

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal, which is brought with the leave of the tribunal chairman, is allowed. I set aside the decision of the Blackpool Appeal Tribunal given on 7 July 2004 and substitute my own decision that the claimant is entitled to housing benefit calculated on the basis that she is to be treated as occupying her flat in Preston as her home from 16 February 2004 and that she is entitled to council tax benefit from and including 15 March 2004. I remit to the council the calculation of the benefits to which the claimant is entitled as a result of this decision.
2. At the beginning of this year the claimant was 87 years old. She lived in sheltered accommodation in Harrow. She received housing benefit from Harrow Council. Her closest relatives lived in the North West of England and they arranged for her to come and live there. On 12 February 2004 she entered into a tenancy agreement with a housing association in respect of a one bedroom flat in Preston at a rent of £72.89 per week. She was disabled and the flat had to be adapted to meet her needs. She applied to the South Ribble Borough Council for housing benefit on 17 February 2004, stating that she intended to move into the flat on 15 March 2004. The work was carried out to her flat and on 15 March 2004 her furniture was moved into the flat. She gave up her tenancy in Harrow, but did not physically go to the flat herself on 15 March or for some months afterwards because she became ill and on 11 March 2004 she had been admitted to hospital. By the date of the hearing before the tribunal she had been discharged from hospital but was undergoing rehabilitation elsewhere. The rehabilitation period was expected to be six weeks from 28 June 2004.
3. It appears from the submissions of the Council on this appeal that the claimant in fact went to the flat to live there on Monday 9 August 2004. On 12 August 2004 she was awarded housing benefit and council tax benefit from 16 August 2004, the Monday after she moved in, and on 20 September 2004 she was awarded housing benefit from 19 July 2004, four weeks earlier than the initial award, under regulation 5(6)(c)(i) of the Housing Benefit (General) Regulations 1987 because she had had to physically adapt the property because of her disability before she could move in. Meanwhile, from 7 June 2004 the claimant's rent had been increased to £74.21 per week.
4. Although she had been liable for rent from mid-February 2004 and for council tax from 15 March 2004, when her furniture was moved into the flat, the council had refused to award her housing benefit for any earlier period on the ground that she was not occupying the flat as her home until she was physically present there for at least a day. It had also refused to award her council tax benefit on the ground that she was not in occupation of the flat, although on this appeal at least the council has contended that, for council tax purposes, it was her sole or main residence notwithstanding the fact that she was not physically living there.
5. The tribunal dismissed the claimant's appeal, holding that she could not be said to have moved in until she was personally in occupation. In the statement of reasons, however, the tribunal chairman observed that this was a question that was not

infrequently raised before tribunals and gave leave to appeal in order that the point may be addressed by a commissioner and some specific guidance provided.

6. Before addressing those issues, there is one other point of concern in this case. By letter of 25 February 2004 the council advised the claimant's brother-in-law, who was acting for her, that housing benefit could only be paid from the tenancy start date if a claim was made in the first week of the tenancy and the claimant moved in within the first week. The letter also stated that as the claimant was only to move in on 15 March, benefit would only be payable from 22 March. When the brother-in-law attempted to appeal this he was told that it was a letter of advice and that there could be no decision until the claimant had moved in and he could not appeal. This advice was given shortly after 15 March 2004 and was given although, as appears from an e-mail from the brother-in-law to the council dated 24 March 2004, the letter was accompanied by a form CU64 advising that the claimant had one month in which to appeal the decision.
7. Following that e-mail, it appears from a file note of the council that the brother-in-law was telephoned on 29 March by a representative of the council to see if the claimant had yet moved in. On being told that she had not, the representative advised him that she would have to withdraw the claim for statistical purposes. This led to a further e-mail from the brother-in-law stating that the claim had not been withdrawn, and in a further telephone call the same representative explained that the claim was withdrawn for statistical purposes only and could be held for longer.
8. This exchange has not in the event affected the claim, but it could have done so. The misleading advice given by the council might well have discouraged a less persistent claimant or lay representative from pursuing an undoubted right of appeal. Also, the statement that the claim was treated as withdrawn for statistical purposes was not only misleading but appears to have been related to a deliberate and dishonest attempt to manipulate statistics, no doubt to the council's advantage. To seek to manipulate claims and claimants in this way reflects discredit on the council.

Housing benefit

9. Under section 130(1) of the Social Security Contributions and Benefits Act 1992, a person is entitled to housing benefit if "(a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home" and certain other conditions are satisfied, as they are in the present case. Under section 137(2)(h) of that Act regulations may be made "as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home". The relevant regulation is regulation 5 of the Housing Benefit (General) Regulations 1987. Regulation 5(1) provides as follows:

"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; or
- (b) [this relates to polygamous families]

and shall not be treated as occupying any other dwelling as his home."

