[2018] AACR 30

(JP v Bournemouth City Council (HB) [2018] UKUT 75 (AAC))

Judge Wikeley **CH/1265/2016**
08 March 2018

Housing Benefit and Council Tax Benefit– Non-dependent deduction – Regulation 3(1) and 74(7)(a) – meaning of normal home

The appellant was in receipt of housing benefit (HB) and council tax benefit (CTB) from Bournemouth Borough Council. The appellant's mother, a resident of Germany lived with her for various periods of time. Bournemouth Borough Council decided that the appellant's mother was actually living with the appellant, working in the United Kingdom and claiming working tax credit from the address in Bournemouth and she should properly have been included as a non-dependant on the appellant's benefit claim. The First-tier Tribunal (F-tT) dismissed the appellant's appeal on 29 January 2016 and ruled as a matter of law that a person can be resident in more than one place at the same time. The appellant appealed to the Upper Tribunal (UT), the issue before the UT was the proper construction of regulations 3(1) and 74(7)(a) of the Housing Benefit Regulations 2006; what is meant by the expression "normally resides with" and the inter-relationship between the statutory definition of "non-dependant" and the exemption from a non-dependant deduction where the person concerned has their "normal home" elsewhere.

Held, allowing the appeal, that;

1. an adult may well reside in more than one place but he or she can only have one 'normal' home or residence. The F-tT accordingly erred in law as it proceeded on the assumption that a person cannot only reside in more than one place at the same time but can also normally reside in both places at the same time (paragraph 32);

2. the test for a non-dependant under regulation 3(1) is whether the person concerned "normally lives with the claimant" that involves a three-stage test. First, does the person reside in the same dwelling as the claimant? Second, does the person normally reside there? Third, does the person normally reside with the claimant? (paragraph 34);

3. a HB claimant under the 2006 Regulations can only qualify for benefit in respect of one property. There is no reason why a non-dependant should be in any different position, i.e. that he or she should only have one place where they normally reside /have their normal home;

4. regulation 74(7)(a) is otiose (paragraph 56).

The Judge re-made the original decision, directing Bournemouth Borough Council to recalculate the appellant's entitlement to housing benefit and council tax benefit.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the appellant.

The decision of the Poole First-tier Tribunal dated 27 January 2016 under file reference SC238/15/00634 involves an error on a point of law and is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

The appellant's appeal is allowed.

The council's decision dated 5 January 2015, as revised on 5 March 2015, in relation to the appellant's entitlement to housing benefit and council tax benefit is revised.

The appellant's mother was not a "non-dependant" within the meaning of regulation 3(1) of the Housing Benefit Regulations 2006 (and the parallel council tax benefit legislation). In short, although the appellant's mother resided with the appellant for extended periods of time she did not normally reside with her as her normal residence or normal home was in Berlin. It follows that no non-dependant deduction should have been made from the appellant's benefit entitlement.

The council is directed to recalculate the appellant's entitlement to housing benefit and council tax benefit accordingly.

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

The legal issue in this Upper Tribunal appeal

1. This appeal is concerned with the proper meaning of the definition of a "non-dependant" within the housing benefit scheme (and also within what used to be the council tax benefit scheme). In particular, it is concerned with what is meant by the expression "normally resides with" and the inter-relationship between the statutory definition of "non-dependant" and the exemption from a non-dependant deduction where the person concerned has their "normal home" elsewhere.

2. The appeal therefore turns, as a matter of statutory interpretation, on the proper construction of regulations 3(1) and 74(7)(a) of the Housing Benefit Regulations 2006 (SI 2006/213; 'the 2006 Regulations').

An outline of my decision

3. I am allowing the appellant's appeal to the Upper Tribunal. I am doing so because there is an error of law in the decision by the First-tier Tribunal. The appellant and the City Council are content for the Upper Tribunal to re-make the original decision under appeal. The Secretary of State expresses no view on that issue. I re-make the First-tier Tribunal's substantive decision so as to allow the appellant's appeal against the original decision by Bournemouth Borough Council. I conclude that the appellant's mother was not a non-dependant on the appellant's benefit claim.

A summary of the factual dispute between the parties

4. The appellant, a lone parent, was in receipt of housing benefit (HB) and council tax benefit (CTB) from Bournemouth Borough Council (from now on, simply 'the council'). The appellant's mother (from now on, 'Mrs D') lived with the

appellant for various (prolonged) periods of time. As the appellant explained in a letter to the First-tier Tribunal, "my mother goes forward and backwards to Germany every 2 weeks and she spends primarily her time in Germany. She is a German resident and has her main residence in Germany".

5. The full facts of the matter are somewhat complex. However, the thrust of the council's case was that, although she had a flat in Berlin, Mrs D was actually living with her daughter, working in the United Kingdom (UK) and claiming working tax credit (WTC) from her daughter's address in Bournemouth. So, the council argued, Mrs D should properly have been included as a non-dependant on her daughter's benefit claim.

6. In particular, the council decided that Mrs D ought to have been included as a non-dependant adult on the appellant's HB and CTB claim for the period from 4 July 2011 to 3 January 2015. The effect of Mrs D not having been properly included on the appellant's claim, the council further argued, was that there was an excess payment of CTB (amounting to £840.04) for the period up until 31 March 2013 (the date when CTB was abolished nationally) and an overpayment of HB (totalling £2,461.44) for the period up till 28 December 2014.

The First-tier Tribunal's decision

7. Following an oral hearing on 29 January 2016, the First-tier Tribunal dismissed the appellant's appeal. The District Tribunal Judge helpfully provided summary reasons on the decision notice. These reasons correctly identified the fundamental issue for determination as being whether Mrs D was "normally residing with" the appellant. The District Tribunal Judge ruled as a matter of law that a person "can be resident in more than one place at the same time". He went on to conclude on the facts that (i) Mrs D was residing with her daughter in Bournemouth, as well as in Berlin, and (ii) Mrs D was also *normally* residing in both places. To anticipate the result of the present appeal, as a matter of law the First-tier Tribunal was correct on point (i) and wrong on point (ii).

