DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Before Upper Tribunal Judge Sutherland Williams

Decision

1. **The appeal by Bristol City Council is allowed**. Permission to appeal having been given by District Tribunal Judge Rolt on 21 January 2019, I set aside the decision of the First-tier Tribunal sitting in Bristol on 14 September 2018 (under reference SC186/17/04221).

2. The judge erred in law. He misdirected himself in terms of existing case law, which clearly suggests that amicable relations do not prevent a finding that a former couple are nonetheless estranged.

3. The claimant was estranged from her former partner at all relevant times.

4. I remit this matter to the First-tier Tribunal for consideration of whether the amount of the overpayment is correct and whether it is recoverable.

Preliminary issues

5. Neither party has requested an oral hearing. I am satisfied that this matter can be dealt with on the papers alone. The submissions from the parties are clear and further oral submissions are unlikely to assist.

6. For the purposes of this appeal, I shall refer to Bristol City Council as 'the local authority', and I shall refer to the appellant at first-instance (now the respondent) as 'the claimant'.

The issue

7. In granting permission to appeal, Judge Rolt observed as follows:

> The [local authority] states the tribunal judge wrongly applied the law. However, the case law points in various directions as explained in the statement of reasons. The judge provides a view of estrangement that is based more on a common-sense return to the everyday meaning of 'estranged'.
>
> It would assist the First-tier Tribunal and the parties to the proceedings if the Upper Tribunal provided guidance on the correct interpretation of estrangement for the purposes of the Housing Benefit Regulations.

8. Judge Rolt is referring to paragraph 4 of Schedule 6 to the Housing Benefit Regulations 2006, which (where relevant to this appeal) provides as follows in terms of capital disregard:

> "4 Any premises occupied in whole or in part –.
>
> (b) by the former partner of the claimant as his home; but this provision shall not apply where the former partner is a person from whom the claimant is estranged or divorced or with whom he had formed a civil partnership that has been dissolved."

Summary of my findings

9. By reference to earlier case law, I find:

    1. In the context of Schedule 6 of the Housing Benefit Regulations 2006 the word 'estranged' or 'estrangement' implies that the reason the two people concerned are no longer living together as a couple in the same household is that the previous relationship between them has ended.
    2. This will often be fact specific, so the circumstances in each case will need to be investigated in order to decide whether the two people concerned are estranged.
    3. A helpful starting point is for the decision-maker to ask whether the two people concerned have ceased to consider themselves to be a couple.
    4. The test is not limited to whether they continue to maintain friendly relations or remain on good terms with one another. That may be a factor to consider, but in the context of Schedule 6, two people can have amicable relations and still be estranged. The outcome will depend on more substantive questions, including the reasons why they are living apart.

Overview

10. This matter concerns housing benefit and the capital value of a property the claimant jointly owned with her former husband.

11. In 2012, the claimant moved out of the matrimonial home with her three children. Her husband at the time remained residing there.

12. The claimant claimed housing benefit and council tax benefit in October 2012 and again in February 2014. On both occasions, the local authority maintain the claimant did not declare any savings, investments or property owned in the UK.

13. On 27 September 2016, the local authority asked the claimant to provide evidence of her income and capital. The claimant replied to state that while there had been no changes in her circumstances, she did own a property together with her husband. She was at that point in the process of going through a divorce.

14. On 14 March 2017 the claimant informed the local authority that the property in question had been sold.

15. On 10 April 2017 the claimant's claim was terminated with effect from 17 February 2014, resulting in a housing benefit overpayment of £11,577.74 for the period 17 December 2014 to 20 November 2016.

16. The local authority maintain that the claimant has capital that exceeds the prescribed amount of £16,000 during the period in question as a result of her share and ownership of the property; and that the said overpayment is recoverable.

17. The local authority based its decision on Schedule 6 of the Housing Benefits Regulations 2006, and in particular paragraph 25 thereof which, for these purposes, provides as follows:

> "Where a claimant has ceased to occupy what was formerly the dwelling occupied as the home following his estrangement or divorce from, or dissolution of his civil partnership with, his former partner, that dwelling for a period of 26 weeks from the date on which he ceased to occupy that dwelling or, where the dwelling is occupied as the home by the former partner who is a lone parent, for so long as it is so occupied."

18. This provision essentially provides for a 6-month period following the claimant's departure from the home, before the capital rule has effect. (In this matter, the husband did occasionally have the children, but they principally lived with the claimant).

