DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I dismiss the appeal. The decision of the appeal tribunal is confirmed.

2 The claimant and appellant is appealing, by his appointee, and with permission of a chairman, against the decision of the Sutton appeal tribunal on 15 November 2001 under reference U 45 176 2001 02974. This case was heard by the tribunal at the same time as case U 45 176 2001 02984, appealed as Commissioners' case CH 1993 2002. I also considered the two cases together but, by agreement of both parties, have considered this case as the "lead" case. I am issuing a separate decision for CH 1993 2002 following this decision.

3 I held an oral hearing of this case (and CH 1993 2002) on 7 April 2003 in London. The claimant's (and appellant's) appointee was present, and the claimant was represented by Mr Simon Ennals of French and Co, solicitors, Nottingham. I refer to the claimant as Mr H in this decision. The respondent (Tandridge District Council, to whom I refer as the Council) was represented by Mr Paul Stagg of counsel, instructed by Mrs Barker, solicitor to the Council. The claimant in CH 1993 2002, to whom I refer as Mr C, was also represented by the same appointee and by Mr Ennals. I am grateful to both parties for explaining the background to, and their full submissions on, these difficult cases.

Background to this appeal

4 Mr H is a single man, aged 58 at the time of the appeal. He suffers from a learning disability and, until the period in question, had been in hospital or residential care for virtually all his life. He also suffers from severe physical disablement. I was told that Surrey County Council (the County Council) had placed Mr H with a charity (the Supporting Charity) under the Community Care Act 1990. That charity was the care provider commissioned to support Mr H by the County Council. By arrangements not directly relevant to the case, the Supporting Charity made arrangements for Mr H to take up a shared shorthold assured weekly tenancy, shared with Mr C, with a landlord that is another registered charity (the Landlord). The letters on file show that officials of the County Council were directly involved in setting up the arrangement. The tenancy began on 7 August 2000. The rent agreed for the tenancy was a net rent of £186.36 and a service charge of £58.31 weekly, a total of £244.67. There are full details in the papers of how this rent, which includes no element of profit, was made up.

5 Application was made to the Council for housing benefit for Mr H (and Mr. C). The Council awarded housing benefit of £95.74 a week in October 2000. The Council stated that "an unreasonable rent reduction" had been made of £148.95 a week. This was based in part on a reference to a rent officer, who had indicated a rent of £70.00 a week. The Supporting Charity promptly objected, supported by the Landlord. An application was also made under the transitional housing benefit scheme. Further correspondence followed, including a further reference of the rent to a rent officer. The rent officer determined that the rent was "significantly high; exceptionally high" and put the appropriate rent at £75.00 a week. The Landlord objected that as a registered charity it was an exempt landlord and not subject to referral to the rent officer, and also that it had been told by the County Council that Mr H would be eligible for housing benefit. The Supporting Charity also wrote in support of the appeal, making express reference to the relevant statutory provisions.

6 The Council later issued a review decision increasing the housing benefit to £158.30 a week from 7 August 2000 to 6 August 2001. The "unreasonable rent reduction" was £86.37. A comprehensive supporting letter stated that the referred rent was considered to be £206.09 weekly. The underlying rent allowed was put at £100 a week, with £38.58 support costs to be funded under the transitional provisions, and £19.72 general service charges included as eligible. The writer indicated that she understood that the rest of the rent would be met by the County Council. It was accepted that the local reference rent did not apply to Mr H. The letter also stated the view taken by the Council on the rent level chosen and on the existence of suitable alternative accommodation available to Mr H. This led to a comprehensive reply from the Supporting Charity, supported by letters from the officials at the County Council. The extremely thorough exchange of views led, however, to no change of decision and Mr H's appointee formally appealed. The grounds of appeal were that the amount of housing benefit was grossly low and that the Council had not given proper attention to the protection that Mr H should have enjoyed under the regulations relevant to him.

7 After an adjournment so that Mr H's case could be joined with that of Mr C, the tribunal held a full oral hearing. Both sides were fully represented, and the Landlord was present. A full written submission was put before the tribunal for the appellants. This indicated significant common ground between the parties. The record of proceedings also indicates a substantial level of agreement between the parties about the questions at issue and the background to them.

8 The decision of the tribunal was that it was appropriate for the Council to restrict the rent but that the level of restriction should be varied. What the tribunal termed the "bricks and mortar" element of the rent was increased by £20 a week to £120, so increasing the overall housing benefit to £178.30 a week. There is a full record of proceedings of the tribunal hearing, and an extremely thorough statement of reasons issued by the chairman.

