THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CH/2791/2003

CHILD SUPPORT, PENSIONS AND SOCIAL SECURITY ACT 2000
SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: MR J MESHER

Appellant: North Tyneside Council

Claimant: Leonard White

Tribunal: Newcastle

Tribunal Case No: U/44/232/2003/00206

Date of tribunal hearing: 16 April 2003

[ORAL HEARING]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the Newcastle appeal tribunal dated 16 April 2003 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute a decision on the landlord's appeal against the decisions dated 13 December 2002 having made the necessary findings of fact (Child Support, Pensions and Social Security Act 2000, Schedule 7, paragraph 8(5)(b)). My decision is:

(a) that the decision dated 5 November 2001 awarding the claimant housing benefit for the period from 17 September 2001 to 15 September 2002, as revised on 21 November 2001, does not fall to be superseded on the ground of change of circumstances;

(b) consequently no housing benefit was overpaid to the landlord in the period from 5 August 2002 to 15 September 2002 and no question of recoverability from him arises.

Thus, although the local authority's appeal to the Commissioner achieves a technical success, in that the appeal tribunal's decision was erroneous in point of law so as to be set aside, my decision on the landlord's appeal against the decisions of 13 December 2002 has the same practical effect as the appeal tribunal'.

Warning

2. A decision on the local authority's appeal to the Commissioner was made by Mr Commissioner Jacobs on 8 September 2003. That decision was set aside by Mr Commissioner Jacobs on 6 February 2004 for reasons that I need not set out. Accordingly, that decision has no legal existence or authority.

Background

3. This is an overpayment case in which the central issue of law is the proper interpretation of regulation 101(1) of the Housing Benefit (General) Regulations 1987 (the HB Regulations). That involves identifying the conditions under which a landlord who has received direct payments of housing benefit can escape from the general rule that overpayments of housing benefit are recoverable from the person to whom the benefit was paid.

4. That general rule is in section 75(1) and (3)(a) of the Social Security Administration Act 1992:

> "(1) Except where regulations otherwise provide, any amount of housing benefit determined in accordance with regulations to have been paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.
>
> (3) An amount recoverable under this section shall be recoverable--
>
> (a) except in such circumstances as may be prescribed, from the person to whom it was paid; and
>
> (b) where regulations so provide, from such other person (as well as, or instead of,

the person to whom it was paid) as may be prescribed."

5. Regulation 101(1), as in force with effect from 1 October 2001, provides:

"(1) For the purposes of section 75(3)(a) of the Administration Act (prescribed circumstances in which an amount recoverable shall not be recovered from the person to whom it was paid), the prescribed circumstance is--

(a) housing benefit has been paid in accordance with regulation 93 (circumstances in which payment is to be made to the landlord) or regulation 94 (circumstances in which payment may be made to a landlord);

(b) the landlord has notified the relevant authority or the Secretary of State in writing that he suspects that there has been an overpayment;

(c) it appears to the relevant authority that, on the assumption that there has been an overpayment--

(i) there are grounds for instituting proceedings against any person for an offence under section 111A or 112(1) of the Administration Act (dishonest or false representations for obtaining benefit); or

(ii) there has been a deliberate failure to report a relevant change of circumstances contrary to the requirement of regulation 75(1) (duty to notify a change in circumstances) and the overpayment occurred as a result of that deliberate failure; and

(d) the relevant authority is satisfied that the landlord--

(i) has not colluded with the claimant so as to cause the overpayment;

(ii) has not acted, or neglected to act, in such a way so as to contribute to the period, or the amount, of the overpayment."

6. The claimant (born 2 May 1977) took a tenancy from 13 August 2001 of a part-furnished flat owned by the landlord, initially under a six month assured shorthold, at a rent of £299 per calendar month. At that time he was in work. He claimed housing benefit and council tax benefit on a form signed on 12 September 2001, requesting payment of housing benefit direct to the landlord. On 5 November 2001, housing benefit was awarded at the rate of £40 per week for the period from 17 September 2001 to 15 September 2002. On 22 November 2001 that decision was revised following receipt of a rent officer's determination that the single room rent was £40 per week and the local reference rent was £65 per week. The amount of housing benefit awarded was altered only from 6 May 2002 to 15 September 2002, to increase it to £65 per week. That was because until the claimant reached the age of 25 his maximum rent was restricted under regulation 11(3A) of the HB Regulations to the single room rent. Payment was made to the landlord four-weekly in arrears. It appears that the claimant did not pay the difference between the housing benefit and the contractual rent.

