

ToC/SH/3

Commissioner's File: CSB/0480/1986

C A O File: AO 2550/86

Region: Midlands

**SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION
OF LAW
DECISION OF A TRIBUNAL OF COMMISSIONERS**

Name: Mrs Pamela June Mason
Appointee for Mrs Gladys Winifred Nicholas

Social Security Appeal Tribunal: Shrewsbury

Case No: 2/7

[ORAL HEARING]

1. Our decision is that the decision of the social security appeal tribunal dated 21 January 1986 is erroneous in law and we set it aside. Our decision is:
- (1) the weekly amount applicable to the claimant for board and lodging in Brook House residential care home
 - (a) from 29 October 1985 to 28 November 1985 is £110
 - (b) from 29 November 1985 to 27 July 1986 is £120
 - (c) from 28 July 1986 to 4 August 1986 is £125
 - (2) the assessments or revised assessments that may be required to give effect to this decision should now be made by the adjudication officer
 - (3) the adjudication officer and the claimant's representative are to be at liberty to apply in the event of dispute in carrying out the terms of this decision.

Representation

2. The representation in this appeal was the same as in the associated appeal the reference to which on Commissioner's file is CSB/842/1986 (Tyler). The definitions in paragraph 7 of Tyler are adopted. We shall refer to decision CSB/1085/86 as "Turner".

Nature of the appeal

3. This is the fourth of the group of appeals referred to in Tyler and the first appeal relating to a residential care home. As with the other appeals, the present appeal is concerned with the extent to which the charges for board and lodging in the home are allowable in calculating the claimant's supplementary benefit and are to be met out of the claimant's supplementary benefit entitlement. The issue in the present appeal relates to the proper method of determining, on the true construction of paragraph 1 of Schedule 1A of the Cotton Regulations (which we have held in Tyler to be valid), of the Camden Regulations and of those regulations as amended by the 1986 Regulations to be "the appropriate amount", that is to say the financial limit of the allowable board and lodging charges in a residential care home. As explained in paragraph 43 of Tyler the weekly amount for board and lodging authorised by regulation 9(1)(a) of the Cotton Regulations and, by paragraph 46, of the Camden Regulations must not exceed the maximum amount referred to in regulation 9(6) and that maximum amount is determined by reference (in the case of persons over the age of 11 years) to the "appropriate amount" in Schedule 1A. The question at issue is accordingly the category of care in paragraph 1 of Schedule 1A into which the claimant's case falls. The problem which arises in this case is one that has been the subject of a number of conflicting decisions of the Commissioner, the references to which on Commissioner's file, with their respective dates of decision, are:

CSWB 7/86 (12 March 1986) CSB 0148/86 (18 April 1986) CSB 0070/96 (1 August 1986)
CSB/0087/86 (7 November 1986).

In all these cases, the home in question was registered as a residential care home under the Registered Homes Act 1984. As appears from the present decision, special considerations apply in determining the category of care in respect of homes registered under that Act, which do not apply to Scotland to which the Act does not extend (see section 58). The question raised in each of them was as to the position where the home was registered as catering for one category of care listed in paragraph 1 of Schedule 1A (e.g. "old age") but the care actually received by the claimant corresponded more closely with another category, carrying a higher weekly amount for allowable charges for board and lodging. The Schedule does not specifically deal with this problem, the only specific provisions being in paragraph 3 of the Schedule, which relates to the position when two or more of the listed categories of care are registered. Special provision is there made for the case when the care actually provided does not correspond with two or more registered categories: see paragraph 3(3). In the present case, only one category of care is listed or shown on the register namely I (old age). It is contended on behalf of the claimant, whose appeal this is, that the appropriate amount allowable for board and lodging charges should be at a higher rate, namely that for past or present mental disorder.

The period in issue

4. The appeal in this case was, Mr Drabble submitted, and Mr Stocker accepted, in respect of the period from 29 October 1985 to 4 August 1986 when the claimant was removed to hospital. We agree. The original decision relating to the first part of the period is not in evidence. But there is a decision dated 26 November 1985 which appears to be an up-rating decision, and is in these terms, according to the written submission of the adjudication officer to the social security appeal tribunal:

"Supplementary Pension of £105.28 per week, determined and paid from prescribed pay-day Thursday in week commencing 25 November 1985"

The date of the earlier decision is not known. No copy of either decision is in evidence. The inconvenience and expense arising from the fact that an adjudication officer's decision on supplementary benefit matters is not in practice usually or at least frequently in writing, and that no record of his actual decision is kept in a lamentably large number of cases, was

emphasised in CSB/0799/86 where it is pointed out that in these circumstances, in order to decide whether a social security appeal tribunal had jurisdiction to decide what it in fact did, a first step must be to discover what the adjudication officer did in fact decide. In the present case, it is not in dispute that there must have been two decisions, one of unknown date, the other issued on 26 November 1985, that they cover the period 29 October 1985 to 4 August 1984 and that, whatever their exact contents, both were under appeal to the social security appeal tribunal.

