CYAG

MJG/SH/9

Commissioner's File: CIS/008/1990

54/92

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

FINAL DECISION

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 14 July 1989 as that decision is not erroneous in law: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a widow aged 52 years at the time of the tribunal's decision. The appeal is against the unanimous decision of the social security appeal tribunal dated 14 July 1989, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 14 December 1988 to the effect that in the computation of the claimant's income support from 13 December 1988 she could not have the benefit of a Transitional Addition to reflect the fact that her husband had previously been in receipt of an additional requirement or requirements for his Supplementary Benefit. The tribunal held that there was no possibility of a 'transfer' to the claimant of the transitional addition that her husband had had, under the terms of the Income Support (Transitional) Regulations 1987, S.I. 1987 No. 1969. In a decision on file CIS/193/1989 (Baker) I have decided that that is a correct interpretation of the 1987 Regulations. As I understand it the claimant does not dispute the correctness of that ruling. However, at oral hearings before me on 17 June 1991 and 19 September 1991 Mr R Drabble on her behalf submitted that nevertheless the tribunal's decision was erroneous in law in that (i) it failed to take account of the possibility that the

provisions of the Income Support (Transitional) Regulations 1987(a) breached the Sex Discrimination Act 1975 and (b) were contrary to EEC Directive 79/7/EEC, in relation to equal treatment between sexes in social security matters.

3. In an interim decision in this case dated 2 October 1991, I indicated that I rejected the contention of infringement of the Sex Discrimination Act 1975 for detailed reasons set out in the Appendix to that decision, now reproduced as an appendix to this decision. I now confirm in this final decision my ruling in relation to the Sex Discrimination Act 1975 and make part of this decision the Appendix above referred to.

4. So far as concerns the EEC matter, I have taken into account written observations dated 1 October 1992 from the Solicitor to the Departments of Health and Social Security and written replies thereto dated 8 October 1992 of the Child Poverty Action Group representing the claimant. Both of those sets of written representations refer to the decisions of the European Court of Justice in the case of Smithson (C/243/90); Jackson (C/63/91) and Cresswell (C/64/91) and submit to me that in the light of those decisions and in particular their relation to Income Support the present appeal cannot succeed on the EEC point.

5. Having given independent consideration to those decisions of the European Court, I have come to the conclusion that those submissions are correct and that the EEC point cannot be sustained in this case.

6. Consequently it follows that both the claimant's grounds of appeal from the original decision of the social security appeal tribunal fail. Although it might be said that technically the social security appeal tribunal was in error for not having given consideration to these points (always bearing in mind that it is doubtful to what extent they were drawn to that tribunal's attention, if at all), I nevertheless consider that I should affirm the social security appeal tribunal's decision as being in substance correct on a detailed and careful consideration by the tribunal of the Income Support (Transitional) Regulations 1987.

7. Accompanying the letter from the Child Poverty Action Group dated 8 October 1992 is a formal written application for leave to appeal to the Court of Appeal against this present decision. This unusual course was pursued because it was known by virtue of my interim decision dated 2 October 1991 that I should rule against the claimant on the Sex Discrimination Act 1975 point and it was sought to challenge my ruling on that point before the Court of Appeal. I have therefore regarded the written

application for leave to appeal as inchoate until this decision was given but I now confirm that I grant to the claimant leave to appeal to the Court of Appeal against this decision.

(Signed) M.J. Goodman
Commissioner

(Date) 16 October 1992

MJG/SH/5

CIS/008/89 (ANDERSON), CIS/193/89 (BAKER), CIS/375/90 (DAVIES)

APPENDIX

1. This is an Appendix to my decisions on file numbers CIS/008/89 (Anderson); CIS/193/89 (Baker); and CIS/375/90 (Davies). The appeals in these three cases were the subject of oral hearings before me on 17 June 1991 and 19 September 1991. At those hearings all three claimants were represented by Mr R Drabble of Counsel. The Adjudication Officer and the Secretary of State were represented by Mr G Pannick of Counsel. I am indebted to Mr Drabble and to Mr Pannick for their assistance to me at the hearings.

