

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CH/3853/01

Starred Decision No: 154/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

so as to arrive by 6th March 2002

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

Decision:

- 1. My decision is that the decision of the Burnley appeal tribunal, held on 1st August 2001, is not erroneous in point of law.

The appeal to the Commissioner

- 2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave. The respondent does not support the appeal.

The history of the case

- 3. This case concerns a claim for housing benefit on the basis of the claimant's liability to make payments in respect of a particular property.

4. The property was previously owned by the claimant's mother and the claimant had lived there with her. On her death, he inherited the property. He believed that this was unfair to his sisters. So, he sold the property and divided the proceeds of sale with his sisters and other relatives. He agreed with the purchaser that he could continue to occupy the property for two years at a rent of £40 a week.

5. The claimant claimed housing benefit from and including 7th May 2001. The claim was refused, because the claimant was renting property that he had previously owned. The legal basis for the refusal was regulation 7(1)(h) of the Housing Benefit (General) Regulations 1987:

'(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 except where he satisfied the appropriate authority that he or his partner could not have continued to occupy that dwelling without relinquishing ownership'.

6. The claimant appealed against the decision refusing his claim. He argued that he was under a moral obligation to share his inheritance with his sisters. Before 7th May 2001, his entitlement was governed by a decision of a housing benefit review board. Its decision was given on 19th January 2001. The board accepted the claimant's argument and concluded that he

'could not have reasonably been expected to continue to live at the property unless he sold it to comply with a moral obligation to sell the house, in particular to aid his ailing sister. He had not tried to de-fraud the benefits system and the Council accepted this.'

7. The local authority prepared a submission for the appeal tribunal. It included Housing Benefit and Council Tax Benefit Circulars HB/CTB A1/99 and HB/CTB A12/2001, which deal with regulation 7.

8. The appeal tribunal dismissed the appeal on the ground that the claimant's circumstances came within regulation 7(1)(h). The tribunal commented that there was no

legal obligation or financial imperative to sell the property. The moral obligation could have been given effect to by taking out a mortgage.

The issues

9. Four issues arise in this case. First, did the tribunal correctly interpret and apply regulation 7(1)(h)? Second, what was the status of the decision of the housing benefit review board? Third, what status and relevance did the Circulars and the guidance they contained have before the appeal tribunal? Fourth, in what form should observations be made on an appeal to a Commissioner?

Issue 1 – regulation 7(1)(h)

10. The key word raised by the claimant's appeal was 'could'. Could the claimant have continued to occupy the property without relinquishing ownership?

11. Two questions arise for me. See the speech of Lord Reid in the House of Lords in *Brutus v Cozens* [1972] 2 *All England Law Reports* 1297 at page 1299.

12. The first is: what does 'could' mean in its context? The interpretation of a statute is a matter of law for me.

13. Regulation 7(1)(h) is mandatory in its terms. There is no scope for interpreting it as conferring a discretion on the local authority or the appeal tribunal. The tribunal is a statutory body and has no power to act outside the powers it is given by legislation.

14. 'Could' is not a term of art in law. In other words, it does not have a special meaning in law. When it is used in legislation, it bears its ordinary meaning unless it is specifically defined or the context requires otherwise. It is not defined and I find nothing in the context to suggest that it bears a special meaning.

15. On this interpretation, the issue for the tribunal was how the word was to be applied. The second question for me is: was the tribunal's conclusion unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably have reached it? The answer to that question is: no.

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. But, whatever the theoretical possibility, the claimant's circumstances in this case did not place him under a practical compulsion. Even accepting the existence of the moral obligation, the claimant could have taken out a mortgage in order to pass on some of his inheritance to his relatives.

17. The claimant argues that if he had taken out a mortgage, as the tribunal suggested, he would now be claiming income support instead of housing benefit. That argument is wrong. Housing costs are only eligible for income support purposes if the mortgage was taken out to acquire an interest in the dwelling occupied as the home or for certain repairs or

improvements: see paragraphs 15 and 16 of Schedule 3 to the Income Support (General) Regulations 1987. Repayments of capital or interest on a loan taken out to pay money to relatives under a moral obligation are not eligible.

