PLH *Commissioner's File: CH 2588/03*

SOCIAL SECURITY ACTS 1992-2000

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Appellant:	*[the claimant]*
Respondent:	London Borough of Camden
Claim for:	Housing Benefit (Overpayment)
Appeal Tribunal:	Stratford
Tribunal Case Ref:	U/42/249/2002/02480
Tribunal date:	5 March 2003
Reasons issued:	17 April 2003

1. This appeal by the claimant succeeds, as the decision of the Stratford appeal tribunal on 5 March 2003 is now shown to have been wrong in law to have followed the decision of the High Court in **R v Wyre BC *ex parte* Lord** (Potts J, 24 October 1997) which has since been overruled by the Court of Appeal in **Adan v London Borough of Hounslow and Secretary of State**, 19 February 2004 [2004] EWCA Civ 101. In consequence, the tribunal wrongly failed to address the question of whether the claimant might have had some underlying entitlement to housing benefit to be offset under regulation 104 **Housing Benefit (General) Regulations** 1987 SI No. 1971 against the total overpayments of housing benefit made to him by the respondent authority. These amounted to £18,254.25 for periods from 15 August 1994 to 24 August 1997 inclusive. Apart from any such offset there can be no possible dispute that this sum is legally recoverable from him.

2. There is equally no doubt that this claimant is unmeritorious. During the years he managed to get housing benefit from the respondent authority for an address in Camden, he also appears to have claimed and received the same benefit simultaneously from other authorities for different addresses around the country, as well as wrongly drawing income support and jobseekers allowance from 1993 to 1999 on the basis of material misrepresentations and non-disclosures about the actual level of his income. The details appear at pages 50-54 of the appeal file and the admissions and apparently undisputed facts recorded in the advice at pages 55-60 about his prosecution, which was it seems withdrawn for procedural reasons.

3. None of that however alters the fact that in proceedings and appeals under the Social Security Acts the law has got to be properly applied to such claimants just as to anyone else, and it is the duty of the respondent authority to assist in seeing that it is.

4. It appears to have been common ground among all concerned that the appeal before the tribunal on 5 March 2003 was properly brought and was against the substance of two determinations originally issued to the claimant by the authority on 26 and 28 July 1999. These had reduced to nil his previous awards of entitlement to housing benefit for successive periods from 15 August 1994 to 24 August 1997 inclusive, and determined that in consequence a total of £18,254.25 benefit for those periods had been overpaid and was recoverable from him: pages 34 to 36, 43. There was some dispute over whether the claimant had received these determinations and a late application for them to be reviewed or revised internally by the authority was accepted in its discretion in the course of 2001: pages 32, 47. In consequence of that the authority issued a further formal letter dated 17 July 2002 declining to alter its earlier determinations or redetermine his entitlement but advising the claimant of his right to have his case "reviewed by the Appeals Service" within a further month: pages 41-42. By letters dated 15 August 2002 from himself and his solicitors the claimant then appealed to the tribunal, alleging he had an underlying entitlement that required to be taken into account for the relevant benefit periods in 1994-97: pages 38-40.

5. No point has been taken against the claimant that this appeal was improperly brought or wrongly entertained by the tribunal, but for the avoidance of doubt I confirm my understanding that the appeal was brought pursuant to paragraphs 6(3) and (6) of schedule 7 **Child Support, Pensions and Social Security Act 2000** and the transitional arrangements for housing benefit decisions and appeals in force from 2 July 2001, and was one against the *original* determinations of July 1999 which had revoked his benefit entitlement and determined the overpayment recoverable from him. For this purpose, the authority's letter of 17 July 2002 refusing to reopen the question of entitlement fell to be treated as a refusal to revise those original determinations so that the letters of 15 August 2002 were within the extended time for appealing against *them* under regulation 18(3) **Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations** 2001 SI No. 1002: there is no separate right of appeal against the refusal.

6. At the hearing on 5 March 2003, the claimant appeared and was represented by his solicitor. The authority failed to attend. The claimant's solicitor relied on a written submission settled by Paul Stagg of counsel in which it was conceded

that the decisions issued in July 1999 were the material ones for the purposes of the appeal, and that these were not invalid on procedural grounds as they had been duly served and the time for appealing had been extended. It was further conceded that (1) the provision in regulation 104 cited above for offsetting any lesser amount of housing benefit "properly payable" against an overpayment otherwise due from the claimant had to be applied as it had stood in 1999, and (2) it followed that the appeal could not succeed before the tribunal, since the decision given in ***ex p* Lord** *supra* on that form of the regulation was binding at this level: its effect was that as no fresh claim on the correct basis had been made to cover the period for which benefit had been withdrawn, no entitlement for that period could now arise at all. However the claimant and his advisers wished to challenge the correctness of the decision by way of a further appeal before the Commissioner where it would not be binding.