The relevant law

5. The pre-Cotton, Cotton and Camden Regulations are set out in Tyler and the relevant provisions of the Registered Homes Act 1984 and of the Residential Care Homes Regulations 1984 are set out in the Appendix to Turner.

The adjudication officer's decision

6. There are no particulars of the first decision under appeal though it is known that it determined the supplementary benefit payable to the claimant in respect of an "open-ended" period which included 19 October 1985. The second decision was issued on 26 November 1985 and was to the effect set out in inverted commas in paragraph 4 above.

7. On 26 November 1985 the claimant's daughter applied to be appointed her mother's representative on the ground that although her mother could be lucid she was not capable of handling her own affairs due to her depressed mental state, her incapacity being due to severe depression causing personality problems. Her appointment was authorised on the same day and she at once appealed to the appeal tribunal. Her grounds of appeal were that her mother had been at the Arden House Nursing Home due to her mental illness. This was not successful and she was re-admitted to Shelton Hospital. Because there were no vacancies at other homes for the mentally ill, she was admitted to Brook House in order to be nearer her daughter, the representative. They were unable to wait for another vacancy in one of the other homes and were advised by staff at Shelton Hospital to get her from the hospital. Before placing the claimant at Brook House, the claimant's social worker was given to understand by the DHSS that she was in the "protected" category and that the fees at Brook House would be met by the Department. After the claimant was placed at Brook House, they discovered that the fees were to be restricted leaving a short fall of £40. She wished to appeal against the restriction on the grounds of her mother's mental state and because she would not have been placed there had the representative thought that the fees would not have been met by the Department. The claimant had settled well at Brook House and any move would be detrimental to her condition.

8. In his written submission on the appeal the adjudication officer stated that the facts before him were that the claimant was aged 78 and moved to Brook House on 4 September 1985. Her only income was retirement pension of £23.67 which was combined with her supplementary pension for administrative convenience. She had been a patient in Shelton Hospital from 24 June 1985 and prior to this was a resident at Arden House Residential Home from 3 May 1985. Before 3 May 1985 she was living with her husband. He was in receipt of supplementary pension, their requirements and resources not being aggregated as the claimant's move was permanent. The fees at Brook House were £150 per week. The home was registered under Part I of the Registered Homes Act 1984 as a residential care home providing accommodation only for persons in need of personal care by virtue of old age.

9. In giving reasons for his decision, the adjudication officer stated that regulation 9(6) and Schedule 1A to the Requirements Regulations set out the maximum amounts which could be included for the requirements of someone in a residential care home or nursing home. He had considered regulation 9(6) and determined that sub-paragraph (b) applied. He

then considered Schedule 1A and determined that the accommodation provided for the claimant was a residential care home for persons in need of personal care by virtue of sub-paragraph 1(1) of Schedule 1A. None of the transitional protection provisions of regulation 9(17) of the Requirements Regulations, which apply to persons receiving a supplementary pension as a boarder immediately before 29 April 1985, applied because the claimant did not become a boarder at Arden House until 3 May 1985. The adjudication officer could find no record of an assurance being given that the fees of Brook House would be met in full and despite any discussion that might have taken place the adjudication officer was not estopped from applying the law and thereby refusing to fulfil any promise to pay given earlier. In this connection the adjudication officer referred to Commissioner's decision R(SB)8/83.

