



## Legal Framework - Commissioner's Decisions



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### THE SOCIAL SECURITY COMMISSIONERS - Commissioner's Case No: CH/4943/2001

#### DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under paragraph 8(4) and (5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.

1.1. The decision of the Oxford appeal tribunal under reference U/40/048/2001/00714, held on 19th July 2001, is erroneous in point of law.

1.2. I set it aside and give the decision that the appeal tribunal should have given without making fresh or further findings of fact.

1.3. My decision is that the local authority's recoverable overpayment decision was correct, subject only to regulation 104 of the Housing Benefit (General) Regulations 1987 being applied. I direct the local authority to exercise its power under regulation 73(1) to identify the claimant's income and other circumstances during the period of the overpayment. It must then, if appropriate, apply regulation 104. If there is a dispute about the application of regulation 104, it may be referred to me or to another Commissioner for resolution.

#### The appeal to the Commissioner

2. This appeal to a Commissioner concerns an overpayment of housing benefit which the local authority is seeking to recover from the claimant's landlord, a Housing Association. It is brought by the landlord with the leave of Mr Commissioner Powell. The claimant's local authority, the Chiltern District Council, is the respondent. I refer to the appellant as the landlord and to the respondent as the local authority.

3. The claimant has not been involved in the proceedings either before the appeal tribunal or before me. On granting leave, Mr Commissioner Powell directed that his direction be served on the claimant so that he could apply to be joined as a party if he wished. He did not respond.

4. As Mr Commissioner Powell was unwell, the case was referred to me when the written submissions had been received. I directed an oral hearing. It was held before me in London on 10th July 2002. The landlord was represented by Mr P Stagg, of counsel. The local authority was represented by Mr H Patterson, who is its Head of Legal Services. I am grateful to them for their written arguments and for their amplification of those arguments at the hearing. I am also grateful to Mr Lunn of the local authority, who provided some practical information about how housing benefit is administered by the authority.

#### The issues

5. If anyone involved in housing benefit work is looking for a Commissioner's decision to take to a desert island, this is the one.

6. This case raises a number of issues relevant to the recoverability of overpayments: (a) the preconditions for a valid recoverability decision; (b) the adequacy of notification of overpayment decisions; (c) the calculation of the overpayment, especially offsets; (d) whether there is a right of appeal to an appeal tribunal against the choice of the person from whom recovery is sought; (e) the Convention right to a fair hearing under the Human Rights Act 1998; (f) disclosure of personal data under the Data Protection 1998; (g) breach of confidence and defences to it.

#### Adequacy of reasons

7. Mr Stagg argued that the tribunal's reasons were inadequate to deal with the arguments put to it at the hearing. I accept that argument. The tribunal's decision must be set aside. That leaves the question: should I direct a rehearing or substitute a decision for that of the appeal tribunal?

Was there a decision over which the appeal tribunal had jurisdiction?

8. Mr Stagg's argument began with a number of propositions about a tribunal's jurisdiction. Mr

Patterson did not dispute them. I accept that they are correct and need only summarise them without elaboration. (a) An appeal tribunal is a statutory body that only has power to act in respect of the jurisdiction conferred on it by statute. (b) A tribunal's jurisdiction cannot be extended by consent or waiver (*Rydqvist v Secretary of State for Work and Pensions* reported in *The Times* on 8th July 2002). I do not read anything in CH/3776/2001, paragraph 8 that contradicts this proposition. (c) In this case, a review was needed before an overpayment decision could be given. (d) If there was no review, neither the appeal tribunal nor the Commissioner has power to conduct one (CIS/362/2001, paragraphs 12 and 13) and (e) the tribunal had no jurisdiction to do anything except to decide that the purported overpayment decision was of no force or effect (R(S) 7/91, paragraph 4).

Was there a review in this case?

9. In the circumstances of this case, a review was necessary in order for the recoverability decision to be of force and effect: see regulation 98 of the Housing Benefit (General) Regulations 1987.

