Bilch 192

CSHB

date

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSHB/405/05

SOCIAL SECURITY ACT 1998

CHILD SUPPORT, PENSIONS AND SOCIAL SECURITY ACT 2000

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: L T PARKER

Oral Hearing

Appellant:

Respondent: Glasgow City Council

Tribunal: Glasgow

Tribunal Case No:

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. I find no error in law in the decision of a tribunal sitting in Glasgow on 1 February 2005 (the tribunal). The tribunal's decision therefore stands.

The issue

2. The decision before the tribunal was a recoverable overpayment determination made by the local authority (the authority) with respect to a Housing Association (the landlord); the landlord is now the appellant to the Commissioner. The sole issue which remains in dispute relates to the claimed entitlement to continuing housing benefit (HB) for the period 28 April 2001 to 28 June 2001 of a particular tenant (the tenant) even though he moved from the property subject to the relevant tenancy (the property) on 24 April 2001 into a nursing home (the nursing home) and remained there until his death; in particular, is an intention to return to occupy the former home dependent only on subjective factors?

The legislation

3. Under section 130(1) of the Social Security Contributions and Benefits Act 1992, 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" and certain other conditions are satisfied, as they are in the present case. Under section 137(2)(h) of that Act, regulations may be made "as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home".

4. The relevant regulation is regulation 5 of the Housing Benefit (General) Regulations 1987 (the regulations). Regulation 5(1) says:

> "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-
> (a) by himself or, if he is a member of a family, by himself and his family; or
> (b) [this relates to polygamous families]
> and shall not be treated as occupying any other dwelling as his home."

5. Regulation 5(7B) and (7C) provide as follows:

> "(7B) This paragraph shall apply to a person who enters residential accommodation –
>
> (a) for the purpose of ascertaining whether the accommodation suits his needs, and
> (b) with the intention of returning to the dwelling which is normally occupied by him as his home should, in the event, the residential accommodation prove not to suit his needs, and
> (c) while the part of the dwelling which is normally occupied by him as his home is not let, or as the case may be, sublet.

(7C) A person to whom paragraph (7B) applies shall be treated as if he is occupying the dwelling he normally occupies as his home for a period not exceeding, subject to an overall time limit of 52 weeks on the absence from that home, 13 weeks beginning from the first day he enters a residential accommodation."

6. Regulation 5(8), (8B) and (8C) read:

"(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 ... only if –

(a) he intends to return to occupy the dwelling as his home ...

...

(c) the period of absence is unlikely to exceed 13 weeks ...

(8B) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home ("absence"), if –

(a) he intends to return to occupy the dwelling as his home; and

(b) while *[sic]* the part of the dwelling which is normally occupied by him has not been let, or as the case may be, sublet; and

(c) he is - ...

(ix) a person who is receiving care provided in residential accommodation other than a person to whom paragraph 7B applies...

(d) the period of his absence is unlikely to exceed 52 weeks...

(8C) A person to whom paragraph (8B) applies shall be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks beginning from the first day of that absence."

Background

7. HB was paid in respect of the tenant's occupation of the property from 4 April 2000 and directly to the landlord. By letter dated 20 June 2001, the Department of Social Security (as it then was) let the authority know that the tenant had moved to the nursing home; then a letter dated 25 June 2001 from the administrator of the nursing home informed the authority that the tenant:

"... died on 13 June 2001.

... I can tell you that he became a resident here on 24 April 2001 and was to be here on a permanent basis".

8. The authority had received no previous notification either from the landlord or the tenant of the move to the nursing home so that HB continued to be paid until 28 June 2001, which the authority maintains is an overpayment from the first day of the benefit week following the said move.

The tribunal hearing

9. The landlord was represented by Mr Steven Craig, one of its welfare rights service officers. He referred in his oral argument to an aide memoire which he had completed in April 2003 for the purposes of a previous tribunal hearing which was adjourned on 15 April 2003.

He was asked by the chairman at the tribunal hearing on 1 February 2005 to lodge a copy of the aide memoire for the benefit of the tribunal and he did so.