10. Commenting on this submission on 14 January 1986 the daughter stated that before 3 May 1985 her mother was not living at home. She had originally been admitted to Shelton Hospital on 12 January 1984 and remained there until 22 March 1984 when she was discharged. She was re-admitted on 23 July 1984 after an overdose and stayed there until 2 January 1985 with leave periods in the interim period. Because she was unable to cope she went back to Shelton Hospital on the 17th February 1985 and remained there until 3 May 1985 when she was taken to Arden House. Because it was held that her mother would be better in a home, the staff at Shelton Hospital started talking about such a home in March 1985. On 24 April 1985 the social worker from Shelton Hospital visited her father and told her and her father that a place had been found for her mother at Arden House and it only remained for transfer arrangements to be made. Unfortunately these arrangements were not made until 3 May 1985 some five days after the magic date. On 22 August 1985 the social worker rang the DHSS office and was told mother would be in protected category. She wrote confirming her telephone call, a copy of which should be on the DHSS file. On 10 October, Mrs C of Brook House rang the social worker and informed her that payment of £110 had been made. On 15 October 1985 the social worker sent to the DHSS a letter of appeal but was informed by a Mr F in a telephone call on 22 October that she could not appeal because it had to be done by her mother or an appointee. On 24 October Mr F rang the social worker and told her that it had been decided to pay the extra £10 from the date of admission. A letter dated 25 October from Mr F to the social worker stated that "although I advised you on the 24th October that I had found a mistake, it has now been pointed out to me that this was not correct. So, not only was the social worker told once that mother was protected, but on two occasions. Had they not been assured that mother would be protected, albeit by telephone, then she would not have been placed at Brook House. Her father felt responsible for mother's welfare and was very distressed that he was unable to meet the £30 per week balance. Mother's mental condition had improved whilst at Brook House and any move would be detrimental .

11. In support of the appeal the daughter submitted four letters. The first is a copy letter dated 2 May 1985 from the Social Services Department of Shropshire County Council Psychiatric Social Work Unit, Shelton Hospital to the Manager of the DHSS Supplementary Benefit Section, Shrewsbury which stated that the claimant had been a patient in the hospital since last July. She had had a few short leave periods at home which had not been a success. Her consultant felt that she no longer needed permanent hospital care but would benefit from a stay in a convalescent rehabilitation type home. Arden House appeared particularly suited to her needs. She had been accepted there from 3 May 1985 for an initial period of one month. The DHSS was asked to arrange for an officer to assess her with a view to assisting with the payment of her fees at Arden House. The second dated 22 August 1985 is a letter from the same Psychiatric Social Work Unit to the same Manager. It stated that the claimant had been re-admitted to Shelton Hospital on 24 June 1985 and as her physical condition had now deteriorated it was not considered suitable to return her to Arden House which catered for the active person seeking rehabilitation and a place had now been found for her at Brook House and the writer understood from a telephone call made to their Visiting Officer Department that she would be regarded as a "protected case" although if the fees were higher at Brook House than those previously allowed she would be liable to

pay the difference. A decision on the case was requested. The third is another letter from the same Unit to the manager which is dated 15 October 1985. This repeated that the writer had telephoned the visiting section and as confirmed in her letter of 22 August 1985 that this would be a "protected" case and the fees would be paid at the same rate as previously. It was now understood that the claimant had only been allowed the minimum of £110 per week and on enquiring about this she was told that the information given to her initially was incorrect. This seemed most unfair to this patient and her family that they should suffer because of an administrative error. The placement was only made on the understanding that the same fees would be paid and they now had the predicament that the resident had to be moved again or the family would have to find £40 per week to cover the discrepancy which was beyond them. Could some additional help be found. The fourth letter is dated 25 October 1985 from the Manager to the Unit in reply to the letter of 15 October 1985 and telephone conversations of 22 and 24 October 1985 that he had found a mistake it had now been pointed out to him that this was not correct. The claimant had been admitted to Arden House Residential Home on 3 May 1985. The transitional protection on claims only applied to people in receipt of allowances as boarders immediately before 29 April 1985. The first payment made to the claimant was for the week commencing 6 May 1985. The reason why she received extra benefit at Arden House was because the home had a dual registration and was registered to care for person suffering with mental disorders. Brook House was only registered under the "old age" category, for which the limit was £110 per week. The manager apologised for the incorrect information given to the Unit on this claim.

The social security appeal tribunal's decision

12. The tribunal heard the appeal on 21 January 1986. The chairman's note of evidence was:

"Claimant has been at Brook House since 4.9.85. Fees were then £150 per week. No increase since. Minimum amounts were increased from £110 to £120 per week from 25.11.85 - reg 9/6 and Sch 1A Requirement Regs.

Claimant first went to Arden House on 3.5.85. Could not take advantage of protective provisions of reg 9(17) as she was not in residential care on 29.4.85.

Department have apparently advised Social Worker that claimant was protected.

Current weekly shortfall is £21.05. Claimant's husband, who is also in receipt of suppb, contributes £10 per week. Claimant provides balance and extra money to cover her personal expenses. Correspondence was produced between Department and Social Worker Mrs [S]. She apparently was told on 24.8.85 that claimant was protected. Adjudication Officer refers to R(SB)8/83."

