

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8(4) and (5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000:

I SET ASIDE the decision of the Portsmouth appeal tribunal, held on 13 February 2006 under reference U/03/201/2005/01793, because it is erroneous in point of law.

I make findings of fact and give the decision appropriate in the light of them.

I FIND as fact that the presence of the claimant's partner in their new property did not amount to occupation by himself or the family of that property as their home. Nor did the weekend visits by the claimant and the children amount to occupation.

My DECISION is that the claimant was not entitled to housing benefit in respect of her new property for the inclusive period 4 July 2005 to 31 July 2005.

The claimant's comments

2. Before I come to the issue in this appeal, I want to say two things to the claimant.
3. She has not commented on the legal issues that arise on the appeal. She has repeated that she won before the tribunal. That is correct, but a tribunal's decision is subject to the possibility of an appeal to a Commissioner, just as the local authority's decision was subject to an appeal to the appeal tribunal. The local authority was entitled to challenge the tribunal's decision on the law.
4. The claimant has also referred to the arrears on her rent account and says that this puts her home at risk. She has shown me a letter from the local authority to confirm this. The collection of arrears and any action for possession are not within my jurisdiction. However, I hope that these comments will be helpful. The local authority's representative has told me that he has arranged for no action to be taken against the claimant while my decision is pending. As a result of this decision, those arrears are still owing. The letter I have seen shows that the local authority has taken action to deal with the arrears. I am sure that the local authority does not want the claimant and her family to lose their home. However, the local authority is responsible for public funds and has a legitimate interest in being paid the rent it is owed. The letter emphasised that the officer concerned wanted to meet the claimant to discuss how the arrears could be cleared. It seems to me that the local authority was trying to bring the claimant to a discussion in order to make an arrangement that was realistic from her point of view while protecting the local authority's ultimate entitlement to payment of the arrears. I encourage her to co-operate with the local authority. She can no longer rely on the tribunal's decision. The worst thing that she can do is to refuse to engage with the local authority.

The issue and how it arises

5. The claimant moved homes. This case raises the issue of whether the claimant was entitled to housing benefit on both properties for the period during which she had to pay the rent on both. I will refer to the properties as her former property and her new property.

6. The claimant gave notice to terminate the tenancy on her former property. That notice terminated on 31 July 2005. She signed the tenancy agreement on her new property on 4 July 2005. Her partner went to stay there at once in order to get the property ready and, I believe partly, because he was not able to have the family car, which the claimant needed to transport herself and the children. Their belongings were moved in gradually. The claimant stayed there first at weekends with the children. They only finally moved in together after the end of term.

7. The claimant was paid housing benefit in respect of her former property until she moved out. She applied for housing benefit in respect of her new property from 4 July 2005, but the local authority awarded benefit only from 1 August 2005.

The law

8. Section 130(1)(a) of the Social Security Contributions and Benefits Act 1992 provides for housing benefit to be payable to a claimant 'in respect of a dwelling in Great Britain which he occupies as his home'. Section 137(2)(h) authorises regulations to make provision 'as to the circumstances in which a person is or is not to be treated as occupying a dwelling as his home'.

9. Regulation 5 of the Housing Benefit (General) Regulations 1987 is made under that authority. Regulation 5(1) provides that 'a person shall be treated as occupying as his home the dwelling normally occupied as his home ... and shall not be treated as occupying any other dwelling as his home.' However, this is 'Subject to the following provisions of this regulation'. Regulation 5(5) provides that 'Where a person is liable to make payments in respect of two (but not more than two) dwellings, he shall be treated as occupying both dwellings as his home only' in specified circumstances. The word 'only' shows that the list of circumstances is exhaustive. The circumstance relevant to this case is:

- '(d) in the case where a person has moved into a new dwelling occupied as the home, except where paragraph (4) applies, for a period not exceeding four benefit weeks if he could not reasonably have avoided liability in respect of two dwellings'.

The tribunal's decision

10. The tribunal decided that regulation 5(5)(d) was satisfied so that the claimant was entitled to housing benefit in respect of both properties for the inclusive period 4 to 31 July 2005. That provision contains three conditions that must be satisfied.

11. First, it only applies for a maximum of four benefit weeks. There is no doubt that the claimant was liable for rent on both properties from 4 to 31 July, which is less than four benefit weeks.

12. Second, the claimant could not reasonably have avoided liability on two dwellings. The tribunal found that she could not have done so. In support of that finding, it referred to: (i) the unreasonableness of giving notice before securing a new tenancy; (ii) her family circumstances; and (iii) the need to make the new property ready for occupation by her family. The local authority does not challenge the tribunal's finding, although it does not accept all its reasoning.

