BULLETIN 181
[START]

CH/296/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Coventry appeal tribunal dated 18 September 2002 is erroneous in point of law, for the reasons given below, and I set it aside. The case is referred to a differently constituted appeal tribunal for determination in accordance with the directions given in paragraph 41 below (Child Support, Pensions and Social Security Act 2000, Schedule 7, paragraph 8(5)(c)).

The background

2. The decision said to be under appeal was that made by the local authority on 27 July 2001 and notified to the claimant in a letter of that date. The letter said that the claimant's housing benefit entitlement had "been stopped from 07/05/01 due to as per investigations" and that if she had been overpaid benefit she would be contacted separately. Further letters of explanation dated 24 August 2001 and 28 September 2001 stated that it had been decided that the claimant's tenancy was not of a commercial nature. The claimant's letter dated 8 August 2001 has been accepted as the relevant appeal. In a letter dated 25 March 2002 the local authority notified the claimant of a recoverable overpayment of £660 for the period from 7 May 2001 to 22 July 2001, which was to be recovered from her. So far as I can see, no appeal has ever been made against this decision, but the appeal tribunal seems to have assumed that the issue of recoverability was before it.

3. The claim for housing benefit was made on a form signed on 7 May 2001. Only a few pages of the claim form are copied in the papers, but on it the claimant said that her tenancy, from Mr S H her brother-in-law, had begun on 15 February 2001, although she has moved into the premises in 1999. She said that she was receiving income support and entered the name of her husband, Mr I H, in the space for details of her partner. A copy of the tenancy agreement was received, it seems with the claim form. The agreement was for a shorthold tenancy at a weekly rent of £110 from 15 February 2001 to 14 February 2002 and was dated 15 February 2001. The tenant was described as the claimant (with husband + child). Clause 2 stated that a deposit of £200 had been paid. In clause 3 the claimant agreed, amongst other things, to pay the rent. Paragraph (f) was as follows:

> "(f) Due to low rent agreed, if the tenant fails to receive the full amount from the housing benefit department, or fail to pay themselves, they are therefore given a four weeks notice to find alternative accommodation."

4. On 1 June 2001 an award of housing benefit of £60 per week was made. A payment of £540 for the period from 7 May 2001 to 8 July 2001 was made on 4 July 2001 and a further payment of £120 for the period from 9 July to 22 July 2001 was made on 18 July 2001.

5. On 27 July 2001 the claimant was interviewed by an officer of the local authority. Among the information given was that the claimant's husband had gone to Pakistan in February 2001 and she did not know when he would return. When she and her husband moved into the

house he had told her that he owned it and they paid no rent, but after he went to Pakistan Mr S H told her that she would have to start paying rent. She now knew that Mr S H was the owner. She paid him £240 a month; she did not make up the difference between housing benefit and the £110 stated in the agreement. She did not have a rent book and did not receive any form of receipt. It was following that interview that the decision of 27 July 2001 was made.

6. The local authority's written submission to the appeal tribunal described the issue for decision as whether or not housing benefit was payable to the claimant. It supported the decision against entitlement on the ground that the tenancy was not an a commercial basis and set out regulation 7(1)(a) of the Housing Benefit (General) Regulations 1987. It was submitted that it was doubtful that Mr S H would take any action to evict his sister-in-law and that the tenancy agreement contained no provision for non-payment of rent. It was also said that the lack of any evidence of payment had been a large factor in the local authority's decision and suggested that the arrangement had been contrived to take advantage of the housing benefit scheme. However, there was no reference to regulation 7(1)(l) of the Housing Benefit Regulations. The submission mentioned that the overpayment recoverability decision had been made.