10. It is plain that the claimant was not, from 15 March 2004, occupying any other dwelling as her home and there is no dispute that if she had gone to her new home and

stayed there from 15 March that that new home would have been, from that date, normally occupied by her as her dwelling. In my judgment, at the latest when the claimant's agents went into the flat and put in her furniture they were taking occupation of it for her and so long as her furniture remained there, she was in occupation of it. Further, it is clear as a matter of ordinary language that the flat was her home. She had no other home and could not be described as homeless. If asked in the hospital on 15 March 2004 for her home address, she would or should have given the address of her flat. It had become her home or residence even though she was not there. She had no other reason to occupy it. The flat was a dwelling which she was occupying as her home in the ordinary use of the word. It was not a temporary home but her new permanent home and it was therefore one which, from the moment she occupied it she was occupying as her home in the same way as if she had turned up in person. It might have been different if there had been some other reason for her absence, but when the reason for her absence was that she needed medical treatment in hospital that reason is in no way inconsistent with the conclusion that she was occupying the flat as her home from 15 March 2004 in the normal sense in which that expression is used.

11. However, regulation 5 modifies the general rule. Under regulation 5(1), subject to the following provisions of the regulation, it is not enough for the claimant to show that she is occupying the flat as her home. She must show that the flat is the dwelling normally occupied as her home. The context of regulation 5(1) clearly shows that, apart from the exceptional cases provided for later in the regulation, only one dwelling can be "normally occupied" in this way and that where a person is occupying two dwellings as homes it is necessary to decide which one is "normally" so occupied. It is also plain from the other paragraphs of the regulation that, whatever the normal meaning of "occupy", rules are laid down as to the period during which, and the reasons for which, a person can be absent from the dwelling and still be treated as occupying the dwelling as her home. None of these rules appear to me to be inconsistent with the general meaning of occupying a dwelling as a person's home. They simply spell out boundaries which may not co-incide precisely with those that would exist if the regulations had not been made.
12. The following provisions of the regulation deal with certain special cases. In particular, regulation 5(8) and (8B) deal with a claimant's temporary absences. Although not referred to by the parties, they appear to me to be crucial to this appeal and I return to them below.
13. The council has pointed out that there is no definition of "normally occupied" in the regulations. It relies partly on a dictionary definition of to occupy which is "to take possession of by being present in, to fill, to take up a space, time, etc." It contends that normal occupation involves physical presence in a property. Since the claimant had a physical presence in the property in the shape of her furniture, I find it difficult to see how she could be said not to have occupied it. It is plain that as a matter of general law occupation does not require the personal presence of the tenant if the property is under her control and is being used by her to store her goods and for no other purpose. The council also relies on various references in regulation 5 to the claimant moving in to the property as inferring that occupation means physically moving in. Its case appears to be that the claimant had to spend at least one night at the property for her to

be treated as normally occupying it as her home. The claimant's representative, on the other hand, contends that the tribunal failed to distinguish "physically occupy" from "normally occupy" and contends that the claimant had moved in and taken possession of the property by signing the tenancy agreement, doing the alterations with the landlord's permission, moving in all her possessions and incurring liability for £1600 arrears of rent.

14. The expression "move in" is not part of the definition in regulation 5(1). It occurs only in subsequent paragraphs of regulation 5 subject to which the general rule in regulation 5(1) is laid down. These paragraphs modify the general rule by spelling out the boundaries within which, in certain circumstances, a claimant can be treated as occupying the dwelling as his home for housing benefit purposes. Thus regulation 5(6) deals with the situation where a person has moved into a dwelling and was liable to make payments in respect of that dwelling before moving in and had claimed housing benefit before moving in. Where, as here, the delay in moving into the dwelling was reasonable and was due to one of three specified reasons the claimant was to be treated as occupying the dwelling as his home for any period not exceeding four weeks immediately before the date on which he moved into the dwelling and in respect of which she was liable to make payments.
15. In my judgment that provision does not determine whether the claimant has occupied the dwelling. It provides that she is to be treated as occupying the dwelling as her home for up to four weeks before she moved in if the conditions are satisfied and that otherwise, and in respect of any longer period, she is not to be treated as occupying the dwelling as her home before she moves in. It would cover a situation where the adaptation was made by the landlord and the claimant had not occupied the premises at all. It would also cover the situation where, as here, the claimant had carried out the adaptation, but had not moved her belongings into the property. It does not answer the question as to what the claimant has to do to "move into" the property. The provision covers a case where the claimant's acts might arguably amount to occupation of the dwelling as a home even before he or she moves in and puts a time limit on such occupation for housing benefit purposes. It also covers a case where there is no such occupation. Clear examples are where the landlord carries out the work of adaptation and where there is no attempt to occupy because, under one of the other heads, the claimant is awaiting a social fund payment to enable the move to take place.
16. In my judgment, the claimant can be said to have moved into this flat for the purposes of regulation 5(6) when she removed all her furniture from her previous home and moved it into the new flat. In the context which I set out below, I conclude that this is the proper construction of the expression "move into the dwelling".
17. A more significant issue is as to the effect of regulation 5(8) and (8B) on the claim in this case. Paragraph 8 provides that

"Subject to paragraph (8C) 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..."

