DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant (the Secretary of State for Work and Pensions).

The decision of the Liverpool First-tier Tribunal dated 10 October 2016 under file reference SC068/13/13512 involves an error on a point of law and is set aside. The decision that the First-tier Tribunal should have made is as follows:

> *The appeal is dismissed.*
>
> *The decision made by the Council on 11 March 2013 (and as subsequently revised in part by the Council) was correct and stands.*
>
> *The Tribunal was satisfied on the facts that the room in question has the necessary attributes to be considered a bedroom under regulation B13. It follows that the claimant was under-occupying his accommodation by one bedroom.*

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This is an appeal of some vintage. It concerns a decision in a so-called ‘bedroom tax’ case originally taken by Liverpool City Council back in March 2013. This is the second time that the case has been before the Upper Tribunal. My decision is to allow the further appeal to the Upper Tribunal by the Secretary of State for Work and Pensions. I set aside the First-tier Tribunal’s decision. I also re-make the decision originally under appeal rather than remit it for a further hearing. My decision, in summary, is that the disputed room is a bedroom for the purposes of the statutory definition concerned.

A brief history of the background to the present appeal

2. The claimant lives alone in social housing accommodation which is designated by his landlord as a three-bedroom maisonette. On 11 March 2013 Liverpool City Council (‘the Council’) decided that the claimant was ‘under-occupying’ his accommodation by two bedrooms. The consequence was that the claimant’s housing benefit (HB) entitlement was reduced by 25% in accordance with regulation B13(2) and (3)(b) of the Housing Benefit Regulations 2006 (SI 2006/213, as amended). The claimant appealed to the First-tier Tribunal (‘the Tribunal’).

3. At some point before the appeal was heard the Council modified its stance and accepted that the claimant needed a regular overnight carer. The result of that concession was that the claimant was adjudged to be under-occupying by only one bedroom rather than two. Accordingly, the reduction in the amount of HB payable was 14% rather than 25% (regulation B13(2) and (3)(a)). The appeal proceeded to the Tribunal.

4. On 23 May 2014 the Tribunal allowed the claimant's appeal against the Council's amended decision, finding that the remaining room in issue could not properly be classified as a bedroom. The result of the Tribunal's decision therefore was that there should be no reduction in the claimant's HB entitlement for under-occupation.

5. On 26 November 2014 a three-judge panel of the Upper Tribunal decided the test case appeal in *Secretary of State for Work and Pensions v Fife Council and Nelson* [2014] UKUT 525 (AAC); [2015] AACR 21 (or *Nelson*). That decision set out several principles to be applied in cases involving the 'bedroom tax' provisions. Meantime the Secretary of State had appealed against the Tribunal's decision in the present claimant's case.

6. On 26 April 2016, in the instant case then under file reference CH/3769/2014, Upper Tribunal Judge Lloyd-Davies allowed the Secretary of State's appeal and set aside the Tribunal's decision dated 23 May 2014. Judge Lloyd-Davies's reasons for doing so are conveniently set out at paragraph 3 of his decision:

> "3. The tribunal found that the room in question had an area of 55 sq. ft. and stated, without explanation, that if an adult single bed was placed in the room, the room would not be able to accommodate any other furniture: this conclusion is not self-evident. Further, it is clear from the tribunal's decision that it took into account the overcrowding provisions of the Housing Act 1985: *Nelson* explains that such overcrowding provisions are not determinative of under-occupation for the purposes of Housing Benefit. For these reasons the decision of the tribunal must be set aside and the case remitted to a new tribunal for redetermination. That new tribunal should make findings on the matters referred to in paragraph 31 of *Nelson* and bear in mind the comments in paragraphs 33 and 55."

7. Furthermore, having dealt with various submissions made on behalf of the claimant, Judge Lloyd-Davies concluded as follows:

> "7. In summary, I revert to what the new tribunal should do. It should make findings on all the factors mentioned in paragraph 31 of *Nelson* and then, in the light of those findings, decide whether or not the room in question can accommodate an adult single bed, a bed side table, and somewhere to store clothes, as well as giving room for dressing and undressing."