7. The claimant attended the hearing on 18 September 2002 with a representative from Coventry Law Centre. She gave evidence through an interpreter. Mr S H attended and gave evidence. His evidence was that he had provided the money for the purchase of the property, which was put into Mr I H's name to make it easier for him to bring the claimant (whom he was about to marry) over to this country. When Mr I H said in January 2001 that he was going to Pakistan, the property was transferred back to the name of Mr S H. He said that he would take steps to get the claimant out of the property if she did not pay the rent, even though she said that she would pay when her husband returned. In addition to what she had said in her statement, the claimant said that she had signed the tenancy agreement in March or April 2001 and had not paid any deposit. She had been surprised when Mr S H asked her about rent, as she had thought that her husband was the owner and was not aware of any rent having been paid before. But when Mr S H showed her proof of ownership she accepted it. She did not contact her husband because she did not know where he was. The claimant's representative argued that Mr S H had always been the beneficial owner of the property, that there was a liability for rent and it was a commercial agreement. The local authority's representative argued that the agreement was not commercial and was contrived, also mentioning regulation 7(1)(h) of the Housing Benefit Regulations.

The appeal tribunal's decision

8. The appeal tribunal disallowed the appeal. In the decision notice it was stated that the claimant was not entitled to housing benefit from 7 May 2001 because "the tenancy is not commercial, the property was owned by her partner within 5 years and in the alternative the tenancy was created to take advantage of the housing benefit scheme". The overpayment of £660 was recoverable from the claimant.

9. In the statement of reasons, the appeal tribunal accepted that the property was vested in the name of Mr I H before being transferred to Mr S H in January 2001 immediately before he

left for Pakistan, "in circumstances which would suggest that he has left his wife". But it was not accepted that the money for the original purchase had been provided by Mr S H (as the arrangement described would have been an attempt to interfere with immigration requirements and anyway would not have needed to continue after the claimant's arrival in the United Kingdom in 1998). The provisions of regulation 7(1)(h) of the Housing Benefit Regulations (no liability where claimant or partner previously, within five years, owned the relevant dwelling, except where claimant or partner could not have continued to occupy the dwelling without relinquishing ownership) were found to apply. It was also found that the tenancy was not commercial and was contrived. The reasons given for that conclusion were as follows:

> "I am satisfied that no deposit was paid which would certainly be the normal case in a tenancy agreement and if it were waived in respect of a relative there would have been no point in putting the clause in the agreement in any event. I further find that the reference to Housing Benefit in the tenancy agreement would appear to be somewhat unusual as the landlord would be able to rely on his or her rights to commence possession proceedings upon non-payment of rent without the need to incorporate any reference to Housing Benefit. The date of the agreement is not the date on which it was signed. Whilst the term may begin earlier than the date of signature, I consider this is another example of attempting to take advantage of the Housing Benefit Scheme in trying to make the tenancy agreement appear commercial. I accept that in the Asian culture there is a concept of family owned property and I am satisfied that in this case that for the purpose of Housing Benefit the property was in the name of [Mr I H] and that he held the beneficial interest in that property and that the creation of a tenancy agreement is a contrivance to take advantage of the Housing Benefit Scheme. I am satisfied therefore that Regulation 7(1)(a) and (b) are applicable in this instance."

The appeal to the Commissioner

10. The claimant now appeals against the appeal tribunal's decision with my leave. The main grounds put forward were that the reasons given for the conclusion on commerciality were inadequate, had not made clear the test applied and had relied on factors which were irrelevant or inconclusive. When granting leave I added a question mark over the reasons given in relation to regulation 7(1)(h) and (l), and also whether there was a ground on which the appeal tribunal's decision could be supported even if there were inadequacies on other grounds. The local authority, in its written submission dated 28 April 2003, did not support the appeal.

11. Both parties requested an oral hearing, which was granted. The claimant was represented by Mr Mark Hemingway of Coventry Law Centre. The local authority was represented by Mr David Walden-Smith of counsel, instructed by the solicitor to Coventry City Council. I am grateful to both representatives for helpful and well-focused submissions. There had to be further written submissions on a number of issues arising at the hearing, including a submission on behalf of the Secretary of State, who, following an invitation, became a party to the proceedings.

