

CH/1502/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal but dismiss the appeal. The decision of the Appeal Tribunal was not erroneous in law.

REASONS

2. The facts are set out in the decision of the Appeal Tribunal and I only set them out to the extent necessary to understand my decision.
3. The claimant is a man born in 1955. Until 2000 he lived with his then wife in East Anglia. In late 2000 the couple separated and under the terms of the separation settlement the former matrimonial home was transferred to the claimant's wife. In early 2001 she sold it and moved to Croydon. At that time the claimant, who was suffering from personal difficulties, also wished to move to Surrey where he had children and was on a waiting list for a place at a rehabilitation centre. He had nowhere to live and asked his wife if he could stay in the house that she had bought in Croydon. She agreed. The appeal tribunal subsequently found that they lived separately in the house. No rent was charged.
4. At that time the claimant's wife was in receipt of jobseeker's allowance (JSA) and the claimant was in receipt of incapacity benefit. Fresh claims needed to be made. The claimant's wife also wished to claim council tax benefit in respect of the property in Croydon. In March 2001 claims were made for council tax benefit and JSA. On the council tax benefit form the claimant's wife entered details of the claimant as her partner. The JSA claim form is not in the papers but a DWP printout (page 40 of the papers) indicates that JSA was awarded on the basis that they were a couple.
5. The claimant left the property in April 2001 and found lodgings, for which, he told me, he claimed and received housing benefit from the Local Authority. Subsequently he took up a place at the rehabilitation centre but later lost it. He asked his wife if he could lodge in her house and she agreed subject to certain conditions, which included paying rent. He stayed in the house upon that basis for a number of periods in late 2001 and 2002. He claimed housing benefit, which was paid. The claimant's divorce from his then wife was finalised by a decree *nisi* in October 2002 and a decree absolute in December 2002.
6. In May 2003 the claimant stayed with his ex-wife again and made a further claim for housing benefit. In July 2003 the claim was rejected pursuant to regulation 7(1)(b) of the Housing Benefit (General) Regulations 1987 on the grounds that the claimant's rent liability was to a close relative who also resided in the same dwelling. The claimant responded by showing evidence of his divorce from his ex-wife. On 29 July the claim was reconsidered but rejected again. The basis of the rejection was

regulation 7(1)(c) of the Housing Benefit Regulations, which applies where a claimant's liability is:

- (i) to his former partner and is in respect of dwelling which he and his former partner occupied before they ceased to be partners.
7. Regulation 7(1)(c) is one of a number of provisions which remove entitlement to housing benefit in circumstances where it is considered improper or inappropriate for it to be claimed. Its effect is that if a couple have lived in a property as a couple, neither of them can ever be entitled to housing benefit in respect of rent paid to the other in respect of that property. The evident policy is that, if a couple separate conjugally but both remain in the property, neither of them can generate a housing benefit entitlement by paying rent to the other.
 8. If the period that the claimant spent in the Croydon property in March/April 2001 was before the claimant and his former wife 'ceased to be partners', then the claimant would not have been entitled to any of the housing benefit paid to him in respect of the subsequent periods he spent at the house and would not be entitled to make the claim he made in May 2003.
 9. That is what the Local Authority decision-maker decided (page 89). She referred to the fact that the claimant's former wife had named the claimant as her partner in the council tax benefit application made in March 2001 and that the two of them had received income support (in fact JSA) 'paid as a couple' at that time. She decided that the previous payments of housing benefit should not be recovered, as the claimant had told the Local Authority what the circumstances were and they had paid in error.
 10. The claimant appealed to the appeal tribunal, which heard the appeal in November 2003. The claimant and his ex-wife appeared and gave evidence. The Local Authority did not appear.
 11. It is clear from the record of proceedings and the statement of reasons for the decision that the Tribunal (which consisted of a chairman sitting alone) approached its task in an extremely thorough and workmanlike way. The chairman correctly directed herself on the law relating to whether the claimant and his ex-wife had been partners in March/April 2001 (which, by virtue of the definitions in regulation 2(1) of the Housing Benefit Regulations and section 137(1) of the Social Security Contributions and Benefits Act 1992, involved deciding whether they were members of the same household at that time). She also correctly directed herself that it was possible in law for a husband and wife to maintain separate households under the same roof. She found as a fact that that had been the case of the claimant and his then wife in March/April 2001.
 12. It is clear from the record of proceedings that the chairman questioned the parties about their living arrangements in March/April 2001 and about points made by the Local Authority in a written submission. These were (1) that in the benefit claim forms submitted in 2001 the claimant had been described as his then wife's partner and husband, and that the first time he was described as her estranged husband was in May 2002, which suggested that the estrangement occurred after April 2001 and (2) that the papers included statements dated February 2001 for a joint bank account held by them both.

