MW-v-Department for Communities (HB) [2020] NICom 82

Decision No: C1/20-21(HB)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

HOUSING BENEFIT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 2 December 2015

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.

2. The decision of the appeal tribunal dated 2 December 2015 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

3. I have set out below my determination on the disposal of the case.

Background

4. In this decision the appellant was the appointee for his late mother ('the claimant') in respect of her claim to the rates element of Housing Benefit (HB).

5. The decision-making process within the Northern Ireland Housing Executive (NIHE) is set out in more detail below. In summary, the claimant was awarded the rates element of HB from 13 December 2004 with, for reasons due to the claimant's income, entitlement commencing from 1 April 2005. By way of a decision of 22 May 2013, as revised on 13 October 2013, NIHE purported to terminate entitlement. The appellant

subsequently appealed against the decision of 22 May 2013 as revised on 13 October 2013.

Proceedings before the appeal tribunal

6. The appeal tribunal hearing took place on 2 December 2015. The appeal hearing proceeded on the 'papers' alone. In correspondence dated 15 October 2015 the appellant had indicated his preference for the appeal to be determined on the 'papers' alone. In addition, the appellant completed and signed Form REG2(i)(HB) on 11 October 2015 giving a similar indication of his preference for the appeal to proceed without an oral hearing.

7. The appeal tribunal disallowed the appeal. The appeal tribunal issued a decision notice in the following form:

> '(The claimant) is not entitled to Housing Benefit from and including 4 March 2013 as she had from 4 March 2013 become a permanent resident in a Nursing Home'.

8. On 30 March 2016 the appellant was provided with a copy of the statement of reasons for the appeal tribunal's decision.

9. On 26 April 2016 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS).

10. On 28 April 2016 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

11. On 19 May 2016 a further application for leave to appeal was received in the Office of the Social Security Commissioners.

12. On 16 June 2016 written observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 11 July 2016, Mr Woods, for DMS, opposed the application for leave to appeal. The written observations were sent to the appellant on 14 July 2016. Written observations in reply were received from the appellant on 20 September 2016 and were shared with Mr Woods on 21 September 2016. A further submission was received from Mr Woods on 29 September 2016 which was shared with the appellant on 4 October 2016. A reply was received from the appellant on 10 October 2016.

13. Correspondence was then exchanged between the Legal Officer to the Commissioners and the appellant concerning his status as an appellant. On 21 March 2017 Mr Woods confirmed that the Department considered that the appellant was entitled to continue with the appeal.

14. There then followed a significant period of inactivity on the file within the Office of the Social Security Commissioners due to administrative oversight. On 16 June 2020 the Business Operations Manager of the Tribunals Hearing Centre wrote to the appellant and expressed his apologies for the 'unacceptable' delay in the processing of the application.

15. The file became part of my workload on 17 May 2020. On 24 June 2020 I indicated that I was minded to hold an oral hearing of the application and directed that, due to the restrictions imposed as a result of the Covi-19 pandemic, enquiries should be made as the possibility of holding an oral hearing on a 'remote' basis. On 7 July 2020, and on the basis that a remote hearing was deemed to be possible, I directed an oral hearing.

15. The remote hearing took place on 11 August 2020 using 'Sightlink' technology. The appellant and Mr Woods participated. On 12 August 2020 email correspondence was received from the appellant.

What I have taken into account

16. In arriving at this decision, I have taken into account all of the case papers which include all of the documentation relating to the application, and all supporting statements and materials. For reassurance, I have noted the appellant's email of 18 June 2020 to which he appended earlier emails of 27 November 2016, 10 October 2016 and 20 September 2016. As noted above, I have also taken into account his post-hearing, email of 12 August 2020.

Errors of law

17. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

18. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

"(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …

Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

The legislative background

19. Section 129(1)(a) of the Social Security (Contributions and Benefits (Northern Ireland) Act 1992, provides:

'129(1) A person is entitled to housing benefit if—

(a) he is liable to make payments in respect of a dwelling in Northern Ireland which he occupies as his home;'

20. Regulation 7 of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006 ('the 2006 Regulations') is headed 'Circumstances in which a person is or is not to be treated as occupying a dwelling as his home'. Paragraphs (11), (12), (16) and (17) provide:

'(11) This paragraph shall apply to a person who enters residential accommodation—

(a) for the purpose of ascertaining whether the accommodation suits his needs;

(b) with the intention of returning to the dwelling which is normally occupied by him as his home should, in the event, the residential accommodation prove not to suit his needs; and

(c) while the part of the dwelling which is normally occupied by him as his home is not let, or as the case may be, sublet.

(12) A person to whom paragraph (11) applies shall be treated as if he is occupying the dwelling he normally occupies as his home for a period not exceeding, subject to an overall limit of 52 weeks on the absence from home, 13 weeks beginning from the first day he enters a residential accommodation.

...

(16) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home ("absence"), if—

(a) he intends to return to occupy the dwelling as his home;

(b) while the part of the dwelling which is normally occupied by him has not been let or, as the case may be, sublet;

(c) he is—

(ii) resident in a hospital or similar institution as a patient;

(ix) a person who is receiving care provided in residential accommodation other than a person to whom paragraph (11) applies;

(d) the period of his absence is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period.

(17) A person to whom paragraph (16) applies shall be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks beginning from the first day of that absence.'

What did the appeal tribunal decide?