Revision of pre-July 2001 "decisions"

12. I start with the issue which caused me to invite the Secretary of State to become a party,

as it is the most far-reaching. In the present case, the award of housing benefit to the claimant was made on 1 June 2001, while what I shall call the old system of housing benefit adjudication was still in operation. On 2 July 2001, Schedule 7 to the Child Support, Pensions and Social Security Act 2000 ("the 2000 Act") came into force (Child Support, Pensions and Social Security Act 2000 (Commencement No 8) Order 2001). Paragraph 3(1) provides:

> "(1) Any relevant decision may be revised or further revised by the relevant authority which made the decision--
> (a) either within the prescribed period or in prescribed cases or circumstances; and
> (b) either on an application made for the purpose by a person affected by the decision or on their own initiative;
> and regulations may prescribe the procedure by which a decision of a relevant authority may be so revised."

By paragraph 1(1) a "relevant authority" means an authority administering housing benefit or council tax benefit and by paragraph 1(2) a "relevant decision" means "a decision of a relevant authority on a claim for housing benefit or council tax benefit" (excluding decisions to revise under paragraph 3) or a decision superseding such a decision. Regulation 4(2) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 includes as a ground of revision (with effect from the date when the original decision took effect) ignorance of or mistake as to a material fact which ignorance or mistake made the decision more favourable to the claimant than otherwise. It also includes official error, as defined in regulation 1(2).

13. So far, so straightforward. The complication arises from the terms used under the old system of adjudication. Under section 34 of the Social Security Act 1998 (which replaced section 63 of the Social Security Administration Act 1992) the local authority to whom a claim for housing benefit was made was to notify the claimant of its determination of the claim. Power was given to make regulations for review and revision of "determinations" relating to housing benefit. Part XI of the Housing Benefit Regulations, as in force down to 1 July 2001, dealt with the determination of questions and uses the word "determination" throughout to describe what is done by a local authority. It was only when a case got to the stage of "further" review by a Review Board (in substance an appeal to that body made up of local authority councillors) that the terminology changed to "decision" (see regulations 82 to 87). The distinction was marked in regulation 79(1) providing for review on specified grounds, which carefully allowed for review of "any determination or decision of a Review Board".

14. The question then arises whether there is from 2 July 2001 onwards power in paragraph 3(1) of Schedule 7 to the 2000 Act to revise determinations made by local authorities made before that date, given the use of the phrase "relevant decision". One would expect to find a simple answer either in the relevant Commencement Order or in transitional regulations, but extraordinarily both are silent on the question. There is nothing relevant in the Commencement Order (No 8). The Housing Benefit and Council Tax Benefit (Decisions and Appeals) (Transitional and Savings) Regulations 2001 do not contain any provision deeming determinations made before 2 July 2001 to be decisions for the purposes of paragraph 3 and

other paragraphs of Schedule 7. Regulation 2 does provide for some representations made by claimant about determinations to be treated as duly made applications for revisions under paragraph 3 or for supersession under paragraph 4, but that is as far as it goes.

15. The difficulties have been set out in the notes to paragraph 1 of Schedule 7 to the 2000 Act and to the Transitional and Savings Regulations in the 2002/2003 edition of CPAG's Housing Benefit and Council Tax Benefit Legislation, which also reveal that in one case in which the issue was raised, neither the judge at first instance nor the Court of Appeal had to decide it. I cannot avoid deciding the issue.

16. In his submission for the claimant dated 5 August 2003, Mr Hemingway submitted that the local authority had no power on 27 July 2001 to revise its determination of 1 June 2001:

> "It is contended on behalf of the appellant that a determination is not a decision for the purposes of the legislation concerned with revision and supersession. The two words are materially different and there is, it is submitted, no authority or no justification for reading the word decision as including a determination. The two concepts, as appeared in previous housing benefit legislation, are materially different. It is submitted that even if the consequences of this was not thought to be the intention of parliament, it should not be the case that Courts or Tribunals interpret the word decision as meaning or covering determination because to do so would, in the circumstances, be akin to legislating."

