THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

This appeal is allowed. The decision of the First-tier Tribunal held at Glasgow on 23 October 2013 was erroneous in law, and is set aside. The decision is re-made as follows. In respect of her claim dated 5 September 2011, the appellant is entitled to have housing benefit determined on the footing that her accommodation was "exempt accommodation" within the meaning of paragraph 4(10) of schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006.

REASONS FOR DECISION

Background

1. The appellant claimed housing benefit as a single person in September 2011. The accommodation in respect of which the claim was made consisted of two bedrooms within campus accommodation at Stirling University. The appellant is severely physically disabled such that she is a wheelchair user and requires overnight care. That is provided at the expense of the local authority under an extensive care package. Her appeal mainly concerned, and this appeal to the Upper Tribunal is only concerned with, the question whether she is exempted from the application of the current general regime on the basis that her accommodation is "exempt accommodation", because, she claims, her landlords, the University, also provide her with "support" which is more than minimal. The First Respondents did not accept that. The First-tier Tribunal refused her appeal against that decision (although they did find that she was entitled to the "two-bedroom" rate). She appeals to the Upper Tribunal with permission of a First-tier Tribunal Judge.

2. The definition of "exempt accommodation" which the appellant required to satisfy, in order to succeed in her appeal, is now contained in paragraph 4(10) of schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006, and is in the following terms:

> " … provided by a non-metropolitan County Council … 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".

There is no dispute that Stirling University is a registered charity. The appellant's claim is limited to "support" within the meaning of the regulation. The effect of success for the appellant in this case would be that eligible rent should not be calculated under the local housing allowance rules, but rather under the rules which were previously generally applicable, although it should be noted that under the previous rules, at least since 2003 as I understand it, any element in payments to the landlord in respect of support, or other non-rent items, are not eligible for payment of this benefit.

Decision of First-tier Tribunal

3. At the hearing of her appeal, the appellant was represented by Ms Blain, a Student Money Advisor at the University, and the First Respondents were represented by Miss Taylor a Customer Service Team Leader in the Council. The tribunal had a large body of documentary material, some relating to the steps taken by the University in relation to the accommodation for the appellant, having regard to her particular needs, some describing the extent of a variety of services available to students at the University, and some quite extensive case material, commentary and a lengthy research report, as well as the appellant's and the First Respondent's written submissions. The hearing clearly took the form mainly of submissions on the basis of these written materials rather than further oral factual evidence.

4. The tribunal's Decision Notice narrates, in relation to this issue, that the tribunal was not satisfied that the property should be exempt:

> (a) As it was not satisfied that the subject (accommodation) has been specifically adapted for a disabled person's needs and therefore in this respect the appeal fails".

In its Statement of Reasons for its decision, the tribunal narrated the procedural history of the claim. The tribunal found that the appellant was a student resident within the University Halls of Residence, that she was disabled and required the services of an overnight carer. It is narrated that it was argued on her behalf that the property in question "would have been adapted due to her disability needs". Further findings are recorded as follows:

> "13 … In respect of the appellant's residence within the Halls of Residence, the University did not provide care, support or supervision. The property was not adapted. The subjects were dealt with by two separate leases to the appellant. The occupancy agreements were produced and referred to for their terms.
>
> "14. Details of the accommodation specific support from the University was also produced and can be found at documents 134 and 135 and these are accepted as fact and incorporated herein *brevitatis cause*."

5. The tribunal then recorded the reasons for its decision in the following paragraph:

> "15. The Tribunal considered at length all of the written and oral evidence before it. The Tribunal were satisfied that the calculation of benefit at the 2 bedroom rate was the correct decision which had been made, there had been an attempt by the Council to reduce this to one bedroom, the Tribunal, however, accepted that the accommodation had been adapted for use as a 2 bedroom property. The question before the Tribunal was as to whether subjects could be considered as exempt. The Tribunal were satisfied that the accommodation provided by the University did not come within the exempt category. The support which was provided was not out of the ordinary. It was not provided in specie for the purposes of care and support of the appellant particularly, it was provided generally for all students in that accommodation and accordingly the property could not be treated as exempt. The human rights argument had been advanced at previous hearings by the appellant but this was not pursued at the time of the final hearing. The Tribunal, in light of the facts of this case, are satisfied that the appellant was entitled to Housing Benefit in respect of a dwelling which should be classed as a 2 bedroomed dwelling, however, the property in their opinion was not exempt. The Tribunal's findings in fact were to the effect that the property and subjects had not been specifically adapted for a disabled person's need and therefore refused the appeal."

