

# Yule v South Lanarkshire Council

Court of Session (Outer House)  
Lord Philip  
4 February 1998

*In assessing the ability to pay for residential accommodation a local authority is entitled to treat persons as possessing actual capital of which they have deprived themselves for the purpose of decreasing the amount that they may be liable to pay for their accommodation, notwithstanding the fact that they deprived themselves of the capital outside the six-month period referred to in Health and Social Services and Social Security Adjudications Act 1983 s21.*

## Facts

On 27 February 1995 Mrs Yule transferred her home to her granddaughter, in consideration of love, favour and affection, retaining a liferent. On the same date, she executed a power of attorney in favour of her son. On 6 February 1996 Mrs Yule fell and broke her arm. This led to her permanent admission to Kirknowe Nursing Home on 13 June 1996. The respondent local authority decided that, having regard to the freehold value of Mrs Yule's former home, she had notional capital in excess of £16,000. Accordingly, by virtue of National Assistance (Assessment of Resources) Regulations 1992 SI No 2977 (hereafter referred to as 'the Assessment of Resources Regs') reg 25, she was assessed as being able to pay at the standard rate for her residential accommodation. Mrs Yule argued that the power to recover property disposed of was governed by Health and Social Services and Social Security Adjudications Act 1983 (HASSASSAA) s21. That section provided for recovery from transferees at an undervalue only when the transfer took place within six months of going into residential accommodation. Since recovery from the transferee was not legally possible in cases where the transfer took place outwith the six-month period, it was not consistent with the statutory scheme as a whole to take into account transfers outwith the six-month period for the purposes of Assessment of Resources Regs 1992 reg 25.

## Held (refusing the application):

In assessing a person's ability to pay for residential accommodation at the standard rate, National Assistance Act 1948 s22(5) requires the local authority to have regard to the Assessment of Resources Regs 1992. Assessment of Resources Regs 1992 reg 25 provides that (except in specified cases):

*... a resident may be treated as possessing actual capital of which he has deprived himself for the purpose of decreasing the amount that he may be liable to pay for his accommodation.*

The regulation imposes no time limit on its operation and accordingly, so long as the deprivation was made for the purposes of decreasing the amount that the resident might be liable to pay, s/he may be treated as possessing the capital disposed of, whenever the disposal took place. The provisions of HASSASSAA 1983 s21 had the purpose of providing additional anti-avoidance provisions directed against the recipient of capital transferred with the intention of avoiding charges, subject to a time limit. There was no justification for implying the same time limit into the self-contained scheme of the Assessment of Resources Regs 1992.

**A Cases referred to in judgment:**

None.

**Legislation/guidance referred to in judgment:**

Health and Social Services and Social Security Adjudications Act 1983 ss21 to 23 –

- B** National Assistance Act 1948 Part III and s22 – Social Security Contributions and Benefits Act 1992 s134 – Social Work (Scotland) Act 1968 s87 – National Assistance (Assessment of Resources) Regulations 1992 SI No 2977 regs 2, 20, 21 and 25.

**This case also reported at:**

- C** 1998 SLT 490; (1998) *Times*, 18 May, CS(OH).

**Representation**

Law agents: Cochran Sayers & Cook; Simpson & Marwick.

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**D Judgment**

**LORD PHILIP:** In this application for judicial review the petitioner is Mrs Rhoda Yule, aged 81 years, on whose behalf the petition has been presented by her son, David Yule, acting under a Power of Attorney granted by her dated 27 February 1995. The petition seeks the reduction of a decision of the respondents, South Lanarkshire Council, dated 12 March 1997 to the effect that the petitioner is not entitled to public funding in respect of the costs of the accommodation provided for her at Kirknowe Nursing Home, Wishaw, on the ground that she is in possession of notional capital in excess of £16,000, represented by the value of heritable property at 195A Stonelaw Road, Rutherglen, by virtue of the provisions of regulation 25 of the National Assistance (Assessment of Resources) Regulations 1992.

- E** The factual background to the matter is that by disposition dated 27 February and recorded 3 March 1995, the petitioner disposed heritable property owned by her at 195A Stonelaw Road, Rutherglen, for love, favour and affection to her granddaughter, Miss Deborah Yule, retaining for herself a liferent of the subjects.
- G** On the same date, 27 February 1995, she executed a Power of Attorney in favour of her son, David Yule. At the time of the execution and recording of the disposition, the petitioner was in good health and lived independently of her family. On 6 January 1996, she fell and broke her arm. She was admitted to hospital and her health subsequently deteriorated to the point that she was unable to look after herself. After her discharge from hospital in or about April 1996, she was looked after by her son and his wife, but her mental and physical condition deteriorated further and an application was made to admit her to Kirknowe Nursing Home. An application form provided by the respondents' Department of Social Work was completed by David Yule on behalf of the petitioner in order that her financial contribution to the cost of her nursing home accommodation might be determined. The form sought details of *inter alia* any property, land or capital disposed of in the previous six months. In the light of the date of the disposition already referred to, no details were given. The petitioner took up residence in Kirknowe Nursing Home on 13 June 1996 and made partial payment of the relevant charges from her own income, which came from various pensions, the balance being paid by the respondents.
- H**
- I**
- J**