21. The pertinent paragraphs from the statement of reasons for the appeal tribunal's decision are as follows:

> 'The evidence is overwhelming that a decision was made by all parties dealing with (the claimant) following her discharge from hospital on 18 February 2013 that she would in all probability require a permanent nursing home placement. I am satisfied that the letter from MMcC of 26 August 2014 is a reliable indicator on the practices and the discussions that took place when making a decision to place (the claimant) in a nursing home on a permanent basis. Notwithstanding (the appellant's) provision of copy of a note from Ms PS indicating that it was stated eventually a care manager would be appointed to maintain contact with you and mum to review care placement on a regular basis I believe given the contents of Mrs McC's letter it was already decided that (the claimant's) placement was to be permanent. The letter from Ms S was in my opinion an indication that a regular review of the placement in general would occur as opposed to a regular review to see if (the claimant) could return home. (The appellant's) assertion that he was not at such a review is rejected. I see no reason why Ms McC would have to lie about such an issue and further believe that a step to place (the claimant) in permanent care would not have been made without (the appellant) being consulted. I also cannot overlook the fact that (the appellant) placed the property at … on the market on 27 February 2013 only 9 days after his mother was in a nursing home during a 2 week period when no charges were payable. If he had believed that there was a realistic chance of his mother returning home why would he have acted so quickly to put the house on the market I also cannot overlook the record of the telephone call made by the NIHE at Tab 53 to DG of the … Health Social Care Trust in which it was indicated at a review meeting on 16 March 2013 that (the appellant) was happy with the care that he had no concerns regarding his

mother's permanent placement and significantly an annual review was agreed. All of this points to the permanency of the arrangements.

Whilst utilities were maintained by telephone, electricity bills, telephone bills etc I cannot overlook the fact that (the appellant) had power of attorney over his mother's affairs and really he had the power to either pay or not pay and cancelled utilities. Given the fact that the house was put on the market on 27 February 2013 it was a logical decision to make to continue payment of utilities as a house without utilities such as electricity would in all likelihood have had led to difficulty in viewing arrangements in connection with the sale of the property. I am further not convinced that there is evidence of his mother's own stated intention to return to the property. He has not provided any evidence as it were from her own mouth by way perhaps of a written document. In any event I believe that Commissioner's Case number CSHB/405/05 is relevant in that it is my belief given the discharge report from the hospital that 24 hour care was required for (the claimant) that at most (the claimant) would have had a desire to return home as opposed to an intention to do so. The evidence of the decision being made to make stay in the nursery home permanent as provided by the Trust Officers the fact that (the appellant) placed the property on the market before the 2 week "trial period" was up do not indicate that there was ever an intention by (the claimant) to return home to … . There is no convincing evidence that (the claimant) herself has ever indicated an intention or wish to return home and for that reason Hammersmith and Fulham London Borough Council v Clarke (2001) 33 LR77CA can be distinguished. I believe the decision made by the NIHE to stop Housing Benefit from 4 March 2013 was correct given all the circumstances of the case and there is no evidence that there ever was an intention for (the claimant) to return to … should the residential accommodation not suit her needs as per Regulation 7(1l)b of the Housing Benefit Regulations Northern Ireland 2006.'

22. I accept, of course, that in his written and oral submissions, the appellant has identified other parts of the statement of reasons which he considers to be problematic.

A primary ground of appeal

23. To the application for leave to appeal, the appellant attached correspondence dated 17 May 2016. In this correspondence, which I shall call 'the application', the appellant has set out what he submits are 'points in dispute' and has cross-referenced these to a written submission dated 15 October 2015 and requests that I take this into account. The submission dated 15 October 2015 was prepared for the appeal tribunal hearing. I shall call this document 'the submission to the appeal tribunal'.

24. On 16 June 2020 the Business Operations Manager in the Tribunals Hearing Centre wrote to the appellant in connection with the unacceptable delay in the processing of the application through the administrative system. Email correspondence was received in response from the appellant on 18 June 2020. In this response, the appellant was concerned to ensure that email correspondence which he had forwarded on 20 September 2016, 10 October 2016 and 27 November 2016 had been received and would be considered by me as part of the decision-making process. The appellant also submitted further copies of his application for leave to appeal and the submission to the appeal tribunal.

25. The appellant, in the various written submissions which he has provided, has set out numerous grounds of appeal. One of these grounds is concerned with whether the appeal tribunal applied the law in a correct manner. There are two aspects to this ground. The first is whether the appeal tribunal applied the correct legislative provisions. The second is whether the appeal tribunal's interpretation and application of relevant caselaw was correct.

26. In his application for leave to appeal, the appellant makes reference to a decision of a Social Security Commissioner cited by NIHE. The first of these is *CSHB/405/2005*. The appellant submits that this case should be distinguished 'on its own terms of reference … that 'it is a question of fact and degree whether or not it has been objectively established that there is no realistic possibility of a return home''. Cross-referencing this submission to paragraph 10 of the submission to the appeal tribunal, the appellant asserts that, as of 4 March 2013, the date on which his later mother's residency had been deemed to be permanent, was 'far too early to apply the objective test set out in *CHSHB/405/2005*.' He noted that his late mother had been in a similar situation a few years previously and had made a sufficient recovery to be able to return home. *CHSB/405/2005* could also be distinguished on its own facts.

