Steane and Another v Chief Adjudication Officer and Another

House of Lords
Lord Keith of Kinkel, Lord Mustill, Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hope of Craighead
24 July 1996

A person in a private sector care home is eligible for attendance allowance unless there is evidence that s/he requires accommodation because of illness, within the meaning of National Health Service Act 1977 Sch 8 para 2.

Facts

The applicant had lived in local authority residential accommodation for some years. She paid the full cost out of her own resources. The local authority then leased the accommodation to a voluntary organisation set up to run care homes previously run by the local authority and the health authority. The local authority provided the staff and the voluntary organisation funded the cost. The DSS then refused to pay the applicant attendance allowance, to which she was prima facie entitled. Its reason was that she was excluded by Social Security (Attendance Allowance) Amendment (No 3) Regulations 1983 SI No 1741 reg 4(1) because she occupied local authority residential accommodation; alternatively the cost of her accommodation was or might be borne wholly or partly out of public or local funds under the National Assistance Act 1948 (NAA) or National Health Service Act 1977 (NHSA) Sch 8 para 2.

Held (allowing the application):

1 The arrangements made between the local authority and the voluntary organisation for the transfer of the accommodation did not comply with NAA 1948 s26(2) in that the applicant paid the charges for the accommodation herself and no provision was made for the local authority to make payments to the voluntary organisation at rates determined by or under the arrangements. It followed that the arrangements did not entail the provision of residential accommodation by the local authority under NAA 1948 s26.

2 There was no power under NAA 1948 Part III to meet the cost of the applicant's accommodation out of public or local funds because so long as the applicant remained in her private sector accommodation 'care and attention' was 'otherwise available' to her and no duties or powers arose requiring or permitting the expenditure of local funds.

3 There was no power under NHSA 1977 Sch 8 para 2 to meet the cost of the accommodation out of public or local funds because that enactment referred to the provision of residential accommodation for the care of persons suffering from illness and there was no evidence that the applicant needed accommodation on account of illness.

Cases referred to in judgment:

Adjudication Officer v Kenyon (1995) *Times*, 14 November, CA.

Chief Adjudication Officer and Another v Quinn and Others; Chief Adjudication Officer and Another v Gibbon (1998) 1 CCLR 529; [1996] 1 WLR 1184; [1996] 4 All ER 72; (1996) 146 NLJ Rep 1150; (1996) 93(37) LSG 27; (1996) 140 SJLB 207; (1996) *Times*, 8 August, HL; *affirming* [1994] CA Transcript 439.

Jones v Insurance Officer (1984) *Times*, 20 February, CA.
Steane v Chief Adjudication Officer (1996) 29 BMLR 87; (1995) *Times*, 19 December; (1996) *Independent*, 8 January, (CS), CA.

Legislation/guidance referred to in judgment:
Health Services and Public Health Act 1968 ss12 and 65 – National Assistance Act 1948 Part III and ss21 and 26 – National Health Service Act 1977 Sch 8 para 2 and Sch 14 para 1 – Social Security Act 1975 s35 – Social Security (Attendance Allowance) Regulations 1991 SI No 2740 reg 7 – Social Security (Attendance Allowance) Amendment (No 3) Regulations 1983 SI No 1741 reg 4 – LAC(74)19 – LAC(74)28 para 5.

This case also reported at:
[1996] 1 WLR 1195; [1996] 4 All ER 83; (1996) 146 NLJ Rep 1313; (1996) 93(37) LSG 26; (1996) 140 SJLB 202; (1996) *Times*, 8 August, HL.

Representation
Roger McCarthy (instructed by Sharpe Pritchard) appeared on behalf of Mrs Steane and Islecare Ltd.
John Howell QC (instructed by the Solicitor to the Department of Health and Social Security) appeared on behalf of the Chief Adjudication Officer and the Secretary of State.

Judgment
LORD KEITH OF KINKEL: My Lords, for the reasons given in the speech to be delivered by my noble and learned friend Lord Slynn of Hadley, which I have read in draft and with which I agree, I would dismiss this appeal.

LORD MUSTILL: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Slynn of Hadley. For the reasons he gives I too would dismiss this appeal.

