IN THE SUPREME COURT OF JUDICATURE,
COURT OF APPEAL (CIVIL DIVISION)
SIMPSON'S APPLICATION FOR JUDICIAL REVIEW.
Justice, APPLICATION OF APPELLANT FOR LEAVE TO AMEND NOTICE OF APPEAL AND LEAVE TO ADDUCE FURTHER EVIDENCE.
SIMPSON'S APPLICATION FOR JUDICIAL REVIEW.
APPEAL OF RESPONDENT FROM THE ORDER OF MR. JUSTICE SEDLEY

No. FC3 94/5377/D and QBCOF 93/1844/D
Royal Courts of Strand, London WC2.
Thursday 5th May 1994.

Before:

THE VICE-CHANCELLOR

LORD JUSTICE MANN

and

LORD JUSTICE KENNEDY

SOLIHULL MBC HOUSING BENEFITS REVIEW BOARD — **Appellant/Respondent**

CHRISTOPHER CHARLES SIMPSON — **Respondent/Applicant**

(Computer Aided Transcript of the Stenograph Notes of John Larking, Chancery House, Chancery Lane, London WC2.
Telephone No. 071 404 7464
Official Shorthand Writers to the Court)

MR. IAN CROXFORD QC. and MR. JAMES FINDLAY (instructed by Messrs. Sharpe Pritchard, Elizabeth House, Fulwood Place, London WC1V appeared on behalf of the **Appellant/Respondent.**

MR. ANDREW COLLINS Q.C. and MR. IAN WISE (instructed by Messrs. Graham Pearce & Co., Corner Oak, 1 Homer Road, Solihull, West Midlands, B91 3QG) appeared on behalf of the **Respondent/Applicant.**

J U D G M E N T
(As approved by the Court)

Thursday 5th May 1994.

JUDGMENT

THE VICE-CHANCELLOR: I will ask Lord Justice Kennedy to give the first judgment.

LORD JUSTICE KENNEDY: This is an appeal against a decision of Mr. Justice Sedley, who on 3rd December 1993 ordered that the Order of the Solihull Metropolitan Borough Council's Housing Benefits Review Board, made on 9th September 1992 in the case of Mr. Simpson, be quashed. The Judge ordered that a differently constituted Board must consider the matter afresh. Mr. Simpson is by trade a building worker and he had for some time prior to the decision of Mr. Justice Sedley, lived with Karen Beasley and her two children, Sam and Lexie, Lexie being a child who suffers from cerebral palsy and is a quadriplegic. Mr. Simpson and Karen Beasley, we are told, have now married and they have a further young child named Tammy Louise.

It appears from the affidavit evidence before us, which was before the Single Judge but not before the Review Board, that in 1991 this family was living in unsatisfactory council accommodation. They applied for a transfer and were advised that it might be up to twelve years before they could be transferred. According to the affidavit they received that information in about August 1991. Mr. Simpson contends that he then applied to housing associations and sought

alternative accommodation on the private market. However, the respondent Authority's Benefits Officer, Mr. Harbottle, claims that on 10th January 1992 Mr. Simpson admitted to one of his officers that he had made no approaches to Housing Associations, nor had he attempted to obtain private rented accommodation, so that matter on the affidavit evidence is in issue.

Mr. Beasley, Karen's father, in the autumn of 1991, offered to buy a house somewhere near to the schools which the children had to attend, and near to the hospital which was caring for Lexie. That house would then be rented to Mr. Simpson and Karen. Mr. Simpson then checked with the Citizens Advice Bureau, and was advised that he would not be disqualified from obtaining Housing Benefit if he were to proceed with the plan put forward by Mr. Beasley, so on 28th October 1991 Mr. Simpson entered into an assured shorthold tenancy of 68 Daylesford Road, Solihull at a rent of £565.75 per month. He then applied for Housing Benefit and on 11th November 1991 he moved into that accommodation. His application for Housing Benefit was refused because, it was said, the liability to make payments appeared to the Authority to have been created to take advantage of the Housing Benefit Scheme and Regulation 7(1) paragraph (b) of the relevant regulations provides that:

> "The following persons shall be treated as if they were not liable to make payments in respect of a dwelling.....
>
> (b) a person whose liability to make payments in respect of the dwelling appears to the appropriate authority to

> have been created to take advantage of the Housing Benefit Scheme".

