IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CH/3082/2016
CH/3083/2016
CH/462/2017
CH/463/2017

Before Upper Tribunal Judge Rowland

Mr Desmond Rutledge, instructed by South West London Law Centres, appeared on behalf of the claimants.

Mr Dominic Carr appeared on behalf of the London Borough of Bromley.

Ms Julia Smyth of counsel, instructed by the Government Legal Department, appeared on behalf of the Secretary of State for Work and Pensions

Decisions: On files CH/3082/2016 and CH/3083/2016, I am satisfied that the First-tier Tribunal erred in law in striking out on 23 November 2015 part of the claimants' appeals to the First-tier Tribunal on the ground that it did not have jurisdiction, but I do not set aside its decisions.

On file CH/462/2017, I set aside the decision of the First-tier Tribunal dated 23 November 2015 dismissing the claimant's appeal against a decision of the London Borough of Bromley to the effect he was entitled to housing benefit from 8 September 2014 on the basis that the "maximum rent" in his case was £81.03 pw. I substitute a decision to the effect he was entitled to housing benefit from 8 September 2014 on the basis that the "maximum rent" in his case was £154.83 pw.

On file CH/463/2017, I set aside the decision of the First-tier Tribunal dated 23 November 2015 dismissing the claimant's appeal against a decision of the London Borough of Bromley to the effect she was entitled to housing benefit from 11 May 2015 on the basis that the "maximum rent" in her case was £81.03 pw. I substitute a decision to the effect she was entitled to housing benefit from 11 May 2015 on the basis that the "maximum rent" in her case was £161.02 pw.

REASONS FOR DECISIONS

1. These are appeals, brought by two claimants with my permission, against four decisions of the First-tier Tribunal dated 23 November 2015. By two of the decisions, one in respect of each claimant, the First-tier Tribunal struck out appeals on the ground that it had no jurisdiction to hear the cases. By the other two decisions, the First-tier Tribunal dismissed appeals brought by the claimants against decisions of the local authority to the effect that, from 8 September 2014 in one case and 11 May 2015 in the other case, they were each entitled to housing benefit calculated by reference to a local housing allowance applicable to "one bedroom shared accommodation".

2. The underlying facts of the cases are not in dispute. The claimants are married to each other and I will refer to them as "the husband" and "the wife". They have lived in a three-bedroom furnished house, under what was originally an assured shorthold tenancy and subsequently became a statutory periodic tenancy, since 2004. They had been intending to purchase a property with the proceeds of sale of their former matrimonial home in New Zealand but the husband was made redundant and this proved impossible. The wife then suffered a mental breakdown which led to the breakdown of their marriage and they separated in the summer of 2005. However, as the property was big enough, they continued to live in it under the terms of a written agreement dated 1 July 2005. They also remained married.

3. The agreement, headed "Agreement for the living arrangements at [the address] following our separation", was signed by both the husband and wife and their signatures were witnessed. It committed them to continue living in the property until 12 November 2005 (when the current annual tenancy ended) and, in clause 3, provided for the husband to "take over the lease" when the wife "withdraws" from it and vacated the property. It also provided for the wife to give a month's notice of such withdrawal and vacation. There were then terms in clauses 4 to 6 for the splitting in equal shares of certain costs, including the "lease rental", and the maintenance of a joint bank account to meet those costs. Clauses 7 to 14 provided –

> "7. The parties agree that this Agreement does not cover the split of other matrimonial assets.
>
> 8. The parties agree that even in separation they will remain legally married on religious grounds ….
>
> 9. The parties agree to be polite and civil to one another.
>
> 10. The parties agree to respect the privacy of one another and the terms in clauses 11 – 13 are aimed at facilitating the degree of separation needed given the marital status of the parties.
>
> 11. The parties agree that [the wife] will have exclusive use of the 2nd floor bedroom and shower room and the ground floor family room, unless she grants [the husband] access for a specific purpose such as to undertake maintenance work.
>
> 12. The parties agree that [the husband] will have exclusive use of the 1st floor master bedroom and bathroom and the ground floor lounge and office, unless he grants [the wife] access for a valid specific purpose.
>
> 13. The parties agree to develop and adhere to a timetable for the separate use of the kitchen.
>
> 14. If either party fails to comply with clauses 3 – 6 and 9 – 13, the other party may immediately withdraw from their lease obligations without notice."

I am not entirely sure whether the "third" bedroom was a room on the second floor described elsewhere as being used for storage or was the "office" on the ground floor or was another, unmentioned, bedroom on the first floor. It appears to have been used, at least latterly, by the claimants' grandson when they were child-minding him

but nothing appears now to turn on the use of that room or, indeed, on its existence if it was not one of the rooms mentioned in the agreement.

4. For nearly a decade, the claimants lived on the proceeds of sale of the former matrimonial home, supplemented, at least at first, by the husband's occasional earnings. Although it appears originally to have been anticipated that the wife would move out at some stage, her condition worsened and she stayed put. Until 2010, the claimants' daughter lived nearby and she was the principal carer for the wife, but she and her family then moved and the husband became his wife's full-time carer. By June 2014, the proceeds of sale of the former matrimonial home were becoming exhausted and both claimants sought advice and then made claims for income-related benefits. The wife also claimed personal independence payment. Despite her illness, it seems that she had not been in receipt of either disability living allowance or personal independence payment until then. On "mandatory reconsideration" of initial refusals of jobseeker's allowance and employment and support allowance, the Secretary of State accepted that the claimants were not "a couple". The husband was awarded income-based jobseeker's allowance and the wife was awarded income-related employment and support allowance. The wife was also awarded the enhanced rate of the daily living component of personal independence payment.

5. The claimants' claims for housing benefit were received by the local authority on 13 June 2014. At the time of the claims, the rent for the house was £1,525 pcm. On 13 January 2015, the local authority awarded each of them £175.96 pw from 9 June 2014 to 7 September 2014 and £81.03 pw from 8 September 2014. This was on the basis that they were entitled to "13 week protection" and thereafter were entitled to housing benefit calculated by reference to the local housing allowance applicable to "one bedroom shared accommodation" by virtue of regulations 12D, 13C and 13D of the Housing Benefit Regulations 2006 (SI 2006/213).

