Bulletin 184

[SHORT]

CH/4306/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since I consider that I can do so without making any fresh or further findings of fact, I substitute for the tribunal's decision my own decision that the authority were not entitled to reduce the claimant's eligible rent under regulation 11(2) of the Housing Benefit (General) Regulations 1987.

2. This is an appeal against the decision of the tribunal dismissing the claimant's appeal against a decision by the respondent housing authority to reduce the claimant's eligible rent, under the provisions of regulation 11 of the Housing Benefit (General) Regulations 1987 in the form in which they applied to persons who claimed housing benefit before 1 January 1996. I held an oral hearing of the appeal on 7 April 2004 at which the claimant was represented by Ms Jane Davies, of Manchester Advice, and the authority was represented by Ms Lorna Findlay, of Counsel. I am extremely grateful to them both for their assistance.

3. The claimant is a single man, born on 14 December 1935, who receives a retirement pension and income support. He has arthritis of the spine and a number of other health problems and walks with the aid of a stick. The claim relates to a terraced house with two bedrooms, two living rooms, a kitchen and bathroom, situated in what has become one of the most sought after areas of Manchester. The claimant has lived in the house all his life (I was told that he was in fact born there), and succeeded to an assured tenancy of the property in December 1989.

4. On 11 December 2001 a rent officer determined the claim-related rent to be £70.00 per week. The contractual rent at that time was £92.31 but, for some reason which has not been explained, housing benefit continued to be paid above the level of market rent set by the rent officer.

5. The claimant made a renewal claim on 3 October 2002 for the period 18 November 2002-16 November 2003. On 18 October 2002 the authority applied to a rent officer for a re-determination to be made of the claim-related rent and on 22 October the authority wrote to the claimant informing him that he had been awarded benefit at the rate of £70.00 per week, but inviting him to give details of his health problems and other circumstances to enable consideration to be given to an award of benefit above the level set by the rent officer. On 23 October a rent officer determined the claim-related rent to be £70.00, that is, the same as the amount determined by the rent officer on 11 December 2001. On 29 October 2002 the claimant replied to the authority's letter of 22 October giving details of his health problems, referring to his restricted mobility and to the network of support which he had in the area where he lived.

6. On 18 December 2002 the authority applied to the rent service for a re-determination of the decision made on 23 October 2002 and on 15 January 2003 the re-determining rent officer determined the market rent for the property to be £80.00 per week. However, in addition, the re-determining rent officer decided that a reasonable rent for accommodation

meeting the size criteria for the claimant, namely accommodation with two rooms, was also £80.00 per week.

7. Regulation 11 of the Housing Benefit (General) Regulations 1987 provides for a housing authority to reduce the eligible rent for housing benefit purposes to below the amount of rent which the claimant is liable to pay if the dwelling is unreasonably large or the rent is unreasonably high. So far as material, the regulation, in the form applicable to this case, provided:

"(2) The appropriate authority shall consider-

> **(a) whether by reference to a determination of re-determination made by a rent officer in exercise of a function conferred on him by an order under section 121 of the Housing Act 1988 ... or otherwise that a claimant occupies a dwelling larger that is reasonably required by him and others who also occupy that dwelling (including any non-dependants of hers/his and any person paying rent to him) having regard in particular to suitable alternative accommodation occupied by a household of the same size; or.....**
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> > **(c) whether by reference to a determination of re–determination made by a rent officer in exercise of a function conferred on him by order under section 121 of the Housing Act 1988 or ...otherwise that the rent payable for his dwelling is unreasonably high by comparison with the rent payable in respect of suitable alternative accommodation elsewhere,**
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> **and, where it appears to the authority that the dwelling is larger than is reasonably required or that the rent is unreasonably high, the authority shall, subject to paragraphs (3) and (4) treat the claimant's eligible rent, as reduced by such amount as it considers appropriate having regard in particular to the cost of suitable alternative accommodation elsewhere and the claimant's maximum housing benefit shall be calculated by reference to the eligible ... rent as so reduced.**