7. So far as the local authority was concerned, the next event was that the claimant failed to return a renewal claim form in respect of the period from 16 September 2002. On that date the local authority wrote to the claimant and to the landlord to inform them that the claimant was no longer eligible for housing benefit from 16 September 2002 because of failing to return the form on time. Although the copy of that letter on page 25 of the papers gives 5 August 2002 as the

date of non-eligibility, I accept the explanation given at the oral hearing that the local authority's computer system, while allowing the printing-out of copies of letters, automatically amends any dates according to changes which have been made later. I accept that the letter actually sent to the landlord gave the date of 16 September 2002.

8. On 26 November 2002, the council tax department of the local authority wrote to the landlord as follows (the landlord's written replies, as received on 3 December 2002, are in square brackets):

> "My records indicate that the above named person was a tenant at the above property and that you are the landlord of the property.
>
> I also believe that [the claimant] no longer resides at the above address and I would be obliged if you would provide me with the following information.
>
> Date tenant left: [No records retained. Tenant is believed to have left July 02]
> Date tenancy ceased: [August 02]
> Forwarding address: [Ex tenants don't provide forwarding addresses!]
> Was the property let furnished? [Part Furnished]"

9. That information was passed on to the benefits and student support department of the local authority, where the view was taken that the claimant had vacated the property on 31 July 2002. On 13 December 2002, a decision was made terminating entitlement to housing benefit with effect from 5 August 2002, the first day of the benefit week following 31 July 2002. The notification letter to the claimant, dated 13 December 2002 and addressed to the flat, stated:

> "You have had a change in your circumstances and your claim for Housing Benefit has been cancelled from 05 Aug 2002. The reason for this is; Claimant moved out."

On the same date, another letter was sent to the claimant saying that he had been overpaid £390 housing benefit from 5 August 2002 to 15 September 2002, that, if he was still receiving benefit, deductions would be made, but if not he might be issued with an invoice in the near future. Also on the same date, a letter was sent to the landlord saying that he had been overpaid £390 for that period, that, if the claimant was still receiving benefit, deductions would be made, but that if he did not re-apply for housing benefit the landlord might be issued with an invoice in the near future.

10. On 13 December 2002, an invoice for £390 was sent to the landlord. The landlord wrote back, asking why the local authority had decided that the sum was recoverable and why it was recoverable from him, rather than from the claimant. The reply dated 23 December 2002 from a senior benefit officer stated that the overpayment occurred because benefit continued to be paid to the landlord after the claimant vacated the property and that the local authority was not aware of that until the landlord informed the council tax department on 3 December 2002 that he had left in July. It continued:

> "As you were aware that [the claimant] had left the property, but failed to inform us, it is my decision that the overpayment should be recovered from you."

11. The landlord appealed on 21 January 2003. There was further correspondence, including a letter dated 12 February 2003 from the local authority in which it was said that information had been received from the claimant that the flat was not his permanent address. It is now accepted that no such information had been received. The appeals officer wrote to the landlord on 20 February 2003, setting out the local authority's view, referring to regulations 99 and 101(1) of the HB Regulations and asking the landlord to confirm the grounds on which he was appealing. It is important to set out much of his reply, as it is the first statement of his case:

> "With respect to Reg 99, circumstances existed where we could only suspect at the end of August 2002 that [the claimant] had possibly abandoned the premises. We entered the premises to inspect them at that time because of nil response to numerous arrangements to inspect. Our entry could have been construed as illegal. There was seeming evidence of continuous occupation, albeit rather sparse, such as bedding, beds, gas and electricity supplies, clothes in wardrobes, occasional table, chairs and even a clothes horse with freshly washed and ironed clothes on it. It may be appreciated that a landlord taking possession of his property without a court order and bailiffs commits a criminal offence, so this situation was extremely difficult. However, as nothing had been disturbed, not even the clothes horse, on another inspection some days later we took a chance and changed locks. Our later enquiries led us to believe that the tenant had probably not used the property regularly since July 2002, but we weren't aware of that at the time."

Among the other points made was that he could not have been expected to inform the local authority of anything before September 2002.

The appeal tribunal's decision

12. The landlord attended the hearing on 16 April 2003 before the appeal tribunal, consisting solely of a legally qualified panel member (the chairman). The local authority was represented by the appeals officer.

13. The landlord gave extensive evidence. The gist of it is shown in the extracts I set out below from the appeal tribunal's statement of reasons. But he also gave evidence that, when he let the flat, the claimant was working man with a partner who was expecting a baby. Shortly afterwards, the claimant broke his leg and had to claim benefits. The landlord gave evidence that the claimant might have been with his girlfriend/partner and baby somewhere else during the day and have come home to sleep. He also gave evidence of having obtained a court order against the claimant for arrears of rent and of having served notices to quit, so that the tenancy came to an end some time in August 2002.

