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Commissioner's File: CIS/255/1990

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

[ORAL HEARING]

1. I disallow this appeal. The decision of the social security appeal tribunal dated 16 March 1990 was not erroneous in law.

2. By a decision issued on 1 September 1989 the adjudication officer decided that the claimant was entitled to income support of £34.90 weekly from 29 August 1989 and that he was no longer entitled to a transitional addition "because his income support entitlement ceased on 18.7.89 for a reason other than that his income exceeded his applicable amount". The claimant appealed. On 16 March 1990 the social security appeal tribunal disallowed the appeal and held that the claimant was only entitled to income support of £34.90 per week from 29 August 1989. The claimant appeals with leave of the tribunal chairman.

3. On 21 July 1992 I held an oral hearing. The claimant attended and presented his own appeal. The adjudication officer was represented by Mr Jeremy Heath of the Solicitor's Office of the Department of Social Security.

4. The law

When supplementary benefit was replaced by income support, if the amount awarded by way of income support for the benefit week beginning 11 April 1988 (the "second benefit week") was less than the sum paid by way of supplementary benefit for the week beginning 4 April 1988 (the "first benefit week"), a claimant

was entitled to a "transitional addition": regulation 10(1) of the Income Support (Transitional) Regulations 1987. That was to ensure that the claimant did not suffer financially by the change to income support. However, regulation 14(2)(a)(i) of those Regulations provides that a claimant "shall cease to be entitled to a transitional addition if ... he ceases to be entitled to income support for a reason other than that his applicable amount under Part IV of the General Regulations (applicable amounts) does not exceed his income". Regulation 21 of the Income Support (General) Regulations provides for applicable amounts in special cases, including the case of a "prisoner". The applicable amount in the case of a prisoner is set out in Schedule 7, paragraph 8 as follows:-

"Prisoners

- | | |
|---|---|
| 8. A person - | 8. |
| (a) except where sub-paragraph (b) applies, who is a prisoner; | (a) nil; |
| (b) who is detained in custody pending trial or sentence following conviction by a court. | (b) only such amount, if any, as may be applicable under regulation 17(1)(e)" |

For the purpose of paragraph (a), a "prisoner" is defined in regulation 21(3) as meaning -

"a person who is detained in custody pending trial or sentence upon conviction or under a sentence imposed by a court other than a person whose detention is under the provisions of the Mental Health Act 1983..."

For the purpose of paragraph (b), regulation 17(1)(e) of the General Regulations provides that the applicable amount shall be -

"any amounts determined in accordance with Schedule 3 (housing) which may be applicable to him in respect of mortgage interest payments or such other housing costs as are prescribed in that Schedule."

In other words, a prisoner detained in custody pending trial or pending sentence following conviction will be entitled to housing costs. But he will not be entitled to "housing benefit expenditure": Schedule 3, paragraph 5(a).

5. The facts

Since August 1985 the claimant had been in receipt of supplementary benefit followed by income support. When income support replaced supplementary benefit, the claimant became entitled to a transitional addition. His applicable amount was

£34.90 and the transitional addition was £3.25 weekly and so he received income support in the sum of £38.15 per week. On 17 July 1989, the claimant failed to sign on at the unemployment benefit office and payment of his income support ceased. The claimant was charged by the police with the offence of threatening to kill a named person and on 20 July 1989 the claimant was remanded in custody at Camberwell Green Magistrates' Court on that charge. He was held on remand in Brixton prison for 5½ weeks. On 25 August 1989, the offence being triable either summarily or on indictment (Magistrates' Court Act 1980, section 17(1) and Schedule 7(2) paragraph 5 and Offences Against the Person Act 1961, section 16), the magistrate decided that the mode of trial should be on indictment and that there should be an "old-style" committal i.e. a preliminary inquiry with depositions and not under section 1 of the Criminal Justice Act 1967 (which would have been without consideration of the evidence). Later on the same day the claimant was notified that proceedings against him for that offence were discontinued by the Director of Public Prosecutions. He was informed in the notice that he could apply to the clerk of the justices for any costs incurred by him in respect of the proceedings.