6. The claimants appealed, arguing that, after the "protection" ended, they were entitled to housing benefit of £154.83 pw, calculated by reference to a local housing allowance applicable to "one bedroom self-contained accommodation", and that protection should have been afforded from 2 June 2014 to 13 April 2015 (i.e., until three months after the local authority's decision to award housing benefit). The local authority decided to treat each claimant as having submitted two appeals, one against the decision to limit the "protection" to 13 weeks, which it referred to the First-tier Tribunal as being "out of jurisdiction", and one in respect of the rate of payment thereafter. On 14 April 2015, it revised its decision in respect of the wife on the ground that, because her applicable amount included a severe disability premium, she was entitled to housing benefit calculated by reference to a local housing allowance applicable to "one bedroom self-contained accommodation" from 8 September 2014. From 1 April 2015, the rate had increased to £161.02 pw. The local authority accordingly, treated her appeal as having lapsed in accordance with paragraph 3(6) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 because the exception in regulation 17(1) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002) did not apply. The local authority therefore considered that there was only one valid appeal before the First-tier Tribunal.

7. However, the revised decision in respect of the wife was then superseded on 22 May 2015 and it was decided that she was entitled to housing benefit calculated by reference to a local housing allowance applicable to "one bedroom shared accommodation" from 11 May 2015, because the husband had been awarded carer's allowance in respect of her and so she was no longer entitled to include the severe disability premium in her applicable amount. Following a case management hearing before the First-tier Tribunal, the wife lodged an appeal against the decision of 22 May 2015. Although it was late, it was admitted and eventually all four cases came before the First-tier Tribunal on 23 November 2015. By then, it appears, the husband had been appointed to act on behalf of the wife.

8. The First-tier Tribunal accepted the local authority's submission that it did not have jurisdiction in two of the cases and struck them out. It dismissed the appeals in the other two cases. Having been sent a statement of reasons on 1 March 2016, the claimants asked for an extension of time for appealing on the ground of the husband's ill heath but that was refused in respect of the wife's cases on 30 August 2016. It does not appear that a decision was made in respect of his own cases. The claimants then applied to the Upper Tribunal for permission to appeal. After some confusion arising out of the existence of four files and their reference numbers, I issued case management directions on 14 February 2017, indicating that I was minded to admit all four applications for permission to appeal and to give permission, although I regarded the appeals against the strike-out decisions as raising only an academic point. I also gave the Secretary of State an opportunity to be joined as a party. The local authority did not oppose the admitting of the appeals and the granting of permission to appeal and the Secretary of State indicated that he wished to be joined if permission were given. Accordingly, I admitted the applications, gave permission to appeal and joined the Secretary of State as a party in all four cases.

The legislation

9. Section 130(1) and (3) of the Social Security Contributions and Benefits Act 1992 provides –

> "**130.**—(1) A person is entitled to housing benefit if–
>
> (a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home;
>
> (b) there is an appropriate maximum housing benefit in his case; and
>
> (c) either–
>
> (i) he has no income or his income does not exceed the applicable amount; or
>
> (ii) his income exceeds that amount, but only by so much that there is an amount remaining if the deduction for which subsection (3)(b) below provides is made.
>
> …
>
> (3) Where a person is entitled to housing benefit, then–
>
> (a) if he has no income or his income does not exceed the applicable amount the amount of the housing benefit shall be the amount which is the appropriate maximum housing benefit in his case; and
>
> (b) if his income exceeds the applicable amount, the amount of the housing benefit shall be what remains after the deduction from the appropriate maximum housing benefit of prescribed percentages of the excess of his income over the applicable amount."

In this case, it appears that the claimants' income did not exceed their applicable amounts and so they were entitled to housing benefit amounting to the appropriate maximum housing benefit.

10. The Act provides broad powers to make Regulations. In addition, sections 134(2) and 136(1) have the effect that, generally, only one member of a family may be entitled to housing benefit and any capital or income of other members of a claimant's family are treated as the claimant's. By section 137(1) -

> "'dwelling' means any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises".

A "family" is defined as a couple, or a couple and any child or other person (*i.e.*, by virtue of regulation 19 of the 2006 Regulations, a "young person") for whom they are, or one of them is, responsible and who is a member of the same household, or a person who is not a member of a couple and any child or person for whom he or she is responsible and who is a member of the same household. The term "couple" is defined both in section 137(1) and in regulation 2(1) of the 2006 Regulations. The definitions are the same, save that the last five words of the definition in the Act are omitted in the Regulations. Arguably, the definition in the Regulations is unnecessary but, in any event, the definition in the Act is –

> "'couple' means–
> (a) a man and woman who are married to, or civil partners of, each other and are members of the same household;
> (b) a man and woman who are not married to, or civil partners of, each other but are living together as husband and wife otherwise than in prescribed circumstances"

The word "household" is not defined, but it is generally taken to be the collective term for those who live together, or with each other. A "household" may therefore include people who are not members of the "family". It may be observed that it is possible for a man and woman who are not married to, or civil partners of, each other to live in the same household but not be a "couple", provided they are not living together "as husband and wife". However, it is not possible for a man and woman who are married to, or civil partners of, each other to live in in the same household without being a "couple". Therefore, the Secretary of State's acceptance that the claimants in these cases were not a "couple" implied an acceptance that they were not members of the same household.

11. Regulation 12(1) of the 2006 Regulations specifies those types of "periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home" in respect of which housing benefit may be payable, including –

> "(a) payments of, or by way of, rent;
> (b) payments in respect of a licence or permission to occupy the dwelling;
> (c) payments by way of mesne profits or, in Scotland, violent profits;

> (d) payments in respect of, or in consequence of, use and occupation of the dwelling;
> …"

Thus, they include "rent" in its strict sense but also payments in respect of a licence or even a trespass.

12. By regulation 70, the amount of a person's appropriate housing benefit in any week is his or her "eligible rent" less any deductions in respect of "non-dependants". The deductions represent an amount that the non-dependent might be expected to contribute to the rent and take into account whether the non-dependant is in remunerative work and, if so, the amount of his or her earnings.

13. A "non-dependant" is defined in regulation 3 as "any person, except someone to whom paragraph (2) applies, who normally resides with a claimant or with whom a claimant normally resides". Paragraph (2) excludes members of the claimant's "family", certain co-owners, certain people liable to make payments to the claimant or to whom the claimant is liable to make payments in respect of the occupation of the dwelling and certain carers and, most materially, any person who "is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling".

14. Regulation 11(1) introduces the provisions for determining a person's "eligible rent". It provides –

> "**11.**—(1) Subject to the following provisions of this regulation, housing benefit shall be payable in respect of the payments specified in regulation 12(1) (rent) and a claimant's maximum housing benefit shall be calculated under Part 8 (amount of benefit) by reference to the amount of his eligible rent determined in accordance with–
> (a) regulation 12B (eligible rent);
> (ab) regulations 12BA (eligible rent and maximum rent (social sector)); A13 (when a maximum rent (social sector) is to be determined and B13 (determination of a maximum rent (social sector));
> (b) regulations 12C (eligible rent and maximum rent), 13 (maximum rent), 13ZA (protection on death and 13 week protection) and 13ZB (change in reckonable rent);
> (c) regulations 12D (eligible rent and maximum rent (LHA)), 13C (when a maximum rent (LHA) is to be determined) and 13D (determination of a maximum rent (LHA)); or
> (d) regulations 12 (rent) and 13 (restrictions on unreasonable payments) as set out in paragraph 5 of Schedule 3 to the Consequential Provisions Regulations,
> whichever is applicable in his case."

