

[2018] AACR 18
(AG v South Ayrshire Council
[2017] UKUT 110 (AAC))

Sir Crispin Agnew Bt QC
16 February 2017

GSH/360/2016

Housing Benefit – exempt accommodation – jurisdiction of tribunal to determine whether provider of care, support and supervision complying with another regulatory regime – whether care, support and supervision being lawfully provided.

The claimant was housed at Safehaven and claimed housing benefit on the basis that the accommodation was exempt accommodation under paragraph 4(10) of Schedule 3 to the Housing Benefit and Council Tax (Consequential Provisions) Regulations 2006. If the accommodation is exempt accommodation, a higher rate of housing benefit can be applied. The local authority's position was that the accommodation was not exempt accommodation because it was not being provided lawfully, in that Safehaven was not registered, and required to be registered, under the Public Services Reform (Scotland) Act 2010. The First-tier Tribunal (F-tT) agreed. The claimant appealed to the Upper Tribunal.

Held, allowing the appeal, that:

1. the 2010 Act does not make it unlawful to contract to provide care services, it only makes it unlawful not to register and thereby to avoid bringing the provider under the regulatory regime. *Eisen v M'Cube Ltd.* [1920] UKHL 534 distinguished (paragraph 11);
2. it is not for the F-tT to determine whether or not Safehaven should be registered under the 2010 Act. The F-tT's jurisdiction is only to determine whether or not this is exempt accommodation under paragraph 4(10), namely whether or not "care, support or supervision" is being provided in terms of paragraph 4(10) (paragraph 13 and 14);
3. the situation would be different if a court having jurisdiction had determined that Safehaven could not lawfully provide care services. Then that would be a fact to be taken into account by the F-tT in determining whether or not care services are being provided that fell within the definition of "care, support or supervision" under paragraph 4(10). *R v the Housing Benefit Review Board for Allerdale District Council* [2000] COD 462 QBD distinguished (paragraph 15 and 16).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The appeal is allowed.

The decision of the tribunal given at Ayr on 14 April 2016 is set aside.

The Judge of the Upper Tribunal remakes the preliminary decision of the First-tier Tribunal on the tribunal's findings in fact. It is as follows: The accommodation occupied by the claimant at Safehaven is exempt accommodation as defined by paragraph 4(10) of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 (SI 2006/217)

The case is referred back to the First-tier Tribunal (Social Entitlement Chamber) for Judge D Hutton to continue hearing the appeal.

REASONS FOR DECISION

1. This is an appeal against a preliminary decision of the First-tier Tribunal (F-tT) given at Ayr on 14 April 2016 for which leave to appeal was given by the tribunal judge on 28 June 2017.

Background

2. The claimant who is a long-term substance abuser, who has had contact with the criminal justice system, took up residence at Safehaven which is a registered charity established for the rehabilitation of substance abusers. Safehaven provides supported accommodation to substance abusers.

3. The claimant claimed housing benefit on the basis that the Safehaven accommodation in South Ayrshire was exempt accommodation as defined in paragraph 4(10) of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 (SI 2006/217) (“the 2006 Regulations”). If the accommodation is exempt accommodation then a higher rate of housing benefit can be applied.

4. The definition of exempt accommodation is in sub-paragraph 4(10) and is, for the purposes of this appeal, accommodation:

“(10) provided by a non-metropolitan county council in England within the meaning of Section 1 of the Local Government Act 1972 a housing association, a registered charity or voluntary organisation where that body or a person acting on its behalf also provides the claimant with care, support or supervision;”

The First-tier Tribunal decision

5. The F-tT decided that the accommodation did not comprise exempt accommodation. The F-tT decided that Safehaven required to register under section 59 of the Public Services Reform (Scotland) Act 2010 (“PSR Act”) because it provided care services which included per section 47(1)(a) “a support service” and 47(1)(j) “an adult placement service”, as defined by Schedule 12. The F-tT then went on to hold “that services provided by an unregistered provider are by definition not provided lawfully and cannot be the foundation for exempted accommodation”.

