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# R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities

Queen's Bench Division

*[1986] 1 All ER 164, [1986] 1 WLR 1, 17 HLR 487, 83 LGR 796*

**HEARING-DATES:** 21 May 1985

21 May 1985

**HEADNOTE:**

In recent years, there has been a significant increase in delegated legislation, ie details of law contained in statutory instrument, or even ministerial circulars or other directions. Such powers are sometimes accompanied by a requirement that before they are used, the Minister or other body should consult with either specified interested parties, or more generally parties appearing to him or to it to have an interest. Not uncommonly, specific reference is made to the associations representing local authorities.

The Housing Benefit scheme (now contained in the Housing Benefit Regulations 1985 (SI 1985, No 677), see Encyclopedia) is made under Social Security and Housing Benefits Act 1982, section 28 (Encyclopedia, pp 2999/1285-1286). Under ibid, section 36, (see Encyclopedia, pp 2999/1293-1294) "before making -- (a) regulations under section 28(1) above other than regulations of which the effect is to increase any amount specified in regulations previously made . . . the Secretary of State shall consult with organisations appearing to him to be representative of the authorities concerned."

On November 16, 1984 (a Friday), the Department of Health and Social Security wrote to the applicants, the Association of Metropolitan Authorities, and a number of other associations representative of local authorities administering the Housing Benefits Scheme, to request their views on changes to the Housing Benefits Regulations 1982 (SI 1982, No 1124), including a change to the qualification for benefit of non-dependants paying rent or rates "other than on a commercial basis." The proposed amendments were attached. The letter was not received until November 22, 1984. A response was sought by November 30, 1984.

The Association replied, seeking an extension of time to reply, stating that it was quite impossible to provide a considered response by that date, which would allow themselves and their advisers only five working days to consider the proposals. On December 7, 1984, the Association sent in a number of observations.

On December 4, 1984, however, the Department had decided that further amendments were called for, and wrote again, referring to proposals concerning the qualification of joint tenants, where the joint tenancy was created in order to take advantage of the availability of Housing Benefit. No reference was made to one aspect of the proposals. The proposed amendments were still being drafted, and were accordingly not attached. Replies were sought by December 12, 1984. The letter was received by the Association on December 5, 1984.

The proposed amendments were not sent to the Association until after the regulations which contained them had been made, on December 17, 1984, and came into operation as the Housing Benefit (Amendment No 4) Regulations 1984 (SI 1984, No 1965) on December 19, 1984. The Association replied on December 13, 1984, complaining about the inadequate time allowed, and making a limited number of comments.

The association issued proceedings for judicial review, (a) for a declaration that before making and/or laying before Parliament SI 1984 No 1965, the Secretary of State for Social Services failed to comply with the duty imposed on him by Social Security and Housing Benefits Act 1982, section 36(1), and (b) for an order of certiorari to quash the Statutory Instrument.

Held (granting the declaration, refusing the order for certiorari)

(1) The essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice; to achieve consultation, sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice; sufficient time must be given by the consulting to the consulted party to enable it to do so, and sufficient time must be available for such advice to be considered by the consulting party; sufficient in this context does not mean ample, but at least enough to enable the relevant purpose to be fulfilled; helpful advice in this context means sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implication for the consulted party, being aspects material to the implementation of the proposal as to which the consulting party might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer;

(2) The obligation to consult in Social Security and Housing Benefits Act 1982, section 36, is mandatory, not directory;

(3) Where insufficient consultation is alleged, the challenge is to the vires of the statutory instrument; accordingly, the correct test is whether there has been sufficient consultation, rather than whether the consultation process fails to satisfy the test now known as "rationality," formerly the "unreasonable" test in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA;

(4) The power to make the regulations is conferred on the Secretary of State, and his is the duty to consult; both the form or substance of new regulations and the time allowed for consulting before making them, may well depend in whole or in part on matters of a political nature, as to the force or implications of which the Secretary of State rather than the court is the best judge; when considering whether or not consultation has in substance been carried out, the court should have regard not so much to the actual facts which preceded the making of the regulations as to the material before the Secretary of State when he made the regulations, which material includes facts or information as it appeared or must have appeared to the Secretary of State acting in good faith, and any judgments made or opinions expressed to him before the making of the regulations about those facts which appeared or could have appeared to him to be reasonable;