(3) If any person to whom paragraph (7) applies –

> **(a) is aged 60 or over; or**
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> **(b) is incapable of work for the purposes of one or more of the provisions of the Social Security Act, or Part I of the Social Security and Housing Benefits Act 1982 (a) or Part II of the Act; or**
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> **(c) is a member of the same household as a child or young person for whom he or his partner is responsible,**

no deduction shall be made under paragraph (2) unless suitable cheaper alternative accommodation is available and the authority considers that taking into account the relevant factors, it is reasonable to expect the claimant to move from his present accommodation.

(6) For the purposes of this regulation –

> **(a) in deciding what is suitable alternative accommodation, the appropriate authority shall take account of the nature of the alternative accommodation and**

the facilities provided having regard to the age and state of health of all the persons to whom paragraph (7) applies and, in particular, where a claimant's present dwelling is occupied with security of tenure, accommodation shall not be treated as suitable alternative accommodation unless that accommodation will be occupied on terms which will afford security of tenure reasonably equivalent to that presently enjoyed by the claimant; and

(b) the relevant factors in paragraph (3) are the effects of a move to alternative accommodation on –

(i) the claimant's prospects of retaining his employment; and

(ii) the education of any child of young person referred to in paragraph (3) (c) if such a move were to result in a change of school.

(7) This paragraph applies to the following persons –

(a) the claimant;

(b) any member of his family;...."

8. On 21 February 2003 the decision awarding the claimant housing benefit at the rate of £70.00 per week was revised so as to award benefit at the rate of £80.00 per week. The claimant was notified of that decision by letter dated 25 February 2003, giving the following reasons for the decision:

"Because you are 60 or over and have health problems I have had to look at other factors set out in regulation 11(3) and 11(6). I considered whether there was cheaper accommodation suitable for your needs which was available to you. After considering a range of information on what accommodation was available for letting at that time, I decided that suitable cheaper accommodation was available. I also looked at whether it would be reasonable to expect you to move. I do not want to put you in a position where you feel you need to move but I was satisfied that it was not unreasonable to expect you to move, given your high rent and the cost to local and national government funds if your rent was met in full.

I therefore reduced the amount of rent used to work out your benefit to the level I felt would be appropriate, £80.00 a week.

There is one situation where I do not have to do this. Regulation 11(3A) says that I should not limit benefit in this way if a relative who lived with you at the time died in the last 12 months. As far as I know, this is not the case.

You have stated that you have a number of health problems which I appreciate must difficult. However you also mentioned on your reclaim form that you currently have £5600.00 in savings. In this instance I think it would not be appropriate to pay above the market rent as it appears you have resources which you may be able to use to meet the shortfall. I have looked again carefully at my decision and carefully considered your comments but I have decided that my original decision was correct so I am not prepared to change it."

9. Although the tribunal held that the authority were entitled to reduce the eligible rent under regulation 11(1)(2)(c), it is accepted that the decision to do so in this case was in fact made

under regulation 11(2)(a), on the ground that the claimant occupied a dwelling larger than was reasonably required by him. The authority accept that the claimant falls within a vulnerable category, under regulation 11(3)(a), but contend that suitable cheaper alternative accommodation is available for the claimant and that it is reasonable to expect the claimant to move from his present accommodation. The alternative accommodation relied on by the authority consists of several hundred dwellings shown in the authority's list of empty houses in the months from October 2003 to February 2003, and in the Manchester 'Homefinder' for the months February to May 2003, giving details of homes available for immediate letting.

