IN THE UPPER TRIBUNAL **Appeal No.** CH/990/2020
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Miss Z.D.

Appellant

- v –

The London Borough of Hillingdon

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 25 November 2021
Decided on consideration of the papers

Representation:

Appellant:	Mr D. Rutledge, Counsel, instructed by Duncan Lewis, Solicitors
Respondent:	Mr S.C. Cullimore, Team Leader Appeals, Complaints and Policy, London Borough of Hillingdon

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The legal issue raised by this appeal

1. The legal issue raised by this appeal concerns the proper interpretation of regulation 8(1)(c) of the Housing Benefit Regulations 2006, and in particular the phrase "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" (emphasis added).

An overview of the relevant provisions of the statutory scheme

2. One of the core conditions of entitlement to housing benefit is that the claimant "is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home" (Social Security Contributions and Benefits Act 1992, section 130(1)(a)). Regulations 8 and 9 of the Housing Benefit Regulations 2006 (SI 2006/213) then lay down the circumstances in which a person is to be treated as respectively liable, or not liable, to make payments in respect of a dwelling.

3. Regulation 8(1), in particular, defines the 'Circumstances in which a person is to be treated as liable to make payments in respect of a dwelling' as follows:

> **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—
>
> (a) the person who is liable to make those payments;
>
> (b) a person who is a partner of the person to whom sub-paragraph (a) applies;
>
> (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**;
>
> (d) a person whose liability to make such payments is waived by his landlord as reasonable compensation in return for works actually carried out by the tenant in carrying out reasonable repairs or redecoration which the landlord would otherwise have carried out or be required to carry out but this sub-paragraph shall apply only for a maximum of 8 benefit weeks in respect of any one waiver of liability;
>
> (e) a person who is a partner of a student to whom regulation 56(1) (circumstances in which certain students are treated as not liable to make payments in respect of a dwelling) applies.

4. The present appeal principally concerns the two highlighted passages in regulation 8(1)(c) above.

The factual background

5. This housing benefit appeal concerns the circumstances in which the Appellant came to occupy her boyfriend's flat (I use the term 'boyfriend', rather than

'partner', advisedly, for a reason that will become apparent in a moment). I refer to her boyfriend as 'Mr W'. The Appellant has known Mr W since 2010. He had a secure tenancy of a local authority property in Hillingdon while she lived in East London. Each claimed housing benefit as a single person at their respective addresses. So, they did not live together in the same household, although typically they would visit each other on alternate weeks and often stay for a couple of nights on each occasion. It followed they were not a "couple" for the purposes of social security benefits: *Broxtowe Borough Council v CS (HB)* [2014] UKUT 186 (AAC).

6. In December 2017 Mr W was arrested and remanded in custody. In January 2018 he wrote to the local authority asking that the Appellant be allowed to live in his flat and included as a joint tenant. Before this could be resolved, Mr W was released from custody. He was then re-arrested in June 2018 and again remanded in custody. On 16 July 2018 Mr W was sentenced to an immediate term of imprisonment (the precise length of the sentence is not apparent from the file, but a release date was set in April 2021, or in December 2020 if released early on licence). Six weeks later, on 31 August 2018, the Appellant gave up her place in a hostel in East London, terminated her housing benefit claim for that accommodation, moved into Mr W's flat in Hillingdon and made an on-line claim for housing benefit there instead. Mr W also wrote to the local authority stating that the Appellant had moved into his flat with his agreement to act as caretaker.

7. On 21 September 2018 the local authority issued a decision refusing the claim for housing benefit as "Our records show that you are not the person shown as liable for Council Tax and Rent at this address". The local authority subsequently made a grant of council tax reduction (which has different rules to housing benefit).

8. On 6 December 2018 a payment of £400 was paid into the rent account for Mr W's flat. However, on 10 December 2018 the local authority wrote to the Appellant declining the request for her to be recognised as caretaker at the flat. The reason given was that the rent account was in arrears. The council began possession proceedings in January 2019 when the arrears stood at just over £4,000. A further payment of just £10 was made into the rent account in September 2019. Subject to that, the Appellant made repeated attempts to regularise her position as a 'caretaker', but the local authority equally repeatedly declined to recognise her as having such a status, citing the rent arrears. In particular, the council refused to set up a 'use and occupation account' as it would normally do so when agreeing to a caretaker arrangement. By July 2019 the rent arrears were in excess of £7,000.