Issue 2 – housing benefit review board decisions

18. Appeal tribunals are bound to apply the legal principles established by decisions of Commissioners. See the decision of the Tribunal of Commissioners in *R(I) 12/75*, paragraph 19. Tribunals are not bound by the decisions of other tribunals. Nor is a particular tribunal bound by its own previous decisions.

19. The housing benefit review board was of a status equivalent to an appeal tribunal, although it did not act judicially or independently. The tribunal was not bound by its interpretation of regulation 7(1)(h). Nor was the tribunal bound by the board's finding that the claimant was compelled to act as he did. That was so despite the fact that it was made in respect of the same claimant, the same premises, the same circumstances and the same arguments. The board's finding was made on a different claim dealing with a different period.

Issue 3 – the Circulars

20. The Circulars issued by the Department of Social Security (now the Department for Work and Pensions) alert local authorities to the state of the law from time to time. They explain why it has been amended and contain explanatory material and examples of how the law works. No doubt, they are very useful to the decision-makers in local authorities, who have to understand and apply the legislation. However, they are not, and do not purport to be, binding on local authorities. The appeal tribunal had to apply the law. So did the local authority. Neither was bound by anything in the Circulars.

21. The status of guidance given to local authorities by central government was dealt with by the Court of Appeal in *De Falco and Silvestri v Crawley Borough Council* [1980] 1 All England Law Reports 913. The case concerned the duty on a local authority to house homeless persons. The statute provided that the authority must 'have regard' to guidance. Nonetheless, the Court of Appeal held that the local authority was not bound to follow the guidance. See the judgments of Lord Denning at page 921 and Lord Justice Bridge at page 925.

22. The reasoning in that decision applies more strongly to housing benefit and council tax benefit Circulars than it did to the Code of Guidance in that case, because there is no duty on local authorities to have regard to the Circulars.

23. Circulars should not be included in submissions to tribunals as a matter of routine. There is little chance of the tribunal being misled and treating them as binding, but they can confuse claimants, who may assume that their provenance gives them an authority that they do not have.

24. If an appeal raises an issue of interpretation on a particular provision, the local authority may wish to adopt, as all or part of its argument, the contents of a Circular. That is permissible, but the fact that the local authority's proposed interpretation is contained in a Circular does not add any weight to it.

Issue 4 – observations on appeal to a Commissioner

25. The respondent made observations on this appeal in the form of a letter addressed to the Office of the Social Security Commissioner.

26. Before the new adjudication scheme for housing benefit came into force, local authorities were issued with guidance on the form in which observations should be made. It tells local authorities that observations need not be made in a particular form. That is correct. However, it must be read in its context. It does not mean that any form whatsoever is acceptable.

27. Presenting observations in the form of correspondence with the Commissioners' office is not appropriate. The Commissioners and the Commissioners' Office are separate.

28. The Commissioners' Office is an administrative body. It acts as the processing centre for applications and appeals. It is not a party to the appeals or involved in any way in the determination of cases. Observations must be sent to the Office, but they are not made to the Office.

29. The Commissioners are the judges who determine applications and appeals. The observations on appeals must be made to them. But they should not be addressed personally to them, because this can cause confusion and delay in the Office, which handles Commissioners' correspondence differently from observations.

30. The form used by the Secretary of State in social security and child support cases provides a model for local authorities to follow. It is headed **SUBMISSION TO THE COMMISSIONER** and identifies the case by the claimant's name and the Commissioners' case reference number. The observations are set out in numbered paragraphs, which is convenient for ease of reference. It is sent with a covering letter to the Commissioners' Office.

Summary

31. The appeal tribunal came to the only decision open to it on a proper construction of the law. I dismiss the appeal.

Signed on original

**Edward Jacobs
Commissioner
18th December 2001**