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CH/2553/2005

DETERMINATION OF THE SOCIAL SECURITY COMMISSIONER

1. Although this Application was not accompanied by a statement of the tribunal's reasons for decision, I waive that irregularity and, although the application to the legally qualified panel member was not made within the prescribed time, I accept this Application for consideration because there are special reasons for doing so. However, I refuse leave to appeal.

REASONS

2. I held an oral hearing of this Application. The local authority, the London Borough of Ealing, was represented by Mrs June Grehan, the Appeals Team Manager of the local authority's Benefits Service. The claimant was represented by Mr James Willan of the Free Representation Unit. The Secretary of State was represented by Ms Carine Patry of counsel, instructed by the Solicitor to the Department of Health and the Department for Work and Pensions. I am very grateful to all three representatives for their clear and helpful submissions.

3. The claimant applied for housing benefit on 4 September 2003. On 21 November 2003, the local authority disallowed the claim on the ground that the claimant's landlord was a close relative who was living in the same house (regulation 7(1)(b) of the Housing Benefit (General) Regulations 1987 (SI 1987/1971)). That was not actually correct as, although her landlord was her brother, he lived in another house in the same street. She therefore applied for the decision to be revised, but that merely resulted in a decision dated 9 January 2004 disallowing the claim on different grounds, expressed as follows –

> "The authority has decided that your tenancy has been contrived to take advantage of the housing benefit system.
>
> "Therefore under regulation 7(1)(a) of the Housing Benefit General Regulations 1987 the Authority is unable to pay housing benefit.
>
> "This is because you started living in the property in June 1999, but have not paid rent until 01/05/03, and the Authority deems your occupation not to be on a commercial basis."

That betrays a common error, which is the running together of two separate grounds upon which a person may be treated as not liable to make payments in respect of a dwelling: that the tenancy was not on a commercial basis (regulation 7(1)(a)) and that the tenancy was created to take advantage of the housing benefit scheme (regulation 7(1)(l)). The claimant unsuccessfully applied for the decision to be revised again and, on 4 April 2004, appealed against it.

4. The appeal was heard on 18 November 2004. It appears that the decision was not announced at the end of the hearing because the decision notice was dated the following day. In the decision notice, the decision was expressed in the following terms –

"There are a number of inconsistencies in the evidence in this appeal and perhaps some mischief. However, I am not satisfied that the local authority has discharged the burden of proof to show that there was a contrivance to take advantage of the housing benefit scheme."

The clear implication was that the claimant's appeal had been allowed and that is how all the parties have read the decision.

5. The decision notice was sent to the parties on 1 December 2004, the delay perhaps reflecting the fact that it is very rare for decisions not to be made at hearings, with notices being written there and then so that they can be issued immediately to those parties present and be put in the next post for those who are not. On 10 December 2004, Mrs Grehan wrote to the clerk to the tribunal to request a statement of reasons, with a view to appealing. On 27 January 2005, the claimant's solicitors wrote to the local authority asking it to implement the tribunal's decision. A reminder was sent by the solicitors on 22 February 2005. On 9 March 2005, the local authority replied to the solicitors, informing them that a request had been made for a statement of reasons. On the same day, a fax was sent by the local authority to the clerk to the tribunal, asking for an "update" on the case. A copy of the letter dated 10 December 2004 was also faxed. It then emerged in the course of a telephone conversation that the clerk to the tribunal had no record of having received the letter dated 10 December 2004 until the copy was faxed on 9 March 2005. On 19 April 2005, the clerk wrote –

"On 09/03/2005 I received your request for a statement of reason [sic] for the decision made on 18/11/2004 [sic]. The time limit for making a request is one month from the date the decision is issued.

"If a request is made after this time limit, but within 3 months, a chairman can decide whether a statement of reasons can be issued. If he refuses, a copy of that decision is sent to all parties. If the request is made 3 months or more after the decision was issued, there is no provision in law for the statement to be obtained. The request in this case has been refused."

The local authority wrote back to protest but on 24 May 2005, the legally qualified panel member who had comprised the tribunal, having obtained information as to the sequence of events, declined to provide a statement of reasons and said that the local authority could apply for leave to appeal. On 22 June 2005, the local authority applied to the legally qualified panel member for leave to appeal under paragraph 8 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. He refused leave on 6 July 2005.

6. On 8 August 2005, the local authority applied to a Commissioner for leave to appeal. It is submitted that the refusal to issue a statement of reasons was wrong and against the principles of natural justice, that the decision notice was not adequate and that the tribunal failed to apply the relevant law or to analyse the facts.