The First-tier Tribunal's decision

9. The First-tier Tribunal ("the Tribunal") held an oral hearing of the Appellant's appeal on 22 November 2019. The Tribunal acknowledged that the Appellant's entitlement to housing benefit "does not turn on whether she was herself liable to pay rent (she was not) but on whether she falls to be treated as someone liable to make payments in respect of the property pursuant to Regulation 8(1)(c)(ii) of the Housing Benefit Regulations 2006" (statement of reasons, paragraph 3). The Tribunal's statement of reasons then carefully reviewed the

facts, the relevant law and the parties' submissions. Based on that review, the Tribunal identified two main issues with which it had to grapple.

10. The first issue was framed in the following terms (at paragraph 21 of the statement of reasons):

> There is a dispute in this case as to the construction of the words "continue to live". Is the effect of their inclusion that the claimant must have been living in the home at or prior to the time when the person who was actually liable to make the payments ceased to do so; or is it sufficient that they have moved in at some later date and, at the time they claim Housing Benefit, cannot remain in the home without making the payments themselves?"

11. As regards this first issue, which relates to the first ground of appeal, the Tribunal decided that the former reading was the correct one. It concluded that "the words *'… 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'* are most naturally interpreted, in context, as confined to the case where the person was living in the home while the person liable *was* making the payments" (statement of reasons, paragraph 33, original emphasis). The Tribunal referred to this as the 'threshold criterion'.

12. The second issue, which corresponds to the second ground of appeal and is raised by regulation 8(1)(c)(ii), was whether it was "reasonable" to treat the Appellant as liable to make the payments in question (see statement of reasons, paragraph 22). Technically, as the Tribunal recognised, it did not need to address this question, given its conclusion on the first issue as regards the threshold criterion, and as it was "common ground that [Mr W] had ceased to make payments (or rather, payments had ceased to have been made in respect of his rent) long before [the Appellant] moved in" (statement of reasons, paragraph 37).

13. As regards this second issue, the Tribunal's conclusion was that it was not "reasonable" to treat the Appellant as liable to make the payments in question.

14. A District Tribunal Judge gave the Appellant permission to appeal.

The Appellant's grounds of appeal

15. There are three grounds of appeal. Ground 1 is that the First-tier Tribunal's construction of the threshold criterion in regulation 8(1)(c) was wrong in law. Ground 2 is that the Tribunal's use of a 'connection test' to determine whether it was reasonable to treat the Appellant as liable under regulation 8(2)(c)(ii) likewise involved an error of law. Ground 3 is that the Tribunal failed to explore the effect of regulation 12(1)(d).

The Upper Tribunal's proceedings

16. The parties' representatives have made detailed and helpful written submissions in which the legal arguments have been fully ventilated. I am especially indebted to Mr Rutledge, who has acted *pro bono* for the Appellant in this appeal, both before the First-tier Tribunal and before the Upper Tribunal. There has been no application for an oral hearing of the appeal before the Upper Tribunal and I am satisfied it is fair and just to decide this case 'on the papers'.

The Upper Tribunal's analysis

Ground 1: the First-tier Tribunal's construction of regulation 8(1)(c)

17. The first and primary ground of appeal concerns the proper construction of regulation 8(1)(c). In particular, it turns on the correct interpretation of the opening phrase in that provision, the threshold criterion, namely "a person who has to make the payments if [she] is to continue to live in the home because the person liable to make them is not doing so".

18. The First-tier Tribunal gave two reasons for its conclusion that the expression "continue to live" meant that a claimant, in order to qualify under regulation 8(1)(c), must have been living in the home at or before the time when the person who was actually liable to make the payments ceased to do so.

19. The first reason is in paragraph 33 of the First-tier Tribunal's statement of reasons (emphasis as in the original):

> 33. Going back to first principles of construction, therefore, my view is that, first, the words *"… 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"* are most naturally interpreted, in context, as confined to the case where the person was living in the home while the person liable *was* making the payments. "Continue to live" necessarily refers back to some previous point in time when the claimant was living in the home and the only clue as to when that time might be is the reference to the other person's making of the payments. This retrospective approach is supported by the reference in Reg.8(1)(c)(i) to a "former" partner (the paradigm example of a Reg.8(1)(c) case being where a couple split up and the partner who holds the tenancy moves out and stops paying the rent).

