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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIS/381/2001

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: MR J MESHER

[ORAL HEARING]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Sunderland appeal tribunal dated 5 October 2000 is erroneous in point of law, for the reason given below, and I set it aside. I can substitute the decision which the appeal tribunal should have given on the appeal against the adjudication officer's decision dated 4 September 1998, on the facts which it found (Social Security Act 1998, section 14(8)(a)(i)). For the reasons set out in paragraphs 27 and 28 below, my decision is that:

- (a) the adjudication officer's decision in December 1997 adjusting the amount of the claimant's income support falls to be reviewed on the ground that it was erroneous in point of law (Social Security Administration Act 1992, section 25(2));
- (b) the revised decision on review is that the adjudication officer's decision awarding the claimant's income support from 6 October 1997 falls to be reviewed on the ground of a relevant change of circumstances (Social Security Administration Act 1992, section 25(1)(b));
- (c) and the revised decision on that review is that the amount of the claimant's income support is to be calculated from and including 1 November 1997 with the only income taken into account being her own retirement pension and her own annuity payments, thus excluding the payments under her husband's annuity contract with the Equitable Life Assurance Society.

That calculation is to be carried out by the Secretary of State. If there is any disagreement about the result of the calculation, the case is to be returned to me or to another Commissioner for further decision. My decision does not take account of any circumstances obtaining after 4 September 1998, and the Secretary of State may need to exercise powers of supersession to take account of changes of circumstances, including changes in legislation, after that date (see paragraphs 24 and 25 below).

2. This case turns on a short, but difficult, point of law. If a person's contractual right to a payment under a personal pension scheme has vested in their trustee in bankruptcy under section 306 of the Insolvency Act 1986 on the making of a bankruptcy order, are the payments part of the person's income for the purposes of income support? A decision of Mr Commissioner Rice in 1990 (CIS/212/1989) held that they are. My decision is to the contrary.

3. The claimant's husband had the misfortune to be made bankrupt in 1996. The date of the bankruptcy order does not appear in the evidence before me, but I do not need to know the precise date. It must have been in 1996 or early 1997. In 1994 the claimant's husband had purchased a with profits annuity from the Equitable Life Assurance Society with the proceeds of a personal pension scheme, the first monthly payment to be made on 1 July 1994. By virtue of section 306 of the Insolvency Act 1986 his right to that annuity was property which was part of his estate and vested

in the trustee in bankruptcy on his appointment taking effect. That has been confirmed in a number of cases to which I shall return below. However, it was not until October 1997 (because of the need to take advice) that the trustee in bankruptcy instructed Equitable Life to make payment of the annuity to him instead of to the claimant's husband. The payment due on 1 November 1997 (apparently £163, after the deduction of £50 in recovery of an earlier overpayment) was made to the trustee in bankruptcy, as have been all subsequent payments.

4. The claimant had made a claim for income support on 6 October 1997. On the claim form she declared her own state retirement pension (£32.97 per week) and annuity from Equitable Life (£139.12 per month). She also declared her husband's annuity. Income support was awarded, taking account of those amounts as income, from 6 October 1997. On a form received on 18 November 1997 she reported that her husband had ceased to receive his annuity, enclosing the explanatory letters from Equitable Life. There appears to have been a review in December 1997 to take account of the full amount of the claimant's husband's annuity (described in the written submission to the appeal tribunal as an "adjustment"), but income support remained payable.

5. In August 1998 the claimant's husband reported that the amount of his annuity had increased to over £200 and that his wife's annuity was £144.47 per month from 31 July 1998. On 4 September 1998 an adjudication officer reviewed the operative income support decision and gave the revised decision that the claimant was not entitled to income support from 6 July 1998. Her income was said to be £112.40, £3.05 in excess of her applicable amount of £109.35 (personal allowance £79.00, plus pensioner premium £30.35). The breakdown of the weekly income was claimant's retirement pension £34.15, claimant's annuity £33.33, husband's annuity £46.15). That calculation seems to have been done on the basis that the husband's annuity was £200 per month, and the total was in fact £113.63. Since there was a clear excess over the applicable amount, it is difficult to see how there could have been entitlement to income support immediately before the increase in the amount of the claimant's own annuity unless a considerably smaller amount had been taken into account for the claimant's husband's annuity.