Mr. Simpson, as he was entitled to, sought an internal review, and when that did not go in his favour he made a further application for an external review, and thus the matter came before the Housing Benefit Review Board. By then the Social Services Department of the Local Authority had indicated that if the tenancy were assured for a period of five years, that Authority would be prepared to build an extension to the accommodation and to install a lift, because Lexie was becoming too heavy to transport in any other way.

The building society, the Nationwide Building Society, had become involved when the premises were purchased by Mr. Beasley, and that Society, not receiving payments under its mortgage, was threatening to repossess.

When the matter came before the Review Board, Mr. Simpson had for some time been in work. He had obtained employment in February 1992 and whilst in work he had been paying in fact rather more than the weekly rent, the sum of £140 per week out of his total net earnings of £150 per week. The Housing Benefit Review Board consisted, as it had to consist under the relevant provisions of the Statute, of three councillors of the Local Authority with Councillor Hill in the chair, and Mr. Wilson, a senior committee clerk with the Metropolitan Borough Council acting as Clerk.

No point is taken before us in relation to the way in which the proceedings were conducted before the Review Board, but no oral evidence seems to have been called, nor were any

documents apparently placed before the Board. The Board's only source of information was submissions made to it by Mr. Harbottle for the Housing Authority, and Mr. Wise, the solicitor acting for the applicant. Mr. Wilson, the Clerk to the Board, made a note of the submissions. It does not purport to be a verbatim note and it reads:

"**Harbottle** Tenancy began 28 October 1991 - moved in 11 November 1991.
Landlord - 37 Colesbourne Road.
Rent £565.74 per month - receives Income Support.
Assured shorthold tenancy.

Rent referred to Rent Officer:-
Recommended interim rent of £100 per week.
On 9 December 1991 a reasonable rent of £80 per week recommended.

Property exceeded their needs.
Appropriate accommodation would be in the region of £75 per week.

Further investigation because related to landlord.
Referred to interview notes.

Brook Farm Walk rent was £29.70 per week.

Didn't seek private rented accommodation.

Decision under H.B. Reg. 7 (b).
£130 substantially above market rent.

Mr. Wise Not question of excessive rent but was tenancy created to take advantage of H.B.?
Mr. Simpson now in employment and paying full rent - this proves tenancy not created for reason above.
Reason to move was anxiety about previous accommodation.
Daughter quadriplegic - lots of special equipment in house.
Problem with vandalism to car parked on lawn.

Sought help from Director of Housing - waiting list up to 12 years for transfers.
Looked unsuccessfully for private rented accommodation.

Question is was tenancy solely to take advantage of H.B. scheme?. Previous tenancy impossibly difficult. Present tenancy an attempt to resolve

these problems.
Mr. Simpson's paying rent disproves Council's claim.

Harbottle 'When did you start work?'. 'February 92'. 'What did you do before that?'. 'Struggled - if no rent landlord would have evicted'.

Counsel for appellant questioned about burglaries. Police notified on first occasion.
Distance of school? - Reynolds Cross.
'What did Director of Housing say about damp?' Mr. S: 'I left this to Miss B because she was tenant'.

Councillor Llewellyn 'Are we sure that this is correct Panel?

Mr. Wise 'Every tenant relies on H.B System '.

Harbottle 'Not reasonable to increase H.B. from £28 per week to £130 per week especially as the rent is unreasonable'".

That gives some indication of the issues ventilated before the Housing Benefit Review Board, and, as one would expect, at the end of the hearing the members of the Board discussed the matter in private in the presence of their Clerk and came to a decision.

That brings me to Regulation 83, paragraphs 4 and 5, which is the second of the two Regulations which are of primary importance in this case, the first being Regulation 7 (b) to which I have already referred. Regulation 83 (4) provides:

"The Chairman of the Review Board shall -

(a) record in writing all its decisions; and

(b) include in the record of every decision a statement of the reasons for such decision and of its findings of questions of fact material thereto.