20. I call this the Tribunal's plain meaning construction.

21. The second reason that the Tribunal gave was as follows:

> Second, a purposive construction also favours limiting the provision to cases where the claimant was already in occupation when the person liable to make payments ceased to do so. The evident purpose of Reg. 8(1)(c) is to protect the interests of individuals whose housing situation becomes precarious because of the actions or omissions of the tenant (or other person with primary liability to pay), or because some accident befalls the tenant. Again, this inevitably relates back to the time when the claimant's housing situation was not precarious, i.e. when the tenant (etc) was paying rent as required. Again, the paradigm example is where a couple who are living together in a property split up and the partner who holds the tenancy moves out and ceases to pay. The remaining partner, who is left high and dry, deserves the protection of the law. One can readily think of other examples (e.g. the facts of *WL*). But it would be a very unusual case in which the claimant's housing situation was put in jeopardy by the acts or omissions of the tenant of a property in which the claimant was not already residing.

22. I call this the Tribunal's purposive construction. The reference to *WL* is to the Upper Tribunal's decision in *WL v Leicester City Council* [2017] UKUT 151 (AAC), considered further below.

23. Mr Rutledge for the Appellant advances three submissions in support of the first ground of appeal, which he develops under the following headings: (1) the natural reading of the text; (2) the significant absence of express words; and (3) the presumption that Parliament is aware of the existing law.

24. The first submission, based on the natural reading of the statutory text, is a head-on challenge to the Tribunal's plain meaning construction. Mr Rutledge contends that the phrase "if he is to continue to live" refers simply to the need for the circumstances to be such that the individual has to make payments in order to remain in the home. As such, "the phrase refers to the day going forward at which the claimant claims HB because s/he has assumed liability to make payments on the home in place of the liable person" (notice of appeal at §15).

25. This submission is not persuasive for a number of reasons. Entitlement to housing benefit, being based on a claimant's liability (or status as being treated as liable) to pay rent, is necessarily based on the continuous present tense. The words underlined in the phrase "if he is <u>to continue</u> to live" must have some purpose and cannot be mere surplusage (see further *Re James's Application for Judicial Review* [2005] NIQB 38 at [18] and *Densham v Charity Commission for England and Wales* [2018] UKUT 402 (TCC) at paragraph 61). However, if Mr Rutledge is correct in his approach, then it would have been sufficient for the threshold criterion in regulation 8(1)(c) to read (with omitted text as struck through) simply as "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". It follows that the verb "to continue" must be doing more than referring to the continuous present. The answer, as the Tribunal correctly identified in paragraph 33 of its statement of reasons, is that it is referring back to a previous point in time when the claimant and the liable person were living in the home and before rental payments were stopped. This reading is also supported by the Tribunal's purposive construction.

26. Mr Rutledge argues furthermore that his construction is consistent with the staged approach to deciding the statutory questions inherent in regulation 8(1)(c) and as adopted in the case law (see *R(H) 5/05* at paragraph 34, followed in *CSHB/606/2005* at paragraph 13). However, although those were both cases on regulation 6(1)(c) of the Housing Benefit (General) Regulations 1987 (SI 1987/1971), being the statutory predecessor to regulation 8(1)(c), neither of those cases turned on the significance of the phrase "continue to live". It followed that the staged approach simply assumed that the threshold criterion was satisfied.

27. The second submission on Ground 1 is that the absence of express words drawing a clear demarcation between two classes of claimant (namely those living at the property when the liable person ceased making payments and those who moved in afterwards) is significant. Mr Rutledge seeks to contrast what he describes as the very general wording of regulation 8(1) with the very precise wording of both regulation 7(1) (circumstances in which a person is or is not to be treated as occupying a dwelling as his home) and regulation 9(1) (circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling). In particular, to illustrate this point, he refers to regulation 7(6)(a), (7)(b), (8)(a) & (b) and (9)(a)-(c) as well as regulation

9(1)(b), (c), (g) and (h). One example will suffice. Regulation 9(1)(c) provides as follows (with emphasis added by Mr Rutledge):

> **9.**—(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—
>
> …
>
> (c) his liability under the agreement is—
>
> (i) to his former partner and is in respect of a dwelling which he and his former partner **occupied before they ceased to be partners**; or
>
> (ii) to his partner's former partner and is in respect of a dwelling which his partner and his partner's former partner **occupied before they ceased to be partners**;

