

## CHAPTER 32

## Housing Benefit &amp; Council Tax Benefit

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## Part 1: Overpayments

### 1 Official error

i The claimant was in receipt of HB and CTB. Her wages increased on 27 March 2000, but she failed to inform the authority. Later she submitted a further claim, which correctly set out the amount of her wages. The applicant continued to receive benefit at the rate appropriate to her previous lower wages. The authority on 9 August 2000 recalculated her entitlement from the date her wages had increased, but due to an error on their part an incorrect (lower) figure for her wages was used. As a result, an additional sum by way of HB and CTB was credited to her rent account on 10 August. On 15 August 2000 she was sent a notice to this effect, showing that the benefits had been calculated using the incorrect figure. The authority accepted that all the overpayments were caused by an official error, but decided that they were recoverable because the claimant could have been expected to realise that the overpayment was occurring. The Commissioner held that:

1. the tribunal had erred in law in failing to analyse sufficiently precisely how reg 99 of the Housing Benefit (General) Regs 1987 applied to the facts of the case;
2. the overpayment made before 10 August 2000 were not recoverable under reg 99 because the claimant could not reasonably have been expected to realise at the time that she was being overpaid;
3. the overpayment made after that date were recoverable because the claimant could at the time of receipt of the notice dated 15 August reasonably have been expected to realise that the payment was an overpayment. Under reg 99(2) an overpayment caused by official error is recoverable if the recipient could at either the time of receipt of the payment or the time of receipt of "any notice relating to that payment" reasonably have been expected to realise that it was an overpayment.

ii The claimant was wrongly awarded IS because he did not disclose to the BA occupational pensions which he and his wife received. The relevant council tax legislation provides that the income (other than earnings) of a person in receipt of IS is not taken into account in determining entitlement to CTB. The claimant was therefore awarded CTB even though he had disclosed the occupational pensions on his original CTB claim form. When the BA became aware of the occupational pensions, entitlement to IS was removed from the date of the original award and a similar decision was then made in relation to CTB.

The Commissioner held that:

1. Under reg 24(2) of and para. 4 of Sch 4 to the Council Tax Benefit (General) Regs 1992 the claimant, being in receipt of IS was entitled to CTB. The information before the council did not demonstrate that the IS award had been wrongly made. Although the council could for its own protection have queried the correctness of the IS award with the BA, the fact that it did not do so was not a mistake and thus not an official error under reg 84 of the Council Tax Benefit (General) Regs 1992.
2. Even if it had been a mistake, the mistake did not cause the overpayment under reg 84(3) because the overpayment was for these purposes caused by the claimant's failure to disclose the occupational pensions to the BA.

iii In a claim for HB in April 2000 the claimant gave the amount of WFTC she was currently receiving. HB was awarded on that figure. The decision notice advised her that she had to inform the council of any change in her income. The claimant did not

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inform the council of a subsequent increase in WFTC until October 2000 when she had made a renewal claim for WFTC. She also failed to inform the council of a further increase in WFTC that was awarded since October 2000.

The Commissioner held that:

1. the general principle under S75 of the Social Security Administration Act 1992 is that all HB overpaid by mistake or for any other reason is recoverable by the Secretary of State or by the council except in the single instance provided for in reg 99 of the Housing Benefit (General) Regs 1987 S.I. No. 1971;
2. it was not an “error” or “mistake” under reg 99 for the local council to maintain the continuity of the HB award by making a new award on 17 October on the best information currently available and trusting the claimant to notify them if it should transpire this needed correction;
3. the overpayment was caused by the claimant’s own failure to notify the council of the true amount of her WFTC entitlement as soon as the figure given by her and reflected in their award calculation became incorrect. A practical approach to questions of causation and responsibility ought to be adopted in such cases.

R(H) 10/08 iv A HB claimant went abroad for several months and informed the LA housing officer of her absence on several occasions, but did not tell the officer administering her benefit award. The tribunal found that she had failed in her duty to inform the relevant department and upheld the decision that the overpayment of benefit was recoverable. The Commissioner allowed the appeal, holding that a housing officer is an officer of the “*relevant authority*” for the purposes of reg. 81(3) of the HB (Persons who have attained the qualifying age for state pension credit) Regs. 2006. The tribunal erred in failing to consider whether the alleged failure of the housing officer to pass the information to the benefits office might have amounted to an “*official error*”.

## 2 Offsetting

R(H) 2/03 i On appeal from the decision of the Commissioner the CA in *Secretary of State for Work and Pensions v. Chiltern District Council and Warden Housing Association* [2003] EWCA Civ 508 held that:-

The cessation of a passport benefit had the effect of ending the benefit period, whereupon the authority was required to invite a fresh claim. That process was quite separate from determining any offset to an overpayment. There was no power to postpone the termination of the award while obtaining information in order to apply offsetting.

R(H) 1/05 ii The LA determined in 1999 that an amount of benefit was recoverable from the claimant. The claimant argued that under reg. 104 of the Housing Benefit (General) Regs 1987, the amount of the overpayment should be reduced by any underlying entitlement he might have if all the true facts had been disclosed. The tribunal dismissed the appeal as it was reg. 104 as it stood in 1999 which was applicable to him, the tribunal were bound by *R v. Wyre BC ex parte Lord* which decided that no entitlement could arise as no fresh claim on the correct basis had been made to cover the period for which benefit had been withdrawn.

The chairman was misdirected by *ex parte Lord* in the light of the CA’s decision in *Adan v. London Borough of Hounslow* [2004] EWCA Civ 101 that *ex parte Lord* was wrongly decided. Reg. 104 did not require a fresh claim for a lesser amount or disclosing the correct circumstances to have been actually made before it can be determined what would have been the amount “properly payable” to deduct in arriving at the net recoverable amount.

The onus was on the claimant to satisfy the tribunal that some identifiable amount of housing benefit was payable to him on the balance of probabilities after full disclosure

of his actual means and all other circumstances. All the actual income which the claimant had obtained, including wrongly obtained benefits, had to be included except where the claimant could show that the amounts were legally recoverable and were being fully recovered from him.

### 3 Amendments to legislation on recoverability - whether retrospective

i The issue for the Upper Tribunal was whether the amendments to the law on recoverability of overpayments of HB that came into force in April 2006 applied to liability in respect of payments made before that date, the difference being that under the former law the claimant and his landlord would, for the period when benefit was paid to the landlord, be jointly and severally liable to repay, whereas under the amended law the claimant would be solely liable.

R(H) 3/09

*Held*, dismissing the appeal, that:

1. Reg. 101 applies to decisions taken after it came into force and therefore to payments that were made before it came into force, and, since it effected a real change in liability, was retrospective in its terms. Therefore it was necessary to consider whether that retrospective effect was so unfair that it was not permissible to attribute to Parliament the intention that it should so operate.
2. The presumption against retrospective effect is flexible and how the question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case.
3. The presumption did not apply in this case, since the retrospective effect did not result in any significant change in the ultimate legal position of any person affected.
4. While s. 75 does not authorise retrospective provision expressly, in most circumstances a payment in excess of entitlement inevitably involves a retrospective change to that entitlement and so the provision authorises retrospective provision by necessary and distinct implication.

### 4 For HBCTB purposes

i The authority decided that the claimant was not entitled to HB or CTB because of her husband's capital and that the resultant overpayment was recoverable from her. On appeal, although the recovery decision was made after bankruptcy, the claimant argued that the overpayment was not recoverable because the liability to repay was a bankruptcy debt incurred before the bankruptcy order and therefore, unless obtained fraudulently, was deemed to form part of the bankruptcy estate. *Held*: that the liability that arose was not a bankruptcy debt and therefore there was no question of there being any inhibition on the making of the recoverability decision or of the debt being discharged on the subsequent discharge from bankruptcy (*R (on the application of Steele) v Birmingham City Council and Secretary of State for Work and Pensions*, [2005], EWCA Civ 1824, [2006] 1 WLR 238) and *Secretary of State for Work and Pensions v Balding* [2007] EWCA Civ 1327, [2008] 1 WLR 564) followed); and whether debts have been obtained fraudulently is only relevant when the debt is a bankruptcy debt, having been incurred before the date of the bankruptcy order. (See also 17.8.5.)