10. The aide memoire was in manuscript form, unsigned and undated, and read:

> "Re discussions with [R.D.] 14 and 15 April. [R.D. is a colleague of Mr Craig's at the landlord housing association].
>
> R.D. confirms that:
>
> - When [the tenant] was in the nursing home it was [A.G.] who visited him regularly. [A.G. is another employee, but now a former one, of the landlord housing association].
> - It was the [landlord's] understanding that [the tenant] did not want to die in the nursing home – he intended to return to his home to die.
> - A.G. stopped work (long term sick initially) in June 2002.
> - His flat was 'never touched' until after his death.
> - He was known to be terminal but death was quite sudden.
> - I recall that [J.M.] had also confirmed the position at date of signing appeal letter. [J.M. is another employee of the landlord; she signed the letter of appeal to the tribunal; this was to the effect that the landlord's understanding was that the tenant's intention was to return home so that it was considered he was not permanently absent.]"

11. The tenant, who was born on 10 July 1959 and thus was just short of his forty-third birthday when he sadly died, suffered from paranoid schizophrenia. He received substantial support from his landlord included as a service charge in his rent, which is why he was visited by the landlord's employees while in the nursing home. Mr Craig explained, however, to the tribunal that he entered the nursing home on account of terminal cancer. At the oral hearing before the Commissioner, that was further clarified as a brain tumour.

12. Also present at the tribunal hearing was a presenting officer (PO) on behalf of the authority. Much of the discussion centred on whether there had been a valid supersession of entitlement. The tribunal decided that there was and no further point has been taken on that (in my view rightly). It is, however, to be regretted that the documentation on this in HB cases is such that it frequently generates these arguments. I cannot understand why, irrespective of the computer programmes, a manually produced letter cannot be introduced in order to set out clearly the revision or supersession process which has taken place and which plainly communicates that to the person affected.

13. In the authority's written submission to the tribunal, reference was made to regulation 5(7B) of the regulations (set out at paragraph 5 above) and the authority argued:

> "[The tenant] was a permanent resident in the nursing home from 24 April 2001, there clearly was no intention of returning home from that date."

14. The record of proceedings notes Mr Craig's alternative submission that regulation 5(8) of the regulations could apply. The presenting officer pointed out that this too depended upon an intention to return home. Mr Craig referred to his aide memoire as recording the situation at the relevant time, while the PO relied on the letter from the nursing home administrator, dated

only 12 days after the tenant's death, describing "a permanent basis" to the tenant's residence at the nursing home once he entered it.

The tribunal decision

15. By its decision notice, the tribunal confirmed the recoverable overpayment:

> "The tribunal is satisfied that when [the tenant] removed from the said dwelling house on or about 24/04/2001, he did so with the desire that he would return there before his death, but that he had no intention to do so."

16. In its statement, on this point it reasoned thus:

> "The tribunal accepted this document [i.e. the manuscript aide memoire] as representing a genuine attempt to record the matters to which it referred. On the other hand, the authority produced a letter by [the nursing home] dated 25-06-01 which advised of [the tenant's] permanent residence at the nursing home from 24-04-01 and the tribunal found that this was a more reliable record of [the tenant's] position as at those dates. The tribunal concluded and found that [the tenant] effected a permanent change of address from 24-04-01...".

Appeal to the Commissioner

17. The application for leave to appeal founded on the ground that:

> "...the tribunal has attached spurious significance to the distinction between 'desire' and 'intention' to return home."

Leave to appeal was granted by a district chairman.

18 In the written response of the authority, the respondent, it is submitted:

> "...
>
> The notes provided by the appellant's representative...do not confirm that [the tenant's] intention was to return home. It provides a record of the association's understanding in April 2003 that [the tenant's] intention was to return home. These notes were not contemporaneous...
>
> Only [the tenant] could have confirmed what his intention was at that time and as this is not possible then the best evidence available is from the nursing home confirming his permanent residence there from 24 April 2001".

19. Mr Craig requested an oral hearing; which I directed and which took place on 8 February 2006. He continues to represent the landlord. The authority was represented by Mr Mair, Solicitor, and Miss S MacKinnon, an employee of the authority. I am grateful to all for the constructive debate. In so far as the parties expanded on their written submissions, I deal with their arguments in the course of this decision where that is necessary.

