IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case Nos. CH/1608/2009
CH/3000/2009
CH/247/2010

Appellant:	Wirral Metropolitan Borough Council
First Respondent:	[redacted]
Second Respondent:	Secretary of State for Work and Pensions

Appellant:	[redacted]
First Respondent:	Salford City Council
Second Respondent:	Secretary of State for Work and Pensions

Appellant:	[redacted]
First Respondent:	Wirral Metropolitan Borough Council
Second Respondent:	Secretary of State for Work and Pensions

DECISION OF THE UPPER TRIBUNAL

Upper Tribunal Judge Ward

ON APPEAL FROM:

Tribunal:	First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No:	062/09/00017
Tribunal Venue:	Birkenhead
Hearing date:	31 March 2009

Tribunal:	First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No:	946/08/01690
Tribunal Venue:	Manchester
Hearing date:	14 August 2009

Tribunal:	First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No:	062/09/01298
Tribunal Venue:	Birkenhead

Hearing date: 22 October 2009

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case Nos. CH/1608/2009
CH/3000/2009
CH/247/2010

Before: **UPPER TRIBUNAL JUDGE WARD**

Attendances:

In CH/1608/2009:

The claimant/First Respondent:	Mr Richard Atkinson and Mr Brian Buckley of Wirral Welfare Rights Unit
The Appellant (local authority housing benefit department):	Mr Mike Bailey
The Second Respondent:	Mr Steven Cooper

In CH/3000/2009:

The claimant/Appellant:	Ms Pam Morris and Mr Damian Walsh of Salford Welfare Rights Department
The First Respondent (local authority housing benefit department):	Ms Michelle Williams
The Second Respondent:	Mr Steven Cooper

In CH/247/2010:

The claimant/Appellant:	Mr Richard Atkinson and Mr Brian Buckley of Wirral Welfare Rights Unit
The First Respondent (local Authority Housing Benefit Department):	Mr Mike Bailey
The Second Respondent:	Mr Steven Cooper

Decision: My decision in appeal CH/1608/2009 is that the appeal is dismissed. The First-tier Tribunal sitting at Birkenhead on 31 March 2009 under reference 062/09/00017 did not involve the making of an error of law.

My decision in appeal CH/3000/2009 is that the tribunal sitting at Manchester on 14 August 2009 under reference 946/08/01690 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I substitute a decision in the following terms. The claimant is entitled to a maximum of three bedrooms in her housing benefit assessment under the Local Housing Allowance Scheme, based on her circumstances current at the date of her claim. This includes, in addition to the bedrooms allowed by the local authority in its original decision, a bedroom for L, who is the subject of a fostering arrangement between the local authority and the claimant.

My decision in appeal CH/247/2010 is that the appeal is dismissed. The decision of the First-tier Tribunal sitting at Birkenhead on 22 October 2009 under reference 062/09/01298 did not involve the making of an error of law.

REASONS FOR DECISION

1. The appeals in CH/1608/2009 and CH/3000/2009 concern whether a child who is the subject of a fostering arrangement under section 23(2)(a) of the Children Act 1989 should be taken into account in determining the number of bedrooms to be reflected in the calculation of a claimant's local housing allowance ("LHA") for housing benefit purposes. In CH/1608/2009 the First-tier Tribunal had found for the claimant, holding that her three foster children were to be treated as occupiers for the purpose of the determination of a maximum rate (LHA). The local authority appealed with the permission of a district tribunal judge of the First-tier Tribunal. In CH/3000/2009 the First-tier Tribunal found against the claimant, holding that her

foster child was not to be taken into account for that purpose. The claimant appealed, with my permission, to the Upper Tribunal.

2. As the two cases involved the same point of law I directed that they be heard together and held an oral hearing at Manchester Civil Justice Centre on 9 June 2010.