(5) Within seven days of the Review Board's decisions or, if that is not reasonably practicable, as soon as possible thereafter, a copy of the record of that decision made in accordance with this regulation shall be given or sent to every person affected".

In fact what happened is clear from the affidavits of Councillor Hill and Mr. Wilson. Councillor Hill in his first affidavit says:

> "4. After the conclusion of the appeal on 9 September 1992 the Appellant and the representative of the Respondent left the premises and my colleagues and I on the Board discussed what had been said to us and decided to refuse the appeal. Mr. Wilson took notes of our decision, but took no part in coming to the decision. His role was only to advise on procedural matters.
>
> 5. I subsequently received from Mr. Wilson a letter dated 9 September 1992 setting out the decision. I confirmed to him by telephone that I agreed with the contents of the letter. There is now produced and shown to me a copy of the letter which I received from Mr. Wilson".

Mr. Wilson for his part says:

> "4. I took notes of the decision of the Review Board and prepared the letter of decision but took no part in coming to or influencing the decision. There is now produced and shown to me a copy of a letter dated 14 September 1992, which is the letter of decision which I prepared from my notes. I sent a copy of the letter to all of the Members of the Board for their consideration. On receipt, the Chairman telephoned me to tell me that he approved the letter. Thereafter I prepared a new letter of decision and sent it to the Appellant".

In a further affidavit Mr. Hill says, having referred to paragraphs 3 and 4 of his previous affidavit:

> "and would confirm that the reasons recorded by the Clerk to the Review Board as contained in the letter dated 14 September 1992 exhibited to this and my previous Affidavit, were those discussed by the Review Board Members.
>
> 3. The reasons were outlined to the Clerk and I asked him to prepare a letter to the representatives of the Respondent recording the Board's decision and their reasons for this.
>
> 4. When I received the letter from Mr. Wilson, I read through it and was satisfied that it adequately recorded the decision and views of the Board. Had

> this not appeared to me to be the case, I would not have agreed to it being sent out. I then signed the letter and returned it to Mr. Wilson"

and he produces a copy of the signed version.

The material parts of the letter which was sent out to the Appellant's solicitor on 14th September 1992 read thus: "The Board found that the material facts in this matter were that prior to October 1991 your clients had been living in Council accommodation at Chelmsley Wood which they had found inadequate and unsatisfactory for various reasons. In October 1991 Miss Beasley's father completed the purchase of 68 Daylesford Road, Solihull with a view to providing accommodation for his daughter, her children and Mr. Simpson. Subsequently, Miss Beasley and Mr. Simpson entered into an assured shorthold tenancy agreement with Mr. Beasley in respect of the property. Oral enquiries of staff in the Housing Department and the Citizen's Advice Bureau concerning entitlement to Housing Benefit were made by Miss Beasley but no official written confirmation of entitlement to Housing Benefit was obtained. An application for Housing Benefit was submitted on 9 October 1991. Whilst the rent was set at £130.56 per week your client's only income was Income Support and Child Benefit. The Rent Officer's assessment of a reasonable rent for the property is £75 per week.

> The Board was of the opinion that Housing Benefit Regulation 7 (b) was directly applicable to the circumstances above. A copy of the Regulation is enclosed.
>
> In considering this matter, the Board expressed the view that your clients had entered into the above tenancy agreement in the knowledge that they did

> not have sufficient means or income to pay rent. It was felt, therefore, that the agreement did not constitute a proper commercial arrangement. In the light of this, it appeared to the Board that the tenancy agreement had been created with the aim of attracting Housing Benefit. It was the Board's view also that it seemed that little effort had been made to seek alternative accommodation in the private sector for rent at a reasonable cost.
>
> Whilst expressing its sympathy with the problems that your clients had experienced at their previous Council accommodation, it was the Board's unanimous decision that your clients remain not entitled to Housing Benefit".

The letter was then signed by Mr. Wilson and I quote "For Town Clerk and Chief Executive Officer".

