Pre-1996 protection and the HB maximum rent (social sector)

This note explains how, in my opinion, any HB claimant who has remained on HB at the same property since 1 January 1996 is exempt from having a limited rent determined under the Maximum Rent (Social Sector) provisions (or bedroom tax/removal of spare room subsidy if you prefer).

Since January 1996 eligible rent for private tenants has been determined in one way or another by the Rent Officer with the Council having very little say over the matter. But private tenants who were already on HB in January 1996 were protected from Rent Officer determinations for as long as they remained on HB in the same dwelling (there were also some limited linking provisions for people who move, separate from a partner etc).

Clearly no-one was thinking about social sector tenants at that time – whenever the rules for private tenants have undergone major reform (principally in 1996 and 2008) social sector tenants have not been affected. So no-one ever noticed that, technically, the eligible rent of a social sector tenant who has been on HB in the same dwelling since 1996 is calculated under the preserved pre-1996 Regulations. Until April 2013 it made no difference because the old Regs and the current Regs treated social sector tenants in exactly the same way (except in those unusual cases where a Housing Association rent is referred to the Rent Officer, but they are as rare as hens’ teeth).

The arrival of the Maximum Rent (Social Sector) in April 2013 has forced social sector tenants and those advising them to scrutinise the Regulations for innovative solutions. The most widely promulgated of these solutions has been “underlying” exempt accommodation – where a registered HA provides one of its tenants with more than minimal support the case is technically exempt accommodation and is therefore exempt from the MR(SS) and largely exempt from the benefit cap as well. And now there is the pre-1996 loophole. This loophole relies on the fact that the transitional protection aimed at private tenants in 1996 operates by freezing the pre-1996 eligible rent rules for **anyone** who satisfies the continuous HB/continuous occupation requirements: the preserved Regs do not only apply to private tenants.

The following flow chart and end notes explain how the protection operates ...

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**Schedule 3 to the HB&CTB Consequential Provisions Regs 2006**

See relevant extracts on following page

**Reg 2: Interpretation**

“**eligible rent**” means, **as the case may require**i, an eligible rent determined in accordance with–

(a) regulations 12B (eligible rent), 12BA (eligible rent and maximum rent (social sector)), 12C (eligible rent and maximum rent) or 12D (eligible rent and maximum rent (LHA)); or

(b) regulations 12 (rent) and 13 (restrictions on unreasonable payments) as set out in paragraph 5 of Schedule 3 to the Consequential Provisions Regulations **in a case to which paragraph 4 of that Schedule applies**

**Reg 70: Maximum housing benefit**

The amount of a person’s **appropriate maximum housing benefit** in any week shall be 100 per cent of his **eligible rent** calculated on a weekly basis ...

**HB Regs 2006**

**Social Security Contributions and Benefits Act 1992:**

130.—(1) A person is entitled to housing benefit if–

...

(b) there is an **appropriate maximum housing benefit** in his case

130A. —(1) For the purposes of section 130 above, the appropriate maximum housing benefit (in this section referred to as “the AMHB”) is determined in accordance with this section

(2) Regulations must prescribe the manner in which the AMHB is to be determined

[[1]](#endnote-1)

**Extracts from Schedule 3 to HB&CTB Consequential Provisions Regs 2006[[2]](#endnote-2)**

4.—(1) Subject to the following provisions of this paragraph, the eligible rent of a person–

(a) who **was entitled to housing benefit on both the first date and the second date**; or

(b) who is liable to make payments in respect of a dwelling occupied by him as his home, which is exempt accommodation[[3]](#endnote-3),

shall be determined in accordance with–

(i) regulations 12 (rent) and 13 (maximum rent) of the Housing Benefit Regulations, or, as the case may be,

(ii) regulations 12 (rent) and 13 (maximum rent) of the Housing Benefit (State Pension Credit) Regulations,

as set out in paragraph 5 *[the “old” Regs 12 and 13 – no bedroom tax etc].*

[[4]](#endnote-4)(2) Sub-paragraph (1)(a) **shall not apply** to–

(a) any determination of a person's eligible rent in a case where a relevant authority is required to determine a **maximum rent (LHA)** by virtue of regulation 13C of the Housing Benefit Regulations or, as the case may be, regulation 13C of the Housing Benefit (State Pension Credit) Regulations;[[5]](#endnote-5)

or

(b) any **subsequent** determination of his eligible rent[[6]](#endnote-6).

