|  |
| --- |
| **Decision Maker’s response to an**  **appeal to the First-tier Tribunal**  *Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008* |
|  |
| **Decision Maker and main respondent:**  **Anytown Council (“The Council”)** |
|  |
| **Revenues and Benefits Service**  **PO Box 695**  **Anytown**  **AT1 1AT**  *This is also the address for service of documents in accordance with Rule 24(2)(c)* |
| **Appeal by:** Mr Surjit Barker, 1 Any Drive, AT5 0HZ |
|  |
| **Second respondent:** Paul Hall (claimant) 33 Any Gardens, Anytown, AT5 2JD, formerly of 16 Any St, Anytown, AT2 0JZ |
| **Brief details of the case**  The Council has decided that an overpayment of Housing Benefit amounting to £754.29 is recoverable from Mr Barker and his former tenant Mr Hall who, according to the Council’s records, moved out of Mr Barker’s property in May 2009. Mr Barker maintains that his tenant remained in occupation throughout the period of the alleged overpayment and was therefore entitled to all of the Housing Benefit paid to Mr Barker on his behalf. |
|  |
| **Please refer to the detailed response and relevant documents attached** |

1. **Personal details**

**Appellant**

|  |  |  |
| --- | --- | --- |
| **Surname** |  | **Address** |
| **Barker** |  | 1 Any Drive, AT5 0HZ |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Other names** |  | **NINO** | | | | |
| **Surjit** |  | N/A |  |  |  |  |

|  |  |  |
| --- | --- | --- |
| **Benefit appealed**  **Against** |  | **Other references:** |
| **Housing Benefit only** |  | **Council ref 234567** |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Date of decision** |  | **Date notified** |  | **Date of appeal** |
| **20 July 2009** |  | **20 July 2009** |  | **31 July 2009** |

|  |
| --- |
| **Date of reconsideration** |
| **10 September 2009** |

1. **Schedule of evidence**

| ***Doc number*** | *Pages* | ***Date of document*** | ***Date of receipt*** | ***Brief description of document*** |
| --- | --- | --- | --- | --- |
| 1 | 10 – 12 | 20 Jul 09 | n/a | Original overpayment decision notice to Mr Barker |
| 2 | 13 – 16 | 20 Jul 09 | n/a | Original overpayment decision notice to Mr Hall |
| 3 | 17 – 20 | 10 Sep 09 | n/a | Revised decision notice to Mr Hall |
| 4 | 21 – 23 | ?? | n/a | Revised decision notice to Mr Barker |
| 5 | 24 – 26 | 31 Jul 09 | 31 Jul 09 | Mr Barker’s appeal |
| 6 | 27 – 28 | 16 Dec 08 | n/a | Original awarding decision |
| 7 | 29 – 31 | 26 Jun 09 | 26 Jun 09 | Electronic notice from DWP |
| 8 | 32 – 33 | 13 Aug 09 | n/a | Letter to Mr Barker |
| 9 | 34 – 36 | 13 Aug 09 | n/a | Letter to Mr Hall |
| 10 | 37 – 40 | 14 Jul 09 | 14 Jul 09 | Data matching report |
| 11 | 41 – 42 | n/a | n/a | Conts & Bens Act s130 |
| 12 | 43 – 44 | n/a | n/a | Conts & Bens Act s137(2) |
| 13 | 45 – 47 | n/a | n/a | HB Reg 7 |
| 14 | 48 – 49 | n/a | n/a | Administration Act s75 |
| 15 | 50 – 51 | n/a | n/a | HB Reg 100 |
| 16 | 52 – 54 | n/a | n/a | HB Reg 101 |
| 17 | 55 – 57 | n/a | n/a | Extract from R(H) 6/06 |

