

**R(IS) 7/07****(R (Hook) v Social Security Commissioner and Secretary of State  
for Work and Pensions [2007] EWHC 1705 (Admin))**

**Mr E Jacobs**  
**Commissioner**  
**29 November 2006**

**CIS/1757/2006**  
**CIS/1807/2006**  
**CH/1822/2006**

**HC (Nicholas Blake QC)**  
**3 July 2007**

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**Capital – deprivation – capital disposed of by person who later became claimant’s partner – whether to be treated as claimant’s notional capital**

**Human rights – capital disposed of by person who later became claimant’s partner – whether counting as notional capital of disabled claimant in breach of Article 8 of the Convention**

The claimant was severely disabled and in need of substantial care. In March 2005 Ms H came to live with him as his partner and carer. His awards of income support and housing benefit were terminated on the ground that his partner had deprived herself of substantial capital before coming to live with him with the intention of securing future benefits for herself and the claimant and that the capital fell to be treated as his notional capital under regulation 51 of the Income Support (General) Regulations and equivalent housing benefit legislation. The claimant appealed to a tribunal, arguing that Ms H’s purpose in disposing of the capital had not been to secure entitlement to benefit, and that the notional capital rule could not apply to deprivation by a future family member. The tribunal dismissed the appeal, finding that Ms H’s account of her reasons for disposing of her capital was not credible and that the notional capital rule did apply to deprivations made by someone who only later becomes the claimant’s partner. The claimant applied for leave to appeal to a Commissioner. Before the Commissioner it was additionally argued that to apply the notional capital rule in the claimant’s circumstances was harsh and irrational or in breach of Article 8 of the European Convention on Human Rights (right to respect for family life). The Commissioner refused leave to appeal, holding that the tribunal had adequately explained why it did not accept Ms H’s evidence and confirming that the notional capital rule did apply by virtue of regulation 23(1) (and equivalent housing benefit legislation), which provides for references to “claimant” to be construed as references to the claimant’s partner for the purposes of calculating income and capital. The relevant regulations were authorised by section 136 of the Social Security Contributions and Benefits Act and their effect was in principle neither oppressive nor irrational as they fulfilled an anti-avoidance function in a proportionate way. He assumed, without deciding, that Article 8(1) did apply, but held that any interference with family life was justified in terms of Article 8(2) as necessary in the interests of the economic well-being of the country in fulfilling that anti-avoidance function. He further held that, even if there were a violation of Article 8, it was not within his power to remedy it. The claimant applied to the Administrative Court for judicial review of the Commissioner’s refusal of leave. Before the Administrative Court it was accepted that the only real issue upon which it was sought to quash the Commissioner’s refusal of leave was his consideration of human rights questions.

*Held*, by the Administrative Court, dismissing the application, that:

1. having regard to the fact that this was a review of a specialist expert tribunal in the field of detailed social security regulation concerning entitlement to public funds, the test to be applied to avoid unnecessary expense and to achieve the desirable aim of finality was that a very substantial point of law was required (*Connolly* [1986] 1 WLR 421 and *R (Sinclair Gardens) v The Lands tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650 followed) (paragraphs 4 to 6);
2. while circumstances could arise where positive obligations are engaged to require the state to provide a disabled person with housing, and to abstain from interference in important aspects of his private and family life, the issues in such matters are fact-specific and depend upon careful factual evaluation of the impact of the decision in question on the individual, and cannot be dealt with in

schematic ways by references to the Human Rights Act in written grounds without developing the argument as to how it is suggested that human rights are engaged or infringed in the particular case, or at least how the approach to determination of that question should be developed (*Marzari v Italy* (1999) 28 EHRR CD175 followed) (paragraph 35);

3. if the Commissioner had concluded that the application of the regime to the claimant had been a violation of his Article 8 rights, there were a number of remedies open to him, including that of declaring the regulations void (paragraphs 42 to 45);

4. the Commissioner's reasons for considering it necessary in the interests of the economic well-being of the country to deny benefit in this case were adequate in the absence of more developed argument, relying particularly upon the impact on the claimant as a disabled person, and the points raised were not sufficiently substantial to meet the test for grant of relief (paragraphs 52 and 53).

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## **DETERMINATIONS OF THE SOCIAL SECURITY COMMISSIONER**

1. I refuse the claimant leave to appeal against the decisions of the Ashford appeal tribunal given on 6 February 2006 under references U/45/174/2005/00860, 00861 and 01031.

### **The issues**

2. I have to decide two issues. Both concern the actions and motivations of the lady who is now the claimant's partner. I shall refer to her as Ms H. First, did the tribunal go wrong in law in deciding that in disposing of her capital Ms H acted with the significant operative purpose of securing entitlement to income support? Second, does the notional capital rule apply to deprivations made by someone who only later becomes the claimant's partner?

3. I raised another issue before the hearing. This was dealt with by the Secretary of State's representative in paragraphs 10 and 11 of her written submission. This was not the subject of argument at the oral hearing and I need not mention it further.

### **The oral hearing**

4. The applications for leave to appeal in these cases were referred to me and I directed that they be decided at an oral hearing. I held the hearing in the Commissioners' court in London on 25 October 2006. The claimant and Ms H attended. Their solicitors, Kingfords, had secured legal services funding for representation only a few days before the hearing. Fortunately, they were able to instruct Mr Desmond Rutledge, of Counsel, in time for the hearing. The Secretary of State was represented by Miss Lisa Busch, also of Counsel. I am grateful to both Counsel for their interesting and helpful arguments. The local authority informed the Commissioners' office that it would not be represented at the hearing and would rely on the submissions of the Secretary of State. Following the hearing, I received further written submissions from Mr Rutledge and, in reply, from Miss Busch.

### **The income support claims**

5. The claimant was receiving income support when, on 22 December 2003, he telephoned his local social security office and asked how his benefit would be affected if his girlfriend (Ms H) were to move in as his partner on 2 January 2004. He was advised that her entitlement to a jobseeker's allowance would cease and that the value of her house would be taken into account as capital. On the following day, he rang again and said that Ms H would not be moving in with him.

6. Ms H later commented on the claimant's enquiry:

“... please note at that time I had no intention of coming down to Kent and living as a carer in his house since we were merely good friends and being a carer to him was a huge commitment. I also had my own commitments in London where I was living at the time. Our friendship was re-established and we became closer since January this year [2005] but I only decided to move down to Kent in March this year.”

7. On 17 March 2005, the claimant submitted a claim for income support. This claim is the subject of CIS/1807/2006. He claimed on behalf of himself and Ms H, declaring only £700 capital. There was no mention of Ms H’s house. Ms H explained that she had been employed for three years and had been made redundant in December 2002. She had then received what she called unemployment benefit (actually jobseeker's allowance) until February 2004. She had had to sell her home to clear her outstanding debts in May 2004. Her only income from February 2004 had been the proceeds of sale and she no longer had any savings.

8. Ms H received £151, 907.69 from the sale of her house. I do not need to deal with every item of expenditure. It is sufficient to mention that she paid £30,000 to her daughter to meet a student loan and bills and £19,256.30 on a family holiday. Asked to explain, she wrote:

“Being a student my daughter was always deep in debts and prior to the sale of my house I was in no position to help in any way to alleviate her debt burden. However, once I had sold my own house, I felt obliged out of parental duty and love to put her affairs in order hence my gift to her.

