1. This appeal, brought with my leave, succeeds. The decision of the tribunal on 26 11 03 was erroneous in law, because it did not recognise that an occupier of a room in a property run by a registered person could be excepted from housing benefit forfeiture if on the facts he was not receiving residential care. I set the tribunal's decision aside, but as I have received further evidence I am able to make my own findings of fact and my own decision in accordance with them. This is that the claimant did not lose entitlement to housing benefit by virtue of the registration in relation to the premises where he lives which was made on 19 4 00. His award should have continued on and after 5 5 02.

2. This appeal travelled with three others, by Mrs R, Mrs S and Mr G, all raising substantially the same questions about registered or care homes and housing benefit. All four claimants live at the same address, Alexandra House, in bed-sitting rooms with cooking equipment but no self-contained washing and toilet facilities. The building is run by a benevolent fund which offers several levels of care, from full nursing downwards. "Hostel" residents like these four receive one meal a day, which may be taken either in their own rooms or in the communal dining room (and therefore have partial board), and may share in recreational facilities, have quarterly room cleaning (or more if required), administrative/warden support as required, emergency assistance from staff on the premises (but I understand no staff actually sleep there), and assistance/transport for appointments with dentist, optician and so on. The 2004/5 weekly charge for these rooms is £175, compared with £350 for the lowest level of residential care and £640 for palliative care.

3. I held an oral hearing covering all four appeals. Mark Beesley, instructed by Field Fisher Waterhouse, appeared for the claimants and for BEN Motor and Allied Trades Benevolent Fund (BEN), who own and operate Alexandra House. Michelle Mayoh, instructed by the council's legal department appeared for Sefton Metropolitan Borough Council (Sefton), the registering authority under the Registered Homes Act 1984 and also the housing benefit authority. Marie Demetriou, instructed by the DWP Solicitors Department, appeared for the Secretary of State, who had accepted my invitation to be joined as a party. I am very grateful to all of them for their written submissions and for their help at the hearing.

The evidence

4. I had written statements from the claimants covering their dates of birth, their dates of entry into Alexandra House, their dates of being awarded housing benefit and the type of accommodation and care they were getting as at 7 6 02, the date of the decisions terminating their housing benefit. The claimant in this case was born on 19 1 21 and has occupied "hostel" accommodation on the third

floor of Alexandra House since 16 9 91. Housing benefit was also awarded from 16 9 91.

5. I also had a written statement from David Prescott MBE, FCIS, BEN's Deputy Chief Executive and the "responsible individual" under the current care standards legislation for Alexandra House. I understand he was in an equivalent position under the Registered Homes Act 1984. He gave evidence at the oral hearing confirming the written statement and clarifying some other points. As well as a registered charity, the organisation is a social landlord (housing association), registered with the Housing Corporation. This reflects its ownership and management of sheltered housing, like the "hostel" accommodation in these cases, which Mr Prescott calls independent households. Alexandra House contains all types of accommodation, the policy being to enable people to stay on in the same building with the same people as they become ill or more infirm, rather than having to turn out and get used to a new place and new people.

6. Personal care provision requires registration, initially under the Registered Homes Act 1984 with the local authority social services department and now, under the Care Standards Act 2000, with the National Care Standards Commission or its successor body the Commission for Social Care Inspection. It was initially a considerable part of this appeal that the 1984 Act was repealed from 1 4 02, and Alexandra House was not registered under the Care Standards Act until 18 10 02, so that at the date of the decisions appealed against there was no subsisting registration. And further that the 2000 Act could not be taken as re-enacting the relevant parts of the 1984 Act. But these points were no longer pursued at the oral hearing. It was accepted that after 1 4 02 when the 1984 Act was repealed, the provisions of the Care Standards Act applied.

7. I have seen five registration certificates. The earliest, of 3 6 83, is under the Residential Homes Act 1980, is not fully completed, and appears to permit a maximum of 46 residents. I am told, however, that this was only the permitted total of "residential care" bedspaces, there being other beds registered with the health authority for nursing care and others still which were sheltered housing. The next certificate, dated 20 8 86, specifies Sefton as the registration authority and again gives 46 as the maximum number of "residents", as does the 28 8 87 certificate. Over time, rising aspirations meant that people were not keen to move into the sheltered housing accommodation because it lacked en suite facilities. Also, some older residents began to need care, but there was no room for them elsewhere in the building.