19. The claimant appealed this decision on 16 January 2017, explaining that she had understood some errors had occurred with regard to declaring a share in the property on previous application forms, but that she was not liable for the overpayment as she informed the housing benefit office she was the joint owner of the property and it had not been explained to her how this would affect her housing benefit claim. In a later submission received from Bristol Citizen's Advice Bureau, it was contended that she had declared her interest in the marital home by telephone in or around 2013.

20. It was against this background that the appeal was listed before the First-tier Tribunal in Bristol on 14 September 2018.

21. The judge found that the local authority had not proven its case and had not discharged the burden on it to demonstrate that the claimant had been overpaid. As a result, he found that there was no recoverable overpayment and that the claimant did not have excess capital during the period concerned.

22. While the judge made a clear finding of fact that the relationship had broken down and the claimant had moved out, with no expectation of reconciliation or of the claimant's return to the home; he went on to find that in the five years between her leaving the marital home and them divorcing in July 2017, the claimant and her former partner remained in contact throughout 'purposefully

and effectively', communicating over childcare care arrangements, child maintenance, money matters, and collaborated actively in a bid to sell their house.

23. As a result, the judge found that during the period in question, although separated, they were not estranged.

24. The judge went on to explain that he had considered a spectrum in the quality of relationships between members of a couple and ex-partners. Estrangement, he found, lies somewhere between splitting up and divorce, with his focus on the amount of contact the couple continued to have.

25. I regret that notwithstanding what is an otherwise well-structured decision, the judge has fundamentally erred in relation to the concept of estrangement.

Reasons

26. The judge approached this appeal on the basis of paragraph 4 of Schedule 6 to the Housing Benefit Regulations 2006 (above), notwithstanding that that was not the provision under appeal and had not been raised by either party. I do not fault him for doing so. Schedule 6 lists the types of capital that are to be disregarded. It was within his remit to consider if any other disregard applied, standing (as he did) in the shoes of the decision maker. (This was particularly so, as I understand the local authority accepted that if the tribunal could find another disregard that applied, they would not object to the tribunal considering the same).

27. It may be helpful to pause to consider the purpose of the legislation. Schedule 6 sets out the circumstances where a claimant and her/his partners capital must be ignored for the purposes of calculating housing benefit. The effect is a mandatory disregard. It follows that where none of the disregards apply, then the capital asset cannot be ignored.

28. Paragraph 25 of Schedule 6 allows a claimant who has left the matrimonial home 26 weeks before the capital disregard provided for is lost. Paragraph 26 gives a period of 26 weeks for a claimant to take reasonable steps to dispose of a premises, or such period as is reasonable.

29. There is no dispute that during the period 17 December 2014 to 20 November 2016 the claimant and her husband were not divorced. That came in July 2017. They may have commenced divorce proceedings or that may have been their intention, but for these purposes the question focuses on whether they were estranged.

30. To understand the nature of estrangement, it is necessary to look at the previous authorities. In *R (IS) 5/05* Commissioner Rowland (as he then was), determined that the question was whether the parties had ceased to consider themselves to be a couple and not whether, despite that, they continue to maintain friendly relations.

31. That in my judgement must be right and it goes to the nub of why the judge in the instant matter erred.

32. It is unnecessary for me to give an exhaustive definition of the word 'estranged'. It seems to me it should bear its ordinary meaning, and this will often be fact specific. In this context it connotes the ending of a previous relationship, where the parties have ceased to consider themselves a couple (adopting paragraph 12 of *R (IS) 5/05*). As Commissioner Rowland rightly observes, in establishing this, the circumstances need to be investigated in order to decide whether the parties are estranged.

33. The flaw in the judge's reasoning in the appeal below can in part be seen when contrasted with the legislative intent for couples who are divorced. It appears to me that paragraph 4(b) links (but does not equate) estranged couples to those who are divorced. Those who are divorced cannot benefit from the disregard. But those who are divorced may also have an ongoing level of contact, they may also communicate purposefully and effectively, or have arrangements in terms of child maintenance.

34. In the instant matter the previous relationship ceased in the sense that one partner removed themselves from it. Subject as I have said to the particular facts, many former couples might accept that in such circumstances their relationship is over, and they are now estranged. They may, nonetheless, carry on communicating and collaborating. The two concepts are not mutually exclusive. The new relationship may operate on a functional, non-acrimonious level, but this cannot be considered to constitute a continuation of the previous or marital relationship. A distinction needs to be drawn.

