

**DETERMINATION AND DECISION OF THE SOCIAL SECURITY
COMMISSIONER**

1. My decision on the application for leave is as follows. I grant leave to appeal against the decision of the Watford appeal tribunal held under reference U/04/052/2001/00631 on 17th May 2002.
2. My decision on the appeal is as follows. It is given under paragraph 8(4) and (5)(c) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.
 - 2.1. The decision of the appeal tribunal is erroneous in point of law.
 - 2.2. I set it aside and remit the case to a differently constituted appeal tribunal.
 - 2.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision.

In particular, I direct the tribunal that the payments made by the claimants into the brother's mortgage account are not mortgage payments under section 130(2)(b) of the Social Security Contributions and Benefits Act 1992. The issue for the tribunal is whether the claimants are excluded from entitlement to housing benefit under regulation 7 of the Housing Benefit (General) Regulations 1987. I draw the tribunal's attention to the points made in paragraph.17.

The appeal to the Commissioner

3. This case first came before me as an application for leave to appeal against the decision of the appeal tribunal.
4. The applicants for leave, and the appellants on the appeal, are housing benefit claimants. For convenience, I will refer to them as the claimants. The respondent in their local authority, the Three Rivers District Council. In addition to the parties, I need to refer to the male claimant's brother. I will refer to him as the brother.
5. The issue in the case is whether the appellants are liable to make payments in respect of the dwelling they occupy as their home.
6. In view of the issues that were raised by the application, I directed an oral hearing. It was held before me in London on 26th February 2003. The appellants were represented by Mr N Nicol of counsel instructed by Tasselli & Co. The respondent was represented by Mrs Tonge. At the end of the hearing, I told the parties that I would grant leave. They then agreed that their submissions on the application could stand as their submissions on the appeal itself.
7. I am grateful to both Mr Nicol and Mrs Tonge for their clear, concise and ingenious arguments. Neither felt able to accept the tribunal's reasoning as expressed in the statement of the reasons for its decision and each had an ingenious interpretation, naturally one that supported their own side.

The tribunal's reasoning

8. I can only set out the bare bones of the tribunal's reasoning, because I cannot follow the detail. Despite the competing interpretations suggested at the oral hearing, I was left with the impression that the reasoning was just confused.

9. The tribunal found that the paper title of the appellants' dwelling was held by the brother. He had bought it from the claimants' previous landlord. I do not know why. Nor do I know why he later declared that he held it on trust for the claimants' four children. There was form of tenancy agreement, but payments made by the claimants into the brother's mortgage account. The tribunal decided that they were not payments to which the housing scheme benefit related.

The legislation

10. The tribunal relied on section 130(2)(b) of the Social Security Contributions and Benefits Act 1992. Section 130 provides:

'(1) A person is entitled to housing benefit if-

(a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home ...

'(2) In subsection (1) above "payments in respect of a dwelling" means such payments as may be prescribed, but the power to prescribe payments does not include power to prescribe-

...

(b) mortgage payments'.

I have set out subsection (2) in its current amended form. The earlier version was to the same effect.

Mr Nicol's argument

11. Mr Nicol's argument was this. The tribunal found that the brother was liable on the mortgage account and the claimants were not. That was determinative of the issue on section 130. The only decision open to the tribunal was that the claimants succeeded. The tribunal had confused the discharge of the mortgage liability with the discharge of the rent liability. It was not clear whether the tribunal accepted that there was a valid tenancy between the claimants and the brother. But the claimants were liable to make payments in respect of their dwelling regardless of whether they were classified as payments of rent or under a licence. The tribunal should have decided in the claimants' favour on section 130 and gone on to consider the application of regulation 7. That further step required a rehearing.

Mrs Tonge's argument

12. Mrs Tonge's argument was this. The tribunal had accepted her argument at the hearing, although it had not expressed it clearly. The tribunal had distinguished between legal liability

and liability. The difference was between actual liability and liability which a person was deemed to have. A person has to make payments in order to continue to live in a home may be treated as liable to make those payments if it is reasonable to do so: see regulation 6(1)(c)(ii) of the Housing Benefit (General) Regulations 1987. The claimants were not legally liable on the mortgage account. But, as they had to make the payments into the mortgage account in order to preserve their occupation of the home, the tribunal decided that they should be treated as liable under regulation 6. That had the effect that they were liable to make mortgage payments under section 130(2)(b) and fell outside the scope of the housing benefit scheme.

Mr Nicol's reply

13. Mr Nicol's reply was this. Regulation 6 could not be used as Mrs Tonge proposed, because section 130(2)(b) prevented regulations being made which had that effect.

Conclusions on section 130

14. I accept Mr Nicol's argument and reject Mrs Tonge's ingenious attempt to interpret and justify the tribunal's decision.

15. Whatever the correct interpretation of the tribunal's reasoning, it was wrong in law, because there was only one decision open to the tribunal on the evidence before it and on its findings of fact. The claimants were paying the money in the brother's mortgage account. Legally, they were not liable on that account. Their payments into it discharged the brother's liability, not theirs.

16. The method of payment was purely a matter of convenience. Assume that A owes B £100 and B owes C the same amount. A could pay B and B could pay C. But it might be more convenient for A and B to agree that A would pay the money owed to B straight to C. The fact that the money is paid in that way for convenience cannot alter the nature of the payment. That applies both between A and B and between B and C. Assume that the money owed by A to B is rent and the money owed by B to C is a loan. If A pays the money to C, it is nonetheless a payment of rent as between A and B, and a payment of the loan as between B and C.

17. Mrs Tonge's attempt to rely on regulation 6 fails, because section 130(2) prevents regulations from defining mortgage payments as 'payments in respect of a dwelling'. Regulation 6 is made under the authority of section 137(2)(j) of the Social Security Contributions and Benefits Act 1992, which provides:

'(2) Regulations may make provision for the purposes of this Part of this Act-

(j) for treating any person who is not liable to make payments in respect of a dwelling as if he were so liable.'

If regulation 6 applied to mortgage payments, it would be made in contravention of section 130(2) and would be without statutory authority.

The rehearing

18. As the tribunal went wrong in law, I must set aside its decision. There is no need for a rehearing on the section 130 issue. I have given my own decision on that. However, the arrangement between the claimants and the brother give cause for suspicion. It is appropriate to investigate how regulation 7 applies to it. I believe that the tribunal heard argument on that regulation, but it did not record any conclusions. A rehearing is necessary in order to investigate that issue. I draw two points to the tribunal's attention. First, the form of regulation 7(1) that appears in the tribunal's standard reference work only came into force on 25th January 1999. Second, the amending Regulations made transitional arrangement for those who were in receipt of housing benefit and affected by the amendment. Regulation 1(3) of the Housing Benefit (General) (Amendment No 2) Regulations 1998 provided:

‘Where a claimant is in receipt of an award of housing benefit on 25th January 1999, these Regulations shall come into force in respect of that individual on the day after the last day of the benefit period in respect of which that award is made.’

Signed on original

**Edward Jacobs
Commissioner
27th February 2003**