Meaning of 'hospital or similar institution'. Comprehensive review of authorities.

THE SOCIAL SECURITY COMMISSIO

Commissioner's Case No: CDLA/3578/19

SOCIAL SECURITY CONTRIBUTIONS AND BENE

SOCIAL SECURITY ADMINISTRATION AC

SOCIAL SECURITY ACT 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON

DECISION OF THE SOCIAL SECURITY COMM

MR COMMISSIONER JACOBS

Decision:

1. My decision is as follows. It is given under section 14(8)(a)(ii) of the Social Security Act 1998.

1.1 The decision of the Southampton Social Security Appeal Tribunal held on 22nd April 1998 is erroneous in point of law: see paragraph 20.

1.2 Accordingly, I set it aside and, as it is expedient, I make findings of fact and give the decision which is appropriate in the light of them.

1.3 I find as facts the evidence recorded in paragraph 19.

1.4 My decision is:

> Suspension of payment of the claimant's entitlement to the mobility component of Disability Living Allowance at the higher rate is not authorised by regulation 12A to 12C of the Social Security (Disability Living Allowance) Regulations 1991. She must be paid at that rate from and including 31st July 1996. The Secretary of State must pay arrears owing as a result of the suspension.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the Social Security Appeal Tribunal brought by the adjudication officer with my leave. When the Social Security Act 1998 came into force in respect of Disability Living Allowance, the Secretary of State replaced the adjudication officer as a party to the proceedings on this appeal. For convenience, I refer throughout to the adjudication officer rather than the Secretary of State.

3. I directed an oral hearing of this appeal. It was held in London on 27th June 2000. The claimant did not attend. However, her parents were present and she was represented by Mr S Toll, a specialist support officer from the National Association of CABx, and Ms A Whiteland-Smith, from the local CAB, who represented the claimant before the tribunal. The adjudication officer was represented by Miss A Main-Thompson of the Office of the Solicitor to the Departments of Health and Social Security. I am grateful to the claimant's parents for the evidence they gave and the points they made during the discussion. I am grateful to the representatives for their clear and concise arguments. They all asked me, if I held that the tribunal's decision was erroneous in law, to give my own decision and not to remit the case for a rehearing.

The decisions of the adjudication officer and the tribunal

4. This case concerns payment of the mobility component at the higher rate element of the claimant's award of a Disability Living Allowance. Her 'entitlement' to that element is not in doubt. But an adjudication officer terminated payment and substituted payment at the lower rate for the mobility component. The claimant appealed against this decision to a Social Security Appeal Tribunal. The tribunal allowed the appeal.

The legislation

5. The authority relied on by the adjudication officer was regula Social Security (Disability Living Allowance) Regulations 1991, v Regulations with effect from 31st July 1996.

6. The key regulation in this case is regulation 12A. The relevan

> '(1) Subject to regulation 12B (exemption), it shall be a co a disability living allowance which is attributable to enti component for any period in respect of any person that dur maintained free of charge while undergoing medical or ot patient-
>
> (a) in a hospital or similar institution under the NHS Act 1978 or the NHS Act of 1990;
>
> ...
>
> (2) For the purposes of paragraph (1)(a) a person shall being maintained free of charge in a hospital or similar insti when his accommodation and services are provided under se of 1977, section 58 of, or paragraph 14 of Schedule 7A to, t paragraph 14 of Schedule 2 to the NHS Act of 1990.'

Regulation 12B contains exemptions from regulation 12A. Regulat adjustment to the amount paid in the case of some exemptions. In v not necessary to consider those regulations.

7. There is provision in the same terms as regulation 12A in regu the care component, and in regulation 2(2) of the Social Securit Regulations 1975.

8. These provisions have to be interpreted in the light of the defi 'illness' in section 128(1) of the National Health Service Act 1977. Court of Appeal in White v. Chief Adjudication Officer and the Secr Security on 21st July 1993 and Botchett v. Chief Adjudication Officer

9. The definitions are:

> 'hospital means-
>
> (a) any institution for the reception and treatment of persor
>
> (b) any maternity home;
>
> (c) any institution for the reception and treatment of perso or persons requiring medical rehabilitation,

and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution, and "hospital accommodation" shall be construed accordingly'.