Procedure in appeal to Upper Tribunal

6. I gave procedural directions. I directed that the Secretary of State should be added as a party to the appeal, and I also directed an oral hearing of the appeal. In the direction I explained that there were a number of authorities bearing on this issue, which might require quite detailed analysis of the elements of "support" claimed, and I was not confident that the written submissions in the appeal fully covered the issues. I indicated that I was minded, in the event of my finding that the decision of the First-tier Tribunal was erroneous in law, to re-make the decision on the basis of the tribunal's findings and the evidence available to the tribunal, because the appeal appeared to turn on the documentary evidence produced. I indicated that the appellant's submission at the oral hearing should identify the categories of assistance which it was contended that the tribunal had wrongly failed to treat as "support" within the meaning of the regulation. I explained that I joined the Secretary of State as a party because it appeared to me that a point of wider importance might be raised, arising out of the fact that at least some of the assistance provided to the appellant may have been available to all students at the University, regardless of whether they were tenants of university accommodation. I directed the Secretary of State to make a written submission. This was duly done. At the oral hearing, the same representatives appeared for the appellant and the First-Respondents, and the Second Respondent, the Secretary of State, was represented by Counsel, Mr Komorowski. Mr Komorowski had submitted a Note of Argument two days before the oral hearing. I refused a request by Ms Blain for postponement of the hearing to enable her to consider the arguments intimated in the Note further. However, at the conclusion of the hearing, I did allow the appellant, if so advised, to make any further submissions on the arguments in that Note, within a period of twenty one days. No such submissions were received during that period. Ms Blain did submit brief "final comments" outwith that period, but, apart from being late, these did not appear to me to add anything material to the particular submission made by Mr Komorowski.

Parties' submissions

7. In her written grounds of appeal, it is submitted on the appellant's behalf that the tribunal misinterpreted the law and did not provide adequate reasons for its decision. Case law had been provided to the tribunal including clarification that accommodation could be classed as exempt accommodation despite the fact that not all accommodation in one "complex" was classed as exempt. Further, that despite services being available to all residents, where these were not used the accommodation need not be classified as exempt. In the appellant's particular circumstances, her accommodation could be classified as exempt within the law, and it could not be determined from the decision and Statement of Reasons why this was not persuasive.

8. In their written submissions, the First Respondents summarised the main reasons for their contention that the property should not be exempt, viz that the appellant paid for her care, which was not provided by the University, and the information received as to the support from the University related to support available to all students in student accommodation and was not specific to the appellant. Further, the evidence had not been that the University paid for any adaptations.

9. The Secretary of State's written submission was that to meet the requirements of the definition, the support provided to the claimant must be more than a token or minimal amount, would benefit the claimant to a significant extent, and there must be some need for it. It is submitted that the support provided in this case was the normal support provided for any student/tenant of Stirling or indeed other Universities. Although not all landlords offered these services to their tenants, Universities in their role as landlords did offer them as a matter of course. The support was not linked to the requirements of the tenant and was

offered to all tenants, so did not meet the definition. It cannot have been the intention of the legislation that all students who are University tenants are living in supported exempt accommodation. The claimant's care was funded and supplied separately.

10. In his Note of Argument, Mr Komorowski advanced a number of propositions derived from the previous Commissioner and Upper Tribunal authorities. These are not, I think, controversial and are among the principles already established and summarised in my consideration below. He advanced, however, a further proposition, viz that the "care, support or supervision" must be provided by or on behalf of the landlord in its capacity as landlord to the tenant in her capacity as tenant. It must be provided in the context of the landlord-tenant relationship. There ought to be a causal relationship between the lease of the property and the "care, support or supervision" (although not necessarily due to a legal obligation in the lease). The submission identified the rationale for exemption from the more stringent local housing allowance rules, as being that costs were likely to be higher in relation to supported accommodation (*Salford City Council v PF (2009)* UKUT 150, at paragraph 62): that being the case, it was submitted, if there were no connection between the provision of accommodation and the provision of "care, support or supervision" and it was mere coincidence that the provider of one was the provider of the other, no effect on the value of the lease would be expected. It could not be case that a beneficiary of a charity's services who happens to lease accommodation from that charity could have that property "exempt", while another beneficiary receiving the same services from the charity but leasing accommodation of the same quality and value from another landlord could not. In the present case, it was clear that, at least to some extent, what was said to be "support" was supplied by the University as part of its functions and an education establishment to the claimant in her capacity as a student, irrespective of any tenancy from the University: such services provided to the claimant in her capacity as a student should be left out of account.

