Hicks/Penny? Fol info, + poss. WRB? Too obscure
Protected sum under Sch 3B DSRSS perhaps
—whether claimant changed her hostel.

JM/1/LM Commissioner's File: CIS/340/90

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Natalie Jane Higgins

Social Security Appeal Tribunal: Harlow

Case No: 2:22/230

[ORAL HEARING]

1. This is an adjudication officer's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 19 April 1990 which reversed a decision which had been issued by the adjudication officer on 4 January 1990. My decision is as follows:

(1) The aforesaid decision of the appeal tribunal is erroneous in point of law - but only in so far as there were not recorded sufficient findings of fact and sufficient reasons as would comply with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 [SI - 1986 - No 2218].

(2) The aforesaid decision of the appeal tribunal is, accordingly, set aside.

(3) It is expedient that I should make fresh and/or further findings of fact and, in the light thereof, give the decision which I consider to be appropriate.

(4) Notwithstanding that her address changed on 27 November 1989, the claimant continued to be entitled to a protected sum.

(Sub-paragraph (4), of course, reflects the conclusion to which the appeal tribunal actually came.)

2. I held an oral hearing of the appeal on 23 October 1990. The adjudication officer was represented by Mrs H Wheatley, of the Solicitor's Office of the Departments of Health and Social Security. Unsurprisingly, the claimant did not attend; but she was represented by Mrs A Mann, a welfare rights adviser from the Harlow Advice Centre. The arguments of each party were presented with enlightened good humour. I cannot pretend to have found it

an easy appeal to decide. As I explain below, the case turns upon a definition which featured, in a particular context, in the original income support legislation. That context disappeared from the legislation with effect from 9 October 1989; but the definition itself survived in that it was transposed (by reference) into a different context, which latter context first appeared in the legislation with effect from that same date. I cannot - and do not - attribute the delay in the promulgation of this decision to the difficulty which it has caused me. As I said in the course of the oral hearing, there was then already before me another case in which, although the facts were substantially different, the same point of construction arose. (It is case on Commissioner's file CIS/168/90.) That case had been listed for hearing before me on 26 September 1990 - ie four weeks before I was due to hear the appeal in this case. But - for reasons into which I need not go here - the hearing on 26 September 1990 was abortive. In due course 20 November 1990 was appointed - and on that day I heard (as I had anticipated) further able argument upon the point. I was aware, of course, that the adjudication officer's representative in CIS/168/90 was (in common with the adjudication officer's representative in this case) from the Solicitor's Office of the Departments of Health and Social Security. As well as being of some difficulty, the point of construction does not appear to have been previously argued before the Commissioner. It seemed to me, accordingly, that, where I was due to hear within the space of one month informed argument on the point upon two occasions, it would be foolhardy to complete the drafting of the first decision until I had heard the arguments directed to the second decision. It is, of course, this decision which has been delayed thereby - and I apologise to the parties therefor.

3. This is a case in which it will, I think, assist comprehension if I identify the point of construction before I turn to the particular facts. We are in the realm of the entitlement to income support of claimants who live in hostels. When the "new" system of supplementary benefit came into effect in November 1980 such claimants were classed as "boarders" and their normal requirements fell to be ascertained pursuant to regulation 9 of the Supplementary Benefit (Requirements) Regulations 1980 [SI - 1980 - No 1299]. It was not then considered necessary to define a hostel. Regulation 9 was entitled "Modification of normal requirements of boarders" - and it applied, of course, to a wide variety of persons other than hostel dwellers. From its outset it was long and complex (nine paragraphs with many sub-paragraphs and sub-sub-paragraphs). At that stage, however, it incorporated no schedules. The sorts and conditions of boarders are manifold - and it is obvious that a measure of complexity must be inevitable in legislative provisions in respect of their requirements. To the legislators and to the draftsman the field was novel; and it would have been remarkable had they hit the nail squarely upon the head at the first attempt. But - from the drafting point of view - the eight year history of regulation 9 is unparallelled by anything within my own experience. Between 1980 and 1983 regulation 9 was amended by no less than five statutory instruments. Those

