IN THE UPPER TRIBUNAL **Case Nos. CH/2658/2015**
ADMINISTRATIVE APPEALS CHAMBER **CH/4674/2014**

Before: A Lloyd-Davies Judge of the Upper Tribunal

DECISIONS

I. In case CH/2658/2015 I decide that the decision of the tribunal held on 11 May 2015 involved the making of an error of law; I set that decision aside; and I give the decision the tribunal ought to have given, namely,

(a) that the appeal of the claimant ("DL") should be dismissed; and

(b) that the decision of the local authority notified to DL on 22 December 2014 (under which decision DL's eligible rent for the purposes of housing benefit was reduced by 14%) should be upheld.

II. In case CH/4674/2014 I decide that the decision of the tribunal held on 12 August 2014 involved the making of an error of law; I set that decision aside; and I give the decision that the tribunal ought to have given, namely,

(a) that the appeal of the claimant ("RR") should be dismissed; and

(b) that the decision of the local authority made on 5 March 2013 (under which decision RR's eligible rent for the purposes of housing benefit was reduced by 14%) should be upheld.

REASONS

Introduction

1. Since the principal issue in each of these two cases is the same, I decide them together to avoid unnecessary duplication. I deal first with the appeal in CH/2658/2015 and then with the appeal in CH/4674/2014: I recognise that this is in reverse chronological order, but CH/4674/2014 raises an additional subsidiary issue which does not arise in CH/2658/2015. The Secretary of State for Work and Pensions requested an oral hearing of these appeals; I consider that such a hearing would serve no useful purpose since it is conceded on behalf of each claimant that the Secretary of State's appeal must be allowed. (Although each was given the opportunity to do so, neither local authority involved has made any submissions.)

The appeal in CH/2658/2015

2. DL (together with his wife) was living in social sector rented accommodation and was in receipt of housing benefit ("HB"). Originally the local authority decided that DL and his wife were under-occupying their accommodation by two bedrooms and that the eligible rent for the purposes of regulation B13 of the HB Regulations 2006 should be reduced by 25%.

The claimant appealed that decision on the grounds, first, that one bedroom was needed for an overnight carer for the claimant and, secondly, that the claimant and his wife could not share a bedroom because of the claimant's disabilities. The local authority accepted the first ground of appeal, but substituted a decision (notified on 22 December 2014) reducing DL's eligible rent by 14% on the grounds there was no provision in the HB legislation relating to under-occupation which could allow members of a couple entitlement to two bedrooms, as opposed to one, notwithstanding that disability might prevent the couple from sharing a bedroom. Following this substituted decision the claimant's first appeal lapsed, but the appeal was renewed against the substituted decision. The tribunal found that the substituted decision unlawfully discriminated against DL on the grounds of his disability and allowed his appeal, with the result that there was to be no reduction in his eligible rent for HB purposes.

3. The Secretary of State for Work and Pensions applied to the First-tier Tribunal for permission to appeal, which was refused. That application was renewed to the Upper Tribunal (AAC), but was stayed pending a decision of the Supreme Court. The Supreme Court's decision - R (Carmichael & Anor) v SSWP [2016] UKSC 58 – was given in November 2016. In that decision, which was given on appeal in judicial review proceedings brought by a number of claimants including a Mrs Carmichael, one of the matters decided by the Supreme Court was that the provisions in regulation B13 relating to under-occupation for the purposes of HB discriminated against a member of a couple (such as Mrs Carmichael) who could not share a bedroom because of disability, if there was a transparent medical need for an additional bedroom. I shall refer to that decision of the Supreme Court as "Carmichael SC".

4. In January 2017 I lifted the stay imposed in this appeal and granted the Secretary of State permission to appeal: I remarked that, although the claimant might eventually be successful, it was not clear that the tribunal had found that the claimant had established a "transparent medical need" for an additional bedroom (see Carmichael SC at [42]).

5. On 2 March 2017 the Secretary of State for Work and Pensions laid before Parliament The Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017 which took effect from 1 April 2017. These Regulations were the legislative answer to the decision of the Supreme Court in Carmichael SC. It is to be noted, however, that these Regulations were not backdated; and affected claimants, in respect of any period prior to 1 April 2017, had to rely on pre-existing remedies.