The First-tier Tribunal's decision now under appeal to the Upper Tribunal

8. Following an adjournment on 8 July 2016, the Tribunal held a re-hearing of the claimant's appeal on 7 October 2016. The claimant's representative filed a detailed report by Mr R.M. Sherwood, a corporate member of the Chartered Institute of Environmental Health. This recorded his view that, based on a 2.0m by 0.9m single bed, there was insufficient space to fit a bed in the third bedroom, as it would not fit down the length of the room if the door was fully opened (and nor would it fit crossways owing to the radiator and the need for space to open the door). So, like the first tribunal, the Tribunal allowed the claimant's appeal against the original decision by the Council taken on 11 March 2013. The Tribunal set out summary reasoning on the Decision Notice in the following terms:

> "The Tribunal was satisfied on the facts that the room in question does not have the necessary attributes to be considered a bedroom. … Although the room is 55 sq ft, the access door is placed in such a way that a bed and other necessary furniture including a bedside table and somewhere to store clothes cannot be accommodated."

9. On 31 October 2016 the Tribunal issued a statement of reasons for its decision. In summary, this document set out its findings and reasoning for its conclusion that a full-size single bed with bedding (being 78 inches in length in imperial measurement) could not fit into the room due to the location of the door and the layout of the room.

The Secretary of State's grounds of appeal

10. On 30 November 2016 the Secretary of State applied for permission to appeal against the Tribunal's decision of 7 October 2016. As originally drafted, the grounds of appeal were essentially two-fold. The first ground – albeit sub-divided into several different limbs – was that the Tribunal had failed properly to apply the *Nelson* case; had it done so, the Secretary of State argued, it would have found that the dimensions and size of the room (actually 56.5 square feet in total) were not determinative and that the third bedroom was indeed a bedroom properly so called. The second ground was that the Tribunal had erred in law by taking into account in its assessment the space standards specified under the Housing Acts 1985 and 2004 and the LACORS guidance. On 5 December 2016 the District Tribunal Judge refused the Secretary of State permission to appeal. On 5 January 2017 the Secretary of State renewed the application for permission to appeal direct before the Upper Tribunal. The grounds of appeal were as summarised above, although they were expanded upon in the written submission by Mr R. Jennings for the Secretary of State.

11. On 1 November 2017 Upper Tribunal Judge Lloyd-Davies gave the Secretary of State permission to appeal, giving the following reasons:

> "Even if it is accepted (contrary to the submissions of the Secretary of State for Work and Pensions) that the door might hit the bed if the bed were to be placed so that one end was against wall AB (as shown on page 140), safe access to the room could arguably still be maintained, and clothes storage provided in corner CDE."

12. As I do not propose to include the diagram from p.140 in this decision, I should add that wall AB was the external wall facing the door from the landing into the room in question, while corner CDE was the corner of the room to the left on entering the room, behind the door from the landing. Thus points A and B were the two corners of the room on the external wall, while points C and D were the two corners on the opposite wall onto the landing (the internal left-hand corner was described as CDE, rather than e.g. CDA, because it had an alcove, represented by the line DE).

13. On 5 February 2018 the claimant's representative, the Merseyside Law Centre, filed a response to the Secretary of State's appeal. In summary the Law Centre argued that (i) the Tribunal had properly applied the principles set out in *Nelson*; (ii) the Tribunal had been entitled to make both the findings and the decision it did on the evidence presented and the Secretary of State was in reality seeking to re-litigate issues of fact; and (iii) the Tribunal had not impermissibly taken into account the statutory space standards and associated guidance (on which see paragraph [12] of the statement of reasons).

14. On 28 February 2018 the Secretary of State filed a reply to the claimant's response, submitting that the Tribunal had gone further than the *Nelson* case in placing too much weight on what furniture needs to be placed in a room before it can be classified as a bedroom. It was also argued that the Tribunal had failed to consider alternative types of bed (e.g. a divan bed or a small single bed) that could be used in the room so allowing it to be used as a bedroom.

