

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

I allow the appeal. The decision of the First-tier tribunal made on 7 November 2017 involved errors on points of law, and it is set aside under Section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007. I re-make the decision in the following terms:

“The decision of South Lanarkshire Council of 28 June 2017 is confirmed. By operation of Regulation 9(1)(d) of the Housing Benefit Regulations 2006, at the material time the claimant was treated as not being liable to make payments in respect of his dwelling, and was not entitled to housing benefit”.

Background

1. The Respondent (the “**claimant**”) made a claim for housing benefit from South Lanarkshire Council (the “**Council**”) on 22 May 2017. On 28 June 2017 (p45) the Council decided that the claimant was not eligible for housing benefit, after applying Regulation 9(1)(d) of the Housing Benefit Regulations 2006 (the “**2006 Regulations**”). The decision remained unchanged on reconsideration dated 9 August 2017. The claimant appealed to the First-tier Tribunal (the “**tribunal**”). On 7 November 2017, after a hearing at which the Council was not present, the tribunal allowed the appeal. The tribunal purported to set aside a decision of the Council of 12 July 2017, although I have found no decision of the Council of that date in the papers. The tribunal found that the claimant was entitled to housing benefit, because the tenancy should be treated as one on a commercial basis. The Council appealed to the Upper Tribunal on the basis that the tribunal had made its decision after considering Regulation 9(1)(a) of the 2006 Regulations, but this paragraph had never been relied on by the Council as excluding the claimant from housing benefit. Rather, the Council had proceeded on the basis of a different provision, Regulation 9(1)(d), as expressly set out in its decision correspondence. The tribunal had failed to consider Regulation 9(1)(d). Permission to appeal was granted by a Judge of the Upper Tribunal on 4 May 2018, who also extended the time for bringing the appeal so that it was timeous.
2. The relevant facts taken from the tribunal’s decision may be summarised as follows.

The claimant was married to his ex-wife (“**JC**”) on 17 May 1997, and divorced on 3 April 2009.

He is father of two children aged 14 and 16. JC is their mother.

The children live for one week with the claimant and one week with JC under an arrangement that has been in place for some time, and has worked well.

The house in which the claimant resides is rented under a Short Assured Tenancy Agreement.

The landlords are JC and her new husband (“**AM**”). They have a buy to let mortgage in place.

A formal valuation was carried out by a surveyor to ensure an agreed market rental valuation. The Short Assured Tenancy Agreement was drawn up by a solicitor.

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

Emails were sent by AM to the claimant chasing up arrears of rent and suggesting that if there was no response matters of arrears, other monies, notice to quit etc would be handled by solicitors.

There is one further relevant fact disclosed by the papers that were before the tribunal. The claimant was awarded Child Benefit for the two children with effect from 12 June 2017 (letter from HMRC dated 6 July 2017 at p51).

3. After submissions were received from the parties, it was evident that an issue arose in the appeal concerning the interpretation of Regulation 9(1)(d) of the 2006 Regulations. Because that point of interpretation was of general importance with possible implications for public funds, the Secretary of State for Work and Pensions was invited to become a party to the appeal. She declined the invitation. Directions were issued on 25 July 2018 requesting submissions on particular matters, including authorities referred to in this Decision. The Council lodged written submissions and authorities on 22 August 2018. The claimant lodged his further submissions on 22 October 2018. I am satisfied that I am in a position to determine the appeal fairly on the papers. The facts are not in dispute and what is in issue are questions of law. Both parties have been afforded opportunities to lodge written submissions, including in the light of a detailed direction, and have done so.
4. In summary, I have decided that the tribunal erred in law because it acted in breach of natural justice, and it did not consider a material matter that was before it. Had the tribunal properly considered Regulation 9(1)(d) of the 2006 Regulations, it would have been obliged to uphold the decision of the Council on the facts before it. Regulation 9(1)(d) prevents a claimant being entitled to housing benefit when they are responsible for their landlord's child. I have decided that Regulation 9(1)(d) is not limited to sole landlord situations, but also covers situations in which there are joint landlords, only one of whom is the parent of the tenant's child. The effect of Regulation 9(1)(d) is that, if a person knows they need housing benefit in order to pay the rent, then their tenancy needs to be with persons who are not the parent of a child or children for whom they are responsible. Below I set out the governing law and then apply it to the facts found by the tribunal.

