R(SB) 3/92

(Sharrock v. Chief Adjudication Officer)

Mr. D. G. Rice
CSB/1110/1988
8.5.89

CA (Woolf and Mann LJJ and Sir Christopher Slade)
26.3.91

Notional income - claimant caring for her disabled son - whether the claimant "performs .... a service"

The claimant, having given up her employment to care for her severely disabled adult son out of love and affection, claimed supplementary benefit. The adjudication officer decided that she performed a service for her son for which he made no payment and, accordingly, under regulation 4(3) of the Supplementary Benefit (Resources) Regulations 1981, a notional earnings resource was attributable to her, to be calculated by reference to the amount payable for comparable employment and her son's means which consisted chiefly of a war disablement pension. It was common ground that the son could not afford to pay the market rate for the service so that the notional payment to the appellant fell to be calculated by reference to the son's means. The adjudication officer treated the son's means as the excess of his resources over his requirements. As a result the notional payment to the appellant caused her resources to exceed her statutory requirements and she was not entitled to supplementary benefit.

The claimant appealed to a social security appeal tribunal who agreed that regulation 4(3) applied, but rejected the method of computation adopted by the adjudication officer. They decided that the son's means to pay for the service provided by the appellant were represented by the amounts he would lose if he went into care at a National Health Service hospital, namely his constant attendance allowance and unemployability supplement, the aggregate of which were the notional resource attributable to the appellant. Accordingly she was entitled to some supplementary benefit but she appealed to a Commissioner on the ground that no notional resource should have been attributed to her at all. The Commissioner rejected that argument but held that the tribunal had erred in the way they determined the amount of the notional resource and restored the decision of the adjudication officer. The claimant appealed to the Court of Appeal.

Held, allowing the appeal, that:

1. the claimant was performing a service which brought her within regulation 4(3);

2. regulation 4(3) conferred a discretion as to whether or not, and how, it should be applied;

3. the tribunal had not erred in law in determining the amount of the notional earnings to be attributed to the appellant and the Commissioner had not been entitled to set aside their decision.

The Court of Appeal restored the decision of the tribunal.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 7 January 1988 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 7 January 1988. The claimant asked for an oral hearing, a request which was acceded to. At that

hearing the claimant, who was not present, was represented by Mr. Shaun Price, a welfare rights officer, whilst the adjudication officer appeared by Mr. D. Tempest of the Solicitor's Office of the Departments of Health and Social Security.

3. The claimant, who originally worked as a nurse, gave up that employment to look after her son Andrew, who sadly is severely disabled with an incurable tumor of the spine. For a period the claimant was able both to look after him and to take in boarders, but as from 4 July 1986 she felt that, owing to her son's deteriorating condition, she must confine her attentions exclusively to him. Accordingly, she gave up taking in boarders. On 15 July 1986 she claimed supplementary benefit. Andrew was in receipt of various pensions and allowances which produced, I am told, an income of some £206.50 per week. Of this sum he made a contribution to the claimant in respect of housing costs, initially of £93.20 per week until January 1987, and thereafter at the rate of £98.20 per week. For the purposes of calculating the claimant's entitlement to benefit that payment was disregarded. However, what was included as part of her income was a notional resource of £104.65 per week, from which £4 was disregarded. That resource was arrived at on the basis that the claimant was caught by regulation 4(3) of the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No.1527], and the actual figure of £104.65 less the £4 disregard was computed on the basis that the payment "for comparable employment" was represented by the excess of Andrew's resources over his requirements. When the adjudication officer compared the claimant's resources, which included, of course, the notional resource, with her statutory requirements, he concluded that, as there was no deficiency, there was no entitlement to supplementary benefit.

4. In due course, the claimant appealed to the tribunal, who varied the adjudication officer's decision. They accepted that the claimant was caught by regulation 4(3), but considered that the notional resource should be calculated by reference to the amount Andrew received by way of attendance allowance (£37.50) and the amount he received by way of unemployability supplement (£7.76). Accordingly, in the tribunal's view, the notional resource attributable to the claimant was £45.26. The claimant's entitlement to supplementary benefit was to be calculated on this basis.

