Bullith, 1fo [Short]

CH 2214 2003

Decision and Hearing

1. This appeal by the London Borough of Camden succeeds but only in a technical sense. The chairman of the tribunal having granted leave to appeal, in accordance with the provisions of paragraph 8(5) of Schedule 7 to the Child Support Pensions and Social Security Act 2000 I set aside the decision of the Fox Court (London) tribunal of 12th November 2002 (reference U/45/161/2002/01607) as having been made in error of law. I substitute my own decision to similar effect but for completely different reasons. My decision is that in respect of her claim made on or about 15th May 2002 the claimant is entitled to housing benefit on the basis that the eligible rent at that time was £15,600 pa. I remit to the London Borough of Camden in the first instance matters concerning calculation and payment consequent upon my decision. In the event of any difficulty over this or the failure of the parties to agree, either party is at liberty to restore the matter for hearing before me (or another Commissioner if I am not available) for further determination.

2. I held an oral hearing of this appeal on 10th February 2004. The claimant was not represented but attended in person. The London Borough of Camden ("the authority") was represented by Mr Cox of counsel. I am grateful to both of them for their assistance, and to Mr Cox for his helpful and fair skeleton submission. The Secretary of State was not involved in this appeal.

Procedure

3. The claimant was born on 30th September 1938. She is now retired and is in receipt of both mobility and care components of disability living allowance and income support. She suffers from widespread osteoarthritis for which she has needed surgery. In September 1991 she became a tenant of Flat No 1, the freehold of which was and is owned by an educational institution, which deals with the claimant through agents. The claimant has continued to rent this flat ever since and during the relevant period has lived alone (although with members of her family staying occasionally). Her flat is on the ground floor of a four storey building which has one flat on each floor. It has a main bedroom, a second very small bedroom, a living room, bathroom, and a well equipped kitchen which is big enough for her to eat in.

4. On 5th June 1999 the claimant entered into a new three year assured shorthold tenancy agreement, expiring on 30th April 2002, at an annual rent of £10,920 (weekly equivalent £210), with no provision for the rent to be increased during that period. The tribunal found that "Previous leases prior to the 12999 lease had had yearly increases of 10% pa". As I understand it, the rent under the 1999 lease was met in full by housing benefit, to which the claimant had been entitled for some years (although

she was working full time when she first rented the flat). A fresh claim was made on 14th January 2002, which was during the benefit period.

5. The tribunal found that:

> "In early 2002, negotiations commenced to renew her lease. During these negotiations [the claimant] consulted the [CAB] and telephoned the Housing Benefit section of [the authority] to ask if Housing Benefit would meet the increase in her rent. She was informed that as long as the increase was in line with comparable rents in the area, there should be no problem".

6. The claimant agreed the new assured shorthold tenancy agreement to run for 5 years from 1st May 2002. The rent was to be £15,600 annually (calendar month equivalent of £1300; weekly equivalent of £299 or £300) with "annual increments in line with RPI". On 15th May 2002 the claimant informed the authority of this and asked for an increase in housing benefit. This request is "the claim" to which I have referred in paragraph 1 above.

The Rent Officer's Determination

7. On 29th May 2002 the rent officer determined as follows: "Size and Rent. The Local Reference rent is the same or more than the Claim-Related rent". This determination requires some explanation. "Local reference rent" is defined in paragraph 4(1) and (3) of schedule 1 to The Rent Officers (Housing Benefit Functions) Order 1997. It is the average (mean) of 2 figures. One is the highest rent, in the rent officer's opinion, which a landlord might reasonably have expected to obtain at the relevant time from a tenant not entitled to housing benefit for an assured tenancy of a dwelling which meets the specified criteria, excluding an exceptionally high rent. The other is the lowest rent, in the Rent Officer's opinion, which a landlord might reasonably have expected to obtain at the relevant time from a tenant not entitled to housing benefit for an assured tenancy of a dwelling which meets the specified criteria, excluding an exceptionally low rent. The criteria are specified in paragraph 4(2). These are that the dwelling is in the same locality, is in a reasonable state of repair, and (in the present case) accords with the size criteria. The size criteria are specified in Article 2 of schedule 2 to the 1997 Order. In the present case this means one bedroom or room suitable for living in, and one other room suitable for living in.

8. Claim related rent is defined in paragraph 6 of schedule 1 to the 1997 Order when read (in this case) with paragraph 2(2) of the schedule. Here, the rent officer determined that the dwelling exceeded the size criteria and therefore the claim related rent is the rent which a landlord might reasonably have been expected to obtain from a tenant not entitled to housing benefit, at the relevant time, for a tenancy which is similar to the tenancy of the dwelling, on the same terms other than the terms relating to the amount of rent, and of a dwelling which is in the same vicinity, which accords

with the size criteria, is in a reasonable state of repair, and corresponds in other respects as closely as is reasonably practical to the dwelling in question. The rent officer is to have regard to the level of rent under similar tenancies of similar dwellings in the vicinity.

9. The rent officer determined that the claim related rent was £1191.67 per calendar month. This compares with the actual rent of £1300 per calendar month.