8. So the BEN staff began in early 2000 to negotiate with both the Housing Corporation and Sefton social services with a view to having some of the third

floor hostel rooms registered for the provision of personal care. This involved taking them out of the ambit of the Housing Corporation and recycling grant aid received from the Corporation. BEN ran into difficulties with Sefton, because it now demanded that registered rooms and hostel rooms be in segregated "blocks", even if on the same floor. This would have involved moving existing residents. And shortly after it was said there could be no mixing at all of registered and hostel rooms on the same floor. I share BEN's surprise at this approach, since in the past Sefton had been quite willing to allow rooms to be registered and then deregistered, for example when one of the other claimants came to Alexandra House he was put into a hostel room, though initially assessed as needing care, and the room had its cooking facilities disconnected. But soon after he was found to be fit for sheltered housing, and the facilities were reconnected. This was all done with the consent of Sefton social services as registration authority.

9. BEN was extremely annoyed at these moves (see Mr Prescott's letter on pages 19-20), and asked what statute or regulation imposed the requirements. No response was forthcoming. BEN wrote to the Department of Health social care group, and Trish Davies responded (page 18) with her surprise at this requirement, which she had not come across before, which appeared to have no warrant in the Registered Homes Act or regulations, and which impeded the flexibility with which schemes were administered elsewhere. But what was then agreed with Sefton was that the whole of the third floor should be registered for residential care "whilst allowing the seven existing tenants to remain in their sheltered accommodation" (page 17). Sefton still did not produce any statutory authority for their demands about all-or-nothing registration, and merely made an oral concession in favour of existing tenants, including the claimants. There is no evidence Sefton ever put the concession in writing, nor that they ever told their housing benefit department. Mr Prescott agreed at the hearing that housing benefit had not been mentioned at the time of the negotiations. What Sefton did was register Alexandra House with effect from 19 4 00 for a maximum of 32 elderly residents (page 40). The lower number is apparently explicable at least in part by single people occupying double rooms. The wording of this certificate was the same as the earlier ones.

10. From various start dates until 7 6 02, when the awards were withdrawn with effect from 5 5 02, the claimants received housing benefit for their rent, which included an element of service charges. At around this time, the method of funding housing benefit service charges changed to *Supporting People*, and Sefton issued questionnaires about what was included under the service charge element. A completed specimen appears at pages 8-11. The replies prompted someone to check, the latest registration of 19 4 00 (still under the Registered Homes Act) was discovered, and entitlement to the benefit was withdrawn, to

comply with HBGR regulation 7(1)(k) (see below). (No point has been taken on the propriety of this withdrawal decision. There is no question of recovering any overpayment.) Since then, the appellants make their pensions over to BEN, which pays them pocket-money, and the considerable shortfall has been "carried" by BEN as a matter of charity. I asked why no attempt had been made to get some other benefit from the DWP, as advised by Sefton in the decision letter. Mr Prescott was not sure, and the representatives from the Department at the hearing were not able instantly to pinpoint another possible benefit.

The law and extra-statutory guidance

11. The Registered Homes Act 1984, s1(1) required registration in respect of

> "any establishment which provides or is intended to provide, whether for reward or not, residential accommodation with both board and personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, or past or present mental disorder".

"Personal care" is defined in s20(1) only as "care which includes assistance with bodily functions where such assistance is required". All four claimants in these cases were elderly, all received accommodation and partial board, but none was in need of, or received, assistance with bodily functions. I very much doubt that the warden etc support their tenancies provided for would have counted as "personal" care: certainly it would not do so under the Care Standards Act. The 1984 Act was repealed with effect from 1 4 02.

