



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CH/3801/2004

**APPEAL FROM DECISION OF AN APPEAL TRIBUNAL
ON A QUESTION OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: Mr H Levenson

[ORAL HEARING]

Decision and Hearing

1. This appeal by the Lincoln City Council does not succeed. I confirm the decision of the Lincoln tribunal of 16th July 2004 (reference U/42/040/2004/00584) to the effect that the claimant is entitled to housing benefit notwithstanding the fact that his wife did not have a national insurance number. I remit to Lincoln City Council (“the authority”) in the first instance matters concerning implementation of my decision (and the Council is now obliged in law to implement it) and calculations and payments or rebates consequent upon my decision. In the event of any difficulty over such calculations in relation to housing benefit 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 9th May 2005. The claimant and his wife attended in person and the claimant was represented by Sally Robertson of counsel, instructed by French and Co, Solicitors. The authority sent observers to the hearing but did not participate in it, being content for its interests to be represented by the Secretary of State, who had been added as a party. The Secretary of State was represented by Kate Olley of counsel, instructed by the Solicitor to the Department for Work and Pensions. I am grateful to counsel for their assistance.

Background and Procedure

3. The claimant was born on 2nd June 1976. At some stage he claimed and was awarded income support. He was a tenant of the authority and had been in receipt of housing and council tax benefit in his own name for some time. He married on 5th April 2003 and lived with his wife, who had been born on 6th September 1979. On 27th June 2003 he made a new claim for housing and council tax benefit as from 13th June 2003. The tenancy was in the claimant’s name alone. In the claim form he disclosed that he was living with his wife.

4. The claimant’s wife has Thai nationality and a Thai passport. She had entered the United Kingdom on 25th January 2003 on a visitor’s visa granted until 24th April 2003 with a condition that she neither work nor have recourse to public funds. She applied to remain as the spouse of a person present and settled in the United Kingdom. That application was refused on 18th June 2003 and she lodged an appeal against that refusal on 26th June 2003. On 5th July 2004, in a letter to her MP, the Minister of State at the Home Office confirmed that leave to remain would continue unless and until the decision to refuse her application was upheld (see page 69 of the bundle of papers). For a reason that I do not really understand, the claimant’s wife was advised by her solicitor or one of her advisers (not by an official) not to apply for a national insurance number, in case this prejudiced her immigration status. The claimant himself has, at all relevant times, had a national insurance number and is a British national.

5. The authority awarded the claimant full housing and council tax benefit from 30th June 2003 as a single person, although this was not notified to him until 6th September 2003. On 16th November 2003 the claimant signed a renewal claim form, on which he also stated that his wife was living with him, and this was returned to the authority on 27th November 2003. Full housing and council tax benefit as a single person continued.

6. On 12th February 2004 the authority issued in the name of the claimant's wife a form DCI 1LA, which is headed "Request for a National Insurance Number (NINO)". This is a form which is supposed to contain a national insurance number and give other information about identity. The idea is that the form is sent by the authority to the Benefits Agency for validation of the number or, if there is no such number, the allocation of one. It is not clear whether this form was ever sent to or seen by the claimant before it was sent to the Benefits Agency. It seems that the Benefits Agency was informed on behalf of the claimant's wife that she did not at that stage wish to have a national insurance number.

7. On 2nd March 2004, in a poorly drafted letter, the authority informed the claimant that his housing and council tax benefit "has been cancelled effective 30th June 2003". This must have been the implementation of a revision or supersession decision but neither of those words is used in the file. The authority based its action on the fact that the claimant's wife did not have a national insurance number. It also took the view that there had been an overpayment but later indicated that it was unlikely to seek recovery because there had been an official error (presumably in failing to realise the significance of the absence of a national insurance number although the claimant had disclosed the facts).

8. On 11th March 2004 the claimant appealed to the tribunal against this decision. The tribunal considered the matter on 16th July 2004 and allowed the appeal in relation to housing benefit. The tribunal took the view that the claimant had an unfettered right to make a claim in his own right, that he was not making a claim for his wife, and that her national insurance number was irrelevant. It was wrong to assume that he was making a claim for both of them. The liability to pay rent was the claimant's alone.