After an exchange of correspondence between the respondents and solicitors acting for Miss Deborah Yule, the respondents decided that, having regard to the terms of the National Assistance (Assessment of Resources) Regulations 1992, the petitioner was not entitled to public funding in respect of the balance of the nursing home charges. This decision was intimated in a letter dated 12 March

**K**

1996. The petitioner contends that that decision was *ultra vires* of the respondents. She also contends that it was unreasonable. The matter came before me for a first hearing, when the parties agreed that the matter could be dealt with without the necessity for evidence. In the time available, it was only possible for parties' arguments on the question of *vires* to be heard, and it was agreed that I should issue my decision on that question, leaving argument on the question of reasonableness to be heard at a later date, if necessary.

The arguments on the question of *vires* involved the consideration of a number of legislative provisions and it is convenient to set these provisions out at this point before dealing with the arguments of the parties.

Section 22, which is contained in Part III of the National Assistance Act 1948, as amended, provides *inter alia* as follows:

**22 Charges to be made for accommodation**

(1) Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section.

(2) Subject to the following provisions of this section, the payment which a person is liable to make for any such accommodation shall be in accordance with a standard rate fixed for that accommodation by the authority managing the premises in which it is provided and that standard rate shall represent the full cost to the authority of providing that accommodation.

(3) Where a person for whom accommodation in premises managed by any local authority is provided, or proposed to be provided, under this Part of this Act satisfies the local authority that he is unable to pay therefor at the standard rate, the authority shall assess his ability to pay, and accordingly determine at what lower rate he shall be liable to pay for the accommodation.

...

(5) In assessing as aforesaid a person's ability to pay, a local authority shall give effect to regulations made by the Secretary of State for the purposes of this subsection.

Section 87 of the Social Work (Scotland) Act 1968, as amended, provides as follows:

**Charges that may be made for services and accommodation**

87.—(1) Subject to sections 78 and 78A of this Act (contributions in respect of maintainable children) and to the following provisions of this section, a local authority providing a service under this Act or section 7 (functions of local authorities) or 8 (provision of after-care services) of the Mental Health (Scotland) Act 1984 or under or by virtue of Part II of the Children (Scotland) Act 1995 may recover such charge (if any) for it as they consider reasonable.

(1A) If a person –

(a) avails himself of a service provided under this Act or section 7 or 8 of the said Act of 1984 or under or by virtue of Part II of the Children (Scotland) Act 1995; and

(b) satisfies the authority providing the service that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount which he would otherwise be obliged to pay for it, the authority shall not require him to pay more for it than it appears to them that it is reasonably practicable for him to pay.

(2) Persons, other than maintainable children, for whom accommodation is provided under this Act or section 7 of the said Act of 1984, shall be required to

A *pay for that accommodation in accordance with the subsequent provisions of this section.*

(3) *Subject to the following provisions of this section, accommodation provided under this Act or section 7 of the said Act of 1984 shall be regarded as accommodation provided under Part III of the National Assistance Act 1948, and sections 22(2) to (8) and 26(2) to (4) (as amended by the Schedule to the Housing (Homeless Persons) Act 1977, paragraph 2(1) of Schedule 4 to the Social Security Act 1980, section 20 of the Health and Social Services and Social Security Adjudications Act 1983 and paragraph 32 of Schedule 10 to the Social Security Act 1986) (charges for accommodation and provision of accommodation in premises maintained by voluntary organisations) and sections 42 (as amended by paragraph 5 of Schedule 1 to the Law Reform (Parent and Child) (Scotland) Act 1986) and 43 of the said Act of 1948 (which makes provision for the mutual maintenance of wives and husbands and the maintenance of their children by recovery of assistance from persons liable for maintenance and for affiliation orders, etc.) shall apply accordingly.*

Sections 21 and 23 of the Health and Social Services and Social Security Adjudications Act 1983 which came into effect on 12 April 1993, provide *inter alia* as follows:

E ***Recovery of sums due to local authority where persons in residential accommodation have disposed of assets***

21.-(1) *Subject to the following provisions of this section, where –*

(a) *a person avails himself of Part III accommodation; and*

F (b) *that person knowingly and with the intention of avoiding charges for the accommodation –*

