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CS172-5

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSA/164/04

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D S BURNS QC

Appellant:

Respondent: Secretary of State

Tribunal: Aberdeen

Tribunal Case No:

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal dated 25th November 2003 which sat at Aberdeen on 13 August 2003 is erroneous in law. I allow this appeal and I remit the case to a fresh tribunal for a further hearing under the directions that I set out at the end of this decision.

2. The appellant was born on 10 April 1929. She is presently 75 years of age. She suffers from dementia and Alzheimer's disease, among other complaints. An attendance allowance claim was made on her behalf on 21 October 2002. At that time, her daughter was looking after the appellant's affairs and completed the form for attendance allowance on her behalf.

3. On 21 November 2002, the appellant's daughter wrote to the Benefits Agency informing them of a deterioration in the appellant's condition. On 13 December 2002, a decision was made to the effect that the appellant was entitled to attendance allowance at the higher rate from and including 28 February 2003. On 12 March 2003, the appellant's daughter again wrote to the Department for Work and Pensions, intimating that her mother had been admitted to hospital because of her greatly confused state. The appellant was then discharged from hospital on 22 March 2003 and took up residence at a nursing home. She remains at the nursing home. As a result of that change of circumstances, the entitlement of the appellant to the attendance allowance was reconsidered and, having obtained information from the nursing home and from the Social Work Department of Fife Council, the decision to pay attendance allowance was superseded and attendance allowance was withdrawn. From the forms which the nursing home completed at the request of the Department, it is evident that the appellant was in receipt of a personal and nursing care allowance and had been paid that allowance from 22 March 2003. The reason for the supersession decision is given at page 59 of the appeal papers and is to the effect that:-

“Benefit payable from 24/03/2003 to 20/04/2003 as has not been fitted [*sic*] from 28 day rule, not payable from 21/04/2003 as more than 28 days in publicly funded accommodation.”

4. The appellant appealed against that decision to the Tribunal. In the notification of appeal, filled in and signed by the appellant's daughter, the appellant requested a hearing on the papers. Along with that notification of appeal, she provided a letter dated 25 June 2003, pointing out that the appellant had never been in receipt of income support, housing benefit or income based job seeker's allowance. She had never claimed any benefit and had only ever received a widow's pension and, in addition, it was pointed out that recent legislation entitles the elderly to personal care allowance. It goes on:-

“In light of my mother's deteriorating condition, she should not be precluded from the receipt of at least some element of attendance allowance simply because she is receiving the personal care allowance.”

5. The Department did not request an oral hearing and contented itself by its submission of written details which are found at pages B, C, D and E of the appeal papers. The decision as narrated there was:-

“Attendance allowance is not payable if a person is in certain accommodation for more than 28 days from and including 21 April 2003.”

In section 4, various facts are narrated from sub-paragraph 4.1 to 4.11. The reasons for the decision are said to have been:-

“From the new claim for attendance allowance (docs. 3 to 35) dated 21 October 2002, it has been established that attendance allowance is not payable from and including 21/04/2003. Please see documents 59 for a full explanation of the reasons for the decision.”

6. The tribunal sat to consider this appeal at Aberdeen on 13 August 2003. The tribunal decided that the appeal should be refused and that the appellant was not entitled to attendance allowance at either rate with effect from 21 April 2003. The statement of reasons for the decision, dated 25th November 2003, purport to incorporate findings of fact in which the personal details and facts of the case contained in the Secretary of State's submission were incorporated by reference. The result is that the tribunal made no independent findings of fact. Further, the reasons for its decision are expressed with the utmost brevity. It is said:-

“On the issue of supersession, the tribunal concluded that the Secretary of State has discharged the onus of establishing that grounds to supersede the decision exist in view of the appellant being in publicly funded accommodation from 22.3.03.” (See docs. 44 – 49 and 50 – 53A).

The tribunal found little difficulty in deciding upon this appeal, in view of the appellant's being admitted to full-time care on 22 March 2003, provided by the local authority once the benefit (AA) ceasing from 28 days thereafter, all in accordance with regulations 7 and 8 of the Social Security (Attendance Allowance) Regulations 1991. No exemptions from the regulations ceasing the benefit would appear to apply to the circumstances. The tribunal refused the appeal.”

That is the sum total of the reasons given for the tribunal's decision in this matter.

