13-11-ohn 155

CH/542/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my permission, against a decision of the Fox Court Appeal Tribunal made on 14 October 2005. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. However, in exercise of the power in para. 8(5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 I make the findings of fact set out below and substitute a decision to the same effect as that of the Tribunal, namely a decision disallowing the Claimant's appeal against the decision of the London Borough of Barnet ("the Council"), made on 16 December 2004, as revised on 20 January 2005, disallowing the Claimant's claim for housing benefit. This appeal has therefore in substance not succeeded.

2. The particular ground on which the disallowance of housing benefit was upheld by the Tribunal was that the Claimant was required by regulation 7(1)(b) of the Housing Benefit (General) Regulations 1987 to be treated as not liable to make payments in respect of the property in which he was living (which I shall refer to as "no. 18"). Regulation 7(1) provides (so far as material) as follows:

> "A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where –
>
> (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis;
>
> (b) his liability under the agreement is to a person who also resides in the dwelling and who is a close relative of his or of his partner;
>
> ....."

It is clear from the structure of regulation 7(1), read as a whole, that the various conditions set out in its separate sub-paragraphs are alternatives– i.e. if any of those sub-paragraphs applies the claimant is treated as not liable to make payments in respect of the dwelling. Therefore, if sub-paragraph (b) applies, the Claimant is treated as not liable to make payments, even if his occupation is on a commercial basis.

3. The claim for housing benefit was made as long ago as 2 May 2001. It has a long adjudication history. The Council has denied entitlement to benefit on a number of other grounds, at least one of which has been the subject of a previous appeal to a Commissioner. It is clear, however, that there is nothing which prevented the Council, on 20 January 2005, from relying for the first time on regulation 7(1)(b) as a ground for disentitlement. In particular, it was not until a visit by its officers in January 2005 that the Council discovered that the Claimant's son and family were also living in no. 18. In view of my decision below in relation to regulation 7(1)(b), I need not consider (and nor did the Tribunal find it necessary to consider) whether the Claimant was also disentitled on any of the other grounds on which the Council has relied. In particular, I do not need to consider whether the Claimant actually has a legally enforceable liability to make payments in respect of his occupation. For the purposes of this decision I assume that he is and has been so liable.

4. The Council's decision under regulation 7(1)(b), upheld by the Tribunal, was that the Claimant's liability for rent (if any) was to his son (undoubtedly a "close relative" within the definition in reg. 2 of the 1987 Regulations), and that the son also resided in the dwelling in respect of which the Claimant was liable to make payments.

5. In the Statement of Reasons the Tribunal expressed its reasons briefly, as follows:

> "3. The primary facts are not in dispute. [The Claimant's] landlord is his son, who also lives with his family at [no. 18]. It is a 3 bedroom house with an extension. The kitchen is shared.
>
> 4. On these facts, since the landlord is a close relative and also resides in the dwelling, [Regulation 7(1)(b)] presents an insuperable obstacle to [the Claimant's] entitlement to Housing Benefit, and the decision under appeal must be confirmed."

6. The Claimant had contended that his accommodation at no. 18 was separate from that occupied by his son. In the light of that contention the Tribunal should in my judgment have made more detailed findings as to the layout and occupation of no. 18 than it did, and its decision was for that reason erroneous in law and must be set aside.

7. However, there is really no dispute as to the layout and occupation of no. 18, and I can therefore make my own findings and substitute my own decision on the papers before me. I take the information in relation to those matters primarily from (a) the Claimant's signed statement, on the occasion of the visit by 2 Council officials to no. 18 on 17 January 2005, and a plan and additional information recorded by those officials on that date (pages 102 to 104) and (b) photographs and an accompanying description supplied by the Claimant (pages 317 to 321).

8. The latest tenancy agreement in the papers (as far as I have been able to discover) is one dated 30 May 2001 (pages 53 and 54). By that agreement the Claimant's son, as landlord, purported to grant to the Claimant a tenancy of "18 .....Crescent" (i.e. on the face of it the whole of no. 18) for a term of 1 year from 1 June 2001 at a rent of £400 per month. On the face of it, therefore, the Claimant was granted a tenancy of the whole of no. 18.

