Payability of RDAA when claiming for Reg. Care — Applicability of AA 1975 Reg 4(1) + 91 Reg. 7(1)

CPAG

JMe/1/LM **Commissioner's File:** CA/060/93 38/94

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR ATTENDANCE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The adjudication officer's appeal is allowed as a matter of law, but the decision on the claim remains to the same effect as that given by the appeal tribunal below. The decision of the Newport social security appeal tribunal dated 21 January 1993 is erroneous in point of law, for the reasons given in paragraph 24 below, and I set it aside. I consider it expedient to make further findings of fact and to give the decision on the claim (Social Security Administration Act 1992, section 23(7)(1)(ii)). My decision on the claim is set out in paragraph 2.

2. My decision on the claim is that higher rate attendance allowance is payable to the claimant from 20 May 1991. Payment to her of the allowance to which she is entitled is not precluded by regulation 4(1) of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 or regulation 7(1) of the Social Security (Attendance Allowance) Regulations 1991.

The background

3. The claimant, who was born in 1909, became a resident in an old people's home (Elmdon) owned and run by the Isle of Wight County Council ("the Council") on 19 December 1988. The home was provided by the Council in pursuance of its duty under section 2(1) of the National Assistance Act 1948 ("the 1948 Act"). The claimant was able to and did pay the full charge for the accommodation from her own resources. On 10 May 1991 Elmdon was leased by the Council to Islecare, a company limited by guarantee and a registered charity, which took over the running of Elmdon. I shall have to return to the circumstances of this transfer in considerable detail below. Before the transfer, the claimant was informed of the changes proposed and was offered the choice of moving to other residential accommodation which would continue to be provided by the Council or of staying at Elmdon under the management of Islecare. Following correspondence between the claimant's son and the Council's Director of Social Services and a meeting of the claimant, her son and Council

officials at Elmdon, the claimant decided to stay at Elmdon and her son signed a form in the terms of that now copied on page 98 of the papers before me. She then became liable to pay a weekly charge for her accommodation to Islecare.

4. On 20 May 1991 the claimant's son made a claim for attendance allowance on her behalf. It is not in dispute that he was made the claimant's appointee for attendance allowance purposes. It appears from the copy of the letter giving notice of the adjudication officer's decision (page T43), that the Attendance Allowance Board certified that she required day supervision, day attention and night attention. It also appears from the form of the adjudication officer's decision set out on page T17 that the certificate was given for life, rather than for a specified period, although I do not have a copy of the certificate in evidence before me. After making enquiries of the manager of Elmdon and the Council, the adjudication officer on 30 August 1991 decided that although the claimant was entitled to attendance allowance, the allowance was not payable to her for any day of residence in scheduled accommodation from and including 20 May 1991 by virtue of regulations 4 and 5 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 ("the 1975 Regulations"). The reply from Elmdon had said that it was owned by the Council and managed by Islecare. The reply from the Council was that the Council was not the owner of and responsible for the management of Elmdon and had not borne any of the cost of the claimant's accommodation. It made a grant of £170.00 per quarter towards the general costs of Islecare under section 65 of the Health Services and Public Health Act 1968.

5. The claimant's son appealed against the adjudication officer's decision in a letter dated 6 December 1991. Although there is in the papers before me (at page T54) a determination by a social security appeal tribunal chairman not to extend the time for appealing so as to admit the appeal for hearing, it was common ground that the appeal was later agreed not to be out of time and that it was properly admitted for hearing by an appeal tribunal. I accept that that was so.

6. The claimant's son attended the hearing before the appeal tribunal on 21 January 1993 and gave evidence. Mr Lightburn, the General Manager of Islecare, also gave evidence and put in a written submission (pages T55 and T57). The supplementary written submission by the adjudication officer (page T32) was that the claimant's accommodation in Elmdon was provided in pursuance of Part III of the 1948 Act and that paragraph 8 of Commissioner's decision R(A) 2/73 establishes that attendance allowance is not payable where the local authority arranges for such accommodation to be provided by someone else.

The appeal tribunal's decision

7. The appeal tribunal, after what was obviously a thorough and careful hearing, decided to allow the appeal and found that the claimant was entitled to higher rate attendance allowance from 20 May 1991. Its findings of fact set out substantially the same

elements as in paragraphs 3 and 4 above. Its reasons for decision were recorded as follows:

> "Under the Social Security (Attendance Allowance) (No. 2) Regulations 1975, except in specified cases, attendance allowance is not payable in respect of a person over the age of 16 years if living in accommodation (a) provided pursuant to Part III National Assistance Act 1948 ... (b) provided in circumstances in which the cost of the accommodation is borne wholly or partly out of public or local funds pursuant to a scheduled enactment or (c) provided in circumstances in which the cost of the accommodation may be borne wholly or partly out of public or local funds in pursuance of a scheduled enactment.
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> In general terms, no attendance allowance was payable to anyone in what was described as "Part III accommodation".
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> The date of claim was 20 May 1991 at which time [the claimant] had opted to transfer to Islecare rather than remain under the care of the County Council (and presumably remain in Part III accommodation). The question for the Tribunal therefore was whether the fact that she had remained at the same nursing home, Elmdon, from 1988 to the present was to be regarded as remaining in Part III accommodation. The Tribunal find that the change in status, and the election she made to transfer to Islecare rather than stay with the County Council, meant that her accommodation came outside the provisions of being provided pursuant to Part III.
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> The Tribunal then had to consider provisions (b) and (c) in Regulation 4(1) of the No. 2 Regulations and to decide whether the cost of the accommodation was being borne wholly or partly out of public or local funds or "may be borne". The Tribunal took note of the fact that £170 per quarter was paid under a non-scheduled enactment, namely one not in the schedule to the No. 2 regulations and had therefore to consider whether sub-para (c) applied in that costs of the accommodation "may be borne". The Tribunal accepted that that was a more difficult concept although it seemed clear from the County Council correspondence that they had no intention of providing for "the cost of the accommodation" as they were contributing to "general costs of the association". In view of the transfer of the undertaking from the County Council to Islecare the Tribunal concluded that although the expression "may be borne" was exceedingly wide, it had to be restricted to what was reasonably foreseeable and the County Council's expressed intention was clearly not to pay towards the cost of the accommodation.
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> On the basis that there was no dispute by the Adjudication Officer that [the claimant] would be entitled to the higher rate of attendance allowance the Tribunal felt it unnecessary to find specific facts as to the medical

condition."