8. The District Tribunal Judge's detailed decision notice read as follows:

> "The fundamental issue in this case was whether the appellant's mother Mrs D was normally residing with her and hence whether she was a non-dependant for the purposes of the appellant's claim for benefits.
>
> A person can be resident in more than one place at the same time. Mrs D has a flat in Berlin, where she lives with her partner. She has other family members in Berlin. However, she also resides with the appellant for a substantial part of the year. I adopt Mrs D's signed list of dates which is at pages 187-8 of the schedule of evidence. She resides at No 3 [*redacted*] Road Bournemouth in order to help the appellant with the care of her children, and hence to enable her to pursue her studies. Whilst in Bournemouth she is employed by a hotel company and works sufficient hours to be in receipt of working tax credit (WTC).
>
> I have decided not only that Mrs D is residing with the appellant, as well as in Berlin, but also that she is normally residing in both places. She is residing

> with her routinely, albeit that she is not in Bournemouth during each month or for the same number of days in the months when she is there. This is evidenced among other things by her employment and by her tax credit.
>
> It is said that Mrs D spent less time in Bournemouth before October 2013, as it was in the autumn term of that year that the appellant began her access course, prior to commencing a degree course in 2014. That may be so. However, she was already working sufficient hours to be entitled to WTCs from 07.01.08. Her Majesty's Revenue and Customs have registered her as living at the appellant's address from 04.07.11 and there is no evidence that she lived elsewhere in the United Kingdom since then. Consequently, I find that she has been a non-dependant on the appellant's claim from that date.
>
> For completeness, the resulting overpayments have not arisen in consequence of official error and are therefore recoverable."

9. Mrs D's signed list of dates, referred to in the second paragraph of the decision notice, and which was to be found at pages 187-8 of the schedule of evidence, included the following chronology from April to December 2014:

> 31.03 – 14.04 Bournemouth
> 15.04 – 30.04 Berlin
> 01.05 – 14.05 Bournemouth
> 15.05 – 31.05 Berlin
> 01.06 – 15.06 Bournemouth
> 16.06 – 30.06 Berlin
> 01.07 – 14.07 Bournemouth
> 15.07 – 31.07 Berlin
> 01.08 – 17.08 Bournemouth
> 18.08 – 31.08 Berlin
> 01.09 – 13.09 Bournemouth
> 14.09 – 30.09 Berlin
> 01.10 – 15.10 Bournemouth
> 16.10 – 02.11 Berlin
> 03.11 – 16.11 Bournemouth
> 17.11 – 30.11 Berlin
> 01.12 – 01.01.15 Bournemouth

10. Thus there was a fairly regular pattern (at least for most of 2014) by which Mrs D spent the first fortnight each month staying with her daughter in Bournemouth and the second fortnight of each month in Berlin. December 2014 was an exception to that general rule in that she spent the entire month in Bournemouth.

11. The District Tribunal Judge expanded on his summary reasons, as set out in the decision notice, in a subsequent full statement of reasons. He first referred to the definition of non-dependant in regulation 3(1) of the 2006 Regulations and the provision for deductions for non-dependants in regulation 74 (without referring to any of the details of that regulation). He found as a fact that Mrs D was "certainly resident in Berlin at that time". This was because "she has a tenancy of a property there, as evidenced by a letter from the company which manages the building. Her partner, father, brother and friends all live in Berlin". However, he added that a person can be

resident in more than one place at the same time. He noted that Mrs D had been in receipt of WTC since 2008 and so must have satisfied the criterion of ordinary residence (in the UK) for that purpose. He concluded as follows:

> "[The appellant's property] is a 3-bedroom flat. When Mrs D stays there, she sleeps on a sofa bed in the dining room. She brings only sufficient clothing for her stay and does not use a wardrobe. She does not leave possessions there when she returns to Berlin. However, and whilst I accept that she has always spent more time in Berlin than in Bournemouth, the frequency and direction of her visits over the years has been such that I cannot find that she has only transiently or temporarily lived in Bournemouth. I find that at all material times she has had two homes and hence has been living in the same dwelling as [the appellant]."

12. The District Tribunal Judge went on to find that Mrs D was not just residing in the same property as the appellant but was residing *with* her – the fact the living arrangements were less comfortable than in Berlin did not affect this conclusion, as the test of normal residence does not include consideration of the quality of the residence (relying on *ST v SSWP* [2009] UKUT 269 (AAC)). He noted that Mrs D, when staying in Bournemouth, worked for a hotel and also provided considerable logistical and other support for the appellant and her three children.

The Upper Tribunal proceedings

13. Upper Tribunal Judge Ward gave the appellant permission to appeal on 24 June 2016. In doing so, Judge Ward posed the following questions:

> "(a) did the tribunal err by failing to give consideration to whether [the Bournemouth address] is Mrs D's usual home?
> (b) did the tribunal err by failing to give sufficient, or any, weight to Mrs D's home in Berlin and her reasons for spending time there?
> (c) did the tribunal err by placing weight on Mrs D's receipt of WTC without explaining its reasons for doing so and/or without applying regulation 3(4) of the Tax Credits (Immigration) Regulations 2003(SI 2003/653) under which, by virtue of being a 'worker' under EU law, Mrs D would fall to be <u>treated as</u> ordinarily resident irrespective of whether she actually was ordinarily resident in the UK (this in any event assumes it is possible to make the link between ordinary residence – the tax credit test – and being 'normally resident' (the relevant test under regulation 3 of the 2006 Regulations ?
> (d) did the tribunal err by misunderstanding the reference to 'the quality of the residence' in *ST v SSWP* [2009] UKUT 269 (AAC)?"

14. The case was subsequently transferred to me. I held an oral hearing of the appeal at the Bournemouth Combined Court Centre on 31 May 2017. The appellant appeared in person. Mr Jack Parker of Counsel appeared for the council. I am grateful to them both for their submissions. Following the hearing, and given the wider issues raised by the appeal, I joined the Secretary of State for Work and Pensions (Secretary of State) as a further respondent to the appeal. There was then a second round of written submissions on the appeal. The appellant did not make a final written reply but I am confident that she has said everything that she wishes to say, either in writing beforehand or at the hearing last May. I am sorry for the further delay in finalising

this decision, but the process of adding the Secretary of State as a party and seeking further submissions has necessarily taken some considerable time.