Governing law

5. The basic conditions for entitlement to housing benefit are in Section 130 of the Social Security Contributions and Benefits Act 1992 (the "**1992 Act**"). A person is entitled to housing benefit if, among other things, he is liable to make payments in respect of a dwelling which he occupies as his home. Section 137(2)(i) gives a regulation making power, to make provision for treating a person who is liable to make payments in respect of a dwelling as not so liable (with the result they will not qualify for housing benefit).
6. Regulation 9 of the 2006 Regulations is entitled "Circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling". Regulation 9(1) sets out a list of different circumstances. If the claimant falls within any one of the categories in the list, their claim for housing benefit will not succeed, even if they must still pay rent. Three of these categories are relevant to this appeal.

“(1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where—

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

- (a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis;...
- (d) he is responsible, or his partner is responsible, for a child of the person to whom he is liable under the agreement;...
- (l) in a case to which the preceding sub-paragraphs do not apply, the appropriate authority is satisfied that the liability was created to take advantage of the housing benefit scheme established under Part 7 of the Act”

7. Regulation 20, to which I refer below, provides:

“20.— Circumstances in which a person is to be treated as responsible or not responsible for another

(1) Subject to the following provisions of this regulation a person shall be treated as responsible for a child or young person who is normally living with him and this includes a child or young person to whom paragraph (3) of regulation 19 applies.

(2) Where a child or young person spends equal amounts of time in different households, or where there is a question as to which household he is living in, the child or young person shall be treated for the purposes of paragraph (1) as normally living with—

(a) the person who is receiving child benefit in respect of him; or

(b) if there is no such person—

(i) where only one claim for child benefit has been made in respect of him, the person who made that claim, or

(ii) in any other case the person who has the primary responsibility for him.

(3) For the purposes of these Regulations a child or young person shall be the responsibility of only one person in any benefit week and any person other than the one treated as responsible for the child or young person under this regulation shall be treated as not so responsible”.

Errors of law

- 8. The tribunal erred in law in two ways.
- 9. First, the tribunal acted in breach of natural justice. If tribunal proposes to decide a case on a material matter upon which parties have not had a fair opportunity to make representations, it ought to warn the parties of that possibility and give them such an opportunity (*CH/396/2002*). Being heard has an instrumental value (among other values), in that the tribunal is likely to be better armed with the right information to make a correct decision if it gives itself the opportunity to hear from both parties, unless there is good reason not to. In this case, the Council was not present at the oral hearing due to an administrative error about the venue of the hearing. Even though the Council was not present, the tribunal was still under an obligation to act fairly. The tribunal elected to determine the case on the basis that the tenancy should be treated as one on a commercial basis. This is a matter covered by Regulation 9(1)(a) of the 2006 Regulations. Regulation 9(1)(a) had neither been relied on nor addressed by the Council. It was quite clear from the Council’s decision letters that its decision was made under Regulation 9(1)(d). In that situation, if the tribunal wished to decide the case under Regulation 9(1)(a), it should have considered whether it should adjourn to give the Council an opportunity to make representations about the relevance and

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

applicability of Regulation 9(1)(a). There is nothing in the statement of reasons indicating that the tribunal did so.

10. Second, the tribunal also erred in law by failing to consider a material matter, namely Regulation 9(1)(d) of the 2006 Regulations. The tribunal was obliged to consider the case put forward by both parties. The Council had clearly put Regulation 9(1)(d) in issue as that was the basis of its decision (pages 1, 3, 4, 45, 48). As a matter of law, the claimant would not be entitled to housing benefit if any of the categories in Regulation 9(1) applied, and not just 9(1)(a). It did not follow from a finding that the tenancy was on a commercial basis, so the claimant was not excluded from housing benefit under Regulation 9(1)(a), that he was therefore entitled to housing benefit.

