SUPPLEMENTARY BENEFIT

Aggregation: whether two persons are living together as husband and wife

The claimant was unemployed and claimed supplementary allowance as a single man He lived in a one-bedroom flat with Miss G , and they shared expenses. Although they slept together and part of their social life was spent together, they did not intend to marry, had not acknowledged themselves as husband and wife and had no children The benefit officer decided that their requirements and resources should be aggregated and treated as those of the claimant. An Appeal Tribunal decided that on the balance of probability the couple lived together as husband and wife and confirmed the benefit officer's decision. The claimant applied for leave to appeal to a Social Security Commissioner.

Held that:—

1. The criteria for deciding whether two persons are living together as husband and wife laid down in decisions of the Commissioners and summarised in R(G) 3/71 correspond to those set out in the Supplementary Benefits Handbook and approved in *Crake v Supplementary Benefits Commission,* with the result that the same essential approach is being applied for both supplementary benefit and national insurance benefit purposes;

2. It is not possible to ascertain whether the parties intended to live together as husband and wife otherwise than by having regard to their conduct at the relevant time (*Robson v Supplementary Benefits Commission* not followed);

3 Account may be taken of the stability of the relationship but the absence of an intention to marry does not mean that the couple have no intention to live together as though they are married.

The Commissioner refused leave to appeal.

1. For the reasons set out below I refuse the claimant leave to appeal from the decision of the supplementary benefit appeal tribunal dated 28 January 1981.

2. The supplementary benefit officer decided that the requirements and resources of the claimant and of a certain Miss G., who was residing in the same flat as the claimant, should be aggregated and treated as those of the claimant. This decision was based on the premise that the claimant and Miss G. were living together as husband and wife within the meaning of the relevant statutory provisions. The claimant's supplementary benefit was adjusted to take account of this situation as from the prescribed pay day Saturday in the week commencing 22 December 1980, and, as I understand it, there is no dispute about the calculation, if the claimant and Miss G. are living together within the statutory definition. What is in dispute is whether or not they are caught by the relevant provisions.

3. The claimant appealed to the supplementary benefit appeal tribunal, but unsuccessfully. The findings of the tribunal read as follows:—

> "The appellant and Miss G. set up a joint establishment in March 1980 and have continued to date. The accommodation is a 1 bedroom flat, they share the expenses. There is an admission that they sleep together and that they socialise together. They both visit their parents separately".

The reasons given for the tribunal's decision are as follows:—

> "The tribunal consider that on the facts and evidence produced, that [sic] on the balance of probability the appellant and Miss G. are living together as husband and wife.

> The resources and requirements had been correctly aggregated and the payment of £10.71 determined and paid weekly from the prescribed pay day Saturday in week commencing 22.12.80 was correct".

The claimant applied to the Commissioner for leave to appeal and asked for an oral hearing, a request to which I acceded. At the hearing the claimant was represented by Miss L. Bowles of the Sheffield Students' Union and the Secretary of State by Mr P. Milledge of the Solicitor's Office of the Department of Health and Social Security. I am grateful to them both, and in particular to Mr Milledge, for their helpful submissions.

4. There have been certain recent decisions of the High Court bearing on the meaning of the expression "living together as husband and wife" as used in paragraph 3(1)(b) of the First Schedule to the Supplementary Benefits Act 1976 as amended by section 14(7) of the Social Security (Miscellaneous Provisions) Act 1977. Until the jurisdiction was taken over by the Social Security Commissioners with effect from the 24 November 1980 appeals on matters of law lay from the supplementary benefit appeal tribunal to the High Court, and a certain amount of case-law has evolved directed to consideration of what constitutes cohabitation or living together as man and wife. Although the High Court was only concerned with construing the relevant statutory provision relating to *supplementary* benefit, and not with the equivalent provision under the Social Security Act 1975 which is concerned with *contributory* benefits, nevertheless, in my judgment, the relevant enactment under the Social Security Act 1975, to be found in the proviso to section 26(3), has exactly the same effect as the corresponding expression in paragraph 3(1)(b) of the First Schedule to the Supplementary Benefits Act 1976. The proviso in question reads as follows:—

> "Provided that the pension shall not be payable for any period after the widow's remarriage or for any period during which she and a man to whom she is not married are living together as husband and wife."