7. In a direction dated 22 August 2005, I raised the questions whether a legally qualified panel member has any power to issue a statement of reasons in response to a request made more than three months after the issue of a decision notice, whether and in what circumstances a Commissioner has any power to hold that a statement has been wrongly refused and whether and in what circumstances a Commissioner may admit for consideration

an application for leave to appeal where a statement of reasons has been refused because the request was made more than three months after the tribunal's decision was issued.

8. I invited the Secretary of State to intervene. He supported the local authority's application for leave to appeal. In a written submission, it was argued that there was no obligation on the legally qualified panel member to issue a statement of reasons on a request received more than three months after a decision notice had been issued and that the legally qualified panel member, rather than refusing leave to appeal, should have said that he had no jurisdiction to consider the application for leave. It was accepted that a Commissioner had power to grant leave to appeal in the absence of a statement of reasons but it was submitted that the Commissioner had no power to hold that a statement of reasons had been wrongly refused if the request had been made more than three months after the decision was issued. However, it was submitted that it was arguable that an error of law could be established in the present case, despite the lack of a statement of reasons, because the record of proceedings showed that the tribunal had not investigated the facts adequately.

9. The claimant opposed the grant of leave to appeal, arguing in a written submission that the legally qualified panel member had no power to issue a statement of reasons where the request was received more than three months after the decision notice had been issued and that, even if there was a power to do so, there was no obligation and so a Commissioner was not entitled to find that a statement of reason had been wrongly refused. It was accepted that a Commissioner could find a decision to be erroneous in point of law even if there was no statement of reasons but it was submitted that any application was defective if it was not accompanied by a copy of the statement of reasons and that the defect should be waived in a case like the present only if the legally qualified panel member had erred in law in refusing the statement of reasons. In any event, it was submitted, no arguable error of law could be demonstrated in the present case.

10. The relevant legislation is to be found in the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991), as applied to housing benefit cases by regulation 23 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002). The 1999 Regulations had already been much amended and were amended again on 18 March 2005, shortly after the clerk to the tribunal became aware of the request for a statement of reasons in the present case, but the 2005 amendments do not affect the issues arising on this appeal even though some of the relevant regulations are among those that were amended then. Before those amendments, regulations 2, 53, and 54(1) provided, so far as is relevant –

> "**2.** Where, by any provision of ... these Regulations –
>
> (a) any notice or other document is required to be given or sent to the clerk to the appeal tribunal ..., that notice or document shall be treated as having been given or sent on the day it is received by the clerk to the appeal tribunal ...
>
> "**53.**(1) Every decision of an appeal tribunal shall be recorded in summary by the chairman, or in the case of an appeal tribunal which has only one member, by that member.
>
> (2) ...
>
> (3) As soon as may be practicable after an appeal ... has been decided by an appeal tribunal, a copy of the decision notice prepared in accordance with paragraphs (1) and

(2) shall be sent or given to every party to the proceedings who shall also be informed of –

(a) his right under paragraph (4); and

(b) ..., the conditions governing appeals to a Commissioner.

(4) A party to the proceedings may apply in writing to the clerk to the appeal tribunal for a statement of reasons for the tribunal's decision within one month of the sending or giving of the decision notice to every party to the proceedings or within such longer period as may be allowed in accordance with regulation 54 and following that application the chairman, or in the case of a tribunal with only one member, that member shall record a statement of the reasons and a copy of that statement shall be given to every party to the proceedings as soon as may be practicable.

(5) ...

"**54.**(1) The time for making an application for the statement of reasons for a tribunal's decision may be extended where the conditions specified in paragraphs (2) to (8) are satisfied, subject to paragraph (13), but no application shall in any event be brought more than three months after the date of the sending or giving of the notice of the decision of the appeal tribunal."

11. By the time the local authority applied for leave to appeal, the regulations had been amended. In its new form, regulation 58(1) (as read in accordance with regulation 23(3)(f) of the 2001 Regulations) provides –

"**58.**(1) Subject to paragraph (1A), an application for leave to appeal to a Commissioner from a decision of an appeal tribunal under ... paragraphs 6 or 7 of Schedule 7 to the Act shall –

(a) be sent to the clerk to the appeal tribunal within the period of one month from the date of the applicant being sent a written statement of the reasons for the decision against which leave to appeal is sought ...

...

(5) Where there has been a failure to apply for leave to appeal within the period of time specified in paragraph (1)(a) or (1A) but an application is made within one year of the last date for making an application within that period, a legally qualified panel member may, if for special reasons he thinks fit, accept and proceed to consider and determine the application.

