

A IN THE HIGH COURT OF JUSTICE

CO/1081/90

QUEEN'S BENCH DIVISION

Royal Courts of Justice,

Friday 11th October, 1991.

Before:

MR. JUSTICE KENNEDY

C Crown Office List

THE QUEEN

-v-

D THE HOUSING BENEFITS REVIEW BOARD OF PENWITH DISTRICT COUNCIL

Ex parte MARJORIE MENEAR

E (Computer-aided Transcript of the Stenograph Notes of Marten Walsh
Cherer Ltd., Pemberton House, East Harding Street, London,
EC4A 3AS. Telephone Number: 071-583 7635. Shorthand Writers to
the Court.)

F MR. R.J. DRABBLE (instructed by Messrs. Sinclair Taylor & Martin)
London, W10) appeared on behalf of the Applicant.

MISS E.A. McALLISTER (instructed by Messrs. A.W.H. Harvey & Son,
Penzance.) appeared on behalf of the Respondent.

G J U D G M E N T
(As approved by Judge.)

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A MR. JUSTICE KENNEDY: This is an application for judicial review
of the decision of the Housing Benefit Review Board of Penwith
District Council which, on 19th March 1990, after a hearing on
B 15th March 1990 dismissed Mrs. Menear's appeal from a decision
of the local authority, which, on 12th January 1990, had
decided that Mrs. Menear and Mr. Wearne were living together
as husband and wife, so that they were an unmarried couple as
defined by section 20(11) of the Social Security Act 1986.
C The consequences of that decision, if correct, were said to be
that Mrs. Menear had no separate entitlement to housing
benefit. She had made a claim for rates rebate, and was told
D that it would have to be treated as if it was made in respect
of both herself and Mr. Wearne.

The factual background is, for the most part, not in
dispute. Mr. Wearne was born on 13th September 1912 so that
E he is now 79 years of age. Mrs. Menear was born on 12th July
1923 so that she is now 68. She at all material times lived
at 21 Guildford Road, Hayle, in Cornwall, and she has been
troubled with arthritis and a tendency to fall -- so her
F neighbour, who lived a few hundred yards away, used to help
her. Eventually they agreed that the best course would be if
he sold his home and moved into her bungalow, which he did.

G There was before the Review Board an issue as to
whether Mr. Wearne and Mrs. Menear shared a bed. They said
that they did not and that he slept on a sofa bed in the
living room. The Review Board made no finding of fact about

A that but they made five other findings, which are set out in
the letter of 19th March 1990 and which read:

B "1. That Mr. Wearne had sold his house because it
needed repair and moved in with Mrs. Menear in about
April 1989 partly to care for her and partly for his own
benefit.

2. That Mr. Wearne had the use of the whole of 21
Guildford Road, Hayle.

3. That Mrs. Menear and Mr. Wearne shared the
household expenses and 'pooled' their financial
resources and their household purchases.

C 4. That Mrs. Menear and Mr. Wearne had each sold
their respective motor cars and purchased a Dormobile
type vehicle in August 1989 which they use inter alia to
go on holiday together.

5. That the relationship between the applicant and
Mr. Wearne was a stable one."

D As the findings indicate, Mr. Wearne had moved in with
Mrs. Menear in April 1989. In October 1989 the Department of
Social Security decided that they were living together as
husband and wife and that Mrs. Menear was not therefore
E entitled to income support, but in December 1989 that decision
was reversed, apparently on the basis that Mr. Wearne and Mrs.
Menear were living together for mutual support and were not
F cohabiting. By then Mrs. Menear had made her claim for a
rates rebate. That claim was addressed, as it had to be, not
to the Department of Social Security but to the local
G authority. In general where two people are living together as
husband and wife their income and capital are aggregated
before a decision can be made as to the entitlement to a rate
rebate. So, on 15th December 1989, a letter was written to

A Mrs. Menear seeking details of Mr. Wearne's income and
capital. If those details were relevant it is common ground
that Mrs. Menear would have had no viable claim, and it is the
primary submission of Mr. Drabble, for the applicant, that the
B details were irrelevant because the issue of her entitlement
to housing benefit had already been resolved by the Department
of Social Security in relation to the claim for income
support. By statute the decision of the Department left the
C local authority with no option but to pay housing benefit at
the full rate, or so Mr. Drabble contends.