I had not been back to the West Indies since 1999, I also had not been away on any holidays during that five year period. Having the means to travel subsequent to the date [sale?] of my house prompted me to take my immediate family, being my daughter and my sisters and their children to see my mother since my mother had not seen her grand children in a very long time, I do agree, this was a major expenditure but I felt I should treat my own family which was my expression of repaying their kindness to me and my daughter in our years of troubles and difficulties.”

9. The Secretary of State refused the claim on the ground that Ms H had notional capital of at least £49,256.30. The claimant also made another claim for income support on 22 July 2005. This claim is the subject of CIS/1757/2006. It was refused on the same ground. The claimant exercised his right of appeal against both decisions.

### **The housing benefit and council tax benefit claims**

10. The claimant received housing benefit and council tax benefit from 1995. On 13 March 2005, he notified the local authority that Ms H was moving in as his partner and carer. The local authority made enquiries and, having learnt of the income support decisions, terminated the awards from 25 July 2005 on the same grounds. The claimant exercised his right of appeal against those decisions. They are the subject of CH/1822/2006.

### **The tribunal’s decision**

11. The claimant’s appeals came before the tribunal at the same hearing. The claimant and Ms H attended and gave evidence. They were accompanied by their representative from the County Council Social Services Department. He argued that

Ms H had not acted with the purpose of securing entitlement to benefit. He also argued that the notional capital rule did not apply as, at the time she had spent the proceeds of sale of her house, she had not been the claimant's partner.

12. The tribunal dismissed the appeals. The chairman provided a single full statement of the tribunal's decisions. The tribunal accepted that Ms H had not been aware of the claimant's telephone enquiry in December 2003.

13. The statement dealt with the purpose for which Ms H had spent her capital:

“8. [Ms H] is an intelligent lady. She knew that the way she was spending the good times would come to an end. After that it would be work or back to benefit. It was not until the money was gone that she elected to live with [the claimant]. It is her thinking beforehand that is relevant though as to [the claimant] he was to her knowledge not a man who could support her from his own resources.

9. It is against this background that I consider that the expenditure on other people primarily [Ms H] but all those taken on holiday as well was incurred with a return to benefit as a significant operative purpose. I acknowledge of course the natural inclination of a mother to help her daughter but there was no legal liability and this was a large percentage of the post debt repayment money. The expenditure hastened the day when it would be new work or new benefit. I accepted [Ms H] took courses to improve her skills but no work was found. There was always the distinct possibility of further benefit. That would have to support her just as it had for two years or so from January 2002.

10. I have therefore essentially confirmed the decisions save that had the holiday to the West Indies been for two weeks for [Ms H] alone I think that that could have been accepted as reasonable and not badged with an operative purpose of returning to benefit. I appreciate that all expenditure hastened the exhaustion of the money but I think that a reasonable holiday (and after many years away from her country of origin two weeks for [Ms H] would have been reasonable) should not have attributed to it any intention other than deriving refreshment from it. Taking a broad brush and allowing for holiday spending money as well as fares and accommodation I have allocated £1756.30 to that reducing the notional capital to £47,500 (£30,000 [Ms H's daughter] and the remaining £17,500 holiday expenditure).”

14. The statement also dealt with the representative's argument that the notional capital rule did not apply:

“12. I see no ground for departing from the standard approach to a claim for a man and his partner. There is first a consideration of the income that either of them has and then of the capital that either of them has including notional capital. In the case of a partner it is her purpose when spending the money that is relevant. [The claimant's] thinking did not come into the case but his partner's did.”

15. The Secretary of State's written submission to me raised the issue whether Ms H had disposed of her capital as she claimed. The tribunal did not expressly deal with actual capital. However, paragraph 12, which I have just quoted, shows that the tribunal had both actual and notional capital in mind. The tribunal found that Ms H had spent the money as she claimed, and in particular that she had paid her

daughter's debts and paid for a family holiday. That is sufficient to show that the tribunal dealt with the actual capital issue.

### **The legislation**

16. Income support, housing benefit and council tax benefit are governed by the Social Security Contributions and Benefits Act 1992. They are all income-related benefits (section 123(1)(a), (d) and (e)).

17. Section 134(1) provides that claimants are not entitled to income-related benefits if their capital exceeds a prescribed amount. Section 136(1) provides that, in determining a claimant's capital, the capital of members of the claimant's family is to be aggregated:

“(1) Where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of that person.”

“Family” is defined in section 137. There is no dispute that the claimant and Ms H are now members of the same family. Nor is it suggested that they had formed a family before March 2005.

18. Section 136(5) provides for regulations to be made on matters relevant to capital. Only one is relevant:

“(5) Circumstances may be prescribed in which –

(a) a person is treated as possessing capital or income which he does not possess”.

19. Regulations have been made under section 136(5)(a). I shall adopt the practice of Counsel at the oral hearing and refer only to the income support legislation. The housing benefit and council tax benefit legislation is in the same terms. The relevant income support provision is regulation 51 of the Income Support (General) Regulations 1987 (SI 1987/1967):

#### **“Notional capital**

**51.**—(1) A claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to income support or increasing the amount of that benefit ...”

20. “Claimant” is defined by regulation 2(1):

“‘claimant’ means a person claiming income support”.

That does not take us very far. But regulation 23(1) is important, because it provides that the capital of a partner is to be calculated in the same way as the claimant's own capital:

“(1) Subject to paragraph (4), the income and capital of a claimant's partner which by virtue of section 136(1) of the Contributions and Benefits Act is to be treated as income and capital of the claimant, shall be calculated in accordance with the following provisions of this Part in like manner as for the claimant; and any reference to the ‘claimant’ shall, except where the context otherwise requires, be construed, for the purposes of this Part, as if it were a reference to his partner.”

Paragraph (4) is not relevant to this case. Regulation 51 is in the same Part of the Regulations as regulation 23 and is, therefore, subject to it. Consequently, a partner can have notional income in the same way that a claimant can.

21. The other relevant provision is regulation 51A. This provides that the amount of the notional capital reduces in line with the amount of income support that would have been awarded if notional capital had not been taken into account.

### **The first issue**

22. This is: did the tribunal go wrong in law in deciding that in disposing of her capital Ms H acted with the significant operative purpose of securing entitlement to income support? My answer is: no.

23. The tribunal accepted Ms H's evidence that she had spent the money and how she had spent it. She denied that her purpose was related to benefit entitlement. The issue for the tribunal was whether to accept her word on that. In other words, the issue was the credibility of her assertion. The tribunal did not accept her word. Issues of credibility are essentially matters for the tribunal. The claimant is still entitled to an adequate explanation of why the tribunal made the decision. But I have to recognise that there is a limit to which a finding on credibility can be explained. It does not just involve an assessment of the evidence. It may depend on the way in which the evidence was given, which involves factors that do not appear in a record of proceedings and may not even register consciously in the chairman's mind.