7. Accordingly the tribunal was invited simply to dismiss the appeal which it duly did. The chairman's record of proceedings and decision notice at pages 74-75 record that it was agreed the only course was for him to dismiss the appeal, which he did confirming expressly that the decisions issued in 1999 were not invalid for procedural reasons and that it was the version of regulation 104 in force at that date that applied to the claimant. His statement of reasons subsequently issued to the parties on 17 April 2003 at pages 77-78 makes clear the *sole* basis of his decision:

> **"... it is acknowledged on behalf of the Appellant that the tribunal is bound to follow the decision of the High Court in R v Wyre BC ex parte Lord (1997) and to dismiss the appeal. The tribunal duly obliged.**
>
> **It was noted that the Appellant wishes to pursue the matter by arguing that Lord was wrongly decided and that he is entitled to have any underlying entitlement to housing benefit set off against the amount of the overpayment."**

Perhaps understandably in those circumstances, the tribunal chairman did not go any further into what, if any, potential entitlement to housing benefit might actually qualify for the set-off treatment under regulation 104 in the claimant's circumstances should the *Lord* interpretation be found incorrect, and did not hear any evidence or make any findings of his own as to the facts relevant to that question.

8. The substance of the present appeal was that the tribunal was wrong to confirm the 1999 determinations that the full amount overpaid was legally recoverable from the claimant without addressing whether this should be reduced by any possible underlying entitlement he might have had in any event if all the true facts had been disclosed. This depends on the proper interpretation of "properly payable" in regulation 104 which as in force at the material time provided as follows:

> **"*Sums to be deducted in calculating recoverable overpayments***
>
> **104. In calculating the amount of a recoverable overpayment, the appropriate authority -**
>
> **(a) if it determines that a lesser amount was properly payable in respect of the whole or part of the overpayment period, shall deduct that amount:"**

9. The contention that this required the tribunal to ascertain and take account of any underlying entitlement there would have been on a truthful claim, and that the decision in **Lord** to the contrary was wrong, was set out in the cogently argued written submissions used at the tribunal and the further grounds of appeal submitted on behalf of the claimant by his solicitors at pages 106-111, 115-116. Consideration of them was deferred to await the decision of the Court of Appeal in **Adan**, *supra*, where a similar issue was raised. In the usual way, procedural directions for submissions from the parties on the issues of law relevant to this present appeal were issued by the Legal Officer both before and after the judgments of the Court of Appeal overruling **Lord** became available.

10. I regret to record that I have received no assistance whatever from the respondent authority in the course of this appeal, despite the procedural directions given. The sum total of its input amounts to an e-mail dated 15 September 2003 saying by way of response to the Legal Officer's original procedural directions:

> **"I have already responded to you on this case to say the Council will NOT be making any further submissions. We have already supplied you *[sic]* with a substantial amount of information. Regards. Peter de la Mothe"**

together with a letter from the same person dated 17 October 2003 saying in response to a further direction from the Legal Officer referring to the then pending appeal in **Adan**:

> **"1. The Council has no objection to this matter being stayed pending the decision of the Court of Appeal. However, as it is accepted that the Council has properly followed the law as it currently stands and in the particular circumstances of this case, the Council intends to continue to pursue recovery of the debt owed.**
>
> **2. It has not been disputed that [the claimant] made multiple claims to a number of local authorities during at least part of the period under dispute. The Council maintains its position that there is substantial doubt about whether any underlying entitlement would be payable even if the Court of Appeal overturned the *Lord* decision.**
>
> **3. I can confirm that no further information has or will be provided by the Council in this matter. The tribunal found in the Council's favour; Counsel acting for [the claimant] acknowledged that this was the only decision the tribunal could reach so it is not clear to me what else would assist the Commissioner."**

11. Contrary to what is asserted in the email no information or material of any kind had been supplied by the authority to the Commissioners' office in connection with this appeal, though I have of course been supplied by the tribunal with copies of the material submitted to it by the authority at that earlier stage, which is presumably what is meant. A further direction by the Legal Officer on 6 April 2004 drawing attention to the Court of Appeal's decision in **Adan,** and asking for submissions on what decision ought to be given in the present case in the light of it, has been ignored.

