introduce such a conflict. In the second place, I am not persuaded that the simple existence or otherwise of a sexual relationship is so clearly determinative, subject to the exclusions the representative suggests, of the nature of the relationship between the parties. To my mind, in the present state of society, any such formulation involves a third question, at present hidden, along the following lines:

- (3) if so, was the sexual relationship one of a committed, faithful nature such as might be thought to be traditionally expected of married couples (as may be inferred from the continued status of adultery as a fact evidencing the irretrievable breakdown of a marriage), or was it of a more casual kind, in which the parties took advantage from time to time of the opportunities which their common household offered?

An investigation of that nature is just as likely to involve difficult and delicate issues as an investigation of the general nature of the relationship. In the third place, at least as formulated by the representative, the new approach seems to lead to the conclusion that where two people are living in one household but are not having a sexual relationship because they have religious or moral objections to doing so while they are unmarried, they will be held to be living together as husband and wife. Not only is that likely to be extremely offensive to the parties concerned, and difficult to justify in terms of policy, but it is also contrary to Commissioner's decision *CSB/150/85*, in which an engaged couple whose religious beliefs prohibited their having a sexual relationship before marriage were held not to be living together as husband and wife. The Commissioner expressed the view that it would be an abuse of language to describe two unmarried persons who refrained on principle from any sexual relationship as living together as husband and wife, and I agree.

14. I therefore return to the question of the applicable law as it appears from those previous decisions. The starting point is the decision in *R(G) 3/71*, which concerned the question whether the claimant, a widow, was "cohabiting with a man as his wife", so as to disentitle her to widowed mother's allowance. The Commissioner there stated that to answer the question required an examination of three main matters: the parties'

relationship in relation to sex, their relationship in relation to money and their general relationship. That decision was carefully considered by the Commissioner in *R(SB) 17/81*, who compared it with the guidance to claimants set out in the Supplementary Benefits Handbook at the material time (the test for supplementary benefits purposes being whether the parties were "living together as husband and wife"). He concluded that the three matters referred to covered exactly the same ground as was covered by the guidance, which drew attention to six matters:

- (1) membership of the same household;
- (2) stability;
- (3) financial support;
- (4) sexual relationship;
- (5) children;
- (6) public acknowledgment.

It is those matters which were described by Woolf J. in *Crake v. The Supplementary Benefits Commission* (1980) as "an admirable signpost". It is clear from the later decisions, however, that they have been treated as "criteria" by tribunals in many cases, with the result that the tribunal has focused excessively on the detailed evidence relating to the six matters of guidance and has not asked itself the overall question whether the relationship is indeed one in which the parties live together as husband and wife: see *CIS/87/93* at paragraph 11, *CP/8001/95* at paragraph 12 and *CIS/443/98* at paragraph 15.

15. The importance of treating the six factors I have mentioned as guidance or as a signpost offering assistance in an overall evaluation of the relationship, in my view, is that it enables appropriate weight to be given to the presence or absence of a sexual relationship in all the circumstances of the case. I am in agreement with the submission of the claimant's representative to the extent that he points to the common sense significance of the presence or absence of such a relationship in considering whether the parties are living together "as husband and wife". Although the nature of the relationship between husband and wife will differ widely according to the enormous variety of circumstances in which married couples live, it seems to me undoubtedly the case that as a matter of general usage the expression "living together as husband and wife" is used when the meaning intended is that the relationship between the parties extends to a sexual relationship, and that the general expectation is that a significant element of the relationship between a married couple will be the sexual relationship. This approach is supported by the

weight attached to the absence of such a relationship in *CSB/150/85*, by *CIS/87/93* at paragraph 13 (despite the importance earlier attached to the general relationship) and by the commentary in *Income-related Benefits: The Legislation*, 1999 edition, at page 27, to which the claimant's representative refers.

16. Such an approach appears to me consistent also with Commissioner's decision *R(SB) 35/85*, in which the Commissioner's attention was particularly directed to the explanation for the fact that the claimant and someone else were living together in the same household. The case draws attention to the varying ways in which the existence or otherwise of a sexual relationship has been treated at different times and in particular to the varying terms of the guidance given in different editions of the *Supplementary Benefits Handbook*.

17. These various decisions broadly support the submission made on behalf of the Secretary of State, which I shall adopt as my approach subject to two points:

- (1) while it seems clear that an essential element of any decision that the parties are living together as husband and wife is that that they should be living in the same household, it may not be helpful to describe that as a wholly separate issue. It is not a distinct statutory requirement and is one of the six factors set out in *R(SB) 17/81*;
- (2) while the submission rightly emphasises the importance of the general nature of the relationship, it tends to underplay the significance of the presence or absence of a sexual relationship.

I make the first point because the submission points towards a completely isolated approach to the question whether the parties are living in the same household, and I am not persuaded that that is correct. The second point is reflected in my approach to the tribunal's decision.