24. Mr Rutledge argued that the tribunal's reasons were inadequate to justify its findings that both the discharge of debts and the payment for the family holiday were undertaken for the purpose of securing entitlement to benefit. He said everything that could fairly be said in support of those arguments. He took me through the evidence that was before the tribunal. He also cited authorities to show that entitlement to benefit is always a background factor in expenditure and that the context had always to be taken into account. But I was not persuaded.

25. The tribunal's reasons do not refer to every consideration that the tribunal took into account. The matters identified by Mr Rutledge were obviously relevant factors in the context of this case and it was not necessary for the tribunal to mention every one of them to show that it took them all into account. What the tribunal had to do was to explain why it did not believe Ms H when she said that she did not act with the purpose of securing future entitlement to benefit. I consider that the reasons, which I have quoted, are adequate for that purpose. I accept that it is possible to give each of the matters mentioned by the tribunal a different significance. But that is the nature of the exercise that the tribunal had to undertake. It had to consider the relevant factors and make a judgment on the significance of each in the context of all the others. To say that each could be given a different significance identifies the difficulty for the tribunal, not an error in its reasoning or an inadequacy in its explanation.

### **The second issue**

26. This is: does the notional capital rule apply to deprivations made by someone who only later becomes the claimant's partner? My answer is: yes.

27. I first consider the interpretation of the legislation on normal principles. I am satisfied that the tribunal interpreted the legislation correctly. Regulation 51 operates at the time when entitlement is in issue. At that point, there is either a claim or an

award. It is appropriate to refer, as the regulation does, to a claimant. But viewed from that point, the focus of the regulation is on the purpose of a past disposal, whether in the immediate past or the more distant past. At that time, there may not have been a claim or an award. So the reference to the claimant is a reference to the person's status at the time the issue arises for decision, not to the person's status at the time of the disposal. And what is so for the claimant is equally so for a partner as a result of regulation 23(1).

28. Mr Rutledge argued that the claimant could not deprive himself of capital that he never had. I accept that. He then argued that, on that basis, section 136(5)(a) did not apply to the circumstances of this case. I reject that argument. It fails to take account of the effect of section 134(1). The "person" mentioned in section 136(5)(a) refers both to the claimant and, by virtue of section 134(1), a partner. Those two provisions, read in combination, have the effect that the enabling provision in section 136(5)(a) applies to a claimant's partner as much as it applies to the claimant. Mr Rutledge's argument overlooks the combined effect of those provisions.

29. Mr Rutledge next argued that the legislation was not authorised by statute to extend to the circumstances of this case and that it was in violation of Article 8 of the European Convention on Human Rights in failing to show respect for the claimant's family life and home. That raises issues of the validity of the regulations I have cited and whether it is necessary or possible to interpret the legislation to avoid those consequences.

30. These arguments were based in part on the circumstances of the disposals in this case and in part on their consequences for the claimant. The tribunal found that in this case the money had been disposed of. That removes the doubt, which may exist in other cases, whether money has not been merely secreted away. Nor, as far as I know, is there any chance that those who have benefited from Ms H's generosity will reimburse her. As to the circumstances of the disposals, Mr Rutledge pointed out that they were made at a time when the claimant and Ms H were not members of the same family and at a time when the claimant had no control over Ms H's actions. He emphasised that the claimant was in no way complicit with what Ms H did. I accept that, on the evidence, he is correct to make those points. As to the consequences, Ms H's notional capital will, subject to regulation 51A, be aggregated with the claimant's capital for so long as they remain members of the same family. If the claimant wishes the relationship to continue, he will not be entitled to income-related benefits and will be unable to pay his rent. Possession proceedings have already been brought against him, but were adjourned at the date of the oral hearing. The couple could separate; then the claimant's entitlement to benefit will be based on his capital alone. But separation cannot relieve Ms H of the notional capital until it reduces, by operation of regulation 51A, below the capital threshold for any income-related benefit.

31. Miss Busch accepted these consequences. She was prepared to characterise them as unfair to the claimant and admitted that ultimately the only recourse for the claimant and Ms H might be the limited provisions of the National Assistance Act 1948. However, she argued that unfairness could also arise within a family. I accept that point. Partners frequently have separate capital and it is not unusual for them to act independently of each other in deciding how to dispose of it. They may be unaware of what the other holds and unable to influence their actions if they are.

32. Mr Rutledge relied on the circumstances and consequences in this case to argue that it would be oppressive, irrational and disproportionate for the notional capital rule to apply. He suggested two possible distinctions on which the legislation should be based. He began by drawing a distinction between cases where the partners were a couple at the time of the disposal and those where they came together later. He then accepted that it was permissible to prevent fraud and drew a distinction between cases where there was collusion and those where there was not.

33. Miss Busch argued that the legislation was not oppressive, irrational or disproportionate. She emphasised that this was a case in which, on the tribunal's findings, there had been a deliberate course of conduct in spending money with the purpose that it should not be taken into account on a claim for benefit in the future. She also mentioned that the provisions had an anti-avoidance function.

34. I reject Mr Rutledge's arguments and accept those of Miss Busch. It is in principle neither oppressive nor irrational to take account of disposals of capital made by a person before becoming the claimant's partner. Quite the reverse. Both in aggregating the capital of the members of a family and in taking account of notional capital, the legislation fulfils an anti-avoidance function. If notional capital were not aggregated, a future partner could dispose of capital before coming to live with the claimant or couples could separate in order to dispose of capital before reuniting. It is a legitimate function of legislation to prevent an obvious means of avoidance. And the legislation does so in a proportionate way. The notional capital rule will only apply to a future partner when there has been conduct that is related to future entitlement to benefit either for the person alone or as a member of a family. That will limit the circumstances in which the rule applies and restrict it to those cases in which a course of conduct has been directed at future benefit entitlement. Moreover, on the interpretation of the Commissioners, a purpose is only relevant for regulation 51 if it is a significant operative purpose (R(SB) 40/85). That further controls the scope of the provision.

35. Mr Rutledge was only able to present his argument with the force that he did because of the particular circumstances of this case, specifically the amount of Ms H's notional capital and the period for which the couple will be affected by the decision. I can see no way to hold that the legislation was valid or invalid according to the effect that it has in a particular case. Nor can I say that it is not valid at all just because it can have serious consequences in individual cases. Nor can I see any way to interpret the clear language of the statute and regulations to avoid the meaning I have given it and its effect for the claimant and Ms H.

36. I come now Mr Rutledge's human rights argument. Article 8 provides:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

37. I will assume that Article 8 is engaged in this case in respect of both the claimant's family life and home. So long as his relationship with Ms H continues, he

is unable to pay his rent and may lose his home. And he can only avoid this by ending the family life which he and Ms H have established together.

38. However, the interference is authorised by Article 8(2). The notional capital rule is contained in legislation. It is, therefore, in accordance with law. It is part of the law governing the social security benefits, which are part of the welfare state. A welfare state is an integral part of the democratic societies that are parties to the European Convention on Human Rights and Fundamental Freedoms. Expenditure on income-related benefits is one of the major items in the national budget. The combined cost of income support, housing benefit and council tax benefit alone was more than £27,000,000,000 in the last financial year. It is necessary in the interests of the economic well-being of the country to ensure that the large but limited funds available for public financial support are targeted at those most in need. That includes, as I have said, a legitimate anti-avoidance function.