6. An appeal was made on behalf of the claimant against the decision. Her solicitors, Singleton Winn McDermott, submitted that the decision was wrong in law in the light of the decision of Ferris J in Re Landau (a bankrupt), Pointer v Landau [1998] Ch 223, [1996] OPLR 371. It was submitted that, because in that case Ferris J had decided that sums otherwise payable to a bankrupt under a retirement annuity contract could not be the subject of an income payments order within section 310 of the Insolvency Act 1986, the payments made to the trustee in bankruptcy of the claimant's husband could not in law be treated as part of her income. In addition, by the time of the appeal tribunal hearing, the local authority had decided that the amount of the husband's annuity should not be taken into account as income for housing benefit purposes.

7. The adjudication officer relied primarily on CIS/212/1989. There the claimant's wife, who was an undischarged bankrupt, was trading in partnership with her husband in a florists' business. Mr Commissioner Rice had to decide whether her share of the profits should count as income. He said this in paragraph 9:

"The only outstanding difficulty is the effect of the appointment of a trustee for the bankrupt wife. In so far as the trustee allowed the claimant's wife to keep all or part of her share of the earnings, that amount clearly fell within the income of the claimant. Moreover, in so far as the trustee laid claim to all or any part of the partnership earnings belonging to the bankrupt, these too must, I am satisfied, be treated as part of the claimant's income. For although profits of the business passing straight to the trustee did not directly form part of the claimant's income, they must be treated as such because they served to reduce the bankrupt's indebtedness. It would be wholly unrealistic to say that, by virtue of the bankrupt's share of the profits going direct to the trustee, the former derived no advantage from the earnings. Her liabilities were correspondingly diminished. Accordingly, it is immaterial what part, if any, the trustee in bankruptcy received of the business profits, the profits in their entirety had to be treated as those of the claimant and his wife."

8. There was also reliance on the decision of Mr Commissioner Henty in CIS/295/1994, where in paragraph 6 he described the decision in CIS/212/1989 as a surprising one having regard to the purpose of income support in supplying a safety net and to the general effect of bankruptcy being to put the bankrupt's property under the complete control of the trustee in bankruptcy to the entire exclusion of the bankrupt. He nevertheless was not minded to depart from CIS/212/1989 as it had stood the test of time over eight years or so. The adjudication officer very properly also mentioned the decision of Mr Commissioner Morcom in CIS/22/1993, which had not been cited in CIS/295/1994. There a farmer had made a voluntary arrangement with creditors under the Insolvency Act 1986 to avoid bankruptcy. Part of the arrangement was that each tranche of "set aside" payment from the European Community should be sent immediately on receipt to his "supervisor" under the arrangement. An appeal tribunal decided that the payments from the EC should not be treated as part of the farmer's income for income support purposes. The Commissioner disallowed the adjudication officer's appeal against the appeal tribunal's decision. He held that the approval of the arrangement by the creditors had the effect that there was a valid assignment of the income to the supervisor. The amounts of the payments accordingly did not form part of the farmer's income.

9. Following an adjournment for further evidence, the appeal tribunal of 5 October 2000 dismissed the appeal. It decided that decisions CIS/212/1989 and CIS/295/1994 were binding on it, together with CIS/22/1993, and distinguished the Landau case as dealing with "an entirely separate issue as to claiming entitlement to payments and to commute part of an annuity for a lump sum" and as having no application to social security law.

10. The claimant now appeals with the leave of a chairman. The Secretary of State's initial submission opposing the appeal drew attention to the decision of Mr Commissioner Angus in CIS/745/1999, now reported as R(IS) 4/01. There an attachment of earnings order had been made against the claimant in enforcement of a judgment in favour of his ex-wife. Under the order an amount was deducted at source from his payment of an occupational pension and paid to the ex-

wife. The Commissioner held, relying on the decision of the Court of Appeal in Leeves v Chief Adjudication Officer, now reported as R(IS) 5/99, that that amount did not form part of the claimant's income. In paragraph 25 he suggested that CIS/212/1989 may have been overtaken by Leeves, but concluded that he could decide the case before him without either agreeing or disagreeing with CIS/212/1989.

