THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CIS/1586/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER JACOBS

Claimant:
Tribunal:
Tribunal's Case No:

Decision:

1. My decision is as follows. It is given under section 23(7)(b) of the Social Security Administration Act 1992.

1.1 The decision of the Rochdale Social Security Appeal Tribunal held on 8th July 1996 is erroneous in point of law: see paragraph 8.

1.2 Accordingly, I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted tribunal for determination.

1.3 I direct the tribunal that rehears this case to conduct a complete rehearing. In particular, the tribunal must deal with the case in accordance with my directions in paragraphs 10 to 26.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the tribunal brought by the claimant with the leave of the tribunal's chairman. The adjudication officer supports the appeal.

The adjudication officer's decision

3. The claimant claimed Income Support on 31st October 1995. The adjudication officer refused the claim on the ground that the claimant was to be treated as having savings of £14,000.

4. The background to the adjudication officer's decision is this. The claimant sold the house in which he was living to his daughter. The sale price was £25,000. £14,662.71 remained after repaying the mortgage debt and meeting the expenses of the sale. The deposit "paid" by his daughter was £5,000 and the claimant's solicitor held a receipt that this money had been paid. However, the claimant returned this money to his daughter to allow her to pay the deposit. The claimant did not intend that his daughter should repay this money to him, as she had lent him money in the past and this would, wholly or partly, repay that debt. The claimant said that the remainder of the money was spent on repaying debts.

The tribunal's decision

5. The claimant appealed against that decision to the tribunal. The tribunal decided that only £9,662.71 was to be treated as the claimant's savings.

6. The tribunal did not explain how it reached this figure. It is the difference between the balance of the purchase price owing to the claimant and the deposit of £5,000. It is fair to take the tribunal's reasons as meaning that this was how it arrived at the figure, although this is not stated in so many words. The presenting officer at the hearing had agreed to what she called a "disregard" of £5,000, but the chairman's record of proceedings does not say why she did so.

7. The tribunal found that the claimant had spent money in the region of £7,000 on his daughter's wedding and on a pilgrimage to Mecca, which he could only have hoped to repay by selling his house. He had done so recklessly and with the intention of depriving himself of capital in order to obtain Income Support. (In fact, he was at the time of the sale in receipt of Income Support. So, he could onlyhave intended to retain entitlement.)

The support for the appeal

8. The adjudication officer submits that the tribunal's decision was erroneous in law for failing to deal with, and explain its reasoning on, all the issues arising for decision. I accept that submission.

Directions for the rehearing

9. I direct the tribunal to approach the rehearing of the case as follows.

10. The questions which arise in a case such as the present are:

(a) How much actual capital did the claimant possess at the start of the period under consideration?

(b) For each alleged deprivation of capital, is the tribunal satisfied that it? If not, no reduction in the claimant's actual capital occurred.

(c) If the tribunal is so satisfied, did the claimant know of the capital limit rule at the time? If not, the tribunal need not consider notional capital.

(d) If the claimant did know of the capital limit rule, (i) what was the value of the deprivation and (ii) for what purpose or purposes was it made?

(e) Is any part of the claimant's capital (actual or notional) to be disregarded?

(f) If the claimant has notional capital, will the diminishing notional capital rule affect the case and, if so, how?

11. The tribunal must deal with each of these questions that arises for decision on the evidence or by contention of one of the parties to the proceedings. In particular, the tribunal must consider the following.

Actual capital

12. The tribunal must identify the actual capital which the claimant had initially possessed.

13. At the date of claim, the claimant had £542.33 in a bank account (page 29). There may have been uncleared cheques on that account (page 3). Did the contents of that account represent the whole of the claimant's capital?

14. The claimant opened the account when he received the balance of the purchase price from his solicitor (page 27). Did he have any bank account before this? Did he retain that account? How much was in it?

15. The papers contain a number of receipts for sums paid by the claimant. The dates on the receipts are not always clear, but some are dated in November 1995. When was the money paid to which these receipts relate? Where did the money come from?

16. At least one of the receipts relates to a payment by two cheques (page 25). Were the cheques written in November? If so, where was the money to cover them? If the cheques were written earlier, which cheques on the bank statements does the receipt refer to?

17. Some of the receipts may relate to cash payments. The claimant drew a cheque of £3050 to himself for cash on 11th September (pages 28 and 44). Was this still being used to make payments in November? Was the money still in his hands, although not in his account?