1. **Decision under appeal**
   1. The Council has decided that a Housing Benefit (HB) overpayment of £754.29 is recoverable from Mr Barker and from his former tenant Mr Paul Hall. The overpayment arises from a superseding decision ending Mr Hall’s Housing Benefit award with effect from 8 May 2009. According to the Council’s records, Mr Hall moved to another dwelling outside the Council’s area at that time; but Housing Benefit payments were made to Mr Barker up to 12 July 2009.
   2. The original decision notices informing Mr Barker and Mr Hall of the overpayment are attached as Appendices 1 and 2 (pages 10 - 16).
   3. The Tribunal will see that the original decision notices say that Mr Hall’s Housing Benefit ended from 8 June 2009 and the amount overpaid was £400. The decision was subsequently revised to Mr Hall’s and Mr Barker’s disadvantage: the Council now believes that Mr Hall’s entitlement ended on 8 May 2009 and that the amount overpaid is £754.29. The decision notices informing Mr Barker and Mr Hall of the revised decision are attached as Appendices 3 and 4 (pages 17 - 23).
   4. The decision notices referred to above include a further overpaid amount of £12.31 a week over the same period. This part of the HB award was paid to Mr Hall himself under the Local Housing Allowance rules; the Council has not decided that this further amount is recoverable from Mr Barker and so it is not relevant to his appeal.

1. **Appeal**
   1. The appellant is Mr Barker. His appeal is attached as Appendix 5 (page 24).
   2. The Council has had no contact from Mr Hall, but he is a respondent to this appeal because he is a person affected by the decision.
2. **Chronology of facts**

**Housing Benefit award to Mr Hall**

* 1. Mr Hall lived at 16 Any St in Anytown until the late spring or early summer of 2009 – the exact date on which he ceased to occupy the property is a matter of dispute between the Council and the appellant, Mr Barker. Mr Hall was awarded maximum Housing Benefit of £92.31 a week, based on the Local Housing Allowance rate of £400 a month, from 20 October 2008.
  2. The original decision notice informing Mr Hall of the award is attached as Appendix 6 (pages 27 - 28). The Tribunal will see that payment of HB was split between Mr Hall and Mr Barker: because Mr Hall’s rent liability was only £80 a week, that was the maximum amount payable to Mr Barker; but under the Local Housing Allowance (LHA) rules, Mr Hall was entitled to a further £12.31 a week because the appropriate LHA for his household size exceeded his rent liability. The extra £12.31 was paid to Mr Hall himself. This appeal is concerned only with the HB payments of £80 a week made to Mr Barker.

**Notice of Mr Hall’s vacation**

* 1. On 26 June 2009, the Council received an electronic notice from the Department for Work and Pensions (DWP) informing it that Mr Hall had moved to the Othertown area (Appendix 7, page 29). The date of the move was shown as 5 June 2009.
  2. One further Housing Benefit payment was issued to Mr Barker covering the period up to and including 12 July 2009. The payment was made in arrears on or shortly before that date.
  3. On 20 July, the Council decided that Mr Hall was no longer entitled to HB from 8 June 2009 as he no longer occupied the dwelling at 16 Any St as his home. The Council also decided that all HB paid for the five-week period from 8 June to 12 July had been overpaid. Of that overpaid HB, the Council decided that £80 a week (£400 in total) was recoverable from both Mr Hall and Mr Barker (Appendices 1 and 2 – pages 10 - 16) – that being the amount that had been paid to Mr Barker.

**Appeal and follow-up correspondence**

* 1. On 31 July the Council received an appeal from Mr Barker (Appendix 5, page 24). Mr Barker said that as far as he was aware Mr Hall remained in occupation until 22 July, and that in any case even if there was an overpayment it was Mr Hall’s fault and not his.
  2. The Council replied to Mr Barker on 13 August 2009 inviting him to provide evidence that Mr Hall continued to occupy 16 Any Street after 8 June (Appendix 8, page 32). On the same date the Council wrote to Mr Hall at his new address asking him to provide clarification of the date when he had moved and to say whether he had given Mr Barker any notice of his intention to move (Appendix 9, page 34).

