

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 Bolton appeal tribunal under reference U/40/122/2001/01716, held on 9th January 2002, 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.

The tribunal must begin by considering the decision under regulation 6 of the Housing Benefit (General) Regulations 1987 in accordance with my guidance in paragraphs 10 to 23.

The tribunal may or may not confirm the decision under regulation 6. If it does not, it has a discretion whether to consider any other possible bar to entitlement: see paragraph 6(9)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. The other obvious bar to entitlement is regulation 7.

- (i) If the tribunal decides not to deal with regulation 7, it must allow the appeal but limit its decision to regulation 6. This will allow the local authority to give a new decision under regulation 7, if it wishes. That decision will carry the right of appeal.
- (ii) If the tribunal decides to deal with regulation 7, it must warn the claimant of that and ensure that she has notice of the terms of that regulation during the overpayment period. At the time I write this decision, the claimant is no longer represented. So, the tribunal cannot rely on the representative to advise the claimant on the relevant law.

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 will have to consider how to ensure that the claimant has a fair hearing if the tribunal deals with regulation 7. I make the following suggestions. They are not directions. The panel member and the tribunal is free to depart from them if the claimant can be given a fair hearing in a different way.

- (a) One suggestion is that the tribunal should hold a hearing and deal with regulation 6 first. If the claimant succeeds, the tribunal can then adjourn for the local authority to prepare a new submission setting out the law on regulation 7.
- (b) My other suggestion is that the panel member who will hear the appeal could preview the case to form a provisional view of whether the claimant is likely to succeed under regulation 6. If she is, directions could be given for further submissions before the case is listed for hearing.

The appeal to the Commissioner

2. This case concerns an alleged recoverable overpayment of housing benefit. The appellant is the housing benefit claimant. The respondent is Bury Metropolitan Council, which I refer to as the local authority.

3. The case comes before me on appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave. A district chairman had decided to refuse leave to appeal. The local authority decided not to support the appeal. In view of the history I set out below, I find both those decisions astonishing.

The history of the case

4. The case concerns an alleged overpayment of housing benefit in respect of the inclusive period from 26th August 1996 to 2nd January 2000. The basis of the overpayment was that the claimant was not liable to make payments in respect of the dwelling. The decision was supported by reference to regulation 6 of the Housing Benefit (General) Regulations 1987. The local authority's submission to the appeal tribunal made no reference to regulation 7 of those Regulations.

5. The claimant applied for the hearing of the appeal to be postponed. That request was refused by a legally qualified panel member. On the same day, the same panel member sat as the tribunal that heard the claimant's appeal.

6. The tribunal accepted that the claimant was liable to make payments in respect of the dwelling under regulation 6. However, it went on to decide that she was treated as not liable under regulation 7(1)(a) and (l).

Fair hearing

7. That history discloses a plain breach of the principles of natural justice and the claimant's Convention right to a fair hearing. The claimant had no warning that the application of regulation 7 was in issue. She was deprived of any chance to make representations on that regulation.

Regulation 7

8. Matters get worse. The tribunal clearly applied the version of regulation 7(1)(a) and (l) that was in force at the date of the hearing. That was wrong. In an overpayment case, the relevant substantive legislation governing entitlement is that which was in force in respect of the overpayment period. The tribunal overlooked that.

The form of decision given by the local authority

9. The problems that arose in this case would have been avoided if the local authority had based its decision in the alternative on regulation 6 and regulation 7. The facts often raise issues under both regulations. I have seen decisions from some local authorities that are made on alternative bases. That is an acceptable form of decision and ensures that all the relevant issues are raised by an appeal. The local authority in this case may wish to consider that approach in the future.

