

RECENT DEVELOPMENTS IN HOUSING BENEFIT
SOCIAL SECURITY LAW PRACTITIONERS' ASSOCIATION

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Service of evidence and submissions

CH/3594/2002 (Legal Action June 2003 27)

C did not receive council's written submission until a few minutes before the hearing at the appeal tribunal. The hearing had been unfair and in breach of Art. 6. Written submissions and evidence should be given to C 14 days in advance of the hearing.

Relevance of the Verification Framework to decision-making

CH/5088/2002 (Legal Action June 2003 27) – whereas the Verification Framework provided a sensible approach to decision-making by local authorities it had no bearing on the way appeal tribunals approached their decisions.

Local authority's duty to disclose evidence to appeal tribunal

CH/396/2002 (Legal Action December 2002 19) – it was the local authority's duty to provide to the tribunal and the claimant any evidence from its file that was or might be relevant to the issue raised by the appeal at the point when it made its submission to the appeal tribunal.

Backdated awards of HB (reg 72(15))

CH/2659/2002 (Legal Action June 2003 26) – confirms the test for good cause as "some fact which, having regard to all the circumstances (including the claimant's health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) in the way the claimant did.

CH/0393/2003 (Legal Action June 2003 26) – for the purposes of the test for backdating it was the mental age of the mentally disabled claimant that had to be taken into account.

CSHC/352/2002 – C made a backdated claim on the basis that she had not been invited to make a further claim as required under reg 72(14). The Commissioner held that the absence of an invitation was a material fact under reg 72(15). To satisfy reg 72(14) it had to be shown that the invitation was received. S. 7 Interpretation Act 1978 did not apply to "invite".

Challenges to Rent Officer's determinations (reg 12A)

R (Cumpsty) v Rent Service [2002] EWHC 2526 Admin, 8 November 2002 (Legal Action June 2003 26) – provided the rent officer made available the reasons for his/her determination, the lack of a right to appeal to an appeal tribunal against the rent officer's decision was not in breach of Art 6.

Liability to make payments in respect of a dwelling (reg 6)

CH/1618/2002 (Legal Action December 2002 16) – guidance on reg 6: was there a genuine agreement, immaterial why rent liability created, manner of implementation should not be given undue significance as contracts often not implemented to the letter.

CSHB/718/2002 – C moved into his parents' home in 1994 with a tenancy agreement. He claimed HB 3 years later but no rent ever actually paid to the mother (owner) who later went into a residential home. HB used for groceries and repairs. On whether there was any liability to make payments the following definition of "sham" was approved: "acts done or documents executed by the parties....which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) that the parties intended to create".

Reg 7 – Circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling

CH/0716/2002 (Legal Action December 2002 17) – as reg 7(1) can produce rough justice, it should be narrowly interpreted.

Tenancy not on a commercial basis (reg 7(1)(a))

CH/0627/2002 (Legal Action December 2002 16) – sets out principles derived from the case-law including that bad faith is not necessary to be caught by reg 7, the test to be applied is whether the principal basis on which the arrangement was made was not a commercial one.

CH/01076/2002 (Legal Action December 2002 16) – the local authority had not discharged the burden of proof, which was on it, as it had terminated the award. There was nothing to suggest that acceptance of the maximum HB as the full rent due was anything other than a sensible commercial decision.

CH/2516/2003 – C moved into a house purchased by his daughter, entered into a tenancy agreement and claimed HB. The local authority refused the claim on the basis that without HB C could not afford the rent. The Appeal

Tribunal dismissed C's appeal. It was held that the Tribunal was in error of law for the undue weight given to that factor. On the tribunal's reasoning HB would be limited to those who encountered financial difficulties only after they had entered into the tenancy. If the local authority wished to rely on reg 6 C had to be given warning.

CH/5125/2003 (and others) – Cs were members of the New Creation Christian Community. They lived in community houses and pooled resources. The houses were owned by a Trust and licensed to Elders who issued sub-licences to the members. The sub-licences included "lifestyle conditions". Members of good standing were permitted to run up arrears indefinitely provided that it was due to factors outside their control, such as non-payment of HB. One "common purse" might be merged with another if it was in trouble. The commissioner upheld the tribunal's decision that the arrangement was not on a commercial basis. He also held that there was no breach of Art 14 and 9 ECHR. He also rejected arguments that the 1999 amendments to Reg 7 were of no effect in view of the decision in *Howker v Secretary of State for Work and Pensions and Social Security Advisory Committee [2002] EWCA Civ 1623*, and that the amendments were made for an improper purpose namely to target organisations of this type.

Tenant formerly occupied dwelling as landlord's partner - reg 7(1)(c)(i)
R(Painter) v Carmarthenshire HBRB, R(Murphy) v Westminster HBRB and Secretary of State for Social Security [2001] EWHC Admin 308 – lodgers who cohabited with/married their landladies were denied HB – no breach of Arts 14 and 8.

