IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CH/2351/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Date of hearing: 30 May 2018
Place: Cardiff Civil Justice Centre
Attendances: The Appellant Mr E in person
For the Respondent local authority, Ms Harris (Bristol City Council Appeals Officer)

Decision: The decision of the First-tier Tribunal (4 April 2016, Bristol, file reference SC 186/14/01688) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2) of the Tribunals, Courts and Enforcement Act 2007.

The Upper Tribunal **RE-MAKES** the First-tier Tribunal's decision but in identical terms. The outcome remains the same. From 19 January 2014, Mr E had one bedroom in excess of his entitlement, resulting in a 14% reduction in his housing benefit award under regulation B13 of the Housing Benefit Regulations 2006.

REASONS FOR DECISION

Background

1. Mr E's landlord, Bristol City Council, was also his housing benefit authority.

2. The council's housing management software contained entries for Mr E's home, recorded in 2010:

- 14 July: "no order – tenant has roof leak in 3 places, spare bedroom, bathroom and stairs. Ceiling sagging in bedroom. Max will inspect on Friday am. Tenant will call if ceiling gets worse for a make safe";

- 16 July: "test ceiling in bedroom 2 for asbestos"; "resite tiles, renew tiles, use ladder through skylight…";

- 19 July: "tenant says we can only contact him by email to arrange asbestos inspection informed Michelle and Max BCS";

- 29 July: "no order – email received regarding roof repairs and asbestos test, forwarded to Lee D and Max requesting that tenant is emailed with info and an appointment date asap";

- 26 August: "major roof repairs required – 6-7 splits in roof – emailed Max … to deal";

- 26 October: "no order…tenant mailed is as asking what is happening ref. the roof repairs as not finished only attendance was claimed";

- 10 November: "after inspection by [Max] erect scaffold for roof repairs next to staircase…please inform Ashcrofts for work to be carried out";

3. On 17 March 2013, the council superseded Mr E's award of housing benefit to give effect to regulation B13 of the Housing Benefit Regulations 2006 ("the 2006 Regulations"). The council decided that, under regulation B13, Mr E's social housing dwelling contained one bedroom in excess of his entitlement, resulting in a 14% reduction in his award. The council's decision had effect from 1 April 2013.

4. An entry in the council records for 9 October 2013 reads: "pre-inspection: bedroom ceiling damaged by roof leak, bowed and hanging down in 2 areas, approx. 2 sq. ft and 3 sq. ft, tenant says was inspected about 3 years ago when roof leak fixed, and surveyor at time advised may have asbestos in it". Below in these reasons, this room is referred to as "room 1". The next relevant entry, for 23 October 2013, reads "Cabot Thermal to remove artex ceiling and renew completed 18/01/14". There is also a works order of that date which describes the works as "RNW ASBESTOS BED1 CEILING".

5. A consignment note, produced for the purposes of the Waste (England and Wales) Regulations 2011 and completed by an employee of Cabot Thermals, indicates that waste, in the form of construction materials containing "bonded white asbestos", was removed from Mr E's home on 10 November 2013. And a "certificate of non-notifiable work", dated 16 December 2013, relating to a job described as 'bedroom ceiling', stated the "area" was free off visible dust or debris.

6. Mr E appealed to the First-tier Tribunal against the council's decision. He argued that room 1 was not habitable "until the exposed asbestos was removed in late 2013" and "you should have made the room habitable if you were going to charge me for it as if it were a bedroom".

7. In July 2014, Mr E emailed the council:

> "[room 1] was cleared of asbestos and given a new ceiling in March 2014. [The council] now wants to charge me Bedroom Tax from that date. However I disagree with that as I had to move all the things stored in that room into my bedroom [below this room is referred to as "room 2"], and sleep in the living room from then until now…If I can't use my bedroom I don't see why I have to pay a bedroom tax…"

8. An internal council email of 6 August 2014 states: "as far as I can tell, the bedroom in question has been habitable since March 2014 when the asbestos was removed?" On 26 September 2014, however, the council instructed a surveyor to inspect Mr E's home. An internal email of 16 December 2016 refers to a surveyor's 'visit' in September 2014; the surveyor "recorded that no further action was required".