(5) The urgency of the need for the regulation as seen by the Secretary of State was such, taking into account the nature of the amendments proposed, that the Department was entitled to require that views in response to its invitation

for comments should be expressed quickly; the urgency of the need for the regulations, as seen by the Secretary of State, taking into account the nature of the amendments proposed, was not such that the Department was entitled to require views to be expressed within such a short period that those views would or might be insufficiently informed or insufficiently considered so that the applicants would or might be unable to tender helpful advice;

(6) Taking into account both the urgency of the matter, as seen by the Department, and the material features of the regulations, and bearing in mind that the applicants had no knowledge until after the regulations were made of one of their features, the Secretary of State failed to fulfil his obligation to consult before making the regulations; the time allowed was so short, and the failure to provide amendments was such that, as the Department must have known even without imputing to them precise knowledge of the applicants' internal arrangements, only piecemeal, and then only partial, assistance could be given;

(7) In the ordinary case, a decision made ultra vires is likely to be set aside, in the present case the applicants sought to strike down regulations which had become part of the public law of the land; it may be that when delegated legislation is held to be ultra vires, it is not necessarily to be regarded as normal practice to revoke the instrument;

(8) As a matter of pure discretion, the statutory instrument would not be revoked for the following reasons: only one of the six associations which had been and habitually were consulted had applied for revocation, and that one applied only on the ground that it was not properly consulted; the regulations had been in force for about six months and authorities must have adapted themselves as best they could to the difficulties which they imposed on them; if the regulations were revoked, all those who had been refused benefit because of them would be entitled to make fresh claims, and all authorities would be required to consider each such claim; the amendment regulations had been consolidated into the Housing Benefit Regulations 1985 (SI 1985, No 677) and which had come into operation, which regulations were not challenged.

**COUNSEL:**

R Henderson QC and D Holgate for the applicants; M Beloff QC and C Symons for the respondent.

**PANEL:** Webster J

**JUDGMENTBY-1:** WEBSTER J

**JUDGMENT-1:**

WEBSTER J: In this matter of judicial review the Association of Metropolitan Authorities applies to quash the Housing Benefits Amendments (No 4) Regulations 1984 (SI 1984 No 1965), made by the Secretary of State for Social Services under the Social Security and Housing Benefits Act 1982, on the ground that the Secretary of State failed to consult the applicant association properly or at all with regard to the making of the regulations before making them. Alternatively, the association applies for a declaration that the Secretary of State failed to comply with the duty of consultation imposed upon him by section 36(1) of that Act.

Section 28(1) of the Act gives the Secretary of State power to make regulations which, when made, constitute the Housing Benefits Scheme. The original scheme made under that section was contained in the Housing Benefits Regulations 1982 (1982 SI 1124); but before the making of the Housing Benefits Amendments (No 4) Regulations, the subject matter of this application, there had been, as the title of those regulations suggests, three earlier amending regulations made under that section.

Section 36(1) of the Act provides that before making regulations, including the regulations in question in this case, "the Secretary of State shall consult with organisations appearing to him to be representative of the authorities concerned." It is common ground that the applicants, often referred to as AMA, are an organisation appearing to the Secretary of State to be representative of authorities concerned.

The association was formed in 1974 as successor to the Association of Municipal Corporations. It comprises and represents 77 metropolitan local authorities in England and Wales having in membership all metropolitan district councils, all metropolitan county councils, all except one of the London boroughs, the Greater London Council, and the Inner London Education Authority.

The Secretary of State also habitually consults other organisations before making regulations to which section 36(1) applies. They are the Association of District Councils, sometimes referred to as the ADC, the London Boroughs Association, sometimes referred to as the LBA, the Association of London Authorities, sometimes referred to as the ALA, the New Towns Association, sometimes referred to as the NTA, and the Convention of Scottish Local Authorities, the COSLA. The applicants and the ADC between them represent the vast majority of local authorities, and the local authorities which the applicants represent cover approximately 50 per cent of the population. Neither the applicants nor any of the other organisations has any particular political colouring or affiliation.

It is common ground that the Secretary of State communicated with the applicants before making the regulations, giving some information about the proposed amendments and asking for their comments. The issue, however, is whether the Secretary of State thereby consulted the applicants within the meaning of that word in section 36(1). The applicants contend that the Secretary of State failed to comply with his obligation to consult within the meaning of that subsection, because the time allowed to them within which to comment on the proposals was insufficient and because the information provided was inadequate or misleading with the effect that they were unable sufficiently or properly to comment on the proposals. The respondent, the Secretary of State, contends that, in the light of the need to amend the regulations urgently, the time allowed and the information provided were each sufficient to enable the applicants to make sufficiently considered comments.