13. The chairman found that the claimant's wife had arranged for the claimant to operate the bank account on his own and had not operated it recently herself. She also accepted the explanation given for why the claimant had been named as his then wife's partner on the council tax benefit and JSA claim forms, which was that the claimant's then wife (who handled the form-filling) knew she should inform the authorities of the claimant's presence in the house but the forms did not cover her situation - living separately under the same roof with a man to whom she was still married. (The JSA claim form is not in the papers but the first council tax benefit claim form involves ticking yes or no to the question "Do you have a partner living with you? 'Partner' means the person you are married to")
14. The Local Authority sought leave to appeal to the Commissioner, submitting that their decision had been correct; the claimant's wife had received JSA in March/April 2001 on the basis that she and the claimant were a couple and the Local Authority were therefore bound by the DWP's decision to treat them as a couple, by virtue of *R v Penwith District Council ex p Menear* (1992) 24 HLR 115. These grounds were supplemented by a letter from the Local Authority's solicitors which identified the issues as being whether the Local authority were bound by the JSA determination, whether the Appeal Tribunal could go behind such a decision without hearing the DWP, whether the Tribunal could overturn a decision of the DWP that had been adopted by a local authority and whether the Tribunal's decision on the facts was perverse.
15. The chairman refused leave to appeal, holding that *ex p Menear* did not apply in the circumstances of the present case. On 4 May 2004 a Commissioner directed an oral hearing of the application for leave to appeal and directed the claimant to attend. The Secretary of State was invited to be represented. I held the oral hearing on 22 June; the claimant and his wife attended in person, the Local Authority was represented by Miss Webb and the Secretary of State by Mr Edwards.
16. Miss Webb and Mr Edwards addressed legal argument to me. The claimant addressed me, stressing that he and his then wife had acted in good faith and that he felt let down by the Local Authority, which had not attended the Appeal Tribunal hearing but had persisted in impugning their integrity by arguing that the Tribunal had been perverse in accepting their evidence. I told him that their integrity had been upheld by the decision of the Appeal Tribunal and that I was going to reject the argument that the Tribunal had acted perversely. Since I am here to resolve issues of law, I do not consider that I ought to comment in any way upon the behaviour of the Local Authority, which was not further gone into at the hearing.
17. The parties consented to my granting the application for leave to appeal and treating the application as an appeal (regulation 11(3) of the Social Security Commissioners (Procedure) Regulations 1999).

Was the tribunal's decision perverse?

18. Miss Webb submitted that the decision that the parties were not a couple in March/April 2001 was one that no reasonable tribunal could come to; she drew my attention to the joint bank account statement and to the terms of the benefit claim forms: the fact that the claimant had been described as his then wife's 'husband' several times in 2001 and was not described as her 'estranged husband' until 2002 indicated that the estrangement did not occur until after March/April 2001.

19. Both these points were considered by the Tribunal chairman, and Miss Webb did not advance any criticism of the chairman's reasoning. It is true that a reader of the 2001 claim forms would assume that the parties were a normally cohabiting husband and wife, but the explanation - that the claimant's wife could not see how else to complete the forms in the circumstances - was one that the chairman was perfectly entitled to accept. The credibility of witnesses is very much a matter for the Appeal Tribunal and the chairman plainly found the parties credible. It could not be suggested that the bank statements or the terms of the claim forms inevitably made their evidence incredible. Had this been the only ground of the application, I would not have given leave to appeal.