(i) *has transferred any asset to which this section applies to some other person or persons not more than six months before the date on which he begins to reside in such accommodation; or*

G (ii) *transfers any such asset to some other person or persons while residing in the accommodation; and*

(c) *either –*

(i) *the consideration for the transfer is less than the value of the asset; or*

(ii) *there is no consideration for the transfer,*

H *the person or persons to whom the asset is transferred by the person availing himself of the accommodation shall be liable to pay to the local authority providing the accommodation or arranging for its provisions the difference between the amount assessed as due to be paid for the accommodation by the person availing himself of it and the amount which the local authority receive from him for it.*

...

I (8) *In this Part of this Act 'Part III accommodation' means accommodation provided under sections 21 to 26 of the National Assistance Act 1948, and, in the application of this Part of this Act to Scotland, means accommodation provided under the Social Work (Scotland) Act 1968.*

J ***Arrears of contributions secured over interest in land in Scotland***

23.-(1) *Subject to subsection (2) below, where a person (hereinafter referred to as the debtor) who avails himself of Part III accommodation provided by a local authority in Scotland, England and Wales –*

K (a) *fails to pay any sum (hereinafter referred to as the debt) assessed as due to be paid by him for the accommodation; and*

*(b) has an interest in land in Scotland (as defined in section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970), the local authority may make in their favour and record in the General Register of Sasines or, as appropriate, register in accordance with the Land Registration (Scotland) Act 1979 an order (hereinafter referred to as a charging order) over that interest in land in respect of the amount of that debt.*

The National Assistance (Assessment of Resources) Regulations 1992 (SI 1992/2977) were made under the provisions of Section 22(5) of the 1948 Act and came into force on 1 April 1993. Regulations 20, 21 and 25 form part of Part III of the Regulations, 'Treatment of Capital', and are in the following terms:

**Capital limit**

*20. No resident shall be assessed as unable to pay for his accommodation at the standard rate if his capital calculated in accordance with regulation 21 exceeds the amount prescribed for the purposes of Section 134(1) of the Contributions and Benefits Act (exclusions from benefit).*

**Calculation of capital**

*21.-(1) The capital of a resident to be taken into account shall, subject to paragraph (2), be the whole of his capital calculated in accordance with this Part and any income treated as capital under regulation 22.*

**Notional capital**

*25.-(1) A resident may be treated as possessing actual capital of which he has deprived himself for the purpose of decreasing the amount that he may be liable to pay for his accommodation except –*

- (a) where that capital is derived from a payment made in consequence of any personal injury and is placed on trust for the benefit of the resident; or*
- (b) to the extent that the capital which he is rated as possessing is reduced in accordance with regulation 26.*

Subsection (1) of Section 134 of the Social Security Contributions and Benefits Act 1992 provides as follows:

*134.-(1) No person shall be entitled to an income-related benefit if his capital or a prescribed part of it exceeds the prescribed amount.*

The parties were agreed that the payment made by the respondents in respect of the balance of the nursing home charges constituted an income-related benefit, that the accommodation provided to the petitioner was provided under the 1968 Act, that the 'prescribed amount' in terms of Section 134(1) of the 1992 Act was £16,000, and that when the heritable property disposed by the petitioner in 1995 was taken into account, her capital exceeded that figure.

Counsel for the petitioner argued that in relation to the present case, the 1983 Act was the primary legislation. Section 21 of that Act provided a remedy for the respondents as providers of accommodation where an asset had been disposed of by a person prior to his being received into accommodation. Subsection (1) of Section 21 made the transferee of such an asset liable to pay the local authority the difference between the amount assessed as due to be paid for the accommodation by the person availing himself of it and the amount which the local authority received from him for it. The reference to the amount assessed as due to be paid provided a link with the 1992 Regulations, which set out the scheme by which ability to pay was assessed. The power to recover, it was argued, was conferred by the provisions of the 1983 Act, and not by the regulations. Section 23 of

- A the 1983 Act enabled the local authority to make a charging order over property still in the ownership of the person to whom accommodation was provided. A remedy was therefore provided to the local authority in two situations, firstly, where the person had disposed of the property, and secondly, where he had retained ownership of it. The 1983 Act made no provision for recovery where an individual had disposed of property outwith the period of six months before he began to reside in the accommodation. Accordingly, the six-month period was the only period during which the appellant's intention was relevant and in seeking to assert that an intention to avoid charges for accommodation could arise outside the six-month period, the council were acting *ultra vires*. Sections 21 to 23 of the 1983 Act were determinative of the respondents' powers. Those powers did not entitle the respondents to find the transferor, in this case the petitioner, liable for payment where there was a disposal outwith the six-month period.

