Bulletin 185

CJHunt

DECISION OF DEPUTY SOCIAL SECURITY COMMISSIONER

Decision

1. I allow the appeal and hold that the tribunal erred in law. I remit to a differently constituted tribunal to re-hear the appeal, having regard to the directions given hereafter.

Background

2. The claimant had been in receipt of housing benefit since 16th August 1993. On 10 November 2000 the local authority received information that the claimant no longer resided as her house and her claim for housing benefit was cancelled and an over payment reclaimed. On 4 December 2001 a further application form for housing benefit was received from the claimant with a request to backdate the housing benefit and council tax benefit to 20 October 2000. It was later explained that the claimant was absent from her home due to fear of violence and requesting that the housing benefit be considered under Housing Benefit (General) Regulations 1987 Reg. 5(5). On 19 September 2002 the local authority decided that their original decision dated 14 December 2001 was correct.

Appeal to tribunal

3. The claimant appealed to the tribunal. On 5 September 2003 the tribunal refused the appeal. The facts found by the tribunal were:

> **"Facts found by the tribunal**
>
> 1. The appellant was absent from her home at 12 Fountain house for the period 23/10/2000 to 16/10/2002.
> 2. The appellant did return to the home from time to time to baby sit, but did not stay overnight during this period.
> 3. The home was not let or sublet during the period.
> 4. The appellant did intend to return to live in the dwelling.
> 5. The period of absence was through fear of violence.
> 6. At the date of consideration/decision of the claim, the period of absence, even though there were exceptional circumstances, was not unlikely to substantially exceed 52 weeks."

Although not found as facts, the following dates are relevant to a consideration of this appeal and are taken from the tribunal's Statement of Facts and Reasons:

4 December 2001	Application for housing benefit etc and back dating to 20/10/00 received;
14 December 2001	Decision made that applicant not entitled to benefit;
28 February 2002	Decision appealed – I take this to mean and application for review;
19 September 2002	Further decision made by local authority that claimant not entitled to benefit;
17 October 2002	Decision appealed to tribunal.

4. The only ground of appeal relevant to my decision relates to the tribunal's decision that the claimant's period of absence was not unlikely to exceed 52 weeks or the extended period under exceptional circumstances. The tribunal considered the question as at 14 December 2001 and at 28 February 2002 and determined that at both dates the absence was likely to exceed 52 weeks. The tribunal said:

> "Both the Local Authority representative and the appellant's representative considered that the matter, as far as Regulation 5 8 A was concerned, was not considered until February 2002 after the appellant's representatives letter dated 28 February was received.
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> First consideration date, 14/12/01:
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> This is just under 14 months after period of absence began. GM A3.31 suggests that the term "substantially exceed" relates to period of absence greater than 15 months. This is suggestion only and I am not bound by the guidance.
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> The appellant gave evidence that she understood that the Local Authority was to re house her daughter in law. The Local Authority had not done so by this date. It is possible that such re housing could have taken place within a relatively short space of time, but the Local Authority at the time of consideration and decision had not provided alternative accommodation and from the evidence given was not undertaking to do so at this time. The appellant could have taken steps to obtain possession herself from her daughter in law, and so returned to the property, but by this date had taken no steps to do so. I consider that it was unlikely at this date that the appellant's period of absence was unlikely to substantially exceed 52 weeks.
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> Second consideration date:
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> Both parties considered that the correct date at which the matter was considered was after receipt of letter dated 28 February 2002 i.e. end February 2002. For the sake of completeness therefore I have also considered whether the period of absence was unlikely to substantially exceed 52 weeks at this date.
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> By this date Notice to Quit had been served upon the appellant's daughter in law. In evidence given at the hearing, this had expired on 25/02/02. The daughter in law was still in occupation. The appellant's representative stated that if the appellant's daughter in law had taken the Notice to Quit to the Local Authority at that time, she would have been re housed by them within a short period of time and thus would still not be substantially in excess of 52 weeks absence from the property.
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> I am aware by this time, the appellant had already been absent from the property for some 16 months. It is possible that this in itself could be said to be substantially in excess of 52 weeks. However I also consider that there was clearly uncertainty as to how long it would in fact be before the appellant could return. Even though her daughter in law may not have had a clear legal right to remain, the process of eviction itself can take time. The daughter in law had clearly made no move to leave the property by the time the matter was considered.
>
> I conclude that it was unlikely at this date that the appellant's period of absence was unlikely to exceed 52 weeks."

Appeal to commissioner

5. The claimant's application for leave to appeal to the commissioner was refused by the tribunal. The claimant applied to the commissioner for leave to appeal. The relevant ground of appeal is lengthy, but can be summarised:

- The tribunal erred in laws in considering the absence retrospectively. The evidence after the relevant date could only go to show whether or not at the date of leaving the house the claimant's belief that her absence would not exceed or substantially exceed 52 weeks was honestly held.
- The date for considering whether or not the absence was likely to exceed or substantially exceed 52 weeks was not the date of the local authority considering the decision;
- The decision that the local authority had to make was whether or not the claimant honestly believed or anticipated that her absence was unlikely to exceed or substantially exceed 52 weeks at the date she left the dwelling.

