

UPPER TRIBUNAL CASE NO: CH/1241/2017

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

As the decision of the First-tier Tribunal (made on 14 December 2016 at Bexleyheath under reference SC168/16/01239) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

- A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under paragraph 6(9)(a) of Schedule 7 of the Child Support, Pensions and Social Security Act 2000, any other issues that merit consideration.
- B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).
- C. In particular, the tribunal must investigate and decide whether regulation 9(1)(c) of the Housing Benefit Regulations 2006 applies in accordance with the guidance given in this decision.

REASONS FOR DECISION

A. The facts

1. In 2014, the claimant, who is female, formed a relationship with Ms M and moved in to live with her as a partner. They shared a bedroom. The other occupant of the property was Mr O. Mr O and Ms M are the joint owners of the property, a three bedroom bungalow, which was left to them by Mr O's late mother. When the relationship between the claimant and Ms M broke down, the claimant remained the property but moved into the spare bedroom and agreed to pay rent.
2. Ms M wrote to the local authority to explain the arrangement (page 19). She said that the property was a three bedroom bungalow jointly owned by her and Mr O. They and the claimant each had a separate bedroom, but shared the rest of the property. She wrote that the claimant 'has started to rent a room *from me.*' There was a room rental agreement (pages 25-26), signed by Ms M and the claimant, but not by Mr O, in which Ms M was described as the landlord and which provided for the rent to be paid to her.
3. The claimant explained her position in more detail in a letter setting out her grounds of appeal to the First-tier Tribunal (page 38). When her relationship with Ms M broke down, she found herself without any savings for a deposit, so it was agreed that she would stay in the property. This would give her the stability

she needed, having a background of long-term domestic abuse and other personal issues.

B. The claim and appeal to the First-tier Tribunal

4. The claimant claimed housing benefit, but this was refused by the local authority under regulation 9(1)(c) of the Housing Benefit Regulations 2006 (SI No 213). Section 130(1)(a) of the Social Security Contributions and Benefits Act 1992 provides that, in order to be entitled to housing benefit, a person must be 'liable to make payments in respect of a dwelling'. Section 137(1) defines 'dwelling' as meaning 'any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises'. Section 137(2)(i) provides for regulations to be made that a person who is liable to make payments in respect of a dwelling is to be treated as not being so. Regulation 9(1)(c) is made under that authority:

9 Circumstances in which a person is to be treated as not liable to make payments in respect of a dwelling

(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; ...

5. On appeal, the First-tier Tribunal also considered regulation 9(1)(a) and found that it did not apply. On appeal to the Upper Tribunal, the local authority did not challenge this part of the decision, so I need say no more about it.

6. The First-tier Tribunal decided that regulation 9(1)(c) did not apply. The tribunal found that the decision that the claimant could remain in the property was one shared by Ms M and Mr O. It accepted the oral evidence that Mr O agreed that the claimant could remain and could insist that she leave at any time. Ms M may deal with the bills and have written up the rental agreement, but Mr O had consented to the arrangement. Accordingly, the claimant's liability was not to her former partner alone, but to her and Mr O.

C. The appeal to the Upper Tribunal

7. I gave the local authority permission to appeal to the Upper Tribunal and allowed the claimant one month in which to make a submission. She did not do so and the local authority accordingly had nothing to which to reply. The result is that I have no submissions on the appeal.

The whole or part of the property?

8. At first glance, there may appear to be a point that is decisive in the claimant's favour. When she and Ms M were partners, they occupied their own

bedroom and shared the rest of the property with Mr O, apart from his bedroom. The claimant no longer shares Ms M's bedroom. Does that not mean that the claimant is no longer occupying the same dwelling as before? The answer is: no. In *R (Painter) v Carmarthenshire County Council* [2002] HLR 23, Lightman J was concerned with two cases in which a lodger became the partner of his landlord until they separated but remained in the same dwelling. I have added a copy of the judgment to the papers for use at the rehearing. The judge considered and rejected the point that the lodgers were now occupying different property from before. He did so on two grounds. One was that their agreements related to the same property in its entirety. The other assumed that that was not do:

13. If I am wrong in either case and the area of the dwelling is smaller after the cesser of the relationship on the basis that there is excluded their landlady's bedroom, the legal position is unchanged and the regulation continues to bite. For upon its true construction (as was submitted by Ms Lieven, counsel for the Secretary of State) it is sufficient that the dwelling occupied by the claimant after the relationship ended formed part of or was subsumed within the space of the dwelling occupied whilst the relationship lasted. For the regulation only requires that the liability is in respect of a dwelling which he and his former partner previously occupied: the dwelling does not have to be the same: it is only necessary that it was in fact occupied by the claimant and his former partner during the period of their relationship. Indeed this must be the paradigm situation at which the regulation was directed.

Why the tribunal accepted the claimant's evidence

9. A second issue is the significance of Mr O's agreement. The tribunal relied on the oral evidence at the hearing, which was given by the claimant. It was entitled to do that, but it did not explain why, which was an error of law. The difficulty is that the oral evidence does not tally with the written evidence. Ms M's letter makes no mention of Mr O other than as joint owner and the rental agreement makes no mention of him at all; both are specific that it is Ms M who is the landlord. Lightman J discussed the relative positions of formal legal documents and informal arrangements at [11]. A different analysis may be appropriate in this case, but it takes some legal analysis to introduce another person into a written agreement as a party to that agreement, especially when he was not mentioned. The tribunal did not engage in that analysis, which is an error of law.

Tenancy by estoppel

10. A third issue is whether Ms M could create a tenancy on her own, given that she and Mr O own the property as joint tenants. The law does recognise this possibility, which it calls a tenancy by estoppel. If this were the case, the tenancy would not (as the First-tier Tribunal assumed) be between Ms M and Mr O as landlords and the claimant as tenant. It would be only between Ms M and the claimant. The tribunal failed to consider this possibility, a further error of law.

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Liability to the former partner and another

11. Finally, if the tenancy was, as the tribunal found, between Ms M and Mr O as landlords and the claimant as tenant, the tribunal should have considered the issue of interpretation that arises on regulation 9(1)(c). *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 Ms 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 that the tribunal should have considered and a final error of law.

**Signed on original
on 29 August 2017**

**Edward Jacobs
Upper Tribunal Judge**