amendments were reflected in the consolidating Supplementary Benefit (Requirements) Regulations 1983 [SI - 1983 - No 1399]. By the regulation 9 had expanded to sixteen paragraphs and had sprouted one (relatively short) schedule. But all that was as nothing compared to what was to follow. The 1983 version of the Requirements Regulations subsisted until the introduction of income support on 11 April 1988. In the period of their subsistence regulation 9 was amended by eight statutory instruments (one of which was adjudged by the High Court to be wholly ultra vires and another of which was adjudged to be ultra vires in part). On 10 April 1988 regulation 9 contained 18 paragraphs; regulation 9A had been inserted; and regulations 9 and 9A incorporated five schedules running to no less than 57 pages in the version printed for Her Majesty's Stationery Office. The final product was a headache for the Commissioners and must have been a nightmare for local adjudication officers (many of whom are young and none of whom possesses legal qualifications). The torrent of amendments is not, of course, to be attributed to ineptitude on the part of the original draftsman. He was, no doubt, working to his then instructions. But when it was seen how the treatment of boarders worked out in practice, one change of policy followed another - and fell to be reflected in the drafting of the regulation.

4. In was in 1985 that the normal requirements of hostel dwellers became the subject of specific and individual legislative treatment. That was one of the consequences of the insertion into the Requirements Regulations of the wholly new Schedule 1A ("Maximum amounts for boarders"). The initial insertion was effected by regulation 4(8) of the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions Regulations 1985 [SI - 1985 - No 613]. But a formidable challenge was mounted in the High Court as to the vires of parts of the new Schedule 1A. That challenge was successful before Mann J and before the Court of Appeal. By the time that the Court of Appeal had pronounced upon the issue, however, the whole of those Miscellaneous Provisions Regulations had been revoked and replaced, with various modifications, by the Supplementary Benefit (Requirements and Resources) Miscellaneous Provisions (No 2) Regulations 1985 [SI - 1985 - No 1835]. Paragraph 4 of Schedule 1A as inserted by those latter Regulations prescribed a national maximum of £70.00 per week in respect of the normal requirements of claimants living in hostels. Paragraph 6(1) of Schedule 1A opened thus:

> "6.-(1) In regulation 9 and in this Schedule -
>
> 'hostel' means a building not being a residential care home or a nursing home, wherein is provided for persons generally or for a class of persons residential accommodation (otherwise than in separate and self-contained premises) and either board or facilities for the preparation of food adequate to the needs of those persons, or both which is -

(a) managed by a housing association registered with the Housing Corporation established by the Housing Act 1964; or

(b) operated other than on a commercial basis and in respect of which funds are provided wholly or in part by a government department or agency or a local authority; or

(c) managed by a voluntary body or charity and provides care, support or supervision with a view to assisting those persons to be rehabilitated or resettled within the community; or

for the purposes of any particular case such other establishment of like nature as the Secretary of State may in his discretion determine;"

5. When income support was introduced, with effect from 11 April 1988, the provisions in respect of boarders remained complex and manifold; but they were set out in a legislative format which was substantially less oppressive to the reader than was the final - and overbloated - version of regulation 9 of the revoked Requirements Regulations. There was no significant change in the treatment of hostel dwellers. Pursuant to paragraph 5(a)(ii) of Schedule 5 to the Income Support (General) Regulations 1987 [SI - 1987 - No 1967] ("the General Regulations") the maximum weekly applicable amount for a single claimant living in a hostel was set at £70.00 - and at that figure it remained until hostel dwellers ceased to be treated as a special category of claimant. The definition of "hostel" was set out in regulation 20(2) of the General Regulations. It opened thus:

"(2) In this regulation and Schedule 5 -

.....

'hostel' means a building not being a residential care home or nursing home -

(a) in which there is provided for persons generally or for a class of persons, residential accommodation, otherwise than in separate and self-contained premises, and either board or facilities for the preparation of food adequate to the needs of those persons, or both and -

(b) which is -

(i) managed by a housing association ....."

(Sub-sub-paragraphs (i) to (iv) repeated verbatim - subject to renumbering - the remainder of the supplementary benefit definition which I have quoted in paragraph 4 above.) It can be seen, accordingly, that for all practical purposes the income

support definition was identical to the supplementary benefit definition. The sub-paragraphing was recast; and (presumably as a sop to modernity) "wherein" gave way to "in which there". But the meaning of the definition was in no way affected thereby.