3. The appeals were heard together with CH/247/2010. That appeal, which concerns the treatment for LHA purposes of a child who spent equal time with each of two separated parents, raised issues which to some degree overlapped with those in the other two appeals and was likewise heard at the above oral hearing.

4. The representatives for the various parties are indicated above: I am grateful to them all for their submissions.

The Law – the local housing allowance scheme

5. Under section 130 of the Social Security Contributions and Benefits Act 1992:

> "(1) A person is entitled to housing benefit if—
>
> (a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home;
> (b) there is an appropriate maximum housing benefit in his case; and
> (c) either—
> (i) he has no income or his income does not exceed the applicable amount; or
> (ii) his income exceeds that amount, but only by so much that there is an amount remaining if the deduction for which subsection (3)(b) below provides is made."

6. Section 137 provides definitions "unless the context otherwise requires", including that:-

""child" means a person under the age of 16"; and

""family" means –

(a) a couple;

(b) a couple and a member of the same household for whom one of them is or both are responsible and who is a child or a person of a prescribed description;

(c) except in prescribed circumstances, a person who is not a member of a couple and a member of the same household for whom that person is responsible and who is a child or a person of a prescribed description."

7. By regulation 11 of the Housing Benefit Regulations 2006 (SI 2006 No. 213) ("the 2006 Regulations"):

"(1) Subject to the following provisions of this regulation, housing benefit shall be payable in respect of the payments specified in regulation 12(1) (rent) and a claimant's maximum housing benefit shall be calculated under Part 8 (amount of benefit) by reference to the amount of his eligible rent determined in accordance with—

...

(c) regulations 12D (eligible rent and maximum rent (LHA)), 13C (when a maximum rent (LHA) is to be determined) and 13D (determination of a maximum rent (LHA));

..."

It was common ground that none of the other sub-paragraphs of regulation 11 (1) were in point.

8. Regulation 12D applies in LHA cases. Where the regulation applies, subject to exceptions which are not material here, "the amount of a person's eligible rent shall be the maximum rent (LHA)": subsection (2)(a). Regulation 13C sets out when a maximum rent (LHA) is to be determined: in the present appeals there was no

challenge to the local authorities' decision that a maximum rent (LHA) was to be determined or to when this was done.

9. Under regulation 13D so far as relevant as it stood at the material time for the purposes of CH/1608/2009 and CH/3000/2009 (the subsequent change to the legislation by the material time for CH/247/2010 is not relevant to that case) :

> "(1) Subject to paragraph (3) to (11), the maximum rent (LHA) shall be the local housing allowance determined by the rent officer by virtue of article 4B(2A) or (4) of the Rent Officers Order which is applicable to—
>
> (a) the broad rental market area in which the dwelling to which the claim or award of housing benefit relates is situated at the relevant date; and
>
> (b) the category of dwelling which applies at the relevant date in accordance with paragraph (2).
>
> (2) The category of dwelling which applies is—
>
> (a) and (b) [not applicable]
>
> (c) in any other case, the category which corresponds with the number of bedrooms to which the claimant is entitled in accordance with paragraph (3).
>
> (3) The claimant shall be entitled to one bedroom for each of the following categories of occupier (and each occupier shall come within the first category only which applies to him)—
>
> (a) a couple (within the meaning of Part 7 of the Act);
>
> (b) a person who is not a child;
>
> (c) two children of the same sex;
>
> (d) two children who are less than 10 years old;
>
> (e) a child.
>
> (4) – (11) [not material]

(12) In this regulation—

...

"occupiers" means the persons whom the relevant authority is satisfied occupy as their home the dwelling to which the claim or award relates except for any joint tenant who is not a member of the claimant's household;

..."

10. By regulation 7(1) of the 2006 Regulations:

"(1) Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home—

(a) by himself or, if he is a member of a family, by himself and his family; or

(b) [relates to polygamous marriages],

and shall not be treated as occupying any other dwelling as his home."

11. By regulation 2 of the 2006 Regulations:

""family" has the meaning assigned to it by section 137(1) of the Act."

