IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CH/2862/2015

Before: **M R Hemingway: Judge of the Upper Tribunal**

Decision: **As the decision of the First-tier Tribunal (made on 1 May 2015 at Liverpool under reference SC068/15/00771 involved the making of an error of law, it is set aside under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is re-made.**

The decision is: The claimant is not liable to a 14% reduction under regulation B13 of the Housing Benefit Regulations 2006.

REASONS FOR DECISION

Introduction

1. This is the claimant's appeal to the Upper Tribunal against a decision of the First-tier Tribunal (hereinafter "the tribunal") made on and after a hearing of 1 May 2015, to the effect that she is liable to a 14% reduction of housing benefit under regulation B13 of the Housing Benefit Regulations 2006.

History and background

2. The claimant lives alone in social sector rented accommodation and is in receipt of housing benefit. There is no dispute about the fact that one of the rooms in her unit of accommodation is properly to be regarded as a bedroom. However, there is a further room, sometimes described in the papers before me as "the second bedroom", but in respect of which it is said by and on behalf of the claimant that it cannot be properly regarded as a bedroom for the purposes of relevant housing benefit legislation.

3. By a decision dated 10 March 2014 the local authority decided that the claimant was under-occupying the accommodation by one bedroom (on the basis that her accommodation had two bedrooms) and that the housing benefit payable should, in consequence, be reduced by 14% under regulation B13 of the Housing Benefit Regulations 2006 (as amended). The claimant appealed against that decision.

4. In order to prepare and pursue her appeal the claimant obtained representation from an organisation known as "Raise". Her representative took five photographs of the room which formed the subject of the dispute and also prepared a plan of it with measurements. That material suggested that the room is unusually configured, that it has within it an open boiler cupboard, that it has a window which can be opened, that it has an inward opening door and that, absent some space under the boiler cupboard, it has a floor space of 46 square feet. The representative also provided, in support of the appeal, a written submission although a number of points taken therein are not now pursued to the Upper Tribunal so it is not necessary for me to say anything further about them.

The appeal to the First-tier Tribunal and its decision

5. The tribunal held an oral hearing at which it heard evidence from the claimant and argument from her representative. There was no attendance on behalf of the local authority. It appears to have accepted the information about the disputed rooms' dimensions and other matters as provided to it by the claimant's representative. It observed, at paragraph 22 of its statement of reasons for decision (hereinafter "statement of reasons") that it was satisfied that the representative "could speak from her personal experience as to the adequacy or inadequacy of the second bedroom". It made a number of factual findings as follows:

> " 12. There was adequate room in the Second Bedroom to put a single bed across the middle of the room.
>
> 13. There was adequate storage space in the second bedroom in an existing wall cupboard.
>
> 14. There was room for a limited number of shelves in the open boiler cupboard in the second bedroom.
>
> 15. It was possible to install a bedside table and to move around the second bedroom without difficulty.
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> 16. The second bedroom had an opening window which provided adequate ventilation.
>
> 17. [The accommodation] had central heating and there was a radiator in the second bedroom. In addition, the second bedroom had both natural and artificial light.
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> 18. There was a door into the second bedroom which could be closed, thereby providing the occupant with privacy.
>
> 19. There was adequate room for a small chest of drawers or a single wardrobe to be placed in the second bedroom.
>
> 20. [The accommodation] is a two bedroom property, the only resident of which is [the claimant]. The landlord is a registered social landlord."

6. It was in light of the above findings, and in light of the fact that the local authority had designated the accommodation as being two-bedroom property, that it decided to dismiss the appeal.

The proceedings before the Upper Tribunal

7. The claimant sought permission to appeal to the Upper Tribunal. It was said in the grounds that the tribunal had made findings to the effect that there was sufficient space within the disputed room to put a single bed across the middle of it and that it would also be possible to install a bedside table and for the claimant to be able to move around the disputed room without difficulty. It was submitted, however, that the plan (which had been accepted) had demonstrated that if the single bed were installed in one possible position seemingly suggested by the tribunal then there would be only "12 inches of clearance" between the foot of the bed and the part of the room where the central heating boiler was located. It was further submitted that if the bed were to be placed in an alternative position (seemingly the only

viable alternative) it would effectively cut off part of the otherwise available floor space. With that in mind it was contended that the tribunal had failed to adequately explain its view that, once a bed was inserted into the disputed room, it would be possible to move around that room without difficulty.