**Revision of decisions**

* 1. From time to time the DWP and local authorities administering the HB scheme compare their records in an exercise known as “data-matching”. The results of a data match carried out on 14 July 2009 showed that Mr Hall had started claiming Housing Benefit in the Othertown area on 12 May 2009. This information suggested that he must have moved out of 16 Any Street earlier than 8 June as previously believed. See data matching report at Appendix 10, page 37.
  2. As a result of this new information the Council revised its decisions on 10 September 2009. The superseding decision ending Mr Hall’s award now took effect from 8 May 2009, extending the overpayment period by exactly one calendar month. The overpayment decision affecting Mr Barker was revised accordingly to £754.29 (the original £400, plus £80 a week converted to a calendar monthly amount). The notice informing Mr Hall of the revised decisions is attached as Appendix 3 (page 17). Unfortunately, it does not appear that Mr Barker was notified of the revised overpayment decision at the same time. However, in the course of preparing this response the Council has corrected that omission and informed Mr Barker of the new overpayment amount (Appendix 4, page 21). The Council still considers that the overpayment is recoverable from both Mr Barker and Mr Hall: the only thing that has changed as a result of the revised decision is the amount of the overpayment, which has increased. As this revision is not to the advantage of the appellant, the appeal does not lapse.

1. **Legislation**

**Entitlement to Housing Benefit**

**Primary legislation**

* 1. Section 130(1) of the Social Security Contributions and Benefits Act 1992 sets out the threshold conditions of entitlement to HB (Appendix 11, page 41). A person is entitled to HB if he is liable to make payments in respect of the dwelling that he occupies as home, subject to a means test.
  2. Section 137(2) of the Act (Appendix 12, page 43) allows the Secretary of State to prescribe circumstances in which a person is or is not to be treated as occupying a dwelling as his home.

**Regulations**

* 1. Regulation 7 of the Housing Benefit Regulations 2006 (Appendix 13, page 45) prescribes the circumstances in which a person is or is not to be treated as occupying a dwelling as his home. Regulation 7(1) and (2) say that, unless the provisions in the remaining paragraphs of Reg 7 apply, the claimant is to be treated as occupying only one dwelling as his home, that being the one that he normally occupies.
  2. Reg 7(6) prescribes circumstances in which a person may be treated as occupying more than one dwelling, including a case where the claimant has moved to a new dwelling but could not reasonably have avoided remaining liable for up to four weeks to make payments for his former dwelling.

**Overpayments of Housing Benefit**

**Primary legislation**

* 1. Section 75 of the Social Security Administration Act 1992 (Appendix 14, page 48) governs recovery of HB overpayments. Subsection (1) provides that an overpayment is recoverable except where Regulations provide otherwise. Subsection (3)(a) provides that an overpayment is recoverable by default from the person to whom it was paid, except where Regulations provide otherwise; and subsection (3)(b) provides that Regulations may prescribe other persons from whom an overpayment is recoverable as well as, or instead of, the person who received it.

**Regulations**

* 1. Regulation 100 of the HB Regs 2006 (Appendix 15, page 50) prescribes circumstances in which an overpayment is not recoverable. An overpayment caused by official error is not recoverable if neither the claimant nor the person who received the money could reasonably have been expected to realise at the time when the payment was made, or at the time of any notice relating to the payment, that it was an overpayment.
  2. Regulation 101 (Appendix 16, page 52) is made under s75(3) of the Administration Act and prescribes the person from whom an overpayment may be recovered. Paragraph (1) is made under s75(3)(a): an overpayment is not recoverable from a landlord in certain cases where the landlord alerts the Council to suspected fraudulent action by the claimant. Paragraph (2) is made under s75(3)(a) and (b) and prescribes persons from whom an overpayment is recoverable as well as or instead of the person who received it. Paragraph (2) can be summarised as follows:
* Where an overpayment has been caused by someone’s failure to disclose a material fact, or misrepresentation of a material fact, the overpayment is **only** recoverable from that person instead of the person who received the money (if different)
* Where an overpayment is caused by an official error, but is nevertheless recoverable because someone should have realised there was an overpayment, the overpayment is **only** recoverable from the person who should have known instead of the person who received the money (if different)
* Where an overpayment arises for any other reason, it is recoverable from **both** the claimant **and** the person who received the money.