7. The appellant appealed to the Commissioner against this decision and the grounds of appeal are set out on pages 87 – 89 of the appeal papers. Along with the grounds of appeal, were enclosed 18 documents which are listed on the fourth page of the grounds of appeal. The Secretary of State responded by submissions which are set out at pages 120 – 127 of the appeal papers. Those submissions of the Secretary of State are detailed and raise many points that were not canvassed before the tribunal in the written submissions. I should record here my disappointment that the Department did not see fit to advance to the tribunal the submissions that it has advanced to me in this appeal. The result is that it is wholly unclear on what basis the tribunal founded its decision and to which statutory provisions it had regard in coming to that decision. None of the Scottish Acts of Parliament which figured large in the submissions before me were cited to the tribunal nor are they referred to by the tribunal in its decision. Similarly, the Scottish regulations, to which detailed reference was made in the appeal before me, do not appear to have been canvassed before the tribunal.

8. The appeal was dealt with at an oral hearing before me on 28 July 2004. The appellant was represented by her son. I should record my gratitude to him for his attendance and the submissions that he made. The Department was represented by Mr Jonathan Brodie, Advocate. Mr Brodie provided me and the appellant's representative with written submissions extending to 11 pages. I should also record my gratitude to Mr Brodie for these submissions as amplified before me at the appeal. It was immediately accepted by Mr Brodie, and quite rightly accepted by him, that the statement of reasons given by the tribunal contained a number of errors of law. First, it was accepted that the tribunal had failed to make findings in fact necessary to their decision. Secondly, the statement by the tribunal that the appellant was:-

“... admitted to full-time care on 22/3/03 provided by the local authority.”

was inaccurate. Thirdly, the tribunal had provided inadequate reasons why they considered that regulation 7 of the Social Security (Attendance Allowance) Regulations 1991 [“the 1991 Regulations”] applied. I agree that the decision of the tribunal contains those errors of law.

9. On behalf of the appellant, the representative informed me that the appellant was in receipt of a personal care allowance of £145 per week and a nursing care allowance of £65 per week. The balance of the fees demanded by the nursing home came from her own resources. He argued that the nursing care element of that allowance did not preclude the payment of attendance allowance and he submitted that the personal care element of the allowance, amounting to £145 per week, did not preclude the payment of attendance allowance either. He referred me to a document that was provided by the Department immediately prior to this appeal which is entitled “Guidance on implementation of free personal and nursing care.” This is guidance that was issued by the Health Department of the Scottish Executive and is dated April 2002. The representative referred me to the first page of Annex A of that guidance, which is an annotated extract of the Community Care and Health (Scotland) 2002 [“the 2002 Act”]. The definition of personal care, as that expression is defined in section 2(28) of the Regulation of Care (Scotland) 2001 [“the 2001 Act”] is given and personal care, according to the 2001 Act means “care which relates to the day to day physical tasks and needs of the person cared for (as, for example, but without prejudice to that generality, to eating and washing) and to mental processes related to those tasks and needs (as, for example, but without prejudice to that generality, to remembering to eat and wash).” The representative submitted that there was no mention of accommodation in that definition and he argued that personal care allowance was not included in the proper definition of the cost of accommodation as it ought to be understood when used in regulation 7 of the 1991 regulations. He submitted that the 1991 regulations preclude the payment of an attendance allowance if the local authority was making a contribution to the cost of accommodation. He submitted that in the appellant's case the local authority is not making a contribution to the cost of accommodation but only making a contribution towards her personal care and nursing care. He asked that the decision of the tribunal should be quashed and that attendance allowance should be allowed to be paid to the appellant.

10. Mr Brodie, on behalf of the Department, advanced submissions in line with his written submission, a copy of which he provided to me and to the representative. The introduction of the submission recognises that this appeal raises an important issue, not only to the appellant but also to the Secretary of State. That issue is whether the payment of personal care to the elderly, provided for under legislation of the Scottish Parliament, which

goes towards the cost of nursing home accommodation, precludes the payment of attendance allowance. At the outset of his submission he asked me to bear in mind that this matter required to be addressed primarily with reference to legislation emanating from Westminster and in the context of what is UK-wide jurisdiction. However, this appeal required me to consider Scottish legislation, and in particular the 2002 Act, together with the Social Security Contributions and Benefits Act 1992 ["the 1992 Act"] and the 1991 regulations and, in particular, regulation 7 of those regulations. This appeal is therefore unusual in that it involves consideration of purely Scottish legislation in arriving at a proper interpretation of UK legislative provisions. At the heart of the submission was the proposition that the payment of a personal care allowance under section 1 of the 2002 Act and the regulations made in pursuance thereof, namely the Community Care (Personal Care and Nursing Care) (Scotland) Regulations 2002 ["the 2002 regulations"] precluded the payment of an attendance allowance in terms of regulation 7 and 8 of the 1991 regulations. Mr Brodie relied in particular upon, and referred me to, regulation 7(5)(g) of the 1991 Regulations, which provision was added by amending regulations commencing on July 1 2002. That regulation provides *inter alia* as follows:

"In this regulationreferences to the cost of accommodation shall not include the cost of-

(g) nursing care provided by (or the provision of which secured by) a local authority for which the local authority are not to charge by virtue of section 1 of the Community Care and Health (Scotland) Act 2002."

