WMW/AMB/T/CH

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SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

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1. This claimant's appeal succeeds. I hold the decision of the appeal tribunal dated 14 May 1996 to be erroneous in point of law and accordingly set it aside. I remit the case to the tribunal for determination in accordance with the directions and guidance which follow.

2. This case came before me for a hearing at which the claimant represented himself. The adjudication officer was represented by Mr William Neilson, of the Office of the Solicitor in Scotland to the Department of Social Security. I am indebted to both for their careful and restrained submissions.

3. The claimant has been in right of income support from October 1995. In February 1996 he sought a review of that running award and its revisal by an award of the severe disability premium. He disclosed that another person was resident in his house. That person was referred to as his "daughter" but I have added quotation marks for the reasons which follow below. At all events the adjudication officer ruled that the premium was not applicable to the claimant because he did not satisfy one of the necessary conditions - and it is the only one which was and is and will be in issue in this case. The claimant appealed to the tribunal and the tribunal upheld the decision of the adjudication officer.

4 The qualification at the centre of the case is one familiar in the role of social security law now, namely that prescribed by sub-paragraph 13(2)(a)(ii) of Schedule 2 to the Income Support (General) Regulations 1987. For the purposes of this case that required the claimant to have:-

> "..no non-dependents aged 18 or over normally residing with him.."

There is no doubt that the person in question was aged 18 or over The essence of the matter centres upon the words "normally residing with". Regulation 3(1), helpfully, defines a "non-dependent" as anyone:-

> "..who normally resides with a claimant.."

subject to three exceptions. None of the exceptions seem to have any part to play in this case That will not inhibit the new tribunal should any relevant point be raised. The essence of the case as it stands simply rests on this concept of "normal residence"

5. The tribunal's findings of fact record acceptance of those set out in the adjudication officer's summary of facts. The basis upon which that was done, however, is not disclosed. I intend no criticism in this particular case by that but, for the reasons which will appear below, it now seems as if the claimant may have a dispute with at least the relationship of the person living in his house. That is not, of course, a matter which I have been able to take into account and it has not affected this decision. The tribunal otherwise made these findings of fact:-

> "2. In particular we accept that this gentleman's daughter began to live with him in May 1995 as a result of a marriage breakdown.
>
> 3. We accept the fact put to us in the papers and confirmed by Mrs Ostle that the matrimonial proceedings in which she is engaged have been long, they involved, inter-alia, a hearing on 23 April 1996 and will involve further hearings in October 1996."

Their reasons for decision were these:-

> "We have considered whether by October 1995 this gentleman had this lady normally residing with him.
>
> We have been urged by the claimant to find that this residence was temporary, expected to be of short duration and expected to cease at any moment when this lady was given a council house.
>
> We accept that in the few days possibly even few weeks after starting to live with her father this lady expected to move out fairly soon (either in the context of applications in the matrimonial proceedings or as a result of housing applications made to her local authority).
>
> We do not, however, accept that after 5 months she had the same belief We think that both of them realised by October 1995 that this lady's stay was going to be of protracted duration during which time she normally lived with her father.
>
> We are fortified in this decision by the fact that even now this lady was only able to tell us "I am now on a housing waiting list I will get my own house within 6 months" and the claimant was only able to tell us "when the housing people see a court order they will act upon it" referring to a court order to be made in October 1996."

The claimant now again appeals, with leave of the Chairman. I can dispose of the grounds of appeal immediately because they refer, largely in repetition, to the facts and mount an argument thereon. No point of law is therein focused. The adjudication officer does not support the appeal and submits that the tribunal adequately considered matters and came to a

decision which they were entitled to reach in so far as they accepted that Mrs Ostle began to live with the claimant in May 1995 following the breakdown of her marriage and that given that she had been there for five months prior even to the claim for income support in October 1995, she fell to be regarded as a person who "normally lived with her father" In response the claimant sought the hearing to explain all the circumstances A nominated officer, because of some concern about the equation between "normally lived with" as used by the tribunal in its reasoning and "normally residing with" in the regulations and as to whether one might become the other, granted the request for a hearing and thus the matter came before me. The adjudication officer responded by pointing to Lord Slynn of Hadley's statement in Bate v CAO that "resides with" seems to be intended to have no other than its ordinary meaning and so to amount to no more than:-

"..that the claimant and the other person live in the same dwelling".