Outcome

11. I am therefore satisfied that there was a material error of law, the appeal should be allowed, and the tribunal's decision set aside. The next question is whether I should remit the case to the tribunal for reconsideration or re-make the decision. I have decided I am in a position to re-make the decision, because the relevant facts are not in issue, and the outcome is essentially a question of applying the law to those facts.
12. The key issue in this case is whether Regulation 9(1)(d) excluded the claimant from housing benefit. There is no disagreement by the Council with the tribunal's conclusion that the rental agreement under which the claimant's property was rented was commercial, and therefore Regulation 9(1)(a) was not applicable to exclude the Respondent from housing benefit. But, as explained above, even if Regulation 9(1)(a) does not apply, if Regulation 9(1)(d) does, then the claimant will not be entitled to housing benefit.
13. In the submissions for the claimant, he advances two main arguments why he should be entitled to housing benefit:
 - 13.1 it is unconstitutional, unfair and inequitable for people not to be able to get housing benefit in these types of situation because they are obliged to pay rent;
 - 13.2 the property is not in the ownership only of his ex-wife, but her and her husband.
14. The claimant's position is understandable. He was obliged to pay rent under a commercial agreement. He considers he ought to be able to claim housing benefit, even if he was paying the rent to his ex-wife and her new husband under this agreement. However, the law does not provide that housing benefit can be claimed in all situations in which a person is paying rent. Regulation 9(1) of the 2006 Regulations contains a list of situations in which people genuinely paying rent are excluded from housing benefit. Even if an agreement is on a commercial basis, and entered into at arm's length, if it falls within the categories listed in Regulation 9(1)(b)-(l), a tenant will not be eligible for housing benefit.

The rationale for Regulation 9(1)(d)

15. One situation in Regulation 9(1) which excludes a claimant from housing benefit is where the claimant is responsible for the landlord's child, under Regulation 9(1)(d). There was a challenge to the lawfulness of this subsection in the Court of Appeal in *Tucker v Secretary of State for Social Security* [2001] EWCA Civ 1646; [2002] HLR 27

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

(“*Tucker*”). The outcome was that the lawfulness of Regulation 9(1)(d) was upheld. *Tucker* gives useful background for those applying Regulation 9(1)(d). Regulation 9(1)(d) (or rather its precursor, Regulation 7(1)(d) of the Housing Benefit (General) Regulations 1987, in the same terms) is an anti-avoidance provision. It was enacted because of concerns about public funds being used for housing benefit where the absent parent or landlord had obligations to their children in any event. It was a deliberate change to the earlier law. The Court of Appeal found that the provision is not irrational because it is founded on the rational belief that, where the tenant is the parent and carer of his landlord's child, the landlord will generally not view the landlord and tenant relationship in the same commercial way that he would otherwise view it. Although this may result in some genuine applicants being denied housing benefit, a person should be aware that, if he needed housing benefit in order to pay the rent, he should take a tenancy from someone other than the parent of his child. The underlying mischief being addressed seems to be the state funding accommodation after relationships break down, when the effect is the state paying (through housing benefit funding rent) one of the former partners who in any event has obligations towards their children.

16. In more detail, at paragraph 33 the court said:

“So one can ask rhetorically what is unjust about the system under which a parent of a child appreciates that if they are to obtain housing benefit there is one person *i.e.* the other parent of the child who cannot be the landlord. Forgetting for the moment the separate argument available to this particular appellant that she has ordered her affairs on the basis of so renting and receiving housing benefit, once the regulations as amended came into force a person such as the appellant simply knew that if they needed housing benefit in order to pay the rent, then the tenancy had to be with someone other than the parent of the child, and that does not, as I would see it, impose serious hardship.”