11. While Mr Brodie accepted that the findings in fact of the tribunal were inadequate, he asked me to make my own findings in fact from the evidence disclosed by the appeal papers and which, he submitted, was not in dispute between the parties. In particular, he asked me to conclude that the evidence from the appeal papers demonstrated the following. Firstly, that the appellant is permanently resident in a nursing home and has been there since 22 March 2003. Secondly, that the gross cost of staying there is £410 per week. And, thirdly, the nursing home received £210, comprised of personal care to the value of £145 per week and nursing care of £65 from Fife Council. That served to reduce the net liability of the appellant for the nursing home fees.

12. Mr Brodie then went on to analyse the Scottish provisions for, and the system of, free "personal/nursing care". He started by examining the provisions of s.1 of the 2002 Act. That section provides *inter alia* as follows:-

"(1) Subject to section 2(a) below, a local authority is not to charge for social care provided by them, or the provision of which is secured by them, if that social care is –

- (a) personal care, as defined in section 2(28) of the Regulation of Care (Scotland) Act 2001 (ASP8),
- (b) personal support, as so defined,
- (c) whether or not such personal care or personal support, care of a kind for the time being mentioned in Schedule 1 to this Act, or
- (d) whether or not from a registered nurse, nursing care."

13. Mr Brodie submitted that previously, under the Social Work (Scotland) Act 1968 ["the 1968 Act"] a local authority had power to charge for services of the type encompassed in s.1 of the 2002 Act. The definition of "social care" is provided in section 22(1) of the 2002 Act

and means, subject to sub-section (2), a service provided (a) under the 1968 Act or (b) under sections 7 or 8 of the Mental Health (Scotland) Act 1984, to an individual by a local authority or a service, the provision of which to an individual, under the 1968 Act or either of those sections, is secured by a local authority.

Section 22(2) of the 2002 act provides that:-

“in this act ‘social care’ does not include a service which (or so much of the service as) consists of the provision of accommodation.”

In terms of section 87(2) and (3) of the 1968 Act, persons for whom accommodation is provided under that Act are required to pay for that accommodation. It can be seen from section 12A, for example, that the local authority has a duty to assess the needs of a person in respect of community care services. In addition, section 13A of the 1968 Act provides that the local authority have a duty to provide suitable residential accommodation, with nursing, to persons who are in need of such accommodation. However, section 2 of the 2002 Act allows the Scottish Ministers, by regulation, to determine what is or is not to be regarded as accommodation for the purposes *inter alia* of the definition of social care in section 22(1) and (2) of the 2002 Act and for the purposes of section 87(2) and (3) of the 1968 Act. Such Regulations have been made in the form of the 2002 Regulations. Regulation 2 of those regulations provides as follows:-

“For the purposes of section 2 of the Act (the 2002 Act), accommodation provided to or provision of which is secured for an individual by a local authority under the 1968 Act or section 7 of the 1984 Act does not include-

- (a) the first £145 per week of care of a kind mentioned in paragraphs (a), (b), and (c) of section 1(1) of the Act and
- (b) the first £65 per week of care of a kind mentioned in paragraph (d) of section 1(1) of the Act.”

The effect of s.1 of the 2002 Act, in conjunction with regulation 2 of the 2002 Regulations was, Mr Brodie submitted, to preclude the local authority for charging a person for the first £145 of personal care and the first £65 of nursing care.

Accordingly, while the local authority retains a general power to charge for accommodation provided under the 1968 Act, it can only charge for those elements of accommodation which are represented by personal care above £145 per week and nursing care above £65 per week.

14. In the light of the above and in the light of the fact that the appellant was in receipt of personal/nursing care of £210 per week, Mr Brodie asked me to find, as I understood it as a matter of fact, that a certain state of affairs existed in relation to the appellant. In particular, I was asked to hold that she was being provided with a service under the 1968 Act. For the reasons set out *infra* I am not prepared to make such findings.