Before I come to the statutory provisions upon which Mr.
Drabble relies I can conclude the history by saying that at
D about 9 a.m. on 11th January 1990 representatives of the local
authority visited 21 Guildford Road, spoke to Mrs. Menear and
made a limited inspection. The notes of that visit are at
page 99 in the bundle. On the following day the local
E authority wrote the letter to which I have already referred.
The matter then went to the Review Board, and it is Mr.
Drabble's second and alternative submission that the approach
F of the Review Board, if it was entitled to be seized of the
matter, was flawed.

I return therefore to Mr. Drabble's first submission,
which involves a careful consideration of some of the
G statutory provisions under which income or related benefits
are paid. They are of three kinds -- income support, family
credit and housing benefit -- and section 20(1) of the Social
H

A Security Act 1986 states that prescribed schemes shall provide
for each of them. Section 20(7) states:

"A person is entitled to housing benefit if --

B (a) he is liable to make payments in respect of a
dwelling in Great Britain which he occupies as
his home;

(b) there is an appropriate maximum housing benefit
in his case; and

(c) either --

C (i) he has no income or his income does not
exceed the applicable amount; or

(ii) his income exceeds that amount, but only by
so much that there is an amount remaining if
the deduction for which section 21(5) below
provides is made.

D It is the submission of Mr. Drabble that Mrs. Menear
satisfied the requirements of paragraphs (a) and (b) and, by
virtue of the decision of the Secretary of State, paragraph
E (c)(i). If he is right, then the provisions of section 21(4)
would apply. It provides:

"Where a person is entitled to housing benefit by
virtue of section 20(7)(c)(i) above, the amount shall be
the amount which is the appropriate maximum housing
benefit in his case."

F Miss McAllister for the respondent submits that
entitlement to housing benefit is not governed entirely by
what appears in section 20(7). The subsection is, she
submits, in broad terms, setting out qualifying conditions
G with more detailed provisions to be found in the Housing
Benefit (General) Regulations 1987, but before I come to those
regulations it is necessary to look at section 22(5) of the

A Act. It provides:

"Where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of that person."

B In order to decide who is a member of a family it is necessary to look back to the definitions in section 20(11). So far as material they read:

"'Family' means --

C (a) a married or unmarried couple;

'unmarried couple' means a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances."

D It is common ground that the prescribed circumstances are not relevant in this case.

E Miss McAllister submits that when the claim for rates rebate was made the local authority, as the determining authority, unfettered by the decision made by the Department of Social Security, had to consider whether Mr. Wearne was for the purposes of section 22(5) a member of the claimants family, and if so what if any effect his income and capital had upon her claim. Hence the letter of 15th December 1989, the enquiries made on 11th January 1990, the decision of 12th January 1990 and the proceedings before the Review Board.

F
G Coming now to the regulations Miss McAllister invites my attention to the aggregating provisions in regulation 16 and both sides invite my attention to regulation 19(1). So far as material it reads:

H 5

A "The income and capital of a claimant's partner
which by virtue of section 22(5) of the Act is to be
treated as income and capital of the claimant, shall be
calculated or estimated in accordance with the following
provisions of this Part in like manner as for the
claimant; and any reference to the 'claimant' shall,
B except where the context otherwise requires, be
construed for the purposes of this Part as if it were a
reference to his partner

Regulation 61 fixes the amount of maximum housing
benefit and regulation 76(1) reads:

C "Unless provided otherwise by these regulations, any
matter required to be determined under these regulations
shall be determined in the first instance by the
appropriate authority."

