

**R(IS) 5/08**

**Mr E A L Bano**  
**Commissioner**  
**4 October 2007**

**CIS/3760/2006**

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**Capital – disregard for arrears of income-related benefit – whether applies to refund to income support claimant of wrongly imposed charges for after-care provided under section 117 of the Mental Health Act 1983**

The claimant lived in residential accommodation from June 1999 to October 2002 and throughout that period her income support, except for a small personal expenses allowance, was paid directly to the providers of the accommodation. On 25 July 2002 the House of Lords decided in *R v Manchester City Council ex parte Stennet* [2002] UKHL 34, [2002] 2 AC 1127 that social services authorities were not entitled to charge for after-care provided under section 117 of the Mental Health Act 1983. The authority therefore refunded the claimant the care charges. The Secretary of State decided that that payment, which exceeded the capital limit for entitlement to income support, was to be taken into account as capital and therefore terminated the claimant's award of benefit. The claimant appealed on the ground that the payment made to her by the authority should have been disregarded under paragraph 7(1) of Schedule 10 to the Income Support (General) Regulations 1987 as "arrears of, or any concessionary payment made to compensate for arrears due to the non-payment of ... an income-related benefit". The appeal tribunal dismissed her appeal and she appealed to the Commissioner.

*Held*, dismissing the appeal, that:

Although income support had been wrongly paid to the care providers, possibly without valid express or statutory authority, the payment to the claimant was not in respect of income support, which can only be paid by the Secretary of State, but a payment made by the social services authority in respect of charges which had been wrongly imposed by the authority, and so could not be considered as arrears of income support (CIS/2448/2006 approved) (paragraph 18).

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**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that the decision of the tribunal is not erroneous in point of law. I therefore dismiss the claimant's appeal.
2. This is an appeal from a decision of the tribunal upholding a decision of the Secretary of State that a refund of charges by a social services authority for after-care provided to the claimant under section 117 of the Mental Health Act 1983 was to be taken into account as capital in determining the claimant's entitlement to benefit after the date of the payment. I held an oral hearing of the appeal on 19 September 2007, at which the claimant was represented by Mr Jeremy Coutinho and Mr Dave Coughlan, who are both welfare benefits advisers, and the Secretary of State was represented by Mr Henry Hendron, Solicitor.
3. The claimant has been in receipt of income support since 1998. She became mentally ill and was compulsorily detained under the Mental Health Act 1983, so that on her discharge the local social services authority came under a duty under section 117 of the 1983 Act to provide the claimant with after-care services. Following an assessment of the claimant's needs, the authority arranged for her to be placed in residential accommodation run by a registered charity which provides therapeutic communities for people with mental ill-health problems. The claimant lived in that accommodation from 14 June 1999 to 20 October 2002.

4. The authority believed that it was entitled to charge the claimant for her accommodation under section 21 of the National Assistance Act 1948 and throughout the period when she was in residential care the claimant's income support, except for a small personal expenses allowance, was paid directly to the providers of the accommodation. However, on 25 July 2002 the House of Lords decided in *R v Manchester City Council ex parte Stennet* [2002] UKHL 34, [2002] 2 AC 1127 that social services authorities were not entitled to charge for after-care provided under section 117 of the 1983 Act. The authority therefore refunded the claimant the care charges, amounting to £23,341.24, on 14 October 2003.

5. On 17 November 2003 the Secretary of State decided that that payment, which exceeded the capital limit for entitlement to income support, was to be taken into account as capital and therefore terminated the claimant's award of benefit. By paragraph 7(1) of Schedule 10 to the Income Support (General) Regulations 1987 (SI 1987/1967), in determining the amount of a claimant's capital there is to be disregarded under regulation 46(2) "any arrears of, or any concessionary payment made to compensate for arrears due to the non-payment of ... an income-related benefit". The claimant's appeal is on the ground that the payment made to her by the authority should have been disregarded under that paragraph.

6. In CIS/2448/2006 Mr Commissioner Turnbull held that a refund of charges wrongly made by an authority for after-care services provided under section 117 of the Mental Health Act 1983 could not be disregarded as capital under paragraph 7 of Schedule 10 to the 1987 Income Support Regulations. However, it was not until the stage of the appeal to the Commissioner that it became clear that income support had probably been paid directly to the providers of the residential accommodation rather than to the claimant himself, which is what the tribunal had been told. The Commissioner's decision in that case, in so far as it is directly relevant to this appeal, was therefore based on largely assumed facts, and on 24 May 2007 I directed an oral hearing of this appeal in order to give the claimant's representatives an opportunity to argue that I should not follow the earlier Commissioner's decision.