Subsequent proceedings

8. The Chief Adjudication Officer applied for leave to appeal to the Commissioner, which was granted by the appeal tribunal chairman on 24 February 1993. In the subsequent submission on the appeal, dated 18 March 1993, the adjudication officer submitted that the appeal tribunal erred in deciding that the claimant's accommodation was provided outside Part III of the 1948 Act and in construing regulation 4(1)(c) of the 1975 Regulations. On the first point, paragraph 7 of the submission was in these terms:

> "It is submitted that where a local authority has accepted responsibility for a person under Part III of the 1948 Act, there is no provision for the local authority to relinquish its responsibilities as long as the person remains in need of care and attention, and provided that the person does not discharge herself from residential accommodation. There was no evidence to show that the claimant voluntarily discharged herself from the care of the local authority, only that she chose to remain in Elmdon, in my submission this does not mean the local authority's responsibilities under Part III of the 1948 Act have ended."

On the second point, it was submitted that the local authority had power to provide for the cost of the claimant's accommodation under Part III of the 1948 Act and paragraph 2(1) of Schedule 8 to the National Health Service Act 1977 ("the 1977 Act") and that therefore, following the Court of Appeal's ruling reported as an appendix to R(A) 3/83, attendance allowance was not payable under regulation 4(1)(c) of the 1975 Regulations.

9. The claimant's son submitted observations in reply dated 2 June 1993. He accepted that the claimant's accommodation was originally provided under Part III of the 1948 Act, but submitted that the Council's responsibilities came to an end with the fundamental changes on 10 May 1991. He had asked the Council to reassume responsibility, but it had declined to do so. He also requested an oral hearing of the appeal.

10. The adjudication officer made a further submission dated 22 June 1993. That submission was not sent to the other parties to the proceedings immediately (I think because the position of Islecare in the proceedings was still being sorted out), but everyone has now had an opportunity to consider it. The additional point made was that the claimant had discharged herself from the care of the local authority, but at the instigation of the local authority. Therefore, it was argued, she had not voluntarily discharged herself and the local authority still had a responsibility under Part III of the 1948 Act.

11. A submission dated 3 September 1993 on behalf of Islecare was made by the Company Secretary. It was argued that

the Council's duty to the claimant under Part III of the 1948 Act came to an end on 10 May 1991, when care and attention became available to her through Islecare, and that thereafter the Council had no duty or power to pay for her accommodation under the 1977 Act, as the result of DHSS circulars LAC 19/74 and (74) 28. On 10 November 1993 a Commissioner granted the claimant's request for an oral hearing and gave leave under regulation 17(5) of the Social Security Commissioners Procedure Regulations 1987 for Islecare to be present and to be heard at the hearing. On 6 December 1993 a nominated officer directed that the case should be expedited.

12. An oral hearing was held on 26 January 1994, at which the claimant's son was present. He maintained his previous submissions and also gave some further evidence as to the circumstances. Islecare was represented by Mr P. Pilgrem of the office of the County Secretary and Solicitor. The adjudication officer was represented by Mr A. Prosser of counsel. I am grateful to all of those present for the thoroughness and care with which their submissions on difficult topics had been prepared.

Was the appeal tribunal's decision erroneous in point of law?

13. It became a matter of agreement during the oral hearing that the appeal tribunal's decision had to be set aside as erroneous in point of law, but it is important that I should identify the extent of the error. Mr Prosser submitted that the appeal tribunal had erred in three respects: (a) in finding that the changes in the management of the claimant's accommodation in May 1991 meant that it was no longer provided pursuant to Part III of the 1948 Act; (b) in not considering whether the claimant's accommodation was provided pursuant to the 1977 Act; and (c) in misconstruing the words "may be borne" in regulation 4(1)(c) of the 1975 Regulations. My conclusion, explained below, is that only point (c) is made out.

Part III of the 1948 Act

14. On point (a) of Mr Prosser's submission, it is convenient to set out here the relevant parts of the 1948 Act, as in force at the date of claim. Section 21(1) and (2) provided:

> "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing--
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> (a) residential accommodation for persons aged eighteen or over who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them;
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> (b) [repealed].

(2) In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided, and in particular to the need for providing accommodation of different descriptions suited to different descriptions of such persons as are mentioned in the last foregoing subsection."

In the DHSS circular LAC 13/74 the Secretary of State directed that local authorities were to make the arrangements described in subsection (1). Section 22 provided for charges to be made for the accommodation. Section 26(1) to (3) provided:

"(1) Notwithstanding anything in the foregoing provisions of this Part of this Act, but subject to the next following subsection, arrangements under section 21 thereof may include provision whereby a local authority--

(a) may make, in lieu or in supplementation of the provision, in premises managed by them or another local authority, of accommodation of the kind mentioned in paragraph (a) of subsection (1) of the said section twenty-one, arrangements--

(i) with a voluntary organisation managing any premises, for the provision in those premises of accommodation of that kind;

(ii) with a person registered under section thirty-seven of this Act in respect of a disabled persons' or old persons' home, for the provision in that home of accommodation of that kind;

(b) [repealed].