The effect of ex p Menear

20. The main thrust of Miss Webb's submissions was that the effect of *ex p Menear* was that Local Authorities were bound by decisions of the DWP on issues of fact that were common to a JSA (or other benefit) determination and to a housing benefit determination, but she bolstered this submission by further submissions based on the undesirability (a) of two decision-makers reaching inconsistent decisions on the same question and (b) of an Appeal Tribunal, on appeal from one decision-maker's decision, reaching a decision that undermined the decision taken by the other decision-maker, particularly where that other decision-maker had not been heard by the Tribunal.
21. Miss Webb's main submission was that where any issue of fact was common to both the JSA legislation and the housing benefit legislation, and that issue had already been decided by the DWP, the housing benefit decision-maker was bound by the DWP decision in accordance with the decision in *ex p Menear*. She accepted that, on its facts, the *Menear* case had concerned a decision about a claimant's income and capital, but there was no reason why the decision should not apply to any other decision on any issue common to both benefits. If not, then local authorities would have to make independent checks of housing benefit claimants' identity, address and other relevant household details and might reach decisions inconsistent with those of the DWP.
22. For the DWP, Mr Edwards submitted that there was no reason to suppose in the present case that the DWP decision-maker had turned his mind to whether the claimant and his then wife were a couple in March/April 2001; I agree. The JSA claim form is not in the papers but, given that the claimant and his then wife had the same surname and will have been stated to live at the same address, it is almost certain that the DWP decision-maker simply assumed that they were a husband and wife living in the same household.
23. He also pointed out that there could be no sinister reason for their describing themselves as a couple although they were leading separate lives under the same roof. I agree. It is not surprising that they did not appreciate the legal distinction between single and separate households which arises under the section 137 definition. There is no suggestion that anything else was not declared. All other things being equal, since the applicable amount for a couple was less than twice the applicable amount for a single claimant, it would have been more advantageous for them to claim as two single claimants (in fact the position is complicated by the claimant's claim for incapacity benefit, but that does not affect the principle).

24. As to the law, Mr Edwards submitted that the effect of *ex p Menear* was only that a housing benefit decision-maker was bound by a DWP decision on income and capital issues. I agree with that conclusion. To explain why, it is necessary to consider the relevant statutory provisions and the *Menear* case itself.
25. The starting point is that a Local Authority is placed under a statutory duty to decide a claimant's entitlement to housing benefit. That duty includes deciding any issue which goes to the claimant's entitlement, unless some provision of the statutory scheme (or conceivably, some other rule of law) requires the local authority to regard any issue as having been concluded by a decision taken by someone else.
26. Section 130 of the Contributions and Benefits Act provides that a person is entitled to housing benefit if, among other things, 'he has no income or his income does not exceed the applicable amount' (section 130(1)(c)(i)); section 134 provides that no person shall be entitled to an income-related benefit 'if his capital or a prescribed part of it exceeds the prescribed amount'. For the purposes of calculating income and capital, section 136 provides that 'Where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as income and capital of that person' and section 137 contains among other things a definition of 'family'.
27. In the case of a housing benefit claimant who is *not* receiving income support or JSA, those provisions give rise to matters on which a local authority has to reach a decision. However, where a claimant is on income support or income-based JSA, certain provisions of schedules to the Housing Benefit Regulations, providing for sums to be disregarded in the calculation of income and capital, come into play. Paragraph 10 of schedule 3 provides for the disregarding of 'Where a claimant is on income support or an income-based jobseeker's allowance, his earnings'; paragraph 4 of schedule 4 provides for the disregarding of income other than earnings and includes 'Where a claimant is on income support or an income-based jobseeker's allowance, his income'; paragraph 5 of schedule 5, dealing with capital to be disregarded, similarly includes 'Where a claimant is on income support or on income-based jobseeker's allowance, the whole of his capital'. Regulation 2 of the Regulations defines a 'person on income support' as a person in receipt of income support and regulation 2(3A) defines when a person is 'on an income-based jobseeker's allowance'.
28. Accordingly, if a housing benefit claimant produces evidence that he is on income support or income-based JSA, the local authority is to disregard any income or capital that he might possess (which, by section 136(1), includes any income or capital of a member of his family), making it unnecessary for the local authority to investigate the income or capital of the claimant or of any members of his family or to decide for this purpose who the members of his family are. It is also unnecessary to calculate his applicable amount, since the disregarding of all income will make him a person who 'has no income' for the purposes of section 130. The rationale for this is that the calculation of income, capital and (if necessary) applicable amount will have been made by the DWP before awarding income support or JSA; the award shows that any income falls below the applicable amount (which is the same for all three benefits) and any capital falls below the prescribed level (which is again the same for all three benefits). It would be pointless for the local authority to repeat the exercise.
29. The existence of regulation 7 of the Regulations also requires a local authority, in an appropriate case, to decide whether the claimant is disqualified for benefit by any of

its provisions. Regulation 7(1)(c), which is in issue in this case, requires it to decide, in the case of a claimant who is paying rent to his former partner, whether it is 'in respect of a dwelling which he and his former partner occupied before they ceased to be partners'. Because the definition of partner in regulation 2 is 'the other member of a married or unmarried couple, the local authority will have to apply the definitions of married and unmarried couple in what is now section 137 of the Act, to which regulation 2 cross-refers.