LORD SLYNN OF HADLEY: My Lords, on 20 May 1991 Mrs Steane claimed an attendance allowance pursuant to s35 of the Social Security Act 1975. Such an allowance is payable to a person over 65 who is so severely disabled physically or mentally that, *inter alia*, he requires frequent attention during the day or prolonged or repeated attention during the night in connection with his bodily functions. It is common ground that Mrs Steane satisfied those conditions so as to be eligible, but for the issues raised on this appeal, to an attendance allowance at the higher rate prescribed. The adjudication officer who dealt with her claim rejected it, but the social security appeal tribunal allowed her appeal and its decision in the result was upheld by the social security commissioner and by the Court of Appeal ((1995) *Times*, 19 December).

Regulation 4(1) of the Social Security (Attendance Allowance) Amendment (No 3) Regulations 1983, SI 1983/1741, made pursuant to s35(6) of the 1975 Act, provided that except in specified cases, including those specified in reg 4(3), attendance allowance should not be payable in respect of a person who has attained the age of 16 for any period during which that person is living in accommodation:

(a) provided for him in pursuance of Part III of the National Assistance Act 1948, paragraph 2 of Schedule 8 to the National Health Service Act 1977, or Part IV of the Social Work (Scotland) Act 1968; or

A *(b) provided for him in circumstances in which the cost of the accommodation is being borne wholly or partly out of public or local funds in pursuance of a Scheduled enactment; or*

(c) provided for him in circumstances in which the cost of the accommodation may be borne wholly or partly out of public or local funds in pursuance of a
B *Scheduled enactment.*

Regulation 4(3) provided:

Paragraph (1)(c) shall not apply in respect of the following accommodation –

(a) temporary accommodation provided for the homeless;
C *(b) accommodation in such other case or class of case as the Secretary of State may direct.*

The issues raised on this appeal centre on each of the sub-paragraphs of para (1).

D The first question is whether accommodation was provided for Mrs Steane in pursuance of Part III of the National Assistance Act 1948 at the relevant time.

Mrs Steane went to reside on 18 December 1988 (when she was 79 years of age) in a residential home called Elmdon which was then owned and run by the Isle of Wight County Council. She paid the full charge for her accommodation from her
E own resources.

In 1990 the county council was instrumental in setting up a company called Islecare, limited by guarantee and a registered charity, for the purpose of managing residential care homes, including Elmdon, formerly operated by the council. An agreement was made between the council and Islecare Ltd on 21 January
F 1991 under which in consideration of the payment referred to therein the council agreed to supply all necessary staff to enable Islecare to operate the properties referred to in the schedule to the agreement as residential care homes and Islecare undertook to pay for the staff so provided.

Before Elmdon was transferred to Islecare Mrs Steane and other residents were
G asked whether they would prefer to stay at Elmdon under the management of Islecare or to move to other residential accommodation which continued to be provided by the council. Mrs Steane was told by letter of 11 April 1991, from the county council to her son, that future charges by Islecare would have to be agreed with the county council but her placement at Elmdon would be secure and that
H residents who satisfy the appropriate criteria will be entitled to income support from the Department of Social Security in order to assist them in meeting their placement fees, though it was said that Mrs Steane would not satisfy the income support criteria by virtue of the level of her capital. She was told, however, that she would receive a personal allowance of £11.40 per week whereas if she had
I remained in a county council home she would only have been entitled to £10.40 and that it was highly likely that she was entitled to an attendance allowance.

Mrs Steane chose to stay at Elmdon. Whether this accommodation was from then on accommodation provided under Part III of the 1948 Act depended on the proper construction of s26 of that Act. It was accepted in the Court of Appeal that
J the decision in this case on that point was covered by the earlier decision of the Court of Appeal in *Chief Adjudication Officer v Quinn; Chief Adjudication Officer v Gibbon* [1994] CA Transcript 439, though the appellants contended that that decision was wrong. For the reasons given in my speech in that case ([1996] 4 All ER 72; [1996] 1 WLR 1184; (1998) 1 CCLR 529) I consider that it is an essential feature
K of arrangements under s26 of the 1948 Act that subsection (2) should be complied with and that the arrangements must 'provide for the making by the local

authority to the [other party to the arrangements] of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements'.

It is clear that no such provision was included in the arrangements made for Mrs Steane, who was to pay the Elmdon authorities the charges herself. Accordingly no accommodation was provided for her pursuant to Part III of the 1948 Act.