10. After some questioning I discovered how this local authority deals with overpayments. It uses software that is available nationally, but which is not used by every local authority. The software prompts the operator for information and then generates a long overpayment decision – some 10 or 11 pages, I was told. The local authority considered that claimant would not understand that decision. So, a simpler letter was produced. That letter is what appears in the papers before me.

11. I am satisfied from that letter and from the explanation I was given that the local authority did undertake a review. All the doubt about this, and the argument it generated, would have been avoided if the local authority had adopted the practice, familiar to appeal tribunals and Commissioners from their social security jurisdiction, of including a copy of the decision in the appeal papers. The policy of communicating complex issues in plain language is commendable. But it is not a reason for failing to provide the technical information in the appeal papers on an appeal. Local authorities should always include a copy of the decision under appeal in the submission to the appeal tribunal.

Notification to the landlord

12. The overpayment decision had to be notified to the landlord under regulation 77 and Schedule 6 of the Housing Benefit (General) Regulations 1987. Mr Stagg argued that the notification to the landlord was defective in a number of respects. Mr Patterson argued that if there had been any failure to comply, it had not prejudiced the landlord.

The principles

13. What standard of compliance with the notification provisions is required?

14. *Warwick District Council v Freeman* (1994) 27 Housing Law Reports 616 concerned an attempt by the local authority to recover an overpayment from the tenant's landlord. A decision was given against the claimant and the landlord was invoiced. When the landlord asked for a review, the local authority replied that the procedure did not apply to landlords and sued for payment in the county court. The case came before the Court of Appeal, which held that there was no basis for the local authority's civil action to recover the overpayment, because the landlord had not been notified in accordance with the legislation.

15. *Haringey London Borough Council v Awaritefe* (1999) 32 Housing Law Reports 517 also concerned an attempt by a local authority to recover an overpayment of housing benefit from the tenant's landlord. The local authority sued in the county court. The landlord's defence was that the notification of the decision was defective. The Court of Appeal distinguished *Freeman* as a case in which the notification procedures had not been followed at all. *Awaritefe*, in contrast, was a case in which the procedures had been followed, but defectively. In those circumstances, the test to be applied was whether the landlord had suffered 'substantive harm' or 'significant prejudice'. (The members of the Court clearly regarded those terms as interchangeable.) If so, there had not been substantial compliance with the notification provisions. If not, there had been substantial compliance. On the facts of that case, there had been no prejudice.

16. *Freeman* was an exceptional, indeed extraordinary, case. It is difficult to imagine that the facts, or anything like them, would ever be repeated. Unfortunately, it is a case that is regularly cited by those who represent claimants and landlords. It is most unlikely that it will ever apply. Representatives would be advised to save its use for those rare cases. I exempt Mr Stagg from these strictures. He relied on *Freeman* only if the local authority had not carried out a review. He accepted that, if a review had been carried out, the facts of this case were not so extreme as to fall within *Freeman*. So long as the notification procedure has been followed, the relevant test will be that laid down in *Awaritefe*.

The principles applied to this case

17. Was there substantial compliance in this case? Did the landlord suffer substantive harm or significant prejudice?

18. The only relevant provisions are those in paragraph 14 of Schedule 6. Mr Stagg referred to some other paragraphs, but paragraph 7 provides that Parts II, III and VI of the Schedule apply only to a decision notice given on a claim. That excludes all the other paragraphs relied on by Mr Stagg. He tried to avoid that consequence by referring to paragraph 8, but that cannot displace the effect of the clear wording in paragraph 7.

19. Mr Stagg argued that the notification should have included: the review, the ground for review, the calculation of the claimant's income and capital, the overpayment and the reason why it was recoverable.

20. What the local authority told the landlord before the appeal was this: (a) that there had been an overpayment to the tenant; (b) the period and amount of that overpayment; (c) the calculation of the overpayment; (d) the fact that it arose because the claimant had ceased to be entitled to jobseeker's allowance; (e) that the cause was classified as claimant error. It was obviously inherent in all the communication with the landlord that the local authority had decided to recover the overpayment from the landlord.