11. In oral submissions at the hearing, Ms Blain acknowledged that the claimant had a care package, but elaborated on the additional steps taken by the University and relied on as "support". I discuss the extent of this in my consideration and decision below. She submitted that the tribunal had erred in determining the issue on the basis not of the individual claimant but on the class of accommodation at the University. The tribunal had failed to look at the claimant's dwelling individually. The tribunal had looked at the services overall and not as they related to this particular student. It was not claimed that the accommodation of every student who rented from the University was exempt. Only a small proportion had disabilities, the majority of these being dyslexia. There were only a handful of adapted properties within the University. The fact that these were integrated into the general accommodation, rather than contained in a separate unit of supported accommodation, was not fatal. Similarly, with the other support made available. The additional test proposed by the Secretary of State was wrong in law. Services made available, even if not actually called upon, might qualify, provided that there was real potential for the tenant to find them useful from time to time. "Support" related to the practicalities of everyday life, as opposed to the care package of physical support. The tribunal, although failing to address the correct issue, had not rejected the various items relied on as *de minimis.*

12. In his oral submission, Mr Komorowski identified the Secretary of State's position. He said that, while the tribunal's findings lacked detailed explanation of the position on the particular levels of support relied on, there was no submission as to whether the decision was erroneous in law. Rather, the Secretary of State made certain observations, including the particular further proposition to which I have already referred. Mr Komorowski agreed that it was necessary to look at the position of the individual claimant, rather than the general class of the accommodation. Advancing his further proposition, he referred to the position of a claimant letting accommodation from a private landlord yet still in receipt of the particular service said to form part of the "care, support or supervision" here relied on. Day-to-day

support, if it was dependent on the tenancy, could count; if it was not so dependent, and was provided whether or not the recipient was a tenant it could not count. The central question therefore was whether the claimant would be in receipt of the particular support if she was not a tenant. The exemption was based on the expectation that accommodation with these additional services would cost the provider more. A student who was a tenant of a private landlord should not be worse off. In relation to disposal of the appeal, support which would have been provided anyway even if the claimant was not a tenant, had to be disaggregated, and if the matter had to be remitted back to the tribunal, a direction to that effect should be given (in addition, perhaps, to direction on the other propositions established from the cases).

13. In her oral submission, following that of Mr Komorowski, Miss Taylor adopted his submissions but also addressed the question whether there was evidence of anything more than minimal support by the University, as opposed to the support provided by others. Appreciating that the list at 134 to 135 was said to be specific to the applicant, there had been no information as to how often it was used. It was available to all the University students. It had been understood that all adaptations were paid for by the local authority. It was unlikely that there was ongoing support by the University.

14. I allowed the appellant herself to add a few words. However, insofar as she went beyond what had been said on her behalf, she was in effect saying that certain items of adaptation, or maintenance of equipment, had been at the University's expense. This was clearly a matter which was in dispute and was not vouched by the documentary material, to which in the circumstances of this appeal I must limit myself.

Consideration

15. As I have indicated, this definition has given rise to quite extensive consideration in a number of Commissioner/Upper Tribunal decisions, mainly those of Judge Turnbull, giving rise to a number of propositions on the approach which requires to be followed. I summarise relevant propositions which I understand to have been established and not subjected to scrutiny or criticism by any higher court. These include propositions which I understand to have been accepted in this case. They arise out of the following cases (in no particular order):

R(H)2/07; R(H)7/07; R(H)4/09 (following on an interim decision, CH/779/2007); Salford v PF (2009) UKUT 150; DW v Oxford, 2012 UKUT 52; R(H)5/09; and CH/2805/07.

16. These propositions which I list and take as my starting point are:

"(i) "Support" must be more than *de minimis.*
(ii) "Support" must be more than, or different from, the ordinary property management functions of a landlord.
(iii) There must be a degree of continuity in the available support, which must in principle be capable of being seen as support continuing through the tenancy.
(iv) Support commissioned by, for example, the local authority and not the landlord is not support provided on behalf of the landlord.

(v) The landlord need not be under any contractual or statutory duty to provide the support, or to be the main support provider. It is necessary to consider the extent of services in reality available.

(vi) The same result need not apply to all the occupants at one location and it is necessary to consider the extent of real likelihood that the particular claimant would need the support.

(vii) The extent to which such support is available from elsewhere is relevant.