15. Mr Brodie emphasised that the Scottish legislation treated personal care separately and distinctly from nursing care. While both were encompassed within the meaning of “social care”, the two are otherwise treated as distinct. In s.1(1)(a) of the 2002 Act, the definition of “personal care” contained within s.2(28) of the Regulation of Care (Scotland) Act 2001 is adopted. The only reference to nursing care appears in s.1(1)(d). The distinction

between the two is maintained in regulation 2 of the 2002 regulations. Mr Brodie then went on to examine the entitlement to the payment of attendance allowance, in particular the terms of regulation 7 of the Social Security (Attendance Allowance) Regulations 1991 as amended (SI 1991/2740). He submitted that, in terms of regulation 7, a person is not to be paid attendance allowance if accommodation is provided for that person in pursuance of the three Acts of Parliament narrated in regulation 7(1)(a) or in circumstances where the cost of accommodation is borne wholly or partly out of public or local funds in pursuance either of those enactments or of any other enactment relating to persons under disability. He submitted that in this case "accommodation" should be given a wide interpretation and that it encompasses not only board and lodgings but other aspects of care, such as "personal care", as defined in the 2002 Act. Further, he submitted that, in this case, the cost of accommodation for the appellant was being borne partly out of public or local funds in pursuance of those enactments or, in any event, it was being borne wholly or partly out of public or local funds in pursuance of another enactment, namely the 2002 Act, which related to persons under disability. Accordingly, the claimant was disabled from entitlement to attendance allowance because of the terms of regulation 7(1)(a) or (b).

16. I was referred to *Steane v Chief Adjudication Officer 1996 1 WLR 11/95* and it was submitted that that case founded the following approach to the proper interpretation of regulation 7. Firstly, that the claimant is a person for whom accommodation was being provided. Secondly, that entitlement to payment applied if any one of the provisions of regulation 7(1)(a) – (c) applied. Thirdly, for the application of 7(1)(b), the sole question is whether, as a matter of interpretation, the claimant is a person for whom there is power to bear the cost of accommodation in whole or in part out of public or local funds in pursuance of the specified enactments, or in any other enactment relating to persons under disability (see *Steane* page 1202). Mr Brodie accepted that it was not clear upon the evidence whether or not the accommodation was being provided in pursuance of any of the enactments specified in regulation 7(1)(a). He submitted that, if I considered that regulation 7(1)(b) did not apply, it would be necessary for further evidence to be heard upon the precise circumstances in which the claimant was staying in the nursing home she was in and whether those circumstances amounted to the provision of accommodation under or in pursuance of those Acts.

17. It was submitted that regulation 7(1)(a), (b) and (c) provided for three distinct situations and that those provisions were disjunctive and not conjunctive. Reference was made to s.67(2)(a) of the Social Security Contributions and Benefits Act 1992. Accordingly, it was submitted that, if a person fell under regulation 7(1)(a) or 7(1)(b) or 7(1)(c), the bar on payment of attendance allowance applied.

18. Mr Brodie also submitted that the word "accommodation" fell to be given a wide construction in regulation 7, so that it encompassed both the appellant's needs in the nursing home that might be seen solely as board and lodgings, and also those elements that include personal care. The word "accommodation" in regulation 7 included "personal care" as it is to be understood for the purposes of s.1 of the 2002 Act.

19. In support of those submissions, it was submitted that the interpretation of the word "accommodation" in regulation 7 in the 1991 regulations must accord with the interpretation of that word under the National Assistance Act 1948 (the 1948 Act). S.21(5) of that Act provides as follows:-

“References in this Act to accommodation provided under this Part thereof shall be construed as references to accommodation provided in accordance with this and the next five next following sections and as including references to board and other services, amenities and requisites provided in connection with the accommodation, except where in the opinion of the authority managing the premises their provision is unnecessary.”

I was also referred to *R v North and East Health Authority ex parte Coughlan* 2001 QB 213. In that case, a Court of Appeal in England examined the provisions of s.21 of the 1948 Act. At page 231 letter (f) Lord Woolf said:-

“The following points should be noted in relation to s.21.....

(b) Under s.21, the primary service provided is accommodation. But the express reference to age, illness and disability as being among the characteristics of the person who is seeking accommodation, which amount to a qualification for the grant of the accommodation, indicate that, in many cases, there is likely to be a need for nursing services as part of the care provided.