27. The appellant asserted that a crucial factor in determining entitlement to continuing receipt of housing benefit is the construction of the word phrase 'intention to return home' in Regulation 7(11) and (12) of the 2006 Regulations. The appellant made reference to paragraph 29 of the decision in *Hammersmith and Fulham LBC v Clarke*, as follows:

> '… intention is undoubtedly of great importance since it may be the only way of distinguishing between a dwelling which has in effect been abandoned by the person as his only or principal home and a dwelling which has not'

28. Further, the appellant submitted that in paragraph 33 of the decision:

> '… although the person concerned had a permanent placement in care home, the fact that her furniture remained in her home indicated her intention to return there. Thus, the fact that my mother was deemed a permanent care home resident did not in itself rule out her intention to return home; my mother clearly demonstrated her intention to return home … and she therefore should have been in receipt of housing benefit through to 8.11.13.'

29. The appellant cross-referenced paragraphs 11 and 13 of the submission to the appeal tribunal.

30. In the email of 20 September 2016 the appellant made the following submissions:

> 'RE: 'Department's Response', it is submitted that paragraphs (11) and (12) of Regulation 7 of the HB Regs do indeed apply in view of paragraph (11)(b). My Submissions (again attached for ease of reference*) make it quite clear that (the claimant's) intention was to return to her home when practicable. Therefore paragraph (12) is also applicable.
>
> Surely if paragraphs (16) and (17) 'may have been [applicable]', then (11) and (12) must also be applicable? Furthermore, Mr Woods also states that '(the claimant's) intention is relevant to paragraph (16)'. In other words it is conceded that (the claimant) did have an intention to return home.
>
> Both the construction of 'permanent'' and distinction between 'desire' and 'intention' to return home are

addressed in paragraphs 6, 11 and 13 of my Submissions, in which I refer to the highest authority cited by the Northern Ireland Housing Executive, namely Hammersmith and Fulham LBC v Clarke [2001] 33 LR 77, CA.

I submit that an error of law is a mistaken or erroneous application of the law: clearly (the claimant) demonstrated her intention to return home (Submissions, paragraphs 5,6,11 and 13)) and therefore paragraphs (11) and (12) of Regulation 7 of of the HB Regs and Hammersmith and Fulham LBC v Clarke [2001] 33 LR 77, CA apply. I would also submit that the sentence Mr Woods quotes from paragraph 33 of Hammersmith and Fulham v Clarke ('That is not only relevant to occupation generally but it may also assist on the issue of intention') has been misconstrued. Surely this sentence serves to emphasise Lord Justice Keene's finding that the presence of furniture belonging to the person concerned in her home confirmed her intention to return there as well as the fact that the dwelling was her home?

It is therefore respectfully submitted that the Tribunal has erred in law.'

31. In the email of 10 October 2016 the appellant made the following submissions:

'Regarding the applicability of paragraphs (11), (12), (16) and (17) of Regulation 7 of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006,

(1) We were given to understand at the outset (handwritten note from Mrs PS, 18.2.13 (Item 1 on the chronological list of documents) that (the claimant's) care placement would be reviewed on a regular basis. In other words, (the claimant) was entering residential care on a trial basis to see if it suited her needs. After all, (the claimant) had only just been discharged from hospital following a major operation; whether she would require further hospitalisation/medical attention (which Holywood Care would not have been able to provide) could not have been known at this time.

(2) Dr J McP (Chief Executive, NIHE) himself confirmed in a letter to Lady Sylvia Hermon, 2.1.14 (Item 13 on the chronological list of documents) that '(The appellant) is correct in his assertion that under Housing Benefit Regulations benefit can be paid for a period not exceeding 52 weeks if it is the claimant's intention to return home'. Regulation 12 of the Housing Benefit Regulations 2006 specifies 'subject to an overall limit of 52 weeks on the absence from home'. The 13 week period (incidentally raised for the first time in this case by Mr Woods in his additional response), is, surely, a cut-off point at which the NIHE would assess whether the person receiving care should continue to be in receipt of housing benefit; the overall limit of 52 weeks merely confirms that housing benefit is not necessarily automatically terminated after 13 weeks.

Therefore, paragraphs (11) and (12) of Regulation 7 of the Housing Benefit Regulations 2006 do apply.

(3) The four conditions for paragraphs (16) and (17) of the Housing Benefit Regulations 2006 to apply are satisfied:

(1) As contended in my submissions and supported by Hammersmith and Fulham LBC v Clarke [2001] 33 LR77, CA, (the claimant) intended to return to her home.

(2) (The claimant)'s home had not been let or sublet as explained at (4) in my previous email (20.9.16).

(3) (The claimant) was receiving care provided in residential accommodation. Mr Woods writes 'other than on a trial basis'; this is not stated at paragraph (17): paragraph (17)(c)(ii) states 'resident in a hospital or similar institution as a patient'. With respect, these paragraphs would be nonsensical if a patient were a resident receiving care other than on a trial basis, in other words if the residency status was permanent and there was no intention to return home.

(4) As contended in my submissions at paragraphs 3 and 4, the option of returning home to … was kept open for (the claimant) unless the property was sold in the meantime, in which case there would be the option of acquiring a suitable alternative. Sadly, by the time the property was sold on 8.11.13, the likelihood of returning

home had receded and it had become more likely that her stay would be longer term. In this circumstance it was therefore unlikely that (the claimant's) absence would exceed 52 weeks.

The issue regarding the Pro Forma document (Item 2 on chronological list of documents) has already been addressed in my submissions at paragraph 9 and in particular at footnote 6:

> '6 The fact that the box ticked for the next assessment was 'annual' is purely arbitrary: had (the claimant)'s improvement over the next few months been acknowledged and rehabilitation provided, e.g. physiotherapy, the opportunity to sit in a suitably adapted chair etc. there would undoubtedly have been a further assessment. Instead, (the claimant) was simply treated as a permanent resident and confined to bed, save for hairdressing and hospital appointments'.