6. On 1 September 1989 the adjudication officer issued his decision that the claimant was no longer entitled to the transitional addition "because his income support entitlement ceased on 18.7.89 for a reason other than that his income exceeded his applicable amount". In Form AT2 he submitted that the claimant was a prisoner within the meaning of regulation 21(3) of the General Regulations, that his applicable amount was only those housing costs which might be applicable to him but that his only housing costs were rent and rates which were met through housing benefit expenditure and that, therefore, no amount was applicable under regulation 17(1)(e) in respect of housing costs, and that the claimant's income support entitlement ceased "because he was held on remand in prison".

7. On 1 November 1989 the appeal came before a social security appeal tribunal who adjourned the hearing at the request of the presenting officer in order that he could refer the case back to the Department's solicitors "to see if there was any way to help the [claimant]". On 16 March 1990 the appeal was heard by the social security appeal tribunal. The claimant submitted that he had not been "in custody 'pending trial'" because there never was a trial, as the proceedings against him were discontinued and "should never have been brought": see form AT3, box 1.

8. The Issue

If the claimant was a "prisoner" within the meaning of regulation 21(3), his applicable amount was nil under paragraph 8(a) of Schedule 7. If he was "detained in custody pending trial" under paragraph 8(b) of Schedule 7, his applicable amount was still nil, as he was not entitled to any housing costs. It does not matter, therefore, whether paragraph 8(a) or (b) applied. In either case, the claimant would have ceased to be entitled to income support. The question to be determined is whether or not he was "detained in custody pending trial".

9. At the oral hearing before me the claimant submitted emphatically, but courteously, that there never was a trial and that he could not have been in custody "pending trial". On the other hand, Mr. Heath submitted that detention in custody pending trial was "a broad phrase" to describe the situation of a person detained in custody on a criminal charge until such time as he is released from custody.

10. Before seeking to define that phrase, it is interesting to compare some other provisions where different words were used. Under section 82(5)(b) of the Social Security Act 1975 (now section 113(1)(b) of the Social Security Contributions and Benefits Act 1992) a person was disqualified for receiving any benefit for any period during which the person "is undergoing imprisonment or detention in legal custody". The claimant in the present case was clearly "undergoing ... detention in legal custody". Under the Supplementary Benefit (Requirements) Regulations, Schedule 3 paragraph 9 a person was not entitled to supplementary benefit if he was a "prisoner" which was defined under regulation 2(1) of the Supplementary Benefit (Requirements) Regulations as meaning -

"any person whose detention in a prison, remand centre, borstal institution or detention centre is for the time being authorised by law".

But (as in the case of income support) certain prisoners were entitled to housing costs, namely those who were "remanded in custody or committed in custody for trial or to be sentenced": regulation 14(7)(d) of the Requirements Regulations. The claimant in the present case would have been a prisoner under the Requirements Regulations, since his detention in Brixton prison was "authorised by law", and he would not have been entitled to supplementary benefit, except that, since he was "remanded in custody", he would or may have been entitled to housing costs (but not housing benefit expenditure). Has entitlement to income support been changed by the use of the words "detained in custody pending trial?"

11. "Pending trial"

Is it possible to determine when a trial is "pending"? According to Stroud's Judicial Dictionary of Words and Phrases,

5th edition at page 1890

"A legal proceeding is 'pending' as soon as commenced .. and until it is concluded, i.e. so long as the Court having original cognisance of it can make an order on the matters in issue, or to be dealt with therein".

The claimant had been charged with the offence of threatening to kill, and had been brought before the magistrates' court. The proceedings had, therefore, commenced. The Bail Act 1976 section 4 provides that a person who is accused of an offence and is brought before the magistrate's court or the Crown Court "in

the course of or in connection with proceedings for the offence" shall be granted bail "except as provided in Schedule 1 to this Act". Clearly the claimant was remanded in custody "in the course of or in connection with proceedings for the offence". Does that mean that the trial was pending? When the magistrate decided that trial should be on indictment and that there would be an "old-style" committal, the proceedings were discontinued. The proceedings were then concluded. Between the commencement of the proceedings for the offence and their conclusion, was there a trial pending? If the answer is yes, was the trial "pending" from the moment when the police charged the claimant? Or from the moment that he was brought before the magistrate? Or when he was remanded in custody? Or from the moment when the magistrate decided on the mode of trial? Or would trial be "pending" only after committal for trial? Or, as the claimant in effect submits, is a trial "pending" only if there is a trial?