The law – fostering arrangements

12. There is provision specific to foster children in regulation 21(3) which provides:

"(3) A child or young person shall not be treated as a member of the claimant's household where he is—

(a) placed with the claimant or his partner by a local authority under section 23(2)(a) of the Children Act 1989 or by a voluntary organisation under section 59(1)(a) of that Act, or in Scotland boarded out with the claimant or his partner under a relevant enactment; or

(b) placed, or in Scotland boarded out, with the claimant or his partner prior to adoption; or

(c) placed for adoption with the claimant or his partner in accordance with the Adoption and Children Act 2002 or the Adoption Agencies (Scotland) Regulations 1996."

13. For the sake of completeness I also note that under schedule 5, paragraph 26 payments made to a claimant by virtue of arrangements made under section 23(2)(a) of the Children Act 1989 fall to be disregarded as income.

14. Section 23(2)(a) of the Children Act 1989 is, as noted, the provision under which fostering arrangements are made. It provides that:

"(2) A local authority shall provide accommodation and maintenance for any child whom they are looking after by—

(a) placing him (subject to subsection (5) and any regulations made by the appropriate national authority) with (subject to section 49 of the Children Act 2004) —
(i) a family;
(ii) a relative of his; or
(iii) any other suitable person,
on such terms as to payment by the authority and otherwise as the authority may determine;"

15. Sub-sections (1) and (2) of section 49 of the Children Act 2004 provide that:

" (1) The appropriate person may by order make provision as to the payments to be made–

(a) by a children's services authority in England or Wales or a person exercising functions on its behalf to a local authority foster parent with whom any child is placed by that authority or person under section 23(2)(a) of the Children Act 1989;

(b) by a voluntary organisation to any person with whom any child is placed by that organisation under section 59(1)(a) of that Act.

(2) In subsection (1)–

"appropriate person" means–

(a) the Secretary of State, in relation to a children's services authority in England;

(b) the Assembly, in relation to a children's services authority in Wales;

"local authority foster parent" and "voluntary organisation" have the same meanings as in the Children Act 1989."

However, such a power has not been exercised, at any rate in England.

16. Although what is described as "good practice guidance" was issued by the Department for Education and Skills (as it then was) in July 2006 regarding "the national minimum fostering allowance and fostering payment systems", it is no more than that; in particular I canvassed with the parties whether it was considered to fall within the ambit of section 7(1) of the Local Authority Social Services Act 1970, which requires local authorities, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, to act under the general guidance of the Secretary of State, but nobody sought to argue that this was so. In any event it contains little of relevance to the question which I have to decide.

The law – children in more than one household

17. The position of children living with parents in more than one household is dealt with in regulation 20 of the 2006 Regulations:

"(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. . .

(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.

The parties' submissions

19. The principal submissions on behalf of the claimants were:

(a) (In all three appeals) The introduction of the LHA system by regulations 13C and 13D contains a self-contained provision, so that, in considering who were "occupiers" within paragraph (12), it was a matter of fact. In the shared care case of CH/247/2010 it was possible for a child who lived with more than one parent in separate homes to fulfil the test in each of those homes, notwithstanding the provisions of regulation 20 which would mean that the child fell to be treated as normally living only with the parent who was receiving child benefit (who was not the claimant in the present case). Similarly, in relation to the foster children, regulation 21 had no relevance for the purpose of the LHA provisions. The foster children as a matter of fact plainly were

living with their foster parent(s) and so were occupiers for the purposes of the LHA provisions;

(b) one aspect of the argument at (a) was that effectively parts 2, 3 and 4 of the 2006 Regulations contained self-contained codes, so that Part 2 (which has the cross-heading "Provisions affecting entitlement to housing benefit") is concerned with the fulfilment of the condition in section 130(1)(a) of the 1992 Act, Part 3 with that in section 130(1)(b) and Part 4 with that in section 130(1)(c);

(c) (In CH/1608/2009 and CH/3000/2009 only) If regulation 13D did not create a self-contained test, and one had to apply the regulation in the context of the 2006 Regulations as a whole, then regulation 7 on its true construction still meant that foster children were to be taken into account.