21. There was certainly delay in providing to the landlord the information I have summarised. It was provided in stages and only after requests for it. No doubt, the landlord was annoyed by the delay. No doubt, the delay caused inconvenience and uncertainty. The requests for more information took time to make. But there was no substantive harm or significant prejudice. The information eventually provided was sufficient for the landlord to know the essence of the case that an overpayment had occurred and was recoverable. It was sufficient to allow the landlord to appeal to an appeal tribunal, albeit in general terms. Once that process had been initiated, further information became available.

22. A passage from the judgment of Lord Justice Pill in *Awaritefe* (at page 531) is relevant to cases that raise this issue:

'the court must remind itself that it is the judge not of standards of administration but of the law. It is to be expected, and indeed hoped, that there is very considerable coincidence between what is required of a local authority by way of good administration and what is required by law. There may however be cases where conduct which may be categorised as poor administration, or even maladministration, does not fall below the standard required by the law.'

#### Disclosure and confidentiality

23. At one stage when the landlord was trying to discover the basis of the overpayment decision, the local authority wrote that more information could not be given 'for reasons of confidentiality'.

24. Mr Stagg told me that this was a common reason given by local authorities for withholding information. He argued that there was no justification for it in law. He identified three possible grounds that the local authority might rely on and argued that none applied. (a) If the information sought was personal data under the Data Protection Act 1998, there was a defence in section 35(1). (b) If the local authority was relying on the tort of breach of confidence, there was a defence in the public interest. (c) If the local authority was relying on the claimant's Convention right in Article 8(1), there was a defence in Article 8(2) that disclosure was justified for the protection of the rights and freedoms of others.

25. Mr Patterson argued that all relevant information had been disclosed.

26. I have commented elsewhere about the reluctance of local authorities to disclose relevant information: CH/522/2001, paragraph 3.1 and CH/396/2002, paragraphs 17 to 19. It is my impression that local authorities have not yet fully understood that they are now dealing with a judicial proceeding and not an internal administrative one.

27. Disclosure has to be considered at two different stages.

28. The first stage is when the overpayment decision is notified to the person affected by it. The contents of the notice is governed by the Housing Benefit (General) Regulations 1987. At this stage, disclosure is governed by the extent of the local authority's duty under those Regulations. It depends on the proper interpretation of regulation 77 and Schedule. I have already dealt with that.

29. The second stage is the appeal. At this stage, disclosure is governed by the requirements of natural justice and the Convention right to a fair hearing. The local authority must disclose the information necessary (a) for the appellant to prepare a case against that made by the local

authority and (b) for the tribunal to exercise its jurisdiction. The time to make that disclosure is when the submission to the tribunal is written.

Does an appeal tribunal have jurisdiction over the local authority's exercise of its discretion?

30. Mr Stagg argued that an appeal tribunal has jurisdiction over the local authority's exercise of its discretion to seek recovery from a landlord. This is an important issue for landlords. Mr Stagg told me that the Housing Association that he represented estimated that, out of a turnover of £4m in rent in 2001-2001, £1¼m was recovered by the local authority as overpayments. I was told that tribunals are divided on the scope of their jurisdiction, with some accepting the jurisdiction over the discretion and others declining it.

31. This issue requires detailed reference to the substantive and procedural legislation. I set out that legislation and my analysis of it without reference to the arguments of the parties. I then refer to those arguments in so far as my analysis has not already covered them.

The substantive legislation

32. Section 75 of the Social Security Administration Act 1992 deals with overpayments of housing benefit. Subsection (3) provides:

'An amount recoverable under this section is in all cases recoverable from the person to whom it was paid; but, in such circumstances as may be prescribed, it may also be recovered from such other person as may be prescribed.'

This subsection consolidated section 29(6) of the Social Security Act 1986. The relevant regulations were made under that subsection. However, for convenience I shall refer only to section 75(3), which is in identical terms. A new version of section 75(3) was substituted from and including 1st October 2001, but that cannot affect the issues that arise in this case.

33. Some features of this subsection are important.

34. First, an overpayment is always recoverable from the person to whom it was paid. It may also be recovered from someone else. The subsection does not impose a duty to recover. It is concerned only with recoverability, not actual recovery. That is shown by the use of 'recoverable' and 'may be recovered'. It is left to the discretion of the local authority whether or not to recover an overpayment.