5. Regulation 4(3) of the Supplementary Benefit (Resources) Regulations 1981 read at the relevant time as follows:

> "Where a member of the assessment unit performs for another person a service for which that person makes either no payment or a payment less than that paid for comparable employment, an amount of earnings calculated by a reference to such employment and the means of that person may be treated as if it were actually paid to and possessed by the member of the assessment unit."

(This provision has been substantially re-enacted in regulation 42(6) of the Income Support (General) Regulations 1987 [SI 1987 No.1967]). It is not in dispute that the claimant looked after her son. Manifestly, she was performing a service, and the tribunal had not hesitation in giving an extensive value to that service. They found as follows:

> "The tribunal considered the situation in the instant case did not lend itself easily to the application of regulation 4(3), since the 'comparable employment'

> would consist of the service of two nurses commanding wages in all of some £700 per week, clearly way beyond the means of the son. However, the claimant did in fact perform a service to her son, albeit out of maternal devotion, of which otherwise he would have to make some payment."

6. It is clear that, if the claimant had not rendered the service in question, and if the claimant were to continue to live at home, he would have to pay for nursing attention. The tribunal evaluated that service at £700 per week. Even assuming some degree of exaggeration, it is quite clear that the value of the service rendered by the claimant was extremely high, and the limiting factor must in the present instance be **Andrew's capacity to pay for it**. As stated above, they resolved the matter by quantifying the capacity to pay by reference to Andrew's attendance allowance and unemployability supplement. They put the matter as follows:

> "Consequently, bearing in mind that he does in fact make a substantial contribution to the claimant's housing, even though this is disregarded under regulation 11(4)(k) of the Resources Regulations, and that, if he went into hospital, he would lose his constant attendance allowance of £37.50 after four weeks, and £7.76 of his unemployability supplement after eight weeks the tribunal considered that they could properly exercise their discretion in regarding these two amounts alone as the payment which the claimant can be considered as receiving and possessing under regulation 4(3)."

The tribunal then went on to reject the method of computation adopted by the adjudication officer.

7. In his helpful submissions to me Mr. Price sought to persuade me that the service rendered by the claimant, as it was given out of love and affection, could not be equated with any "comparable employment", and accordingly the discretion inherent in regulation 4(3) (the word "may" is used) should be exercised in favour of the claimant. I reject that submission. As was said in paragraph 14 of the unreported decision CSB/92/1984:

> " .... the principal mischief at which regulation 4(3) is aimed should be kept firmly in view, namely that an employer who has the ability to pay a claimant, or other person dependent on supplementary benefit, the full market rate for services should not be enabled to economise on the wages that he pays because the assessment unit is being supported out of a supplementary allowance."

In my judgment, the mischief there referred to embraces the present case. The claimant was in receipt of supplementary benefit, and although there was nothing to prevent her giving her services out of love and affection for no financial return, such generosity, however laudable, should not be at the expense of the supplementary benefit fund. In so far as the recipient of the services was financially able to pay for or make a contribution to the cost of such services, in reduction of the claim on the supplementary benefit fund by the provider of those services, the discretion conferred by regulation 4(3) should be exercised to ensure that the recipient made an appropriate payment. Accordingly, in my judgment, both the adjudication officer and the tribunal were right to conclude that a notional payment should be fixed to reflect Andrew's capacity to contribute to the value of the service rendered by the claimant.

8. The only difficult issue in this case is the amount of the contribution. The adjudication officer approached the matter in one way, by deciding that the relevant sum should be calculated by reference to the excess of Andrew's resources over his requirements, whilst the tribunal preferred to restrict his liability to the total of his attendance allowance and unemployability supplement. Manifestly, the tribunal were being more generous to the claimant than was the adjudication officer, and I think by use of the word "alone" the tribunal realised that they were treating the claimant mercifully.