My conclusion and reasons

The structure of the legislation

20. In CH/2957/2004, Mr Deputy Commissioner Mark said this at paragraph 11:

> "However, regulation 5 modifies the general rule. Under regulation 5(1), subject to the following provisions of the regulation, it is not enough for the claimant to show that she is occupying the flat as her home. She must show that the flat is the dwelling normally occupied as her home. The context of regulation 5(1) clearly shows that, apart from the exceptional cases provided for later in the regulation, only one dwelling can be "normally occupied" in this way and that where a person is occupying two dwellings as homes it is necessary to decide which one is "normally" so occupied. It is also plain from the other paragraphs of the regulation that, whatever the normal meaning of "occupy", rules are laid down as to the period during which, and the reasons for which, a person can be absent from the dwelling and still be treated as occupying the dwelling as her home. None of these rules appear to me to be inconsistent with the general meaning of occupying a dwelling as a person's home. They simply spell out boundaries which may not co-incide precisely with those that would exist if the regulations had not been made."

21. The special cases set out in the following provisions of regulation 5, which could possibly apply in the present appeal, are paragraphs (7B) and (7C) or (8) or (8B) and (8C). Because the tenant's absence from the property in the event was less than 13 weeks, let alone than 52 weeks, he could fall potentially within either (8) or (8B) if there existed the crucial "...intends to return to occupy the dwelling as his home", which is necessary for each.

22. So far as the trial period in a care home under paragraphs (7B) and (7C) is concerned, as Mr Commissioner Turnbull said at paragraph 10 of CH/1854/2004:

> "In my judgment it is reasonably clear that paragraphs (7B) and (7C) do not treat the claimant as occupying his former dwelling once he has become a permanent resident of the residential accommodation and so has ceased to intend to return to his former home.

23. Moreover, if it is accepted that the tenant entered the residential home as a permanent resident, then this similarly also precludes entitlement under regulation 5(8) or (8B) and (8C). An intention to be a permanent resident elsewhere is necessarily inconsistent with a continuing current intention to return to occupy the former property as his home at some future stage.

The significance of 'permanent'

24. For the person entering residential accommodation (which includes nursing and care homes) there are basically three scenarios; either he is going in to try it out with the fallback that he will return home should the experiment not work; or he enters with the definite intention of returning home when, for example, a period of respite care has ended or his condition has sufficiently improved or stabilised; or he enters the accommodation on a permanent basis which is necessarily inconsistent with either carrying out a trial or harbouring an intention to return to his former home.

25. By its reasoning, with reference both to a permanent change of address and to a desire, but not an intention, that the tenant would return to the property before his death, the tribunal impliedly covered all the possible statutory provisions which could give him entitlement under the circumstances; I therefore reject the submission made by Mr Craig at my hearing that error of law lay in a failure expressly to address regulation 5(8) or (8B).

26. The tribunal acknowledged that the burden of proof in an overpayment case on all pertinent matters lay on the authority; but it preferred the nursing home letter as constituting a more reliable indication of the tenant's position at the relevant date, than the understanding of the landlord about it as recorded in April 2003. Error of law only arises in the assessment of evidence if the tribunal adopted an irrational or improper approach. That has in no way been demonstrated. While I accept Mr Craig's point that he was available for personal questioning by the tribunal whereas the nursing home administrator, author of the nursing home letter, was not, he could not really help the tribunal on the accuracy of the landlord's understanding.

27. Neither RD nor JM, who were the sources of his information, were available for questioning and even they were not privy to the information at first hand but received it from yet another employee AG; it is not even clear how AG communicated the information as she left the employment in June 2002 and the record was made in April 2003. Mr Mair argued that, for the above reasons, the letter was "the best evidence". I agree. While a tribunal is not governed by formal rules, those which embody common sense are clearly useful tools, albeit not determinative ones, when weighing evidence. In no way was it perverse for the tribunal to prefer information recorded contemporaneously and from an authoritative source as more correctly representing the tenant's intention in the relevant period.