39. Even if there were a violation of Article 8, I have no power that would allow me to provide the claimant with a remedy. I have a duty under section 3 of the Human Rights Act 1998 to interpret legislation, in so far as it is possible, in a way that renders it compatible with the claimant's Convention rights. However, there is no way in which I could interpret the legislation to avoid the consequences that it has for the claimant and Ms H while also maintaining the legitimate anti-avoidance function. That would require the legislation to be rewritten to the extent that I would be legislating rather than interpreting. That I have no power to do.

40. Mr Rutledge sought to rely on the decision of the European Court of Human Rights in *Stec v United Kingdom* in its judgment given on 12 April 2006 on Applications 65731/01 and 65900/01. Section 2 of the Human Rights Act provides that courts and tribunals must take account of judgments and decisions of the European Court. However, the House of Lords has decided in *Lambeth London Borough Council v Kay* [2006] UKHL 10, [2006] 4 All ER 128 that this duty has to be applied within the domestic doctrine of precedent. Accordingly, in so far as *Stec* differs from the decisions of the Court of Appeal and House of Lords in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577 and [2005] UKHL 37, [2006] 1 AC 173, [2005] 2 WLR 1369, I must follow the latter. Mr Rutledge did not, thereafter, pursue an argument on *Stec*.

41. After the hearing, I received written submissions on the relevance of the decision of Mr Commissioner Mesher in CIS/5479/1997. The issue in that case was whether an Italian pension that had been suspended to allow the recovery of an overpayment on an occupational pension was nonetheless income for the purposes of the Income Support (General) Regulations 1987. The Commissioner decided that it was not. He said:

“11. ... If a claimant who has not actually received income is to be treated as having that income, that has to be achieved by a specific provision in the legislation. That is why, for instance, in addition to the regulations mentioned in paragraph 9 above, there has to be specific provision for circumstances in which payments are made to a third party in respect of a claimant or a member of the family. That does not mean that there are no controls over abuse of the system, as the provisions on notional income will be relevant, as discussed in paragraphs 14 and 15 below.”

42. I have to confess that I do not follow how that case helps Mr Rutledge or the details of the argument that he has based on it.

43. As to Mr Rutledge's argument, he first referred to the natural meaning of the word "capital" and to the fact that the claimant never possessed any of the capital that was disposed of. This is correct in so far as it goes, but it overlooks the provisions that aggregate the capital of members of a family. Mr Rutledge tried to avoid this by arguing that regulation 23 is a deeming provision and, as such, to be construed strictly. For the latter proposition, he cited the judgment of Lord Justice Evans in *Chief Adjudication Officer v Woods* reported as R(DLA) 5/98:

"A deeming provision such as section 69(2) [of the Social Security Administration Act 1992], which provides what the law shall be in certain specified circumstances, is relatively innocuous, because it is no more than a legislative technique. It does not embark on the potentially dangerous course, from the constitutional point of view, of deeming as a matter of law that the facts of a case are otherwise than they are. Nevertheless, in my judgment, a statutory deeming provision should be strictly construed, because it requires matters, even matters of law, to be regarded differently from what they are."

From this, Mr Rutledge argued that regulation 23 should be interpreted in a way that is proportionate, linking back to his argument at the oral hearing.

44. Miss Busch argued in response that CIS/5479/1997 was irrelevant. Mr Mesher recognised the possibility of specific legislative provision, which is present in this case. And he recognised the role of notional income, which is the issue in this case. Finally, he was not concerned with regulation 23, which is important in this case. I also add that Mr Mesher recognised the role of notional capital as a control over abuse, a point that Miss Busch made at the hearing.

45. I accept Miss Busch's argument and reject Mr Rutledge's argument for these reasons. First, I can see no way to interpret regulation 23 to reduce its scope. Its meaning is clear. Second, I can see no reason to do so. It performs a legitimate function in a proportionate way. Third, I do not accept that the regulation is a deeming provision. Section 134(1) of the 1992 Act uses the words "treated as", but that does not necessarily make it a deeming provision. What it does is to provide for the resources of the members of a family to be aggregated. In other words, for income-related benefits the family is treated as a single economic unit. Regulation 23 gives effect to that. It is merely a drafting device, akin to a definition provision, that allows the remaining regulations to be written in terms of the claimant only but to apply to all members of the claimant's family. That contributes to the clarity and simplicity of those regulations. There is no deeming there. There is, of course, deeming in regulation 51, authorised by section 136(5)(a). But there is, as I have said, no scope for interpreting those provisions to mean anything other than what they clearly say.

### **Disposal**

46. As the tribunal did not go wrong in law, I refuse the claimant leave to appeal.

*The claimant applied to the Administrative Court for judicial review of the Commissioner's determinations. The decision of the Administrative Court follows.*

## DECISION OF THE ADMINISTRATIVE COURT

Mr Stephen Knafler and Mr Desmond Rutledge (instructed by Kingsfords) appeared on behalf of the claimant.

Miss Lisa Busch (instructed by the Solicitor, Department for Work and Pensions) appeared on behalf of the defendant.

### Judgment

#### DEPUTY JUDGE:

1. This is an application for judicial review of a decision of a Social Security Commissioner, Mr Commissioner Jacobs, given on 29 November 2006. Permission to review that decision was granted by Forbes J on 30 April 2007. The decision of Mr Commissioner Jacobs, which is to be reviewed, is a decision when he refused permission to appeal to the Commissioners from a decision of the Ashford appeal tribunal, dated 6 February 2006.

2. The appeal tribunal itself was concerned with two linked appeals against the refusal of income support on the one hand and housing and council tax benefit on the other, following a notification of a change of circumstance made by the claimant, Mr Hook, on or about 14 March 2005. The change of circumstance was that he had now been joined by a partner, who was deemed under the regulations to be a member of his family, but who it was found in the appeal process had disposed of capital that was available to her, thus disqualifying her and the claimant from support whilst the notional capital remained, in accordance with the regulations.

3. The appeal tribunal and Mr Commissioner Jacobs both heard full argument on the issues, applying the regulations to the primary facts of this case. There was oral argument before the tribunal. There was a written application for permission to appeal to the tribunal that was rejected, and a written application to the Commissioner. He directed an oral hearing. There was an oral hearing in which the claimant was represented by Counsel, and there was then a request for supplementary written submissions. Overall a substantial process of examination of these questions has been undertaken. This hearing has therefore constituted the third tier of appeal or review for error of law in respect of this social security decision. If the relief claimed were granted, the Commissioner would be obliged to re-hear the claim and there would then be a right of appeal to the Court of Appeal on a point of law.

4. It is clear from the authorities governing the approach that the court should take in this field that judicial review is available to review a decision of the Commissioner to refuse permission to appeal from the appeal tribunal. However, it is also clear that something more than a merely debateable error of law in the Commissioner's decision is needed for relief to be granted. In the case of *Connolly* [1986] 1 WLR 421 Slade LJ said at page 423:

“In a case where a commissioner has refused leave to appeal without giving reasons and an applicant seeks to challenge such refusal by way of judicial review, the onus must, in my judgment, lie on the applicant to show either (a) that the reasons which in fact caused the commissioner to refuse leave were improper or insufficient, or (b) that there were no good grounds upon which

such leave could have been refused in the proper exercise of the commissioner's discretion."