R(H) 9/09

### 5 Recovery of overpayments: overpayment of housing benefit paid direct to landlord's agent - whether recoverable from landlord as well as from agent.)

i *Walsall Borough Council v GP Ltd (HB)* [2009] UKUT 247 (AAC); [2010] AACR16

[2010]  
AACR 16

*Held*, that:

1. The extension to the definition of “landlord” in reg. 93(1) of the Housing Benefit (General) Regulations 1987 (95(1) of the Housing Benefit Regulations 2006) to include inter alia agents has the effect of directly authorising payment to an agent expressly or impliedly authorised to receive rent from the tenant in question;
2. Under general principles of the law of landlord and tenant and of agency, the payment of HB to an agent goes to discharge the claimant’s liability to the landlord and in those circumstances the housing benefit has been paid not only to the agent, as decided by R(H) 10/07, but also to the landlord;
3. The reference in s. 75(3)(a) of the SSAA to “the person to whom” benefit was paid does not require that only one person can be regarded as having had benefit paid to them;
4. The overpayment in the present case was legally recoverable from the agent and the landlord under s. 75(3)(a), since neither of them escaped liability under reg. 101(1), as well as from the claimant under s. 75(3)(b) and reg. 101(2)(c) of the 1987 Regulations (paras. 28 and 32).

## Part 2: Liability to make payments in respect of a dwelling

### 1 Whether tenancy on a commercial basis

i The claimant moved from rented accommodation into accommodation owned by her brother. She claimed HB in respect of the payments she agreed to make to her brother. Benefit was refused and the claimant appealed to a tribunal. The tribunal concluded from its findings of fact taken cumulatively that the tenancy was not on a commercial basis and therefore she fell to be treated as not liable to make payments in respect of the dwelling (reg. 7(1)(a) of the HB (General) Regs. 1987). On appeal to the Commissioner it was argued on behalf of the claimant that the tribunal had failed to explain the basis of its decision, and in particular had not made it clear which of its findings of fact had weighed most heavily in favour of the decision that the arrangement was not on a commercial basis. R(H) 1/03

In dismissing the appeal, the Commissioner held that reg. 7 presupposed that there was a genuine legal liability to make payments in respect of the dwelling. Otherwise there was no entitlement by virtue of reg. 6. A case under reg. 7 must be considered on the basis that there was an arrangement that created a legal liability for payment. The proper approach for an appeal tribunal was to investigate and determine the facts material to the issue and then determine as a question of “compound fact” whether as a matter of the proper use of language the arrangement was not on a commercial basis, applying the principles established by the authorities. In doing so, they must not reason by analogy from the reported cases and must consider the individual facts of each case in the context of all the others. It followed that, if a tribunal had made sufficient findings of the constituent facts, there may be little more that it could usefully say to explain its findings of compound fact. Therefore the tribunal had made sufficient findings of the constituent facts.

ii The claimant had been in receipt of HB for some time. When making her claim and on her renewal claim, the claimant had stated that she was not related to the landlord or his partner. It came to light that the registered owners of the property were the claimant’s mother and the mother’s partner. The LA decided that the claimant was not entitled to HB and that there had been an overpayment of benefit because the tenancy was not on a commercial basis within the meaning of reg. 7(1)(a) of the HB (General) Regs. 1987. The claimant appealed to an AT. In allowing the appeal, the tribunal referred to CH/3008/02 and said that the fact that the tenancy agreement was properly drawn up was important since the Commissioner in CH/3008/02 had observed that it would be hard to imagine that a tenancy created by law was not commercial. The tribunal did consider other factors said to point in favour of non-commerciality but concluded that the tenancy was on a commercial basis. The LA appealed to the Commissioner who allowed the appeal. In allowing the LA’s appeal, the Commissioner held that the statement in CH/3008/02 that a statutory tenancy cannot, at the point when it arises, be non-commercial is wrong, since the statutory periodic tenancy arising under the Housing Act 1988 has essentially the same terms as those of the preceding fixed term tenancy and arises simply by reason of the termination of the previous contractual tenancy. If that previous tenancy was not on a commercial basis, then it is likely that the statutory one won’t be either. In addition, the tribunal had clearly misunderstood what was said in CH/3008/02 as the Commissioner there, in referring to a “tenancy created by law”, was referring to a statutory periodic tenancy. The tribunal appeared to have taken the reference to be to any tenancy created by a formal agreement. It was not possible to be sufficiently confident that the tribunal’s misunderstanding of CH/3008/02 had not influenced the outcome of the claimant’s appeal. The decision of the tribunal had to be set aside and the case remitted to another tribunal to consider the issues again. R(H) 10/05

### 2 Whether tenancy agreement is a sham

i The LA sought to recover an alleged overpayment on the basis that the claimant did not fall within any of the categories of people treated as liable to make payments in respect of R(H) 3/03

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a dwelling set out in reg. 6(1) of the HB (General) Regs. 1987. On appeal a tribunal accepted that she was liable to consider reg. 7. The claimant had no warning that reg. 7 was at issue and was therefore unable to make representations on that reg. The tribunal decided that she was to be treated as not liable under the version of reg. 7 in force at the date of the hearing, 9 January 2002. The appeal was allowed. The tribunal erred by considering reg. 7 without warning the claimant thus breaching the principles of natural justice and applying the reg. in force at the date of the hearing rather than the legislation that was in force in respect of the period of the overpayment. In considering the documentary evidence the tribunal must determine liability and whether that liability is genuine.

### 3 Eligible and ineligible payments

R(H) 2/05

i The claimant, a single man, was in receipt of RP and IS. He suffered from arthritis of the spine and a number of other health problems and walked with a stick. On 3 October 2002 he made a renewal claim for HB for the period 18 November 2002 to 16 November 2003 in respect of his assured tenancy (which he had inherited) of the property which he occupied (and in which he had been born) comprising two bedrooms, two living rooms, a kitchen and a bathroom, the property being situated in what had become a sought after area. Reg. 11 of the HB (General) Regs. in the form then applicable made provision for a housing authority to reduce the eligible rent for HB purposes to below the contractual rent if the dwelling was unreasonably large or the rent was unreasonably high. The authority applied to a rent officer to re-determine the claim-related rent and the rent officer determined this to be £70 per week (the same amount as had been determined in December 2001 when the contractual rent had been £92.31 per week). The claimant wrote to the authority giving details of his health problems, his restricted mobility and the network of support which he received in the area where he lived. The authority applied for re-determination of the rent officer's determination and the re-determining rent officer determined the market rent for the property to be £80 per week. The authority revised its decision so as to award benefit on the basis of a rent of £80 per week. The claimant appealed to a tribunal. The tribunal accepted that the authority had in fact made its decision under reg. 11(2)(a) on the ground that the claimant occupied a dwelling larger than was reasonably required by him and that the authority, whilst accepting that the claimant was in a vulnerable category for the purposes of reg. 11(3)(a), had demonstrated that there was an active market in houses of an appropriate type in an appropriate place at the level of rent to which the claimant's rent had been restricted, the authority having relied in this respect on its own list of empty houses and the Manchester "Homefinder" which gave details of homes available for immediate letting. The claimant appealed to the Commissioner. The Commissioner allowed the appeal and held that reg. 11(3) is designed to make special provision for certain categories of vulnerable persons and the power in reg. 11(2) to restrict the eligible rent can only be exercised in cases where there is cheaper alternative accommodation available for the claimant which is "suitable". The Commissioner also held that reg. 11(6) provides that the authority shall take account of the nature of the alternative accommodation and the facilities provided having regard to the claimant's age and state of health and that whilst the authority identified a few of the many properties in "Homefinder" as being suitable for the claimant in terms of size and area they could not provide information about the accommodation other than that provided in the publication itself so that they had thereby failed to discharge the onus upon them to show that suitable alternative accommodation was available for the claimant accordingly the authority were not entitled to reduce the claimant's eligible rent on the ground that the claimant's dwelling was larger than was reasonably required. The Commissioner substituted his own decision for that of the tribunal to the effect that the authority were not entitled to reduce the claimant's eligible rent under reg. 11(2) of the HB (General) Regs. 1987.