5. It is perhaps surprising to find that apparently no attempt was made to bring to the attention of the High Court Commissioner's decisions relating to the meaning of living together as man and wife, so that the High Court has reached an independent interpretation of that expression. Fortunately, the decisions of the High Court would not appear to be at variance with the interpretation adopted by the Commissioners, so that the same criteria can be applied whether or not the claim is for supplementary benefit or for widow's benefit.

6. Mr Milledge drew my attention first to the decision of *Crake v The Supplementary Benefits Commission* and *Butterworth v The Supplementary Benefits Commission* (unreported), where Mr Justice Woolf said with reference to the criteria to be considered in determining whether or not a man and a woman were living together as husband and wife as follows:

> "....there is a Supplementary Benefits handbook which sets out guidance to claimants and that, very conveniently, has paragraphs dealing with the problem as to when couples should be treated as living together as husband and wife. At page 17 it sets out no doubt what the Tribunal were referring to as criteria. They are an admirable signpost to help a Tribunal or indeed the Commission to come to a decision whether in fact the parties should be regarded as being within the words 'living together as husband and wife'. They are: whether they are members of the same household; then there is a reference to stability of the relationship; then there is a question of financial support; then there is the question of sexual relationship; the question of children;

and public acknowledgement. Without setting out the part of the handbook in full in this judgment, it seems to me that the approach indicated in that handbook cannot be faulted."

7. In view of the importance of the criteria to be applied I think it is worthwhile my setting out exactly what the particular handbook referred to does say. The criteria read as follows:—

"(a) *Members of the same household.* The man must be living in the same household as the woman and will usually have no other home where he normally lives. This implies that the couple live together wholly, apart from absences necessary for the man's employment, visits to relatives etc.

(b) *Stability.* Living together as husband and wife clearly implies more than an occasional or very brief association. When a couple first live together, it may be clear from the start that the relationship is similar to that of husband and wife, e.g. the woman has taken the man's name and has borne his child, but in cases where the nature of the relationship is doubtful the Commission will be prepared to continue the woman's benefit for a short time in order to avoid discouraging the formation of a stable relationship.

(c) *Financial Support.* In most husband and wife relationships one would expect to find financial support of one party by the other, or sharing, of household expenses, but the absence of any such arrangement is not conclusive.

(d) *Sexual Relationship.* A sexual relationship is a normal and important part of a marriage and therefore of living together as husband and wife. But its absence does not necessarily prove that a couple are not living as husband and wife, nor does its presence prove that they are. The Commission's officers are instructed not to question claimants upon the physical aspect of their relationship, though claimants may choose to make statements about it.

(e) *Children.* When a couple are caring for a child or children of their union, there is a strong presumption that they are living as husband and wife.

(f) *Public Acknowledgement.* Whether the couple have represented themselves to other parties as husband and wife is relevant, but many couples living together do not wish to pretend that they are actually married, and the fact that they retain their identity publicly as unmarried persons does not mean they cannot be regarded as living together as husband and wife."

8. Mr Milledge also brought to my attention the case of *Robson v Secretary of State for Social Services* (unreported) decided by Mr Justice Webster. In the course of his judgment the learned Judge expressed the following view:

"Often it is only possible to decide [the issue] by considering the objective facts, because usually the intention of the party is either unascertainable, or, if ascertainable, is not to be regarded as reliable. But if it is established to the satisfaction of the Tribunal that the two persons concerned did not intend to live together as husband and wife and still do not intend to do so, in my judgment it would be a very strong case indeed sufficient to justify a decision that they are, or ought to be treated as if they are, husband and wife."

The learned Judge suggests the above approach by way of guidance to supplementary benefit appeal tribunals. I am afraid that I do not think it will be of any real assistance to them, in that, apart from the fact it pre-

supposes that the two persons concerned have the same intention—and often they do not—I do not see how a person's intention can be ascertained otherwise that by what he or she does and says at the relevant time. It is the conduct of the person concerned to which regard has to be paid. In my judgment, an intention cannot be ascertained without regard to such conduct. However, the actual decision of *Robson v Secretary of State for Social Services* would appear to be consonant with what Mr Justice Woolf said in the earlier case.