13. Their recorded decision, which was unanimous was:

"Appeal dismissed. Adjudication Officer's decision confirmed."

14. The tribunal's recorded findings of fact were:

1. Claimant is aged 78 and suffers from mental illness. From 17.2.85 to 3.5.85 she was receiving treatment at Shelton Hospital. On 3.5.85 she was admitted to Arden House Residential Home, Church Stretton. On 4.9.85 she moved to Brook House where fees are £150 per week.

2. Claimant was not a boarder on 29.4.85 and could not take advantage of the transitional protection provisions of reg 9(17) Requirements Regs. Tribunal was satisfied that Department had given no assurance that such protection did apply but

even if such assurance had been given it was not binding on the Department - R(SB)8/83.

3. Claimant's supp ben entitlement fell to be considered under reg 9(6) and sub-para 1(1) of Sch 1A of Requirements Regs which imposed a maximum boarding charge of £120 plus an allowance for personal expenses of £8.95 under Reg 9(12). Claimant's retirement pension of £23.67 per week was fully accountable as an income resource under reg 11(2)(a) Resources Regulations.

4. Claimant's weekly supp pension was thus £105.28 per week from payday in week commencing 25.11.85 - see AT2(A) annexed.

Their recorded reasons for decision were:

"This was in many respects a tragic case. Had claimant been admitted to Arden House on 29.4.85 she would not have been restricted to the maximum boarding charges allowed and the actual charges levied would have been met in full by the Department under the provisions of Reg 9(17) Requirements Regulations. Unfortunately claimant was not admitted until 3.5.85 - 4 days too late - preventing the application of such protection provisions, para 1(1) of Sch 1A Requirements Regulations and personal expenses of £8.95. Tribunal was concerned that this created a shortfall of £21.05 per week which had to be met elsewhere. Both claimant and her aged husband should be spared such activity. Regrettably Tribunal had no discretion under the regulation and with some reluctance confirmed the Adjudication Officer's decision."

Was the tribunal's decision erroneous in law?

15. Yes, it clearly was. The claimant's letter of appeal and the correspondence relating to the adjudication officer's decision, which includes a letter from the Manager of the Shrewsbury DHSS Office dated 25 October 1985 relating to the claimant's proposed appeal to the tribunal and the necessity of an official appointment of someone to act on behalf of the claimant, makes it clear that the appeal was being made in respect of a decision which must have been given before 25 October 1985. This correspondence was before the tribunal. But the tribunal never considered that decision at all. This is clear from the fact that they accepted that the maximum charge was £120 a week: see the note of evidence that maximum amounts were increased from £110 to £120 per week from 25.11.85 (this is the date when the Camden Regulations came into force). The tribunal, if they considered the question of the appropriate category in paragraph 1(1) of Schedule 1A at all, must have accepted the assertions of the adjudication officer and the DHSS manager that the home was "a residential care home providing accommodation only for persons in need of personal care by virtue of old age" which begs the very question which they were required to decide. There has been a clear breach of regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984 (which required reasons to be given by the tribunal for their decision) and an error of law on the face of the record in failing to deal with the decision against which the claimant was in fact appealing.

The arguments on appeal

16. Mr Drabble's submission is that the claimant was entitled throughout the period in issue to the rate referred to in sub-paragraph (b) of paragraph 1(1) of Schedule 1A to the Cotton Regulations and, from 25 November 1985, the Camden Regulations, that is to say "past or present mental disorder but excluding mental handicap" and not the lower rate in sub-paragraph (a) that is to say "old age".

17. In his submission the Commissioners should be slow to adopt any construction which meant that claimants who are lawfully being cared for in a home in the course of that

home's routine business, do not obtain the rate of benefit appropriate to the care they receive by reason of their physical or mental condition. They should also be slow to adopt a construction which means that the description of the home on the register (in the case of a residential care home, in the "box" on the register) is decisive. All the evidence suggested that none of the entries were made with supplementary benefit issues in mind. Mr Drabble cited the Howard appeal (CSB/354/86) as an example. There, the certificate showed that the home was catering for elderly and elderly physically handicapped persons. One suspected that the local authorities might easily have provided just for the elderly. Whatever appears on the certificate (in the absence of express conditions) the range of claimants lawfully and strictly admitted would be the same.

