

*National Capital - diminishing  
CC 70*



Commissioner's File: CIS/334/1989

**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]**

1. The claimant's appeal from the decision of the social security appeal tribunal dated 26 April 1989 is allowed as that decision is erroneous in law and is set aside. The case is remitted for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted social security appeal tribunal: Social Security Act 1975, section 101, as amended by paragraph 6 of Schedule 3 to the Social Security Act 1989.

2. This appeal by the claimant to the Commissioner from a decision of the social security appeal tribunal dated 26 April 1989 was the subject of an oral hearing by a Tribunal of Commissioners on 3 July 1990. The claimant was not present but was represented by Mr R English of the Free Representation Unit and the adjudication officer was represented by Mr N Butt of the Office of the Solicitor to the Departments of Health and Social Security. We are indebted to Mr English and to Mr Butt for their assistance to us at the hearing.

3. The appeal is from the social security appeal tribunal's unanimous decision dated 26 April 1989, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 31 January 1989 in the following terms,

"The claimant is not entitled to income support from 11.1.89. This is because he is treated as possessing capital which exceeds the prescribed amount of £6,000."

4. The facts of the case were shortly and accurately stated by the local adjudication officer's summary provided for the social security appeal tribunal, reading as follows,

"[The claimant] is a single man aged 43 who lives in board and lodge accommodation. He has no dependents. [The claimant] had been continuously in receipt of [first supplementary then income support] benefit from 17.10.86 until 3.10.88, when he voluntarily stopped claiming benefit as he had received £8,400 [by way of a settlement of his claim for damages for unlawful eviction] from his former landlord at [an address in] London SW1. On 11.1.89, [the claimant] obtained a form B1 from the Unemployment Benefit Office and made a claim for Income Support. He stated at Part XII of the claim form '... have got no more money left.' [The claimant] was interviewed by the Adjudication Officer at the local office on 21.1.89 and provided the following information:- Building society account - balance at 19.1.89, £2.00; He received the sum of £8,400 on 7.10.88 and spent it thus:- approx £112 weekly on board and lodge charges;

approx £100 daily on drink and food and gambling;

approx £750 cash gift to girl friend; part of this was repayment of a loan, claimant couldn't be specific

approx £300 in gifts to girl friend;

approx £700 to family at Christmas (cash);

approx £500 clothes (cash)

[The claimant] was only able to produce documentary evidence (receipts) of this expenditure for the following:-

two receipts for clothing - total £52.90;

hotel receipts for the period 26.9.88 to 24.1.89.

On 31.1.89 the adjudication officer informed [the claimant] that he was not entitled to Income Support, as he was still to be treated as having capital of £7,034.90."

5. That net figure of £7,034.90 was arrived at by the local adjudication officer in the following manner, (see his submission to the tribunal),

"Under the Income Support Regulations, a single claimant in [the claimant's] circumstances is entitled to £80.30 per week. If we allow him this entitlement for the 17 weeks from 4.10.88 to 30.1.89 (his income support benefit week ending date following his interview on 26.1.89), then this

totals £1,365.10 which leaves a balance of £7,034.90."

6. The tribunal, when dismissing the claimant's appeal, allowed the claimant legitimate expenditure at the rate of £20 per day for bed and breakfast accommodation and for midday and evening meals at the rate of £4 per day and calculated that at such rate of expenditure over the relevant period the claimant had out of the £8,400 spent £6,214 of it "for the purpose of securing entitlement to income support" within the meaning of regulation 51(1) of the Income Support (General) Regulations 1987 [S.I. 1987 No. 1967 - as amended], which provides as follows,

"Notional capital

51. (1) A claimant shall 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 except where that capital is derived from a payment made in consequence of any personal injury and is placed on trust for the benefit of the claimant."

7. The claimant's primary ground of appeal to the Commissioner was that regulation 51(1) was ultra vires the empowering legislation. Subsequent written submissions by Mr English on behalf of the claimant have elaborated that ground of appeal by drawing attention to the fact that regulation 51(1) of the 1987 Regulations states that "a claimant shall be treated as possessing capital" whereas its predecessor regulation under the system of supplementary benefit, namely regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No. 1527 as amended], used instead of the word "shall" the word "may".

