

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: Douglas J May QC

Attendances:

For the Appellant: Mr Muir, Solicitor

For the First Respondent: Mr Lynch, Solicitor

For the Second Respondent: Mr Bartos, Advocate instructed by the Solicitor of the Office of the Solicitor to the Advocate General

The appeal against the decision of the First-tier Tribunal given at Ayr on 22 July 2010 is refused. It is dismissed.

REASONS FOR DECISION

1. The claimant has appealed against the decision of the tribunal which is recorded at page 435 of the bundle. It disallowed his appeal against the decision of the first respondent and found:

“The decision of the Respondent in relation to Housing Benefit issued on 24.10.07 is confirmed. The revision carried out on 31.1.08 is set aside.”

2. The claimant’s appeal against the decision of the first respondents had previously been before another tribunal on 30 May 2008. The decision of that tribunal had been set aside by my colleague Upper Tribunal Judge Gamble on 29 May 2009. His decision on that appeal is recorded at page 468.

3. The claimant’s grounds of appeal in the instant appeal are to be found at page 448. These grounds of appeal amongst other things sought to appeal upon the basis that the tribunal had failed to follow the directions set out by my colleague in his decision at paragraph 8 of his decision. It is apparent when the tribunal’s statement of reasons, which is recorded at pages 437 to 441, is read that the principal reason for this was that the first respondent’s position altered in that they no longer accepted that the housing benefit applied for fell to be decided under “the alternative regulation 13” referred to in paragraph 5 of the decision of my colleague in the appeal before him. In light of the claimant’s grounds of appeal I brought in the Secretary of State as a second respondent by virtue of my direction of 9 September 2011. The Secretary of State responded by a written submission recorded at pages 484 to 487. Mr Muir did not in his submission seek to dispute the content of that submission. I accept the Secretary of State’s submission and hold that the tribunal were entitled to entertain the first respondent’s argument on a different basis to that

argued by them before the Upper Tribunal judge. The tribunal would only have erred in law by failing to follow the directions given to them by the Upper Tribunal judges if they had held that the accommodation that the claimant was resident in was exempt accommodation for the purposes of determining eligible rent.

4. The provisions in relation to exempt accommodation and including its definition are set out in regulation 4 of the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006, set out at pages 64 to 66 of the bundle. The definition is in sub-paragraph (10) and is, for the purposes of the instant case, accommodation

“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;”

The claimant’s landlord in the instant appeal is a registered charity, though it should be noted that the objects of the charity are, as is pointed out by the tribunal, related to provision for women and not men. Mr Muir was not contending that the charity provided care for the claimant. His position was that it provided support and supervision.

5. It was not contended by Mr Muir that the claimant’s lease made provision for an obligation on the part of the landlord to provide support for supervision. He did not dispute the tribunal’s finding in fact:

“The leased premises comprise exclusive use of one furnished bedroom in a building containing 4 bedrooms and shared use of a sitting room, kitchen and toilets. The rent is £1,537.80 every 4 weeks according to the application and every calendar month according to the lease. It does not include any charges for personal care and support or other services. The lease imposes no obligation on the landlord to provide any services other than the usual responsibilities regarding insurance and repairs.”

It was however conceded by Mr Lynch that for the purposes of the definition of exempt accommodation it was not necessary for there to be a written contractual obligation contained within the lease for the provision of the support or supervision.

6. The difficulty for the claimant was related to the tribunal’s findings in respect of the provision of support and supervision.

7. The tribunal found in addition to the absence of any contractual provision for services that no such services were in fact provided. Having found that the claimant was the former owner of the property they also found:

“[SH] has no employees. Any assistance is provided by volunteers. Church members visit once, maybe twice, a week and talk about day to day things. Whether or not to attend is a matter for the individual. The residents do their own cooking, shopping and laundry and arrange the division of tasks among themselves. The residents are free to come and go as they please. No checks are carried out but anyone found in possession of illegal substances will have them confiscated and will be told to leave if the offence is repeated. Residents who wish to attend AA meetings do so on their own initiative and make their own arrangements. No such meetings are held in the premises or attended by the appellant. He sometimes has his meals with other residents and sometimes has them in his own room.”