18. It was Mr Drabble's principal submission that the purpose of registration under the 1984 Act is to enable a person owning/managing the home to lawfully conduct his business. A Home, either a residential care home or a nursing home, in respect of which no conditions have been imposed under either s.5(3) or s.29(2) regulating the category of patient the home can cater for, can lawfully be used for all categories. A registration authority is expressly given by the 1984 Act the choice of whether to register the home subject to conditions (ie for limited categories) or not subject to conditions (ie for all categories). Accordingly, when one approaches the phrase "registered under the Registered Homes Act 1984 for" one looked at the breadth of activity lawfully encompassed within the registration. If it is unlimited, the registration authority have chosen not to limit the categories and so it is registered for all categories. If it is limited by condition, it is registered for only the categories permitted by the registration.

19. According to Mr Drabble, Schedule 1A operates as follows:-

- (1) Paragraphs 1 and 2 pose questions of fact - is "the accommodation provided for the claimant a residential care home for persons in need of personal care by virtue of ..." the relevant condition? On this issue of fact, evidence that the claimant needs care by virtue of the relevant condition, and is in a home which is providing that care as part of its day to day business, is both admissible and, in the absence of evidence showing that the provision of that kind of care is not part of the purpose of the home, highly persuasive.
- (2) However, paragraphs 1 and 2 are expressly subject to paragraph 3. One accordingly has to examine paragraph 3 in order to see whether it produces a different result.
- (3) A Home with an unlimited registration is "registered for" persons in need of care by virtue of more than one condition (even if it is not a "home for" such person because it does not provide the full range of care). Such a home is within paragraph 3(1) and the rate of benefit will be determined by paragraph 3(2).

This construction, Mr Drabble says, has the advantage of avoiding reliance on the lottery created by the descriptions entered on the register, whilst respecting the wishes of the registration authority had they thought it necessary to control the categories by the imposition of express conditions. If they have not thought it necessary, there is no logical reason why supplementary benefit should be limited. Paragraphs 10 and 13 of decision CSB/0054/1986 were relied upon in support of this submission.

20. In the alternative, if contrary to the primary submission a residential care home is to be regarded as registered for the category of patient appearing in the "box" on the register, Schedule 1A operates as follows, in Mr Drabble's submission:

- (1) Paragraph 1 poses the question of fact.

- (2) However, it is "subject to" paragraph 3.
- (3) If in "the box" only one category is shown, as in the present case of Nicholas, the Home is not "registered for" more than one category and paras 3(2) and 3(3) can have no application. One will accordingly answer the question of fact posed by paragraph 1 read together with paras 3(1) and 3(4).

21. Mr Stocker's submission is that in the case of a registered care home where only one category of care was shown on the register it was not necessary to look further and to see what care the claimant was actually receiving. The appropriate rate payable was that for the category of care shown on the register i.e. old age in the present case.

Construction of paragraphs 1 and 3 of Schedule 1A

22. Mr Drabble's arguments, as set out above, were presented, as usual with him, with lucidity and ability. But we do not feel able to accept either of his submissions.

23. (1) Paragraph 4 of Schedule 3 to the Residential Care Homes Regulations 1984 requires the following particulars to be recorded in the register of the proprietor of the residential care home:

"The number, sex and categories of residents (excluding persons registered or persons employed at the home and their relatives) indicating the various categories by reference to the following code -

old age	I
mental disorder, other than mental handicap, past or present	MP
mental handicap	MH
alcohol dependence, past or present	A
drug dependence, past or present	D
physical disablement add, if the resident is -	PH
(i) over 65 years of age	E
(ii) a child	C

Paragraph 6 of Schedule 3 requires:

"6. The details of any conditions imposed on registration and of any addition to those conditions or variation thereof."

(2) Paragraphs 3 of Schedule 1A of the Cotton and of the Camden Regulations refers to "a home for, or a home registered under the Registered Homes Act 1984 for, persons in need of personal care by virtue of any two or more of the physical or mental conditions referred to in paragraphs 1 or 2"

Paragraph 1(1) specified the following physical or mental conditions:

"(a) old age,....

