

Before Robin C A White, Deputy Judge of the Upper Tribunal

Decision: I set aside the decision of the tribunal as erroneous in law. I remake the decisions which the tribunal should have made.

The remade decisions are that each of the three respondents was not in exempt accommodation in relation to their claims for housing benefit made on 2 November 2006.

REASONS FOR DECISION

Background and context

1. These three appeals have been heard together, as in the tribunal below. They raise an apparently simple issue which is surprisingly difficult to decide. In this decision I will refer to the appellant as the housing authority.
2. When changes were made to the housing benefit scheme in 1996, certain existing provisions were preserved and claims to housing benefit in relation to these situations are determined under a modified scheme, which is more generous to claimants than the new scheme.
3. The three respondents in these appeals are all people with significant special needs. They live in a bungalow (“the property”) under tenancies with Progress Care Housing Association Ltd (“the housing association”). The tenancies began on 17 July 2006, but the respondents only moved in on 23 October 2006 when the care arrangements were able to start.
4. The respondents each have care plans established by Cumbria County Council (“the county council”). Day services are provided by Cumbria Care,¹ and domiciliary care is provided by Thera North² (“the company”) under a contract with the county council.
5. The precise arrangements between the housing association and the county council require further discussion, which can be found later in this decision.
6. The respondents claimed housing benefit as tenants of the property on 2 November 2006. Benefit was awarded, but the full amount of the rent was not allowed.
7. If the arrangements described in paragraphs 3 to 5 above fall within the scope of ‘exempt accommodation’ under paragraph 4 of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006, and the county council is the provider of accommodation and also the provider of care, support or supervision, then the eligible rent is determined in accordance with paragraph 5 to that Schedule. In a nutshell, and so far as it could apply to

¹ Which is, I understand, a local authority business unit located within the Adult Social Care service, part of Cumbria County Council's Adult and Cultural Services Directorate.

² A not for profit company limited by guarantee.

the circumstances of these appeals, there are significantly more limitations on the ability of a housing authority to restrict rent than under the current scheme.

8. So the central issue in this appeal is whether the respondents are in exempt accommodation. It is common ground that the relevant part of the definition of 'exempt accommodation' reads as follows:
 - " exempt accommodation" means accommodation which is—
 - (a)
 - (b) provided by a non-metropolitan county council in England within the meaning of section 1 of the Local Government Act 1972, a housing association, a registered charity or voluntary organisation where that body or a person acting on its behalf also provides the claimant with care, support or supervision.
9. All parties accept that the county council is a non-metropolitan county council in England within the meaning of section 1 of the Local Government Act 1962, and, if it is relevant, that the housing association comes within the definition of housing association under the relevant regulations.
10. The respondents appealed against the restrictions on their housing benefit payments on the grounds that they were in exempt accommodation.
11. The appeals came before a tribunal on 7 December 2007. The tribunal had before it a fair amount of correspondence relating to the arrangements made for the respondents. A letter from the housing association dated 9 January 2007 states:

The property was purchased following consultation with Cumbria County Council Adult Social Care, Thera Trust, tenants and relatives as it met the specific needs of the tenants. There are currently no special adaptations at the property other than a TMV [thermostatic mixing valve] blender valve fitted to the bath.
12. A letter from the county council dated 5 January 2007 states:

... all three tenants have been assessed under the NHSCC Act 1990 and receive individual care packages which meet their care needs. We purchase the Day services from Cumbria Care and the Domiciliary Service from Thera North. Progress Housing are the landlords. Therefore, Thera North and Progress housing are absolutely independent from Adult Social Care and are agencies that specialise in Learning Disabilities.
13. The tribunal also had before it the integrated individual care plans for each of the respondents, and copies of the assured tenancy for each of the respondents.
14. The submission put in by the representative for the respondents included a draft of a 'Master Form of Agreement' in the process of negotiation between the county council and the housing association. The premises to which this agreement applies are not stated in the agreement; the First Schedule includes a note which reads as follows:

It is intended that any Master form of Management Agreement concluded between the Parties will relate to all properties being made available by Accommodation Provider [defined earlier as the housing association] to the Council [defined earlier as the county council] whether in occupation now or to be acquired at the instigation of the Council in future.
15. The Tenth Schedule to this agreement is a standard form complementary agreement for conclusion between the housing association and a support agency which must be an accredited provider of domiciliary care in accordance with the provisions of the Care Standards Act 2000.

