

RAS/SH/4

Commissioner's File: CIS/785/1993

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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:



1. This is an appeal by the adjudication officer against the decision of the Bromley social security appeal tribunal, given on 6 September 1993, that the claimant "... is not disentitled to Income Support from 1 February 1993 by reason of his partner having as a capital resource an interest in her former matrimonial home at 126 Church Street, Cliffe because his partner has since 1989 taken and is now still taking all reasonable steps to dispose of her interest, the same to be disregarded for Income Support purposes. Pursuant to paragraph 26 of Schedule 10 to the Income Support (General) Regulations 1987." At the claimant's request I held an oral hearing of the appeal. He attended and was represented by Mr R Haigh of the Gravesend Citizens Advice Bureau. The adjudication officer was first represented by Mr S Cooper of the Solicitor's Office, Departments of Health and Social Security and then, following an adjournment, by Mr L Scoon of that Office.

2. The claimant has for several years lived with Mrs Cheryl White who has been separated from her husband since September 1989. The husband was left in the jointly owned matrimonial home and, as I understand it, is still there. When the claimant and Mrs White started to live together the claimant was in employment but he lost his job about the end of 1992 and has not been able to get full-time employment since. On 1 February 1993 he made a claim for income support. His claim form showed that he was living with Mrs White and she declared that she owned "50% of previous matrimonial home but my ex-husband lives there. Financial affairs are still to be sorted out in Court". On making enquiries about this an adjudication officer was able to confirm that Mrs White's solicitors were

taking legal action to realise her interest in the property, that there was no recent valuation but that £85,000 had been agreed between Mrs White and her husband or ex-husband as the value, subject to a mortgage of approximately £18,000, at which he would buy out her interest. The adjudication officer then decided that the claimant's capital resources exceeded the prescribed limit of £8,000 because Mrs White's half share of the matrimonial home was to be taken into account as a capital resource of his and was not to be disregarded under Schedule 10 of the Income Support (General) Regulations 1987. The tribunal allowed the claimant's appeal.

3. It is not in issue that Mrs White's capital is to be treated as that of the claimant: section 136(1) of the Social Security Contributions and Benefits Act 1992. What was put in issue in this appeal was (a) whether the tribunal were right to decide that the capital in question should be disregarded pursuant to paragraph 26 of Schedule 10(b) whether the findings of fact in relation to the application of that provision to the circumstances were sufficient and (c) how, if the value of Mrs White's interest in the matrimonial home was not to be disregarded, that value should be ascertained.

4. The original adjudication officer had determined the value of Mrs White's half share in the matrimonial home by taking the £85,000 agreed value of the property, deducting 10% for realisation expenses, deducting the amount of the mortgage and dividing the net amount in half; the result was said to be the value of Mrs White's share. In CIS/391/92 (Palfrey) a Tribunal of Commissioners had decided that that was an entirely wrong method. What had to be valued was the share not the whole property; in many cases the share would have no value. When the hearing of this present appeal was commenced Palfrey was on appeal, by the adjudication officer, to the Court of Appeal and Mr Haigh and Mr Cooper agreed that this appeal should be adjourned to await the outcome. In the event the Court of Appeal confirmed the Tribunal of Commissioner's decision and there was then no doubt, in the light of Palfrey, that the original adjudication officer's method of valuing Mrs White's interest was wrong. Whereupon it was submitted on behalf of the adjudication officer that "... it is desirable to obtain an expert opinion, such as conforms with the requirements set out in paragraphs 53 and 54 of CIS/319/92, as to the market value of the claimant's partner's actual or deemed interest in her former matrimonial home". Mr Scoon adopted that submission on the resumption of the hearing.

5. The tribunal had not concerned themselves with the value of Mrs White's interest. That was because they had concluded that, whatever its value, it was to be disregarded under paragraph 26 of Schedule 10 to the General Regulations, which, pursuant to regulation 46(2), provides for the 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 adjudication officer's representative had submitted to the tribunal that that paragraph was not capable of applying in the circumstances of this case; the only conceivably relevant paragraph was paragraph 25 which reads -

"Where a claimant has ceased to occupy what was formerly the dwelling occupied as the home following his estrangement or divorce from his former partner, that dwelling for a period of 26 weeks from the date on which he ceased to occupy that dwelling."