Irrespective of notes made by care staff and views expressed by the NIHE, (the claimant)'s intention, as already indicated in my submissions (at paragraphs 5, 6, 11 and 13 and footnote 5), was to return home and not to become a permanent resident at … Care Home. This is in accordance with the decision of the highest authority cited by the NIHE, namely Hammersmith and Fulham LBC v Clarke [2001] 33 LR 77, CA. In summary, (1) the overriding factor for establishing intention to return home is demonstrating one's intention to return home (retaining personal possessions and furniture at the home address and maintaining utility bill payments) and (2) even if a patient/resident is deemed 'permanent', this does not necessarily mean that he or she is in fact a permanent resident.

I therefore continue to submit that the Tribunal has erred in law as Regulation7 (11) and (12) and Hammersmith and Fulham LBC v Clarke [2001] 33 LR 77, CA clearly do apply. I would also respectfully draw attention to paragraph 10 and footnote 7 (re CSHB/405/2005) and paragraph 15 (re Benefit Decision Notices, Item 17 on the chronological list of documents) in my submissions as these areas were not addressed by Tribunal.

> Mr Woods refers to 'all of the available evidence'. In the interests of justice and a person's right to a fair trial (Article 6 ECHR), I would respectfully request that the Department ensures it has received all evidence and documents provided for Tribunal, as well as any subsequent correspondence relating to the paper 'hearing'.'

32. In the email of 27 November 2016 the appellant made the following submissions:

> 'Further to my earlier comments (20.9.16 and 10.10.16 emails to Tribunals Unit) there are still concerns regarding the fairness and openness of decision-making processes generally (please see Submissions for Tribunal), and especially in relation to the appeal on behalf of (the claimant) (Deceased):
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> …
>
> (2) The overall tone of the Reasons for the Decision is biased rather than balanced. For instance, the terms ' permanence', 'permanency', 'permanently' and 'permanent', recur to such an extent (no less than 24 occurrences) as to detract from the relevance of the test for receipt of Housing Benefit, namely 'intention' to return home (Regulation 7(11) and (12) of the Housing Benefit (Persons who have attained the qualifying age for State Pension Credit) Regulations (NI) 2006 ('HB Regs (NI) 2006')). The term 'permanent' was only introduced when I queried the suspension of Housing Benefit in May 2013. At this point the NIHE still focused on 'intention', 'realistic intention' (letters from NIHE dated 22.5.13 and 3.7.13 (Items 4 and 5 of the chronological list of documents supplied for Tribunal) before relying on the status of 'permanent resident'.
>
> (3) The phrase 'I see no reason why Ms McC (SEHSCT) would have to lie about such an issue ' (Reasons for Decision 3) suggests that some accusation had been made. This was not the case, though I was never consulted on the issue of permanent placement. Moreover, the NIHE was inconsistent in its handling of this case and in the reasons given (please see Submissions, paragraph 14 and NIHE correspondence

(Items 4, 5, 8, 9, 11, 12, 13 and 14 of the chronological list of documents supplied for Tribunal) for suspending payment of Housing Benefit to (the claimant), as if to find any means of denying the claimant her entitlement under Regulation 7(11) and (12) of the HB Regs (NI) 2006; yet the NIHE issued benefit decision notices stating that housing benefit was payable to (the claimant) for the years commencing 1.4.13 and 1.4.14 (Item 17), the former being the year in question. As submitted (Submissions, paragraph 16), (the claimant) acted consistently and in good faith throughout in exercising her right to keep her options open regarding where she lived.

(4) The 'evidence is overwhelming that a decision was made by all parties.....' : a sweeping statement that does not allow for the fact that (the claimant) had just undergone a major operation from which she could have recovered, as she had done from a similar operation only a few years earlier, had she received appropriate care. However, as previously submitted (please see Submissions, paragraph 10), no attempt was made to enable (the claimant) regain any form of mobility. Again, the focus on permanence failed to take into account (the claimant's) intention to return home, as well as the findings in Hammersmith and Fulham LBC v Clarke [2001] 33 LR,CA, the highest authority cited by the NIHE. Mr Woods, for the Department, submits that 'the fact that (the claimant's) furniture in the property is only one of a number of factors that need to be considered in relation to her intention' (11.7.16). This comment not only underplays (the claimant's) intention to return home (as stated in my Submissions at paragraphs 3, 11 and 13), it does not acknowledge the most important aspect of the findings in Hammersmith and Fulham LBC v Clarke [2001] 33 LR, CA, namely that demonstrating one's intention to return home was the overriding factor, irrespective of whether the person concerned has been deemed a 'permanent resident'.

(5) Please refer to the final paragraph of my 10.10.16 email: 'Mr Woods refers to 'all of the available evidence' (29.9.16). In the interests of justice and a person's right to a fair trial (Article 6 ECHR), I would respectfully request that the Department ensures it has received all evidence and documents provided for Tribunal, as well as any

subsequent correspondence relating to the paper 'hearing'.'

As this case involves a public authority and is therefore potentially a matter of public interest, it is requested that consideration of all evidence is objective insofar as is practicable.'

