

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I GRANT LEAVE to Southampton City Council to appeal against the decision of the Southampton appeal tribunal held under reference U/03/203/2004/01446 on 21 December 2004.
2. My decision on the appeal is given under paragraph 8(4) and (5)(c) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It is:

I SET ASIDE the decision of the appeal tribunal, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT that tribunal to conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under paragraph 6(9)(a) of Schedule 7 to the 2000 Act, any other issues that merit consideration. In particular, the tribunal must investigate and determine:

- Whether the local authority had grounds to revise or supersede the decision(s) awarding housing benefit to the claimant under the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. Before this case is listed for rehearing, it must be put before a district chairman to consider whether it is necessary or appropriate to give directions under regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 requiring the local authority to deal with this issue in a further submission.
- Whether the claimant was barred from entitlement to housing benefit under regulation 6 or regulation 7(1)(g) and (l) and (1B) of the Housing Benefit (General) Regulations 1987.

3. This case has been delayed to allow the claimant to obtain legal funding for representation. It was originally under the management of Miss Commissioner Fellner, but she transferred it to me before going on sick leave. Miss Fellner had directed an oral hearing of the application, which was held before me on 5 June 2006 in the Commissioners' court in London. The local authority was represented by Mr Ranjit Bhowse, of counsel. The claimant was represented by Mr Desmond Rutledge, also of counsel. I am grateful to them both for their written arguments in advance of the hearing and for their oral argument at the hearing. They agreed that their submissions should stand as the submissions on the appeal were I to grant leave.

The background of the case

4. I am going to set out the 'facts' in a rather general way that is sufficient to show how the issues arise. I have tried to avoid as far as possible referring to matters that are in dispute and to points of detail that may seem insignificant but have been made much of by one or other party.

5. The claimant was born in 1983 and has some disabilities, both physical and mental. He has an indefinite award of a disability living allowance, consisting of the mobility component at the higher rate and the care component at the highest rate. According to the award notice, the care component was based on supervision by day and watching over at night, and the mobility component was based on the claimant being severely mentally impaired. The claimant's step-father is his appointee for housing benefit purposes; his mother is his appointee for other benefits. The application for appointeeship by the claimant's step-father said that the claimant 'is severely mentally impaired and has severe learning difficulties. As such he is unable to fully understand or complete his benefit forms.' Mr Rutledge told me that the claimant's difficulties with vision affected his ability to read and complete the claim forms. That may be a factor, but the application for appointeeship presented the claimant's difficulties as essentially mental.

6. An important feature of the case, at least as far as the local authority is concerned, is that the claimant's mother is an employee of the local authority in its housing benefit section.

7. There are two properties involved in the case. One is a council house and the other is a flat. The claimant originally lived with his grandmother in the flat. His mother and step-father lived in the council house. His grandmother moved into sheltered accommodation and his mother and step-father moved into the flat. A new tenancy agreement was signed, under which the claimant was a joint tenant. His mother could not qualify for housing benefit, but the claimant could. He made a claim through his appointee and benefit was awarded from 14 October 2002.

8. Housing benefit continued in payment until January 2004, when it was 'cancelled' with effect from 14 October 2002. The word 'cancelled' may be a convenient way of conveying the effect of the local authority's decision, but it conceals with legal basis on which it was made. It must have been made on a revision under regulation 4 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. The basis of the revision was that the tenancy with the claimant had been created to take advantage of the scheme.

9. The local authority emphasised a number of features of the case. The following is not intended to be comprehensive: (i) the claimant's limited mental capacity; (ii) the conduct of his mother in relation to the tenancy of her council house and her knowledge of the housing benefit scheme; (iii) the fact that the claimant's security was less under the tenancy of the flat than under the tenancy of the council house; and (iv) the way in which the tenancy was signed.

10. On appeal to an appeal tribunal, the tribunal allowed the appeal and decided that the claimant had been properly entitled to the award of housing benefit from 14 October 2002.

11. Before me, the issue was whether the tribunal had misdirected itself on the law and, if it had not, whether it had given adequate reasons for its decision.

Further evidence

12. In the course of the written submissions on the application, the claimant's representatives have produced further evidence of the claimant's intellectual capacity. I have not considered that evidence on the application, as it was not before the tribunal, and have not

needed to consider it on the appeal. It can be put to and considered by the tribunal at the rehearing.

The burden of proof

13. Mr Rutledge referred to the different burden of proof between regulation 7(1)(l) and regulation 7(1)(g) and (1B). On the face of the legislation, that is correct. However, in this case the decision under appeal was given as a revision on the local authority's initiative. That means that the legal burden of proof was on the local authority under regulation 7(1)(l), just as it was expressly under regulation 7(1B).

14. The case as presented to the tribunal did not deal with any issue of revision. I do not criticise the tribunal for not dealing with it. However, tribunals should deal with these issues in submissions to the appeal tribunal, if only in order to instil in them the good practice of demonstrating how their decisions were taken within the terms of the legislation. There may also be an issue of identifying the facts of which the local authority was ignorant or mistaken? I have directed the district chairman to consider requiring the local authority to provide a further submission on this issue. This is, of course, subject to the claimant's representatives deciding that this issue is not worth pursuing. In that case, the issue will not arise on the appeal and the tribunal need not deal with it unless it chooses to raise it on its own initiative.