Mr Scoon adopted a different approach. He submitted that, while paragraph 25 was capable of applying, it did not apply on the facts of this case because the 26 weeks to which the paragraph refers had expired long before the claim for income support had been made, Mrs White having ceased to occupy the matrimonial home in September 1989. The paragraph does of course refer, as does paragraph 26, to "the claimant" as the relevant person but the difficulty that that produces in a case such as this, where it is not the claimant but his partner who owns the capital, is presumably removed by regulation 23(1) of the General Regulations which provides that where under section 136(1) of the 1991 Act the capital of a claimant's partner is to be treated as that of the claimant, any reference to "the claimant" in Part V of the Regulations which (by virtue of regulation 46(2) includes Schedule 10) may be construed as a reference to the partner.

6. Mr Haigh I think accepted that there could be no disregard in this case under paragraph 25 as that provision contains no discretion to extend the period. He did however maintain that a disregard had been properly allowed by the tribunal under paragraph 26 and that the tribunal had been right to exercise their discretion to extend the period. Mr Scoon agreed that paragraph 26 was capable of applying but contended that the tribunal had not sufficiently found the facts on which application of the provision depended.

7. It is by no means clear that paragraph 26 can apply in circumstances where the capital in question is that of the claimant's partner's interest in a property not occupied by her. Taken literally, the reference to "any premises" and "taking reasonable steps to dispose of those premises" might be thought to suggest that the paragraph is limited in its application to claimants who are absolutely entitled to "the premises". But I think it is right to take account of the fact that paragraph 25 does not apply and that, unless paragraph 26 can be made to apply, the claimant in this case would, if Mrs White's interest in the matrimonial home at the material time had sufficient value, be deprived of entitlement to income support even though Mrs White has throughout had no benefit from it and effectively no ability to realise such value as it has other than to pursue the matrimonial proceedings to a successful outcome. In these circumstances I am prepared to agree with Mr Scoon that

paragraph 26 does apply, the reference to "premises" being taken, as appropriate, as a reference to the claimant's or his partner's interest in the premises.

8. Mr Scoon also accepted that Mrs White's instructions to her solicitors to take steps to obtain her share of the matrimonial home would count as the "taking of .. steps" for the purposes of paragraph 26 and that, provided she had done so expeditiously, it was right to extend the period as allowed by the paragraph. Mr Scoon submitted however that the tribunal, who did extend the time, had not sufficiently found the facts as to when the necessary steps had been taken.

9. Mrs White, who attended the hearing of this appeal, gave evidence to me that she had gone to her solicitors within a week of leaving the matrimonial home, in September 1989. She had told them, among other things, that she and her husband jointly owned the matrimonial home, that she wanted her share and she instructed the solicitors to do what was necessary to obtain it. The house had been put on the market about six months after Mrs White had left but, because of the slump in the property market, it had not sold. Since then there had been many negotiations with the husband who had from time to time promised to buy out Mrs White's share but had not stood by his promises. Proceedings had been threatened and then commenced. The present position was that the husband's financial situation had improved, he had been able to increase the mortgage so as to buy out Mrs White's interest and, according to Mr. Haigh, approval by the Court of the settlement was awaited. Mr Scoon agreed that if that evidence was accepted the tribunal's decision to extend the period was justified. I have absolutely no reason not to accept Mrs White's evidence.

10. The outcome is that paragraph 26 of Schedule 10 applies to this case; Mrs White having taken the reasonable steps to which the paragraph refers it is appropriate to extend the time, as provided by the paragraph, until at least Mrs White's interest in the matrimonial home is bought out under the present agreement. It follows that a Palfrey valuation is not necessary, the adjudication officer's appeal does not succeed and I confirm the tribunal's decision to which I referred in paragraph 1 above. An adjudication officer should now determine this claim on that basis.

(Signed) R.A. Sanders
Commissioner

(Date)

4 AUG 1995