The legal framework

15. The 2006 Regulations provide that a claimant's entitlement to housing benefit is reduced by a prescribed amount (see regulation 74(1) and (2)) where there is a "non-dependant". To paraphrase regulation 3(1) in plain English, a "non-dependant" might fairly be described as an adult who shares the claimant's home. Strictly speaking, and for the purpose of those regulations, a "non-dependant", according to regulation 3(1), "means any person, except someone to whom paragraph (2) applies, who normally resides with a claimant or with whom a claimant normally resides." None of the exceptions in regulation 3(2) apply in the current case. At the time in question there was an identical definition of non-dependant in the Council Tax Benefit Regulations 2006 (SI 2006/215), regulation 3(1) (and see regulation 58 for the rates for non-dependant deductions and relevant exceptions). Accordingly, the discussion that follows refers solely to the HB legislation but applies equally to the parallel CTB provisions (although of course that benefit was abolished with effect from 1 April 2013).

16. As well as setting out the various rates for non-dependant deductions (which depend on the non-dependant's normal weekly gross income), regulation 74 also provides for a range of cases in which no non-dependant deduction is to be made despite the presence of such a non-dependant (see regulation 74(6), (7), (8) and (10)). In particular, regulation 74(7)(a) provides as follows:

> '(7) No deduction shall be made in respect of a non-dependant if—
>
> > (a) although he resides with the claimant, it appears to the appropriate authority that his normal home is elsewhere'.

17. I simply record at this stage that the council's written response to the appellant's appeal, as provided to the First-tier Tribunal, listed the titles of relevant legislation, but without including any substantive extracts from that legislation. Thus the list includes just the heading "Housing benefit regulation 74: Non-dependant deduction" but not the actual text of the regulation. The tribunal's statement of reasons also mentioned regulation 74 in passing but did not refer, either directly or indirectly, to regulation 74(7)(a) (and nor did the decision notice).

18. It is also relevant at this juncture to refer to regulation 7(1) of the 2006 Regulations (emphasis added):

> **"Circumstances in which a person is or is not to be treated as occupying a dwelling as his home**
>
> **7.**—(1) Subject to the following provisions of this regulation, *a person shall be treated as occupying as his home the dwelling normally occupied as his home–*
>
> (a) by himself or, if he is a member of a family, by himself and his family; or

> (b) if he is polygamously married, by himself, his partners and any child or young person for whom he or any partner of his is responsible and who is a member of that same household, *and shall not be treated as occupying any other dwelling as his home*."

19. I simply observe at this stage that in *R v Swale Borough Council ex parte Swale* [1999] 1 FLR 1087 Kay J held that regulation 5(1) of earlier HB regulations (and the predecessor of regulation 7(1)) "was intended to answer the question of which home a person occupies as a dwelling for the purposes of housing benefit" (at 1094B). Kay J could see "no justification for limiting the application of regulation 5(1) simply to questions of whether any housing benefit is payable to an applicant or not" (at 1094A). The Court of Appeal ([2000] 1 FLR 246) considered Kay J was correct in his approach (see also *Stroud DC v JG* [2009] UKUT 67 (AAC) reported as *R(H)* 8/09).

20. However, the principal focus of this appeal has been the inter-relationship of regulation 3(1) and 74(7)(a) of the 2006 Regulations and their application to the facts of this case.

The submissions at the Upper Tribunal oral hearing

21. The appellant's submissions at the oral hearing were understandably focussed on the factual background to the case rather than the finer points of statutory construction. In a nutshell, and reiterating points she had made in correspondence both with the council and the First-tier Tribunal office, she argued that her mother's real home was in Berlin, however much time she spent with her in Bournemouth.

22. Mr Parker, on behalf of the council, argued that regulation 3(1) and 74(7)(a) of the 2006 Regulations must be read together, and are complementary in nature. He contended that under regulation 3(1) a finding of fact had to be made as to where a person "normally resides"; the First-tier Tribunal had done that in a way which was open to it on the evidence before it. It was accordingly entitled to find that Mrs D normally resided with the appellant and so fell to be considered as her non-dependant. Moreover, Mr Parker submitted, the choice of statutory language in regulation 74(7)(a) was significant; the emphasis of regulation 74(7)(a) was on where a person "resides with the claimant". Regulation 74(7)(a) therefore focussed on the concept of "residence", and not "normal residence". In particular, regulation 74(7)(a) did not in terms provide that a non-dependant deduction was inapplicable where a person *normally* resided (as opposed to resided *simpliciter*) with the claimant but had their normal or usual home elsewhere.

Pausing there

23. The starting point must be that the statutory test for being a non-dependant is plainly one based on normal residence with the HB claimant (see regulation 3(1)). The presence of a non-dependant, i.e. someone who normally resides with the claimant, typically involves a deduction being made from what would otherwise be the claimant's full HB entitlement. However, there are various exceptions where, even though a person is a non-dependant, no deduction applies (regulation 74).

24. On further reflection I was sceptical about Mr Parker's attempt to differentiate between the situation where a third party "resides with the claimant" (in regulation 74(7)(a)) and where a person "normally resides with the claimant" (in regulation 3(1)) as being mutually exclusive. At first sight, if an individual *normally resides* with the claimant, it seemed to me that by definition she also *resides* with the claimant, as "normal residence" is simply residence with a greater degree of normality (whatever that is) than ordinary residence. That being so, in a case such as the present appeal, it appeared to me that it may be necessary, for the purposes of regulation 74(7)(a), to identify where such a person's "normal home" is – if only to avoid circularity in the application of regulations 3 and 74. Moreover, although it is true that the Interpretation Act 1978 provides that "words in the singular include the plural and words in the plural include the singular" (section 6(c)), this canon of interpretation only applies "unless the contrary intention appears". It seemed to me that regulation 74(7)(a) could only sensibly be read as referring to a single "normal home".

The submissions following the Upper Tribunal oral hearing

25. I therefore invited the Secretary of State to become a party to the appeal, as the inter-action between regulations 3 and 74(7)(a) was worthy of further and more detailed exploration.