9. A number of emails were sent amongst council officials in September and October 2014:

- 15 September, asset management team to "repairOrders": "could you advise if the attached query has been dealt with? I'm just going through my outstanding under-occupation charge queries and wondered if I can file this one away as completed? I believe the query about paying the charge stemmed from a question about knocking through a doorway…"

- 26 September, email between 'repairOrders' officials: "please can you reply to [15 September email]? I believe this relates to an inspection you carried out on 1.9.14…Tenant refusing to pay bedroom tax as saying he cannot use it and is requesting a new door…";

- 9 October, housing benefit appeals officer to a Response Repairs Supervisor: the officer asked if (a) Mr E correctly stated that a leaking roof was not repaired until late 2013, (b) room 1 "had exposed asbestos and therefore was inhabitable [*sic*]"; (c) "when exactly this problem started and if/when it was solved"; and (d) "whether [room 1] bedroom remains inhabitable [*sic*]";

- 10 October, Supervisor to appeals officer: "it appears that there was a roof leak around Oct. 2013 or before because Cabot had a job to remove a damaged ceiling, this means that it did contain a textured coating containing asbestos. The ceiling was bowing due to the leak";

- 10 October, Supervisor to appeals officer: "did he have a leak to the other bedroom ceiling and was it in a dangerous condition, if not there is no reason why he couldn't occupy the room, if there is no disturbance to the material and is not damaged or likely to be damaged, textured coating or artex is not a health hazard";

- 10 October, Supervisor to appeals officer: arrangements would be made for an inspection of Mr E's property.

10. Following an inspection on 13 October 2014, a council official (job title unspecified) emailed the appeals officer:

> "[room 1] is habitable. The leak has been rectified, the ceiling has been renewed and plastered…The tenant is using this room for storage as well as using [room 2] for storage claiming there is not enough room for personal belongings and asbestos could of [*sic*] got into boxes from the old artex ceiling which was in the bedroom at the time of the leak.
>
> The tenant said the leak started 2009/10, rectified 2010/11 and artex removed and new ceiling early 2013".

11. On 19 January 2015, the council revised their original decision so that no regulation B13 reduction applied until 20 January 2014 (said to have been the date of completion of the asbestos removal works). The council's decision letter stated that room 1 was not habitable until that date. The letter added "our surveyor visited your property on 13 October 2014 and confirmed that [room 1] is currently habitable".

12. On 26 January 2015, a Health and Safety Inspector, acting in a personal capacity, provided a report to Mr E's representative. The report's contents included:

- Damage to artex ceilings is unlikely to expose "the residents to any significant levels of airborne fibres" and "even significant abrasion or cutting does not generate airborne respirable fibres". However, it would be a "good precaution" to wear respiratory protection where the material is dry;

- While artex poses a low risk, the risk is proportionate to the degree of disturbance and the generation of respiratory fibres, and "any residual dust would settle out and would only become airborne again if disturbed";

- "The damaged ceiling should offer no greater risk than the ceiling as it was in its previous condition unless there was some other factor which caused further disturbance";

- In the period immediately after the ceiling collapse, there was potential for contamination. In those circumstances, a tenant should be "advised of the fact that their ceilings are artex and likely to contain asbestos";

- Whether contaminated items should have been disposed of as asbestos waste depended on the degree of contamination and whether an item could be cleaned. Damp items could be cleaned using damp cloths rather than a special type of vacuum cleaner;

- On the question whether removal of items would have extended asbestos-related risks, the risk would remain until an environmental clean was performed although "there would be very limited potential of significant quantities of airborne fibres which would settle out over time and would only become airborne again if disturbed";

- Removed furniture and other items would not pose a significant risk "particularly if it had been subject to an environmental clean".