### 4 Income treated as capital

R(H) 5/05

i The claimant was director of a limited company engaged in property development in the UK and Italy. A lease between the company and the landlord allowed the claimant to occupy his flat. The claimant suffered a severe stroke in March 1999, so that the company was unable to continue to do business. Payments of rent to the landlord were made by cheques drawn on the claimant's personal bank account. He made a claim for

HB and CTB from 1 April 2001. Details of the claimant's bank accounts submitted to the LA in support of the claim showed large irregular payments into the claimant's current account, as well as extensive use of overdraft facilities and credit cards. The claimant explained that the main payments were received from his girlfriend in Italy. She wrote a letter saying that she had provided him with £22,375 financial support between April 2001 and May 2002. The LA refused benefit on the ground that income from these payments, and the claimant's bank overdraft facilities and credit cards, had been used to discharge liability for rent. The claimant appealed on the ground that the monies were not a gift, and his girlfriend expected repayment. The appeal was disallowed. On appeal to the Commissioner, the LA argued that the claimant was not liable for the rent and in the alternative that the monies from the claimant's girlfriend fell to be treated as income despite their irregular nature. The Commissioner allowed the appeal and held that for the purpose of reg. 6(1)(c)(ii) of the HB (General) Regs. 1987 the "person" can include a limited company and the other conditions of reg. 6(1)(c) were met. The Commissioner also held that for the purpose of reg. 40(6) "voluntary payment" has the meaning of a payment made without obtaining anything in return. Having found as a matter of fact that the monies were paid by way of loan, and that, although a lender would normally obtain something in return for making a loan - the right to repayment, in these circumstances there was no intention to create legal relations, the payments were voluntary and reg. 40(6) applied. In addition, the Commissioner held that "income" should be given its natural and ordinary meaning, so that the loans incurred by drawing down on the bank overdraft facilities, being repayable on demand, did not amount to income.

## **5 Rent to former partner for home previously shared - possible discrimination**

i HB was refused because the claimant was paying rent to her ex-partner for a home they had formerly shared. The claimant appealed on grounds that it constituted discrimination under the Human Rights Act because partner referred only to heterosexual relations, so that a person who had been in a homosexual relationship and whose circumstances were otherwise the same, would have qualified for benefit. The appeal was refused by the tribunal and the Commissioner. The CA held that although the HB scheme as a whole is within the ambit of Art. 8 of the Human Rights Act, it was necessary to consider the particular provision that was alleged to be discriminatory. Since the purpose of reg. 7(1)(c)(i) of the HB (General) Regs. is to prevent abuse, it does not engage any Convention right. R(H) 6/05

## **6 Payments by an owner**

i This case was the subject of a CA decision in *Burton v New Forest District Council*. The claimant, who is severely disabled, was the sole proprietor of a property. By deed dated 17 January 1997, he transferred his beneficial interest in the property to the Nay Housing Care Trust, of which he and his mother were the trustees. The property was let to third parties. By further deed, dated 20 October 2001, the claimant retired (and was replaced) as a trustee. The claimant had by then himself moved into the property. On 4 April 2002, the legal estate was transferred by the claimant to the trustees of the Nay Trust. The transfer was registered at the Land Registry on 8 April 2002. On 2 November 2001, the claimant had applied for HB as a tenant of the Nay Trust. His claim was refused. A ground of refusal was that benefit was not payable in respect of "payments by an owner", pursuant to reg. 10(2) of the HB(General) Regs. 1987. An "owner" is defined in reg. 2(1) as "the person who ... is for the time being entitled to dispose of the fee simple". The claimant appealed. A tribunal allowed the appeal. It decided that, although owner of the legal title, the claimant had no beneficial interest in the property and was therefore not the "owner" within the meaning of reg. 10(2). The LA appealed to a Commissioner, who allowed the appeal, holding that the claimant was the "owner", as that word is defined in reg. 2(1). The claimant appealed to the CA. The CA dismissed the appeal and held that the claimant was the owner of the property within the meaning of reg. 2(1): s. 20(1) of the Land Registration Act 1925 makes it clear that the claimant was entitled to dispose of the fee simple up until the register at the Land Registry was rectified on 8.4.02 and it is not possible to construe "owner" in reg. 2(1) as meaning exclusively a beneficial owner. R(H) 7/05

R(H) 8/07      ii      The appeal concerned a terraced house divided into three flats. The claimant owned the freehold of the house. One of the flats had been sold to his former partner on a 99 year lease. He then rented the flat from the former partner and claimed HB. Following R(H) 7/05 the Commissioner decided the claimant was the “owner” of the property. “Owner” is defined as the person who is entitled to dispose of the fee simple and the claimant was entitled to do so.

**7      Whether claimant and landlord reside in the dwelling**

R(H) 5/06      i      The claimant was refused HB under reg. 7(1)(b) of the HB General Regs. 87 because the person to whom she was liable to pay rent also resided in the dwelling and was a close relative. Appealing to the Commissioner, the claimant contended the reg. infringed various provisions of the European Convention on Human Rights, in particular that it was discriminatory contrary to Art. 14 taken together with Art. 8. Dismissing the appeal, the Commissioner held that where landlord and tenant are sharing the majority of the living accommodation, albeit that the claimant has exclusive use of her room, it is right to regard them as both residing in “the dwelling”. The Commissioner also held that reg. 7(1)(b) was justified as a reasonable and proportionate anti-abuse measure, and not in breach of Art. 14.

**8      Dwelling previously owned by claimant**

R(H) 6/07      i      The appeal concerned the test in reg. 7(1)(h) of the HB (General) Regs. 1987 of whether the claimant could have continued to occupy the dwelling without relinquishing ownership. The claimant and her husband contended that they believed themselves to be under a compulsion to sell and that the proper approach to the test was subjective, not objective. The Commissioner held that the reg. contains both subjective and objective elements and that the test is one of practical possibility as applied to the particular circumstances of the claimant. However it was impossible to interpret the words “could not” as meaning “believe she could not” so apart from exceptional circumstances such as extreme stress the claimant’s perceptions are not relevant to the application of the test.

R(H) 1/08      **9      Payment to tenant or landlord**

i      Reg. 95(1) of the HB Regs. 2006 gives a LA a duty, not a discretion, to undertake an independent reconsideration of whether the exception applies and payment of HB is to be made to the landlord. A change of payee involves a revision or a supersession of an award (see R(H) 2/08) which carries appeal rights for both the claimant and the landlord. Accordingly, reg. 11(2)(a)(ii) of the HBCTB Decisions and Appeals Regs. 2001 permits the suspension of payment while enquiries are made. R(H) 2/08 also directs it is not possible to make duplicate payment of HB to both the claimant and the landlord.

**10      Whether two tenancies on different properties constitute a single dwelling**

R(H) 5/09      i      The claimant, who had a large family, rented two adjacent flats. The LA refused to award either HB or CTB in respect of the second flat because separate flats could not constitute a single dwelling. In R(JSA) 9/03 it was held that a dwelling occupied as the home could apply to two dwellings, although this was a JSA(IB) authority it is permissible, for HB purposes, in appropriate circumstances to take a similar functional approach. In that context it was appropriate to take account of the reality of the claimant’s living arrangements and as such a finding that the claimant’s dwelling consisted of both flats was not perverse.