There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a pre-condition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable

it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.

These propositions, as it seems to me, can partly be derived from, and are wholly consistent with, the decisions and various dicta, which I need not enumerate, in Rollo and Another v Minister of Town and Country Planning [1948] 1 All ER 13 and Port Louis Corporation v Attorney-General of Mauritius [1965] AC 1111.

Mr Beloff, on behalf of the Secretary of State, tentatively submits that the obligation laid upon the Secretary of State to consult under section 36(1) is directory, not mandatory. He relies upon a passage in the judgment of Templeman J, as he then was, in Coney v Choyce and Others [1975] 1 WLR 422, where the learned judge, in turn, cited and applied a passage from a highly respected academic source. Considering the question whether the particular statutory provision before him was directory or mandatory, Templeman J at pages 433-444 said:

"Now in those circumstances a suggested test, which Mr Harvey adopted and put forward, and with which, as a test, Mr Hames did not quarrel -- although of course he disputed the consequences of applying the test -- is to be found in de Smith, Judicial Review of Administrative Action (3rd ed 1973), at p 122. After hinting that the law might have been in a bit of a mess, he continues: 'When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions.'

That describes the present case. Parliament has prescribed the manner in which the duty of giving public notices is to be performed, but it has not specified the consequences of failure. It has not said if the regulations are not carried out then the approval is invalid. It has left the result unspecified and in those circumstances I go back to de Smith, who says at p 123: 'The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act.' Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience,' breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice

has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.'

I accept that test, and applying it, here is an Act, which is concerned with the administration of education in which, as has been seen in the present case, the ramifications can be considerable as regards different areas and as regards a host of children."

I need not read on.

With the very greatest respect to the learned judge, as it seems to me, and indeed as Mr Beloff frankly pointed out during his submissions might be the case, the last paragraph of the learned author's test, reading from the words "breach of procedural or formal rules," should go in principle, not so much to the question whether the statutory obligation itself is mandatory or directory, as to the question, if it is mandatory, of the nature of the relief to be granted by the court if the obligation is not fulfilled.

In the present case, looking at the "whole scope and purpose" of the 1982 Act, one matter which stands out is that its day-to-day administration is in the hands of local housing authorities who bear 10 per cent of the cost of the scheme. It is common ground that in them resides the direct expertise necessary to administer schemes made under the Act on a day-to-day basis. For these reasons, if for no other, I conclude that the obligation laid on the Secretary of State to consult organisations representative of those authorities is mandatory not directory.

The last question of principle to be decided before turning to the facts is the test to be applied to the facts as I find them for the purposes of judicial review. Two over-lapping questions arise: first, to what extent is it for the Secretary of State, not the court, to judge how much consultation is necessary and how long is to be given for it? The answer to that question may qualify the word "sufficient" in the requirements of consultation which I have set out above. The second question is whether, on the one hand, the regulations may be set aside if in the court's judgment the consultation did not comply with the section or whether, on the other hand, they may only be set aside if consultation fails to satisfy the test now known as that of "rationality," formerly the "Wednesbury unreasonable test."

Answering the second question first, it became clear during argument, if it was not already clear, that what is being challenged by the applicants is not the validity of a ministerial decision, but the vires of subordinate legislation, which in turn depends upon the question whether section 36(1) of the Act was complied with. "Rationality," in my view, is irrelevant to that question, which is one for the court to determine yea or nay, although in determining that question yea or nay I will consider simply whether the substance of the requirement of consultation has been complied with: (see The Union of the Benefices of Whippingham and East Cowes, St James [1954] AC 245). That is not to say, however, that the Secretary of State's attitude to the making of the regulations is irrelevant.