6. One of those affected claimants was Mrs Carmichael's husband, Mr Carmichael, who was the HB claimant for the couple. In parallel to the judicial proceedings brought by Mrs Carmichael (which were finally resolved in Carmichael SC), Mr Carmichael appealed to the First-tier Tribunal against a decision by the local authority that the eligible rent for the accommodation occupied by Mr and Mrs Carmichael should be reduced by 14%. The First-tier Tribunal allowed the appeal and directed that there should be no deduction. The Secretary of State for Work and Pensions appealed to the Upper Tribunal, which stayed the appeal pending the decision in Carmichael SC. That stay was lifted in January 2017 and the appeal was decided in April 2017. The Upper Tribunal (sitting in a panel of three judges) allowed the Secretary of State's appeal on the grounds that the First-tier Tribunal had impermissibly added in words into regulation B13. This did not, however, avail the Secretary of State since the Upper Tribunal substituted its own decision to the effect (i) that Mr Carmichael's appeal was allowed, (ii) that his housing benefit entitlement was to be

recalculated without making the under-occupancy deduction of 14%; and (iii) that the Upper Tribunal had so directed because if the deduction were applied there would be a clear breach of Mr (or Mrs) Carmichael's Convention rights, contrary to section 6(1) of the Human Rights Act 1998. The decision is to be found at SSWP v. Carmichael & Anor [2017] UKUT 174 (AAC): I shall refer to it as "Carmichael UT".

7. The Secretary of State for Work and Pensions applied for permission to appeal the Upper Tribunal decision, which permission was granted by Davis LJ. Following that grant of permission the Upper Tribunal, on 28 July 2017, reimposed a stay in this case (and in about 130 English and Welsh Carmichael "lookalike" cases, about 25 Scottish such cases being separately sisted) to await the decision of the Court of Appeal in Mr Carmichael's case.

8. The Court of Appeal (Sir Brian Leveson PQBD, Flaux LJ and Leggatt LJ) handed down judgments on 20 March 2018: the case is to be found at SSWP v Carmichael and Anor [2018] EWCA Civ 548. I shall refer to this decision as "Carmichael CA". The Court of Appeal held:

(a) by a majority (Sir Brian Leveson PQBD and Flaux LJ, Leggatt LJ dissenting), that the Upper Tribunal did not have the power to direct as it did since that would amount to an impermissible rewording of the HB legislation and that any remedy was to be found in an action under section 8(2) of the Human Rights Act 1998; and

(b) *per* Leggatt LJ, that the Upper Tribunal had erred in not taking into account the Discretionary Housing Payments ("DHPs") that Mr Carmichael had received.

An application was made on behalf of Mr Carmichael to the Court of Appeal for permission to appeal to the Supreme Court; this was refused; the application was not renewed to the Supreme Court.

9. As a result of the decision in Carmichael CA I lifted the previous stay in this case and directed submissions. I indicated that I considered that I was bound by Carmichael CA. I asked for confirmation that DL had not been in receipt of DHPs since the decision of 22 December 2014. I received that confirmation. DL's representative conceded that the appeal had to be allowed.

10. In my judgment the appeal in DL's case is on all fours with that of Mr Carmichael in Carmichael CA and, accordingly, I must follow the findings of the majority in Carmichael CA and allow the appeal of the Secretary of State. The secondary ground of the decision in Carmichael CA relating to DHPs does not arise in DL's case. I therefore give the decision set out at Decision I above.

11. (For the sake of completeness I add that, after I directed submissions in this case, another division of the Court of Appeal (Sir Terence Etherton MR, Sharpe LJ and Leggatt LJ) has distinguished the decision in Carmichael CA: see JT v First-tier Tribunal [2018] EWCA Civ.1735. In that case the Court of Appeal unanimously held that Carmichael CA did not prevent the disapplication (as opposed to the rewriting) of certain words in the Criminal Injuries Compensation Scheme on the grounds that they were incompatible with JT's

Convention rights. The point of distinction does not arise in the present case. Accordingly I did not feel it necessary to invite further submissions on JT before giving this decision.)

The appeal in CH/4674/2014

12. The claimant ("RR") together with his severely disabled partner was living in social sector rented accommodation and was in receipt of HB. By a decision dated 5 March 2013 his local authority decided that RR and his partner were under-occupying the accommodation by one bedroom and that the eligible rent for purposes of regulation B13 of the HB Regulations 2006 should be reduced by 14%. The First-tier Tribunal allowed RR's appeal: although the tribunal dismissed a submission that each of the bedrooms was too small to be treated as a bedroom, it found that RR and his partner needed separate bedrooms because of her disabilities, that there was indirect discrimination and that the HB legislation had to be read as if RR and his partner were allowed a bedroom each. The tribunal accordingly directed that there should be no reduction in the eligible rent for the purposes of HB.

13. The Secretary of State for Work and Pensions applied for permission to appeal which was refused by the First-tier Tribunal. That application was renewed to the Upper Tribunal in September 2014. The application was stayed pending the decision in Carmichael SC. The application for permission to appeal remained stayed until after the decision in Carmichael CA (the intervening procedural history essentially is the same as I have described in CH/2658/2015). On 4 May 2018, following the decision in Carmichael CA, I lifted the previous stay dated 28 July 2017 and granted the Secretary of State for Work and Pensions permission to appeal. I directed submissions. Following receipt of those submissions, in which RR's representative conceded that the appeal of the Secretary of State had to be allowed in the light of Carmichael CA, I directed further submissions since it appeared that RR had for a period been in receipt of DHPs. RR's representative confirmed that RR had received DHPs for the period 1 April 2013 to 5 October 2014.