9. However, Mr. Tempest submitted that both the adjudication officer and the tribunal approached the matter in an incorrect way. The criterion was what the beneficiary of the services could pay. Although it was clear that in the present instance Andrew could forfeit his attendance allowance and unemployability supplement without disastrous consequences it did not follow that he could not necessarily afford more. An analogy could be drawn with claimants in a nursing home or residential care home who were left with what was in effect pocket money. The tribunal should have considered the full extent of what Andrew could afford, and in this connection they should have taken into account his own personal needs. In Mr. Tempest's submission, the tribunal had in effect been too generous towards the claimant.

10. I accept Mr. Tempest's submissions. Accordingly, the tribunal erred in point of law and I must set aside their decision. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned above. That tribunal will have to determine what Andrew can afford and this will constitute the notional resource of the claimant for the purposes of calculating her entitlement, if any, to supplementary benefit.

11. For completeness, I should mention that, in the course of his submissions to me, Mr. Price referred me to regulation 10(2)(b) of the Resources Regulations, and suggested that the claimant was supplying board and lodging, and that any payment attributable there to should be disregarded as a resource of the claimant. At first sight there appeared little in this point, in that the issue was the comparability of the notional payment with the service rendered by the claimant and that service consisted essentially of nursing. However as this matter was not fully argued before me I make no ruling on this issue and leave it, if it is raised again before the tribunal, for determination by them. The new tribunal will also have regard, if it becomes relevant, to regulation 10(4)(d).

12 I allow this appeal.

Date: 8 May 1989

(signed) Mr. D. G. Rice
Commissioner

The claimant appealed to the Court of Appeal. The decision of the Court of Appeal follows:

DECISION OF THE COURT OF APPEAL

Mr. M. Rowland (instructed by Messrs. Rowley Ashworth, Exeter) appeared on behalf of the Appellant.

Miss G. Caws (instructed by the solicitor to the Department of Social Security) appeared on behalf of the Respondent.

LORD JUSTICE WOOLF: I shall ask Lord Justice Mann to deliver the first judgment.

LORD JUSTICE MANN: This is an appeal by Mrs. Doreen Mildred Sharrock against a decision of the Social Security Commissioner dated 8 May 1989. By his decision the Commissioner set aside a decision of the Exeter social security appeal tribunal dated 7 January 1988. The Commissioner directed that the appellant's appeal from an adjudicator should be re-heard by a differently constituted tribunal.

This appeal concerns supplementary benefit, which was a benefit introduced by Part 1 of the Supplementary Benefits Act 1976. That form of benefit has now been replaced by the system of income related benefits introduced by Part 2 of the Social Security Act 1986.

The appellant originally worked as a nurse, but she gave up her employment in 1984 in order to care for her son Andrew. Andrew Sharrock was formerly a soldier, but in 1984 he was disabled by an incurable tumor of the spine. For a while Mrs. Sharrock was able to combine the care of her son with taking boarders into her house. However, the deterioration of her son's condition caused her to cease taking in boarders on 4 July 1986. As from 15 July 1986 Mrs. Sharrock claimed supplementary benefit.

In very general terms supplementary benefit was payable to a person where his "requirements" exceeded his "resources". There were elaborate provisions by way of regulations which provided for the determination of what were resources and requirements. Resources could be either actual or notional. This appeal is about the notional resources of Mrs. Sharrock and in particular with the application to her of regulation 4(3) of the Supplementary Benefits Resources Regulations 1981. That regulation appears under the heading "Notional resources". Paragraph 3, which is the critical paragraph for the present appeal, reads as follows:

> "Where a member of the assessment unit performs for another person a service for which that person makes either no payment or a payment less than that paid for comparable employment, an amount of earnings calculated by reference to such employment and the means of that person may be treated as

> if it were actually paid to and possessed by the member of the assessment unit."

The phrase "assessment unit" is unsurprisingly a term of art which is defined in regulation 2(1) as meaning in this case, Mrs. Sharrock.

I shall return to arguments upon the regulation but must continue for the moment with the facts of the matter.

Andrew Sharrock was in receipt of various pensions and allowances under the War Pensions Scheme. The allowances included a constant attendance allowance and an unemployability supplement. The sum produced by the pension and allowances was £206.50 per week. Out of that sum Andrew Sharrock paid at first £93.50 but later £98.20 per week to the appellant in respect of housing costs. It is common ground that those payments do not fall to be taken into account as part of the appellant's resources actual or notional.