Before Mr. Justice Sedley there were two substantive issues: first, whether the letter to which I have just referred, constituted a sufficient compliance with the requirements of Regulation 83, paragraphs 4 and 5, and secondly, whether the Board was entitled to apply Regulation 7 (b) as it did to the circumstances of the case; in other words, whether the Board gave adequate reasons for deciding as it did. The learned Judge found in favour of the appellant on both of those issues. He held in relation to the first issue that the letter did not discharge the Chairman's personal obligation to record the decision and to state the reasons for it. He considered that to be a mandatory requirement, but if it was only directory he considered the failures neither menial nor technical, so the decision he held could not stand.

In relation to the second issue, the learned Judge was of the opinion that if he were wrong in relation to the first issue, the Board would have needed to spell out why it chose

an adverse rather than a benign interpretation of Regulation 7 (b). When considered together with Regulation 7 (a) and 7 (c), the Regulation he found does no more than seek to shut out abuse of a kind not apparent in this case. In order to come within Regulation 7 (b) the Board would have had to be satisfied that the arrangement had been made with the primary purpose of taking advantage of the Housing Benefit Scheme.

Before us the same two issues have arisen for consideration. The first issue therefore is whether the way in which the letter of 14th September 1992 came into existence, and the general form of the document constituted a sufficient compliance with Regulation 83, paragraphs 4 and 5. As to that, Mr. Croxford has submitted that complying with regulation 83, paragraph 4, the record must first of all be in writing. He submits that it can be in a letter, provided that the letter meets with the requirements of Regulation 83, paragraph 4 (b); that is to say, that it records not only the decision, but also the reasons for it, and the Board's findings on questions of fact are material thereto.

Secondly, Mr. Croxford submits that the record can be drafted by, for example, a secretary to the Board, provided it is adopted by the Chairman as its record. There is, he has submitted, no obligation on the Chairman to actually sign the records. As to Regulation 83, paragraph 5, Mr. Croxford submits that the copy of the record sent to an appellant may be a photocopy or a transcription, whichever is most convenient.

Mr. Collins, for the respondent before us, submits

that the words of Regulation 83, paragraph 4, should be given full effect. Unlike, for example, regulation 77, which requires an Authority to notify a person affected of its determination. Regulation 83, paragraph 4, places a personal obligation on the Chairman of the Review Board. He or she is to record all of the decisions in writing together with a statement of the reasons for the decision, and the Board's findings on material questions of fact. Then, very soon after the decision has been made, persons affected are to receive not simply notification of the decision, but a copy of the Chairman's record.

A personal obligation is imposed, Mr. Collins submits, upon the Chairman and I accept that that is the position for at least two of the reasons which he advanced; first, because the Regulation is designed as it is so as to ensure that, so far as possible, there is distance placed between the Review Board and the Local Housing Authority, which is a party to the proceedings before the Board. Secondly, since the Chairman has the personal obligation, he will, as he presides, be aware of that obligation and of the need for the Board to make findings of fact, so that it can not only arrive at a decision, but also give reasons for it.

Mr. Collins concedes, in my judgment rightly, that there can be compliance with Regulation 83 (4) if the Chairman makes his record in the form of a letter. Mr. Collins goes so far as to contend, which I do not accept, that the Chairman must himself physically make the written record. He describes this as a genuine non-delegable duty,

and he contends, which again I do not accept, that if the record is in the form of a letter the Chairman must sign it to show that the record is his.

In my judgment, the effect of Regulation 83, paragraphs 4 and 5, is to require the Chairman to bring into existence a public document, namely his record, of which every person affected by the Review Board's decision is entitled to receive a copy. It should therefore be apparent to the recipients what the document is, so that if they care to consider the matter they may know that there has been compliance with Regulations 83, paragraphs 4 and 5. In my judgment, the letter of 14th September 1992 simply failed to meet that test. It was, as Mr. Collins said, on the face of it, not a copy of the Chairman's record, but an original letter from a Local Authority official advising solicitors for the applicant of the decision of the Board. In fact, the Chairman of the Board had approved the contents of the letter, but the letter itself is silent as to that.

