

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under paragraph 8(4) and (5)(c) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.
 - 1.1. The decision of the Rochdale appeal tribunal under reference U/40/124/2001/00738, held on 7th December 2001, is erroneous in point of law.
 - 1.2. I set it aside and remit the case to a differently constituted appeal tribunal.
 - 1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision in accordance with my analysis of the tribunal's jurisdiction.

Before this case is listed for rehearing, it must be put before a legally qualified panel member to consider whether it is necessary or appropriate to give directions under regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. In particular, the panel member may wish to consider directing the local authority to make a further submission on regulation 7 of the Housing Benefit (General) Regulations 1987 in anticipation that this may be considered at the rehearing.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave.

The history of the case

3. The claimant's claim for housing benefit was received on 14th April 1999. It was made in respect of payments on a dwelling owned by the claimant's daughter, who lived in the same street. The claim was refused on the ground that the claimant was not liable to make the payments, relying on regulation 6 of the Housing Benefit (General) Regulations 1987. See the terms of the notification at page 11 and the review letter at page 17.
4. The case eventually came before an appeal tribunal on 7th December 2001. The tribunal decided that the claimant was liable to make the payments under regulation 6. However, it confirmed the refusal of the claim on the ground that the claimant's agreement with his daughter was not on a commercial basis, relying on regulation 7(1)(a). The full statement of the tribunal's decision also records that the tribunal also considered regulation 7(1)(l). It is mentioned briefly in the final paragraph. The tribunal does not appear to have come to a firm conclusion on it, probably because it was not necessary in view of its decision under regulation 7(1)(a).

The claimant's grounds of appeal

5. The claimant's grounds of appeal consisted largely of a collection of typing errors and irrelevancies. I dealt with them in detail in my grant of leave. It is at page 204 and 205 of the papers; I do not need to repeat what I wrote there.
6. However, there is merit in the claimant's appeal.

7. The tribunal rejected the basis on which the local authority refused the claim, but confirmed the refusal on a different ground. Did it have jurisdiction to do that? If it did, did it exercise that jurisdiction judicially?

Jurisdiction on an appeal against a refusal of a claim

The scope of a tribunal's jurisdiction

8. What issues are within the jurisdiction of an appeal tribunal on an appeal against a decision refusing a claim? This question is not answered expressly by the legislation. However, it is possible to answer the question by reference to: (a) the language of the legislation; (b) the nature of an appeal to an appeal tribunal; and (c) decisions of Commissioners on the jurisdiction of the predecessor tribunals to the appeal tribunal. The answer is that the tribunal has jurisdiction to deal with any issue that relates to the claimant's entitlement to housing benefit on the claim that has been refused. Those issues fall into three categories. (i) The first category consists of the issues that are in dispute between the parties. (ii) The second category consists of the issues that are not raised by the parties, but which appear to the tribunal to require investigation. (iii) The third category consists of the issues that are not controversial, but which the tribunal determines in order to avoid further consideration of the claim by the local authority.

9. The scope of a tribunal's jurisdiction is limited by paragraph 6(9)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. This is in the same terms as section 12(8)(a) of the Social Security Act 1998. It provides:

'In deciding an appeal under this paragraph, an appeal tribunal-

- (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

This excludes from the tribunal's jurisdiction any issue that relates to those circumstances.

10. *The language of the legislation* The tribunal's jurisdiction is conferred by paragraph 6(3). It provides for a right to appeal to an appeal tribunal in respect of 'a decision to which this paragraph applies'. The decision in this case was that the claimant was not entitled to housing benefit. The ground on which the decision was made was that the claimant was not liable to make payments in respect of the dwelling. However, that was not the decision. It was a determination of an issue that led to the decision. That decision was given on the claimant's claim for housing benefit that was made on 14th April 1999.

11. *The nature of an appeal* An appeal to a tribunal under the social security legislation has always been regarded as an appeal by way of a rehearing: *R(F)1/72, paragraph 9* and *R(SB)1/82, paragraph 10*. The same reasoning now applies to appeal tribunals under the Social Security Act 1998. This does not mean that the appeal tribunal must actually consider afresh every issue that the decision-maker acting for the local authority considered. The issues actually considered will probably be fewer. In practice, they will be those raised either by the parties or by the appeal tribunal on its own initiative. The issues raised by the local authority will be apparent from the terms of the decision and be set out in the submission to the tribunal. The issues raised by the claimant will be apparent from the letter of appeal and related submissions. The issues raised by the appeal tribunal will be those that appear to merit

consideration on the information before it. However, this does not affect the principle that all the issues that were before the decision-maker on the claim are potentially open to consideration by the appeal tribunal in the light of the evidence and submissions presented to the tribunal.