I now turn to the first question. Before answering that question the first point to note is that the power to make the regulations is conferred on the Secretary of State and that his is the duty to consult. Save for those

consulted, no one else is involved in the making of the regulations. Secondly, both the form or substance of new regulations and the time allowed for consulting, before making them, may well depend in whole or in part on matters of a political nature, as to the force and implications of which it would be reasonable to expect the Secretary of State, rather than the court, to be the best judge. Thirdly, issues may well be raised after the making of the regulations as to the detailed merits of one or other reason for making them, or as to the precise degree of urgency required in their making, issues which have been raised on this application. Those issues cannot be said to be wholly irrelevant to a challenge to the vires of the regulations, and Mr Beloff has not submitted that they are irrelevant; but at the same time it would seem to me to be inherently improbable that the question of the vires of the regulations should depend upon precise findings of fact on issues such as those. In my view, therefore, the court, when considering the question whether the consultation required by section 36(1) was in substance carried out, should have regard not so much to the actual facts which preceded the making of the regulations as to the material before the Secretary of State when he made the regulations, that material including facts or information as it appeared or must have appeared to him acting in good faith, and any judgments made or opinions expressed to him before the making of the regulations about those facts which appeared or could have appeared to him to be reasonable. The Department's good faith is not challenged on this application.

The effect of treating as material the facts as they appeared to the Secretary of State, and not necessarily as they were, is to give a certain flexibility to the notions of sufficiency, sufficient information, sufficient time and sufficiently informed and considered information and advice in my homespun attempt to define proper consultation. Thus, it can have the effect that what would be sufficient information or time in one case might be more or less than sufficient in another, depending on the relative degrees of urgency and the nature of the proposed regulation. There is no degree of urgency, however, which absolves the Secretary of State from the obligation to consult at all.

I now turn to the circumstances which give rise to this application, beginning with the scheme itself. For the purposes of this application the material features of the Housing Benefits Scheme, established by the Housing Benefits Regulations 1982, can be described as follows. Housing Benefit consists of rent allowance (paid to a "private" landlord), rent rebate (allowed by a local authority to its tenants) and rate rebate (paid or allowed to private and public tenants). The scheme provides, in the first place, for certain persons to be "eligible" for Housing Benefit. These include persons receiving supplementary benefit ("certified cases"), where the eligibility depends prima facie on the issue of a certificate by the Department. Eligible persons are "assessed" for the amount of each benefit to which they are entitled, but deductions from those amounts are to be made for non-dependants, meaning generally persons living with the family other than dependant children. Finally, despite being eligible for benefits, and being assessed to an amount to which he is entitled, a person may be disentitled to a benefit, in particular by virtue of regulation 23 which I will set out in full hereafter. Save for the issue of certificates, all other relevant parts of the scheme are administered by local authorities.

Although this application is only concerned with the making and validity of one set of regulations, the No 4 Amendment Regulations, the consultations which

preceded the making of those regulations were carried out in two stages which I will call the November amendment and the December amendment respectively. I will ignore one amendment which has been non-controversial -- the amendment of the definition of rent in Regulation 2 so as to make licencees eligible for housing benefit in the same way as tenants.

The object of the November amendment was to prevent a non-dependant, in respect of whom a deduction would be made from benefit paid or allowed to the head of the household, from himself becoming eligible for and entitled to an allowance or rebate if he made a payment to the head of the household for board and lodging.

It seems to me that this loophole ought to have been apparent to the Department by March 1984 when it was raised by the ADC in almost the same terms, but as there is no challenge to the Department's good faith, I accept for the purpose of this application that it, and therefore the Secretary of State, first had occasion to consider this loophole in October 1984 when they were alerted to it by an opinion of counsel which they were shown. The department then concluded that this was a loophole in the regulations which should be closed.

The Department adduced evidence that within a very short time after receiving that opinion it received calls from one authority stating that that authority was getting a large number of claims for benefits from people living with their families, that before December a total of seven authorities said they had received such claims, that by early December the number had increased to 26 and that by December 19, when the regulations were made, the number of authorities receiving such claims had increased to 50. By mid-December the Department estimated that the cost of permitting the loophole to continue could have amounted to up to £200 million per annum and that by that date, that is to say about December 19, about £200,000 per week was being paid to people living with their families.

With a view to closing this loophole, therefore, on November 16 1984 (a Friday) the department wrote to the applicants, and all but one of the other organisations which I have mentioned, a letter in the following terms. Headed "Housing Benefit Amendment Regulations," the first three paragraphs read:

"I am writing on behalf of the Secretary of State formally to request the views of your associations and other relevant associations on proposals to make regulations under Part II of the Social Security and Housing Benefits Act 1982.

As you know it is our intention to avoid inessential legislative changes while the Housing Benefit Review is in progress. But a small number of changes need to be made urgently: none involve changes in policy or practice. One group of amendments closes a loophole in the regulations which would allow a non-dependent to qualify for Housing Benefit if he makes a payment for board and lodging which includes an amount for rent. The other amends the definition of rent to ensure that former licencees as well as former tenants can get benefit. At present because of a defect in the Regulations help can only be given on payments made in the latter case. Details of the proposed amendments are contained in the Annex to this letter.

