IN THE UPPER TRIBUNAL **Appeal No. CH/140/2013**
(ADMINISTRATIVE APPEALS CHAMBER)

BEFORE JUDGE WEST

DECISION

The decision of the appeal tribunal sitting at Bolton dated 18 September 2012 under file reference 122/12/01508 does not involve an error on a point of law. The appeal against that decision is dismissed.

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

REASONS

1. This is an appeal, with the permission of Judge Lloyd-Davies, against the decision of the appeal tribunal sitting at Bolton on 18 September 2012.

2. The appellant is Bolton Metropolitan Borough Council. I shall refer to it hereafter as "the Council". I shall refer to the respondent hereafter as "the claimant". I shall refer to the tribunal which sat on 18 September 2012 as "the appeal tribunal".

The Facts

3. The Council appeals against the decision of the appeal tribunal dated 18 September 2012 that

(1) the claimant's housing benefit appeal was allowed

(2) its decision in relation to housing benefit dated 22 November 2011 (that the claimant should be awarded the one bedroom rate of local housing allowance) was set aside

(3) a second bedroom was reasonably required by the claimant for occupation by his daughter, who regularly attended as his carer. Owing to his serious medical condition he was forced to sleep in the bedroom which would otherwise be occupied by his carer. In the circumstances he should be awarded the two bedroom rate of local housing allowance.

4. The claimant's appeal, which was made on 31 January 2012 (pages 13 to 15), came before the appeal tribunal on 18 September 2012. The decision had been reconsidered, but not revised, on 14 December 2011 (page 12). On the hearing the claimant attended and gave evidence. The appeal was allowed. The record of the proceedings appears at pages 16 to 17. The notice of decision appears at page 18. The statement of reasons appears at pages 20 to 21.

5. The Council then sought permission to appeal from the Tribunal Judge on 31 October 2012 (page 22), which was refused on 7 November 2012 (page 23). It applied to the Upper Tribunal for permission to appeal on 18 December 2012 (pages 24 to 28). On 25 February 2013 Judge Lloyd-Davies gave permission to appeal and made directions for the claimant to submit his observations on the merits of the appeal within one month of the date on which the notice was sent to the parties and for the Council to provide a response within one month thereafter (page 29).

6. The claimant made his submissions on 30 May 2013 (pages 30 to 34), although the Council did not reply until 28 August 2013 (at pages 69 to 71).

7. Neither party has requested an oral hearing and I do not consider that it is necessary to hold such a hearing in order to determine the matter.

The Decision of the Appeal Tribunal

8. In the statement of reasons the appeal tribunal said this

> "2. The Tribunal found the following facts:
>
> a. The Appellant moved to [the dwelling] in November 2011, because he had pneumonia and COPD. He had been advised that he could not climb stairs, and [the dwelling] is a bungalow. He had just come out of hospital. He is prone to infections because of his conditions.
>
> b. The Appellant receives DLA (Higher Rate Mobility and Middle Rate Care). His wife has arthritis, and had had a disc removed. She is not in receipt of DLA.
>
> c. The Appellant and his wife had previously slept together in the same bed, but on his discharge from hospital, the appellant was advised to sleep in the raised bed in the second bedroom.
>
> d. The Appellant's daughter is his carer, and comes daily to look after him, staying over three or four nights a week. She helps him at night to get to the bathroom, and with his nebuliser when he needs it.
>
> e. If the second bedroom were available, she would sleep there, but, as the Appellant's serious medical condition requires that the second bedroom is used by the Appellant, the carer is forced to sleep on a portable bed in the lounge.
>
> 3. The Council made a decision on 22.11.11 that the appellant should be awarded Housing Benefit based on the 1 bedroom rate of Local Housing Allowance because the criteria for the additional room rate of Local Housing Allowance have not been met, as there is no additional bedroom available for the use of the carer.
>
> 4. The Tribunal looked at all the factors surrounding the tenancy. The Tribunal concluded that, taking all the circumstances into account, the Appellant's daughter was engaged in providing overnight care for the Appellant, she regularly stayed overnight at the dwelling for that purpose, and is provided with the use of a bedroom additional to that used by the persons occupying the dwelling as their home. The second bedroom is provided for such purpose, but as it temporarily needs to be occupied by the Appellant during his incapacity following release from hospital, the Appellant's daughter is using the lounge instead.