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## Part 3: Appeals

### 1 Choice from whom to recover

i On appeal from the decision of the Commissioner the Court of Appeal in *Secretary of State for Work and Pensions v Chiltern District Council and Warden Housing Association* [2003] EWCA Civ 508 held that: R(H) 2/03

There is the right of appeal against exercise of a LA's discretion as to the person (ie landlord or tenant) from whom they will recover an overpayment of housing benefit. (See also R(H) 6/06, 32.3.1 iii).

ii The housing authority determined that there had been an overpayment which was recoverable from the claimant. The claimant did not appeal. The landlord sought to appeal as a "person affected". The Commissioner decided landlord had no right of appeal as, in this instance, he was not a "person affected"(See also R(H) 6/06, 32.3.1 iii). R(H) 7/04

iii The claimant appealed against a recoverable overpayment decision because, although he had failed to disclose a change of circumstances that removed entitlement to HB/CTB, the landlord had made an earlier misrepresentation, that they had charitable status. The landlord's misrepresentation resulted in HB being awarded at a higher rate. The supersession and overpayment decisions on the claimant's failure to disclose were made without knowledge of the landlord's misrepresentation. After losing his appeal and being convicted in court the claimant was notified of the decision in relation to the landlord's misrepresentation. Leave to appeal was granted as, had the landlord's earlier misrepresentation being known about the claimant's HB and his recoverable overpayment would have been considerably lower. The Tribunal of Commissioners held, allowing the appeal: that one aspect of the CA decision in *Chiltern* (see 32.3.1 i above) may have been *ultra vires* in its application of Reg 101 of the HB (General) Regs 1987; that the Reg must be construed so that an overpayment is recoverable from "such other person" (Reg. 101(2)) as well as the person to "whom the overpayment was made, except where Reg 101(1) applies; and that overpayment decisions should be notified to both parties so that, if there is an appeal, every relevant person is likely to be a party, thereby avoiding the need to set aside tribunal decisions where recovery might be decided against someone who is not a party. R(H) 6/06

iv Claimant awarded HBAugust 2003, based on his entitlement to IS. Payment was made to his landlord as authorised by the claimant. Entitlement to IS ceased on 28 May 2004 when he was taken into legal custody. The LA was not informed and there was a resulting overpayment which was recoverable from the agent under the provisions of s. 75(3)(a) of the SS Administration Act 1992 as he was "the person to whom it was paid". Held; secondary legislation (The HB (General) Regs. 1987 and the HB (Recovery of Overpayment) Regs. 1997) demonstrates a clear intention to include an agent within the definition of a landlord, effectively without distinction; the reference to "person" in s. 75(3) must be taken as wide enough to encompass both a natural person and an incorporated company (Sch. 1 to the Interpretation Act 1978) and both a landlord and an agent. Therefore, the secondary legislation is *intra vires* and entitled to treat the landlord and his agent interchangeably by virtue of the primary legislation; the overpayment is therefore recoverable from the agent notwithstanding that it might have accounted to its principal, the landlord, for such sum or part of it (paras. 1 and 24). R(H) 10/07

### 2 Responsibilities of LA as respondent

i The LA determined in 1999 that an amount of benefit was recoverable from the claimant. The claimant argued that under reg. 104 of the Housing Benefit (General) Regs 1987, the amount of the overpayment should be reduced by any underlying entitlement he might have if all the true facts had been disclosed. The tribunal dismissed the appeal as it was reg. 104 as it stood in 1999 which was applicable to him, R(H) 1/05

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the tribunal were bound by *R v Wyre BC ex parte Lord* which decided that no entitlement could arise as no fresh claim on the correct basis had been made to cover the period for which benefit had been withdrawn. The claimant appealed to the Commissioner. The LA maintained that they had correctly applied the law to the circumstances of the case and declined to make any further submissions to the Commissioner.

The object of proceedings of this nature was to achieve the right result by a proper application of the law and a true determination of the claimant's entitlement. The Commissioners were entitled to the assistance of a public authority respondent in ensuring that the law is properly applied to the claimant.

**3 Right of appeal - refusal to give decision on claim**

R(H) 3/05

i In four cases considered by the Tribunal of Commissioners the LA had refused to give a decision on a claim because the claimant had failed to supply evidence requested, invoking reg. 76(2)(b) of the HB (General) Regs. 1987 (the HB Regs.) and identical CTB provisions. The issues were (1) whether a failure to provide evidence or information under reg. 73 of the HB Regs. rendered a claim defective and, if so, whether there was (a) a duty or (b) a power to determine such a claim; (2) whether a decision to refuse to decide a claim was appealable. They held:

A failure to provide evidence or information requested after the receipt of a claim does not render the claim defective.

A duty to decide claims for benefit is implicit within the statutory scheme.

The power to make reg. 76 could not be implied into s. 5 of the Social Security Administration Act 1992, on the ground that it was necessary in order to provide for cases where a decision was impossible because evidence or information had not been provided, since it was always possible for the authority to make a decision, drawing an adverse inference if necessary.

*Kerr v Department for Social Development* [2004] UKHL 23, [2003] 1 WLR 1372 applied.

The proper construction of reg. 76(2) had the effect that the regs. allowed what was in substance a decision on a claim to be treated as not being such a decision, but the broad power under s. 123(1)(d) of the Social Security Contributions and Benefits Act 1992 to make a HB scheme did not authorise the Secretary of State to make a reg. having such an effect, and reg. 76(2) was therefore *ultra vires*. It followed that the decisions of the LAs were to be treated as decisions that the claimants were not entitled to benefit and were therefore appealable.

**Note:** reg. 76(2) of the HB Regs. was revoked by S.I. 2004/3368 with effect from 21 December 2004.

R(H) 1/08

**4 Appeals Right of appeal - landlord**

i Reg. 95(1) of the HB Regs. 2006 gives a LA a duty, not a discretion, to undertake an independent reconsideration of whether the exception applies and payment of HB is to be made to the landlord. A change of payee involves a revision or a supersession of an award (see R(H) 2/08) which carries appeal rights for both the claimant and the landlord. Accordingly, reg. 11(2)(a)(ii) of the HBCTB Decisions and Appeals Regs. 2001 permits the suspension of payment while enquiries are made. R(H) 2/08 also directs it is not possible to make duplicate payment of HB to both the claimant and the landlord.

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**5 Right of appeal - termination**

i The issue was whether a termination decision was a “relevant decision” within the definition in para. 1(2) of Sch. 7 to the Child Support, Pensions and SS Act 2000, and therefore appealable, or an administrative decision outside the normal decision-revision-supersession rules and therefore not appealable. Reg. 14 of the 2001 Regs. provides that a person shall “cease to be entitled” to benefit from the date of suspension, but para. 5(b) of the Sch. to the 2001 Regs. prescribes a decision that entitlement to benefit is terminated under reg. 14 as having a right of appeal. R(H) 4/08

*Held*, dismissing the appeal, that:

1. the cessation of entitlement under para. 15 of Sch. 7 and reg. 14 must take effect by a decision of the LA as for it to take effect simply by operation of law would make it unique within the structure of the legislation, and that view is supported by para. 5 of the Sch. to the 2001 Regs, which assumes that a decision is required (para. 28);
2. the decision-revision-supersession provisions are the only express decision-making provisions for CTB once a claim has been decided and a termination decision fits within that framework as taking effect on supersession of the awarding decision on the basis of a change of circumstances under reg. 7(2)(a)(1) of the 2001 Regs, whether that change of circumstances is the operation of reg. 14 or the facts underlying the operation of reg. 14 (paras. 30 to 31);
3. although reg. 8 purports to fix the effective date for supersession decisions made under reg. 7(2)-(7) and makes no provision for termination decisions, it must be read as limited to matters authorised by para. 4(6) of Sch. 7, whereas the effective date for termination decisions is governed by reg. 14 (para. 32);
4. a termination decision is therefore a “relevant decision” and within the right of appeal under para. 6(1) (para. 33).



## Part 4: Conditions of entitlement

### 1 New tenancy - whether benefit to be paid from second or third week of tenancy

i The claimant was a single person with no children and in receipt of income-based JSA. She took up a new tenancy on 11 March 2002 and claimed HB on and became liable for rent from that date. She did not move into her new home until 20 March 2002 because she was awaiting a loan from the SF for essential furniture. The LA awarded benefit from 25 March 2002, being the Monday after she had moved, but refused to backdate the award to the commencement of the tenancy. The tribunal allowed her appeal, holding that she could be treated as occupying her new home from 11 March under reg. 5(6)(c)(ii) of the HB (General) Regs. 1987. The LA appealed to the Commissioner, who allowed the appeal on the ground that reg. 5(6)(c)(ii) could not apply because the claimant's applicable amount did not include a premium listed in that provision. The Commissioner substituted his own decision that the claimant was entitled to benefit from 18 March, holding that reg. 65(2) of those Regs. applied notwithstanding that the claim for benefit had been made in the week preceding that in which the conditions of entitlement were first met. The Secretary of State appealed to CA.