5. This of course is a case where very substantial reasons have been given by the Commissioner.

6. I have been referred to the subsequent decision of Neuberger LJ in *R (Sinclair Gardens) v The Lands tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650, where the test for the grant of relief is where there is an error "that is sufficiently grave to justify the case being treated as exceptional". The reasons for that approach are set out at [30], [40], [41] and [44] of that judgment, from which I have drawn some assistance. It is not necessary for me to resolve precisely the test to be applied in judicial review from a Social Security Commissioner, and I recognise that, in many cases, claimants may not be legally represented and points of importance may not have been developed in the way that would be desirable. The inquiry is inquisitorial, and the tribunal and the Commissioner are both able to play an active role in the elucidation of relevant facts and legal issues. However, having regard to the fact that this is a review of a specialist expert tribunal in the field of detailed social security regulation concerning entitlement to public funds, it is common ground that the test to be applied to avoid unnecessary expense and to achieve the desirable aim of finality in this context is that a very substantial point of law is required.

7. I am particularly conscious of the fact that, during the past two years, Mr Hook's housing benefit has not been paid and rent arrears are accruing, creating no doubt significant problems for the Housing Association who are the landlords of his home of many years' duration.

8. In this application, it is accepted that the only real issue upon which it is sought to quash the Commissioner's refusal of leave is his consideration of human rights questions and the inter-related application of the Human Rights Act 1998, and the statutory regime that was being considered below. In particular, I must consider whether he has given sufficient reasons to indicate that he has properly directed himself and properly addressed the issue of justification, and the proportionality of any interference with the right to respect for home, private and family life granted by Article 8 of the European Convention on Human Rights (ECHR) and incorporated into domestic law by the Human Rights Act 1998.

9. The amended claim form indicates three issues: first, misdirection on the question of justification; second, misdirection on the ability to give relief where a violation of human rights is found; and third, insufficient reasons for deciding that the legislation and the regulations as applied to this claimant were proportionate; and in particular, the question of whether there were less intrusive means available to the public authority. I stress, however, that that is how the case is now put. As we shall see in the course of this judgment, matters have developed some way, and that was not the original case that was considered below.

10. It is necessary to supplement the brief facts already given to set the context for the issues in this case. Mr Hook, the claimant, is and has been for many years severely disabled through injury sustained at work. It appears that he is unable to work, walk without assistance and needs assistance to wash and clothe himself. He has for many years been in receipt of a disability living allowance at the middle rate, and the higher rate of the mobility component of the disability living allowance, plus

income support, housing benefit, council tax benefit, child tax credit, and child benefit.

11. The arrangements regarding his domestic household and those who care for him have changed over the years. His former wife and children have played significant roles in attending upon him. However, this case is concerned with the arrival into the household of the claimant of his present partner (who I shall refer to as Ms H). She and the claimant appear to have struck up a friendship in about the autumn of 2003, and discussion arose as to whether she should move into the house to live with him as his partner, but also to take some of the responsibility for the care of the claimant from his daughters.

12. In December 2003, the claimant telephoned his local social security office, and had been told that if Ms H moved in, then that would have an effect upon the claimant's income support and benefits. The reason for that is that Ms H was the beneficiary of the proceeds of her former matrimonial home and there was apparently capital available to her in 2003 or early 2004 of something in the order of £150,000.

13. Ms H did not move in with the claimant until about March 2005. In the intervening period, the tribunal found that the capital represented by the sale of her former matrimonial home had been dissipated: partly in clearing debts, partly in living expenses of her own, but also generous distributions of £30,000 to her own daughter to help the daughter pay off a student loan, and some £17,500 taking a number of family members for an extended holiday to the Caribbean, where Ms H had family ties and where she had originated.

14. The tribunal therefore concluded that there was some £47,500 which had been dissipated, and it concluded that it had been dissipated in the knowledge that Ms H, if she moved in with the claimant, would be able to claim benefits again. There was a nexus between the dissipation and the future intention to claim income support and other social security benefits.

15. The application of the scheme of regulation was therefore the subject of an appeal to the appeal tribunal once the claimant had informed the social security authorities of the change of circumstances and they had decided to apply the regulations, to which I shall now turn, that had the effect of disentitling the claimant to income support and the housing benefit and council tax support to which I have already referred.

16. The legislative scheme can be summarised as follows. Section 134(1) of the Social Security Contributions and Benefits Act 1992 provides that claimants are not entitled to income-related benefits if their capital exceeds a prescribed sum. Section 136(1) provides that the income and capital of family members is to be treated as being that of the claimant except in prescribed circumstances; that is to say, where a person claiming an income-related benefit is a member of the family, the income and capital of any member of that family shall be treated as the income and capital of that person. "Family" is defined in section 137 as including a couple, and a couple as including a man and a wife, living together as man and wife, again save in prescribed circumstances.

17. Section 136(5)(a) provides that regulations can be made on matters relevant to capital, and those regulations may include circumstances where a person is treated as possessing capital or income which he does not possess. The regulations treated as

being made under the principal statute have been in existence for some good many years. The court was not informed precisely when they first emerged. It is sufficient to note that regulation 51 of the Income Support (General) Regulations of 1987 (SI 1987/1967) states:

“A claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to income support or increasing the amount of that benefit ...”

18. I pause to note that that was the regulation that was applied in the case of Ms H after she had become, as she clearly had, a member of the family of the claimant by cohabiting with him in his home.

19. “Claimant” is defined in the regulations in two ways. By regulation 2(1) it means a person claiming income support. That of course is the claimant personally; secondly, by Regulation 23(1), it is said that, subject to paragraph (4):

“the income and capital of a claimant’s partner which by virtue of section 136(1) of the Contributions and Benefits Act is to be treated as income and capital of the claimant, shall be calculated in accordance with the following provisions of this Part in like manner as for the claimant; and any reference to the ‘claimant’ shall, except where the context otherwise requires, be construed, for the purposes of this Part as if it were a reference to his partner ...”

20. On the findings of fact of the appeal tribunal, which are not challenged, the claimant was held to be disentitled by regulation 51, taken with regulation 23, because he included in his claim his new partner, Ms H, and because, in any event, since Ms H was to be treated as a family member, her resources, including the deemed resources as provided under regulation 51, were to be taken into account until such time as the deemed resources had been run down by the period of disqualification of benefit. The end result was that Mr Hook, the claimant, has not received since March 2005 or thereabouts his income-related benefits. He will not do so if the present situation continues where Ms H continues to reside with him as his family member and partner, until such time as the deemed resources of some £47,500 have been run down against the weekly accrual of benefit entitlement – something that will take some years to happen. In the meantime, as I have indicated, rent arrears are accruing, as well no doubt as pressure on the monies available by way of income support to the families.

21. Now, before the tribunal, the argument was founded squarely upon the proper meaning of the regulations, and the essential submission was that it would be unfair and therefore impermissible to construe the regulations as applying to Mr Hook, who had himself not dissipated any capital and had not been a party to the dissipation of capital by Ms H, with the consequence that I have just indicated. No submission at all was made referring to human rights, and, in my judgment, the tribunal was perfectly entitled to conclude that the policy of the regulations was such that it manifestly included dissipations by a family member, even before the period of cohabitation as a family member had occurred, otherwise it would be easy to evade the policy considerations of preventing artificial reliance or dependence upon state benefits and the anti-avoidance principle implicit in the scheme as a whole.