9. On 19th July 2004 the authority wrote to request a full statement from the tribunal and, in apparent ignorance of the appropriate procedure, suggested in that letter the matters that the full statement should deal with and put forward arguments against the decision (see page 73). A full statement was issued and on 13th October 2004 the chairman of the tribunal refused the authority leave to appeal to the Commissioner against the decision of the tribunal. On 4th January 2005 the Secretary of State indicated that he wished to become a party to the appeal. On 16th February 2005 I granted the authority's renewed application for leave to appeal and I directed that there be an oral hearing of the appeal.

The Applicable Law

10. So far as is relevant, section 1 of the Social Security Administration Act 1992 provides as follows:

1(1) ... no person shall be entitled to benefit unless, in addition to any other conditions relating to that benefit being satisfied –

- (a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations ...; or
- (b) he is treated by virtue of such regulations as making the claim for it.

(1A) No person whose entitlement to any benefit depends on his making the claim shall be entitled to the benefit unless subsection (1B) below is satisfied in relation both to the person making the claim and to any other person in respect of whom he is claiming benefit.

(1B) This subsection is satisfied in relation to a person if –

- (a) the claim is accompanied by –
 - (i) a statement of the person's national insurance number and information or evidence establishing that that number has been allocated to the person; or
 - (ii) information or evidence enabling the national insurance number that has been allocated to the person to be ascertained; or
- (b) the person makes an application for a national insurance number to be allocated to him which is accompanied by information or evidence enabling such a number to be so allocated.

11. Section 130(1) of the Social Security Contributions and Benefits Act 1992 provides that, subject to other conditions of entitlement, a person is entitled to housing benefit if he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home.

12. So far as is relevant, regulation 6(1) of the Housing Benefit (General) Regulations 1987 provides as follows:

6(1) ... the following persons shall be treated as if they were liable to make payments in respect of a dwelling –

- (a) the person who is liable to make payments;
- (b) a person who is a partner of the person to whom sub-paragraph (a) applies.

It is not disputed that in the present case, the claimant's wife is his partner and has been so at all relevant times (see regulation 2(1)).

13. Under the heading "Who May Claim", regulation 71(1) provides:

71(1) In the case of a married or unmarried couple ... a claim shall be made by whichever one of them they agree should so claim or, in default of agreement, by such one of them as the relevant authority shall determine.

The Nature of the Claim

14. There is no statutory definition of the phrase "a person in respect of whom he is claiming benefit". Ms Olley argued that (a) a partner cannot claim separately and the provisions of regulation 71 meant that there could only be one actual claimant and that the claimant did not have an unfettered right to make a claim; (b) income support and jobseekers' allowance provisions deal with circumstances in which the requirement to state a partner's national insurance number is to be disapplied, indicating that in general the reference to "a person in respect of whom he is claiming benefit" is to be taken as including a partner; (c) to hold otherwise would also be inconsistent with the requirement to aggregate means; (d) section 191 of the Social Security Act 1998 defines claimant to include "beneficiary under the award or affected by the decision"; (e) because the claimant's wife was dependant on him (being a member of his family but not excluded from the definition of non-dependant in regulation 3(2) of the Housing Benefit (General) Regulations 1987) then she must be "a person in respect of whom he is claiming benefit".

15. On the first point, Ms Robertson argued that regulation 71(1) is permissive rather than definitive. One cannot read back from its provisions to interpret section 1(1A) of the Social Security Administration Act 1992. First, any person in respect of whom the claim is made has to be identified. Then, regulation 71(1) provides that if that person is a partner, then either of the partners can claim. It is no accident that section 1(1A) does not refer specifically to a partner or to a member of the family but regulation 71(1) refers specifically to a partner. On this point I find Ms Robertson's argument persuasive.

16. In relation to (b), regulation 2A of the Income Support (General) Regulations 1987 provides:

2A Section 1(1A) of the Social Security Administration Act 1992 (requirement to state national insurance number) shall not apply

- (a) [related to children and young persons but has been repealed]
- (b) to a partner in respect of whom a claim for income support is made or treated as made before 5th October 1998.

Regulation 2A of the Jobseekers Allowance Regulations 1996 is in similar terms in relation to that benefit.

17. It seems to me this only shows that a partner is capable of being "a person in respect of whom he is claiming benefit", not that a partner is necessarily or invariably such a person.