28. Accordingly, given the comparatively more detailed drafting of regulations 7(1) and 9(1), the contention on behalf of the Appellant is that "something more precise is required to do the job of being a 'threshold criterion'" (notice of appeal at §22). I disagree. The question is whether the statutory language used for the threshold criterion in regulation 8(1)(c) does the job by itself and without the need for further elucidation. The Tribunal's plain meaning construction demonstrates that it does, no more and no less. Furthermore, it is important to read regulation 8(1)(c) primarily in the context of the rest of regulation 8(1) and not so much against the backdrop of its neighbouring regulations 7(1) and 9(1). The other categories of eligible claimants in regulation 8(1) are each defined relatively restrictively. Sub-paragraph (a) covers those actually liable to make payments while sub-paragraph (b) covers their partners (and so by definition people who have been sharing the liable person's household). As the Tribunal correctly observed, the paradigm case for sub-paragraph (c) is the liable person's *former* partner (regulation 8(1)(c)(i)), again indicating they must previously have shared the same household. Regulation 8(1)(c)(ii) must be read in that context, which is reinforced by the threshold criterion. Sub-paragraphs (d) and (e) are even more so two very special and narrowly defined cases.

29. As such, the categories of persons who are treated as liable to make payments in respect of a dwelling for the purpose of regulation 8 are ranked in descending order of proximity to the tenant or other primary occupier (sub-paragraph (a)). Leaving aside the two very special cases, they are partners (sub-paragraph (b)), former partners (sub-paragraph (c)(i)) and finally "some other person whom it is reasonable to treat as liable to make the payments" (sub-paragraph (c)(ii)). The housing need of those in the final category must be in some way analogous to the position of a former partner, judged by the test of reasonableness.

30. Mr Rutledge's third submission on the first ground of appeal is based on the proposition that Parliament can be presumed to be aware of the existing law. He notes that the statutory predecessor to regulation 8(1)(c) – in regulation 6(1)(c) of the Housing Benefit (General) Regulations 1987 – was introduced at a time when security of tenure was typically governed by the Rent Acts. In particular, the parliamentary draftsperson would have been aware that a statutory tenant who was absent from their rented property could maintain their tenancy through the presence of a caretaker. Indeed, case law specifically referred in this context to tenants who were serving a sentence of imprisonment (see e.g. *Brown v Brash* [1948] 2 KB 247 and *Amoah v London Borough of*

Barking and Dagenham (High Court, 23 January 2001, unreported)). Mr Rutledge's submission was that the Tribunal had erred by failing to have proper regard to the housing law context such that, as he put it in the notice of appeal (at §25), "a caretaker installed after the tenant has been convicted of an offence will be automatically excluded from claiming HB on that property".

31. There are several difficulties with this submission. It sits uneasily with some of Mr Rutledge's other submissions, where he emphasises that housing benefit law does not necessarily follow the principles of housing law (see e.g. statement of reasons, paragraph 45). Moreover, cases such as *Brown v Brash* are necessarily concerned with the property rights of the tenant, and not the welfare law rights of a third party non-lawful occupier claiming a social security benefit, where different considerations may well apply. Nor does the submission provide any satisfactory rebuttal to the Tribunal's purposive construction of regulation 8(1)(c).

32. For all the above reasons I conclude that Ground 1 does not succeed. Rather, I agree with the submission made by Mr Cullimore on behalf of the Respondent:

> My view is that "to continue to live in the home" should be interpreted with some retrospectivity as well as looking to the future. I read it as supporting a person to remain in their existing home when the formally liable party stops paying. I read it as a safety net for an existing occupier when the formally liable party is no longer paying. I do not read it as allowing a person to subsequently move into a home after the formally liable party has stopped paying and establish a liability. I do not think it was intended as having a wider reading and interpretation.