..."

12. One point upon all parties were agreed was that, as there was no statement of reasons in this case, the time for applying to a legally qualified panel member for leave to appeal under regulation 58 had not started to run and accordingly the legally qualified panel member had no jurisdiction to consider the application. However, the parties also agreed that, in the light of CSDLA/536/1999, a Commissioner may consider an application for leave to appeal provided he waives the irregularity involved in not supplying the copy of the statement of reasons required by regulation 10(2)(b) of the Social Security Commissioners (Procedure) Regulations 1999 (SI 1999/1495) and if he finds special reasons within the scope of regulation 9(3) of those Regulations. Those submissions are plainly correct. (The Secretary of State is also right to point out that regulation 9 draws a distinction between a refusal of leave and the rejection of an application, but the distinction has no practical importance in that regulation and it is not inappropriate to refuse leave for want of jurisdiction to consider granting it. I

would therefore not criticise the legally qualified panel member for having expressed his decision on the application in terms of a refusal of leave rather than a rejection of the application.)

13. I am satisfied that this is a case in which it would be right to give leave to appeal if I were to be satisfied that it is arguable that the decision of the appeal tribunal was erroneous in point of law. I therefore waive the irregularity and find special reasons for considering the application. I take that view because there is quite a lot of money at stake and the principal reason for the lack of a statement of reasons is that the letter of 10 December 2004 was lost, which I am satisfied was not the fault of the Appeals Team within the Benefits Service of the local authority. Moreover, had the effective application for a statement of reasons been made a mere nine days earlier, the legally qualified panel member might well have accepted it under regulation 54(5)(b) of the 1999 Decisions and Appeals Regulations. I therefore turn to consider whether any error of law is revealed, either because there was a breach of a duty to provide a statement of reasons or otherwise.

14. The first question that arises is whether the clerk to the appeal tribunal did receive the original letter dated 10 December 2004. Mrs Grehan is able to say that it left her desk. No-one recalls seeing it again. It is conceivable that it was never put in the post at Mrs Grehan's office or that it was lost in the post or that it was mislaid in the tribunal's office before being linked to the file. I do not consider that it can be regarded as established that it arrived at the tribunal's office, notwithstanding that the office concerned was not renowned as the most efficient. Mrs Grehan said that none of her applications had gone astray before, although it is fair to say that she had not challenged many tribunal decisions on behalf of the local authority. In those circumstances, regulation 2(a) of the 1999 Decisions and Appeals Regulations has the effect that the letter of 10 December 2004 cannot be regarded as having been sent until the copy was received on 9 March 2005. Mrs Grehan placed much weight on CH/4065/2001, but that case is distinguishable from the present one. The issue the tribunal had to resolve in that case was whether the claimant had telephoned the local authority to tell it that her benefit appeared not to have been calculated correctly. The claimant said she had but the local authority had no record. The Commissioner pointed out that the mere fact that the local authority had no record of the telephone call was not, by itself, an adequate ground for rejecting the claimant's evidence. In the present case, I accept that the fact that the clerk to the tribunal had no record of receiving the letter dated 10 December 2004 before 9 March 2005 did not necessarily mean that it did not arrive at the tribunal's office. However, whereas accepting the claimant's evidence in CH/4065/2001 would necessarily have meant accepting that someone in the local authority had answered the telephone and received the information, accepting that Mrs Grehan put the letter out for the post does not mean that it reached the tribunal's office.

15. The next question that arises is whether, if the application for a statement of reasons was not sent until the copy was received on 9 March 2005, the application was late. Mrs Grehan explained that part of the reason why the local authority had not queried the lack of response to the letter 10 December 2004 until 9 March 2005 was that it was not unusual to have to wait that long for a statement of reasons to be issued by a legally qualified panel member where the tribunal was administered from the office in question and that she had not been aware that there was any three-month absolute limit. Had she been aware of that, she would, she said, have put procedures in place to check that all requests for statements of reasons had been received before that limit was reached, although she conceded that it would

have been wise to have checked earlier anyway. In any event, she submitted that the decision of the tribunal could not be taken to have been validly issued on 1 December 2004 because the clerk to the tribunal had failed to comply with the duty to provide the information specified in regulation 53(3)(a) and (b) of the 1999 Decisions and Appeals Regulations and, in particular, had failed to provide information about the three-month absolute time limit imposed by regulation 54.