11. Miss Commissioner Fellner issued a number of detailed directions, which produced a valiant attempt by the Secretary of State's representative, in the submission dated 20 July 2001, to reconcile all the decisions, but little more in the way of additional information which she had sought. She directed an oral hearing, which I conducted at Doncaster County Court. The claimant and her husband attended, but were not represented. The Secretary of State was represented by Mrs Ruth Aldred of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to all present for their assistance.

12. The claimant maintained the straightforward case that the income from her husband's annuity was not available for them to use to live on. As a matter of law it belonged to the trustee in bankruptcy. That was not altered by her husband's discharge from bankruptcy. The present information was that, setting the ongoing interest on the outstanding debts and costs against the money going to the trustee, the claimant's husband was unlikely ever to receive payment of the annuity. Mrs Aldred maintained that CIS/212/1989 ought to be followed in accordance with the Commissioners' practice on precedent and that its result was right in the particular circumstances of bankruptcy in accordance with the principles of the income support scheme. However, she recognised that the effect of CIS/212/1989 had come under question in some recent decisions, including one of my own in CIS/5479/1997 in April 2000, and suggested that the Secretary of State would welcome a decision which dealt with CIS/212/1989 head-on. I have to do that in the present case.

13. Let me start briefly with the argument that the Landau case held that in circumstances like those of the present case the annuity was not part of the bankrupt's income. I can be brief because the claimant and her husband I think accepted from the written submissions in the appeal that Landau did not incorporate any such general finding. Ferris J's judgment in Landau has been approved in its entirety by the Court of Appeal in Krasner v Dennison and Lesser v Lawrence [2001] Ch 76, [2000] OPLR 299. The judgment of Chadwick LJ there gives a very thorough and helpful survey of the effect of the insolvency legislation as it applies to bankruptcy orders made before section 11 of the Welfare Reform and Pensions Act 1999 came into force on 29 May 2000. It is plain that no provisions of retirement annuity contracts or personal pension schemes could prevent the operation of section 306 of the Insolvency Act 1986 in vesting property part of the bankrupt's estate at the date of the order in the trustee in bankruptcy as from the date of his appointment. Such property included rights under such contracts and schemes, whether or not annuities had yet been purchased, for the self-employed. Then it was held that the reason why future payments of annuities could not be made subject to an income payments order under section 310 is that that section only applies to income of the bankrupt which does not already form part of his estate. The non-application of section 310 was not on any general ground such as the annuity

not counting as income of the bankrupt. Therefore, Landau does not directly help the claimant. But the effect of the insolvency legislation is a very important factor in this case.

14. There was an appeal to the House of Lords in the case of Lesser v Lawrence (Mr Dennison having settled his case), which was due to be heard at the end of October 2001. I have concluded that I should not wait for the speeches to be delivered. If the House of Lords were to hold that rights to payments of annuities under personal pension schemes did not vest in the trustee in bankruptcy and the claimant's husband was then to receive payment of his annuity in the present case, account could be taken of that change of circumstances in relation to my decision on the facts as presently known.

15. Chadwick LJ in Krasner v Dennison also explains very clearly the limits on the effects of income payments orders. There must be an application by the trustee in bankruptcy and an order may not reduce the income of the bankrupt below what appears to be necessary for meeting the reasonable domestic needs of him and his family (section 310(2)). Orders cannot be made after discharge from bankruptcy and, if made before, do not have effect after discharge (section 310(6)). The order may require the bankrupt to pay to the trustee an amount equal to that identified in the order or require the payer to pay the amount claimed to the trustee instead of the bankrupt (section 310(3)). The difference in effect from that of the automatic vesting of property in the trustee in bankruptcy under section 306 may be significant in the present case.