**Interaction between paragraphs (1) and (2) of Regulation 101**

* 1. On first reading, Reg 101(1) imposes a series of conditions which must all be met before a landlord can escape liability for repayment of an HB overpayment made to him on his tenant’s behalf: unless the claimant has indulged in suspected fraud, and unless it is the landlord who brings the matter to the Council’s attention, the overpayment will always be recoverable from the landlord as the person who received the money under s75(3) of the Act.
  2. However, the Council would suggest that Reg 101(2), made under s75(3)**(a) and (b)**, operates independently of Reg 101(1). Thus, if the overpayment is caused by the claimant’s innocent mistake, it is only recoverable from him instead of the landlord; and if the overpayment is caused by a Council error which **only** the claimant could have been expected to notice, it is recoverable **only** from him instead of the landlord.
  3. The Council suggests that the above interpretation is supported by paragraphs 45 to 52 of R(H) 6/06 (Appendix 17, page 55). While Reg 101 itself has been amended twice since the Tribunal of Commissioners gave its decision in R(H) 6/06, s75(3) remains the same and so the Council suggests that the comments in the cited extract remain good authority for viewing Reg 101(2) in isolation from Reg 101(1).

1. **The Council’s submission in support of its decision**

**Adjudication**

* 1. The Council submits that it had grounds to make a superseding decision ending Mr Hall’s HB entitlement on the grounds that there had been a change of circumstance in that he had ceased to satisfy the threshold condition of occupying 16 Any Street as his home, even if he remained liable to make payments in respect of that address. While the date on which Mr Hall ceased to occupy the dwelling remains a matter of contention, the grounds for making a superseding decision are the same irrespective of the effective date of that decision.
  2. The Council submits that it has correctly notified both Mr Hall and Mr Barker of the decision that there has, as a consequence of the superseding decision referred to above, been an overpayment of HB that is recoverable from them both; and, despite the fact that notices were issued on different dates, the Council submits that it has now properly informed both parties of the revision of the overpayment amount from £400 to £754.29. Any residual prejudice caused to either party by any delays or flaws in the notification process has, the Council submits, been remedied by the provision of this response to both of them in time for the hearing of Mr Barker’s appeal

**Date on which Mr Hall ceased to occupy the dwelling**

* 1. The notice issued to the Council by the DWP on 26 June 2009 (Appendix 7, page 29) gives 5 June as the date on which the DWP changed Mr Hall’s address in its records. But the Council would submit that the more compelling evidence of the date of Mr Hall’s move is the data matching report showing that he had started to claim HB from Othertown City Council as early as 12 May 2009 (Appendix 10, page 37).
  2. The only counter-evidence is Mr Barker’s assertion in his letter of appeal (Appendix 5, page 24) that Mr Hall “continued to live at my property until 22 July”. The Council considers this statement inherently implausible: if Mr Barker is correct, Mr Hall was still living at 16 Any Street on the date when the DWP informed the Council that he had moved and on the date when the Council made its first overpayment decision. There would have been no reason for the DWP to issue such a notice if Mr Hall were still living at 16 Any Street. The Council suggests that Mr Barker is offering a date that would absolve him of any liability to refund an overpayment without any evidence to back up his assertion.
  3. The Tribunal is reminded that the Council invited both Mr Barker and Mr Hall to provide more information and evidence about the circumstances of his move – see the letters sent to both of them on 13 August (Appendices 8 and 9, pages 32 to 36). The Council has received no reply to either of those letters. In the absence of evidence to the contrary, the Council considers that it is correct to assume that Mr Hall left 16 Any St on or shortly before 12 May 2009; and in the absence of any evidence to suggest that he could not have arranged his move without unavoidably remaining liable to pay rent to Mr Barker, the Council submits that it is correct to conclude that Mr Hall does not satisfy the requirements of Regulation 7(6) (Appendix 13, page 45) and that his award in respect of 16 Any Street must therefore end from the date when he moved out.
  4. The Council therefore submits that the amount of the overpayment, as revised on 10 September 2009, is correct on the best available evidence.

