

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. In this appeal the appellant, Tandridge District Council, is the housing authority; the respondent is the person who claimed housing and council tax benefit. The appeal, which proceeds by my leave, is from the decision of the tribunal held on 19 May 2005. I set aside the decision of the tribunal for error of law but consider this to be an appropriate case in which to substitute my own decision, pursuant to paragraph 8(5)(a) of Schedule 7 to the Child Support, Pensions & Social Security Act 2000. My decision is that the claimant's accommodation (at Torwood Cottage) was not provided by the appellant to the respondent, the consequence being that the accommodation is not "*exempt accommodation*" as provided for by regulation 10(6) of the Housing Benefit (General) Amendment Regulations 1995. ("The 1995 Regulations")

2. I make it plain at the outset that I regret the delay in the determination of this appeal. A number of factors contributed to the delay. First, leave to appeal was originally refused by Commissioner Levenson who, however, subsequently set aside that refusal and the matter was then placed before me for redetermination of the application for leave. Second, although the appeal was ready for determination after the oral hearing which I held there was a further delay because I considered it right to give the parties an opportunity to comment on a decision (CH/3811/2006) promulgated after the date of the oral hearing. Finally, owing to an administrative error in the Office of the Commissioners, the file was further delayed after the parties had commented on the later decision.

3. A housing/council tax benefit application had been made on behalf of the respondent in respect of property which I need only refer to as Torwood Cottage. On behalf of the respondent it had been argued that she was in exempt accommodation as defined in regulation 10(6) of the 1995 Regulations, with the result that the local reference rent (lower than the actual rent payable) did not apply in her case. The factual scenario as recorded by the tribunal is not disputed:

"[The claimant] has very special needs...A residential assessment of her needs carried out at the National Epilepsy Centre at Chalfont indicated that she required 24 hours support because of her severe learning disability and her uncontrolled and unstable epilepsy but that she did not need personal care. Kent County Council [who act on behalf of the respondent] accepted that they had a duty to provide [the respondent] with housing because she had been assessed as not needing residential care. However, it was clear that none of the local domiciliary care agencies in Kent were able to meet [the respondent's] needs, so Kent County Council engaged Independence Homes (who had been recommended by the National Epilepsy Centre) to help them find suitable accommodation for [the respondent]. This led to [the respondent] moving into Torwood Cottage...The domiciliary support services are provided by Independence Homes on behalf of Kent County Council."

4. If a claimant is in exempt accommodation then he or she is not subject to the rules on rent restrictions introduced on 2 January 1996. "Exempt accommodation" is defined in regulation 10(6) of the 1995 Regulations. What is in issue in this appeal is the proper construction of regulation 10(6)(ii), under which "*exempt accommodation*" means accommodation which is "*provided by a non-metropolitan county council in England within the*

meaning of section 1 of the Local Government Act 1972, a housing association, registered charity or a voluntary organisation where that body or a person acting on their behalf also provides the claimant with care, support or supervision". It is not disputed that Kent County Council is a non-metropolitan county council in England within the meaning of section 1 of the Local Government Act 1972. The issue before the tribunal, and before me, is the meaning of the words "provided by".

5. The tribunal correctly recorded the appellant's contention that because the respondent's obligation was to pay rent to a private landlord it followed that the accommodation could not be exempt as it had not been provided by Kent County Council. The tribunal reasoned, however, that "*Kent County Council has the right to say who will live in Torwood Cottage (or at least [the respondent's] part of it), namely [the respondent]. They engaged Independence Homes to act on their behalf in order to meet the council's obligation to house [the respondent] and to provide her with support services. It is thus Kent County Council who have said it is [the respondent] who is to live at Torwood Cottage...Thus looking at the situation as a whole I have concluded that the words 'provided by' in the definition of exempt accommodation should be given a broad meaning and that [the respondent's] accommodation at Torwood Cottage is being 'provided by' Kent County Council in compliance with Kent County Council's statutory duties to [the respondent]*". The tribunal, thus, gave 'provided by' a wide construction. It is argued on behalf of the appellants that the tribunal erred in law in adopting that construction.

