London Borough of Hammersmith & Fulham v FJ
[2023] UKUT 203 (AAC)

IN THE UPPER TRIBUNAL **UA-2022-001625-HB**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber) sitting at East London

Between:

LONDON BOROUGH OF HAMMERSMITH & FULHAM

Appellant

- v -

FJ

Respondent

Before: His Honour Judge Najib sitting as a Judge of the Upper Tribunal

Decision date: 14 August 2023
Decided on consideration of the papers

Representation:
Appellant: Ms Felisha Romain (appeals officer)
Respondent: In person (assisted by her son MG)

DECISION OF THE UPPER TRIBUNAL

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the First-tier Tribunal sitting at East London on 20 April 2022 under file reference SC242/21/03307 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. The Respondent's appeal against the Appellant's revised decision dated 18 November 2020 is therefore remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the Tribunal Judge who previously considered the appeal on 20 April 2022.

(3) The parties are reminded that the First-tier Tribunal can only determine the appeal based on the facts and circumstances as they were at the date of the original decision under appeal (namely 18 November 2020).

(4) If either party has any further written evidence to put before the new First-tier Tribunal, this should be sent to the relevant HMCTS Regional Tribunal Office within one month of the issue of this decision. Any such further evidence will have to relate to the facts and circumstances as they were at the date of the original decision under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new First-tier Tribunal may reach the same or a different outcome to the previous tribunal.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The Upper Tribunal's decision in summary and what happens next

1. I allow the appeal by the Appellant ('the Council'). The First-tier Tribunal's ('FtT') decision dated 20 April 2022 involves an error on a point of law and I therefore set aside the decision.

2. The case now needs to be reheard by a new FtT. I cannot predict the outcome of the re-hearing. The new FtT may reach the same, or a different, decision to that of the previous tribunal.

Factual Background

3. The Respondent ('the Claimant') is 85 years old and lives with her son ('MG') in a privately owned property ('the Property').

4. Initially, the Property was occupied by the Claimant and MG pursuant to an assured shorthold tenancy agreement effective from 8 February 2010 in MG's sole name. As MG was in receipt of Income Support, he received maximum Housing Benefit ('HB') between February 2010 and December 2019. Throughout this period the Claimant was recorded as a non-dependant member of MG's household.

5. In December 2019, MG started to work and his Income Support came to an end. His HB was consequently reduced from £300 per week to £66.82 per week.

6. On 11 September 2020, the Claimant submitted a claim in her own name for HB. In support, she provided a new tenancy agreement for the Property effective from 8 August 2020 which named both her and MG as tenants. She also provided a new backdated tenancy agreement purporting to be effective from 8 February 2010 and which, contrary to the original tenancy agreement provided and relied upon by MG, named both her and MG as tenants.

7. By a decision dated 14 September 2020, the Claimant was awarded HB at a rate of £150 per week. However, by a subsequent decision dated 18 November 2020, the Claimant's HB was terminated on the grounds that she was deemed not to be liable to make payments in respect of a dwelling for HB purposes in accordance with regulation 9(1)(g) of the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006. Regulation 9(1)(g) provides that, subject to the exception in regulation 9(3), a person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable if "*before the liability was created, he was a non-dependant of someone who resided, and continues to reside, in the dwelling*". Regulation 9(3) provides that regulation 9(1)(g) shall not apply "*in a case where the person satisfies the appropriate authority that the liability was not intended to be a means of taking advantage of the housing benefit scheme*". The Council concluded that regulation 9(1)(g) applied because prior to the new August 2020 tenancy agreement, the Claimant had been a non-dependant member of MG's household, MG resided and continued to reside in the Property, and the Claimant had not shown that the liability under the new August 2020 tenancy agreement was not intended to be a means of taking advantage of the HB scheme. The decision was reconsidered on 26 June 2021 but not revised.

The Appeal to the First-Tier Tribunal

8. The Claimant appealed to the FtT asserting that: (i) despite the original February 2010 tenancy agreement being in MG's sole name, it had always been understood by the Council and the landlord that the Claimant was eligible for HB and would also occupy the Property; (ii) when MG's HB was reduced, he contacted the landlord and requested that a revised version of the original February 2010 tenancy agreement be issued naming both him and the Claimant as tenants; (iii) when the Council queried the validity of the revised February 2010 tenancy agreement, MG again contacted the landlord and requested that a new tenancy agreement be issued naming both him and the Claimant as tenants; (iv) the landlord then issued the new August 2020 tenancy agreement; (v) the original February 2010 tenancy agreement was revised and the new August 2020 tenancy agreement was issued because MG was no longer able to afford the rent, the Claimant had started to contribute £100 per week from her pension allowance towards the rent, she therefore wished to claim HB and wanted the security of knowing that should anything happen to MG, she would have the protection afforded to tenants and would be entitled to continue to receive HB.