Adjudication and Appeal

10. On 29th June 2002 the authority decided that the claimant's accommodation was larger than was reasonably required and had an unreasonably high rent compared with suitable alternative accommodation. In doing so the authority was applying the provisions of what is usually referred to as "old regulation 11" of the Housing Benefit (General) Regulations 1987. This version of the regulation has been repealed and replaced but still applies in respect of claims for housing benefit (such as in the present case) which were first made prior to 1st January 1996. The authority restricted the eligible rent to £235 per week. It is not clear how this figure was reached at the time because the weekly equivalent of the claim related rent was £275.

11. On 18th July 2002 the claimant appealed to the tribunal against this decision. The tribunal considered the matter on 17th November 2002 and allowed the appeal. On 29th May 2003 the chairman of the tribunal granted the authority leave to appeal to the Commissioner against the decision of the tribunal. On 20th October 2003 I directed that, as requested by the claimant, there be an oral hearing of the appeal.

12. At the tribunal hearing the authority accepted that the accommodation was not larger than was reasonably required. Before me Mr Cox accepted on behalf of the authority (while not agreeing with) the tribunal's finding that the rent payable under the agreement was not unreasonably high compared with suitable alternative accommodation elsewhere. On these matters I incorporate into my own decision the findings of fact made by the tribunal (subject to the calculation referred to below). I do not propose to comment further on "old regulation 11", because the issues under it are no longer disputed in this case and anything I might have to say would be obiter (incidental to my decision and not part of the legal reasoning for it).

13. However, Mr Cox argued that the decision of the tribunal was made in error of law because the tribunal failed to give any consideration to the provisions of "old regulation 12" of the Housing Benefit (General) Regulations 1987. This provision has also been repealed, but remains in force for the claimant under the transitional arrangements. Henceforth I refer to it as regulation 12. It was not referred to by the authority as a basis for its decision of 20th June 2002. However, tribunals hear appeals on the basis that they are deciding the matter afresh. The written submission to the tribunal from the authority indicated that regulation 12 was relevant (paragraph 2.1 on page 1A of the file) and drew attention to the need to consider the substantive issue

under regulation 12 (paragraph 4.8 on page 4 of the file). At the hearing the authority's representative also raised the issue orally (1st line on page 133 of the file). Accordingly, I agree with Mr Cox that the tribunal was in error of law in failing to vive any consideration to the provisions of regulation 12. For that reason I set aside the decision of the tribunal.

14. The basic facts of this case are not in dispute and it is expedient that I make the necessary findings under regulation 12 myself and give my own decision rather than refer the matter to a fresh tribunal, which would consist of a legally qualified chairman sitting alone.

The Applicable Law

15. So far as is relevant, regulation 12 provided:

> 12(1) ... where a claimant's eligible rent is increased during a benefit period, the relevant authority [or tribunal or Commissioner] shall, if it considers whether by reference to a determination made by a rent officer ... or otherwise ...
>
> (a) that the increase is unreasonably high having regard in particular to the level of increases for suitable alternative accommodation, or
>
> (b) ...
>
> treat the eligible rent as reduced either by the full amount of the increase or, if it considers that a lesser increase was reasonable in all the circumstances, by the difference between the full amount of the increase and the increase that is reasonable having regard in particular to the level of increases for suitable alternative accommodation and the claimant's maximum housing benefit shall be calculated by reference to the eligible rent as so reduced.

16. Regulation 12 is not concerned with the size of the accommodation, nor with whether the rent is reasonable in itself, but with the amount of any increase in rent. "Suitable alternative accommodation" is not defined in or for regulation 12. The same phrase is used in old regulation 11. It is not defined therein but old regulation 11(6)(a) provides that for the purposes of that regulation "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 certain other people with whom the claimant might live. The alternative accommodation must also be occupied with reasonably similar security of tenure to that of the accommodation presently occupied by the claimant.

17. I am happy to accept that similar considerations must be taken into account in deciding what is suitable alternative accommodation for the purposes of regulation 12, as suggested by Mr Cox, but that does not take the matter very far. This is because

even within regulation 11 these are not definitive but are matters (and not necessarily the only matters) to be taken into account, because it might be thought that these matters are obviously to be taken into account even without this being specified in the regulations, and because what I am now concerned with is only the increase in rent rather than the amount of the rent in itself.

The Argument for the Authority

18. The tribunal found that the increase in the claimant's rent between the 1999 lease (£10,920 pa) and the new (2002) lease (£15,600 pa) "equates to less than the amount that it would have been if a 10% increase had been made each year from 1999". On my calculations that is not quite correct. An annual increase of 10% for 3 years would have resulted in an annual amount of £14,534.52. The true equivalent increase is a little under 13% pa (13% would produce £15,756.44). Mr Cox has calculated that the overall increase was almost 43% and pointed out that there had been no evidence of any relevant improvement or adaptation to the home. I accept those facts.

