

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 26th January 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference ST/4384/19/51/P.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I make a decision under Article 15(8)(a) of the Social Security (NI) Order 1998, without hearing further evidence, to the effect that the capital value of the property referred to in these proceedings, which is part-owned by the appellant, is nil.
3. I refer the claim to the Department for a decision on entitlement, taking into account all other evidence relevant to the conditions of entitlement to ESA.

REASONS

Background

4. The appellant had been in receipt of contributory employment and support allowance (ESA) from the Department for Communities (the Department) from 22 March 2012 on the basis of incapacity for work. Following exhaustion of his entitlement to contributory ESA, the claim was reassessed as a claim for income related ESA. On 10 October 2018 it was determined that the appellant was part-owner of a property not occupied as his home which fell to be treated as capital. The Department assessed the value of this as £26,300.30. As this figure was in excess of the capital limit for entitlement to income based ESA, the Department decided that the appellant's entitlement was nil. It made a decision superseding and

disallowing the appellant's award of ESA. The appellant requested a reconsideration. Land and Property Services (LPS) – part of the Department of Finance in Northern Ireland – subsequently assessed the value of the appellant's half-share in the property as £22,000. The decision was reconsidered by the Department, accepting the lower capital valuation of £22,000, but as this amount still exceeded the capital limit, the outcome was not revised. The appellant appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 26 January 2021. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 21 April 2021. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was refused by a determination issued on 14 June 2021. On 23 September 2021 the appellant, through his solicitor, applied for leave to appeal from a Social Security Commissioner.
6. The application was received after the expiry of the relevant statutory time limit. However, on 3 November 2021 the Chief Social Security Commissioner admitted the late appeal for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

7. The appellant, represented by Oliver Roche and Co (Solicitors), submits that the tribunal has erred in law on the basis that the value of the property in issue falls to be disregarded, as it is occupied by his ex-wife who has limited capacity for work. In making this application, the appellant referred to Departmental guidance prepared for the purposes of universal credit (UC).
8. The Department was invited to make observations on the appellant's grounds. Ms Toner of Decision Making Services (DMS) responded on behalf of the Department. She submitted that the tribunal had not erred in law as alleged, but indicated that the Department supported the application on other grounds, namely whether there was a real world market for the appellant's half-share in the property occupied by his ex-wife.

The tribunal's decision

9. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, which included a copy of the claim form and decisions in the case, along with a valuation report from LPS. This assessed the unencumbered value of the appellant's property as £70,000. However, as the property was jointly owned by his ex-wife, who was unwilling to sell, it assessed a sale value of £22,000, premised on the likelihood of a court ordered sale of the property.

10. The case was made by the appellant that:
- (i) premises occupied by a former partner are not taken into consideration where the former partner has limited capacity for work;
 - (ii) premises occupied by a former partner should be disregarded where the claimant and the former partner are not estranged but living apart by force of circumstance;
 - (iii) it would be impracticable for the appellant to force his estranged wife out of the house as the property had been adapted to her disability needs and the appellant could not force her to sell.
11. The tribunal addressed the issue of whether any capital disregards applied in the circumstances, finding that they did not. It found that the appellant's ex-wife was not a partner or relative for the purposes of paragraph 4(a) of Schedule 9. In light of conflicting evidence, it preferred the version that the appellant's ex-wife was estranged, and therefore that she did not fall within paragraph 4(b). It accepted the capital valuation of £22,000 and found that the appellant had capital in excess of the statutory limit, disallowing his appeal.

Relevant legislation

12. The capital limit for income related ESA is set by regulation 110 of the Employment and Support Allowance (NI) Regulations 2008 (the 2008 Regulations). It provides:

“110. —(1) For the purposes of paragraph 6(1)(b) of Schedule 1 to the Act as it applies to an income related allowance (no entitlement to benefit if capital exceeds prescribed amount), the prescribed amount is £16,000.

13. Assessment of capital is governed by regulation 111 of the 2008 Regulations. It provides:

“111.—(1) For the purposes of sections 1(2) and 4 of, and Part 2 of Schedule 1 to, the Act as it applies to an income-related allowance, the capital of a claimant to be taken into account is, subject to paragraph (2), to be the whole of the claimant's capital calculated in accordance with this Part and any income treated as capital under regulation 112 (income treated as capital).

14. The relevant disregards are set out at paragraphs 1-55 in Schedule 9 of the 2008 Regulations. These include:

...