16. It is true that there is nothing in the Regulations to suggest that the duty on the clerk to provide the relevant information does not apply where the party to the proceedings is a public authority administering benefits just as it does to claimants. One might think that such authorities do not need the information but Mrs Grehan said that the Benefits Service had no lawyers among its staff, received very little assistance from the local authority's legal department and was heavily dependent on advice from the Department for Work and Pensions and the Appeals Service. It is also true that Commissioners have on occasion held that a decision that is not issued in the correct form is no decision at all, on the basis that a claimant is not to be deprived of a right of appeal due to the decision-maker's failure to comply with a statutory duty to inform him of that right. However, Mr Willan submitted that any failure to provide information in the present case was not material. Mrs Grehan knew there was a right of appeal and, moreover, had known of the one month time limit for making applications imposed by section 53(4) and had taken all reasonable steps to comply with it. In those circumstances, he submitted, the decision had to be taken to have been validly issued on 1 December 2004. Ms Patry also submitted that any failure to comply with the duty imposed by regulation 53(3) could not invalidate the decision of the tribunal.

17. I agree with Mr Willan and Ms Patry on this issue. I am not entirely sure that a failure to refer to the absolute time limit for applying for a statement of reasons is necessarily a breach of the duty to provide information imposed by regulation 53(3) but, even if it is, it is not such as to invalidate the notice of decision. In *Regina v Soneji* [2005] UKHL 49; [2006] 1 A.C. 340, the House of Lords held that the question whether a breach of a procedural requirement invalidated the action only if that was what Parliament intended. It is easy to see why a decision made by the Secretary of State or a local authority concerning benefit entitlement should be held to be invalid when no reference is made to the right of appeal and the consequence is that the right is not exercised within time, because the decision-maker would be the beneficiary of his own breach of duty were it otherwise and no other party is affected by the invalidity. Where a tribunal's decision is concerned, I will not go as far as Ms Patry and say that a breach of the regulation 53(3) requirement to provide information could *never* result in a decision being invalid but I would be slow to find that Parliament intended a decision to be invalid on that ground when one of those parties might have been quite satisfied with the decision and have been relying upon it. Moreover, as Mr Willan submits, if a person is aware of the right of appeal and the one-month time limit for applying for a statement, he or she is not prevented from exercising the right of appeal and is in a position to seek more detailed information. The effect of not knowing of the absolute time limit was merely that Mrs Grehan was not prompted to follow up her application for a statement of reasons as soon as she would have done had that knowledge.

18. I come then to the third issue arising on this Application, which is: how absolute is the absolute time limit prescribed in regulation 54(1)? Is there any power to issue a statement of reasons in response to an application made after that time limit has expired? Mr Willan pointed out that, under regulation 23(3A) and (3C) of the Social Security (Adjudication)

Regulations 1995 (SI 1995/1801), as amended in 1996, a chairman plainly had a duty to provide a statement of reasons if a request was made within 21 days of a decision notice being issued and equally plainly had a wide power to provide reasons at any time where no request had been made or where it was made late. He contrasted that with the language of regulation 54(1) which provides that "no application shall *in any event* be brought more than three months after the date of the sending or giving of the notice of the decision of the appeal tribunal". The words "in any event", he submitted, made it plain that reasons were not to be given on an application made more than three months late and that there had clearly been a deliberate change in policy since the 1996 amendments to the 1995 Regulations. It was important to bear in mind, he submitted, that extending the time necessarily meant extending the time for appealing because by virtue of regulation 58(1)(a), the time for applying for leave to appeal does not start to run until a statement of reasons is issued. Once the three-month period had elapsed, the other party was generally entitled to assume that there would be no appeal. Moreover, if a legally qualified panel member had a power to issue a statement of reasons following a request made more than three months after the statement of reasons had been issued, the three-month time limit would be rendered redundant. Mr Willan also pointed out that, even within the three-month period, an application for a statement of reasons could be made only in the limited circumstances permitted by paragraphs (2) to (8) of regulation 54 and that, in contrast to the power that Commissioners are expressly given by regulation 27 of the Social Security Commissioners (Procedure) Regulations 1999 to waive procedural irregularities, appeal tribunals are given no such power. Consequently, he submitted, if the Regulations were read as a whole, it was apparent that a legally qualified panel member had no power at all to issue a statement of reasons following a request made more than three months after the issue of the decision notice.

19. Mrs Grehan did not disagree with that approach, which is why she relied so heavily on the argument that valid notice of the decision had not been given in this case on 10 December 2004. Ms Patry, however, submitted that, although regulation 54(1) prohibited a party from making an application for a statement of reasons more than three months after the decision notice had been issued, it did not prohibit the legally qualified panel member from issuing a statement of reasons.

