SUPPLEMENTARY BENEFIT

Aggregation—living together as husband and wife—other reasons for unmarried couple living in the same household.

Mr. W had been living in the household of the claimant and her brother since 1974 as he needed care and help which they were prepared to provide. Following her brother's death in 1975 the claimant continues to provide this care and help. Mr. W contributed to the expenses of the household in cash and in kind. On 6 September 1984 the adjudication officer decided that the claimant was living with Mr. W as his wife and that their requirements and resources should be aggregated with the result that she was not entitled to supplementary benefit. On appeal the tribunal upheld that decision and the claimant appealed to a Social Security Commissioner.

Held that:

1. adopting the dicta in *Crake and Butterworth v SBC 1980* (reported as SB/38) the fact that a man and a woman lived in the same household might raise (and here did raise) the question as to whether they were living together as husband and wife but in each case it was necessary to find out why they lived in the same household. If there were an explanation which indicated that they were not there because they were living together as man and wife they could not be so described for supplementary benefits purposes (paragraph 7);

2. on the facts of this particular case the elements of care, companionship and mutual convenience explained why they were living in the same household and in the context of the circumstances of the case as a whole they were not living together as man and wife (paragraph 8).

The appeal was allowed.

1. (1) This is a claimant's appeal from the decision dated 20 November 1984 of a social security appeal tribunal ("the tribunal") brought by leave of the tribunal chairman and upon the contention that the tribunal's decision was given in error of law. By their decision the tribunal upheld the decision issued by an adjudication officer on 6 September 1984 that the claimant was not entitled to a supplementary pension from 20 August 1984 because she was living with a Mr. W as his wife.

(2) The claimant has been assisted by her solicitors upon the present appeal, and they and the adjudication officer now concerned are at one in submitting that the tribunal's decision was given in error of law; and I agree. At that point, however, they part company—because the adjudication officer now concerned invites me to remit the case to a different tribunal for re-hearing in the event I set aside the tribunal's decision; whilst the claimant's solicitors invite me, in the same event, to give myself the decision which the tribunal should have given. I am satisfied that I should set aside the tribunal's decision and, after anxious consideration, satisfied also that it is appropriate that I should give myself the decision which the tribunal should have given. The claimant has requested an oral hearing of the appeal but I am satisfied, further, that the appeal can properly be determined without one.

(3) The appeal is allowed. I set aside the tribunal's decision as given in error of law as later below identified and, considering it expedient so to do in the circumstances of the case, proceed to give myself the decision which the tribunal should have given.

(4) My decision is that the claimant was not at 20 August 1984 ineligible for supplementary pension by reason of being one of the two persons constituting an "unmarried couple" whose resources

and requirements fell to be aggregated (and, in particular, was not "living as husband and wife" with Mr. W—whose full name is identified in the case papers).

The adjudication officer's decision issued on 6 September 1984 is accordingly reversed. It will be for an adjudication officer now to make a fresh assessment of the claimant's requirements and resources and give a decision upon the claimant's entitlement or otherwise to supplementary pension as from 20 August 1984 upon a basis consistent with my present decision but taking account also of all other material ingredients. The decision so to be given will be open afresh to operation of the normal appeal procedures.

2. The tribunal are, in my respectful view, to be congratulated upon an exemplary record of decision as regards the finding of material facts. Where they have fallen into error lies in the first instance in a failure to state reasons for decision from which the claimant and her advisers can identify with adequate particularity why it is that the contentions advanced before the tribunal on her behalf have not prevailed. And on that account I must set aside the tribunal's decision, as having failed to discharge the tribunal's obligations under regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984 as amended. However, the fault can in my view be related back to an underlying shortcoming in the tribunal's interpretation and application of the—admittedly difficult—law as to what constitutes or does not constitute "living together as husband and wife". And there I have every sympathy with the tribunal, because although the circumstances of the case in my judgment warrant the conclusion expressed by my present decision, the criteria to be applied in arriving at a correct determination are elaborate, embody fine distinctions, and yield results tenably devoid of intrinsic logic. (By way of illustration, if Darby, an elderly widower, and Joan, an elderly widow, choose for companionship in old age to get married and live thereafter in the same household, there is no question but that their combined resources are aggregable for supplementary benefit purposes. In contrast, if David, an elderly bachelor, and Jane, an elderly spinster, from precisely the same motives make their home together, pool their resources, and care for each other in old age—but are brother and sister—no such aggregation ensues ... and one could go more widely and consider other comparisons no less anomalous).