13. On 11 February 2015, Mr E's representative emailed the First-tier Tribunal, arguing:

- "All the belongings Mr [E] stored in [room 1], including furniture and other items, were partly soaked and wholly covered in debris under these areas. Asbestos is one of 19 Category 1 Hazards and the Health and Safety Executive website advised 3 steps in the clearing and cleaning of such debris in a room with a collapsed ceiling";

- Those steps included sealing debris in plastic sacks, an "environmental clean" using a special vacuum cleaner, disposing of furniture and un-cleanable items as asbestos waste by double-bagging and sealing;

- "at the time, Mr [E] was not advised by Bristol City Council that these items posed any risk, even after it was established that the damaged Artex ceiling contained asbestos". As a result, Mr E "used [room 1] as normal and handled and moved the items in it until the ceiling was repaired by a specialist firm, Cabot Thermal over three years later";

- Cabot Thermal asked Mr E to remove the contents of room 1, which he did manually transferring them into room 2. Cabot Thermal did not give Mr E any safety advice;

- While the council 'signed off' the repairs as complete on 18 January 2014, they did so incorrectly because none of the removed items had been subject to an environmental clean or disposed of as asbestos waste;

- "For these reasons, we respectfully ask that the Council's decision, which predates their inspection of the property last October when it was noted repairs were not complete, be overturned".

14. On 18 February 2015, the council wrote to Mr E stating:

- In October 2013 a council surveyor ordered removal of a ceiling "in one room of your home" because its artex was presumed to contain small amount of "chrysotile (white) asbestos";

- Room 1 was available for use once a 16 December 2013 certificate of works was given stating that the room was free of dust and debris. The council had spoken to the contractor who said all asbestos dust was removed on completion of the work;

- Council surveyors receive training in 'asbestos awareness". Accordingly, the October 2013 surveyor "would have made a mental risk assessment of the possible contamination to…belongings" including a "visual assessment". The surveyor would inevitably have taken into account the low risk of artex-asbestos escaping as fibres and any that did escape would be the least hazardous". The surveyor "obviously observed" no visible dust on Mr E's belongings "indicating no hazard". Had such been observed, vacuuming would have been arranged, a low-cost operation : "there would have been no incentive for the surveyor to have 'skimped' on that cost";

- Any contamination risk in 2013 was insignificant and "you can move them back into [room 1] without any hazard now".

15. Mr E's representative obtained the HSE Inspector's views on the council's letter of 18 February 2015:

- "the amount or numbers of asbestos fibres does not determine whether there is a risk";

- Mental risk assessments and visual assessments were inadequate to determine whether asbestos fibres had been released by the ceiling collapse: "taking a sample of dust would have been sensible and cautious";

- The Inspector was surprised that employees of a specialist firm of asbestos removal contractors advised Mr E to remove items by hand;

- Vacuuming Mr E's belongings would have been a sensible precaution.

16. On 30 April 2015 the First-tier Tribunal dismissed Mr E's appeal. On 25 January 2016, the Upper Tribunal allowed Mr E's appeal against that decision and remitted the case to the First-tier Tribunal for re-hearing. I need not go into the Upper Tribunal's decision because the reasons for its decision are not relevant to the present appeal.

17. Mr E's appeal was re-heard by the First-tier Tribunal on 4 April 2016. The Tribunal instructed itself that "the issue…was whether the state of [room 1] after the repairs had been completed made it not usable as a bedroom after 18 January 2014". Its findings of fact were quite brief: "the repairs to the ceiling had been carried out and the room cleaned"; "a surveyor had in October 2014 reported that the room was fit for habitation"; Mr E's belongings "had been removed from [room 1] before the work was done and even if there had been any contamination from dust after the work had been completed that would not have rendered [room 1] unusable as a bedroom". The stated conclusion was that "the 14% reduction was correctly applied".

Proceedings before the Upper Tribunal

Grounds of appeal

18. Following a hearing at Cardiff Civil Justice, at which Mr E represented himself but the council were not represented, I granted Mr E permission to appeal to the Upper Tribunal. My permission determination read:

> "The ground on which permission to appeal is granted concerns the FtT's conclusion that [room 1] was habitable from 20 January 2014. A surveyor seems not to have inspected the property, presumably to determine whether the asbestos removal works had properly dealt with the problem, until October 2014. Arguably, the FtT erred in law by failing to explain why the room should be considered habitable between January 2014 and October 2014. While the evidence indicates the works were

> completed in January 2014, could the room reasonably have been considered habitable, given the dangers associated with asbestos, before the surveyor's inspection?"