35. Second, if the circumstances are such that the overpayment may be recovered from someone else, that does not relieve the person to whom it was paid of liability. If there is such a person, the overpayment may be recovered from either. The choice is left to the discretion of the local authority.

36. Third, the subsection contains an enabling power. It allows regulations to provide for the circumstances in which, and other persons from which, an overpayment may be recovered.

37. The circumstances in which an overpayment is recoverable from someone other than the person to whom it was paid are prescribed by regulation 101 of the Housing Benefit (General) Regulations 1987. Only paragraph (1) is relevant. It provides:

'Persons from whom recovery may be sought

101.-

(1) Subject to paragraph (2) a recoverable overpayment shall be recoverable from either-

(a) [deals with cases in which the overpayment was a consequence of a misrepresentation or failure to disclose]; or

(b) in any case, the claimant or the person to whom the overpayment was made.'

38. Some features of this paragraph are important.

39. First, it is made under the predecessor to section 75(3). Its scope cannot be wider than that authorised by that provision.

40. Second, the language is again that of recoverability and not of actual recovery. Issues concerning the latter are left to the discretion of the local authority.

41. Third, subparagraph (b) repeats section 75(3) by providing that an overpayment is always recoverable from the person to whom it was made.

42. Fourth, there is an ambiguity in subparagraph (b). Is an overpayment recoverable from a claimant in any circumstances or only if the overpayment was made to the claimant? My reading is that it is recoverable from the claimant in all circumstances. If the alternative reading were correct, the subparagraph would add nothing to section 75(3). Also, the more natural wording for that reading would be: 'the claimant or other person to whom the overpayment was made.' However, I do not have to resolve this issue in this case.

43. So, if an overpayment is made to a landlord, the local authority may seek recovery from the landlord. However, it has a discretion not to. And, it has a discretion to pursue the claimant instead of the landlord.

44. The discretion is conferred expressly by the language of section 75(3). The language of regulation 101 is also discretionary. However, the scope of the regulation is limited by the enabling power under which it was made. That was the statutory predecessor of section 75(3). The power is limited to prescribing the persons from whom recovery may be sought and the circumstances in which it may be sought from them.

The procedural legislation

45. So, the local authority may in its discretion decide not to recover an overpayment and, if it is potentially recoverable from more than one person, it may in its discretion pursue one rather than the other. However, that does not mean that the appeal tribunal has jurisdiction over the exercise of the local authority's discretion. This is because not all issues are subject to the right of appeal.

46. Provision is made for appeals to an appeal tribunal by paragraph 6 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. The right of appeal in this case arose under regulation 3(4) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) (Transitional and Savings) Regulations 2001. By virtue of regulation 3(10), the jurisdiction on that appeal is limited by paragraph 3 of the Schedule to the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. Paragraph 3 applies to all cases, whether or not they are governed by the Transitional and Savings Regulations.

47. Paragraph 3 cannot have a different meaning in cases under the Transitional and Savings Regulations from what it bears in other cases. It must be interpreted in the context of the provisions that govern jurisdiction in those other cases.

48. The right of appeal is conferred in those cases by paragraph 6(3) of Schedule 7 to the 2000 Act, but this is subject to exclusions prescribed in regulations made under paragraph 6(2)(e).

49. The exclusions are contained in regulation 16(1) of, and the Schedule to, the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. Paragraph 1 to the Schedule provides:

'1. No appeal shall lie against a decision made by virtue of, or as a consequence of, any of the provisions in Part X (claims), Part XII (payments) and Part XIII (overpayments) of the Housing Benefit Regulations except a decision under-

(f) regulation 101 (person from whom recovery may be sought)'

Paragraph 3 is also relevant. It provides:

'3. Subject to paragraphs 1(f) ..., no appeal shall lie against a decision as to the exercise of discretion to recover an overpayment of housing benefit ...'

50. My analysis of those provisions is this.

51. Paragraph 1 excludes appeals against decisions made by virtue of, or as a consequence of, the overpayment provisions in the Regulations. That is wide enough to cover the local authority's discretion on recovery.

