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

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Crown Office List

THE QUEEN

-v-

THE HOUSING BENEFITS REVIEW BOARD OF PENWITH DISTRICT COUNCIL

Ex parte MARJORIE MENEAR

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(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.)

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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.

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J U D G M E N T

(As approved by Judge.)

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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 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. 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 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 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 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.

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

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

> "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.
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> 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."

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 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 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 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

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 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 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 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 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 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 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

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 --
>
> (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 --
>
> (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.

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 (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."

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 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

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."

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 --
>
> (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."

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

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.

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:

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, except where the context otherwise requires, be construed for the purposes of this Part as if it were a reference to his partner .....".

B

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

> "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."

C

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

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

D

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

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

E

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 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.

G

H

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).

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

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 suprising for a number of reasons.

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.
2. Because housing benefit is heavily subsidised by the Department of Social Security.
3. Because under regulation 9(1) of the Housing Benefit Regulation 1985, which were the preceeding 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.

Mr. Drabble might also have added that, if as Miss

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 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, 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 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 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 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 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

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 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 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) 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 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 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.

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

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 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 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 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 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, 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 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 Lordship was the legal submission.

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

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.

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.

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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