2. Common to all three appeals was a submission by Mr Drabble on behalf of the claimants to the effect that regulations 2(1) and 10(1) of the Income Support (Transitional) Regulations 1987 [S.I. 1987 No. 1969], hereinafter referred to as "the Transitional Regulations", operate so as to discriminate against women in certain circumstances and that such discrimination was made "unlawful" by the Sex Discrimination Act 1975 (c.65), with the result that regulations 2 and 10 must be qualified in some way so as not to produce "unlawful" discrimination within the meaning of the 1975 Act. I have decided in all three of these cases that that submission must fail and that the Sex Discrimination Act 1975 has no application to the operation of the relevant Transitional Regulations.

3. Regulation 10(1) of the Transitional Regulations provides for a transitional addition to income support where "a former beneficiary" was entitled to supplementary benefit immediately prior to the transition to income support on 11 April 1988 and the award of income support to that beneficiary resulted in less benefit being paid than had been received by way of supplementary benefit. The transitional addition makes up the difference. Frequently the reason why income support is less than supplementary benefit is because the recipient of supplementary benefit was entitled to additional requirements eg. for a special diet or for additional laundry expenses, under the Supplementary Benefit (Requirements) Regulations 1983 [S.I. 1983 No. 1399].

4. The problem arises when a husband and wife or a man and woman were living together, supplementary benefit being claimed for them both by the man. On the transition from supplementary benefit to income support the man would receive a transitional addition which might in fact relate largely to the needs of the woman. Then at some future date the man either left the woman or died. The woman then has to make a claim for income support in her own name and in her own right. It will then be decided that the transitional addition, which the man had, is not

transferrable to the woman because of the provision of regulation 10(1) of the Transitional Regulations that only "a former beneficiary" would be entitled to the transitional addition. The phrase "former beneficiary" is defined by regulation 2(1) of the Transitional Regulations as meaning "a person who, for a period immediately preceding 11 April 1988, is entitled to supplementary benefit". But in the type of case with which I am dealing, the woman was not "entitled to supplementary benefit" before 11 April 1988 because the man was then the claimant and he and his wife or partner had their requirements and resources aggregated (Supplementary Benefits Act 1976, section 1(2)).

5. Mr Drabble conceded on behalf of the claimants that this was the undoubted result of regulations 2 and 10 of the Transitional Regulations read on their own but he nevertheless submitted that, because there was thereby caused discrimination against women (since in the large proportion of cases supplementary benefit was claimed by the man not the woman - see paragraph 7 below), to operate regulation 10 of the Transitional Regulations was in breach of the Sex Discrimination Act 1975, with the result that it would be "unlawful" within the meaning of that Act for the adjudication officer to do so. Mr. Drabble agreed with me when I indicated at the hearings that the acceptance of such a submission would involve to a certain extent some 're-writing' of the Regulations by the adjudicating authorities but submitted that there was a precedent for this in that UK legislation already has to be 're-written' where it is in conflict with EEC legislation. However there is special provision for that in section 2 of the European Communities Act 1972, whereas I must deal with the present contention as to the Sex Discrimination Act 1975 by reference to UK law alone.

6. In two of these three cases (Anderson and Davies) there is in fact an allegation by Mr Drabble of breach of the relevant EEC legislation and I have deferred a decision as to whether to refer those cases to the European Court until there is available the judgment (expected shortly) of the European Court in the case of R v. Secretary of State, ex P. Smithson. It should also be noted that the Court of Appeal in the case of Chief Adjudication Officer and Secretary of State for Social Security v. Foster (21 February 1991 - unreported) has held that a Social Security Commissioner does not have power to consider whether or not a regulation is ultra vires the empowering statute. That case is currently under appeal to the House of Lords and Mr Drabble has reserved his position in these appeals as to an allegation that regulations 2 and 10 of the Transitional Regulations are ultra vires (see further paragraph 20 below).

7. In support of his allegation of breach of the Sex Discrimination Act 1975, Mr Drabble contended that the Transitional Regulations are discriminatory against women, in that a large proportion of those claimants who are disadvantaged by the non-transferability of the transitional addition are in fact women. He cited the reply given in answer to a question in the House of Commons by a Minister on 15 May 1989,

".. the most recent information available indicates that, in May 1987, of all supplementary benefit claimants with partners, 18,994 or 1.8% were women. We estimate, of all income support claimants with partners in May 1988, about 25,000 or 3% were women."