15. Regulation 12B provides –

> **12B.**—(1) The amount of a person's eligible rent shall be determined in accordance with the provisions of this regulation except where any of the following provisions applies–
> (a) regulations 12BA (eligible rent and maximum rent (social sector));
> (b) regulation 12C (eligible rent and maximum rent);

> (c) regulation 12D (eligible rent and maximum rent (LHA)) ;
> (d) paragraph 4 of Schedule 3 to the Consequential Provisions Regulations.
> (2) Subject to paragraphs (3), (4) and (6), the amount of a person's eligible rent shall be the aggregate of such payments specified in regulation 12(1) as that person is liable to pay less–
> (a) …;
> (b) …; and
> (c) ….
> (3) Where the payments specified in regulation 12(1) are payable in respect of accommodation which consists partly of residential accommodation and partly of other accommodation, only such proportion of those payments as is referable to the residential accommodation shall count as eligible rent for the purposes of these Regulations.
> (4) Where more than one person is liable to make payments in respect of a dwelling, the payments specified in regulation 12(1) shall be apportioned for the purpose of calculating the eligible rent for each such person having regard to all the circumstances, in particular, the number of such persons and the proportion of rent paid by each such person.
> (5) ….
> (6) In any case where it appears to the relevant authority that in the particular circumstances of that case the eligible rent as determined in accordance with the preceding paragraphs of this regulation is greater than it is reasonable to meet by way of housing benefit, the eligible rent shall be such lesser sum as seems to that authority to be an appropriate rent in that particular case.

The provisions in paragraphs (2)(a), (b) and (c) and (5) that I have omitted relate to the deduction of inclusive charges for water, sewerage and other services.

16. However, regulation 12B is only of indirect relevance in these cases, because regulation 12D applied instead. Under regulation 12D(1), it did so because, as is not in dispute, the local authority was required by regulation 13C(2)(a) to determine a "maximum rent (LHA)" in accordance with regulation 13D. The consequence was that, by virtue of regulation 12D(2), their "eligible rent" was the "maximum rent (LHA)" save that, because the claimants had previously been able to meet their financial commitments for the dwelling, they were first entitled to have their housing benefit assessed by reference to the "eligible rent determined in accordance with regulation 12B(2)" for 13 weeks by virtue of regulation 12D(5)(a) and (7)(b)(i). The length of that period is no longer in dispute and, indeed, had ceased to be in dispute before the First-tier Tribunal made its decisions. It is only the effect of regulation 13D that is in dispute.

17. As in force at the material time, regulation 13D provided –

> "**13D.**—(1) Subject to paragraph (3) to (11), the maximum rent (LHA) shall be the local housing allowance determined by the rent officer by virtue of article 4B(2A) or (4) of the Rent Officers Order which is applicable to–
> (a) the broad rental market area in which the dwelling to which the claim or award of housing benefit relates is situated at the relevant date; and
> (b) the category of dwelling which applies at the relevant date in accordance with paragraph (2).
> (2) The category of dwelling which applies is–
> (a) the category specified in paragraph 1(1)(a) of Schedule 3B to the Rent Officers Order (one bedroom shared accommodation) where–

(i) the claimant is a young individual who has no non-dependant residing with him and to whom paragraph 14 of Schedule 3 (severe disability premium) does not apply; or

(ii) paragraph (b) does not apply because neither sub-paragraph (b)(i) nor (ii) are satisfied in the claimant's case and neither the claimant nor his partner (where he has one) is a person to whom paragraph 14 of Schedule 3 (severe disability premium) applies, or to whom the circumstances in any of paragraphs (b) to (f) or (i) of the definition of young individual applies (certain care leavers);

(b) except where paragraph (a)(i) applies, the category specified in paragraph 1(1)(b) of Schedule 3B to the Rent Officers Order (one bedroom self-contained accommodation) where that applies in the claimant's case at the relevant date in accordance with the size criteria as set out in paragraph (3) and–

(i) the claimant (together with his partner where he has one) has the exclusive use of two or more rooms; or

(ii) the claimant (together with his partner where he has one) has the exclusive use of one room, a bathroom and toilet and a kitchen or facilities for cooking,

and in this sub-paragraph "room" means a bedroom or room suitable for living in except for a room which the claimant shares with any person other than a member of his household, a non-dependant of his, or a person who pays rent to him or his partner;

(c) in any other case, the category which corresponds with the number of bedrooms to which the claimant is entitled in accordance with paragraph (3) to (3B) up to a maximum of four bedrooms.

(3) The claimant shall be entitled to one bedroom for each of the following categories of occupier (and each occupier shall come within the first category only which applies to him) –

(a) a couple (within the meaning of Part 7 of the Act);
(b) a person who is not a child;
(ba) a child who cannot share a bedroom;
(c) two children of the same sex;
(d) two children who are less than 10 years old;
(e) a child.

but the claimant is only entitled to a bedroom in respect of a child who cannot share a bedroom if there is a bedroom in the dwelling occupied as the home that is additional to those to which the claimant would be entitled if the child were able to share a bedroom.

(3A) The claimant is entitled to one additional bedroom to any case where–

(a) the claimant or the claimant's partner is (or each of them is) a person who requires overnight care; or

(b) the claimant or the claimant's partner is (or each of the is) a qualifying parent or carer.

(3B) The claimant is entitled to two additional bedrooms where paragraph (3A)(a) and (b) both apply.

(4) The relevant authority shall determine–

(a) the cap rent (in accordance with the definition in paragraph (12)); and
(b) whether the cap rent exceeds the applicable local housing allowance.

(5) Where the applicable local housing allowance exceeds the cap rent, the maximum rent (LHA) shall be the cap rent.

