Bulletin 182

CF CH/2111/03

1. This appeal, brought with my leave, succeeds. The decision of the tribunal on 9 4 03 was erroneous in point of law, as explained below, and I set it aside. But I am able under paragraph 8(5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 to give the decision I consider the tribunal should have given. This is that the claimant did not lose his entitlement to council tax benefit by reason of his absence from his regular address between 27 9 01 and 19 3 02.

2. Regulation 4C(3) of the Council Tax Benefit (General) Regulations 1992, inserted from 1 4 95 by regulation 4 of the Housing Benefit, Council Tax Benefit and Income Support (Amendments) Regulations, SI 1995 No 625, on the face of it removes entitlement to council tax benefit (CTB) where a person's absence from the home on which he pays council tax is likely to exceed 13 weeks. It does this by treating him as thereafter no longer occupying that dwelling as his home. The present claimant was away for six months. The local authority applied the regulation and terminated the CTB award. The claimant disputed this, arguing that under s131 of the Contributions and Benefits Act 1992 (CBA), CTB entitlement, like council tax liability, depends on "residence". It is housing benefit (HB) which under s130 uses the concept of occupying as a home, both for entitlement and for extending entitlement in limited circumstances. The tribunal held that the claimant should lose CTB entitlement: CBA s137(2)(h) authorises, among other things, the making of regulations "as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home", and this empowered the making of regulation 4C(3).

3. Despite having won the appeal, the local authority, when faced with the claimant's grounds of appeal reiterating the earlier arguments, agreed that the use of "residence" as a test for CTB as well as of liability for council tax meant the appeal to me should succeed. I was tempted to allow it without more, but I was mindful of the Secretary of State's practice of appealing decisions in which at lower levels he has taken no part, under his express power in paragraph 8(2)(a) of the 2000 Act. I therefore thought it prudent to invite the Secretary of State to be joined as a party if he wished, and in any event to make a submission. He elected to be joined on 5 11 03, made a submission supporting the tribunal's decision, and appeared on the oral hearing.

4. The local authority understandably decided not to attend or be represented at the oral hearing, but the claimant, who did not attend, was represented by Mrs Ward of the Birmingham Tribunal Unit, who had written the excellent submissions for the claimant and also represented him before the tribunal. She was accompanied by Mr D Beckett as an observer. Mr David Forsdick of counsel represented the Secretary of State, supported by Mr Jason Westerman of ACIB and accompanied by Miss Dasitra and Messrs Bana and Jennings as

observers. I am most grateful to Mrs Ward and Mr Forsdick for their assistance. I later issued a further direction, to which Mrs Ward and Mr Westerman responded.

5. The facts were not in dispute. The claimant is an owner-occupier of his house at 272 W L Road, for which he pays council tax. It was no part of his case that he should not continue to do so during his absence abroad. There is no HB claim. On a date which the tribunal held and the local authority accepted to be 27 9 01 the claimant and his wife went on holiday to India. While away, they stayed with relatives. They always intended to return to occupy their dwelling as their home, and no part of the house was sublet, but the tribunal found, and again there is no dispute, that the period of absence was always likely to exceed 13 weeks. There was some question of difficulty in arranging a return flight after the original return date in January 2002 was rescheduled, but there was nothing to suggest supervening illness or that the holiday was other than for an indefinite period. So the claimant was away for six months, and even if the January 2002 return date had been adhered to, the absence would still have exceeded 13 weeks. Mrs Ward said that this was irrelevant anyway because the claimant and his wife continued to be "resident" at the property during their absence.

The legislation

6. From 1 4 95 Parliament, by means of the same statutory instrument, SI 1995 No 625, amended both the HB and the CTB Regulations. It sought to place HB and CTB on the same footing and to limit continuing entitlement to either benefit where a claimant's temporary absence from his dwelling is likely to exceed 13 weeks (or 52 weeks in certain circumstances which do not apply in this case). The claimant's argument has been that although this intention may have succeeded in relation to HB, it failed with CTB.

7. Under s130(1)(a) in Part VII of the Social Security Contributions and Benefits Act 1992, (CBA) a person is entitled to HB if (among other things) "he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home". Regulation 5 of the Housing Benefit (General) Regulations 1987, which is headed "Circumstances in which a person is or is not to be treated as occupying a dwelling as his home", provides

> (1) Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home –
>
> (a) by himself or, if he is a member of a family, by himself and his family...
>
> and shall not be treated as occupying any other dwelling as his home.

