IN THE UPPER TRIBUNAL **Appeal No. CH/1720/2020**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

MP

Appellant

- v –

Sutton London Borough Council

Respondent

Before: Deputy Upper Tribunal Judge Rowland

Decision date: 30 July 2021
Decided on consideration of the papers

Representation:
Appellant: Mr Trefor Parry of Sutton Citizens' Advice
Respondent: Mr Daniel Gower, appeals officer

DECISION

The decision of the Upper Tribunal is to allow the appeal. The First-tier Tribunal's decision is set aside and there is substituted a decision that the claimant is entitled to housing benefit from 1 December 2018 for an indefinite period, calculated on the basis that her maximum rent (LHA) is the "one bedroom self-contained" rate. Consequently, there has been no overpayment of benefit to her. In calculating the arrears due, the local authority may take account of material changes of circumstances since 28 February 2019.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with permission granted by the First-tier Tribunal, against a decision of the First-tier Tribunal dated 5 August 2020, whereby it allowed in part an appeal against a decision of the local authority to the effect that the claimant was not entitled to housing benefit from 1 December 2018 because she was to be treated as not liable to make payments in respect of her occupation of accommodation and that £1,104.09 paid to her in respect of the period from 1 December 2018 to 28 February 2019 was recoverable from her. The First-tier Tribunal held that she was entitled to housing benefit from 1 December 2018 to 19 February 2019 and that there had been no overpayment, and consequently no sum was recoverable from her, in respect of that period, but that she was not entitled to

housing benefit thereafter, because she had entered into a new tenancy agreement and her liability to make payments under it "was created to take advantage of the housing benefit scheme", and any housing benefit paid from 20 February 2019 to 28 February 2019 was overpaid and was recoverable from her.

2. The claimant is represented by Mr Trefor Parry of Sutton Citizens' Advice and the local authority has been represented by its appeals officer, Mr Daniel Gower. I am grateful to both of them for the clarity of their written submissions. Neither party has asked for an oral hearing and I am satisfied that I can properly determine this appeal without one.

3. It is not now in dispute that, as the First-tier Tribunal found, the claimant, who had been under pressure to leave her previous accommodation, moved to her present address, which is a three-bedroom house owned by her son-in-law, on 1 December 2018, as the subtenant of another woman who had rented the whole house for £1,350 per month in the expectation that she would have two flatmates but whose arrangements had fallen through. A tenancy agreement was drawn up under which the claimant (who wanted her disabled daughter, who normally lived in a care home, to be able to stay with her from time to time) was to occupy two bedrooms and have shared use of the rest of the house save for the tenant's bedroom for a rent of £850 per month. She made a claim for housing benefit under the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 (SI 2006/214) and, on 22 January 2019, was awarded £84.93 per week (the "one bedroom shared accommodation rate" of Local Housing Allowance – to be paid at £368.03 per month) with effect from 1 December 2018.

4. That being rather less than she, the tenant and the landlord had been expecting (at least partly because it was less than she had been receiving in her previous accommodation), they agreed to alter the legal arrangements and new agreements were entered into whereby the claimant rented the whole house for £1,350 per month and then sublet one bedroom to the former tenant, with shared use of other rooms apart from her two bedrooms, at a rent of £500 per month with effect from 20 February 2019, although the new subtenant continued to pay her rent direct to the landlord

5. Following the submission of a new claim for housing benefit in the light of the new agreements, the local authority decided on 12 March 2019 to revise its earlier award with effect from 1 December 2018, on the ground that neither the claimant's original subtenancy nor her subsequent tenancy had been or were on a commercial basis and so, under regulation 9(1)(a) of the 2006 Regulations, she was to be treated as not liable to make the payments in respect of her dwelling. It further decided that the three monthly payments that had already been paid to her were recoverable.