8. Mr. English then stressed that Commissioners' decisions, principally R(SB) 38/85 and R(SB) 40/85, on regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981 had used the existence of a discretion conferred by the word "may" to allow a "diminishing capital" rule. That rule meant that, even if initially a claimant was 'fixed' with an amount in excess of the prescribed capital limit, he could be taken as diminishing that capital over the period thereafter by spending notionally for example, as a reasonable sum, "the weekly equivalent of the amount by which his weekly resources fell short of his requirements" (R(SB) 40/85 - paragraph 13).

9. Mr English contended that because the word "may" had now been replaced by the imperative word "shall" in regulation 51(1) of the Income Support (General) Regulations 1987, it was no longer possible to apply a diminishing capital rule, with the result that once a claimant was treated as possessing notional capital under regulation 51(1), he would be treated as possessing it for all time. Mr English asserted that such a result was so plainly unreasonable or irrational that it rendered the regulation ultra vires. That is despite the breadth of the

empowering section, section 22(9) of the Social Security Act 1986, which simply states that,

"Circumstances may be prescribed in which - .. a person is treated as possessing capital or income which he does not possess."

10. At the hearing before us, we indicated to Mr English and Mr Butt that, before we could consider such an argument, we would have to construe regulation 51(1) of the 1987 Regulations to see whether it in fact had the effect of excluding any diminishing capital or analogous rule, i.e. whether it excluded the possibility that, when once a claimant had been deemed to have notional capital under that regulation, he might thereafter not be able to show that he had spent it or that he no longer had it (an alternative way of looking at the practical effect of the diminishing capital rule - see below).

11. Mr Butt on behalf of the adjudication officer denied that the substitution of the word "shall" for the word "may" had any such effect. He stated that the substitution had merely been effected in order to bring the notional capital rule into conformity with the rule as to actual capital, because section 22(6) of the Social Security Act 1986 provides that "no person shall be entitled to an income-related benefit if his capital or a prescribed part of it exceeds the prescribed amount". Regulation 45 of the Income Support (General) Regulations 1987 prescribed £6,000 as the capital limit at the relevant time - it is now £8,000 (see S.I.1990 No.671).

12. We canvassed with the parties two possibilities. They both stem from the provision of sub-paragraph (6) of regulation 51 (notional capital) which provides as follows,

"51. (1)-(5) .....

(6) Where a claimant is treated as possessing capital under any of paragraphs (1) to (4) the foregoing provisions of this Chapter shall apply for the purposes of calculating its amount as if it were actual capital which he does possess."

13. The "Chapter" thus referred to is Chapter VI of the 1987 Regulations headed "Capital", comprising regulations 45-53. Regulation 45 prescribes the amount of the capital limit. Regulation 46 provides,

"Calculation of capital

46. (1) For the purposes of Part II of the Act as it applies to income support, the capital of a claimant to be taken into account shall, subject to paragraph (2), be the whole of his capital calculated in accordance with this Part and any income treated as capital under regulation 48

(income treated as capital).

- (2) There shall be disregarded from the calculation of a claimant's capital under paragraph (1) any capital, where applicable, specified in Schedule 10 [a point arises on this see paragraphs 19-21 below]."

14. Our first point then arises from regulation 49, which provides as follows,

"Calculation of capital in the United Kingdom.

Capital which a claimant possesses in the United Kingdom shall be calculated -

- (a) except in a case to which sub-paragraph (b) applies, at its current market or surrender value, less
- (i) where there would be expenses attributable to sale, 10%; and
  - (ii) the amount of any incumbrance secured on it;
- (b) [not relevant - relates to National Savings Certificates]."