Finally in Schedule 5, dealing with capital to be
disregarded, paragraph 5 reads:

D "Where a claimant is on income support, the whole of
his capital."

By reference to those statutory provisions Mr. Drabble's
primary submission is formulated thus:

E 1) When Mrs. Menear applied for housing benefit she was
on income support.

2) Her capital therefore had to be disregarded. (See
Housing Benefit Regulations, Schedule 2, paragraph five.)

F 3) Even assuming Mr. Wearne was correctly regarded as a
member of her family his income and capital was to be treated
as hers. (See section 22(5)). Therefore his income and
capital also fell to be disregarded. The alternative would be
G to have regard only to his income and capital when by virtue
of the regulations hers has to be disregarded. That, submits
Mr. Drabble, would be illogical.

A 4) Mrs. Menear satisfies the requirements of section 7(a) and section 7(b) and as she is on income support she must also satisfy the requirements of section 7(c)(i).

B 5) Therefore she is entitled to housing benefit at the maximum rate. (See section 21(4)).

C Mr. Drabble accepts that if he is right there will be occasions when a local authority responsible for the administration of housing benefit will be fettered by a decision of the Department of Social Security in relation to income support but he submits that this is not surprising for a number of reasons.

- D
1. Because in relation to income support there is a sophisticated adjudication system with guidance available from a chief adjudication officer and a statutory right of appeal to the Court of Appeal.
 - E 2. Because housing benefit is heavily subsidised by the Department of Social Security.
 - F 3. Because under regulation 9(1) of the Housing Benefit Regulation 1985, which were the preceding regulations to those of 1987, where the Secretary of State certified a claimant to be entitled to supplementary benefit, that claimant had to be treated as eligible to receive housing benefit. So what is now being submitted is in accordance with the pattern as it existed before the 1987 regulations came into effect.
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- H Mr. Drabble might also have added that, if as Miss

A McAllister submits, there is no interlinking between the
decisions in relation to income support and those in relation
to housing benefit there may be, as she concedes, curious
B results, and to some extent interlinking is to be expected
because these are two types of income related benefits which
come into existence under the same statute. Admittedly one is
concerned primarily with income and the other with housing,
C but that income is relevant to any enquiry as to the need for
support in relation to housing is spelt out in section
20(7)(c). For that reason, in addition to the reasons
advanced by Mr. Drabble, I believe that his interpretation of
D the statutory provision is correct. It follows that the
Housing Benefit Review Board concerned itself with a question
which in the particular circumstances it was unnecessary to
consider. The decision of that board must therefore be
E quashed.

My decision in relation to Mr. Drabble's primary
submission makes it unnecessary to consider in any detail his
second submission, namely that even if the Review Board was
F considering a relevant issue its approach was flawed, but it
may be helpful if I indicate briefly the outline of that
submission. It amounted to this, that having regard to the
ages of Mrs. Menear and Mr. Wearne the Review Board should
G have been slow to conclude that they were living together as
husband and wife. The findings of fact made by the Review
Board might be very persuasive in relation to younger people

A but older people coming together under the same roof may well
just be seeking mutual support, so something more than the
Review Board found is required before it is safe to conclude
that they are living together as husband and wife. If they
B are not shown to share a bed there may be evidence that they
look upon themselves or are generally regarded as living
together in that capacity, and here there were persuasive
reasons for not so regarding them, namely Mrs. Menear's
C physical needs and the obvious financial and other advantages
to Mr. Wearne as her carer if he was to share her roof. In
this context Mr. Drabble referred me to two authorities,
namely Robson v. Secretary of State for Social Services (1982)
D 3 FLR. 232, and Crake v. Supplementary Benefits Commission
{1982} 1 All ER 498. The authorities seem to me to be of
limited assistance, and I am by no means persuaded that I
would have been prepared to interfere with the decision of the
E Review Board on the basis of Mr. Drabble's second submission,
but for the reasons that I have indicated it is unnecessary
for me to express any concluded view on that point. Suffice
F to say on the first ground the application succeeds.

