IN THE HIGH COURT OF JUSTICE CO/1075/89 Royal Courts of Justice
Monday, 26th February , 1990

QUEEN'S BENCH DIVISION

.

before:

MR JUSTICE SIMON BROWN
Crown Office List

THE QUEEN V PENWITH v DISTRICT COUNCIL Ex parte CATHERINE THOMAS BURT

Miss L Findlay (instructed by The Solicitor to the Child Poverty Action Group, London, EC1) appeared on behalf of the Applicant.

Mr R Drabble (instructed by Messrs. Sharpe Pritchard,London, WCl, London agents to Penwith District Council, Penzance) appeared on behalf of the Respondent.

JUDGMENT (As approved by Judge)

M**R JUSTICE SIMON BROWN**

The applicant is aged 91. Some two years ago on 9th February 1988 she was widowed. She and her husband had until then lived together for a great number of years. For some 30 years they lived in a Penwith District Council house in St. Ives. Then, shortly before the applicant's husband died, they moved to 5 Higher Stennack, St. Ives. Once widowed the applicant stayed a good deal with her son at his house in Bracknell, Berkshire. In December 1988 the Penwith District Council withdrew her housing benefit. As I apprehend it, that was essentially because they regarded her as having ceased to occupy no. 5, as I shall call it. In March 1989 the authority maintained that decision, albeit postponing the withdrawal of benefit until February 1989 - the anniversary of the applicant's widowhood, or more pertinently the anniversary of the date when she began to spend the larger part of her time in Bracknell.

On 14th April 1989 that decision was upheld by the council's Housing Benefit Review Board, strictly the respondents to this motion. It is that review board decision which is under challenge before me today. Let me at once set out those provisions in the legislation which are relevant to the present issue. Section 20(7) of the Social Security Act 1986 provides, so far as relevant:

> "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; ....".

The subsection imposes further requirements, but there is no doubt that they were satisfied in this case. The crucial statutory question is accordingly that of occupation. It is now the subject of subordinate legislation, namely, the Housing Benefit (General) Regulations 1987. Under Part II of the regulations, under the crossheading "Circumstances in which a person is or is not to be treated as occupying a dwelling as his home", the following regulations appear:

> "5(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."

5(2) reads:

> "In determining whether a dwelling is the dwelling normally occupied as a person's home for the purpose of paragraph (1) regard shall be had to any other dwelling occupied by that person ....".

Regulation 5(8) reads:

> "A person shall be treated as occupying a dwelling as his home while he is temporarily absent therefrom for a period not exceeding 52 weeks 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 52 weeks or, in exceptional circumstances (for example where the person is in hospital or otherwise has no control over the length of his absence), is unlikely substantially to exceed that period."

Before turning to consider the crucial issues raised by those provisions, let me first briefly flesh out the facts of the case. As already stated, since her husband's death in February 1988, the applicant has spent the larger part of her time with her son and his family in their Berkshire home. In the 52 weeks immediately following the beginning of her first visit to her son as a widow she has spent in total 36 weeks in Berkshire, 16 weeks in St. Ives. Those 16 weeks, as I understand it, have been essentially during school holidays, the relevance of that being that her son has then been able to accompany her to Cornwall and look after her there. The applicant intends, so she deposes and so it is not, I believe, disputed, to return permanently to Cornwall as soon as her state of health permits. By that, as I understood it, she means that she will return to no. 5 to live alone.

The initial decision taken against her by the district council on 16th December was to withdraw her benefit with effect from 4th December 1988. That of course was within the 52-week period following the first of her several prolonged visits to Berkshire. It is unclear precisely how the district council came to that decision in particular whether they were endeavouring to apply regulation 5(1) or on the contrary regulation 5(8) (c). At this juncture it perhaps matters little.

In response to that initial decision the applicant wrote to the authority stating: *"I fully intend to continue my tenancy and to continue living at [no. 5] which was built specially for us."*

The council's redetermination of 1st March 1989 recited the essential provisions of regulation 5(8) and it was in purported accordance with them that the council agreed at least to the benefit being paid for 12 months from the date when the applicant first went to Berkshire in February 1988.

It was that decision that was then the subject of review by the respondent board. The applicant was represented before the board by her son. He argued her case entirely by reference to the provisions of regulation 5(8), pointing out that she had not been away continuously for 52 weeks but rather had been coming and going continually within that period. He contended that the regulations do not provide for the adding together of separate periods of absence, and made the point that, even if they did, such aggregated absences would not in fact amount to 52 weeks even by April 1989.

