

Benefit fraud

David Winch, September 2009

In this article I cover some key points relating to benefit fraud from the perspective of a forensic accountant who is often instructed on behalf of defendants in such cases.

Typically the client will be charged with one or more offences under the Social Security Administration Act 1992 (SSAA 1992). Sometimes a domestic partner may also be charged. (This article does not deal with fraudulent claims for tax credits, which are prosecuted under the Tax Credits Act 2002.)

The relevant provisions of SSAA1992 are not the easiest piece of legislation to follow as they have been amended – and the amendments have themselves been amended! Even prosecutors are apt to quote incorrect section references, which can add to the confusion. An important difference is that the more serious offences under section 111A (which carry a maximum sentence of seven years imprisonment) necessarily involve dishonesty, whereas the summary offences under section 112 do not.

Fraudulent claims

In practice most criminal charges fall into one of three types. These allege:

- A claim has been made for benefit which was illegitimate from the start, contrary to s111A(1) or s112(1);
- Claims initially were legitimate but have continued illegitimately despite a change of circumstances, contrary to s111A(1A) or s112(1A); or
- An individual, who is not himself the claimant, has caused or allowed an illegitimate claim – which may be contrary to s111A(1) or s112(1) if that claim was illegitimate from the start, or contrary to s111A(1B) or s112(1B) if there has been a failure to notify a change.

As prosecutors may include several counts in one prosecution, and the different counts may be of different types, it is necessary to carefully tease out exactly what the prosecutor is alleging and what evidence he is adducing in relation to each count.

It is not unknown for such careful analysis to reveal that the prosecution has little or no evidence in support of some of the counts charged.

Where an offence under s111A is alleged the prosecution must prove dishonesty and that the offender himself realised that he was behaving dishonestly by the standards of ordinary and decent people (the *Ghosh* test).

Where an offence under s112 is alleged the prosecution need not prove dishonesty but, in most cases, must begin proceedings within 3 months of receiving sufficient information to do so, or within 12 months of the last day upon which the offence was committed, whichever is the later – see s116(2).

Where there is an alleged failure to notify a change the prosecutor must show that a change has occurred, see *R v Mote* [2007] EWCA Crim 3131, and that the change actually would have affected the benefit payable, see *R v Passmore* [2007] EWCA Crim 2053.

Where an individual who is not the claimant is charged with causing or allowing a failure to notify a change that individual must have been active in some way in that failure. Mere inaction in the face of a failure of the claimant to notify a change of which the claimant was fully aware is not sufficient, see *R v Tilley* [2009] EWCA Crim 1426.

Commencement dates

Allegations of benefit fraud may go back over a number of years. If the allegation refers to a period commencing before 18 October 2001 care should be taken to ensure that the prosecutor is not relying on legislation that was not in force at the relevant time, particularly where the allegation is one of failing to notify a change of circumstances.

Where a change occurred prior to 18 October 2001 and was not notified to the authorities at the time it occurred it is doubtful whether that pre-existing change became notifiable as a result of the change in the law, see paragraph 92 of the decision in *Mote*.

However where a defendant has confirmed that no changes have occurred, for example on review or renewal of an ongoing claim, and that confirmation is false, the confirmation may form the basis of an offence as a false statement or representation.

Mitigation

In benefit fraud cases there may be substantial mitigation to be offered whether on conviction or on a guilty plea. The personal circumstances of the offender and the motive for the offence will be relevant to sentence.

A further factor which may sometimes be overlooked is the defendant's entitlement on the true facts to other benefits, such as tax credits, for which no claim has been made. In many cases in which, for example, entitlement to income support or jobseeker's allowance has been lost, there will have been an entitlement to tax credits which have not been claimed. Such unclaimed entitlements are recognised as a factor in mitigation, see *R v Parmer* [2006] EWCA Crim 979.

Confiscation

In many benefit fraud cases before the Crown Courts the defendant, if convicted, will satisfy the criteria of a 'criminal lifestyle' under s75 Proceeds of Crime Act 2002 where the 'benefit' of an offence is £5,000 or more and the offence has continued over at least six months.

In confiscation proceedings the defendant's 'benefit' of his fraudulent claim will be the gross over-payment received by him without any deduction for unclaimed tax credits to which he may have been entitled, see *DWP v Richards [2005] EWCA Crim 491*. Any further benefit arising under the statutory 'criminal lifestyle' assumptions will be additional to this.

However in practice confiscation proceedings may not be instigated where the defendant has no substantial assets.

Using a forensic accountant

The defence will wish to have the prosecution's figures of the illegitimate benefits paid carefully checked. Where appropriate a calculation of tax credits and any other benefits to which there may be an unclaimed entitlement should be put forward in the course of mitigation.

A forensic accountant with appropriate skills and experience, whose fees may be covered by a prior authority from the LSC, can be invaluable to the defence in these circumstances.

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