> (2) In determining whether a dwelling is the dwelling normally occupied as a person's home for the purposes of paragraph (1) regard shall be had to any other dwelling occupied by that person or any other person referred to in paragraph (1) whether or not that dwelling is in Great Britain.

The claimant does not dispute that, had this been a claim for HB, he would have been excluded by subparagraph (8) which provides that

> ...a person shall be treated as occupying a dwelling as his home while he is temporarily absent therefrom for a period not exceeding 13 weeks beginning from the first day of that absence from home only if -
>
> (a) he intends to return to occupy the dwelling as his home; and
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> (b) the part of the dwelling normally occupied by him has not been let or, as the case may be, sub-let; and
>
> (c) the period of absence is unlikely to exceed 13 weeks.

The claimant's absence was always likely to exceed 13 weeks.

8. But, the claimant argues, s131(3) of the 1992 Act is different from s130(1)(a): it provides, as here material, that a person is entitled to CTB if he satisfies the "main condition" that he

> (a) is for the day liable to pay council tax in respect of a dwelling of which he is a resident; and
>
> (b) is not a prescribed person or a person of a prescribed class.

No regulations have been made prescribing a person or a class, other than persons from abroad and students. The claimant is neither of these. S131(11) (like regulation 2(1) of the Council Tax Benefit Regulations) defines "resident" by reference to Parts I or II of the Local Government Finance Act 1992 (LGFA), which by s6(5) defines "resident" in relation to any dwelling as "an individual who has attained the age of 18 years and has his sole or main residence in the dwelling". Liability to pay council tax is governed by s6(2) which provides, as here material, that a person is so liable if

> (a) he is a resident of the dwelling and has a freehold interest in the whole or any part of it.

9. By the 1995 amendments, the CTB Regulations had inserted in them regulation 4C. This closely parallels regulation 5 of the Housing Benefit Regulations, and in particular regulation 4C(3) provides that

> ...a person shall be treated as occupying a dwelling as his home while he is temporarily absent from that dwelling for a period not exceeding 13 weeks beginning from the first day of absence from the home, if –

(a) he intends to return to occupy the dwelling as his home; and

(b) while the part of the dwelling normally occupied by him has not been let or, as the case may be, sublet; and

(c) the period of absence is unlikely to exceed 13 weeks.

This wording, too, imports a reference to occupying the dwelling as a home; but in relation to CTB the primary legislation contains no such expression.

10. Mrs Ward's argument, which also appears in *Housing Benefit and Council Tax Benefit Legislation,* ed. Findlay and others (*Findlay*), the leading textbook on HB and CTB, was that this regulation simply was not authorised by the governing legislation, which made no reference, in connection with CTB, to occupying the dwelling as a home. It was an unauthorised attempt to impose HB concepts, based on the statutory expression "occupying a dwelling as the home", on a benefit based on residence.

11. The tribunal thought it could solve the problem by reference to CBA s137(2). This is a subsection enabling the making of regulations for the purposes of Part VII (income-related benefits), including

(h) as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home

The tribunal decided that (h) was sufficient to enable the making of regulation 4C(3) of the Council Tax Benefit Regulations.

12. Could this regulation-making power, worded by reference to the s130 HB requirement, also operate to, in effect, add an extra condition to the s131 residence test? The claimant reiterated his original arguments in the grounds of appeal. The local authority now decided that it agreed, and no longer wanted to contest the appeal. It accepted that the Secretary of State had intended to bring HB and CTB under the same regulatory scheme, but had failed, and if there was a lacuna in the legislation, it was for the Secretary of State to fill it by further amending the statutory scheme.

13. The Secretary of State submitted that s137(2)(h), if nothing else, did give power to enact regulation 4C(3), and that clearly in this context the notions of occupation and residence were meant to be equivalent, and Parliament would not have intended the lacuna identified by the local authority. Alternatively, since the main condition is residence, a person away from home other than temporarily is not resident unless the legislation deems him to be so.

14. Mrs Ward responded that if this was so, then the claimant would have had no liability to pay council tax and would not have needed CTB, and this appeal

would not have been necessary. She further argued that residence is a more enduring concept than occupation, and cited *Ward v Kingston upon Hull CC* [1993] RA 71 QBD, where a worker in Saudi Arabia was considered still to be resident at his address in Great Britain, because even though he was not physically living there all the time, it was still his sole or main residence.