30. In some cases, a local authority will on the face of it have to decide whether a housing benefit claimant and another person are (or have been) a married or unmarried couple at much the same time as the DWP decision-maker is deciding that same question. One such case (slightly different from the present, but probably more common in practice) will be where a housing benefit claimant pays rent for a share of a house and there is an issue whether he and the householder are an 'unmarried couple' (which under section 137 means living as 'husband and wife' rather than as a lodger); if they are an unmarried couple, then the householder will be a 'close relative' and the claim will be disqualified under regulation 7(1)(b). If the claimant has also claimed JSA, then the DWP will have had to decide that same question for the purposes of deciding whether the two people's income and capital fall to be aggregated pursuant to section 136. If so, Miss Webb would submit, the DWP decision as to the nature of their relationship will be binding on the local authority for the purposes of regulation 7(1)(b). She points to *ex p Menear* as a case where a local authority was precluded from reaching a decision about a relationship that differed from a DSS decision on that issue.
31. In *ex p Menear* an elderly man had sold his house and moved in with an elderly female neighbour for whom he had been acting as a carer. She claimed income support. The DSS decided (reversing its earlier decision) that the two were not an 'unmarried couple' because it found that they were living together for mutual support rather than as husband and wife; consequently their income and capital were not aggregated and Mrs Menear qualified for income support (which she would not have done if their income and capital had been aggregated). Mrs Menear also claimed housing benefit. The local authority concluded that the two *were* living as husband and wife, with the consequence that their income and capital should be aggregated, and she was not entitled to housing benefit.
32. It is correct that the High Court held that the local authority was not entitled to do this. However, the basis of the Court's decision is found in five propositions advanced by counsel for Mrs Menear and accepted by Kennedy J, together with a further reason advanced by the judge. The submissions on behalf of Mrs Menear can be summarised as follows: first, the fact that Mrs Menear was on income support meant that the local authority were bound to disregard her income and capital under the provisions in the schedules to the Housing Benefit Regulations that I have referred to above. Secondly, 'even assuming Mr Wearne was correctly regarded as a member of her family' his income and capital had to be treated as hers under the predecessor provision to section 136; therefore they would have to be disregarded anyway. Thus, on either basis, Mrs Menear had to be treated as having no income and was entitled to housing benefit under the predecessor provision to section 130.
33. It is to be noted that Mrs Menear's submission was *not* that the local authority could not regard the two as a couple; it was that doing so would not alter the result because, in that event, his income and capital would be treated as though they were hers and would fall to be disregarded. It was a submission based purely on the effect of the

requirement to disregard all income and capital of an income support recipient. To the extent that the decision was based on an acceptance of these submissions, it cannot support the wider principle argued for by Miss Webb.

34. Mrs Menear's counsel went on to accept that this meant the local authority were bound by the DSS's decision as to the nature of the relationship, but submitted that this was not surprising given (among other things) the sophisticated adjudication system for income support and the fact that housing benefit is heavily subsidised by the DSS. As to that, Kennedy J said

Mr Drabble [counsel for Mrs Menear] might also have added that if, as Miss McAllister [for the local authority] submits, there is no interlinking between the decisions in relation to income support and those in relation to housing benefit, there may be as she concedes, curious results, and to some extent interlinking is to be expected because these are two types of income-related benefits which come into existence under the same statute. Admittedly one is concerned primarily with income and the other with housing, but that income is relevant to any enquiry as to the need for support in relation to housing is spelt out in [the predecessor to section 130(1)(c)]. For that reason, in addition to the reasons advanced by Mr Drabble, I believe that his interpretation of the statutory provision is correct. It follows that the Housing Benefit Review Board concerned itself with a question which in the particular circumstances it was unnecessary to consider. The decision of that board must therefore be quashed.

35. This passage does not in my judgment support the wider principle contended for by Miss Webb. Kennedy J observed merely that 'some', not complete, 'interlinking' was to be expected; moreover, the dispute before him related purely to financial issues. If Kennedy J had been recognising the existence of some wider principle akin to *res judicata*, he would have explained the legal basis for it. In my view there is no legal basis for such a wider principle.
36. I therefore conclude that Mr Edwards was right to submit that the binding effect of DWP decisions established in *ex p Menear* relates only to issues relating to income and capital. More precisely, I consider that the binding effect of the DWP decision consists in requiring the local authority to treat a person on income support or income-based JSA as having no income or capital and therefore automatically entitled, from the financial point of view, to housing benefit. On facts such as those of *ex p Menear* this will have the practical effect of preventing a different view being taken on a 'relationship' issue – where that issue goes to the computation of income and/or capital. But that does not make the decision into a general rule that no local authority can depart from the DWP position on a 'relationship issue' that arise under a different provision of the housing benefit scheme, such as regulation 7. There is no basis in the provisions of the Act or Regulations for the wider binding effect contended for by Miss Webb – viz as regards any factual issue that falls to be decided for the purposes of both benefits – and the judgment in *ex p Menear* does not identify any such basis.
37. Miss Webb points out that recipients of income support or income-based JSA constitute 80% of housing benefit claimants and submits that, if the Appeal Tribunal was right, then local authorities would be compelled in these cases to obtain independent evidence of a claimant's identity and family situation in order to satisfy itself that a DWP decision was correct. In my view this over-states the local