The review board's decision of 14th April 1989 was contained in a letter written and signed by a solicitor acting as their clerk. In its material part it said:

> *"The Board was unanimous in its expression of sincere regret for the predicament in which your mother now finds herself. It follows that if it had been possible to find grounds on which the appeal could have been allowed the Board would have gone down that path with the greatest of pleasure. Unfortunately, those grounds were found not to exist and, with reluctance, the appeal was dismissed. The formal reason for the decision is that your mother is not regarded as occupying the dwelling as her home, as defined by Regulation 5(1) and (8).... and thus is not entitled to receive Housing Benefit from the Council."*

Mr. Drabble on behalf of the respondent review board rightly concedes before this court that that decision falls foul of the requirements of regulation 83(4) which provides:

> "The Chairman of the Review Board shall: (a) record in writing all its decisions; and
> (b) include in the record of every decision a statement of the reasons for such decisions and of its findings of questions of fact material thereto."

His concession relates to requirement (b) and acknowledges the insufficiency of the reasons, and yet more particularly the factual findings, contained in the letter of 14th April 1989. Whether a letter signed by the clerk to the review board is a sufficient discharge of the chairman's obligation to record the board's decisions in writing need not be decided today
.
Although the admitted deficiency in the decision letter gives rise to a good ground of challenge, it is not one that can now profit the applicant, given the affidavits now filed by the respondent board in which their reasoning has become clear and sufficient as required by the authorities. The best that can be achieved by a "reasons" challenge in a case like this is not the quashing of the decision but rather to require the tribunal in question to disclose their reasoning in proper form. That now has been achieved by way of the affidavits filed in response to the motion.

In their main affidavit the respondents make plain that their decision is founded upon their conclusion that there has here been a continuous period of absence exceeding 52 weeks so that the entitlement to benefit has ceased by operation of regulation 5(8). That 52 weeks, the respondents have found, began in February 1988 when first the applicant went to stay with her son. As it is put in paragraph 5 of the respondent's affidavit:

> *".... Mrs. Burt had been away from 5 Higher Stennack for a period exceeding 52 weeks. In other words, despite her return from time to time, there was a single period of absence with no intention to return permanently for some time."*

In short, the respondents have treated the applicant's periodic returns to no. 5 within that 52-week period as immaterial and ineffective for the purpose of ending the continuous period of temporary absence. Are they entitled so to do? That raises the crucial question as to the proper construction of regulation 5(8). As Mr. Drabble rightly points out, the critical question is this. Is the position, as the applicant must necessarily contend that any period of return, however short, within the 52-week period is sufficient of itself to end the period of temporary absence i.e. to stop time running, and to require any further application of regulation 5(8) to be

related to a subsequent period of absence; or is it more properly a question of fact and degree whether one or more periods of return are of sufficient duration and of such a nature as to prevent the overall period of absence from being regarded as a single continuous absence?

Not without hesitation in the light of Mr. Drabble's characteristically able argument, **I** have concluded that regulation 5(8) is indeed to be construed as Miss Findlay for the applicant here contends, namely, so as to prevent a period of absence being held to continue despite periods of return, however short**.** In my judgment, if, in a case such as this, the authority wish to terminate the occupier's eligibility for housing benefit on the footing that he or she is essentially absent from the dwelling in question, then, where there has not been a literally continuous period of absence for 52 weeks (or, I would add parenthetically, a shorter period if requirement 5(8) be not satisfied) they can only do so by operation of regulation 5(1), i.e. on the basis that the claimant does not normally occupy that dwelling as his or her home and that his or her absences are accordingly not in any real sense temporary. It is regulation 5(1) that enshrines the governing principle, namely, that a person is to be treated as satisfying the requirement of occupation only in respect of a dwelling "normally occupied as his home".

It is always open to an authority to consider as a question of fact and degree whether a dwelling is indeed occupied as a claimant's home and whether absences are in fact properly regarded for regulation 5(8) purposes as temporary only. It may very well be that, had the respondent board approached the appeal upon that footing, they would have been entitled to conclude, and on the facts would have concluded, that no. 5 is no longer normally occupied by this applicant as her home. But that is not the approach that they in fact brought to bear upon her case. Their determination was plainly arrived at by reference to regulation 5(8) and, as I have concluded, it involved the misconstruction of that provision.

In short I concluded that the presumption raised in favour of a claimant by regulation 5(8) will not be defeated by a period of temporary absence unless that period of absence exceeds 52 continuous weeks. In the result this decision falls to be quashed and that is the order that I make.

MISS FINDLAY: Your Lordship, the applicant is legally aided. May I make an application for costs?

MR. DRABBLE: I cannot resist that.

MR. JUSTICE SIMON BROWN: Very well. Thank you both for your helpful argument on what I confess to have found by no means a straightforward issue