Paragraph 2 of Sch 8 to the National Health Service Act 1977 is relevant in two ways. It is specifically referred to in reg 4(1)(a) of the 1983 regulations and it is a scheduled enactment for the purposes of reg 4(1)(c). Paragraph 2 provides:

> *(1) A local social services authority may, with the Secretary of State's approval . . . make arrangements for the purpose of the prevention of illness and for the care of persons suffering from illness and for the after-care of persons who have been suffering . . .*

This provision replaced s12 of the Health Services and Public Health Act 1968 pursuant to which two circulars had been issued by the Secretary of State. The first, Local Authority Circular (74)19 dated 23 April 1974 approved the provision of residential accommodation for the purpose of the prevention of mental disorder or in relation to persons who are or who have been suffering from mental disorder. The second is Local Authority Circular (74)28 of August 1974, by para 5 of which the Secretary of State approved the making of arrangements under s12 of the 1968 Act for the provision of social services for the prevention of illness, the care of those suffering from illness and the aftercare of those so suffering, namely:

> *a For the purpose of preventing the impairment of physical or mental health, especially of children in families where such impairment is likely; for preventing the break up of such families or for assisting in their rehabilitation;*
> *b To meet the needs of the sick, not provided for under the general approval given in Local Authority Circular 19/1974 (persons who are under medical care or have been discharged from hospital) and the provision of night-sitter services;*
> *c and d. for the provision of meals and of recuperative holidays.*

These circulars continued to have effect under the 1977 Act by virtue of para 1(1)(b) of Sch 14 to that Act.

No reliance was placed on the 1977 Act by the adjudicating officer or by him before the social security appeal tribunal. The social security commissioner found that there was no purported exercise of the power under the 1977 Act either before or after 10 May 1991. In the Court of Appeal the appellants asked that the case be referred back to the commissioner for consideration of the question as to whether the accommodation was provided for Mrs Steane because she was ill. The Court of Appeal rejected this application. In my opinion they were plainly right to do so. True Mrs Steane had diabetes and had problems in moving about but there was no evidence to suggest that she needed accommodation because of illness or that she had been provided with accommodation because of illness. She had been provided with the accommodation by the council in 1988 because of her age. She needed care and attention not otherwise available to her because of her age.

A more difficult question, however, arises under para 4(1)(c) of the 1983 regulations since para 2 of Sch 8 to the 1977 Act and Part III of the 1948 Act are both 'scheduled enactments'.

Clearly Mrs Steane was living in accommodation provided for her, though on the opinion which I have expressed it was not provided under either of those

A scheduled enactments. Was it provided 'in circumstances in which the cost of the accommodation may be borne wholly or partly out of public or local funds in pursuance of a Scheduled enactment'?

Apart from the present case this provision has been considered in two earlier decisions of the Court of Appeal. In the first case, *Jones v Insurance Officer* (1984) B *Times*, 20 February, the applicant for an attendance allowance was until November 1974 in a home for the mentally ill conducted by the local authority. From that date he resided at a privately owned residential home under arrangements made by a receiver appointed by the Court of Protection. The cost of his accommodation was met out of his own resources. He contended that he would only be C disentitled to an attendance allowance if he was in accommodation physically provided by the local authority; the department initially contended that 'may be borne' covered the case where there was a real possibility that there would be a subsidy from local funds although they apparently abandoned that contention. The commissioner took the view that a claimant was not entitled to an attend- D ance allowance when under one of the scheduled enactments the authority had power to subsidise the cost of his accommodation even if the authority did not in fact do so. Browne-Wilkinson LJ said:

> *Looking at the words of the section, to my mind the prima facie meaning of them* E *is clear. It seems to me that, on the plain meaning of the words, if the claimant is being provided by someone with accommodation and the cost of such provision is being, or could be, met either wholly or in part out of public funds, then the requirements of the subsection are fulfilled. Plainly in the case of this claimant the cost of his accommodation, whatever that may be, could have been met out of* F *local authority funds under Sch 8, para 2, and indeed was so met in part until November 1980. The crucial question is whether the words 'accommodation provided' are to be construed as limited to a case where such accommodation is provided by the local authority or whether the accommodation can be provided by anyone.*

G He further held that the accommodation could be provided by anyone not just by the local authority. He concluded:

> *I therefore reach the conclusion that the commissioner was right in his decision. The claimant is living in accommodation provided for him by a private nursing* H *home in circumstances in which the cost of such accommodation could be, although in fact it is not, met by the local authority.*

The other members of the Court of Appeal agreed. The second case is *Chief Adjudication Officer v Kenyon* (1995) *Times*, 14 November. That was an appeal from a decision of the social security commissioner holding the applicant entitled I to an attendance allowance. After some years in hospital the applicant who suffered from a mental disorder moved to live in a hostel owned, administered and funded by the Lancaster Health Authority. The same question arose as to whether this accommodation was provided for her in circumstances in which the cost thereof 'may be borne wholly or partly out of public or local funds' in pursuance J of para 2 of Sch 8 to the 1977 Act.

It was common ground in the Court of Appeal (though not earlier) that pursuant to para 2(1) the authority had approval for the making of arrangements for the provision of residential accommodation for the care of persons suffering from the illness from which the claimant suffered and that the local authority could have K borne the cost of such accommodation but that his hostel accommodation was not provided under such an arrangement.

The Chief Adjudication Officer's argument was simply that since the local authority could have provided the accommodation and paid for it, it mattered not that it had not done so. The counter-argument was that since the accommodation had not been provided by the local authority it had no power to pay for it.

Simon Brown LJ, with whom other members of the Court of Appeal agreed, said:

> *Regulation 4(1)(a) is to be regarded as confined to cases of direct public authority provision of residential accommodation, as, of course, is possible under para 2 of Sch 8 . . . Regulations 4(1)(b) and 4(1)(c), however, apply where, as is also possible under para 2 of Sch 8, the local authority either pay (reg 4(1)(b)) or have the* vires *to pay (reg 4(1)(c)) some or all of the cost of accommodation provided by a third party . . . The local authority, however, does not have the* vires *to pay unless and until it makes arrangements for the provision of the accommodation or, once the accommodation has been provided, for its cost. That, of course, is precisely what happened in* Jones v Insurance Officer *so that that case was rightly decided. It has not, however, happened here and the mere existence of para 2 of Sch 8 on the statute book is not of itself sufficient to prohibit the claim.*

The Court of Appeal in the present case distinguished *Jones's* case from *Kenyon's* case on the basis that, in the former case, the local authority had made arrangements for the applicant's accommodation since Mr Jones, the receiver, was the Director of Social Services for the local authority. In *Kenyon's* case no such arrangement had been made so that the question of whether the authority had no *vires* to pay 'unless and until it makes arrangements for the accommodation or once the accommodation has been provided, for its cost' had to be decided. The Court of Appeal followed the test of *vires* laid down in *Kenyon's* case and held that in the present case no arrangements had been made by the local authority for Mrs Steane's accommodation so that they had no power to pay for her accommodation.

In my opinion, contrary to that of the Court of Appeal in the present case, there is a distinction in the interpretation adopted in *Jones's* case and in *Kenyon's* case and not simply a difference in the application of the same interpretation to the facts. In *Jones's* case it was clearly held that the power to bear the cost of accommodation out of public or local funds pursuant to a scheduled enactment was sufficient to bring reg 4(1)(c) into play and to exclude the entitlement to an attendance allowance. I agree with the interpretation in *Jones's* case. There is nothing in sub-para (c) which refers to the need for arrangements to have been made under the scheduled enactments before the exclusion applies and I cannot see that there is any necessary inference that this should be implied. The sole question is whether, as a matter of interpretation of the scheduled enactment in question, there is power to bear the cost in whole or in part out of public or local funds of accommodation in which the applicant is living.

I do not consider that in the circumstances there was power here for the residential accommodation at Elmdon to be borne out of public or local funds under para 2 of Sch 8 to the 1977 Act. I agree with the commissioner that Local Authority circular (74)19 had no application since Mrs Steane was in no way mentally disordered or in need of care to prevent mental disorder. Whether the commissioner was right to hold that there was no power to provide residential accommodation pursuant to para 5 of Local Authority Circular (74)28, which was limited to meeting very specific needs arising from illness and not to meeting more general needs of residential accommodation, it does not seem to me necessary to decide

since I agree with the Court of Appeal that there was no evidence, and it was not contended, that Mrs Steane was in any event a person needing accommodation on the ground of illness. If she was not, there was no power to provide it even if that paragraph is to be given a wider interpretation than that given to it by the commissioner.