6. But the days of "boarders" as a special category were numbered. With effect from 10 April 1989 claimants in ordinary board and lodging accommodation have been, in the context of income support, restricted to the ordinary personal allowances and premiums under regulation 17 of the General Regulations. They have had to look to the housing benefit system for their accommodation costs. Since 9 October 1989 a like fate has befallen hostel dwellers. And chapter 9 of the White Paper, "Caring for People: Community Care in the Next Decade and Beyond", indicates that from April 1991 special provision for residents in residential care and nursing homes will cease to exist. They too will be restricted to the ordinary personal allowances, the premiums and housing benefit - with local authorities topping up those amounts to meet the fees of the relevant home. But in this appeal I am concerned only with the position of hostel dwellers.

7. The elimination of hostels as a special type of accommodation in the context of income support was effected, as from 9 October 1989, by regulation 11 of and Part I of Schedule 1 to the Income Support (General) Amendment Regulations 1989 [SI - 1989 - No 534]. Part I was entitled "Omission of references to hostel in the General Regulations and consequential amendments". In the long list of omissions featured -

(a) the whole of what was left of regulation 20 of the General Regulations, and

(b) the whole of what was left of Schedule 5 to those Regulations.

But, as often happens when entitlement to a social security benefit is circumscribed or reduced in quantum, provision was made for the interim protection of those who were already in receipt of the benefit as it had stood immediately before the amendments. Part II of Schedule 1 to the aforesaid Amendment Regulations was entitled "Transitional provisions for determining the applicable amounts of persons who were in hostels prior to 9th October 1989". The main function of Part II was to insert the new Schedule 3B into the General Regulations. Schedule 3B is entitled "Protected Sum". Its purpose is to afford a measure of protection to claimants who were living in a hostel in the week immediately preceding the coming into effect of the elimination of hostels from the relevant legislation. Most of its provisions are directed to the computation of the protected sum in any given case - and those provisions are complex indeed. But this appeal does not turn upon computation. It turns upon whether the claimant was, after 27 November 1989, entitled to a protected sum at all. Of the essence is paragraph 5 of Schedule 3B (which is headed "Termination of protected sum"). The paragraph is brief:

"5. Subject to paragraph 6 [which has no bearing upon this case], the protected sum shall cease to be applicable if -

(a) that amount is reduced to nil under paragraph 4; or

(b) the claimant changes or vacates his hostel; or

(c) the claimant ceases to be entitled to income support."

We are concerned with sub-paragraph (b). It is common ground that on 27 November 1989 the claimant was moved from one address to another. It is common ground that each address ranked as a hostel for the computation of income support as the law stood before 9 October 1989. But, in the context of sub-paragraph (b), was each address a separate and different hostel; or did they together constitute parts of the same hostel? What meaning falls to be given to "his [or her] hostel" where that phrase occurs in sub-paragraph (b)?

8. For the purposes of income support "hostel" had been, of course, defined in regulation 20 of the General Regulations (cf paragraph 5 above). But in the amendments which took effect on 9 October 1989 the whole of regulation 20 was revoked. In paragraph 1 ("Interpretation") of the new Schedule 3B appears the following:

"'hostel' means any establishment which immediately before the commencement of this Schedule was a hostel within the meaning of regulation 20(2) (applicable amounts for persons in hostels);"

But, as I observed in paragraph 2 above, that definition has imported into the context of paragraph 5(b) of Schedule 3B a definition which was designed, both in the field of supplementary benefit and in the field of income support, to serve a rather different purpose. My long (and, I fear, tedious) historical excursus in paragraphs 3, 4 and 5 above was designed to demonstrate that, at the time when (and for many years after) the definition of "hostel" was formulated, all that mattered was the nature of the accommodation in which a given claimant was actually living at the relevant time. So long as that accommodation complied with the definition, it mattered not whether it did or did not form part of a larger hostel. To put it another way: changes of hostel did not, per se, come into the picture. If a claimant moved from one address to another, the only material question was whether the new address was a "hostel" within the meaning of the definition. No one was concerned to enquire whether it was or was not part of the same hostel as had comprised the first address.