The Secretary of State's submissions

26. Mr Roger Jennings, for the Secretary of State, has made a helpful written submission on the issues raised by this appeal. Mr Jennings's central submission is that there is what he describes as a "limited practical effect" to regulation 74(7)(a) of the 2006 Regulations. Mr Jennings argues that although a person may certainly reside in more than one place they can (at least for the purposes of HB law) only have one "normal" home or residence. Accordingly, a person cannot have a normal home in one place (as required for regulation 74(7)(a) to apply) and also normally reside somewhere else (so as to be a non-dependant under regulation 3(1)). Thus it follows that if a person's *normal home* is not the HB claimant's address then they will not be a non-dependant – and in that event regulation 74(7)(a) would have no application in any event (as by definition it acts as an exception to the general rule that applies only to non-dependants).

27. Applying those principles to the present appeal, Mr Jennings contended that if it were the case that Mrs D maintained her normal home in Berlin, and also resided with the appellant but did not *normally* reside with her in Bournemouth, then regulation 74(7)(a) would not apply. This would be because Mrs D would not be a non-dependant in the first place (applying the definition under regulation 3(1)) and so no non-dependant deduction would fall to be made (and so likewise no exception would be relevant under regulation 74(7)(a)). In order for regulation 74(7)(a) to apply, then necessarily Mrs D would need to be normally residing with the appellant, so as to fall within the definition of a non-dependant under regulation 3(1), and yet simultaneously have a normal home in Berlin. However, the Secretary of State's position was that (at least for the purposes of the 2006 Regulations) a person can only have one normal home/residence and there is no appreciable difference between residing somewhere and having a home somewhere. According to Mr Jennings, if on that test Mrs D normally resided with her daughter then the appellant's address would also be Mrs D's normal home; as such, in those circumstances the appellant could not

rely on regulation 74(7)(a) to prevent a non-dependant deduction being made from her HB award.

28. Having reviewed the case law and arguments, and referring by analogy to the requirement under regulation 7(1) of the 2006 Regulations that a person "shall be treated as occupying as his home the dwelling normally occupied as his home" (see above paragraph 19), Mr Jennings neatly summarised his submissions as follows:

> "14. In summary, the SSWP does not consider that there is a distinction between normally residing with a claimant, normally occupying as a home and having a normal home somewhere. Therefore, if a person is found to be *normally residing with* a claimant then it is likely that this dwelling will also be their *normal home*. In relation to regulation 74(7)(a) the effect is that this regulation serves little purpose [as] a person cannot have two normal residences. This means that either the person living with the claimant is not a non-dependant because whilst they may reside with the claimant, they do not normally reside with the claimant because their normal home is elsewhere. Alternatively, they do normally reside with the claimant, so fall within the definition of non-dependant so cannot have their normal home elsewhere."

29. Indeed, if Mr Jennings is correct in his analysis, then it seems to me that regulation 74(7)(a) does not simply serve "little purpose" or have "limited practical effect" but rather it serves no purpose and has no practical effect. It is difficult in practice to envisage a case where a person may be brought within the scope of the definition of non-dependant in regulation 3(1) yet simultaneously escape the effect of a deduction by falling within regulation 74(7)(a).

The council's further submissions

30. The council, but not the appellant, has taken the opportunity to respond to the arguments advanced by the Secretary of State.

31. Mr Parker, for the council, has two principal submissions in response to the analysis by Mr Jennings. First, he argues that a person may "normally reside" in two places without offending either the language or the purpose of the relevant statutory provisions. As such, regulations 3 and 74(7)(a) do not require a decision maker to decide which home is a person's "normal home". Second, he contends that even if Mr Jennings is correct in his submission that a single normal home must be identified, on the facts of the present case the Upper Tribunal should decide that Mrs D's normal home was in Bournemouth and not in Berlin. I explore that latter submission further below, when re-making the First-tier Tribunal's decision under appeal. As regards the former submission, Mr Parker makes the following points:

- Regulation 3(1) simply requires a decision-maker to determine whether a person is "normally residing" with a HB claimant; here the First-tier Tribunal had made a finding, which was reasonably open to it on the evidence, that Mrs D was normally resident in Bournemouth;

- Neither regulation 74(7)(a) nor any other provision required a decision-maker or tribunal to identify a single "normal residence" so a person can be "normally resident" in more than one place;

- Regulation 74(7)(a) is solely concerned with circumstances in which a person is found to "reside" somewhere (but is not "normally residing" there), in which case it is necessary to decide whether their normal residence is elsewhere;

- A person cannot have two homes for the purposes of regulation 7(1), but there was nothing in principle within the statutory scheme to stop a person being an HB claimant in one place and at the same time being an HB non-dependant in another place, even if that might be unlikely to occur in practice – thus "normal residence" (within regulation 3(1)) and "normal home" (within regulation 7(1)) are not synonymous.

The Upper Tribunal's analysis

Introduction

32. Cutting to the quick, I agree with Mr Jennings's analysis of the relevant provisions in the statutory scheme. It is important to read regulations 3 and 74 together, not least as regulation 74 provides for the circumstances in which a deduction for a non-dependant, as defined by regulation 3, either is or is not to be made from the claimant's HB award. In particular, and specifically in the context of the HB scheme, I conclude that an adult may well reside in more than one place but he or she can only have one 'normal' home or residence. The First-tier Tribunal accordingly erred in law as it proceeded on the assumption that a person cannot only reside in more than one place at the same time but can also *normally* reside in both places at the same time.

33. It is helpful to take regulation 3(1) and then regulation 74(7)(a) in turn.

The definition in regulation 3(1) of the 2006 Regulations

34. The test for a non-dependant under regulation 3(1) is whether the person concerned "normally lives with the claimant" (or *vice versa*, following the so-called *Bate* amendment). As Mr Jennings submits, that involves a three stage test. First, does the person <u>*reside*</u> in the same dwelling as the claimant? Second, does the person <u>*normally*</u> reside there? Third, does the person normally reside <u>*with*</u> the claimant? In *AM v Secretary of State for Work and Pensions (IS)* [2011] UKUT 387 (AAC) the issue was whether the income support claimant's adult son had been living with her since his release from prison, and so was a non-dependant on her benefit claim, or whether he had simply being using her address for his post. There is a helpful discussion in Upper Tribunal Judge Parker's decision of the principles inherent in the three-part test that merits extensive citation here:

"'Residing'

14. The first question is whether the son resided in the same dwelling as the claimant in the period in issue. There are analogies to habitual residence cases. At paragraph 19 of *R(IS) 6/96* the Commissioner said:

> 'To count as resident, a person must be seen to be making a home here, even though it need not be his or her only home, nor need it be intended to be a permanent one, provided that it is genuinely home for the time being'.