35. As Commissioner Jacobs stated in *CPC/0683/2007*:

> "13. It seems to me that the proper analysis of the relationship between the claimant and his wife is this. They remain married and have no plans to divorce. He would like to resume living with her, but she is opposed to the idea. The reality is that they will never resume living as husband and wife; the claimant accepts that. However, they are not hostile to each other on a personal level and he feels a continuing responsibility towards her. This leads him to help her when she cannot manage on account of her ill-health. In other words, there is no emotional disharmony between the claimant and his wife as adults, but there is emotional disharmony between them as partners. That is a key distinction, because the language used in the legislation is attempting to identify those cases in which the relationship between the parties is such that it is appropriate for their finances to be treated separately for the purposes of benefit entitlement. Once the facts of the case are set out, they seem to me to allow of only one interpretation, which is that the couple are estranged."

36. Commissioner Jacobs came to a similar conclusion in *CH/0117/2005*. He accepted that the couple's mental attitude to each other may be a relevant factor in deciding whether they are estranged and that it may even be decisive in the context of the circumstances as a whole, however '*mere good relations alone is not sufficient to show that the couple are not estranged'*, and '*it certainly does not mean that a continuing emotional relationship between the parties is necessarily sufficient to prevent estrangement'* (paragraph 13).

37. *CH/3777/07* provides further authority for the contention that where a claimant and her husband are not divorced and continue to communicate on amicable terms about the children, they can nonetheless be estranged. I concur with the view expressed therein by Commissioner Howell that 'estranged' in this context is not simply a matter of whether a couple who have separated remain on good terms with one another or there exists a lack of acrimony; but depends on more substantive questions concerning the reasons why they are living apart. The judge adds:

> "10. ….In my judgement the interpretation placed by the tribunal on "estranged" in these provisions was clearly mistaken and the only reasonable conclusion on the facts outlined above was that the claimant and her husband were living separately because they were for the time being estranged from one another, notwithstanding the claimant's hope that their estrangement might not prove permanent and they might one day be reconciled and resume living together as a normal couple."

38. While estrangement is different from separation, particularly trial separation, that does not mean the fact of separation is irrelevant to whether or not there has been an estrangement. Subject again to the facts, a couple can have separated and be estranged. It is a factor that cannot be ignored and another ingredient to be considered when investigating why the parties have ceased to consider themselves to be a couple.

39. By way of example to demonstrate where separation may not lead to a conclusion of estrangement, if a member of a couple was going to care for an elderly relative for a period, they would not, on its ordinary meaning, be estranged by virtue of their separation. *Per CH/0117/2005*:

> 22. The only test to apply is that set by the language of the legislation. Bearing that in mind, I would suggest that the couple are not estranged for so long as the only aspect of their relationship that has changed is their physical separation. To put it another way, they are not estranged if the couple retain all the indicia of partners apart from physical presence in the same household.

Disposal

40. In my judgement, it is clear that the claimant in the present case was estranged from her husband at the time she made her claims for housing benefit, and certainly by the start of this overpayment period in December 2014. She described herself as a 'single mum' and there were no expectations of reconciliation or of her return to the matrimonial home by that stage. She had left that home two years earlier in 2012. Her relationship with her former husband had ended and the claimant did not consider herself to be part of a couple.

41. These are the objective facts that the judge at first instance appears to have overlooked and the interpretation he has placed on 'estranged' is equally mistaken. He has erred in law.

42. Nothing in the submission now made by the Avon and Bristol Law Centre changes the position, and the further points raised by them are addressed by me above.

43. The claimant was therefore not entitled to have the value of her interest in the matrimonial home disregarded under paragraph 4(b).

44. Arguably, until the issue was raised by the judge, the claimant had never sought to suggest otherwise. Her case was that she had informed the local authority of her interest in the property, and it was essentially official error not to have acted upon that, pursuant to regulation 100 of the Housing Benefit Regulations 2006.

45. As a result of the First-tier Tribunal's finding on estrangement, the central factual issue on recoverability of the overpayment was not resolved.

46. I therefore remit this matter to the First-tier Tribunal, with the following finding of fact: the claimant was estranged from her former partner at all relevant times during the period of this overpayment.

47. It will now be for the new Tribunal to consider whether the amount of the overpayment is correct, and if so, whether it is recoverable, with reference to the appeal as drafted by those representing the appellant, and where applicable with regard to the effect of paragraphs 25 and 26 of Schedule 6.

M. SUTHERLAND WILLIAMS
Judge of the Upper Tribunal

Signed on the original on 14 November 2019