33. In written observations dated 11 July 2016, Mr Woods, for DMS, made the following response to this ground of appeal:

'(The appellant) has submitted that paragraphs (11) and (12) of Regulation 7 of the HB Regs should continue to apply to his mother until 8 November 2013.

I submit that these paragraphs do not apply to (the claimant), they apply to claimants who enter residential accommodation on a trial basis to try it out to see if it suits their needs. At no point has (the claimant), her son (the appellant) or anyone connected with the home stated that the purpose of her stay was to ascertain if the accommodation would suit her needs. The Tribunal have concluded this in the last sentence of the Reasons for Decision – *"...and there is no evidence that there ever was an intention for (the claimant) to return to (her home) should the residential accommodation not suit her needs...".*

Whilst I submit that paragraphs (11) and (12) are not applicable in this case, paragraphs (16) and (17) may have been and are the basis for the decision of the Department which the Tribunal upheld.

(The appellant) has argued that it was always (the claimant's) intention to return to (her home) and this was the Tribunal's main focus in their Reasons for Decision. So although I submit that paragraphs (11) and (12) are not applicable, (the claimant's) intention is relevant to paragraph (16).

The Tribunal in line with GB Commissioner Parker's decision CSHB/405/05 determined that, on the evidence available to it, (the claimant) had a desire to return to her home as opposed to an intention to do so.

At paragraph 24 of CSHB/405/05 GB Commissioner Parker stated with regard to the significance of *"permanent":*

> *For the person entering residential accommodation (which includes nursing and care homes) there are basically three scenarios: either he is going in to try it out with the fallback that he will return should the experiment not work; or he enters with the definite intention of returning home when, for example, a period of respite care has ended or his condition has sufficiently improved or stabilised; or he enters the accommodation on a permanent basis which is necessarily inconsistent with either carrying out a trial or harbouring an intention to return to his former home.*

Furthermore at paragraphs 29 to 31 she stated:

> *29. Mr Craig submits that when the nursing home administrator referred to 'permanent' she possibly meant no more than 'indefinite', which latter concept was compatible with an intention to return at some future date although no such date was yet fixed. While that may be so, the primary meaning of 'permanent' is surely, enduring and without change; I would have expected the administrator to say something like 'uncertain basis' or 'temporary basis' in the circumstances outlined by Mr Craig. In any event, the interpretation given to 'permanent' by the tribunal in no way can be categorised as irrational and is consistent with any intention by the tenant to occupy his former home again.*
>
> *A distinction between 'desire' and 'intention'*
>
> *30. Mr Craig argues that there is no difference between 'desire' and 'intention'. I must disagree. A 'desire' to do something is quite distinct from an 'intention' to do so. An intention involves the aim or purpose of*

carrying out what is intended, whereas a desire may be no more than a wish or hope, however remote, to do something; so far as "intends to return occupy the dwelling as his home" in regulation 5 is concerned, in my judgment this must encompass, moreover, not simply a subjective purpose to do so but also that, objectively, such a return is a realistic possibility.

31. The whole tenor of regulation 5 supports the laudable policy that one who leaves his home, for example, on holiday, or as a hospital or care home patient, remains entitled to HB while the absence can be categorised as sufficiently temporary having regard to the particular situation. But if the matter solely depended upon a subjective wish, then however unrealistic is the occupier's desire to return to his former home, and even in a situation where circumstances beyond his control now prevent such return, he can expect to be paid HB (which may be, as in the present case, a not inconsiderable sum of public money) unnecessarily for up to 52 weeks. This cannot be right. As Mr Commissioner Turnball points out at paragraph 12 of CH/1854/2004 with reference to paragraph (7B) and (7C):

"...That [i.e. continuing HB for up to 13 weeks after a person has become a permanent resident of a home] would be inconsistent with the tenor of, for example, reg. 5(5)(d), which provides that, in the case where a person moves from one dwelling to another, he can be treated as occupying both dwellings, but for a period not exceeding 4 weeks and only if he could not reasonably have avoided liability in respect of two dwellings."

The Tribunal found that it was its *"belief given the discharge report from the hospital that 24 hour care was required for (the claimant) that at most (the claimant)*

would have had a desire to return home as opposed to an intention to do so."

As GB Commissioner Parker stated at paragraph 26 of the above decision an *"Error of law only arises in the assessment of evidence if the tribunal adopted an irrational or improper approach."* Furthermore paragraph 30 of R(I)2/06 sets out examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. This decision has been followed in numerous NI Commissioner's decision including MBD v Department of Social Development (IS) [2016] NICom 1 [also known as C2/15-16(IS).

…

I submit that the Tribunal in this case have come to a logical conclusion given the circumstances of the case and have fully complied with the above decision in relation to material matters and as such have not erred in law. The Tribunal considered all of the available evidence and weighted it accordingly and found that there was no evidence that (the claimant's) intention was to return to the property.

…

With regards to (the appellant)'s submission that paragraph 33 of Hammersmith and Fulham LBC v Clarke [2001] 33 LR 77, CA confirms that although the person concerned had a permanent placement in care home, the fact that her furniture remained in her home indicated her intention to return there. Lord Justice Keene concluded that same paragraph by stating with regards to the furniture remaining in the property *"That is not only relevant to occupation generally but it may also assist on the issue of intention."* I submit that the fact that (the claimant's) furniture remained in the property is only one of a number of factors that need to be considered in relation to her intention and does not in itself mean that her intention was to return to the property.

With regards to the meeting that the Tribunal stated occurred on 16 March 2013 that (the appellant) disputes, I submit that the meeting was actually held on 16 April 2013 and that this was just a *"slip of the pen"* error.