The oral hearing

15. Mr Forsdick, while recognising the force of Mrs Ward's argument, urged me to have full regard to the similar contexts in both sets of regulations into which the 1995 amendments were inserted. Their consistency with each other was also plain to see. Clearly Parliament intended both sets of provisions to operate in the same way. The differences in the governing sections of CBA 1992, on the one hand s130(1)(a) (liability for rent plus occupation), on the other s131(3) (liability for council tax plus residence) arise merely from the need, under s131(11), to look to the Local Government Finance Act for the definition of "resident". Both benefits are income-related (means-tested) under s123(1), and they have similar financial tests employing applicable amounts, similar rules relating to couples, and the like. The "residence" requirement is simply added in by s131(11) with reference to LGFA s6(2). "Residence" is an elastic concept, but council tax under LGFA s6 and CTB under CBA s131(1) are *daily* benefits, so the question of residence has to be answered for each day in question: is there a chargeable dwelling of which the payer or claimant is a resident *on that day*? The Secretary of State could thus rely on a more limited definition of residence, one closer to the sense of "occupy", the *Shorter Oxford Dictionary* definition of which includes "to reside", so that it was perfectly proper for the CTB regulations to refer to occupying the dwelling in question without specific reference to residence. A dwelling of which a person is a resident for that day is equivalent to a dwelling occupied as his home for that day. All this fits neatly within the statutory scheme as a whole. Why should Parliament be supposed to have made CTB a more generous benefit than HB? Rent has to go on being paid whether or not HB is awarded, so why should it make a difference that council tax has to go on being paid when CTB stops?

16. In the light of these arguments, Mr Forsdick contended that CBA s137(2)(h) is wide enough to cover the making of regulations for both benefits, without any stretching of language and without the need specifically to mention residence. He expressly denied that this involved the *addition* of an occupation requirement for CTB which is not otherwise there.

17. Mrs Ward disputed that there was power to invoke a different and narrower meaning of "residence" for CTB than for council tax. HB relates to a rent liability, which may be more transient than council tax liability. This is reflected in the terminology used in ss130 and 131: "occupation" is more

transient, "residence" more enduring. If Parliament did not mean this, it should have said what it did mean. The *Findlay* commentary has been in all editions of the book (one every year), so why was this not acted on by amending the regulations, if they did not reflect Parliament's intention? If there is a lacuna, it is for Parliament to put it right.

18. Mr Forsdick submitted that if his "context" points were accepted for CTB, they would also extend to council tax liability: no liability without residence from day to day.

Further investigations

19. Mr Forsdick told me that he had only very recently received the papers. So I thought it wise to investigate the legislative history of the 1995 amendment to see whether any clues to interpretation could be found.

20. Mr Forsdick convinced me that Parliament, or at least the Secretary of State, intended HB and CTB to be treated the same. Had I wanted confirmation, Cm 2783, the Social Security Advisory Committee (SSAC) Report on SI 1995 No 625 and the Secretary of State's response, provides it. One purpose of the regulations was to introduce uniformity of treatment of temporary absences across the three means-tested benefits, HB, CTB and income support. Before, CTB had continued in payment for as long as council tax liability continued, and the Department called this an "anomaly" (paragraph 11). The SSAC deplored the lack of supporting evidence for the proposed changes and objected to them on other grounds. It doubted (paragraphs 73-6) there could be very many CTB cases and believed the extra administrative burden would outweigh any benefit. But it did not question whether the proposed CTB change was enabled by the governing statute. The Secretary of State was unmoved. CTB should be subjected to a temporary absence rule to remove the "anomaly".

21. The preamble to SI 1995 No 625 cites s137(2)(h) as one of the provisions under which it was made. So does SI 1995 No 560, made a couple of days earlier but coming into effect on the same day. No 560 inserted into regulation 4 the heading "circumstances in which a person is or is not to be treated as occupying a dwelling as his home", and a new regulation 4B about persons on temporary release from custody being treated as still detained. No 625 added regulation 4C, exemplifying further "circumstances in which" etc, including the circumstances which occurred in the present case and various other circumstances similar to parts of regulation 5 of the HB Regulations as amended by the same SI. Why this was the course taken, I cannot say. When regulation 4A was introduced by SI 1994 No 470, the course taken was expressly to prescribe "persons from abroad" as persons of a prescribed class under s131(3)(b) – a subsection not cited in either of the other two SIs.

22. An attempt was made in SI 625 to tie in regulation 4C by also amending regulation 2(2) of the CTB Regulations so as to read

> In these Regulations references to a claimant occupying a dwelling or premises as his home shall be construed in accordance with regulation 5 of the Housing Benefit (General) Regulations 1987 [and regulation 4C of these Regulations].