3. The material facts of the case have not been in dispute and can be summarised as follows:—

(1) The claimant, a widow then in her early 70's, was in August 1984 living in a three bedroom bungalow which had been her home for many years. She had taken over the tenancy upon the death in 1976 of her brother, who had earlier been the tenant, and with whom she had maintained a common household. She had income resources comprising a state retirement pension and an occupational pension.

(2) Mr. W was in August 1984 a widower. His wife had become mentally ill and was from 1974 down to her eventual death a hospital in-patient. Mr. W himself suffers and at all material times suffered from a war injury which causes him pain and memory lapses and also affects his co-ordination. Following his wife's admission to hospital Mr. W moved in to live with the claimant and her brother as a member of their household. Mr. W had a home of his own in which he had previously lived, but which he then let under a long-term arrangement. His income resources consisted of a disablement pension and some independent means.

He had his own separate bedroom in the bungalow, and some of his own furniture there. At the time he came so to live Mr. W was very depressed and needed help and care which the claimant and her brother were willing to provide.

(3) At all material times the claimant did the cooking and she and Mr. W took their meals together. There was no arrangement in the nature of a "board and lodging" charge. Mr. W contributed in cash and kind to the running expenses of the household; he performed some household duties; he paid for the telephone to be installed; and he paid the gas, electricity and telephone bills and made some contribution towards food bills. It was not a commercial arrangement. There was no and never had been any sexual relationship between the claimant and Mr. W, and there were no children. In public they were known respectively by his name of Mr. W and her married name of "Mrs. T".

(4) The tribunal have held as a fact that there was a caring relationship between Mr. W and the claimant—indeed no-one has contended otherwise—but have recorded also a finding that the claimant also cares for other elderly people in the locality.

4. Though not amongst the tribunal's findings, the notes of evidence indicate—and it does not appear to have been in dispute—that another of her brothers came to live in the household in 1980, but left it in April 1984 in order to enter a nursing home, as he needed a lot of care.

5. The reasons for decision stated by the tribunal were as follows:— "On the balance of evidence the Tribunal is of the opinion that [the claimant] and [Mr. W] are living in the same household and should be accepted as man and wife for supplementary benefit purposes. Their requirements and resources should be aggregated. It is a stable and caring relationship. No moral judgment is being made and the tribunal hope the relationship and caring will continue. Section 34 of and para 3(1) of Schedule 1 to 1976 Act, and R(SB)17/81."

6. What the tribunal have, in my judgment, overlooked is that the existence of a common household—the fact as to which was not in dispute—was only one ingredient in the complex evaluation properly falling to be made, and that their statement "and should be accepted as man and wife for supplementary benefit purposes" represented their conclusion and was not an explanation. For it is impossible to ascertain from the record of decision what—if any—were the considerations apart from the common household upon which the tribunal relied in arriving at the decision they gave. The claimant's case being that she and Mr. W who though living in a common household and having a stable relationship were *not* living together as husband and wife", the tribunal needed to concentrate closely both in arriving at and in expressing reasons for decision upon what constituted as living together *as husband and wife*. And, though I am also left in doubt as to whether they sufficiently did the first, I am in no doubt that they have failed to explain their reasons for decision in that context.