(1A) No arrangements shall be made by virtue of paragraph (a) of the foregoing subsection by a local authority with a person who has been convicted of an offence against regulations under section forty of this Act.

(2) Any arrangements made by virtue of subsection (1) of this section shall provide for the making by the local authority to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements.

(3) A person for whom accommodation is provided under any such arrangements shall, in lieu of being liable to make payment therefor in accordance with section twenty-two of this Act, refund to the local authority any payments made in respect of him under the last foregoing subsection: [provisions where person unable to pay full rate of

charge]."

Subsection (5) provided:

> "(5) Where in any premises accommodation is being provided under subsection (1) of this section in accordance with arrangements made by any local authority, any person authorised in that behalf by the authority may at all reasonable times enter and inspect the premises."

15. Mr Prosser submitted that if the claimant's accommodation in Elmdon was provided pursuant to the Council's duty under section 21(1) of the 1948 Act prior to 10 May 1991 there was no provision in the 1948 Act for the Council to relinquish the duty which it had undertaken to the claimant. Under section 26, the Council only had power to transfer the management of the accommodation to a voluntary organisation; its underlying duty remained the same. He submitted that if a local authority enters an agreement with a voluntary organisation to take over premises currently provided under section 21(1), then the care and attention needed by the residents does not become "otherwise available" under paragraph (a). If it did, the interpretation of section 26 would be very difficult, because as soon as an arrangement with a voluntary organisation was made the duty to provide accommodation would fall away. He pointed to evidence before the appeal tribunal which indicated that the Council's duty to the claimant continued beyond 10 May 1991, in particular the fact that Islecare was a creation of the Council for the purpose of taking over the management of the Council's residential care homes. He accepted that if a person voluntarily discharged herself from her accommodation, the Council's duty under section 21(1) would cease, and that the result would be the same if a person made it clear that she was no longer in need of care and attention. However, he submitted that, on the evidence before the appeal tribunal, the claimant was offered only a choice of residence or of management, but not of releasing the Council from its duty, and remained in the same accommodation. Therefore, he submitted, the appeal tribunal erred in concluding that "the change in status, and the election she made to transfer to Islecare rather than stay with the County Council, meant that her accommodation came outside the provisions of being provided pursuant to Part III."

16. On this point, Mr Pilgrem gave a good deal of further information, from his personal knowledge, about the details of the arrangements between the Council and Islecare about the management of Islecare. I shall have to return to those details when considering my decision on the facts, but at the present stage I am concerned with the appeal tribunal's decision on the evidence which was before it. On the legal points, Mr Pilgrem submitted that the duty on a local authority under section 21 of the 1948 Act is to make arrangements to provide accommodation in premises managed by itself or another local authority (see subsection (4)). Then section 26 broadens the range of premises in which accommodation can be provided, but only within its specific terms, which refer back to accommodation of the kind

referred to in section 21(1)(a). Thus, he submitted, section 26 only remained in play while a duty was owed to a person within section 21. On that question, he submitted that if a voluntary organisation or some other residential home is providing on the market accommodation which would meet the needs of a particular person then section 21(1)(a) prevents the local authority from assisting that person. From 10 May 1991, once Islecare was managing Elmdon, the accommodation was available on the market to anyone who was able to pay the charges and, since the claimant chose to stay at Elmdon, the care and attention which she needed became "otherwise available" to her and the Council's duty ceased. He submitted that the arrangement between the Council and Islecare was not made under section 26. Everything that was done was authorised by statutes other than the 1948 Act and followed logically from the basis that the arrangements were not within section 26. The quarterly grant to Islecare was made under section 65(1) of the Health Services and Public Health Act 1968, which provides:

> "(1) A local authority may give assistance by way of grant or by way of loan, or partly in one way and partly in the other, to a voluntary organisation whose activities consist in, or include, the provision of a service similar to a relevant service, the promotion of the provision of a relevant service or a similar one or the giving of advice with respect to the manner in which a relevant service or a similar one can best be provided, and so may the Greater London Council."

A "relevant service" is one whose provision must or may be secured by a local authority under one of a list of specified enactments, including Part III of the 1948 Act (section 65(3)(c) and (d)). A grant cannot be made under section 65(1) to a voluntary organisation which actually provides a relevant service, only to an organisation which provides a similar service. Thus, Mr Pilgrem submitted, the making of the grant was an indication that the provision of accommodation by Islecare was not in fulfilment of the Council's duty under Part III of the 1948 Act. He submitted that the question was not whether the claimant had voluntarily released the Council from its duty, but whether the statutorily defined circumstances which gave rise to the duty had changed so that it no longer existed. He invited me to take the same approach to the effect of similar sorts of arrangements as that taken by the Commissioner in decisions CIS/298/1992 and CIS/641/1992.

17. The claimant's son submitted that the fundamental changes in the organisation and management of Elmdon meant that the Council relinquished responsibility for providing care and attention to the claimant, and that she made a free choice to move outside the care of the Council.