14. The appeal tribunal allowed the appeal and decided that the overpayment of £390 was not recoverable from the landlord. The statement of reasons contained the following:

"It was the local authority's case that the landlord should have reported a change in circumstances namely that the tenant has vacated the property, that he failed to notify that `fact' and consequently as a result of that an overpayment had occurred.

The local authority's argument was that when the landlord inspected the property in August 2002 he should have at that point notified the local authority of the fact that the tenant had vacated the premises. The landlord contended that the visit made at the beginning of August 2002 did not reveal that fact. His argument was that upon entering the property there was evidence of occupation in the form of heating being on and clothes airing on a clothes horse. Clothing was in the wardrobes, there were clothes lying in the bedroom, those included clothes of a child and whilst there was no television present there was a facility for music. On that visit, the landlord changed the locks and left a note asking that the tenant contact him.

The Tribunal find as a fact that on that visit there was no evidence to suggest the tenant had given up occupation of the property and there was good evidence that the property was being occupied by the tenant, eg the evidence of the variety of clothing.

...
On a subsequent visit to the property towards the end of August the landlord found that the clothing had been removed which indicated that the tenant had gained access even though a new lock had been applied to the premises.

...
At the times of the visits of the landlord the only change in circumstances which he could have possibly reported to the local authority in the opinion of this Tribunal was the fact that he changed the locks on the first visit and on the second visit that the clothing had been removed from the clothes horse. The Tribunal are not able to deduce from that that Regulation 101(1)(c)(ii) is satisfied so as to allow the overpayment to be recovered from the landlord.

The Tribunal similarly was not satisfied that Regulation 101(1)(d) was satisfied as there is no evidence of collusion and the Tribunal do not accept that the landlord has acted or neglected to act in such a way as to contribute to the overpayment.

There has been no misrepresentation by the landlord. The only material facts relevant to the situation during the period of overpayment were the situations with regard to the changing of the locks and the existence of clothing and the removal thereof from the premises hence the Tribunal were not satisfied that Regulation 101(2) could be satisfied so as to allow recovery from the landlord.

The landlord may well have suspected that the tenant effectively vacated the premises from July 2002 that suspicion being communicated to the local authority in correspondence in or around December 2002 but that does not mean the landlord was aware of that in July 2002 or had reasonable grounds to suspect that in July or indeed in

August 2002.

The Tribunal do not accept the landlord was aware of the change in circumstances which should have been disclosed to the local authority which mean that failure to do so led to an overpayment."

The appeal to the Commissioner

15. The local authority was granted leave to appeal against that decision by the chairman of the appeal tribunal. The grounds put forward concentrated on the terms of regulation 75(1) of the HB Regulations (duty to notify changes of circumstances which claimant or person paid housing benefit might reasonably be expected to know might affect entitlement to housing benefit) and whether the landlord ought to have notified his suspicions. There was also a reference to regulation 101(1)(b) and to the landlord's not having reported his suspicions. The local authority's appeal was allowed by Mr Commissioner Jacobs on 8 September 2003. He substituted a decision that the local authority's overpayment recoverability decision of 13 December 2002 against the landlord was correct in fact and law. As noted above, Mr Commissioner Jacobs set aside his decision of 8 September 2003 on 6 February 2004, so that I do not need to go any further into his reasoning.

16. Accordingly, the local authority's appeal had to be determined completely afresh. The case was transferred to me. I directed further submissions on the proper interpretation of regulation 101(1) of the HB Regulations and later directed that the Secretary of State for Work and Pensions was to be a respondent to the appeal. An oral hearing was directed, which took place on 9 August 2004 at Darlington County Court. The local authority was represented by Mr Paul Stagg of counsel. Two of its officers also attended. The Secretary of State was represented by Mr Daniel Kolinsky of counsel. The landlord attended. I am grateful to the landlord and to the representatives concerned for their assistance and for their patience through a long hearing in uncomfortable conditions. I am satisfied that all relevant points had been explored by the time that the hearing had to come to an end before the closing of the court building.

Did the appeal tribunal go wrong in law?

17. I can deal with this question relatively shortly. It was, I think, common ground that, for regulation 101(1) to operate to prevent the recovery of an overpayment that would otherwise be recoverable from a landlord who had received direct payments of housing benefit, all four of sub-paragraphs (a) to (d) must be satisfied. There were differences of opinion about the interpretation of individual sub-paragraphs, but that basic proposition was agreed. Thus, even if the claimant's valiant submission that the appeal tribunal got sub-paragraphs (c)(ii) and (d) the right way round were correct, the appeal tribunal did not expressly deal with sub-paragraph (b) or give any reasons why that sub-paragraph was satisfied (in addition to sub-paragraph (a) which was plainly satisfied), so as to allow regulation 101(1) to operate. That would in itself have been an error of law.