'illness includes mental disorder within the meaning of the Mental Health Act 1983 and any injury or disability requiring medical or dental treatment or nursing'.

'disabled persons' means persons who are blind, deaf or dumb or who suffer from mental disorder of any description and other persons who are substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed'.

10. The definition of 'illness' has been read into the definition of 'hospital' since at least the decision of the Court of Appeal in Minister of Health v. Royal Midland Counties Home for Incurables, Leamington Spa, General Committee [1954] 1 All England Law Reports 1013. The result is that the accommodation in which the claimant lives will be a hospital if it is an 'institution for the reception and treatment of persons suffering from' a 'disability requiring ... nursing'. Also, she will be undergoing 'treatment' if she receives 'nursing' care

Who has the burden of proof?

11. The claimant has been awarded a Disability Living Allowance containing the mobility component at the higher rate. Her entitlement to that award was not questioned and, on the evidence before me, cannot be in doubt. The authority relied on by the adjudication officer permits suspension of payment. In those circumstances, I put to Miss Main-Thompson that the burden was on the adjudication officer to show that the conditions for suspension of payment were satisfied. She agreed. So, the burden was on the adjudication officer.

12. The adjudication officer had to prove that each element of regulation 12A was satisfied. If that burden was not discharged on any one of those elements, payment could not be suspended.

Language and labels

13. Nowadays there are a variety of terms used to describe the relationship between the provider and recipient of a service. A recipient of health care continues to be called a patient. A recipient of residential care is called a resident. A recipient of social services is now called a client. And a claimant for social security, at least below appeal level, is now called a customer. This is more than just political correctness. It is an attempt to find a proper characterisation of the relationship in order to emphasise its nature, bring about a change in the culture of an organisation or service, or to differentiate it from other types of provision.

14. Those within a particular profession naturally use the terminology with which they are familiar. It would be wrong to attach too much significance to their use of language. Sometimes the appropriate category in which falls a service or a recipient of that service is relevant in legislation. In that case, the use of a particular label appropriate to one category may be relevant, but it cannot be decisive. Argument from labels rather than substance is not

question is: does the claimant come within the meaning of the that has to be applied?

is evidence from a Healthcare NHS Trust that refers to the claimant who receives 'hospital care'. There is also evidence from a nurse that pendent on nursing care'. I have taken those statements into account. account that the authors have used the language to which they are those labels is not decisive of any question I have decided. I have ut, when set alongside evidence that is directly about the substance claimant's care, they carry little weight.

uishable from regulation 8?

t regulation 12A should be interpreted in the context of mobility. sion of payment for the care component while accommodation and public funds was sensible in order to prevent double payment. ted with mobility was not met from other public funds and still had of Disability Living Allowance. In those circumstances, he argued ch deals with the mobility component, should be interpreted 8, which deals with the care component.

l to this extent. There is a difference between care and mobility in modation covers the costs of care but not of mobility. It would, levelop a policy that treated the care and mobility components regulations are subject to detailed exemptions which take account particularly relevant to care or mobility. Given those detailed surprising if the identical terms used in the regulations contained es that were not spelt out. To accept Mr Toll's argument in full ve structure of rules and exemptions for payment of the two Living Allowance. I can see no justification for interpreting the tions 8 and 12A differently.

mant's parents

n the claimant's parents in response to my questions. Miss Main- ons of them. I have no reason to doubt any of the evidence they did not suggest otherwise.

given by the claimant's parents. I accept it and find it as fact.

where the claimant lives consists of a unit made up of three ouses five residents. Each resident has a bed-sitting room and g has a shared lounge, kitchen and dining room. There is no cility. Any treatment is carried out in the claimant's bed-sitting eas that are for the common use of all 15 residents.

t up, each resident was given a lump ~~sum~~ dowry to buy furniture. They nd paint colours. Replacements for furniture have to be paid for

by the residents. If they cannot afford it, they can apply for funds to the NHS Trust. There is no social services funding.