9. No. 18 is a semi-detached house. On the ground floor there are two living rooms, a kitchen/dining room, a bathroom and WC and a utility room. On the first floor there are five bedrooms, a bathroom and WC, and a separate toilet. The Claimant and his wife have exclusive use of two of the bedrooms and of the separate toilet. The Claimant's son's family (i.e. the son, his wife and their 4 children) have exclusive use of the three other bedrooms. The first floor bathroom is shared, as are the rooms on the ground floor (save possibly the bathroom, which the Claimant and his wife may not in practice use – it is not necessary for me to make any finding about that). The staircase from the ground floor reaches a small landing, from which further stairs then ascend to right and left. The two bedrooms and the toilet used exclusively by the Claimant and his wife are reached by going up the stairs to the right, and the 3 bedrooms used exclusively by the son and his family are reached by going up the stairs to the left. There are suggestions in the papers that the rooms on the first floor used exclusively by the Claimant and his wife may have been added by way of an extension or some form of rebuilding to no. 18. I do not find it necessary to make any finding about that.

There is no separate entrance to that accommodation, and it is not physically separate accommodation save to the very limited extent which I have indicated above.

10. Regulation 7(1)(b) requires me first to identify the "dwelling" in respect of which the Claimant is liable to make payments, and then to determine whether the Claimant's son also resides in that dwelling.

11. Section 137(1) of the Social Security Contributions and Benefits Act 1992 defines "dwelling" as "any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises."

12. As I have said, the tenancy agreement purported to grant a tenancy of the whole of no. 18. In the light of that it is arguable that the legal position is that there is simply an agreement under which the Claimant and his son agree to share occupation of the whole of no. 18, but with each agreeing to respect the other's privacy in relation to the bedrooms which they respectively occupy. (See, for example, the analysis of Lightman J. in *R (on the application of Painter) v Carmarthenshire County Council Housing Benefit Review Board* [2001] EWHC Admin 308). If that is the correct analysis, the "dwelling" in respect of which the claimant is liable to make payments is the whole of no. 18, and the Claimant's son clearly also resides in that dwelling, so that regulation 7(1)(b) applies.

13. The only other possible analysis is in my judgment that the "dwelling" in respect of which the Claimant is liable to make payments consists of the entirety of no. 18 less the 3 bedrooms (and possibly the bathroom on the ground floor) of which the Claimant's son and family have exclusive occupation. Where, as here, a person is entitled to and does share essential living accommodation such as living rooms and a kitchen, it is not in my judgment right to regard the "dwelling" in respect of which he pays rent as being only the rooms of which he has exclusive occupation. The "dwelling" in respect of which the Claimant is liable to make payments cannot therefore be properly regarded as being only the two bedrooms and the toilet of which he and his wife have exclusive occupation.

14. On the footing that the "dwelling" in respect of which the Claimant is liable to make payments is the entirety of no. 18 less the bedrooms (and possibly ground floor bathroom) of which his son and family have exclusive occupation, do the son and family "also reside in the dwelling" within the meaning of regulation 7(1)(b)? In my judgment they do, because they share with the Claimant the use of (i) substantial living accommodation (namely (a) all the rooms on the ground floor other than perhaps the bathroom, and (b) the first floor bathroom), and (ii) the common parts, comprised in that "dwelling". As a matter of the ordinary use of language it is in my judgment not necessary, in order to conclude that the landlord also resides in the dwelling in respect of which the claimant is liable to make payments, to find that the landlord is entitled to occupy *all* the accommodation comprised in that dwelling. I agree with the decision to that effect of Miss Commissioner Fellner in CH/3656/2004.

15. It follows that I agree with the result at which the Tribunal arrived, and therefore make the decision set out in paragraph 1 above.

(signed on the original) **Charles Turnbull**
Commissioner
23 October 2006