13. Third, 'a person has moved into the new dwelling occupied as the home'. The tribunal found that the claimant's partner had moved in and lived in the new property continuously from 4 July, when the tenancy was signed. In support of this finding, it referred to three provisions. (i) Regulation 5(5)(d) itself, which refers to 'a person', not to 'the claimant'. (ii) Regulation 71(1), which provides that either member of a couple may claim housing benefit. (iii) Schedule 7 to the Child Support, Pensions and Social Security Act 2000, which refers to persons affected by a decision. It is this finding that the local authority challenges on this appeal.

Analysis

14. The tribunal did not spell out its reasoning in detail. I hope that I have been able to reconstruct it accurately. The tribunal concentrated on the words 'a person' and said that this was not limited to the claimant. But obviously it could not mean just anybody, even one with no connection to the claimant at all. That is why the tribunal referred to the fact that the person in question was the claimant's partner and that, under regulation 71(1), either partner could claim. It was, therefore, in a sense a matter of chance which of them happened to make the claim. The tribunal also noted that any person affected had rights and, again, that was not limited to the claimant.

15. I can deal with the 'person affected' point straightaway, because it was a bad one. The tribunal overlooked the definition of that expression in regulation 3 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, which does not include a partner. But what of the tribunal's other reasoning?

16. Regulation 5(5)(d) refers to 'a person'. That provision is one of a limited number of exceptional cases in which 'a person ... shall be treated as occupying both dwellings as his home'. Notice the words 'a person' again. They must mean the same in both places in the same regulation. And the basic rule in regulation 5(1) is also stated in terms of 'a person'. Again, it must surely mean the same as elsewhere in regulation 5. Regulation 5 is made under the authority of section 137(2)(h), which refers to 'a person'. And that relates to section 130. This section also refers to 'a person' and this time it is linked to entitlement. Following that chain, 'a person' refers to a person whose entitlement to housing benefit is in issue.

17. A claim is determined by a local authority under regulation 76(2). That involves determining whether the claimant is entitled to housing benefit. Linking section 130 and regulation 76(2) produces the result that the claimant is the person mentioned in section 130 and, following the chain, in section 137 and regulation 5. Payment under regulation 88(1) is also usually made to the person entitled, and that person is the claimant.

18. On the basis of that reasoning, the tribunal was wrong to interpret 'a person' as meaning someone other than the claimant.

19. There is a further indication that the tribunal's interpretation of regulation 5(5)(d) was wrong. Regulation 5(1) provides that 'a person shall be treated as occupying as his home the dwelling normally occupied as his home ... by himself or, *if he is a member of a family, by himself and his family*'. In other words, occupation as a home means occupation by the family. The same concept of occupation is used in regulation 5(5). However, on the tribunal's interpretation, it was possible for the claimant's partner to be occupying the new property on his own. That is contrary to the concept of occupation as a home in the housing benefit scheme. Occupation under regulation 5(5)(d) must be occupation by the family as a whole.

20. Accordingly, the tribunal misdirected itself on the law and I must set aside its decision.

Disposal

21. Given that I have set aside the tribunal's decision, how should I dispose of the case? I could either direct a rehearing or substitute the decision that the tribunal should have given. The tribunal's reasoning was wrong, but it does not follow that it came to the wrong conclusion. Is it possible that the tribunal could have come to the same decision on different reasoning?

22. I have considered whether the claimant's whole family was occupying the new property through her partner's presence, but I have decided that they were not. He was living there, but that is not the same thing as occupying it as a home. From the evidence and the tribunal's findings, he was preparing the new property as the family home rather than occupying it as a home. It was not yet ready for the family as a whole to live there as their home. They stayed there together at weekends, but that is not the same thing. Accordingly, there is only one decision that the tribunal should have reached, which is that regulation 5(5)(d) did not apply. In those circumstances, a rehearing is not appropriate and I have substituted a decision confirming the refusal of the claim in respect of the new property for the inclusive period from 4 July 2005 to 31 July 2005.

Concluding remarks

23. Like the tribunal, I have sympathy for the predicament in which the claimant found herself. She found herself forced by the system to accept an overlapping period of liability on two properties and the new one was not immediately ready for occupation by her family. The law caters for some circumstances in which a claimant incurs dual liability for rent. Unfortunately, the circumstances in which the claimant found herself did not fall within them. The local authority, the appeal tribunal and the Commissioner only have power to apply the law. They cannot adapt it to meet the particular circumstances of a case that falls outside it.

**Signed on original
on 08 September 2006**

**Edward Jacobs
Commissioner**