

Decision

1. This appeal by the local authority succeeds. In accordance with the provisions of section 8(5)(c) of schedule 7 to the Child Support Pensions and Social Security Act 2000 I set aside the decision made by the Burnley Tribunal on 17th December 2003 (reference U/06/123/2003/00102). I refer the matter to a completely differently constituted tribunal for a fresh hearing and decision in accordance with the directions given below

Background and Procedure

2. The claimant was born on 13th November 1957. On 9th July 2003 she applied to the local authority for housing benefit and council tax benefit in respect of fully furnished accommodation to which I shall refer as 114. She stated that she and her husband were living with their 16 year old son who was still at school and with the claimant's 77 year old mother. The claim form included a statement that the claimant was employed as a shop assistant by RS Limited and a statement by a Director of RS Limited (the address of which was also given as 114) that the claimant was paid £70 in cash weekly. The form stated that the landlord was the claimant's son ("Mr A"), whose address was in a different town. The rent was stated to be £500 monthly. The claimant produced a 36 month tenancy agreement made on 4th July 2003.

3. A search of the Land Registry revealed that what appears to be the freehold title to the whole property at 114 was jointly owned by the claimant and her husband as from 24th July 1998, with a charge registered by a bank to secure what I assume to be a mortgage. There was no reference to Mr A.

4. On 22nd July 2003 the local authority wrote to the claimant indicating that it was "unable to consider payments" of rent allowance. This inelegant and inaccurate phrase seems to mean that the local authority was going to refuse the claim (which, of course, it could not do until it had considered it). The letter stated that a computerised notification of appeal would be issued "showing your claim as ineligible" and detailing appeal rights. The reason given was that the claimant was in receipt of council tax benefit as the owner of 114 and that "neither a claimant nor their partner can claim assistance with payments of rent on a property which they once owned". Again, this is not quite accurate. Anybody can claim anything – the point is that the authority was saying that the claim could not succeed.

5. On 13th August 2003 the claimant appealed to the tribunal against the decision of the local authority. Although I do not have the full appeal form, it seems that the basis of the appeal was that the claimant and her husband had relinquished ownership of 114.

6. From further evidence it then appeared that 114 had been used as a Post Office and general store, this business was in debt to the bank, they had lost the licence to act as a Post Office and the bank was not prepared to provide further assistance to the remaining business. The bank had declined to transfer the debt to Mr A and had advised that 114 be remortgaged or the business sold. Subsequently Mr A had bought the business and the debt to the bank had been repaid. A further search of the Land Registry showed that on 16th July 2003 Mr A became the freehold owner of 114, with a price of £45,000 stated to have been paid on 3rd July 2003. Again, there was a charge registered by a bank. This does not reconcile with the solicitors' completion statement (pages 20, and 20A) and the solicitors have confirmed that the sale price was £65,000 (page 28). These documents show that £20,250 was paid to the claimant and her husband after discharging the existing mortgage. I am not required to make a decision on what effect this capital amount had or should have had on their entitlement to means tested benefits, but the new tribunal must be careful about this if it is minded to award benefit.

7. On 19th September 2003 the local authority confirmed its original refusal to award housing benefit. I do not know what happened to the claim for council tax benefit. The authority relied on the provisions of regulation 7(1)(h) of the Housing Benefit (General) Regulations 1987.

8. On 17th December 2003 Mr A wrote to say that he had purchased the property for £63,500 (the third different figure given for the purchase), that the business without the Post Office had no income (presumably he meant that it did not show a profit) and no value and that until he had developed it as an off-licence he had to rely on the rental income received from his parents.

9. The tribunal considered the matter on 17th December 2003 and allowed the appeal, finding that the case came within an exception to the rule in regulation 7(1)(h) (see below) and also on the wording of "the Circular" (not clearly identified in its decision, but see below). On 27th January 2004 the District Chairman of the tribunal refused an application by the local authority to set aside that decision and on 6th April 2004 the Regional Chairman of the tribunal refused the local authority leave to appeal to the Commissioner against the decision of the tribunal. It now appeals by leave of the Chief Commissioner, His Honour Judge Gary Hickinbottom granted on 24th May 2004. The Chief Commissioner also invited the Secretary of State to become a party to the appeal, which invitation was accepted. The Secretary of State supports the appeal of the local authority; the claimant supports the decision of the tribunal.

The Regulation

10. In so far as is relevant, regulation 7(1) of the Housing Benefit (General) Regulations 1987 as amended provides as follows:

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

....

(h) he previously owned, or his partner previously owned, the dwelling in respect of which the liability arises and less than five years have elapsed since he or ... his partner ceased to own the property, save that this sub-paragraph shall not apply where he satisfies the appropriate authority that he or his partner could not have continued to occupy that dwelling without relinquishing ownership;

...

(l) in a case to which the proceeding sub-paragraphs do not apply, the appropriate authority is satisfied that liability was created in order to take advantage of the housing benefit scheme ...