52. Paragraph 3 removes any doubt about whether the exercise of the discretion left to the local authority by the Regulations is appealable to an appeal tribunal.

53. Paragraph 3 applies both to the Regulations (as paragraph 1 does) and to section 75 of the Act (which paragraph 1 does not).

54. Subparagraph (f) is one of the exceptions to the general exclusion made by paragraph 1. Paragraph 3 is subject to it. The exception preserves the right of appeal for decisions under regulation 101. However, that regulation is limited to identifying the circumstances in which, and the persons other than the payee from whom, recovery may be sought. That is made clear by the scope of the enabling authority in the predecessor to section 75(3). The local authority's discretion is not a decision made under that regulation. The exercise of the discretion is independent of that regulation. Either the discretion is either exercised directly under section 75 or it is a matter that is left outside the legislation altogether.

55. The fact that paragraph 3 is made subject to paragraph 1(f) may suggest that otherwise the two provisions would otherwise conflict. As paragraph 3 excludes discretions, that may suggest that regulation 101 confers a discretion. But, whatever the suggestion, it cannot affect the proper interpretation of the scope of that regulation, taking account of its enabling authority. There is, though, another explanation that accounts for paragraph 3 being made subject to paragraph 1(f) – it may simply be there to remove any doubt about a conflict.

56. So, my conclusions are these. The appeal tribunal has no jurisdiction over the exercise of the discretion by the local authority as to the actual recovery of an overpayment, whether as to the amount of the overpayment that is recovered or as to the person from whom it is recovered. That discretion is outside the jurisdiction of the appeal tribunal by virtue of paragraph 3. However, a person who is the subject of a recoverable overpayment decision has the right of appeal on the ground either that the person is not prescribed by regulation 101 or that the circumstances fall outside the scope of that regulation. The circumstances include whether there is an overpayment and whether it is recoverable. Those matters are within the jurisdiction of the appeal tribunal by virtue of paragraph 1(f).

Mr Stagg's arguments

57. My reasons so far have not taken account of three of Mr Stagg's arguments.

58. Mr Stagg's first argument was that there was a distinction between two discretions that were given to the local authority. The first discretion was whether or not to recover the overpayment at all. This discretion was not appealable and rightly so because it raised general issues about the finances of the local authority. The second discretion was the person from whom recovery should be sought. This discretion was appealable and rightly so because, in contrast to the first, it involved considerations that were more personal to the persons involved.

59. I accept that in theory it is possible to draw this distinction. However, I do not accept that in practice it is possible to adhere to this sequential, structured analysis. I am sure that in practice the two are often indistinguishable with each being informed by a consideration of the other. Also, I can find no justification for drawing this distinction as a matter of interpretation of the legislation.

60. Mr Stagg's second argument relied on a passage in the judgment of Mrs Justice Hale in Freeman (the penultimate paragraph on page 619). There are parts of that passage that may be read as supporting Mr Stagg's argument. I do not read them in that way. I read them merely as an attempt to summarise the law in a decision that did not raise any issue relevant to the argument Mr Stagg has presented on this appeal. Even if the passage means what Mr Stagg says it means, it is not an authority binding on me.

61. Mr Stagg's third argument referred to a written Parliamentary question and answer. The answer was given on 10th January 2001. The question and answer read:

'Mr McCabe: To ask the Secretary of State for Social Security what recent representations he has received about appeal rights against recovery of overpayments of Housing Benefit and Council Tax benefit from third parties. [145210]

'Angela Eagle: Housing Benefit and Council Tax Benefit legislation provides that where benefit has been paid to a third party, such as a landlord, the local authority has discretion to recover any overpayment from the claimant or from the person to whom the benefit was actually paid. Under the current review arrangements, the local authority's exercise of discretion in this respect is not a matter reviewable by a Review Board. The decision may of course be challenged by judicial review.