12. *Authority* My conclusion on the scope of the tribunal's jurisdiction is also supported by authority. Local tribunals and social security appeal tribunals were given jurisdiction to deal with questions first arising in the course of the appeal. It was conferred by section 70A of the National Insurance Act 1965, which was inserted by section 84(6) of, and Schedule 21 to, the Social Security Act 1973. The provision was then consolidated, first as section 102 of the Social Security Act 1975 and then as section 36 of the Social Security Administration Act 1992. When the power was introduced, it did not at first apply to means tested benefits. It was later extended to them. There is no present equivalent to that power. So, the position now is as it was before the power applied.

12.1. Before the introduction of the power, Commissioners decided that a tribunal had jurisdiction to consider issues that had not formed part of the decision under appeal. In *R(U) 2/54, paragraph 8*, this was applied to different bases of disqualification that arose under the same legislative provision. In *R(F) 1/72, paragraphs 8 and 9*, it was applied to errors identified by the decision-maker that, if corrected, would be to the claimant's disadvantage. The error related to a provision different from that on which the decision had been based.

12.2. Before the power was extended to means tested benefits, the Commissioners decided that a tribunal had jurisdiction to consider any issues that were within the purview of the original claim: *R(SB) 9/81, paragraph 9*. In that case, the issues had not been considered by the decision-maker and were not mentioned in the claimant's letter of appeal to the tribunal. Nonetheless, the Commissioner held that the tribunal had a discretion to consider them.

The scope of an appeal

13. The legislation does not define the scope of an appeal. However, that does not mean that the appeal tribunal is under a duty to investigate and determine every issue that is potentially within its jurisdiction. This is governed by paragraph 6(9)(a) of Schedule 7, which is the equivalent to section 12(8)(a) of the Social Security Act 1998. This is in the same terms as section 12(8)(a) of the Social Security Act 1998. It provides:

'In deciding an appeal under this paragraph, an appeal tribunal-

- (a) need not consider any issue that is not raised by the appeal'.

This implies that there are other issues, not raised by the appeal, which the tribunal may consider. However, its language is not appropriate to extend the tribunal's jurisdiction to issues that would not otherwise be within it. So, its effect is to relieve the tribunal of the need to consider every issue within its jurisdiction. It divides the issues that are within the tribunal's jurisdiction into two.

13.1. One set consists of those issues that are automatically before the tribunal. These are the ones that are raised by the appeal. The tribunal is under a duty to consider and

determine these issues in so far as necessary to dispose of the appeal. The 'in so far as necessary' qualification covers issues that are rendered unnecessary by the determination of another issue. For example: if the local authority has refused the claim on two alternative grounds and the tribunal confirms one of those grounds, it need not consider the other ground.

13.2. The other set consists of those issues that are not automatically before the tribunal. These are the ones that are not raised by the appeal. The tribunal has a discretion whether or not to consider and determine these issues.

14. The legislation does not specify how an issue may be 'raised by the appeal'. My conclusion is that it must be raised by one of the parties. In other words, the issues raised by the appeal are those that are put in issue by one of the parties at or before the hearing. My reasoning is as follows.

15. There are two possible interpretations of paragraph 6(9)(a). One is that it does no more than codify what was the practice of tribunals before the 1998 Act. On this interpretation, an issue is raised by an appeal if it is raised by one of the parties or identified by the tribunal as meriting consideration. If this is correct, it means that the provision has the effect of removing from a tribunal a duty that it would not for practical purposes ever be under and giving it a power which it will seldom if ever use.

16. The other interpretation is that it reduces the scope of the duty that the tribunal would otherwise be under. Considered analytically, issues might be raised at one of four stages. (a) They may appear to be in dispute between the parties from the claimant's letter of appeal and the local authority's submission in response. (b) They may have been raised in a later written submission before the hearing. The submission might come from either the claimant or the local authority. (c) They may be raised for the first time by one of the parties at the hearing itself. (d) They may be raised by the tribunal on its own initiative. This may be because of something that appears from the documents or something that arises from the evidence or submissions at the hearing.

17. Which of these are 'raised by the appeal'?

17.1. Obviously, (a) must be raised by the appeal.

17.2. A claimant may not realise that issues arise until the local authority's submission is available. This may be the first time that the claimant has seen a detailed statement of the reasons for the local authority's decision with the supporting legislation. In view of the technicality of the legislation, it would be surprising if it was left to the discretion of the tribunal whether or not to consider those issues. So, a distinction between (b) and (c) is likely to be arbitrary.