9. Not before time, perhaps, I turn to the facts. The claimant is now aged about 18 and lives in Harlow. She is unmarried and has a son who was born in March 1989. At that time the claimant was living with her mother. She (the claimant) was awarded

income support. On 9 June 1989 she and her son moved into temporary accommodation provided by the Housing Welfare Section of Harlow District Council ("the Council"). (I shall refer to that accommodation simply as "No 6".) The manner in which the Council caters for its homeless families lies at the root of the issue before me; and is - I was assured by Mrs Mann - unique in this country. The Council cannot avail itself of any purpose built hostels for homeless families - or, even, of any large buildings which have been adapted to serve as such hostels. Nor does it burden its community charge payers with the costs of maintaining such families in private hotels or private bed and breakfast establishments. In common with most local authorities, the Council has a stock of houses which are too run-down to let to ordinary tenants. The individual houses in that stock vary from time to time - and they are, of course, situated in various parts of the town. But some such houses are always available. It is in such houses that the Council accommodates the homeless families for which it is responsible. The houses are divided into what the Council terms "temporary accommodation units". Each house is so fitted and equipped that, by itself, it complies with the statutory definition of a "hostel". The Council allocates individual temporary accommodation units to individual families. As a matter of policy, however, occupants are not lightly transferred from one unit to another. Rather than essay my own paraphrase, I quote from a letter dated 14 February 1990 written by the Council's Head of Housing Services:

> "All temporary accommodation units are managed and allocated by the Housing Welfare Section.
>
> Due to the nature of the accommodation it is sometimes necessary for the Welfare Section to transfer people between units.
>
> I would advise you that staff <u>do not</u> transfer occupants frivolously, or simply as a result of a request from occupants. Any transfer between Temporary Accommodation units is purely on a management basis either to optimise use of the stock or to protect the safety of residents.
>
> Therefore occupants are only transferred to alternative units in the following circumstances:-
>
> a) If the unit they occupy needs to be vacated in order that necessary structural repairs are undertaken.
>
> b) If the occupant is threatened with violence by the people with whom they share, or their acquaintances.
>
> c) If the occupant is threatened with violence from an ex-partner who finds out their address.
>
> d) If the temporary accommodation which was offered originally has become inadequate due to a change in the size or composition of the family and it is impossible for the family to remain.

e) If the Council requires the accommodation to enable it to maximise resources by moving families to alternative units.

I would draw your attention to the fact that the occupants of temporary accommodation are licence holders and can be requested to move at any time.

I would advise you that it is not the case that many occupants are moved between units, and that it is only in exceptional circumstances that residents are moved.

The recent changes in the Department of Social Security regulations may well cause the current residents of Temporary Accommodation either financial or emotional/physical distress if the Council's ability to move those in residence prior to 9th October 1989 is curtailed.

It is currently the case that if an occupant is moved to an alternative unit, they keep the same account number on which to make payments, and generally the same conditions of occupation apply. Residents also keep their original date of occupation as the one which Officers use when considering applicants for rehousing on a date order basis.

I would therefore contend that all Temporary Accommodation units are considered by this Authority to be one resource which can be utilized for homeless families."

I should add that no challenge is made to any of the facts set out in that letter.

10. At the hearing before me the following further facts emerged (and were not challenged by Mrs Wheatley):

(a) The Housing Welfare Section has 16 members of staff whose duty it is to look after all the units and all the occupants thereof. (The papers contain a schedule showing that at 22 September 1989 there were about 60 houses containing temporary accommodation units.)

(b) Those 16 members of staff are by no means solely concerned with the physical state of and living conditions in the various units. In the words of Mrs Mann: "They provide quite a high level of support and practical assistance." That includes counselling and the giving of advice. In the context of this appeal I think it important to stress that such support and assistance in no way depends upon the address of any particular unit. It is available to the occupants of all the units.

(c) Very few - if any - of the houses have a resident caretaker. The functions which a caretaker would normally perform are performed by the central staff.