(viii) The support may include the availability to the tenant of services, for example, advice and assistance going beyond that which might ordinarily be provided by a landlord, even if that service is not actually used. However, there must be a realistic prospect of the particular claimant requiring such support on something more than an occasional basis.

(ix) The relevant period is the period between making the claim and the date of the local authority decision (in this case apparently 31 October 2011, i.e. within two months of the original application), but evidence of support provided or available before or after that period might provide evidence of the extent of relevant support during it.

17. Notwithstanding the tribunal's statement of its reasoning, which might appear to reflect a view that the items relied on as "support" in this case were no different from the ordinary property management functions of the University as landlord, the tribunal's acceptance of a document listing the support given to the claimant as accurate makes clear that it was arguable, at the very least that some of the eighteen items under the heading, "accommodation specific support", could amount to support within the definition, even if Mr Komorowski's proposition is accepted. The list refers to "adaptations and organising of adaptations", "liaison and organising equipment needs", "organisation of hoists", "storing of equipment when not in use, i.e. room kept available in non-term time at no extra cost", "electronic door fitting", "wet flooring", "provisions of additional heaters and permanent addition due to health-related problems", "disables (sic) alarm system". Mr Komorowski accepted, as is clear on the authorities, that the accommodation to be looked at is the "dwelling" leased by the claimant, with the result that a particular room, or in this case two rooms, tenanted by the claimant may involve the provision of support of a quite different order from that received by ordinary student tenants. I accept Ms Blain's submission that the tribunal has either looked simply at the overall provision of accommodation and seen it as nothing out of the ordinary and thus misdirected itself, or has simply not given adequate reasons for concluding that items such as these could not amount to relevant "support". For that reason, the tribunal's decision is erroneous in law and the matter requires to be considered further. I would add that I can see no explanation of the tribunal's finding that the accommodation had not been adapted for the appellant's needs, although, as I have indicated, there was no documentary evidence that the university did this at their own expense. Even on the basis of the tribunal's finding on the question of adaptation, they have really not considered the other areas of "support" claimed.

18. However, the slightly unusual nature of the case, arguably out of the range of what might at least popularly be referred to as "supported accommodation", does raise a more general issue which Mr Komorowski's further proposition addresses. The same document, accepted by the tribunal as accurate, goes on to list services provided by the University under two other headings, "disability services – support" and "finance support services", which generally are available to students whether or not they are tenants of university accommodation. Although there is some difficulty, to which Miss Taylor properly referred, as to the extent of vouching in the documentation as to the extent to which the appellant availed herself of these services, it was clearly represented that they had been made available to her and used to a certain extent, so that the question whether such matters could be accepted as relevant was a live issue in this case.

19. I have reached the view that Mr Komorowski's further proposition to the effect that the support must be provided by the landlord in the capacity of landlord to the tenant in the capacity of tenant is unsound.

20. Mr Komorowski acknowledged that his proposition does not feature in any of the authorities. As it seems to me, the "care, support or supervision" required is outside that provided by a landlord. That is the point of the provision, that some landlords (but only particular types of landlord, not ordinary private landlords) provide, to more than a minimal degree, support which they may not be contractually obliged to provide and which goes beyond that which they provide as landlords.

21. I see no problem in the example provided by Mr Komorowski of tenants who receive the same support from the landlord body which that body provides to non-tenants. A qualifying landlord, say for example a mental health or disability charity, should not be penalised just because it extends the support to non-tenants. I do not understand how that would affect the cost of providing the accommodation.

22. I appreciate that there might be no difference in fact between a purely private landlord providing additional support and a charity or other qualifying body providing the same support. Plainly, however, the provision restricts its application to particular qualifying bodies, presumably as a matter of policy, as it is not difficult to imagine the types of situation in which private landlords might seek to take advantage of this definition (perhaps in complete good faith, perhaps not). It should be remembered that the effect of the provision is not to enable landlords to make charges for support which may then be recoverable as housing benefit. It is rather to excuse such landlords from strict application of the "local housing allowance" rules. As I understand it, there is in the case of "vulnerable adults" some further protection under the rules applicable to "exempt accommodation".

23. It is evident from the principles which I listed above that claims of "exempt accommodation" do require to be scrutinised carefully. "Support", although a general word not further defined in the regulations, does I think require to be given a meaning limited by the context. As indicated above, it is support in the practicalities of every-day living and not more particular forms of support, for example educational support. However, to limit it to support given by a landlord in his capacity as landlord in my opinion goes too far. I am fortified in this view by a consideration of the types of support referred to in some of the cases. I give one example, in the consideration by Judge Turnbull, in the Salford case, at paragraphs 76 to 84. Some of the claimants in that case were "also assisted with other matters, and in particular the refugees were helped with problems arising from their lack of English and their unfamiliarity with the culture". He summarises such support and that given to a tenant with alcohol problems, a tenant who had been homeless and sleeping rough, and so on. In the particular case, such support may only have arisen when the tenancy was taken, but it seems to me to provide examples of support which might be given by a qualifying body to persons other than their own tenants. That does not mean that it is not support which they have actually provided to their tenants.