18. I reject point (a) of Mr Prosser's submissions. I consider that on the evidence before it, the appeal tribunal's conclusion was one which it was legally entitled to reach. In my view, when a local authority which has been maintaining residential

accommodation in pursuance of its duty under section 21(1) of the 1948 Act makes some arrangement with a voluntary organisation for that organisation to take over responsibility for the management of the accommodation there are two possible legal consequences in terms of the 1948 Act. The first is that the local authority has made arrangements under section 26 for the voluntary organisation to provide the accommodation in fulfilment of the local authority's duty under section 21(1). In that case, all the provisions of section 26 will apply. The second consequence is that the care and attention needed by the residents becomes available to them otherwise than by exercise of the local authority's duty under section 21(1), so that the duty is no longer owed to the residents. Which consequence follows in any particular case will depend on the nature of the arrangements made. In that conclusion I follow the approach of the Commissioner in decisions CIS/298/1992 and CIS/641/1992, where the argument that such arrangements could only have effect under section 26 was rejected. It was drawn to my attention that appeals to the Court of Appeal from those two decisions are due to be heard on 21 and 22 March 1994, but Mr Prosser did not make a specific request for an adjournment to await the Court of Appeal's decision. Since I am dealing with different benefit legislation, and I have taken a different view of some parts of the 1948 Act from that taken in the two decisions, I have decided that I should not delay my decision in the present case. In so far as the submission on behalf of the adjudication officer was that, in the absence of a resident voluntarily discharging herself from the accommodation or declaring herself not in need of care and attention, the local authority's duty cannot be brought to an end, I reject that submission. It seems to me that the fact that the 1948 Act contains no provision for a local authority to relinquish its responsibility under section 21(1) is beside the point. A local authority has the power to act and to incur expenditure only when authorised to do so by legislation. If the legislation defines the necessary circumstances for that authority to arise, then if those circumstances cease to exist, the authority to act also comes to an end. I accept Mr Pilgrem's submission that there is nothing in the form of Part III of the 1948 Act to take it outside this principle. In my view, once the care and attention which a person needs becomes available to her otherwise than by way of arrangements under sections 21(1) or 26 the local authority's duty under section 21(1) ceases to exist. Nor is there anything in Part III of the 1948 Act to exclude from that effect circumstances in which the care and attention becomes otherwise available by virtue of arrangements to which the local authority is a party or even instigates. I see no consequent difficulty in the construction of section 26 of the 1948 Act. It is not the case that if a local authority makes any arrangement with a voluntary organisation for the management of accommodation the section 21 duty will fall away, and with it the authority to act under section 26. Arrangements may still be made under section 26 which do not have that effect.

19. The question then is how to distinguish between arrangements within section 26 and arrangements which have the result that

care and attention becomes otherwise available. I accept Mr Pilgrem's submission that section 26 provides an exception to the local authority's duty under section 21(4) to provide accommodation in premises managed by itself or another local authority. Consequently, an arrangement with a voluntary organisation will fulfil the local authority's duty only if it is within the specific terms of section 26. That seems to me to reinforce the conclusion reached by the Commissioner in paragraph 20 of decision CIS/298/1992 that "the wording of section 26 ... relates[s] to - and solely to - freely consensual arrangements". In other words, section 26 applies only to arrangements made expressly or by necessary implication under the powers granted by that section, and which exhibit the necessary characteristics specified in section 26. If the arrangements with a voluntary organisation do not exhibit those characteristics, then even if they purport to be made under section 26, they will not fulfil the local authority's duty under section 21, with the result that the continued provision of accommodation under the management of the voluntary organisation is not in pursuance of Part III of the 1948 Act.

20. The Commissioner in decision CIS/298/1992 refers particularly to subsections (2) and (5) of section 26 in describing important attributes of section 26 arrangements. I consider that subsection (5), giving representatives of the local authority the right to enter and inspect the premises which are the subject of the arrangements, is of little importance, since it confers that right automatically as a consequence of there being section 26 arrangements and does not require the arrangements themselves to provide for such a right. However, I consider that subsection (2) is central to the operation of section 26. At the oral hearing I expressed some puzzlement over the thinking behind the requirement in subsection (2) that the arrangements themselves should provide for payment by the local authority to the voluntary organisation. No-one was able to shed much light on the matter. But on further study of section 26, I have concluded that the combination of subsections (2) and (3) provides the key. Where accommodation under the management of a local authority is provided to a person under section 21(1) she is obliged to pay for the accommodation under section 22. The person's liability to pay is a statutory liability. Subsection (3) of section 26 provides that, where the accommodation is managed by a local authority under section 26(1), the person is not liable to pay for the accommodation under section 22, but is obliged to refund to the local authority the payments made by the local authority to the voluntary organisation under subsection (2). The essence of a section 26 arrangement thus seems to me to be that, since the accommodation is provided in fulfilment of the duty under section 21(1), the person concerned is under no liability to pay the voluntary organisation for the accommodation, but is obliged to pay the local authority by refunding the payments made to the voluntary organisation by the local authority. The second part of subsection (3), which I have not set out in paragraph 14 above, provides for the reduction of the amount of the refund on grounds of inability to pay on the same basis as

under section 22. There then seems, in the absence of specific statutory authority, to be no room for the person concerned to be placed under any liability to the voluntary organisation to pay for the accommodation provided. Thus, if the arrangements made in any particular case provide for residents to make payments for their accommodation to the voluntary organisation, a necessary characteristic of section 26 arrangements is missing and the continued provision of accommodation is not pursuant to Part III of the 1948 Act. I must stress that I am considering only the form of the 1948 Act prior to the important amendments made by the National Health Service and Community Care Act 1990 which came into force on 1 April 1993.

21. My conclusion that a local authority's duty to a person under Part III of the 1948 Act may come to an end, not only as a result of that person's voluntary discharge from accommodation or declaration of not being in need of care and attention, but also from the cessation of the circumstances which gave rise to the duty, is supported by some remarks of Dillon LJ in R v Devon County Council, ex parte Baker and R v Durham County Council, ex parte Curtis (1993) 91 LGR 479. That decision of the Court of Appeal was not cited to me in argument, and the context is rather different, so that I do not rely on it directly. The question was of the extent of the consultation of residents required before a local authority closed a Part III home. Dillon LJ (at page 484) makes it clear that the 1948 Act "envisages that by reason of a change in a person's circumstances he may no longer be qualified to receive accommodation under the Act or may become unsuitable therefor".