16. Must I follow CIS/212/1989? The principle is that Commissioners normally follow the decisions of other individual Commissioners, although not bound to do so (R(I) 12/75, paragraph 21). However, if satisfied that the decision is wrong, a Commissioner will not follow it. It is easier to be satisfied that an unreported decision is wrong than a reported decision, which is known to have commanded the assent of at least a majority of the Commissioners at the time. If a decision has been followed and applied by other Commissioners, especially over a period of years, that will increase its authority. If there have been developments in the law, including decisions of superior courts, that may weaken the decision's authority. Finally, there is the overriding question of the correctness of the decision and its reasoning as a matter of legal principle.

17. Here, CIS/212/1989 was not reported. It was followed and applied in CIS/295/1994, although with some reservation. It has in a sense stood the test of time. However, its effect has been doubted in a number of cases, in which Commissioners have so far avoided having to decide whether it was right or wrong. I conclude that if I would have taken an opposite view, taking into account the other authorities, if CIS/212/1989 had not existed, there is no obstacle to my declining to follow it.

18. I do take that view. That stems fundamentally from the general meaning of income within the income support legislation, in the light of the decision of the Court of Appeal in Leeves. I set this out in the following paragraphs of CIS/5479/1997 (where an overpayment of an occupational pension was being recovered by the Italian authorities by withholding the complete amount of monthly payments of the pension, possibly at the claimant's request):

"9. The starting point is that there is no general definition of "income" in the Income Support Regulations or the Social Security Contributions and Benefits Act 1992. Therefore, as was accepted by the Court of Appeal in Leeves, the term should be given its natural and ordinary meaning. I agree that the decision in Leeves has no direct application to the circumstances of the present case. The context of a student who had received a payment of grant, which was by regulations to be treated as income for the whole of a term, and who came under a certain obligation of immediate repayment after withdrawing from the course during that term, is different from that of the present case. However, there is some significance in the Court of Appeal's approach that in the ordinary meaning of the words and subject to specific provisions to the contrary, it was income which was received which counted in the Income Support Regulations. That confirms my view of the general context of the Regulations, which is that income to be taken into account is income which is actually paid to a claimant. Without going into any great detail, that is seen in the many references to "payments" of income (eg in regulation 29(2) on the period over which a payment is to be taken into account, regulation 31 on the date on which a payment is to be treated as paid, and the terms of regulation 42 on notional income, especially where income is due to be paid but has not been paid). There are some other provisions which are not entirely consistent with that approach, but that does not affect my view of the general context. I shall discuss regulation 40(3) specifically below.

10. It is plain that from some date prior to 5 April 1993 the claimant did not receive any actual payment of his Italian pension. However, is he to be regarded as having received payment because the amount of the pension that he would otherwise actually have received was diverted to reduce his debt to the Italian authorities for the previous overpayment? Or, to put it another way, is the reality of the situation that the claimant has been paid his Italian pension, but has expended the full amount of it on paying off the overpayment? It is usually the case that what income is spent on has no effect on the taking of the income into account as such for income support purposes. There is certainly a good deal of general force in such points, and some support in principle from cases on other areas of law, such as income tax. They could also be regarded as supported by decision CIS/212/1989. I have found this to be an extremely difficult issue, although one in which, as explained above, an oral hearing would not be likely to reduce the difficulty at all. I have eventually come down in favour of the claimant for the following reasons.

11. The first and main reason is that, although there is considerable general force in the points mentioned in paragraph 10, I conclude that the scheme of the Income Support Regulations rests on a more straightforward, and perhaps crude, approach to the receipt of income by claimants. If a claimant who has not actually received income is to be treated as having that income, that has to be achieved by a specific provision in the legislation. That is why, for instance, in addition to the regulations mentioned in paragraph 9 above, there has to be specific provision for circumstances in which payments are made to a third party in respect of a claimant or a member of the family. That does not mean that there are no

controls over abuse of the system, as the provisions on notional income will be relevant, as discussed in paragraphs 14 and 15 below."