(6) *revoked*
(7) *revoked*
(8) *revoked*
(9) *revoked*

(10) ….
(11) ….
(12) In this regulation–

'cap rent' means the aggregate of such payments specified in regulation 12(1) (rent) which the claimant is liable to pay, or is treated as liable to pay by virtue of regulation 8 (circumstances in which a person is treated as liable to make payments in respect of a dwelling), subject to regulation 12B(3) (mixed use accommodation), (4) (more than one person liable to make payments) and (6) (discretion in relation to eligible rent);

'occupiers' means –

(a) the persons whom the authority is satisfied occupy as their home the dwelling to which the claim or award relates except for any joint tenant who is not a member of the claimant's household; and
(b) …

…"

18. Paragraph 1(1) of Schedule 3B to the Rent Officers (Housing Benefit Functions) Order 1997 (SI 1987/1994), which specifies the categories of dwelling to which regulation 13D(2) of the 2006 Regulations refers, provides –

"**1.**—(1) The categories of dwelling for which a rent officer is required to determine a local housing allowance in accordance with article 4B(2A)(a) are–

(a) a dwelling where the tenant has the exclusive use of only one bedroom and where the tenancy provides for him to share the use of one or more of–
  (i) a kitchen;
  (ii) a bathroom;
  (iii) a toilet; or
  (iv) a room suitable for living in;
(b) a dwelling where the tenant (together with his partner where he has one) has the exclusive use of only one bedroom and exclusive use of a kitchen, a bathroom, a toilet and a room suitable for living in;
(c) a dwelling where the tenant has the use of only two bedrooms;
(d) a dwelling where the tenant has the use of only three bedrooms;
(e) a dwelling where the tenant has the use of only four bedrooms."

19. The local housing allowances determined under that paragraph by the rent officer for the broad rental market area where the claimants lived were, in September 2014 –

Subparagraph (a)	£81.03 pw
Subparagraph (b)	£154.83 pw
Subparagraph (c)	£196.15 pw
Subparagraph (d)	£233.08 pw
Subparagraph (e)	£309.67 pw

The parties' submissions and the First-tier Tribunal's decision on the main issue

20. The key issue in these cases is whether regulation 13D(2)(b) of the 2006 Regulations applied to the claimants, from 8 September 2014 in the husband's case and from 11 May 2015 in the wife's case. The claimants argued before the First-tier Tribunal that their cases fell within regulation 13D(2)(b)(i) because, under their agreement, each had exclusive possession of two rooms: a bedroom and a "room

suitable for living in". The local authority replied that that could not be so because the house was let to the claimants as joint tenants and it relied on the decisions of the Upper Tribunal in *AA v Chesterfield Borough Council (HB)* [2011] UKUT 156 (AAC) and on file CH/2483/2012.

21. In its statement of reasons for its decision, the First-tier Tribunal set out the facts and arguments and then said –

> "7. It seemed inherently unlikely that their respective use of their designated rooms was wholly exclusive, as [the husband] claimed carers' allowance as the carer for [the wife]. This meant that he must be providing a minimum of 35 hours care to her each week. …"

Having considered the *Chesterfield* case, the First-tier Tribunal continued –

> "12. The agreement between [the claimants] established between them the way in which they would use the property, but this did not override the tenancy agreement. That agreement let the whole property to both as joint tenants, which meant they both had use of the whole property, even if they had reached an agreement between themselves as to how they would use the property from day to day, after their relationship broke down."

22. When I indicated that I was minded to give permission to appeal, I said–

> "12. It currently seems to me that the First-tier Tribunal erred in paragraph 7 of its statement of reasons in suggesting that [the husband's] entitlement to carer's allowance had a bearing on whether [the wife] had exclusive use of her part of their house. It might have had a bearing on the question of whether the claimants were in fact living in separate households but, once it was accepted that they were doing so, the fact that he was a carer seems to me to have been irrelevant. As held in the *Chesterfield* case, "exclusive use" is concerned with the *legal right* to exclude someone and a person does not cease to have exclusive use of premises merely because he or she regularly invites someone in."

I also made some observations on the *Chesterfield* case and drew attention to *JS v Secretary of State for Work and Pensions and Cheshire West and Chester Borough Council (HB)* [2014] UKUT 36 (AAC); [2014] AACR 26, in which the *Chesterfield* case had been considered and followed.

23. In their written responses to the appeals, both the Secretary of State and the local authority submitted that the First-tier Tribunal did not err in law in paragraph 7 of its statement of reasons. The Secretary of State submitted that the First-tier Tribunal "was entitled to consider this factor" and both Respondents submitted that the First-tier Tribunal did not actually rely upon it but instead founded its decision on what was said in the *Chesterfield* case. I am content to accept that the First-tier Tribunal did not actually decide the cases on the basis that the care that the husband gave to his wife was fatal to their appeals.

24. As to the main issue, which is the operation of regulation 13D of the 2006 Regulations, the claimants point out that the housing benefit scheme applies to licensees as well as tenants and submit that the claimants must be regarded as occupying separate dwellings so that regard must be had to the terms on which each

claimant occupies his or her dwelling, rather than to the terms on which the whole premises were let to them both. The Secretary of State and the local authority, on the other hand, rely on the analysis of the legislation in the three decisions of the Upper Tribunal.

The case law in the Upper Tribunal, with some further analysis

25. In the *Chesterfield* case, the claimant lived with his father. They were joint tenants of what had become a four-bedroom house. The father, who was disabled, lived downstairs where he had a bedroom and a bathroom in an extension. The son, in practice, had sole use of one of the upstairs bedrooms and an attic room which he could use as a separate living room. Both had access to the whole house although the father, due to his disability, seldom went upstairs. The local authority and the First-tier Tribunal found that the claimant fell within regulation 13D(2)(a)(ii) and so was entitled to the one-bedroom shared accommodation rate. On appeal to the Upper Tribunal, the claimant argued that he came within regulation 13D(2)(b)(i) because he had exclusive use of the attic. The local authority defended its decision. The Secretary of State did not agree with either of them. He argued that the claimant fell within regulation 13D(2)(c) and was entitled to the two-bedroom rate. This was because both the claimant and his father were occupiers and fell within paragraph (3)(b). Although the father was a joint tenant, he was a member of the claimant's household and so was not excluded from the definition of "occupier" in paragraph (12). The Upper Tribunal accepted the Secretary of State's submission on this point. That the claimant's son was a carer for his father was one element of the reasoning that they were members of the same household and that may have been what lay behind paragraph 7 of the First-tier Tribunal's statement of reasons in the present cases.