18. However, I have no doubt that, as submitted by Mr Stagg and Mr Kolinsky, the appeal tribunal misinterpreted regulation 101(1) by regarding the conditions in sub-paragraphs (c) and (d) as conditions for making an overpayment recoverable from a landlord, rather than the other

way round. Thus, in the statement of reasons the appeal tribunal expressly concluded that sub-paragraph (c)(ii) was not satisfied "so as to allow the overpayment to be recovered from the landlord". And its conclusion that sub-paragraph (d) was not satisfied was expressed in a way which it evidently regarded as favourable to the landlord.

19. The landlord submitted that that was no more than a clumsiness of expression, contributed to by the complexity of the structure of regulation 101(1). He submitted that the appeal tribunal knew which way round the conditions in the four sub-paragraphs of regulation 101(1) worked and by its conclusions simply meant that the conditions in sub-paragraphs (c)(ii) and (d) operated in the landlord's favour. That submission could possibly be accepted in relation to sub-paragraph (d), because the appeal tribunal's findings that there had been no collusion and that the landlord had not acted or neglected to act so as to contribute to the period or amount of the overpayment could in fact only support a conclusion that sub-paragraph (d) was satisfied. But the submission cannot be accepted in relation to sub-paragraph (c)(ii). That makes it a condition for preventing recovery from the landlord that there has been a deliberate failure to report a change of circumstances contrary to regulation 75(1). The appeal tribunal's findings and conclusions were plainly in terms of the landlord not having deliberately failed to report a relevant change of circumstances and not having breached regulation 75(1). If the landlord's conduct were relevant to sub-paragraph (c)(ii) (on which, see the following paragraph), then the appeal tribunal's findings could not support a conclusion that that sub-paragraph operated in his favour.

20. I accept the concurring submissions for the local authority and the Secretary of State that, in the context of regulation 101(1) as a whole, sub-paragraph (c)(ii) can only refer to a deliberate failure to report a relevant change of circumstances by someone other than the landlord to whom the housing benefit was paid. It cannot possibly be a condition for preventing an overpayment being recoverable from a landlord that he has deliberately failed to report a relevant change of circumstances in breach of the obligation in regulation 75(1), rather than not having breached the obligations of regulation 75(1). In the present case, there might well have been a deliberate failure by the claimant, so that regulation 101(1)(c)(ii) was satisfied. But that was not the way that the appeal tribunal put it and the appeal tribunal did not make any of the findings of fact that would have been necessary to support such a conclusion.

21. For those reasons, I set aside the appeal tribunal's decision as erroneous in point of law. Although the appeal tribunal's basic findings of fact could have supported a decision in favour of the landlord on another ground, the approach it actually took is too flawed for the decision simply to be upheld for alternative reasons. In the light of the nature of the case, of the further documentary evidence which I have received and of the further oral evidence given by the landlord at the hearing on 9 August 2004, it is clearly expedient for me to give a decision on the landlord's appeal against the decisions of 13 December 2002 after considering all the evidence now available and making the necessary findings of fact.

The Commissioner's decision on the landlord's appeal against the decisions of 13 December 2002

22. First, I confirm that, as appears to have been accepted by the local authority's

representative at the appeal tribunal hearing on 16 April 2003, the landlord's appeal encompasses not only the question of whether the alleged overpayment is recoverable from him, but also the question of whether an overpayment was incurred for any part of the period from 5 August 2002 to 15 September 2002, which involves the question of whether the previously operative decision under which benefit was paid should be revised or superseded so as to support a conclusion that payment in excess of entitlement had been made. That is an essential element of the definition of overpayment in regulation 98 of the HB Regulations. Mr Stagg accepted this approach in his skeleton argument.

Supersession

23. The next question in logical order is whether the local authority has proved that there had been a change of circumstances since the decision awarding the claimant housing benefit (Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, regulation 7(2)(a)) and that that decision should be altered in a way adverse to the claimant and the landlord. I approach that question on the agreed basis that one of the conditions of entitlement to housing benefit under section 130(1) of the Social Security Contributions and Benefits Act 1992 is that the claimant is liable to make payments "in respect of a dwelling ... which he occupies as his home". Regulation 5(1) of the HB Regulations provides:

> "(1) Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home ... and shall not be treated as occupying any other dwelling as his home."

In applying that test, regard is to be had to the occupation of any other dwelling (regulation 5(2)), although there are some provisions allowing a person to be treated as occupying two dwellings in restricted circumstances. Regulation 5(8) provides:

> "(8) Subject to paragraph (8C) a person shall be treated as occupying a dwelling as his home while he is temporarily absent therefrom for a period not exceeding 13 weeks beginning with the first day of absence from home only if--
> (a) he intends to return to occupy the dwelling as his home; and
> (b) the part of the dwelling normally occupied by him has not been let or, as the case may be, sub-let; and
> (c) the period of absence is unlikely to exceed 13 weeks."