(c) The words in s.21(5) ‘board and other services’ are readily capable of being construed as including nursing services and there appears to be no reason why they should not be so construed.

(d) The nursing services would, however, as s.21(5) requires, have to be ‘provided in connection with the accommodation’.”

It was clear from that analysis, that the word “accommodation”, as used in the 1948 Act, fell to be given a wide interpretation. Further, it was submitted that regulation 7(5) of the 1991 Regulations provided exclusions from what is encompassed within the phrase “the cost of accommodation”. What is there excluded from the cost of accommodation envisages services beyond simply those related to board and lodging. He also relied upon the maxim of statutory construction *expressio unius est exclusio alterius* (it is presumed that where an act contains a specific exception, then those are the only exceptions of the kind intended). Given the distinction and treatment of “personal care” and “nursing care” under the 2002 Act, nursing care is excluded from the operation of regulation 7 but personal care is not. That, Mr Brodie stated, indicates that personal care is not excluded from the operation of regulation 7 and cost of accommodation includes that element relating to personal care.

20. Mr Brodie made other points in support of the above approach. One was that the interpretation he advanced would have the effect of making uniform the provisions of regulation 7 throughout the United Kingdom. He reminded me that entitlement to and payment of social security benefits are a matter for the United Kingdom parliament and that the Scottish parliament had no power to modify the provisions of United Kingdom legislation relating to social security. If his interpretation was not adopted and payment of accommodation allowance continues, despite payment of free personal care, that would have the effect that people in Scotland would have the benefit of attendance allowance as well as free personal care. It was submitted that the appellant was in receipt of free personal care and the word “accommodation” is properly interpreted as covering personal care, as used in s.1 of the 2002 Act. The payment of that personal care to the nursing home serves to reduce the cost to the appellant of staying at that nursing home. Accordingly, it was submitted that the appellant is one for whom accommodation is provided in circumstances where the cost of

accommodation is borne partly out of local funds, in terms of regulation 7(1)(b). Mr Brodie then went on to explain that none of the exemptions from regulation 7 which are contained in regulation 8 applied in this case.

21. It is appropriate in the light of the submissions set out above to look firstly at the Scottish legislation. In the context of the 2002 Act, social care means a service provided, *inter alia*, under the 1968 Act (section 22(1) of the 2002 Act). It does not include a service which consists in the provision of accommodation (section 22(2) of the 2002 Act). A local authority has power to charge for accommodation by virtue of section 87 of the 1968 Act. Were it not for the provisions of section 1 of the 2002 Act, a local authority would be able to charge for social care. But, because of the terms of section 1(1)(a) of the 2002 Act, a local authority is barred from charging for certain types of social care including personal care, as defined in s.2(28) of the Regulation of Care (Scotland) Act 2001. No charge can be made either for nursing care in terms of section 1(1)(d) of the 2002 Act. Nursing care itself is not defined but, as Mr Brodie pointed out, it is treated separately and distinctly from personal care in section 1 and in the 2002 Regulations. However, section 1(1) of the 2002 Act is made subject to section 2(2)(a) of that Act. That sub-section empowers the Scottish Ministers by regulations to qualify the requirements of sub-section (1) in any way they think fit. The 2002 Regulations were made in exercise of the powers conferred *inter alia* by that sub-section and section 2 of the 2002 Act. Section 2 empowers the Scottish Ministers by regulation to determine what is and is not to be regarded as accommodation provided under the 1968 Act. Those regulations restrict the meaning of accommodation for the purposes of section 2 of the 2002 Act and exclude from the meaning of accommodation provided to or secured for an individual under the 1968 Act, the first £145 of personal care and the first £65 of nursing care. The effect of that restriction is that the local authority can not charge for accommodation comprising of those components in those amounts. But for the provisions of the 2002 Act and the 2002 Regulations, a local authority would be able to charge for those components. From my reading of the wording of regulation 2 of the 2002 Regulations, it is clear that the word accommodation can include personal and nursing care but the first £145 and £65 of those types of care is specifically excluded. Thus the Scottish Ministers have used the powers given to them to limit the definition of accommodation so as to exclude, to a certain value, those two named types of social care from the ambit of what is to be understood as accommodation.