26. It was against that background that Upper Tribunal Judge Wikeley made observations about the term "exclusive use" in regulation 13D(2)(b) which, as he acknowledged, did not actually arise for determination in the case before him. He said –

> "43. … [A] claimant has 'exclusive use' of a room within regulation 13D(2)(b) if he or she has a legal right under the tenancy to exclude all others. … [J]oint tenants have the joint and several right to possession of the whole of the property as one of the four 'utilities' (possession, interest, time and title). It is fundamental to the very nature of a joint tenancy that one joint tenant cannot exclude the other joint tenant from any part of the property concerned: *Bull v Bull* [1955] 1 Q.B. 234 and *Hammersmith & Fulham LBC v Monk* [1991] UKHL 6.
>
> 44. [The claimant's representative] argues that 'exclusive use' simply refers to a state of affairs – what the facts on the ground are, rather than what the legal technicalities may provide for. However, I conclude that the First-tier Tribunal was correct to focus on the issue of 'exclusive use' as a legal concept rather than a factual state of affairs. …"

In my observations when indicating that I was minded to give permission to appeal, I said of the cases cited –

> 13. … *Bull v Bull* [1955] 1 QB 234, relied upon by the local authority in its submission to the [First-tier Tribunal], was a case where one joint tenant sought to exclude the other from the jointly held property altogether, against her wishes. *LB Hammersmith and Fulham v Monk* [1991] UKHL 6; [1992] 1 AC 478 was concerned with whether notice to quit given by one joint tenant terminated the joint tenancy. Either of the present claimants could, by giving notice to quit to their landlord, end the joint tenancy so that the other had to surrender his or her dwelling, but it would not entitle the giver of the notice to occupy that dwelling. Neither of those cases therefore appears particularly helpful. …"

27. In any event, Judge Wikeley did not accept the Secretary of State's further submission that the case should be remitted to the First-tier Tribunal for consideration of the question whether the claimant was over accommodated (see [36] to [39] and 50]). In the course of dealing with that submission, he considered whether the claimant's father could have made an equally successful claim for housing benefit. Section 134(2) of the 1992 Act would not have precluded him from doing so because he and his son were not members of each other's "family". Judge Wikeley observed at [55] –

> "Under the standard housing benefit rules the claimant's eligible rent would be apportioned as between the claimant and any other joint tenant (see regulation 12B(4)), in this case his father. That apportionment rule appears to be incorporated into the LHA scheme by the definition of the "cap rent" in regulation 13D(12)."

28. This may have caused some confusion in the decision on file CH/2483/2012. In that case, the male claimant and a woman friend were joint tenants of what had been a two-bedroom property with one living room downstairs but to which an attic bedroom had been added. It was common ground that they were not living together as husband and wife but there was a dispute as to whether they were living in the same household. The First-tier Tribunal found that they were not and upheld the local authority's decision that the claimant's eligible rent was the local housing allowance for one-bedroom shared accommodation. As in the *Chesterfield* case, it was argued on behalf of the claimant that he had exclusive use of two rooms. They were both on the first floor, as his friend slept in the new attic bedroom. The Upper Tribunal expressed agreement with the approach taken in *Chesterfield* and rejected the claimant's argument but set aside the First-tier Tribunal's decision because the record of proceedings had been lost so that the basis on which it had found that the claimant and his friend were not living in the same household was unclear.

29. In the course of the decision (at [3] and [10]), the Upper Tribunal said that, if the claimant and his friend were living in the same household, the claimant's eligible rent would be 50% of the local housing allowance applicable to a dwelling where the tenant has the use of only two bedrooms, apportionment being appropriate under regulation 12B(4). That seems to have become common ground during the course of the proceedings. However, in my respectful view that cannot be right and it is not what Judge Wikeley said in *Chesterfield*. Save to the extent to which reference is made to regulation 12B(3), (4) and (6) in the definition of "cap rent", regulation 12B has no bearing on cases within the scope of regulation 13D, as is made clear not only in regulation 11(1) but also in regulation 12B(1).

30. The effect of the "cap rent" is that the claimant's eligible rent is whichever is the lower of the applicable local housing allowance (in respect of which there can be no apportionment) and the appropriate share of the actual rent (or other payments within regulation 12(1)) that is payable. It was in that context that the Secretary of State had raised the question whether the claimant was "over-accommodated" in *Chesterfield* and argued that the case should be remitted to the First-tier Tribunal. Judge Wikeley had expressed some doubt about that argument, saying –

> "40. It is arguable that the discretion to restrict eligible rent under regulation 12B(6) has either no or very little relevance to the LHA scheme. This is partly a matter of construction – regulation 12B(6) applies where "the eligible rent as determined in accordance with the preceding paragraphs of this regulation [i.e. regulation 12B] is greater than it is reasonable to meet by way of housing benefit". In contrast, a claimant affected by the LHA rules has his rent determined by the regime prescribed by regulation 13D, not as provided for by regulation 12B. It is also partly a question of the overall regulatory framework. The very nature of regulation 13D is to confine housing benefit to reasonable levels by the application of the size criteria, so it is difficult to see much practical scope for the operation of regulation 12B(6) alongside that regime."

However, he did not need to resolve his doubts because he anyway took the view that the point had been raised at too late a stage in the proceedings and there was no evidence to suggest that regulation 12B(6) could have any practical application in the case.

31. Insofar as it may have been based on a local authority's duty to determine a "cap rent", I consider that the Secretary of State's argument in the *Chesterfield* case was sound. The reference to an amount based on "the aggregate of such payments specified in regulation 12(1) (rent)" is common to both regulation 12B(2) and the beginning of the definition of "cap rent" in regulation 13D(12) and it seems obvious that the draftsman intended that paragraphs (3), (4) and (6) of regulation 12B should apply to reduce such payments for the purposes of the definition of "cap rent" as they would apply to reduce them in regulation 12B itself. Given that there is nothing else material in regulation 12B, because paragraph (1) is merely introductory and paragraph (5) merely supplements paragraph (2), the reference to "the preceding paragraphs" in paragraph (6) does not cause any difficulty (although it is true that the deduction of ineligible charges has been omitted and it is not obvious to me why that should be so). The need for provision such as is made by regulation 12B(3), (4) and (6) in the definition is clear if the most obvious purpose of the "cap rent" – *i.e.*, preventing a local housing allowance from being greater than the housing benefit that would have been allowed under regulation 12B – was to be achieved. However, the "cap rent" assumes a greater role than it might otherwise have as a result of the lack of any other provision for apportionment within regulation 13D. (I am not sure whether that reliance on the "cap rent" was deliberate or whether it is the result of the draftsman having overlooked the possible need for some provision for apportionment within the main body of regulation 13D for cases where paragraph (2)(c) applies to a dwelling let to joint tenants who live in the same household within the dwelling without being members of the same "family".)

32. Thus, it appears that, in both *Chesterfield* and, if the claimant's case was accepted on its facts, CH/2483/2012, the claimant should have been entitled to

housing benefit calculated by reference to the lower of the two-bedroom rate of local housing allowance or to the rent actually payable, which latter figure could be reduced under regulation 12B(4) or (6) (as applied through the definition of "cap rent") in order to take account of shared use or any excessiveness in the amount of the accommodation or the amount being charged for it. If otherwise eligible, their co-tenants would have been entitled to housing benefit calculated by reference to the same amount.