- (b) past or present mental disorder but excluding mental handicap,...
 - (c) past or present drug or alcohol dependence,.....
 - (d) mental handicap,.....
 - (e) physical disablement,.....
 - (f) any other condition not falling within sub-paragraphs (a) to (e) above.....
- (3) A copy of the register relating to the Brook House Residential Care Home and its proprietors is now in the case papers. It gives the date of registration 1 October 1984 and enters only one category of residents in the series of boxes marked with the above mentioned letters (I, MP, MH, A, D, PH, E, C). The category entered is in the Box I and the number there entered is 13. There is a note on the register that this number was increased to 14 persons on 18 July 1985. There are two certificates of registration in evidence. One dated 1 October 1984 stating that it is a condition of registration that the number of persons received into the home shall not exceed 13. The other is dated 18 July 1985 and states that it is a condition that the number shall not at anytime exceed 14 elderly persons.
- (4) Mr Drabble's primary submission set out in paragraphs 18 and 19 above, if accepted would deprive of all purpose the division of the specified physical or mental conditions under sub-paragraphs (a) to (e) of paragraph 1 of Schedule 1A into categories which exactly correspond with those required to be entered on the register of the residential home by the Residential Care Homes Regulations, and to be specified in the application for registration. The distinction drawn in paragraph 3 between homes registered under the Registered Homes Act 1984 for two or more physical or mental conditions and those not so registered would likewise have no purpose. Furthermore, we find it impossible to credit the function attributed by Mr Drabble to paragraph 3(3) of Schedule 1A on the construction contended for in his primary submission, namely that it is to cater for the case where a claimant is in a home unlawfully and in breach of a condition imposed under the Registered Homes Act 1984 so that the proprietor has committed a criminal offence in receiving him. Acceptance of this contention involves crediting the legislature with the intention of making special provisions for the payment of benefit to persons unlawfully received into the home.
- (5) Mr Drabble's secondary submission, set out in paragraph 20 above, if accepted, involves treating a home registered for one category (in the present case old age) but used for two categories (in the present case, it is asserted, mental handicap) as a home for two more physical or mental conditions, notwithstanding that the register specifies only one such condition. Acceptance of this contention would enable paragraph 3(4) of Schedule 1A to be applied and the higher rate specified in paragraph 1(1)(d) for mental handicap to be applied for the claimant, if this is found to be more consistent with the care received by her than that appropriate to old age. We cannot accept this contention. Its acceptance would lead, as the Commissioner pointed out in paragraph 11 of decision CSB/0087/86 (unreported) to:

"the absurd position that a person in a home which registered itself in respect of the care of persons in need of personal care by virtue of one of the conditions referred to in paragraphs 1 and 2 and who receives care not corresponding to that condition would receive the amounts specified in

those paragraphs on the basis of the personal care he receives, while if the home registered itself in respect of two or more conditions and the person receives personal care not corresponding to one of those conditions he would be paid the lesser amount."

Thus in the present case, because the register specifies old age alone, the claimant could, on this contention, receive the higher rate for mental handicap, but if the register had also specified (for example) past or present drug or alcohol dependence as a category the claimant would only receive the lower rate for old age!

24. As explained in Turner, in relation to the construction of paragraph 2, the approach to paragraphs 1 and 2 turns on the construction of paragraph 3 of Schedule 1A because it is crucial to determine, in the first instance, whether or not the home, whether a residential care home or a nursing home, is single or multi-purpose in respect of the accommodation for persons in need of personal care by virtue of physical or mental conditions falling within the categories listed in paragraph 1 in the case of residential care homes' or paragraph 2 in the case of nursing homes (as defined in paragraph 7 of the Cotton Regulations and in paragraph 6 of the Camden Regulations).

25. If the residential care or nursing home provides accommodation only for persons in need of personal care by virtue of only one physical or mental condition falling within the categories listed in paragraph 1 or 2 (as the case may be) then the maximum amount to be allowed by way of board and lodging charges is the sum set out in relation to that category. It does not matter what is the type of care that the claimant is actually receiving. The question is simply what sort of physical or mental condition for persons in need of personal care is the accommodation provided by the home for, not what sort of personal care is the claimant receiving: see the wording of paragraphs 1 and 2 of Schedule 1A (set out in the Second and Third Appendices to Tyler, a copy of which accompanies this decision).

26. Since paragraphs 1 and 2 are both expressed to be subject to paragraph 3, it is necessary to look at paragraph 3 to see what provisions it makes in respect of single and multi-purpose homes.

27. Apart from cases of dual registration (ie as residential care homes and nursing homes), none of which arise in the appeals before us, paragraph 3 is concerned with multi-purpose homes, that is to say homes which provide accommodation for persons in need of personal care by virtue of two or more physical or mental conditions, and not with single purpose homes. The reason for these special provisions is that in the case of multi-purpose homes, as above defined, there are two categories in paragraph 1 or 2 carrying (usually) different maximum rates and it is necessary to know in which particular category the claimant's case is to be treated as falling in order to arrive at the maximum allowable for board and lodging charges.

