DECISIONS OF THE SOCIAL SECURITY COMMISSIONER

1. My decisions are that the decisions of the Northampton appeal tribunal, held on 15 to 17 April 2002 are not erroneous in point of law.

The appeals to the Commissioner

2. These are five appeals by members of the Jesus Fellowship. The appellants are the benefit claimants. The first respondent in their local authority, the South Northamptonshire Council. The second respondent is the Secretary of State.

3. The cases came before me as appeals to a Commissioner against the decisions of the appeal tribunal brought by the claimants with the leave of the district chairman who heard the appeals.

4. Page references are to the papers in the file for *CH/5126/2002*.

5. In view of the issues raised on the appeals, I directed an oral hearing. It was held before me in London on 19th March 2003. The appellants were represented by Mr J Goudie QC and Mr P Stagg of counsel. The local authority was represented by Mr J Findlay of counsel. The Secretary of State was represented by Miss M Demetriou of counsel. I am grateful to them all for their written and oral arguments.

The tribunal's decision

6. The statement of the reasons for the tribunal's decision, in its original format, runs to 38 pages. It is by any standard an impressive piece of work. The Senior Legal Officer to the Commissioners contacted the chairman at my request and asked him to provide me with an electronic copy of his decision. He has done that and I am grateful to him for the typing from which he has thereby saved me. I have annexed his statement to this decision. I have taken the liberty of making three changes. First, I have corrected the name of the counsel who represented the local authority at the hearing. Second, I have corrected a mistake in the paragraph numbering. Third, I have removed personal details from the decision in order to comply with the Commissioners' current policy of issuing decisions in anonymous form.

Regulation 7

7. This case concerns the interpretation, application and validity of regulation 7 of the Housing Benefit (General) Regulations 1987. The relevant provisions in the current form of regulation 7 are:

> '(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-
>
> (a) the tenancy or other arrangement pursuant to which he occupies the dwelling is not on a commercial basis
>
> ...

'(1A) In determining whether a tenancy or other arrangement pursuant to which a person occupies a dwelling is not a commercial basis regard shall be had inter alia to whether the terms upon which the person occupies the dwelling include terms which are not enforceable in law.'

8. These provisions were introduced by regulation 3 of the Housing Benefit (General) (Amendment No 2) Regulations 1998. They came into force on 25th January 1999. Before that date, the relevant provision that would have applied in a case like those before me read:

'(1) The following persons shall be treated as if they were not liable to make payments in respect of a dwelling-

(a) a person who resides with the person to whom he is liable to make payments in respect of the dwelling and either-

...

(ii) the tenancy or other agreement between them is other than on a commercial basis ...'

The facts of the case

9. I rely on the tribunal's decision for the statement of the facts of the cases, subject to one qualification.

10. Only two findings of fact were challenged. One was the tribunal's finding that the arrangement under which the claimants occupied their dwellings was not on a commercial basis. I deal with, and reject, that argument below.

11. The other finding that was challenged was recorded in paragraph 102. The tribunal found that it was possible for the claimants to maintain their religious beliefs without living in accommodation owned by their church. That may be correct as a matter of construction of the church's constitution. However, it is possible that in practical reality the claimants could only submit fully to the discipline of their church by living in property owned by that church. The reason is that only in that way is the church able to exercise control over the life-style followed by the claimants. I am not persuaded that the tribunal went wrong *in law* in making its finding. However, in so far as it may be relevant, I have considered these cases on the basis that this finding of fact is not correct and that the claimants are only able to live in accordance with the calling of their faith by living in property owned by their church.

The claimants' arguments

12. Mr Goudie argued that the tribunal went wrong in law in four ways.

- The tribunal went wrong in deciding that the arrangement under which the claimants occupied their dwellings were not on a commercial basis.

- The tribunal's decision was in violation of article 14 of the European Convention when read in conjunction with article 9.

- The 1999 amendments to the Housing Benefit (General) Regulations 1987 were of no force or effect in view of the decision in *Howker v Secretary of State for Work and Pensions and Social Security Advisory Committee* [2002] EWCA Civ 1623.

- The amendments were also of no force or effect because they were made for an improper purpose.