Mr Pannick reserved his position as to whether or not there was discrimination but, in view of my ruling as to the non-applicability of the Sex Discrimination Act 1975, I need not go further into that matter.

8. Mr Drabble's contention as to the Sex Discrimination Act 1975 is as follows. He first refers to section 1(1) of that Act reading as follows,

"Sex discrimination against women

(1) A person discriminates against a woman in any circumstances relevant to the purposes of any provision of this Act if -

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a requirement or condition or would apply equally to a man but

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it,

(ii) which he cannot show to be justifiable irrespective of the sex of the person for whom it is applied, and

(iii) which is to her detriment because she cannot comply with it."

9. Mr Drabble asserts that the denial of a transitional addition in the circumstances mentioned above constitutes discrimination within the meaning of section 1(1)(b) of the 1975 Act. That is not admitted by Mr Pannick who also would be prepared to contend, if need be, that, even if there were such discrimination, it was "justifiable" within the meaning of section 1(1)(b)(ii).

10. Mr Drabble then cites section 29 of the Sex Discrimination Act 1975, reading as follows,

"Discrimination in provision of goods, facilities or

services

29. (1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services,

(a) by refusing or deliberately omitting to provide her with any of them, or

(b) by refusing or deliberately omitting to provide her with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in his case in relation to male members of the public or (where she belongs to a section of the public) to male members of that section.

(2) The following are examples of the facilities and services mentioned in subsection (1) -

(a) access to and use of any place which members of the public or a section of the public are permitted to enter;

(b) accommodation in a hotel, boarding house or other similar establishment;

(c) facilities by way of banking or insurance or for grants, loans, credit or finance;

(d) facilities for education;

(e) facilities for entertainment, recreation or refreshment;

(f) facilities for transport or travel;

(g) for services of any profession or trade, or any local or public authority.

(3) [Relates to exercise of skills - not relevant to this case]."

11. Mr Drabble contends that section 29 makes if "unlawful" for an adjudication officer to discriminate against a woman claimant by refusing to provide her with the "facility" of having a transitional addition to her income support in the circumstances involved in these cases. He points to the use of the words "grants, loans, credit or finance" in subsection (2)(c) and submits that they are wide enough to cover transitional additions to income support. He stresses that section 85(1)(a) of the Sex

Discrimination Act 1975 applies the provisions of that Act "to an act done by or for the purposes of a Minister of the Crown or Government Department". He seeks to distinguish the House of Lords decision in Amin v. Entry Clearance Officer, Bombay [1983] 2 A.C. 818 where it was held that section 29 does not apply to the refusal by an immigration officer of a special voucher for permission to enter the United Kingdom as part of an administrative scheme. (Compare Kassam v. Immigration Appeal Tribunal [1980] 2 All E.R. 330, C.A. and Savjani v. Inland Revenue Commissioners [1981] Q.B. 458, C.A.). Mr Pannick submits however that in no circumstances could the provision of income support come within section 29 and cites Lord Fraser in the Amin case at [1983] 2 A.C. at page 835, paragraphs E to H for that contention and in particular his statement that section 29 ".. applies only to acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person... there must be acts (including deliberate omissions - see section 82(1)), done in the course of formulating or carrying out Government policy, which are quite different in kind from any act that would ever be done by a private person, and to which the Act does not apply".

12. I need not finally rule on those conflicting submissions because in my judgment, even if section 29 applied in the present situation, the adjudication officer would be protected from any assertion that he had acted in an "unlawful" manner by the fact that his decision was given in pursuance of his duty to implement the social security legislation and in particular the Transitional Regulations. However, Mr Drabble, responds by citing what was originally section 51 of the Sex Discrimination Act 1975, now replaced in identical terms by sections 51 and 51A of the Sex Discrimination Act 1975, as substituted by section 3(3) of the Employment Act 1989. Section 51A reads as follows,

" 51A. (1) Nothing in -

(a) the relevant provisions of Part III [includes section 29 of the Act, cited above], or

(b) [Not relevant],

shall render unlawful any act done by a person if it was necessary for that person to do it in order to comply with a requirement of an existing statutory provision within the meaning of section 51."

13. "Existing statutory provision" is defined by the substituted section 51 as follows,

" 51. (3) In this section 'existing statutory provision' means... any provision of -

(a) an Act passed before this Act, or

(b) an instrument approved or made by or under such an Act (including one approved or made after the passing of this Act).

