OUTER HOUSE, COURT OF SESSION

[2024] CSOH 79

P96/24

OPINION OF LORD LAKE

in the Petition of

ALAN HOUSTON

Petitioner

for

Judicial Review of a decision for deductions from State Pension Credit in relation to alleged Social Fund loan and/or loans from 2006 and 2007 by the Secretary of State for Work and Pensions

Pursuer: Party
Defender: Maciver, Advocate; Office of the Advocate General

9 August 2024

[1] Mr Houston seeks to challenge decisions of the Secretary of State for Work and Pensions to make deductions from pension credit that are payable to him. The deductions are being made on the basis that they are required to repay crisis loans from the Social Fund which had been paid to the petitioner. Mr Houston challenged the lawfulness of these deductions on a number of different bases and these can be considered in turn.

First – that deductions may not lawfully be made from pension credit

[2] In this regard Mr Houston relies on the Social Security Administration Act 1992, section 187, which is headed "Certain Benefits to be Inalienable". The relevant text of the subsections (1) and (2) of that section is as follows:

> "(1) Subject to the provisions of this Act, every assignment of or charge on—
> ….
> (ab) state pension credit;
> ….
> and every agreement to assign or charge such benefit shall be void; and, on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors.
>
> (2) In the application of subsection (1) above to Scotland—
>
> (a) the reference to assignment of benefit shall be read as a reference to assignation, 'assign' being construed accordingly;
> (b) the reference to a beneficiary's bankruptcy shall be read as a reference to the sequestration of his estate or the appointment on his estate of a judicial factor under section 41 of the Solicitors (Scotland) Act 1980."

Mr Houston contends that the stipulated inalienability of pension credits means that deductions may not lawfully be made from them.

[3] Counsel for the respondent outlined the statutory framework that was in force at the relevant times and which regulated crisis loans made from the Social Fund. He drew my attention to the Social Security Administration Act 1992, sections 78(1) and (2) which state:

> "(1) A social fund award which is repayable shall be recoverable by the Secretary of State.
>
> (2) Without prejudice to any other method of recovery, the Secretary of State may recover an award by deduction from prescribed benefits"

State pension credit was prescribed as a benefit from which recovery might be made by the Social Fund (Recovery by Deductions from Benefits) Regulations 1988, regulation 3. Those regulations were given effect in relation to the 1992 Act, including section 78, by the Social

Security (Consequential Provisions) Act 1992, section 2. On this basis, counsel submitted that there was clear statutory authority for what had been done.

[4] In view of the terms of the legislation referred to by counsel for the respondents, there can be no doubt that making deductions from pension credit to secure repayment of social fund awards is permissible. In referring to assignment/assignation or charge under the heading of inalienability, section 187 of the 1992 Act appears to address the different situation in which the person entitled to benefits might voluntarily seek to transfer their right to receive them. On any view, the petitioner's interpretation is inconsistent with the clear words of section 78. I do not accept the argument that deductions can never lawfully be made from pension credit.

Second - that any obligation to repay sums from the Social Fund had prescribed

[5] The second issue raised by the petitioner was that any obligation to repay the loan had prescribed in terms of the Prescription and Limitation (Scotland) Act 1973, section 6. He likened the loan to a contract. In response to this, the respondent's counsel noted that only obligations specified in Schedule 1 to the Act can be extinguished in this way and that the obligation to repay a crisis loan does not fall into any of the specified categories.

[6] Section 6 of the 1973 Act applies to obligations of the type specified in Schedule 1. In addition to specifying a number of obligations which arise at common law (eg an obligation arising from liability to make reparation, an obligation based on redress for unjustified enrichment and an obligation arising from a contract) it specifies obligations arising under a number of statutes. The 1992 Act is not among those specified. I have considered whether it could be said that there was a contract in terms of which the petitioner

was paid the crisis loan and was obliged to repay it but have concluded that the terms of the 1992 Act preclude this. The funds advanced are described as an "award" and the requirement that it is repaid is also created by statute (section 139). The fact that the loan was sought and offered in the context of the statutory framework excludes an intention to create private law rights and obligations. This means that the obligation to make repayment of a crisis loan is not one of the ones specified in Schedule 1 with the result that it is not subject to 5-year prescription.