12. I must assume in favour of the particular official concerned in this case that he was unfamiliar with the procedure, and unaware of the nature of an appeal on law to the Commissioners or the responsibilities of a public authority as respondent in such proceedings. All the same I have to say that for a responsible department of a large public authority not to take the trouble to find out what was needed, or to seek legal advice if in doubt, is little short of astonishing. As has been recently re-emphasised in emphatic terms in the House of Lords in **Kerr v Department for Social Development** [2004] UK HL23, proceedings of this nature have as their object the attaining of the right result in terms of a proper application of the law and a true determination of the claimant's entitlement, not merely an evaluation of whatever arguments the claimant or his advisers may seek to put forward: see also **CIS 1459/03**. The interests of many other claimants as well as of the public purse may be involved in the points of law that arise on appeals under section 14 Social Security Act 1998 or the corresponding paragraph 8 of Schedule 7 to the 2000 Act, and if the system is to work properly a full and objective consideration of *all* material arguments is essential in deciding an appeal; in attempting to ensure that this is done, the Commissioners are entitled to the assistance of any public authority joined as respondent. I can only suggest that if this or any other authority remains uncertain of its role nearly three years after the current legislation came into force, guidance should be provided as a matter of urgency by the Secretary of State. His officers at what is now the Adjudication and Constitutional Issues Branch have between them many years of experience of the appeal process and at providing what in the great majority of cases I for my part find helpful, well analysed and objective submissions that make a real contribution to the just and effective disposal of appeals.

13. So far as the present appeal is concerned however I have concluded that in the light of the Court of Appeal's decision in **Adan v Hounslow** I can properly proceed to determine it without any assistance from the authority, and without having to defer the proceedings even further for the Secretary of State to be joined as an additional respondent to make submissions on the law instead. As has now been clearly stated by the Court of Appeal, ***ex parte* Lord** was wrongly decided; and the wording of

regulation 104 above does not require a fresh claim for a lesser amount, or a fresh claim disclosing the correct circumstances, to have been actually made before it can be determined what would have been the amount "properly payable" to deduct in arriving at the net overpayment benefit recoverable. For this purpose an amount is "properly payable" if (although not actually payable) it would have been payable if the proper course had been followed, including where necessary the making of a fresh claim: see in particular per Keene LJ, paragraphs 24, 28; Chadwick L.J. paragraphs 40 to 44.

14. It must follow that the chairman in the present case on 5 March 2003 was misdirected by ***ex parte*** **Lord** as to the true requirements of the law and regulation 104. Consequently his decision was erroneous in law for failing to address the material issues under the regulation as correctly construed, and it must be set aside.

15. The only course I can take in these circumstances, in the absence of any clear findings by the tribunal as to the relevant facts or sufficient evidence before me to be satisfied for myself what those findings ought to have been, is to remit the case to a fresh tribunal for rehearing of the relevant facts and issues. They must determine whether any lesser amount of housing benefit would have remained "properly payable" to the claimant from the respondent authority over all or any of the relevant housing benefit periods from 14 August 1994 to 24 August 1997 inclusive, applying the test now laid down by the Court of Appeal: that is what, if anything, they are satisfied would have been the amount payable if each claim for housing benefit from *this* authority in respect of *this* property had been properly made on the basis of true disclosure of all the actual facts relevant to such a claim at that time.

16. I direct the fresh tribunal that the starting point is that the actual entitlement for these periods has been determined by the respondent authority to be nil, and that under regulation 104 it is for the claimant affirmatively to satisfy the tribunal, which for this purpose is conducting a complete reconsideration and redetermination of the refusal by the authority to deduct anything at all from the overpayment of £18,254.25, that some identifiable amount would on the balance of probabilities still have been payable to him in any event even with full disclosure of his actual means and all other circumstances.

17. In the circumstances described above and given what appears to be a fortunate escape by the claimant from prosecution for his admittedly unjustifiable multiple benefit claims, a fairly close scrutiny by the tribunal of any evidence and contentions he now puts forward as to what was really going on at the time of his claims in 1994-1997 (particularly if uncorroborated) will be in order; and this is plainly a case

where the tribunal will require the assistance of the authority with proper representation at the rehearing, to challenge any of his factual assertions that it disputes and to put in evidence before the tribunal any material information in its possession, for example of his making concurrent claims elsewhere while still claiming to live in Camden.

18. I further direct the new tribunal that the two principal points on which the claimant must be required to satisfy them on the balance of probabilities before he can identify any amount as "properly payable" under regulation 104 are:

(1) that he was in fact residing at the Camden property throughout the material periods so as to qualify for the benefit at all; and

(2) that the levels of his income and capital from all sources during the same periods were below the threshold amounts to enable him to qualify even though he failed to do so as an income support claimant.

19. In this latter context, I further direct the tribunal that it is the *actual* income he was managing to obtain from all sources that would have been required to be disclosed, even if he was obtaining it wrongly; and that any amounts of housing benefit he was in fact drawing from other authorities at the relevant times must be brought into the reckoning as actual income *except* insofar as he is able to satisfy the tribunal that these amounts are fully legally recoverable, and in fact being fully recovered, from him. Only in those circumstances can there be any reason to justify leaving them out of account in assessing the true net amount of what would still have been properly payable to him under the housing benefit system.

20. The appeal is allowed and the case remitted for rehearing accordingly.

(Signed)

P L Howell
Commissioner
29 June 2004