15. The second Upper Tribunal appeal was then listed for hearing in Manchester on 25 June 2018. Miss Kelly Bond of Counsel filed a detailed skeleton argument on behalf of the Secretary of State (18 June 2018). In the event the hearing on 25 June 2018 had to be vacated. The case was re-listed before me in Manchester on 15 November 2018, by when the claimant's representative had also filed a skeleton argument.

The oral hearing of the present appeal and the parties' arguments

16. The Appellant, the Secretary of State for Work and Pensions, was represented at the oral hearing by Mr Christopher Buckingham of Counsel. The First Respondent, the claimant, was represented by Ms Mary Heery, Solicitor, of Merseyside Law Centre. I am grateful to them both for their well-focussed submissions. The claimant did not attend but there was no reason for him to do so, given the oral argument was confined to issues of law. The Second Respondent (the Council) took no part in the Upper Tribunal proceedings at any stage.

17. Mr Buckingham gratefully adopted the submissions advanced by Miss Bond in the Secretary of State's earlier skeleton argument. In oral argument he started by pointing out that (in the pre-bedroom tax era) the claimant had accepted the room in question was a bedroom and indeed had even placed a bed in it, as demonstrated by one of the photographs. Given the overall size of the room, it was counter-intuitive to decide that the room was not a bedroom. He attacked what he described as the 'rigidity' of the Tribunal's decision, namely that unless a 75-inch bed with a further 3 inches of overhanging bedding could fit into the room lengthways, and without touching the door when opened, then the room could not be a bedroom. To conclude as such was to miss the points about the application of regulation B13 which were clearly established by *Nelson* (see paragraphs 27, 28, 35 and 60 of that decision). The Tribunal had also failed to consider whether one of the other categories of individual specified in regulation B13(5) and (6) – e.g. a child – could use the room as a bedroom. There was also no absolute requirement that the bed in the room must be an adult-sized single bed. If Parliament had wished to impose such a bright line rule, it could have said so. Moreover, there was no requirement that there be sufficient space for multiple pieces of furniture for storage (see now *M v Secretary of State for Work and Pensions* [2017] UKUT 443 (AAC)), so the Tribunal had also erred in that respect too.

18. Ms Heery, for the claimant, primarily relied on the points made in her skeleton argument. She submitted the Tribunal had made adequate findings of fact in accordance with the Upper Tribunal's directions on the remitted appeal. It had properly applied the relevant case law and given sufficient reasons for its decision. The Tribunal had had all the necessary evidence, including floor plans and photographs. In short, the Secretary of State, who had not availed herself of the opportunity to be represented at the first instance hearing, was now seeking to re-litigate issues of fact. The case law, Ms Heery submitted, did not support Mr Buckingham's contention that the assessment could be carried out on the basis of the bed being a bed smaller than a standard adult single bed. However, Ms Heery accepted that the question of the ability to place a bed in the room was critical – if an adult bed could be fitted in the room safely, she acknowledged that the Tribunal's decision might be open to criticism on the basis of its finding with regard to the need for extra furniture.

The Upper Tribunal's analysis

Introduction

19. The starting point for any analysis in an appeal such as this must be to identify the basis for the Tribunal's decision. Only then can one establish whether that basis discloses any material error of law. There are two possible readings of the Tribunal's decision. On one reading the Tribunal allowed the claimant's appeal because it was not possible to get a bed and two extra pieces of storage furniture into the room. On another reading the Tribunal allowed the claimant's appeal simply because it was not possible to get a bed into the room.

What did the First-tier Tribunal decide?

20. The Tribunal's decision notice undoubtedly points to the first of those readings. It states quite explicitly that it "was satisfied on the facts that the room in question does not have the necessary attributes to be considered a bedroom … the access door is placed in such a way that a bed *and other necessary furniture including a bedside table and somewhere to store clothes cannot be accommodated*" (see paragraph 8 above, but emphasis added). On this view, if the facility to have both a bedside table and a storage unit had not been material, then presumably the Tribunal would not have mentioned them in its decision notice. In doing so, Mr Buckingham very fairly acknowledged that the Tribunal was doing no more than addressing the Upper Tribunal's remittal directions (see paragraph 7 above). However, since then the case law has marched on, and it is now evident that regulation B13 does not presuppose a need for both a bedside table and additionally separate clothes storage (see *M v Secretary of State for Work and Pensions* at paragraphs 64-69). Accordingly, if the first reading was the sole basis for the Tribunal's decision, it had erred in law. I understood Ms Heery to concede as much in oral argument.