If, as we have been told, Chairman of Review Boards commonly seek to discharge their obligations under Regulation 83, paragraphs 4 and 5 by means of letters such as that which we have seen in this case, then in my judgment they should stop doing so. As suggested by Miss Norma Findlay in her annotation to the Regulations, it would be good practice for Boards to develop a standard form with spaces for findings, reasons, the decision itself and a space for the Chairman's signature in order to minimise the chances of error, but of course the Regulation can be complied with without bringing

into existence a standard form, or for that matter, without the Chairman actually placing his signature upon the document.

The next question which arises is whether the non-compliance with Regulation 83, (4) and (5) which I have considered thus far, should lead to any form of relief in proceedings for judicial review. The relief sought is discretionary and, in my judgment, it should not be granted simply because the letter which went to the applicant's solicitors did not purport to be Councillor Hill's record for the purposes of Regulation 83, paragraph 4, when the court knows from his affidavits that it did contain what he wanted to say. I note that in R. v. Stoke-on-Trent City Council, Ex parte Highgate Projects Limited, 25 March 1994, unreported, the Divisional court also declined to give a remedy in somewhat similar circumstances, but in my judgment the Court in that case was not right in asserting that the signature of the Chairman of the Review Board on the decision letter was something that Regulation 83, paragraph 4 requires.

So I come to the second main issue which we have to consider, namely whether, if a proper interpretation is given to Regulation 7 (b), the letter of 14th September 1992 did not give adequate reasons for the decision of the Board for the purposes of Regulation 83, paragraph 4 (b).

Mr. Croxford submits that it did. He reminded us that such reasons should not be analysed in minute detail, see Tickner v. Mole Valley District Council, 2nd April 1980 unreported. The reasons must be proper, intelligible and

adequate dealing with the substantial points that have been raised. See Save Britain's Heritage v. Secretary of State for the Environment and others (1991) 2 AER, page 10 at page 23, per Lord Bridge commenting on the well known words of Mr. Justice Megaw in Re Poyser and Mills Arbitration (1964) 2 QB Reports 467 at 468.

The reasons need not be elaborate, but as Mr. Collins pointed out, they should be sufficient to enable an applicant for Housing Benefit to know whether to try to persuade the Authority to act under Regulation 79, 1 (b) by admitting fresh evidence or to seek judicial review. In fairness to the Housing Benefit Review Board, which was concerned in this case, it must be said that Regulation 7 (b) on which they had to focus is, in my judgment, not well worded. As both Mr. Croxford and Mr. Collins recognise, it is commonplace for persons of limited means to enter into tenancies in the expectation of obtaining Housing Benefit, and the Regulation is clearly not intended to enable benefit to be refused to all such applicants on the basis that their liability to make payments has been created to take advantage of the Housing Benefit Scheme. So in what circumstances can Regulation 7 (b) properly be relied upon?

Mr. Justice Sedley at page 17 of the transcript said this:

> "It is evident from the totality of provision made by Regulation 7 (1) (a) (b) and (c) that the framer of the Regulations is seeking to shut out certain arrangements which, in the Secretary of State's view, would amount to an abuse of the system".

I believe that to be a correct approach, provided that abuse

is not equated with bad faith on the part of the applicant. Bad faith would, of course, be persuasive evidence of abuse, but the appropriate Authority might in some cases properly conclude that there was a breach of Regulation 7 (b) without it. In other words, the use of the words 'take advantage' shows that at least in the eye of the beholder there has to be conduct which appears to some extent improper.

Mr. Croxford submitted that Regulation 7 (b) can properly be invoked, when taking advantage of the Housing Benefit Scheme is an applicant's dominant purpose when taking out a particular tenancy, as opposed to the reasonable satisfaction of his housing needs. I would not disagree with that, so of course it follows that when a tenant agrees to pay a rent above the market level, or takes accommodation more spacious and thus more expensive than he needs, and then applies for Housing Benefit, that is some evidence that his liability to make payments has been created to take advantage of the Housing Benefit Scheme. It may shift the evidential burden of proof, but it depends on the facts of the case whether or not it is conclusive.