At paragraph 42 the court rejected a challenge based on Articles 8 and 14 of the European Convention on Human rights, stating that the provision:

“pursues a legitimate aim and any differential treatment bears a reasonable relationship of proportionality to the aim sought to be achieved, viz the eradication of abuse”.

17. Regulation 9(1)(d) is the law, and it is the duty of tribunals to apply it. I therefore reject the claimant's first argument.

The interpretation of Regulation 9(1)(d)

18. The claimant's second argument is about the interpretation of Regulation 9(1)(d). On its wording, a person is to be treated as not liable to make payments for a dwelling if “he is responsible, or his partner is responsible, for a child of the person to whom he is liable under the agreement”. Are its provisions met in this case?

19. Applying the first part of Regulation 9(1)(d) (about responsibility for children) is relatively straightforward. On the tribunal's findings in fact, there was shared care of the children, with them living with each parent week about. To decide if the claimant

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

was 'responsible' for the children, Regulation 20 of the 2006 Regulations (set out in the governing law section above) had to be applied. The children spent equal amounts of time in the different households (or even if that was disputed, there would then be "a question as to which household" in which they were living, so the same test would apply). The test to be applied was who was in receipt of Child Benefit for the children. At the time of the Council's decision the claimant was entitled to Child Benefit for the two children (p51). The claimant was therefore "responsible" for them within the meaning of Regulation 9(1)(d).

20. The more difficult question when applying Regulation 9(1)(d) is whether it makes a difference if the absent parent is only one of the landlords. In this case, the claimant was liable under a tenancy agreement to "The Landlord", who is defined in the tenancy agreement as two people, JC and AM. JC is the mother of the children, but AM is not their natural parent (although is their step-father). The wording of Regulation 9(1)(d) is "the person", not "a person". The claimant's position is that because the property is owned by AM as well as JC, Regulation 9(1)(d) does not apply. The Council's position is that Regulation 9(1)(d) covers joint landlord situations, in which a parent of the child or children is not the sole person who is landlord, but one of two or more landlords. (The Council also produced a document on appeal which was a landlord registration, but I do not take that into account as this is an appeal not a rehearing and it was not evidence before the tribunal).
21. Previous cases contain conflicting suggestions about how to approach this issue. In *CH/716/2002*, at paragraph 11, albeit in relation to a different category within the predecessor provision to Regulation 9(1), the Commissioner said:

"Regulation [9(1)] is clearly designed to identify cases in which there is a risk of abuse of the housing benefit scheme. The categories may be drawn in a way that can produce rough justice. No doubt, that was based on a policy decision to err on the side of protection for the scheme rather than fairness in an individual case. However, given that the categories can produce rough justice, it is appropriate to give them the narrowest interpretation that is consistent with the policy of protecting the scheme".

If the narrowest interpretation is given to Regulation 9(1)(d), then the outcome would be that the exemption only applies when "the" person to whom the Respondent is liable under the agreement is the parent of the children, a sole landlord situation, rather than "a" person, where the parent is only one of the landlords. It might be argued that the obvious potential for abuse of the housing benefit system, simply by adding a second name to an agreement, might be dealt with by applying Regulation 9(1)(l), a catch-all provision at the end of Regulation 9(1) which provides "in a case to which the preceding sub-paragraphs do not apply, the appropriate authority is satisfied that the liability was created to take advantage of the housing benefit scheme established under Part 7 of the Act".