21. However, reading as a whole the Tribunal's detailed statement of reasons, I consider it is tolerably clear that it decided both that (a) it was not possible to get a bed in the room in question, owing to the difficulty of fitting a bed lengthways without snagging on the door, and irrespective of the positioning of any other furniture, and also (b) there was — as well — independently insufficient space to squeeze in a bedside table and a storage unit. So I do not read the Tribunal's reasons as suggesting that a bed could not be put in the room because of the need to find space for other pieces of furniture. Rather, the principal problem identified by the Tribunal concerned the logistics of fitting in a bed given the dimensions of the room, the length of a bed, the opening of the door and the other features of the room itself.

22. Accordingly, I do not consider this to be a case where there is an irreconcilable inconsistency between the decision notice and the statement of reasons such as may amount to an error of law (see, for example, Social Security Commissioner's decision CCR/3396/2000). Instead, this is rather a case in which the very summary and understandably terse explanation in the decision notice was elaborated upon in the statement of reasons. It follows that the question for the Upper Tribunal is whether the Tribunal below erred in law in finding that a bed could not be fitted into the room in issue.

Where did the First-tier Tribunal go wrong?

23. It may be as well at this stage to recap on the relevant dimensions (and I note that other than Mr Sherwood's report, all the evidence used imperial measurements). The room in question measured 107 inches in length from the door to the window on the opposite external wall. The door, when fully opened, measured 28 inches. This left a maximum space of (at most) 79 inches when the door was fully open. There seems to have been no dispute over those individual measurements. The question then was whether this left sufficient space for a bed to fit safely, with the head of the bed at the window and the foot of the bed closest to the door. On this crucial aspect of the case the Tribunal made the following findings:

> "6. A bed including a bed frame is 6ft 3 inches long without bedding. However once bedding on it would measure at least 6 foot 6 inches or 78 inches. There is a skirting on the window wall which would mean that any bed frame or head board could not go up to the wall. In any event the headboard would be below the window and again there would need to be some small space for ventilation and to ensure access to the window. If a bed head was placed on the window wall then it would run down at least 79 inches allowing for the bed, bed head, space for the skirting board and the window and the bedding. The door is 28 inches wide and therefore it would not open fully and would bang into the bed since the room has only a depth of 107 inches."

24. The Tribunal also recorded its finding that a bed would not fit anywhere else in the room because of the position of the door and the problems of access and privacy (paragraph 9). In the section of the statement of reasons dealing with its reasons, the Tribunal noted "the difficulty in this room is that the access door is placed in such a way that a bed cannot be placed between it and the window wall without compromising on the occupant's privacy. Every time the door opened it would hit the bed, or alternatively not fully open thereby compromising the occupier's access, safety and privacy" (paragraph 10).

25. The parties' respective contentions on this issue are summarised at paragraphs 17 and 18 above. At first, I confess I was attracted by Ms Heery's principal submission that this was all ultimately an issue of fact, that the Tribunal's decision was sustainable on the evidence before it and that the Secretary of State is seeking to relitigate the factual merits on an appeal which is confined to matters of law. However, on closer examination I was persuaded by Mr Buckingham's submissions (or, at least, some of them).

26. I agree with Mr Buckingham that the Tribunal erred in law in proceeding on the unacceptably rigid basis that a standard bed with associated bedding was *necessarily* 78 inches in length. The Tribunal's finding that the bedding added a further 3 inches to the length of a standard 75-inch bed was not adequately explained. A fitted sheet is going to add a matter of millimetres (to revert to metric currency) to the length of a bed but there is no reason why additional bedding (e.g. a duvet) should necessarily overhang the end of a bed by as much as 3 inches. The Tribunal also failed to explain why, even if the bed were 78 inches in length, it would *necessarily* snag on the door to the room when that door was fully open. The various diagrams produced to the Tribunal did not adequately demonstrate that even a 78-inch bed would for certain hit the door when that was fully open. As Miss Bond argued in her skeleton argument, it might or it might not. Given the room was 107 inches long, and the door 28 inches wide, the evidence certainly does not support a finding that a 75-inch standard bed would necessarily hit an open door (as that gives 4 inches of leeway). Indeed, if the bed were placed down the side of wall BC then there is a very strong case for saying that the door would clear the end of a standard adult bed.