MR. J.M. KARAS (for Mr. R. Drabble): My Lord, on that basis I
would ask for the costs of the application and for legal aid
taxation.

G MISS McALLISTER: My Lord, may I address you briefly on the
question of costs. Your Lordship will recall the point in
which the applicant has now succeeded, if I may call it the
legal argument, was not in fact before the Review Board on
15th March and was not in fact put in its final form until
your Lordship gave leave to amend at the commencement of these
proceedings. There is in addition to that a further point
arising under the regulations themselves, which is that under
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A regulation 86. I will paraphrase it while it is being handed
to you. The essence of it is that if the applicant wishes to
make a further application back to the Review Board for them
to reconsider their decision, she, in this case, must do so
within 13 weeks of that decision, failing which, if one goes
on to regulation 87, it seems the implication is that she has
no further opportunity to go back to the local authority. If
B one looks briefly at regulation 86, my Lord, "Subject to
regulation 87 on an application made by any person affected by
the determination or decision, a determination or decision may
be set aside by the determining authority", which is further
defined as including the Review Board looking at 87(1), "in a
case where it appears just to set aside on the ground
that". Three grounds are set out, the first two of
C which, in my submission, are clearly not relevant, the only
one which would have been relevant being the third ground --
the interests of justice being required. There is then under
regulation 86(2) a timetable for making that application. I
think it is accepted on all sides that the applicant did not
apply back to the authority within that timetable. In fact
the first the authority knew of the application for judicial
D review was when they obtained the notice of motion on 17th
July. My submissions are simply stated. Taking the fact that
the point was not raised, looking then at regulation 86, and
bearing in mind it is a point in which the authority in effect
were seeking some guidance, your Lordship may feel it
appropriate to make no order as to costs in this case.

MR. JUSTICE KENNEDY: The applicant is legally aided and the local
authority is a local authority. In a sense we are dealing
E with two public pockets.

MISS McALLISTER: We are. I accept that.

MR. JUSTICE KENNEDY: What do you want to say about it, Mr. Karas?

MR. KARAS: My Lord, I make three points. First, the usual rule
is that costs do follow the event. The second point is that,
F in my submission, the reference back must be wholly irrelevant
to the costs, certainly of the hearing of this matter, because
the matter could have been dealt with without the legal aid
fund being put to costs by being settled by the local
authority's solicitors or counsel prior to the hearing.
There is an easy method of the respondents saving the
applicant's costs by settling this matter. The third point is
G this. My Lord, you have not expressed a conclusion on the
factual point. In my submission, it was proper to bring
factual points before your Lordship and, if that is the case,
the reference back provisions would be neither here nor there.
I think my learned friend accepts that regulation 86 would
only apply if the only ground properly brought before your
H Lordship was the legal submission.

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MR. JUSTICE KENNEDY: That is not quite right. That is the interests of justice.

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MR. KARAS: My Lord, yes. As I understand my learned friend's submissions, certainly from the way she puts her case, and prior to your Lordship's judgment, they were that she would not seek to rely upon regulation 86 if your Lordship found for us on the facts, because once there had been a determination in our favour on the issue of fact, as I understand it she would say that regulation 86 does not actually assist her in this case, although if we won on the question of law she would rely upon it. We say the question of fact was properly put before your Lordship, that is that the improper approach of the council, factually speaking, was properly before your Lordship. Therefore the regulation 86 point fails in any event. Those are my further submissions.

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MR. JUSTICE KENNEDY: There is no criticism of the local authority. I think this is a difficult area of law, but on the whole I think the proper course is for costs to follow the event in the normal way.

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MR. KARAS: My Lord, does your order include the order for legal aid taxation?

MR. JUSTICE KENNEDY: Yes, there will be legal aid taxation.

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