10. The claimant's representative appealed on his behalf on 21 March 2003, contending that the authority had wrongly treated the rent officer's determination as conclusive of the issue of whether the rent was unreasonably high, that the authority had not established that there was alternative accommodation which was suitable for the claimant's needs, and that the security of tenure under which the claimant would occupy such accommodation would not be reasonably equivalent to that enjoyed by the claimant under his existing assured tenancy. The basis of the argument regarding security of tenure was that any tenancy granted to the claimant by a housing association or private landlord would be an assured shorthold tenancy, whilst any tenancy granted by the authority would an 'introductory' tenancy, as authorised by section 124 of the Housing Act 1996. That provision allows a local housing authority to elect to operate an introductory tenancy regime, under which a tenant does not have the security of tenure of a secure tenancy during a trial period of one year, although the tenancy can only be brought to an end by order of the court and after service of a notice complying with section 128 of the 1996 Act. The respondent authority has elected to operate an introductory tenancy scheme, which obliges them to grant an introductory tenancy on every new letting.

11. The tribunal, consisting of a legally qualified panel member sitting alone, dismissed the claimant's appeal following a 'paper' hearing held on 2 July 2003. Having found that the claimant had given no reason for requiring a four-roomed property and that the property had not been adapted in any way to be more suitable for the claimant in view of his health problems, the chairman gave the following reasons for dismissing the appeal:

> **"I therefore accept that the appellant's dwelling is larger than is reasonably required by him and I further accept that the local authority have demonstrated that there is an active market in house of an appropriate type in an appropriate place at the level of rent to which the appellant's rent has been restricted. The appellant is not in employment and does not have children at school and it is therefore not unreasonable to expect the appellant to move. He has been at his present accommodation since 1989 and has therefore clearly complied with the terms of occupation of that property and, although if he did move, he would only acquire an introductory tenancy for a period of 12 months, he would then automatically be given a full tenancy which would afford him the same level of security of tenure as he has in his present accommodation; in view of his history I find it more likely than not that the appellant would satisfactorily complete his introductory tenancy and then move on to a full tenancy.**
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> **The actual rent being paid by the appellant is some 15% higher than the market rent as set by the Rent Service and I therefore consider that it is unreasonably high and in any event the market rent was set with regard to the size criteria on the basis that the dwelling is larger than is reasonably required."**

Following an application for leave to appeal by the claimant, leave was granted by a district chairman on 21 October 2003. On 2 February 2004 Mr Commissioner Levenson directed an oral hearing of the appeal at the respondent's request.

12. In *R v Housing Benefit Review Board for East Devon District Council ex parte Gibson* (1993) 25 H.L.R. 487 the Court of Appeal held (per Lord Bingham MR at p.493) that the scheme under the 'old' regulation 11 was directed:

> **"...to mitigate the demand on public funds where recipients of housing benefit are paying rent above the market level or living in accommodation which is larger than reasonably necessary to meet their needs, or living in accommodation which is unreasonably expensive. The key to the operation of the reduction mechanism is the finding that recipients are paying a rent which is, for one reason or another, unreasonably high.**
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> **It is, as I have already suggested, plain that the procedure is designed to protect the public purse. But it is fair, I think, to infer that the procedure is not designed to produce homelessness, which would be the result if a beneficiary's rent were restricted, so that he could not afford to stay where he was but was unable to find any other accommodation to which he could be expected to move at the level of rent payable.**
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> **The effect of the regulations, therefore, under regulation 11(2)(c) is to confer a discretion as to whether the rent should be restricted but, in a case which falls within section 11(3), to deny the local authority...a discretion to restrict the rent, unless it is in effect satisfied that there is alternative accommodation suitable for the reasonable needs of the beneficiary and his family which is available on the market at the level of rent allowed. Regulation 11(3) is clearly designed to make special provision for families which include elderly persons of the advanced age of 60, disabled persons and children and young persons. It is, I think, implicit that the restriction of the rent is recognised as being possibly such as to oblige the recipient of housing benefit to move, but certainly in a section 11(3) case such a recipient is not to be obliged to do so unless it appears that there is somewhere that he and his family can move at the rent allowed."**

In a passage much relied on by Ms Findlay, Lord Bingham MR continued:

> **"...it has repeatedly been said that it is not part of the local authority's function and no part of the Review Board's function to identify specific property available for a claimant's occupation. Speaking for myself, I unreservedly accept that. Neither the local authority nor the Review Board is an accommodation agency; neither of them can be expected to assume what would be an inappropriate role. A situation should never arise, therefore, where the local authority or the Review Board is in the position of saying: "Number 3 laburnum Avenue is the same size as the house you are now occupying, it is available for letting at a rent substantially below that which you are paying; why do you not move there?" That would, as I say be an entirely inappropriate approach to the matter. Moreover, it must be borne in mind that details of payment of housing benefit are confidential matters and it can therefore never be incumbent on local authorities to disclose the names or addresses of beneficiaries to whom the benefit is paid. It is, in my judgment, quite sufficient if an active market is shown to exist in houses of the appropriate type in an appropriate place at the level of rent to which rent is restricted. There must, however, be evidence at least of that in a case falling within paragraph 11(3); otherwise the recipient, if he had to move, would have nowhere to go. It is, however, sufficient, as I wish to stress, to point to a range of properties, or a block**

of property, which is available without specific identification of particular dwelling-houses."

13. Ms Davies accepted that the authority were entitled to find that the dwelling occupied by the claimant was larger than reasonably required, but submitted that the authority had failed to establish that there was an 'active market' in houses of a type appropriate for the claimant. Under section 159(1) of the Housing Act 1996 a housing authority must comply with the provisions of Part VI of the Act in allocating housing accommodation, and Ms Davies submitted that the empty houses listed by the authority could only be lawfully let in accordance with the authority's allocation criteria. Ms Davies also submitted that there could only be an 'active market' if there was a mix of private and public sector tenancies and produced evidence that the properties listed in 'Homefinder' were exclusively local authority dwellings. On the basis of the decision of Mr Commissioner Levenson in *CH/2214/2003* Ms Davies submitted that factors other than the possible loss of a job and children's education can be taken into account in deciding what is suitable alternative accommodation. Ms Davies also repeated her argument that the security of tenure under an introductory tenancy was not reasonably equivalent to that enjoyed by the claimant under his existing assured tenancy.

14. Ms Findlay submitted, on the authority of *R v Coventry City Council ex parte Morgan* (CO/1448/1994), that the authority were entitled to take into account the availability of local authority accommodation in deciding whether suitable cheaper alternative accommodation was available for the claimant. Ms Findlay did not rely on the accommodation shown in the list of empty houses as being available for the claimant, but submitted that in the absence of any evidence that the claimant needed a particular type of accommodation, the decision maker could rely on the accommodation listed in 'Homefinder' as evidence of an active market of houses of a type appropriate for the claimant. In relation to the security of tenure issue, Ms Findlay submitted that it was inconceivable that the claimant would be evicted during any introductory tenancy, so that his security of tenure under a housing authority secure tenancy should be regarded as reasonably equivalent to the security which he presently enjoyed as an assured tenant.

15. Regulation 11(3) requires an authority to consider two separate matters. The first is whether there is suitable cheaper alternative accommodation available for the claimant and, in considering that question, the authority must take into account the maters set out in paragraph (6)(a). The second is whether it is reasonable to expect the claimant to move, taking into account the relevant factors in paragraph (6)(b). As Collins J. held in *R v City Council ex parte Morgan*, an authority is entitled to have regard to the existence of suitable local authority accommodation in deciding whether suitable alternative accommodation is available, and I do not agree with Ms Davies that it is necessary for the authority to show a mix of public and private sector tenancies in order to establish that there is an active market in houses of the appropriate type. In my judgment, it is sufficient for the authority to show that there is a an 'active market' in the sense that there is a supply of accommodation which meets the statutory criteria, and it is not necessary to show that there is more than one type of provider of such accommodation.