28. Where a home is a residential care home which is registered under the Registered Homes Act 1984, the question whether it is multi-purpose or single purpose must, in our judgment be determined by looking at the register. It is clear from our analysis of the Registered Homes Act 1984, the Residential Care Homes Regulations 1984 and the Nursing Homes Regulations 1984 in Turner, that in respect of residential care homes registered under that Act there is a statutory categorisation under the Registered Homes Act 1984 entered on the register. It is only in respect of residential care homes that are so registered that there are categories under that Act which correspond with paragraph 1 of Schedule 1A. Nursing homes (including mental nursing homes) are not required to have a register which states those categories or indeed any categories at all. Residential care homes which are not required to be registered under the Registered Homes Act 1984 may be registered under some other Act (e.g. residential care homes in Scotland, to which the Registered Homes Act 1984 does not apply at all) or be free from registration under the 1984 Act because its

numbers are too small to require registration.

29. Paragraph 3 of Schedule 1A could, but for the special category of residential care homes registered under the Registered Homes Act 1984, have simply provided that where a home was for persons in need of personal care by virtue of any two or more physical or mental conditions referred to in paragraph 1 or 2 the appropriate amount should be that amount in paragraph 1 or 2 as the case might be, having regard to the nature of the personal care that the homes provided as was consistent or reasonably consistent with the personal care that the claimant was receiving in that accommodation. The tests for determining the category in all such cases would then be as stated in paragraphs 29 to 33 of Turner.

30. But it is clear from paragraphs 3(2) and 3(3), that multipurpose registered homes, which have a register which states the physical or mental conditions which the homes provides accommodation for, are to be dealt with differently. The basis of these provisions is that the register indicates (as indeed in the case of residential care homes it does), the categories of care for which the accommodation in the home provides. It is only where there is more than one category referred to in the register, that there was considered to be any difficulty. Where there is more than one such category it was necessary to determine which category was to apply to the claimant. Para 3(2) provides that it is the category consistent with the care being received by the claimant. But suppose that neither category is so consistent? Then para 3(3) provides that the lesser amount (it should of course add "or least" where there are more than two categories) is to apply.

The tests for determining the relevant category of care and "the appropriate amount" in residential care home cases.

31. The following tests (which of course apply in England and Wales, since the Registered Homes Act 1984 does not apply to Scotland: see section 58 of the Act) should be applied in residential care homes cases:

- (1) Apply the definition of "residential care home" set out in paragraph 7 of Schedule 1A of the Cotton Regulations or paragraph 6 of Schedule 1A of the Camden Regulations (depending on which regulations were in force during the period in issue) in order to determine whether the home in question is a residential care home for the purpose of the Schedule
- (2) If it is such a home because it is registered under the Registered Homes Act 1984, look at a verified copy of the register itself.
- (3) Compare the category or categories of care specified in the register under the Code referred to in paragraph 3 of Schedule 4 of the Residential Care Homes Regulations 1984 with the physical and mental conditions set out in sub-paragraphs (a) to (e) of paragraph 1(1) of Schedule 1A and ask the question, "Is the home (i.e. the proprietor of the home) registered as a residential care home providing accommodation for persons in need of personal care by virtue of that condition?" If, for example, the register shows category I (old age) as a category catered for, then the condition specified in sub-paragraph (a) is provided for and the answer in respect of that sub-paragraph is "Yes".
- (4) There is no need to consider sub-paragraph (f) in the case of a residential care home registered under the Registered Homes Act 1984 because the only conditions to be entered on the register are specified in paragraph 4 of Schedule 3 to the Residential Care Homes Regulations 1984 and correspond with sub-paragraph (a) to (e) of paragraph 1(1) of Schedule 1A. Paragraph 1(1)(f) ("any other condition") relates to cases where the home is not registered under the Act.