6. The F-tT held that the services provided at Safehaven, which was a charity, were genuine and effective and could not be ignored as *de minimus*; *Chorley Borough Council v IT (HB)* [2009] UKUT 107 (AAC); [2010] AACR 2. Thus it can be seen that, but for the technical decision that these were not services lawfully provided, the F-tT would have held that this was exempt accommodation.

Ground of appeal and position of the Secretary of State and Respondent

7. Apart from an assertion that the reasons are inadequate, the claimant has two grounds of appeal. First, that on the evidence accepted by the F-tT Safehaven could not be regarded as

either a “support service” or as an “adult placement service” and so section 59 of the PSR Act did not apply to Safehaven and therefore the unlawfulness decision was unfounded. Secondly, that the HB regime was separate from the PSR Act regime and so whether or not Safehaven required to be registered under the PSR Act was irrelevant to a decision on whether or not Safehaven was exempt accommodation under the 2006 Regulations; reference was made to *Chorley Borough Council* where the provider was not registered with the Care Quality Commission, but that did not affect entitlement.

8. The Secretary of State supports the appeal because the 2006 Regulations do not require a provider of exempt accommodation to be registered. The F-tT had found that the support provided was not *de minimus* and therefore the appeal should be allowed. Whether or not Safehaven were in breach of obligations under the PSR Act was a matter for the regulator.

9. The Council’s position is that it is “implicit in the definition of exempt accommodation that the services are provided legally” and reference is made to *R v the Housing Benefit Review Board for Allerdale District Council ex parte Doughty* [2000] COD 462 QBD and *Eisen v M’Cabe Ltd.* [1920] UKHL 534. The Council goes on to submit that the contract between the appellant and her landlord is, absent registration, illegal and unenforceable to the extent of the provision of services ... It would be an extraordinary state of affairs were public resources to be made available to fund such a provision.”

Discussion

10. Part 5 of the PSR Act establishes Social Care and Social Work Improvement Scotland (“SCSWIS”) whose functions include monitoring, inspecting and reporting on social services which are defined by section 46 to include care services and social work services. Under section 59 “Any person who seeks to provide a care service must apply to SCSWIS for registration of the service” and registration may be granted or refused and, if required, SCSWIS can give an improvement notices and may cancel registration. SCSWIS has to establish a complaint’s procedure about the provision of care services. Under section 80 any person who provides a care service while not registered commits an offence.

11. It is clear to me that the purpose of part 5 of the PSR Act is to regulate care services and to maintain standards and to take steps to remove care providers from the system who are not meeting the required standards. Failure to register is a criminal offence. The PSR Act does not make it unlawful to contract to provide care services, it only makes it unlawful not to register and thereby to avoid bringing the provider under the regulatory regime. I consider this is an important distinction from *Eisen v McCabe* which was concerned with a war time regime that provided that persons should not enter into contracts for the sale of timber without a permit; thus any contract made without a permit was inoperative in law.

12. Judge May said in CSH/298/2011, a case in which Safehaven was involved, *obiter* because as he recognised that this was not material to his decision:

“It seems clear that the landlords were not registered under the 2001 Act of the Scottish Parliament and that registration was in fact required. I am sympathetic to Mr

Lynch's submission that it is implicit in the definition in regulation 4(10) that any care support or supervision provided has to be lawfully provided."