6. At the hearing the claimant expanded upon the background to and the facts of the case which are all matters with which I am not concerned, although he will no doubt wish to develop these, perhaps even more fully, before the new tribunal. Mr Neilson argued in favour of the tribunal decision pointing to the length of time that had passed without Mrs Ostle having any other home than that with the claimant. He accepted, as I understood it, that the claimant's house might initially have been regarded as a temporary refuge for a battered wife, but the more time that passed and the more that seemed to be involved in getting her any independent home the more her "normal residence" become that of the claimant. He would not be drawn upon the length of time necessary nor even that length in relation to the previous history, preferring to rely on the tribunal's judgment in the circumstances of this case as one which they were entitled to reach. On intention he submitted that that did not matter unless it could be said that there was an intention soon to depart. He founded also upon there being no question of Mrs Ostle returning to the home which she had left, which also seemed to be least in part based upon the length of time she had lived with the claimant. "Normally" he took to be the essential guidance. It was a question as to whether the residence was temporary or was normal. Since the claimant's home was Mrs Ostle's only home she "normally lived there" The tribunal, he contended, had made adequate findings of fact and had applied their common sense to the situation - primarily the absence of any other possible home, which distinguished this case from those that I put to him in discussion such as an Australian relative on a visit whose return is substantially delayed by factors outside his control. There then was an alternative "residence" - and one where the relative would most usually be found. The tribunal were entitled to reach the conclusions which they did. His submissions effectively reminded me that hard cases make bad law. At one stage he submitted that it did not matter whether people had any control over the time involved: it was a simple question of "just where was she residing" The essential factors, he concluded, were that Mrs Ostle had no other house and given the additional factor of the time involved and the lack of ability to say how much more time might be involved the tribunal had dealt with the matter properly and adequately

7 I have much sympathy with the adjudicating authorities in this case, including the tribunal, but I am not entirely satisfied that the issue has been sufficiently dealt with below. I start with the adjudication officer's point that the issue has really been settled by the dictum of Lord Slynn in Bate. That case, on that occasion before the House of Lords, had as its central relevant issue the question whether, as concluded by the Court of Appeal, "residing

with" indicated a relationship of dominance and subservience in the sense that the person who was resided with had some legal interest in the dwelling and the person who resided with that person was there in a subordinate position. Lord Slynn concluded *in that context* that "residing with" meant "living with" He answered Glidewell L J's suggestion below that for a husband and wife the normal phrase would be that they "lived together" by observing that the act of living together meant that he lived (resided) with her and she lived (resided) with him. But this case concerns not whether there is a relationship between the individuals concerned and its nature but the prior question of what is in law necessary to establish or prove residence. I note that at least one version of the shorter Oxford English Dictionary provides for the definition of "reside".-

> "to dwell permanently or for a considerable time, to have one settled or usual abode, to live, in or at a particular place...."

and the primary meaning of residence repeats the concept about a usual dwelling place or abode. And then there is the word with which Lord Slynn did not deal with, nor had he need to deal with, in circumstances of Bate namely:-

> "normally".

That seems to me to add some emphasis, at least for the purpose of a case such as the present, that the dwelling must be, if not permanently at least for a time sufficient to allow the house concerned to be regarded as, the individual's usual abode. Determination of that issue, as it seems to me, requires a rather deeper consideration than has been provided for this case thus far.

8 The claimant made much before me of some doubt as to whether Mrs Ostle might be his daughter. He emphasised how he had came to know, and the short time that he had actually known, her. I cannot say whether that was a matter set out before the tribunal. So far as I can make out from the manuscript notes of evidence it does not seem to have been raised. The findings of fact refer to her as the claimant's daughter but on the other hand the reasons refer, more than once, to "this lady". That may mean that they were aware of some question about the relationship. The new tribunal will have to determine as clearly as they can the nature of the relationship. The period of time over which the two have known each other, whatever be the relationship, may well also be relevant. In that regard I bear in mind what Lord Slynn also said as to the underlying purpose of the legislation namely:-

> "The scheme of the legislation as I see it is that if a claimant has to make arrangements to enable him to deal with his disability (not just to be housed) then the premium is payable, but that if someone is living with him and able to look after him (or who may be assumed to be likely to look after him) then the premium is not payable."