Paragraph (8B) provides that

“This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home (“absence”) if-

(a) he intends to return to occupy the dwelling as his home...”

18. Paragraphs (8B) and (8C) then go on to make further provision in specified cases for a person to be treated as occupying the dwelling he normally occupies as his home during a period which cannot normally exceed 52 weeks. One of those cases, that in paragraph (8B)(c)(ii), is where the claimant is resident in a hospital or a similar institution. It appears to me that the effect of paragraph (8) is that where a person is absent from the dwelling normally occupied by him they are not to be treated as occupying the dwelling as their home for the purposes of housing benefit even though they might otherwise do so. The effect of paragraph (8B), taken with paragraph (8C) is to make further special provision for exceptions to the general rule laid down in paragraph (8).
19. The net result is that, whatever the general meaning of “the dwelling normally occupied as his home” in regulation 5(1), when the claimant was temporarily absent from the property she had to be treated as if she was there to the extent that she fell within one of these provisions, but could not otherwise be treated as occupying the flat as her home during her absence.
20. The claimant can only satisfy either condition if she can be said to intend to *return* to occupy the dwelling as her home. If this means that she has to have been physically present there before, then she cannot satisfy this condition and for the duration of her stay in hospital is not to be treated as occupying the flat as her home. On that basis the appeal would effectively fail, although not for the same reasons as were given by the tribunal.
21. However, it appears to me that the claimant does satisfy that condition for the following reasons:
 - (1) I do not consider that it was in the contemplation of the secretary of state in making these regulations that a person in need should be deprived of housing benefit when ill just because they became ill when in the process of moving home when at any other time, either in their previous home or in their new one, they would have been entitled to benefit during the illness. It would, in my view, require very strong words to give effect to so odd a result, which can affect the entitlement of the claimant to substantial sums in housing benefit, and put them at risk of losing their home.
 - (2) I reject the council’s submission that it would be sufficient to spend one night at the property to normally occupy the property as the claimant’s home. If some degree of regularity of occupation were intended by “normally” then far more than one night would be needed. The word “normally” appears to me to be used to deal with the case where there is more than one possible dwelling which might be treated as the claimant’s home, and is not directed to any question of length of occupation.

(3) Once the claimant had given up her previous home, and had moved her furniture into the flat, the flat was occupied by her and had become her normal home – i.e., the place she would normally live in.

(4) I conclude that the claimant occupied the flat as her home in the ordinary use of that expression at latest when her agents moved her furniture in. In that she had no other home, by that time the flat had become her normal home.

(5) The word “return” in paragraphs (8) and (8B) indicate that the claimant had at least in some sense to have been at the flat before. However, through her agents, she had been at the flat before when they occupied it for her as her home by putting her furniture there.

(5) The initial act of occupation of the flat does not have to be by the claimant herself. It can be effected by agents on her behalf. She was there through her agents when they moved in the furniture and when she left hospital it was her intention to return there in person.

(6) While this strains the use of the word “return”, the alternative construction would be to draw an artificial distinction between somebody who spent ten minutes in person at the property before becoming unwell and somebody who became unwell before arriving in person at the property. It would also disqualify from benefit a class of persons whom there is no reason to suppose that the secretary of state had any intention of disqualifying, or any reason to disqualify from benefit.

22. I conclude that the claimant moved in to the flat on 15 March 2004 and that she is to be treated as occupying the flat as her home from that date by virtue of regulation 5(1), (8B) and (8C). Her entitlement to housing benefit is to be calculated on that basis and also on the basis that, as is common ground she is to be treated as occupying the flat as her home for a period of four weeks immediately prior to 15 March 2004 by virtue of regulation 5(6), that is from 16 February 2004. The council is to calculate and pay housing benefit to the claimant on that basis. In the event of any disagreement over the calculations, the claimant will have a right of appeal to a tribunal from the decision of the council.

Council Tax Benefit

23. Section 131(3)(a) of the Social Security Contributions and Benefits Act 1992 provides that a person is entitled to council tax benefit, if they satisfy other conditions and so far as relevant to this appeal, if the person concerned “is for the day liable to pay council tax in respect of a dwelling of which he is a resident”. The test is not the same as for housing benefit. Accordingly, as was held in CH/2111/2003, the amended regulations in the Council Tax Benefit (General) Regulations 1992 which contain similar provisions to regulation 5 of the Housing Benefit (General) Regulations 1987 as to when a person is to be treated as occupying a dwelling house as his home are of no effect in relation to this test. Indeed, the 1992 Act contains no power to make regulations as to who is or is not to be treated as a resident. Rather, as was pointed out in CH/2111/2003, section 131(11) of the 1992 Act states that “resident” is to have the same meaning as in Part I or II of the Local Government Finance Act 1992, which by section 6(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”.

24. It is plain that from 15 March 2004 the claimant had her sole residence in the flat in Preston and, provided all other conditions were satisfied, as they appear to have been, she was therefore entitled to council tax benefit in respect of that flat.

(signed on the original)

Michael Mark
Deputy Commissioner
22 December 2004