17.3. The choice of whether to raise an issue before or at the hearing may depend on chance factors, such as the claimant's confidence in putting matters into writing, the closeness of the hearing or the time available to a busy representative. There is an apparent difference between (b) and (c) in that the other party will have a chance to consider and prepare a response to (b) but not to (c). But this may be more apparent than real, depending on how close to the day of the hearing the issue is raised. So, a distinction between (b) and (c) is also likely to be arbitrary.

17.4. That leaves only one distinction that would not produce results that are either harsh or arbitrary: that between issues raised by the parties and those taken on the tribunal's own initiative.

17.5. Hence my conclusion that the issues 'raised by the appeal' are those that are put in issue by the parties.

18. This interpretation is in line with authority on the interpretation of social security legislation in that: (a) it avoids prejudice to claimants from undue emphasis on technicalities (*R(I) 15/53, paragraph 4*); and (b) it produces a result that is rational, coherent and workable (*R(DLA) 6/02, paragraph 33*). It may have the result that one party does not have a chance to consider and respond to an issue that is raised by one party in a late submission or at the hearing. However, the other party must, if necessary, be allowed a postponement or an adjournment to prepare a response. In practice, this will not often happen, as it is unusual for a new issue to be raised during the proceedings. If a new point is raised, it is more likely to be a matter of evidence or submission relevant to an issue that has already been raised than a new issue.

The exercise of the discretion

19. Paragraph 6(9)(a) gives the tribunal a discretion to limit itself to the issues raised by the appeal. The discretion must be exercised judicially. That means that it must be exercised in a selective and discriminating manner and not arbitrarily and idiosyncratically: see the speech of Lord Diplock in *Birkett v James* [1977] 2 All England Law Reports 801 at page 804.

20. If an appeal tribunal exercises the discretion by refusing to consider any other issue, it will only go wrong in law if it did not act judicially. Usually, it will be a proper judicial exercise of the discretion to refuse to deal with any other issue, because one of two circumstances is likely to obtain. One circumstance is that the issue is not relevant to the disposal of the case. For example: if a claim is refused under regulation 6, it is irrelevant whether it would also have been refused under another provision. The other circumstance is that the outstanding issues will be decided by the local authority, giving rise to another right to appeal. For example: if the refusal of a claim under regulation 6 is reversed by an appeal tribunal, the remaining issues relating to entitlement will be decided by the local authority and the claimant will be able to appeal against that decision. There may, exceptionally, be circumstances in which the discretion can only properly be exercised judicially by considering the other issue. For example: if the claimant is under a real and present danger of eviction, the tribunal may be under a duty to deal with all issues relating to entitlement if that is the most expeditious way of deciding the claim.

21. If an appeal tribunal exercises the discretion by considering another issue, it must also comply with the principles of natural justice and the Convention right to a fair hearing under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms. This means that the parties must have notice that the issue will be considered and sufficient time to prepare a case on it.

22. It is good practice for the chairman to record that the tribunal raised the issue, considered how to exercise its discretion and, if it decided to investigate and determine it, that it considered whether an adjournment was necessary to allow the parties to prepare a case on the issue.

Summary

23. My analysis produces these conclusions. If an issue is raised by one of the parties, it is raised by the appeal and the tribunal is under a duty to deal with it. The tribunal has a discretion to deal with other issues on its own initiative.

24. My reasoning applies only to issues. It does not apply to the evidence and argument deployed in relation to those issues. The only controls on the elaboration of the issues are the principles of natural justice and the Convention right to a fair hearing. In particular, a party must have a chance to respond to evidence or arguments that could not have been anticipated and require time to investigate or consider.

My reasoning applied to this case

25. Applying my reasoning to this case produces these conclusions.

26. The local authority refused the claim on the basis of regulation 6. The claimant's appeal expressly challenged the application of that regulation. The appeal tribunal had to deal with that issue. It did.

27. Despite the valiant effort in the local authority's observations on the appeal, it is impossible to link regulations 6 and 7 together as a single issue so that reference to one automatically includes reference to the other.