22. However, doubt was cast on the approach of the Commissioner in *CH/716/2002* in *Bristol CC v JKT* [2016] UKUT 0517 at paragraph 12. The dictum quoted above was set out and it was then commented (again in relation to a different category within Regulation 9(1)):

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

“So to rely, in order to justify giving the claimant the benefit of the doubt and applying a narrow construction, on the fact that it is a deeming provision, without also taking into account that Regulation 9(1) plays an important part in protecting the scheme (i.e. public funds) is not in my view a correct approach. The obvious mischief being guarded against is that what is essentially an intra-family, intra-dwelling arrangement should be subsidised through the public purse. Of course, that does have the effect that a person whose living arrangements would be entirely unexceptionable for housing benefit purposes if he instead lived somewhere else where his landlord was not his close relative may find himself deprived of housing benefit, but it is a bright line rule intended to prevent abuse of the scheme and like all bright line rules will inevitably give rise to some hard cases. I agree with the authority therefore that the fact that the present claimant is left liable for the rent without being able to claim housing benefit on it is not the question”.

23. In my view, the approach in *Bristol CC v JKT* [2016] UKUT 0517 is to be preferred, for the following reasons.
24. *Purposive construction.* Regulation 9(1)(d) should be construed to try to give effect to the intention of the legislator expressed in the language used. The legislative object, or “mischief” sought to be addressed, is an important aid to ascertaining legislative intention (*Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at paragraph 56). The underlying mischief sought to be redressed by Regulation 9(1)(d) is discussed in paragraphs 15 and 22 above. In general terms, the mischief is the public purse funding family arrangements, when a landlord parent who would benefit from these public funds has responsibilities to accommodate the children (for whom the claimant parent is responsible) in any event. It does not matter for these purposes whether the landlord is one parent, or that parent plus a partner. The landlord parent is still receiving a benefit funded by the public purse. This suggests that, in Regulation 9(1)(d), “the person to whom he is liable under the agreement” should be construed to include situations where a parent is one of two or more landlords, as well as sole landlord situations.
25. *Consistency with purposive approach to construction given to other categories within Regulation 9(1) of the 2006 Regulations.* While not all cases are consistent, it seems to me that there is a general trend in caselaw on Regulation 9(1) to construe the remit of the various sub-paragraphs in accordance with their anti-avoidance purpose. For example, paragraph 9(1)(h) exempts from housing benefit situations where the claimant “previously owned, or his partner previously owned, the dwelling in respect of which the liability arises and less than five years have elapsed since he or, as the case may be, his partner, ceased to own the property”. The anti-avoidance purpose is to prevent housing benefit being payable where a person has divested themselves of property, and set up a rental arrangement for that property so they can claim housing benefit. The unavailability of housing benefit in these situations cannot be avoided by alterations being made to the dwelling so it is not quite the same as ‘previously owned’; where it has been divided, or where it has been extended (*CH/3616/2003* paras 14-16). Another example arises in relation to Regulation 9(1)(b), which prevents a person renting being entitled to housing benefit where “his liability under the agreement is to a person who also resides in the dwelling and who is a close relative of his or of his partner”. This provision cannot be avoided even where there are some parts of the building where the claimant has exclusive occupation, where

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

there are shared parts (*CH/542/2006*). Further, half-brothers will be counted as close relatives (*Bristol CC v JKT* [2016] UKUT 0517), because the underlying mischief struck at by Regulation 9(1)(b) is to prevent intra-family arrangements subsidised by the public purse. A case on Regulation 9(1)(c) is also relevant. Regulation 9(1)(c) excludes a person renting property from housing benefit where “his liability under the agreement is to his former partner and is in respect of a dwelling which he and his former partner occupied before they ceased to be partners”. In *London Borough of Bexley v KM* [2017] UKUT 0354 (AAC) paragraph 11 the Upper Tribunal discussed a point of construction of Regulation 9(1)(c) which has similarities with the point of construction of Regulation 9(1)(d) arising in this case. In relation to Regulation 9(1)(c), the judge said:

“Housing Benefit and Council Tax Reduction Legislation (29th edition 2016/2017) at page 284 discusses whether the liability must be to the former partner alone. The tribunal assumed without analysis that the provision only applied if the claimant’s liability was to M alone. It is possible that, in an anti-avoidance measure, it would be sufficient if the liability were to the former partner along with others. I have not had argument on this, so I do not attempt to work out the answer. It was, though, something the tribunal should have considered and a final error of law”.