22. To return to the facts found by the appeal tribunal in the present case, the consequence of the legal approach described above is that the appeal tribunal came to the only possible decision, in concluding that from 10 May 1991 onwards the claimant's accommodation was not provided pursuant to Part III of the 1948 Act under regulation 4(1)(a) of the 1975 Regulations. Mr Prosser put forward a number of items of evidence as indicating that the Council had not relinquished its responsibility towards the claimant under Part III of the 1948 Act, in particular the fact that Islecare was a creation of the Council for the express purpose of managing residential care homes formerly operated by the Council. However, on the view that I have formed of the law, those other items of evidence are not relevant. It was a matter of agreement that from 10 May 1991 the claimant was required to pay a weekly charge to Islecare for her accommodation in Elmdon (see the letter dated 5 December 1991 from the Council's Director of Social Services and the letter dated 24 August 1992 from Mr Lightburn, the General Manager of Islecare). In my view, that prevented the arrangements from having effect under section 26 of the 1948 Act. Elmdon was no longer managed by the Council, so that its accommodation could not be provided under section 21. The result is that it was not provided pursuant to Part III. The appeal tribunal did not make a specific finding of fact on the claimant's liability to make payments to Islecare. It would have been better if it had, but in the circumstances, and as there was no dispute about the

matter, I consider that such a finding was implied in the findings that the claimant transferred to Islecare. Those findings as a whole were adequate. The reasons given for the appeal tribunal's conclusion were succinct, but also adequate in the circumstances.

The National Health Service Act 1977

23. Mr Prosser's second point was that when the appeal tribunal had determined that the claimant's accommodation was no longer provided pursuant to Part III of the 1948 Act under regulation 4(1)(a) of the 1975 Regulations it should have gone on to consider whether it was provided pursuant to paragraph 2 of Schedule 8 to the 1977 Act and to record findings of fact on that issue. He accepted that there was no question of Part IV of the Social Work (Scotland) Act 1968 (which is also referred to in regulation 4(1)(a)) applying, but submitted that although no-one had suggested the application of the 1977 Act, the appeal tribunal should have investigated the matter in the exercise of its inquisitorial jurisdiction. As will appear below, there was no power to provide accommodation to the claimant in pursuance of paragraph 2 of Schedule 8 to the 1977 Act. But even if there had been, it was clear that there had been no purported exercise of that power either before or after 10 May 1991. In those circumstances, it would be carrying the inquisitorial duties of the appeal tribunal to absurd lengths to hold that it should have considered the 1977 Act.

Regulation 4(1)(c) of the 1975 Regulations

24. Mr Prosser submitted that the appeal tribunal adopted the wrong legal principle when it asked itself whether it was reasonably foreseeable that the Council would exercise any of its powers under a scheduled enactment, and in particular under paragraph 2 of Schedule 8 to the 1977 Act, to provide in whole or part for the costs of the claimant's accommodation in Elmdon. He submitted that the ordinary and natural meaning of the words "may be borne" in regulation 4(1)(c) did not carry any implication as to reasonable foreseeability of use of any statutory power, but referred only to the existence of that power. He supported that submission by reference to the decision of the Court of Appeal in Jones (on behalf of Wilde) v Insurance Officer (15 February 1984), reported as an appendix to R(A) 3/83 and printed at page 1608 of the bound volume of Commissioners' decisions for 1983 and 1984. That decision was concerned with an earlier version of the 1975 Regulations which contained a provision in substantially the same terms as regulation 4(1)(c). The view that the provision required there to be a real possibility of subsidy from public funds was argued before the Social Security Commissioner. He rejected that view and held that the provision applied whenever a local authority had power under a scheduled enactment to subsidise the cost of the claimant's accommodation. The Court of Appeal held that the Commissioner was right. I must of course follow the Court of Appeal's decision as to the legal principle, which accords with the view I would in any event have taken of the meaning of

regulation 4(1)(c).

25. The consequence is that the appeal tribunal erred in law, although, since R(A) 3/83 and the Court of Appeal's decision was not referred to before it, no personal fault can attach to the members of the appeal tribunal for that. Mr Pilgrem in his submissions accepted that the appeal tribunal erred in law in this respect. Accordingly, I must set aside the decision dated 21 January 1993. However, I consider that it is expedient for me to make further findings of fact and to give the appropriate decision on the claim under section 23(7)(a)(ii) of the Social Security Administration Act 1992. My decision is set out in paragraph 2 above and I explain my reasons and findings of fact below.

The Commissioner's decision on the claim

26. A preliminary question is the period which is in issue before me. That question was raised at the oral hearing and the parties were given the opportunity to make written submissions within very strict time limits. Fortunately, the further submissions made by Ms Churaman on behalf of the adjudication officer, and not challenged by the claimant or Islecare, accorded on this point with the view I had already reached independently. The adjudication officer's decision under appeal expressly determined that the claimant was entitled to attendance allowance at the higher rate from 20 May 1991. The decision was open-ended in this respect. Entitlement was not determined for a definite period. Section 35(2) of the Social Security Act 1975, as in force at the date of claim, provided that the period for which a person was entitled to attendance allowance should be that specified in a certificate issued by the Attendance Allowance Board as being the period throughout which the person is likely to satisfy one or both of the day-time or night-time medical conditions. That indicates that the certificate issued in relation to the claimant was for life, rather than for a limited period. Regulation 4(1) of the 1975 Regulations was made under section 35(6) of the Social Security Act 1975 and relates to the payability of attendance allowance for any period during which the claimant is living in accommodation specified in sub-paragraphs (a) to (c). In those circumstances, where there is an underlying entitlement to attendance allowance for an indefinite period, I have no doubt that an adjudicating authority considering the claim is bound to take into account in determining the question of payability the circumstances and the legislation in force for each week from the date of claim down to the date on which the adjudicating authority makes its decision. Thus, although the adjudication officer was only considering the circumstances down to the date of his decision, on appeal the appeal tribunal was bound to consider the circumstances down to 21 January 1991. On the further appeal to the Commissioner, I am bound to consider the circumstances down to the date of my decision. If the position were otherwise, there would be a serious risk of injustice to claimants, particularly where the process of appeal is long drawn-out.