To allow time for Ministers to consider your comments, and for the final preparation of the draft regulations, I must ask for any response by November 30, 1984. If you would like to discuss the proposed amendments before that date please let me know."

A Parliamentary question and answer were attached to the letter, as were the draft amending regulations.

The material amendment was to regulation 23. Unamended it had read as follows:

"23(1) Except in a certificated case, a person shall not be entitled to rent allowance where (a) he resides with the person to whom he is liable to pay rent in respect of the dwelling; or (b) the person to whom he is liable to pay rent in respect of the dwelling is a member of his family, and in either case it appears to the local authority that the tenancy or other agreement was created in order to take advantage of the rent allowance scheme."

I need not set out the provisions of subsection (2) which are in the same terms but apply to rate rebates.

The draft amendment substituted the following regulation 23 for the whole of the pre-existing regulation, and I shall set all of this out:

"(1) A person shall not be entitled to a rent allowance or, as the case may be, a rate rebate where it appears to the appropriate authority that the tenancy or other agreement to pay rent or, as the case may be, to make payments by way of rates was created to take advantage of the rent allowance scheme, or in so far as the tenancy or other agreement relates to payments by way of rates, the rate rebate scheme . . ."

I omit irrelevant words.

"(2) A person shall not be entitled to a rent allowance or, as the case may be, a rate rebate where (a) he resides with the person to whom he is liable to pay rent or, as the case may be, to make payments by way of rates in respect of the dwelling and (b) either that person is a close relative or the tenancy or other agreement between them is other than on a commercial basis.

(3) For the purposes of paragraph (2), 'close relative' means a parent, son, daughter, step-parent, step-son, step-daughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother, sister, brother-in-law or sister-in-law."

There are also amendments to paragraph (2) of regulation 6 and paragraph (3) of regulation 8 dealing with certificated cases.

The more material features of the amendments to regulation 23 are, first, that it was now to apply in all cases, not only to non-certificated cases; secondly, that it disentitled to benefit, not only those who had entered into a "contrived" tenancy designed to take advantage of the scheme, but also certain categories of those living with others; thirdly, that it defined a family for the first time (by defining a "close relative") and, fourthly, that it introduced the notion of payment of rent or rates "other than on a commercial basis."

Probably because the letter of November 16 was not posted until the following Monday or Tuesday, it was not received by any of the interested organisations until November 21, 22 or 23. The applicants received their letter on November 22, a Thursday. They replied by Mr Cantle, their Under Secretary, Housing and Public Works, by a letter dated November 22, in which, having referred to the Department's letter of November 16, he wrote:

"I regret that I must once again complain about the quite inadequate period which you are allowing for consultation. It is quite impossible for the Association to provide a considered response by November 30. Effectively, this will allow ourselves and our advisers only five working days to consider these proposals.

Having complained previously about the short timescale which your Department imposes, I would have hoped that this could have been avoided on this occasion. I must therefore ask you to extend the period for consultation and I would have thought that a period of several weeks would not have been unreasonable."

The five working days, that is to say the Monday to Friday mentioned in that letter, excluded Thursday, the day of receipt, the Friday November 30, the day by which the reply was required.

The staff of the applicant Association are not authorised to express views on behalf of the Association without committee authority, or at least consultation with elected representatives.According to Mr Cantle's evidence, there are a number of committees, including the housing and public works committee.Each committee appoints advisers who are officers of member local authorities and whose functions are to respond to and assist the Association's officers and to advise the appointed committees. These advisers generally hold chief officer status in member local authorities and are able to provide an input which takes account of their expertise and experience both as professional officers and as administrators. However, advisers do not simply assist in the formulation of policy by committees, but also are concerned in policy implementation in two ways, assisting the association's officers in carrying out their duties and representing the association at meetings with government departments. The relevant committee, the housing committee, is currently advised, Mr Cantle says, by seven directors of housing, three chief executives, four directors of finance, one chief architect and two chief legal officers. These advisers are drawn from 11 metropolitan district councils, six London boroughs and a number of other regions. To assist at a more detailed level the association also consults specialist advisers with particular day-to-day working knowledge and experience in their area of work.On housing benefit matters the association consults directly five specialist advisers with specialised knowledge and experience of administering the Housing Benefits Scheme. These advisers are officers below chief officer level in their employing local authorities. They head Housing Benefit sections and have considerable expertise in operating the Scheme.