(d) (In CH/247/2010) It was conceded that if regulation 13D did not create a self-contained test the appeal must fail. The reasons why this is so are briefly set out at [25] below.

20. The two local authorities explained that the guidance manual issued by the Department of Work and Pensions was clear in asserting that foster children did not fall to be taken account of in the calculation of bedrooms for LHA purposes. Because local authorities receive subsidy in respect of payments of housing benefits properly made, they were constrained to oppose the claimants' original appeals and continued to do so. In particular, they opposed any notion that regulation 13D created a self-sufficient test. Therefore, Wirral also opposed the appeal in CH/247/2010. The language of the regulation used a number of concepts drawn from other parts of the regulations, against which background it was impossible to hold that the regulation was self-contained. The local authorities had less to say on the regulation 7 point.

21. The principal burden of defending the position articulated in the housing benefit guidance manual fell accordingly on Mr Cooper for the Secretary of State. It would be fair to say that his position was refined in the course of oral argument but can, I hope fairly, be summarised as being that:

(a) regulations 13C and 13D were not self-contained but were part of a set of regulations which need to be construed as a whole;

(b) he accepted that regulation 7 fell to be taken into account as part of that process;

(c) while he would have liked to have been able to argue that regulation 7 was to be confined to the context of determining a claimant's entitlement to benefit, having been given the opportunity to consider the point during the lunch adjournment, he accepted that the Court of Appeal in the case *of R v Swale BC ex parte Marchant* (2000) 32 HLR 856 provided binding authority on the Upper Tribunal to the contrary, a view which had also been taken by Upper Tribunal Judges Mesher and Williams in CH/2197/2009 and *Stroud District Council v JG* 2009 UKUT 67 (AAC) respectively;

(d) however, he argued that the regulation 7 definition fell to be applied within the context of the housing benefit scheme as a whole, so that "child" within sub-paragraph (3) of regulation 13D must be understood so as to exclude children who were excluded from forming part of the household by (in this case) the provisions of regulation 21(3);

(e) he invited me to permit further submissions allowing pre-Parliamentary material to be submitted, though he could not give any indication that there were relevant materials to be considered.

Conclusions

22. I have little hesitation in dismissing the argument that the LHA provisions are intended to create a self-contained regime to which other parts of the 2006 Regulations are not relevant. The *Swale* decision was concerned with whether the claimant could, under predecessor provisions, claim housing benefit by reference to size criteria for the house which took into account children who lived with him for half of the time and for the other half with their mother, from whom he was separated. The Court of Appeal, upholding the decision of Kay J, rejected a submission from Counsel for the claimant that regulation 5 (the predecessor to regulation 7) was only relevant to considering a claimant's benefit entitlement and this is binding authority on the Upper Tribunal. They went on to hold that regulations 14 and 15 (the predecessor to regulation 20) meant that the claimant's children were to be treated as a member of the household of their mother (who received the child benefit) and that this resolved the question of which dwelling they occupied. *Swale* of itself provides sufficient reason not to accept the submission recorded at (b) of [19] above.

23. There is nothing in regulation 13D (introduced by SI 2007/2868 from 7 April 2008) that suggests that it was intended to introduce a significantly different approach from that which prevailed in relation to the provisions considered in *Swale.* As the local authorities' representatives said, there are a number of terms used in regulation 13D which would not make sense unless taken in the context of the remainder of the regulations. Also, if it had been intended that regulation 13D was to create a self-contained regime then in my judgment express words would have been used to make clear that it was to be applied notwithstanding anything in the remainder of the 2006 Regulations and the content of the regulation would have been formulated so as to avoid the need to do so.