19.3 Each wing is now called a bungalow and has a separate name. Each has its own minibus for transport.

19.4 There is usually a nurse covering the unit during the day and one is on call at night. The nurse has a mental illness qualification. A GP is on call from a local surgery. The claimant receives 20 minutes of physiotherapy free of charge each week.

19.5 The care of the claimant is otherwise in the hands of care assistants - a maximum of three in each wing. They have to tend to most, if not all, of her bodily functions. The claimant takes Gaviscon for her hiatus hernia (one spoonful before each meal), a natural laxative, vitamin drops and a painkiller for her period pains.

19.6 The residents have a say in their meals and are able to participate in shopping for food if possible. Other shopping is their responsibility, with the necessary help.

19.7 Care in the unit is free of charge, as are meals. There is no rent for the accommodation. Laundry, clothing, bedding and toiletries are the residents' own responsibility. They have to pay for transport, holidays and outings. The out-of-pocket expenses of a care assistant who accompanies them have to be met by the resident.

19.8 On two days a week the claimant attends a Day Centre for half a day. She also regularly goes out with her parents during their visits.

The error of law and my disposal of the issues

20. The tribunal allowed the claimant's appeal. That was the correct decision to reach. The reason given by the tribunal was that the claimant did not live in a hospital or similar institution and not undergoing medical or other treatment. I agree with that conclusion. However, the tribunal did not deal in detail with the legislation or issues. That is not surprising, given their complexity. I have used that lack of detail as an error of law. That has allowed me to give my own decision on the basis of my own findings of fact. That has the advantage that I have been able to deal with the case in a way that leaves it less susceptible to supersession on the basis of further evidence than the tribunal's approach. That will bring greater certainty to the claimant's finances. Of the issues that arise in this case, I am pleased to have been able to avoid dealing with one of them. Others I have decided against the adjudication officer, because the officer did not discharge the burden of proof. One issue I have decided conclusively in the claimant's favour without reference to the burden of proof. There is only issue that I have decided conclusively against the claimant.

The issue which I am pleased to avoid

21. Regulation 12A only applies for any period during which the conditions are satisfied. In this case, the claimant is free to come and go as she wishes. This is subject only to transport or an escort being available. She spends half a day at a Day Centre twice a week. She may go out with her parents in the afternoon or on other occasions. This raises the issue of how those

days should be treated when the claimant is away from the accommodation. Must the claimant be an in-patient for the whole of a day if it is to qualify as a day for suspension of payment? Commissioners have not spoken with one voice on this issue. Their decisions are set out in the general note to regulation 2(2) of the Hospital In-Patients Regulations in Non-Means Tested Benefits: The Legislation 1999 by David Bonner and others (pages 591 to 593). Fortunately, it is not necessary for me to decide which line of authority is correct.

22. If for any reason my decision were revisited, this issue would have to be investigated and a choice made between the conflicting decisions of the Commissioners before regulation 12A could apply to the claimant.

Issues on which the adjudication officer did not discharge the burden of proof

Hospital or similar institution

22. What is the accommodation that the adjudication officer regarded as constituting the institution where the claimant lives? It obviously does not consist of her private rooms, as she shares other rooms with the other four residents in her wing. So, it must consist at least of her wing. This would be consistent with the provision of care staff, the provision of the mini-bus and the day-to-day organisation of the lives of the residents. Another possibility is that the institution comprises the whole of the unit. There is some support for that in the provision of a nurse to cover all the wings and in the fact that the provider of the accommodation obviously treats them as a whole. I acknowledge that each wing is now separately named, but that is more a matter of form than substance. I deal with the case on the basis that the institution consists of all three wings.