16. The respondents understandably did not attend the tribunal, but they were represented. The housing authority was also represented. The outcome of the appeal was that the appeal was allowed. The tribunal decided that the arrangement fell within the definition of exempt accommodation in that the county council was the provider of accommodation and also provided care, support or supervision, and that the full amount of the rent should be allowed, subject to a liberty to apply on the amount of the rent within one month. A full statement of reasons was subsequently provided.
17. The housing authority sought permission to appeal which was granted by the tribunal chairman.

The grounds of appeal

18. The housing authority raises two grounds of appeal. First, it is argued that the tribunal has not provided any reasons for its decision. Secondly, it is argued that the decision is contradictory because the housing association was the landlord. In granting leave, the tribunal chairman observed that he had only become aware of Commissioner's decision *CH/3900/2005* after making his decision, and that this might have a bearing on the outcome of the appeals.

Did the tribunal err in law?

19. The housing authority's first ground is wholly misconceived and has no merit. Though relatively brief, it cannot be said that the tribunal's decision is without reasons. Any reader can see quite readily how the tribunal has come to the conclusion that the complex web of arrangements constitutes the provision of exempt accommodation as defined in the regulations I have quoted above.
20. The second ground raises the question of whether the tribunal properly applied the authorities. The representative for the respondents says that the tribunal got it right, and that the authorities which appear to suggest the contrary can be distinguished. The housing authority argues that any conclusions which flow from the agreement put before the tribunal must be ignored since this was not a signed contract and cannot evidence any binding obligations. There is, by contrast, a completed tenancy agreement in each case with the housing association. The thrust of the authorities is that this is not a situation in which it can be said that the accommodation is provided by the county council.
21. Who is right? This is the complex point I must decide. If it is the representative of the respondents, then the tribunal did not err in law. If it is the representative of the housing authority, then the tribunal must have erred in law.
22. I would simply observe at this point that this is not a case which simply turns on its facts. The proper interpretation of the definition of 'exempt accommodation' involves questions of law.
23. It would seem incontrovertible on the factual situations presented to me that the county council, or those acting on their behalf, provide the respondents with care support or supervision. So the respondent's appeal can only succeed if their accommodation is also 'provided by' the county council.

The authorities

The reported decisions

24. *R(H)2/07* was a case in which the claimants to housing benefit sought to argue that their landlord, a housing association, was the provider of accommodation and that the care, supervision and support they received was provided on behalf of the housing association.

25. The Commissioner agreed that the tribunal was correct in concluding that the landlord was not under any contractual or statutory obligation to provide care, support or supervision to the claimants. Nor did the landlord provide such care, support or supervision; this was provided by a separate agency engaged by the local social services authority.

26. The Commissioner concluded:

51. ... I remind myself that the phrase ... which falls to be applied is: “where **that body [ie the landlord] or a person acting on its behalf** also provides the claimant with care support or supervision”. In my judgment that clearly connotes that the care must be provided either **by** the landlord or a person acting in some sense **for** him, ie with the notion of some form of interposition referred to in the previous edition of the *Shorter OED*. It is in my judgment clearly not sufficient that the provision of the care benefits the landlord, even if that benefit is intended.

27. *R(H) 7/07* was rather more concerned with the definition of ‘care, support, or supervision’, which is not in issue in the appeal before me. The Commissioner ruled that the tribunal had erred by reading into the definition a requirement that the landlord (the provider of the accommodation) also be the ‘main’ provider of care, supervision or support. He observed, ‘The definition requires merely that the landlord provides the claimant with care, support or supervision.’ (para. 21), although it must be more than minimal (para. 23).