28. I accept that the tenant had not given notice on the property nor moved his furniture. This is certainly indicative, but not conclusive, of an intention to return. There seems to have been no incentive, however, for the tenant to give notice terminating his tenancy even if he had no intention to return; there was certainly not for the landlord, because of the substantial monies received to support the tenant while his tenancy continued. Moreover, the tenant was obviously seriously ill even when he entered the nursing home. If the landlord in the regular visits to the nursing home did not suggest taking action to terminate the tenancy, it is hard to see how the tenant had the ability to do so given his health circumstances.

29. Mr Craig submits that when the nursing home administrator referred to 'permanent' she possibly meant no more than 'indefinite', which latter concept was compatible with an intention to return at some future date although no such date was yet fixed. While that may be so, the primary meaning of 'permanent' is, surely, enduring and without change; I would have expected the administrator to say something like 'uncertain basis' or 'temporary basis' in the circumstances outlined by Mr Craig. In any event, the interpretation given to 'permanent' by the tribunal in no way can be categorised as irrational and is inconsistent with any intention by the tenant to occupy his former home again.

A distinction between 'desire' and 'intention'

30. Mr Craig argues that there is no difference between 'desire' and 'intention'. I must disagree. A 'desire' to do something is quite distinct from an 'intention' to do so. An intention involves the aim or purpose of carrying out what is intended, whereas a desire may be no more than a wish or hope, however remote, to do something; so far as "intends to return to occupy the dwelling as his home" in regulation 5 is concerned, in my judgement this must encompass, moreover, not simply a subjective purpose to do so but also that, objectively, such a return is a realistic possibility.

31. The whole tenor of regulation 5 supports the laudable policy that one who leaves his home, for example, on holiday, or as a hospital or care home patient, remains entitled to HB while the absence can be categorised as sufficiently temporary having regard to the particular situation. But if the matter solely depended upon a subjective wish, then however unrealistic is the occupier's desire to return to his former home, and even in a situation where circumstances beyond his control now prevent such return, he can expect to be paid HB (which may be, as in the present case, a not inconsiderable sum of public money) unnecessarily for up to 52 weeks. This cannot be right. As Mr Commissioner Turnbull points out at paragraph 12 of CH/1854/2004 with reference to paragraph (7B) and (7C):

> "... That [i.e. continuing HB for up to 13 weeks after a person has become a permanent resident of a home] would be inconsistent with the tenor of, for example, reg. 5(5)(d), which provides that, in the case where a person moves from one dwelling to another, he can be treated as occupying both dwellings, but only for a period not exceeding 4 weeks and only if he could not reasonably have avoided liability in respect of two dwellings."

32. I take Mr Craig's point that it is a delicate matter for the landlord to raise with the tenant the question whether return to the home is a realistic possibility and within the relevant timescale. However, had the landlord carried out its duty by informing the authority of the change of circumstances that the tenant had moved into a nursing home, the authority could have made its own enquiries; so far as the objective facts are concerned, this might well mean asking the appropriate medical authorities, so that the authority could make up its own mind whether the criteria for entitlement continued, including the tenant's own inclinations. Appeal from any relevant supersession could be taken.

33. It is a question of fact and degree whether or not it has been objectively established that there is no realistic possibility of a return home even where a person aims to do so; having regard to the nature of the tenant's illness, and that he died less than two months after entering the nursing home without having apparently taken any steps to appraise the nursing home of his wish to return home to die or to facilitate that move should it become appropriate (and nor had the landlord done so on his behalf), it seems to me that there was no such relevant intention, because carrying it out was simply not feasible whatever the tenant's wishes in that respect. The tribunal was correct when it distinguished, as it did, between the concepts of 'desire' and 'intention'.

Summary

34. For the above reasons, in my view, no error of law is demonstrated and therefore the tribunal's decision stands. The tribunal did not apply any wrong legal test and sufficiently explained why it took the view of the evidence it did, which assessment was reasonable.

(Signed)
L T PARKER
Commissioner
Date: 15 February 2006