Ground 2: the Tribunal's approach to regulation 8(1)(c)(ii) and the 'connection test'

33. The second ground of appeal turns on the First-tier Tribunal's construction of regulation 8(1)(c)(ii). This was only a live issue on the appeal if the Tribunal was wrong to conclude that the Appellant was not "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" within the meaning of the threshold criterion in regulation 8(1)(c). Assuming that the Appellant qualified under that test, she also had to satisfy either of two alternative further tests. The first was that she "was formerly a partner of the person who is so liable" within regulation 8(1)(c)(i). Given the statutory definitions of the terms "couple" and "partner" in regulation 2(1) of the 2006 Regulations, that first route was closed off here (see also paragraph 5 above). Accordingly, the Appellant had to be "some other person whom it is reasonable to treat as liable to make the payments" within the meaning of regulation 8(1)(c)(ii). As already noted, the Tribunal decided it was not reasonable to treat her in that capacity.

34. The first point to be made is that – given my conclusion on Ground 1 – any error of law by the First-tier Tribunal in respect of Ground 2 cannot have been material. The question as to whether the Appellant was "some other person whom it is reasonable to treat as liable to make the payments" simply did not arise on the facts as she was not "a person who has to make the payments if [she] is to continue to live in the home because the person liable to make them is not doing so". Given that state of affairs, this ground of appeal can be considered relatively shortly, at least as compared with the other two grounds.

35. Mr Rutledge submits that the Tribunal erred in law by assessing the regulation 8(1)(c)(ii) reasonableness question by reference to what he describes as a 'connection test', namely the connection between the liable person and the claimant. He refers to the Tribunal's assertion that "The greater the connection between that person's non-payment and the housing difficulties faced by the claimant, the more weight they should attract when assessing reasonableness" (statement of reasons, paragraph 39). In this context, the Tribunal's principal reasons for finding it was not reasonable to treat the Appellant as liable were as follows (see also statement of reasons, paragraph 46):

> 40. In my view, the connection between [the Appellant's] predicament and the fact that [Mr W] is not paying the rent is very tenuous indeed. She had her own accommodation in East London which was being paid for with Housing Benefit and, although the Council had indicated at an earlier point that it might be open to permitting her to occupy the property in a caretaker role, nothing had been agreed at the time she chose to abandon her own home and move in to the property, If the move had been part of the natural progression of their relationship – moving in to live together as a couple – and this had been rudely interrupted by the unforeseen conviction and imprisonment of [Mr W], then I might have found otherwise. But on my reading of the facts, set out above, that was not the case here.

36. Mr Rutledge also takes issue with the weight attached by the Tribunal to Mr W's conduct. The Tribunal expressed its thinking as follows:

> 42 I also disagree with Mr Rutledge as to the weight I should give to [Mr W's] interest in maintaining his tenancy. As I have said, the primary focus is on the consequences for the claimant of the acts or omissions of the tenant. It would be odd therefore to give much weight to the interests of the tenant who has caused the problem in the first place. There might be exceptions, e.g. where an illness or something else beyond the tenant's control has rendered them incapable of making the necessary payments. But that is not the case here. I did not enquire into the offence for which [Mr W] has been convicted but the sentence alone indicates that it involved serious wrongdoing. That is the reason his tenancy is now at risk.

37. According to Mr Rutledge, however, "Nothing in the statutory language used in Regulation 8(1)(c)(ii) indicates that the test of reasonableness is to be determined by the liable person's actions or omissions or the point at which the other person takes up occupation of the accommodation" (notice of appeal at §28). The difficulty with the former submission is that the Tribunal did not treat Mr W's conduct as *determinative* in and of itself. The same is true of the timing point (this, of course, was on the assumption the Tribunal was wrong on the threshold criterion issue). Instead, these considerations were treated as *relevant* factors in the assessment of overall reasonableness. The First-tier Tribunal plainly directed itself correctly as to the proper legal test. For example, at paragraph 22 of its statement of reasons:

> 22. The question whether it is "reasonable" to treat a relevant person as liable to make the payments is to be determined in all the circumstances and in light of the overall purpose of the housing benefit scheme: *FK v Wandsworth BC* [2016] UKUT 570 (AAC) at [21], and see, to similar effect, *WL v Leicester City Council* [2017] UKUT 151 (AAC) at [22].