33. In *JS*, as in the present cases and as in CH/2483/2012 on the view taken by the First-tier Tribunal in that case, the claimant and his former partner were joint tenants of the dwelling but were *not* living in the same household. However, while there were two bedrooms and two bathrooms, there was only one living room and one kitchen. Nonetheless, the claimant asserted that he was entitled to housing benefit calculated by reference to the "one bedroom self-contained accommodation rate". Precisely on what basis that assertion was made is not clear from the Upper Tribunal's decision. Presumably it was on the basis that he had exclusive use of a bedroom and the living room, because otherwise it is hard to see how the case could have fallen within the scope of regulation 13D(2)(b), but the decision gives no details of any agreement under which his use of the living room was claimed to be exclusive as against his former partner. It is merely stated (at [2]) that the issue in the case was whether "exclusive use" referred to rooms "he practically has control over and sole use of" or to a legal right to exclude others from the rooms. In any event, Upper Tribunal Judge Wright agreed with what Judge Wikeley had said in *Chesterfield* and dismissed the claimant's appeal against the First-tier Tribunal's decision that regulation 13D(2)(a)(ii) applied. He did however, consider two important issues in addition to those considered by Judge Wikeley.

34. First, he pointed to the fact that the term "exclusive use" appears in paragraph 1(1)(a) and (b) of Schedule 3 to the 1997 Order, where, I agree, the question is clearly whether the terms of the tenancy provide for exclusive use, rather than whether joint tenants, or, indeed, a tenant and other occupiers, have agreed among themselves that each of them should have exclusive use of particular rooms within the dwelling. However, he observed that whether or not regulation 13D(2)(b) applies does not depend on whether the dwelling is one to which paragraph 1(1)(b) of Schedule 3 to the 1997 Order applies but depends simply on whether the claimant falls within the scope of either regulation 13D(2)(b)(i) or (ii). Nonetheless, he concluded that the term "exclusive use" has the same meaning in both regulation 13D(2)(b)(i) and paragraph 1(1)(b) of Schedule 3 to the 1997 Order.

35. Secondly, because housing benefit is payable to licensees as well as tenants, he expressed (at [53] to [59]) some doubt as to the precise meaning of "exclusive use" and its application to licensees as opposed to tenants. He suggested that either "the statutory provisions misfire in respect of licensees" or "as a matter of law a licensee may have exclusive use of the rooms and be able legally to exclude others from using them as rooms from themselves". He referred to *Street v Mountford* [1985] 1 A.C. 809 but wondered whether that case could be distinguished on the ground that it was concerned with the distinction between a tenancy and a licence or between a tenant and a lodger.

36. I do not, with respect, see why that should be a ground for distinguishing the case. One thing that is clear from *Street v Mountford* is that licensees may enjoy exclusive use of premises, at least in one sense of the term "exclusive use". At 883A to E, Lord Templeman, with whom the other members of the House agreed, said –

> "In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own. In *Allan v. Liverpool Overseers* (1874) L.R. 9 Q.B. 180, 191-192 Blackburn J. said:
>
> > 'A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.'
>
> If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant."

At 888B to C, he said –

> "Exclusive possession is of first importance in considering whether an occupier is a tenant; exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant. The occupier may be a lodger or service occupier or fall within the other exceptional categories mentioned by Denning L.J. in *Errington v. Errington and Woods* [1952] 1 K.B.290."

In the light of those passages, I do not think it can be considered inappropriate to use the term "exclusive use" in housing benefit legislation. What precisely it means in that legislation is another matter.

Discussion

37. As Judge Wikeley pointed out in the *Chesterfield* case, such terms as exclusive possession, exclusive occupation, exclusive use and exclusive enjoyment are not always used in exactly the same senses, partly because it is not always necessary to distinguish between possible meanings of those terms and partly because sometimes they are used in relation to "actual" possession etc. and sometimes they are used in relation to "legal" possession etc., *i.e*, a right to possession etc. rather than actual possession. Moreover, there are also degrees of exclusivity and, as an added complication, exclusive possession etc. may be shared. As is so often the case, the words must take their flavour from the context in which they are used.

38. It seems fairly clear that the term "exclusive use" is used in housing benefit legislation in contradistinction to shared use. It is also clear that, as the phrase in both paragraph 1(1)(a) and (b) of Schedule 3B to the 1997 Order and regulation 13D(2)(b) of the 2006 Regulations is "has the exclusive use of", it is at least partly concerned, as the Upper Tribunal has consistently held, with the question whether the claimant has an exclusive *right* to use the rooms and not merely whether he or she is in fact the only person who in practice uses them. Equally, in this context, as in the context that I considered in *RK v Secretary of State for Work and Pensions* [2008] UKUT 34 (AAC), the words "share" and "shares" in, respectively, article 1(1)(a) of the 1997 Order and the definition of "room" in regulation 13D(2)(b) of the 2006 Regulations, must refer to a right to shared use as opposed to exclusive use, rather than merely to whether the claimant and another person both in fact use the room. Thus, in considering both whether a person has "exclusive use" of a room and whether the person "shares" a room, one is concerned with that person's rights rather than actual use.

39. However, it does not necessarily follow either that the term "exclusive use" is used in a wholly technical sense or that a claimant's agreement with the landlord is the only relevant source for the purpose of ascertaining his or her rights.

40. Paragraph 1(1) of Schedule 3B to the 2007 Order is concerned with a notional letting. It does not matter whether the dwelling is let to a single tenant or to joint tenants. The word "tenant" in the singular is used, but it could perfectly well include the plural. The purpose of the words in parenthesis in subparagraph (b) is obscure but they are perhaps intended to make the point that use does not cease to be exclusive merely because a tenant shares it with his or her partner, whether or not the partner is a co-tenant. That might be thought to suggest that the word is not being used in a particularly technical way.

41. The same may be said of the language in regulation 13D(2)(b), to which may be added the point that that paragraph is concerned with the accommodation that the particular claimant actually occupies. In general terms, regulation 13D is concerned with ascertaining the appropriate amount of support to be provided from public funds to people living in rented accommodation or other accommodation in respect of which certain types of payments must be made. The approach is to consider the number of bedrooms that the claimant and those occupying the dwelling with him or her require and then to take the rent fixed under the 2007 Order for rented accommodation with that number of bedrooms. Where more than one bedroom is required, no regard is paid to the actual accommodation occupied by the claimant, but the actual accommodation occupied is taken into account where only one bedroom is required.