22. While it is useful to bear in mind that Scottish statutory regime, it is important to recognise, as Mr Brodie submitted, that the operation and effect of regulation 7 of the 1991 regulations, as amended, requires to be addressed principally with reference to the legislation of the United Kingdom Parliament and in the context of what is a United Kingdom wide jurisdiction. By regulation 7(1), a person is precluded from being paid any amount in respect of attendance allowance if he is a person for whom accommodation is provided under one of three Acts of Parliament set out in 7(1)(a), or, in circumstances where the cost of accommodation is borne only or partly out of public or local funds in pursuance of those enactments or of any other enactment relating to persons under disability. In terms of regulation 7(5), the references to the cost of accommodation do not include the cost of, *inter alia*, "(g) nursing care provided by (or the provision of which is secured by) a local authority for which the local authority are not to charge by virtue of s.1 of the Community Care and Health (Scotland) Act 2002". I agree with Mr Brodie that the word "accommodation" and the phrase "cost of accommodation" ought to be given a wide interpretation. Such an approach is supported by the cases of *Steane v. The Chief Adjudication Officer* 1996 1 WLR 1195 and *Regina v North and East Devon Health Authority, ex parte Coughlan* 2001 QB 213. It is also

supported by the provisions of the National Assistance Act 1948, and in particular s.21. In addition, Mr Brodie, in my judgement, is correct in submitting that, since regulation 7(5)(g) specifically excludes nursing care provided by a local authority, for which it cannot charge by virtue of s.1 of the 2002 Act, from the definition of the cost of accommodation, it follows that personal care, as understood in the 2002 Act, is included within the definition of that phrase. If the Westminster Parliament had wanted to exclude personal care, as defined in the 2002, or any part of it, from the meaning of accommodation, it could have done so in Regulation 7(5). But for the provisions of regulation 7(5)(g), the phrase "cost of accommodation" would include nursing care of any value. Regulation 7(5)(g) means that nursing care above the value of £65 would be included within the cost accommodation.

23. I conclude therefore that the phrase "the cost of accommodation" in regulation 7(1)(b) of the 1991 Regulations is properly to be interpreted as including personal care as that phrase is used in the 2002 Act.

24. A person is not entitled to attendance allowance if accommodation is provided to him in pursuance of the enactments named in regulation 7(1)(a). In addition, he is not entitled to that allowance if the cost of accommodation is borne wholly or partly out of public or local funds in pursuance of those enactments or of any other enactment relating to persons under disability (regulation 7(1)(b)). Accordingly, in order to be excluded from entitlement to attendance allowance, the provisions of regulation 7(1)(a) or (b) require to be fulfilled. It is for the Secretary of State to establish that those conditions are fulfilled in the appellant's case. I am not prepared, upon the material available to me, to make any findings in fact in that respect. In particular, I am not prepared to find, as a matter of fact, that accommodation is being provided to the appellant in pursuance of the named enactments in regulation 7(1)(a). Nor am I prepared to hold, in terms of regulation 7(1)(b), that the cost of accommodation is being borne wholly or partly out of public or local funds in pursuance of any of the three named enactments in regulation 7(1)(a) or, alternatively, in pursuance of any other enactment relating to persons under disability. In my judgement, those matters of fact fall properly within the province of the tribunal and it is for the Secretary of State to lead such evidence as is thought fit in order to demonstrate to the tribunal's satisfaction that the conditions contained either in regulation 7(1)(a) or 7(1)(b) apply in the case of the appellant so as to exclude entitlement to attendance allowance. It will be open to the appellant's representatives, whoever they may be, to adduce evidence and to advance submissions to the contrary.

25. As requested by Mr Brodie, I am able to make the following findings. First that the appellant is resident in a nursing home and has been there since 22 March 2003. Secondly, that the gross cost of being there is £410 per week. Thirdly, the nursing home receives £210 per week comprising of personal care to the value of £145 per week and nursing care to the value of £65 per week from Fife Council. For the reasons set out above, I am also able to conclude, as a matter of law, that in regulation 7(1)(b) of the 1991 Regulations, the phrase "the cost of accommodation" is apt to include the sum of £145.00 per week paid to the appellant as a personal care allowance.

26. Accordingly, I will remit this matter to a fresh tribunal and I direct that that tribunal consider evidence advanced before it upon the question of whether the accommodation is being provided to the appellant in pursuance of the enactments contained within regulation 7(1)(a) of the 1991 regulations, or, alternatively, in circumstances where the cost of accommodation is borne wholly or partly out of public or local funds in pursuance of those

enactments or of any other enactment relating to persons under disability (regulation 7(1)(b)). In the light of the tribunal's findings on those matters, it will require to consider whether or not the appellant is entitled to any award of attendance allowance.

(signed)
D S BURNS QC
Deputy Commissioner
Date: 22 September 2004