**Is the overpayment recoverable?**

* 1. Neither Mr Hall nor Mr Barker informed the Council that Mr Hall had moved out – the Council first learned of the move by way of a notice from the DWP issued on 26 June 2009 (Appendix 7, page 29). One further HB payment was made on or shortly before 12 July 2009. The Council submits that the interval between the receipt of the notice from the DWP and the issuing of that final payment was not long enough to amount to an official error by way of omission; rather, it was within the period that should be seen as a normal, routine and efficient turnaround. No further payments were issued after that.
  2. It is true that the Council appears to have taken several weeks to react to the data matching report dated 14 July 2009 – the overpayment was not revised in the light of that report until 10 September. However, the overpayment of HB had already happened by the time of the data match – any delay in reacting to the data match cannot have caused any overpayment because *no payments were issued* after that date.
  3. The Council submits that the cause of the overpayment is not official error, which means that it is recoverable.

**From whom is the overpayment recoverable?**

* 1. The Council accepts (see paragraphs 6.8 to 6.10 above) that Mr Barker does not have to satisfy the stringent requirements of Reg 101(1) in order to escape recovery of the overpayment: all he needs to do is satisfy the Tribunal that the overpayment should be recoverable from another person instead of him in accordance with Reg 101(2). In essence, if Mr Barker can persuade the Tribunal that the overpayment is mainly Mr Hall’s fault, then the overpayment will only be recoverable from Mr Hall, instead of Mr Barker.
  2. On the evidence available, the Council finds it impossible to say whether Mr Barker or Mr Hall is principally to blame for the overpayment. Both parties have been invited to comment on the circumstances in which Mr Hall left 16 Any Street, but neither party has offered any further comments. The Council is unable to say whether or when Mr Barker knew that his tenant was moving. In the absence of evidence to fix either party alone with responsibility to repay the money, the Council has concluded that **either**:
* Both parties are equally responsible for causing the overpayment, in which case Reg 101(2)(b) applies to both of them at the same time; **or**
* Reg 101(2)(b) does not apply, therefore Reg 101(2)(a) applies and the overpayment is recoverable from both the claimant and the person who received it
  1. Either way, the overpayment is recoverable from Mr Barker and Mr Hall.

**Appendix 11**

**Section 130 of the Contributions and Benefits Act**

**Section 130**

(1) A person is entitled to housing benefit if

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

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

(c) either

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

(ii) his income exceeds that amount, but only by so much that there is an amount remaining if the deduction for which subsection (3)(b) below provides is made.

(2) In subsection (1) above "payments in respect of a dwelling" means such payments as may be prescribed, but the power to prescribe payments does not include power to prescribe

(a) payments to a billing or levying authority in respect of council tax; or

(b) mortgage payments, or, in relation to Scotland, payments under heritable securities.

(3) Where a person is entitled to housing benefit, then

(a) if he has no income or his income does not exceed the applicable amount, the amount of the housing benefit shall be the amount which is the appropriate maximum housing benefit in his case; and

(b) if his income exceeds the applicable amount, the amount of the housing benefit shall be what remains after the deduction from the appropriate maximum housing benefit of prescribed percentages of the excess of his income over the applicable amount.

**Appendix 12**

**Section 137(2) of the**

**Social Security Contributions and Benefits Act 1992**

**Section 137**

(2) Regulations may make provision for the purposes of this Part of this Act–

(a) as to circumstances in which a person is to be treated as being or not being in Great Britain;

(b) continuing a person’s entitlement to benefit during periods of temporary absence from Great Britain;

(c) as to what is or is not to be treated as remunerative work or as employment;

(d) as to circumstances in which a person is or is not to be treated as engaged or normally engaged in remunerative work;

(e) as to what is or is not to be treated as relevant education;

(f) as to circumstances in which a person is or is not to be treated as receiving relevant education;

(g) specifying the descriptions of pension increases under war pension schemes or industrial injuries schemes that are analogous to the benefits mentioned in section 129(2)(b)(i) to (iii) above;

**(h) as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home;**

(i) for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable;

(j) for treating any person who is not liable to make payments in respect of a dwelling as if he were so liable;

(k) for treating as included in a dwelling any land used for the purposes of the dwelling;

(l) as to circumstances in which persons are to be treated as being or not being members of the same household;

(m) as to circumstances in which one person is to be treated as responsible or not responsible for another.