Paragraphs (8B) and (8C) allow the deeming to operate for up to 52 weeks of temporary absence in specified circumstances which are not relevant in the present case.

24. A problem for the local authority is that, beyond the fact that the claimant did not make any renewal claim for housing benefit and/or council tax benefit from 16 September 2002, it knows nothing about the circumstances in which the claimant left the flat apart from what the landlord has told it. There is no doubt that the claimant did vacate the premises at some date or other, but according to what was said to the appeal tribunal there had been no check of the electoral register for another address for the claimant. A check of housing benefit records did not show any other address. Mr Stagg has submitted that the landlord's evidence should be

approached with caution, on the ground that it had varied, especially in accordance with what might seem to his advantage at the time. In particular, Mr Stagg put to the landlord that his evidence at the oral hearing of 9 August 2004, that at the time of his second visit to the flat he was satisfied that the claimant was still living there, relied on significant "improvements" in his account over time. Yet Mr Stagg has to rely on the landlord's statements made at earlier stages. I think that there may some element of "improvement", but there is also a process of more details being given as issues are explored more thoroughly. A blanket view of reliability cannot be taken.

25. I look first at the evidence in existence before the claimant gave evidence in person to the appeal tribunal on 16 April 2003. The landlord's replies on the council tax form were very brief, although there was only one line given for each question. Mr Stagg accepted that it may not have been reasonable to interpret the replies as a statement that the claimant had definitely left in July 2002. The natural interpretation would have been that the landlord believed that the tenant had left in July 2002. He has later said that he was merely reporting what had been said to him by a neighbour across the road in November 2002, that she did not think that she had seen anyone coming and going from the flat since July 2002. He was merely reporting that gossip or "belief". Be that as it may, I do not take the way that the landlord put those brief answers as necessarily throwing doubt on more detailed explanations given later.

26. The next major explanation was in the landlord's grounds of appeal, set out in paragraph 11 above. Mr Stagg pointed in particular to the statement that later enquiries led "us" to believe that the claimant had probably not used the property since July 2002, indicating the landlord's own belief. But that was about what had probably happened and the opening words of the grounds talked of only being able to suspect at the end of August 2002 that the claimant had possibly abandoned the premises. I think that that was in response to the assertion in the appeals officer's letter of 20 February 2003 that the landlord had been aware that the claimant had left the property but failed to inform the local authority. The grounds described the landlord's two entries to the property, by inference at the end of August 2002, including information about furnishings and clothes seen, although suggesting that the locks were changed on the second visit.

27. The essence of the landlord's evidence on 16 April 2003 is set out in paragraphs 13 and 14 above. There were some differences about the timing of the landlord's visits and the changing of the locks, but it seems to me that the evidence was in substance a development and further explanation of what he had said before. Mr Stagg particularly relied on the following sentence in the chairman's record of proceedings, apparently under a heading of the landlord's answers to questions from the chairman:

> "Must have had strong susp at end July & changed locks but not done anything to tell LA until CT letter 11/02."

However, that reads oddly to me as part of the landlord's evidence and I consider that it was a point put to the landlord either by the chairman or by the local authority's presenting officer, to which there was no reply recorded. If the landlord had given such evidence I do not think that

the appeal tribunal, which generally accepted his evidence, could have come to the conclusions it did.

28. I give quite a lot of weight to the conclusions of the appeal tribunal, constituted by an experienced chairman and sitting eight or nine months after the crucial events, rather than two years afterwards as I am. The appeal tribunal accepted that there was no firm evidence that the claimant had ceased to occupy the flat at the time of either visit by the landlord. The appeal tribunal then applied a wrong view of the effect of regulation 101(1) of the HB Regulations to its findings of fact, but it could have asked itself whether, in the light of those findings, the local authority had proved that the decision awarding the claimant housing benefit should be superseded.

29. At the oral hearing on 9 August 2004 the landlord's evidence was that he made two visits to the flat in the second half of August 2002, a few days or a week apart. His main reason for trying to get in touch with the claimant was that there was a large amount outstanding in top-up rent that had not been paid, and he had been unsuccessful in getting any answer from calling round both during the day and in the evening. His impression, from the lack of reaction to notices to quit and knowledge that the claimant had been advised by a solicitor that he did not need to leave until the landlord had obtained a court order, was that the claimant wished to continue using the flat for as long as he could. The landlord described the furniture which was in the flat, including a bed with bedding, wardrobes with a reasonable number of clothes in. The only furniture provided with the flat was perhaps a fridge and an occasional table left over from a previous tenant. He described the freshly washed and ironed clothes on the clothes horse, including baby clothes. There were everyday items and cutlery in drawers. The water heating was on. The lock on the flat door was changed on the first visit and a note left telling the claimant to get in touch with the landlord for keys. The only thing that had changed on the second visit was that the clothes from the clothes horse had gone. The landlord's evidence was that while he had wondered, just before he entered the flat for the second time, whether he would find that the claimant had gone, after inspection he was satisfied that he was still living there. The landlord accepted, I think, that he could not tell how often the claimant was there.