42. The reason for taking the actual accommodation into account where only one bedroom is required is presumably that there is a significant amount of one-bedroom accommodation where the tenant has exclusive use of only one room but also a significant amount of self-contained accommodation with one bedroom and there is also a very significant difference in the market rents for each of those types of accommodation. In those circumstances, on one hand, it is not considered reasonable to place pressure on a claimant (other than a "young individual") to seek one-bedroom accommodation that is not self-contained but, on the other hand, it is

not generally considered reasonable to provide more support for those who actually have only exclusive use of one room with shared use of other facilities than they reasonably need in respect of their actual accommodation.

43. It has to be borne in mind that, by virtue of regulation 8(1) of the 2006 Regulations, housing benefit may be payable where a person is not actually liable to make payments in respect of a dwelling at all. For instance, regulation 8(1)(c) provides –

> "**8.**—(1) Subject to regulation 9 (circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling), the following persons shall be treated as if they were liable to make payments in respect of a dwelling—
>
> …
>
> (c) a person who has to make the payments if he is to continue to live in the home because the person liable to make them is not doing so and either—
>
> (i) he was formerly a partner of the person who is so liable; or
>
> (ii) he is some other person whom it is reasonable to treat as liable to make the payments;
>
> …"

44. Similarly, by virtue of regulation 12(1), housing benefit is payable not only in respect of rent, in the strict sense of that word, or payments in respect of a licence or permission to occupy the dwelling, but also payments for which former tenants or trespassers might be liable by way of compensation for use and occupation and which clearly may not arise as a consequence of any agreement with the person to whom they are due. In these circumstances, it seems to me that, in considering whether a person has the use of the premises for the purposes of regulation 13D(2)(b) and, if so, whether it is exclusive use, one must be entitled to look beyond any tenancy (in the strict sense of the word) under which the premises were let with exclusive possession and to look at subsidiary agreements and arrangements, including unilateral arrangements that can be regarded as having some legal force such as, for instance, a person unilaterally, or under an order of a court, making payments that could be set off against a claim for rent or damages.

45. Although it may not be of much direct relevance as regards regulation 13D(2)(b), a subtenancy might be regarded as the archetypal subsidiary agreement. If a landlord grants a tenancy of premises to a tenant and that tenant then grants a subtenancy of part of it to a subtenant but continues to live in what remains, it seems to me that the dwelling occupied by the tenant as his or her home for housing benefit purposes would be only the part of the premises that has not been sublet. Moreover, the tenant would not only have ceased to have possession of the sublet part but would also be regarded as no longer having the "use" of that part, in the housing benefit sense of that word, even though he or she might be said still to have the use of it in the sense of being entitled to rent from it. Thus, the tenant's rights would be determined not only by the tenancy but also by the subtenancy.

46. Regulation 8(1)(c) might be applied where a claimant has taken over liabilities that are strictly those of a former occupier who has moved out. Presumably, in such a case, the rights of the former occupier are not to be taken into account for the purposes of determining whether the claimant has exclusive use of the premises for the purposes of regulation 13D(2)(b). If a dwelling has been let to joint tenants and

one has moved out in similar circumstances, then the remaining joint tenant ought to be treated in the same way, as being liable for the whole rent and, if not sharing with anyone else, as having exclusive use of the premises. A joint tenant who has moved out is excluded, perhaps unnecessarily and only for the avoidance of doubt, from the definition of "occupier" in regulation 13D(12) and it would be odd if his or her rights as a joint tenant were then to be taken into account for the purpose of regulation 13D(2)(b).

47. The present cases are different in that each claimant's co-tenant is still occupying part of the premises let under the joint tenancy. However, I do not see why an agreement between joint tenants should not be taken into account in determining their rights to use rooms within a dwelling, provided that it has some legal force. Once it is accepted that they live in different households, it seems to me that each occupies a separate dwelling as a home within the premises that was originally let. If regulation 12B were to apply, the payments due in respect of that dwelling could be ascertained by apportioning the rent due in respect of the whole premises. If regulation 13D applies and each household consists of a single person, it is necessary to determine whether all or part of the dwelling is shared. It is true that neither person can unilaterally exclude the other from any part of the property and that, as against the landlord, they remain jointly and severally liable for the whole rent, but it does not follow that they are not at liberty to agree between themselves the way in which each will occupy the premises and the proportion of the rent that each will pay in consequence and to do so by way of a binding contract.

48. Does the 2005 agreement between the claimants have legal force? Obviously, the agreement could not bind the landlord and there is a difficulty with the idea of the wife simply "withdrawing" from the lease. On the other hand, it seems fairly plain that it was intended by that term that the wife would not assert any further right of occupation under the lease after "withdrawing" and would not object to the lease being terminated and a new lease being granted to the husband alone and, more importantly, it was clearly agreed that, in return, the husband would take responsibility for all the obligations under the lease for as long as it continued in force after the wife, having given the requisite notice, vacated the property. That did not mean that the landlord could not have sued the wife for unpaid rent due after she had moved out, but it did mean that, if the landlord did so, she could seek an indemnity from the husband. Clause 14, which was in permissive terms, was to similar effect.

49. As regards clauses 11 and 12, whereby the claimants agreed that each should have exclusive use of certain rooms, they were doing no more than surrender to each other rights that they had against each other under the joint tenancy. In doing that, they were not interfering with the landlord's rights. Nor, of course, was either of them interfering with the other's rights against his or her will.

50. Thus analysed, the agreement was capable of having legal force as regards the claimant's rights to use the property, because it was entered into for consideration, each party, as against the other, giving up some rights and gaining others.

51. Whether the agreement did have legal force depends on whether the parties intended it to create legal relations. There has never been any suggestion that it was not genuine or, indeed, that it was a device intended merely to achieve a collateral advantage, and it was made against the background of a matrimonial breakdown when a desire to draw clear and enforceable boundaries is readily understandable. Moreover, clause 7, in my view, supports the proposition that a legal relationship was intended, as does the formality of having the signatures to the agreement witnessed. In those circumstances, I do not consider that there can be any doubt that this particular agreement was intended to create legal relations.

52. There is the separate point whether the claimants have in fact ceased to live as separately as the agreement provided and that therefore the agreement should be regarded as having been varied or rescinded. However, as I said in my original Observations and as the Respondents appear to accept, if the parties were not living separately, they should have been regarded as a couple and, that issue not having been raised by the Respondents, the First-tier Tribunal was not bound to consider the point. It did hint at the issue in its reasoning but I accept that it did not go further and that it did not need to do so.