12. Regulation 7(1) of the Housing Benefit (General) Regulations 1987 SI No1971 (HBGR) sets out a list of situations in which people are to be "treated as not liable to make payments in respect of a dwelling" – ie in which they may be denied housing benefit even though being charged rent. The regulation 7(1)(k) exclusion is "except where paragraph (2) applies, he is in residential accommodation". Paragraph (2) applies to people who were entitled to housing benefit immediately before 30 10 90 in respect of residential accommodation. Under paragraph (3), "residential accommodation" means, among other things, "accommodation provided by an establishment - (a) registered in Part 1 of the Registered Homes Act 1984". This definition has not been amended to take account of the repeal of the 1984 Act and the change in registration requirements.

13. In deciding whether housing benefit is payable, officers are reminded in a DWP Housing and Council Tax Benefit Manual (extract at page 194) that although registration mostly applies to the whole accommodation and not to individual bedspaces, certain parts of residential accommodation where both

board and care are not provided may be exempt. Benefit may then be payable. An example given is of self-contained bungalows in the grounds of a registered care home which are for less-dependent residents: officers are advised to check with the registering authority.

14. The Care Standards Act 2000 now sets out in s3(1) and (2) that a care home must provide "accommodation, together with nursing or personal care", for

(a) persons who are or have been ill;
(b) persons who have or have had a mental disorder;
(c) persons who are disabled or infirm;
(d) persons who are or have been dependent on alcohol or drugs."

In other words, if this is what is being provided, there must be registration.

15. The only definition of "personal care" I have been able to find is in s121(3): "In this Act, the expression "personal care" does not include any prescribed activity". But Mr Beesley gave me an extract from a Department of Health circular *Supported Housing and Care Homes,* paragraphs 8-11, which points out that the established, ordinary meaning of personal care includes four main types:

-assistance with bodily functions such as feeding, bathing and toileting

-care which falls just short of assistance with bodily functions but still involving physical and intimate touching, including activities such as helping a person get out of a bath and helping them to get dressed

-non-physical care, such as advice, encouragement and supervision relating to the foregoing, such as prompting a person to take a bath and supervising them during this

-emotional and psychological support, including the promotion of social functioning, behaviour management, and assistance with cognitive functions.

The circular comments that the third and fourth of these do not trigger registration as a care home.

16. All who knew were agreed that the four claimants had required none of this help, with the exception (possibly) of Mr G for a short period when he first entered Alexandra House in 1997. Nor could anyone except Mr G arguably fall

within the categories of person to be catered for by a care home under (a)-(d) above on the ground of a previous need.

The tribunal's decision and this appeal

17. The tribunal held that Alexandra House had been registered as a whole under the 1984 Act and that the registration had continued seamlessly until re-registration under the Care Standards Act on 28 10 02. Sefton's decision under HBGR regulation 7(1)(k) did validly deny the appellants housing benefit. The tribunal held that "establishment" in regulation 7 referred to BEN itself, rather than any particular premises.

18. BEN's argument is that the tribunal was right to read "establishment" as meaning BEN itself rather than Alexandra House, and therefore in coming to a decision it was necessary to look at the accommodation actually provided in any particular premises. In the present case, this was sheltered housing, and there was no evidence that since the 2000 registration the claimants had been assessed by Social Services, as would be required for residential care. As a fallback, Mr Beesley argued that the female claimants, who had had housing benefit since before 30 10 90, should come within regulation 7(2) and be entitled to keep it.

19. Sefton's argument is that the 19 4 00 registration was different from the earlier ones (despite looking the same and being for fewer people) because it covered the third floor as well as the rest. Therefore the claimants are squarely within HBGR regulation 7(1)(k) and cannot have housing benefit. Moreover, since the third floor was **not** covered by the earlier registrations, the female claimants cannot rely on regulation 7(2) to give them continuing entitlement.

20. The Secretary of State agrees with Sefton that the fallback position will not work. But Miss Demetriou points out that registration under both statutory regimes is of a person to run a care home, not of the home itself, and submits that the claimants may indeed be persons living in an establishment run by a person registered to run a care home, but not receiving the care which is contemplated in the registration. All these matters are questions of fact, for the tribunal or the commissioner.