CH/1205/2003 – C argued that reg 7(1)(c)(i) should be declared of no force or effect because it was in breach of Arts 14 and 8, in that it discriminated against heterosexual couples. The commissioner rejected the argument on the grounds that C had not shown that heterosexual and gay couples were in relevantly similar situations. C had to show that gay couples posed the same risk of abuse.

Tenant responsible for child of landlord – reg 7(1)(d)
R(Tucker) v Secretary of State for Social Security [2001] EWCA 1645 – tenant of 9 years denied HB – no breach of Arts 14 and 8.

Tenant or his partner previously owned the dwelling – reg 7(1)(h) --
CH/3853/2001 (Legal Action June 2002 19) – C argued that he fell within the proviso to the regulation being a person who could not have continued to occupy the dwelling without relinquishing ownership because he was under a moral compulsion to sell. It was held that test was whether there was a

practical compulsion (which could arise out of a moral compulsion). In this case C had had the alternative of mortgaging the property.

CH/1278/2002 – C argued that she was not the owner for the purposes of the regulation. The definition of owner was in reg 2(1). C was owner as next of kin when her mother died intestate. Whether as administrator of her mother's estate she would have been an owner in any event was left undecided.

Liability created to take advantage of the HB scheme – reg 7(1)(l)

CSHB/718/2002 – (see facts above). For the purposes of this reg R must demonstrate that the intention to abuse the scheme existed when the liability to make payments was created. Anticipation of a future advantage was enough however. The lack of enforcement by the landlord after the date of the decision under appeal was not a matter to be taken into account.

Circumstances in which a person is or is not treated as occupying a dwelling as his home – reg 5

R(Waite) v Hammersmith v Fulham LBC & Secretary of State for Social Security [2002] EWCA Civ 482 – denial of HB to recalled prisoners not in breach of Art 14 (and Protocol 1, Article 1)

Overpayments – from whom to recover

Secretary of State for Work and Pensions v Chiltem DC [2003] EWCA Civ 508 (Legal Action June 2003 27) – a decision as to from whom to recover an overpayment can be appealed to the appeal tribunal.

In view of the effect of reg 93(2) this may be useful for tenants who otherwise find themselves suddenly in serious arrears of rent (appealing as a "person affected" under reg 3 HB& CTB (Decisions and Appeals) Regs 2001).

CH 5216/01 (and others) – a Tribunal of Commissioners decided that the right of appeal was limited to judicial review grounds.

HB Reform

Anti-Social Behaviour Bill – housing benefit sanctions

- To be introduced into the Anti-Social Behaviour Bill by government amendment
- The consultation paper (12 August 2003) contained 2 options: (1) Court based sanction: on a finding of anti-social behaviour the court would make a "declaration of anti-social behaviour" triggering a sanction of reduced HB (2) Administrative sanction: a local authority officer determines that there has been anti-social behaviour triggering the reduction. In both cases there would be an appeal to an independent tribunal against the application of the sanction.
- The government believes the sanction will provide a deterrent effect
- It believes that time spent investigating complaints and legal fees will be saved
- At the same time it says, "the level of the sanction is such that those arrears are unlikely of themselves to give grounds for eviction, but if there are other arrears, eviction may follow".

New flat-rate housing benefit

- Proposals were set out in the government's proposal paper "Building choice and responsibility: a radical agenda for Housing Benefit" (17 October 2002).
- A new flat rate "local housing allowance" for tenants in the deregulated private sector. Higher allowances for larger households. Allowances to be based on the local market rent. If the rent is less than the flat rate, the tenant can keep the difference.
- In most cases benefit will be paid direct to the claimant.
- There will be no need for new claims on starting work, or at the end of a benefit period.
- Pilots will be launched in 9 local authority areas, starting with Blackpool on 17 November.

been forced to do if the claimant had not. The duration of the rent-free period must be reasonable and not "excessive". But even if all of these conditions are met, the claimant will only be able to retain her/his HB for up to eight benefit weeks in any one rent-free period. There is nothing to stop a person claiming for a subsequent eight week period, so works that will take longer can be split up into eight week portions. In *R v Westminster CC HBRB ex p Sier* (1999) 32 HLR 655 at 662-3, QBD (Latham J), it was pointed out that where the eight-week period pre-dated any payment for rent, the authority would have to satisfy itself that there was actually an obligation to pay rent (in the absence of the waiver) prior to the payments of rent starting. In that case there was no evidence to support the existence of any such pre-existing liability. The judge also ruled that the eight week period had to run from the beginning of any rent-free period. Thus it is not possible to select a convenient eight week period in order to preserve transitional protection on, as in *Sier*, to take advantage of the exception to the old reg 7(1)(b).