22. Before the Commissioner, it appears that that again was very much the submission at the forefront of the arguments and the submission that he dealt with

first in the first two points of a lengthy reasoned determination, examining whether this was a case for permission to appeal. It is not suggested before this court that either the tribunal or the Commissioner were in fact wrong in their interpretation of the regulations to this case, and it must therefore follow that the rule-maker and Parliament in promoting the scheme through primary legislation contemplated and intended that there would be cases of partners not party to the dissipation who would suffer loss of benefit because of cohabitation with a family member who had previously dissipated.

23. The present point that now lies before this court therefore has an unsatisfactory history. There indeed may well be room for argument whether the tribunal was required to address human rights at all since it had not been asked to do so, applying section 12(8) of the Social Security Act 1998, which should set the parameters for what the Commissioner considers ought to be the points that the tribunal should deal with arising from the case from which leave to appeal should be granted. It may well have been open to the Commissioner to take a summary view to say that, since the claim was not raised below before the tribunal by way of human rights being violated, then he was not required to grant leave to appeal to consider the point *de novo*. In the particular case, the court notes that section 7 of the Human Rights Act 1998 indicates that a person who claims to be a victim of a violation of his human rights may raise the matter, either by way of positive claim or by way of defence and proceedings. But the point is that someone has to claim to be a victim in order to engage the process of human rights determination and consideration.

24. I accept of course that obvious errors of law on the face of a tribunal determination can be the basis of the grant of permission to appeal by the Commissioner, or indeed if there was such an obvious error in the Commissioner's decision, could be the basis for relief by way of judicial review before this court. However, it would be difficult to suggest that there was an obvious error in the tribunal's decision in not engaging human rights questions, which of course had not been raised, given the complete absence of any Strasbourg case law suggesting that denial of benefit for income support or housing has violated Article 8(2) in any case which the Strasbourg Court has considered, or indeed in any case that the UK courts have considered.

25. A valuable review of the authorities is contained in the decision of the Court of Appeal in *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] 2 WLR 603. I have drawn assistance from the reviews of the case-law at [19]–[20] and [25]–[27], and will return to that case in one further moment.

26. However, the Commissioner did not take the view, when human rights were raised before him in the written grounds upon which permission to appeal from the tribunal was sought, that he could dismiss that on that basis; nor did the respondent to this appeal (who here as before the Commissioner appears through Ms Busch) invite the Commissioner or this court to take that approach. Therefore, human rights was an issue which he had to pay regard to in his determination, but it seems it was the third of the three issues and not the principal issue with which he was concerned.

27. Secondly, before the Commissioner very little authority by way of human rights material was placed before him and there was no detailed exploration at the invitation of the claimant, or indeed the respondent, of the way in which human rights might become involved in a social security issue. Accordingly, the Commissioner assumed, without deciding, that Article 8(1) did apply in this case and

that the benefits decisions were an interference with family life, and went on to consider whether the interference could be justified by application of the terms of Article 8(2). Before this court, the respondents make clear they do not concede or accept that Article 8(1) is engaged or that there is an interference or a failure to respect family life, private life or a home, and if this application were to succeed and the matter were remitted to the Commissioner, they indicate that they would seek to argue the contrary.

28. Again, before this court, it is common ground that I should proceed as before the Commissioner on the basis that human rights were engaged, but the fact that these matters have not been fully explored has a significant impact upon the points which are now taken, which substantially complain of the reasoning process of the Commissioner in respect of human rights. Indeed, the Commissioner might well have concluded from the written grounds that a freestanding human rights point was somewhat low in the submissions made before him, and the written grounds state:

“It is accepted that refusal of income support or housing benefit cannot breach Article 8 on its own because there is no positive obligation on the Government to pay social security benefit. However, deductions made from benefits which the state has decided the claimant is entitled to can breach Article 8 [citing the case of *Logan v United Kingdom*].”

29. Further, the human rights point was described in the written grounds as follows:

“There is a lack of respect for Mr Hook’s family life because the only way that he can avoid losing his home and claiming access to income support is to sever his ties with his partner. That is entirely unreasonable, particularly bearing in mind that his partner has not done anything dishonest, and in addition provides Mr Hook with personal care.”

30. The written submissions that were provided by Counsel who appeared on behalf of the claimant before the Commissioner, albeit instructed somewhat late in the day and without therefore the opportunity to have drafted a skeleton argument, also stress that the attack was upon the application of the rules *per se*. Thus paragraph 12 of the written submissions supplied to the Commissioner after the oral hearing states:

“It is the appellant’s case that any provision which treats the claimant as having the partner’s notional capital where the deprivation of capital took place before they were a couple would show a lack of respect for the claimant’s private life in that although he was an autonomous individual, he is treated as owning notional capital, and as a result is treated as being ineligible for income support and housing benefit solely as the result of retrospective account being taken of the actions of a person who, at the time, was not living with him as his partner and with whom they had no legally relevant connection, for benefits purposes.”

31. In my judgment, it is therefore important to see precisely what the Commissioner was being asked to grapple with before criticising his judgment refusing grant of leave to appeal from the tribunal on human rights grounds. In the light of this history, I do not decide the Article 8(1) question itself as to whether the social security decisions themselves amount to a lack of respect for family life or respect for home or interference with family life. However, I consider that it is highly

arguable that they do in the combination of factors that were in play in this case. First, by loss of the housing benefit, Mr Hook was unable to pay the rent on his housing provided by the Housing Association which he had occupied as his home for many years. Having regard to his underlying condition as a disabled person, he was dependent on state benefits for being able to pay for the rent on his home.

32. Secondly, there is of course the feature that was pressed below, that Ms H is his partner and cohabitation is an important and intimate aspect of family life. But thirdly, and in my judgment of some significance in this particular case, is the fact that his disability means not only that he cannot find work for himself, but that he also requires care during the day and during the night, which is provided by family members and in particular his partner. It is true that in the grounds of appeal it is mentioned that his partner is a carer, but very little else is made of that proposition, and the matter is not developed either by evidence demonstrating the degree of reliance upon his partner, or by citation of authority as to how human rights might impact upon Mr Hook, and what was not done in this particular case was to link Article 8 with Article 14 in suggesting that the application of rules of general import to those whose partners have previously dissipated capital worked a disproportionate impact upon disabled people, who are dependent upon their partners for support and housing.

33. Despite the complete absence of authority either in Strasbourg or in the United Kingdom as to when Article 8 would be violated by a decision not to award benefits, it cannot be said that, in those circumstances, a case could never arise upon this question.

34. Returning to the judgment in *Anufrijeva*, the court noted at [29] of its decision:

“As long ago as 1982, in an article on ‘The Protection of Privacy, Family Life and Other Rights under Article 8 of the European Convention on Human Rights’ (1982) 2 YEL 191, at p 199, Mr Peter Duffy wrote, in relation to the positive obligations inherent in Article 8:

‘The case-law has only just begun to grapple with this issue. In general, one would expect a somewhat cautious approach from the Commission and the court. It seems nevertheless very probable that some welfare benefits come within the scope of Article 8 and possible that minimum welfare provision may now constitute a positive obligation inherent in the effective respect for private and family life by the States.’