Commercial basis

13. The issue for the tribunal was whether or not the arrangements under which the claimants occupied their dwelling were on a commercial basis. That was a finding of compound fact. (The expression is that of Jessel MR in *Erichsen v Last* (1881) 8 Queen's Bench Division 414 at page 416.) The tribunal decided that the arrangements were not on a commercial basis. The issue for me is whether the tribunal went wrong in law in making that finding. As I wrote in *CH/0627/2002, paragraph 27*:

> '27. One argument that will not find favour with the Commissioners is to isolate comments made by tribunals on individual constituent facts and argue that the tribunal attached the wrong significance to them. Many of those facts, taken in isolation, may be neutral or equivocal in their significance. It is always possible to point to a different significance that could have been attached to some, or all, of those facts. But that does not identify a flaw in the tribunal's reasoning. It is an unavoidable feature of the nature of the issue.'

14. Mr Goudie argued that 'Since the commerciality of an agreement is a matter of inference, an error of law is more readily demonstrated than is the case with the finding of primary facts'. For that proposition, he cited the decision of the House of Lords in *Benmax v Austin Motor Co Ltd* [1955] 1 All England Law Reports 326 and paragraph 17 of my decision in *CH/1076/2002*. I am not sure how the paragraph in my decision supports the proposition. However, I accept that *Benmax* is authority for the proposition cited. I am not sure that the finding of a compound fact is an inference rather than an assessment of the cumulative effect and significance of the relevant constituent facts. That may be just a matter of terminology. I accept that the principle applied by the House of Lords applies to a finding of compound fact whether or not it is properly called an inference. The reasoning of the House was this. A fact-finding body is better able to make findings of fact that involve an assessment of witnesses and their evidence than an appellate body that has to rely on a record. But an appellate body is as able as the fact-finding body to draw an inference once the primary facts are established. That reasoning applies alike to findings of compound fact and to inferences, if they are different.

15. Mr Goudie argued that the tribunal misdirected itself or misapplied the legislation in four ways. I take the headings from the skeleton argument.

Ground 1 – errors in application of paragraph (1)

16. The tribunal took account of the whole of the arrangements involving the claimants. It did not limit itself to the arrangements for occupation. Mr Goudie argued that that was wrong. Miss Demetriou argued that the tribunal had correctly directed itself on this issue, which had not been in dispute at the hearing. Mr Findlay drew attention to the lack of authority for much of Mr Goudie's argument.

17. I reject Mr Goudie's argument.

18. In so far as Mr Goudie's argument relies on the factors that the tribunal was entitled to take into account, I disagree. Considering the whole of the arrangements was a proper approach to the interpretation of the occupation arrangements and the analysis of whether they were on a commercial basis. In view of the lifestyle adopted by the claimants, the arrangements formed a composite whole. It would be unrealistic to isolate the occupation arrangements and interpret and analyse them in isolation from their context.

19. In so far as Mr Goudie's argument relies on the interpretation of regulation 7, I reject it. Regulation 7(1)(a) refers to 'tenancy or other arrangement'. In determining the nature of that arrangement, it is proper to consider the context of the arrangement. Regulation 7(1A) expressly relates to, and limits its application to, regulation 7(1)(a). It merely specifies a factor that has to be taken into account when applying regulation 7(1)(a). It would probably be a factor that was relevant without any provision. Its precise scope is not, therefore, of particular significance. Provisions that are outside the scope of regulation 7(1A) may nonetheless be relevant directly under regulation 7(1)(a). In so far as Mr Goudie argued that the tribunal was wrong in law to treat particular provisions as 'terms' under regulation 7(1A), his argument is misconceived. Even if the tribunal made this mistake, it is of no significance, as the tribunal was entitled to consider those provisions under regulation 7(1)(a) anyway.

20. Mr Goudie argued that a provision is only a term for the purposes of regulation 7(1A) if it imposes an obligation, as opposed to being merely a statement of aspiration. On this argument, 'terms which are not enforceable at law' must mean obligations that are not legally enforceable. Such things exist, but they are very difficult to distinguish from mere aspirations. In theory, this is very close to arguing that unenforceable provisions are irrelevant when applying regulation 7(1A). In practice, the argument comes even closer than that. It effectively deprives the provision of any significant effect. That cannot be right. My interpretation is that in regulation 7(1A) 'terms' means 'provisions' and is not limited to obligations.