27. I begin by looking at the date of claim, 20 May 1991. I adopt as basic findings of fact what is set out as background in paragraphs 3 and 4 above. I make additional findings as necessary in dealing with the legal issues. For the reasons explained in paragraphs 18 to 22 above, I conclude that the claimant's accommodation was not provided pursuant to Part III of the 1948 Act. It is not in dispute that from 10 May 1991 Elmdon was not managed directly by the Council, in that Islecare was a legal entity separate from the Council. I have found that the arrangements for the transfer of management to Islecare required that residents who remained at Elmdon would become liable to pay a charge for the accommodation to Islecare. I also accept Mr Pilgrem's evidence from his personal role in the making of the arrangements for the transfer that the Council was deliberately not seeking to use its power under section 26 of the 1948 Act, but used other powers. In those circumstances, I do not need to make any further findings of fact, but it might be helpful for me to record the essentials of Mr Pilgrem's evidence about the nature of the arrangements. Mr Prosser did not seek to challenge that evidence, which I accept. Islecare was set up as a voluntary organisation by the Council, the Health Authority and a housing association with the objective of carrying on the business of residential care homes on the Isle of Wight. The Council leased Elmdon to Islecare for 21 years and made a grant of £170.00 per quarter under section 65 of the Health Services and Public Health Act 1968. Islecare undertook no obligations as to the standards of provision in Elmdon in return for the lease or the grant. The home would be registered under the Registered Homes Act 1984 and that system was relied on for ensuring appropriate standards of provision. There was no reservation of places at Elmdon for residents referred by the Council. There was a "care agreement" which related only to the provision of staff by the Council to Islecare. A copy of that agreement, dated 21 January 1991, has been provided following the oral hearing. It provides for the Council to supply sufficient staff, who will remain employed by the Council, for each dwelling listed from time to time in the schedule to the agreement. Islecare agreed to pay the Council the cost of the staff.

28. I would also have found, if it had been necessary, that the expression of choice signed by the claimant's son in the form set out on page 98 of the papers before me was clear enough to release the Council from any duty owed to her under section 21(1) of the 1948 Act. I accept her son's evidence that the issues were discussed fully with her before the transfer of management, that she fully understood them and that she made a free choice to move from Council care to Islecare. His signature was an expression of her wishes. That could not have been a clearer indication that the claimant no longer desired care and attention to be provided, in the form of accommodation, by the Council. If I had not concluded that the nature of the arrangements made between the Council and Islecare meant that the continued provision of accommodation to the claimant in Elmdon was not in pursuance of Part III of the 1948 Act, I would have concluded that the expression of choice in fact made had the same result.

29. For the reasons given in paragraph 23 above the accommodation in Elmdon was not provided pursuant to paragraph 2 of Schedule 8 to the 1977 Act or to Part IV of the Social Work (Scotland) Act 1968. Therefore, as at 21 May 1991, payability of attendance allowance to the claimant was not precluded by regulation 4(1)(c) of the 1975 Regulations. There has been no suggestion that the cost of the accommodation was being borne wholly or partly out of public or local funds in pursuance of another scheduled enactment. Section 65 of the Health Service and Public Health Act 1968 is not referred to in the Schedule to the 1975 Regulations. Therefore, as at 20 May 1991, payability was not precluded by regulation 4(1)(b) either.

30. That leaves regulation 4(1)(c). Since paragraph 2 of Schedule 8 to the 1977 Act is a "scheduled enactment", being referred to in the Schedule to the 1975 Regulations, it would appear at first sight that the circumstances were such that the cost of the accommodation "may be borne wholly or partly out of public funds in pursuance of a scheduled enactment". Paragraph 2 provides:

> "(1) A local social services authority may, with the Secretary of State's approval, and to such extent as he may direct shall, make arrangements for the purpose of the prevention of illness and for the care of persons suffering from illness and for the after-care of persons who have been suffering and in particular for--
>
> (a) the provision, equipment and maintenance of residential accommodation for the care of persons with a view to preventing them from becoming ill, the persons suffering from illness and the after-care of persons who have been so suffering;
>
> (b) the provision, for persons whose care is undertaken with a view to preventing them from becoming ill, persons suffering from illness and persons who have been so suffering, of centres or other facilities for training them or keeping them suitably occupied and the equipment and maintenance of such centres;
>
> (c) the provision, for the benefit of such persons as are mentioned in paragraph (b) above, of ancillary or supplemental services; and
>
> (d) for the exercise of the functions of the authority in respect of persons suffering from mental disorder who are received into guardianship under Part II or III of the Mental Health Act 1983 (whether guardianship of the local social services authority or of other persons).
>
> [remainder not relevant]."

In the present case the Council was the local social services authority.

31. The powers conferred by paragraph 2(1) are very broad indeed. The adjudication officer's submission dated 18 March 1993 referred to the statement by Browne-Wilkinson LJ in the Court of Appeal in Jones (on behalf of Wilde) v Insurance Officer, appendix to R(A) 3/83, in the following terms:

> "The powers of the local authority in cases of severe disablement under paragraph 2 of Schedule 8 of the National Health Service Act 1977 are very wide, and it is difficult to think of any case in which such power is not potentially exercisable in favour of a claimant who would otherwise qualify for an attendance allowance. Therefore the view which the commissioner has formed and which the Department now supports is one which limits the ambit of attendance allowance very closely indeed."