6. I held an oral hearing of this appeal. The appellants were represented by Mr P Stagg, of counsel, the respondent by Mr J Zebedee, assisted by Mr A Campbell. I am grateful to them all for their help.

7. The essence of the appellant's argument is that where a local authority arranges for a third party to obtain accommodation for a person with special needs from a private landlord, it cannot properly be held that such accommodation is 'provided by' the local authority and, on the contrary, the accommodation is 'provided by' the individual who rents it out to a claimant, and not by any body that facilitates the provision of that accommodation. Mr Stagg draws attention to the contrast between the requirements in respect of accommodation (which must be provided by the relevant body) and services (which may be provided by *or on behalf of* the relevant body), suggesting, he contends, that a body only provides accommodation if it does so directly, not through some other provider. I am referred by Mr Stagg to the definition of 'provides' in the Shorter Oxford English Dictionary (1993 Edition):

"Equip or fit out with what is necessary for a certain purpose; furnish or supply with something...Supply or furnish for use; make available; yield, afford...Make provision for the maintenance of a person...Supply necessary resources."

Mr Stagg argues that "*furnish*" or "*supply*" suggests the direct provision of a resource to a person as opposed to an indirect arrangement for another person to provide that resource.

8. Mr Stagg also prays in aid Command Paper 2920, to which I am entitled to have regard as an aid to construction since its contents form part of the "enacting history" of the 1995 regulations. The draft of the 1995 regulations was referred to the Social Security Advisory Committee ("SSAC") for comment and in a memorandum to SSAC the Secretary of State indicated his concern that rents in the private sector payable by way of housing benefit were too high. One of the comments of SSAC was that, in relation to exempt accommodation, "*non profit making accommodation managed by housing associations and charities should be exempt from the proposed restriction*". The concern of SSAC that non profit making organisations who

“*managed*” accommodation would be adversely affected by the proposals was reflected in the response of the Secretary of State to the effect that “*we will exempt from the new proposals the following accommodation:…Accommodation provided by housing associations, registered charities or voluntary organisations where care, support or supervision is provided by, or on behalf of, the provider to residents.*” Mr Stagg’s argument in relation to all of this is that it cannot have been the intention that “*exempt accommodation*” should extend to property let by a private individual (Torwood Cottage being privately owned) to a person requiring care and attention where the only role of the non-profit making body listed in the definition of “*exempt accommodation*” (Kent County Council) was to find that accommodation and make the necessary arrangements for care.

9. Mr Stagg also relies upon paragraph 23 of circular HB/CTB A7/96 suggesting that accommodation is only “*provided by*” a relevant authority when and if that relevant authority is the landlord. That I am empowered to have regard to DWP guidance as an aid to interpretation (when the meaning of legislation is unclear as it is in this appeal) is, says Mr Stagg, suggested by R B Tower Hamlets LBC HBRB ex parte Kapur [2000] The Times 28 June. (See also Wicks v. Firth [1983] 2AC 214 and R Wandsworth LBC, ex parte Beckwith [1996] 1 All ER 129. Mr Stagg also refers to CH/423/2006 (to be reported as R(H)2/07) which, he acknowledges, dealt with an issue different to the one arising in the instant appeal. That is because in that appeal the accommodation provider and the care provider had been separately engaged by a local authority to meet the needs of the claimant and the Commissioner held that the care provider was not acting on behalf of the accommodation provider. Mr Stagg submits that the decision in CH/423/2006 is still of relevance in that the reasoning of the Commissioner essentially proceeds on the basis that “*provided by*” indicates direct provision of the care by the accommodation provider, not through an agent. Moreover, Mr Stagg draws attention to R(IS)2/91 in which, it is submitted, the reasoning of the Commissioner indicates that the concept of provision (of accommodation and meals in that case) supports the narrower construction offered by Mr Stagg as opposed to the wider construction accepted by the tribunal and advanced by Mr Zebedee.