Grounds of appeal

9 On behalf of Mr H, Mr Ennals based the appeal on two grounds: (a) a failure by the tribunal properly to apply the suitable alternative accommodation test that applied to Mr H under the Housing Benefit (General) Regulations 1987, "old" regulation 11, and (b) that the rent was grossly inadequate. It was submitted that the Council has not produced evidence that there was any alternative evidence available for Mr H, and that therefore Mr H was entitled to the full housing benefit claimed. But he accepted that the record and statement of the tribunal were beyond criticism in terms of the facts and proceedings.

10 In his oral submissions to me, Mr Ennals reinforced those points. His appeal was based on the contention that the tribunal had failed properly to interpret and apply both regulation 11(2)(c) and regulation 11(3), old form, of the Housing Benefit (General) Regulations 1987. More specifically, the tribunal had failed to make a valid comparison of like with like in setting the rent, and had also failed properly to interpret and apply the test of suitable alternative accommodation.

11 On the first point, Mr Ennals submitted that the Council and, on appeal, the tribunal, should have awarded the full amount of housing benefit claimed. There was no basis of fact on which to restrict the rent to less than the full amount claimed. The test had to take account the particular needs of Mr H, and it was not enough merely to refer to accommodation generally. No evidence had been produced to show that the rent agreed with the Landlord was excessive. Full details had been supplied. There was no excess element and, as the landlord was a charity, no profit element either. The tribunal, in

particular, had not dealt appropriately with the service elements of the rent. It had also fallen into the trap of treating the application as if made by the Landlord, and not by M H and the supporting charity. Any comparison had to be viewed from the point of view of Mr H, and the package of accommodation and services assessed as a whole. This was important because the evidence produced to the tribunal fell far short of evidence of an active market in accommodation supported to the level that Mr H was to be supported.

12 On the point about "suitable alternative accommodation", the wording of the regulation required that the accommodation "is" available at the relevant time. The Council had argued that it could provide alternative accommodation if given some months to do it. That was not enough. The test was not "to be made available." Mr Ennals drew on the decision of the courts about the old regulation 11, including the decision of the Court of Appeal in *R v East Devon District Council Housing Review Board ex parte Gibson* (1993) 25 H.L.R. 487. He submitted that it was plain that the regulation did not fit the supply of supported housing well, and that the test laid down by the Court in that case had to be adjusted to apply to supported housing.

13 In reply, Mr Stagg acknowledged that the support in a case like this was divided between his client as district council and the County Council. There was also responsibility on the local national health service providers. This division applied at that time under a number of different Acts of Parliament. But his starting point was that there was no question of Mr H being left to fend for himself. The County Council had a statutory duty to assess and meet Mr H's needs. He also agreed that supported housing cases were not in mind when the regulations were made. But the decision of the Court of Appeal in *Gibson* was the proper test to be applied. In applying it, it was accepted that regard should be had to the individual, as shown in *R v Oadby and Wigston District Council ex parte Dickman* (1995) 28 H.L.R. 806. Perhaps the nearest case to that of Mr H was *R v Westminster City Council ex parte Pallas* (23 September 1997, unreported). That was a case where the evidence was that moving the claimant put his life at risk. But this case does not show evidence of that sort in terms of alternative accommodation.

14 On the specific point about the interpretation of the test of suitable alternative accommodation, it did not make sense to interpret "is" as relating to the date of claim only. It had to have a forward application in reality. In most cases nothing could be done by way of leaving one tenancy and obtaining another without at lest the lead time of a month for the relevant notice periods. So the true test was whether the accommodation could be made available in a matter of weeks. That should also bear in mind that temporary arrangements could be made if necessary. On the issue of the required location and required adaptations, the evidence was before the tribunal, and it was not such as to make the decision of the tribunal wrong in law. The modifications were modest. The tribunal in this case had taken everything into account and it was entirely right to conclude as it did.

15 Both parties indicated that they were asking me to make the final decision in the case, rather than refer it back to a tribunal. I agreed that this is obviously expedient in this case. Following from that, I agreed with the parties at the conclusion of the arguments that if I decided to allow the appeal I would either reimpose the decision of the tribunal, adopting its findings of fact, but with any error of law corrected or made good, or I would allow the appeal in entirety and decide that the whole sum claimed was to be awarded. Accordingly, I did not need to consider further at the hearing any issues of fact about the levels of rent and services, and I did not hear argument about relative rent levels.

Old regulation 11

16 This appeal is limited to issues that arise from the application to Mr H's application for housing benefit of the old regulation 11 of the Housing Benefit (General) Regulations 1987. This is the form of the regulation before a new text was inserted in the regulation from 2 July 2001. Both sides agreed throughout that the old form of the regulation was the relevant wording to be applied to Mr H, and that agreement is clearly correct.