17. Both Mr Walden-Smith for the local authority, in the submission dated 17 September 2003, and the representative of the Secretary of State, in the submission dated 7 October 2003, took the opposite view. Mr Walden-Smith submitted that the word "decision" in Schedule 7 should be given its ordinary and natural meaning, and that it did not matter that old legislation used the word as a term of art with a more limited meaning or used the word "determination" to avoid confusion. Alternatively, he submitted that regulation 79(1) of the Housing Benefit Regulations as in force before 2 July 2001 should remain in force in relation to determinations made before that date, but I do not think that that alternative submission can stand in the circumstances of the present case with general effect of the Transitional and Savings Regulations. The Secretary of State's representative also submitted that there was no technical significance to be given to the use of the word "determination" in the legislation on the old system of adjudication, other than distinguishing determinations of local authorities from decisions of Review Boards for purposes of review. Since the distinction was no longer necessary under the 2000 Act, the change to "decision" from "determination" was merely a matter of nomenclature, not meaning. Finally, it was submitted that it could not possibly have been intended to leave a hole in the new legislation such that no determinations under the old system of adjudication could be revised or superseded at all unless representations were made within the very limited period allowed by regulation 2 of the Transitional and Savings Regulations. It was also pointed out that, if there were no power to revise or supersede old determinations that could disadvantage claimants as well as advantage them, as for instance by preventing an old and too limited determination from being revised for official error.

18. I find this issue very difficult. It seems to me that it is nowhere near as easy as Mr Walden-Smith and the Secretary of State's representative suggest to ignore the pre-2 July 2001 distinction between determinations and decisions. Once it is accepted that the words "determination" and "decision" marked conclusions on questions by different bodies and marked a distinction that was important in the working of the then current system of adjudication, that effect cannot be ignored. It is doubtful how far I can gain assistance in interpreting the meaning of primary legislation from the terms of secondary legislation. The Transitional and Savings Regulations, being enacted for the specific purpose of dealing with the consequences of the coming into force of Schedule 7 of the 2000 Act, could be of assistance. However, it seems to me that those Regulations contain some indications pointing in opposite directions which in effect cancel each other out. On the one hand, regulation 2 (and regulation 3) uses "determination" in identifying conclusions on claims and questions reached by local authorities before 2 July 2001. On the other, the technique of regulation 2 is simply to deem certain representations about determinations to be duly made applications for revision under paragraph 3 of Schedule 7 or for supersession under paragraph 4. That assumes that a duly made application for revision of a determination can lead to an actual revision and that that circumstance falls within the power in paragraph 3. In addition, regulation 6 provides that where a determination fell to be made by a local authority before 2 July 2001 but is made after that date, then, subject to conditions, "that decision" takes effect from an earlier date than it would otherwise. That might appear to be using the word "decision" as encompassing "determination", but I think that in fact it is doing no more than acknowledging that when a local authority reaches a conclusion on a claim or question on or after 2 July 2001 that is a "decision".

19. Thus, although there is an assumption in the Transitional and Savings Regulations that powers to revise and supersede determinations of local authorities made before 2 July 2001 do exist, the crucial issue is the meaning of "decision" in paragraph 3 of Schedule 7 to the 2000 Act (and in paragraph 4 for supersessions).

20. The primary purpose of Schedule 7 was to set out the new adjudication framework in effect from 2 July 2001. However, the effect on conclusions on claims and questions reached before that date must have been contemplated. It is essential to any system of benefit adjudication that there should be a mechanism to take account of changes in circumstances and of conclusions having been reached on a mistaken or too limited a view of the existing circumstances. Such a mechanism can operate in favour of claimants or against, but in either case reflects a public interest in ensuring that claimants receive no more and no less than the amount (here of housing benefit) to which they are properly entitled. I proceed on the basis that the legislature intended the provisions in and under Schedule 7 to form at least a reasonably workable scheme, not one which would lead to impracticable or absurd results (see paragraph 50 of the Tribunal of Commissioners' decision in CIB/4751/2002, CDLA/4753/2002, CDLA/4939/2002 and CDLA/5141/2002: "the revision/ supersession Tribunal of Commissioners").