7. (1) It is submitted on the claimant's behalf that the tribunal failed to give due effect to the authority constituted by the High Court decisions in the cases of *Crake and Butterworth v SBC 1980* (reported as SB/38 page 309—below referred to as "the *Crake* case"). That submission does not, however, identify any particular passage in such decisions as relied upon, and the adjudication officer now concerned whilst conceding that the tribunal erred in law in failing to give adequate reasons for their decision indicates that he is unsure of the particular passage or

passages in those High Court decisions upon which the claimant's case relies. He has, however, made an inference as to that which I regard as well-founded, identifying a passage at p.316 of the report. That passage in my judgment affords helpful guidance in the present case. It is guidance to which it would appear the tribunal were not referred; and I think that had they been referred to it their decision might have been different. The passage reads as follows:—

> "...it is not sufficient in order to establish that a man and woman are living together as husband and wife to show that they are living in the same household. If there is the fact that they are living in the same household, that may raise the question as to whether they are living together as man and wife. Indeed, in many circumstances it may be strong evidence to show that they are living together as man and wife. But in each case it is necessary to go on and ascertain in so far as this is possible why they are living together and in the same household. If there is an explanation which indicates that they are not there because they are living together as man and wife, then the position would be that they would not fall within paragraph 3(1); they are not two persons living together as husband and wife.
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> It is impossible to categorise all the explanations which would be sufficient to mean that paragraph 3(1) is inapplicable. But it seems to me that if the reason that someone goes to live in the same household as another person is to look after that person because they are ill or incapable for some other reason of managing their affairs, that in ordinary parlance is not what you would describe as going to live together as husband and wife as required by the paragraph."

2. I respectfully adopt and apply the intimation in the above passage from the *Crake* case that it is impossible to categorise all the explanations which would be sufficient to mean that paragraph 3(1)—which is the same paragraph 3(1) as is identified in the tribunal's stated reasons for decision—is inapplicable.

8. Whilst there was in the present case, in my judgment, a significant element of care for the claimant attending the circumstance of Mr. W's membership of the claimant's household, one cannot, in my judgment, put that so high as to be the sole reason for the claimant's presence in August 1984. What one can, however, in my judgment, conclude with confidence is that such element of care as there was, together with elements of companionship and mutual convenience, explain why the claimant and Mr. W were living together and in the same household and in the context of the circumstances of the case as a whole constitute "an explanation which indicates that they are not there because they are living together as man and wife". And that, to my mind, is so far as one has to go.

9. (1) There have been a number of successive attempts by the Department of Health and Social Security to express guidelines in the Supplementary Benefits Handbook as to who are and are not properly to be regarded as "living together as husband and wife", and by what criteria. The relevance or otherwise of a past or present sexual relationship has been somewhat differently treated at different times and is evidently and understandably regarded as a delicate matter. The treatment in that respect of the criteria stated in the edition of the Handbook which was cited with

approval in decision R(SB)17/81 and was that referred to in the *Crake* case (and would I think have been the 1979 Revision of the Handbook, though nothing turns on that) indicated:

"*Sexual relationship*":
A sexual relationship is a normal and important part of a marriage and therefore as 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 about the physical aspect of their relationship, though claimants may choose to make statements about it.

(2) The September 1980 Edition is in the same terms save for the prefatory opening "similarly", the omission of "and important", and alterations in the final sentence of "Commission" to "Department" and of "make statements" to "talk".

(3) The 1982 Edition contained an entirely different final sentence, which I infer to have been inspired in part at least by the above cited passage from the judgment of Woolf J. It read:

> "However, if a couple have *never* had such a relationship it is most unlikely that they should be regarded as living together as husband and wife".

(4) However, the 1983 Edition appears to have "watered that down"—the final sentence there is:

> "If a couple have never had such a relationship it may be wrong to regard them as living together as husband and wife"

And in the 1984 Edition the final sentence has disappeared altogether—the treatment ends at "nor does its presence prove that they are".

10. It is no part of my jurisdiction to determine what the Department of Health and Social Security should or should not put into the Handbook. But I am aware of no case law authority or statutory provision which displaces the force of what Woolf J. indicated; and if the Handbook is to continue to accord under the head of sexual relationship the "neutral" treatment reflected by the 1984 Edition perhaps an attempt might be made to reflect elsewhere in it the gist of what he said as to a couple "living together" being rather a starting point than a finishing point in the required evaluation, and as to what inquiry next lay.

11. My decision is as indicated in para.1(3) above.

(Signed) I. Edwards-Jones
Commissioner