4. Any premises or land occupied in whole or in part by—

(a) a partner or relative of a single claimant or any member of the family as the home where that person has attained the qualifying age for state pension credit or is incapacitated;

(b) the former partner of a claimant as the home; but this provision is not to apply where the former partner is a person from whom the claimant is estranged or divorced or with whom the person formed a civil partnership that has been dissolved.

Assessment

15. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
16. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
17. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
18. The grounds advanced by the appellant, represented by Oliver Roche (Solicitors), were that the appellant's ex-wife had limited capacity for work and that the value of the property should be disregarded, submitting a section on capital disregards from the Departmental guidance relating to universal credit (UC).
19. The Department did not support this ground, but offered support for the application on different grounds. As support has been offered by the Department, albeit on a different basis to that advanced by the appellant, I consider that there is an arguable case and I grant leave to appeal.
20. It appears to me that the submission of the appellant – based as it is on guidance relating to UC – is not well founded. The guidance relied upon is itself derived from legislation – namely paragraph 2 of Schedule 10 to the Universal Credit Regulations (NI) 2016. The relevant provision appears in the list of capital to be disregarded and reads:
 2. Premises occupied by a close relative of a person as their home where that close relative has limited capability for work or has reached the qualifying age for state pension credit.

21. "Close relative" is defined by regulation 2 of the UC Regulations and the definition does not include the claimant's spouse/partner or former spouse/partner.
22. However, this is not a claim for UC but rather income related ESA. The relevant legislation on capital disregards in an ESA case would be Schedule 9 to the Employment and Support Allowance Regulations (NI) 2008. It follows that the appellant does not establish an arguable case on this basis, as his case is not based upon the relevant legislation. Moreover, the appellant's former partner does not fall within the relevant definition of "close relative" and it appears to me that the circumstances of the case do not fall within the legislation relied upon in any event.
23. Even allowing for an accidental error in the appellant's submission and assuming that the intended reference was to the ESA Regulations, the equivalent provision is paragraph 4 of Schedule 9. This appears in the list of capital to be disregarded and reads:

...

 4. Any premises or land occupied in whole or in part by—
 - (a) a partner or relative of a single claimant or any member of the family as the home where that person has attained the qualifying age for state pension credit or is incapacitated;
 - (b) the former partner of a claimant as the home; but this provision is not to apply where the former partner is a person from whom the claimant is estranged or divorced or with whom the person formed a civil partnership that has been dissolved.
24. The premises in the present case are occupied by the appellant's wife, who the tribunal noted had been described by the appellant as his "estranged wife" and "estranged spouse". It found that the capital disregard did not apply in the present case as the circumstances fell within paragraph 4(b). This conclusion was inevitable from the evidence and law and it is not arguable that the tribunal has erred in law in this respect.
25. Nevertheless, as indicated above, the application has found support from the Department on a different basis. Ms Toner has referred to a strand of case law relating to valuation that has relevance to the particular circumstances of the case. She referred to the decision of the Social Security Commissioner in Great Britain, reported as *R(JSA)1/02*, which had been endorsed by the former Chief Commissioner in *C23/02-03(IS)* at paragraph 18. She made further reference to *R(IS)5/07* and the Upper Tribunal decision in *AM v Secretary of State for Work and Pensions* [2010] UKUT 134, submitting that although those cases dealt with different benefits, the general principles derived from them could be applied equally to ESA. She further referred to my own decisions in *GB -v- Department for Social Development* [2015] NI Com 62 and *GE-v-Department for Social*

Development [2016] NI Com73, where the existence of a real world market for a half-share interest in a property with an occupier unwilling to sell was queried.

26. Ms Toner noted that an assumption underpinning those cases was that the courts would be unwilling to force a sale. She submitted that, given the particulars of the present case, it was uncertain whether a court would force a sale, as the valuer had assumed. She submitted that the tribunal should have scrutinised the accuracy of the valuation and that the reconsidered report was not adequate for the purposes of establishing the value of the appellant's interest for the purposes of his claim to benefit. She submitted that the tribunal had erred in law by accepting the LPS valuation in the absence of any reference to whether there was a real world market for the sale of the appellant's share of the property.
27. I consider that there is force in the submissions advanced by the Department in the appellant's interest. I allow the appeal and I set aside the decision of the appeal tribunal.
28. On the evidence available to me I consider that I am in a position to give the decision that the tribunal should have done. I consider that the capital value of the property occupied by the appellant's ex-wife is nil. In the absence of further findings, I cannot be sure that the appellant would meet all other conditions of entitlement to ESA. Therefore, I refer the matter to the Department for a decision on other aspects of entitlement, apart from the issue of the capital value of the property part-owned by the appellant but not occupied as his home.

(signed): O Stockman

Commissioner

02 February 2022