24. Further, while it was argued for the claimants that *Swale* was a decision on predecessor legislation, which did not contain a substantive definition of "occupier" whereas regulation 13D now did so in subsection (12), I do not consider that this assists the argument. That definition serves essentially two purposes. Firstly, it makes clear that who constitutes an "occupier" is a matter for the relevant authority to satisfy itself about rather than for the rent officer who determines the maximum

rent (LHA) itself under paragraph (1). Secondly, by its reference to a test of where the persons "occupy as their home the dwelling to which the claim or award relates" it is in my judgment consciously mirroring the very matter with which regulation 7, by the words immediately following the opening proviso in its text, is concerned. Thus the inclusion of the definition makes it more, rather than less, likely that regulation 13D is not self-contained. I do not accept the argument that an express cross-reference would have been made to regulation 7 if that had been the intention: regulation 7 deals with "Circumstances in which a person is or is not to be treated as occupying a dwelling as his home" and, as *Swale* establishes, does so for a range of purposes. Given the existence of regulation 7 for such a range, no express reference to it was required in order to bring it into play for the purposes of regulation 13D(12).

25. It follows, therefore, that the appeal by Miss O in CH/247/2010 must fail. Regulation 20 falls to be applied and, as she does not receive the child benefit in respect of the child, the child is treated for this purpose as not normally living with her, but with her father, who does. This in turn causes the child to be – for this particular purpose - within the "family" of her father; and so by regulation 7, as a member of a family, such a child is treated as occupying as her home the home normally occupied by that "family".

26. In view of the conclusion I have reached on the first limb of the claimants' argument, it is necessary to consider further the implications of regulation 7 in relation to the foster-children. Applying the regulation 7 test, then by virtue of regulation 21(3)(a), a child who is fostered is not to be treated as a member of the claimant's household. If he or she is not to be treated as a member of the claimant's household nor can he or she fall within the core definition of "family" in section 137, which is applied to the 2006 Regulations by regulation 2. I emphasise that for housing benefit purposes we are not concerned with the expression "family" in general usage, but rather with the very specific and in some ways artificial meaning which the term has in housing benefit legislation. Consequently, when one turns to regulation 7(1)(a) one is forced to the conclusion that a foster child is not for these statutory purposes "a member of a family". As the words in regulation 7(1)(a) which

address only where a person "is a member of a family" have no applicability, one is led to the conclusion that in the case of a foster child, that person is treated as occupying as his home the dwelling normally occupied as his home by "himself". (I interpolate that in my view "himself" is used to mean "him" with particular emphasis rather than that a person is required to occupy it alone: that is clear from the second place in sub-paragraph 1(a) where the word "himself" appears).

27. While I note that what I have termed the "core" definition of "family" in section 137 applies "unless the context otherwise requires", regulation 2 of the 2006 Regulations, which imports the definition for the purposes of those regulations, is not so qualified. Difficult questions may arise (having regard to the relevant provisions of the Interpretation Act 1978) as to whether regulation 2 additionally imports the qualification (which applies to all the definitions in section 137 of the Act) when it imports the particular definition of "family" and/or whether the definition established by regulation 2 should yield to contrary intention even if the qualification is not so imported. However, I do not consider that these are matters I am required to resolve, as even if I assume in favour of the local authorities and the Secretary of State (though without deciding) that the definition of "family" in the 2006 Regulations could yield to contrary intention if the context so required, I consider that the context does not so require. Exclusion of a foster child from the "household" would have the effect that no applicable amount or premium could be claimed in respect of that child and there is no reason to suppose that this was not what the draftsman had in mind. This part of the legislation thus makes sense with the core definition of "family", albeit that sense may not be the one for which Mr Cooper contends.

28. Accordingly, a foster child is among "the persons [who…] occupy as their home the dwelling to which the claim or award relates" and falls within the definition of "occupiers" in regulation 13D(12).