R(H) 4/04

ii The claimant claimed HB on 12 July 2005 stating that he would take up occupation on 2 September. His tenancy started on Saturday 27 August but he did not move in until 31 August. HB was only paid from 5 September. He appealed. The tribunal upheld the decision saying there was no discretion. The Commissioner dismissed the appeal holding that there was a potential discretion to treat the claim as an advance claim. Once reg. 72(11) had been applied to give an assumed date of claim, reg. 65(2) must be considered in relation to that assumed date. Robinson, reported as R(H) 4/04, was to be distinguished as reg. 72(11) did not apply in that case. Reg. 72(11) did not assist the claimant, as reg. 65(2) was not satisfied. Although the approach the council took was wrong in law, its decision was correct. (See also R(H) 4/04 *above*).

R(H) 9/07

### 2 Occupying a dwelling as the home

i The claimant was the owner-occupier of a house for which he paid council tax. In September 2001 he went abroad on holiday not returning for six months. The LA terminated the claimant's award of CTB, applying reg. 4C(3) of the CTB (General) Regs. 1992. That reg. which was inserted into the 1992 regs. by reg. 4 of the HB, CTB and IS (Amendments) Regs. 1995, provided for a person to be treated as "occupying a dwelling as his home" while he was temporarily absent for a period not exceeding 13 weeks, provided that certain conditions were met. In this case, it was undisputed that the claimant's period of absence was always likely to exceed 13 weeks, and so, on the application of the reg. by the authority, the claimant was treated after 13 weeks as no longer occupying the dwelling as his home and his award of benefit was withdrawn. The claimant appealed. He argued that under s. 131 of the SS Contributions and Benefits Act 1992 entitlement to CTB depended on residence, rather than on any concept of the occupation of a dwelling as his home. The latter concept, he argued, was only relevant to HB, arising as it did in both s. 130 of the 1992 Act and reg. 5 of the HB (General) Regs. 1987. On this basis, he argued that the terms of the primary legislation did not authorise the 1995 amendment to the CTB (General) Regs. and that reg. 4C(3) was therefore invalid. The tribunal dismissed the claimant's appeal. It found that s. 137(2)(h) of the 1992 Act empowered the making of reg. 4C(3). The claimant appealed to the Commissioner, before whom the LA supported his appeal. The Commissioner invited the Secretary of State to be joined as a party if he so wished and he was so joined. The Secretary of State submitted, *inter alia*, that the amendment to the regs. was authorised by s. 137(2)(h) of the 1992 Act, and that the notions of occupation and residence were meant to be equivalent. The Commissioner allowed the appeal and held that the test of entitlement to CTB under s. 131(3) and (11) of the SS Contributions and Benefits Act and under s. 6(5) of the Local Government and Finance

R(H) 4/05

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Act 1992 is liability to pay council tax on a dwelling which is the claimant's sole or main residence and there is nowhere in the council tax statutory provisions any reference to the claimant having to occupy the dwelling as his home as a condition of entitlement. The Commissioner also held that s. 137(2)(h) of the SS and Contributions Act, which empowers the making of regs. as to when a person can be treated as occupying or not occupying a dwelling as his home, does not extend to CTB where the only prescribed test is different, and the tribunal had erred in law in concluding that it did and in those circumstances, reg. 4C(3) of the CTB (General) Regs. is of no effect.

R(H) 9/05      ii      The claimant became liable for rent on her flat from mid-February 2004 and for council tax from mid-March 2004. She had moved her furniture into the flat on 15 March following adaptations which had been made to meet her disability needs. However, the claimant did not move into the flat herself at this time because she was in hospital until 9 August 2004. The LA refused the claimant's claim for HB from mid-February on the grounds that she was not occupying the flat as her home and refused CTB on the grounds that she was not in occupation of the flat. The AT dismissed the claimant's appeal holding that she could not be said to be in occupation of the flat until August when she had personally moved in following her stay in hospital. The claimant appealed to the Commissioner. In allowing the appeal, the Commissioner held that from 15 March the claimant was occupying the flat in the normal sense in which that expression was used. For the purposes of the legislation, the claimant had moved into the flat when she removed her furniture from her previous home and moved it into her new flat. It did not matter that she had not done this personally but through agents acting on her behalf. The claimant was entitled to CTB from 15 March 2004. Entitlement to HB however should commence from 16 February by virtue of reg. 5(6) of the HB (General) Regs. 1997 which allows for a person who has yet to move into a property to be treated as occupying that dwelling for up to four weeks where adaptations are being made to it.

R(H) 4/06      iii      On 22 July 2003 the claimant moved into a residential care home on a trial basis. On 25 August 2003 the Council were informed that the move had become permanent and that the claimant would not be returning to his home on which the tenancy would expire on 3 September. The Council decided to supersede the claimant's entitlement to HB with effect from 19 August. Reg. 5(7B) and (7C) of the HB (General) Regs. 1987 provides that a person who enters residential accommodation on a trial basis shall be treated as occupying the dwelling normally occupied as the home for up to 13 weeks. The claimant died on 7 September 2003 but his representative appealed against the decision to end entitlement to HB arguing that entitlement should have continued until 3 September, the date that the liability on the former property expired. The tribunal allowed that appeal. The council appealed to the Commissioner who decided that the supersession should have taken place with effect from 25 August, the first day of the benefit week following the relevant change of circumstance. The Secretary of State appealed to the CA. In allowing the appeal, the CA held that para. (7B) requires that the intention to return to the dwelling normally occupied as the home must be present at the time that the claimant enters the residential accommodation. Para. (7C) then deems the claimant to be occupying his home despite being absent from it and that this deeming continues even though the claimant has manifested the intention of not returning to his home. The claimant in this case remained entitled to HB until the notice to quit on his former home expired.

R(H) 4/07      iv      The claimant, who suffered from anxiety and depression, had been living in a property as part of a planned resettlement plan after being homeless. A new property had been found for him by the Salvation Army. However, the property had recently been vacated and required carpeting, wallpapering and redecoration. The Commissioner held that: reg. 5(5)(e) and 5(6)(c)(i) of the HB (General) Regs. 1987 permitted a tenant to be treated as occupying two dwellings if, *inter alia*, the delay in moving into the new dwelling was reasonable and necessary in order to adapt that dwelling to meet the disablement needs of that person (para. 5); but the issue in this case was whether carpeting, wallpapering and painting constituted "adaptation" of the property for the purposes of reg. 5(6)(c)(i). Following CH/1363/2006, "adapting" a building should be interpreted as meaning altering the fabric or structure of the building in order to meet a disablement need (including such matters as the provision of fixed handrails, raised lavatories or widened doors). Redecoration and carpeting did not constitute

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“adaptations” for the purpose of reg. 5(6)(c)(i) and the claimant was not entitled to housing benefit until the date when he moved in to the new property.

v Claimant in receipt of HB & CTB for her three bedroom tenancy. Non-dependent son becomes a full time student. Authority and Rent Officer determine HB entitlement based on two bedroom accommodation. FtT determine son was normally resident with claimant, that she was entitled to HB based on three bedrooms (Reg. 7(16-17)), and that no non-dependent deduction was appropriate (Reg. 74(7)). Upper Tribunal confirmed FtT determinations: a full time student is to be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks; no non-dependent deductions appropriate in respect of both HB & CTB. R(H) 8/09