(4) Where an Act passed after this Act re-enacts (with or without modification) a provision of an Act passed before this Act, that provision as re-enacted shall be treated for the purposes of subsection (3) as if it continued to be contained in an Act passed before this Act."

The actual date of passing of the Sex Discrimination Act 1975 was 12 November 1975.

14. Mr Drabble stresses that that statutory provision gives a 'defence' against "unlawfulness" created by the Sex Discrimination Act 1975 only where the act was done in order to comply with a requirement of an Act passed before the Sex Discrimination Act 1975 or an Instrument made or approved under such an Act. Mr Drabble points out that here the relevant Act is the Social Security Act 1986 which created the system of income support. The 1986 Act was of course enacted after the Sex Discrimination Act 1975. The Transitional Regulations were made (inter alia) under sections 84(1) and 89(1) of the 1986 Act. Mr Drabble therefore contends that there can be no protection under sections 51 and 51A of the 1975 Act for any person implementing a discriminatory provision of the Transitional Regulations. He contends therefore that the adjudication officer would have to implement the Transitional Regulations in a way that did not involve unlawfulness. Quite how that could be done in the face of the precise terms of regulations 2 and 10 of the Transitional Regulations may be difficult to envisage.

15. In my view, Mr Drabble's contentions are misconceived. It is a well known principle of United Kingdom constitutional law, to quote Garner's Administrative Law, 6th Addition 1975, pages 5 and 6, that,

> "... no Parliament is capable of legislating so as to limit the powers of a successor Parliament. In other words, one Parliament cannot 'entrench' its legislation so as to be immune from repeal by ordinary legislation that may be passed by a subsequent Parliament."

16. As this point was not fully explored at the first hearing, I issued a direction dated 17 June 1991 requiring further written submissions from the parties on the following question,

> "In connection with section 51 of the Sex Discrimination Act 1975, does the doctrine of Sovereignty of Parliament mean that any statute enacted after the 1975 Act, and any intra vires statutory instrument made thereunder, could freely contain discriminatory provisions, since the 1975 Act could not bind future Parliaments? Would this explain why

section 51 of the 1975 Act refers only to pre-1975 Acts etc, to counter any suggestion of an implied repeal of them?"

17. In response to that direction, I have received further written submissions (dated 17 July 1991) from Mr Drabble and (dated 26 July 1991) on behalf of the Secretary of State and the Chief Adjudication Officer. Those submissions were amplified orally before me at the further hearing on 19 September 1991.

18. In his written submission of 17 July 1991, Mr Drabble submits as follows,

> "It is respectfully submitted that this explanation [the explanation canvassed in my direction - see above] cannot be reconciled with the actual wording of section 51 [of the Sex Discrimination Act 1975]. Had it been intended that compliance with Acts and Statutory Instruments passed both before and after 1975 should be treated in exactly the same way, and for both to mean, without more, that the act complained of was not unlawful, it would have been possible to draft section 51 clearly so as to make this plain. It is to be observed that the equivalent provision in the Race Relations Act 1976 - section 41 - is so drafted. Hence the references in section 41 to "any enactment" and "any Instrument". It is conceded that the doctrine of Parliamentary sovereignty would operate to mean that if a subsequent Parliament decided that, despite the wording of section 51, a particular discriminatory act should be lawful it could say so. However, nothing in the Social Security Act 1986 evinces an intention to disapply the provisions of the Sex Discrimination Act 1975, and it is accordingly submitted that the provisions of Statutory Instruments made under the 1986 Act cannot prevail over the express requirement of primary legislation in the form of the 1975 Act. That primary legislation, unless expressly or impliedly disapplied, renders decisions unlawful if they discriminate."