9. By a Decision Notice dated 20 April 2022, the FtT allowed the appeal and determined that the Claimant was entitled to HB. At §2 of the Statement of Reasons ('SoR'), the FtT stated that it allowed the appeal because regulation 9(3) applied, which meant that regulation 9(1)(g) did not apply (whether this was, in fact, the basis upon which the appeal was allowed, is a matter of dispute and forms the basis of the first ground of appeal - see further below).

The Appeal to the Upper Tribunal

10. The Council now appeals the FtT's decision to the Upper Tribunal. The Council asserts that the FtT erred in that (i) its findings and conclusions as to whether regulation 9(3) applied are inconsistent; (ii) its finding that the Claimant had always been a tenant is unsupported by any evidence; and (iii) it ought not to have followed the approach in case ***CH/39/2007*** when considering whether the new August 2020 tenancy agreement was "*a means of taking advantage of the housing benefit scheme*" - it should instead have followed the approach in ***MP v Sutton London Borough Council (HB)*** **[2021] UKUT 193 (AAC)**. The Council invites the Upper Tribunal to allow the appeal, set aside the FtT's determination and to remit the matter back to the FtT for a fresh hearing.

11. By an order dated 8 January 2023, Upper Tribunal Judge Wikeley granted permission to appeal on all the grounds advanced.

12. The Claimant opposes the appeal but has not engaged with the specific grounds of appeal. By her 'Response to Appeal' form, the Claimant simply asserts that she believes that the FtT's decision is valid and reasonable and that she is entitled to HB.

Ground 1

13. At §2 of the Statement of Reasons ('SoR'), the FtT stated that it allowed the appeal because "*Regulation 9(3) did apply"* and that "*Regulation 9(1)(g) did not apply as Regulation 9(3) prevented the application of Regulation 9(1)(g)".* However, at §§11-12 the FtT found in clear and unequivocal terms that the Claimant had *"been a tenant of [the Property] since back in 2010"* and the "*fact that she was not listed as a tenant on the original tenancy agreement does not negate that fact"*.

14. The Council says that the FtT's conclusion that regulation 9(3) applied is inconsistent with its finding that the Claimant had always been a tenant of the Property, in that if she had always been a tenant, regulation 9(1)(g) would not apply and regulation 9(3) would, therefore, not be engaged.

15. I agree that the FtT's findings and conclusions are inconsistent. The FtT found that that the Claimant had always been a tenant of the Property. Leaving aside for the moment whether the FtT was entitled to so find on the evidence, this meant that regulation 9(1)(g) did not apply because the Claimant had always been liable to pay rent to the landlord and she had never been a non-dependant of MG. As regulation 9(1)(g) did not apply, regulation 9(3) was not engaged and did not fall to be considered. The appeal ought simply to have been allowed on that basis. The FtT, however, not only went on to consider regulation 9(3) but found and allowed the appeal on the grounds that the liability created by the August 2020 lease was not created with the intention of taking advantage of the HB scheme. It does not appear from the SoR that the FtT did so 'in the alternative' - in other words it was not seeking to take a 'belt and braces' approach and say the appeal would be allowed because the Claimant had always been a tenant and so regulation 9(1)(g) did not apply, but even if it was wrong about that, it 'would have found' that regulation 9(3) applied and so would have allowed the appeal in any event. The FtT expressly allowed the appeal on the grounds that regulation 9(3) applied, even though the consequence of it finding that the Claimant had always been a tenant was that regulation 9(3) was not engaged. In my judgment,

the FtT conflated the issue of whether the Claimant had always been a tenant (and whether regulation 9(1)(g), therefore, applied in the first instance) with whether regulation 9(3) applied so as to disapply regulation 9(1)(g). I am satisfied that the approach taken by the FtT amounts to an error of law.

16. However, I am not satisfied that that error of law was material. Even if the FtT had simply allowed the appeal on the grounds that the Claimant had always been a tenant without considering regulation 9(3) or had allowed the appeal on that ground but had gone on, in the alternative, to consider regulation 9(3) (as it could have done), the end result would have been the same - the appeal would have been allowed. The FtT's error of law did not, therefore, affect the outcome of the appeal and so was not material.