The department never expressly answered the applicant association's request for an extension of time, nor indeed did it answer their letter at all. Mr Cantle in his affidavit has deposed to the fact, which has not been challenged, that the applicant association was unable within the time allowed to respond to the department, meaning by that, I take it, that there was no time for a formal response to be considered by the housing committee.

Mr Cantle did, however, consult advisers and specialist advisers. Then on December 7, 1984, he wrote a letter to the department which included the following:

"Housing Benefit Amendment Regulations. Generally, we are not happy with these proposals as we have argued that there is a need to encourage more efficient use of the housing stock, whereas the approach to non-dependants and

the high level of deductions does exactly the opposite. I can understand your concern, but rather than plug what you see as a loophole, we would prefer a more fundamental appraisal of the position of non-dependants. This is all the more relevant in view of your proposals to deal with joint tenancies.

Is the intention of your proposed amendment to regulation 6(2) and 8(3) to prevent the payment of HB to some non-householders on SB who have acquired a tenancy but not yet moved in?If this is the case, we could not agree and would prefer to see amendments permitting certification in these circumstances.

The proposals to extend the 'contrived tenancy' provisions are badly thought through and could create some problems in practice (eg where a young person leaves home and takes up lodgings nearby)." [I omit irrelevant words.]

I have had the advantage of seeing the LBA's and the ADC's comments and would generally support them. In particular, I would agree with the LBA's comment that this group of amendments are neither essential or desirable and should be properly put before the Housing Benefit Review."

So much for the history of the November amendment.

Meanwhile the Department had decided to make, or at least to consult about the making of, the December amendment. Press articles in mid-November had suggested that non-dependants and their tenants might avoid deductions from the tenants' benefit and might procure an entitlement for non-dependants in their own right to a benefit by tenants and non-dependants entering into joint tenancies.

By the end of November the Department had been advised that further amendments to the regulations were desirable. Accordingly, on December 4, 1984, they wrote the following letter to the applicants and other interested bodies:

"I am writing on behalf of the Secretary of State formally to request the view of your association and other relevant associations on proposals to make regulations under Part II of the Social Security and Housing Benefits Act 1982.

As you may know there have recently been a number of press articles suggesting that Housing Benefit claimants should avoid a non-dependant deduction being made from their benefit by taking out a joint tenancy agreement with the non-dependant. The draft amendment regulation 23(1), which I sent to you on November 16, would prevent private tenants from abusing the scheme in this way since it would apply to any new tenancy created in order to take advantage of the scheme. However, in considering the application of the amendment to joint tenants, we have found that it would have a harsher effect in these cases than was intended. The amendment would disentitle to benefit not only the non-dependant, but also the former tenant if the new joint tenancy was created in order to take advantage of the scheme.

We therefore propose to make further amendments to regulation 23 to provide that where a joint occupier was previously a non-dependant of one or more of the joint occupiers, that person will not be eligible for housing benefit unless the local authority is satisfied that the joint tenancy was not created in order to take advantage of the scheme. Secondly, if the authority is satisfied that a new joint tenancy was created in order to take advantage of the scheme, the Housing Benefit payable to the other joint occupier(s) will be restricted to the amount which would have been payable had the joint tenancy not been created.

These provisions will apply to rent and rate rebate cases as well as to rent allowance cases.

The proposed amendments are currently being drafted and I will let you have copies as soon as they are available.

Ministers wish to make to proposed amendments at the same time as the amendments which were referred to you with my letter of 16 November. I must therefore ask for any response on these new proposals by 12 December. If you would like to discuss the proposals before that date please let me know."

December 4 was a Tuesday and December 12, as a matter of arithmetic, was eight days away.

The proposed amendments were never sent to the applicants or to any of the other organisations before the regulations were made. But the December amendments included the following: first, a new paragraph (3) was added to regulation 11 under the heading "Joint occupiers" in the following terms:

"If a joint occupier of his dwelling was, at any time during the period of eight weeks prior to the creation of the joint tenancy or other agreement giving rise to the joint liability to pay rent or, as the case may be, to make payments by way of rates, a non-dependant of one or more of the other joint occupiers of that dwelling, he shall not be eligible for Housing Benefit in respect of that dwelling unless the appropriate authority is satisfied that that joint tenancy or other agreement was not created to take advantage of the rate rebate scheme, the rent rebate scheme or the rent allowance scheme, as the case may be."