18. It is clear that the tribunal was invited to approach the matter on the footing that *R(SB) 17/81* contained "the criteria to be applied in deciding whether two persons are living together as husband and wife". Even on that approach, the submission to the tribunal was inadequate because it did not deal with the factors of sexual relationship and public acknowledgment. The tribunal, however, did so and that omission therefore caused no difficulty. It seems to me, however, that the tribunal did approach its task on the footing that it

simply needed to consider the six factors and that it failed to step back and consider the general relationship of the parties, interpreting that among other things in the light of its knowledge that there was no sexual relationship. Perhaps inevitably, it therefore failed to make full findings of fact and to give adequate reasons for the majority's conclusion in the light of the applicable law. The decision was therefore erroneous in point of law, as appears from *R(SB) 11/83*, and must be set aside.

19. The points on which it appears to me that the tribunal's findings and reasons were inadequate are as follows:

- (1) there is no finding as to what was the "long time" for which the claimant and the husband had not had sexual relations and why. I appreciate that this is a delicate matter, but bearing in mind that they were formerly a married couple, the possible reasons seem to me to include that the nature of the relationship irrevocably changed on the occasion of their divorce and that thereafter, on the claimant's return on what was initially a temporary basis, there was no question of their resuming the intimate part of their former marital relationship. Equally, it seems to me possible that over time the relationship was fully restored, but later ceased in view of the health of either or both of the parties. I note that not only has the claimant been unwell, but that the husband is in receipt of war disablement benefit and is of retirement age;
- (2) there is no finding as to whether the claimant had a sexual relationship with the friend, no finding when the relationship, whatever its nature, began and whether it changed over time and no consideration of the implications of the relationship in relation to the general relationship between the parties. It might be thought improbable that if the claimant and the husband were indeed living together as husband and wife she should be spending so much of her time with the friend even if the relationship did not have a sexual element, and that the case would be stronger in her favour if it did;
- (3) the tribunal did not explain in what way the claimant's continued use of her married name after divorce (which of course is by no means

uncommon) pointed to a continued association with the husband;

- (4) the tribunal did not consider the general relationship in terms at all and so gave no reasons for holding that a relationship with the individual features identified nevertheless involved the parties in living together as husband and wife, despite the explanation on the basis of convenience and absence of other resources on the part of the claimant which was put forward. In particular, the tribunal did not identify what factors, in its judgment, took the case out of the category of persons of the opposite sex living together without a sexual relationship who are not living together as husband and wife, a category which it is clearly recognised does exist.

20. These points are similar to those made on behalf of the Secretary of State, although not identical. As to the point made on the financial arrangements, I have difficulty in understanding the way in which the majority's finding is expressed. It appears to be to the effect that the claimant made non-commercial, voluntary financial contributions frequently and without obligations. In view of the general tenor of the evidence, however, I think that what was intended may have been that, whatever the financial contributions made by the claimant, the husband paid all the household bills voluntarily. I am not sure who is supposed to have done what frequently.

21. The general impression created in my mind by the evidence overall is more consonant with that formed by the dissenting member of the tribunal than with that formed by the majority, and I have considered whether the material is sufficient to enable me to substitute my own decision for that of the tribunal. I have concluded, however, that it would not be proper for me to do so. As paragraph 19 sets out, there are significant areas of fact which have been insufficiently explored for it to be possible for me to make findings on the questions which in my view should be dealt with. It would also be unsatisfactory for me to proceed in the light of what is said in paragraph 20. I should also add that there are two points which cause me difficulty as respects the reasons given by the dissenting member:

- (1) it seems to me unlikely that if the claimant simply spent a substantial amount of each day with her daughter that would lead to a finding that she and the husband were not living in the

same household. The nature of the relationship with the friend, which the dissenting member has also left unspecified in clear terms, is likely to be of substantial relevance to the question whether the extent of the claimant's absences has the effect that she and the husband are not living in the same household. In any event, the extent of her absences seems to me more properly an element of the general relationship than specifically of the question whether the parties are living in the same household;

- (2) I do not see how the finding that the claimant provided company for the husband, amounting to a service, is to be reconciled with the dissenting member's view that the claimant's presence at the property was minimal.

22. Finally, I should add that there appear to be some inconsistencies between the evidence given by the claimant on this occasion and that given by her on the occasion of her previous claims. The Secretary of State rightly points out that although it is incumbent on a tribunal to make its own findings of fact, it can have regard to evidence given previously for the purpose of testing the credibility of a witness. The tribunal which hears this matter on the next occasion will wish to have that principle in mind.

23. In conclusion , then, I set aside the decision of the tribunal given on 9th June 1999 and refer the matter to be heard by a new tribunal. I direct that a search should be made by the Secretary of State to ascertain whether there remains any further material relating to the proceedings before the first and second tribunals or any material which would cast light on the document referred to in paragraph 5 above, and that if there is any such material it should be before the new tribunal. That tribunal should have regard to the matters discussed above in making its decision.

(Signed) E H Ovey
Deputy Commissioner

(Date) 29 September 2000