authority's task. There is no reason why a local authority should not take evidence of the award of the other benefit as evidence of the claimant's identity. As regards the claimant's family status, given that the claimant's financial entitlement to housing benefit is established by the award of income support or JSA, the cases in which it will matter to the local authority whether the claimant is a member of a couple or not will be limited – principally, if not exclusively, to cases where a regulation 7 issue arises. If the local authority has evidence of the position taken by the DWP on the question of the claimant's family status, I see no reason why the local authority should not take it as evidence that the claimant's family status is as found by the DWP, particularly if the claimant agrees with the DWP's determination. If the claimant contends that the DWP's decision was wrong, I consider that the local authority must reach its own conclusion on the issue – especially in a case where, as here, it is unlikely that the DWP's position represents a considered view.

38. There will be other cases where parallel decisions fall to be made by the DWP and local authorities. In that connection my attention was drawn to a passage in the commentary to regulation 7A of the Housing Benefit Regulations on page 293 of CPAG's *Housing Benefit and Council Tax Benefit Legislation 2003/2004*. Regulation 7A disqualifies 'persons from abroad' for housing benefit, and is a counterpart to similar provisions in the income support and JSA Regulations. The commentary says that if a housing benefit claimant is receiving income support or income-based JSA then the local authority 'is not entitled to refuse benefit on the ground that s/he is a person from abroad, just as it may not apply the means tests' and *ex p Menear* is cited. In my view *ex p Menear* is not authority for the proposition.
39. The DWP's Housing Benefit Guidance Manual (paragraphs 7.500 to 7.505) tells local authorities that "a claimant who is receiving IS or JSA(IB) is not to be treated as a [person from abroad]" and "It should normally be assumed that Jobcentre Plus has applied the appropriate tests". If a local authority has evidence that a claimant may be a person from abroad, the local authority should confirm with Jobcentre Plus that the appropriate test has been applied. The Manual rightly does not say that a Jobcentre Plus decision is binding on a local authority, though the first phrase that I have quoted from it tends to give that impression. In my view, that would be to overstate the duty of the local authority; I do not consider that the local authority is precluded from disagreeing with such a decision. On the other hand, I do not consider that the local authority is obliged to decide the issue from scratch as though the Jobcentre Plus decision did not exist. Where the local authority is satisfied that a considered decision on the issue has been made by Jobcentre Plus, the local authority is entitled, in the absence of anything to compel a contrary conclusion, to regard the existence of that decision as satisfactory evidence that the claimant is not a person from abroad.
40. Miss Webb pointed to the undesirability of different decision-makers making different decisions on the same issue. She is right to say that that is not a desirable state of affairs. However, it is an inevitable possibility unless provision is made to make one decision-maker's decision binding on the other decision-maker. That could be done, but has not been done as regards relationship issues arising under regulation 7 of the Housing Benefit Regulations. She also pointed out that the result in this case is that the DWP's determination to treat the claimant and his then wife as a couple has been undermined by the decision of the Appeal Tribunal, without the DWP having been heard by the Tribunal. The practical force of that point is reduced in a case, like the present, where it is very unlikely that the DWP decision-maker turned his mind to the issue of the relationship; but it is fair to point out that a case could arise of conflicting considered determinations.

41. In a hypothetical case in which the two decision-makers remained wedded to different decisions on the same factual issue, the obvious solution would be an appeal to an Appeal Tribunal. There might be cases in which it would be appropriate for the Tribunal to ensure, by an appropriate procedural means, that it heard from both decision-makers.
42. As regards the final issue raised by the Local Authority – whether a DWP decision that has been ‘adopted’ by a Local Authority can be affected by an Appeal Tribunal decision – I do not consider that the Local Authority’s ‘adoption’ of a DWP decision adds anything to the issues I have considered.

(Signed) **Nicholas Paines QC**
Deputy Commissioner

(Date) **25 June 2004**