I should not speculate upon how the evidence may appear to the new tribunal. I can only say that these considerations seem to me to require some care when determining "normal residence" in a case such as the present.

9. The tribunal's reasons open by rehearsal of what the claimant and Mrs Ostle expected about the duration of her stay. They go on to reject that that continued after some time There is nothing in the evidence, far less the findings, to indicate that either of these individuals ever changed their expectations or belief and so it is difficult to see why the tribunal did not accept their expectations. I think that their concentration upon whether they accepted what these two thought or realised - about which again there is no finding of fact or even material in the evidence - persuaded the tribunal that the stay was to be protracted and so "she normally lived with" the claimant. I am not clear that they really had in mind the essential essential of "residence" as discussed above, far less the weight to be attached to it by the concept of "normally". That, together with the rejection of a belief or understanding which has, at best, been imperfectly explored in the evidence and is without adequate explanation seem to me to amount to at least two errors of law upon the basis of which I am entitled to set aside the decision. Moreover, the test fell to be applied as at the date of the claimant's application for the premium. I do not think that the tribunal clearly excluded subsequent events, including the continuing effluxion on time, from their consideration as at that date. Of course the subsequent passage of time, like other subsequent events may indicate a relevant change of circumstances and to that extent have some later bearing upon the decision: but that decision must first be made.

10 I turn now, to the guidance which I think the new tribunal may require It is not possible to lay down guidelines as to all the factors that may be relevant to the determination of a "normal residence" question. In CSIS/76/91 I observed that whether or not someone was normally residing with another is an intensely practical question for a tribunal to answer in light of their common sense. Arising out of the submissions now made to me I consider that I can provide but little further guidance. I have concluded that it may, and in this case will be, relevant to consider the reason why the residence started; the relationship, if any, including its history, between those concerned; the motivations involved; the purpose for which the residence has been taken up; its duration and, as a matter of secondary determination, whether that is within or exceeds what might be expected from time to time having regard to the purpose: and of course whether there is any alternative house in which residence is or could be taken up. In this particular case if Mrs Ostle was at the start virtually unknown to the claimant, as he suggested to me, although it will be for the tribunal alone to consider and determine the matter, then whether or not there was any actual relationship between them of a family nature one might be rather slower to conclude, even with the passage of time, that she was normally resident with the claimant, having regard to the underlying purpose of the Act as explained by Lord Slynn, than were she a close relative well known to the claimant over many years. And possibly even longer if there was no relationship. Further, if somebody takes another into their house "whilst they seek a council house of their own" that may indicate a general acceptance of a longish term but yet be a relative weak pointer to the answer for the "normal residence" question than if there was no such reason. It is for the tribunal and not for me to consider whether what the claimant and Mrs Ostle did in respect of seeking to get her an alternative home was within what, in the area, would be accepted as reasonable or not. In this case, moreover, it is not clear whether the claimant had any possible recourse to her former home. Thus had she been a co-owner or co-tenant she might well have been able to take steps to obtain or regain possession of it. No steps in that regard might strengthen the adjudication officer's case. Equally if, as was suggested to me but again it will be for the tribunal to determine to what if any extent they accept the evidence, the relevant court has kept postponing determining the issue of custody and so in effect

postponing any resolution of an alternative house for Mrs Ostle. That may mean that the time involved should be discounted, substantially or in whole, when considering the extent to which the overall time span of being in the claimant's house establishes "habitual residence". These are the sort of factors that I would expect a tribunal to seek to consider although the extent to which they make findings about them and the weight which they decide to give them will be for them to determine in light of the evidence put before them and their common sense.

11. It is essentially because I doubt whether this tribunal has dealt with the matter in sufficient depth, and I appreciate it is a relatively novel matter so far as this branch of social security jurisprudence is concerned, that the case must be returned for determination in line with the guidance given above.

(signed)
W M WALKER QC
Commissioner
Date: 18 February 1997