21. In the case of decisions of Review Boards made before 2 July 2001, regulation 4(4) of the Transitional and Savings Regulations provides for such decisions to be treated as decisions of appeal tribunals under paragraph 6 of Schedule 7, so as to bring those decisions within the

scope of the power in paragraph 4 to supersede decisions "under this Schedule of an appeal tribunal or a Commissioner". The definition of "relevant decision" in paragraph 1(2) is not expressly restricted to decisions of local authorities under Schedule 7. That is a faint indication, but just, in the overall context, sufficient, that the definition was intended to include housing benefit and council tax benefit "decisions" made by local authorities before 2 July 2001, and that the word "decision" was intended to include both decisions made by local authorities on or after 2 July 2001 and determinations made before that date. In my judgment, a scheme which allowed provision to be made for supersession of Review Board decisions made before 2 July 2001, but which did not contain any power to revise or supersede local authority determinations made before 2 July 2001, would not be reasonably workable and would produce impracticable results. Thus, the word "decision" is to interpreted as above, and no further provision was needed in Commencement Order No 8 or in the Transitional and Savings Regulations, although a confirmation of that position would have very simply avoided a great deal of trouble.

22. For those reasons I conclude that in the present case the local authority did on 27 July 2001 have the power, if a ground were proved, to revise its decision/determination of 1 June 2001. The appeal tribunal therefore did not err in law simply because the decision it confirmed was based on the power in paragraph 3(1) of Schedule 7 to the 2000 Act. However, I consider that it did go wrong in law in not asking itself whether the local authority had proved that a ground of revision existed or whether it should exercise its discretion in paragraph 6(9)(a) of Schedule 7 to consider that issue although it had not expressly been raised by either of the parties.

23. The local authority's decision of 27 July 2001, as notified in the letter of that date, was simply that the claimant's entitlement to housing benefit had stopped from 7 May 2001. The later letters of explanation merely referred to the reasons why it had been concluded that the claimant was not entitled to housing benefit. In accordance with the approach taken in paragraph 76 of the decision of the revision/supersession Tribunal of Commissioners, the decision of 27 July 2001 is to be taken as revising the decision/determination of 1 June 2001, notwithstanding that there was no express reference to the use of the power of revision. The only power under which the local authority could make a new decision that was disadvantageous to the claimant and took effect from the same date as the decision of 1 June 2001 took effect was that in paragraph 3 of Schedule 7 to the 2000 Act. A supersession on the ground of ignorance of or mistake as to a material fact could not have taken effect before the date of the superseding decision (paragraph 4(5) of Schedule 7, there being nothing to the contrary in regulation 8 of the Decisions and Appeals Regulations). And in any case there can only be a supersession on that ground if there cannot be revision (Decisions and Appeals Regulations, regulation 7(2)(b)). Any defects in the revision process were legally capable of correction by the appeal tribunal.

24. One consequence of that analysis is that the claimant's appeal was properly against the decision of 1 June 2001, as revised on 27 July 2001. Paragraph 1(2) of Schedule 7 to the 2000 Act excludes decisions under paragraph 3 to revise a relevant decision from the meaning of "relevant decision" and thus from the right of appeal in paragraph 6. But paragraph 6 gives a right of appeal against relevant decisions as revised under paragraph 3. For the reasons given in paragraphs 18 to 21 above, I am satisfied that that right of appeal arises although the decision

revised was made before 2 July 2001 and was, when it was made, called a determination. A further consequence is that on appeal an appeal tribunal cannot take account of any circumstances not obtaining on the date of the decision which has been revised (paragraph 6(9)(b) of Schedule 7 and paragraph 53 of the decision of the revision/supersession Tribunal of Commissioners). That consequence may have to be revisited in some other overpayment cases.

25. In an appeal against a decision as revised a claimant may assert that no ground of revision existed. In the present case the potentially applicable ground would seem to have been that in regulation 4(2)(b) of the Decisions and Appeals Regulations, that the original decision:

> "was made in ignorance of, or was based upon a mistake as to, some material fact and as a result of that ignorance of or mistake as to that fact, the decision was more advantageous to the person affected than it would otherwise have been but for that ignorance or mistake."