Conclusion

To conclude, and for the reasons stated above, I do not support (the appellant)'s application for leave to appeal on behalf of (the claimant).'

The remote oral hearing

34. The remote oral hearing took place on 11 August 2020. Both the appellant and Mr Wood elaborated on the written submissions which they had made. Following the remote oral hearing, further email correspondence was received from the appellant in which he made reference to an error in a date in his email correspondence of 27 November 2016 and, once again, expressed his expectation that the appeal tribunal's decision notice, the statement of reasons for the appeal tribunal's decision and his email of 27 November 2016 were all available to me. As the narrative above demonstrates that is indeed the case.

Analysis

35. The appellant's concentration on identification of the correct legislative provisions is reflective of parallel submissions which he made in his interactions with the NIHE and in the proceedings before the appeal tribunal.

36. A primary duty of an appeal tribunal is to consider the decision under appeal to it and to determine whether that decision is correct. The decision-making process giving rise to the appeal in the instant case was as follows. At Tab 16 of the appeal submission which was before the appeal tribunal is a copy of a decision of the NIHE dated 22 May 2013. The narrative of that decision includes the following:

> 'On the 22.5.13 the decision of the 27.3.12 which award [*sic*] HB rates to the claimant from the 1.4.12 was superseded with effect from 18.2.13 (effective date 24.2.13) and any subsequent decisions were revised. Therefore, HB was end dated from 24.2.14 at (claimant's former address).
>
> The outcome decision – (the claimant) is not entitled to HB from the 24.2.13 as she is not residing in (claimant's

former address) as she is permanently resident in … Care Home.'

37. The decision contains a section which is headed 'Regulations'. In this section the decision maker has inserted the following:

> 'Section 129 of the Social Security Contributions and Benefits (NI) Act 1992
> Regulations 7(1), 7 (11) and 7(12) of the HB Regulations (NI) 2006
> HB DMA regulations (NI) 2001 Regulations 4, 6, 7 and 8.'

38. As noted above, section 129 of the 1992 Act makes primary legislative provision for entitlement to HB. It is now accepted by everyone that the Housing Benefit Regulations (Northern Ireland) 2006 do not apply in the instant case but that the Regulations which do apply are the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006. What is striking, though, is that regulations 7(1), 7(11) and 7(12) of the Housing Benefit Regulations (Northern Ireland) 2006, which the decision maker noted were applied in the decision of 22 May 2013 are in identical terms to regulations 7(1), 7(11) and 7(12) of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006.

39. For the sake of completeness, regulations 4, 6, 7, and 8 of the Housing Benefit (Decision and Appeals) Regulations (Northern Ireland) 2001, also noted by the decision maker, are concerned with the powers of a decision-maker to alter a previous decision.

40. I note here that in paragraph 18 of section 4 of the appeal submission, the following is set out:

> 'On the 22.5.13 the NIHE issued a letter to (the appellant) advising that his mother's residency status at … Care Home became permanent on the 18.2.13 as the NIHE had ascertained that it was not (the claimant's) intention to return home, due to ill health. Also Regulation 7(11) and 7(12) of the HB Regulations (NI) 2006 are only applicable where an absence from home is 'classified as temporary.
>
> Note; the regulations that apply to (the claimant) are the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (NI) 2006 as (the claimant) was over sixty years old.'

41. A copy of the correspondence of 22 May 2013 was attached to the appeal submission as Tab 24.

42. The next decision was a reconsideration decision dated 3 July 2013. There is a copy of what is headed a 'Reconsideration Sheet' at Tab no 26 of the appeal submission. Part 1 is headed 'Details of the Disputed Decision'. It contains the following:

> 'Claim was terminated from 24 February 2012. Letter received from son on 14 June 2013 disputing decision to terminate entitlement from 24 February 2013. Son believes that HBR (SPC) (NI) 2006 Reg 11 and 12 applies to claimant …)

43. There are two errors in this aspect of the narrative. The reference to 24 February 2012 should, of course, be 24 February 2013. The reference to 'Reg 11 and 12' should be to regulation 7(11) and (12) of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations (Northern Ireland) 2006.

44. It is clear, therefore, that the decision which was under reconsideration was the decision of 22 May 2013 which had the effect of 'terminating the claim from 24 February 2013.' Part 2 of the reconsideration decision of 3 July 2013 notes that while the decision of 24 February 2013 was reconsidered it was not changed.

45. As was noted above, an appeal form was received in NIHE on 29 July 2013. At that stage, the appeal had to be against the decision of 24 February 2013 as reconsidered but not changed on 3 July 2013.

46. The next and final decision was a further reconsideration decision on 13 October 2013. Once again there is a copy of what is headed 'Reconsideration Sheet' at Tab No 36 of the appeal submission. Part 3 notes that a decision has been revised and includes the following narrative:

> 'To revise decision of 22/05/13 to end HB 25/02/13; revised end date 10/03/13 – (the claimant) was temporarily absent 18/02/13-4/03/13.'