15. We asked whether the reference in regulation 49 to "current market or surrender value" would allow in fact an equivalent of the diminishing capital rule to be applied. However, we do not pronounce finally on this because we arrive at the same conclusion by different reasoning (see below). We would however point out that the difficulty in the case of cash is that it seems artificial to speak of what regulation 49(a) refers to as "current market or surrender value". We do not necessarily accept Mr. English's contention that regulation 49 would require any notional capital to have a zero value.

16. Nevertheless we consider that in fact the same result (i.e. the application of a rule analogous to the diminishing capital rule) is arrived at on general principles. This arises simply from the provision of regulation 51(6) that, when calculating the amount of notional capital it must be calculated "as if it were actual capital which [the claimant] does possess". If a claimant in fact had actual capital of a sum of money and at the time of a first claim this exceeded the prescribed amount (£6,000 at the relevant time) then he would not be entitled to income support. However, if after reasonable expenditure on living and other sensible expenses (which we do not consider need be limited to the relevant amount of income support - a point which Mr Butt conceded at the hearing), the claimant's actual capital became reduced to below the limit of £6,000, then there is no doubt that the claimant would then be entitled to income support. In our

judgment regulation 51(6) envisages that precisely the same situation should occur if what the claimant has initially is not actual capital but notional capital. Just as under regulation 51(1) the claimant is treated as still possessing such capital so he is also entitled in our view under regulation 51(6) to be deemed to diminish that capital by reasonable expenditure related to his own particular financial and other circumstances (not necessarily the same as the amount of income support that he would receive). When such notional expenditure from his notional capital has reduced the notional sum to below the prescribed limit (then £6,000, now £8,000) then the claimant would be entitled to reclaim income support and this particular bar on entitlement to that benefit would have ceased to exist.

17. Some support is lent to this conclusion by decisions by Commissioners, in relation to recovery of overpayments of supplementary benefit for misrepresentation or material non-disclosure, in R(SB) 15/85 and R(SB) 3/86. However the actual case of calculation of overpayments and the application thereto of a "diminishing capital rule" in such cases is now governed by regulation 14 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 [S.I. 1988 No. 664], which provides for "quarterly diminution of capital resources".

18. It follows from this that in our view an argument that regulation 51(1) of the 1987 Regulations is ultra vires, as being unreasonable in its effect or irrational, cannot be sustained. By so saying, we do not express any opinion on the question of whether a Commissioner could in fact consider "irrationality" as a ground of "ultra vires". We note that two previous Tribunals of Commissioners have held, in R(SB) 10/88 and R(SB) 15/89, that a Commissioner cannot consider a contention that, because the operation of a regulation was allegedly "unreasonable", it was ipso facto ultra vires. We also note that the Court of Appeal has recently considered this issue and has affirmed that it is not possible to attack an exercise of statutory power on the ground of "unreasonable" operation, though it may apparently be possible for it to be attacked on the ground of what the Court of Appeal described as a "perverse" application (see R v. Secretary of State for the Environment, Ex Parte Hammersmith and Fulham London Borough Council and others, The Times, 4 July 1990).

19. It follows from this that we reject the principal ground of appeal of the claimant. We nevertheless feel that we must set the tribunal's decision aside for another reason, which we raised with the parties at the outset of the hearing. This results from the provision of regulation 46(2) of the Income Support (General) Regulations 1987 (cited in paragraph 13 above) that certain types of capital are to be disregarded. They are specified in Schedule 10 to the Regulations. We drew to the parties' attention the possible application of paragraph 8 of Schedule 10, the relevant parts of which read as follows,

"SCHEDULE 10

CAPITAL TO BE DISREGARDED

8. Any sum -

(a) paid to the claimant in consequence of.. loss of the home .. and intended for its .. replacement; or

(b) [not relevant]

and which is to be used for the intended purpose [is to be disregarded], for a period of 26 weeks from the date on which it was so paid or acquired or such longer period as is reasonable in the circumstances to enable the claimant to effect the .. replacement .."