19. The written submission on behalf of the Secretary of State and Chief Adjudication Officer (dated 26 July 1991) contends as follows,

> "Section 51 of the Sex Discrimination Act 1975 in essence saves and renders lawful certain discriminatory acts where such acts are necessary in order to comply with the requirement of a statute passed before the Act of 1975. Moreover, section 51(1)(b) expressly keeps alive Instruments which can be made intra vires under previously existing legislation irrespective of whether those Instruments are made before or after the Act of 1975. This was recognised by the Employment Appeal Tribunal in the case of Greater London Council v. Farrar [1979] [should be [1980]] 1 W.L.R. 608. There the following view was expounded: '... it seems to us that the words of section 51(1)(b) do expressly contemplate that provisions may be made under Instruments

even after the passing of the Act of 1975 which prevent from being unlawful Acts which otherwise would be unlawful under the provisions of Part II of the Act.' (page 613H-614). The underlying rationale behind section 51 becomes apparent when that section is analysed in the context of Parliamentary sovereignty. By that doctrine any previous Act of Parliament can always be repealed by a later Act, either expressly or in case of conflict, impliedly. The Sex Discrimination Act 1975 like any other Act is amenable to this fundamental principle. The ability of Parliament to make or unmake any law whatever is consistent with the view that any Statute enacted after the 1975 Act and similarly any intra vires Instrument made thereunder, could quite legitimately contain discriminatory provisions since the 1975 Act cannot bind future Parliaments. Having said that, I think it is significant to add the qualification that a post-1975 Parliament would exercise circumspection in the formulation of legislation so that the principles and provisions of the Sex Discrimination Act are recognised and are not impliedly repealed, unintentionally. If such a Parliament wished to do something in contravention to the Sex Discrimination Act, it would probably do so by express provision. None of this is practicable in the case of pre-1975 legislation because at the time of making and implementing such enactments the Sex Discrimination Act 1975 was not in existence and so realistically its principles and provisions could not feature in the contemplation of the legislature. The express provision which section 51 makes for pre-1975 enactments, effectively circumvents the implication of repeal which would ensue as a natural consequence of conflict, by virtue of the doctrine of Parliamentary Sovereignty. I think this explains why section 51 of the 1975 Act refers only to pre-1975 Acts."

20. In my view, the above-cited submissions on behalf of the Secretary of State and the Adjudication Officer are to be preferred to those of Mr Drabble. Mr Drabble's point about the Race Relations Act 1976, section 41 (which does admittedly refer to Acts and Statutory Instruments passed or made after the 1976 Act as well as before them) does not in my view detract from that conclusion. Section 41 of the 1976 Act could not 'entrench' its provisions and it would be equally open to Parliament to ignore them if it wished to do so subsequently. There is of course a problem where one is concerned, as here, with delegated legislation i.e. regulations 2 and 10 of the Transitional Regulations. In my judgment however the only way in which that issue can be pursued is by an allegation that those Regulations are in some way ultra vires the empowering sections of the Social Security Acts. I make no further comment further on that because of the Court of Appeal's ruling in Chief Adjudication Officer and Secretary of State for Social Security v. Foster (21 February 1991 - unreported) that a Social Security Commissioner does not have power to consider whether or not a regulation is ultra vires.

21. However, I should add that I consider that I do have

jurisdiction to give the ruling that I have done as to the applicability of or otherwise of the Sex Discrimination Act 1975. At the first hearing before me, Mr Pannick contended that I did not have such jurisdiction. He submitted that that followed from sections 62 and 66 of the Sex Discrimination Act 1975. Section 62 (as substituted by Schedule 4 to the Race Relations Act 1976) provides that "no proceedings, whether civil or criminal" should lie against any person other than as provided by the Act (with a saving for certiorari, mandamus or prohibition). That leads to the provision of section 66 of the 1975 Act that a claim that a person has been discriminated against "may be made the subject of civil proceedings in like manner as any other claim in tort..." (section 66(1)) and "shall be brought in England and Wales only in a County Court." (section 66(2)(a)). Mr Pannick therefore contends that the Social Security Commissioner has no jurisdiction to rule on issues of discrimination under the Sex Discrimination Act 1975. However, I should observe that the word "proceedings" in the prohibition in section 62(1) of the 1975 Act is not defined in that Act and I would not have thought that an appeal to the Social Security Commissioner under his statutory appellate jurisdiction comes under the head of "proceedings" (compare section 66 of the 1975 Act). Nor do I consider that there is anything in the ruling of the Court of Appeal in the Foster case - see above - which would prevent me from ruling on the provisions of the 1975 Act. Certainly I consider that, in pursuance of my duty under section 101 of the Social Security Act 1975, I have jurisdiction to give the type of ruling that I have done in these cases.

(Signed) M.J. Goodman
Commissioner

(Date) **2 October 1991**