30. It is noteworthy that, so far as we are aware, the Strasbourg court has not yet given a decision that a State has infringed Article 3 as a result of failure to provide welfare support, let alone that Article 8 has been infringed in such circumstances. The court has, however, recognised the possibility of such an infringement. In *Marzari v Italy* (1999) 28 EHRR CD175 the applicant suffered from a rare disease that, at times, constrained him to use a wheelchair. He complained that his Article 8 rights had been infringed in that he had been evicted and that the alternative accommodation offered to him was not suitable, having regard to his special needs. The court observed at p 179:

‘The court must first examine whether the applicant’s rights under Article 8 were violated on account of the decision of the authorities to evict him despite his medical condition. It further has to examine whether the applicant’s rights were violated on account of the authorities’ alleged failure to provide him with adequate accommodation. The court considers that, although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such interference: in addition, to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter’s private life.’”

35. In my judgment, it is plain, particularly having regard to the decision on admissibility in *Marzari v Italy*, that circumstances could arise where positive obligations are engaged to require the state to provide certainly a disabled person with housing, and to abstain from interference in important aspects of his private and family life. However, as in all these matters, the issues are fact-specific and depend upon careful factual evaluation of the impact of the decision in question on the individual, and cannot be dealt with in schematic ways by references to the Human Rights Act in written grounds without developing the argument as to how it is suggested that human rights are engaged or infringed in the particular case, or at least how the approach to determination of that question should be developed.

36. It is with that background that I turn to the Commissioner’s decision on the question. As I have indicated, he gives a very substantial decision of some 46 paragraphs, explaining why he has refused the claimant leave to appeal after the extensive hearing that I have described. Between paragraphs 22 and 35 he rejects the arguments based upon construction of the regulations and policy considerations, having regard to the impact of the regulations that the claimant was developing, without reference to human rights jurisprudence. He rejects those submissions and concluded that it was:

“in principle neither oppressive nor irrational to take account of disposals of capital made by a person before becoming the claimant’s partner. Quite the reverse. Both in aggregating the capital of the members of a family and in taking account of notional capital, the legislation fulfils an anti-avoidance function. If notional capital were not aggregated, a future partner could dispose of capital before coming to live with the claimant or couples could separate in order to dispose of capital before reuniting. It is a legitimate function of legislation to prevent an obvious means of avoidance. And the legislation does so in a proportionate way. The notional capital rule will only apply to a future partner when there has been conduct that is related to future entitlement to benefit either for the person alone or as a member of a family. That will limit the circumstances in which the rule applies and restrict it to those cases in which a course of conduct has been directed at future benefit entitlement.”

37. That is an observation made in the context of the non-human rights claim, but clearly equally relevant to the purpose of the legislation and its legitimate aim, and, as I have indicated, no complaint is made of that conclusion as a matter of purely domestic law and policy. At paragraph 37 of his determination, the Commissioner assumes that Article 8 is engaged, as I have indicated, and recognises that:

“So long as his relationship with Ms H continues, he [that is Mr Hook] is unable to pay his rent and may lose his home. And he can only avoid this by ending the family life which Ms H and he have established together.”

So he was aware of the impact of the decision.

38. I then turn to paragraph 38, and it is this paragraph upon which Mr Knafler, appearing in this court for the claimant, has directed his attack. The Commissioner states:

“38. However, the interference is authorised by Article 8(2). The notional capital rule is contained in legislation. It is, therefore, in accordance with law. It is part of the law governing the social security benefits, which are part of the welfare state. A welfare state is an integral part of the democratic societies that are parties to the European Convention on Human Rights and Fundamental Freedoms. Expenditure on income-related benefits is one of the major items in the national budget. The combined cost of income support, housing benefit and council tax benefit alone was more than £27,000,000,000 in the last financial year. It is necessary in the interests of the economic well-being of the country to ensure that the large but limited funds available for public financial support are targeted at those most in need. That includes, as I have said, a legitimate anti-avoidance function.”

39. That is all the Commissioner said by way of justification of the interference or the assumed interference with Article 8(1) rights in this case. Mr Knafler complains that he has merely indicated that the legislative purpose was for a good reason, that there was an interference in accordance with the law, but he has not asked himself the question: is the interference proportionate having regard to its impact upon this individual?

40. As against that, the respondent submits that he does direct himself to all three limbs of the Article 8(2) test, and he has in terms come to his own conclusion that the decision is necessary in the interests of the economic well-being of the country. Quite clearly, those considerations are wholly legitimate in terms of the purpose of the regulatory scheme as a whole, and the fact that the regulatory scheme as a whole was laid down in law, and indeed it would appear that Mr Hook was advised if he did move in with his partner he stood to lose his income support because of her capital. So there is no question that this is an obscure or untransparent system. But what Mr Knafler says is that there is no sufficient consideration of the impact upon him as an individual, and that is what is required to give effect to proportionality.

41. Complaint is also made of paragraph 39 of the Commissioner’s decision, and here I can paraphrase. Essentially he says that, even if there were a violation, he concluded that he had no power to allow the claimant a remedy. He says that, despite his duty under section 3 of the Human Rights Act to interpret legislation insofar as it is possible in a way that renders it compatible with the claimant’s Convention rights, he could not so interpret the legislation, and he would be engaging in the task of legislation rather than interpretation, which he has no power to do. It is common

ground that, as he is not sitting as a High Court Judge, he has no power to grant a declaration of incompatibility.

42. Complaint is made of that paragraph and, in my judgment, if that was the only issue in the case, that complaint would be substantial. If and I stress “if” the Commissioner had concluded that the application of the regime to Mr Hook had been a violation of Mr Hook’s Article 8 rights, there are many ways in which he could, and indeed he would be obliged to, ensure that that violation ceased. Since this was canvassed in the debate before this court, it is worthwhile setting them out. First, says Mr Knafler, once Mr Hook had informed the social security authorities of his change of circumstance, there was a discretion to apply to him the new regime – a claim for both him and his partner but also then taking into account his partner’s resource – but not a mandatory duty to do so, although obviously in the normal case the discretion would be exercised in accordance with the regulatory scheme. It is possible, says Mr Knafler, for the Secretary of State or his officials to look ahead to see what the consequence of altering his single person’s income support and housing benefit would be, conclude that that would violate his Article 8 rights, and therefore for those reasons choose not to do so.

43. Second, as was plain from regulation 23, noted earlier in this judgment, the principle of aggregation and treating the partner of a claimant as a claimant is liable to be displaced “where the context otherwise requires”. That was a matter that I did draw to Counsel’s attention, but then having reserved judgment overnight, I was interested to note a reference in one of the cases handed to me, *Secretary of State for Work and Pensions v M* [2006] UKHL 11, [2006] 2 WLR 637 (also reported as R(CS) 4/06). This was a decision of the House of Lords concerning the interaction of Article 8 and Article 14 to a lesbian couple under the then regulations which did not make allowance for couples who are other than a man and a woman. At [52] of their Lordship’s judgment in the speech of Lord Walker, it was pointed out that, in the particular case, Mr Edward Jacobs, the Child Support Commissioner, decided the case and concluded that he could act consistently with the human rights of the claimant not by using the Interpretation Act to treat the lesbian couple as man and wife, but by the introductory rubric to regulation 1(2) “unless the context otherwise requires”. So it appears that the same Commissioner had achieved a human rights compatible result in another case by that technique, although in the event the House of Lords concluded that Article 8 was not engaged and therefore Article 14 did not avail the claimant.