Third – that he had never received any loans from the Social Fund

[7] This appeared to be the principal argument for the petitioner. He contended that he had never applied for or received the loans in respect of which deductions were made. He claimed that he was homeless at the time the loans were sought which meant that he would have had no use for the items such cookers, a single bed, bedding, a three piece suite and curtains the purchase of which was the purpose for which the loans were made. He submitted also that homelessness would have meant that he was not eligible for the loans. He was concerned that he had not been able to get information or vouching for the loans from the Department of Work and Pensions (DWP) or had got misleading information. The initial letters intimating the current deductions were dated 24 March and 26 March 2023 and referred only to a "social fund payment" without giving details. He had made subject access requests to seek information from DWP and has been assisted by an employee of a job centre in his attempts to get more details of the loans. He considered that the letters from DWP that informed him of the deductions lacked sufficient details and he complained that

he had not been given substantive responses to the issues he had raised. He considered that the conduct of DWP was fraudulent.

[8] Counsel for the respondent emphasised that this was an action for judicial review and that the issue for determination was whether the actions in making the deductions were lawful rather than considering the merits of the deduction. By reference to an affidavit from Raymond Baldwin, Deputy Director for Working Age and Move to Universal Credit, he identified screenshots from the DWP computer system and explained their contents. They recorded that one crisis loan had been sought by and awarded to the petitioner in September 2006 and the other in February 2007. According to the records, the petitioner appeared to have been homeless at the time of the first application but had an address at the time of the second. The records showed that there were some repayments in the period up to 2008 - including cash payments totalling £200 - but nothing thereafter until the deductions were made from pension credit. Counsel referred me to a letter from DWP to the petitioner dated July 2023 which had sent a copy of the acceptance form for the second loan and copies of screenshots from the DWP computer system to the petitioner. It was noted that the acceptance form was signed by the petitioner and was dated 5 February 2007. It includes an acknowledgment that the money must be repaid. Mr Baldwin's affidavit considered the issue of why DWP did not hold other documentation and concluded that this was a result of human error in setting which documents were to be retained in respect of the petitioner. It was accepted by counsel that the statement made in a letter from DWP to the petitioner dated 12 September 2023 that they had the both the application letters and acceptance forms for both loans was not correct and should not have been made.

[9] While maintaining his position that the scope for challenge was restricted by the fact that this was a judicial review rather than an appeal against the decision, counsel very properly and fairly drew my attention to authority that in some situations unfairness arising from an error of fact may be a basis on which a decision may be challenged. In particular, he drew my attention to the following passage from the judgement of Carnwath LJ in *E* v *Home Secretary* [2004] QB 1044:

> "66 In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the Criminal Injuries Compensation Board case [[1999] 2 AC 33]. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

He submitted that the test was not met in the present case.

[10] In relation to the matters raised by the respondent, the petitioner maintained his position that he had no recollection of having applied for or received loans. He was particularly critical of the incorrect statement that had been made in the letter of 12 September 2023 to the effect that DWP held documentation for both loans, describing it as a serious misrepresentation. He complained that the affidavit provided by the respondent was from someone who had no first-hand knowledge of the matters to which it related and that it consisted of assumptions and opinion. He said that he was unable to understand the screenshots provided originally as they bore no legend or explanation. He claimed that the present situation satisfied the requirements identified by Carnwath LJ as to when a mistake of fact can amount to a head of challenge.

[11] Intimation was given to the petitioner that deductions would be made by letters of 24 March and 26 March 2023. Reading those letters together would indicate that the repayments were to pay back a social fund payment but little more. They do not indicate when the crisis loans were made, in respect of what they were made and what sums were advanced as loans. As the crisis loans had been paid to the petitioner in September 2006 and February 2007 and the last repayment prior to the letters appears to have been in April 2008, it is not surprising that he might recollect little of them in 2023. The position has been made much clearer, however, by Mr Baldwin's affidavit. It is no objection to its validity or weight that Mr Baldwin did not have personal knowledge of the matters it refers to. It is clear that Mr Baldwin is using his knowledge of the DWP IT system to explain or interpret the records that exist. I appreciate that someone who was in the petitioner's situation of not having that knowledge might find the documents difficult to interpret. However, I accept the contents of the affidavit, and when the screenshots are examined with that knowledge, they provide a contemporaneous record of the petitioner applying for and receiving two crisis loans some time ago. This conclusion is fortified by the copy of the acceptance of the second loan which ties in with the computer records. As a result, there can be no doubt that there was a basis on which a decision could be taken that repayment was due and the determination that there should be repayment cannot be seen as irrational.

[12] This background of available evidence is relevant also to the challenge on the basis that an error of fact has given rise to unfairness. It is not apparent that there has been a mistake such as is referred to in the first criterion and, on any view, it cannot be said to be uncontentious or objectively verifiable that there has been an error. Accordingly, the challenge on the basis outlined in *E* also fails. In view of the above, the challenges by the

petitioner of the decision to deduct sums from his pension credit do not succeed and the petition will be dismissed.