Ground 2 – relevance of enforcement of conditions

21. This ground refers to this passage from paragraph 77 of the tribunal's decision:

> 'I cannot place much weight on the facts that the Conditions of Residence create a genuine enforceable liability and that reasonable legal and extra-legal measures are taken to enforce those Conditions. Those factors merely go to show that there is a liability ... rather than that the liability is commercial.'

22. Mr Goudie argued that the tribunal misdirected itself, because 'evidence that the liability *is enforced in practice* is very weighty evidence that an agreement is commercial in nature.' Miss Demetriou argued that the tribunal was merely emphasising that regulation 7 presupposes the existence of a genuine legal liability. Mr Findlay argued that the passage had been taken out of context.

23. I reject Mr Goudie's argument. The terms in which it is expressed show that it an argument about the weighing of relevant factors. The passage quoted shows that the tribunal took this factor into account. The argument invites me to re-evaluate the relevance of this factor and substitute my own assessment for that of the tribunal. The weighing of the factors

involved a matter of judgment by the tribunal. Whether they could have been weighed differently is irrelevant. So is whether I agree with the way the tribunal carried out this balancing exercise. The tribunal's assessment was one that it was entitled to make. It did not go wrong in principle. It did not overlook a relevant consideration. It did not take account of an irrelevant consideration. Nor was its assessment clearly wrong.

Ground 3 – relevance of financial controls

24. This ground refers to this passage from paragraph 77 of the tribunal's decision:

> 'The rigorous financial procedures and controls which are operated by Mr Farrant and his staff show that the Trust is an efficient and properly run organisation but not that it is a commercial one.'

25. Mr Goudie argued, in summary, that the tribunal misdirected itself by considering the nature of the landlord's organisation rather than the nature of the arrangement under which the claimants occupied their dwellings. Miss Demetriou argued that Mr Goudie was merely challenging the weight given to this particular consideration. Mr Findlay distinguished between commerciality and efficiency.

26. I reject Mr Goudie's argument. If the sentence on which he relies is taken in isolation, it supports his argument. However, it must be read in the context of the reasons as a whole. The nature of the landlord's organisation is a factor that is relevant to the nature of the arrangement, although it is not conclusive. As Mr Goudie points out, many landlords are not commercial organisations. This isolated passage does not show that the tribunal misdirected itself on the law or misapplied that law. Reading the decision as a whole leaves me in no doubt that the tribunal correctly understood the law that it had to apply.

Ground 4 – allegedly non-commercial features

27. This ground refers to paragraphs 78 and 79 of the tribunal's decision.

28. Mr Goudie argued that the tribunal accorded too much weight to the factors discussed in these paragraphs. Miss Demetriou argued that Mr Goudie was merely challenging the weight given to this particular consideration. Mr Findlay did not specifically comment on this ground.

29. I reject Mr Goudie's argument for the same reason that I rejected his argument on ground 2. His argument does not show that the tribunal went wrong in law. The weighing of the factors involved a matter of judgment by the tribunal. Whether they could have been weighed differently is irrelevant. So is whether I agree with the way the tribunal carried out this balancing exercise. The tribunal's assessment was one that it was entitled to make. It did not go wrong in principle. It did not overlook a relevant consideration. It did not take account of an irrelevant consideration. Nor was its assessment clearly wrong.

Discrimination

30. Mr Goudie argued that there was a breach of article 14 when read in conjunction with article 9. On the facts as I assume them to be for the purpose of this decision, I accept that the circumstances of these cases fall within the ambit of article 9.

31. The claimants' skeleton argument alleged discrimination by failing to make special provision for organisations like the Jesus Fellowship, whose members were committed to communal living. I accept that discrimination may take the form of treating persons in analogous circumstances differently or of failing to treat differently persons whose circumstances are significantly different: *Thlimmenos v Greece* (2001) 31 European Human Rights Reports 411 at paragraph 44. So, I accept in principle the possibility of discrimination as alleged.

32. Having read the skeleton arguments, I gave a direction asking (a) whether the discrimination alleged by the claimants was direct or indirect and (b) if the latter, whether it was within the scope of article 14. I drew attention to these comments of Sir Richard Tucker in *R (Barber) v Secretary of State for Work and Pensions* [2002] 2 Family Law Reports 1181:

> '**39.** ... I very much doubt whether the argument of indirect as opposed to direct discrimination is available ... under Art 14. Mr Coppel submits that there is no example in the European or domestic courts of a successful claim for indirect discrimination contrary to Art 14 and that if I were to find for the claimant on this ground, I would be the first judge to do so.
>
> **40.** In any event, as Mr Coppel rightly submits, an allegation of indirect discriminating raises complex issues. The field of employment law shows that for such a claim to succeed, it must be supported by proper statistical evidence.'