But it is also accepted that if a person makes his home in different parts of the country for a part of each year, he or she may simultaneously be resident in both places. Alternatively, a person may have 'no fixed abode' and therefore no residence at all. It is a question of fact whether the quality of a person's stay in a particular dwelling constitutes it as a home for the person concerned; or alternatively is only a place where that person transiently or temporarily lives. Whether the claimant's son had a home in the same accommodation as the claimant at the relevant time has never been addressed.

'*Normally***'**

15. In *CSIS/100/93*, Commissioner Walker recognised that, after the first question is answered in the affirmative, i.e. whether a person has a home in the same house as the claimant, a second point then arises. At paragraph 5 he said:

> 'But the wording here has also a more continuous meaning about actually being there and so "*normally* resides". That will introduce the second question, namely whether the claimant's daughter normally lived with the claimant – or whether she was normally to be found living somewhere else. And it will matter not where else. On these questions the address that the daughter gave for correspondence is a possible indicator. Equally, having regard to the other places in which she dwelt from time to time, it may be that the tribunal will conclude that the daughter had no "fixed abode" and so no home or residence. Ultimately it is a matter for common sense and judgement. But the two questions basically are whether the claimant's daughter made such a home as she had with the claimant and, perhaps more importantly, whether she was normally to be found dwelling there.'

Thus, the first question in the present case is whether the son made a home in his mother's accommodation and, secondly, whether such was his usual abode at the time.

'Reside <u>with</u>'

16. This is a third point. One has to look at the property, and at the relationship between the parties, in context, to determine, as a matter of fact, whether they "reside with" each other, or rather that they each have a separate home in the same residence or dwelling. *RK v SSWP* [2008] UKUT 34 (AAC) decided that people are only to be regarded as residing with each other if they are sharing accommodation in a way that is consistent with living in the same household. A normal domestic set-up, for example, one containing a parent and an adult child, who together remain a happy family unit, will inevitably be described as one in which each member normally resides with the other. This is because they share

> the accommodation as their same residence when one looks at the living arrangements as a whole; this will be so even though grown up children in a family may tend to keep to their own bedrooms, eat at different times from the rest of the family and socialise less with them in the common living areas. It is a different situation from those who are in accommodation of multiple occupancy, like a block of bedsits. However, if parent and child deliberately constitute wholly different households, for example because they are estranged, then they will not be regarded as residing *with* each other.

35. It is also relevant in this context to refer to *ST v Secretary of State for Work and Pensions (IS)* [2009] UKUT 269 (AAC); [2010] AACR 23, referred to by Upper Tribunal Judge Ward when granting permission to appeal. There the issue was whether or not the claimant's adult son, who for the purposes of immigration law was not lawfully present in the UK, was "normally residing" with her within the meaning of that phrase in the Income Support (General) Regulations 1987 (SI 1987/1967). According to Upper Tribunal Judge Jacobs, "whether the claimant's son was 'normally residing' with the claimant is a purely factual question of their living arrangements. It involves no element of judgment on the quality of his residence" (at paragraph 20). Moreover, on a proper interpretation of the law as applied to the relevant facts (at paragraph 24):

> "there is no doubt that the son was residing with the claimant. The issue is whether he was doing so normally. On the evidence, he clearly was. He lived with her from his arrival. He had nowhere else to live in this country …. And, so far as the evidence shows, there was no one he could stay with and no funds to pay for accommodation elsewhere. Indeed, living elsewhere would have undermined his ability to provide care for the claimant, which was the whole purpose of his visit."

36. Applying the three-fold test from *AM v Secretary of State for Work and Pensions (IS)* [2011] UKUT 387 (AAC) in the present context, the First-tier Tribunal was plainly entitled on the facts to find that Mrs D *resided* in Bournemouth for much of the year and that when she did so she was residing *with* the appellant. No other contrary conclusions on those two issues were seriously open to the Tribunal. The crucial question, however, related to the second stage of the tripartite test, namely whether she was *normally* residing with the appellant.

37. It follows on Mr Jennings's analysis that, in order to establish where a person's normal home or residence is, one must first establish where that individual resides or has a home. In that context the Secretary of State's position is that there is no significant difference between *residing somewhere* and *having a home somewhere*. That seems to me to be correct in principle and to be consistent with authority. As Lord Slynn of Hadley held in *Mohamed v London Borough of Hammersmith & Fulham* [2002] AC 547, where the issue was the meaning of "normally resident" in the context of homelessness legislation:

> "18. It is clear that words like ordinary residence and normal residence may take their precise meaning from the context of the legislation in which they appear but it seems to me that the prima facie meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or

abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few belongings and moves into a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is 'shelter' but it is also where he resides. Where he is given interim accommodation by a local housing authority even more clearly is that the place where for the time being he is normally resident. The fact that it is provided subject to statutory duty does not, contrary to the appellant authority's argument, prevent it from being such."

38. For present purposes there are perhaps two points to emphasise from *Mohamed*. The first is Lord Slynn's opening caveat, namely that the broader statutory context is all important when interpreting and applying particular words. The second and related point is that on the facts of *Mohamed* the applicant, if he was resident anywhere, was realistically only resident in one place – so by default his ordinary and normal residence were one and the same.

39. Mr Jennings also relies on the Housing Act authority of *Crawley Borough Council v Sawyer* (1988) 20 HLR 98 to support his submission that there is no significant difference between residing somewhere and having a home somewhere. There the issue in possession proceedings was whether the property was occupied as the tenant's "only or principal home" within section 81 of the Housing Act 1985. The local authority argued that the tenant had abandoned the property whereas the tenant claimed he had only gone to live with his girlfriend on a temporary basis. In the Court of Appeal, Parker LJ, reviewing the Rent Act authorities, rejected the submission that "there was a material difference between occupying as a residence and occupying as a home" (at 100). Furthermore, Parker LJ concluded as follows (at 101-102):

"It is quite plain that it is possible to occupy as a home two places at the same time, and indeed that is inherent in the wording of section 81. It is therefore plain that, if you can occupy two houses at the same time as a home, actual physical occupation cannot be necessary, because one cannot be physically in two places at the same time."

