[2012] AACR 23

(*Ahmed v Secretary of State for Work and Pensions*

[2011] EWCA Civ 1186)

CA (Longmore, Rimer LJJ, Warren J) **CIS/2812/2008**
21 October 2011

Housing costs – loan taken out while on income support – exception where accommodation more suited to needs of disabled person – whether applies when no link between move and acquisition

The claimant was the mother of a severely disabled son. In 2001 they moved from their privately rented house to another privately rented house. In or around 2006 the landlord defaulted on the mortgage for the property and in June 2007 the claimant obtained a mortgage and purchased the property. Her application for an increase in income support for housing costs was refused on the ground that the loan was taken out during a "relevant period", namely while she was in receipt of income support, within paragraph 4 of Schedule 3 to the Income Support (General) Regulations 1987 and that the condition for the exception in paragraph 4(9) of the Schedule was not satisfied as the loan was not taken out to acquire alternative accommodation more suited to the special needs of a disabled person than the accommodation which was occupied before the acquisition by the claimant. The appeal tribunal, relying on CIS/3295/2003, allowed the claimant's appeal, holding that the fact that the claimant and her son had occupied the property for some six years before she acquired it did not prevent the property from being alternative accommodation within the meaning of paragraph 4(9). The Upper Tribunal judge allowed the Secretary of State's appeal. He held that, while the acquisition, loan and move did not need to be contemporaneous, there did have to be a link between them, and in the present case, the necessary link was not established.

Held, dismissing the appeal, that:

1. what the Commissioner said in CIS/3295/2003 must be approached with considerable care and it was arguable that paragraph 4(9) should be strictly construed so that any gap is fatal, but it was not, on the facts of the present case, necessary to decide that point (paragraphs 20 to 21);

2. although paragraph 4(9) did not expressly lay down any requirement of immediacy, it was necessary on a true construction of the paragraph to find some link between the move, the loan and the acquisition. Even adopting the approach of CIS/3295/2003, a finding of fact had to be made about whether the original accommodation "was occupied before" the acquisition (paragraph 22);

3. there may be borderline cases where it is difficult to judge whether the loan was taken out to acquire "alternative" accommodation and whether one property was "occupied before" the acquisition of the other, but in the present case it was clear that the six-year gap between the move and the purchase meant that there was not the necessary link between the move and the acquisition. The Upper Tribunal judge had been correct to describe what happened as that the loan was taken out for the purposes of the acquisition of the existing, already suitable, accommodation and not for the acquisition of alternative, more suitable, accommodation (paragraph 23).

DECISION OF THE COURT OF APPEAL

Alex Durance of counsel (instructed by Glaisyers LLP) appeared for the appellant.

David Blundell of counsel (instructed by the Solicitor, Department for Work and Pensions) appeared for the respondent.

Judgment (reserved)

MR JUSTICE WARREN:

Introduction

1. This appeal concerns the application of the appellant, Sughra Ahmed, for her housing costs to be paid as part of her claim for income support. Her application was refused by the respondent, the Secretary of State for Work and Pensions. She appealed from that decision to the Manchester appeal tribunal. Her appeal was heard by Mr N Neary, (now Judge Neary as a judge of the First-tier Tribunal). He allowed her appeal, his reasons being contained in a written decision dated 21 April 2008. The Secretary of State then appealed to the Upper Tribunal (Administrative Appeals Chamber) (the AAC). Judge Lloyd-Davies dealt with the appeal at an oral hearing. By his written decision dated 26 August 2009, he allowed the appeal. The appellant now appeals to this court, permission having been granted by Arden LJ on 26 October 2010.

2. The appeal raises a short point of construction relating to paragraph 4(9) of Schedule 3 to the Income Support (General) Regulations 1987 (SI 1987/1967) (paragraph 4(9)) which is set out at [13] below.

The facts

3. The relevant primary facts are not in dispute and can be shortly stated.

4. The appellant was the mother of Zeeshan Ahmed. Zeeshan was severely disabled and received disability living allowance. Zeeshan died very recently, on 26 August 2011, but that sad fact makes no difference to the appellant's historic claim.

5. Until some time in 2001, the appellant lived with Zeeshan in a privately rented house in Old Trafford. In 2001, they moved into 212 Brantingham Road, Whalley Range, Manchester (the property). She began to receive housing benefit with effect from 5 November 2001. On 14 November 2003, she entered into a tenancy agreement with her landlord, Mr Arshad Mahmood. This was for a fixed term of five years until 14 November 2008. The property was acquired by a Mr Dilbaug Singh in June 2005.

6. In or around early 2006, the landlord defaulted on his mortgage payments. The mortgagee started possession proceedings in the county court. A possession order was made on 16 January 2006. However, that order was set aside on 3 April 2006. Although the mortgagee attempted to continue the claim for possession by the filing of amended particulars of claim, the claim was automatically struck out because they were filed after the time provided for doing so by an order of the court.