### 3 Incapacity for work under a savings provision

i The appeal concerned an exemption from a rent restriction and turned on whether the claimant was incapable of work under the pre-1996 version of reg. 11(3)(b) of the HB (General) Regs. 1987. This continued to apply to her claim as a result of the savings provision in reg. 10 of the HB (General) Amendment Regs. 1995. The Commissioner decided that incapacity for work had to be determined by reference to the present law rather than that in force before the 1995 reforms and that the decision on incapacity fell to be determined by the Secretary of State rather than the DM. An appeal lay against a determination embodied in the HB decision or against any determination on incapacity made in the context of a SS decision. R(H) 3/06

### 4 Meaning of “exempt accommodation” under a savings provision

i The appeal concerned an exemption from a rent restriction under the savings provision in reg. 10 of the HB (General) Amendment Regs. 1995. The issue was whether the care provider was acting on the landlord’s behalf in providing housing related support so as to income within the definition of “exempt accommodation” in reg. 10(6). The Commissioner decided that it could not be said that the care provider was acting on the landlord’s behalf in the absence of a contractual or statutory obligation on the part of the landlord to provide the care, support and supervision. The provider would not be acting on behalf of the landlord even if in practice the landlord would wish to take steps to ensure such provision. The care must be provided either by the landlord or by a person acting in some sense for him and it is not sufficient that the provision of care benefits the landlord. R(H) 3/07

ii The appeal concerned an exemption from a rent restriction under the savings provision in reg. 10 of the HB (General) Amendment Regs. 1995. The issue was whether the landlord had to be the main provider of care, support or supervision in order for the accommodation to come within the definition of “exempt accommodation” in reg. 10(6). The Commissioner decided that it was wrong to read this requirement into the provision. Furthermore the care, support or supervision did not have to be provided pursuant to a contractual or statutory obligation on the part of the landlord. However the care, support or supervision must be more than minimal. R(H) 7/07

iii The appeal concerned an exemption from a rent restriction under the saving provision in reg. 10 of the HB (General) Amendment Regs. 1995. Reg. 10(6) defines exempt accommodation as including accommodation provided by certain bodies where the landlord or a person acting on its behalf also provides the claimant with care, support or supervision. It was argued on behalf of the claimants that that provision applied where the person providing support acted on behalf of the landlord in any respect, not necessarily in providing support. The Commissioner decided that the tribunal had been correct in construing reg. 10(6) as limiting the saving provision to cases where the support provider was acting on behalf of the landlord in providing support. R(H) 6/08

iv The claimant, a Polish national, came to the UK in 2004. She initially worked but gave birth to a child in August 2005 and subsequently claimed IS; having separated from the child’s father, a French student. The claim was refused because she did not have a right to reside. This was overturned on appeal, the tribunal finding that she had a right to reside as the parent and primary carer of a child of an EU student with a right to reside in the UK. The tribunal decision was set aside by a Commissioner who found R(IS) 3/09

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the claimant had not shown that the father was a student at the relevant time, or that the child was dependent on him. Dismissing a further appeal, the CA held that the Commissioner's decision was in accord with the evidence before him, that it was for the claimant to provide the necessary information in this case, and that the Commissioner was entitled to proceed on the basis that claimant's counsel had supplied him with all the information relevant to the appeal. The Court further held that the Commissioner had considered the proportionality of finding that the child did not have a right to reside and, having rejected this argument, it was thus unnecessary to consider whether the claimant would have an indirect right to reside as primary carer.

R(H) 4/09 v The appeal concerned an exemption from a rent restriction under the saving provision in reg. 10 of the HB (General) Amendment Regs. 1995. Reg. 10(6) defines exempt accommodation as including accommodation provided by certain bodies where the landlord or a person acting on its behalf also provides the claimant with care, support or supervision. The Commissioner decided that the provision of support involves the landlord doing more than exercising ordinary property management functions, implies a degree of continuity and connotes the giving of advice and assistance in coping with the practicalities of everyday life.

[2010] AACR 2 vi *Chorley Borough Council v IT(HB)* [2009] UKUT 107 (AAC); [2010] AACR 2. The appeal concerned an exemption from a rent restriction under the saving provision in reg. 10 of the Housing Benefit (General) Amendment Regulations 1995. Reg. 10(6) defines exempt accommodation as including accommodation provided by certain bodies where the landlord or a person acting on its behalf also provides the claimant with care, support or supervision. The Judge decided that the provision does not encompass persons who have played a part in the accommodation becoming available but who have no proprietary interest in the accommodation. However in this case the landlord had undertaken to provide items of support that provided significant benefit to the tenants.

## 5 Meaning of "long tenancy"

R(H) 2/07 i The appeal concerned the meaning of "long tenancy" in reg. 10(2)(a) of the HB (General) Regs. 1987. The issue was whether the tenancy agreement which was stated to be for a term of 25 years amounted to a long tenancy. The Commissioner confirmed the tribunal's decision that it was not. He held that DM's, tribunals and Commissioners cannot form conclusions as to whether an agreement not made by deed is specifically enforceable. The provisions on long tenancies are designed to set a dividing line between claimants who are not in economic terms the owners of the property they occupy and those who are. The IS regime applied to owners is not intended to be applied to claimants unless they hold a long term interest of a sort which typically has a capital value. The reference in reg. 10(2)(a) to a "tenancy granted" is to a tenancy granted at common law and does not include an agreement to grant such a tenancy, even if enforceable in equity.

## 6 Right to reside

R(IS) 8/07 i In both cases the claimants were EEA nationals who had entered the UK, and then claimed income related benefits (IS, HB, and SPC) after 1.5.04. Neither was a worker or otherwise economically self-sufficient at the relevant time. The claims were rejected on grounds that the claimants were not habitually resident, because they did not have a right to reside in the UK. The decisions were eventually appealed to the CA, who held that simply being lawfully present did not equate to having a right to reside under UK law, for which it is necessary to be a "qualified person": and that was not inconsistent with the UK's obligations under ECSMA or the European Social Charter. The Court concluded that Art. 18 of the Treaty does not create a right of residence for an EEA national in another member state where the limitations imposed under Directive 90/364/EEC are not satisfied. Where a person has no right of residence under either the Treaty or domestic legislation, there was no question of discrimination under Art. 12 (discrimination on grounds of nationality).

ii The claimant was awarded MIG (and then SPC) from January 2003, but this was subsequently disallowed in April 2006 when it was found that she was subject to a sponsorship agreement, signed in November 2002. The claimant appealed and produced evidence, including a British passport and naturalisation certificate, showing that she had become a British citizen in 2004. Despite this, the tribunal upheld the disallowance. The Commissioner held that all British citizens have a right of abode in the UK and a British citizen can never be regarded as a sponsored immigrant or barred for that reason from public funds. R(PC) 2/07

iii The claimant a Norwegian national with four children, came to the UK in 2003 to live with her elderly father, who had himself claimed asylum. Her father became a naturalised British Citizen in 2004 and she then claimed IS mentioning that she had to care for her father. The claim was disallowed because she did not have a right to reside, and that was subsequently upheld by an AT. Confirming that the claimant did not have a right to reside as her father's carer, the Commissioner then considered whether she might, alternatively, have such a right as a dependant of her father. However, the Commissioner held that the claimant had no right of residence as a dependant under the Immigration (EEA) Regs. 2000 because her father's right of residence was only by virtue of domestic legislation rather than under European Community law. R(IS) 6/08

iv *London Borough of Hillingdon v MJ and another (HB)* [2009] UKUT 151 [2010] AACR 4 (AAC); [2010] AACR 4. The claimant, a Dutch citizen, came to the UK in January 2006 and was in receipt of JSA(IB) when she claimed HB and CTB in September of that year. Although any award of JSA(IB) must include a positive determination that the claimant is habitually resident, the LA were advised that this had probably not been investigated when JSA(IB) was first awarded. The LA interviewed the claimant and decided that she did not have a right to reside, and was therefore a person from abroad with no entitlement to HB or CTB. Before the UT, the LA argued that R(H) 9/04 was authority permitting the LA to conduct their own investigations and to decide a claimant were not habitually resident, even though JSA(IB) was in payment. The Judge held that reg. 10(3B)(k) of the HB Regs. 2006, and reg. 7(4A)(k) of the CTB Regs. 2006 was absolutely clear that a person in receipt of IS, JSA(IB), or ESA(IR) was not a person from abroad for HB or CTB claims. The only exception might be where the award of IS, JSA(IB), or ESA(IR) was subsequently found to have been obtained fraudulently. The comments by the Deputy Commissioner in R(H) 9/04 regarding habitual residence were obiter and not binding; and that same Deputy Commissioner had acknowledged his oversight in a later decision (CIS/34/2006). AACR 4