40. Returning to the 2006 Regulations, if it is shown that a person has a home or resides in more than one place, regulation 3(1) necessarily requires the decision-maker to identify where the person normally resides (or, in other words, where their normal home is) – and in the singular. I agree with Mr Jennings that, as a matter of logic, if one normally resides in place X for the purpose of the definition of non-dependant in regulation 3(1), it is difficult to see how can have one's normal home for the purpose of regulation 74(7)(a) in place Y. In other words, one cannot have two normal homes for the purposes of the HB scheme. In this context it is very relevant to consider both the traditional position in means-tested benefit schemes and in particular other pertinent features of the HB legislative scheme.

41. As to the former, the position under the old supplementary benefits scheme was that "the home" was defined as "the accommodation … normally occupied by the

assessment unit and any other members of the same household as their home" (Supplementary Benefit (Requirements) Regulations 1980 (SI 1980/1299) regulation 2(1)). The underlying principle in supplementary benefits law was accordingly "one assessment unit, one household, one home" (*R(SB)*30/83 paragraph 18(2)). Put another way, "'the home' does not extend to a plurality of units of accommodation in different locations" (*R(SB)* 30/83 paragraph 19(3)). Thus, as the Tribunal of Social Security Commissioners put it in *R(SB)* 7/86, "we do not consider that in the context of supplementary benefits it is possible for a claimant to have more than one "home" at a time save where the Requirements Regulations prescribe … limited exceptions to what is by necessary inference the general rule" (at paragraph 6).

42. As to the latter, and drawing on other features of the HB scheme itself, the fundamental principle (subject again to a number of very narrowly drawn exceptions) is that one can only *normally* occupy (and so e.g. get benefit in respect of) one home. Section 130(1)(a) of the Social Security Contributions and Benefits Act 1992 provides for entitlement to HB where a person "is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home." The possibility of a claimant applying for HB in respect of a second home is quickly closed off by regulation 7(1) of the 2006 Regulations, which stipulates that "a person shall be treated as occupying as his home the dwelling normally occupied as his home … <u>and shall not be treated as occupying any other dwelling as his home</u>" (emphasis added). Moreover, as Kay J and the Court of Appeal noted in *R v Swale Borough Council* this is a general statement of principle and not confined to issues of entitlement or payability (see paragraph 19 above). Furthermore, regulation 7(2) explicitly requires a process of comparison where there is more than one place the claimant resides:

> "(2) In determining whether a dwelling is the dwelling normally occupied as a person's home for the purpose of paragraph (1) regard shall be had to any other dwelling occupied by that person or any other person referred to in paragraph (1) whether or not that dwelling is in Great Britain."

43. In undertaking that process of comparison required by regulation 7(2), the case law shows that a range of factors must be considered (see e.g. unreported Commissioners' decisions *CH/2521/2002* and *CH/1786/2005*). These include the amount of time spent at each property (see also by analogy *R v Penwith DC ex parte Burt* (1990) 22 HLR 292 at 296), the reason for any absence from either property, the place where the individual's personal belongings are kept and such matters as where they are registered with a GP, liable for utility bills, on the electoral roll, etc.

44. Thus given both the history of means-tested benefit schemes but more particularly the overall framework of the HB legislation, if a HB claimant can (by and large) only have one normal home, it is difficult to see why the same principle should also not apply to non-dependants. The principle may be tested thus in a practical example. Assume that Mrs D, rather than being a German national with accommodation in Berlin, lived in a rented property in Blackpool. Assume also that in this same scenario Mrs D was a HB claimant in Blackpool. Furthermore, and for the purpose of this hypothetical, assume that all the other facts of the domestic arrangements were the same as those for the appellant and her mother in the present case. If so, what is the possible linguistic or policy justification for finding that an individual can both be "occupying as [her] home the dwelling normally occupied as [her] home" in Blackpool (and so qualify for HB there under regulation 7(1)) and yet

at the same time be someone "who normally resides with" her daughter 300 miles away in Bournemouth and so under regulation 3(1) have the status of a non-dependant on her daughter's HB claim?

45. Mr Parker argues that "normal residence" (within regulation 3(1)) and "normal home" (within regulation 7(1)) are not one and the same thing, and that while the Blackpool-Bournemouth situation is perhaps unlikely to occur in reality, in principle there is nothing in the legislative scheme to stop a person claiming and receiving HB in one place and simultaneously being a non-dependant in another place for the purpose of that other claimant's HB claim. I do not accept that submission. On the contrary, it is difficult to envisage a situation where a person is a HB claimant in one place and a HB non-dependant on another claimant's HB claim in another place. First, I agree with Mr Jennings that there is no real daylight between the respective meanings of "normal residence" and "normal home". Second, we cannot say the Blackpool-Bournemouth situation is unlikely to occur in reality, as Mr Parker submits, not least as the present case is a real life Berlin-Bournemouth situation.

46. The hypothetical can be pushed further to test Mr Parker's submission. Assume that a HB claimant has two elderly parents, both in need of care, who are separated, each of whom is also an HB claimant in their own accommodation in the same town that the claimant lives. Assume that the HB claimant lives in her own flat for one week, then stays with her mother for a week, and then stays with her father for a week before returning to her own property and starting the three-week cycle all over again (and so on). The HB claimant thus lives 17 weeks a year in her own property and 17 weeks a year with each of her parents. Taking Mr Parker's submission to its logical conclusion, the HB tenant in such a situation qualifies for an award of benefit under regulation 7(1) while simultaneously being a non-dependant (for every week of the year) on both her mother's claim and her father's claim. It is difficult to see how that outcome can be consistent with the policy objectives underpinning the concept of the non-dependant deduction (or even with elementary fairness).

47. In conclusion, much must depend on the statutory context. Case law has shown that under the Rent Acts – in contrast to the position for secure tenants under the Housing Acts – a private sector tenant may in principle have two homes and qualify for protection in both (the so-called "two home tenant"). However, a HB claimant under the 2006 Regulations can only qualify for benefit in respect of one property. There is no reason why a non-dependant should be in any different position, i.e. that he or she should only have one place where they normally reside /have their normal home.