I went on to say that regulation 40(3) of the Income Support Regulations (providing in the case of British social security benefits that where there was a deduction by way of recovery the gross amount was to count as income) would have been unnecessary if the law had been against the claimant in CIS/5479/1997, and provided further support for the general scheme and context of the Regulations being as I had concluded. A new appeal tribunal was directed to consider any case put forward by the Secretary of State that the claimant was to be treated as notionally still having the income under the intentional deprivation rule.

19. That general approach is inconsistent with paragraph 9 of CIS/212/1989 and with the result reached in CIS/295/1994. It is consistent with CIS/22/1993 (where Mr Commissioner Morcom considered that the claimant could not be caught by the deprivation of income rule because of the need to pay debts which were immediately due: R(SB) 12/91) and R(IS) 4/01. Since the general approach rests in part of the authority of the Court of Appeal in Leeves, I would apply it in the present case unless there is something to make the circumstances of bankruptcy a special case.

20. I do not think that bankruptcy is a special case. I do not find the reasoning of Mr Commissioner Rice in CIS/212/1989, on the reduction of indebtedness, convincing in reaching a conclusion about actual income. His views are to be treated with especial respect in commercial matters, but it seems to me that while his reasoning shows that the receipt of the income by the trustee in bankruptcy has a similar effect to the receipt of income directly by the claimant (ie a shift in the balance of assets and liabilities), it does not show that the income is actual income for the purposes of the income support scheme. That really is the nub of the inconsistency between Mr Commissioner Rice's view and the approach above. The Secretary of State has suggested that it is relevant that, after the debts have been paid off, the income would revert to the bankrupt. But I cannot see why that should make any difference. It may be that Leeves dealt with different circumstances, but as stressed above, it is the general approach in Leeves which shows the structure and context of the income support scheme rather than the specific result on the facts.

21. It may be significant that in CIS/212/1989 the right to receive the income in question would appear to have been of a kind which would not have formed part of the bankrupt's estate at the date of the order and to have vested in the trustee in bankruptcy by operation of law. The income consisted of profit from current trading. If the regime of the Insolvency Act 1986 applied (as it would only if the bankruptcy petition had been lodged on or after 29 December 1986, and the decision does not disclose the crucial date), the right to receive such income would not vest in the trustee in bankruptcy unless he had obtained an income payments order. Such an order could not, by virtue of section 310(2), leave the bankrupt with less income than was necessary to meet reasonable domestic needs (for which income support level might be thought to be a minimum). Nor need the order require the payment to be made to the trustee in bankruptcy (section 310(3)). Some of the language used by Mr Commissioner Rice seems more consistent with a situation where a trustee in bankruptcy has to apply for an income payments order, or even with the pre-

Insolvency Act 1986 regime (about which I know next to nothing). In my view, the absence of an analysis of the effect of the relevant insolvency legislation further weakens the authority of paragraph 9 of CIS/212/1989. I should say, though, that it seems to me that if an income payments order under section 310 of the Insolvency Act 1986 requires the payment of income to the trustee in bankruptcy, the income is not part of the bankrupt's actual income for income support purposes, for the same reasons as apply to property which has vested in the trustee under section 306.

22. Accordingly, I decline to follow paragraph 9 of CIS/212/1989, and CIS/295/1994. I conclude in the present case that in the circumstances that the claimant's husband's right to the payment of the annuity had vested in the trustee in bankruptcy under section 306 of the Insolvency Act 1986, the payments of the annuity were not part of his and the claimant's actual income for income support purposes.

23. There was at the date beyond which I cannot take account of changes of circumstances (4 September 1998) nothing in the Income Support Regulations prescribing a different result on actual capital or that the claimant should be treated as having notional income. Before 9 November 1999, regulation 42(4) of the Income Support Regulations provided that income paid to a third party in respect of the claimant or a member of the family was only to be treated as possessed by the latter (outside cases of benefit payments) if it was used for food, ordinary clothing or footwear, household fuel, rent, rates, housing costs, council tax or water charges. That was plainly not the case, and no other part of regulation 42 on notional income can apply. There was no question of any intentional deprivation of income.

