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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref:	CARC3692
Delivered:	04/07/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

THOMAS FRANK KERR

(Claimant) Appellant

and

DEPARTMENT FOR SOCIAL DEVELOPMENT

(Respondent) Respondent

_____

CARSWELL LCJ

This is an appeal by way of case stated from a decision of the Chief Social Security Commissioner for Northern Ireland (the Commissioner) dated 15 May 2001, whereby he upheld the decision of a Social Security Appeal Tribunal given on 2 December 1999 dismissing the appellant's claim to be entitled to a Social Fund payment of £1172.58 in respect of funeral expenses incurred on the death of his brother, who died on 27 July 1999.

Provision for payment of funeral expenses out of the Social Fund is made by section 134 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, under which the payments are to be made in circumstances prescribed by regulations. The applicable regulations are the

Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987 (the 1987 Regulations). The material parts of Regulation 6 of these regulations, which have been framed with the Byzantine complexity customary in social security legislation, may for present purposes be conveniently summarised in the following propositions:

1. The funeral must be that of a deceased person who was ordinarily resident in the United Kingdom and must take place in the United Kingdom.
2. Where the deceased was an adult who did not have a partner or leave any immediate family member (defined as a parent, son or daughter), payment may be made to a responsible person who is a close relative of the deceased (defined as constituting a range of relatives, including siblings), where it is reasonable for the responsible person to accept responsibility for the funeral expenses. That is to be determined by the nature and extent of that person's contact with the deceased.
3. The responsible person is not entitled to a payment where he is an immediate family member, a close relative or close friend of the deceased unless one of the conditions set out in Regulation 6(4) applies, the material one being that he is in receipt of one of several specified social security benefits.
4. Regulation 6(6) contains a further exception, with which the present case is concerned. This paragraph, omitting immaterial wording, provides:

> " … in a case where the deceased had one or more close relatives … if on comparing the nature and extent of any close relative's contact with the deceased, any such close relative was –
>
> (a) in closer contact with the deceased than the responsible person;
>
> (b) in equally close contact with the deceased and neither that close relative nor his partner, if he has one, has been awarded a [relevant] benefit … ; or
>
> (c) in equally close contact with the deceased and possesses, together with his partner, if he has one, more capital than the responsible person and that capital exceeds [the specified amounts]
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> the responsible person shall not be entitled to a funeral payment under these Regulations in respect of those expenses."

5. By Regulation 7(1) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 a claimant is under an obligation to furnish information:

> " … every person who makes a claim for benefit shall furnish such certificates, documents information and evidence in connection with the claim, or any question arising out of it, as may be required by the Department … "

The appellant was the elder brother of the deceased. At the death of the deceased he had another brother and a sister living. The Social Security Appeal Tribunal found that –

> " … for many years he and his brothers and sisters drifted apart and lost contact with each other. This has been to such an extent that the claimant is unsure of their addresses or circumstances … The claimant was too ill to attend the funeral and does not know if his surviving brother or sister

> attended or whether they are in receipt of a relevant benefit … The claimant is in receipt of a qualifying benefit viz housing benefit."

The tribunal was of opinion that it was reasonable for the appellant to accept responsibility for the funeral expenses, but that that did not end the matter. It held on the evidence that –

> " … it cannot be established one had more contact than the other. The evidence is that all the brothers and sisters drifted apart over the preceding 20 years. The most that can be said is that they had equal contact or perhaps more accurately an equal lack of contact. On the evidence it certainly cannot be established the claimant had more contact. He himself argued he had no contact."

The tribunal went on to hold that it simply was not known whether any of the close relatives of the deceased was in receipt of a relevant benefit, and the same applied to their capital position. It appears to have accepted, however, that the appellant had supplied all the information that he could.

The tribunal concluded that the onus was on the appellant to show that his brother or sister was in receipt of a relevant benefit and did not have capital over the prescribed amount, which he was unable to prove, with the consequence that his claim failed. It expressed its reasons as follows:

> "In the view of the Tribunal where this situation pertains the burden of proof is on the claimant to establish that other relative is on a relevant benefit. The Tribunal can envisage hardship on this approach, for instance, as in the present case, where the circumstances of the other relative is unknown or they live abroad where they could not receive a relevant benefit. However unfairly this may operate in individual cases the Tribunal interprets the legislation as placing the onus on the

> claimant to establish entitlement. Consequently, as he cannot establish if his brother and sister are on a relevant benefit and do not have relevant capital his claim fails."

On appeal before the Commissioner it was submitted on behalf of the appellant that the tribunal was in error in its conclusion concerning the burden of proof. It was also argued that contact with the deceased could include contact after death. The Commissioner rejected the latter argument, holding, in my opinion correctly, that the contact required by the legislation must be contact during the lifetime of the deceased, though the taking of responsibility for a funeral can be supportive evidence of the quality and nature of a relationship during his life. On the issue of the burden of proof the Commissioner followed a decision of Mr Commissioner Henty in *CIS/5321/98*, where he said at paragraph 7 of his decision:

> " … insofar as the burden of proof plays any part in the matter, marginally, it lies on the AO. However, in my view, as a general rule appeals should not be decided by reference to the burden of proof. Moreover, a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn."