11. In November 1989 it became the turn of No 6 for renovation. On 27 November the claimant was moved to a temporary accommodation unit in a house ("No 90") which was in a different road from No 6. She had not asked to be moved. It was an involuntary move - save to the extent that she could have opted to be homeless. Her address had changed - but little else had. She still had the right to the exclusive occupation of one room, with shared kitchen and bathroom facilities. She paid the same rent. She paid the same heating charge. She continued, of course, to enjoy the support and assistance of the staff of the Housing Welfare Section. But - no doubt to her surprise and to the surprise of any objective reader of this decision - her overall financial position had changed dramatically.

12. On the day before the move the claimant's weekly income had consisted of -

(a) £7.25 child benefit;

(b) £4.00 maintenance from the father of her son; and

(c) income support, which included a protected sum of £27.07.

But by a decision issued on 4 January 1990 the local adjudication officer determined that the claimant was not entitled to a protected sum from 21 November 1989 "because she changed her accommodation on 27-11-89". In his submission to the appeal tribunal he included this paragraph:

> "6.3 In connection with a similar case an officer of the Department has contacted the Department's Headquarters to obtain clarification of paragraph 5(b) [ie of Schedule 3B] and was advised that it is not relevant who owns or runs the hostel, only the fact that the claimant changes address that calls for the protected sum to cease, except in specified circumstances." (Those specified circumstances do not arise in this case.)

13. I am bound to confess that I find that interpretation of paragraph 5(b) to be surprising. It is premised upon the concept "one address, one hostel". In other words, a hostel with an annexe down the road (in which annexe are adequate facilities for the preparation of food) can never, in fact, be "a hostel"; it is two hostels, notwithstanding that the occupants of the annexe may regularly have recourse to the main building for such purposes as the collection of mail, the use of recreation facilities and general association. And if a resident in the annexe were to be told that a vacancy had arisen in the main building and were to move to that building, would it be anything but an abuse of language to say that he had "changed" hostels? In my view, only the very clearest of drafting would justify a conclusion so antipathetic to the understanding of the ordinary citizen.

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14. But it was urged upon me that the drafting is quite clear. Both the adjudication officer now concerned and Mrs Wheatley stressed that the relevant definition opens: "'hostel' means a building ...." (their emphasis). But a single building is not synonymous with an address. (The colleges of Oxford and Cambridge exemplify that.) So the advice cited by the local adjudication officer (see paragraph 12 above) cannot be regarded as a mere paraphrase of the literal wording of the definition. And, of course, there were obvious reasons for expanding "building" to mean "address"; for, as Mrs Wheatley herself agreed, without such expansion the definition would be so preposterous that no reasonable person would believe that Parliament had intended it to be taken at its literal face value. I need hardly labour this point; but I given an example. It will be seen that, on a literal reading of the definition, the building which is to be treated as a hostel must contain both residential accommodation and board or self-catering facilities. But one can readily imagine a hostel (in the everyday meaning of that word) which, within the one curtilage, has one or more detached blocks containing only residential accommodation, whilst a main, and detached, building contains the communal canteen. Mrs Wheatley conceded that it would be little short of ridiculous to deny such an establishment the status of "hostel" within the meaning of the definition. But beyond that she was reluctant to go. I expressly put to her the hypothetical situation of a number of buildings, all within the same curtilage and under the same management, each of which contained residential accommodation and board or self-catering facilities adequate for those residing therein. Although eschewing dogmatism, Mrs Wheatley submitted that a resident who moved from one of those buildings to another would be changing his hostel. I appreciate that that approach was integral to Mrs Wheatley's argument upon the issue in this particular case; but I cannot bring myself to believe that Parliament ever intended so bizarre an outcome.

15. No judicial authority, of course, can simply ignore the plain wording of legislation on the mere ground that it produces anomalous results (see, for example, the House of Lords in Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231). But it is in no way necessary to do that in this case. I quote from section 6 of the Interpretation Act 1978:

> "6. In any Act, unless the contrary intention appears, -
>
> .....
>
> (c) words in the singular include the plural and words in the plural include the singular."