44. Thirdly, the Commissioner would be able to interpret the Social Security Regulations by reading in and reading down, as the Court of Appeal and the House of Lords have indicated is possible in the case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, the reading down taking some such form as “save where human rights otherwise required” or some version of that.

45. Finally, of course, the regulations that disentitle the claimant in this case were regulations made under a primary statute, but not the primary statute itself. Therefore, there was no constitutional inhibition, if it was necessary to do so, to simply declare those regulations or that part of them that bit upon the case to be void, in accordance with the Commissioner’s jurisdiction to decide whether the decision was in accordance with the law: the law in this case being section 6 of the Human Rights Act, and section 6(2), which prevents certain kinds of decisions being treated

as contrary to human rights where they are in compliance with the mandatory obligation for primary legislation, did not apply.

46. Mr Knafler developed his attack on the key part of the judgment of the Commissioner dealing with justification by reference to the decision of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 WLR 581. This, of course, was an immigration case concerning the proper approach of the adjudicator in an immigration human rights appeal, provided under the immigration statute, where a person faced removal from the United Kingdom with the consequence that they would be separated from their family. The House of Lords made it plain that that decision was a decision for the adjudicator him or herself, giving such weight to the policy considerations which arose in that case, and it was not a decision that should be decided either by reference to: “Could a reasonable Secretary of State have concluded that it was necessary to deport or move?”, or any version of that formula, nor was it necessary to ask the question: “Was this an exceptional case justifying the conclusion of a breach?”

47. However, I accept the respondent’s point that [17] of the decision in *Huang* indicates that the appellate committee was in that paragraph particularly concerned with the statutory context of an immigration human rights appeal, where both the statute recognised that immigration decisions could breach human rights, and the Immigration Rules recognised that the rules had not been the conclusive means by which effect was given to the ECHR, and that there could be cases which fell outside the rules, but nevertheless violated the Convention.

48. By contrast, there are classes of case, particularly the housing cases referred to in [17], where Parliament has generally struck a balance and where the parliamentary scheme itself will indicate how, in the vast majority of cases, the question of interference with right to respect for a home is to be governed. The appellate committee found the analogy of the housing cases with the immigration case unpersuasive because:

“Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.”

49. I accept that we are here dealing with a scheme set out in the subordinate regulations rather than in primary legislation from Parliament, and the quality of parliamentary scrutiny and debate is much less in the case of regulations than primary legislation. But nevertheless, these are principles set out for many years pursuant to primary legislation that Parliament has been content to adopt as a balance between competing claims on the public purse, and these matters do of course concern very much the making of best use of finite public resources. So, in my judgment, the claimant does not get too much assistance by way of [17] of *Huang*.

50. A little greater assistance, however, is obtained by [19], which is a general review of what any court in any context has to do by way of considering justification of a human rights infringement. [19] provides as follows:

19. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate:

‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.’

This formulation has been widely cited and applied. But Counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (page 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paragraphs 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality:

‘must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage.’ (see paragraph 20).

If, as Counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good.”

51. Mr Knafler therefore submits: where is the evidence that the Commissioner asked himself either question (iii) referred to in that paragraph: is the means used to impair the right or freedom no more than is necessary to accomplish the objective?; or question (iv), which has been added to the checklist as a result of having been omitted from the key decision of *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, namely that it must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. Mr Knafler submits that that fair balance has to be applied in the context of the individual case, and it is not sufficient to say that the legislation generally serves a legitimate aim and an effective purpose.

52. Those therefore were the contentions in the case as argued before me. I have already indicated that, if the case turned upon paragraph 39 of the Commissioner’s decision, there would be a basis for relief. But, in my judgment, the case does not turn upon paragraph 39, where the Commissioner went on to consider what he could do if he found there was a violation. He has not found a violation, and he did give his reasons why he considered it was necessary in the interests of the economic well-

being of the country to deny benefit in this case. If more developed argument had been made, relying particularly upon the impact on Mr Hook as a disabled person, it may be that something more by way of reasoning would be expected and required to dispose of that argument. But for the reasons which I have sought to explain at some length by quoting from the procedural history of this case and the essential submissions made, I conclude that the Commissioner was not really being invited to accept that the regulations served a legitimate purpose in the vast majority of the cases, but in the particular case of this claimant, they went further than was necessary or further than was legitimate because of the impact upon him. What the outcome to such a case would be I do not seek to estimate. But I do recognise that, applying [19] of *Huang*, it may be in the appropriate case necessary for the Commissioner to grapple with it.

53. In my judgment, however, he does not have to grapple with human rights in the abstract. He has to grapple with the basis that is placed before him on why he should grant permission to appeal from the tribunal where, as I have indicated, the human rights point was not live at all. In those circumstances, I have come to the conclusion that it is not appropriate to grant relief in this case: either because the alleged error of law is essentially one going to the sufficiency of reasons in the context in which there was not sufficient precise argument requiring a more sophisticated analysis of the reasons; secondly, because he has reached a conclusion on the issues that were before him as to the overall impact and legitimacy of the regulations when applied to partners generally; and thirdly, if there was any debateable error of law in those reasons, in my judgment it does not meet the test for grant of relief set out in the two authorities to which I referred at the outset of this judgment.

54. I therefore conclude that this is a case in which the application should be dismissed. I appreciate that leaves the claimant in a vulnerable position, but, in my judgment, it is particularly important in the interests of finality for him to deal realistically with the predicament that he is in and have to make such decisions as are necessary to enable him to seek to retain his home if possible, this process now having expired. That may well require some cesser of cohabitation with his partner, but human rights do not require the state to respect every form in which people live together, and if partners with a history of disposition of capital are to be taken into account, then the state should not be, as it were, forced to accept that cohabitation.

55. It is the impact upon him as a disabled person which has caused me some concern, but there may well be other ways in the future where that can be re-balanced and re-addressed, and certainly it is necessary for that claim to be presented fully and effectively before any inferior judicial body could be criticised for failing to give sufficient reasons.

56. It was pointed out by the respondent that the class of persons who are in receipt of income support are generally not expected to work. Mr Knafler points out that it goes further in the claimant's case: it is not a question that he cannot be expected to work; he cannot work. It may be that a shortfall in his care arrangements if his present partner does leave and stop co-habitation could be met either by her during day-time care or by others until such time as a change of circumstance can be taken into account. But if there is ever at some point in the future co-habitation and the matter falls to be re-determined, it may well be the facts of this case will need to be borne very carefully in mind by those who have to make future decisions on the

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application of this legislation and the human rights principles which are beginning to emerge from the case law. That however is for the future. For the reasons I have given, I have disposed of the application in the way that I have.