23. My impression on the limited information I have been given is that the claimant's accommodation is an institution but not one that is, or is similar to, a hospital.

24. *Institution* This is a broad and vague word. It carries for some people unfortunate connotations of workhouses and strict authoritarian regimes. In this legislation, it has to be interpreted without any of those connotations. I respectfully agree with the Commissioner in CDLA/7980/1995, paragraph 9 that the words 'hospital or similar institution'

> 'connote some sort of formal body or structure which controls all aspects of the treatment or care that is provided including the premises in which that treatment or care is carried out. They mean more than just a building in which care a [sic] treatment takes place.'

My impression is that, although the claimant's accommodation is organised on a relatively informal basis that takes account of, and responds to, the wishes of the residents, it is properly described as an institution.

25. *Hospital or similar* The nature of the institution can only be determined by looking at the facilities provided in the institution as a whole. I have detailed evidence about the facilities provided for the claimant and, to some extent, about the facilities provided to the other four residents in her wing. However, the evidence about the facilities in the institution as a whole is sparse. In order to justify suspension of payment the adjudication officer should have

gathered evidence about the institution that was more specific and detailed than the evidence in the file.

26. I take account of the fact that hospitals have a varying range of facilities depending on the needs of their patients and that someone with the claimant's disabilities would not need the full range of facilities that would be found in a hospital providing general or acute care. However, on the evidence, my impression is that the claimant's accommodation would be more properly described as a residential care facility than as a hospital or anything similar to a hospital.

27. I notice that in CDLA/2496/1997 the Commissioner found no error in a tribunal's decision that accommodation was not similar to a hospital. The tribunal found that the role of the staff was to supervise the lifestyle of the residents. The arrangements were in many respects similar to those in the case before me, although there are differences. I do not rely on this decision as an authority, as it is wrong to proceed by way of comparison of the facts of cases. However, the decision gives me confidence that my analysis of the evidence in this case is correct.

Under a relevant statute

28. The claimant must be undergoing medical or other treatment under one of the statutes listed in regulation 12A(1)(a).

29. There was limited evidence on this.

29.1 At page 72, there is a reply by the claimant's mother to questions about the accommodation. Asked whether the accommodation had any NHS funding, she answered 'Yes but this would be from a separate budget as this bungalow was tendered for'.

29.2 There is also evidence from the NHS Trust and Health Authority. At page 90, there is a report of a telephone call in which an unidentified person is recorded as saying that the accommodation 'receive NHS funding'. At page 92, there is a letter from the Trust's Associate General Manager who writes that funding is received from the NHS. However, at page 95 there is a letter from the Quality Manager of the Health Authority who writes:

> 'I believe there are several parts of different NHS acts [sic] providing the authority for us to commission the service. I am unable to give you more detail than this although you may want to ask for legal advice on this.'

30. Miss Main-Thompson argued that I should presume that the funding was properly authorised and that the authority lay in one of the statutes specified in regulation 12A(1)(a). I cannot do that. It may be possible in some circumstances to make those assumptions, but this case is not one of them. The evidence shows that the providers of the service are sure that there must be an authority but cannot identify it. The letter from the Quality Manager in effect tells the adjudication officer to find out for herself. I cannot presume that things were done

properly when those who speak for the organisations admit that they do not know the basis of their authority.

31. Ironically, there is evidence in support of the adjudication officer's decision from the claimant's mother. I do not intend to be rude to her when I say that it is obviously not appropriate to attach much weight to her evidence on the statutory basis for the funding of the claimant's accommodation, especially when the providers of the service plainly do not know themselves.

32. Commissioners and tribunal exercise an inquisitorial jurisdiction. However, there are limits to what is expected of them. Carrying out research to identify the possible statutory basis under which public bodies may have acted is beyond those limits.

Conclusion

33. My conclusion on each of these issues is decisive of the appeal in the claimant's favour. However, they rest to a large extent on the lack of evidence or information available to the adjudication officer. If I were to base my decision on these grounds alone, the Secretary of State might obtain the details that are lacking and again suspend payment on the new evidence. As I am satisfied that the claimant must win on another issue regardless of the burden of proof, I base my decision on that ground also.