19. Case management directions required both parties to prepare their cases for hearing on the basis that the Upper Tribunal, if it allowed Mr E's appeal, might re-make the First-tier Tribunal's decision rather than remit for re-hearing before that tribunal. Accordingly, the hearing involved arguments both on points of law and, in anticipation of the Upper Tribunal re-making the decision under appeal, fact.

The local authority's arguments

20. The council's written response to Mr E's appeal paid little attention to the ground on which permission to appeal was granted. And some of the arguments were simply irrelevant not to mention antagonistic. The council argue:

(a) the asbestos removal works were in fact completed on 16 December 2013, not 18 January 2014 as previously argued;

(b) Mr E's home was inspected twice after the works, on 1 September 2014 and 13 October 2014 and "both times the surveyors concluded that [room 1] was habitable and no further action was required";

(c) Mr E was advised to remove his goods from room 1 before the works commenced. It was unclear whether he ignored this advice or if he argues his goods were contaminated "whilst stored in the spare room during the leak";

(d) On 18 February 2015, Mr E was given written confirmation that his belongings could safely be moved back into room 1;

(e) "The Tribunal should note it was never established whether the artex ceiling in [room 1] contained asbestos or not. The surveyors stated that "there is not 100% certainty of this";

(f) Although the authority decided to disregard room 1 "from 18/1/14, he continued looking for reasons in order to avoid the "bedroom tax" after this date";

(g) If Mr E could not make use of his bedrooms, he should have sought a rent reduction. The issue he is trying to raise "is not related to the bedroom tax at all and needed to be addressed to Mr [E's] landlord";

(h) The authority now think they may have wrongly excluded room 1 "until the point the repairs have been completed";

(i) "the question the appellant needs to answer is whether he would continue to pay full rent for his property if he was not in receipt of housing benefit";

(j) The authority's submission concludes:

"The authority is of the opinion that it was reasonable for Mr [E] to **contact his landlord** and apply for a rent reduction if the property could not be used to its full extent. It again raises the question as to whether the appellant became unsatisfied with the state of [room 1] only when his eligible rent was reduced".

21. I will shortly describe the arguments put by the council's representative at the hearing of this appeal. But first I should record that there were certain aspects of the representative's conduct at the hearing with which I was not impressed. I had to intervene on a number of occasions. Mr E's motives were unfairly criticised. If Mr E did not have documentary evidence to support a point that meant it should be rejected yet, if he did, that showed he would do whatever he could to avoid the 'bedroom tax'. The council, however, did not need to rely on supporting documentary evidence to prove matters such as risk assessments because it must be assumed that they do everything right, all the time. I was impressed with the way in which Mr E dealt with this. He remained civil and actually thought about the arguments being put rather than automatically disagreeing with every point made by the council's representative.

22. A surveyor must have carried out a risk assessment and concluded that Mr E could safely store items that used to be in room 1 elsewhere in his home. I asked if there was a documented risk assessment. The representative said not but a surveyor must have assessed the risks because, otherwise, Mr E would have been advised not to store the belongings in his flat. The council's surveyors are trained to assess risk. It was inconceivable that no risk assessment was done and, in any event, Mr E's delay in raising concerns about contaminated belongings cast doubt on their genuineness. Mr E argues in response that the council unfairly invite the Upper Tribunal to accept that unrecorded risk assessment were carried out.

23. I asked the council's representative to comment on the health and safety inspector's view (p.54 of the bundle) that a tenant should, following an artex ceiling collapse, be advised of the potential for contamination of belongings. The representative maintained, as previously, that there cannot have been any risk. Had there been, Mr E would have been given appropriate advice. No further action was necessary following completion of the 2013 works.

24. The council's representative argues it is argues it is absurd to think that the council would simply leave an unwitting tenant to live in unsafe accommodation. She does not concede that all the artex removal work was done by specialist units who sealed-off rooms and wore protective gear. But, if Mr E was right that this happened, it showed how seriously the local authority took their asbestos-removal obligations. Mr E countered by arguing that, if the contractors used specialist protective gear, how could the authority argue that any asbestos in his artex ceiling posed little if any health risk.