28. *R(H) 6/08* concerned the effect of a management and agency agreement between a housing association and a National Health Service Trust. The Commissioner did not accept that any change to the wording of the definition of ‘exempt accommodation’ by the Housing Benefit (General) Amendment (No. 2) regulations 1997 (SI 1997/1974) and re-inserted by the Housing Benefit (General) Amendment Regulations 2003 (SI 2003/363) affected its interpretation. He said:

27. ... the natural meaning of the amended definition is in my judgment that the care etc must be provided either by or on behalf of the landlord. The words “or acting on its behalf” in my judgment mean acting on its behalf in providing the care support, or supervision which is subsequently provided.

29. The Commissioner went on to reject a second argument that the amended definition only required that the care be provided either by the landlord or ‘by some person who acts in some respect (ie not necessarily in providing care etc) on behalf of the landlord.’

A key unreported decision

30. The meaning of the words ‘provided by’ in the definition of ‘exempt accommodation’ was considered in *CH/3900/2005*. The factual situation in this case is much closer to that in the appeal before me than the scenarios which were under consideration in the reported decisions.

31. In the reported decisions, the argument (which ultimately failed) was that the arrangements in place between the various agencies involved in meeting the requirements of tenants with special needs meant that it could be said that the care, support or supervision was being provided on behalf of the landlord.
32. In *CH/3900/2005*, the argument was that county council, which had made arrangements for meeting the care, support or supervision of the tenant, and had facilitated the finding of accommodation for her, was the provider of the accommodation to the tenant. The tribunal accepted that argument and the housing authority appealed.
33. A brief account of the facts in *CH/3900/2005* will help to establish the distinction. The tenant required 24 hour support because of severe learning disability and her uncontrolled and unstable epilepsy. The county council engaged an organisation (which had been recommended by the National Epilepsy Centre) to help them find suitable accommodation for the tenant. The third party found accommodation, and rented the accommodation to the tenant. The county council had the right to say who would live in the accommodation in question. The tribunal decided that the accommodation had been provided by the county council.
34. The tenant's representative argued for a broad definition of the words 'provided by' in the definition of exempt property. So in the circumstances described in paragraph 33, it was argued that the accommodation was not provided by the third party, but was provided by the county council which had made the arrangements for the tenant to be found accommodation by the third party.
35. In contrast, the housing authority's representative argued that accommodation is provided by the party who rents it out to a tenant, and not by a body which has facilitated the provision of that accommodation.
36. The Commissioner, after the most careful consideration of the arguments put to him, including consideration of the legislative history of the provision, concluded:

13. In my judgment the arguments of [the housing authority's representative] are persuasive. There is force in each discrete argument and their cumulative weight leads me to the conclusion that the "*wider*" interpretation adopted by the tribunal, and urged upon me by [the tenant's representative] is not correct. If the "*wider*" meaning of "*provided by*" is indeed correct then the following words ("*on behalf of ...*") in the relevant part of the regulation would be superfluous. There is, of course, some force in the argument of [the tenant's representative] that the relevant part of the regulation could have been more clearly expressed. Such argument would equally attach to a good deal of the Byzantine complexities of social security legislation. It is not, however, a warrant for me to impose upon the relevant part of the regulations a meaning which it simply will not bear. [The tenant's representative] has supported his argument by quotations from the Compact Oxford English Dictionary, a less comprehensive and authoritative source in my judgment than the Shorter Oxford English Dictionary. Moreover a good deal of the examples of "*provide*" offered by [the tenant's representative] are particularly context sensitive and some of the definitions he offers relate to "*provide with*" or "*provide for*", as distinct from "*provide*" and to that extent the definitions have subtle but significant difference of meaning. In addition the shorter OED's reference to "*furnish*" or "*supply*" to my mind is suggestive of personally arranging for a person to receive a resource, not simply facilitating arrangements for such a resource to be provided by a third party.

37. As a result, the Commissioner concluded:

In my judgment “*provided by*” ... will not reasonably suffer the wide interpretation adopted by the tribunal. It does not in my judgment include instructing, arranging or facilitating privately rented accommodation through a third party, as happened in the instant appeal. In this appeal it is not disputed that the local authority arranged for a third party to obtain accommodation for the claimant, a person with special needs, from a private landlord. I hold that that accommodation was not “*provided*” by the local authority and, accordingly, was not exempt accommodation within the ambit of regulation 10(6) of the 1995 Regulations.