**Appendix 13**

**Extract from Regulation 7 of the Housing Benefit**

**Regulations 2006**

**7. Circumstances in which a person is or is not to be treated as occupying a dwelling as his home**

(1) Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home—

(a) by himself or, if he is a member of a family, by himself and his family; or

(b) if he is polygamously married, by himself, his partners and any child or young person for whom he or any partner of his is responsible and who is a member of that same household

and shall not be treated as occupying any other dwelling as his home.

(2) In determining whether a dwelling is the dwelling normally occupied as a person´s home for the purpose of paragraph (1) regard shall be had to any other dwelling occupied by that person or any other person referred to in paragraph (1) whether or not that dwelling is in Great Britain.

...

(6) Where a person is liable to make payments in respect of two (but not more than two) dwellings, he shall be treated as occupying both dwellings as his home only—

(a) for a period not exceeding 52 weeks in the case where he has left and remains absent from the former dwelling occupied as his home through fear of violence in that dwelling or by a former member of his family and—

(i) it is reasonable that housing benefit should be paid in respect of both his former dwelling and his present dwelling occupied as the home; and

(ii) he intends to return to occupy the former dwelling as his home; or

(b) in the case of a couple or a member of a polygamous marriage, where he or one partner is a student, other than one to whom regulation 56(1) applies (circumstances in which certain students are treated as not liable to make payments in respect of a dwelling), or is on a training course and it is unavoidable that the partners should occupy two separate dwellings and reasonable that housing benefit should be paid in respect of both dwellings; or

(c) in the case where, because of the number of persons referred to in paragraph (1), they have been housed by a housing authority in two separate dwellings; or

(d) in the case where a person has moved into a new dwelling occupied as the home, except where paragraph (4) applies, for a period not exceeding 4 benefit weeks from the date on which he moved if he could not reasonably have avoided liability in respect of two dwellings; or

(e) in the case where a person—

(i) is treated by virtue of paragraph (8) as occupying a dwelling as his home ("the new dwelling") and sub-paragraph (c)(i) of that paragraph applies; and

(ii) he has occupied another dwelling as his home on any day within the period of 4 weeks immediately preceding the date he moved to the new dwelling

for a period not exceeding 4 benefit weeks immediately preceding the date on which he moved.

**Appendix 14**

**Section 75 of the Social Security Administration Act**

**75. Overpayments of Housing Benefit**

(1) Except where regulations otherwise provide, any amount of housing benefit determined in accordance with regulations to have been paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.

(2) Regulations may require such an authority to recover such an amount in such circumstances as may be prescribed.

(3) An amount recoverable under this section shall be recoverable–

(a) except in such circumstances as may be prescribed, from the person to whom it was paid; and

(b) where regulations so provide, from such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed.

(4) Any amount recoverable under this section may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.

(5) Where an amount paid to a person on behalf of another person is recoverable under this section, subsections (3) and (4) above authorise its recovery from the person to whom it was paid by deduction-

(a) from prescribed benefits to which he is entitled;

(b) from prescribed benefits paid to him to discharge (in whole or in part) an obligation owed to him by the person on whose behalf the recoverable amount was paid; or

(c) from prescribed benefits paid to him to discharge (in whole or in part) an obligation owed to him by any other person.

(6) Where an amount is recovered as mentioned in paragraph (b) of subsection (5) above, the obligation specified in that paragraph shall in prescribed circumstances be taken to be discharged by the amount of the deduction; and where an amount is recovered as mentioned in paragraph (c) of that subsection, the obligation specified in that paragraph shall in all cases be taken to be so discharged.

(7) Where any amount recoverable under this section is to be recovered otherwise than by deduction from prescribed benefits-

(a) if the person from whom it is recoverable resides in England and Wales and the county court so orders, it is recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court; and

(b) if he resides in Scotland, it may be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

**Appendix 15**

**Regulation 100 of the HB Regulations 2006**

**100. Recoverable overpayments**

(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.

(2) Subject to paragraph (4) this paragraph applies to an overpayment which arose in consequence of an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.

(3) In paragraph (2), "overpayment which arose in consequence of an official error" means an overpayment caused by a mistake made whether in the form of an act or omission by—

(a) the relevant authority;

(b) an officer or person acting for that authority;

(c) an officer of—

(i) the Department for Work and Pensions; or

(ii) Revenue and Customs, acting as such; or

(d) a person providing services to the Department for Work and Pensions or to the Commissioners for Her Majesty´s Revenue and Customs,

where the claimant, a person acting on his behalf or any other person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission.