The issues which I decide without reference to the burden of proof

Undergoing medical or other treatment

34. I am satisfied beyond any reasonable doubt that the claimant is not 'undergoing medical or other treatment'. That conclusion alone is sufficient to prevent the suspension of payment of the mobility component at the higher rate.

35. Whether a claimant is undergoing medical or other treatment must be determined by reference to the service that the claimant actually receives. It is not relevant that other services, including treatment, would be available to her if she needed them. The nature of the services that are available is relevant to the issue whether the claimant's lives in a 'hospital or similar institution', but she cannot be undergoing a treatment unless it is actually provided to her.

36. I now consider the decisions of the courts and Commissioners. I have considered them as a source for principles, not as a basis for comparison on the facts.

Home for Incurables

37. The meaning of treatment and nursing was considered by the Court of Appeal in the Home for Incurables case. The issue was whether the Home was a 'hospital' which vested in the Minister of Health under the National Health Service Act 1946. An arbitrator decided that it did not. All three judges agreed on the interpretation of the legislation and, by a majority, the Court held that the Home was a hospital. Lord Justice Denning disagreed on the analysis

of the arbitrator's award and on the application of the legislation as interpreted to the facts found in that award.

38. The case was concerned with the nature of the institution. The court considered the nature of the services provided to residents of the Home. However, it was not concerned with the services provided to any particular resident of the Home. The judgments must be read in that context.

39. The Home was set up to look after those with incurable, although not necessarily terminal, diseases. Admission was limited to those who required 'medical supervision and nursing'. The Home was staffed by nursing and domestic staff, with visiting medical staff. Some residents received 'attention' designed to relieve the symptoms, or arrest the progress, of their incurable disease. 'Attention' was also given to all residents for complaints that anyone might have, like 'flu.

40. The Master of the Rolls, Sir Raymond Evershed, said (at pages 1016 and 1017):

> 'In my judgment, "treatment" in the definition of "hospital" includes not only medical treatment ... in the sense that the patient or subject is looked after and attended to by a doctor, but also nursing in the sense that the subject or patient is looked after and attended to by persons professionally trained to look after and attend to the sick.'
>
> '[F]rom other sections of the Act a distinction may be discerned between "treatment" and mere "care" (which I assume to comprehend "looking after" by persons not professionally trained for the purpose) ....'

41. Lord Justice Denning said (at page 1020):

> 'Where is the line, then, to be drawn in this regard between "treatment" and "care"? Neither is defined in the Act, but "treatment" means, I think, the exercise of professional skill to remedy the disease or disability, or to lessen its ill effects or the pain and suffering which it occasions; whereas "care" is the homely art of making people comfortable and providing for their well-being so far as their condition allows. "Nursing", too, is not defined, but it covers, I think, both treatment and care. Some part of it, indeed an important part, is the exercise of professional skill, but a goodly part, perhaps the larger part, is just kindness and attention.'

42. Lord Justice Romer said (at page 1023):

> 'It is true that "nursing" means more than the mere "care" of persons suffering from illness ... and, presumably, refers to nursing of a professional character ....'

43. I derive the following from this case. (i) As the Court was concerned with the nature of the institution, it was concerned with the services provided or available to residents. It was sufficient for the decision that nursing was provided as a general service, regardless of whether any particular resident received that service at a particular time. Certainly, they all potentially required some nursing, as this was a condition of admission. (ii) However, the case does provide guidance on the meaning of 'nursing'. (iii) All three judges referred to nursing as

being professional. Inherent in this is the attainment of specialist skill through training. This is a point expressly made in some of the passages I have quoted. (iv) There may be an overlap between nursing and care. Nurses may provide both care and nursing. However, although care can be provided by someone who is not professionally trained, nursing cannot. (v) There is nothing in this case to suggest that care amounts to nursing if it is given by someone other than a nurse.