47. Part 4 is headed 'Legislation (To be completed only where decision is revised)'. In this Part the following is recorded:

> 'Regulation 7(11) & DMA Reg 4'

48. On 15 October 2013 correspondence was sent to the appellant. A copy of the correspondence is at Tab No 38 of the appeal submission. The correspondence contains the following:

> 'You made an appeal against a Housing Benefit decision issued to you on 22 May 2013.
>
> We have looked again at the facts and evidence we used to make our decision and considered the points you have raised. As a result we have changed the decision.
>
> South Eastern Health and Social Care Trust have confirmed (the claimant) was discharged from hospital to … Nursing Home on an intermediate placement on 18 February 2013; she became a permanent resident on 4 March 2013.
> We have therefore revised our decision of 22 May 2013 and decided (the claimant) was temporarily absent up to 4 March 2013 therefore my revised decision is to pay Housing Benefit 25 February 2013-10 March 2013.
>
> This decision is made in accordance with Regulation 7(11) of the Housing Benefit (Persons who have attained the qualifying age for State Pension Credit) (NI) 2006 (copy Regulation is enclosed for your information).'

49. The revision decision of 13 October 2013 had the effect of lapsing the first appeal against the decision of 22 May 2013. The revision decision gave a new right of appeal this time against the decision of 22 May 2013 as revised on 13 October 2013. The appellant exercised that right of appeal which was received on 13 November 2013.

50. There was a further reconsideration decision on 18 December 2013. Once again, there is a copy of a 'Reconsideration Sheet' at Tab No 54 of the appeal submission. In the section headed 'Referral to the Decision Maker' the decision maker is asked 'Was the decision of 13 October … correct?' In Part 2 a box marked 'reconsidered but not changed'. Correspondence (attached to the appeal submission as Tab No 55) was forwarded to the appellant on 18 December 2013 explaining the effect of the reconsideration decision of 18 December 2013.

51. Accordingly, the decision under appeal to the appeal tribunal was the decision of 22 May 2013 as revised on 13 October 2013.

52. I turn to the appeal submission prepared for the appeal tribunal hearing. Section 5 is headed 'The Decision Maker's Submission'. The opening paragraphs of this section are as follows:

> The Decision Maker has decided that (the claimant) was not occupying … as her home from the 4.3.13 (effective date 10.3.13). (The claimant) via her son (the appellant) the owner/landlord, appellant (had power of attorney) has disputed this decision. The disputed decision was made in accordance with the following Acts and Regulations.
>
> Section 129 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 states that a person is entitled to Housing Benefit if she is liable to make payments in respect of a dwelling in Northern Ireland which she occupies as her home. (The claimant) from the 4.3.13 (effective date 10.3.13) no longer occupied … as she was a permanent resident in the Nursing Home from the 4.3.13. Therefore, (the claimant) did not have a liability to make payments with regard to rates for … as she was not residing in her home. Her permanent address was the Nursing Home.
> Prior to (the claimant) entering the Nursing Home on a permanent basis she had a right to reside in … however. She was not the owner of the property, the property was owned by (the appellant) her son, owner and Landlord. (The claimant's) late husband assigned the property over to his son on the 14.09.01 (prior to his death) and the assignment contained a clause giving (the claimant) a right to reside in the properly for her lifetime or until such times as she no longer wished to live in the premises. When (the claimant) became a permanent resident in the Nursing Home on the 4.3.13 (effective date 10.3.13) the liability for rates and bills associated with the dwelling automatically reverted to the owner i.e. (the appellant) as this property was no longer (the claimant's) main and principle home and she was no longer residing in it as her home.
>
> Regulation 7 of the Housing Benefit (persons who have attained the qualifying age for state pension credit) Regulations (NI) 2006 sets out the circumstances in which a person is or is not to be treated as occupying a dwelling as their home.

(The claimant) satisfied the conditions of occupation in 2004 (when she applied for HB rates only) under Regulation 7 of the former legislative provision known as the Housing Benefit (State Pension Credit) Regulations (NI) 2003.
Note: (The claimant) did not have a liability for rent, just rates.

When (the claimant) moved into Holywood Private Nursing Home (the Nursing Home) on the 18.2.13 she continued to satisfy the conditions of occupation for … under what is commonly known as the 'temporary' absence rules'.

Paragraph (17) of Regulation 7 of the HB (Persons who have attained the qualifying age for state pension credit) Regulations (NI) 2006 allows a person to be treated as occupying a dwelling they normally occupy during a period of temporary absence not exceeding 52 weeks, but only where paragraph (16) applies.

Paragraph (16) of Regulation 7 of the HB (Persons who have attained the qualifying age for state pension credit) Regulations (NIJ 2006 contains three qualifying conditions all of which must be satisfied if temporary absence is to apply

- The first condition which is in paragraph (16)

(a) states that the person must intend to return to the dwelling. (The claimant satisfied this condition on the 18.2.13 when she entered the nursing home (as she did not hold a permanent place within the Nursing Home).

- The second condition in paragraph (16)

(b) confirms that the dwelling (which they are absent from) must not be sublet: this was also satisfied.

- The third condition is that the reasons for the absence must be one of those circumstances specified in paragraph 16

(c) In the case of (the claimant), she fell within paragraph 16 (c) (ix) as she was receiving medically approved care.

(The claimant) was awarded HB based on temporary absence in accordance with Regulation 7 (16) and (17) as she was admitted to the Nursing Home on the 18.2.13 as she was placed in the Nursing Home on a temporary basis for respite care with a view to permanency. Therefore, from the 18.2.13 to the 4.3.13 (the claimant) was classified as being a temporary resident in the Nursing Home. When someone is temporary absent from their home, they may remain on a temporary basis in the Nursing Home and their rates on their permanent home may be paid for a period up to a maximum of 52 weeks. However, once an individual becomes a permanent resident in a Nursing Home they are no longer classified as being temporary absence.

