

Case No: QBCOF 99/0071/4

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
(MR JUSTICE KAY)

Royal Courts of JusticeRoyal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 9 November 1999

Before:

LORD JUSTICE HENRY
LORD JUSTICE POTTER
and
LORD JUSTICE WALLER

THE QUEEN

v

**THE HOUSING BENEFIT REVIEW BOARD
FOR SWALE BOROUGH COUNCIL
THE HOUSING BENEFIT REVIEW BOARD FOR
SWALE BOROUGH COUNCIL**

ex parteex parte

**SIMON STUART MERCHANTSIMON
STUART MERCHANT**

Appellant

Respondent

(Transcript of the Handed Down Judgement of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
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Official Shorthand Writers to the Court)

Richard Drabble QC and Jon Holbrook Esq (instructed by Russell Campbell,
Chief Solicitor, Shelter, for the appellant).

R. Clayton Esq (instructed by WD Milne, Chief Solicitor, Swale Borough Council, for the respondent).

JudgmentJudgment
As Approved by the CourtAs Approved by the Court

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JUDGMENT
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LORD JUSTICE POTTER:

INTRODUCTIONINTRODUCTION

This is an appeal from the decision of Mr Justice Kay dated 17th December 1998 dismissing the application of the appellant, Simon Stuart Marchant (“the applicant”), for Judicial Review of the decision of the respondent, the Housing Benefit Review Board of Swale Borough Council, notified to the applicant in a letter dated 5th June 1997, to the effect that the Local Authority was correct in not identifying the applicant’s children as occupants of the dwelling for which the applicant had submitted an application for Housing Benefit. The appeal raises an issue as to the correct application of the provisions governing the establishment of maximum rent for the purposes of the **Housing Benefit (General) Regulations 1987** (“the **1987 Regulations**”).

THE FACTSTHE FACTS

The applicant is the father of three sons aged eleven, nine and seven. In June 1996, he moved into a property at 40, Park Road, Faversham together with his partner in which they lived as a family home. However, in September 1996 his partner moved out of the house, and since that date, the children have lived alternate weeks with their mother and with the applicant, the mother being the person in receipt of Child Benefit for the children. Before moving into 40, Park Road, the applicant had made a claim for housing benefit in respect of the rent of £400 per month. On 11th September 1996, following the break-up, he made a fresh claim for housing benefit, identifying the three children as living with him in his application. He also indicated that he did not receive Child Benefit for the children. The Local Authority referred the matter to the Rent Officer indicating that the children had moved out. Thus, in the application for determination, the applicant alone was shown as the occupier of the dwelling.

On 27th November 1996 the Rent Officer determined that the house exceeded

the “size criteria” for a house solely occupied by the applicant with the result that the applicant’s housing benefit was restricted to £321.25 per month (being the mid-point of the size-related rent of £345 and the local reference rent of £297.50 found by the Rent Officer). The applicant sought an internal review of this decision but this was rejected on 5th February 1997. He appealed against that rejection to the respondents on 4th March 1997 and, on 5th June 1997, the respondents rejected his appeal. The applicant sought judicial review of that decision before Kay J. The particular issue raised is whether, in the circumstances of the applicant’s case, the respondent was right not to identify the applicant’s three children as occupiers of his house when referring the matter to the Rent Officer to determine the amount of the housing benefit to which the applicant was entitled.

THE LEGISLATIVE FRAMEWORK THE LEGISLATIVE FRAMEWORK

The entitlement to housing benefit is defined by **Section 130(1)** of the **Social Security Contributions and Benefits Act 1992** (“**the SSCBA**”) which provides that:

“A person is entitled to housing benefit if –

- (a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home;
- (b) there is an applicable maximum housing benefit in his case and
- (c) either -
 - has no income or his income does not exceed the applicable amount; or
 - his income exceeds that amount, but only by so much that there is an amount remaining if the deduction for which sub-section (3)(b) below provides is made”

It is common ground that the applicant qualified for housing benefit under **SSCBA**.