White

44. The White case concerned entitlement to Income Support by claimants who were moved from a hospital to accommodation that was registered as both a residential care home and a nursing home. The Court of Appeal held that the accommodation was a 'hospital or similar institution' under the Hospital In-Patients Regulations. The only judgment was given by Lord Justice Ralph Gibson.

45. The Court held that it was wrong to determine the nature of an institution by comparing the new accommodation with some other accommodation. The issue had to be addressed directly and not by comparison: was the accommodation within the meaning of 'hospital or similar institution'? See pages 23 and 23 of the transcript; pages 171 and 172 of the papers.

46. Lord Justice Ralph Gibson said (at pages 24 and 25 of the transcript; pages 173 and 174 of the papers):

> 'The proportion of professional nurses to unqualified staff and the need for resident doctors in an institution are matters which must normally be determined by the requirements of the patients, having regard to the illnesses or disabilities for which treatment and nursing are required. Nor do I accept that the question whether an institution is a "hospital" ... is to be decided by reference to whether the dominant purpose is medical treatment, or whether the majority of the services provided to the patient is medical treatment. I acknowledge that if the provision of nursing by professionally trained nurses in an institution is minimal, as for example only rarely expected to be required, such an institution may not be a hospital.'

47. I derive the following from this case. (i) As with the Home for Incurables case, the issue was the nature of the accommodation. (ii) However, the case is authority that the legislation must be applied directly to the facts of the case. It was not proper to proceed by comparing a claimant's present accommodation with the accommodation previously occupied or some other accommodation. (iii) As in the Home for Incurables case, nursing is equated with professionalism and training. (iv) It may be permissible to disregard minimal nursing provision when determining the nature of an institution. (v) So, it may also be permissible to disregard it when determining if a particular claimant is undergoing treatment.

Botchett

48. The Botchett case also concerned entitlement to Income Support by claimants whose nursing home was transferred from a Health Authority to a Trust. Miss Main-Thompson based her argument on this decision. The Court of Appeal held that (i) the claimants were patients

(ii) who were undergoing treatment (iii) in a 'hospital or similar institution' under the Hospital In-Patients Regulations. The only judgment was given by Lord Justice Evans.

49. The Court held that it was dangerous to determine these issues by comparing the facts of the case with the facts in the White case. The issues were better addressed directly on the facts of the case and not by comparison with the facts in other cases. See page 6 of the transcript; page 142 of the papers.

50. Lord Justice Evans dealt with the claimant's receipt of treatment (specifically nursing) and the nature of the institution in this passage (at pages 8 and 9 of the transcript; pages 144 and 145 of the papers):

> 'If the social security regulations stood alone, I would be inclined to accept Mr Havers' submission that a distinction should be made between mental illness for which professional treatment is made available in a hospital or other institution, on the one hand, and various forms of mental handicap for which skilled but domestic care, but not medical treatment, is required and which is made available in a residential home, on the other hand. But the Regulations have to be construed with reference to the statutory definitions of "hospital", "illness" and "mental disorder" already quoted, and these lead inexorably, in my judgment, to the conclusions that persons suffering from the degree of mental handicap to which unfortunately the appellant is subject are within the definition of mental disorder; that the care and assistance which they derive from nursing as opposed to domestic staff must be regarded as "medical or other treatment" within the statutory definition; and that the home where they reside so that this can be made available to them is a "similar institution" to a hospital ....'

51. The evidence about the services provided to the claimant in that case is sparse. However, the quotation again distinguishes between care that is provided by nursing staff and care that is provided by domestic staff.