## 7 Meaning of "resident" for CTB purposes

i The appeal concerned two contiguous self-contained flats both of which the claimant occupied with his nine children. The flats were valued as separate hereditaments for council tax purposes. The question was whether a person could be resident in both properties for CTB purposes. The Commissioner decided that as the claimant was liable for council tax on both flats as a resident he qualified for CTB on both as a resident. R(H) 3/08

## 8 Meaning of "houseboat"

i The claimant was living on a canal narrow boat. It was fitted out for permanent residence but was registered as a leisure craft and had only a cruising licence. The question was whether this was a houseboat for the purposes of reg. 10(1)(f) of the HB (General) Regs. 1987. The Commissioner decided that the term "houseboat" was an ordinary English word without a technical meaning. The tribunal had erred in relying on the lack of a licence for residential mooring when deciding that there was no entitlement. It was a matter of fact in an individual case and here the claimant was entitled. R(H) 9/08



## Part 5: Membership of the family

### 1 Meaning of “partner”

i The claimant signed her claim for HB on 12 May 2001, naming her husband as her partner. In her claim form she stated that her tenancy had been granted by her brother-in-law and that it had begun on 15 February 2001, although she had actually resided at the property since 1999. The tenancy agreement provided for a weekly rent of £110, and, on 1 June 2001, HB of £60 per week was awarded. On 27 July 2001 the claimant was interviewed by an officer of the LA. The claimant stated she had originally moved into the property with her husband in 1999, that he had at that time told her that he owned the property, and that they had paid no rent. However, her husband had left the country in February 1999 and she did not know if he would return. Following her husband’s departure, her brother-in-law had told her that she would have to start paying rent and she now believed him to be the owner of the property. She paid him £240 per month and did not make up the difference between this and the stated rent in the tenancy agreement. She did not have a rent book nor did she receive any sort of receipt for the payments she made. A decision was taken on the same day to terminate the claimant’s entitlement to benefit with effect from 7 May 2001. The claimant appealed against the removal of her award. A tribunal disallowed the claimant’s appeal. It found that the claimant was not entitled to HB from 7 May 2001 because the tenancy was not commercial. Moreover, the tribunal found further that reg. 7(1)(h) of the Housing Benefit (General) Regs. 1987 applied, to the effect that the claimant could not be treated as liable to pay since her husband had previously owned the dwelling within five years of the claimant’s claim.

R(H) 6/04

In allowing the appeal, the Commissioner held that in relation to the application of reg 7(1)(h) the relevant “partner” was the person who was the claimant’s partner between the date of claim and the date the determination was given. Moreover, having regard to the definition of the term “married couple” in reg. 2(1), the claimant’s husband would not be her partner once he ceased to be a member of the same household. The tribunal therefore erred when it applied reg. 7(1)(h) because at the relevant time the claimant’s husband had ceased to be her partner within the meaning of reg. 2(1).

### 2 Whether a LA is bound by a decision awarding JSA to a claimant and his wife as a “married couple”

i The claimant had separated from his wife in late 2000 and the divorce was finalised at the end of 2002. In July 2003 the LA refused the claimant’s claim for HB on the ground that the claimant should be treated as not liable to make payments in respect of the dwelling occupied as his home by virtue of reg. 7(1)(c)(i) of the HB (General) Regs. 1987, which applies where a claimant’s liability is to his former partner and is in respect of a dwelling which he and his former partner occupied before they ceased to be partners. The LA DM found that the claimant and his wife had not ceased to be “partners” in March 2001, referring to the fact that the claimant’s then wife had named him as her partner in her application for CTB made at that time and that they had been paid income-based JSA as a couple by the DWP. The claimant appealed to an AT. The tribunal allowed his appeal, accepting his evidence and that of his ex-wife, and finding that they had been living in separate households at the material time. The LA appealed to the Commissioner, citing *R v. Penwith District Council ex parte Menear (1992)* 24 HLR 115 as authority for the proposition that it was bound by the JSA decision. In dismissing the appeal, the Deputy Commissioner held that the effect of *ex parte Menear* was limited to requiring a HB DM to treat a person on IS or income-based JSA as having no income or capital and therefore automatically entitled, from the financial point of view, to HB. As the claimant contended that the DWP’s decision as to his family status was wrong, the LA had to reach its own conclusion on that issue, especially as it was unlikely that the DWP’s position represented a considered view. However, in cases where parallel decisions fell to be made by the DWP and a LA, the LA could regard the existence of a **considered** decision by the DWP as satisfactory evidence of a state of affairs, in the absence of anything to compel a contrary conclusion see also 32.4.6 iv above.

R(H) 9/04



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## Part 6: Claims

### 1 Lack of evidence

i In four cases considered by the Tribunal of Commissioners the LA had refused to give a decision on a claim because the claimant had failed to supply evidence requested, invoking reg. 76(2)(b) of the HB (General) Regs. 1987 (the HB Regs.) and identical CTB provisions. The issues were (1) whether a failure to provide evidence or information under reg. 73 of the HB Regs rendered a claim defective and, if so, whether there was (a) a duty or (b) a power to determine such a claim; (2) whether a decision to refuse to decide a claim was appealable. They held: R(H) 3/05

A failure to provide evidence or information requested after the receipt of a claim does not render the claim defective.

A duty to decide claims for benefit is implicit within the statutory scheme.

The power to make reg. 76 could not be implied into s. 5 of the SS Administration Act 1992, on the ground that it was necessary in order to provide for cases where a decision was impossible because evidence or information had not been provided, since it was always possible for the authority to make a decision, drawing an adverse inference if necessary.

*Kerr v. Department for Social Development* [2004] UKHL 23, [2003] 1 WLR 1372 applied.

The proper construction of reg. 76(2) had the effect that the regs. allowed what was in substance a decision on a claim to be treated as not being such a decision, but the broad power under s. 123(1)(d) of the SS Contributions and Benefits Act 1992 to make a HB scheme did not authorise the Secretary of State to make a reg. having such an effect, and reg. 76(2) was therefore *ultra vires*. It followed that the decisions of the LA s were to be treated as decisions that the claimants were not entitled to benefit and were therefore appealable.

**Note:** Reg. 76(2) of the HB Regs. was revoked by S.I. 2004/3368 with effect from 21 December 2004.



## Part 7: Capital and income - general

### 1 Expenses of self-employed earners

i The claimant was in receipt of HB and CTB for a period of about a year. The LA decided that part of the benefit had been overpaid and the claimant appealed against this decision. The appeal concerned the expenses that were deductible from the claimant's self-employed earnings when calculating the net profit of the business in accordance with HB (General) Regs. 1987, reg 31 as "wholly and exclusively incurred....for the purpose of the business". The tribunal allowed the claimant's appeal and directed the LA to recalculate the claimant's entitlement, however the claimant appealed to the Commissioner stating that aspects of the tribunal's decision were wrong and that additional amounts of expenditure should have been held deductible. In particular the claimant stated that an apportioned amount of repayments for interest and capital on the loan for purchase of a replacement car should be deductible. The Commissioner allowed the appeal; and held that in determining whether any and if so what, part of the loan interest repayments for the car were expenses "wholly and exclusively incurred..." the principle of apportionment adopted in R(FC) 1/91 applied. The apportionment should be in accordance with the amount of business mileage as a percentage of the total mileage in the assessment period in which the interest was paid and this same principle of apportionment applied to the capital repayments as to the interest payments. The Commissioner substituted his own decision setting out the further deductions to be made. R(H) 5/07