14. As in CH/2658/2015 I am clearly bound by the reasoning of the majority of the Court of Appeals in Carmichael CA. This case is clearly on all fours with that of Mr Carmichael and cannot be distinguished. I accordingly give the decision set out in Decision II above.

15. There is, however, one distinguishing feature between this case and CH/2658/2015. As mentioned above RR was in receipt of DHPs for a period of about 18 months. In Carmichael CA Leggatt LJ, although dissenting from the reasoning of the majority on the primary issue, would have allowed the appeal on the grounds that the decision in Carmichael UT did not take account of the DHPs that Mr Carmichael had received and that Mr Carmichael should not be allowed to receive double provision - see Carmichael CA at paragraphs [101] to [106]. This factor also was taken into account by Flaux LJ – see paragraphs [49] and [67] of Carmichael CA.

16. DHPs, as their name suggests, are payable at the discretion of the local authority concerned. Questions relating to their payment, non-payment or recovery do not fall within the statutory jurisdiction of the First-tier Tribunal or Upper Tribunal but can only be decided in judicial review proceedings. The details of the DHP regime are set out in the Discretionary Financial Assistance Regulations 2001. The existence of those Regulations and, in particular, regulation 8 (relating to the review and recovery of DHPs) was drawn to the attention of the

parties by the panel during the course of the hearing of Carmichael UT (I was a member of the panel in the case). Written submissions on the question of double payment were invited after that hearing: no such submissions were received. RR's Counsel, Mr Drabble QC, (who represented Mr Carmichael before the Court of Appeal) stated in his submission that regulation 8 was drawn to the attention of the Court of Appeal during the hearing of Carmichael CA, but that no submissions were made on behalf of Mr Carmichael on the meaning and availability of regulation 8. That regulation was not referred to in any of the judgments of the Court of Appeal in Carmichael CA.

17. In the circumstances described in the preceding paragraph I consider that it might be of assistance if I make the following observations on regulation 8 of the 2001 Regulations, not least because they might go some way to assuaging the concerns that Leggatt LJ expressed about double payment. Regulation 8 of the 2001 Regulations provides:

> " 8. (1) A relevant authority may review any decision it has made with respect to the making, cancellation or recovery of discretionary housing payments in such circumstances as it thinks fit.
>
> (2) Without prejudice to the generality of paragraph (1) above, a relevant authority may, on any such review, cancel the making of further such payments and recover a payment already made, where that authority has determined that:
>
> (a) whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, a material fact and as a consequence of that misrepresentation or failure to disclose, a payment has been made; or
>
> (b) an error has been made when determining the application for a payment and as a consequence of that error a payment had been made which would not have been made but for that error."

It seems to me eminently arguable that if Leggatt LJ's primary conclusion was correct and the Upper Tribunal in Carmichael UT had power to direct as it did, then the problem of double payment could have been met as follows:

(a) Although no error was made at the time any DHP was made, such payment was subsequently shown to have been made in error following the decision of the Upper Tribunal (a superior court of record).

(b) A superior court's decision on an error of law states the law as it always has been.

(c) Although any decision made on DHPs may not have been made in error at the time it was made, it is shown to have been made in error by the subsequent decision of the superior court.

(d) The local authority therefore had a right of recovery under regulation 8(2)(b).

(e) Any entitlement to mainstream HB found to be payable as a result of the decision of the superior court could be offset against the otherwise recoverable DHPs previously paid.

Further matters

18. The representatives for both claimants (which representatives also represented Mr Carmichael) have indicated that they wish to apply for a "leap-frog" certificate in the inevitable event of the decisions I have made going against the claimants. The representatives refer to section 12 of the Administration of Justice Act 1969. That is not the relevant legislation. The relevant provisions are to be found in sections 14A-14C of TCEA 2007. I further point out that the time limits for making an application for any such certificate are set out in The Supreme Court Practice Direction 3 at paragraph 3.6.2 and not in any tribunal procedure rules: accordingly I do not have power to extend the time limit for making any such application. So far as I am aware no application for a "leap-frog" certificate has been made in any chamber of the Upper Tribunal since the jurisdiction to grant such a certificate was introduced in August 2016. In these circumstances, if a timeous application for a certificate is made, I should be willing to consider holding an oral hearing of the application if any party requests one.

(Signed on the Original)

A Lloyd-Davies
Judge of the Upper Tribunal

Dated: 28 August 2018