20. The obvious difficulty with Ms Patry's approach is that, if a legally qualified panel member may issue a statement of reasons on his own motion, he can hardly be prevented from being prompted into issuing one by an application made more than three months after the date on which the decision notice was issued, which appears to drive a coach and horses through the prohibition imposed by regulation 54(1) on such late applications. So far as the legislation is concerned, I am satisfied that Mr Willan must be right. There is no power to issue a statement of reasons following an application made more than three months after the decision notice is issued.

21. There are also, of course, good reasons why a statement of reasons should generally be issued soon after the decision is made, not the least of which is that the legally qualified panel member's memory of the case may fade. Reasons cannot be produced once the legally qualified panel member, even when prompted by his record of proceedings and other documents, no longer has an adequate recollection of the issues in the case. Only he can judge whether he has such a recollection. It is important to bear in mind that many hearings in social security cases are extremely short, lasting for less than an hour, and that members of tribunals are therefore less likely to remember individual cases than will be the case in

jurisdictions where hearings often run over several days. The appeal in the present case was obviously regarded as relatively complicated because it was listed for two hours.

22. However, it would be extraordinary if, merely because three months had elapsed, a legally qualified panel member were to be completely unable to provide a statement of reasons that he felt he could give and that he considered it would be fair to give. As the time limit for an appeal can be extended to up to thirteen months after a statement of reasons is issued if there are special reasons, if a legally qualified panel member is able to issue a statement of reasons four months after a decision notice is issued and is satisfied that the same sort of special reasons exist, I can see no rational explanation for not allowing him to issue the statement. The effect of refusing to issue a statement of reasons would be merely artificially to limit the arguments that could be advanced on an appeal, which would hardly be in the interests of justice.

23. Moreover, if one looks just at the legislation, one looks in vain for any power at all in a legally qualified panel member to issue a statement of reasons on his own motion without any written application from a party. Yet that is frequently done where a legally qualified panel member anticipates that there might be an appeal or there are other reasons why the parties might wish to have the reasons and he wishes to write them straightaway. That procedure is justified, not by the legislation, but because a power to give reasons for a decision is generally to be implied from the mere duty to give a decision. It is, to that extent, extra-statutory. In the absence of a statutory duty to give reasons, no doubt there would be an extra-statutory duty implied by the common law, instead of, or as well as, an implied power, but the existence of a statutory duty severely limits any possibility of, and may entirely prevent, any further duty being implied. However, the statutory duty to give reasons imposed by regulations 53(4) and 54 does not justify refusing to imply the power. The statutory duty and the implied power can co-exist quite satisfactorily. (The power in regulation 54 is a power to extend the time in which an application may be made so as to create a duty to give reasons. For the purposes of this analysis, it is not a power to give reasons.)

24. In the light of these considerations, it seems to me that Mr Willan's submission can be reconciled with Ms Patry's. An application for a statement of reasons made more than three months after a decision notice is issued cannot give rise to any duty to provide a statement of reasons under the legislation, but it may amount to an invitation to the legally qualified panel member to exercise his power to provide a statement of reasons on an extra-statutory basis. Thus, Mr Willan is correct to say that there is no power to issue a statement of reasons under the legislation but Ms Patry is right to say that there is a power to issue such a statement, because it can be done extra-statutorily. This approach does not undermine the legislation because the reference to a "statement of reasons" in regulation 58(1) plainly contemplates a statement of reasons provided under the legislation. Therefore, unless a statement of reasons is provided in response to an application made within three months of a decision notice being issued, or is provided within that period on the motion of the legally qualified panel member so as to remove the need to make such an application, the provision of a statement of reasons does not cause the time for applying for leave to appeal to start to run and cannot unfairly prejudice any party's position in respect of the time limit for applying for leave to appeal. However, if an extra-statutory statement of reasons reveals on its face a clear error of law on the part of the tribunal, that will be relevant on any application for leave to appeal, just as a clear error of law on the face of a decision notice is (see R(IS) 11/99). I prefer to express no view as to whether, and if so in what circumstances, a document that purports to be a full

statement of reasons can be considered inadequate and render a decision erroneous in point of law where there was no duty to produce any statement of reasons at all and the document does not show that there was some other error of law.