8. An initial application for permission to appeal was refused by a district tribunal judge of the First-tier Tribunal. The application was renewed with the Upper Tribunal but it was lodged later than the permitted time. On 30 November 2015 a judge of the Upper Tribunal granted permission to appeal and, by implication, extended time so as to admit the application.

9. Directions issued with the grant of permission provided for the local authority to make a written response to the appeal and then for the claimant to reply. However, the local authority has not filed a response and, as I understand it, it is not the practice of that particular local authority to involve itself in appeals concerning this sort of subject matter. There being no response there is, of course, nothing for the claimant to reply to.

Did the tribunal err in law?

10. I have decided, despite the lack of a response from the local authority, that I should determine this appeal. There is nothing to suggest that if I were to issue further directions seeking a response one would be provided. I have also decided not to hold an oral hearing of this appeal before the Upper Tribunal, neither party having sought one.

11. In considering whether the tribunal has erred in law I have reminded myself that I am not permitted to substitute my own discretion for that of the tribunal and that I must be slow to interfere with matters of fact determined by a first instance tribunal. Essentially, I may only interfere with its decision if it did make an error of law and not merely because I think it reached the wrong decision on the facts.

12. Although the written arguments put to the tribunal were much more wide-ranging, the ground of appeal put to the Upper Tribunal is a narrow one which simply concerns the adequacy of the tribunal's reasons.

13. It is clear that the tribunal did have in mind, as it was required to, the guidance given by the Upper Tribunal in *Secretary of State for Work and Pensions v Nelson and Fife Council DN (HB)* [2014] UKUT 525 (AAC). In that decision the Upper Tribunal said:

> "31. When an issue arises as to whether a particular room falls to be treated as a bedroom that could be used by any of the persons listed in Regulation B13(5) and (6) a number of case sensitive factors will need to be considered including (a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy."

14. The use of the word "including" demonstrates that the above is a non-exhaustive list. The Upper Tribunal went on to explain, at paragraph 33 of its decision, that an evaluation of such matters would have to incorporate "reasonableness in the context of the underlying purposes of Regulation B13". It subsequently went on to explain that size, of itself, was not the determinative issue.

15. It is clear that the tribunal did seek to incorporate into its consideration the various matters identified as being of potential relevance in the *Nelson* decision. It is clear that it had careful regard to the dimensions of the disputed room as demonstrated in the plan which had been placed before it and which it had accepted as being accurate. However, it did find that it would be possible for the claimant or any other individual to move around the disputed room "without difficulty" once a bed had been installed. On any view the disputed room is a very small room indeed. Further, its potential use as a bedroom is complicated by its quite unusual configuration. In looking at the plan and bearing in mind that a normal single bed might be expected to have the usual dimensions of 36 inches by 75 inches (though I note the claimant's representatives says that a typical single bed should be regarded as being 80 inches long including a bed frame) it would appear, as is suggested by the claimant's representative, that the two possible locations for it would result in either the cutting off of part of the room or the result of there being only a very limited space indeed between one end of the bed and a part of one of the walls (the wall running from point F to point G on the plan). On the face of it, in these circumstances, it is difficult to see how it can properly be said that an occupier of the disputed room would be able to move around it "without difficulty". I consider that, on the basis of the facts as found or accepted by the tribunal, if it was to reach the conclusion that an occupant could move around without difficulty, which was clearly relevant to the sorts of considerations referred to in *Nelson* and the attendant reasonableness consideration, it was required to say more than it did in order to adequately explain it. I conclude, therefore, that it did make an error of law as a consequence of the inadequacy of its reasoning so that its decision falls to be set aside.

Remaking or remitting?

16. Having set the tribunal's decision aside I now have to consider whether or not I should remake the decision myself (and if so of course what that decision should be) or whether I should remit to a differently constituted tribunal. Remittal is often the appropriate course of action, in my view, where there are further facts to be found. However, the relevant facts were made clear in the plan and the photographs and do not appear to have been the subject of any dispute at any stage in these proceedings. The tribunal itself found clear relevant facts based upon the material which had been presented to it and, as noted, it accepted the dimensions and, it seems, the configuration of the room as set out in the plan. The one "finding" which has been the subject of dispute, that concerning the ease with which an occupier could move around the room without difficulty, might properly be characterised as a conclusion drawn from the facts. In these circumstances it seems clear to me that remittal would be unlikely to lead to any further or different factual findings being made. It also seems to me similarly clear that the uncontested factual findings that there are constitute a sufficient basis for me to be able to properly and fairly re-make the decision myself. That, then, is what I have decided to do.