It is just possible that official error under regulation 4(2)(a) could have been relevant. There is an issue about the existence of a ground of revision because when the decision/determination of 1 June 2001 was made the local authority had the claim form and the tenancy agreement before it. Thus it knew that the claimant's landlord was Mr S H, her brother-in-law, and it knew what the terms of the tenancy agreement were. It must therefore be asked whether there were any material facts of which the local authority was ignorant on 1 June 2001. Facts which suggest themselves are that no deposit had been paid, that the tenancy agreement was not signed until March or April 2001 and that the claimant had not paid the full agreed rent, plus the history of the legal ownership of the property.

26. Since the existence of a ground of revision was fundamental to the power to make any decision taking away the claimant's existing entitlement, I conclude that the appeal tribunal should have given judicial consideration to whether to investigate that issue. The failure to do so was an error of law, but I would be reluctant to set aside the appeal tribunal's decision on that ground alone, since it appears that a ground of revision can relatively easily be identified.

Regulation 7(1)(h) of the Housing Benefit Regulations

27. At the oral hearing Mr Walden-Smith referred to the decision of the Divisional Court in *Fairbank v Lambeth Magistrates' Court* [2002] EWHC 785 (Admin) and to the definition of "owner" in regulation 2(1) of the Housing Benefit Regulations. He submitted that the effect of that definition was that the case could only be disposed of in one way, against the claimant, so that there was no practical purpose in exploring other issues.

28. The definition of "owner", unless the context otherwise requires, is in relation to a dwelling in England and Wales:

> "the person who, otherwise than as a mortgagee in possession, is for the time being entitled to dispose of the fee simple, whether or not with the consent of other joint owners."

Since the date of the oral hearing in the present case, I have had to discuss that definition, as well as *Fairbank* and other cases, in my decision in CH/1278/2002, so that I do not need to repeat that discussion here. Mr Walden-Smith pointed to the finding, although obiter, in *Fairbank* that a trustee who holds the fee simple for the benefit of others is an owner within that definition, regardless of any obligation to consult beneficiaries in order to sell the property. He submitted that, even if the claimant's husband did, before 15 January 2001, hold the property concerned on resulting trust for Mr S H, because he had provided all of the purchase price, he was an owner for the purposes of the Regulations. Therefore, he said, on any footing the claimant was to be deemed by regulation 7(1)(h) not to be liable to make payments of rent.

29. One reason for not immediately accepting that submission was raised at the oral hearing. This was that it was not known whether the property in question was freehold or leasehold. If the property was held on a lease, no matter how long the term, the fee simple would not be held by the person who held the lease. The fee simple would continue to be held by the freeholder, however long the term of years of the lease. It would thus appear that a leaseholder cannot be an owner within the Housing Benefit Regulations definition. At the oral hearing, no-one had any information about whether the property in question was freehold or leasehold. One of the purposes of requiring further submissions was to allow Mr Hemingway to obtain information on the point. With his letter dated 5 August 2003 he enclosed a copy of the Land Registry entries, which show that the property is freehold. It also shows that Mr S H has been registered as the proprietor with title absolute from 5 April 2001 and was said to have paid a price of £40,000 on 15 February 2001. As a result, there is now no basis for any argument that no-one relevant had been an owner of the property in question because of its nature as leasehold, although in my judgment the appeal tribunal should not have relied on regulation 7(1)(h) without investigating the issue.