On 10 October 1986 the adjudication officer determined that the appellant had a notional resource of £104.65 per week. It was determined in accordance with regulation 4(3). Of this resource the first £4 fell to be disregarded (see regulation 10(5)(a) of the Resources Regulations). The balance of £100.65 gave to Mrs. Sharrock a notional income in excess of her assessed requirements. Hence there was no entitlement to any benefit. The determination by reference to regulation 4(3) was on the basis that the appellant was performing a service for he son for which he made no payment and that accordingly there could be attributed to her an amount of earnings calculated by reference to the amount which would be paid for comparable employment and to the means of the son.

The adjudication officer looked to the means of the son as affording the upper limit to the notional income. He made an assessment of the son's resources and requirements such as would have been made had the son applied for supplementary benefit. That exercise produced an excess of income over requirements of £104.65. That is the figure to which I have already referred as constituting the notional resource of Mrs. Sharrock.

Mrs. Sharrock appealed to the Exeter social security appeal tribunal. The appeal to such tribunal is of course by way of re-hearing. The tribunal gave its decision on 7 January 1988. In substance their determination was that Mrs. Sharrock's case attracted regulation 4(3) but that the only amounts which the appellant could be treated as notionally receiving were the son's constant attendance allowance and his unemployability supplement, making in total £45.26 per week.

Mrs. Sharrock appealed to the Commissioner. She could appeal only upon a point of law (see Social Security Act 1975 section 101(1)). The decision of the

Commissioner, which is the decision under appeal, contained in paragraph 7 this passage:

> "In his helpful submissions to me Mr. Price sought to persuade me that the service rendered by the claimant, a it was given out of love and affection, could not be equated with any 'comparable employment', and accordingly the discretion inherent in regulation 4(3) - the word 'may' is used - should be exercised in favour of the claimant. I reject that submission. As was said in paragraph 14 of the unreported decision CSB/92/1984:
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> > '... the principal mischief at which regulation 4(3) is aimed should be kept firmly in view, namely that an employer who has the ability to pay a claimant, or other person dependent on supplementary benefit, the full market rate for services should not be enabled to economise on the wages that he pays because the assessment unit is being supported out of a supplementary allowance.'
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> In my judgment, the mischief there referred to embraces the present case. The claimant was in receipt of supplementary benefit, and although there was nothing to prevent her giving her services out of love and affection for no financial return, such generosity, however laudable, should not be at the expense of the supplementary benefit fund. In so far as the recipient of the services was financially able to pay for or make contribution to the costs of such services, in reduction of the claim on the supplementary benefit fund by the provider of those services, the discretion conferred by regulation 4(3) should be exercised to ensure that the recipient made an appropriate payment. Accordingly, in my judgment, both the adjudication officer and the tribunal were right to conclude that a notional payment should be fixed to reflect Andrew's capacity to contribute to the value of the services rendered by the claimant.
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> The only difficult issue in this case is the amount of the contribution."

I quote no further. It suffices to say that the Commissioner considered that the appeal tribunal were wrong in law in the way in which they determined the amount of the contribution. To that matter I shall return.

Mrs. Sharrock now appeals against the Commissioner's decision by leave of this court. Her appeal is and can only be upon a point of law (see Social Security Act 1980 section 14). The grounds of the appeal are:

(1) the Commissioner was wrong in law in holding that the appellant might have attributed to her a notional income in respect of care for her son, and

(2) the Commissioner was wrong in law in holding that the amount of the resource was to be the amount which the son could afford to pay.

The argument before the court focussed upon:

(1) the construction of regulation 4(3);

(2) the ambit of the discretion under regulation 4(3); and

(3) the ascertainment of the amount which may be treated as if it were paid.

Construction of regulation 4(3)

Mr. Rowland for the appellant submitted that the care of the mother for her terminally ill son is not the "performance of a service", it is something done by reason of the affection produced by the family relationship. To fall within regulation 4(3), said Mr. Rowland, some more formal relationship is required than that of the family relationship. Mr. Rowland drew our attention to the phrase "such employment" which occurs in the regulation.

