

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CH/2111/2018

Before: Deputy Upper Tribunal Judge Gullick

The decision of the Upper Tribunal is to allow the appeal against the decision of the First-tier Tribunal.

The decision of the First-tier Tribunal made on 28 March 2018 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and I re-make the decision, as follows:

The appeal against the decision of 23 June 2017 is dismissed.

REASONS FOR DECISION

Introduction

1. Below, I will refer to the parties to this appeal as “the Council” (which is the Appellant before this Tribunal) and “the Claimant” (who is the Respondent before this Tribunal).
2. This is an appeal regarding the Claimant’s entitlement to Housing Benefit (HB). References below to page numbers are to the pages in the bundle of documents before the Upper Tribunal.
3. Entitlement to HB depends on the occupation of a person’s main dwelling as her home. Regulations 7(13C) and (13D) of the Housing Benefit (Persons Who Have Attained the Qualifying Age for State Pension Credit) Regulations 2006 (“*the 2006 Regulations*”) govern the period of time during which a person to whom those Regulations apply may leave Great Britain without cessation of their HB. They provide:

(13C) This paragraph applies to a person who is temporarily absent from Great Britain and who occupied the main dwelling as his home, or was treated as occupying that dwelling as his home, immediately before the period of absence from Great Britain.

(13D) Subject to paragraphs (13E), (13G), (17C) and (17D) a person to whom paragraph (13C) applies shall be treated as occupying the main dwelling as his home whilst he is absent from Great Britain, for a period not exceeding 4 weeks beginning with the first day of that absence from Great Britain, provided that—

(a) the person intends to return to occupy the main dwelling as his home;

(b) the part of the main dwelling normally occupied by the person has not been let or, as the case may be, sub-let; and

(c) the period of absence outside Great Britain is unlikely to exceed 4 weeks.

4. This appeal concerns the computation of the permitted period of four weeks' absence from Great Britain.

Background to the Appeal

5. The Claimant is presently 79 years of age. She had claimed housing benefit in respect of her residence, which is in Slough, as a sole occupant since 22 August 2005. The Council is the local authority for that area.

6. On 14 January 2017, the Claimant visited the Council's customer services centre to submit evidence of her imminent trip to India (pages 8-10). That evidence showed that she was to leave the UK by air on a flight from London Heathrow airport at 9:55 pm on Sunday 15 January 2017 and to return on a flight arriving at the same airport at 6:20 am on Monday 13 February 2017.

7. The Claimant's period of physical absence from the UK, on the assumption that her flights left and arrived on time, would have been 28 complete calendar days (Monday 16 January to Sunday 12 February 2017, inclusive) together with short periods on the evening of Sunday 15 January (the day of departure) and on the morning of Monday 13 February (the day of return).

8. On 16 January 2017, the Council terminated the Claimant's HB with effect from 23 January 2017. On 14 February 2017, the Claimant submitted an application for revision of that decision (pages 13-14). That was rejected on 1 March 2017 (page 18). The Claimant then submitted an application for reconsideration to the Council (pages 19-20). On 23 June 2017, the Council revised its decision so that the Claimant's HB was terminated from an earlier date, 16 January 2017, giving rise to an overpayment for the period from 16-23 January 2017 (pages 21-25).

9. The Claimant appealed to the FTT. The FTT heard the appeal at an oral hearing at Maidenhead on 28 March 2018. The Claimant was present and represented herself. She gave evidence through an interpreter. The Council was represented by a presenting officer.

10. The FTT allowed the appeal in a Decision Notice issued on 28 March 2018 (page 27) supplemented by a Statement of Reasons issued on 2 July 2017 (pages 30-32).

11. The FTT found that the Claimant was absent from the UK temporarily, that she always intended to return to the UK and that her home was not let or sub-let during her absence. The FTT further found that the Claimant's actual period of absence from the UK was in accordance with the travel plans that she had submitted to the Council on 14 January (paragraph 7, page 31).