17 The former text of regulation 11 was headed "restrictions on unreasonable payments", and the relevant parts of the regulation provided as follows:

> (2) The relevant authority shall consider -
> ...
> (c) whether by reference to a determination or redetermination made by a rent officer in exercise of a function conferred on him by an order under section 121 of the Housing Act 1988 ... or otherwise, whether the rent payable for his dwelling is unreasonably high by comparison with the rent payable in respect of suitable alternative accommodation elsewhere.
>
> (3) If any person to whom paragraph (7) applies -
> ...
> (b) is incapable of work for the purposes of one or more of the provisions of the Social Security Act ...
>
> no deduction shall be made under subsection (2) unless suitable cheaper alternative accommodation is available and the authority considers that, taking into account the relevant factors, it is reasonable to expect the claimant to move from his present accommodation.
>
> (6) For the purposes of this regulation -
>
> (a) in deciding what is suitable alternative accommodation, the relevant authority shall take account of the nature of the alternative accommodation and the facilities provided having regard to the age and state of health of [the claimant] and, in particular, where a claimant's present dwelling is occupied with security of tenure, accommodation shall not be treated as suitable alternative accommodation unless that accommodation will be occupied on terms that will afford security of tenure reasonably equivalent to that presently occupied by the claimant; and
>
> (b) the relevant factors in paragraph (3) are the effects of the move to alternative accommodation on -
> (i) the claimant's prospects of retaining his employment; and
> (ii) the education of any child or young person ... if such a move were to result in a change of school.

It is common ground that the factors in (6)(b) do not apply and that the alternative accommodation offered was, or was likely to be, subject to the same level of security of tenure.

18 From that, the issues to be decided by the Council and tribunal in this case were:
- was the rent claimed "unreasonably high" by comparison with other suitable accommodation; and, if it was,
- was suitable alternative accommodation available for Mr H; and if it was,

- was it reasonable for Mr H to move to that accommodation?

The main issues of law about the tribunal's answer to those questions was whether it had properly considered Mr H's circumstances, and when it had to be shown that alternative accommodation was available.

The Gibson decision

19 The old regulation 11 was the subject of examination by the courts on several occasions. The leading decision is that of the Court of Appeal in *Gibson* noted above. The Master of the Rolls examined the housing benefit scheme, and regulation 11 in particular, in some detail. He stated of the limits on rents:

> It is, as I have already suggested, plain that the procedure is designed to protect the public purse. But it is fair, I think, to infer that the procedure is not designed to produce homelessness, which would be the result if a beneficiary's rent were restricted, so that he could not afford to stay where he was but was unable to find any other accommodation to which he could be expected to move at the level of rent payable.

Referring to regulation 11(3) he stated:

> Regulation 11(3) is clearly designed to make special provision for families which include elderly persons of the advanced age of 60, disabled persons and children and young persons. It is, I think, implicit that the restriction of the rent is recognised as being possibly such as to oblige a recipient of housing benefit to move, but certainly in an 11(3) case such a recipient is not to be obliged to do so unless it appears that there is somewhere that he and his family can move at the rent allowed.

and

> ... it has been repeatedly said that it is not part of... the Review Board's function to identify specific property available for a recipient's occupation. Speaking for myself, I unreservedly accept that ... It is in my judgment quite sufficient if an active market is shown to exist in houses of the appropriate type in an appropriate place at the level of rent to which rent is restricted. There must, however, be evidence of that in a case falling within paragraph 11(3); otherwise the recipient, if he had to move, would have nowhere to go. It is, however, sufficient, as I wish to stress, to point to a range of properties, or a block of property, which is available without specific identification or particular dwelling-houses.

20 Evans LJ agreed, commenting:

> ... the authority must be satisfied at least that there is suitable alternative accommodation to which the applicants can move. It is agreed on all hands that the authority is not an accommodation or estate agency and that there is no requirement that it should identify any actual or specific other property. On the other hand, the paragraph in this context, in my judgment, does require the authority to be satisfied that the appropriate accommodation is available in fact to the applicants.

He also endorsed the words of the Matter of the Rolls that there should be " a relevant active market in property of the relevant description, type or class, to use words that have appeared in previous judgments".