13. I agree with the Secretary of State and the ground of appeal that it is not for the F-tT to determine whether or not Safehaven should be registered under the PSR Act. The F-tT's jurisdiction is only to determine whether or not this is exempt accommodation under Regulation 4(10). It is for the SCSWIS or others to act under the PSR Act if it is considered that SCSWIS is providing care services, as defined by that Act, without being registered. I consider that there is a significant risk that if the F-tT could rule on whether or not Safehaven required registration as a preliminary to deciding whether it could provide lawful services, then different tribunals might reach different decisions if slightly different facts were resented in different appeals and that would be very unsatisfactory. It must be born in mind that "care, support or supervision" in the regulations is different from "care services" in the PSR Act; i.e. carrying out housing repairs beyond the landlord's obligations can be "support" – *Chorley Borough Council* paragraph (7) – and that would not be a care service under the PSR Act. Further most regulators have a discretion whether or not to take enforcement action; what happens if a regulator has decided not to take action or decided that registration is not required (facts not known to a tribunal), but the tribunal then finds that the provider ought to have been registered and so no "legal" service is provided. One can envisage the situation where there is a criminal prosecution where the defendant is found not guilty; can the F-tT consider the matter again because the issue will be determined on a balance of probabilities rather than beyond reasonable doubt. I also raise the issue of how far could the F-tT go on the question of "lawfulness" in relation to other regulatory regimes; e.g. if planning permission is required but has not been obtained does that make the provision of services in an establishment "unlawful" or if the premises do not comply with fire regulations should the F-tT decide that the provision of services is not lawful.

14. In my opinion the tribunal is only concerned with whether or not "care, support or supervision" is being provided in terms of Regulation 4(10). If the Secretary of State wanted to do so, it would be quite easy to amend the regulations to provide that it is only "care, support or supervision" provided by an appropriate registered provider in Scotland or England etc. that qualified. This has not been done. I am of the opinion that a tribunal does not have an independent jurisdiction to determine whether or not a provider is complying with some other regulatory regime.

15. The situation would be different if a court having jurisdiction had determined that Safehaven could not lawfully provide care services. Then that would be a fact to be taken into account by the F-tT in determining whether or not care services were being provided that fell within the definition of "care, support or supervision" under regulation 4(10). The *Allerdale District Council* case is an example. In that case the application for registration as a small residential home was rejected by the Registered Homes Tribunal. The fact that registration had been rejected by the regulator meant that care services could not be lawfully provided. The Housing Board then made their decision on the basis of the fact that the proper regulatory body had refused registration and so care could not be provided. As the Secretary of State says in "11. The HB decision maker may decide on a balance of probabilities that a landlord who does not register as a care service in Scotland is not providing a sufficient level of care, support or supervision to meet the definition."

16. If Judge May’s comment that “it is implicit in the definition in regulation 4(10) that any care support or supervision provided has to be lawfully provided” is read in the context that the regulator has made such a decision, which is then a primary fact for the tribunal, then I would agree. However, I do not read Judge May’s comment to be that the tribunal has a jurisdiction to determine itself whether or not the provision of care, support or supervision is lawful under some other regulatory regime. I do not consider that the *Allerdale District Council* case assists the Respondent, because that case was a case where the regulator had made a decision and that decision was then the primary fact used by the Housing Board to make their decision. It is not a case that supports the proposition that a local authority or F-tT has jurisdiction to make a decision on whether or not a provider is complying with some other regulatory regime.

17. In view of the decision I have taken above, it is not really for me to say whether or not Safehaven is providing a “support service” or an “adult placement service”. *Prima facie* I am inclined to agree with the argument in the Grounds of Appeal that as Safehaven provides a service which provides overnight accommodation it does not come within “support service” but I consider that it might come within a paragraph 2 as care home service and that as “an adult placement service” is a service that works “by placing the person with a family or individual” and that is not what Safehaven does.

18. For all these reasons I hold that the F-tT erred in law in deciding itself whether or not Safehaven ought to have registered under the PSR Act and so deciding that the services were not lawfully provided. I remit to the same tribunal Judge to continue the appeal hearing on the basis that this is exempt accommodation based on the finding in paragraph 15. This leaves it open to the Respondent to argue that cheaper alternative accommodation is available or to raise any other competent argument.