27. There is one submission advanced by the Secretary of State which I am 'parking' for the purposes of this appeal as a matter that can be decided on another day as and when it is central to an appeal. Mr Buckingham, echoing Miss Bond's earlier written submissions, had also contended that the Tribunal had erred by failing to consider whether a *smaller adult bed* or a *child's bed* could be accommodated in the room. I accept that the case law demonstrates that one must consider whether the room in question can be used by any of the people listed in regulation B13(5), e.g. a child. Thus, the characteristics of an actual occupier are irrelevant. However, it

does not seem to me that this is the same as saying that the room need not be able to accommodate a standard adult single bed. As the three-judge panel observed in *Nelson*:

> "35. Issues as to whether a room of that size is a bedroom because it could be used as a bedroom for one child under 10, but not a teenager under the age of 16, are outside the ambit of this decision. However we note that paragraph 5 of bulletin U6/2013 and the Secretary of State's submission to us seem to indicate that his view is that there must be room for a normal single bed and so if there was only room for say one cot or one young child's bed he would not, or would not generally, regard the room as a bedroom."

28. I therefore conclude that the Tribunal erred in law for the reasons set out at paragraph 26 above. Those amounted to a material error of law such that I should set aside the Tribunal's decision. There was understandably no enthusiasm from either party for the matter to be remitted to a new First-tier Tribunal. I therefore proceed to re-decide the underlying appeal myself.

The Upper Tribunal's re-made decision

29. In her skeleton argument, Miss Bond helpfully summarised the relevant principles to be applied in the light of *Nelson* and *Secretary of State for Work and Pensions v IB* [2017] CSIH 35 as follows:

> "(1) 'Bedroom' is an ordinary and familiar English word which is not defined in the legislation. The statutory test based on this word should not be re-written or paraphrased. The word 'bedroom' should be construed and applied in its context having regard to the underlying purposes of the legislation: *Nelson* at [19].
>
> (2) The underlying purposes of the test and the context in which the word 'bedroom' is used are important and often determinative factors to be taken into account in determining whether on the facts of a given case the test is satisfied: *Nelson* at [21].
>
> (3) The underlying purpose of regulation B13 is to limit the housing benefit entitlement of those under-occupying accommodation. The trigger for a reduction is set by reference to the entitlement of a tenant to bedrooms for the occupation of the categories of people listed in regulation B13. What regulation B13 therefore requires is an assessment of the claimant's entitlement to bedrooms. It is only when that entitlement to bedrooms is less than the number of bedrooms in the home that a reduction can be made: *Nelson* at [24]-[26].
>
> (4) The use or potential use of the relevant room or rooms can be by any of the people listed in the categories set out in regulation B13, which means that it has to be considered whether the relevant room or rooms could be used by any of the listed people: *Nelson* at [27(i)-(ii)], [28].
>
> (5) The classification and description of the property is a matter of fact to be determined objectively by reference to the property's vacant state without paying regard to how it is actually used from time to time: *Nelson* at [28]; *IB* at [20].
>
> (6) A starting point for determining how the property could be used and the number of bedrooms it contains is the landlord's description but this is only a starting point and is not determinative: *Nelson* at [30]; IB at [22].

(7) In the event of a dispute a number of case sensitive factors will need to be considered including (a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy: *Nelson* at [31].

(8) It may include deciding whether a room is suitable to accommodate a bed with, for example, sufficient space, height, light, privacy to be classified as a bedroom: *IB* at [22].

(9) It may involve taking into account the number of rooms in the property, their size, layout and function as living / dining space, kitchen, washing / toilet facilities and what other space is available in the property as a whole: *IB* at [22].