29. That regulation 7 is not confined to questions of benefit entitlement is, as Mr Cooper conceded, established, conclusively at Upper Tribunal level, by *Swale*. Such a proposition is also consistent with the two decisions of the Upper Tribunal referred

to above, which concerned the position of a student (adult) child who was living with the claimant and not the claimant herself.

30. However, in Mr Cooper's submission that was not the end of the matter, as regulation 13D has to be applied within the context of the 2006 Regulations. He invited me to hold that the word "child" in paragraph (3) of regulation 13D referred to a child who was a member of the claimant's household, so that, because of the operation of regulation 21, even if regulation 7 would make foster children "occupiers" they were still not covered by regulation 13D. This route was in my judgment not open to him as firstly, "child" is a defined term, the definition not supporting his argument; secondly, sub-paragraph (3) potentially includes a significant number of other people, such as sub-tenants and non-dependents and Mr Cooper was unable to suggest any test or formulation by which they might or might not fall to be excluded as well; and thirdly, it would be with the utmost reluctance that I would imply anything into drafting as detailed as that of regulation 13D, particularly as in the definition of "occupiers" itself there is already excluded from those covered by that definition one category of person (joint tenant who is not a member of the claimant's household) who would otherwise fall within it. If it had been the draftsman's intention to exclude foster children, he would have done so similarly. In my view the exclusion effected by regulation 21(3) from the "household" is a limited one, and must be taken to have been chosen advisedly.

31. In case it led to an outcome that was repugnant to the construction which appeared to me at first sight to be the correct one I did explore with the representatives whether there was any suggestion of an existing legislative background that might lead to an element of double counting if those who received fostering allowance thereby obtained a contribution intended for the cost of housing the foster child which would be duplicated if regulations 7 and 13D bore the above interpretation. Fostering allowances under section 23 of the Children Act 1989 have been set locally. The power to set them nationally by regulation has not been exercised and even the guidance referred to above contains nothing material. Mr Cooper expressly disclaimed at the hearing any point based on double-counting.

32. As I regarded the interpretation as clear, I did not accede to Mr Cooper's invitation to allow further submissions to be made by reference to pre-Parliamentary materials which had not been placed before the Upper Tribunal. In any event, the Secretary of State had had ample opportunity to submit any such materials in time to be considered at the hearing, had he wished to do so.

33. Accordingly, in CH/1608/2009 and CH/3000/2009, the LHA falls to be determined on the basis that the foster-children are "occupiers".

(Signed on the Original)

C G Ward
Judge of the Upper Tribunal
24 June 2010

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Challenging an Upper Tribunal decision.

A decision of the Upper Tribunal is final. The only ways in which it is open to challenge are set out below.

Set aside. A decision may be set aside by the Upper Tribunal judge if there has been a procedural irregularity in the proceedings and the judge considers that it is in the interests of justice to do so. For example, if a document relating to the proceedings has gone astray or a party or his representative was not present at a hearing. If you wish to apply to set aside you must do so in writing with reasons so that your application is received **within one month** from the date of the attached letter.

Appeal. There is provision for an appeal against a decision of the Upper Tribunal to the Court of Appeal **on a question of law only**. If any party wishes to appeal they must first ask for permission from the Upper Tribunal judge. If the Upper Tribunal judge refuses permission, then the party wishing to appeal can ask for permission from the Court of Appeal itself. If you wish to apply for permission to appeal against the Upper Tribunal decision you must do so in writing with reasons so that your application is received **within three months** from the date of the attached letter.

If any party applies for permission to appeal to the Court of Appeal, the Upper Tribunal judge may review the decision if (1) the judge overlooked a legislative provision or binding authority which could have had a material effect on the decision, or (2) since the decision a higher court has made another decision binding on the Upper Tribunal which, if made before the decision, could have had a material effect on it. If you think that either of those grounds apply you should say so in your application for permission to appeal.

The Upper Tribunal judge may extend either time limit if satisfied that there is a good reason for doing so.