In agreeing with this the Commissioner stated at paragraph 17 of his decision:

> "Accordingly it seems to me that a claimant has to prove the basic qualifications by proving the circumstances that make him or her entitled, whilst the Department normally has to prove any exceptions such as those matters set out in regulation 6(3). However the last sentence of the quotation from Mr Commissioner Henty's decision gives a guide that a pragmatic approach must be taken by Tribunals."

He expressed his conclusion in paragraphs 25 to 27:

> "25. Therefore, to summarize, I conclude that the Tribunal decided that no one had "closer contact" than the claimant but the other siblings were in "equally close contact" or had "an equal amount of lack of contact", which constitutes, in the particular circumstances of this case, a finding of "equally close contact".
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> 26. It is understandable that the Tribunal did not describe any of the relationships as close but this merely reflects the appropriate approach in the context of the evidence in this case. It does not appear to be an error in law.
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> 27. Once the Tribunal has found all the siblings are equal then the question turns to finances and the burden of proof. Who has to show that the siblings had no capital or were in receipt of benefit? It seems to me that a burden might be on the Department if there is sufficient evidence to enable the Department to make relevant enquiries. However, as Mr Commissioner Henty stated in *CIS/5321/98* (quoted at paragraph 17 herein), "the claimant must to the best of his or her ability give" such information to the Department "as he reasonably can". Siblings are, on balance, expected to have some knowledge of each other and must be expected to provide basic information to the Department or at the very least show that they have taken all reasonable steps to obtain such information. In my view the Tribunal's approach set out in the last four sentences of its reasons [see paragraph 6 herein] is the correct course to take in the present circumstances."

On appeal before us Mr McLaughlin for the appellant submitted that whereas the claimant had to bear the burden of proving the entitling provisions, it shifted to the Department when it came to disqualifying provisions such as Regulation 6(6). He argued that this had been correctly recognised by Mr Commissioner Henty in *CIS/5321/98*, and that the Chief

Social Security Commissioner had been right to accept that statement of the law, He had, however, failed to apply it correctly when he affirmed the decision of the Appeal Tribunal, which had confused entitling provisions with disqualifying ones. Mr McLaughlin further argued that there was insufficient evidence to justify the conclusion reached by the Appeal Tribunal and the Commissioner that the appellant's siblings had been in equally close contact with the deceased.

Mr Maguire on behalf of the respondent Department relied on two main propositions:

1. Regulation 6(6) of the 1987 Regulations is not a disqualifying provision but an entitling provision, expressed in negative terms, which a claimant has to satisfy by proving the matters specified in it. This conclusion is supported by the fact that it was intended as an anti-abuse provision. If the burden of proof were on the Department, a claimant would be entitled to payment of the benefit if he failed to produce any evidence about his close relatives or even if he deliberately withheld such evidence.
2. The Commissioner was entitled to find that since on the evidence neither the appellant nor his brother or sister had had any contact with the deceased for twenty years, they were in equally close contact with him.

Under Regulation 6(6) the adjudicating officer has to compare the nature and extent of the contact with the deceased of the responsible person

with that of other persons who were close relatives. If any such close relative was in equally close contact with the deceased, then it is necessary to ascertain whether that relative had been awarded a relevant benefit or possessed capital of the specified amount. It may be observed that the test is not framed in terms of estrangement, as in Regulation 6(3). Estrangement has a connotation of an alienation of feeling and affection, whereas the evidence may be, as in the present case, that the deceased and his relatives merely drifted apart: cf *CIS/5321/98* at paragraph 8, which I would regard as a correct approach. The essence of the present case was succinctly expressed by the Appeal Tribunal, that the siblings had an equal amount of lack of contact. I would agree with the Commissioner's conclusion that the Appeal Tribunal applied the correct test, even though it omitted reference to the word "close". I also agree with his opinion expressed at paragraph 25 of his decision that an equal amount of lack of close contact can constitute equally close contact within the meaning of Regulation 6(6).

The legislature has not expressly specified on which party the burden of proof lies and it is necessary to attempt to ascertain that by implication or by the application of any relevant rules of construction or presumptions. The distinction between provisos and exceptions, which is discussed in Bennion, *Statutory Interpretation,* 3rd ed, pp 556-8, might be invoked. It was formerly of some importance in the criminal law, but it is less so now and I do not find it of assistance in the present task. I incline to the view that a more useful indication may be found in two principles of interpretation. The first is the

rule, described by Lord Wilberforce in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 at 130 as

> "the orthodox principle (common to both the criminal and the civil law) that exceptions, etc., are to be set up by those who rely on them."