30. I apply some of the caution suggested by Mr Stagg to that evidence. It is only human nature that the memory can play tricks after a lapse of time and it becomes harder to tell the difference between what we remember and what we want to remember. Thus, especially in the light of the way the landlord put things in writing early in the course of his appeal, I do not accept that he was at the time as satisfied that the claimant was still living at the flat as he suggested at the oral hearing. I consider that he was in doubt about that. However, I find the landlord's account of his observations on his two visits to the flat to have been essentially consistent, with more details given along the way. Although different dates and timings have been given for the two visits, I conclude on balance that they took place in the last few weeks of August 2002, with about a week between them, and that he changed the lock on the first visit.

31. How does that impact on the question of whether the claimant had ceased normally to occupy the flat as his home? My judgment is that it is neutral. What was observed by the landlord on his two visits is just as consistent with the claimant's continuing normally to occupy

the flat as his home as with his having ceased to do so. There was a suspicion that his young child and its mother were living elsewhere. The claimant could have made his normal home with them, while continuing to use convenient facilities in the flat, having got away with not paying the landlord the excess rent due over the amount of housing benefit. Alternatively, he could have been spending a lot of time with them, while maintaining his home base for the time being at the flat. It could be said that he had good reasons for avoiding seeing the landlord, in the light of the amount he owed and the actions taken by the landlord to bring the tenancy to an end. I must take into account that normal occupation as the home can survive temporary absences. That can only be subject to the conditions in regulation 5(8) of the HB Regulations, including that the person intends to return to occupy the dwelling as the home. However, it must be the case that even towards the end of a period of normal occupation of one home, perhaps when preparations are being made for a change of home, the current normal occupation can be maintained during temporary absences even when a definite change is not far away.

32. Local authorities are obviously in a difficulty in trying to establish what has happened in the past if a claimant has in effect disappeared. It will often be legitimate to draw inferences from secondary evidence. Here there is no dispute that at some point the claimant did cease to occupy the flat as his home. Because at around the end of August 2002 the landlord handed over control of the whole building to a property company pending the completion of the sale to them, there is virtually no evidence about any other circumstances after his second visit. The information from the neighbour reported by the landlord does not as such add anything of significance. It seems to me that it is equally consistent with the claimant's having continued normally to occupy the flat as his home (while having temporary absences and keeping a low profile) as with having ceased to do so, even though the landlord appears at the time to have accepted it as pointing towards the latter.

33. Putting all that together as best I can, I have little doubt that in the period from the end of July 2002 to the time of the landlord's second visit there is insufficient evidence to show that the claimant had ceased normally to occupy the flat as his home. Is the position different for the period from the time of the second visit to 15 September 2002? I share the view of the appeal tribunal of 16 April 2003 that there was no real change of any significance in what the landlord saw on that second visit. Although there are doubts about what the position was in that period, as the claimant left for good at some point or other, I find insufficient evidence from which to conclude, directly or by inference, that the claimant ceased normally to occupy the flat as his home at any date before 16 September 2002. I am left with in doubt, but that is not good enough for the local authority.

34. Accordingly, my decision is that the decision awarding the claimant housing benefit for the benefit period down to 15 September 2002, as revised on 22 November 2001, is not to be superseded on the ground of a change of circumstances, as the changes of circumstances which have been proved do not justify the making of a superseding decision that the claimant was not entitled to housing benefit from any date within the benefit period. As a result, there has been no overpayment of housing benefit as defined in regulation 98 of the HB Regulations, so that no question of recoverability arises. My decision to that effect is set out in paragraph 1 above.

Could the landlord have invoked the protection of regulation 101(1) of the HB Regulations?

35. The result of my decision is that it is unnecessary for me to decide whether, if an overpayment had otherwise been recoverable from the landlord, recovery from him would have been prevented because all four conditions in regulation 101(1) of the HB Regulations were satisfied. I did hear detailed submissions on that question. In case this case might proceed any further, and as a matter of general interest, I record the submissions on the parts of regulation 101(1) which I have not had to consider in deciding whether the appeal tribunal erred in law, with my provisional views.