The Court of Appeal, however, held that the Commissioner's view (summarised in paragraph 24 above) was correct on the plain words of the provision before them. Mr Prosser's initial submission was that, applying the principle laid down by the Court of Appeal, the Council had power to contribute to the cost of the claimant's accommodation in Elmdon, so that payability of attendance allowance was precluded by regulation 4(1)(c) of the 1975 Regulations.

32. Mr Pilgrem submitted that the power to contribute to the cost of accommodation only arose with the approval of the Secretary of State and that the Secretary of State had not approved the making of such contributions in circumstances like those of the claimant. He referred to two Department of Health and Social Security circulars, both of which related to section 12 of the Health Services and Public Health Act 1968. However, it was accepted that paragraph 2 of Schedule 8 to the 1977 Act was a re-enactment of section 12 following its repeal and that the directions or approvals contained in the circulars applied to paragraph 2 of Schedule 8 to the 1977 Act. The first circular was LAC 19/74, dated 23 April 1974. The Appendix to that circular sets out the Secretary of State's approval for the provision of a wide range of services, including the use of accommodation made available by voluntary bodies, but only in relation to the prevention of mental disorder or to the care or after-care of persons who are or have been suffering from mental disorder. The second circular was LAC (74) 28, dated August 1974, paragraph 5 of which provides:

> "5. General approval has already been given in Local Authority Circular 19/1974 in respect of services for the mentally disordered provided under Section 12. In addition, the Secretary of State hereby approves the making of arrangements under this section for the provision of social services (including advice and support) for the prevention of illness, the care of those suffering from illness and the after-care of those suffering, namely:

(a) For the purposes of preventing the impairment of physical or mental health, especially of children, in families where such impairment is likely; for preventing the break up of such families or for assisting in their rehabilitation;

(b) To meet the needs of the sick, not provided for under the general approval given in Local Authority Circular 19/1974 (persons who are under medical care or who have been discharged from hospital) and the provision of night-sitter services;

(c) For the provision of meals served in clubs or centres and meals-on-wheels for house-bound people, not provided for under Section 29 of the National Assistance Act 1948, or Section 45 of the Health Services and Public Health Act 1968;

(d) For the provision of recuperative holidays."

Mr Pilgrem submitted that that approval only related to social services for the purposes specified and did not extend to providing residential accommodation or contributing to the cost of accommodation provided by voluntary organisations. Since the claimant was not mentally disordered, or at risk of becoming mentally disordered, the Council had no power to contribute to the cost of her accommodation in Elmdon in pursuance of paragraph 2 of Schedule 8 to the 1977 Act. He distinguished Jones (on behalf of Wilde) v Insurance Officer, appendix to R(A) 3/83, on the basis that both the claimants involved in that case were mentally disordered, so that there was clearly power to contribute to the cost of their accommodation. Indeed the local authority had been making contributions until they were withdrawn in an attempt to facilitate claims for attendance allowance.

33. In reply, Mr Prosser accepted the restriction of LAC 19/74 to the mentally disordered, but submitted that paragraph 5 of LAC (74) 28 authorised the use of the full scope of the power available under paragraph 2 of Schedule 8 to the 1977 Act, including contributing to the cost of accommodation. He submitted that the words "social services" were apt as an umbrella covering the broad range of provision and purposes mentioned in paragraph 2. Since the claimant was by definition suffering from illness, the Council had power to contribute to the cost of her accommodation at Elmdon.

34. I accept Mr Pilgrem's submissions and reject Mr Prosser's submissions. The matter is very much one of impression, and deep analysis of the words of circulars is not appropriate. I note that section 2 of the Local Social Services Act 1970 required a local authority to establish a social services committee and to refer to it all matters concerning the discharge of the local authorities functions under a number of statutes, including

Part III of the 1948 Act and section 12 of the Health Service and Public Health Act 1968 (the predecessor of paragraph 2 of Schedule 8 to the 1977 Act). Section 3 defined social services functions as those concerning those specified statutes. Therefore, there is force in the general proposition that the words "social services" when used in circulars relating to social services functions could have a very wide meaning. But the approval given in paragraph 5 of LAC (74) 28 is restricted to the provision of "social services" for the purpose and of the types specified in sub-paragraphs (a) to (d). Those sub-paragraphs seem to me to be directed to meeting very specific needs arising from illness and not to meeting more general needs for residential accommodation. I note that in paragraph 4 of the same circular, dealing with the needs of unmarried and other unsupported mothers and their children, the provision of residential accommodation is expressly mentioned as an example of a more general approval. In my view, paragraph 5 does not approve the making of arrangements for the provision of residential accommodation. If it had been intended to, it would have said so expressly. Thus, local authorities only have power to contribute to the cost of accommodation pursuant to paragraph 2 of Schedule 8 to the 1977 Act in cases relating to mental disorder. In my judgment, what was said by the Commissioner in R(A) 3/83 and the Court of Appeal in Jones (on behalf of Wilde) v Insurance Officer in relation to the local authority's power under paragraph 2 of Schedule 8 to the 1977 Act must be limited to such cases. The Commissioner refers in paragraph 3 of his decision to LAC 19/74, but does not note that that circular was restricted to the mentally disordered. Before the Court of Appeal, it seems to have been a matter of agreement that the legislation authorised the making of supplementation payments to the proprietor of the accommodation in which the one claimant who pursued the appeal beyond the Commissioner lived. It was found that he suffered from a mental disability. In those circumstances, the view taken of the scope of paragraph 2 of Schedule 8 of the 1977 Act must be limited to the authorisation in fact supplied by the legislation at the time. Browne-Wilkinson LJ may not have expressed himself quite in the way in which he did in the passage quoted in paragraph 31 above if that limit had been in the forefront of his mind, but that statement was not necessary to the decision in the appeal. The limitation which I have put forward has no effect on the central point of the appeal, which was the proper meaning of regulation 4(1)(c) of the 1975 Regulations, as then in force, and, in view of the regrets expressed by the members of the Court of Appeal about the conclusion to which they were forced, I do not think that it is in any way inconsistent with their intentions.