I cannot accept Mr. Rowland's submissions. The phrase "performs for another person a service" is a wide one and is apt to include the service performed by Mrs. Sharrock for her son. For my part, I cannot regard the ordinary meaning of the phrase as coloured by the subsequent phrase "such employment". That phrase as a matter of syntax refers back to "comparable employment". That latter phrase is, as Miss Caws put it, simply a reference point in the calculation of an amount. In sum neither phrase, in my judgment, affects the ordinary meaning of "performs for another person a service." Accordingly, in my judgment, regulation 4(3) does in its terms refer to a person in the circumstances of Mrs. Sharrock.

The ambit of the discretion under regulation 4(3)

There is no dispute but that regulation 4(3) does confer a discretion. That it does so is plain from the employment of the word "may", which can be contrasted with the employment of the word "shall" in adjacent regulations. The exercise of the conferred discretion could be challenged on ordinary public law principles in any particular case. Mr. Rowland sought to persuade us that it was a constrained discretion which could not be exercised adversely to a claimant in Mrs. Sharrock's circumstances, for so to do, he said, would be to create anomalies which the draftsman cannot have intended to create.

The anomaly upon which Mr. Rowland principally relied is this. Let it be assumed that the discretion is exercised adversely to a mother such as Mrs. Sharrock. Then she has three options:

(1) to cease providing the service;

(2) to demand and receive the amount of the attributed payment: or

(3) to do nothing and subsist at an income level below that which she would have if she did not render the service.

Options (1) and (3) do not call for expansion, but as to option (2) it may be observed that, if the service is extended over more than 30 hours a week, as do the services performed for Andrew Sharrock, then the claimant would be in remunerative

full time employment and not eligible for supplementary benefit at all regardless of her requirements (see the Act of 1976 section, 6(1) and the Conditions of Entitlement Regulations 1981, regulation 9).

I find myself unable to constrain what appears as an unconstrained discretion by reference to what could be anomalous consequences. I do not perceive the anomalies as inevitable. Thus, in situation (2) there is no perceptible anomaly if the payment is equal to or exceeds the claimant's requirements. Miss Caws suggested, and I agree, that an anomaly arising can be taken into account in the exercise of the discretion under regulation 4(3). Thus, if the actual payment for 30 hours of service would be less than the claimant's requirements, this would on its face seem a good reason for not exercising the discretion against the claimant. Course (3) also does not necessarily present an anomaly, for the cared recipient of the service could assume a greater share of household expenditure, thereby mitigating the needs of the claimant, and such a mitigation would be the subject of disregard under regulation 11(4)(k) which relates to housing contributions by non-dependant persons.

As I have said, I am unable to construe the discretion as constrained in the circumstances of Mrs. Sharrock. It thus follows that the Commissioner was correct in holding that Mrs. Sharrock fell within regulation 4(3) and that the discretion was available to be exercised against her. The Commissioner saw no reason in law to flaw the tribunal's actual exercise of discretion. None was suggested to us and I, for my part, do no see how the Commissioner's decision on this part of the case can be flawed.

The ascertainment of the amount which may be treated as paid

The amount which may be treated as paid is (with a slight adjustment of language) "an amount of earnings calculated by reference to comparable employment and the means of the person for whom the service is performed." Comparable employment and means have effect as ceilings of amount. Whichever is the lower in a case is the appropriate ceiling in that case. Here the ceiling is means. The comparable employment would produce £700 a week, which it is common ground is outside the means of Andrew Sharrock to pay. Thus we have to focus upon means.

What are means? The adjudication officer treated them as equivalent to excess income on a supplementary benefit calculation. No-one has sought to defend that approach. It equates "means" with the technical concept of "resources" less "requirements" which is not an equation required by the draftsman or by ordinary English, where "means" simply means monetary resources.