> 5. In the finding of the Tribunal, there is a genuine need for a second bedroom, for occupation by the Appellant's carer, and the effect of the council's decision is to deny the two bedroom rate for Local Housing Allowance to the Appellant. The purpose of the Regulation is to provide that rate where it is genuinely required, and the Tribunal find[s] that it is genuinely required. The temporary use of the second bedroom by the Appellant at the time of his greatest need should not be used by the Council to deny the Allowance to the Appellant."

9. Accordingly it allowed the claimant's appeal. (For the sake of completeness, I should add that it is not entirely clear whether the claimant's wife is in receipt of DLA. In his original claim form it was said that she was in receipt of DLA (page 5), but in evidence the claimant said that she was not (see the record of proceedings on page 17). The Council, however, is its original application for permission to appeal stated that they were both in receipt of DLA (page 27). For present purposes, nothing turns on the point.)

The Housing Benefit Regulations 2006

10. So far as is material, the version of regulation 13D of the Housing Benefit Regulations 2006 then applicable provided that:

> "(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—
>
> ...
>
> (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) up to a maximum of four bedrooms.
>
> (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
>
> *[from 1 April 2011]* and one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care (or in any case where both of them are)."

11. A "person in overnight care" is one who is in receipt of the care component of disability living allowance at the highest or middle rate and who fulfils the criteria in the following sub-paragraph (b) of the definition in regulation 2(1):

> ""person who requires overnight care" means a person ("P")—
>
> (a) who—
>
> ...
>
> (ii) is in receipt of the care component of disability living allowance at the highest or middle rate prescribed in accordance with section 72(3) of the Act ...
>
> ...
>
> and
>
> (b) whom the relevant authority is satisfied reasonably requires, and has in fact arranged, that one or more people who do not occupy as their home the dwelling to which the claim or award for housing benefit relates should—
>
> (i) be engaged in providing overnight care for P;

(ii) regularly stay overnight at the dwelling for that purpose; and

(iii) be provided with the use of a bedroom in that dwelling additional to those used by the persons who occupy the dwelling as their home".

12. By way of explanation, the reason for the insertion in 2010 (with effect from 1 April 2011) (by regulation 2(6) of the Housing Benefit (Amendment) Regulations 2010) of the words in the last three lines at the end of paragraph 3 of regulation 13D which come after sub-paragraphs (a)-(e) was set out by Judge Bano in ***MG v. Carmarthenshire CC and the Secretary of State for Work and Pensions*** [2013] UKUT 363 (AAC):

> "9. The amendment to the 2006 regulations effected by the 2010 amendment regulations remedied the breach of Article 14 of the ECHR identified by the Court of Appeal in ***Burnip v Birmingham City Council and Secretary of State for Work and Pensions*** [2012] EWCA Civ 629 that the regulations in their previous form disproportionately disadvantaged severely disabled claimants because, unlike able-bodied claimants, they were not entitled to housing benefit to defray the cost of an extra bedroom for which there was an objective need. The regulation in its amended form therefore makes provision for the cost of an additional bedroom which is used by one of a team of carers on a rota basis, or where one member of a team of staff on duty at night is asleep at any one time."

The Application for Permission to Appeal

13. In seeking permission to appeal the Council accepted that the claimant and his wife were both disabled and in receipt of DLA and that their daughter stayed over 3 or 4 nights to care for them. It also accepted that the claimant had a special raised bed which meant that he had to have a bedroom to himself and that his wife had the other bedroom. It was likewise accepted that their daughter slept in the living room (though in fact on a portable bed rather than a sofa according to the evidence on page 17), but the Council cited the definition of a person in overnight care in regulation 2(1) and in particular the provision that there must be

> "(b) … one or more people who do not occupy as their home the dwelling to which the claim or award for housing benefit relates should—
>
> (i) be engaged in providing overnight care for P;
>
> (ii) regularly stay overnight at the dwelling for that purpose; and
>
> (iii) be provided with *the use of a bedroom* in that dwelling additional to those used by the persons who occupy the dwelling as their home".