38. Thus, as Upper Tribunal Judge Lane expressed it in the latter of those two authorities, "the question that regulation 8(1)(c)(ii) requires to be answered is whether treating a person as liable to make payments is reasonable on all of the facts. In other words, it is multi-factorial and not to be determined on a single issue". This was precisely the approach taken by the First-tier Tribunal in the instant case. It is also illustrated by the opening passage to paragraph 39 of the Tribunal's statement of reasons, observing that the reasonableness test "is a question to be determined in light of all the circumstances and I remind myself of all the facts that I have found above. But it is also a question to be determined by reference to the overall purpose of the housing benefit scheme". The Tribunal's reference to what Mr Rutledge characterises as the connection test was made immediately after the following passage in the same paragraph:

> It seems right that the more closely related facts and matters are to the statutory purpose, the greater weight I should give them. In this regard, I repeat that the most obvious purpose of Reg. 8(1)(c) is to protect the interests of individuals whose housing situation becomes precarious because of the actions, omissions or an accident befalling the person who is directly liable for payment of the rent on the property.

39. The First-tier Tribunal correctly applied regulation 8(1)(c)(ii) in accordance with the principles laid down in the relevant Upper Tribunal authorities. Even if it did not, it would make no difference to the outcome of this appeal. Ground 2 is accordingly dismissed.

Ground 3: the First-tier Tribunal's failure to explore regulation 12(1)(d)

40. The third ground of appeal is that the Tribunal erred in law by failing to make any finding as to whether the Appellant was entitled to housing benefit through a combination of the application in tandem of regulation 8(1)(a) and regulation 12(1)(d) of the 2006 Regulations. As we have seen, regulation 8(1)(a) is the belt and braces provision which treats a person who is liable to make payments in respect of a dwelling as if they were so liable. Regulation 12 sets out the type of periodical payments which qualify for payment of housing benefit. In plain English, it effectively provides an expanded statutory definition of the term 'rent'. The various categories of qualifying payment are listed in regulation 12(1)(a) through to regulation 12(1)(j). The first four categories are as follows:

> **12.**—(1) Subject to the following provisions of this regulation, the payments in respect of which housing benefit is payable in the form of a rent rebate or allowance are the following periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home—
>
> (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;

41. There is a simple reason why the First-tier Tribunal made no finding as to whether the Appellant was entitled to housing benefit through a combination of regulation 8(1)(a) and regulation 12(1)(d). That reason was because before the

Tribunal Mr Rutledge had expressly disclaimed reliance on any such proposition. The Tribunal explained its thinking at paragraph 28 of its statement of reasons:

> 28. Neither did Mr Rutledge place any reliance on Regulation 8(1)(a) (i.e. what might be called "direct" liability to make relevant payments). Given that [the Appellant] has the benefit of representation from solicitors and counsel, I decided that it was not appropriate to use my discretionary powers to explore this issue on my own initiative. I comment (without purporting to decide) that it is highly counter-intuitive that a trespasser should qualify for Housing Benefit, through a combination of Reg. 8(1)(a) and Reg. 12(1)(d), when the landlord is not seeking payment from them and in fact does not wish them to be there at all and would prefer to evict them. In *Kirklees MBC v JM* [2018] UKUT 219, UT Judge Jacobs said at [3] "both subparagraphs (b) and (d) imply permissive occupation". *WL* does not assist, because that case concerned "tolerated" trespassers. Determining the application of Reg. 8(1)(a) in this case would therefore have involved the exploration of deep legal waters, without the benefit of written submissions on the point, and would have undoubtedly taken up much more time than had been allocated for the hearing.

42. I just add that the next paragraph in the statement of reasons commences with the simple statement: "Mr Rutledge's case was based on Reg.8(1)(c)(ii)." This reinforces the clear message that the Appellant was not seeking to rely on the possible direct liability engineered through a combination of applying regulations 8(1)(a) and 12(1)(d).

43. Accordingly, this ground of appeal appears to raise two discrete issues. The first is whether the Tribunal was entitled to rely on the representative's express disavowal of reliance on regulations 8(1)(a) and 12(1)(d). The second is whether the Tribunal was correct in its preliminary assessment as to the substantive merits of that argument.