18. The point in (c) raised on behalf of the Secretary of State is totally unpersuasive. Section 136(1) of the Social Security Contributions and Benefits Act 1992 provides that where a person claiming an income related benefit is a member of a family (which includes a spouse), the income and capital of that family shall, except in prescribed circumstances, be treated as the income and capital of the person claiming the benefit. In the present case, the income and capital of the claimant's wife is treated as his for the purposes of calculating entitlement to benefit, whether or not he is also claiming benefit for her.

19. Ms Robertson pointed out that where a person is in receipt of income support or income based jobseekers' allowance, the whole of any income or capital is disregarded for the purposes of housing benefit. In such a case the composition of his family is irrelevant for housing benefit purposes (at least when benefit is by way of rent rebate), the relevant calculations having been done in relation to the claim for income support.

20. In relation to section 191 of the Social Security Administration Act 1992 (point (d)) and the definition of "claimant", and regulation 3(2) (point (e)), it is clear that the claimant's wife is affected by the decision but she cannot really be a "beneficiary" because she is not allowed recourse to public funds, and being affected by the decision or being a dependant is not the same as being "a person in respect of whom he is claiming benefit".

Has There Been an Application for a National Insurance Number?

21. Ms Robertson argued that on the facts of this case the claimant's wife did satisfy the requirements of section 1(1B) of the Social Security Administration Act 1992 because she provided all of the necessary information and evidence, the information which is necessary being indicated by the questions on form DC1 1LA. There is no requirement on that form that the applicant for the national insurance number sign it. In this case the local authority has asked the Department to allocate a national insurance number on the basis of that information and evidence.

22. Ms Olley denied that there had been any application for a national insurance number, but she could not tell me what such an application would look like or how it would be constituted. In those circumstances I do not see how can she say that there was no application.

23. In view of my approach to the main issue I do not have to adjudicate on this issue, but should the issue arise again I would expect the Secretary of State to be better prepared to deal with this argument.

The Human Rights Act 1998

24. Ms Robertson argued that the requirement to provide a national insurance number as a condition of entitlement to housing and council tax benefit is incompatible with the provisions of article 8 of the European Convention on Human Rights. On the face of it, I do not find this a very attractive argument, but I resist the temptation to add unnecessarily to the judicial literature on article 8 in this case, where it is unnecessary to do so.

Council Tax Benefit

25. Neither the tribunal's decision nor its full statement referred to council tax benefit, and therefore there is an unresolved appeal against the authority's decision in relation to council tax benefit. In principle the claimant could ask for a tribunal hearing to resolve that appeal, but in practice I would expect all parties to accept that the position for council tax benefit is the same as for housing benefit. However, since the tribunal has not yet decided that matter, I have no jurisdiction over the issue.

Conclusions

26. I have no doubt that the phrase "a person in respect of whom he is claiming benefit" in section 1(1A) of the Social Security Administration Act 1992 is capable of including a claimant's partner with whom he lives, and that in most cases it does in fact include such a partner.

27. However, it seems to me that the injustice of the Secretary of State's more general argument is demonstrated by the facts of the present case. A claimant lives alone and is correctly in receipt of income support and housing and council tax benefit. The tenancy is and continues to be in his name. He has a national insurance number. He then marries but his wife does not have a national insurance number. She comes to live with him but has no capital or income. She is not allowed to work or to have recourse to public funds. The Secretary of State argues that the claimant would immediately lose his entitlement to housing and council tax benefit because his wife does not have a national insurance number. I cannot accept that this result was either intended or in fact is the consequence of the legislation. The claimant still needs to

live somewhere. He still has a level of means that would otherwise entitle him to income support and to passported benefits.

28. Accordingly, I conclude that where a claimant's partner is not allowed by law to have recourse to public funds, she is not "a person in respect of whom he is claiming benefit" for the purposes of section 1(1A) of the Social Security Administration Act 1992 in relation to a claim for housing benefit. Accordingly, the requirements of section 1(1B) do not have to be satisfied in relation to her.

29. In another inappropriate request, the authority has asked me to deal in this decision whether the claimant's entitlement to council tax benefit should be limited to 75% if I uphold the tribunal's decision and he is deemed not to be claiming for his wife. This matter was not raised until the week after the oral hearing and has not been the subject of any submissions or argument. In the circumstances, I decline to comment. However, I do suggest that the authority take better steps to familiarise itself with the proper procedure for appeals to the tribunal and the Commissioner and to appreciate that these are in essence court proceedings rather than part of the process of administrative decision making.

H. Levenson
Commissioner

7th June 2005