It cited from the guidance note in the relevant local authority training manual to the effect that

> "*Additional room for a non-resident carer*
> Where a disabled person or someone with a long term health condition, has a proven need for overnight care and it is provided by a non-resident carer, the additional bedroom will be allowed. There must be an extra room actually in the property for the non-resident carer".

14. But, so the Council says, the claimant's daughter does not occupy a bedroom: she occupies a lounge in which she sleeps, but that is not sufficient. In essence what the Council says is that the claimant's daughter does not occupy a "bedroom" within the meaning in sub-paragraph (b)(iii) of the definition of a "person who requires overnight care" in regulation 2(1) and thus the claimant does not qualify for the two bedroom rate of local housing allowance.

The Decision

15. It would be curious if that were the effect of the relevant provisions. If, by contrast, the claimant had been disabled and entitled to the highest or middle rate of the care component of DLA, but his condition was not sufficiently serious that he needed to sleep in a separate bed, yet he still needed overnight care from his daughter, who occupied the second bedroom, she would have been provided with a bedroom additional to that used by the occupiers of the dwelling within sub-paragraph 3 of the definitional regulation. In that event there would have been a clear application of paragraph 3 of regulation 13D:

> "(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);
>
> ...
>
> and one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care (or in any case where both of them are)."

16. Thus the two bedroom rate would have been applicable. If, however, the claimant's medical needs are sufficiently serious that he is advised to sleep in a separate bedroom in a special bed away from his wife, with the result that his daughter has to sleep elsewhere, on the Council's argument he is in fact penalised by virtue of his additional needs because he is then entitled only to the one bedroom rate of local housing allowance.

17. Equally, it seems to me, on the logic of the local authority's argument the claimant would qualify for the two bedroom rate of the allowance if the family rearranged its affairs so that his daughter slept in the second bedroom and he slept in the raised bed in the lounge, or if he slept in the first bedroom and his daughter in the second bedroom and his wife in the lounge.

18. In my judgment, on the facts of this case the claimant's daughter was provided with the use of a bedroom additional to those used by the persons who occupy the dwelling as their home. The fact that the room which she used was also the lounge of the house does not preclude it from being a bedroom. It was the room in which she had a portable bed and the room in which she slept when she was caring for her father, staying over, as the appeal tribunal found, three or four nights a week and helping him at night to get to the bathroom and with his nebuliser when he needed it. The legislation does not require that the "bedroom" must be a room primarily intended for sleeping in, such that a lounge or other living room is necessarily precluded from being a bedroom because it can be used for another purpose when it is not being used to be slept in.

19. The word "bedroom" is not defined in the legislation. It is an ordinary English word and should be construed as such. According to the dictionary definition in the Shorter Oxford English Dictionary a bedroom is

> "a room containing a bed",

whilst in the Collins Dictionary it is

> "a room furnished with beds or used for sleeping".

In the Merriam Webster Dictionary it is

> "a room used for sleeping"

and in Webster's Dictionary it is

> "a room furnished with beds and used for sleeping".

(There is no essential or material difference between the room being furnished with one bed or more than one bed.) On any of those definitions it seems to me that the claimant's daughter had the use of a bedroom; the fact that the bed may have been folded up or put away in the course of the day when the room was being used as a lounge or living room does not mean that it was not a bedroom within the meaning of the regulations when she slept in it at night. It is sufficient if the room in question, of which the overnight carer has use, is furnished with a bed or is used for sleeping in. It would therefore make no difference if the claimant's daughter had, for example, slept on the sofa, or in a sleeping bag on cushions on the floor, as opposed to sleeping on a portable bed.

20. The appeal tribunal therefore concluded in paragraph 4 of its statement of reasons that

> "4. … the Appellant's daughter was engaged in providing overnight care for the Appellant, she regularly stayed

> overnight at the dwelling for that purpose, and is provided with the use of a bedroom additional to that used by the persons occupying the dwelling as their home."