10. Finally, Mr Stagg draws support from section 2(4) of the Local Government Act 2000 in considering under what power Kent County Council was acting. He submits that, given that it is not a local housing authority and has no powers or duties under the Housing Act 1996 and given that the claimant had not been provided with accommodation under Part 3 of the National Assistance Act 1948, the county council must have been acting under section 2(4) of the 2000 Act which empowers the local authority “(b) to give financial assistance to any person (c) to enter into arrangements or agreements with any person or (d) cooperate with, or facilitate or coordinate the activities of, any person.” Mr Stagg submits that in engaging Independence Homes to find accommodation for the respondent the council was acting under the provisions of section 2(4)(b), (c) and (d) and not exercising powers under 2(4)(f) to “provide staff, goods, services or accommodation to any person”.

11. Given that the substantive issue involves questions of interpretation I invited the Secretary of State to indicate whether he would wish to be joined as a party to the proceedings. He accepted that invitation and a submission was made, in substance concurring with the views offered by Mr Stagg. The upshot of the submission provided on behalf of the Secretary of State is that “*provided by*” does not extend to the co-ordinator of housing, as in the instant appeal.

12. For his part Mr Zebedee, in arguing for a broad construction of “*provided by*”, offers a series of examples (“*provide new uniforms for the band/provide the troops with comforts/provide the children with free balloons*” and the like) which, he suggests, is consistent with goods, services or facilities emanating from a source other than the original “*provider*” which, he says, is consistent with a definition, from the Compact Oxford English Dictionary, of “*provide*” including “*equip or supply (someone) with*” or “*make adequate preparation or arrangements for*”. Mr Zebedee argues also that if the definition of “*exempt accommodation*” extended only to circumstances in which the rent was due to the “*relevant body*” that definition could easily have used the word “*landlord*”, such that “*provided by*” must mean something wider, and must encompass situations in which a “*relevant body*” makes arrangements to provide someone with accommodation. Mr Zebedee says that in the late 1990s the Joint Council for the Welfare of Immigrants persuaded Westminster City Council that the “*wide*” interpretation was correct but that, of course, does not bind me and I have no idea of the arguments marshalled by the JCWI or why Westminster City Council were persuaded by them. Mr Zebedee also draws support from DWP guidance in relation to regulation 2(1) of the Housing Benefit (General) Regulations 1987 which exempts from the definition of “*young individual*” a person “*who has not attained the age of 22 years and was formerly provided with accommodation under section 20 of the Children Act 1989*”. The DWP guidance referred to by Mr Zebedee is to the effect that “*The young person does not have to have been housed in Local Authority owned or run property – they only need to have been provided with their accommodation by the LA in this section of the Children Act...*” Mr Zebedee also draws attention to the definition of “*exempt accommodation*” before April 2000 in which reference was made to “*the occupants*” of any relevant property instead of “*the claimant*”. That, says Mr Zebedee, indicates that “*exempt accommodation*” may exist only in part of the dwelling.

13. In my judgement the arguments of Mr Stagg are persuasive. There is force in each discrete argument and their cumulative weight leads me to the conclusion that the “*wider*” interpretation adopted by the tribunal, and urged upon me by Mr Zebedee, is not correct. If the “*wider*” meaning of “*provided by*” is indeed correct then the following words (“*on behalf of ...*”) in the relevant part of the regulation would be superfluous. There is, of course, some force in the argument of Mr Zebedee that the relevant part of the regulation could have been more clearly expressed. Such an argument would equally attach to a good deal of the Byzantine complexities of social security legislation. It is not, however, a warrant for me to impose upon the relevant part of the regulation a meaning which it simply will not bear. Mr Zebedee has supported his argument by quotations from the Compact Oxford English Dictionary, a less comprehensive and authoritative source in my judgment than the Shorter Oxford English Dictionary. Moreover a good deal of the examples of “*provide*” offered by Mr Zebedee are particularly context sensitive and some of the definitions he offers relate to “*provide with*” or “*provide for*”, as distinct from “*provide*” and to that extent the definitions have subtle but significant difference of meaning. In addition the shorter OED’s reference to “*furnish*” or “*supply*” to my mind is suggestive of personally arranging for a person to receive a resource, not simply facilitating arrangements for such a resource to be provided by a third party.