### 2 Self-employed earners - calculation of income

i The claimant was awarded CTB based on his income from self-employment and his wife's part-time earnings. His business was making a loss during the relevant period and he disagreed with the income figure used in the calculation arguing that the loss from his self-employment should be deducted from his wife's earnings. The tribunal upheld the council's decision so the claimant appealed to the Commissioner. Reg. 22(10) of the CTB (General) Regs. 1992 prevents offsetting of losses from a claimant's self-employed business against any other employment in which he is engaged. The claimant argued this reg. did not apply because although his wife's earnings were to be treated as his under s136 of the SS Contributions and Benefits Act 1992, this did not require that he be treated as engaged in the employment undertaken by his wife and reg. 22(10) only applied where the claimant is engaged in two or more employments. The Commissioner dismissed the appeal and held that whilst reg. 22(10) did not in terms prevent offsetting against his wife's income, it did allow only for net profit to be taken into account when calculating self-employed income, in regs. 22(1) and (3) and made no provision for a loss to be treated as anything other than nil. This meant that there was no figure to offset against his wife's earnings. R(H) 5/08

ii Claimant's wife was running a business with a partner, making regular drawings from the capital but the business was not making a profit. Claimant's CTB award was re-calculated to take account of his wife's drawings from the business initially as earned income but on revision as unearned income. AT confirmed this revised decision but claimant appealed. Appeal allowed and confirmed that when partnership is making profits any drawings taken by a partner are not taken into account as income as to do so would involve taking into account both claimant's share of profits and actual drawings from that share of profits. This view clarifies earlier decisions. Where the partnership is not in profit or where partner draws amounts in excess of his or her share of profit so that partner's capital account goes into, or further into, overdraft, it would be unfair to take such drawings into account since drawings from profits in future years might be restricted to decrease the overdraft on the capital account, but the partners full share would still be required by the legislation to be taken into account. R(H) 6/09

32.7.3

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**3 Whether gross income means Incapacity Benefit actually received or the notional rate**

- R(H) 2/09
- i The claimant was in receipt of an occupational pension and IB reduced from the full rate to take into account the occupational pension in accordance with s. 30DD of the SS Contributions and Benefits Act 1992 (the 1992 Act). In dealing with his claim for CTB the LA had taken into account the amount of IB actually paid, but on 22 May 2007 reassessed his entitlement back to April 2004 using the standard rate of IB payable rather than the actual amount paid to the claimant following the s. 30DD reduction, relying on reg. 30(5) of the Council Tax Benefit Regs. which provides that “where payment of any benefit ... is subject to any deduction by way of recovery the amount to be taken into account ... shall be the gross amount payable”. On appeal to the Commissioner it was held that reg. 30(5) did not apply on the facts of the case. The claimant’s IB was not “subject to any deduction by way of recovery” but subject to a reduction by virtue of the operation to s. 30DD of the 1992 Act: no amount was being “recovered” from his benefit entitlement (para. 16). The correct approach was to assess the claimant’s income based on (a) his gross occupational pension payments (see R(IB) 3/05), (b) the actual rate of IB in payment after any reduction under s. 30DD and (c) any other relevant income. (See also R(IB) 3/05 2.1.1ii).

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## Part 8: Capital

### 1 Notional capital

i Towards the end of 2001 the claimant inherited a sum of money which exceeded the capital limit for housing benefit. In May 2002 he reclaimed HB stating that his capital had decreased below the limit. The LA decided that the claimant was not entitled to HB on the grounds that he possessed notional capital in excess of the capital limit. This is because it was determined that the claimant had deprived himself of over £68,000 for the purpose of securing entitlement to HB. The claimant appealed. The appeal tribunal dismissed the appeal finding that, although the claimant suffered from mental illness, he was capable of managing his own affairs and of realising he was spending his money imprudently. The tribunal found that a significant operative purpose of the expenditure was to secure entitlement to HB. The Commissioner allowed the claimant's appeal from the tribunal. In allowing the appeal and remitting the case to another tribunal, the Commissioner held that the subjective "significant operative purpose" test was the correct test to apply. However, the tribunal had erred in concluding that because a person is not completely incapable of managing his affairs or realising he was spending his money imprudently, it follows as a matter of course and without further analysis that all such spending is done for the purpose of securing entitlement to benefit. The tribunal had also erred in failing to provide any breakdown or analysis of the actual amounts or occasions in respect of which the claimant was being found as a fact to have deprived himself of capital for the purpose of obtaining benefit. See also R(IS) 1/91, 29.10.7 i. R(H) 1/06

### 2 Calculation of capital

i The claimant was refused HB and CTB on the ground that he had capital of £30,000 in the form of a caravan on a non-residential site. The LA ruled that it could not be disregarded as a personal possession because it was static and connected to services and therefore was to be classed as property. The claimant appealed and the tribunal found that the caravan was capital, but its conclusions on the issue whether it should be disregarded as a personal possession were unclear. The question whether the claimant has acquired the caravan with the intention of reducing his capital in order to secure entitlement to HB or to increase the amount of that benefit was not in issue. The Commissioner held that the caravan was capital for the purposes of the HB and council tax legislation but fell to be disregarded as a "personal possession". Having regard to the context of the words and the history of the legislation, "personal possessions" mean any physical assets other than land and assets used for business purposes. R(H) 7/08



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## Part 9: Payments

### **1 Benefit paid to tenant where duty to pay to landlord - whether possible to pay to landlord for same period**

i The claimant had authorised the payment of HB to her landlord under reg. 96(1)(a) of the HB Regs. 2006. In January 2006, at the claimant's request, the LA decided to stop payments to the landlord and pay benefit instead into the bank account of a friend of the claimant, but it did not notify the landlord of its decision. In April 2006 the landlord contacted the LA and the authority accepted that it was required by reg. 95(1)(b) to make payments to the landlord because the claimant was more than eight weeks in arrears with her rent. The authority reinstated direct payments to the landlord. The landlord appealed to an AT, arguing that payment should be made to him under reg. 95(1)(b) for the period from January to April. The tribunal dismissed the appeal, holding that there was no power to order a second payment of HB to the landlord. The landlord appealed to the Commissioner. Before the Commissioner it was common ground, on the authority of CH/2986/2005, that: R(H) 2/08

1. the decision to pay HB to the claimant should have been made on a supersession;
2. the supersession decision should have been notified to the landlord;
3. it carried a right of appeal by the landlord; and
4. it was that decision which was under appeal to the tribunal.

This case was heard together with R(H) 1/08, which raised the same issue.

*Held*, dismissing the appeal, that:

1. the absence of any provision for recovery of the payment made in error to the tenant did not prevent a payment being made to the landlord for the same period, since the recovery provisions follow on in their effect from the entitlement provisions, and cannot have any effect by relation back on what payments may be made;
2. it was possible that entitlement to a retrospective payment to the landlord might arise since a decision on revision or supersession is a decision dealing with all aspects of entitlement (R(I) 9/63 followed) and it would have been open to the LA or the tribunal to make a retrospective decision on revision that included the payment of the benefit to the landlord;
3. however that result was prevented by reg. 98, which provides that any sum paid in respect of a period covered by a subsequent decision shall be offset against arrears of entitlement under the subsequent decision and treated as properly paid on account of them.



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## Part 10: Suspension and Termination

### **1 Suspension of awards and payments of benefit pending provision of information or evidence; and termination of award for failure to provide**

i The authority terminated the claimant's entitlement to CTB following the correct period of suspension as the required information or evidence was not provided (see HBCTB (Decisions and Appeals) Regs. 13 and 14). However, the evidence required was the claimant's previous tax year's profit and loss accounts and the claimant had reported within the month that these had not yet been prepared by his accountant - they did not exist. This was not a "failure" for the purposes of Reg. 14. The Commissioner states it would have been reasonable for the authority to request the information in terms the claimant could comply with either initially or when it became clear the evidence did not exist, in this case for instance, "net profit" details.

R(H) 1/09



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The decisions listed below are not included in  
chapter 32

*A Decision which turned on special facts.*

R(H) 1/07