Sub-paragraph (b)

36. Mr Stagg submitted that sub-paragraph (b) was to be interpreted as requiring that the landlord had actually notified in writing a suspicion of an overpayment having been made. That was the ordinary and natural meaning of the words used. He said that the condition could not be satisfied if the landlord had no suspicion or had no reason to suspect that an overpayment had been made and therefore had not notified, because there was nothing to notify. There was also reliance on paragraph 4 of adjudication and operations circular HB/CTB A44/2001, issued by the Department for Work and Pensions in October 2001. This stated that there was a need to encourage landlords to be vigilant and report suspicions of fraud and that the amendment to regulation 101 would remove the current financial disincentive for landlords to report such suspicions. Mr Stagg pointed out that the pre-October 2001 version of regulation 101(1) simply allowed any overpayment that was otherwise recoverable to be recoverable from the person to whom the overpayment was made. He also submitted that, although sub-paragraph (b) did not specify the time by which the notification had to be given, the only rule that would fulfil the statutory purpose was that it had to be given before the end of the period of the alleged overpayment.

37. Mr Kolinsky agreed with Mr Stagg's submissions about the need, if sub-paragraph (b) was to be satisfied, for an actual report of suspicion of an overpayment to have been made, which had been the position taken on behalf of the Secretary of State in the written submission of 14 July 2004. He also submitted that it was necessary for the landlord to "get in first", although it was accepted that a notification could count although some investigations had already been instigated by the local authority. His final submission was that it was not sufficient for the written notification to have been given before the decision on recoverability of an overpayment was made, but that it had to have been given at some time before the end of the period for which benefit had been overpaid. He suggested that the purpose of the amendment to the regulations, as shown by circular HB/CTB A44/2001 was to create a very limited exception for landlords, so that each condition should be construed narrowly.

38. The landlord's submission on the meaning of sub-paragraph (b) was that it would be unfair to deprive a landlord of its protection if he had no suspicion which it would have been reasonable to notify to the local authority. The protection should only be lost if a landlord had a suspicion which should have been notified and was not.

39. I would have accepted the first part of Mr Stagg's and Mr Kolinsky's submissions. I agree with the landlord to the extent that the meaning he put forward could sensibly have been part of a regulation like regulation 101(1). However, it would have been slightly less consistent with the overall structure, as there would then have been an overlap between asking if a landlord ought reasonably to have reported a suspicion with the question under sub-paragraph (d) of whether he had neglected to act in such a way as to contribute to the amount or period of the overpayment. But the real stumbling block for the landlord's submission is in the actual words of sub-paragraph (b). If the rule put forward by the landlord had been intended, one would have expected sub-paragraph (b) to say something like "the landlord has not failed to notify the relevant authority of any suspicion which he had, or reasonably ought to have had, that an overpayment has been made". The actual words are very different from that. They apply a fairly plain condition that I would have judged to be taken at face value. I would have concluded that to satisfy sub-paragraph (b), a landlord must have actually notified in writing a suspicion that there has been an overpayment. For that purpose I would not have needed to take into account what circular HB/CTB A44/2001 said.

40. The difficult question remaining would then have been to identify the time by which the notification must be given, when by definition the notification is to be of a suspicion of a past overpayment. It is unfortunate that sub-paragraph (b) leaves the question open. I would have rejected one technical point which occurred to me after the oral hearing. Regulation 98 of the HB Regulations defines "overpayment" for the purposes of Part XIII of the Regulations as a whole, including regulation 101, in terms of an amount paid to which there was no entitlement. It cannot be said that there can be no suspicion that there has been an overpayment until there has been a revision or supersession altering the claimant's entitlement for a past period. That would make no sense in the context of regulation 101(1). A suspicion that there has been an overpayment in sub-paragraph (b) must refer more generally to a suspicion that the circumstances are or were such that an overpayment might be formally identified under regulation 98. The final date for notification therefore cannot be any later than the date of the revision or supersession which reveals that housing benefit has been paid in excess of entitlement. From that point on, "suspicion" is not a relevant concept. I would therefore have preferred that date to the date of the decision on the recoverability of an overpayment, which might in other cases be later.

41. But is the final permissible date for notification a potentially earlier date, such as the end of the period for which overpaid benefit was paid? I would not have accepted Mr Stagg's submission that such a rule was the only one consistent with the statutory purpose. Regulation 101(1) prescribes the circumstance in which the rule in section 75(3)(a) of the Social Security Administration Act 1992 is not to apply. Therefore it must already have been determined under section 75(1) that an amount of housing benefit had been paid in excess of entitlement and would otherwise be recoverable from the landlord. So regulation 101(1) comes into play at the date that the recoverability decision is being made. Although sub-paragraphs (c) and (d) focus on action or inaction which led to the occurrence of the overpayment, sub-paragraph (b) is satisfied by notification that the landlord suspects that there has been an overpayment in the past. I would not have approached the question on the basis that regulation 101(1) was intended to establish only a very limited exception or is to be interpreted narrowly. The approach would

have been that the intention was to establish an exception limited by the conditions actually laid down, so that the task is to identify just what the conditions are that a landlord has to show are met to come within the exception. There is thus a powerful argument that, in view of the time at which regulation 101(1) comes into play and of the control imposed by the further condition in sub-paragraph (d), it is enough under sub-paragraph (b) that the landlord notifies that he suspects that there has been an overpayment at some date before the revision or supersession is carried out.