16. However, as Lord Bingham MR pointed out in *Gibson*, regulation 11(3) is designed to make special provision for certain categories of vulnerable persons, and in such cases the power in regulation 11(2) to reduce the eligible rent can only be exercised in cases where there is cheaper alternative accommodation available for the claimant which is "suitable". In

relation to the question of what is suitable, regulation 11(6)(a) provides that the authority *shall* (my emphasis) take account of the nature of the alternative accommodation and the facilities provided having regard to the to the claimant's age and state of health. Unless those matters are actually taken into consideration, the provision will not be effective to confer on vulnerable persons the protection which the Court of Appeal in *Gibson* considered that it was designed to achieve.

17. I reject Ms Findlay's submission that the authority need only consider housing needs if they are specifically raised by the claimant. Regulation 11(6)(a) is in mandatory terms and, in my judgment, places the onus on the authority to establish that the accommodation relied on by them for the purposes of regulation 11(2) is suitable, taking into account the factors in regulation 11(6). In *Nevile v Hardy* [1921] 1 Ch. 404, Peterson J., dealing with somewhat similar provisions in the Rent Acts, held:

> **"But the conditions of the latter part of the clause must also be satisfied by the landlord before he can obtain an order for possession, and then under them the Court must be "satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available." It was contended that under this provision the onus is thrown upon the defendant, the lessee. But that would mean that the lessee had to satisfy the Court "that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is *not* available." Those, however, are not the words of the clause; the words are "that alternative accommodation" of the kind specified "*is* available." In my opinion, therefore, it is for the landlord who seeks possession to satisfy the Court by positive evidence that alternative accommodation of the kind specified "*is* available.""**

18. The obligation on an authority to show that the matters referred to in regulation 11(6)(a) have been taken into account in deciding what is suitable alternative accommodation does not prevent the authority from establishing that suitable accommodation is available by showing that there is an active market in such accommodation. But, as Lord Bingham MR said in *Gibson*, the market must be "in houses of the appropriate type in an appropriate place at the level of which rent to which rent is restricted". In the case of a claimant who is elderly, for example, it may be sufficient for the authority to show that there is a supply of accommodation to rent designed or adapted for elderly residents, and in such a case it will not be necessary for the authority to identify any specific properties actually available for occupation by the claimant.

19. In their written submission, the authority identified a few of the many properties in 'Homefinder' as being suitable for the claimant in terms of size and area, but could provide no information about the accommodation other than that contained in the publication itself. It was accepted that the properties in 'Homefinder' are for the most part "difficult to let" properties, and much of it must be extremely unattractive for one reason or another if no tenants can be found from among the many persons who are desperate for housing. Be that is may, however, there is no evidence with regard to the nature of any of the accommodation or the facilities provided in any of the properties, having regard to the claimant's age and state of health. Notwithstanding the assertions contained in the authority's letter of 25 February 2003, the authority have therefore failed to discharge the onus which I have held to be on them to show that suitable alternative accommodation was available for the claimant. Accordingly, I hold that the authority were not entitled to reduce the claimant's eligible rent on the ground that the claimant's dwelling was larger than reasonably required.

20. So far as security of tenure is concerned, there remains a dispute as to whether any of the property in 'Homefinder' was private sector accommodation. In the absence of any more detailed identification of a property considered to be suitable for the claimant, consideration of the claimant's security of tenure under any new tenancy seems to me to purely hypothetical. Since I have decided to allow the appeal for the reasons I have given, I do not consider it necessary to deal with this aspect of the case.

21. Although the tribunal held that the authority were entitled to reduce the eligible rent on the ground that the rent was unreasonably high, the authority does not appear to have done so on that ground. In *R v Westminster Housing Benefit Review Board ex parte Mehanne* [2001] 2 All ER 690 it was held by the House of Lords that the power to reduce the eligible rent under regulation 11(2) is discretionary and can take account of a tenant's circumstances. Since the authority do not appear to have exercised their powers under regulation 11(2)(c) and the material relevant to the exercise of the discretion is in any case incomplete, I do not consider it appropriate for that matter to be considered on appeal.

22. I therefore allow the appeal, set aside the tribunal's decision, and substitute for that decision the decision set out in paragraph 1.

(Signed) E A L BANO
Commissioner

23 July 2004