Mr E's arguments

25. In Mr E's written reply, he argues that the council failed to recognise that he could not use room 2 (to store room 1 items), and that the 2014 works were done by specialist asbestos contractors with specialist equipment.

26. I now describe the arguments put by Mr E at the hearing of his appeal to the Upper Tribunal.

27. Mr E argues that, during 2010, a surveyor attended his home, broke off a piece of ceiling artex and told him it contained asbestos. From then on, the local authority knew he was exposed to asbestos. I asked the authority's representative to comment on the fact that, at p.31 of the bundle, council records from 2010 included "test ceiling in bedroom 2 for asbestos" and "we can only contact him by email to arrange asbestos inspection". The representative concedes the record was authentic but, nevertheless, Mr E must have been informed of the results of any tests. I pointed out that this contradicted the representative's submission at an earlier stage of the hearing that there was no testing at all in 2010. Nevertheless, the representative, who was at times inappropriately combative, continued to maintain both that there were no tests in 2010 but that, if there were, Mr E must have been told the results so why had he not supplied them? Mr E politely objected, not without justification, to the representative's stance. The Upper Tribunal was being invited to find that a lack of documentary evidence from the council was irrelevant because it could be assumed they always acted properly but, when he could not supply supporting documentary evidence, his evidence should not be relied on or his argument rejected.

28. Mr E argues that at least one room in his home could not have been considered habitable between January and October 2014, either due to contaminated items in room 2 or because room 1 was not certified as safe until October 2014. Even if the asbestos was 'low grade', it was still potentially fatal and would have prevented his accommodation from being let to a new tenant. The potential lethality of asbestos requires a no-risk approach. The council seem to think that their contractors need to be protected from asbestos but not their tenants.

29. In response to questioning from the local authority's representative, Mr E argues the October 2014 inspection took place because he asked the authority's contractor to check for asbestos dust. He did not receive any written confirmation of the result of the inspection, only a telephone call.

After the hearing

30. After the hearing, I decided it was necessary to seek further written submissions from the parties. I gave the following case management directions:

> **"Background**
>
> Mr [E's] tenancy is a social sector tenancy and so the Local Housing Allowance (LHA) provisions of the Housing Benefits Regulations 2006 ("2006 Regulations") do not apply. However, the LHA provisions may be relevant in interpreting the provisions of the 2006 Regulations that reduce eligible rent where a social sector tenant's property has bedrooms in excess of the tenant's entitlement:
>
> (a) the LHA provisions of the 2006 Regulations deal with unsuitable rooms. The amount of a claimant's LHA depends on the applicable category of dwelling. The "one bedroom self-contained accommodation" category applies where a claimant (and any partner) has exclusive use of "two or more rooms" or "one room, a bathroom and toilet and a kitchen or facilities for cooking" (regulation 13D(2)(b)). For this purpose "room" is defined. The first part of the definition refers to "a bedroom or room suitable for living in";
>
> (b) it might be said that, in regulation 13D(2)(b)'s definition of "room", the requirement for a room to be "suitable for living in" does not apply to bedrooms, only to other rooms. However, doubt may be dispelled by the linked regulation

114A which specifies information that authorities must supply to rent officers. Amongst the information required to be supplied by regulation 114A(7) we find:

"(e) how many rooms suitable for living in there are--

(i) in the dwelling;

(ii) in the dwelling which the claimant shares with any person other than a member of his household, a non-dependant of his, or a person who pays rent to him or his partner;

(f) how many bedsitting rooms there are in the categories (e)(i) and (ii);

(g) how many bedrooms there are in the categories (e)(i) and (ii)".

(c) It can be argued that sub-paragraph (g)'s reference back to sub-paragraph (e) shows that the requirement in regulation 13D(2)(b) for a room to be "suitable for living in" is intended to apply to bedrooms as well as other rooms.