25. The fourth question that arises on this Application is whether, if there is a power to issue a statement of reasons in response to an application made more than three months after the issue of the decision notice, a decision to exercise it one way or the other can be directly challenged before a Commissioner. All three parties were agreed that it could not, at least in practice. It might in theory be possible to say that, in a particular case, the circumstances were such that the power could only have been exercised in favour of issuing a statement of reasons so that the decision of the tribunal would have to be set aside for breach of a duty to provide reasons but, as I have already indicated, where there is a limited statutory duty to provide a statement of reasons, it is difficult to conceive of circumstances where an extra-statutory duty, as opposed to a power, might arise in a case where the decision did not fall to be set aside on some other grounds anyway. Of course, a legally qualified panel member errs in law if he denies the existence of a power that he has or ignores relevant considerations or takes into account irrelevant considerations, but the only practical challenge to such errors would be by way of judicial review because, if a Commissioner found such an error, he would be unable to provide an appropriate remedy. Setting aside the tribunal's decision on that ground would not be appropriate if the legally qualified panel member could properly have refused to provide a statement of reasons if the error had not been made.

26. All three parties referred to regulation 20(2) of the Social Security Commissioners (Procedure) Regulations 1999 and suggested that it entitled a Commissioner to direct a tribunal to provide a statement of reasons, although they did not suggest that I make use of the power. It actually entitles a Commissioner to "direct the tribunal to submit a statement of facts or other matters" and seems to me aimed more at directing a tribunal to state what happened at a hearing rather than at directing it to produce a statement of reasons for its decision, although presumably reasons could be encompassed by the term "other matters". However, I have grave doubts as to the propriety of Commissioners directing tribunals to provide statements of reasons, save perhaps in exceptional cases. The duty to give reasons is placed on the legally qualified panel member and the appropriate remedy for a breach of that duty is usually the setting aside of the decision (see CA/4297/2004 and the recent decision of the Court of Appeal in *Hatungimana v Secretary of State for the Home Department* [2006] EWCA Civ 231 in the context of appeals from the Asylum and Immigration Tribunal). If there is a mere power to give reasons, one consideration for a legally qualified panel member will be whether he has sufficient recollection of the case and a Commissioner cannot substitute his own judgment on that issue. In the present case, the application to the Commissioner for leave to appeal was made the best part of nine months after the hearing before the tribunal and this is not atypical of cases where an applicant has failed to obtain a statement of reasons from a legally qualified panel member. It would be wholly inappropriate to direct a tribunal to produce a statement of reasons for its decision after such a lapse of time.

27. Therefore, even if it were possible to show that a legally qualified panel member had erred in law in declining to exercise his power to provide an extra-statutory statement of reasons, the most that a Commissioner could properly do would be to adjourn the proceedings and invite, rather than direct, the legally qualified panel member to reconsider the question. That might provide an adequate remedy in some cases but I agree with the parties that the real hurdle faced by an applicant is in showing that there was any error of law at all on the part of

the legally qualified panel member in declining to provide a statement of reasons in response to a request made more then three months after the issue of a decision notice.

28. Certainly, the circumstances of the present case could not have obliged the legally qualified panel member to provide a statement of reasons if he had the power to do so. The local authority may not have lost the original application for a statement of reasons but it was not altogether blameless because it could have followed up the original request for a statement of reasons sooner than it did.

29. I am therefore satisfied that there was no breach of any duty to provide a statement of reasons in this case so that I must turn to consider whether some other error of law on the part of the tribunal can be demonstrated without there being a statement of reasons. This requires me to look in closer detail at the facts of this case.

30. The claimant was born in 1956. She lives with her husband and two dependent children. There was evidence before the tribunal that she is severely disabled through rheumatoid arthritis, to the extent that in 2001 a possible hip replacement was being considered. When she claimed housing benefit, she was in receipt of the higher rate of the mobility component and the lowest rate of the care component of disability living allowance. She moved to her present home in 1999 but no attempt to charge her rent was made until May 2003 and she did not claim housing benefit until September 2003. In a letter dated 28 January 2004 to the local authority, the claimant's brother said that he had bought the claimant's home as an investment, with a view to letting it commercially but allowed his sister to live in it because she "faced a housing crisis", due partly to her disablement. He argued that if the arrangement had been contrived a claim for housing benefit would have been made in 1999. He continued –

> "However, certain circumstances have altered the *status quo*. Firstly, my sister's condition has deteriorated and she needs more help from her family. This is having financial implications. I have been able to meet my sister's housing and care costs in the past but my financial circumstances have also deteriorated and I am no longer able to absorb the costs. Consequently, I am faced with the option of either selling the house or renting it and asking the council to rehouse my sister in specially adapted accommodation."