7. As a result of the mortgagee's action and the order for possession, housing benefit ceased to be paid to the appellant. It is not clear how this came about, but the fact is that benefit ceased to be paid, the appellant receiving no payments after 24 April 2006.

8. On 29 June 2007, following negotiations with the mortgagee, the appellant purchased the property for £130,699 with the assistance of an interest-only mortgage loan from Bristol and West Building Society.

9. On 9 August 2007, the appellant applied for assistance with her housing costs. The application was refused on 4 October 2007. The reasons for the refusal addressed the alternative criteria by reference to which assistance could be given. So far as relevant to the present appeal, it was said that the loan from Bristol and West Building Society:

> "… was not to purchase alternative accommodation more suited to the special needs of a disabled person. The loan taken out [*sic*] when you were in receipt of income support. This is called a 'relevant period'. Help toward housing costs cannot be given if a loan is taken out in a 'relevant period'."

10. The reference to "alternative accommodation" and the "relevant period" reflect the provisions of paragraph 4(9).

11. The appellant's application was subsequently reviewed. The reviewing officer was of the view that the application had been properly refused and referred the matter to the appeal tribunal. He said this:

> "In this case, the loan was not obtained to acquire alternative accommodation that was more suited to the needs of the disabled person because the loan was obtained to acquire the existing accommodation occupied by the disabled person. The exemption therefore does not apply in this case …"

12. The matter eventually came before Judge Neary. I refer to his decision in more detail at [15] below.

Paragraph 4(9)

13. It is not necessary to refer to the statutory provisions concerning housing costs, other than paragraph 4(9), since the parties agree that the validity of the appellant's claim to housing costs turns on whether or not the condition set out in that paragraph is satisfied. Paragraph 4(9) provides as follows:

> "The condition specified in this sub-paragraph is that the loan was taken out, or an existing loan increased, to acquire alternative accommodation more suited to the special needs of a disabled person than the accommodation which was occupied before the acquisition by the claimant."

14. It is common ground that the property was, when it was acquired, more suited to Zeeshan's special needs than was the house in Old Trafford. The issues in the appeal before the Court are the closely related questions whether the property was "alternative accommodation" and whether the house at Old Trafford was "the accommodation which was occupied before the acquisition" of the property by the appellant.

CIS/3295/2003

15. It is convenient at this stage to refer to decision CIS/3295/2003, a decision of Mr Commissioner David Williams dated 5 May 2004 on appeal. Judge Neary relied on this decision as does Mr Durance (who appears for the appellant but did not do so below).

16. In that case, the ex-husband of the appellant, Mrs M, had bought the property in question as sole owner subject to a mortgage. He later declared that he held it on trust for Mrs M. She made payments to her ex-husband who then paid them to the mortgagee. She moved into the property in April 2001. Later, she obtained mortgage finance to purchase the property from her ex-husband in May 2002; she applied for housing costs shortly afterwards.

17. The tribunal below had held that the applicant was not entitled to housing costs. It found that the loan taken out by Mrs M could not be said to fall within paragraph 4(9) because it had been taken out a year after she had moved to the property. The Commissioner set aside the tribunal's decision and remitted the matter to a new tribunal. He did so for the reasons which appear from paragraphs 20 and 21 of his decision:

> "20. There are no time limits in sub-paragraph (9) and in particular no requirement of immediacy linking the time of acquisition, the time the loan is taken out, and the time the claimant moves. It will depend entirely on the circumstances. What the sub-paragraph requires for it to apply in this case is:
>
> (a) that alternative accommodation is acquired,
>
> (b) that the acquired accommodation is more suited to the special needs of a disabled person than the accommodation occupied by that person before the acquisition, and
>
> (c) that the loan is taken out to enable the accommodation to be acquired.
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> 21. The tribunal found none of those facts. The matter must go back for a tribunal to determine them."

18. It can be seen that the Commissioner did not decide that the case fell within paragraph 4(9) notwithstanding the gap of one year between the appellant occupying the property and her taking out the mortgage. He rejected the Secretary of State's argument that such a gap necessarily entailed that paragraph 4(9) could not apply because this would be to "set rules rather than consider facts". Instead, he saw this as a question to be left to the tribunal to determine on the remittal when it would make necessary findings of fact. Each case will depend on its own circumstances.