(4) Where in consequence of an official error, a person has been awarded rent rebate to which he was not entitled or which exceeded the benefit to which he was entitled, upon the award being revised or superseded any overpayment of benefit, which remains credited to him by the relevant authority in respect of a period after the date on which the revision or supersession took place, shall be recoverable.

**Appendix 16**

**Regulation 101 of the**

**Housing Benefit Regulations 2006**

**101.—** **Person from whom recovery may be sought**

(1)For the purposes of section 75(3)(a) of the Administration Act (prescribed circumstances in which an amount recoverable shall not be recovered from the person to whom it was paid), the prescribed circumstance is–

(a) housing benefit has been paid in accordance with regulation 95 (circumstances in which payment is to be made to the landlord) or regulation 96 (circumstances in which payment may be made to a landlord);

(b) the landlord has notified the relevant authority or the Secretary of State in writing that he suspects that there has been an overpayment;

(bb) the relevant authority is satisfied that the overpayment did not occur as a result of any change of dwelling occupied by the claimant as his home;

(c) it appears to the relevant authority that, on the assumption that there has been an overpayment–

(i) there are grounds for instituting proceedings against any person for an offence under section 111A or 112(1) of the Administration Act (dishonest or false representations for obtaining benefit); or

(ii) there has been a deliberate failure to report a relevant change of circumstances contrary to the requirement of regulation 88 (duty to notify a change of circumstances) and the overpayment occurred as a result of that deliberate failure; and

(d) the relevant authority is satisfied that the landlord–

(i) has not colluded with the claimant so as to cause the overpayment;

(ii) has not acted, or neglected to act, in such a way so as to contribute to the period, or the amount, of the overpayment.

(2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), where recovery of an overpayment is sought by a relevant authority–

(a) subject to paragraph (1) and where sub-paragraph (b) or (c) does not apply, the overpayment is recoverable from the claimant as well as the person to whom the payment was made, if different;

(b) in a case where an overpayment arose in consequence of a misrepresentation of or a failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant, or by or on behalf of any person to whom the payment was made, the overpayment is only recoverable from any person who misrepresented or failed to disclose that material fact instead of, if different, the person to whom the payment was made; or

(c) in a case where an overpayment arose in consequence of an official error where the claimant, or a person acting on the claimant's behalf, or any person to whom the payment was paid, or any person acting on their behalf, could reasonably have been expected, at the time of receipt of the payment or of any notice relating to that payment, to realise that it was an overpayment, the overpayment is only recoverable from any such person instead of, if different, the person to whom the payment was made.

(2A) Where an overpayment is made in a case where a relevant authority has determined a maximum rent (LHA) in accordance with regulation 13D (determination of a maximum rent (LHA)), and the housing benefit payable exceeds the amount which the claimant is liable to pay his landlord by way of rent, the relevant authority must not recover from the landlord more than the landlord has received.

(3) For the purposes of paragraph (1) and (2A), “landlord” shall have the same meaning as it has for the purposes of regulation 95.

(3A) For the purposes of paragraph (2)(c) “overpayment arose in consequence of an official error” shall have the same meaning as in regulation 100(3) above.

**Appendix 17**

**Extract from decision R(H) 6/06**

45. The words in parenthesis in section 75(3)(b) are ambiguous in their effect. Three possible constructions were considered in argument. First, they might be construed as enabling regulations to be made that leave to the local authority in every case the question whether an overpayment is recoverable from a prescribed person as well as, or instead of, the person to whom it was paid. Secondly, they might be construed as enabling regulations to be made that have the effect that an overpayment is always recoverable from a prescribed person as well as the person to whom it was made, except where regulations under section 75(3)(a) have the effect that it is not recoverable from the person to whom it was made in which case it would be recoverable from the prescribed person instead of that person. Thirdly, they might be construed as enabling regulations to be made that themselves specify whether an overpayment is recoverable from the prescribed person as well as the person to whom it was made or is recoverable from the prescribed person instead of the person to whom it was made.