21 I do not find any of the other decisions discussed or cited move things much further forward in this appeal from that guidance. However, I think it worth noting the factual context of the *Gibson* decision. It was about a family of two parents and two teenage children occupying a three bedroomed house. They were paying rent of £104 a week, and the rent officer set the rent at £95 a week. The local council decided that the house they were occupying was too expensive by the standards of the area. The case for Mr H is far removed from the mainstream context of the facts before the Court of Appeal in *Gibson*. Not least, the question of the "public purse" applies very differently here to a case such as that of the family in *Gibson*. If a higher rent is allowed to Mr H, the practical effect appears to be that it is borne by the local council tax payers of the Council, while if the County Council bears the cost then it is presumably the county council taxpayers and general taxpayers who pay. Mr H's only income is income support and disability living allowance, and he has no capital resources, so there is no question about costs being deflected from the public purse. At basis, it is a question of which public purse pays. There is also no question of "luxury" here. The facilities, as far as I can see, were those sought by the County Council and the Supporting Charity. They were keen to get Mr H out of residential accommodation, and they decided what was necessary to achieve that. Indeed, that decision may have benefited the public purse in the broad sense as well as Mr H. It was certainly not an arrangement of the kind that the Master of the Rolls considered to be the focus of the regulations. Nor, it is accepted, does the reference rent decide the matter. But I record that the tribunal satisfied itself that the issue of who pays did not affect the decision of the Council. That was a matter expressly considered by the tribunal and on which it made a clear finding of fact. And, in any event, the decision before me is that of the tribunal, not the Council.

My decision

22 The circumstances of Mr H are far removed from an "ordinary" situation such as that in Gibson. Mr H could not, and never has, lived on his own. He has severe physical and mental disablements. They were such that he could not have moved into a house without changes being made - though the parties disagreed about the extent of those changes. The request from the County Council was for a house with three bedrooms, one at ground floor level, fully wheelchair accessible shower, door and room layouts suitable for a frame user, and ability to convert to full wheelchair access (document 68). It was not disputed that the house also needed to have facilities for 24 hour care support, including therefore a third bedroom as well as those for Mr H and Mr C. In addition (document 85) the assessment of the Supporting Charity was that Mr H could only live in independent accommodation "in the familiar district that he has lived for most of his life ... If he were not able to continue at his present address there is a clear risk that he would have to be moved again to live in another residential care home." Again, the tribunal had this evidence in front of it and clearly had these unusual facts in mind. It concluded: "although it is desirable for the tenants to have continuity of residence at their present home for the reasons stated, there was other suitable accommodation in their locality and a move would not be so detrimental as to make that other accommodation suitable."

23 Did the tribunal apply the right test in finding that suitable other accommodation was available? The tribunal expressly rejected Mr Ennals' submission that the accommodation had to be available immediately at the date of decision. It found that "it was sufficient for an active market to exist in property which was capable of adaptation without any great

difficulty... the tribunal found that accommodation in such circumstances of the present two tenant could never be available off the shelf and this could not be the correct interpretation of the section". But elsewhere in its statement the tribunal noted that the Council had stated that it would take 18 months to make alternative accommodation available and that "the tribunal did not find this a wholly satisfactory explanation for the length of the delay".

24 At the hearing before me, Mr Ennals did not assert the immediacy of the requirement in regulation 11(3) as the tribunal understands him to have done. Mr Stagg's argument that in any event there would be a month or so of leeway because of notices raised a valid point. But Mr Ennals did assert, and in my view was right to asset, that the 18 months suggested by the Council was not within the scope of regulation 11, and that the Council had not produced evidence on which the tribunal could find that accommodation was available within the meaning of the regulation. I do not accept as an appropriate response to that the assertion by Mr Stagg that any break in the provision of accommodation caused by such delays could be ignored because of the duty of the County Council to accommodate. It is clear from the correspondence that the current arrangements were precisely the arrangements undertaken by and for the County Council to meet that duty.

25 Nonetheless, my conclusion is that Mr Ennals has not persuaded me that the tribunal went wrong in its decision. This was a most difficult case, and one at the margins of the scheme into which it must be fitted. But the question for the tribunal was one of impression when, as here, full evidence and argument from both sides is put before the tribunal. The tribunal formed a view about what would constitute suitable alternative accommodation not in the abstract but for Mr H and Mr C. It also formed a view about the modifications necessary to produce such accommodation and the time taken to do it. Those facts were applied by the tribunal to the regulation, taking into account the guidance of the caselaw and the arguments of the parties. From that, the tribunal formed the conclusion that the test was met and that it was reasonable, if it should come to that, that Mr H and Mr C should move. Whether I would, or would not, have reached the same decision on the facts as the tribunal on any of those points is not relevant. The question is whether it erred in law. Despite Mr Ennals' best endeavours, I see nothing in the wording of the regulation that requires some other answer, or that renders the decision of the tribunal perverse on the evidence before it.

26 On the underlying issue of the reasonableness of the decision about the level of rent, the decision against which the appeal is made was the decision of the tribunal. It made that decision afresh and did not merely adopt the decision of the Council. Again, it did so after a full hearing and consideration. I see no ground to set aside that decision, which was again essentially a decision on the facts. I therefore confirm the decision of the tribunal and dismiss the appeal.

David Williams
Commissioner

08 May 2003

[Signed on the original on the date shown]