33. At the oral hearing, Mr Goudie argued that: (a) all that article 14 required was that he prove discrimination' and that he could do; (b) anyway, the discrimination in this case was direct; (c) anyway, the discrimination in this case was indirect but nonetheless within article 14.

34. Miss Demetriou argued that: (a) there was no discrimination; (b) any discrimination was not direct, because no group was singled out and treated less favourably; (c) any discrimination was not indirect; and (d) indirect discrimination did not fall within article 14.

35. Mr Findlay did not present arguments on human rights.

Article 14 – does it cover indirect discrimination?

36. I am able to decide this case without reference to this issue. However, for the benefit of those who will have to consider the issue in the future, I set out the arguments, the authorities and my conclusion.

37. Article 14 provides:

> '*Article 14 - Prohibition of Discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

38. Article 14 covers different treatment of individuals in comparable circumstances (whether by express provision or by failure to make separate provision) without a justification that is (a) objective and reasonable and (b) proportionately applied.

39. The article does not refer to any particular form of discrimination. In particular, it does not refer to direct or indirect discrimination. The reason is simple. At the time when the Convention was written, this distinction was not recognised. Indirect discrimination was not recognised as a concept until the judgment of the Supreme Court of the United States in *Griggs v Duke Power Co* – see the history traced by Lord Justice Sedley in *R (on the application of Marper) v Chief Constable of South Yorkshire* [2003] Human Rights Law Reports 1 (paragraph 89).

40. That does not mean that the distinction and concept have no place in the Convention. The Convention is interpreted dynamically. Mr Goudie argued that both the Strasbourg and the domestic case law recognised indirect discrimination as sufficient. He cited these authorities:

41. *Marckx v Belgium* (1979) 2 European Human Rights Reports 330. This case concerned the difference in treatment of legitimate and illegitimate children in Belgian law. The latter's family relationships and patrimonial rights, unlike the former, depended on voluntary recognition or a court declaration. The distinction and the different treatment based on it were expressed on the face of the legislation. The court held that there had been a violation of article 14 when read in conjunction with article 8.

42. Mr Goudie referred to the language used by the court in paragraph 32 of its judgment. After setting out the terms of article 14, the paragraph continues:

> 'The Court's case law shows that, although Article 14 has no independent existence, it may play an important autonomous rôle by complementing the other normative provisions of the Convention and Protocols: Article 14 safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention or the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14, thereby violates those two articles taken in conjunction. It is as though Article 14 formed an integral part of each of the provisions laying down rights and freedoms.'

That passage is directed at the relationship between article 14 and the other Convention rights. The court is making the point that a provision which complies with the terms of the other Convention right may nonetheless be discriminatory under when article 14 is notionally read in conjunction with the article. This passage does not further Mr Goudie's argument.

43. Mr Goudie also referred to the language used by the court in paragraph 40:

> '**40.** The Government do not deny that the present law favours the traditional family, but they maintain that the law aims at ensuring that family's full development and is thereby founded on objective and reasonable grounds relating to morals and public order (*ordre public*).

> 'The Court recognises that support and encouragement of the traditional family is in itself legitimate and even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family; the members of the "illegitimate" family enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family.'

Mr Goudie emphasised the words 'object or result' in the second paragraph. But the whole of paragraph 40 is directed at the Belgian Government's argument that the different treatment was justified. The words 'object or purpose' are directed to the proof of justification for the difference in treatment. They were not directed to the nature of the difference. In particular, as the difference in treatment was expressly set out in the legislation, the nature of the discrimination was not in issue in the proceedings. Miss Demetriou argued that this passage was *obiter*. I prefer to say that it is dealing with a different issue from that of indirect discrimination.

44. This case does not further Mr Goudie's argument.

45. *Belgian Linguistics Case (No 2)* (1968) 1 European Human Rights Reports 252. This case concerned the different language used for education in different areas. As in *Marckx*, the distinction and the different treatment based on it were expressed on the face of the legislation. The court held that in one respect there had been a violation of article 14 when read in conjunction with article 2 of the First Protocol.