24. From 9 November 1999, regulation 42(4) was amended to add subparagraph (a)(ia), treating payments of occupational pensions or payments of pensions or other periodical payments under personal pension schemes as possessed by the claimant or relevant member of the family. Leaving aside the question of when a payment of a pension to a third party is "in respect of" the claimant or a member of the family (on which R(IS) 4/01 takes a restrictive view), that could apply to circumstances like those of the present case. However, there is an exclusion for payments listed in regulation 42(4ZA), which now includes payments of income made:

- "(d) under an occupational pension scheme or in respect of a pension or other periodical payment made under a personal pension scheme where--
 - (i) a bankruptcy order has been made in respect of the person in respect of whom the payment has been made or, in Scotland, the estate of that person is subject to sequestration or a judicial factor has been appointed on that person's estate under section 41 of the Solicitors (Scotland) Act 1980;
 - (ii) the payment is made to the trustee in bankruptcy or any other person acting on behalf of the creditors; and
 - (iii) the person referred to in (i) and any member of his family does not possess, or is not treated as possessing, any other income apart from that payment."

25. It may well be that, after the present decision has been put into effect, an officer of the

Secretary of State will have to consider the application of regulation 42(4)(a)(ia) to the claimant as from 9 November 1999 and decide whether, in the light of what was said in paragraphs 29 to 31 of R(IS) 4/01, payment of the annuity to the trustee in bankruptcy was made "in respect of" the claimant's husband, so that the amount was to be taken into account as notional income. For, although heads (i) and (ii) of paragraph (4ZA)(d) would be satisfied, head (iii) would appear not to be, because of the claimant's own income. I should say no more about those questions. I note that, if CIS/212/1989 had been right, the exception in paragraph (4ZA)(d) could never have applied, because in the circumstances prescribed the payment would have been treated as part of the claimant's actual income. However, I have not weighed that in the balance against CIS/212/1989, because the amendment might have been based on a misunderstanding of the law or might have been intended, as Mrs Aldred suggested, as a fallback provision if CIS/212/1989 were wrong.

26. For the reasons given above, the appeal tribunal erred in law in treating the claimant's income as including the amount of her husband's annuity paid to his trustee in bankruptcy. Its decision must be set aside. It is agreed that it is expedient for me to substitute a decision on the appeal against the adjudication officer's decision of 4 September 1998.

27. The principle to be applied is clear, but I must look carefully at dates. It was never clear on what basis the adjudication officer thought that the relevant change of circumstances took effect from 6 July 1998, when the only evidence of an increase in the amount of the claimant's annuity appeared to be the payment into her bank account on 31 July 1998. But I do not immediately have to worry about that. In substituting a decision, I may do anything which the adjudication officer considering the review of the operative income support decision on 4 September 1998 could have done. The operative decision was that made, apparently in December 1997, "adjusting" the amount of income support payable to take account of the full amount of the claimant's husband's annuity (as the uprating of income support and retirement pension rates in April 1998 did not require a review: Social Security Administration Act 1992, section 159). That decision should have been reviewed on the ground that it was erroneous in point of law. A wrong view was taken of whether that annuity formed part of the claimant's income within the Income Support Regulations. There should, when the "adjustment" was made in December 1997, have been a review of the existing decision to take account of the relevant change of circumstances with effect from 1 November 1997 that the claimant's husband no longer had that actual income.

28. That review could lead to additional benefit being payable under regulation 63(1) of the Social Security (Adjudication) Regulations 1995, as it stemmed from the claimant's request on 18 November 1997. The review of the December 1997 decision on the ground of error of law could lead to additional benefit being payable because, under regulation 57(3)(a) of the Adjudication Regulations, the adjudication officer had misconstrued the meaning of the word "income" in the Income Support Regulations and in section 124(4) of the Social Security Contributions and Benefits Act 1992. I am quite satisfied that the review on the ground of error of law is not in consequence of the decision of the Court of Appeal in Leeves, so that section 69 of the Social Security Administration Act 1992 does not apply.

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29. Accordingly, I substitute the decision set out in paragraph 1 above.

(Signed) J Mesher
Commissioner

Date: 24 January 2002