14. Mr Zebedee offers support for his interpretation from the definition of “*young individual*” in regulation 2(1) of the Housing Benefit (General) Regulations but I remind myself that this refers to a person who has not attained the age of 22 years “*and was formerly provided with accommodation under section 20 of the Children Act 1989*”. The comparison with a “*young individual*” in the Housing Benefit Regulations is not to my mind relevant because “*provide*” under the Children Act 1989 has an extended meaning (see section 20(1), 22(1)(b),

23(1)(a) and (2)) to such an extent that a comparison of “provide” in that context and in the instant appeal is not comparing like with like.

15. Mr Zebedee has drawn attention to the amendments to the regulations but the essential words “*provided by...on behalf of*” are common to all versions of the amendments, so the other changes in phraseology referred to by Mr Zebedee have no bearing on the point of interpretation now at issue.

16. For the reasons advanced by Mr Stagg I am entitled to have regard to the SSAC report as an aid to interpretation. The draft version of the regulations provided no exempt accommodation exception. The memorandum by the Secretary of State to the SSAC made clear the policy behind the new scheme because concern was expressed about higher rents in the deregulated private sector. SSAC recommended that non-profit making accommodation managed by housing associations and charities should be exempt from the proposed restrictions and this recommendation was accepted in part. From the SSAC report and the comments of the Secretary of State it is in my judgment clear that the concern of the Secretary of State was to restrict unregulated rents, and their implications in relation to housing benefit, in the private sector and the SSAC were concerned not with private individuals (like the landlords in the instant appeal) but with non-profit making organisations. Mr Zebedee, I remind myself, in referring to the legislative policy of protection of public funds says that there must be a proper closeness of relationship between the parties involved in providing the accommodation and in providing the care, support or supervision. Whilst I fully accept that there is nothing improper in the relationship between the parties in the instant appeal nonetheless there is in reality no “closeness of relationship” between Kent County Council and the other parties.

17. I am also entitled to take into account circular A7/96 as an aid to interpretation and I note that paragraph 2 refers to “*accommodation provided by housing associations, registered charity or voluntary organisations*” and that in referring to the exemption under paragraph 22 it is made clear in paragraph 23 that “*this exemption will not apply where the landlord of the accommodation is any other person or organisation than those specified*”. The landlord in the instant appeal, of course, is not Kent County Council but a private landlord.

18. Whilst I accept that CH/423/06 addressed a different point of interpretation I remind myself that in referring to regulation 10(6) the Commissioner said “*...That clearly connotes that the care must be provided either by the landlord or a person acting in some sense for him...*”. That to my mind supports the “*narrow*” interpretation advanced by Mr Stagg. The reasoning of the Commissioner at paragraph 52 of that decision also goes in the same direction. I also draw inferences as to the meaning of the words now in issue from R(IS)2/91 in which, in considering the meaning of “*provided*”, the Commissioner considered the concept of provision as meaning provision by the owner of accommodation where a claimant lives, not the case in the instant appeal.

19. Mr Zebedee argued that “*provide*” refers to a continuing arrangement as opposed to a sham one, there of course being no suggestion of the latter in the instant appeal. I do not accept that argument. The definition urged upon me by Mr Stagg in my judgment does not derive from or depend upon any longstanding relationship.

20. In my judgement “*provided by*” as used in regulation 10(6) will not reasonably suffer the wide interpretation adopted by the tribunal. It does not in my judgment include instructing,

arranging or facilitating privately rented accommodation through a third party, as happened in the instant appeal. In this appeal it is not disputed that the local authority arranged for a third party to obtain accommodation for the claimant, a person with special needs, from a private landlord. I hold that that accommodation was not “*provided*” by the local authority and, accordingly, was not exempt accommodation within the ambit of regulation 10(6) of the 1995 Regulations.

(Signed)

**S J Pacey
Commissioner**

(Date)

9 July 2007