

Commissioner's File: CIS/408/1990

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. I allow this appeal by the adjudication officer. The decision of the social security appeal tribunal dated 7 June 1990 was erroneous in law and I set it aside. I substitute my own decision under and by virtue of section 101(5)(a)(i) of the Social Security Act 1975. My decision is that at the date of the claim the claimant was not entitled to income support.

2. The claimant is a widow aged 89. She has lived in a private nursing home since July 1987. She is in receipt of retirement pension and a widow's pension from a bank. She has a half share in a property in Lincolnshire. That property is let to a chemist on a lease and she receives, as her share of the rent, £1,875 per annum. In addition, she had, at the date of the claim, savings of £2,497.90. On 12 December 1989 she made a claim for income support. By a decision issued on 3 February 1990 the adjudication officer decided that the claimant was not entitled to income support because she had more than £6,000 in savings. The claimant appealed. On 7 June 1990 the social security appeal tribunal in a majority decision allowed the appeal and decided that the claimant was not possessed of capital assets in excess of £6,000. The adjudication officer appeals with leave of the tribunal chairman.

3. On 4 December 1990 I held an oral hearing. The adjudication officer was represented by Mr. Frank D'Souza of the Solicitor's Office, Departments of Health and Social Security. The claimant was not present but was represented by her son.

4. Section 20(3)(b) of the Social Security Act 1986 provides that a person in Great Britain is entitled to income support if, amongst other things, "he has no income or his income does not exceed the applicable amount". Section 22(6) of the Act provides

that no person shall be entitled to benefit "if his capital or a prescribed part of it exceeds the prescribed amount". Regulation 45 of the Income Support (General) Regulations sets out the prescribed amount for the purposes of section 22(6) of the Act and, at the date of the claim, the prescribed amount was £6,000. In other words, if a claimant's capital exceeded £6,000 he or she would not be entitled to income support.

5. The district valuer had valued the property at £100,000 at current market value. At the oral hearing before me the claimant's son did not dispute that valuation. The adjudication officer submitted that after deducting 10% as expenses attributable to sale, there was a sum of £90,000 to be shared. Although, as I have said, the claimant is entitled to a 50% share in the property, the owner of the other 50% has died and her share has been inherited by two people. There are thus now, therefore, three persons entitled to share in the interest in the property - it is not known whether their interest is freehold or leasehold. Regulation 52 of the Income Support (General) Regulations provides that where a claimant and one or more persons are beneficially entitled in possession to any capital asset "they shall be treated as if each of them were entitled in possession to the whole beneficial interest therein in an equal share". The claimant is, therefore, to be treated as entitled to a one third share. That appears to be "an extraordinary rule" as Mr. Mesher calls it in "Income Support, the Social Fund and Family Credit: the Legislation" (1990 edition) at page 127. 90 000 ?

6. In their reasons for their decision in Form AT3 box 4, the appeal tribunal stated:

"The sole area of dispute was whether [the claimant's] interest in the property in Lincolnshire should be taken as a capital asset with a value of £30,000. It was not disputed that [the claimant] was one of three owners of the property. The property was on lease to Boots The Chemists. Boots had been offered the property for sale but were not interested in buying. [The claimant] had been willing to sell her share to the other two, but they were not interested. If the share owned by [the claimant] were realised and after paying off all expenses the balance invested, it was unlikely to give a return of the value of the rent received by [the claimant]. Whatever the interest held by [the claimant] in the property it was plainly not an asset with a capital value in excess of £6,000 and as [the claimant's] savings were now less than £2,500, the [claimant's] capital was not in excess of £6,000. ([The claimant] had been willing to contribute her total income, and had made every economy including moving to a smaller room in Bruswick House)."

The chairman in his dissenting reasons, however, stated:-

"R(SB) 14/86. [The claimant's] interest in the property was difficult to realise, but this did not allow for it to be disregarded under schedule 10. The value was impossible

to decide upon, but as [the claimant] had 50% interest in property valued at £100,000 in my opinion it would mean that taken together with [the claimant's] saving she had capital assets in excess of £6,000."