The second is the principle that where a matter requiring proof is particularly within the knowledge of one party and it would be unduly onerous for the other to have to prove it, the burden lies on the former. This was propounded as a general rule by Bayley J in respect of negative averments in the old criminal case of *R v Turner* (1816) 5 M & S 211, but in the modern law it might be regarded as rather wider in scope but less general in its application.

In *Nimmo v Alexander Cowan & Sons Ltd* the House of Lords held by a majority that in a prosecution under section 29(1) of the Factories Act 1961 the burden of proving that it was not reasonably practicable to make and keep a place of work safe rested upon the defendant employer. In reaching this conclusion Lord Upjohn referred at pages 124-5 to the presumption that that construction should be presumed to be correct which appears to be most in accord with convenience, reason, justice and legal principles. Although not conclusive in all cases, the difficulty for a plaintiff in a civil action based on section 29 of proving impracticability was a pointer towards the intention that the burden should rest upon the defendant.

Similarly in *Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd* [1942] AC 154, although it concerned the construction of a charterparty and not of a statute, the difficulties involved in producing

evidence weighed heavily in determining where the onus of proof lay. In that case charterers claimed damages from the shipowners for breach of charterparty. The defence was that the contract had been frustrated by the destruction of the ship, which would have exonerated the shipowners if it occurred without fault on their part. The cause of the destruction was unclear and the argument centred round the burden of proving or disproving fault. The House of Lords held that it would be unduly onerous to require the shipowners to prove a negative, the absence of fault. The reality was that the charterers asserted the existence of fault and should be required to prove it.

In the present case arguments *ab inconvenienti* can be stated on either side. It may be said that it is less onerous for a claimant than for the Department to establish the identity and whereabouts of his close relatives and the degree of closeness of contact that each had with the deceased. On the other hand, it could be very difficult indeed for him to establish that they had all been awarded relevant benefit or that the capital possessed by each did not exceed the specified amount. The latter factor, taken together with the fact that Regulation 6(6) of the 1987 Regulations takes the form of an exception, leads me to the conclusion that it was the intention of the legislature that the burden of proof of establishing that the exception contained in Regulation 6(6) applies should rest upon the Department.

Mr Maguire's argument concerning the situation which would result if a claimant withheld the evidence about close relatives required to determine his entitlement to funeral benefit is in my opinion based on an unsound

premise. I do not find it possible to accept the suggestion that in such a case the Department has no power to refuse payment. Mr Maguire based his argument on a statement in paragraph 14 of Mr Commissioner Mesher's decision in *R (IS) 4/93,* where he said:

> "If a claimant is thought by the adjudication officer to have provided insufficient evidence on a relevant issue, where the burden of proof is on the claimant to make out his claim, that issue should be decided against the claimant. Thus, here, since the adjudication officer considered that the claimant had provided insufficient evidence to show that his actual and notional capital was within the then current limit of £6,000, he should have determined the amount of actual and notional capital which the claimant possessed and determined that he was not entitled to income support by reason of section 22(6) of the Social Security Act 1986, which applies the capital limit. It is not in itself a ground of disentitlement to income support that a claimant has failed to provide sufficient evidence to support his claim. But the result of such a failure will be that he fails to prove some essential element of entitlement."

Counsel argued that it followed from this statement that where the burden of proof was on the Department the claimant was not disentitled to benefit if he failed to provide the evidence. The anti-avoidance provision in Regulation 6(6) could be rendered inefficacious by a careless or unscrupulous claimant. This accordingly was a pointer to the conclusion that it was not intended that the burden of proof on the issue should rest on the Department. If Mr Commissioner Mesher intended to hold that failure to comply with the statutory obligation to furnish evidence has no effect other than to leave the claim short of the necessary evidential foundation, I should not find it

possible to agree with that conclusion, which would make the provision of Regulation 7 of the social Security (Claims and Payments) Regulations (Northern Ireland) 1987 otiose. It seems to me rather that it was intended to impose an obligation on the claimant fulfilment of which is a condition of entitlement to claim benefit and that failure to comply with the statutory requirement entitles the Department to withhold payment on his claim. It is to be noted that in the present case, perhaps exceptionally in such circumstances, it was accepted that there was no deliberate intent on the appellant's part to mislead, even though his claim contained incorrect statements.

I would therefore hold that the Appeal Tribunal and the Commissioner were in error in imposing the burden on the appellant of proving that the case did not come within the exception contained in Regulation 6(6) of the 1987 Regulations. In the absence of evidence relating to the matters material to that exception the appellant is accordingly entitled to succeed in his claim.

It was agreed that the questions posed in the case stated require reformulation, but instead of the revised version propounded on behalf of the Department I would frame them in the following terms:

1. On the facts proved or admitted was I entitled to hold that the appellant's brother and sister were in equal contact with the deceased?

2. Was I correct in law in holding that the burden lay on the appellant to prove that his brother and sister had been awarded a relevant benefit and did not possess capital of the specified amount?

I would answer question 1 in the affirmative and question 2 in the negative and allow the appeal.