They went on to say:

“16. Furthermore, I was not satisfied that the appellant actually required or was provided with the necessary support or supervision. What Mr [S] said in his letters about the appellant and [SH] was a repetition of what the appellant told him. The appellant was not prepared to explain to me the basis for his statement that he was unable to maintain an independent life and in urgent need of support and rehabilitation. It was not consistent with what I was told about the appellant’s activities or how he appeared. The claim that [SH] provides rehabilitation using the well known 12 step plan did not fit with what was said at the hearing. The appellant described obtaining indirect and informal support and encouragement from being around and talking to like minded residents in what should be a dry environment. I was given little information about the input provided by the volunteers and it appeared that what they provided to the appellant was minimal. He was under the misunderstanding that minimal support was enough whereas more an minimal support is required as specified in a number of authorities to the contrary including the Chorley case, a copy of which in included in the papers and was highlighted by the appellant. Mr [L] put to me that it was essentially a self help group which appeared to me a fair summary. It can not be said, in my view, that the other residents are providing support or supervision on behalf of [SH]. Nor is [SH] providing support in carrying out routine landlord obligations such as providing furniture and carrying out repairs. The appellant’s claim that he was required to live at [SH] under a court order was not vouched by any evidence and struck me as improbable and inconsistent with the appellant living elsewhere between leaving prison and taking up residence at [HF]. Overall, I was left with the impression that the most likely reason for the appellant’s resident at [HF] was his connection to the property.”

Mr Muir was unable to demonstrate to me that the tribunal made any error in law in its assessment of the evidence and the findings in fact which it made and in particular those in paragraphs 13 and 16. Whether support or supervision was provided was essentially a jury question for the tribunal. The tribunal have indicated that they were on the reasoned view of the evidence by them unable to make specific and direct findings of support and supervision. The conclusion they reached in the last sentence of paragraph 16 seems to me to be a reasonable judgement. Without the necessary findings in fact as to support and supervision the claimant's contention that the accommodation was exempt cannot on any view succeed. Accordingly in these circumstances I am satisfied that the appeal must fail.

8. The principal issue that the claimant advanced before me was related to the tribunal's acceptance of the first respondent's written submission set out at pages 280 to 287. It was put as follows by the tribunal in paragraph 15:

"15. It was the respondent's position that the appellant's accommodation was not exempt. This was also the basis of their original decision albeit at that time the question of potential exemption had not been raised. In order to attract the benefit of the alternative regulation 13 of the HB Regulations, [SH] or a person acting on its behalf requires to provide the claimant with care, support or supervision. It is undisputed that no care was provided. I agree with the respondent's submission that [SH] is not authorised to provide support. As [SH] is not registered with the Care Commission, they can not provide a support service as defined in the Regulation of Care (Scotland) Act 2001. This means personal support provided to a person because of that person's vulnerability or need arising, among other things, by reason of the person being, or having been, affected by disability, illness or mental disorder or dependent on alcohol or drugs – s2(1)(a) & (2). It appears to me that the support and supervision purportedly provided by [SH] falls within that definition and, accordingly, can not be said to be provided by them or on their behalf because they lack the necessary registration."

9. It was Mr Muir's submission that there was no direct correlation between the definition in regulation 4(10) and the Regulation of Care (Scotland) Act 2001. Mr Lynch's position was that it is only care which was lawful which could be encompassed within the definition contained in regulation 4(10) and the fact set out in his written submission to the First-tier Tribunal –

"In the meantime it should be noted that [SS] has a conviction for a breach of Section 21(1)(a) of the Regulation of Care (Scotland) Act 2001 which relates to [HF], St Quivox; in relation to this matter she was fined £500 at the Sheriff Court, Ayr, on 2nd August 2005. [SH] has not registered with the Commission."

was accepted.

10. In my view the resolution of this dispute between the parties is of no moment given the tribunal's findings in paragraphs 13 and 16. As I have indicated above on these findings the claimant on any view cannot succeed. It seems clear that the landlords were not registered under the 2001 Act of the Scottish Parliament and that registration was in fact required. I am sympathetic to Mr Lynch's submission that it is implicit in the definition in regulation 4(10) that any care support or supervision provided has to be lawfully provided. Thus I am inclined to the view that an error in law on the grounds advanced by Mr Muir has not been established. However I emphasise that my view on this issue is not essential to my determination of the appeal standing my view that the tribunal's decision that the provision of services of the type referred to in paragraph 4(10) was not established and that this was a conclusion they were entitled to reach.

(Signed)
D J MAY QC
Judge of the Upper Tribunal
Date: 24 January 2012