The decisions of Judge Neary and of Judge Lloyd-Davies

19. Judge Neary decided that the loan to the appellant did fall within paragraph 4(9). He held that the property was "alternative accommodation", that is to say alternative to the house at Old Trafford, and that the house at Old Trafford was itself within the meaning of the words "was occupied before the acquisition" (that is to say of the property). He set out in paragraph 9 of his decision almost verbatim what the Commissioner had said in paragraph 20 of his decision in CIS/3295/2003. Then, in paragraph 12, he said this:

> "12. … The tribunal accepted that the property is alternative accommodation which was acquired; and that it was more suited to the needs of the appellant's disabled son than the accommodation in Old Trafford as it was closer to the appellant's family, who help care for her son; and that the loan was taken out to acquire the accommodation. The tribunal decided that the fact that the appellant and her son had occupied the property for some 6 years before the appellant acquired it did not prevent the property from being 'alternative accommodation more suited to the special needs of a disabled person than the accommodation which was occupied before the acquisition by the claimant' for the purposes of sub-paragraph (a)."

20. Judge Neary applied what he clearly thought was the approach of the Commissioner in CIS/3295/2003, regarding it as allowing him to adopt a flexible (to use Mr Durance's word)

interpretation of paragraph 4(9) and almost ignoring the need for any connection between the move, the loan and the acquisition at all. However, I consider that what the Commissioner said must be approached with considerable care. It may well be correct that there will be cases within paragraph 4(9) where there is a gap between leaving the first accommodation and the acquisition of the more suitable accommodation. Let me give two examples:

a. The applicant lives in property A. She agrees, subject to contract, to purchase property B which is more suitable accommodation within paragraph 4(9). She is allowed by the vendor to move into property B before exchange of contract while she organises a loan for the purchase and moves out of property A. There is a gap of say one month between her move and her acquisition of property B.

b. The applicant lives in property A. It is destroyed by fire and she moves to live with her parents whose house, coincidentally, provides accommodation which is more suitable than the property which has been destroyed for the purposes of paragraph 4(9). After a month or so she acquires with the aid of a loan a new property, property B, which is more suitable than property A had been (although no more suitable than her parents' house).

21. In each of those examples, there is an obvious link between the acquisition, the loan and the move. It may well be that, in each case, property B is to be seen as "alternative accommodation" and that property A "was occupied before the acquisition" of property B. I say "may well be" because it is arguable that paragraph 4(9) should be strictly construed so that any gap is fatal. The point has not, however, been argued by Mr Blundell and it is not, on the facts of the present case, necessary to decide it.

22. It is not necessary to do so because, although paragraph 4(9) does not expressly lay down any requirement of immediacy (to use the words of the Commissioner), it is necessary on a true construction of the paragraph to find some link between the move, the loan and the acquisition. Even adopting the approach of the Commissioner, a finding of fact has to be made about whether the original accommodation "was occupied before" the acquisition, a question which cannot be answered in the affirmative simply because at one time, the original accommodation was occupied by the applicant and because at a later time, the applicant has purchased some other accommodation more suited to the needs of the disabled person.

23. In point of fact, it will always, or nearly always, be the case that the loan and the acquisition are very closely linked: the actual loan will usually be made on completion of the purchase and therefore be contemporaneous with the acquisition. And it will often be the case that the link between the move and the acquisition is obvious. There may be borderline cases when it is difficult to judge whether the loan was taken out to acquire "alternative" accommodation and whether one property was "occupied before" the acquisition. But the answer in the present case is, in my view, clear. The six-year gap between leaving the house in Old Trafford and moving into the property, on the one hand, and purchasing the property on the other, cannot be ignored and, if it is not ignored, it cannot sensibly be said that there is the necessary link between the move and the acquisition. In other words, the property is not "alternative accommodation" (that is to say, accommodation alternative to the house at Old Trafford) nor was that house accommodation which "was occupied before" the acquisition of the property. Judge Neary reached a different conclusion but he failed, in my view, to address adequately the necessary link, reaching his conclusion as a matter of assertion.

24. In my judgment, Judge Lloyd-Davies got it absolutely right in allowing the appeal from Judge Neary when he said, rather more succinctly than I have done:

> "3. … The tribunal in essence found that the claimant's current home was more suitable accommodation than the rented property she had previously occupied prior to moving into her current home in 2001, and that the fact that the claimant had occupied her current home for some six years before her acquisition of it did not prevent her from satisfying the condition of paragraph 4(9). In my judgment the tribunal erred in law. I accept that the acquisition, loan and move do not need to be contemporaneous but there does, however, in my judgment have to be a link between them. Where the claimant moved to the alternative accommodation in 2001, as is the present case, the necessary link is not established: in truth what happened in the present case was not that the loan was taken out for the acquisition of alternative, more suitable, accommodation but that the loan was taken out for the purposes of the acquisition of the existing, already suitable, accommodation. For these reasons the appeal must be allowed."

Conclusion

25. I would dismiss the appeal.

LORD JUSTICE RIMER:

26. I agree.

LORD JUSTICE LONGMORE:

27. I also agree.