'In the light of the proposed changes to decision-making and appeals in Housing Benefit and Council Tax Benefit, to be introduced in July 2001, we have been examining current procedures to ensure that they remain appropriate, and we have taken account of representations received from a number of organisations. We have decided that, in cases where more than one person may be liable under the legislation to repay an overpayment, the person from whom the local authority decides to seek recovery should have a right of appeal to an appeal tribunal against that decision. Regulations giving effect to the new decision-making and appeals procedures for Housing Benefit and Council Tax Benefit will be laid before the House shortly.'

Mr Stagg argued that that answer was admissible to help resolve any ambiguity in paragraph 3. He accepted that it was not made in a Parliamentary debate and that the Regulations, when they were laid, had not been the subject of a debate.

62. I have read that passage a number of times. The key to its meaning is the last word in the penultimate sentence, which I have italicised. Does the decision referred to include the exercise of the local authority's discretion? The general tenor of the passage as a whole suggests that it does. But it is capable of being read as saying no more than the landlord will have the right to appeal against the overpayment decision. However, accepting for the sake of argument that the passage means what Mr Stagg says, it is not relevant to my decision. On my analysis of the legislation, there is no ambiguity once the scope of the enabling authority for regulation 101 is taken into account.

63. I have also not as yet referred to Mr Patterson's argument. He argued that it was not appropriate to take Parliamentary material into account in interpreting regulations. They were, he argued, different from statutes. Statutes have to be amended by another statute, which takes time, whereas regulations may be amended more easily by another regulation. It was appropriate in those circumstances to take a more literal reading of regulations. I disagree. First, the comparative ease with which statutes and regulations may be amended has been affected by the Regulatory Reform Act 2001, which allows a statute to be amended by regulations in certain circumstances without any other specific authority. Second, the principles of statutory interpretations have steadily moved from a concentration on the language to a wider consideration of all matters that throw light on the meaning of the words in their context. Those principles apply to statutes and regulations alike.

64. I was not aware that this Parliamentary material would be cited until I received a copy of Mr Stagg's skeleton argument on the day before the hearing. At the hearing, I asked whether it would be appropriate to invite the Secretary of State to be joined as a party. Neither Mr Stagg nor Mr Patterson was enthusiastic to have another oral hearing. They agreed that if the Secretary of State were joined, any observations should be dealt with by written submissions. As I have no doubt about my interpretation of the legislation, I do not consider it necessary to invite the Secretary of State to be joined as a party.

#### Offset

65. Regulation 104 of the Housing Benefit (General) Regulations 1987 applies to reduce the amount of a recoverable overpayment. Its application is mandatory. It is the equivalent to regulation 13 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, but it is wider in that regulation 104(1)(c) brings into account changes of circumstances that have occurred since the claim. In summary, it provides for the amount of the overpayment to be reduced by the amount of benefit to which the claimant was properly entitled during the benefit period.

66. Mr Stagg argued that that regulation should have been applied. The claimant ceased to be entitled to his jobseeker's allowance when he received a working family's tax credit. That showed that he was working. It was possible that his income might have been so low that he qualified for his award or a reduced award of housing benefit.

67. Mr Patterson told me that his local authority did apply that regulation. However, it did it by allowing the claimant to make a fresh claim for the period covered by the overpayment, relying on good cause under regulation 72(15). He told me that claimants were sent a claim form along with the notice of overpayment. He argued that this was the only way that the local authority had of obtaining information. I reject that argument. The local authority has the power to obtain the necessary information from the claimant under regulation 73(1):

'a person who makes a claim, or a person to whom housing benefit has been awarded, shall furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of the claim or the award, as may be reasonably required by the relevant authority in order to determine that person's entitlement to, or continuing entitlement to, housing benefit, and shall do so within 4 weeks of being required to do so or such longer period as the relevant authority may consider reasonable.'

68. Mr Patterson argued that that power did not apply to a claimant whose benefit had been terminated. I reject that argument for two reasons. First, it is too narrow a reading of the power. The claimant has been awarded housing benefit, even if it has now been terminated. Second, if the local authority operated regulation 104 correctly by using its power under regulation 73(1) it would not terminate the award until the information was received and the claimant would still be entitled under an award, even if payment of the award had been suspended. The reference to 'continuing entitlement' shows that the power extends to cases in which there is a doubt about entitlement.