12. The FTT set out the issue it had to determine at paragraph 8 of the Statement of Reasons (page 31);

"The question for the tribunal was whether that period of absence exceeded 4 weeks which amounts to 28 days. If either the day of departure or the day of landing is included in the period of absence, then the period of absence amounted to 29 days. If both are included, then the period is 30 days. If neither is included the period is 28 days. The local authority submitted both the date of departure and the date of return are to be counted in the period of absence."

13. The FTT held that both the day of departure from the UK and the day of arrival back to the UK were not to be counted towards the 'period of absence' in Regulation 7(13D)(c) of the 2006 Regulations. On that basis, the Claimant's absence from the UK was always envisaged to be, and was, 28 days. The FTT therefore concluded that the Claimant had always been entitled to HB and allowed the appeal.

14. The Council applied for permission to appeal to the Upper Tribunal (pages 34-36). Permission to appeal was granted by a judge of the FTT on 7 August 2018 (page 45). The Council then filed a Notice of Appeal with the Upper Tribunal. On 24 August 2018, the Claimant was informed of the appeal and asked to complete a form indicating whether she wished to deal with the case herself or to appoint a representative. On 30 August 2018 she returned that form stating that she wished to deal with the case herself. On 29 September 2018, Upper Tribunal Judge Mitchell made case management directions in which he required the Claimant to provide a written response to the appeal within one month of the issue of his directions, with the Council to reply one month thereafter.

15. However, no response to the appeal has been filed by the Claimant. The Claimant has also not responded to further correspondence from the Upper Tribunal sent in December 2018 reminding her that she had failed to file submissions in accordance with the directions and asking her to provide such submissions, together with a request for an extension of time.

16. I am satisfied that the Claimant has had a full opportunity to provide submissions in response to the appeal and that it is in the interests of justice and in accordance with the overriding objective in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to determine this appeal in the absence of submissions from the Claimant.

17. Neither party has requested an oral hearing of this appeal. The Council is content for the appeal to be decided on the papers. I am satisfied that I can properly determine the appeal without an oral hearing.

Discussion

18. The issue of whether a period of absence is to be treated as including the day on which the absence commences, or whether it starts only on the first complete day of absence, is one on which there is some authority.

19. In *CSH/499/2006* at [10], Mr Commissioner May QC held that the day on which an offender was remanded into custody was the first day of his absence from home for the purpose of Regulation 5(8) of the Housing Benefit Regulations 1987. The wording of that Regulation referred to "... a period not exceeding 13 weeks beginning from the first day of that absence from the home..." That was applied by Mr Commissioner Levenson in *CH/2638/2006* at [18], a case concerning the same provision.

20. In *KdeS v London Borough of Camden* [2011] UKUT 457 (AAC) at [22-25], Upper Tribunal Judge Jupp also concluded, *obiter*, that the day on which a claimant leaves his home is to be included within the period of absence from the home in Regulation 7(13) of the 2006 Regulations which was the successor provision to Regulation 5(8) of the 1987 Regulations.¹ Upper Tribunal Judge Mark applied this

¹ Judge Jupp also noted that that in Regulation 8(3)(b) of the Council Tax Benefit Regulations 2006, the period of temporary absence from a dwelling that is referred to is defined as "...a period of

reasoning in *CB v Liverpool City Council* [2015] UKUT 359 (AAC) at [7], another case concerning the release of a prisoner.

21. In my judgment, these decisions are directly applicable to the question of when the period of absence from Great Britain (as opposed to the home) in Regulation 7(13D) of the 2006 Regulations is to be treated as commencing. In any event, the language used in Regulation 7(13D) is “*beginning with*” not “*beginning from*” and it is clear that such language results in the first day of the relevant period being the date on which the specified event occurs.² The Claimant left Great Britain by air on Sunday 15 January 2017; her absence from Great Britain commenced on that date and that is therefore the first day of the period of absence for the purpose of the calculation in Regulation 7(13D).³

22. Conversely, and again applying the same decisions (see e.g. *KdeS* at [25]), the day on which the Claimant returned to Great Britain, Monday 13 February 2017, is not to be treated as a part of the period of absence.