7. Schedule 10 to the Income Support (General) Regulations sets out those items of capital which are to be disregarded and paragraph 5 provides for the disregarding of "Any reversionary interest". Mr. D'Souza referred to and relied upon R(SB) 3/86, and in particular paragraphs 21 and 22 of the Appendix to that decision. It follows from that decision that, as the claimant is in receipt of the rents and profits of the property, or her share therein, her interest in the property is not a reversionary interest for the purposes of paragraph 5.

8. It is clear that, as the adjudication officer has pointed out in his submission dated 15 August 1990 in paragraph 8, that as a joint legal owner the claimant can compel a sale in the absence of the consent of the other joint legal owners under the provisions of section 30 of the Law and Property Act 1925. Furthermore, of course, the claimant would be entitled to sell her 50% share in the property. As I have said, the majority decision was that the claimant was not possessed of capital assets in excess of £6,000. The adjudication officer in paragraph 3 of his submission dated 15 August 1990 has submitted that the Tribunal have erred in law for the following reasons -

"Firstly they failed to establish the value of the claimant's share of interest in the property. Also there is insufficient evidence to support their conclusion that the claimant's share of capital was less than £6,000; that the interest in the property was impossible (rather than difficult) to realise; or that any conditions of Schedule 10 were satisfied in order to disregard the value of that interest".

In fact, I do not read the majority reasons as expressly stating that the interest in the property was 'impossible' to realise, although that may be the implication underlying their reasons for their decision. What they said was that "it was plainly not an asset with a capital value in excess of £6,000". They made no findings of fact on which they could reach that conclusion. The only evidence was that the property having been valued at £100,000, the claimant's interest, by virtue of regulation 52, was £30,000 and that clearly was an asset in excess of £6,000. They gave no reasons to indicate why they concluded that if the claimant's interest was £30,000, the value was less than £6,000. The Appeal Tribunal found no facts on which they could reach their conclusion. I have no doubt that their decision was erroneous in law in that it failed to comply with regulation 25(2)(b) of the Adjudication Regulations. Furthermore, on the facts found, no reasonable appeal tribunal could reach the conclusion which they reached. Their decision was, therefore, erroneous on that ground also. I must, therefore, set aside their decision.

9. The next question is to determine whether or not I should remit the case to a new tribunal for rehearing and redetermination or whether I should substitute my own decision under section 101(5)(a) of the Social Security Act 1975. The claimant's son made it clear that he had come to the oral hearing not with a view to arguing any point of law but clearly to put forward the merits of the claimant's case. I explained to him that, whatever sympathy a Commissioner may have with an individual claimant, the Commissioner, like the social security appeal tribunal and indeed the adjudication officer, is bound by the statute and regulations and must give decisions in the light thereof. When I expressed my opinion that on the present evidence the claimant was not entitled to income support, the claimant's son said that he was satisfied, having attended the oral hearing, with that decision and that he did not wish to have a rehearing before a differently constituted tribunal. Accordingly, I give the decision which I consider the tribunal should have given, namely that at the date of the claim the claimant was not entitled to income support.

10. I emphasise that my decision is made on the basis of the evidence at present available. There is no evidence as to whether the claimant's interest in the property is freehold or leasehold. There is no evidence as to whether or not the interest in the property, of which the claimant has 50% share, is subject to a trust for sale. There is no evidence as to the estimated sale price if the property were to be sold in pursuance of a sale under a trust for sale, bearing in mind the sitting tenant. On the other hand, if the claimant were to sell her 50% share in the open market, there is no evidence of the value of that share.

11. The capital limit under regulation 45 of the General Regulations was increased from £6,000 to £8,000 from 9 April 1990. As Mr. D'Souza pointed out at the oral hearing, if the market value of the claimant's share (however determined) taken together with her present savings now amount to no more than £8,000, the claimant could make a fresh claim for income support.

12. For those reasons I allow this appeal.

(Signed) A T Hoolahan
Commissioner

(Date) 8 January 1991