(Section 6 applies to subordinate legislation - see section 23(1).) It seems quite clear to me that no "contrary intention" appears so as to inhibit the construing of "building" in the relevant definition as "buildings". I have explained the context in which that definition entered the legislation and the purpose to which it

was directed. Manifestly it was never intended to exclude from the category "hostel" the type of establishment which I described in the middle of paragraph 14 above (ie after the words "I give an example"). Such an establishment can only be brought within the definition by construing "building" as "buildings"; and I am satisfied that that is how Parliament intended that it should be construed. That said, the definition must bear that construction for so long as it stands in - or is incorporated into - legislation. To put it another way, its construction cannot be affected by its wholesale adoption in a context different from that for which it was devised. In any event, there is no reason to believe that Parliament ever intended that, for the purposes of Schedule 3B, the original definition should be applied in a sense narrower than that which it originally bore. The definition in Schedule 3B opens "'hostel' means any establishment ....". An "establishment" is in no way confined to a single building.

16. In the present case, of course, the two buildings in issue (No 6 and No 90) do not stand within the one curtilage; but nor did the main building and the annexe in the illustration which I offered in paragraph 13 above - and I am quite satisfied that the definition is apt to cover those two buildings as one, single hostel. Certainly, before 9 October 1989 no one would have been concerned to argue otherwise. Can that approach be projected to No 6 and No 90? After much reflection I have come to the conclusion that it can. I have no intention of essaying a definitive list of the criteria which should be applied in the determining of whether two or more buildings (not in the same curtilage) are or are not a single hostel. I doubt whether the topic is susceptible of such rigorous analysis. There is an inevitable element of impression - and impression imports commonsense. There can be no doubt but that if the homeless families of Harlow were living under one roof in a purpose built hostel - but otherwise living exactly as the homeless families now do - no argument could arise as to the "unity" of the hostel. Did Parliament really intend that, in the context of the protected sum, the treatment of a claimant should depend upon the accident of the nature of the buildings available to such claimant's local authority? In strict logic it is difficult to justify the concept of the protected sum. The concept is grounded in humaneness. It has for decades been the practice of the legislature to afford relief to those claimants who are actually in receipt of a means tested benefit at the time when that benefit is reduced or the conditions of entitlement are made more stringent. Such relief must, of course, be finite in time - or there would be perpetuated a "two class" division between claimants; ie between those who were in receipt of the relevant benefit at the time of the change and those who were not. In the present case the cut-off point selected by Parliament was the changing or vacating of the hostel in which the relevant claimant was living when the legislation was amended. I repeat that we are not in the realm of strict logic but in the realm of humaneness. This claimant in no way brought the change of accommodation upon herself. That change was dictated by the welfare authority which operated and controlled

both No 6 and No 90 - and afforded support and assistance to the occupants thereof. I cannot think that it was the intention of Parliament that a claimant in that position should lose her protected sum; and I do not find that the relevant legislation demands such an outcome.

17. I heard interesting argument as to the degree to which the common management of a number of dispersed buildings affected the "one hostel" issue. Mrs Wheatley pointed out that there are in this country many Salvation Army hostels - and that each is undoubtedly a separate hostel, although all are under one central management. Mrs Mann accepted that - but submitted that, despite the overriding central management, each hostel is run as an autonomous unit with its own individual staff. Individual management staff is - she further submitted - a hallmark of a hostel. The temporary accommodation units in Harlow are all under the control of the 16 members of staff to whom such control is assigned by the Housing Welfare Section. Those units are part of a whole - and that whole is intimately controlled by local staff. In reply, Mrs Wheatley submitted that, in fact, management does not feature in the definition. The definition focuses upon the nature of the relevant accommodation (in particular, sleeping and eating facilities). With that last submission I cannot agree. It is stressing sub-paragraph (a) of the definition to the exclusion of sub-paragraph (b). The management and/or operation of a given set of premises is an essential element in the application of the definition of "hostel".

18. My own conclusion is the same as that to which the appeal tribunal unanimously came. Unsurprisingly, the tribunal's findings of fact and its reasons were not recorded at the inordinate length of this decision. That would have been unusual indeed. But the recorded findings and reasons typed out at a total of 23 lines - and it is my view that they do not suffice to explain fully the processes by which the tribunal reached its conclusion. I have sought to remedy that. I am much fortified, however, to note that, upon an issue which imports a substantial measure of commonsense, the tribunal's view coincides with my own.

(Signed) J Mitchell
Commissioner

Date: 11 December 1990