35. The result of my conclusion on the Council's powers under paragraph 2 of Schedule 8 to the 1977 Act is that the circumstances as at 20 May 1991 were such that the cost of the claimant's accommodation could not be borne wholly or partly out of public or local funds in pursuance of an enactment referred to in the Schedule to the 1975 Regulations. The evidence is that the claimant's need for attention and supervision at that date

stemmed from her diabetes and difficulties with mobility generally. She was not mentally disordered or in need of care to prevent mental disorder. Therefore, payability of attendance allowance was not precluded by regulation 4(1)(c).

36. That leads to the conclusion that attendance allowance was payable to the claimant from 20 May 1991, since no other barrier to payability has been suggested. Attendance allowance will remain payable indefinitely unless there is a change of circumstances. Because the claimant was over the age of 65 on 6 April 1992, her award of attendance allowance is not affected by the introduction of disability living allowance (Social Security (Introduction of Disability Living Allowance) Regulations 1991, regulation 2). As explained in paragraph 26 above, I must deal with the circumstances down to the date of my decision. The evidence is that the circumstances, in the sense of the claimant's condition and her continued residence in Elmdon have remained unchanged in any material respect. A potential change would be that she became mentally disordered, or at risk of mental disorder such that preventive measures became necessary. Such a change might trigger the Council's power to contribute to the cost of accommodation under paragraph 2 of Schedule 8 to the 1977 Act and lead to attendance allowance becoming not payable by virtue of regulation 4(1)(c) of the 1975 Act. Although there was evidence that the claimant's mental condition had deteriorated somewhat from that as at 20 May 1991, there was no evidence that it had reached the stage of mental disorder or a risk of mental disorder requiring preventive measures. Certainly, that was not the case prior to the occurrence of a second type of change of circumstances.

37. That second type is a change in the relevant law. The 1975 Regulations were revoked on 6 April 1992 and replaced by the Social Security (Attendance Allowance) Regulations 1991 ("the 1991 Regulations"). There have been amendments to the 1991 Regulations since 6 April 1992, but I deal first with the position as at that date. Regulation 7(1) of those Regulations is in substantially the same basic terms as regulation 4(1) of the 1975 Regulations. However, regulation 7(1) is expressly made subject to paragraphs (2), (3) and (4). Paragraph (3) provides:

> "(3) Paragraph (1)(c) shall also not apply--
>
> (a) [not relevant];
>
> (b) where the person himself pays the whole cost, and always has paid the whole cost, of the accommodation;
>
> (c) [not relevant]."

The undisputed evidence, which I accept, is that the claimant currently pays the whole cost of her accommodation in Elmdon and has done so continuously since she became resident there. Thus, I accept the further submission dated 9 February 1994 on behalf of Islecare that, from 6 April 1992 onwards, attendance allowance

cannot be found not to be payable to the claimant by virtue of regulation 7(1)(c) of the 1991 Regulations, which is the equivalent of regulation 4(1)(c) of the 1975 Regulations. Even if a power arose for the Council to contribute to the cost of the claimant's accommodation under paragraph 2 of Schedule 8 to the 1977 Act, that would not affect the payability of attendance allowance. That conclusion is not affected by any of the amendments of the 1991 Regulations taking effect on 15 December 1992. Nor is it affected by the amendments taking effect on 1 April 1993. On that date, the condition was added to regulation 7(3)(b) that the person concerned has a preserved right for the purposes of regulation 8(3) of the Social Security Benefits (Amendments Consequential Upon the Introduction of Community Care) Regulations 1992. Thus it is no longer enough for exemption from regulation 7(1)(c) that the person has always paid the whole cost of her accommodation. A person has a preserved right as described above when, inter alia, she was on 31 March 1993 living in a home registered under the Registered Homes Act 1984 as a residential care home or a nursing home (Social Security Benefits (Amendments Consequential Upon the Introduction of Community Care) Regulations 1992, regulation 8(4)(a)). In the present case, Elmdon was registered as both a residential care home and a nursing home and the claimant was resident there on 31 March 1993. She has a preserved right and has not lost that preserved right by a period of absence under regulation 8(5).

38. I am also satisfied that neither sub-paragraph (a) nor (b) of regulation 7(1) of the 1991 Regulations applies to the claimant's circumstances from 9 April 1992 to the present. I shall not go into any details beyond saying that in my view the Council's quarterly grant to the running costs of Islecare under section 65 of the Health Services and Public Health Act 1968 is not made in pursuance of an "enactment relating to persons under disability or to education or training" (regulation 7(1)(b)). Section 65 is an enactment relating to voluntary organisations, not to persons under disability. The submission on behalf of Islecare dated 9 February 1994 mentions regulation 8(6) of the 1991 Regulations (in force from 1 April 1993) as exempting the claimant entirely from the effect of regulation 7. However, the application of regulation 8(6) to the present case is not free of problems, because it does not apply where the claimant's home is owned, even though not managed, by a local authority (regulation 8(7)) and I prefer to express no view on the matter.

39. I therefore conclude that there is no obstacle to payability of attendance allowance to the claimant from 20 May 1991 to the present, since no obstacle other than the residence of the

claimant in Elmdon has been put forward. My decision on the claim, which gives effect to that conclusion, is set out in paragraph 2 above.

(Signed) J Mesher
Commissioner

Date: 5 April 1994