28. The full statement of the tribunal's decision records that the local authority, in refusing the claim, relied on regulations 6 and 7(1)(a). I can find nothing to support that. There is a passing reference to commercial basis in the penultimate bullet point on page 1E. But read as a whole, the submission is clearly directed to regulation 6. I would not have realised from the papers presented to the appeal tribunal that the case to be met by the claimant *on this claim* involved regulation 7, although some of the evidence was relevant to both regulations 6 and 7. So, regulation 7 was not put in issue before the hearing by either party. As regards the hearing, the chairman's record of proceedings does not show that it was raised by the presenting officer at the hearing. The presenting officer for the local authority, who attended the hearing, is recorded only as saying:

'Rely on submissions in Box 5'

Box 5 presents a case that the claimant was not liable for the rent. The local authority's observations on the appeal to the Commissioner (written by the presenting officer present at the hearing) do not allege that she asked the tribunal to consider the issue. So, the application of regulation 7 was not raised by the appeal.

29. The tribunal can only have considered regulation 7 on its own initiative under paragraph 6(9)(a). That required the exercise of a discretion. The tribunal did not consider the discretion. Indeed, the way that the statement is worded suggests that the tribunal did not consider that an exercise of discretion was necessary. That means it assumed jurisdiction without considering judicially whether or not to deal with the issue. That was wrong in law.

30. The tribunal also made the related mistake of not warning the parties, and in particular the claimant, that regulation 7 was in issue. The chairman's record of proceedings does not

contain a note of a warning to the claimant and his solicitor, and none of the evidence recorded by the chairman was uniquely directed at regulation 7 rather than regulation 6. The claimant's solicitor attended the hearing and his submission to the tribunal relates only to regulation 6. In other words, on the basis of the record of proceedings my conclusion would be that the claimant was not warned by the tribunal that regulation 7 was in issue. That would be a breach of natural justice and of the claimant's Convention right to a fair hearing.

31. The observations on behalf of the local authority on this appeal were made by the officer who attended the hearing as presenting officer. She reports that the tribunal invited the claimant's solicitor to comment on regulation 7, but he declined. That is not sufficient to persuade me that it was made clear that regulation 7 was in issue. The solicitor might have considered that he was being invited to agree to the issue being considered or to comment on how the tribunal should exercise its discretion. Nothing that the officer has written persuades me that the tribunal made it clear to the claimant and his solicitor that it was exercising a discretion or that the solicitor had the right to ask for time to prepare a case on regulation 7. I suspect that the tribunal was not clear on these matters itself. Even taking account of the local authority's observations, I am satisfied that the conduct of the proceedings was in breach of natural justice and the Convention right to a fair hearing.

The local authority's observations on the appeal

32. I want to make a general comment on the nature of observations that are made on behalf of local authorities on appeals to Commissioners. Commissioners have so far not received many appeals in housing benefit and council tax benefit cases – less than 100. But it is already clear that the observations that we are receiving from local authorities lack the objectivity and detachment that we have become accustomed to expect from the Secretary of State in our social security and child support jurisdictions. That is probably because in those jurisdictions the observations are not made by the officers who were responsible for making the decisions or who appeared on appeal before the tribunal. In this jurisdiction, the local authority is not a contentious party in the sense that the claimant is. As decision-maker, the local authority is under a statutory duty to ensure that benefit is paid according to law. As a party before an appeal tribunal, its function is not to defend its decision, but to assist the tribunal in ensuring that the legislation is correctly applied. That may lead the authority to support its decision. But it may also lead the authority to recognise that it made a mistake and even draw attention to that mistake so that the tribunal can correct it. As a party to an appeal before a Commissioner, its function is to take an objective view of the lawfulness of the tribunal's decision both substantively and procedurally.

33. Although it is not for me to tell local authorities how to organise themselves, it would only assist the Commissioners if observations were made by persons who are in a position to take a detached, objective and realistic view of the grounds on which a Commissioner has granted leave to appeal. The Secretary of State has taken that approach. That has allowed the Commissioners to devise a series of case management directions that are given when leave to appeal is granted. They reflect the complexity of the issues and the likelihood of the appeal being allowed, as viewed by the Commissioner when granting leave. In appropriate cases, they allow for the expeditious disposal of cases in which the tribunal was clearly in error. We are unable to adopt similar procedures in housing benefit and council tax benefit cases, because of the lack of realism and objectivity in the observations we receive.

Summary

34. I allow the appeal and direct a rehearing. As the case stands at the moment, the tribunal is only under a duty to consider regulation 6. However, it is reasonable to expect that if the claimant succeeds on regulation 6, the application of regulation 7 will be considered at the rehearing. That may be done either at the request of the local authority or on the tribunal's own initiative. I have directed the district chairman to consider obtaining a further submission from the local authority in anticipation of that. This decision stands as a warning to the claimant that the issue may be considered and that he must be prepared to deal with it at the rehearing without adjournment.

Signed on original

**Edward Jacobs
Commissioner
2nd July 2002**