Case Management Directions

I now direct as follows:

1. Both parties must, within **two weeks** of the date on which these directions are issued, supply the Upper Tribunal with a written submission setting out their views on whether the LHA provisions of the Housing Benefit Regulations 2006 influence the meaning of "bedroom" as that term is used in the social sector rent limitation provisions. In particular, the submissions must set out a party's views on whether the LHA provisions imply that "bedroom" is to be read as a bedroom suitable for living in;

2. If a party thinks "bedroom" is to be read as a bedroom suitable for living in, their submission may also set out their views on whether the disputed room in this case was suitable for living in during the relevant period…

31. In response, the local authority supplied a supplementary written submission which argues:

(a) The Local Housing Allowance provisions of the 2006 Regulations have no bearing on the social housing rent reduction provisions. Had the legislature intended to require a bedroom in the social housing sector to be 'suitable for living in', it would have made express provision. In the social housing sector provisions, 'bedroom' does not mean a bedroom suitable for living in;

(b) The purpose of regulation 13D(2)(b) is to define "what space can be counted" and "the purpose of this regulation is not to disadvantage private renters who have more than one room but where the accommodation could not otherwise be defined as self-contained. In other words, the regulations accept this accommodation will be more expensive and the LHA rules are structured to reflect this";

(c) The phrase 'suitable for living in' operates to exclude certain bathrooms and kitchens but is not about the state or condition of a room;

(d) More generally, issues about disrepair are a matter between landlord and tenant. They are not a concern of the 2006 Regulations. It cannot be reasonable for a local authority administering housing benefit to make judgements about suitability other than size and the matters identified in the *Nelson* case. Paragraph 28 of the *Nelson* decision "provides a useful approach and that the availability of rooms that can be used as bedrooms is an assessment when the property is vacant, rather than how it is actually being used";

(e) "this matter comes back to the designation of the property by the landlord and this is persuasive", although the submission subsequently recognises that *Nelson* holds this is only a starting point.

32. Mr E's supplementary written submission argues:

(a) Presumably, a 'bedroom' is to be taken to mean a room that is suitable for a human to sleep in safely;

(b) A room containing exposed asbestos would not be suitable for a human to sleep in, nor would a room containing items contaminated by asbestos;

(c) The local authority provided Mr E with no advice against moving room 1 items into another room. That failure has persisted. He has yet to be given clear guidelines on moving and disposing of the potentially contaminated items stored room 2. Given that a single asbestos fibre, if ingested, may prove fatal, room 2 should be continued to be unsuitable for sleeping in;

(d) Room 1's ceiling collapsed due to severe subsidence which caused a wall to crack. Since the authority had not fully dealt with the subsidence, there was an ongoing risk

that the part of the building containing room 1 would "break apart". It continued to be unsafe to sleep in.

Legal framework

33. Regulation B13(1) of the Housing Benefit Regulations 2006 requires the "maximum rent (social sector)" to be determined in accordance with regulations B13(2) to (4). Regulation B13(2) requires an authority to "determine a limited rent", which involves reducing eligible rent determined under regulation 12B(2) by "the appropriate percentage" where "the number of bedrooms in the dwelling exceeds the number of bedrooms to which the claimant is entitled". Where the number of bedrooms exceeds entitlement by one, the percentage is 14%.

34. The 2006 Regulations do not define "bedroom".

35. Regulation B13(5) provides that a claimant is entitled to one bedroom for each of various categories of person occupying a dwelling as their home. Only one category applies in Mr E's case – "a person who is not a child", i.e. Mr E – and so he is entitled to one bedroom.

36. Since Mr E is a tenant within the social sector, the Local Housing Allowance (LHA) provisions of the 2006 Regulations do not apply. But the LHA provisions' treatment of unsuitable rooms is worth mentioning. The amount of a claimant's LHA depends on the applicable category of dwelling. The "one bedroom self-contained accommodation" category applies where a claimant (and any partner) has exclusive use of "two or more rooms" or "one room, a bathroom and toilet and a kitchen or facilities for cooking" (regulation 13D(2)(b)). "Room" is defined and the first part of the definition refers to "a bedroom or room suitable for living in".

37. Regulation 114A specifies information that authorities must supply to rent officers in LHA cases. Amongst the information, we find:

> "(e) how many rooms suitable for living in there are--
>
> (i) in the dwelling;
>
> (ii) in the dwelling which the claimant shares with any person other than a member of his household, a non-dependant of his, or a person who pays rent to him or his partner;
>
> (f) how many bedsitting rooms there are in the categories (e)(i) and (ii);

> (g) how many bedrooms there are in the categories (e)(i) and (ii)". (regulation 114A(7)).