42. A counter-argument might be based on the overall structure of regulation 101(1), although it seems to me that the drafting has not been clearly thought through so as to provide a coherent structure. It might be said that the tense used in sub-paragraphs (a) and (b) (ie housing benefit "has been paid" direct to the landlord and the landlord "has notified", rather than "was paid" or "notified"), suggests a focus on the circumstances as they were during the period of the overpayment or during a subsequent period of continued payment of housing benefit. The suggestion could possibly be supported by the very peculiar introduction in sub-paragraph (c) of an assumption that there has been an overpayment, which might appear to refer back to the circumstances as they were while benefit was being paid. However, it seems to me that the words "on the assumption that there has been an overpayment" have no purpose in sub-paragraph (c) and merely illustrate the lack of a clear overall structure. As explained in the previous paragraph, regulation 101(1) will only come into play once it has actually been determined that there has been an overpayment, so that there is no need for an assumption. Sub-paragraphs (c) and (d) can then plainly be satisfied by evidence that is not before the relevant authority, or an appeal tribunal, until the questions under regulation 101(1) are being decided. Although the tests under both sub-paragraphs do relate to action or inaction that caused all or some of the overpayment and so to the circumstances during or before the period for which benefit was paid, that does not in my judgment give any indication that the condition in sub-paragraph (b) can only be met by a notification while benefit is still being paid.

43. Thus I would have found no real indication in the overall structure of regulation 101(1) or in the factors mentioned by Mr Stagg and Mr Kolinsky of the answer to the present question. The factors mentioned in paragraph 41 would remain, and in particular the time at which the questions under regulation 101(1) are to be answered. In the absence of any express words in sub-paragraph (b), I would have concluded that notification in writing at any time before the relevant revision or supersession is carried out is sufficient. On the facts, I would probably have concluded that the landlord's reply to the council tax department of the local authority received on 3 December 2002 was a notification meeting the condition under regulation 101(1)(b).

Sub-paragraph (c)

44. I should say little about this provision beyond what has already been said in paragraphs 19, 20 and 42 above. The satisfaction of either head (i) or head (ii), in relation to some person other than the landlord (and in the case of head (ii) a person bound by regulation 75(1)), will do from a landlord's point of view. And although the condition is put in terms of what appears to the local authority, an appeal tribunal or Commissioner on appeal must make its own judgment, not merely ask whether the local authority's judgment was flawed on judicial review grounds (see paragraph 8 of Commissioner's decision R(SB) 5/81 and the general principles set out in

paragraphs 12 to 30 of the Tribunal of Commissioners' decision in CIB/4751/2002 and others).

45. In the present case, there was no evidence to suggest that head (i) is satisfied. Mr Stagg and Mr Kolinsky accepted that, if I found (which I did not) that the claimant ceased normally to occupy the flat as his home at some time before the last benefit payment was made and did not tell the local authority, head (ii) was satisfied. I express no opinion on whether that approach was right or not. I therefore do not need to explore here what might be involved in a "deliberate failure" to report a relevant change of circumstances.

Sub-paragraph (d)

46. Mr Stagg and Mr Kolinsky concurred in their submissions that in order to satisfy sub-paragraph (d) a landlord must show that both of heads (i) and (ii) are made out. I would have agreed that that follows from the negative formulation of heads (i) and (ii) despite the absence of an "and" between them. In addition, I note that the all or nothing nature of regulation 101(1) can have a particularly harsh effect here. By the all or nothing effect, I mean that either a landlord satisfies all of sub-paragraphs (a) and (d) and the whole of the relevant overpayment cannot be recovered from him or he fails to satisfy one or more sub-paragraphs and the whole of the relevant overpayment is recoverable from the landlord if it would otherwise be so. Thus if a landlord has neglected to act in such a way as to contribute to a short part (beyond the purely trivial) of the period of the overpayment, so that sub-paragraph (d)(ii) is not satisfied, the whole of the overpayment is recoverable, not just the amount relating to the part of the period to which the landlord's neglect to act contributed. It is better that I say nothing further about the more detailed meaning of heads (i) and (ii), in particular of "neglected to act" in head (ii), or about how the test might have been applied in the present case. Those questions of interpretation, like many others, must await dome future cases.

(Signed) J Mesher
Commissioner

Date: 23 August 2004