Ground 2

17. At §11 of the SoR, the FtT stated that the first issue to determine was whether the Claimant was a tenant of the Property. It then stated that "***This statement*** *submits that [the Claimant] has been a tenant of [the Property] since she and her son moved into the [Property] back in 2010*" (emphasis added).

18. The Council says that the FtT relied upon "*[t]his statement"* in order to reach the conclusion that the Claimant had always been a tenant of the Property but failed to explain what "*[t]his statement"* was. The Council says that the FtT did not explain if it is referring to a written statement, an oral statement or to some other document. The Council, therefore, says that the FtT's conclusion that the Claimant had always been a tenant is unsupported by evidence.

19. There are 3 references in the SoR to 'this statement' (§§3,11 and 13). On a literal reading, each is out of context and does not make sense. There has clearly been some typographical error when the SoR was prepared - perhaps caused by inaccurate dictation. In any event, I note that each reference to 'this statement' is followed by the word 'submits'. It is, therefore, most likely that each is a reference to submissions made on the Claimant's behalf rather than some unidentified piece of evidence. This explanation also makes most sense in the context of the relevant paragraphs. I am, therefore, not satisfied that it can properly be said that the mere lack of explanation for its use of the term 'this statement' means that the FtT's conclusion that the Claimant had always been a tenant is 'unsupported by evidence'.

20. However, that is not the end of the matter. Whether the Claimant had always been a tenant was an issue before the FtT and indeed one that it described as the "*the first issue to address"* (SoR §11). The FtT was, therefore, under a duty to properly consider and explore that issue and to then make necessary and adequate findings of fact to enable it to arrive at a conclusion (***Benmax v Austin Motor Co Ltd*** **[1955] AC 370** at 373). The FtT was also under a duty to give adequate reasons to explain how relevant findings were made and how it arrived at its conclusion (***Re B (Appeal: Lack of Reasons)*** **[2003] FLR 1035** at §11).

21. The FtT's consideration, findings and conclusion on the issue of whether the Claimant had always been a tenant are set out in §11 of the SoR as follows:

"*... The first issue to address is whether [the Claimant] is a "tenant" and if so from when, and whether it makes any material difference as to whether or not that person is not named on the original tenancy agreement. [This statement] submits that [the Claimant] has been a tenant of [the Property] since she and her son moved into the property back in 2010. The fact that she was not listed as a tenant on the original tenancy*

agreement does not negate that fact. Just as much as her son, she had exclusive possession to [the Property], between herself and the landlord, for a fixed duration and for a fixed price. She is not a licensee, the landlord is not renting out a room to her whilst also living in the property, she occupies the premises with her son, they are both tenants of [the Property]."

22. In my judgment, the FtT's approach to whether the Claimant had always been a tenant was flawed.

23. A lease (or tenancy) is "*at its heart fundamentally a contract between two parties in which one (variously described as the Landlord or Lessor) grants the other (described as the Tenant or Lessee) the exclusive right to the possession of land for a fixed and certain period of time"* (Aldridge Leasehold Law 1.001A). A contract of lease may arise by express written agreement, express oral agreement, implied agreement, or an agreement arising by virtue of the doctrine of estoppel or by statute (Aldridge Leasehold Law 1.003 -1.006). Where it is asserted that a contract of lease arises by oral or implied agreement, there must be sufficient certainty that the parties in fact intended to agree to the grant of a tenancy, rather than, for example a simple licence to occupy (Aldridge Leasehold Law 2.020).

24. In ***Bruton v London & Quadrant Housing Trust*** **[2002] 1 A.C. 406** Lord Hoffmann summarised the position as follows (at 413):

"*The decision of this House in Street v. Mountford [1985] A.C. 809 is authority for the proposition that a "lease" or "tenancy" is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents. The fact that the parties use language more appropriate to a different kind of agreement, such as a licence, is irrelevant if upon its true construction it has the identifying characteristics of a lease. The meaning of the agreement, for example, as to the extent of the possession which it grants, depend upon the intention of the parties, objectively ascertained by reference to the language and relevant background."*

25. The Claimant was not named as a tenant in the February 2010 tenancy agreement. The starting point, therefore, was that between February 2010 and August 2020 she was not a tenant - that is, no legal relationship of tenant and landlord with binding mutual obligations (for example, the tenant's legally binding obligation to pay rent and the landlord's covenant of quiet enjoyment and so on) existed between her and the landlord. The FtT was, of course, entitled to go on and consider whether a tenancy, nevertheless, existed between the Claimant and the landlord. However, such a tenancy could only exist pursuant to a <u>contractually binding agreement</u> between the Claimant (personally) and the Landlord - whether by separate written agreement, express oral agreement, implied agreement, or an agreement arising by virtue of the doctrine of estoppel or by statute. The FtT was, therefore, required to approach the issue of whether the Claimant had been a tenant between February 2010 and August 2020 by considering the strict contractual position. That is, by asking itself, exploring and making necessary and adequate findings of fact as to whether (i) there was any express oral agreement between the Claimant and the landlord by which they both intended and agreed that the legal relationship of tenant and landlord should exist; (ii) if not, whether there were any specific words used or conduct from which such an

agreement could be inferred or implied; and (iii) if not, whether such an agreement arose by virtue of the doctrine of estoppel or by statute.