7. The claimant's case in this appeal has been that the Secretary of State had no power to pay benefit to anyone other than the claimant herself, so that the repayment of the charges made for the claimant's after-care represents the payment of arrears of income support which should always have been paid to the claimant, rather than to the care providers. Much of the argument in this case has been concerned with whether the Secretary of State had power to make payments of income support directly to the care providers, either because such payment was expressly authorised by the claimant, or because the Secretary of State had power to make payment of benefit directly to the care providers under paragraph 4 of Schedule 9 to the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968). For the reasons given below, I do not consider that that was the decisive issue in this case, but I have nevertheless dealt with it in some detail because of its possible relevance in other cases.

8. Although some of the facts are not entirely clear, the evidence provided by the authority establishes that the authority in this case contracted with the care providers to provide residential care for the claimant and paid their charges for her accommodation. Arrangements were made for the claimant's income support (less the personal expenses allowance) to be paid directly to the providers as a contribution by the claimant to the cost of her care, and the local authority was

credited by the providers with the income support payments which they received. The case papers also include part of the claim form signed by the claimant on 16 June 1999, which includes an entry under "Other Information": "Fees component to be paid directly to [the providers of the accommodation] on our direct payment Schedule".

9. Paragraph 2 of Schedule 9 to the Social Security (Claims and Payments Regulations) 1987 allows income support to be paid directly to a third party, in accordance with the provisions of the Schedule, "in discharge of a liability of the beneficiary ... to that third party" in respect of miscellaneous accommodation costs, that is, costs falling within paragraph 4 of the Schedule. Section 26(3) of the National Assistance Act 1948 provides for the occupant of the accommodation, the accommodation provider and a local authority to agree that the occupant will pay his contribution to accommodation costs direct to the accommodation provider, and in CIS/2448/2006 the Commissioner inferred that the claimant was under a liability to pay accommodation charges to the provider by virtue of an agreement made under that provision. In this case it was the authority which agreed with the providers of the accommodation to pay the claimant's accommodation charges, and there is no evidence of any agreement under section 26(3) of the National Assistance Act. However, on the assumption that the claimant was under a liability to pay the charges for her accommodation to the care providers, it is necessary to consider whether any of the conditions in paragraph 4 of Schedule 9 for the direct payment of benefit to a third party were satisfied.

10. Paragraph 4, as in force at the relevant time, provided that where an award of income support was made to a person in a residential care home which included an amount for residential accommodation, the adjudicating authority might determine:

"that an amount of the specified benefit shall be paid direct to the person or body to whom the charges in respect of that accommodation are payable, but, except in a case ... where the accommodation is run by a voluntary organisation either for purposes similar to the purposes for which resettlement units are provided or which provides facilities for alcoholics or drug addicts, only if the adjudicating authority is satisfied that the beneficiary has failed to budget for the charges and that it is in the interests of the family."

11. In the summary of the grounds for the tribunal's decision, the chairman stated that the question of whether the claimant had authorised direct payment of her benefit was disputed, but that the claimant's representatives had accepted that direct payment had been authorised by paragraph 4 of Schedule 9 to the 1987 Claims and Payments Regulations. In the statement of reasons, the chairman repeated that the claimant's representatives had accepted that direct payments had been authorised under paragraph 4 of Schedule 9 and added: "I agree that direct payments in this case came within paragraph 4". At the oral hearing before me the claimant's representatives stated that they had accepted only that the claimant had signed a claim form apparently authorising direct payment, though without accepting that it constituted a valid authority for such payment, and had at no time accepted that direct payment was authorised by paragraph 4 of Schedule 9. The claimant's representatives have vigorously asserted throughout this dispute that paragraph 4 of Schedule 9 to the 1987 Claims and Payments Regulations was not applicable in this case, and indeed threatened judicial review proceedings following a refusal to revise

the decision to make direct payments. It therefore seems to me that the tribunal's finding that the claimant's representatives accepted that direct payments were authorised by paragraph 4 of Schedule 9 must have been the result of a misunderstanding.

12. In a written submission to the tribunal dated 6 September 2004, the Secretary of State's representative argued that the accommodation provided for the claimant was accommodation "run by a voluntary organisation for purposes similar to the purposes for which resettlement units are provided". According to the submission, the term "resettlement unit" has its origins in the Supplementary Benefits Act 1976 and refers to temporary accommodation "at which persons without a settled way of life are afforded temporary board and lodging with a view to influencing them to lead a more settled life". I do not consider that such an establishment is properly to be compared with a therapeutic community providing after-care for people with serious mental illnesses and Mr Hendron, wisely in my view, did not pursue this argument. Since the claimant's accommodation was not provided for purposes similar to those of a resettlement unit and there is no evidence that payment of benefit directly to a third party was in the interests of the claimant's family, I agree with the claimant's representatives that paragraph 4 of Schedule 9 to the 1987 Regulations did not empower direct payment of the claimant's income support to the organisation providing her with residential care.