38. Sub-paragraph (g)'s reference back to sub-paragraph (e) suggests that the requirement in regulation 13D(2)(b) for a room to be "suitable for living in" is intended to apply to bedrooms as well as other rooms.

Case law

39. In *Secretary of State for Work & Pensions v Nelson* [2014] UKUT 0525 (AAC), a three-judge panel of the Upper Tribunal held that, in determining whether a room is a bedroom for the purposes of regulation B13, the question is whether the room "could be used" by a person described in regulation B13(5). Various factors "will need to be considered" in answering this question (paragraph 31): "(a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy". At paragraph 33 the Upper Tribunal stated that these "will address issues of degree and so reasonableness". While 'habitability' or some similar concept is not referred to in the Upper Tribunal's decision, 'ventilation' is one of the factors identified.

40. *Nuneaton & Bedworth BC v RH & the Secretary of State for Work & Pensions* [2017] UKUT 471 (AAC) was also a decision of a three-judge panel of the Upper Tribunal. While *RH* expressed doubts about some of the reasoning in *Nelson*, it agreed with its "general approach" (paragraph 28). I also note that, in *RH*, the Upper Tribunal offered views on how non-structural safety risks could be dealt with so that, presumably, the risk would not prevent a room from being used as a bedroom:

> "29…the use of LED bulbs should reduce, if not eliminate, any danger that the boy sleeping in the upper bunk might burn himself".

Conclusions

Whether the First-tier Tribunal's decision involved an error on a point of law

41. The sole ground on which permission to appeal was granted in this case concerned the First-tier Tribunal's treatment of asbestos-related risks associated with room 1. Therefore, the tribunal's analysis of whether room 2 (which stored room 1 items) was a "bedroom" is not an issue on this appeal (although room 2 issues could be argued were the Upper Tribunal to re-make the First-tier Tribunal's decision). Similarly, the new argument in Mr E's supplementary submission, concerning subsidence, is not an issue arising on the appeal.

42. The First-tier Tribunal's decision involved an error on a point of law. The tribunal instructed itself that "the issue…was whether the state of [room 1] after the repairs had been completed made it not usable as a bedroom after 18 January 2014". The tribunal found that "a surveyor had in October 2014 reported that [room 1] was fit for habitation" but that room 1 was usable from January 2014. Mr E had one bedroom in excess of his entitlement, "even if there had been any contamination from dust after the work had been completed". The tribunal failed to explain why bedroom 1 would have been usable as a bedroom even if contaminated by dust or why it was usable before the October 2014 inspection. The tribunal erred in law by giving inadequate reasons for its decision, which I set aside.

Decision on re-making the First-tier Tribunal's decision

43. Having set aside the First-tier Tribunal's decision, I decide to re-make its decision rather than remit the matter for re-determination by that tribunal. I have before me all the relevant evidence that is reasonably likely to be obtained and I am in as good a position as the First-tier Tribunal to decide the appeal Mr E made to that tribunal against the council's decision.

44. I make the following findings of fact:

(a) in October 2013, the ceiling in room 1 was in a state of significant disrepair. It had collapsed. This is shown by contemporaneous council records (e.g. the entry for 9 October 2013);

(b) the remedial works carried out by the council did not simply make good the damaged ceiling. The council also instructed their contractor to remove artex that contained a form of asbestos. I do not accept the argument in the council's written submission that the artex might well have been asbestos-free. On a balance of probabilities, I find it did contain asbestos. The council's doubts are contradicted by the statutory notification given by Cabot Thermals that "bonded white asbestos" was removed from Mr E's home. I also rely on that notification to find that, as Mr E argues, the removal works were carried out by workers wearing using specialist equipment;

(c) after the ceiling contractors finished work, it was not until October 2014 that a council surveyor inspected the works to check that the offending artex had been removed. This is shown by the entry in council records recording that an inspector had been instructed to carry out an inspection;

(d) on 13 October 2014, a council official expressed the view, by email, that room 1 was habitable. While the email does not give the official's job title, the official must have been either the surveyor who carried out the inspection or an official reporting the conclusions of the surveyor. I make this finding due to the short period of time that elapsed between the surveyor being instructed and the email being written;