If regulation 4C was made without authority, this cannot be cured by including it in an interpretation section as a means of interpreting itself. But I wondered what the pre-amendment reference to occupying a dwelling as a home might signify, in terms of the regulations as they then stood.

23. However, it appears from the legislative history to have related only to Schedule 5 (capital disregards). The original form of regulation 2(2) read

> In Schedule 5 references to a claimant occupying a dwelling or premises as his home shall be construed in accordance with regulation 5 of the Housing Benefit (General) Regulations 1987.

This was amended in 1993 by deleting "Schedule 5" and substituting "these Regulations" (1993 SI No 688, regulation 2(2)). But I discern nothing else in that SI that might have warranted this amendment. And in SI 625 Parliament went to the trouble of adding in the reference to the *new* regulation 4C, apparently as an aid to construction.

24. I wondered about s6(1)(l) of the Social Security Administration Act 1992, which is also cited in the preamble to SI 625 as one of its empowering provisions, and enables regulations to be made about "the day on which entitlement to a benefit is to begin or end". I directed further submissions. Mrs Ward argued that this was too remote from regulation 4C, which contains no express reference to days of, or beginning or ending of, entitlement, or to entitlement at all. And even if the regulation *were* to be given its presumed full intended effect, it would still be irrelevant, because there is no statutory requirement for a person to occupy a dwelling as his home in order to get CTB, only to reside there. There was nothing to warrant a finding that an extra CTB condition of occupying the dwelling as a home had been successfully imposed, and she reminded me that the power contained in s6(2) of the Administration Act to disapply the LGFA residence definitions or prescribe different ones had not been exercised, indeed s131(11) referring to the LGFA residence definition had also been cited in the preamble.

25. Mr Westerman thought otherwise. He argued that s6(1)(l), combined with s137(2)(h) which empowered regulations for the purposes of Part VII of CBA 1992 (*including* s131), did empower the insertion of regulation 4C, and also regulation 3 which amended regulation 2(2) as set out above and regulation 6,

which contained transitional provisions. Equivalent HB amendments were empowered by s5(1)(k) of the Administration Act, also cited in the preamble.

My conclusion

26. In the end, I agree with Mrs Ward on the claimant's behalf. Regulation 4C(3) of the CTB regulations is of no effect. I agree with Mr Forsdick and Mr Westerman that from the context it was meant to have the same effect as regulation 5(8) of the HB regulations. It was reasonable to attempt parallel provision. But Parliament did not succeed in enacting it. The test of entitlement to CTB under CBA s131(3) and (11) and LGFA s6(5) is liability to pay council tax on a dwelling which is a claimant's sole or main residence. Mr Forsdick felt driven to suggest that council tax *liability* should also cease in accordance with regulation 4, but this, particularly in the absence of the local authority which might have had trenchant observations to make, is not a suggestion I could entertain.

27. There is nowhere in the council tax statutory provisions any reference to the claimant having as a condition of entitlement to occupy the dwelling as his home. The concept of a "main", as opposed to sole, residence militates against it. Mr Forsdick denied that the 1995 provisions operated to prescribe an *extra* condition; he simply argued that they were wide enough to cover both HB and CTB. But I am not satisfied that s137(2)(h), empowering the making of regulations as to when a person can be treated as occupying or not occupying a dwelling as his home, extends to CTB where the only prescribed test is different, and the tribunal was wrong in law to conclude that it did.

28. Parliament had two means of achieving the effect it desired. It could, as it did with CTB regulation 4A, have prescribed under s131(3)(b) the persons or classes of persons it intended should be caught. Or it could have used s6(2) of the Administration Act to prescribe provisions disapplying or modifying the LGFA definitions. It did neither.

29. I note that SI 625 also cites s137(2)(i) as an enabling provision. This empowers regulations "for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable", and is doubtless the current power under which regulation 7 of the HB Regulations prescribes numerous circumstances where people with a rent liability cannot get benefit. I suppose it could be read as treating, in circumstances set out in regulation 4C, someone liable to pay council tax as if he were not so liable. And the preamble also refers to "all other powers enabling [the Secretary of State] in that behalf". But no-one asked me to consider these points and I am reluctant to take up yet more time getting further submissions which in all probability would not alter the view I have formed.

30. I have not dealt with the fine detail of the parties' more recent submissions, but to do so would reinforce my conclusion. I can only apologise that the decision has been so long in coming.

31. Regulation 4C(3) of the CTB Regulations is of no effect, and the appeal therefore succeeds.

(signed on original) Christine Fellner

Commissioner

20 July 2004