Section 130(3) of **SSCBA** deals with the extent of the benefit to which an applicant is entitled. It provides:

“Where a person is entitled to housing benefit then –

- (a) if he has no income or his income does not exceed the applicable amount, the amount of housing benefit shall be the amount which is the appropriate maximum housing benefit in his case; and
- (b) if his income exceeds the applicable amount, then the amount of the housing benefit shall be what remains after the deduction from the appropriate maximum housing benefit of prescribed percentages of the excess of his income over the

applicable amount.”

In this case the applicant’s income did not exceed ‘the applicable amount’ (as to which see **s.135(1)** of **SSCBA**) and the only issue arising is what was the ‘appropriate maximum housing benefit’ in his case.

Section 130(4) provides:

“Regulations shall prescribe the manner in which the appropriate maximum housing benefit is to be determined in any case.”

Section 130(5) provides:

“Regulations under subsection (4) above may provide for benefit to be limited by reference to determinations made by rent officers in exercise of functions conferred under section 121 of the Housing Act 1988 ..”

Under **Section 121** of the **Housing Act 1988** the Secretary of State enacted the **Rent Officers (Additional Functions) Order 1995** (“**the 1995 Order**”) under which the Rent Officer shall inter alia determine whether the dwelling exceeds the size criteria for the occupiers. Before turning to the 1987 Regulations and the 1995 Order, it is necessary to refer to certain other provisions of the Act.

Section 134(2) of **SSCBA** provides:

“Except in prescribed circumstances the entitlement of one member of a family to any one income related benefit excludes entitlement to that benefit for any other member for the same period.”

Section 136(1) provides for the income and capital of all members of the family to be treated as the income and capital of the family.

Section 137 defines “family” to mean:

- “(a) a married or unmarried couple;
- (b) a married or unmarried couple and a member of the same household for whom one of them is or both are responsible and who is a child or a person of a prescribed description;
- (c) except in prescribed circumstances, a person who is not a member of a married or unmarried couple but a member of the same household for whom that person is responsible and who is a child or a person of a prescribed description.”

Section 137(2) provides:

“Regulations may make provision for the purposes of this Part of this Act –

...

(h) as to the circumstances in which a person is or is not to be treated as occupying a dwelling as his home;

...

(m) as to circumstances in which one person is to be treated as responsible or not responsible for another.”

When the **SSCBA** came into force, the relevant regulations were the **1987 Regulations**. These have since been amended. As already mentioned, further relevant provision has also been made pursuant to the **Housing Act 1988** by the **1995 Order**. It is the interpretation and interrelation of these statutory instruments which are the subject of the rival submissions in this case.

Part II of the **1987 Regulations** is headed “**Provisions Affecting Entitlement to Housing Benefit**”.

Regulation 5 of the **1987 Regulations** is headed “**Circumstances in which a person is or is not to be treated as occupying a dwelling as his home**”.

Paragraph 1 provides:

“Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home-

by himself or, if he is a member of a family, by himself and his family;
or

... and shall not be treated as occupying any other dwelling as his home.”

Part III of the **1987 Regulations** is headed “**Payments in Respect of a Dwelling**”.

Regulation 8(1) of the **1987 Regulations** (as amended) provides:

“subject to the following provisions of this Regulation, housing benefit shall be payable in respect of the payments specified in Regulation

10(1) (rent) and a claimant's maximum housing benefit shall be calculated under Part VIII (amount of benefit) by reference to the amount of his eligible rent determined in accordance with Regulation 10(3), (6A) and (6B) (rent) and (11) (maximum rent)."

Regulation 10(1) lists those periodical payments in respect of which housing benefit is payable and **Regulation 10(2)** provides for periodical payments which are not to be counted.

Regulation 10(3) (as amended) provides:

"subject to paragraph (6AA) and any apportionment in accordance with paragraphs (4) and (5), and to paragraphs (6A) and (6B) and Regulation 11 (Maximum Rent) and 12 (Restrictions on Rent Increases), the amount of a persons eligible rent shall be added to such payments specified in paragraph (1) as he is liable to pay less [a list of items not relevant to this case]."