(3) Sub-paragraph (1)(a) **shall only apply** in a case where–

(a) either–

(i) the **dwelling occupied as his home** by a person to whom sub-paragraph (1)(a) refers is the **same on both the first date and the second date**; or

(ii) [decants etc] **and**

(b) the person–

(i) was **continuously entitled to and in receipt of housing benefit between the first date and the second date in respect of the dwelling to which head (a) above applies**; or

(ii) *[4 week breaks],* or

(iii) *[welfare-to-work breaks]*

(5) to (7) *[protection passed on to successors etc]*

(10) In this paragraph–

"**the first date**" means **1st January 1996**, except *[protection passed on to successors]*;

"**the second date**" means any day after the first date for which a claimant's entitlement to housing benefit is to be determined

**Endnotes**

1. **First argument against protection applying:** It has been suggested that the words “as the case may require” are flexible so as to allow the Council to choose whichever calculation method it thinks appropriate having regard in particular to the policy intention. Thus, so the argument goes, the Council is free to take the view that the extension of pre-1996 protection to social tenants is clearly an unintentional quirk of drafting and to conclude that the case “requires” a maximum rent (social sector) determination under principal Reg 12BA *et seq.* **My answer to this argument:** I disagree. These words first appeared in the definition of eligible rent from April 2008, when LHA was implemented nationally. The reason was that there were now so many different alternative eligible rent calculation methods that a clear definition was required in order to ensure that the assessment sets off down the correct path from the start and in particular to guarantee that protected pre-1996 cases remain protected. As far as I can see, where the claimant satisfies para 4 of Schedule 3 to the CP Regs then the case “requires” the eligible rent always to be calculated under para 5 of that Schedule [↑](#endnote-ref-1)
2. **Second argument against protection applying:** Paragraph 11 of Schedule 7 to the Social Security Administration Act 1992 says that Regulations do not have to be referred to the Social Security Advisory Committee if they merely consolidate existing provisions. It has been suggested that the Consequential Provisions Regs cannot therefore confer any new protection on claimants because they were passed without referral to SSAC. **My answer to this argument**: the pre-1996 protection applied in exactly the same way under the HB (General) Amendment Regs 1995 – including social sector tenants. All the CP Regs do is revoke the 1995 Regs and re-make them in a different place – there is no substantive change at all. Therefore it was perfectly correct to pass the CP Regs without referring them to the SSAC.

 [↑](#endnote-ref-2)
3. **Third argument against protection applying**: Subpara 4(1) is only engaged at all if the accommodation is exempt accommodation. This argument relies on the position of the comma in head (b). **My answer to this argument**: heads (a) and (b) are quite clearly separate alternative routes to protection. Limb (a) only applies to those who were getting HB immediately before 1/1/96, whereas limb (b) applies to any exempt accommodation case irrespective of when the claim started. Although these rules now appear in the HB&CTB (CP) Regs 2006, those are consolidating Regs: the original pre-1996 savings appear in the HB (General) Amendment Regs 1995. The purpose of those Regs was to prevent the new LRR scheme applying to private tenants who were already on HB. I don’t think there is any ambiguity here at all

 [↑](#endnote-ref-3)
4. **Subpara (2):** Historical note – subpara (2) was originally inserted as Reg 10(1A) of the 1995 Regs from 2003 when the LHA pilots started. It was amended to its current wording from April 2008 when LHA rolled out nationally. It must be read alongside Reg 13C of the principal HB Regs. [↑](#endnote-ref-4)
5. **Subpara (2)(a) -** **migration to LHA:** A new claim requires an LHA determination by virtue of Reg 13C. Subpara (2)(a) makes this “trump” the four week linking rules and protection for successors in subparas (3) to (7). In plain English: if a private tenant currently enjoying pre-1996 protection has any break in claim – even a single week – or dies or splits from their partner, the protection is lost and the case migrates to LHA

 [↑](#endnote-ref-5)
6. **Fourth argument against protection applying:** Pre-1996 protection only applies to the first determination of eligible rent on or after 1/1/96: it is lost by virtue of subpara (2)(b) at the next subsequent determination. **My answer to this argument**: I think you have to read this in the context of subpara (2) as a whole (formerly para (1A) of Reg 10 in the 1995 Regs). It was inserted at the same time as (2)(a) and in my opinion it only applies to LHA cases. The word “subsequent” in (2)(b) means subsequent to the first LHA determination made as a result of (2)(a) – in plain English it’s a lobster pot, once the case has gone into LHA it stays there. (2)(b) is necessary because otherwise the linking rules in subparas (3) to (7) would act to reapply the protection as soon as there was, say, a wage increase or uprating etc. [↑](#endnote-ref-6)