Directions on regulation 6

10. The overpayment decision involved a determination that the claimant was not entitled to housing benefit on the ground that she was not liable to make payments in respect of the dwelling under regulation 6(1)(a) of the Housing Benefit (General) Regulations 1987. How should the tribunal deal with that issue?
11. If the claimant had not produced any documents in support of the allegation that she had a liability for rent, the issue would turn on the credibility of her evidence. However, in this case the claimant has produced some documentary evidence of a contract of tenancy or licence. It may be that there is other documentary evidence, like a rent book.
12. The tribunal must interpret the documentary evidence in order to determine whether, on its face, it imposes a liability for rent. In interpreting the document, the tribunal is not entitled to take account of evidence of the way in which the agreement has been implemented by the parties. See the decision of the House of Lords in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All England Law Reports 796.
13. If as interpreted the document produced by the claimant does not impose a duty to pay rent, the claimant was not entitled to housing benefit by virtue of regulation 6(1)(a).
14. If as interpreted the document produced by the claimant does impose a duty to pay rent, the tribunal must consider whether the obligation to pay rent is a genuine part of the arrangement between the parties. If it is not, the term is a mere sham that was never intended to be implemented, but which was brought into existence to misrepresent the true arrangement between the parties and to conceal the truth from those dealing with them. The sham may extend to the whole of the document or be confined to one or more of its terms. I have used the word 'sham', which is the usual descriptive word in my experience. In *AG Securities v Vaughan* [1988] 3 All England Law Reports 1058 at page 1067, Lord Templeman said that 'pretence' was the best description. 'Artificial transactions' is also used. But the label applied does not matter.
15. It is for the person who alleges that a document is a sham to prove it: see the judgment of Lord Justice Slade in *Mikeover Ltd v Brady* [1989] 3 All England Law Reports 618 at page 626. The issue must be decided, like any other, even-handedly without favouring any particular approach to the interpretation or any particular inference from the facts: see the judgment of Sir Denys Buckley in the Court of Appeal in *Stribling v Wickham* (1989) 21 Housing Law Reports 381 at page 390.
16. That means that in this case the legal burden of proof is on the local authority.
17. Whether a term is a sham is a question of fact: see the judgment of Lord Justice Sellers in *Stoneleigh Finance Ltd v Phillips* [1965] 1 All England Law Reports 513 at page 516. The tribunal has to decide whether the term as to rent that appears in the document represents the genuine agreement of both the parties. It will only be a sham if neither party regards it as a genuine term: see the judgment of Lord Justice Diplock in *Snook v London and West Riding Investments Ltd* [1967] 1 All England Law Reports 518 at pages 528 and 529. If a term is a genuine arrangement, it is irrelevant why it was made: see the judgment of Mr Justice Megarry in *Miles v Bull* [1968] 3 All England Law Reports 632 at page 636. So, it is

irrelevant to *this issue* that the term was included in order to bring the claimant within the housing benefit scheme.

18. In deciding whether the term is a sham, the tribunal is entitled to take account of evidence of the way in which the alleged contract has been implemented by the parties: see the speeches of Lords Oliver and Jauncey in *AG Securities v Vaughan* [1988] 3 All England Law Reports 1058 at pages 1072 and 1077. However, the tribunal must be careful not to give undue significance to this evidence. It is common experience that contracts are often not implemented to the letter in all circumstances. There is much give and take in the operation of contracts. In particular, the tribunal must bear in mind two distinctions.

19. First, there is a difference between a term that will never be implemented and one that may never be implemented. Contracts contain terms covering many eventualities. It may be envisaged that a particular term will not necessarily be implemented if the eventuality with which it deals arises. However, that does not mean that the provision is a sham. It is possible that the term was included so as to be available if necessary or as a last resort. If that was the case, the fact that the term was not implemented does not mean that it was a sham.

20. Second, even if it is intended that the term will be implemented, when the eventuality occurs it may not be enforced because of the circumstances at the time.

21. These possibilities may be less likely of a term to pay rent than of some other terms. But it may be envisaged that that term will not be implemented until housing benefit has been awarded. Or, when there is a delay in obtaining benefit, the term may not be enforced pending a final resolution.

22. The law gives binding force to contracts and makes available remedies to deal with breaches of contract. However, it realistically takes account of the way in which the operation of a contract may differ from its terms. It has a number of devices that recognise the effectiveness of these departures from the contractual arrangements. Some have the effect of altering the terms of the contract, for example by varying the terms as to the amount of rent. Others have the effect of preventing action being taken for particular breaches, for example by waiving (expressly or impliedly) a breach of the failure to pay rent for a past period. These possibilities must be taken into account in assessing the relevance of evidence of a failure to pay or collect rent.

23. If the obligation to pay rent is a sham, the claimant was not entitled to housing benefit by virtue of regulation 6(1)(a). If it is not a sham, regulation 6 does not bar entitlement to housing benefit. The tribunal must then decide whether to consider the application of regulation 7.

Conclusion

24. I allow the appeal and direct a rehearing so that the claimant may have a fair hearing of the issues that arise for decision.

25. The grounds on which I have allowed this appeal demonstrate very basic errors. Errors like these are seldom made by appeal tribunals in their social security jurisdiction. It seems, from my limited acquaintance with housing benefit appeals, that tribunals regularly fail to transfer lessons they have learned in the one jurisdiction to the other.

Signed on original

**Edward Jacobs
Commissioner
5th September 2002**