Although the word "calculated" which occurs in the regulation suggests an exercise in accountancy, the input to that exercise is, in my view, a matter of judgment. In my view it is for the adjudication officer, or on appeal the social security appeal tribunal, to make an informed judgment as to what are a person's means. This

should not present an experienced person or body with difficulty. Once the judgment is made, then a calculation of the amount of the earnings can undertaken. The quantity of calculation may be small as where, for example, means is judged in weekly terms and payments are weekly. In other cases the calculation may be extensive. Whatever the complexity of the calculation, the input of means remains in my judgment an input formed upon the adjudicating officer's or tribunal's assessment. I admit that two different bodies are capable of different evaluations upon the same facts but, unless either evaluation betrays some self misdirection, neither can be said to be wrong in point of law.

I would add this because there was some discussion upon it. A judgment as to the amount of a person's means and the consequent calculated amount would, in my view, be a legitimate factor to be taken into account in the exercise of the discretion available under regulation 4(3). For example, if the calculated amount following upon the judgment as to means is very small, there may be a case for exercising the discretion in favour of the claimant. However, I would not myself accept any suggestion that, once a judgment as to means is made, there is then a discretion to reduce the judged means or the consequentially calculated amount. The discretion under regulation 4(3) is exerciseable only in regard to the calculated amount. The words "or some part thereof" are, in my judgment, conspicuous by their absence.

The Commissioner here thought that the social security appeal tribunal were wrong in law, and in consequence remitted to another tribunal the question of amount. In March 1991, as we now are, that seems a melancholy prospect when the claim for benefit was made four and three quarter years ago.

The Commissioner said this:

> "The adjudication officer approached the matter in one way, by deciding that the relevant sum should be calculated by reference to the excess of Andrew's resources over his requirements, whilst the tribunal preferred to restrict his liability to the total of his attendance allowance and unemployability supplement. Manifestly, the tribunal were being more generous to the claimant than was the adjudication officer, and I think by the use of the word 'alone' the tribunal realised that they were treating the claimant mercifully.
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> However, Mr. Tempest submitted that both the adjudication officer and the tribunal approached the matter in an incorrect way. The criterion was what the beneficiary of the services could pay. Although it was clear that in the present instance Andrew could forfeit his attendance allowance and unemployability supplement without disastrous consequences, it did not follow that he could not necessarily afford more. An analogy could be drawn with claimants in a nursing home or residential care home who were left with what was in effect pocket money. The tribunal should have considered the full extent of what Andrew could afford, and in this connection they should have taken into account his own personal needs. In Mr. Tempest's submission, the tribunal had in effect been to generous towards the claimant.

> I accept Mr. Tempest's submissions. Accordingly, the tribunal erred in point of law, and I must set aside their decision. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned above. That tribunal will have to determine what Andrew can afford, and this will constitute the notional resource of the claimant for the purposes of calculating her entitlement, if any, to supplementary benefit."

Those observations excite enquiry as to what the social security appeal tribunal said. They said this:

> "The tribunal considered that the situation in the instant case did not lend itself easily to the application of regulation 4(3), since the 'comparable employment' would consist of the service of two nurses commanding wages in all of some £700 per week, clearly way beyond the means of the son. However, the claimant did in fact perform a service to her son, albeit out of maternal devotion, for which otherwise he would have to make some payment. Consequently, bearing in mind that he does in fact make a substantial contribution to the claimant's housing, even though this is disregarded under regulation 11(4)(k) of the Resources Regulations, and that, if he went into hospital, he would lose his constant attendance allowance of £37.50 after four weeks, and £7.76 of his unemployability supplement after eights weeks the tribunal considered that they could properly exercise their discretion in regarding these two amounts alone as the payment which the claimant could be considered as receiving and possessing under regulation 4(3)."

With respect to the tribunal, the use of the word "discretion" is perhaps unfortunate. The word "alone" upon which the Commissioner fastened does not, with respect to the Commissioner and to the tribunal, appear to me to have an effective content. It must, when considering the language employed, be recollected that we are not construing an enactment or a contract. If the word "discretion" is read as "judgment", then I think it is tolerably clear what this experienced tribunal were doing. They looked at the son's complex of pension and allowances and decided that his means to pay for care was represented by the amounts which he would lose were he to go into care at a National Health Service hospital. He would lose his constant attendance allowance and his unemployability supplement. I am not sure for myself that I would have followed the same judgmental route, but I do not consider that the result betrays a misdirection. For my part, I cannot flaw the tribunal and I think, with respect, that the Commissioner was wrong to do so.