26. In my judgment, it failed to do so. The FtT seems to have simply taken the view that because MG had always been a tenant (and so had exclusive possession of the Property for a fixed duration and at a fixed rent), and the Claimant lived him, it followed that she too had always had exclusive possession of the Property for a fixed duration and at a fixed rent and so had also always been a tenant. However, the mere fact that the Claimant occupied the Property with MG did not, of itself, give rise to a tenancy between her and the landlord. As MG had exclusive possession of the Property against the landlord (by virtue of the February 2010 tenancy agreement), there was nothing in principle preventing the Claimant from simply living in the Property as MG's licensee with the landlord's knowledge and consent. There is nothing unusual about such an arrangement - particularly in a family context.

27. In my judgment, in approaching the matter in the manner in which it did, the FtT failed to ask itself the correct questions/misdirected itself, failed to make necessary and adequate findings of fact and failed to give adequate reasons for its findings and conclusions, and so materially erred in law.

Ground 3

28. At §3 of the SoR, the FtT directed itself as to the meaning of 'take advantage' by reference to the decision of then Commissioner Jacobs in the case of ***CH/39/2007***. The FtT directed itself that 'take advantage' would "*constitute something close to "abuse" or taking "improper" advantage of HB*", that a HB claimant "*making the most of opportunities presented would not constitute such abuse"* and that ***CH/39/2007*** sets a "*high legal bar"*. The FtT then applied this approach when determining whether the liability created by the August 2020 tenancy agreement was created with the intention of taking advantage of the HB scheme (SoR §§13-16).

29. The Council does not suggest that the FtT's approach to the meaning of 'take advantage' was inconsistent with ***CH/39/2007***. It accepts that then Commissioner Jacobs' view that 'taking advantage' (in the context of regulation 9(1)(l)) means something akin to 'abuse' or 'taking improper advantage' is correct and applies equally to regulation 9(3). However, the Council says that then Commissioner Jacobs' reference to and focus on "*making the most of opportunities presented"* by the HB scheme was said in the particular context of landlords targeting the supported accommodation sector and leasing properties to non-profit bodies for higher rents than the HB scheme would support outside that sector, and so was of little assistance when considering whether the liability created by the August 2020 tenancy agreement was created with the intention of taking advantage of the HB scheme for the purposes of regulation 9(3). The FtT ought not, therefore, have focused on/asked itself whether the Claimant was simply "*making the most of opportunities presented"* by the HB scheme.

30. The Council says that the FtT ought to have followed the approach in the more recent case of ***MP v Sutton London Borough Council (HB)*** **[2021] UKUT 193 (AAC)**. In that case a subtenant pursuant to an original 'subtenancy agreement' entered into a new 'tenancy agreement' when she discovered that her HB had been restricted to the shared accommodation Local Housing Allowance rate. In determining whether the subtenant had done so to 'take advantage' of the HB scheme, Deputy Upper Tribunal Judge Rowland made no express reference to "*making the most of opportunities presented"*. He stated and then concluded as follows (§11):

"It is necessary to distinguish between the purpose of the original subtenancy agreement and the purpose of the new tenancy agreement. The original subtenancy agreement, as the First-tier Tribunal found, was a perfectly proper one, designed both to provide the claimant with the housing she needed and to enable the original tenant to pay her contractual rent. On the other hand, the new tenancy agreement, made when the claimant discovered that she had not been awarded as much housing benefit as she and her son-in-law had expected, was intended to increase the amount of housing benefit payable to the claimant without either increasing her accommodation or (contrary to Mr Parry's argument) altering the portions of the overall rent that the claimant and the original tenant were contractually required to pay... the intention behind the new tenancy agreement was plainly to "take improper advantage" of the housing benefit scheme through a legal device that conferred no other immediate benefit on anyone and so I am satisfied that, for the reasons given in both the decision notice and the statement of reasons, the First-tier Tribunal did not err in finding that regulation 9(1)(l) was potentially engaged."