As we were helpfully reminded, if the Authority considers that the dwelling is too large, or the rent is too high, it can rely on Regulation 11 (2) to calculate Housing Benefit entitlement by reference to what it considers to be an appropriate rent, but if, as here, there are children in the household, it can only do so if suitable alternative accommodation is available, and it considers it reasonable to expect the claimant to move. (See Regulation 11 (3)). It is

significant that in the present case bad faith has never been alleged, nor has there ever been any reliance placed upon Regulation 11.

What the Board appears to have done is to have had regard to, first, the rent of £130.56 per week in respect of a property for which a reasonable rent assessed by the Rent Officer was in the region of £75 per week. Second, that little effort had been made to seek alternative accommodation in the private sector for rent at a reasonable cost, a somewhat surprising view for the Board to form, as it is clear from the note of its Clerk that the matter was in issue and the Board heard no evidence. Third, the fact that, like many others, the applicant and the lady who is now his wife, entered into the tenancy agreement in the knowledge that they did not have sufficient means or income to pay the rent. The tenancy was not, said the Board, a proper commercial arrangement, and the letter of 14th September 1992 continues:

> "In the light of this ,it appeared to the Board that the tenancy agreement had been created with the aim of attracting Housing Benefit".

Of course that was one of the aims. That was why the applicant properly made inquiries to try to establish if Housing Benefit would be payable before he made the agreement, but it is at least arguable that his dominant purpose when he entered into the tenancy agreement was not to obtain Housing Benefit, but to provide adequate accommodation for his family, and I can find nothing in the letter to assist me as to why the Board rejected that conclusion.

In my judgment, the Board had to reject that conclusion if it was to find that the applicant created his liability to make payments to take advantage of the Housing Benefit Scheme, and even the limited information apparently available to the Board contained indications that such a conclusion would be inappropriate. In particular, the Board knew that the Council accommodation used by the family before it moved was unsuitable, it knew that Lexie was a quadriplegic, although the letter is strangely silent as to that, and it knew that the applicant, when in work, had been paying all of the agreed rent. I therefore agree with Mr. Justice Sedley in relation to the second main issue. In my judgment, the letter of 14th September 1992 does not give adequate reasons for the conclusion that Regulation 7 (b) applied. I would therefore uphold the Judge's Order that the decision of the Review Board be set aside and that the matter be remitted for re-determination by a differently constituted Board. For those reasons I would dismiss this appeal.

LORD JUSTICE MANN: I agree for the reasons given by my Lord that the appeal should be dismissed. I add this: I entirely endorse what my Lord has said as to good practice. It would be a good practice for Housing Benefit Review Boards to devise and use a standard form in which there are spaces for the decision, the facts found and the reasons. The Chairman

would then sign that form. I appreciate that there is no requirement for a signature under regulation 83 (4), but a signed proforma would have avoided much of the argument which has occurred in this case. To utilise a letter such as that of 14th September 1992, a usage which we were told is widespread, is, in my judgment, very likely to give rise to challenge with a consequent expenditure of public money. I hope Authorities will perceive a lesson in the circumstances of this appeal.

THE VICE-CHANCELLOR: I agree that for the reasons given my Lord, Lord Justice Kennedy, this appeal should be dismissed. I also agree with the observations made by my Lord, Lord Justice Mann.

MR COLLINS: May I in those circumstances invite you to make an order for the applicant's costs to be borne by the Respondent Local Authority and for Legal Aid taxation?

MR. CROXFORD: I cannot resist that. May I mention one matter raised in correspondence between the solicitors for the parties? The order made below apparently does not reflect the order which my Lord intended to make, that my clients should pay the costs below. It has been raised in correspondence and no doubt my friend's application will be for costs here and below. The order is at letter G in the bundle. It simply orders Legal Aid Taxation and it is perfectly plain from Mr. Justice Sedley's order that judgment was intended for my clients. I raise it in order to ensure we do not have to waste any further time in going back under the slip rule.

THE VICE CHANCELLOR: We will order that the appeal be dismissed and the Appellant Authority is to pay the Respondent's costs here and below.

MR. CROXFORD: Yes, my Lord.

(Order: Appeal dismissed and the appellant Authority is to pay the respondent's costs, here and below.

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