30. Another reason for not immediately accepting Mr Walden-Smith's submission was mentioned in paragraph 3(f) of my direction of 3 July 2003, and was taken up by Mr Hemingway in his submission dated 5 August 2003. This was related to the question of the date at which a person has to be a partner of the claimant for regulation 7(1)(h) to operate and whether the claimant's husband ceased to be her partner at any relevant date. Mr Hemingway submitted that her husband was not her partner at the date that she made her claim for housing benefit. He said that the evidence then was that he had left for Pakistan and neither he nor the claimant knew when or if he would come back. It was submitted that therefore at the date of claim the claimant did not have a partner and regulation 7(1)(h) could not be applied to her. In his submission dated 17 September 2003, Mr Walden-Smith referred to the definition of "partner" in regulation 2(1) of the Housing Benefit Regulations as "where a claimant is a member of a married or unmarried couple, the other member of that couple". He submitted that as at all relevant dates the claimant and her husband remained lawfully married, the claimant was a member of a married couple, in the ordinary meaning of that term, and her husband was her partner. The Secretary of State's representative, in the submission dated 7 October 2003, merely submitted that regulation 7(1)(h) could not be interpreted as applying to a former partner, in view of the specific references to a former partner in other parts of regulation 7, but extended only to the current partner. The issue was not taken any further.

31. I agree that, for regulation 7(1)(h) to be applied to a claimant, either the claimant or the person who is currently her partner at the relevant dates must have previously been an owner of the property in question. The relevant dates in the present case are from 7 May 2001 to 1 June 2001. Mr Walden-Smith failed to observe, and no other representatives have pointed this out, that not only is "partner" defined in regulation 2(1), but so are "married couple" and "unmarried couple". The definitions refer back to section 20(11) of the Social Security Act 1986, which has been replaced by section 137(1) of the Social Security Contributions and Benefits Act 1992. There "married couple" is defined as "a man and a woman who are married to each other and are members of the same household". Therefore, the claimant's husband would not be her partner once he ceased to be a member of the same household. Although membership of the household can survive temporary absence (and see regulation 15 of the Housing Benefit Regulations), there was evidence before the appeal tribunal of the nature of his absence and the lack of contact with the claimant that could indicate that his absence was such as to take him out of membership of the household. The appeal tribunal itself expressly found that the circumstances suggested that the claimant's husband had left her.

32. In those circumstances it was an error of law for the appeal tribunal to have applied regulation 7(1)(h). Either a wrong legal interpretation of regulation 7(1)(h) or of the meaning of "partner" had been adopted or the appeal tribunal had failed to make adequate findings of fact or give adequate reasons in relation to this issue. I therefore do not need to go into any of the submissions about whether the appeal tribunal should have investigated the question of whether the claimant could not have continued to occupy the dwelling without her husband's relinquishing ownership.

Regulation 7(1)(a) of the Housing Benefit Regulations

33. The arguments for the claimant and for the local authority on the issue of commercial basis, as expanded at the oral hearing, were fairly straightforward. The Secretary of State expressed no views.

34. Mr Hemingway submitted that the three factors relied on by the appeal tribunal did not go far enough to explain its conclusion. The fact that no deposit was paid, contrary to the terms of the tenancy agreement, was relevant but not very informative. He submitted that there were many types of tenancy in which a deposit could not realistically be demanded and circumstances in which a landlord might not enforce a right to payment. He submitted that the reference to housing benefit in the tenancy agreement was entirely irrelevant and was entirely neutral on commerciality, as was the fact that the agreement was signed after the start of the tenancy, which could have many explanations. Overall, Mr Hemingway submitted that the appeal tribunal failed to refer to other relevant factors and failed to explain how the three factors specifically relied on fitted into all the relevant circumstances as a whole and justified the conclusion that the tenancy was not on a commercial basis. There was also a suggestion that the appeal tribunal should have specifically stated that the burden of proof was on the local authority.

35. Mr Walden-Smith submitted that, looking at the four pages of the appeal tribunal's statement of reasons as a whole, the claimant could not say that she did not know why the

decision went against her and what the appeal tribunal considered important. The three factors specifically mentioned were relevant and pointed against a commercial basis. Given the other findings of fact about the circumstances, there was a sufficient explanation of the conclusion. Mr Walden-Smith submitted that the claimant could not sensibly complain of the appeal tribunal's failure to mention other specific factors when those also pointed against a commercial basis. He pointed to the appeal tribunal's conclusion in paragraph 23 of its statement of reasons that it was satisfied that this was not a commercial tenancy and submitted that that showed that the right burden of proof had been applied.