The claimant was interviewed on 29 March 2004 and said that the reason that a tenancy was created in 2003 was "so that I could get some security and also get some self-respect. I do not want to be a burden on my family." She also said that she had not paid any rent since then because she was waiting for her housing benefit to come through and she had not been given notice to quit and did not expect to be "as my brother is concerned for my welfare". The interview also established that there were flights of stairs in both the claimant's previous home and in her current one. Evidence was submitted showing that the rent charged was within the range or market rents.

31. However, important evidence contradicting the account of the claimant emerged in the form of a record of a telephone call made on 5 May 1999 in connection with council tax liability when the claimant first moved to her home. The council tax notebook says –

> "T/c received from [the claimant] adv that she and her husband are joint owners, says they are renting prop out in due course. Unfurnished let adv to put details in writing. name amended from [...]. Checked corres add given by [the claimant] they are not registered at that prop. L520 sent."

The significance of this is that, if the claimant had owned the property less than five years before the claim, she was to be treated as not liable to make payments in respect of the dwelling under regulation 7(1)(h) of the 1987 Regulations.

32. The claimant then instructed solicitors who submitted a statement from the claimant and a written submission addressing both the question whether the tenancy had been created to take advantage of the housing benefit scheme and the question whether the property was let on a commercial basis. Unfortunately, the case was not reached on the first occasion it was listed. It was eventually heard on 18 November 2004. The local authority's represented handed in a number of documents at the beginning of the hearing. Among them was another copy of the extract from the council tax notebook mentioned above (which makes it unclear whether the first copy had reached the tribunal and the parties by the time of the earlier hearing) and copies of entries in the Land Register, showing that the registered proprietor of the property was a limited company from 27 May 1999, a named individual (subsequently identified as the claimant's father) from 18 May 2000 and the claimant's brother and (as was subsequently confirmed) his wife from 2 July 2001.

33. Against that background, Mrs Grehan and Ms Patry submit that it can be shown from the record of the proceedings that the tribunal neglected to ask the claimant material questions and so was in breach of its duty to act inquisitorially. Ms Patry cited R(IS) 11/99 and R(IS) 17/04. In R(IS) 11/99, the claimant had not attended the hearing and so it was clear that, in order to ask him questions on an issue that had been entirely missed by the adjudication officer and about which he had therefore not been asked questions before, the tribunal would have had to adjourn the hearing. In R(IS) 17/04, the tribunal declined to ask the claimant any questions at all because the Secretary of State's had failed to comply with a direction to send a representative. In both cases, there was an issue or evidence before the tribunal about which the claimant had not previously been asked any questions. In the present case, the claimant was present and the local authority was represented and able itself to ask material questions. The presence of the local authority's representative did not remove from the tribunal the responsibility for ensuring that relevant questions were put, but there is a limit to the extent to which the local authority can complain about the lack of depth of the questioning when it could have cross-examined the claimant itself.

34. At the bottom of the second page of the record of proceedings there is a reference to regulation 7(1)(h) and, on the next page, there is a record of the claimant's representative taking instructions and then agreeing to the "5 yr rule being in issue today". There follows the claimant's evidence in which it is clear that she was asked about her understanding of who owned the premises, that she identified a director of the company that owned the property in 1999 as a friend of her brother and that she did not know why her father, who had been in his 90s, had bought the house. She also made clear that she had never owned the property and she appears to have suggested that she said she did because her brother had said she had to pay the council tax and "she thought [the local authority] would ask a lot of questions".

35. Insofar as there was new evidence before the tribunal about which the claimant had not previously been asked questions, it seems to me that the relevant issues were addressed and that Mrs Grehan's and Ms Patry's complaints about the tribunal not cross-examining the claimant are really submissions to the effect that there appear to have been contradictions or inconsistencies in the evidence that were not resolved to their satisfaction by the claimant's evidence. That was a matter for comment and, indeed, the local authority made perfectly good submissions to that effect to the tribunal and the tribunal obviously accepted in the decision notice that there were some difficulties with the claimant's case. It has not been, and I do not consider that it could be, suggested that the tribunal's decision was perverse. The way in which the apparent contradictions and inconsistencies were reconciled is not explained, but that is because there is no statement of reasons. I reject the submission that the tribunal's decision is erroneous in point of law on the ground that the tribunal failed to ask relevant questions.

36. Mrs Grehan and Ms Patry also attacked the decision notice on two grounds. First, it is suggested that the tribunal erred in not recording an "outcome" decision. However, the only point in issue was the application of regulation 7 of the 1987 Regulations and, by virtue of paragraph 6(9)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, the tribunal was not required to consider the other issues that it would have been necessary to determine before an award of benefit could be made. The local authority has never complained that the decision was one that could not have been implemented. Its complaint is that, unless an appeal is allowed, it will be obliged to implement a decision about which it is unhappy.