Deprivations

18. For each alleged deprivation of capital, the tribunal must identify the amount and the date. Then the tribunal must decide whether the evidence shows that it occurred. The burden is on the claimant to show this. If the claimant cannot account explain to the satisfaction of the tribunal what has happened to certain money, it must be treated as having remained as actual capital.

19. It is only when the tribunal is satisfied that a deprivation occurred that any question of notional capital arises.

20. In theory, the claimant repaid the deposit paid by his daughter. In reality, money probably never changed hands. Either the claimant in effect sold his house for £5,000 than the apparent sale price or he released his daughter from paying £5,000 of that price. The precise manner in which this part of the transaction took place is not clear from the papers. The tribunal must decide whether this amounted to a "deprivation" of capital by the claimant. Deprivation is an ordinary English word. It is, however, appropriate for me to direct that a sale at a known undervalue and the release of a debtor from a debt are capable of amounting to deprivation. There is support for this in the obiter comment of the Commissioner in CSB/598/1987, paragraph 11.

Knowledge of the capital limit rule

21. In this case, the claimant said in a statement in November 1995 that he "was aware" of the capital limit rule. He did not say when he became aware. He certainly knew by early October, as his award of Income Support was terminated because of his receipt of the proceeds of sale of his house.

22. Capital will be treated as still possessed by the claimant if he deprived himself of it for the purpose of securing entitlement to Income Support or increasing the amount of that benefit: see regulation 51(1) of the Income Support (General) Regulations 1987. There can be no deprivation for such a purpose if the claimant did not know that the disposal could have any

affect on entitlement to Income Support, because in the absence of such knowledge it is impossible for a claimant to formulate the necessary purpose. So, the tribunal must enquire and decide when the claimant first knew of the capital limit rule. Any deprivation before that time cannot be treated as notional capital. It is not sufficient that the claimant should have known: see the decision of the Commissioner in CIS/124/1990, paragraph 11.

The purpose of the deprivation

23. If the claimant had the necessary knowledge, the question to ask in respect of each deprivation was: did it have as the, or a, significant operative purpose the obtaining or continuation of an award, or an increased award, of Income Support? If the answer was "yes", the value of the deprivation was to be treated as the claimant's capital. If the answer was "no", the claimant's capital was reduced by the amount of the deprivation. See the decision of the Commissioner in R(SB) 40/85, paragraph 10. In answering the question, the tribunal is not bound to accept the claimant's explanation, but must decide on the basis of the facts and circumstances of the case as a whole whether the explanation is credible.

The payment of debts

24. In dealing with notional capital and the use of money received to pay debts, the tribunal will find it helpful to refer to the decision of the Commissioner in R(SB) 12/91, paragraphs 11 to 15. The tribunal will be concerned with the repayment of the alleged debts. It is this which amounted to the deprivation of capital. Of course, the tribunal must be satisfied that the debts were incurred. However, it is not concerned with the purpose for which the money was borrowed, only with the purpose for which it was repaid.

The diminishing notional capital rule

25. Regulation 51A of the Income Support (General) Regulations 1987 provides for a claimant's notional capital to reduce in accordance with a specified formula. Unless there is a relevant decision that ends the tribunal's jurisdiction earlier, the tribunal has to consider the case down to the date of hearing. If the effect of the diminishing notional capital rule is likely to have an impact on the claimant's entitlement to Income Support before that date, the tribunal should apply the rule. If, however, it is clear that even by the date of the hearing the claimant's entitlement will not be affected by the rule, the tribunal need not apply it.

A broadbrush or a precise approach?

26. The tribunal must ask itself the questions I have set out. Generally speaking, the tribunal must make precise findings on all of the issues arising for decision. However, in two cases the tribunal is entitled to bypass these detailed considerations and take a more broadbrush approach to the case.

26.1 First, in assessing the evidence, the tribunal is entitled to stand back from the individual questions and decide overall how credible or reliable the claimant's explanation is.

26.2 Second, it may be that in the circumstances of the case, the tribunal can sufficiently deal with the case for the whole of the period within its jurisdiction by reaching a decision on the particular deprivations that in total exceed the capital limit throughout the relevant period even after making allowance for the diminishing notional capital rule.

Summary

27. The tribunal's decision is erroneous in law and must be set aside. It is not appropriate for me to give the decision that the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal. The tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions. As my jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the tribunal on the law to apply.

Signed: **Edward Jacobs**
Commissioner

Date: **20th January 1999**