I wish to emphasise that I do not wish it to be taken that I am deciding any question of principle in regard to this decision. I merely apply what are well known principles to the language of a particular decision.

I would allow this appeal and restore the determination of the social security appeal tribunal dated 7 January 1988.

SIR CHRISTOPHER SLADE: I agree with the judgment which has just been delivered and only wish to add a little of my own particularly in relation to the first of the two grounds set out in the notice of appeal.

According to its terms regulation 4(3) of the Supplementary Benefit (Resources) Regulations 1981 can apply only in a case where "a member of the assessment unit performs for another person a service". This is a condition precedent which has to be satisfied if the regulation is to apply at all.

On the ordinary use of language, I think that Mrs. Sharrock has been performing services, indeed valuable services, for her son Andrew. At first sight I was nevertheless attracted by Mr. Rowland's submission that the subsequent use in the regulation of the phrase "comparable employment" shows that, in the context of this regulation, the condition precedent is satisfied only in cases where an employer/employee relationship exists between the person accepting the service and the person performing it.

The use of this phrase certainly shows, to my mind, that the service in question must be of a character for which an employer would be willing to pay. On closer consideration, however, I have been persuaded by Miss Caws that the phrase is intended merely as a point of reference for the purpose of ascertaining the market rate for comparable services and cannot be read as restricting the application of the wide phrase "performs for another person a service" to services provided on a commercial or contractual basis. Mr. Rowland, I should add, placed no reliance on the phrase "such employment" (which also appears in the regulation) for this part of his argument because he accepted, I think rightly, that that phrase merely refers back to the phrase "comparable employment" and does not refer to the relationship between the two individuals concerned in the particular case.

Accordingly, I am of the opinion that the adjudication officer and the social security appeal tribunal had the power to apply regulation 4(3) in the present case.

This was, in my opinion, an unsatisfactorily drafted regulation because, while giving the adjudicating officer a discretion either to apply the regulation *in toto* or not to apply it at all, it gave him no guidance as to the factors which should influence him in exercising that discretion. For the reasons given by Lord Justice Mann, however, I am unable to accept Mr. Rowland's submission that, on the facts of this case, that discretion could be properly exercised only one way, that is to say by declining to apply the regulation. In my judgment, the adjudication officer and the social security appeal tribunal were entitled to apply the regulation in relation to Mrs. Sharrock.

As Lord Justice Mann has already pointed out, regulation 4(3) provides in effect for two maximum figures, neither of which must, in my judgment, be exceeded when the tribunal comes to calculate the deemed "amount of earnings" for the purpose of the regulation. One maximum figure is the market rate for comparable employment. The other is the "means" of the recipient of the service. The latter was the only relevant ceiling figure in the present case, since the market rate for comparable employment would on any footing have greatly exceeded Andrew Sharrock's means.

Significantly, the regulation uses the broad word "means" rather than the narrower word "resources" which bears a special technical sense in the social security legislation. The assessment of a person's means for the purposes of the regulation is correspondingly a matter of broad, though informed, judgment for the tribunal. I agree with Lord Justice Mann that, for the purpose of applying the regulation in the present case, the tribunal were entitled to treat the son's means as being £45.26 per week representing the amount of his constant attendance allowance and unemployability supplement, that this was in substance what they did and that correspondingly they did not err in law in deciding that Mrs. Sharrock had deemed earnings of that amount at the date of her claim.

For these reasons shortly expressed and the further reasons given by Lord Justice Mann, I too would allow this appeal and concur in the form of order which he has proposed.

LORD JUSTICE WOOLF: I agree with both judgments and concur with the order proposed by Lord Justice Mann.

Order: Appeal allowed with costs. Legal Aid taxation of Appellant's costs.