36. I have no doubt that on the evidence it had the appeal tribunal was entitled to conclude that the agreement was not on a commercial basis and that it applied the right burden of proof. I do not consider that in taking into account the three specific factors mentioned the appeal tribunal took into account any factor that was irrelevant.

37. The difficult question is whether the appeal tribunal gave adequate reasons. Very helpful guidance was given by Mr Commissioner Jacobs in decision CH/627/2002, now reported as R(H) 1/03, as to the proper approach to cases under regulation 7(1)(a). I apply that guidance here. It includes the statement that the whole nature of the arrangement must be considered, including all the terms and the whole relationship between the parties so far as it concerns the occupation of the dwelling. It also includes the warning that there is a limit to what can be expected of appeal tribunals in explaining the outcome of the complex interaction of factors and impressions, if there have been proper findings of the constituent facts.

38. I conclude, by a narrow margin, that in the present case the appeal tribunal's identification of the three specific factors as the reasons for its conclusion left it unexplained how the appeal tribunal saw the balance of all the other relevant factors and of the "whole nature of the arrangement". I would have been reluctant to set aside the decision if that were the sole error of law in play. But Mr Walden-Smith sought to put a great deal of weight on the appeal tribunal's conclusion on commercial basis, by in effect submitting that even if there were errors of law, of substance or of explanation, in relation to other issues, the appeal tribunal's decision should be supported if there was one sub-paragraph of regulation 7(1) which had properly been found to apply. In my judgment it is not safe to put such weight on the appeal tribunal's conclusion on regulation 7(1)(a) in the light of the nature of the reasons given.

Regulation 7(1)(l) of the Housing Benefit Regulations

39. I need say very little about this provision, excluding liability where an authority is satisfied that liability was created to take advantage of the housing benefit scheme. Mr Hemingway submitted that there were not sufficient findings about the conditions for applying regulation 7(1)(l) and was not a sufficient explanation. Mr Walden-Smith submitted that the adequate findings and explanation in respect of regulation 7(1)(a) also supported the conclusion under regulation 7(1)(l). I would probably have rejected Mr Walden-Smith's submission, in the light of the particular findings about intention which are necessary under regulation 7(1)(l). But as I have rejected the adequacy of the appeal tribunal's reasons on regulation 7(1)(a), those reasons cannot then be adequate for regulation 7(1)(l).

The Commissioner's decision

40. For the reasons given above the appeal tribunal's decision is set aside as erroneous in point of law. Although further evidence has been put forward on behalf of the claimant, in particular a statement by her husband, I am not in a position to substitute a decision. The claimant's appeal against the local authority's decision/determination dated 1 June 2001, as revised by the decision dated 27 July 2001, is referred to a differently constituted appeal tribunal for determination in accordance with the following directions.

Directions to the new appeal tribunal

41. There must be a complete rehearing of the appeal on the evidence presented and submissions made to the new appeal tribunal, which will not be bound by any findings made or conclusions expressed by the appeal tribunal of 18 September 2002. The new appeal tribunal must apply the legal conclusion set out above as to the powers to revise determinations made by local authorities before 2 July 2001 and give proper consideration to the question of whether a ground of revision has been shown (see, in particular, paragraphs 22 to 26 above). If it concludes that a ground has been shown, the new appeal tribunal must go on to consider whether it has been shown by the local authority that the decision/determination of 1 June 2001 should be revised adversely to the claimant. When considering regulation 7(1)(h) of the Housing Benefit Regulations, the appeal tribunal must apply the approach in paragraphs 27 to 32 above and must consider afresh, on the evidence available about the circumstances down to 1 June 2001, whether the claimant's husband was her partner at any relevant date. I need give no specific directions of law about regulations 7(1)(a) and (l), beyond the reminder to follow the guidance of R(H) 1/03 on regulation 7(1)(a). Again, all the relevant evidence must be considered afresh in the light of the burden of proof on the local authority. The evaluation of all the evidence will be entirely a matter for the judgment of the new appeal tribunal. The decision on the facts in this case is still open.

(Signed) J Mesher
Commissioner

Date: 29 January 2004