(e) the remedial and asbestos-removal works resulted in the effective removal of asbestos from room 1. I accept the opinion of the surveyor who inspected room 1 in October 2014, an opinion which Mr E does not seriously dispute;

(f) Before October 2014, Mr E was not told that room 1 had been effectively cleared of asbestos. Had he been, the council would have supplied documentary evidence in support. The council's evidence includes a statement asserting that the asbestos contractor, in December 2013, verbally informed a council official that all asbestos dust was removed. But there is no documentary evidence that Mr E was so informed at that time. Furthermore, the council were unlikely, in October 2014, to have instructed a surveyor to carry out an inspection had a surveyor already visited Mr E's home and informed him that the asbestos had been removed;

(g) after room 1's ceiling collapsed, there was a risk, albeit a relatively low risk given the type of asbestos involved, of contamination in the form of asbestos fibres released into the space of the room. It seems to me that that was the view of the Health and Safety Inspector who provided Mr E with a report during the proceedings before the First-tier Tribunal (the only documentary expert evidence supplied in those proceedings);

(h) whatever happened to the items put in room 2, their presence in that room did not make the fabric of the room itself unsafe. I make that finding having regard to the Health and Inspector's views about the limited potential for onward movement of asbestos fibres in the absence of disturbance. In any event, at the hearing Mr E informed me that he only sought a finding that, before October 2014, he did not have more bedrooms than he was entitled to. That is a highly relevant date for room 1 but not for room 2;

(i) Mr E raised his subsidence argument at a very late stage in the proceedings and it was not advanced before the First-tier Tribunal. Furthermore, the argument is not supported by any expert evidence. I am not persuaded that room 1 unsafe due to subsidence or the effects of subsidence.

45. While the Housing Benefit Regulations 2006 do not define "bedroom", the case law, in particular *Nelson*, demonstrates that a room needs to possess certain characteristics in order to

be treated as a bedroom for the purposes of the Regulations. As the Upper Tribunal held in *M v Secretary of State for Work & Pensions* [2017] UKUT 443, "for a room to function as a bedroom properly so-called, [it must amongst other things] avoid obvious safety risks". This accords with the purpose of regulation B13, described in *Nelson* as including "to free up homes that are being under occupied so that they can be used by others with an entitlement to the number of bedrooms in the property". The statutory scheme cannot be interpreted on the assumption that potential renters would be willing to move into properties with unsafe bedrooms. In the light of that conclusion, it is unnecessary for me to decide whether the 2006 Regulations are to be read as if they incorporated a general requirement for a purported bedroom to be 'suitable' in the same way as expressly provided for in the LHA provisions.

46. I am satisfied that a room contaminated with asbestos, even lower risk asbestos, cannot be treated as a "bedroom" for the purposes of regulation B13. While the risk may be low, the consequences should the risk materialise (i.e. asbestos related lung disease) are so great that the room cannot be considered safe for sleeping in. But that is not quite the end of the matter.

47. What if a room has been effectively cleared of asbestos, in fact, yet the occupant (or prospective occupant) is unaware of this? In these circumstances, the room is factually safe for sleeping in. That is what matters for regulation B13 purposes rather than a subjective view of the room's safety. This conclusion does not thwart the regulation's purpose. If a prospective occupant were to raise legitimate concerns about the effectiveness of recent asbestos removal works in social housing, any responsible social landlord would inevitably investigate and the issue would be clarified. Doubts about the room's safety would be dispelled and the purpose, according to *Nelson*, of freeing-up under used social housing, would not be thwarted.

48. I have already found that the room 2 items, even if they do, or did, bear some of the room 1 artex, do not make the room itself unsafe. Mr E does not argue that any such contamination spread from the items to penetrate the fabric of the room.

49. If decency of conduct determined appeals, there would be no doubt who won this case. Unfortunately for Mr E, that is not how it works. Since I find that the December 2013/January 2014 asbestos removal works were effective, it follows that I must dismiss Mr E's appeal. I re-make the First-tier Tribunal's decision but in the same terms. The outcome is the same.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
18 July 2018