46. Mr Goudie referred to the language used by the court in paragraphs 9 and 10 of its judgment. Paragraph 9 makes the same point that is made in paragraph 32 of *Marckx*; my comments on that paragraph apply to this paragraph also. Paragraph 10 begins by drawing a distinction between different treatment and discrimination. It then deals with how different treatment and discrimination are to be distinguished:

> 'It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14. On this question, the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective or reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

Mr Goudie emphasised the words 'aim and effects'. But the whole of the passage I have quoted is directed to the proof of justification for the difference in treatment. The passage shows the intimate connection between justification and discrimination. The latter is defined in terms of the former. However, the words 'aims and effects' relate to justification and not to the form that the difference in treatment may take. Miss Demetriou argued that this passage was *obiter*. I prefer to say that it is dealing with a different issue from that of indirect discrimination.

47. This case does not further Mr Goudie's argument.

48. *McShane v United Kingdom* (2002) 35 European Human Rights Reports 593. This case concerned an allegation of discrimination against republicans in the policy of the security forces in Northern Ireland. The court held that there had been no violation of article 14.

49. Mr Goudie referred to the language used by the court in paragraph 135 of its judgment:

> '**135.** Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.'

However, the court went on to decide that the statistical evidence did not show that this had occurred in this case. Miss Demetriou argued that statistical proof was exactly how indirect discrimination was proved. So, the court had cancelled its comments on indirect discrimination by its reference to statistics. I do not accept that analysis. The court appears to have accepted the possibility of indirect discrimination but found that it was not established on the evidence. There is nothing in the latter proposition to cancel the former.

50. The passage I have quoted certainly supports Mr Goudie's argument that indirect discrimination falls within article 14.

51. *R (on the application of Marper) v Chief Constable of South Yorkshire* [2003] Human Rights Law Reports 1. This case concerned the Chief Constable's policy, permitted by legislation, of retaining DNA evidence collected from a suspect who was later acquitted. The Court of Appeal decided that there was no violation of article 14, because the difference in treatment was objectively justified. Lord Woolf, the Lord Chief Justice, also considered (paragraph 47) that the discrimination relied on was not within the categories covered by article 14.

52. Mr Goudie referred to the judgment of Lord Justice Sedley. He considered (paragraph 80) that the discrimination relied on was 'as involuntary and as stigmatic a condition as the majority of those listed' in article 14 and that 'it falls sensibly within the catholic phrase "other status".' He then analysed the case in terms of indirect discrimination (paragraphs 88 to 92). This judgment certainly supports Mr Goudie's argument that indirect discrimination falls within article 14. However, the judgments of Lord Woolf and Lord Justice Waller do not. And any discrimination in that case must surely have been expressed in the terms of the policy that exercised the power conferred by the legislation.

53. Surprisingly, Mr Goudie did not rely on *Thlimmenos v Greece* (2001) 31 European Human Rights Reports 411 in the context of this argument. However, Miss Demetriou did refer to it in her argument. The case concerned a person who had been barred from a post as a chartered accountant on the ground of a conviction that he had incurred only because of his faith as a Jehovah's Witness. The court held that there had been a violation of article 14 when read in conjunction with article 9. The court considered that the Government's response was disproportionate to the legitimate aim of excluding improper persons from the profession of chartered accountant. Miss Demetriou argued that this case was distinguishable on the ground of remoteness – the result followed directly from the religious belief. That may be true of the facts of that case, but I see no reason to limit so narrowly the principle on which the case was

based. That principle supports Mr Goudie's argument that indirect discrimination falls within article 14.

54. My conclusions on the indirect discrimination argument are these. I respectfully agree with what Sir Richard Tucker said in *Barber*. There is no decision that actually and expressly accepts that indirect discrimination is covered by article 14. I find that surprising. The text books accept that indirect discrimination is covered and cite some cases in support. However, my analysis of *Marckx* and the *Belgian Linguistics Case (No 2)* show that the passages cited do not support the proposition. There are, though, comments in other authorities that do support Mr Goudie's argument, both in the Strasbourg jurisprudence (*McShane*) and in the domestic law (*Marper*). The principle underlying *Thlimmenos* also supports Mr Goudie. Finally, there no reason in principle why article 14 should not apply to indirect discrimination as well as any other form of discrimination, whether direct, intentional, unintentional or any other form that can exist. Under the Strasbourg jurisprudence, Convention rights have to be interpreted dynamically in accordance with current circumstances. Those circumstances include the various forms in which discrimination occurs in practice and which are controlled by legislation.