Regulation 10(6A) as amended provides:

"In no case shall the amount of a person's eligible rent as determined in accordance with the preceding paragraphs of this Regulation exceed the amount of the maximum rent."

Regulation 11(1) provides:

"Where an authority has applied to the rent officer for a determination in accordance with regulation 12A ... and a rent officer has made a determination or re-determination in exercise of the Housing Act functions, the maximum rent shall be determined in accordance with paragraphs (2)-(12)."

It is unnecessary for the purpose of this appeal to refer to those last mentioned paragraphs.

Regulation 12(A), paragraph 1 provides:

"Subject to the following provisions to this Regulation an appropriate local authority shall apply to a Rent Officer for a determination to be made in pursuance of the Housing Act functions where it has received- a claim on which rent allowance may be awarded; or a notification of a change relating to rent allowance ..."

Regulation 14 and 15 are contained in **Part IV** of the **1987 Regulations** which is headed **“Membership of a Family”**. They provide as follows:

“**14(1)** subject to the following provisions of this Regulation a person shall be treated as responsible for a child or young person who is normally living with him.

where a child or young person spends equal amounts of time in different households, or where there is a question as to which household he is living in, a child or young person shall be treated for the purposes of paragraph (1) as normally living with –

the person who is receiving child benefit in respect of him; or

if there is no such person

where only one claim for child benefit has been made in respect of him, the person who made that claim, or

in any other case the person who has the primary responsibility for him.

For the purpose of these Regulations a child or young person shall be the responsibility of only one person in any benefit week and any person other than the one treated as responsible for the child or young person under this Regulation shall be treated as not so responsible.

15(1) Subject to paragraphs (2)-(4), the claimant and any partner and, where the claimant or his partner is treated as responsible by virtue of Regulation 14 (Circumstances in which a person is to be treated as responsible or not responsible for another) for a child or young person, that child or young person and any child of that child or young person, shall be treated as members of the same household notwithstanding that any of them is temporarily living away from the other members of his family.”

Paragraph 3 of the **1995 Order** (under which the Rent Officer made his determination in this case) requires the Rent Officer to make the determination in accordance with **Schedule 1**.

Paragraph 2 of **Schedule 1** is headed **“Size and Rent”**.

Paragraphs 2(1) and **2(2)** provide:

“1. The Rent Officer shall determine whether the dwelling, at the relevant time, exceeds the size criteria of the occupiers.

If the Rent Officer determines that the dwelling exceeds the size criteria, the rent Officer shall also determine the rent which a landlord might reasonably have been expected to obtain at the relevant time, for a tenancy which is –

- (a) similar to the tenancy of the dwelling.
- (b) on the same terms other than the term relating to the amount of rent; and
- (c) of a dwelling which is in the same locality as the dwelling but which -
 - accords with the size criteria for the occupiers;
 - is in a reasonable state of repair; and
 - corresponds in other respects, in the Rent Officer's opinion, as closely as is reasonably practicable to the dwelling.”

“Occupier” and “size criteria” are defined by **Paragraph 2** of the **1995 Order** as follows:

“Occupier” means a person (whether or not identified by name) who is stated in the application for the determination to occupy the dwelling;

“Size criteria” means the standard relating to bedrooms and rooms suitable for living in specified in Schedule 2 of this Order.”

The size criteria in **Schedule 2** make different provision according to the number of occupiers, whether they are one of a couple or single, an adult or a child, and (if there is more than one child) the children's age and sex. The definition of "occupier" quoted above makes it clear that the decision as to who was or were the occupier or occupiers was one for the local authority and not the Rent Officer, who must take the number of occupiers as being that stated in the application for the determination. The essential question underlying the challenge of the applicant is therefore whether the respondent, as the local authority, was correct in not including the children of the applicant as occupiers when making application for the Rent Officer's determination. **The size criteria in Schedule 2 make different provision according to the number of occupiers, whether they are one of a couple or single, an adult or a child, and (if there is more than one child) the children's age and sex. The definition of occupier quoted above makes it clear that the decision as to who was or were the occupier or occupiers was one for the local authority and not the Rent Officer, who must take the number of occupiers as being that stated in the application for the determination. The essential question underlying the challenge of the applicant is therefore whether the respondent, as the local authority, was correct in not including the children of the applicant as occupiers when making application for the Rent Officer's determination.**