6. The other ground of appeal was that the tribunal's decision "that the fear of violence must be reasonably held", was wrong as there was no provision in the statutory material to import this test. In my opinion this ground of appeal does not arise, because the tribunal accepted that the claimant left the house through a fear of violence, but I will deal with it later.

Leave to appeal granted

7. On 14 May 2004 Mr Commissioner Rowland granted leave to appeal saying:

> "**REASONS**
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> As the tribunal accepted that the claimant left the property through fear of violence, the first ground of appeal does not appear to arise. The second ground of appeal is arguable but, at the moment, it seems to me that the relevant date at which the likelihood of the period of absence exceeding 52 weeks must be considered is neither the date of leaving the premises (although that is the date from which the 52 weeks must be calculated), nor the date of the local authority's decision, but is each date in respect of which the claim is made. Furthermore, it seems to me that what is important is not what the claimant believed was likely but what a reasonable bystander would have believed was likely. On that view, the claimant's intentions are obviously relevant but are not determinative."

Local authority's response

8. The local authority rejected the grounds of appeal saying that the relevant date was the date of the claim and the period of absence had already exceeded 13 months and that even taking exceptional circumstances into account the absence was likely to continue beyond the 15 months usually allowed for "substantially to exceed that period". They went on to suggest that any test had to be objective. Therefore the tribunal had not erred.

Reasons for decision

9. The Housing Benefit (General) Regulations 1987 provide:

> "(5) Where a person is liable to make payments in respect of two ... dwellings, he shall be treated as occupying both dwellings as his home only –
> (a) for a period not exceeding 52 weeks in the case where he has left and remains absent from the former dwelling occupied as his home through fear of violence in that dwelling or by a former member of his family and –
> (i) it is reasonable that housing benefit should be paid in respect of both his former dwelling and his present dwelling occupied as the home, and
> (ii) he intends to return to occupy the former dwelling as his home; ..."
> ...
> (8B) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home ("absence") if –
> ...
> (c) he is –
> ...
> (x) a person who has left the dwelling he occupies as his home through fear of violence, in that dwelling, or by a person who was formerly a member of the family of the person first mentioned and to whom paragraph (5)(a) or (7B) does not apply; and
> (d) the period of absence is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period."

10. Paragraph (5) provides that a claimant "shall be treated as occupying both dwellings". Paragraph (8B) applies to "a person who is temporarily absent from the dwelling he normally occupies ... if" sub-paragraphs (a) to (d) apply and in particular under (d) that "the period of his absence is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period". This raises the question of at what date is the claimant to be "treated" as occupying both houses. At the date he falls to be "treated" the absence has to be unlikely to exceed 52 weeks or substantially exceed that period. For the avoidance of doubt, where I refer in this decision to "unlikely to exceed 52 weeks" [or similar words], it is a short hand that is to be taken as including the exceptional circumstances permitting a consideration of the extended period, unless the context otherwise requires.

11. Under paragraph 72(5)(c) the date on which a claim is held to have been made is the date on which it was received at the office – none of the exceptions appear to apply in this case. The claim date is the date that Mr Commissioner Rowland suggested might be the date at which the likelihood of the absence exceeding 50 weeks has to be judged. That was a view expressed at the time he had to consider whether or not there was an arguable ground of appeal and was clearly expressed without the benefit of a full consideration of the whole case.

12. I have come to the conclusion that that the assessment of whether or not the period was likely to exceed 52 weeks had to be made by reference to the date at which the claimant left the house. I am also of the opinion that the continued entitlement has to be judged on a week by week basis, so that if at any date it becomes likely that the 52 weeks will be exceeded, then that is a relevant change of circumstances, allowing a re-consideration of the entitlement. Mr Commissioner Walker recognised such an approach in CIS/14850/96 where he said:

> "Moreover, the test fell to be applied as at the date of the claimant's application for the premium. I do not think that the tribunal clearly excluded subsequent events, including the continuing effluxion on time, from their consideration as at that date. Of course the subsequent passage of time, like other subsequent events may indicate a relevant change of circumstances and to that extent have some later bearing upon the decision: but that decision must first be made."

Mr Commissioner Mesher in CIS/543/1993, in a similar claim, based on leaving a dwelling through fear of violence, where at paragraph 21 he required the tribunal to consider capital and income "throughout the period in issue", thus suggesting that the right to payment could be settled for a limited period having regard to that determination.

13. I take support for this approach from the wording in paragraph (5) that the claimant "shall be treated as occupying". This must mean treated from time to time, so that the first question must relate to the date of leaving – at the date of leaving was the period of absence "unlikely to exceed 52 weeks". As time passes the same question can be asked again, if a local authority wanted to invoke a change of circumstances. I note that in CAPG's Housing Benefit etc 14th Ed at page 220 under "***Subpara (a)***" say that if the intention to return to the dwelling ceases then the right to housing benefit ceases. The same would apply to the fear of violence – if the fear ceased then the right to benefit would cease or if the property was let or sub-let. The same reasoning applies to the requirement in para (8B)(d) that the period of absence remains unlikely to exceed the 52 weeks. That paragraph "shall apply to a person ... **if**" [my emphasis] (a), (b), (c) or (d) apply. The moment any one of those sub-paragraphs cease to apply then paragraph (8B) ceases to apply and with it the entitlement to housing benefit etc.