Secondly, the following words were added at the end of paragraph (1) of regulation 23 after the words "the rate rebate scheme," the added words being "so however that this provision shall not apply to a person who was, for any period within the eight weeks prior to the creation of the tenancy or other agreement to pay rent or, as the case may be, to make payments by way of rates, otherwise liable to pay rent in respect of the same dwelling."

The material feature from a practical point of view of these amendments, when they came into force, was that they would require local authorities to inform themselves about, and to consider, the relationship between joint tenants during the period of eight weeks immediately preceding the creation of the joint tenancy and then decide, if one had been a non-dependant of the other during that period, whether they were satisfied that the joint tenancy was not created to take advantage of the scheme.

On December 5, when he received the letter, Mr Cantle copied the letter and sent it by first class post to all advisers to the committee and specialist advisers. In his affidavit he says that although the importance of the matter warranted consulting all member authorities, or at the very least reporting to the housing committee, this could not be done due to the timescale imposed by the Department. If the Department's deadline was to have been met it would, in effect, have required the advisers and specialist advisers to consider these complicated proposals, without draft regulations, consult with colleagues within their own local authorities and respond to him by return of post. He would then have had to collate a response, discuss this with advisers and specialist advisers, consult with elected members if necessary and reply to the department by December 12, 1984. In spite of the advisory system the applicant association uses, which is generally well-tested and well-oiled, the timescale imposed by

the Department was quite impossible.

On December 13, Mr Cantle wrote his second letter to the Department. He referred to the Department's letter of December 4, and continued:

"I think you will accept that this is a rather hasty and ill-considered response to your proposals which also seem rather hasty and ill-considered. Time and time again we make the point that changes in the Housing Benefit Scheme should be avoided at all costs unless they are essential, and should always be based on a properly thought out approach. When will the DHSS take notice of this view?

With regard to your proposals in respect of joint tenancies, I have only had time to take a number of quick telephone calls from advisers, and the following points have arisen which I think you should consider."

He then went on to make a number of comments, but of course he was unable to make any comment on the proposal that an authority would have to investigate the period of eight weeks immediately preceding the date of the creation of any joint tenancy, because the applicant association had no knowledge of any such proposal.

Mr Cantle in his evidence says that he considered taking up the Department's offers of discussion, but that he had nothing to discuss at that stage. In relation to the December 4 letter, he had neither received a copy of the amendment proposed, nor had he received, or was likely to receive within this timescale, any detailed comments from advisers or specialist advisers.

The regulations were made on December 17. They were laid before Parliament on December 18 and they came into operation on December 19.

The first issue which I have to decide, therefore, is whether in all the circumstances the applicant Association has satisfied me that the Secretary of State failed to consult with the applicants before making the regulations in accordance with his duty under section 36(1) of the Act.

The applicants rely only on the contention that the Secretary of State failed to consult them. They do not rely on his failure to consult any of the other organisations. But conversely Mr Beloff, on behalf of the Secretary of State, has not contended that it is not enough for the applicants to show only that the Secretary of State failed to consult them, and in my view he is right in not having sought to make that contention. By not making that contention, however, he is not to be taken as making any very significant concession, because the evidence shows that the terms and timetable of consultation were essentially the same for all the representative bodies.

As I am to consider the question in substance, rather than in detail, a detailed analysis of the facts or arguments will not assist me or anyone. It is not even in my view necessary or helpful to consider separately the November and December amendments, since there is only one set of regulations under challenge and since I do not propose to say anything, if I can help it, which could be taken as a code or set of minimum requirements for application to future cases.

Considering the matter as one of substance, I arrive at the following conclusions. First, the urgency of the need for the amending regulations as seen by the Secretary of State was such, taking into account the nature of the