THE DECISION OF KAY.J

The judge held that, in accordance with the intention revealed by its immediate heading, the purpose of **Regulation 5(1)** was to answer the question of which home a person occupies as a dwelling for the purposes of housing benefit. For that purpose it contemplates a two-stage process, first that of identifying the occupier and then identifying the occupier and his family. For the latter purpose "family" has the meaning ascribed to it by **section 137(1)** of the **1985 Act** and thus includes a couple and a member of the same household for which one of them is responsible. In this case, in accordance with **Regulation 14** it was clear that the applicant's partner was responsible for the three children as the person receiving the child benefit in respect of them. **Regulation 15** in turn made clear that the children were not to be treated as part of the applicant's household for the purposes of housing benefit since he was not responsible for them. Accordingly, the children were not occupiers of the applicant's home for the purposes of housing benefit and, in the application of the size criteria, they should not be taken into account.

The judge rejected the argument for the applicant, which has been renewed before us by Mr Drabble QC who appeared on his behalf. His argument ran as follows.

The heading and content of **Regulation 5** is an echo of **S.130** of the **SSCBA** and is concerned simply with a claimant's entitlement to housing benefit and, in particular, the requirement of **s.130(1)(a)** that he must be liable to make payments in respect of a dwelling which he *occupies as his home*. **Regulation 5** defines the circumstances in

which he shall be treated as occupying such dwelling as his home and is designed to ensure that such a person may not claim in respect of more than one “home”. No question of the appropriate quantum of his entitlement arises. The **1995 Order** on the other hand, and in particular the “size criteria for the occupiers” referred to in **Paragraph 2(1) of Schedule 1 Part 1** is concerned with quantum and, for that purpose, with determining an appropriate rent level by, inter alia, reference to the number of persons physically occupying, and thereby requiring physical living space within, the dwelling being assessed. This is made doubly clear by the fact that the size criteria in Schedule 2 allow for one bedroom or room suitable for living in to be allowed for children, as well as for persons who are not children.

Mr Drabble submits that there is nothing in the machinery or language of the **1987 Regulations**, and certainly nothing under **Regulation 12A paragraph 1** of the **1987 Regulations** (whereby the appropriate local authority is required to apply to a rent officer for a determination), or under **Paragraph 3** of the **1995 Order** and **Schedule 1** (pursuant to which such determination is made), which requires the local authority to limit the persons specified by it as ‘occupier’ to persons who occupy the dwelling *as their home* within the meaning of **Regulation 5(1)**. Given the exercise being performed by the Rent Officer, there is every reason to give the word “occupier” in the **1995 Order** its usual meaning, which (as Mr Drabble submits) would cover the applicant’s children in this case, spending as they do half their time with him. Thus, it is urged, the applicant’s three boys should have been included in the request for a determination so that allowance could be made for them in applying the size criteria.

It was also argued before the judge that, if the statutory scheme were ambiguous, any ambiguity should be resolved in the applicant’s favour by reference to **Article 8** of the **European Convention on Human Rights**. However, that argument has not been renewed before us and there is no need to refer to it further.

Despite the attractions of Mr Drabble’s argument, I consider that the judge was correct in the conclusion to which he came.

The exercise performed by the Rent Officer under the **1995 Order** is one performed pursuant to **Regulation 12A** of the **1987 Regulations** (as amended) which regulations are part of the housing benefit scheme. The term “occupier” is not defined in, or for the purpose of, the 1995 Order save as ‘a person ... who is stated in the application for the determination to occupy the dwelling’. It is thus apparent (1) that in making his determination the Rent Officer does not decide, or indeed concern himself with deciding, who is or is not to be treated as an occupier for the purpose of applying the size criteria; his is an administrative exercise consequent upon an earlier decision by the local authority as to whether or not there are persons properly to be regarded as occupiers of the premises in addition to the claimant occupier himself. (2) As to the question whether or not such additional person has been wrongfully omitted, one must refer to the relevant provisions of the scheme as set out in statute and regulations.