14. If the date of claim is taken as the relevant date for assessing likelihood of the 52 weeks being exceeded, then unfairness can arise depending on when a claim is made and changes of circumstances since the claimant left the dwelling. For example if a claimant makes a claim immediately on leaving the house the facts and circumstances might be such that the absence was unlikely to exceed 52 weeks, but if the claim was made six months later with a request to backdate, it may be that circumstances changed the day before the late claim which mean that it was no longer unlikely that the absence would exceed 52 weeks – it might be that the circumstances made clear that she could now never return. Why should the second claimant be denied the claim for the first six months, which she would have been entitled to had she claimed straight away, but which could have been removed after six months on a relevant change of circumstances for the first claimant.

15. For all these reasons I consider that the local authority and the tribunal ought to have assessed the evidence of whether the period of absence was unlikely to exceed 52 weeks at the date the claimant left the house. The evidence of whether or not the absence was unlikely to exceed 52 weeks has to be assessed objectively. Subsequent events may be relevant to determining, objectively, the likelihood of the period exceeding 52 weeks, if those events could reasonably have been anticipated at the time. The claimant's believe or opinion about the likely length of absence is not determinative; it is a factor to be taken into account, in light of all the evidence, as to whether or not, objectively, it can be held as a matter of fact, that the "absence is unlikely to exceed 52 weeks".

16. Where a claim is made late, as has happened in this case, and there is a request for back dating, it is my opinion, that the local authority and the tribunal are entitled to allow the claim for a period and to disallow it for part of the period. For example if they find that for

the first six months there was an intention to return to the home, but that at six months the intention changed, then the claim could be allowed for six months and refused for the period after that date up to the 52 weeks allowed by Regulation 5(5)(a). The same applies to this case, if the tribunal were to hold that at the outset the absence was unlikely to exceed 52 weeks, but that at some stage the facts and circumstances were such that the period had become likely to exceed that period. At the date of change the tribunal would then have to consider whether or not the exceptional circumstances existed to allow an extended period.

17. For the avoidance of doubt, it at the date the claimant left the house, or at any subsequent date it was held that the period was likely to exceed 52 weeks and there were not exceptional circumstances to extend the period, then that is the end of the claim. Once a person has left the home and one or more of the sub-paragraph (8A)(a) to (d) does not apply, then there is either no entitlement or the entitlement ceases when a sub-paragraph applies. Therefore it is not open to a local authority or tribunal to determine that for the first six months there was no entitlement, but that there was the a change of circumstances, which allowed in a claim; eg a sub-let ceased.

Reasonable belief about fear of violence

18. Had it been necessary to determine the first ground of appeal issue, I would have held that the tribunal did not err. Where a statute provides for a "fear" or a "belief" to be the cause of a person acting in a particular way, then a court will always have to determine the question of whether or not there were reasonable or objective grounds for that fear or belief. What the tribunal has to determine under Regulation 5(5) is whether a claimant "has left or remained absent from the former dwelling ... through fear of violence". What has to be established is whether or not there was "fear of violence". How this is approached is a matter of what evidence is presented to the local authority or to the tribunal. If the evidence is from third parties of nightly violence in the home and that the claimant left, then the tribunal could infer that the claimant left through fear of violence. If the evidence came only from the claimant that she feared violence, then a local authority or tribunal has to determine whether or not the fear or believe was reasonably or objectively, held in all the circumstances of the case. It is not enough for a claimant to say that she feared violence, without the reasonableness of that believe being assessed objectively.

Summary & directions

19. I therefore allow the appeal and hold that the tribunal erred in law. I remit to a differently constituted tribunal to re-hear the appeal.

20. In considering the appeal the tribunal will have to determine whether or not at the date the claimant left the house the absence was unlikely to exceed 52 weeks, or if it did, if there were exceptional circumstances to extend the period. The tribunal will also have to determine if at any time thereafter it became clear, objectively, that the period was likely to exceed 52 weeks or there were exceptional circumstances to extend the period. If at any date, during the period of the claim, the 52 weeks were likely to be exceeded and there were no exceptional circumstances to extend the claim, then the tribunal should only allow the claim for the period that it determined that paragraph (8A)(d) applied. The tribunal should have

regard to the general guidance given by Mr Commissioner Mesher in CIS/543/1993 at paragraph 19 onwards.

21. If the tribunal holds that at the outset, when the claimant left the house, the period exceeded 52 weeks and there were no exceptional circumstances, then the claim fails.

(Signed)
Sir Crispin Agnew of Lochnaw Bt QC
Deputy Commissioner
Date: 14 September 2004