amendments proposed, that the Department was entitled to require that views in response to its invitation for comments should be expressed quickly. Secondly, the urgency of the need for the amending regulations, as seen by the Secretary of State, taking into account the nature of the amendments proposed, was not such that the Department was entitled to require views to be expressed within such a short period that those views would or might be insufficiently informed or insufficiently considered so that the applicants would or might be unable to tender helpful advice. Thirdly, taking into account both the urgency of the matter, as seen by the Department, and the material features of the amendments which I have mentioned, and bearing in mind in particular that the applicants had no knowledge until after the regulations were made of the last of those features, namely the provision requiring authorities to inform themselves about and consider the relationship between joint tenants during the period of eight weeks immediately preceding the creation of the tenancy, I am satisfied that the Secretary of State failed to fulfil his obligation to consult before making the regulations. All those features of the regulations were matters with respect to which the applicant association, on behalf of those responsible for administering the scheme on a day-to-day basis, might have been able to offer informed and considered information and advice if they had been given an opportunity to obtain the relevant information from a sufficient number of authorities or their advisers and to consider it collectively in some way.There was, and in my view still is, plenty of scope for such assistance. As I have said, it was reasonable in my view to require the assistance to be given quickly, but the time allowed was so short and the failure to provide the December amendments to regulations 11 and 23 was such that, as the department must have known even without imputing to them precise knowledge of the applicants' internal arrangements, only piecemeal, and then only partial, assistance could be given.

Having decided that the provisions of section 36(1) are mandatory and that they were not complied with before the regulations were made, I now have to consider the relief which I should give to the applicant association. They ask me to quash the regulations. I do not think that I should do so.

I acknowledge, with respect, that in the ordinary case a decision -- I emphasise the word "decision" -- made ultra vires is likely to be set aside in accordance with the dictum of Lord Diplock in Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service [1978] AC 655, 695, where he said:

"My Lords, where a statutory authority has acted ultra vires any person who would be affected by its act if it were valid is normally entitled ex debito justiciae to have it set aside, if he has proceeded by way of certiorari, or to have it declared void. If he has proceeded by way of an action for a declaration the court may exercise its discretion to refuse the remedy on grounds of laches or of acquiescence or maybe, though there appears to be no reported case of this, where the ultra vires act of the authority was induced by the unlawful acts of the complainant himself."

But whereas the ordinary case is that of a ministerial departmental decision, which adversely affects the rights of one person or of a class of persons, and which can be struck down without, usually, more than individual or local implications, in this case the applicant association seeks to strike down regulations which have become part of the public law of the land. Although I have been shown and have found no authority to support that proposition, I

suspect that it is not necessarily to be regarded as the normal practice, where delegated legislation is held to be ultra vires, to revoke the instrument, but that the inclination would be the other way, in the absence of special circumstances making it desirable to revoke that instrument. But in principle I treat the matter as one of pure discretion and so treating it decline to revoke the instrument for the following reasons, no particular significance being attached to the order in which I state them.

Although six organisations were and are habitually consulted in the context, only one of them has applied for revocation of the instrument and that one applies only on the ground that it was not properly consulted. It makes no formal complaint that the other organisations were not consulted. Although the applicant association complains about the substance of the regulations, it is apparent that its principal complaint throughout is, and has been, the absence of proper consultation and it and other organisations were able to express some, albeit in a sense piecemeal, views about the proposal which apparently the Department took into account before making the regulations, but without, be it noted, any effect whatsoever on the November or December amendments.The regulations have been in force for about six months and, although their implementation creates difficulties for some at least of the housing authorities who have to administer them, those authorities must by now have adapted themselves as best they can to those difficulties. If however, the regulations were to be revoked all applicants who had been refused benefit because of the new regulations would be entitled to make fresh claims, and all authorities would be required to consider each such claim.

Finally, the Amendment (No 4) Regulations had been consolidated into the Housing Benefit Regulations 1985 (1985 SI 677), which were made on April 29, 1985, laid before Parliament on April 30 and came into operation and indeed have come into operation for the most part, today, May 21. Those regulations are not at present challenged. If, therefore, the No 4 amendment regulations were to be revoked, and so long as the 1985 regulations remain valid, any person entitled to reconsideration of his claim to benefit would, if successful, at best be entitled to benefits for about six months.

For all these reasons, I refuse, in the exercise of my discretion, to revoke the No 4 amendment regulations.

I can see no reason whatsoever, however, for refusing the application association the declaration for which they ask; namely, a declaration that before making and/or laying before Parliament the Amendment (No 4) regulations, or paragraphs 2(3), (4), (5), (6) and (7) of the aforesaid regulations, the Secretary of State for Social Services failed to comply with the duty imposed upon him by section 36(1) of the Social Security and Housing Benefits Act 1982. I accordingly grant the application to the extent that I make that declaration.

**DISPOSITION:**

Application granted

**SOLICITORS:**

Solicitor for London Borough of Greenwich; Solicitor for the DHSS.