38. The respondents’ representative argues that the situation before me is qualitatively different from that before the Commissioner in *CH/3900/2005*, arguing that the county council is ‘entirely in control of the supported housing scheme and has directly arranged for the provision of both housing and care aspects.’ He argues that the relationships are far closer than in the factual situation which arose in *CH/3900/2005*.
39. In the alternative, the respondents’ representative says that, if I were to consider the situations in *CH/3900/2005* and that before me could not be adequately distinguished, I should regard *CH/3900/2005* as wrongly decided and not follow it. It is not suggested why it is wrongly decided.
40. The local authority make the following points:
- The accommodation was provided by the housing association and not by the county council.
 - Little reliance can be placed on the agreement between the housing association and the county council because it is unsigned.
 - The circumstances before me are not distinguishable from those before the Commissioner in *CH/3900/2005*. The fact that the housing provider was a housing association makes no material difference.
 - The housing authority adopts the arguments put forward on behalf of the housing authority in *CH/3900/2005*.
41. The starting point must be the words of the definition of ‘exempt accommodation’. That definition would seem to require that the provider of the accommodation is first identified. Such providers must fall within the list given. Then consideration is to be given to whether the provider of the accommodation ‘or a person acting on its behalf also provides the claimant with care, support or supervision.’
42. On the ordinary meaning of the words used, in the case before me, it is the housing association which is the provider of the accommodation. It is the owner of the accommodation. Its name is on the tenancy agreement.
43. But can it also be said that the inter-relationship of the actions of various agencies in this case also means that we can regard the county council as the provider of the accommodation?
44. I do not consider that any material difference arises by reason of the third party being a private organisation in *CH/3900/2005*, and the third party being a housing association registered as a social landlord in the appeals before me.
45. I do not deny that a number of agencies were working closely together to meet the needs of three people with special needs which were met by providing appropriate accommodation to enable them to thrive, and appropriate care and

support to enable them to live as independently as possible. I cannot, however, see any distinguishing features in the arrangements before me that render the interpretation of the word 'provided' in *CH/3900/2005* inapplicable to the facts of this case.

46. I have placed little reliance on the unsigned agreement put to the tribunal. An agreement in the process of negotiation (which this clearly was) cannot give rise to any binding legal obligations between the parties. I have, however, accepted its contents as indicating a close working relationship between the county council, the housing association, and the company with whom arrangements were made for domiciliary services, as well as the respondents themselves and their relatives. All were seeking to do their best to set up the most appropriate living arrangements and support services for the three respondents.
47. I cannot see any basis on which to depart from the decision of the Commissioner in *CH/3900/2005*. The matter was fully argued before him in an oral hearing, and his reasoning is exhaustive on the point of interpretation. His approach seems consistent in its underlying principles with the approach adopted on the interpretation of different words in the definition of 'exempt accommodation', which were in issue in the reported decisions. For all these reasons, I choose to follow the decision of the Commissioner on the interpretation of the words 'provided by' which are set out in *CH/3900/2005*. I adopt the reasoning in that decision as my own in determining the outcome of this appeal.
48. Applying the interpretation of 'provided by' found in *CH/3900/2005* to the factual position before me, I conclude that the accommodation in this case was provided by the housing association and not by the county council. The county council was no more than the facilitator in the provision of accommodation for the three respondents.
49. It follows that the accommodation let to the three respondents was not exempt accommodation.
50. The decision of the tribunal was to the contrary and was made in ignorance of the Commissioner's decision in *CH/3900/2005*. In that regard there was an error of law, for which I set aside the decision of the tribunal below.
51. It follows from my analysis—and I cannot see any further or better evidence being before the tribunal if I were to remit the case—that I can remake the decisions which the tribunal should have made in each of the three appeals before me.
52. My formal decisions in substitution for those of the tribunal are set out on the first page of this decision.

**Signed on the original
on 21 May 2009**

**Robin C A White
Deputy Judge of the Upper Tribunal**