

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000:

The decision of the Cardiff appeal tribunal under reference U/03/188/2005/05843, held on 7 April 2006, is not erroneous in point of law.

The issue and how it arises

2. In the autumn of 2004, the claimant and her husband decided to sell their home to their nephew and then rent it from him. They did so and claimed housing benefit in respect of the rent they paid. The local authority refused the claim under regulation 7(1)(h) of the Housing Benefit (General) Regulations 1987 on the ground that the claimant and her husband could have continued to occupy the dwelling without relinquishing ownership. The appeal tribunal confirmed the local authority's decision.

3. The issue, as formulated in the tribunal's reasons and on the appeal to the Commissioner, has been whether the test under regulation 7(1)(h) is objective or subjective. I explain below why I do not consider that that is the appropriate way to frame the issue. I prefer to ask: to what extent are the claimant's circumstances and perceptions relevant under regulation 7(1)(h)?

The facts

4. The tribunal accepted the evidence given by the claimant and her husband. I set out the facts as found on the basis of that evidence.

5. In 2004, the financial position of the claimant and her husband was as follows. On the credit side, they had income and owned their own home, subject to a mortgage. Otherwise, they had no capital. Their joint benefit income amounted to £192.03 a week from disability living allowance, income support including a direct payment of mortgage interest, and child benefit. On the debit side, they had to pay £250 a month for their mortgage. The mortgage account was in arrears; these had built up over a period of years. The mortgagee was not pressing for payment or taking steps to obtain possession. The couple also owed some £25,000 in credit card debts. Payments were being made on the cards each month and the lenders were not threatening any action. The couple were able to pay their normal living expenses and to take a holiday at a local resort.

6. They wanted to clear their debts and arranged to sell their home to their nephew. According to the evidence, the suggestion came from him. The sale went through, allowing them to clear their credit card debts. They were left with about £7000. They remained in occupation of their home under an assured shorthold tenancy. They believe that they have security to remain in their home for the remainder of their lives. Their tenancy does not provide them with that degree of protection. It may be that have an agreement with their nephew that I have not seen or are satisfied by his assurances that they will not be evicted. I mention this, because even if the claimants were successful under regulation 7(1)(h), the issue

would then arise whether the tenancy under which they occupy their home was on a commercial basis. If it was not, they would be barred from housing benefit by regulation 7(1)(a). That issue may have to be considered if the couple claim housing benefit when five years have passed from the sale.

The legislation

7. Housing benefit is governed by the Social Security Contributions and Benefits Act 1992. Section 130(1)(a) provides:

‘(1) 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’.

8. Section 137(2) authorises Regulations to be made. Only section 137(2)(h) is relevant:

‘(2) Regulations may make provision for the purposes of this Part of this Act-

...

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

9. Regulation 7 of the Housing Benefit (General) Regulations 1987 is made under the authority of that provision. Regulation 7(1)(h) provides:

‘(1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where-

...

(h) he previously owned, or his partner previously owned, the dwelling in respect of which the liability arises and less than five years have elapsed since he or, as the case may be, his partner, ceased to own the property, save that this sub-paragraph shall not apply where he satisfies the appropriate authority that he or his partner could not have continued to occupy the dwelling without relinquishing ownership’.

The tribunal’s reasons

10. The chairman considered what options were available to the claimant and her husband. He ruled out a remortgage on account of their ages and the size of the property. He also ruled out taking in a lodger on account of the sleeping arrangements. However, he found that the couple could have taken steps that would have allowed them to retain ownership of their home. Specifically, they could have contacted the mortgagee and the credit card companies to discuss payments arrangements. Nor had they considered contacting the CAB about debt management. The chairman did not itemise the possibilities, but they are well-known. The credit card debts could be consolidated; a schedule of repayments could be negotiated; there

was more than sufficient equity in the property to provide security for repayments; and an equity release scheme might be appropriate.

11. The chairman relied on my decision in *CH/3853/2001*, in which I said:

'16. Perhaps in its strictest sense the word 'could' conveys impossibility. The claimant's circumstances did not come within that meaning. It was possible for him to retain ownership of the property he had inherited. However, in use the word may convey a degree of difficulty that falls short of impossibility, but nonetheless conveys practical compulsion. I do not exclude the possibility that a moral obligation might place a claimant in that position. ...'