12. It seems to me that there is a strong argument for saying that a trial was not pending until the mode of trial was determined. The difficulty, however, is that if it had been determined that trial should take place summarily, the detention in custody for 5½ weeks would have been, as it seems to me, detention in custody pending that trial. In other words, detention in custody pending trial will arise before the mode of trial is determined. It would certainly be anomalous if, two persons having been charged with an offence triable either way and, assuming exceptional circumstances, one was tried summarily and the other was tried on indictment, the detention of the one prior to his summary trial was detention "in custody pending trial" but detention of the other was not "in custody pending trial" until the mode of trial was determined.

13. I have considered, but get no help from, slightly different wording used in connection with availability for employment. To be entitled to income support a person must be available for employment: section 20(3)(d)(i) of the Social Security Act 1986 (now section 124(1)(d)(i) of the Social Security Contributions and Benefits Act 1992). However, a person is not required to be available for employment (by virtue of regulation 8(1) of the Income Support (General) Regulations) if he is in custody: see paragraph 21 of Schedule 1 to those Regulations which provides that a person in custody is

"21. A person remanded in, or committed in, custody for trial or for sentencing".

A person in custody cannot be available for employment and that is no doubt the reason for that provision.

14. The reason why a person detained in custody is not entitled to income support is not difficult to understand. While he is in custody, his food and accommodation are provided by the State. He is being kept by the State and he has no need for income support. However, if the person is in custody pending trial or pending sentence, he will be entitled to claim any housing costs presumably because he may soon be released and be allowed to

return home. Whereas if he is in custody under a sentence imposed by the Court, he will not be entitled to housing costs, presumably because he will be in custody for a longer period. The spouse or partner of the person in custody was and is provided for. For the purposes of supplementary benefit a partner of "a prisoner for any period" was treated as a single person: regulation 2(3)(e) of the Supplementary Benefit (Aggregation) Regulations; and could apply for supplementary benefit in his or her own right. There is a similar provision in relation to income support: see regulation 16(3)(b) of the Income Support (General) Regulations, which provides that a claimant and any partner are not treated as members of the same household where one or both is or are "detained in custody pending trial or sentence upon conviction or whilst serving a sentence imposed by a court".

15. The meaning of the words will, in my view, become clearer if one asks why the claimant was remanded in custody. He was remanded in custody on a charge of threatening to kill. That charge would have to be tried unless he was released before trial (as in fact happened). Unless he was released on bail, he would continue to be detained in custody until the trial or until the charge was otherwise disposed of. I have come to the conclusion that detention in custody "pending trial" must be understood to mean detention in custody pending trial of the offence charged. It does not seem to me to matter that no trial took place. The fact remains that he was in custody awaiting trial of the offence charged.

16. I appreciate that the claimant feels considerably aggrieved. He says that there was no good reason for the proceedings as is shown by the fact that they were discontinued against him and that not only did he suffer 5 $\frac{1}{2}$ weeks on remand in prison but under the decision of the appeal tribunal he has also suffered the loss of the transitional addition. In other words, he suffered a loss of liberty and now a financial loss and that is very unfair. I fully sympathise with him. However, I am bound by the Regulations and have no discretion in the matter. I have given the matter very careful thought and have come to the conclusion - albeit reluctantly - that the claimant was detained in custody pending trial. He was, therefore, a person who was "detained in custody pending trial" within the meaning of paragraph 8(b) of Schedule 7 and his applicable amount was nil, because, for the reasons given above, he was not entitled to any housing costs. It follows that he ceased to be entitled to income support "for a reason other than that his applicable amount ... does not exceed his income" and he ceased to be entitled to the transitional addition: regulation 14(2)(a)(i) of the Income Support (Transitional) Regulations. It follows that the social security appeal tribunal came to a correct decision and there was no error of law therein.

17. In his observations dated 20 December 1992 the claimant has requested a further oral hearing "to put my case forward to be heard at the High Court." I am not sure what that means but, in

any event, I have held one oral hearing and I have issued two further Directions (dated 22 July 1992 and 4 November 1992) which have been dealt with by the adjudication officer with further observations by the claimant. I am satisfied that I can now properly determine this appeal without a further hearing: regulation 15(2) of the Social Security Commissioner's Procedure Regulations.

18. For those reasons I must disallow this appeal.

(Signed) A.T. Hoolahan
Commissioner

(Date) 25 March 1993