Unfortunately, the relevant provisions contain no definition of “occupier” simpliciter. The question at issue is thus whether (as Mr Drabble QC contends), the word “occupier” should be accorded its straightforward meaning in the sense of any person (whether adult or child) who occupies the premises as a matter of fact or whether, as the judge concluded, the effect of **Regulation 14** and **15** of the **1987 Regulations** is such that the child of a claimant for whom the claimant’s former spouse or partner is responsible should be excluded from the definition of “occupier” for the purposes of the claimant’s application for housing benefit.

In my view, the latter is the case.

A person is only entitled to claim housing benefit in respect of a dwelling which he occupies as his home: **s.130(1)**. **Regulation 5 paragraph 1** of the **1987 Regulations** sets out the basis on which he shall be treated as fulfilling that occupation requirement i.e. occupation as his own home (if he has no family) or (if he has a family) by himself and his family. In the latter case, head **(b)** of the definition of ‘family’ in **s.137** of **SSCBA** applies to a family consisting of a couple and any children who are not members of their household and for whom either is responsible, and head **(c)** covers the case where the claimant is a lone parent with a child or children who are members of his or her household and for whom he or she is responsible (see also the definition of ‘lone parent’ in **Regulation 2** of the **1987 Regulations**). However, the question of whether or not a person (in this case the applicant) is to be treated as ‘responsible’ for a child turns upon whether the child in question is ‘normally living’ with that person: see **Regulation 14**, which goes on to provide that, when a child spends equal time in different households, or there is a question as to which household he is living in, the child is to be treated as ‘normally living’ with the person receiving child benefit in respect of that child. **Regulation 15** in turn makes clear that the child shall be treated as a member of the household of the partner receiving such benefit.

It thus seems clear that, for the overall purpose of claiming housing benefit, children in the position of the claimant’s three sons are not to be treated as persons for whom he is responsible, nor as persons normally living with him, nor as members of his household. Instead, they are to be treated as the responsibility of his former partner, normally living with her and part of her household, in respect of which she is the proper claimant for housing benefit.

It also seems clear that for both partners to claim and receive housing benefit at a level based on the needs of the children as members of *both* households would be to circumvent the clear purpose of the scheme, which appears to be designed to settle the question: in which household does the child reside for the purposes of a claim for housing benefit? In these circumstances, it also seems clear to me that, where spouses or partners live apart, resolution of the question in which household does the child normally live and/or of which household is the child to be regarded as a member, should also resolve the question: which dwelling does the child occupy for the purposes

of the claim to household benefit by one of the spouses or partners? That being so, the respondents were in my view entitled to treat the applicant as the sole occupier when applying to the Rent Officer for a determination to be made pursuant to **Regulation 12A** of the **1987 Regulations**.

It may appear, as Mr Drabble QC has argued, that such a result is an unfortunate one which is likely to work to the detriment of shared access arrangements and the provision of proper (in the sense of sufficiently spacious) accommodation being available for children amicably accommodated in split households. That may well be so. The contrary arguments however are essentially twofold. First, given that the housing benefit system is intended only to assist a claimant to meet the reasonable costs of his or her household, to determine a higher maximum rent to allow for children who are no longer members of that household, but have become members of the separate household of the former spouse or partner, is in essence to pay benefit in respect of persons excluded from the assessment. Second, to include a child as occupier of the dwelling of a parent in whose household the child does not reside would frequently involve their inclusion as occupiers of two or more dwellings in respect of which housing benefit is being paid, thus leading to an element of double provision contrary to the apparent intention of the scheme.

I would dismiss the appeal.

LORD JUSTICE WALLER: I agree.

LORD JUSTICE HENRY I also agree.

Order: Appeal dismissed; order nisi against Legal Aid Fund with nil contribution; legal aid taxation.