31. The Council says that applying the approach in ***MP v Sutton London Borough Council (HB)***, the FtT ought to have concluded that the Claimant had sought to take advantage of the HB scheme. It says that the Claimant and MG were perfectly content to proceed on the basis for over 10 years that the August 2010 tenancy agreement was in MG's sole name and that she simply lived with him as a non-dependent member of his household without any legal liability to pay rent. Whilst the Claimant and MG could have both been named as tenants on the August 2010 tenancy agreement from the outset, there was nothing irregular or unusual about the fact that they were not so named. The only reason for adding the Claimant as a tenant in August 2020 was to increase the amount of HB payable to the household.

32. Insofar as the Council seeks to argue that ***MP v Sutton London Borough Council (HB)*** somehow changes the approach to or re-defines the term 'take advantage' in regulation 9, I do not agree. One of the grounds of appeal in ***MP v Sutton London Borough Council (HB)*** was that the FtT had erred in not following the approach in ***CH/39/2007*** as to the meaning of 'take advantage'. Deputy Upper Tribunal Judge Rowland rejected that ground of appeal. He stated, "*I do not accept that the First-tier Tribunal failed to apply the approach required by CH/39/2007 and the authorities to which Mr Commissioner Jacobs (as he then was) referred in that case"* (§11). It is clear, therefore, that far from seeking in any way to change the approach to or re-define the term 'take advantage', Deputy Upper Tribunal Judge Rowland endorsed and adopted the approach in ***CH/39/2007***. Further, merely because the factual matrix in ***CH/39/2007*** was different from that in ***MP v Sutton London Borough Council (HB)*** and the present case, did not mean that the relevant propositions of law set out in ***CH/39/2007*** did not apply. Whether the Claimant's actions constituted something close to "abuse" or "taking improper advantage" of the HB scheme was a fact specific assessment to be carried out by the FtT. As part of that assessment, the FtT was entitled to consider whether the Claimant's actions could properly or better be described as simply "making the most of opportunities presented" as opposed to "abuse" or "taking improper advantage" of the HB scheme. In my judgment, therefore, the FtT correctly direct itself as to the meaning of 'take advantage' by reference to ***CH/39/2007*** and did not err in its approach in doing so.

33. That said, it is clear from the SoR that the FtT relied heavily on its earlier conclusion that the Claimant had always been a tenant of the Property when determining that her actions did not constitute something close to "abuse" or "taking improper advantage"

of the HB scheme. As I have already determined that the FtT erred in law in its approach to whether the Claimant had always been a tenant of the Property, its consideration of and approach to regulation 9(3) was, therefore, also flawed. In my judgment, in relying upon its earlier flawed conclusion that the Claimant had always been a tenant of the Property, the FtT further materially erred in law.

Conclusion

34. I, therefore, allow the appeal, set aside the decision of the FtT (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)) and remit the original appeal for re-hearing before a new FtT (section 12(2)(b)(i)). As findings of fact must be made on issues which were not fully and properly explored at the hearing before the FtT, it is not appropriate for me to re-make the decision on paper.

35. It will be open to the Council to argue before the new FtT (and I put it no higher) that the factual matrix of the Claimant's case is more analogous to that in ***MP v Sutton London Borough Council (HB)*** such that the Upper Tribunal's analysis and the ultimate outcome in that case is of greater assistance than ***CH/39/2007***. That will be a matter for the FtT and it would not be appropriate for me to pre-emptively express any view other than to say that any such argument can only go so far. As then Commissioner Jacobs cautioned in ***CH/39/2007*** (§48)*, "CH/0136/2007 depended on its own facts, as do all cases under regulation 9(1)(l). Reasoning by factual analogy or comparison from case to case is unlikely to be helpful. Authorities are only relevant for the propositions of law on which they are based*". Those very useful words of caution, apply equally to cases under regulation 9(1)(g) and 9(3).

36. Although I am setting aside the FtT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether the Claimant is entitled to HB. That is a matter for the new FtT. The new FtT must review all the relevant evidence and law and reach its own conclusions. In doing so, however, the new FtT will have to focus on the Claimant's circumstances as they were as at 18 November 2020, and not the position as at the date of the new FtT hearing. This is because the new FtT must have regard to the rule that a tribunal "***shall not*** *take into account any circumstances not obtaining at the time when the decision appealed against was made*" (section 12(8)(b) of the Social Security Act 1998).

Signed on the original
on 14 August 2023

His Honour Judge Najib
Sitting as a Judge of the Upper Tribunal