37. The second, and more substantial ground upon which the decision notice is attacked is that the tribunal made no reference to any decision under regulation 7(1)(a) (tenancy not on a commercial basis), referring only to taking advantage of the housing benefit scheme (regulation 7(1)(l)). It is submitted that either the tribunal failed to make a decision under regulation 7(1)(a) or it failed to record it. Mrs Grehan, on the other hand, did not complain about the lack of any decision under regulation 7(1)(h) (property owned by the claimant within the last five years) because she submitted that the local authority had not raised the issue, although it seems to me it was expressly raised at the hearing and was in any event raised by the extract from the council tax notebook. Mr Willan, submitted that it was wrong to place too much weight on the exact wording of the decision notice and that it should be inferred that the tribunal had dealt with all issues and merely referred to the most important one.

38. Decision notices are important documents that should be in terms that enable a local authority properly to implement them. However, they are usually produced quickly at the end of a hearing and they are intended only to be a record of the decision "in summary" and in my judgment they should not be construed too strictly. If the true decision can be discerned with reasonable certainty by inference from the surrounding circumstances, that is sufficient. I bear in mind that the usual remedy if a decision notice is unclear is to ask for clarification or a statement of reasons and so it is only necessary for a Commissioner to rely on a decision notice alone where the applicant or appellant has neglected to act in time to obtain a statement of reasons. An over-technical approach to decision notices would tend to give an advantage to parties who had failed to give the tribunal a proper opportunity to explain or correct its decision.

39. I agree with Mrs Grehan that the decision notice is not defective through a failure to refer to the question whether the claimant had previously owned her home (regulation 7(1)(h)), because it is plain that the reason no reference is made to it is that it had really ceased to be a live issue once the Land Registry entries were produced by the local authority and the claimant had not challenged them. In my judgment, the explanation for the tribunal not referring to the question whether the tenancy was on a commercial basis is equally clear. The local authority had not itself distinguished between that issue and the question whether the tenancy had been created to take advantage of the housing benefit scheme and had never suggested that there was some evidence relevant to one of those issues and not the other. There was certainly evidence from which it could be inferred that, as the local authority argued, if the tenancy in this particular case was not on a commercial basis, one motive for creating it at all was to gain housing benefit. The issues were, in reality, alternative ways of putting the same case. I accept Ms Patry's point that the test for regulation 7(1)(a) is easier for a local authority to satisfy than the test for regulation 7(1)(l) for which something approaching "abuse" of the system is required, and that, in any event, regulation 7(1)(l) strictly speaking falls to be considered only when none of the other sub-paragraphs applies. It was therefore necessary for the tribunal to distinguish between the two issues and it would undoubtedly have been better if the tribunal had expressly referred to both issues in the decision notice. However, it is simply not realistic to construe the decision notice as meaning anything other than that none of the relevant sub-paragraphs of regulation 7(1) applied. The parties, rightly in my view, all construed the decision notice as notice of a decision allowing the appeal. Whether the tribunal in fact properly considered the distinct issues arising in relation to both sub-paragraphs (a) and (l) is a matter that could be discovered only if a statement of reasons were obtained. The wording of the decision notice is too flimsy a basis upon which to find that the tribunal made an error of law in that respect.

40. I am therefore not satisfied that it is arguable that there is an error of law in the tribunal's decision.

41. Mrs Grehan expressed concern that, if I were to reach such a conclusion, the local authority would never be able to do anything about what might be a wrong decision by the tribunal having effect for an indefinite period. In the absence of any statement of reasons, it would be difficult to supersede the tribunal's decision for error of fact and a local authority has no power either to revise a tribunal's decision or to supersede it for error of law. Mr Willan, however, pointed out that there were likely to be changes of circumstances justifying supersession because, for instance, new fixed term tenancies were created. Supersession involves making a new decision and, strictly speaking, a tribunal's decision as to whether one tenancy is on a commercial basis or was created to take advantage of the housing benefit scheme is not binding in respect of such a decision in respect of a different tenancy. Moreover, if the local authority investigated matters more closely, it might be possible to supersede the tribunal's decision on the ground of ignorance of a material fact. Thus, if the tribunal's decision is really wrong, the local authority may well have a remedy. However, even if it did not, that would not entitle me to find an error of law where there is none. The result would have to be accepted as a consequence of having an appeal restricted to points of law from a tribunal that is not always bound to give reasons for its decisions.

(signed on the original) **MARK ROWLAND**
Commissioner
24 May 2006