(The appellant) constantly refers to Regulation 7(11) and 7(12) of the regulations. As (the claimant) entered the Nursing Home on a 2 weeks temporary basis and then became a permanent resident from the 4.3.13; from the 4.3.13 Regulation 7(11) and 7(12) do not apply to this case as (the claimant) was no longer a temporary resident of the Nursing Home on a trial basis, she was a permanent resident.'

53. This is first suggestion by NIHE that the legislative provisions which apply to the claimant's case are regulations 7(16) and (17) of the Housing Benefit (Persons who have attained the qualifying age for State Pension Credit) (Northern Ireland) 2006. That submission runs counter to the explanations given for various of the decisions which were taken in connection with the claimant's entitlement to the rates element of HB. As noted above, NIHE has been consistent in stating that the applicable regulation is regulation 7(11).

54. It is arguable that the writer of the appeal submission is asserting that there were errors in the decision-making process and is asking the appeal tribunal to rectify those errors. It is important for the appellant to note that an appeal tribunal has the power to remedy defects or mistakes in the decision-making process giving rise to an appeal which is before it – see the discussion in paragraphs 72 to 80 and 192 of the Tribunal of Commissioners in Great Britain in *R(IB) 2/04*. Any argument that there were errors in the decision-making process and that the appeal tribunal

should remedy those errors is not overtly apparent from the terms of the appeal submission.

55. At this stage, and for the sake of completeness, the appellant should note that the power to remedy defects or mistakes in the decision-making process, either at Departmental of appeal tribunal level, giving rise to a further application or appeal which is before him, extends to a Social Security Commissioner.

56. Returning to the analysis, a submission to an appeal tribunal is no more than that. It is for the appeal tribunal to consider and accept/reject any submissions which is made to it while, of course, providing adequate reasons for its conclusions. Attention turns, therefore, to what the appeal tribunal decided. I have already set out the relevant paragraphs from the appeal tribunal's statement of reasons. The appeal tribunal has concentrated on the issue of 'permanency', assessing the evidence in connection with whether the claimant's placement in the nursing home had become permanent and applying caselaw relevant to whether there was an intention on the part of the claimant to return to the dwelling formerly occupied as her home.

57. The only reference by the appeal tribunal to the relevance of any legislative provision is in the final sentence of its statement of reasons when it said:

> '… there is no evidence that there ever was an intention for (the claimant) to return to … … should the residential accommodation not suit her needs as per Regulation 7(1l)b of the Housing Benefit Regulations Northern Ireland 2006.'

58. There is an obvious error here in that the Housing Benefit Regulations (Northern Ireland) 2006 do not apply at all to the claimant's case. More importantly, however, if the appeal tribunal concluded that regulation 7(11) of the Housing Benefit (Persons who have attained the qualifying age for State Pension Credit) (Northern Ireland) 2006 (the correct Regulations) did not apply then it should have concluded that the decision-making in the NIHE was wrong, given that, and as was noted in detail above, the stated basis for various of the decisions which NIHE made was regulation 7(11).

59. An appeal tribunal will not err in law if it fails to set out potentially applicable legislative provisions. In my view, however, this was a case in which the methodical and proper assessment of conflicting and equally applicable legislative provisions was mandated. The argument that regulation 7(11) and (12) of the Housing Benefit (Persons who have

attained the qualifying age for State Pension Credit) (Northern Ireland) 2006 was central to the appellant's case before the appeal tribunal. He had made comprehensive written submissions on this issue and had pointed to detailed evidence which support the applicability of regulation 7(11) and (12). The appeal tribunal's reasoning in connection with the applicable legislative provisions is not adequate, is perverse in its outcome and does not explain, to an acceptable standard, to the appellant why his appeal did not succeed.

Disposal

60. I have given careful consideration to the disposal of this case. The starting point is Article 15(8) and (9) of the Social Security (Northern Ireland) Order 1998, as amended, which provides:

> '(8) Where the Commissioner holds that the decision appealed against was erroneous in point of law, he shall set it aside and—
>
> (a) he shall have power—
>
> (i) to give the decision which he considers the tribunal should have given, if he can do so without making fresh or further findings of fact; or
>
> (ii) if he considers it expedient, to make such findings and to give such decision as he considers appropriate in the light of them; and
>
> (b) in any other case he shall refer the case to a tribunal with directions for its determination.
>
> (9) Subject to any direction of the Commissioner, a reference under paragraph (7) or (8)(b) shall be to a differently constituted tribunal.'

61. I am not going to exercise the powers set out in Article 8(a)(i)(ii) or 8(b). Given the prolonged nature of the proceedings, there is a strong argument that I should give the decision which the appeal tribunal should have given. I am reluctant to do so, however, for one primary reason. This is because it might mean that I have to give consideration to defects in the decision-making process in NIHE and the possibility of remedying any identified defects. It is my view that any review of the decision-making process in this case should, in the first instance be for the NIHE

itself. Accordingly I am remitting the case to NIHE for the purpose of undertaking such a review. Any such review may result in further decision-making in the appellant's favour or to his continuing detriment. If it is the latter then any new decision will accord him new appeal rights.

62. As a protective mechanism for the rights of the appellant I am permitting him (and the NIHE as the other party to the proceedings) to return to my office should any issue arise as a consequence of the NIHE review. This can be done by making contact with the Office of the Social Security Commissioners through the usual methods.

(signed): K Mullan

Chief Commissioner

10 December 2020