46. The first of those constructions was the one advanced by both Mr Kovats and Mr Maurici as being the most obvious implication of the words in parenthesis. However, that construction seems to us to sit oddly with section 75(3)(a) because it is not easy to see why Parliament should have intended that a local authority should be given an open-ended power under regulations under section 75(3)(b) to determine that an overpayment is not recoverable from the person to whom it has been paid when section 75(3)(a) provides that an overpayment shall always be recoverable from such a person save in defined circumstances.

47. There also seem to us to be other reasons for concluding that section 75(3)(b) was not intended to confer on local authorities a broad discretionary power to choose whether an overpayment should be recoverable from another person as well as or instead of the person to whom an overpayment has been made.

48. Given its fiduciary duty to its council tax payers, it is hard to see why a local authority, given a free hand, should ever decide that an overpayment is recoverable from only one person when it could equally well decide that it is recoverable from two.

49. Moreover, since a local authority undoubtedly has the same discretion as any private law creditor whether and how to enforce private law rights arising out of the exercise of its public law powers, there is no obvious reason why Parliament should have provided that the public law power to make a recoverability decision should also be discretionary. A broad discretion is much more appropriate to questions of enforcement than to questions of liability.

50. However, perhaps the most compelling argument against the construction of section 75(3)(b) supported by Mr Kovats and Mr Maurici is that, as the Tribunal of Commissioners found in R(H) 3/04, the question whether an overpayment should be recovered from the person to whom it was paid or some other person is not really justiciable in the absence of any statutory guidance as to the relevant considerations. If there is to be a power to relieve a person to whom an overpayment has been made from the liability to repay it and if the exercise of that power is to be subject to a right of appeal that is not expressly limited to points of law, it is to be expected that the legislation will give some guidance as to the circumstances in which the power is to be exercised, unless the context is such that the relevant considerations can be implied. Here, neither the context nor section 75(3)(b) gives any guidance and, on this construction, section 75(3)(b) fails to require secondary legislation to do so.

51. Mr Kovats and Mr Maurici submitted that the second possible construction, which was one of two alternative constructions suggested by the Chief Commissioner when directing that this appeal be heard by a Tribunal of Commissioners, was untenable. It would, in effect, mean that the question whether an overpayment is recoverable from a prescribed person as well as, rather than instead of, the person to whom it was made would be determined by the terms of regulation 101(1), which is made under section 75(3)(a). That would be perfectly sensible but we are driven to accept that the words in parenthesis would not add anything to the rest of the paragraph if that construction were correct. In the absence of any clear indication to the contrary, words in legislation are to be presumed to have some purpose and meaning and we therefore accept that the draftsman of section 75(3)(b) intended the scope of the regulation-making power to be wider, so that regulations may be made that have the effect that an overpayment may be recoverable from a prescribed person instead of the person to whom the overpayment was made even where regulations under section 75(3)(a) do not apply.

52. The third construction, which is the other construction suggested by the Chief Commissioner, requires that any regulation made under section 75(3)(b) should specify whether a prescribed person is jointly liable with the person to whom the payment was made or is liable instead of that person. Under this construction the words in parenthesis have a purpose. The construction is consistent with section 75(3)(a) because, where the Secretary of State makes regulations providing that an overpayment is recoverable from a prescribed person instead of the person to whom it was made, he is, in effect, providing for additional, but defined, circumstances in which the person to whom the payment was made is not liable to repay an overpayment. The circumstances are defined by the terms in which the prescribed person is defined or by the circumstances in respect of which he is prescribed (see section 189(4)). This construction is also consistent with paragraph 6(6) of Schedule 7, which provides a right of appeal to a tribunal in terms that do not limit it to points of law, because all issues arising under regulations made under section 75(3) as to from whom an overpayment is recoverable are justiciable. If the Secretary of State makes regulations having the effect that an overpayment is recoverable from a prescribed person as well as the person to whom it is made, the non-justiciable choice as to from which of them the overpayment should actually be recovered falls to be made by the local authority at the stage of enforcing the right of recovery and so is not within the scope of the right of appeal. For all these reasons, we are satisfied that this is the correct construction of section 75(3)(b).