(The discussion referred to appears in the 30th edition of *Housing Benefit and Council Tax Reduction* 2017/2018 also at page 284). Overall, I consider that the trend of construing in accordance with the purpose of the provision as an anti-avoidance measure, as applied to Regulation 9(1)(d), points towards a construction covering both sole and joint landlord situations. Frequently in situations of family breakdown there is a new partner, or other supportive family members. If, just by adding them as another landlord, the sort of family arrangements intended to be struck at by Regulation 9(1)(d) could still attract housing benefit, the potential for avoidance of the intended restrictions is obvious.

26. *The Interpretation Acts*. Construing Regulation 9(1)(d) so that multiple landlord situations are covered, and not only single landlord situations, might be said to be consistent with the general thrust of Section 6 of the Interpretation Act 1978. Section 6 (read with Section 23(1) since the 2006 Regulations are subordinate legislation) has the effect that, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular. The Council argued that this meant Regulation 9(1)(d) covered multiple landlord situations as well as sole landlord situations. I cannot accept that Section 6 is directly applicable, because the issue in this case is whether the definite article includes the indefinite article (whether the word “the” before “person” in Regulation 9(1)(d) includes “a”), rather than whether any singular word should be read as plural or vice versa (eg “a person” be read as “the people”). But I am prepared to accept that the general thrust of Section 6 is that, unless the contrary intention appears, it should not matter whether a legislative provision is in the singular or plural. That is at least consistent with the conclusion reached in the two previous paragraphs that Regulation 9(1)(d) applies to both sole landlord and joint landlord situations.
27. Drawing all of this together, I consider it appropriate to interpret Regulation 9(1)(d) in the context of its anti-avoidance purpose, to try to ensure the mischief it sought to address is remedied. As discussed in *Tucker*, the housing benefit system was being used to fund housing costs of a parent responsible for children renting accommodation from a former partner, even though that former partner and landlord was also a parent

South Lanarkshire Council v DG
[2018] UKUT 417 (AAC)

with obligations to children living there. There was a policy decision to prevent that happening. If, just by adding another person as landlord in a tenancy agreement, the effect of this provision could be avoided, it would lose much of its effectiveness. If housing benefit was payable, the landlord parent of the child would still benefit, resulting in a state subsidy, even if only one of multiple landlords. The general policy aim of Regulation 9(1)(d) would be subverted. *Tucker* recognised that there would be some situations where Regulation 9(1)(d) would adversely affect genuine claimants. *Bristol CC v JKT* [2016] UKUT 0517 recognised that the application of the bright line rule in order to achieve the overall policy would produce hard cases. This case is perhaps one of them, because of the shared care arrangement. However, the provisions of Regulation 20 make it clear that the claimant is a responsible parent, and Regulation 9(1)(d) has the effect he is not entitled to housing benefit. The way forward for somebody in his situation who wishes to claim housing benefit is to live in accommodation where the former partner is not a landlord.

28. In my Directions, I asked for submissions on the interrelationship of Regulation 9(1)(d) and 9(1)(l), largely because of the discussion in paragraph 21 above. I accept the Council's submission that Regulation 9(1)(l) only applies where the preceding subparagraphs do not apply, as that is what it says. As I have found that Regulation 9(1)(d) applied on the facts of this case, there is no need to consider Regulation 9(1)(l) any further.
29. For all of these reasons, I find that the words "the person" in Regulation 9(1)(d) may include "a person". Since the claimant is liable to a parent of his children under the rental agreement, even if only as one of two landlords, he is caught by Regulation 9(1)(d). He is responsible for a child of a person to whom he is liable under the agreement, and is to be treated as not liable to make payments on his dwelling. He was not therefore eligible for housing benefit at the material time.

Conclusion

30. I therefore set aside the decision of the tribunal because it was in error of law. I re-make it in the terms set out at the beginning of this Decision.

A I Poole QC
Judge of the Upper Tribunal
4 December 2018