20. The original tribunal made no reference in its record of decision to this matter but at the hearing before us Mr English indicated that it had been canvassed before the tribunal. We note that the claimant gave the following evidence to the original tribunal,

"Evicted by landlord from -Street, Pimlico - privately rented accommodation. I saw a solicitor about it and took the landlord to court - case was settled out of court, on terms landlord paid me in full £10,000 - after costs deducted I was left with £8,400 - sum was paid to me by a cheque. I got the cheque on 7.10.88. ... I was living in hotels at this time, moving from hotel to hotel. .... [Presenting officer] asked the claimant why he did not use the £8,400 to get other private accommodation. Claimant: I looked around Pimlico, the only area I knew but couldn't find accommodation."

21. On that evidence, the tribunal should have made a finding of fact and given reasons for decision on the question (which apparently had been raised before them) as to whether or not in the circumstances the £8,400 received by the claimant could come within regulation 8 of Schedule 10 to the 1987 Regulations and thus be disregarded capital. Certainly there is a possibility that on the facts of this case the sum of £10,000 paid by the landlord could be said to have been paid in consequence of the "loss of [the claimant's] home" and to have been intended by the landlord for the "replacement" of the claimant's home. Whether however the claimant was going to use the sum for the "intended purpose" (see para.8 of Schedule 10 to the 1987 Regulations) is another matter. The new tribunal should look into this and see whether there was any real intention by the claimant to use the money to obtain other accommodation or whether his attempts to secure other accommodation were so perfunctory as to render

paragraph 8 of Schedule 10 inapplicable altogether.

22. When dealing with the entirety of the case anew, as the new tribunal must, the tribunal is not bound by the findings of fact made by the original tribunal. The new tribunal must proceed on the assumption that regulation 51(1) of the 1987 Regulations is not ultra vires and must apply it to the circumstances that existed as at the date of claim for income support, namely 11 January 1989. The tribunal should ascertain whether any part of the sum of £8,400 received by the claimant came within regulation 51(1) of the 1987 Regulations. That involves deciding whether or not the claimant deprived himself of any part of the £8,400 "for the purpose of securing entitlement to income support or increasing the amount of that benefit". In so doing the existing case law in Commissioners' decisions on the meaning of "deprive himself for the purpose of securing entitlement to [benefit] or increasing the amount of that benefit" in regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981 will still apply. It must be ascertained whether or not the spending of the whole or part of the £8,400 had as a "significant operative purpose" the securing of entitlement to income support or the increasing of income support entitlement (see R(SB) 40/85, paragraphs 9 and 10, and compare R(SB) 38/85). Mr. English did not, in view of our finding that regulation 51(1) of the 1987 Regulations allows for 'diminishment' of capital, persist in his contention that the test should now be "predominant motive", because of the alleged penal effect of the regulation.

23. We note that the original tribunal allowed the claimant only by way of reasonable expenditure £20 per day for bed and breakfast and a further £4 per day for other meals and on that reckoning arrived at £6,214 out of the original £8,400 as being notional capital. That figure of £6,214 was not of course much in excess of the prescribed capital figure of £6,000 at that date. We have already indicated that reasonable and modest living expenditure including the cost of accommodation, meals and other incidentals to a reasonable quality of life (not including gambling for example) can be deducted in arriving at this figure.

24. Lastly, should the new tribunal find that regulation 51(1) applied at the relevant time with a figure in excess of £6,000 the tribunal should also indicate (as indeed the original tribunal did in its reasons for decision) that because of the rules we have enunciated above a date could be reached when after notional reasonable expenditure (on the principles indicated above) from the notional capital he has reduced that capital to below the relevant capital limit - then £6,000.



25. It should also be borne in mind that, in so far as any capital left, though less than £6,000, exceeds £3,000, the claimant is regarded as having a "tariff income" from that capital, under the provisions of regulation 53 of the Income Support (General) Regulations 1987. That can also of course be relevant to the question of whether or not the claimant had deprived himself of any sum for the purpose of "increasing the amount of that benefit".

(Signed) J G Mitchell  
Commissioner

(Signed) M J Goodman  
Commissioner

(Signed) J J Skinner  
Commissioner

(Date) 17 August 1990