(10) Evidence of how similar rooms / spaces are used in other properties in the area may assist: *Nelson* at [32].

(11) To be a bedroom the room need not generally be reasonably fit for full-time occupation of this nature, as opposed to short-term or irregular occupation as a visitor or overnight guest, such as an overnight carer: *Nelson* at [57]-[60]."

30. In addition, one might add to those statements of principle the following further proposition, also drawn from Miss Bond's skeleton argument:

"(12) For a room to function as a bedroom properly so-called there must be adequate room for a bed and also for clothes storage, a flat surface of some sort on which to place necessary items and avoid obvious safety risks, as well as sufficient free space for dressing and undressing. There are a range of different ways in which those requirements may be met. It all depends on the size and configuration of the room in question. A room with space only for a single bed and chest of drawers may be sufficient: *M v Secretary of State for Work & Pensions* [2017] UKUT 443 (AAC) at [65]-[66]."

31. I did not understand Ms Heery to dissent from that list (of propositions (1)-(12)) as an accurate summary of the current legal position on the proper application of regulation B13. She certainly objected to the suggestion that the bed in question need not be a standard adult single bed (see paragraph 27 above), but it is noteworthy that Miss Bond's summary of the principles to be drawn from the case law, and as cited above, does not in terms include such a prescriptive requirement.

32. My task is therefore to re-decide the appeal in the light of those principles. In doing so, I have reached the conclusion that the room in issue is a bedroom for the purposes of regulation B13. My reasons are as follows.

33. It is plain that the landlord regards the property as a three-bedroom unit (see notice at p.5 of the file). It is also clear that the claimant himself – before regulation B13 created an incentive to the contrary – considered his accommodation to be three-bedroomed (see his 2011 application form for housing benefit at p.3 and his DHP application from 2013 at p.14). At one stage he indeed had a bed in the room (measuring, it is said, 80 inches), such that the door could not be fully opened (p.32). I note from the photograph on file that the bed in question was placed alongside the opposite wall (AD) and only just snagged on the door. The room in question is undoubtedly small and might well be described as a box-room, but that does not stop it also being a bedroom properly so called. The approximate size of the room is 56.5 square feet. It is just possible to fit an adult standard 75-inch bed lengthways in the room, facing the door, alongside wall BC. It is also certainly possible to include another (single) piece of furniture for clothes storage etc. Given those findings, I am

not persuaded there are any sufficient access or privacy issues which militate against the room being properly described as a bedroom. I also bear in mind that the room may be suitable for occupation by any of the categories of individual listed in regulation B13 and need not necessarily be in permanent or continual full-time use as a bedroom (see *Nelson* at paragraph 60).

34. I have not overlooked the very detailed report by Mr Sherwood, which on the face of it supports the claimant's case. However, his conclusion that a bed could not fit into the third room was premised on three important matters. First, his conclusions are based on the assumption that a standard bed is 2m long (i.e. 78.7 inches) (see p.136). Second, his findings are also based on the assumption that a bed could only be considered for placement lengthways along wall AD – a placement along wall BC does not appear in the options sketched on the plan on p.140. Third, his reasoning also relies on the need to place other pieces of furniture (in the plural) in the room. For those reasons I attach less weight to his findings.

Conclusion

35. I conclude that the decision of the First-tier Tribunal involves an error of law for the reason summarised above at paragraph 26. I therefore allow the Secretary of State's appeal and set aside the decision of the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). There is no point in yet another re-hearing of the case by a new First-tier Tribunal (section 12(2)(b)(i)). Accordingly, I re-decide the appeal that was before the First-tier Tribunal (section 12(2)(b)(ii)). My substituted decision is as follows:

> *"The appeal is dismissed.*
>
> *The decision made by the Council on 11 March 2013 (and as subsequently revised in part by the Council) was correct and stands.*
>
> *The Tribunal was satisfied on the facts that the room in question has the necessary attributes to be considered a bedroom under regulation B13. It follows that the claimant was under-occupying his accommodation by one bedroom."*

Signed on the original
on 12 December 2018

Nicholas Wikeley
Judge of the Upper Tribunal