55. So, I accept that if the claimants suffered discrimination and that discrimination was indirect, it falls within article 14.

Article 14 – was there discrimination?

56. Miss Demetriou relied on the tribunal's reasoning in paragraph 115 of the full statement of the tribunal's decision. In short, that reasoning was that if there was a difference in treatment it was a proportionate response to the legitimate aim of preventing abuse and making appropriate administrative arrangements for the implementation of that aspect of the scheme.

57. Mr Goudie argued that the prevention of abuse was a legitimate aim, but that the 'commercial basis' category was not a proportionate response to the legitimate concern to prevent abuse. He argued that as that category did not refer in terms to religious belief, it was permissible to interpret it so as to exclude religious belief being taken into account.

58. It is to me self-evident that regulation 7 is a provision that is designed to prevent abuse. That appears from the terms of the regulation and its place in the scheme. If there is any doubt about this, it is laid by the correspondence with the Social Security Advisory Committee, which I deal with in the next section of this decision. In terms of article 14, the avoidance of abuse is a legitimate aim.

59. In order to fulfil that purpose, the anti-abuse categories are drawn more widely than is necessary to catch cases that actually involve abuse. That is done for two reasons.

60. The first reason is the effectiveness of the control. An anti-abuse provision naturally seeks to catch cases of actual abuse. That is obviously both justifiable and reasonable. It is also proportionate. However, regulation 7 goes further than that. It is drawn more widely than actual instances of abuse in order to include circumstances in which there is a risk of abuse. That is the nature of an anti-abuse provision. It enhances its effectiveness in limiting abuse. It is justifiable in principle, because the nature of abuse is infinitely various and may be difficult to prove. Whether it is reasonable and proportionate depends on the nature and extent of the

provision. I am concerned with the 'commercial basis' category. That is a category of case in which there is an obvious possibility of abuse. I consider it both reasonable and proportionate. Also, it is within the degree of deference that it is appropriate to allow to the State in the implementation of the scheme.

61. The first reason is linked to the second reason, which is ease of administration. Clear categories based on observable and ascertainable facts are easier for the housing benefit officers of local authorities to apply than more subtly drawn categories that depend on an analysis of intention, motivation or purpose. The officers concerned are not trained as lawyers and they have to make decisions quickly and on the basis of documentary evidence only. It makes their task of policing the scheme and detecting abuse easier if they do not have to rely for their main weapon on a rule that is drawn in terms of intention, purpose or motive. This is an objectively justifiable consideration. It is reasonable and proportionate. It is within the degree of deference that it is appropriate to allow to the State in the implementation of the scheme.

62. I have not overlooked the fact that regulation 7(1)(l) contains a provision that requires an analysis of intention, purpose and motive. However, that is a final category that catches cases that do not fall within the specific circumstances set out in regulation 7(1)(a) to (k). Those earlier, specific provisions reduce the need for this sort of investigation and analysis by the officers.

63. The result is that cases may be caught by regulation 7 which do not involve actual abuse. It is for that reason that I have decided elsewhere that 'given that the categories can produce rough justice, it is appropriate to give them the narrowest interpretation that is consistent with the policy of protecting the scheme.' See *CH/0716/2002, paragraph 11.*

64. I accept that the arrangements made by the Jesus Fellowship and the claimants in these cases do not involve any improper intention, motive or purpose. If the arrangements they have made fall foul of regulation 7, they do so only because they are of a type that contains the potential for, or risk of, abuse. However, I accept Miss Demetriou's argument and the tribunal's conclusion that the 'commercial basis' category is a response to the legitimate concern to prevent abuse of a publicly funded benefit scheme that is objectively justifiable, reasonable and proportionate. There is no scope in my analysis for a special exception for claimants whose religious faith calls them to live a communal life. It would be possible to devise a policy that both protected the scheme and allowed the claimants to live as their faith requires. However, my function is not to rewrite legislation as the claimants would prefer it to be. It is to decide whether the legislation as it stands is compatible with the claimants' Convention rights. In doing that, I have to allow a degree of deference to the policy makers and their political masters.