Wallbridge v. Dorset County Council

52. After the oral hearing, I found the decision of Mr Justice Lloyd-Jacob in Wallbridge v. Dorset County Council[1954] 2 All England Law Reports 201. The case concerned the public duty of a local authority over certain arrangements for child care, specifically the 'nursing and maintenance of a child under the age of nine years'. This passage from the judgment at page 203 is relevant:

> 'It is, I think, plain that, in relation to children of five and under, nursing and maintenance can fairly be regarded as equivalents, the maintenance of the child being conducted in the manner known to and sometimes performed by the child's nurse or "nanny". This would mean that nursing ... would not be synonymous with sick nursing. ... [I]t may well be that in the higher age range the importance attached to nursing - in the sense of mothering - may be thought to have diminished and that the child might be expected to develop sufficient self-reliance to be able to dispense with it, at any rate, when in health. In my judgment, the word "nursing" in the phrase "nursing and maintenance" ... is not limited to sick nursing, although it includes it, and means doing whatever is necessary to make the maintenance effective.'

53. At first sight, two aspects of this decision appear to support the adjudication officer rather than the claimant. First, the judge did not refer to professional care or to training to give the care. That is not surprising as he was concerned with public health legislation which was designed to protect children and applied to any 'person' who undertook for reward the nursing or maintenance of young children. Second, it could be argued that the nature and amount of care that the claimant requires is very similar to that of a child, so that any maintenance of her is equivalent to nursing. On closer consideration, however, the interpretation of 'nursing' was influenced by its context, leading the judge to equate it with 'mothering'. I do not consider this case relevant to the interpretation of regulation 12A.

CP/3/1989

54. This was one of a series of five cases covered by a Common Appendix, all of which involved the Hospital In-Patient Regulations. The accommodation involved was a home for former long-stay patients which was intended to provide and maintain 'a quality of care and a warm supportive atmosphere in which relationships can be established and maintained with individuals' (paragraph 7). Its staff included qualified psychiatric nurses. It provided rehabilitation that was social rather than medical (paragraph 14). The Commissioner decided that 'undergoing medical or other treatment' had to be interpreted widely and not restrictively (paragraph 16, citing R(P) 1/67, paragraph 14). Despite this wide interpretation and the presence of nurses, the Commissioner concluded that the claimant was not undergoing medical or other treatment. He also decided that the home was not a hospital or similar institution.

55. It is fair to record that the Commissioner was less confident about the treatment issue than about the nature of the institution. However, it is an authority for two propositions. (i) 'Undergoing medical or other treatment' must be interpreted broadly. This is in line with the approach taken by the Court of Appeal in the cases I have cited. (ii) It is possible for a claimant not to be undergoing medical or other treatment despite the presence of nursing staff.

CIS/371/1990

56. This decision was made under the Hospital In-Patient Regulations. The Commissioner found that (paragraph 7):

> 'I am satisfied that the main purpose of [the claimant's accommodation] was to provide care for the patients, but that such care was provided by nursing staff who were professionally trained to look after and attend the mentally sick. It seems to me that such nursing is similar to that provided in a hospital for the mentally ill.'

57. He held that the claimant was undergoing medical or other treatment (paragraph 10):

> 'I am satisfied on the evidence before me that the claimant was undergoing treatment ... He, in common with the other patients, was looked after and attended to by nurses trained in psychiatry. Where such nursing is provided for the mentally ill then it seems to me all the more so to be treatment, treatment as envisaged by the regulation.'

58. Again there is an emphasis on the fact that the care was provided by professionally trained nursing staff.

Conclusion on treatment

59. I decide this issue in favour of the claimant. My reason are these.

60. The claimant receives no regular attention from a doctor. A GP is available on call, but there is no evidence that he is needed more than occasionally by the claimant. The only medical treatment that she has is sporadic, as particular illnesses require.

61. There is usually a nurse present during the day, covering all three wings. One is available on call at night. The nurse has qualifications in mental illness, which is a specialism for which the claimant has no need, as she has learning disabilities. However, no doubt the nurse also has a general expertise in basic nursing skills.

62. The claimant takes some medication. She has a spoonful of Gaviscon before each meal for her hiatus hernia. She also has vitamin drops. She takes a ghastly concoction as a natural laxative, which has eliminated the need for enemas. Finally, during her periods she takes Paracetamol for pains. All of those are available without prescription, although no doubt a doctor or nurse originally suggested that they be taken. I doubt whether any of them is administered by a qualified nurse. Certainly they do not have to be. Even if they are, the time involved would be a minute or two each day.