23. The FTT distinguished the decisions to which I have referred above in paragraph 10 of the Statement of Reasons on the basis that the moment when an imprisonment starts and when it ends were both fixed points in time, but that when someone leaves home to travel away are not because e.g. they might need to return to pick up an item they had forgotten, or their flight might be delayed. I do not accept that as a valid basis for distinguishing the approach taken in these authorities. Both the provisions discussed in the authorities above and that in issue in the present appeal concern the issue of absence – in the former absence from home, and in the latter absence from Great Britain. I do not consider that there is any valid distinction to be made in terms of the principle to be applied in computing the length of the permitted period of absence.

24. The commencement of a period of imprisonment is in any event not ‘fixed’ in the way that the FTT considered it to be; it will depend on many things including, for example, in the case of a remand in custody the time at which the offender is arrested and in the case of a sentence of imprisonment after trial, precisely when the trial concludes and whether there is a delay before sentence is passed. These points are not fixed, just as the point at which a person leaves Great Britain is not fixed. The computation of the relevant periods however depends, in both cases, on the commencement of a period by reference to a particular event.

25. Another reason that the FTT gave in support of its conclusion was that the Council had, even in its final decision, awarded HB for Sunday 15 January 2017 itself. The FTT considered that it would be anomalous if HB were paid for that day but it was then also taken to be the first day of the period of absence from Great Britain. I accept the Council’s submission that the FTT erred in its construction of Regulation 59 of the 2006 Regulations when coming to this conclusion. Regulation 59(8) provides that “... *where a change of circumstances occurs which has the effect*

absence not exceeding 13 weeks, beginning with the first whole day on which a person resides in residential accommodation...” There is no such reference to the period beginning on the first “whole day” of absence from Great Britain in the regulations on housing benefit.

² See e.g. *Trow v Ind Coope (West Midlands) Ltd* [1967] 2 QB 899, CA

³ A necessary part of the FTT’s decision on the facts is that the Claimant did leave Great Britain during the late evening of Sunday 15 January 2017, her flight having departed from London Heathrow airport shortly before 10:00 pm as scheduled. Different considerations might have arisen in relation to the interpretation of the words “absent from Great Britain” if, for example, the Claimant’s flight had left the ground in London very shortly before midnight, but they do not arise in this case.

of bringing entitlement to an end it shall take effect on the first day of the benefit week following the benefit week in which that change actually occurs...” It is not therefore anomalous that Sunday 15 January 2017 is treated as the first day of the permitted four-week period of absence from Great Britain for the purpose of Regulation 7(13D) but that housing benefit is still payable for that day, because the cessation of benefit did not take effect until the beginning of the following benefit week.

26. The next question, having determined that Sunday 15 January 2017 was the first day of the Claimant’s period of absence from Great Britain, is whether the period was one “*not exceeding 4 weeks*”. In my judgment, it is clear that the Claimant’s period of absence from the UK did exceed 4 weeks and indeed it was always likely to exceed 4 weeks on the information provided to the Council by the Claimant. A week is a period of seven days. The first day of the first week of the period of the Claimant’s absence from Great Britain was Sunday 15 January 2017. The final day of the fourth week of that absence was Saturday 11 February 2017.

27. If the Claimant had returned to Great Britain on Sunday 12 February 2017 then her period of absence from Great Britain would have been exactly 4 weeks, because the day of return to Great Britain is to be disregarded when computing the period of absence. However, the Claimant did not return until the morning of Monday 13 February 2017. Her period of absence therefore exceeded the permitted maximum under the terms of the Regulations by one day.

Conclusion

28. I therefore allow the appeal, for the reasons given above. The decision of the FTT was made in error of law. I set that decision aside. I re-make the decision on the Claimant’s appeal against the Council’s decision of 23 June 2017 by dismissing her appeal.

**Signed on the original
on 8 April 2019**

**Mathew Gullick
Judge of the Upper Tribunal**