Applying that approach, the chairman reasoned:

'It does appear that the Appellant and her husband believed themselves to be under a practical compulsion to sell and so, looked at subjectively, it could be said that there was such a compulsion and the exception applies. However, the evidence available suggests that, objectively, there were other options open to the couple which would have enabled them to stay in their home without selling it but that they were unaware of those options and did not have any competent advice. Is the test subjective or objective? In my judgment, the use of the word "could" (even as refined by the Commissioner) must require an objective view.'

The appeal to the Commissioner

12. The claimant's representative applied for leave to appeal, arguing that the proper approach to regulation 7(1)(h) was subjective, not objective. I gave leave on that issue. The local authority made observations in mid-November. The claimant's representative has not made observations in response, despite the efforts of the Commissioners' clerk responsible for housing benefit cases to obtain a response.

13. The local authority argued that the approach to regulation 7(1)(h) is objective. The claimant's circumstances are relevant as the context in which the legislation has to be applied. However, the test of practical compulsion focuses on whether there was a critical need to sell. The wording suggests a simple factual analysis of the options available to the claimant in her particular circumstances. The claimant's knowledge, belief or reasoning is irrelevant. The task for the local authority's decision-maker is a simple fact-finding one that does not involve any consideration of whether the claimant was acting in good faith or met any particular standard of reasonableness. It is irrelevant that the claimant did not seek or receive proper advice; the legislation deals with fact, not fault. It is fair and reasonable that public funding should be denied to a claimant who could have remained in occupation as owner. There is no public policy or practical reason why a claimant should benefit from failing to take steps to identify the full range of options available in particular circumstances. I broadly accept those arguments, but with some qualifications.

14. As I have said, the issue I have to decide is not best formulated in terms of an objective or subjective test. Regulation 7(1)(h) contains elements of both.

15. There is a distinction between the legal test to be applied and the circumstances to which it has to be applied. Regulation 7(1)(h) deals with both. It identifies the legal test as whether the claimant or her partner could have continued to occupy the dwelling without relinquishing ownership. I stand by what I wrote in *CH/3853/2001* that, as a matter of language, ‘could not’ does not mean that it was completely impossible to do otherwise. That is not how ‘could’ is used and there is nothing in the context or the likely policy of the legislation to suggest a different interpretation. That is the test, but what are the circumstances to which it must be applied? The reference to the claimant and her partner makes the test not a general one of what is possible, but a targeted one of what is possible for them. In other words, the test has to be applied to their circumstances.

16. In the context of this case, the test had to be applied to the claimant’s family and financial circumstances. But was her perception of what was possible, sensible or appropriate in those circumstances relevant to the application of the test?

17. The claimant’s perceptions may be relevant as evidence of what was practically possible. But in this case the claimant’s admitted that she did not investigate the full range of possibilities. It seems that, motivated by a desire to rid themselves of their debts, the claimant and her husband hit upon an idea and did not consider any other options. Her perception in those circumstances is not relevant as evidence of what was actually possible.

18. The claimant’s perceptions may also affect or limit the options that are available. For example, a claimant might be under so much stress as a result of debts and worries that it is in the interests of her own mental health to dispose of ownership as quickly as possible without investigating and regardless of other options that are available. But that would be an exceptional case and there is no evidence that the claimant or her husband were so much or so badly affected in this case.

19. Apart from these possibilities, the claimant’s perceptions are not relevant to the application of the test. It is impossible in the normal use of language to interpret ‘could not’ to mean ‘believe she could not’. The language is not susceptible to such an interpretation. And there is no justification for subverting the language to be found in policy, in any feature of the legislative context, or in the practical consideration relevant to the application of the legislation.

20. Finally, I do not agree with the local authority that the application of housing benefit legislation is necessarily a simple fact finding one. It can be extremely complex. And it can involve a decision on a party’s intention (contrived tenancies under regulation 7(1)(l)) or motivation (notional capital under regulation 43). The reason why good faith, reasonableness, knowledge, belief and reasoning are not relevant under regulation 7(1)(h) is that they are not authorised by the language of that provision.

Disposal

21. The tribunal did not go wrong in law. I must, therefore, dismiss this appeal.

**Signed on original
on 22 January 2007**

**Edward Jacobs
Commissioner**