- In my view the correct construction of the legislation begins, as submitted by counsel for the respondents, with consideration of the National Assistance Act 1948. Section 22(1) of that Act imposes a duty on a local authority providing accommodation to recover from a person provided with accommodation the amount of the payment which he is liable to make in accordance with the provisions of the section. Subsection (2) of section 22 provides that the payment is to be in accordance with the standard rate fixed by the authority, and that the standard rate is to represent the full cost of providing the accommodation. Subsection (3) provides that, if a person for whom accommodation is provided satisfies the local authority that he is unable to pay for it at the standard rate, the authority is obliged to assess his ability to pay and to determine at what lower rate he shall be liable to pay. Subsection (5) enjoins the local authority, in assessing a person's ability to pay, to give effect to regulations made by the Secretary of State. Accordingly, the section imposes a liability on the person to whom accommodation is provided to make payment of the standard rate fixed by the authority, and imposes on the authority, the obligation to recover it. The authority is also charged with the obligation to assess the person's ability to pay. The assessment of the ability to pay must be done in accordance with the regulations.

- Section 22 deals with the situation in which a person is provided with accommodation under Part III of the 1948 Act. The accommodation in this case, it is agreed, is provided under the Social Work (Scotland) Act 1968. Section 87(2) of that Act provides that persons for whom accommodation is provided under the 1968 Act shall be required to pay for that accommodation in accordance with the subsequent provisions of that section. The subsequent provisions of that section include subsection (3), which provides that accommodation provided under the 1968 Act shall be regarded as accommodation provided under Part III of the 1948 Act and that Sections 22(2) to (8) of the 1948 Act shall apply. Included in those subsections of Section 22 is, of course, subsection (5) which requires a local authority to give effect to regulations made by the Secretary of State. The 1992 Regulations therefore apply to the accommodation in this case.

- Turning to those Regulations, regulation 2, provides that 'resident' means a person provided with accommodation under Part III of the 1948 Act, and by virtue of Section 87(3) of the 1968 Act, it also means a person provided with accommodation under the 1968 Act. Regulation 25 provides that a resident may be treated as possessing actual capital of which he has deprived himself for the purpose of decreasing the amount that he may be liable to pay for his accommodation (except in certain circumstances which do not arise in this case). The regulation imposes no time limit on its operation and accordingly, so long as the deprivation was made for the purpose of decreasing the amount that the resident

might be liable to pay, he may be treated as possessing the capital disposed of, whenever the disposal took place.

Counsel for the respondents submitted that the provisions of the 1948 Act, the 1968 Act and the 1992 Regulations to which I have just referred, when looked at together, constituted a self-contained scheme for the payment of accommodation charges and for the assessment of ability to pay. The 1983 Act on the other hand, had the effect of providing additional anti-avoidance provisions directed against the recipient of any capital transferred by a resident with the intention of avoiding charges, and against heritable property retained by the resident. So far as such recipients of capital were concerned, Parliament had imposed a limit on the operation of the provision to cases in which the transfer of the asset had taken place not more than six-months before the date on which the transferor had begun to reside in the accommodation. There was no justification, it was argued, for extending that six-month time limit to the provisions of the self-contained scheme contained in the 1948 and 1968 Acts and 1992 Regulations. Regulation 25 made no reference to such a time limit and none should be implied.

Counsel for the respondents also prayed in aid Section 87(1A) of the Social Work (Scotland) Act 1968 as demonstrating the parity of treatment of persons to whom accommodation is provided under the two Acts of 1948 and 1968. In the absence of more detailed argument, I am not satisfied that subsection (1A) relates to persons to whom accommodation is provided. It seems to me that subsections (1) and (1A) of Section 87 relate to the provision of services, in contrast to subsections (2), (3) and (4) which deal with the provision of accommodation.

Apart from that, in my view, the submissions of counsel for the respondents were well founded. Accordingly, I consider that in terms of regulation 25, the respondents were entitled to treat the heritable property transferred to Miss Yule in 1995 as notional capital in the assessment of the petitioner's ability to pay for the accommodation which is provided to her, so long as the transfer was made for the purpose of decreasing the amount that the petitioner might be liable to pay for her accommodation, even although the transfer was made more than six months before she entered the nursing home. In these circumstances, the petitioner has failed to satisfy me that the decision of the council under review was *ultra vires*, and I shall therefore sustain the first plea in law for the respondents so far as it relates to the petitioner's averments directed to the question of *vires*. I shall also repel the petitioner's first plea-in-law in so far as it is based on the contention that the decision under review was *ultra vires* of the respondents.