The position under Part III of the 1948 Act is different. There it seems to me that if Mrs Steane was at the relevant time a person who by reason of age was in need of care and attention which was not otherwise available to her then the authority could have made arrangements for her accommodation under s26(1) of the 1948 Act so long as they provided for the making of payments by them to the voluntary organisation. They clearly had power to arrange the accommodation and to bear part or all of the cost. But since Mrs Steane was living at Elmdon and cared for there under the arrangements with Islecare it seems to me that she was not a person who was in need of care and attention not otherwise available to her so long as she remained there. Accordingly, it seems to me that since she did not fall within the category of persons described in s21(1)(a) of the 1948 Act as being in need of care and attention the local authority do not have statutory power under Part III of that Act to provide for her accommodation the cost of which could be borne out of local authority funds.

There is in any event another relevant provision. In the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 7, which came into force on 6 April 1992, replaces reg 4 of the 1983 regulations. It provides by para (3): 'Paragraph (1)(c) shall also not apply . . . (b) where the person himself pays the whole cost, and always has paid the whole cost, of the accommodation . . .'

Mrs Steane paid £185 per week in 1991 for the accommodation and no doubt more in subsequent years. Before the tribunal, the commissioner and the Court of Appeal it was said that the county council made Islecare a grant of £170 per quarter under s65 of the 1968 Act to assist with management and administration costs. The commissioner and the Court of Appeal both accepted that despite this grant under that Act Mrs Steane was paying and always had paid the whole cost of her accommodation and indeed it is said that before the commissioner, that the issue was not contested. The commissioner said: 'The undisputed evidence, which I accept, is that the claimant currently pays the whole cost of her accommodation in Elmdon and has done so continuously since she became resident there.'

The position has changed since it has now been ascertained that a much larger grant was made for the year 1991–92; it was £595,600 and in addition the county council 'rebated' the whole of the rent due to them from Islecare in respect of the homes which they took on. For the same year the rent rebated was £234,400 for all the homes. Comparable figures exist for the following years until 1995–96. It is not said how these figures would be apportioned to the particular home, Elmdon.

For my part Mrs Steane objecting to the point being taken at this stage I would not allow the appellants to take advantage of this point before your Lordships but since it has been argued I express my view upon it.

It is clear that some matters paid for by public or local funds are to be excluded from the cost of accommodation for the purpose of reg 7 of the 1991 regulations. Thus, by para (5)(c), the cost of improvements made to, or furniture or equipment provided for, residential homes in respect of which a grant or payment has been made out of public or local funds, except where the grant or payment is of a regular or repeated nature, is not to be included in the cost of the accommodation. Nor is the cost of social and recreational activities provided outside the accommodation in respect of which grants or payments are made out of public or local funds (see also sub-para (d)).

These provisions indicate that other expenses met out of public or local funds are to be included in the cost of accommodation and *ex-hypothesi* the resident does not pay the cost of them, I do not think that the intention of this regulation was to ensure that every item of expenditure was intended to be taken into account in analysing for each resident the whole cost of his or her accommodation. If it were so it seems that a very difficult accountancy exercise would be involved. How should there be apportioned to a particular resident payments made for social and recreational activities inside the accommodation provided by individuals or charitable organisations? How should the value of any house or land or equipment given to the voluntary organisation for the benefit of residents be apportioned? I do not accept that if such gifts had been made so as to provide for elements of the accommodation the resident is automatically excluded from relying on reg 7(3)(b) of the 1991 regulations unless the cost of such activity or equipment is included in the resident's charge. If it were so a very large number of people would seem to be affected. In my opinion the reference to paying 'the whole cost' is to be read as meaning the payment of the charge fixed for residents in respect of their individual accommodation. If this is paid wholly by the resident, reg 7(1)(c) (formerly reg 4(1)(c) of the 1983 regulations) does not apply. If it is paid wholly or partly by others including payment out of public or local funds, then the resident is required to satisfy the other provisions of reg 7(1)(c).

I would accordingly dismiss the appeal and hold that Mrs Steane was entitled to the attendance allowance which she claims.

LORD NICHOLLS OF BIRKENHEAD: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley and for the reasons he gives I too would dismiss this appeal.

LORD HOPE OF CRAIGHEAD: My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley. I also would dismiss this appeal for the reasons which he has given.