Common ground

15. At least by the time of the hearing before me, Mr Bhose and Mr Rutledge were agreed that the conduct of the claimant's mother was in principle relevant to whether or not the claimant's tenancy was created to take advantage of the housing benefit scheme. I accept their agreed submission. The legislation does not specify who must have that purpose. Usually the only persons concerned will be the landlord and the tenant. They may act jointly to take advantage of the scheme or one may have motives and purposes unknown to the other. However, in a case where a tenant is unable to function wholly independently it is relevant to take account of the motives and purposes of those who help in the setting up a tenancy or other arrangement.

Arguments for the local authority

16. Mr Bhose's main argument was that the tribunal had misdirected itself by disregarding the conduct of the claimant's mother. He argued that this was clear from paragraph 16 of the tribunal's reasons:

'The focus of the submission so far as the Local Authority are concerned appears to be upon [the mother's] actions and possibly those actions in context of her employment. It is clearly seen to excite a lot of interest on the part of the Local Authority. The focus has to be, however, on the Appellant and his purposes in taking on his liability under the tenancy. The fact that he may have relied significantly upon his mother and indeed his step-father to achieve what he wanted and indeed not to be a wholly independent person in terms of living, does not mean that he is incapable of having his own views on what he wants for himself or expressing those entirely reasonable aspirations and then having assistance in carrying them out.'

17. As a secondary point, Mr Bhose argued that the tribunal had failed to deal with the issue of contractual capacity and liability for rent under regulation 6, which had been put to the tribunal by the local authority's counsel.

Arguments for the claimant

18. Mr Rutledge argued that the tribunal had not overlooked the local authority's arguments. He argued that Mr Bhose's argument was really one on adequacy of reasons and that, read in the context of the arguments of the parties at the hearing, the tribunal's reasons were adequate. He undertook a detailed, line by line analysis of paragraphs 16 and 17 of the tribunal's reasons. He argued that the tribunal had not ignored the local authority's evidence and argument on the conduct of the claimant's mother. It had taken this into account as part of the 'all the circumstances' mentioned in paragraph 17 and concluded that on balance the focus should be on the claimant's own intentions. He conceded that the claimant did rely on his mother, but that she had kept at arm's length in the tenancy and benefit arrangements.

19. I pressed Mr Rutledge on one point made by the tribunal, that a record of rent payment as a tenant would be useful in establishing a credit reference record. Was someone who could not understand the claim form be able to form that sort of intention? In summary, Mr Rutledge's answer was that the claimant had made clear his general aspiration to live independently and that those who advised him were able to help him undertake the transactions necessary to give effect to that.

My conclusions

20. I will deal first with regulation 6, which logically needs to be considered before regulation 7. (In practice, tribunals may find it more convenient to deal with regulation 7 first in investigating the facts or explaining their decisions.) The tribunal dealt with regulation 6 and decided that the claimant had a contractual liability to pay rent. That is clear from the decision notice. However, the full statement of the tribunal's decision does not deal with this issue. I suspect that the chairman overlooked it when he came to write the full statement of his tribunal's decision. It is not self-evident from the evidence that the claimant had contractual capacity in the tenancy. In the absence of an explanation of how the tribunal reached its conclusion, the reasons are inadequate.

21. As to regulation 7, I do not go so far as to accept Mr Bhose's argument that the tribunal misdirected itself by disregarding the conduct of the claimant's mother and concentrating solely on the claimant's purposes in taking on the tenancy. Ultimately, this is a matter of impression derived from my reading of paragraph 16 of the tribunal's reasons. My reading is that the tribunal put to one side the conduct of the claimant's mother as irrelevant in the context of the case. The final sentence of paragraph 16 reads to me as a statement of why the tribunal considered that the claimant's motives and purposes alone should be considered, not as a matter of law but on the facts of the case. However, I accept Mr Bhose's argument to this extent, that the tribunal has not made it clear what was a matter of direction and what a matter of application. Given the issues in this case, it should have done so.

22. Mr Rutledge's analysis produced a set of reasons which the tribunal could have given and which, if given, would have been proof against an appeal on a point of law. But, as Mr Bhose pointed out, I was concerned with the reasons given, not with the reasons that could

have been given. I reject Mr Rutledge's analysis because it is too detailed and complex to be supported by reasons actually recorded.

23. Even if Mr Rutledge's ingenious analysis of the reasons is correct, there is a key issue on which the reasons are silent. Why did the tribunal decide that the focus should be on the claimant? On Mr Rutledge's interpretation, that was a key step in the tribunal's reasons. Not being self-evident, it had to be explained. It was not and the tribunal's reasons are, therefore, inadequate even on Mr Rutledge's argument.

24. I do not accept Mr Rutledge's argument that the claimant's advisers were helping him to give effect to his general aspiration to live independently. I am sure that that was true in a general sense. But in its specific application by Mr Rutledge, it was but a beguiling way of disguising that those advising the claimant were formulating specific purposes relevant to his housing and benefit arrangements that he did not personally have. Their motives and purposes could not be disregarded as merely giving effect to the claimant's own more general and unformulated intentions. As regards the specific point about credit reference record, there was no evidence to support this; the tribunal was relying on speculation rather than evidence.

Disposal

25. I give the local authority leave to appeal against the tribunal's decision. I allow the appeal, set aside the tribunal's decision and direct a rehearing. Both counsel accepted that a rehearing was appropriate. I want to emphasise that I have decided only that the tribunal failed to make clear how it had directed itself in law on the relevance of the mother's conduct or failed to give adequate reasons for its conclusions. I have been careful to express no opinion on the ultimate outcome of the rehearing.

**Signed on original
on 07 June 2006**

**Edward Jacobs
Commissioner**