The Howker argument

65. This issue was not raised at the hearing before the tribunal, because the Court of Appeal had not at that time given its decision in *Howker*. Put shortly, the case decides that Regulations are invalid if the Social Security Advisory Committee was mislead about their effect.

66. Some documents that were before the Committee were produced at the hearing. At the hearing, Miss Demetriou undertook that the Secretary of State would provide any other

documents that existed. They were provided and I directed the other parties to make written observations on them. The local authority made no comments, but Mr Goudie and Mr Stagg made a written submission, dated 3 March 2003. I did not consider that observations in response to that submission were needed from the other parties.

67. Mr Goudie and Mr Stagg argued that, looking at that documentation as a whole, the Committee was misled. I disagree.

68. I do not need to set out the documents in detail. I am satisfied that the Committee was not mislead about the effects of the amendments that it considered. My reason is this. One of the documents before the Committee was headed **SSAC 44/98 Annex C**. This was a memorandum from Mary Selby of Housing Benefit Policy 3 to Gill Saunders of the Committee. In paragraph 4, Mary Selby wrote:

> '7(1B)(a) (referred to as 1A(j)) is not intended to tackle religious groups who live communally. Insofar as they seek to abuse the HB scheme by the terms of their residence, we would expect them to be caught by 1A(a) ie non-commercial arrangements.'

69. That passage made it clear to the Committee that religious groups who live communally might be deprived of benefit on the basis that their arrangements for occupying their premises was not on a commercial basis. I agree with Mr Goudie and Mr Stagg that there are passages in the documents before the Committee that suggest that the amendments were merely a clarification of the existing legislation and did not represent a change in policy. However, the passage I have quoted is a clear statement that the provision relied on by the local authority in these cases might apply to claimants whose living arrangements were similar to those of the Jesus Fellowship. The opening words of the second sentence in the quotation tie this comment to cases of abuse. However, that merely reflects the fact that the provisions as a whole are anti-abuse provisions. This is a memorandum, not a piece of legislation. It would be wrong to attach too much significance to the precise choice of words; the substance of the meaning is clear.

70. The most that Mr Goudie and Mr Stagg can show is that there *may* have been some contradiction in what the Committee was told. But, first, the Committee was able to see that for itself. It was not misled. And, second, the specific and unambiguous reference to religious groups living communally should not have left the Committee in any doubt about how the amendments might apply to the circumstances that have arisen in these cases.

The improper purpose argument

71. Mr Goudie accepted that he could not sustain this argument without further disclosure from the Secretary of State. He argued that, in order to justify disclosure, all he had to do was to raise a sufficient suspicion that there had been an improper purpose behind the 1999 reform of regulation 7. I accept that that is all that he has to do. However, at the end of the oral hearing I told him that I refused to direct further disclosure. My reasons are these.

72. I have asked myself, and Mr Goudie, two questions. First, why would the Secretary of State for Social Security or the policy makers in that Department have wanted to target the Jesus Fellowship or similar organisations? Second, if they did, could it not have been done much more simply than by use of the 'commercial basis' test?

73. By way of answer, Mr Goudie referred me to the arguments put by Mr Stagg to the appeal tribunal. They are set out in paragraph 15 of his skeleton argument to the tribunal (pages 246 and 247).

74. I am by nature and experience a cynical person. So I am open to be persuaded by this argument. However, I find nothing in Mr Stagg's arguments to arouse my suspicion. They merely show that the Secretary of State was properly concerned with the interpretation and operation of the housing benefit scheme.

75. Mr Goudie told me that the members of the Jesus Fellowship believed that they were the target of the 1999 amendments and of the way the local authority had implemented them. I do not doubt that that is how they feel. However, those feelings were not objectively justified by anything I have seen in these cases.

Summary

76. I have considered Mr Goudie's arguments on the basis that the tribunal made a mistake in one finding of fact. If the tribunal did make that mistake, it is relevant only to some of the grounds of appeal. On the facts as I have assumed them to be, the tribunal did not go wrong in law. If the tribunal did go wrong in law in making that finding, I would nonetheless adopt its reasoning and give a decision to the same effect. I am not persuaded that the tribunal's mistake on that fact was one of law, so I have dismissed the appeal. If I had allowed the appeal, the effect would not have been to the claimants' advantage.

Signed on original

Edward Jacobs
Commissioner
20 May 2003