24. Accordingly, in my opinion, the more general forms of assistance than "accommodation specific support" may also be considered, and should have been considered, in relation to this particular claimant, in this case. Such consideration of course required to follow the principles indicated above. I approach the further consideration of disposal of this appeal on that basis.

Disposal of present appeal

25. Having held the tribunal's decision erroneous in law, I have to go on to consider how to dispose of this appeal. I have discretion to re-make the decision myself if I consider it expedient to do so. I did indicate in the Direction referred to above that I was of a mind to do so in the event of upholding the appeal. I did not understand any of the parties to suggest otherwise. I do appreciate that this course has some difficulty, particularly perhaps because I accept that there is some force in Miss Taylor's submission that, while the extensive list of items claimed as support has been accepted as factually accurate, detail of the actual extent of assistance under the various headings, particularly ongoing through the tenancy is somewhat lacking. However, I bear two things particularly in mind: firstly, the delay which has taken place in this case, for understandable reasons, and the desirability of reaching a decision without undue delay; and secondly, the fact that the appeal is primarily based on the documentary evidence supplemented by submissions as to its relevance. I have therefore decided to re-make this decision myself.

26. In my judgement, this is a very particular case of support of a very disabled person. It is of course the position that, as such a disabled person, she receives an extensive care package at the expense of the local authority. That care does not qualify as "support" provided by the landlord. This does suggest a need to look carefully at the extent of what the University does additionally provide, beyond ordinary property management and beyond that care package, for the claimant.

27. The documentation provided by the claimant includes a record of what can only be described as impressive preliminary consideration by the University, along with the claimant and her parents, of her particular specialised accommodation requirements. It may not be possible to see these preliminary steps as ongoing support, but they are indicative of the degree of particular consideration actually required by and actually given to the appellant's particular needs. It seems to me that the University was going above and beyond its normal responsibilities as a landlord. When one comes to consider the list of "accommodation specific support", such as the items I refer to above, this in my opinion clearly includes items of support which can qualify even when one is careful to exclude ordinary landlord functions and steps taken in the landlord's, rather than the tenant's, interests. Even if adaptation is excluded, it is clear to me that the university required to give, and did give, ongoing additional accommodation support. Further, they maintained 24 hour "accommodation support" availability which, in the appellant's circumstances, there was a realistic prospect of her having to take advantage of. They treated the appellant as having particular additional ongoing accommodation requirements (separate from the appellant's physical care package), and provided services which met these.

28. There are then, additionally, the disability and finance support services. One can readily imagine that, in the case of a student without disability or other particular problems, such matters might only arise from time to time, if at all, and would normally be disregarded as minimal. Again, however, I do not find it difficult to accept that, in the case of the appellant, these advisory services were of substantial benefit. The vouching of various job descriptions in the Accommodation and Student Development and Support Services, including 'Student Money Adviser' and 'Disability Adviser', to my mind provides support for the claim that the appellant received ongoing guidance and assistance with a number of financial matters, going well beyond the landlord's ordinary functions. In reaching this view, I have excluded the extensive support given to the appellant in pursuing her housing benefit appeal. It is clear that this support went well beyond the area of housing benefit in the case of this severely disabled student. Accepting that the matter has not been canvassed in extensive oral evidence of the type encountered in some of the cases referred to, I conclude that there is in this case relevant "support" which is more than minimal.

29. I would add that I would have reached this view on the basis of the vouched "accommodation specific" support alone.

30. I hope it is clear that my decision that the accommodation in this case is "exempt accommodation" reflects the very considerable needs of this particular appellant. There is clearly no question of all, of any other university tenants (except possibly in a tiny handful of similar cases), qualifying for this exemption. I also point out that this decision does not involve excusing the rent charged by the University from appropriate scrutiny under the older rules, merely from the application of local housing allowance rates.

31. For all these reasons I have allowed this appeal and myself determined that the appellant's accommodation is "exempt accommodation".

(Signed)
J N WRIGHT QC
Judge of the Upper Tribunal
Date: 23 December 2014