69. Mr Patterson also referred to the local authority's duty to comply with the time limit in regulation 77(1)(b). An authority 'shall notify any person affected by' an overpayment decision 'within 14 days of that decision or as soon as reasonably practicable thereafter'. Obviously, the

local authority must comply with that duty. However, it is not an absolute 14 days limit. It is subject to the 'or as soon as reasonably practicable' qualification. It cannot be practicable to give notice of a decision until the local authority has the information necessary in order to make a decision in accordance with the legislation.

70. Regulation 104 is mandatory. It has to be applied as part of the process of determining the overpayment. Until it has been applied, a local authority does not possess the information to decide: (a) whether the award should be terminated or merely reduced in amount or duration; and (b) the amount of the overpayment. The power to obtain the information necessary to implement regulation 104 is in regulation 73(1). The local authority did not operate regulation 104 correctly. The tribunal went wrong in law by not adjourning for regulation 104 to be applied.

#### Conclusions

71. Towards the beginning of my decision I posed the question: should I direct a rehearing or substitute a decision for that of the appeal tribunal? Any inadequacy in the reasons for the tribunal's decision has, I hope, been remedied by the reasons I have given. A rehearing is not justified on that ground. I have rejected Mr Stagg's arguments on all points, except regulation 104. I could direct a rehearing on that ground. However, before a rehearing could take place, the local authority would have to exercise its powers under regulation 104 to find out what income the claimant had during the period of the overpayment. I suspect that the claimant's income was higher than would give entitlement to housing benefit for that period. It is significant that he did not complete and submit the claim form sent to him with the notification of the overpayment decision. If that proves correct, a rehearing will be redundant. In those circumstances, it is expedient for me to give my own decision. That is to confirm the local authority's decision, subject only to the amount of the overpayment being reduced if that is justified by the result of the investigations under regulation 104. The local authority will notify the landlord of the results of those inquiries. There should be no scope for doubt about the significance of the information given by the claimant or the calculations that may be necessary as a result of it. Those are matters that can be left to the local authority, with power, if there is any dispute about the application of regulation 104, for the case to be referred back to me or to another Commissioner.

Signed on original Edward Jacobs Commissioner 15th July 2002

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#### **Note - following above decision the DWP have issued the following memo to all local authorities on 12/11/02:**

Department for Work and Pensions  
 Adjudication and Constitutional Issues Division  
 GS 36, Quarry House, Quarry Hill, Leeds LS2 7UB  
 Telephone 0113 2324000 o GTN 513 24000 (Operator) o Fax 0113 2324841

To: All Local Authorities

From: ACIQuarry HouseLeeds

Date: 12.11.02

Commissioner's Decision CH/4943/01 - Appeal to Court Of Appeal

We recently sent a copy of decision CH/4943/01 to all local authorities. The Commissioner decided that there is no right of appeal from an authority's discretion to recover from either the landlord or the tenant where payment has been made to the landlord. There is a right of appeal against the decision that there has been an overpayment and that it is recoverable. The position is summarised at paragraph 56 of the decision.

The Commissioner also indicated when considering regulation 104 HBGR that the benefit period of the claimant does not necessarily come to an end following the termination of the claimant's entitlement to a passport benefit. The local authority should at that point determine whether other factors give the claimant a continuing entitlement to housing benefit before it can decide whether the housing benefit award should be terminated at all (see paragraphs 68 and 70 of the decision).

The DWP is to make an appeal to the Court of Appeal against:-

the decision that there is no right of appeal from the discretion to recover from the landlord or tenant; and

the Commissioner's interpretation of regulation 104 HBGR.

The Commissioner has granted leave to appeal.

If you have any queries about this please write to, or fax or email this office.

Department for Work and Pensions  
Adjudication and Constitutional Issues Division  
GS 36  
Quarry House  
Leeds LS2 7UB

Fax: 0113 2324841

Email: [ACIB-Office-Support-ACIB-Leeds@dwp.gsi.gov.uk](mailto:ACIB-Office-Support-ACIB-Leeds@dwp.gsi.gov.uk)



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