Regulation 7(1)(h) and the Exception

11. The tribunal considered regulation 7(1)(h). Clearly the claimant came within the main rule and the tribunal correctly placed on her the burden of proving that she came within the exception. The Circular on which the tribunal relied suggested that the exception was principally aimed at those who sell their home when a mortgage lender was on the point of seeking possession. The tribunal was of the view that this was too strict an approach and that the claimant in the present case could benefit from the exception because there were mounting mortgage arrears, there was no realistic prospect of stopping the arrears increasing, enforcement proceedings were likely to be taken at some time in the not too distant future and it was reasonable in these circumstances to transfer ownership of the property.

12. The question to be answered in deciding whether the exception in regulation 7(1)(h) applies is whether the claimant or her husband could (which really means “could in practice” – see paragraph 16 of CH/3853/2001) have continued to occupy that dwelling without relinquishing ownership. The reasonableness of the transaction is not directly relevant here, but the availability of other reasonable solutions to the difficulties is relevant. It appears that the claimant (who was only 46 at the time of the decision by the local authority) and her husband had both been working in the post office and/or the shop. There seems to have been no investigation as to whether they could have obtained employment and financed the mortgage that way (which is how most people finance their mortgages), or as to whether they could have raised an income by sub-letting part of the property (for example, to their son to develop his business), or as to whether they could have run some slightly different sort of business rather than selling the property. The tribunal was in error of law in failing to consider such matters.

Regulation 7(1)(l)

13. Regulation 7(1)(l) applies where none of the provisions of 7(1)(a) to 7(1)(k) applies. The only one of those provisions that is relevant in the present case is 7(1)(h). Having decided that 7(1)(h) did not apply, because the claimant came within the exception to it, the tribunal was under a duty to consider 7(1)(l). There is no indication that the tribunal gave any thought at all to this provision. The tribunal was in error of law in respect of this matter as well.

14. The claimant's original comments to the Commissioner confused 7(1)(h) with 7(1)(l) – see pages 46-47 of the file. The claimant has now argued that the regulation does not require 7(1)(l) to be considered in every case and that the local authority had not done so in this case and therefore there was no duty on the tribunal to do so. I disagree. The very structure of the regulation requires that this exercise be carried out if none of the provisions of 7(1)(a) to 7(1)(k) applies. Having decided that 7(1)(h) did apply, the local authority did not need to consider 7(1)(l) – which it could only have done in the alternative. The tribunal decided that 7(1)(h) did not apply – therefore it was under a duty to consider 7(1)(l). The very fact that regulation 7(1) was raised at all put 7(1)(l) into issue.

15. Reference has been made to the decision in CH/1229/2002. However, in that case regulation 7 was not put in issue at all by the local authority in making its own decision. In the present case it formed the basis for the decision.

16. It will be for the new tribunal to decide, but relevant matters might include the appropriateness of the amount of rent and the terms of the tenancy, and the suggestion that the market value of the property, as judged by previous attempts to sell the property, was £120,000 but it was sold to the claimant's son for £65,000, of which only £45,000 was initially declared. The local authority might also wish to place before the tribunal matters such as those referred to in its letter of 5th September 2003 (page 23A of the file). However, it is important to identify which matters are relevant for 7(1)(h) and which are relevant for 7(1)(l).

The Circulars

17. The Court of Appeal decided in the De Falco case ([1980] 1 All ER 913) that even where a statute requires a local authority to “have regard” to guidance from a Minister or government Department, the local authority is not bound to follow any such guidance. In the case of housing benefit, there is not even that requirement in the statutes or regulations. I agree with the Commissioner in CH/3853/2001 (paragraph 20) that central government Circulars in relation to housing benefit are not binding on local authorities or appeal tribunals (or, for that matter, on Commissioners), who must apply the law as set out in the statute and regulations in the light of decisions by the Commissioners and the relevant courts.

18. In the submission of 27th August 2004 from the Secretary of State, his representative agreed that “Departmental guidance is intended to assist local authority decision makers but it is not, and nor does it purport to be, a definitive interpretation of the law”.

19. In the present case, the Housing Benefit and Council Tax Benefit Circular HB/CTC A1/99, dealing with Adjudication and Operations, was issued by the Department of Social Security (whose functions in this respect have now been taken over by the Department for Work and Pensions) to give “guidance on the intention and interpretation” of certain amendments to the regulations. There is also a Housing Benefit Guidance Manual. Extracts from these documents have been set out on pages 87 and 92 to 94 of the file and referred to on page 8. In the absence of sight of the full documents I do propose to comment on their accuracy and it is for the Secretary of State to decide whether any amendment is necessary in the light of Commissioners’ decisions.

20. The local authority couched its submission to the tribunal in terms of the guidance in the Circular, and no doubt that is what led the tribunal to express its decision in the way that it did. In its application to the Commissioner the local authority then argued that since the tribunal had considered the guidance and found that the lender was not on the point of seeking possession, it should not have ignored that fact when reaching its decision. This was to misunderstand the legal relevance of the guidance in the Circular. This misunderstanding seems to have continued in the local authority’s submission of 30th June 2004 (pages 83 to 85 of the file). For the local authority and for the tribunal the starting point must always be the wording of the statute and regulations.

Conclusion

21. For the above reasons this appeal by the local authority succeeds,

H. Levenson
Commissioner

18th October 2004