- (5) If only one condition listed in sub-paragraph (a) to (e) of paragraph 1(1) of Schedule 1A is a condition in respect of which the home is registered in the way described in (2), the appropriate amount is that shown in the sub-paragraph of paragraph 1(1) of Schedule 1A which corresponds to that condition. The nature of the care actually provided for the claimant should then be disregarded. For example, if the only condition in respect of which the home is registered is old age, the amount specified in sub-paragraph (a) is the appropriate amount whether or not the claimant in question is young or old. Where two amounts are shown in one sub-paragraph (namely under the heading (e) "physical disablement") paragraph 1(2) should be applied: see the explanation in Howard at paragraph 20 in this respect.
- (6) (a) If the home is registered in the way described in (3) above in respect of two or more conditions, apply paragraph 3(2) of Schedule 1A by determining which of the two conditions in sub-paragraphs (c) to (e) of paragraph 1(1) corresponds with the personal care actually received. It will be that sub-paragraph of paragraph 1(1) of Schedule 1A which determines the appropriate amount. Where there are two amounts specified (namely under the heading (e) "physical disablement") paragraph 1(2) should be applied.
- (b) If the personal care actually received does not correspond with either condition apply the lesser amount appropriate to one of those conditions: see paragraph 3(3) of Schedule 1A.
- (7) In the cases where the Camden Regulations apply, and sub-paragraphs other than (d) or (e) would otherwise determine the appropriate amount, consider whether paragraph 1(3) of Schedule 1A operates to alter the amount there specified: see the wording of paragraph 1(3), which was added by the 1986 amendments and applies, only from 28 July 1986. The relevant provision is set out in the Fourth Appendix to Tyler.
- (8) In the case of every residential care home which is not registered under the Registered Homes Act 1984 as a residential care home, apply the tests set out in Turner allowing for the fact that it is paragraph 1, not paragraph 2, of Schedule 1A that is relevant and that sub-paragraphs (2) and (3) of that paragraph may operate: see (5) and (7) above.

Conclusions

32. In the present case, Brook House is registered as a residential care home under the Registered Homes Act 1984 in respect of "old age" and this is the appropriate rate, applying the tests set out above.
33. (1) Our decision is set out in paragraph 1.
- (2) The actual supplementary benefit entitlement of the claimant during the period in issue is complex and we do not have sufficient information before us to consider how existing assessments should be revised or fresh assessments made. This should be done by the adjudication officer. We have accordingly confined our determination to deciding the weekly amounts applicable for board and lodging. If there is any dispute as to the assessments or revised assessments, either party is to be at liberty to apply.
34. We must refer to the grounds of appeal put forward by the claimant's daughter and appointee, which claim, in graphic terms, that she and the social worker representing the claimant at Shelton Hospital were misled by the DHSS into putting the claimant into a home for which the daughter and the claimant were unable to pay on the basis that the fees would

be paid in full. The statutory authorities (who include the Commissioner) have no jurisdiction over officials of the DHSS; and there is no question of an estoppel against the adjudication officer, based on any wrong advice that such officials may have given: see paragraph 19 of Finch (CSB/1085/86) where this question is considered.

35. (1) The claimant, through her advisers, may wish to adopt the suggestion made by Mr Stocker in Finch and to apply to the Secretary of State to seek an ex gratia payment from the Department in this case, though it is fair to say that our understanding is that such payments in practice require the approval of the Treasury; and representations can be made through a member of Parliament to the Parliamentary Commissioner for Administration.
- (2) If the claimant has any remedy in law, it does not lie with the Commissioners, but elsewhere, for negligence, or possible breach of statutory duty. The Department of Health and Social Security hold themselves out to advise on matters appertaining to supplementary benefit. In countless appeals the Commissioner, and the social security appeal tribunal, have accepted that a claimant who has failed to seek advice from the local office of the DHSS as to his or her benefit position does not have good cause for a late claim or cannot escape a requirement to repay overpaid benefit. The need to seek advice from the local office is re-iterated in submission after submission by the adjudication officer. What then, if the local office advises a claimant carelessly and wrongly, and the claimant suffers loss? It has been held that, in the absence of disclaimer of responsibility, a negligent, though honest misrepresentation spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance would be placed on his skill and judgment: see Hedley Byrne and Co Ltd v. Heller & Partners Ltd [1964] A.C. 465. The Crown is liable for the torts of its servants or agents: see section 2(1) of the Crown Proceedings Act 1947. It is also liable for breach of statutory duty: see section 2(2). There can, we think, be no question of advice given by a local office being in the discharge of responsibilities of a judicial nature (so that the escape provisions in section 2(5) is inapplicable) and advice given by anyone other than an adjudication officer (who would not give advice as such in a local office) cannot be free from any duty of care on the basis of Jones v. Department of Employment 27 November 1987, where the Court of Appeal held that an adjudication officer was protected by section 117 of the Social Security Act 1975. As to whether such an action would in fact lie, and as to its prospects of success, the claimant, through her appointee, should obtain advice from her legal advisers.

(Signed)

V G H Hallett
Commissioner

(Signed)

R F M Heggs
Commissioner

(Signed)

R A Sanders
Commissioner