48. Another example of the importance of the statutory context is my recent decision in *MC v Secretary of State for Work and Pensions (UC)* [2018] UKUT 44 (AAC), in which I concluded that a child can "normally live" in more than one household for the purposes of the universal credit legislation. However, that was in large part because the relevant legislation specifically contemplates that a child may normally live in more than one household (e.g. where there is a shared care arrangement in place following relationship breakdown): see regulation 4(2) and (4) of the Universal Credit Regulations 2013 (SI 2013/376). In the present case, on the other hand, both the statutory framework and the underpinning legislative policy point to the conclusion that in HB law an adult can only normally reside in one place which is their normal home.

The exception in regulation 74(7)(a) of the 2006 Regulations

49. So where does this leave regulation 74(7)(a)? It provides that a non-dependant deduction will not apply where the individual concerned "although he resides with the claimant, it appears to the appropriate authority that his normal home is elsewhere". The expression "normal home" is not itself defined in the 2006 Regulations. The natural reading of that phrase in regulation 74(1)(a) presupposes that a person may reside in more than one place but he or she can only have one normal home.

50. So what is the purpose of the regulation 74(7)(a) exception? The *HB/CTB Guidance Manual* (DWP, 2013) gives the following guidance to local authority staff in Part A5 (Calculating benefit):

> ***"Deciding the non-dependant's normal home***
> 5.520 No deduction should be made when the non-dependant is living or staying with the claimant but their normal home is elsewhere. There are no set rules or time limits for deciding whether the claimant's address can be registered as the non-dependant's normal home for the purpose of Regulation 74(7)(a).
>
> 5.521 You must make a decision on the basis of all relevant factors, including
>
> - the relationship between the non-dependant and the claimant
> - how much time the non-dependant spends at the claimant's address
> - where the non-dependant has their post sent
> - where the non-dependant keeps their clothes/personal belongings
> - whether or not the non-dependant's stay or absence from the claimant's house is temporary
> - where the non-dependant lives when not living with the claimant - do they travel around or have another base which could be regarded as their home
> - whether the person has liabilities for rent, water charges, services, TV licence
>
> These factors are important, for example when a full time student is living away from their parent's address while studying. See Commissioner's decision CH 2337 2008."

51. I observe parenthetically that Commissioner's decision CH 2337 2008 has since been reported as *R(H)* 8/09 (*Stroud DC v JG* [2009] UKUT 67 (AAC)).

52. This guidance is curiously phrased in two respects.

53. First, the statement in paragraph 5.520 that "no deduction should be made when the non-dependant is living or staying with the claimant but their normal home is elsewhere" reflects a misunderstanding of the definition of non-dependant in regulation 3. As I have already concluded, if an individual "normally resides with" a HB claimant – rather than is simply temporarily staying with that person – then by definition they do not have a normal home elsewhere.

54. Secondly, the various considerations enumerated in paragraph 5.521 are all relevant factors for deciding in the first place under regulation 3(1) whether a person is a non-dependant at a HB claimant's address (see also paragraph 43 above).

55. So what then is the purpose of regulation 74(7)(a)?

56. The Secretary of State's contention is that regulation 74(7)(a) has no real purchase. Mr Jennings submits that the provision serves "little purpose" or has "limited practical effect". In a word, it is otiose.

57. The council's argument, on the other hand, is essentially that regulation 74(7)(a) is concerned with circumstances in which a non-dependant is found to "reside" in one place but has their "normal home" in another place, so that there is no non-dependant deduction applicable. However, as a matter of statutory construction that cannot be right. Regulation 74(7)(a) operates as an exception to regulation 3. A person cannot be a non-dependant unless they normally reside with the HB claimant – and if that is both the place at, and the person with whom, they normally reside, then how can they have a normal home elsewhere?

58. So neither party's explanation is particularly persuasive. The normal presumption in statutory interpretation is that the legislative language must serve some purpose, which may make the Secretary of State's approach questionable. The council's construction, on the other hand, is based on an internal logical inconsistency.

59. I did not hear further argument on this point, but the answer to this mystery seems to lie in the history of the amendments to, and the consolidations of, the HB secondary legislation. The 2006 Regulations were preceded by the Housing Benefit (General) Regulations 1987 (SI 1987/1971; "the 1987 Regulations), in which the original version of regulation 3(1) defined non-dependant in similar terms as the 2006 Regulations as meaning "any person, except someone to whom paragraph (2) applies, who normally resides with a claimant". Similarly, the parallel provision to regulation 74(7)(a) was regulation 63(7)(a), providing in identical terms that "No deduction shall be made in respect of a non-dependant if (a) although he resides with the claimant, it appears to the appropriate authority that his normal home is elsewhere."

60. The predecessor in turn to the 1987 Regulations comprised the Housing Benefit Regulations 1982 (SI 1982/1124; "the 1982 Regulations"). But here the drafting was different. First of all, regulation 2(1) provided as follows:

> "'non-dependant' means, in relation to an eligible person,—
> (a) a member of his household other than his partner or a dependent child of his or of his partner, or

(b) a person occupying his dwelling who makes payments to him which include a charge in respect of board, where that charge forms a substantial proportion of those payments,

but does not, except where sub-paragraph (b) of this definition applies, include a person paying rent under a tenancy or similar agreement;."

61. Thus, at least as a matter of strict form, the non-dependant test under the 1982 Regulations was primarily based on membership of a common household (under (a)) rather than the modern "normally residing with" test (and with lodgers being treated as a special case under the second limb (b) of the definition). Regulation 18(6) of the 1982 Regulations then provided that:

> "No deduction shall be made in respect of a non-dependant who is a member of the eligible person's household but whose normal home appears to the appropriate authority to be elsewhere than the eligible person's dwelling."

62. Thus the inter-relationship between regulations 2(1) and 18(6) of the 1982 Regulations made some sort of sense. A non-dependant was defined then as another member of the claimant's household (who was not a partner or dependant), arguably a rather looser concept than "normally residing with" the HB claimant. But no deduction was to be made if their "normal home appears … to be elsewhere". However, in the 1987 Regulations the definition of non-dependant was restructured and firmed up by reference to the "normally residing with" test, while at the same time no amendment or modification was made to the "normal home" exemption from the non-dependant deduction. The consequence of the draftsperson's failure to think through the ramifications in the change of definition of "non-dependant" results in the statutory conundrum now evident in regulations 3(1) and 74(7)(a). How can a person both "normally reside" with an HB claimant yet also have their "normal home" elsewhere?