44. As to the former, and as a matter of principle, and also as Upper Tribunal Judge Wright has recently had cause to remind us, "a representative cannot remove from the First-tier Tribunal's consideration an issue which is raised by the appeal" (*KN v SSWP (ESA)* [2021] UKUT 155 (AAC) at paragraph 30). Referring to the decision of the Court of Appeal of Northern Ireland in *Mongan v Department for Social Development* [2005] NICA 16 (reported as *R3/05 (DLA)*, Judge Wright observed as follows:

> 33. The key relevant passages from *Mongan* are in paragraphs [14] and [18] where the court states that:
>
> > "14……the tribunal would not be absolved of the duty to consider relevant issues simply because they have been neglected by the appellant or her legal representatives and that it has a role to identify what issues are at stake on the appeal even if they have not been clearly or expressly articulated by the appellant. Such an approach would chime well with the inquisitorial nature of the proceedings before the tribunal.
> >
> > 18. In carrying out their inquisitorial function, the tribunal should have regard to whether the party has the benefit of legal representation. It

> need hardly be said that close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation. Where an appellant is legally represented the tribunal is entitled to look to the legal representatives for elucidation of the issues that arise. But this does not relieve it of the obligation to enquire into potentially relevant matters. A poorly represented party should not be placed at any greater disadvantage than an unrepresented party."

45. The approach in *Mongan* was confirmed by the Court of Appeal in England and Wales in *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495; R(IB) 4/07, where the Court held as follows:

> the essential question is whether an issue is "clearly apparent from the evidence" (paragraph 16 in *Mongan*). Whether an issue is sufficiently apparent will depend on the particular circumstances of the case. This means that the tribunal must apply its knowledge of the law to the facts established by it, and it is not limited in its consideration of the facts by the arguments advanced by the appellant... But the tribunal is not required to investigate an issue that has not been the subject of argument by the appellant if, regardless of what facts are found, the issue would have no prospects of success.

46. That takes us to the latter issue, namely whether the Tribunal was correct in its preliminary assessment as to the substantive merits of any argument based on regulations 8(1)(a) and 12(1)(d). In this regard Mr Rutledge seeks to rely on *WL v Leicester City Council* but, as the Tribunal noted, that does not assist him as it was a case of "tolerated" trespassers. Furthermore, in *WL* the housing authority had set up a mesne profits account for the occupiers, the very step which the housing authority in the present appeal had expressly (and repeatedly) declined to take.

47. The Tribunal also relied on what it said was Judge Jacobs's observation In *Kirklees MBC v JM* [2018] UKUT 219 (AAC) at paragraph 3 that "both subparagraphs (b) and (d) imply permissive occupation". This involved a slight but immaterial misstep on the Tribunal's part, as the passage in question involved a citation from the judgment of Owen J in *R v Bristol City Council ex parte Mrs J Jacobs* (2000) 32 HLR 841. Owen J's judgment is instructive, as it explains (itself citing *Woodfall on Landlord and Tenant*) that "… an award of compensation for use and occupation is a restitutionary remedy, based upon quasi-contract. It arises where a person has been given permission to occupy the land of another without any binding terms having been agreed about payment. In such circumstances [Woodfall continues] the law will imply a promise on the part of the occupier to pay a reasonable sum for his use and occupation of the land." Furthermore, as Judge Jacobs held (at paragraph 7 of *Kirklees MBC v JM*, a decision followed by Upper Tribunal Judge Mitchell in *AB v London Borough of Camden (HB)* [2020] UKUT 158 (AAC)):

> As always, it is necessary to consider the statutory context. Regulation 12(1) prescribes the periodical payments in respect of which housing benefit is payable. The first five are in summary: (a) rent; (b) licence payments; (c) mesne profits; (d) payments for use and occupation; and (e) service charges. Subparagraph (d) is surrounded by expressions that

have an established meaning in property law. I would expect in that context that it would bear that meaning.

48. In that context the fundamental problem facing the Appellant in the present case is that regulation 12(1)(d) refers to "payments in respect of, or in consequence of, use and occupation of the dwelling" as an example of one "the following periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home" (emphasis added). Regulation 12(1) does not refer to "payments which a person is potentially liable to make in respect of the dwelling which he occupies as his home". So long as the housing authority refused to give permission for the Appellant to occupy the home, and refused to set up a use and occupation account, there could be no such (quasi-contractual) liability for the purposes of regulation 12(1)(d), and so any submission based on the combination of regulations 8(1)(a) and 12(1)(d) had no traction on the facts of the case. The argument had no prospects of success on the merits and as such the issue was not "clearly apparent from the evidence". The Tribunal was perfectly entitled to decline its self-initiated invitation to explore the potential applicability of regulation 12(1)(d).

49. It follows that Ground 3 does not succeed.

Conclusion

50. There was no material error of law in the decision of the First-tier Tribunal. Accordingly, I dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 25 November 2021