

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since it is not expedient for me to make the findings of fact which are necessary to decide what decision the tribunal should have given, I refer the case for rehearing before a differently constituted tribunal.

2. This appeal arises out of a claim for income support made on 30 March 2003, shortly after the dissolution of the claimant's marriage. The claimant was a joint owner of the former matrimonial home and at the time of her claim was in the process of selling the home, in accordance with the terms of a county court consent order made on 7 March 2003. The value of the claimant's interest in the former matrimonial home was disregarded at the time of the initial decision awarding benefit, on the basis that the claimant was taking all reasonable steps to dispose of the property.

3. On 7 July 2003 the claimant's solicitors sent her the sum of £41,020.67, representing her share of the net proceeds of sale of the former matrimonial home, together with a lump sum from her former husband, in accordance with the agreement recorded in the consent order. However, the claimant did not disclose the sale until 2 December 2003, when she stated that she had given £12,000.00 to her daughter and £14,000.00 to her son. Written confirmation was subsequently provided that those payments had in fact been made.

4. The sums paid by the claimant to her children were treated as notional capital under regulation 51(1) of the Income Support (General) Regulations 1987, which provides that a claimant is to be treated as possessing capital of which he has deprived himself "for the purpose of securing entitlement to income support or increasing the amount of that benefit." The claimant appealed against that decision, and it is against the decision of the tribunal dismissing her appeal that the claimant, with my leave, now appeals.

5. The claimant's case was, in essence, that she intended to benefit her children to compensate them for the loss of the money which they would eventually have received if their parents' marriage had not come to an end. In an interview on 22 December 2003 the claimant is recorded as stating:

"After 34 years of marriage and the hostile behaviour of my husband towards our children my only concern was to help stabilise the life of them. This was the rationale behind the approximately '3 way split' of my funds."

At the hearing of the appeal the claimant expanded on her family circumstances and her reasons for making gifts to her children, evidence which was summarised statement of reasons as follows (although it may not be an accurate summary of the evidence):

"She stated she wanted to give money to her children as she feels that they have lost any inheritance from their father, that it was never part of the divorce settlement or the terms of the divorce settlement and she has never maintained that it was her choice to give a total of £26,000.00 to her children to give them some sort of stability in life, even though they were grown-up children and in fact her son is now 20 and her daughter 24."

6. After summarising the evidence and the undisputed facts, the tribunal chairman gave the following reasons for dismissing the appeal:

“Bearing in mind that this money was a settlement to provide for (the claimant’s) future, bearing in mind that she was in receipt of benefit, it does not seem prudent or reasonable for her to have given away such a large sum totalling £26,000.00

This is capital that the appellant has deprived herself of and as she has been aware in January 2003 of the capital rules and the effect the same would have on her claim to income support, on the balance of probabilities she has therefore deprived herself of this amount to secure entitlement to income support and she is to be treated therefore as possessing notional capital of £26,000.00, which she would still have retained had she not given the same away at the crucial date of 14/1/2004, and she is therefore to be treated as possessing notional capital of £26,000.00, which is to be added to any other actual capital held by her at that date.”

The claimant appealed through solicitors challenging the evidence before the tribunal and the conclusions drawn by the tribunal from the evidence, but I gave leave to appeal because the tribunal made no finding on the question of whether securing entitlement to income support was a significant operative purpose of the claimant’s gifts to her children. The Secretary of State has supported the appeal in a very helpful submission dated 23 February 2005.

7. The question which has to be considered when deciding whether capital which has been disposed of is to be treated as notional capital is not simply whether the disposition was reasonable or prudent, but whether the reason, or one of the reasons, why the claimant disposed of the capital was to secure or increase entitlement to income support. As Mr Commissioner Howell QC recently stated when applying the ‘significant operative purpose test’ in the context of housing benefit in *CH/3169/2004*, the issue requires a determination of the actual, or subjective, intention of the claimant:

“Whether the securing of entitlement to benefit was, in this sense, among the purposes which led any particular claimant to act as he did is a question that must be determined by the tribunal of fact in the circumstances of each individual case, the test...being one of subjective purpose: see in the housing benefit context *R (Beeson) v Dorset County Council* [2001] EWHC Admin 986, per Richards J at paragraphs 9, 37 (not challenged on this point in the Court of Appeal). In the great majority of cases this must be a matter of drawing such inferences as the tribunal of fact thinks fit from the surrounding circumstances, such as the claimant’s state of knowledge of the rules, the nature and timing of the disposals he makes and the timing and manner of his claims for benefit; since direct evidence to such a purpose is in the nature of things unlikely. Such a task is however a perfectly normal one for a tribunal of fact to have to undertake, and this of course is by no means the only instance in law when the purpose for which a thing is done may not be express, and has to be ascertained as “as a matter of substance and fact”: *re South African Supply and Cold Storage Company* [1904] 2 Ch 268.”

8. It was undoubtedly necessary for the tribunal to consider whether it was reasonable or prudent for the claimant to give away large amounts of money to her children, since an improvident gift by a claimant in straitened circumstances increases the probability that one of the reasons for the gift is to secure or increase entitlement to a means-tested benefit. As Mr

Commissioner Howell QC explained, it is also necessary to take into account all the other relevant circumstances, including in this case the very long delay before the claimant reported receipt of the sums paid under the divorce settlement. Ultimately, however, the tribunal had to decide whether the reason, or a reason, for the gifts which the claimant made to her children was to secure or increase her entitlement to income support. Because the tribunal failed to make that crucial finding, their decision was wrong in law and must therefore be set aside

9. Questions of this kind turn entirely on an assessment of credibility, and this case must therefore be referred for rehearing to a differently constituted tribunal. The new tribunal should note the claimant's challenges to the evidence and make any findings of fact which are necessary in relation to those challenges. Having made those findings, the tribunal should decide the question of whether in this particular case securing or increasing entitlement to income support was a significant operative purpose of the gifts made by the claimant to her children, in accordance with the guidance in *CH/3169/2004*.

(signed on the original)

E A L BANO
Commissioner

8 June 2005