On the other hand, it also seems to have regarded the claimant's bedroom as the second bedroom, with his daughter temporarily occupying the lounge, but held that a temporary use of the lounge instead of the second bedroom did not prevent the claimant from being entitled to the two bedroom allowance:

> " ... The second bedroom is provided for such purpose, but as it temporarily needs to be occupied by the Appellant during his incapacity following release from hospital, the Appellant's daughter is using the lounge instead.
>
> 5. In the finding of the Tribunal, there is a genuine need for a second bedroom, for occupation by the Appellant's carer, and the effect of the council's decision is to deny the two bedroom rate for Local Housing Allowance to the Appellant. The purpose of the Regulation is to provide that rate where it is genuinely required, and the Tribunal find[s] that it is genuinely required. The temporary use of the second bedroom by the Appellant at the time of his greatest need should not be used by the Council to deny the Allowance to the Appellant."

It is not in fact clear from the evidence or from the statement of reasons whether and to what extent the arrangement was a temporary one, but it seems to me that the reason why the claimant is entitled to succeed is that the arrangement is such that, whether temporary or not, the person who is the claimant's overnight carer has the use of a bedroom whilst she is caring for him. What is crucial is that, whether the care is long-term or short-term (and temporary), she has a bedroom which she uses whilst caring for him. However that may be, I am satisfied for the reasons set out above that the appeal tribunal was correct in concluding the claimant's daughter had the use of a second bedroom and that the claimant was accordingly entitled to the two bedroom rate of local housing allowance under regulation 13D.

21. The Council sought to rely on the Adjudication and Operations Circular on Housing Benefit size criteria restrictions for working age claimants in the social rented sector from 1 April 2013 (HB/CTB Circular A4/2012 (July 2012) (albeit that it concerns the 2012 amendment regulations which were laid before Parliament on 18

June 2012 and not the earlier ones which came into force with effect from 1 April 2011)

> "We will not be defining what we mean by a bedroom in legislation and there is no definition of a minimum bedroom size set out in regulations. It is up to the landlord to accurately describe the property in line with the actual rent charged".

In my judgment, however, that purported reliance does not assist the Council's argument. The words in the last sentence of the guidance note to the effect that

> "There must be an extra room actually in the property for the non-resident carer"

do no more than apply the requirement in the statutory definition that the additional bedroom must be "in that dwelling". They do not shed any light on the correct meaning of the word "bedroom" nor do they limit the meaning of the word "bedroom" to a room which is primarily intended for sleeping in.

22. The situation in this case is entirely different from that with which Judge Bano was faced in ***MG*** where, as he explained, the additional room was described as an office which had no bed or other sleeping facility and only a table and chair and where the care workers worked a "wakeful" system:

> "8. The argument on behalf of the claimant put forward by the company (which is effectively the appellant in this case) requires the word 'bedroom' in the amendment to the 2006 Regulations to be read as extending to any room occupied by a carer providing night time care to a recipient of housing benefit, or the partner of such a person, whether or not the room contains a bed or is used for sleeping in. Such a departure from the plain and ordinary meaning of the word 'bedroom', if it were ever permissible, could only be justified if it was necessary to give effect to legislation implementing a provision of EU law, or to achieve compatibility with a right conferred by the European Convention on Human Rights."

23. In those circumstances it is hardly surprising that he held that the definition of the word "bedroom" could not be extended to *any* room occupied by an overnight carer. I would add that Judge Bano likewise regarded the word "bedroom" as one

which had a plain and ordinary meaning and that in his view it would be sufficient if the room in question either contained a bed or was used for sleeping in.

24. In the circumstances I do not need to consider the additional argument made by the claimant to the effect that the effect of the regulations is such that they is unlawfully discriminate against him in the same way as the appellant in ***Burnip***. The effect of the amendments introduced into regulation 13D of the Housing Benefit Regulations was in fact to deal with the ***Burnip*** point as Judge Bano explained in paragraph 9 of his decision in ***MG***.

25. However, given the local authority's expressed concern about the implications of this case, I would reiterate the cautionary words of Henderson J in paragraph 64 of ***Burnip***:

> "Secondly, there is no question of a general exception from the normal bedroom test for disabled people of all kinds. The exception is sought for only a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for a carer to sleep in … Thirdly, such cases are by their very nature likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring. The cost and human resource implications of accommodating them should therefore be modest, quite apart from the point that in some cases the effect of refusing the claim could well be to force the claimant into full-time residential care at much greater expense to the public purse."

26. I therefore dismiss the appeal.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **10 January 2014**