13. It therefore becomes necessary to consider Mr Hendron's argument that such payment was expressly authorised by the claimant on the 1999 income support claim form. The entry on the claim form is apparently not in the claimant's handwriting and the reference to "our" direct payment schedule suggests that the form was completed by a DWP official. The claimant's representatives submitted that in those circumstances it would be dangerous to assume that the claimant gave an informed and valid consent to direct payment of benefit to the care providers.

14. Quite apart from that issue, it seems to me that this case raises questions about the claimant's mental capacity to give consent to payment of benefit to a third party. The 1999 claim was made just after the claimant was discharged from hospital. However, assuming that the claimant had the mental capacity to give a valid authorisation for direct payment of benefit to a third party at the time when she completed the claim form, any supervening incapacity would terminate that authority – see *Yonge v Toynbee* [1910] 1 KB 215. In cases where a claimant has an illness which may affect the claimant's capacity to give a valid authority for payment of benefit to a third party, it would therefore seem to me to be desirable if possible for the Secretary of State to exercise the powers of appointment given by regulation 33 of the 1987 Claims and Payments Regulations, rather than to rely on a form of express authority given by the claimant.

15. However, if the claimant did have the mental capacity necessary to authorise payment of benefit to a third party, it becomes necessary to consider the effect of any mistake in relation to the claimant's liability to pay a contribution to the cost of her care. The Secretary of State's reasons for refusing to revise the decision to pay benefit to the care providers state:

"A request for direct payments was made on the claim form submitted by (or on behalf) of (the claimant) on 22.6.99. At that time both (the care providers) and (the authority), who also contributed towards the fees, believed that the correct legal position was that (the claimant) was liable to make a

contribution towards them. The decision maker had no reason to think that this might not have been the case.”

16. On the basis of that account, it seems clear that the claimant authorised the payment of income support to a third party because she was wrongly advised that she was liable to make a contribution towards the cost of her care. Although that mistake was one of law rather than fact, in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 the House of Lords finally abrogated the rule that money paid under a mistake was recoverable only if the mistake was one of fact. The Commissioner in CIS/2448/2006 considered that in these circumstances the claimant might have a claim in quasi-contract in respect of the sums of income support wrongly paid to the third party, and for my part I can see no reason why a restitutionary claim by the claimant for money paid under a mistake should not succeed.

17. It does not follow from the existence of the claimant’s right of action against the authority that the authorisation given by the claimant to the DWP to pay income support directly to the care providers was necessarily invalid. However, I do not consider that it is necessary to decide that question because in my view the question of whether the payment made by the authority to the claimant was a payment of “arrears of income support” does not depend on whether there existed valid express or statutory authority for the payment of the claimant’s income support to a third party. In CIS/2448/2006 the Commissioner decided that, even on the assumption that income support had been wrongly paid to the authority instead of the claimant, the repayment made by the authority to the claimant could not be considered arrears of income support.

18. I have reached the same conclusion. Income support can only be paid by the Secretary of State. The relevant payment in this case was a payment made by the social services authority in respect of charges which had been wrongly imposed by the authority, and not in respect of income support which had been wrongly paid to the care providers. The claimant’s rights against the authority would have been exactly the same if the claimant had paid the charges for her care out of her own resources, and in my judgment the fact that the charges were actually paid out of the claimant’s income support cannot turn the repayment of charges wrongly made for the claimant’s care into a payment of arrears of income support. Even though I accept the claimant’s arguments that payments of income support should not have been made to the care providers, and I disagree with the tribunal that such payment was permitted by paragraph 4 of Schedule 9 to the 1987 Claims and Payments Regulations, I have therefore concluded that the payment of £23,341.24 made to the claimant by the authority on 14 October 2003 was not “arrears of income support”.

19. In reaching that conclusion, I am conscious that, as a result of the refund by the authority of charges which should not have been made, the claimant has now lost income support to which she would otherwise have been entitled. I entirely reject the suggestion at the hearing before me that she was in some way the author of her own misfortune. However, for the reasons I have given, I consider that the tribunal was bound to conclude that the payment made by the authority to the claimant could not be considered as arrears of income support, and therefore fell to be treated as capital.

20. For those reasons, my decision is as set out in paragraph 1.