- (5) Partners of students excluded by reg 48A(1) from entitlement: subpara (e).

Paragraph (2)

This ensures that a claimant may receive HB in respect of all of the rent due for a particular period, even when payment is made wholly or partly in advance. Benefit is to be calculated on the basis of the period to which a payment relates, irrespective of when payment is actually made. Likewise, where rent is varied, HB is calculated on the basis of the period the variation affects, irrespective of when the variation is announced to, or paid by, the claimant. So if rent is due on the first day of every month and the claimant's landlord informs her/him on the 15th that s/he is putting the rent up as of that month, for HB purposes the increase is treated as taking effect on the first day of the month.

Circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling

7.—(1) [A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where—

- (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis
- (b) his liability under the agreement is to a person who also resides in the dwelling and who is a close relative of his or his partner;
- (c) his liability under the agreement is—
 - (i) to his former partner and is in respect of a dwelling which he and his former partner occupied before they ceased to be partners, or
 - (ii) to his partner's former partner and is in respect of a dwelling which his partner and his partner's former partner occupied before they ceased to be partners;
- (d) he is responsible, or his partner is responsible, for a child of the person to whom he is liable under the agreement;
- (e) subject to paragraph (1B), his liability under the agreement is to a company or a trustee of a trust of which—
 - (i) he or his partner,
 - (ii) his or his partner's close relative who resides with him, or
 - (iii) his or his partner's former partner
 is, in the case of a company, a director or an employee, or, in the case of a trust, a trustee or a beneficiary,
- (f) his liability under the agreement is to a trustee of a trust of which his or his partner's child is a beneficiary;
- (g) subject to paragraph (1B), before the liability was created, he was a non-dependant of someone who resided, and continues to reside, in the dwelling;
- (h) he previously owned, or his partner previously owned, the dwelling in respect of which the liability arises [and less than five years have elapsed since he or, as the case may be, his partner, ceased to own the property,

save that this sub-paragraph shall not apply] where he satisfies the appropriate authority that he or his partner could not have continued to occupy that dwelling without relinquishing ownership;

- (i) his occupation, or his partner's occupation, of the dwelling is a condition of his or his partner's employment by the landlord.
- (j) he is a member of, and is wholly maintained (disregarding any liability he may have to make payments in respect of the dwelling he occupies as his home) by, a religious order;
- (k) except where paragraph (2) applies, he is in residential accommodation; in a case to which the preceding sub-paragraphs do not apply, the appropriate authority is satisfied that the liability was created to take advantage of the housing benefit scheme established under part VII of the Contributions and Benefits Act.

(1A) In determining whether a tenancy or other agreement pursuant to which a person occupies a dwelling is not on a commercial basis regard shall be had inter alia to whether the terms upon which the person occupies the dwelling include terms which are not enforceable at law.

(1B) Sub-paragraphs (e) and (g) of paragraph (1) shall not apply in a case where the person satisfies the appropriate authority that the liability was not intended to be a means of taking advantage of the housing benefit scheme.]

[(2) [This paragraph applies to a person who—

- (a) [. . .]
 - (b) [. . .]
 - (c) was or became entitled immediately before 30th October 1990 to housing benefit in respect of residential accommodation; or
 - (d) became or becomes entitled to housing benefit in respect of such accommodation on or after that date but only if the claim was made or, as the case may be, the appropriate authority is satisfied that the claim was sent or delivered to the appropriate DSS office or designated office in accordance with regulation 72(4) (time and manner in which claims are made), before that date.
- (3) In this regulation "residential accommodation" means accommodation which is provided by an establishment—
- (a) registered in Part I of the Registered Homes Act 1984;
 - (b) in Scotland, which is a home registered under section 61 of the Social Work (Scotland) Act 1968 or is an establishment provided by a housing association registered with Scottish Homes established by the Housing (Scotland) Act 1988 which provides care equivalent to that given in residential accommodation provided under Part IV of the Social Work (Scotland) Act 1968;
 - (c) in premises which are a nursing home or mental nursing home within the meaning of the Registered Homes Act 1984 and which are either registered under Part II of that Act or exempt from registration under section 37 thereof (power to exempt Christian Science Homes);
 - (d) in any premises used or intended to be used for the reception of such persons or the provision of such nursing or services as are mentioned in any of sub-sections (1)(a) to (c) of section 21 or section 22(1) of the Registered Homes Act 1984 (meaning of nursing home or mental nursing home) or, in Scotland, as are mentioned in section 10(2) of the Nursing Homes Registration (Scotland) Act 1938 (interpretation) and which are maintained or controlled by a body instituted by special Act of Parliament or incorporated by Royal Charter;
 - (e) (i) in premises which are a nursing home within the meaning of