53. I am therefore satisfied that the rights that the claimants had against each other under the 2005 agreement are relevant when considering regulation 13D(2) in their cases. The First-tier Tribunal erred in law in not having regard to it. In the light of that agreement, both claimants had exclusive possession of two rooms that were not shared.

54. These cases are distinguishable from the *Chesterfield* case because the joint tenants in that case were living in the same household, whereas in these cases they live in separate households, and they are distinguishable from *JS* because the claimant in that case did not suggest that there was any agreement having legal force under which he had exclusive use of any rooms, or at least any room other than his bedroom, as against his former partner.

55. I am happy to have been able to reach the conclusion that I have because the effect of the First-tier Tribunal's decision was that the claimants between them were entitled to less than they would have been entitled had they been single persons living in the same household. It is true that, instead, they are entitled to considerably more than they would have received had they been single people living in the same household, but that is merely the consequence of them having separated and it represents the amount to which they would be entitled if they negotiated separate tenancies with their landlord or, perhaps more importantly, if they went their separate ways and each moved into similar accommodation in separate premises. The housing benefit scheme is not intended to put pressure on people to leave accommodation and find other accommodation in which they will be entitled to a greater amount of housing benefit.

A "person to whom paragraph 14 of Schedule 3 (severe disability premium) applies"

56. This point does not arise on this appeal and I have not heard argument on it, but I have some difficulty in seeing how, if the local authority had been right that paragraph 13D(2)(a) applied to the wife's case from 11 May 2015, the fact that she

was "a person to whom paragraph 14 of Schedule 3 (severe disability premium) applies" had the effect that paragraph 13D(2)(b) applied from 8 September 2014 to 10 May 2015. Clearly, if a young individual is "a person to whom paragraph 14 of Schedule 3 (severe disability premium) applies" so that subparagraph (a)(i) does not apply, subparagraph (b) may apply if either of the conditions in heads (i) and (ii) is satisfied. However, the wife in these cases was not a young individual and it was the local authority's position that paragraph (b) did not apply. It is a precondition of subparagraph (a)(ii) applying that subparagraph (b) does not apply. Therefore, if subparagraph (a)(ii) does not apply only because the claimant is "a person to whom paragraph 14 of Schedule 3 (severe disability premium) applies", subparagraph (b) will also not apply and the case will fall to be determined under subparagraph (c). Given the terms of paragraph 14 of Schedule 3, that would presumably now have the effect that the claimant would be entitled to an additional bedroom under paragraph (3A) if paragraph (b) of the definition of "person who requires overnight care" in regulation 2(1) were satisfied, so that the "two-bedroom" rate would be applicable, subject to the "cap rent". Otherwise it is not clear to me what is intended to be the consequence of the exclusion of a case where a claimant or partner was "a person to whom paragraph 14 of Schedule 3 (severe disability premium) applies" from subparagraph (a)(ii). It is certainly not obvious to me how the operation of subparagraph (c) can ever result, or ever have resulted, in the "one-bedroom self-contained accommodation" rate being applicable to a person who did not satisfy the condition of subparagraph (b).

The unnecessary files

57. When giving my initial case management directions, I said –

> "10. The two cases where the point may be academic are the cases on files CH/3082/2016 and CH/3083/2016, where the local authority's submission that the First-tier Tribunal had no jurisdiction to consider the appeals was accepted by the First-tier Tribunal. My current view is that the First-tier Tribunal's decisions were clearly wrong. The local authority had decided to treat the claimants' appeals against the '3 month limitation of Full Protection' as separate appeals and argued that they were both appeals against a 'decision of a relevant authority as to the amount of benefit to which a person is entitled in a case in which the amount is determined by the rate of benefit provided for by law' in respect of which there is no right of appeal by virtue of paragraph 6(2)(d) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It pointed out that the 13-week period of protection was prescribed by law. However, insofar as the appeals could be construed as being against the decision to limit the *period* of protection, they were not about the *rate* of benefit payable during that period. Moreover, it seems to me to have been entirely unnecessary for the local authority to treat the claimants as having brought two appeals each. They were complaining about the reduction of benefit after the period of protection and so against the decision to supersede the existing awards and the resulting reduction in the amount of benefit payable. Accordingly, if permission to appeal were to be granted, I would currently be minded to allow these appeals and to set aside the decisions of the First-tier Tribunal declining jurisdiction. However, I would make no further decisions in their place because whether there were grounds for supersession and, if so, whether the amount of benefit should have been reduced is the issue that arises in the claimants' other appeals."

Both Respondents now agree with those comments.

58. I ought, perhaps, to clarify what the issue really is. Paragraph 6(2) of Schedule 7 to the 2000 Act provides that the right of appeal to the First-tier Tribunal against a decision of a local authority does not apply to –

> "(d) any decision of a relevant authority as to the amount of benefit to which a person is entitled in a case in which the amount is determined by the rate of benefit provided for by law".

The term "the rate of benefit provided for by law" is to be construed narrowly so that it only applies to specific rates of benefit set out in legislation, the purpose of the provision presumably being to ensure that any challenge to such rates should be brought only by way of judicial review (see *Re Smyth's Application* [2001] NIQB 29; [2012] N.I. 393), although it is anyway difficult to envisage circumstances in which a claimant might, through an appeal, obtain a higher rate of benefit than that prescribed. That the term is to be construed narrowly is apparent when consideration is given to the equivalent provision in paragraph 6(a) of Schedule 2 to the Social Security Act 1998, which clearly takes its flavour from paragraph 6(b).

59. Generally, therefore, any application that a case be struck out because the law is clear should be made under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) on the ground that "there is no reasonable prospect of the appellant's case, or part of it, succeeding", rather than under rule 8(2) on the ground that the First-tier Tribunal does not have jurisdiction.

60. However, I cannot see any practical advantage in applying for part of a housing benefit appeal to be struck out when there is another live issue in the appeal. The effect is almost inevitably to create more work for everyone, rather than reducing it. In the present cases, the most obvious disadvantage was that two virtually identical files were constructed for each claimant, rather than just one.

61. The First-tier Tribunal erred in law in holding that it did not have jurisdiction to deal with the part of the claimants' appeals whereby they challenged the removal of "protection" after 13 weeks. However, as is now implicitly accepted by the claimants, that part of their appeals could have been struck out on the alternative ground that it had no reasonable prospect of success. In these circumstances, the proper course of action for me to take under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 is to record the error but not to set the decisions aside, rather than to take the action I originally proposed. It comes to the same thing in the end.

Conclusion

62. I do not set aside the striking out of part of each claimant's appeal to the First-tier Tribunal but I allow the claimants' appeals against the dismissal by the First-tier Tribunal of the remaining part of the appeals. My decisions are set out above.

Mark Rowland
7 December 2018