The remaking of the decision

17. I bear in mind, in particular, the specific factors referred to at paragraph 31 of the decision of the Upper Tribunal in *Nelson*. I bear in mind that the list of matters to consider, as set out in that decision, is not exhaustive and that it is also necessary to consider what is reasonable in the context of the underlying purposes of regulation B13.

18. By way of brief recapping, the room is of unusually limited size. It has an available floor space, discounting that underneath the open boiler cupboard, of 46 square feet. It is an unusually configured room and is not, by any means, the sort of square configuration one often sees in small bedrooms which are sometimes described as "box rooms". Given the combination of the small size and the unusual configuration it is clear that the placing of a bed in the room, whilst possible, will leave very little space for, for example, a bedside table and for an occupant to be able to properly, and without being unusually cramped, dress and undress. It does seem to me that it is reasonable to expect that a room which could properly be regarded as a bedroom for these purposes would have sufficient space for an occupant to be able to dress and undress with a degree of ease. Whilst I accept as noted by the tribunal that the local authority did describe the property as comprising two bed-roomed accommodation, that, whilst a starting point, cannot of itself be decisive. I fully accept that many rooms which can fairly be characterised as small will, nevertheless, be properly regarded as a bedroom for housing benefit purposes. However, on the facts and in taking the above considerations together, I conclude that this is not one of them.

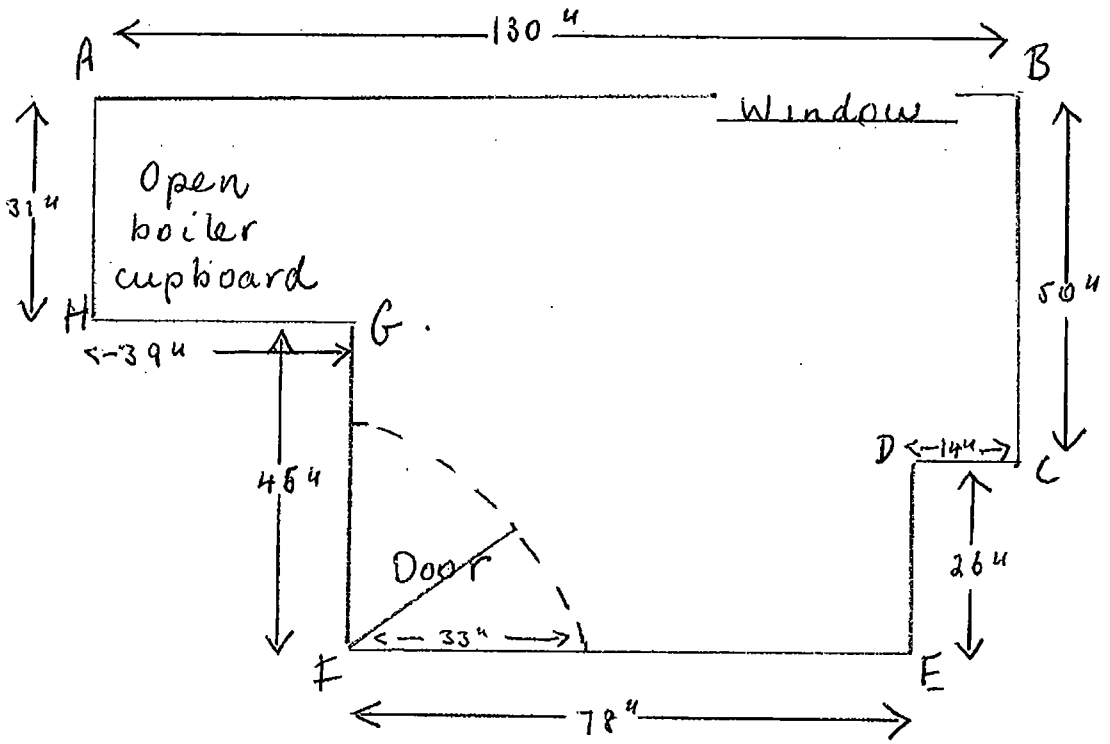
19. In light of the above, therefore, I have decided in remaking this decision to allow the claimant's appeal to the Upper Tribunal and to substitute my own decision as set out above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Date: **12 July 2016**

Plan of small upstairs room in



Total area (~~ex~~cluding boiler cupboard.
46 square feet).