63. The claimant also receives 20 minutes of physiotherapy a week. That may be provided by an outside specialist who visits to administer it. However, it may be possible that it could be given by the nurse at the unit.

64. I will assume for argument's sake that a qualified nurse gives all the claimant's medication each day and administers the physiotherapy every week. I will also assume that the claimant needs occasional treatment and dressings for bed sores and the like, as well as attention for conditions such as 'flu. Even taking all those into account, the amount of nursing is properly described as minimal and insufficient to qualify as treatment.

65. Apart from her family, the bulk of attention provided for the claimant is given by the care assistants. The claimant's mother commented on their training. It may well be true that only minimal training is required in order to work as a care assistant. However, there are many training courses available for aspects of care. So, it is possible for care assistants to undergo training and gain qualifications. They also inevitably build up considerable practical experience. No doubt, they have basic first aid skills. So, it is wrong to characterise all care assistants as well-meaning untrained amateurs. They provide a skilled and valuable service which the claimant has to have in order to survive. However, they are not trained as nurses, regulated as nurses or called nurses. What they provide is care rather than nursing.

66. Miss Main-Thompson referred to the extent of the claimant's disabilities and emphasised the amount of care that the claimant receives. She argued that all the attention given to the claimant was essential to maintain her health and to nurture her mental faculties. She described the environment as therapeutic. I agree. But that does not make what the

claimant receives nursing. 'Treatment' must be interpreted widely to take account of all forms of treatment encompassed by the definitions in the National Health Service Act. It certainly includes 'nursing' and 'nursing' includes care given by a nurse. However, the Court of Appeal and the Commissioners have drawn a distinction between nurses and other providers of care. Care provided by someone who is not a nurse is not nursing and is not, therefore, treatment.

67. I have made a number of assumptions about the amount and nature of nursing care given to the claimant. I have also made a number of assumptions about the training, experience and skills of the care assistants. All those assumptions are favourable to the adjudication officer. However, even when all those assumptions are added to the evidence, I am satisfied beyond doubt that what the claimant receives is not 'treatment' within the meaning of the regulation 12A.

Maintained free of charge

68. This issue is covered by regulation 12A(2). It provides an exhaustive definition of when a claimant is being maintained free of charge. In plain English, a claimant is maintained free of charge unless she receives her accommodation or services as a paying, private patient under specific provisions. I accept the evidence from the claimant's parents that there are things for which she has to pay. However, that does not affect regulation 12A(2). The claimant is being maintained 'free of charge' as that expression is defined in regulation 12A.

69. This issue must be decided against the claimant.

Conclusion

70. I told Miss Main-Thompson that I was not persuaded by the adjudication officer's written submission to the Commissioner. I gave her a rather hard time over the nature of the attention received by the claimant. At the end of the hearing, I warned the claimant's parents not to assume from that that the claimant would win. However, the more I have looked at the authorities and the evidence since the hearing, the weaker the adjudication officer's case has appeared on almost all the issues that arise. The adjudication officer did not assemble the necessary evidence about either the claimant's circumstances or the nature of her accommodation. That meant that the whole range of relevant issues was not identified and that the suspension of payment was imposed without a proper grounding in fact. It was not until the case reached the tribunal that a proper investigation of the facts began. I do not mean this as a criticism of the adjudication officer or of Miss Main-Thompson. The issues are complex and may not have been within the regular experience of the adjudication officer. Although it is easy to be wise after the event, too much reliance was placed on weak and inclusive evidence from the providers of the claimant's accommodation and care. If there is a moral to be learned from this case, it is that a suspension of payment under regulation 12A can only be made on the basis of a thorough investigation of the facts relevant to all the issues that arise.

Signed on original

Edward Jacobs
Commissioner
30th June 2000