9. Mr Milledge referred me to the various relevant Commissioners' decisions relating to what constitutes living together under the proviso to section 26(3). In my judgment, the most succinct statement of the principles to be adopted is set out in paragraph 5 of Decision R(G) 3/71, and the criteria there laid down have been repeatedly approved in Commissioners' decisions (see for example R(G) 1/79 paragraph 8). Paragraph 5 of Decision R(G) 3/71 reads as follows:

> "It is generally accepted that the question whether a woman is cohabiting with a man as his wife, within the meaning of the statute, requires an examination of three main matters: (1) their relationship in relation to sex: (2) their relationship in relation to money: (3) their general relationship. Although all three are as a rule relevant, no single one of them is necessarily conclusive."

There is, of course, no distinction between "cohabiting" and "living together".

10. I take the view that the above succinct statement corresponds with the criteria set out in the Supplementary Benefits handbook. In the latter case there is some expansion, but the same essential approach is being applied. It may be helpful if I specifically compare the criteria contained in the Supplementary Benefits handbook with the yardstick adopted in Decision R(G) 3/71.

11. First, it is axiomatic that the man and woman concerned must be living in the same household. This requirement is not spelt out specifically in Decision R(G) 3/71, but only, in my judgment, because it is self-evident. The second requirement contained in the handbook, namely "stability" is covered by the parties' "general relationship". As for "financial support" and "sexual relationship" these are manifestly covered by criteria (2) and (1) respectively of Decision R(G) 3/71. The existence of children is indicative of a sexual relationship and/or the general relationship of the man and woman. As regards "public acknowledgement" this again goes to their general relationship. Accordingly, in my judgment, exactly the same criteria apply whether or not consideration is being given to a claim to supplementary benefit or to widow's benefit, and this same approach has been adopted in R(G) 3/81.

12. I should also say for completeness that the decisions of the High Court referred to above proceeded on the basis of the Supplementary Benefits Act 1976 as it stood prior to its amendment in 1980. As a result of such amendment the relevant statutory provisions are now paragraph 3(1) of Schedule 1 to, and section 34 of, the Act. These provisions read as follows:

> "3. (1) Where two persons are a married or unmarried couple, their requirements and resources shall be aggregated and treated,
>
> (a) until the prescribed date [no date has so far been prescribed], as those of the man; and
>
> (b) ....."

Section 34(1)

"'unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances."

The "prescribed circumstances" are those specified in regulation 6 of the Supplementary Benefit (Aggregation) Regulations 1980 and deal with very exceptional circumstances, which are not normally applicable, and are certainly not applicable in the case which I have to decide. Although there have been these changes to the Act, they effect no material alteration to the law.

13. I invited Miss Bowles to say in what respect she contended that the decision of the appeal tribunal was erroneous in point of law. She argued in effect that no tribunal, acting judicially and properly instructed as to its role, could on the evidence have reached the decision that it did. This raised something of a problem, in that the papers before me, including the chairman's note of evidence, did not indicate the full extent of the evidence which must have been given. However, Miss Bowles was able to put before me a document which the claimant himself had read to the tribunal, and this supplemented extensively what is recorded in the papers. It appeared that the claimant and Miss G. had in March 1980 moved into a 1 bedroom flat, and it was not in dispute that from that point on they had been sleeping together. They were then both students at Sheffield University. The claimant had completed his degree at the end of the academic year 1980, but had continued to reside in the flat whilst looking for employment. They had shared the expenses, although Miss G. had to lend the claimant something like £10.00 a week in order to enable him to meet his proper share. They had spent part of their social life together but not all of it, and in particular during the vacations they had returned to their respective parents. They had not regarded themselves as intending to marry, they had not acknowledged themselves as husband and wife and there were no children. In particular there had never been anything permanent about the relationship.

14. However, having heard the evidence including the claimant's statement to the above effect the tribunal took the view that the claimant and Miss G. were living together within the meaning of the relevant statutory provisions. I am satisfied on the evidence that the tribunal could properly have come to that conclusion. In particular, the fact that they did not intend to marry—and I was told that this was a feature of many student relationships of the kind under consideration—does not mean that they did not intend to live together as though they were married. Having considered the findings of the local tribunal, I do not see how it can be said that they cannot be supported by the evidence given.

15. Accordingly, I do not see how it can be argued that the decision of the tribunal was or might be erroneous in point of law. Leave to appeal is therefore refused.

(Signed) D. G. Rice
Commissioner