In conclusion

63. All this leads me to the conclusion that the First-tier Tribunal fell into error of law. It was undoubtedly correct as a matter of both law and fact for the District Tribunal Judge to conclude that Mrs D lived in both Berlin and Bournemouth. However, it was wrong as a matter of law to proceed on the basis that she could normally reside or have a normal home in both places at the same time. I therefore allow the appellant's appeal and set aside the First-tier Tribunal's decision. There is no point in remitting the matter to a fresh tribunal for a re-hearing, so I proceed to re-decide the underlying appeal and substitute my decision for that of the First-tier Tribunal.

Re-making the decision under appeal

64. I therefore re-make the decision under appeal on a proper analysis of the law. In other words, I proceed on the basis that Mrs D may well have been living or residing in both Bournemouth and Berlin but she was only normally residing or had a normal home in one of those two places.

65. I do not repeat the appellant's arguments here as it will be evident that I accept the broad thrust of her account.

66. The Secretary of State's representative does not make any submissions on the factual resolution of this appeal.

67. Mr Parker's alternative submission, if I am not with the council on the issue of statutory interpretation, is that the Upper Tribunal should decide that Mrs D's normal home was in Bournemouth and not in Berlin. Mr Parker relies in particular on the following three factors in support of the council's argument that Mrs D's "normal home" was in Bournemouth, rather than in Berlin:

- over the relevant period Mrs D spent more time in Bournemouth than in Berlin;
- while living in Bournemouth, Mrs D worked for a local hotel and claimed working tax credit in relation to that employment;
- Mrs D was, in the appellant's own words, a "massive help" to her in terms of helping with the children and in the kitchen.

68. In my assessment those factors are more than outweighed by a range of other factors which point to the conclusion that if as a matter of law Mrs D can only "normally reside" in one place, and have her "normal home" there, then that place was at all material times Berlin. I rely in part on the following findings of fact which were made by the District Tribunal Judge:

- Mrs D rents her own flat in Berlin;
- Mrs D has a long-term partner and other family members and friends in Berlin;
- when Mrs D stays in Bournemouth, she sleeps on the sofa bed in the sitting room;
- when Mrs D stays in Bournemouth, she brings sufficient clothing for her stay and does not use a wardrobe;
- Mrs D does not leave belongings in Bournemouth when she returns to Berlin.

69. On the basis of the ample documentary evidence on file (in both English and German), I also make the following further findings of fact:

- Mrs D, who is a German national, has rented the same flat with the same landlord in Berlin for at least 15 years;
- Mrs D keeps all her furniture in her Berlin flat and has no furniture in Bournemouth;
- Mrs D is on the electoral roll in Berlin and registered with a doctor and dentist in Berlin;
- Mrs D has a household contents insurance policy for her Berlin flat;
- Mrs D is the registered user at her flat for the purposes of various German utility companies;
- Mrs D's mother (the appellant's grandmother), who lives in Bavaria, has Alzheimer's, and Mrs D also spends time caring for her.

70. These various factors – as found by the District Tribunal Judge and myself – comfortably outweigh the factors identified by the council. It is true that over the period in question Mrs D may have spent marginally more time staying in

Bournemouth than in Berlin, but that factor alone cannot be determinative. Likewise, the fact that Mrs D had a hotel job – even a long-term job – when staying in Bournemouth cannot be decisive by itself. Plenty of people have jobs in another country while normally residing elsewhere. The admirable level of child care and other assistance provided by Mrs D to the appellant is not a significant factor. Many grandparents provide support of this nature – some come for the day, some for several days at a time, and some like Mrs D for more prolonged periods; but it is unlikely to be a factor that tips the balance one way or another.

71. There are two findings of fact made by the District Tribunal Judge which I regard as especially telling. These are the findings that when Mrs D stays in Bournemouth, she (i) sleeps on the sofa bed in the sitting room and (ii) brings sufficient clothing for her stay and does not use a wardrobe. In a sentence, this is a case of a grandmother who is living out of a suitcase when she comes to stay – admittedly for lengthy periods – with her daughter and grandchildren. That is not the behaviour, whether viewed objectively or subjectively, of someone who normally resides in, or whose normal home is in, Bournemouth. Taking a holistic view, the overwhelming preponderance of the factors identified in paragraphs 68-69 above means that the only proper conclusion is that Mrs D normally resided in Berlin and her normal home was there.

72. I therefore conclude that the First-tier Tribunal erred in law in relation to grounds (a) and (b) as identified by Upper Tribunal Judge Ward (see paragraph 13 above). In those circumstances I can accordingly determine this appeal exclusively on the rather narrow basis of the purely domestic statutory provisions, which have no broader European Union (EU) Law angle, rather than determine the 'EU worker status' question (point (c) in the grant of permission to appeal). Accordingly, I do not need to decide the point turning on Case 4 of regulation 3(1) (not regulation 3(4) of the Tax Credits (Immigration) Regulations 2003 (SI 2003/653)). Nor do I need to specifically address ground (d).

73. I therefore allow the appellant's appeal to the Upper Tribunal, set aside the First-tier Tribunal's decision as involving an error of law and re-make the original decision under appeal as follows:

> *"The appellant's appeal is allowed.*
>
> *The council's decision dated 5 January 2015, as revised on 5 March 2015, in relation to the appellant's entitlement to housing benefit and council tax benefit is revised.*
>
> *The appellant's mother was not a "non-dependant" within the meaning of regulation 3(1) of the Housing Benefit Regulations 2006 (and the parallel council tax benefit legislation). In short, although the appellant's mother resided with the appellant for extended periods of time she did not normally reside with her as her normal residence or normal home was in Berlin. It follows that nonon-dependant deduction should have been made from the appellant's benefit entitlement.*
>
> *The council is directed to recalculate the appellant's entitlement to housing benefit and council tax benefit accordingly."*

Conclusion

74. I conclude that the decision of the First-tier Tribunal involves an error of law for the reasons summarised above. I therefore allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also re-make the substantive decision originally under appeal to the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(ii)).