21. I see the attraction of Mr Beesley's argument on "establishment", but I do not see how it can succeed. The expression is used in various places in the legislation (eg the Care Standards Act ss11, 13, 14, 15, 22 covering fitness of premises, welfare of persons and management and control, in each case of an establishment) where it could not mean an organisation like BEN. HBGR regulation 7(3) in sub-paragraphs other than (a) defines "residential accommodation" as accommodation provided by an establishment comprising a "home", a "nursing home", "premises" etc, all bricks-and-mortar based. I

prefer, as a means of looking at what a person's conditions actually are, Miss Demetriou's formulation of a person living in a care home but not fulfilling any of the s3(2) conditions nor receiving any of the specified services. She compared such a person's position with a staff member who does not live in the home *qua* home. Her submission, and that of Mr Beesley, is that HBGR regulation 7(1)(k) is meant to avoid double recovery, by payment of housing benefit where a person is maintained by other funds, not to cut it off even though they are not.

22. *Alternative Futures and Ors v National Care Standards Commission and Sefton MBC* [2002] EWHC 3032 Admin was an application by the proprietor and a number of residents for judicial review of a refusal to de-register a care home. One point was Sefton's refusal of housing benefit to the residents on the ground that they still lived in residential accommodation. Richards J did not need to deal with this aspect, which was to be left to the statutory appeal process. But it should be noted that the residents in this case were all people with mental health problems, and therefore clearly within s3(2)(b) of the Care Standards Act.

23. Miss Mayoh took a sterner line. She argued that earlier registration certificates, even though they looked the same as the 19 4 00 one, in fact did not cover the third floor of Alexandra House. But once Sefton decided to insist on the whole of the third floor being included, that was that for these claimants. They ultimately (and rightly) lost their housing benefit. They had no choice about what happened to them, and nor did BEN. The oral concession that they would be allowed to remain in their sheltered housing, on the faith of which BEN accepted registration of the third floor, was worthless. Miss Mayoh did not know why Sefton had insisted on registering the whole floor, she had been having difficulty in getting instructions from them now they were no longer the registration authority, similarly she was not able to put forward their account of the 2000 negotiations.

24. If Miss Mayoh is right, the registration of the third floor has had quite serious results for the claimants. From being largely independent people living in sheltered housing and no doubt entitled, within reason, to exclude other people from their rooms they became dwellers in a care home subject to quite onerous inspection provisions who could be obliged to allow inspectors into their rooms. Their personal documentation may also be more readily inspected by strangers than previously. They forfeited their housing benefit. Miss Mayoh suggested to Mr Prescott that they might have claimed other funds under (I think) the *Supporting People* system, and if so, I am sure they will. But Sefton's decision letters simply referred them to the DSS. Such a disadvantageous change of position requires careful consideration of its necessity.

25. There might be human rights arguments under ECHR articles 8 and 14 and article 1 protocol 1. But happily I do not need to trouble anyone with these, because I can accept Miss Demetriou's submission. The position at the date of the decisions was that the 1984 Act had been repealed by Schedule 6 to the 2000 Act with effect from 1 4 02. The 2000 Act regime had taken over. This claimant, on all the evidence, was at 7 6 02 (and still is) a person living in what had, because of the 19 4 00 registration, apparently become a registered care home but who did not (and does not) himself come within any of the definitions of vulnerable people in s3(2) of the Care Standards Act, and was not (and is not) receiving care as set out in the Department of Health circular. He is not excluded from housing benefit under HBGR regulation 7(1)(k) because he was not and is not in "residential accommodation". There is no question here of double recovery.

26. Having decided this way, I need not consider whether the two female claimants could come within HBGR regulation 7(2) – the male claimants could not, because neither was in receipt of housing benefit before 30 10 90. Sefton and the Secretary of State assert that the earlier registrations did not cover the third floor, so the claimants were not then in residential accommodation. But I would not feel safe about deciding this specific point without seeing the documents which, I am led to suppose, back up or clarify both the earlier registrations and that of 19 4 00.

27. The period in issue here straddles the introduction of *Supporting People* grants in place of paying certain service charges as part of housing benefit. I believe people on benefit at the relevant time received transitional housing benefit instead. I do not pretend to be in a position to sort this out, and leave it to Sefton to do so. If this leads to any problems, there will be a further decision carrying appeal rights.

(signed on original) Christine Fellner
Commissioner

26 April 2005