19. The tribunal had in evidence before it a Royal Institute of Chartered Surveyors residential lettings survey for July 2002. Mr Cox argued that the survey showed that national rental levels for flats were at the same level in mid 2002 as they had been in mid 1999 but that in London, the Midlands and the South East there were falling rental levels in 2002. However, I have serious doubts about the value of this evidence. It fails to distinguish between London and the other areas, and between different parts of London. It does not distinguish between tenants according to age or any other criteria (including whether they are in receipt of housing benefit). Above all it appears to be methodologically unsound. No indication is given of the size of the sample, how it was selected, whether it was limited to members or (for example) included letting agents who were not members, or organisations of landlords or tenants. No statement is made about the relationship that the sample had to the total number of lettings. The conclusion about downward pressure on rents in London and elsewhere is based in part on the finding that "A net 10% of surveyors reported a drop in rents in the quarter to July [2002], a slightly faster pace of decline than in April when a net 5% of surveyors reported falls in rents". There are two problems with this formulation. The first is to confuse the number of surveyors making such reports with the number of lettings – on which no information is given. The second relates to presentation – suppose it had said "90% of surveyors reported no drop in rents in the quarter to July [2002], compared with 95% in April"? I imagine that would have been thought to be unremarkable. The rest of this survey consists of anecdotal evidence which does not necessarily relate to suitable alternative accommodation.

20. In relation to the claimant, there was evidence from the landlord's agents of a list of new lettings from April to July 2002 of 1 and 2 bedroom flats on the estate on which the claimant lives. Of the 6 properties listed, 3 had been newly created and therefore no previous rent could be given. The relevant rents for the remaining three flats were as follows:

2 bedrooms for 2 years	old rent £19,000	new rent £18,720
2 bedrooms for 1 year	old rent £10,920	new rent £18,200
2 bedrooms for 2 years	old rent £19,240	new rent £18,200

21. The only flat showing an increase in rent had been "newly redecorated" but I do not believe that the cost of that can account for the increase in rent shown. In every case the new rent is significantly higher than that paid by the claimant under her new lease. The old rents for the 2 flats which had a small reduction in rent were nearly double the old rent for the claimant's flat. For the flat where there was an increase in rent, the increase was over 66%. It seems to me that no clear pattern emerges and that these factors all cancel each other out.

22. Mr Cox then suggested that the fact that the claimant's 1999 tenancy contained no provision for increase "shows that the landlord recognised at that time that rents were no longer rising, not that the landlord intended to defer a cumulative increase to be made up in a single leap three years later". This is purely speculative. On the contrary (I did not put this to the parties, but I include the reference for illustrative purposes), in CIS/4320/2002 I considered (in paragraph 23) government statistics which showed that in 1998 the average purchase price for all types of dwellings was £123,921 in London. By 2001 the average purchase price for all types of dwellings was £188,342 in London. I recognise the limited use of these statistics in the present case, but if rental values reflect capital value (as they must do to make economic sense) the actual movement in London on average was in the opposite direction from that which Mr Cox suggested was expected. Indeed, the cumulative increase over those 3 years, on these figures, was over 50%.

23. Finally, Mr Cox pointed out that the RPI only increased by 6.4% from May 1999 to May 1992. That may be so, but I do not require evidence to know that house price (and therefore rental) inflation bears little relationship to the RPI. Mr Cox accepted this in his proposal that a reasonable increase in the claimant's rent over the 1999 figure would be, at most, £25 per week (12%) to bring the eligible rent to £235 per week.

The Claimant's Evidence

24. The claimant was not really in a position to make legal submissions but she did explain her situation and what had happened. Much of what she told me (none of which was disputed by Mr Cox) has been incorporated into the above narrative. She also said the she did not feel that the agents were really prepared to negotiate over the rent and that they considered the previous rent to have been too low. She said that there was a high turnover in the flats and that each time a flat becomes empty the rent goes up (this is from observation, neighbourly gossip and guesswork). She did not know where else she could have gone if she had had to move. Her local support network is extensive. She has been with the same GP for many years and regularly

attends hospital at Bart's and The Middlesex. She is active in the local community and has very good neighbours. Her family are far away from London.

Conclusions

25. The first question to be determined is whether the increase in rent from £10920 pa for 1999-2002 to £25,600 was unreasonably high having regard in particular (although not only) to increases in rent for suitable alternative accommodation. In my view, for reasons that I have explained, there is no adequate evidence of the level of increases in rent for suitable alternative accommodation.

26. Other factors to be taken into account in this case include, in my opinion:

- whether the claimant would have to move if the rent increase were not met (this is not in doubt in this case)
- the quality of the accommodation
- the effect on the claimant of having to move
- the length of time that the claimant has lived in the accommodation
- the age, state of health and social mobility of the claimant.

In other cases, other factors would be relevant such as the effect on job prospects of having to move, and the effects on other members of the household.

27. Although the increase in this case is high, in my view it is not unreasonably so taking into account the facts that the claimant had lived in the accommodation since 1991, that there had been no rent increase since 1999, that the accommodation has been suitable for her particular needs, her age and state of health, and the importance in view of these factors of the local support network The landlords were entitled as a matter of law (if not social justice) to take account of the claimant's reluctance to move and no doubt did so.

28. For these reasons I allow the appeal but substitute my own decision to similar effect as set out in paragraph 1 above.

H. Levenson
Commissioner

24th February 2004