6. The claimant appealed. It is unnecessary to describe either the early procedural history of the appeal or the detailed arguments raised in it. Eventually, the case came before Tribunal Judge Gannon on 4 March 2020. He raised the question whether the local authority's decision had correctly been made under regulation 9(1)(a), rather than either under regulation 8 on the basis that the agreements were shams or under regulation 9(1)(l) on the basis that the liability to pay rent "was created to take advantage of the housing benefit scheme", and he

adjourned the hearing, giving the local authority permission to provide a further submission in relation to regulations 8 and 9(1)(l) and the claimant permission to respond to any such submission or to provide further evidence. Then the Covid-19 pandemic hit the tribunals as well as everyone else, but further directions were issued by Tribunal Judge Woollen on 23 June 2020 and the case came before Tribunal Judge Pierce on 5 August 2020 as a telephone hearing. The claimant participated in the hearing with her niece and an interpreter and Mr Gower represented the local authority. As recorded above, Judge Pierce found that, far from being a sham, the original agreements had been on a commercial basis but she found that the new tenancy agreement and the claimant's liability to make payments under it "was created to take advantage of the housing benefit scheme" and so within the scope of regulation 9(1)(l) of the 2006 Regulations and on that basis she allowed the claimant's appeal in respect of the period from 1 December 2018 to 19 February 2019 but dismissed it in respect of the period from 20 February 2019. She subsequently gave the claimant permission to appeal

7. Mr Parry's first ground of appeal is a procedural one. He submits that either the First-tier Tribunal or the local authority should have made it clear before the hearing why it was considered that the tenancy agreements might be a sham or have been created to take advantage of the housing benefit scheme so that the claimant could have prepared a response. Mr Gower points out that the local authority was merely given an opportunity to make a submission on those points and it did not do so because those arguments were no part of its case. He also submits that the First-tier Tribunal is entitled to take points that are not taken by a party to proceedings and that, not only had Judge Gannon identified the points and referred to both regulation 8 and regulation 9(1)(l) in his adjournment notice, but also those regulations had been set out in full in the local authority's original response to the appeal. In reply, Mr Parry acknowledges that the First-tier Tribunal has an inquisitorial function but submits that the issue is whether there was a breach of the rules of natural justice. He points out that the claimant's niece had provided a detailed reply to the local authority's initial response but was unable to do so on the new points raised by the First-tier Tribunal because the arguments in favour of finding the agreements to be shams or that they were made for the purpose of taking advantage of the housing benefit scheme were never set out.

8. I accept Mr Parry's submission that the issue is whether there was a breach of the rules of natural justice. I also agree with Mr Gower that there was no obligation on the local authority to provide a written submission to the First-tier Tribunal, and so the question is whether the First-tier Tribunal should have done more. I would be sympathetic to the claimant if she were able to show that she had failed to produce relevant evidence as a result of not fully understanding the issues the First-tier Tribunal had raised, but that is not the case. Insofar as she may not have been able to produce relevant argument, it seems to me that this ground of appeal does not really add anything to Mr Parry's submissions that the First-tier Tribunal erred in law in its approach to regulation 9(1)(l). The claimant, of course, had the disadvantage of being a litigant in person unfamiliar with the relevant law, but I accept Mr Gower's submission that Judge Gannon had adequately identified the issues that the First-tier Tribunal would address at its next hearing. That was enough to enable the claimant to seek advice, but litigants are not expected to become legal experts and it was ultimately for the First-tier Tribunal to ensure that it got the law right. Accordingly, I

reject this ground of appeal and turn to Mr Parry's other grounds of appeal, which are directed to the question whether the First-tier Tribunal did get the law right.

9. Mr Parry argues that the First-tier Tribunal erred in finding that the claimant's liability under the new tenancy agreement was created to take advantage of the housing benefit scheme. He submits that it failed adequately to have regard to the point made in CH/39/2007 (following *R. v Solihull Metropolitan Borough Council Housing Benefits Review Board, ex parte Simpson* (1994) 27 HLR 41) that "to take advantage of the housing benefit scheme … means something akin to abuse of the scheme of the scheme or taking improper advantage of it" and that that must be the dominant purpose. He asserts: "The main intention in this case is to have been to more fairly apportion the rental liability between the tenants as the other tenant was struggling to pay their portion of the rent. The claimant's dominant purpose was to provide a home for herself and also somewhere for her disabled daughter to visit and stay. This reflects the actual situation at the time of the original tenancy agreement as [the other tenant] only wanted to rent one room." He further argues that the First-tier Tribunal failed to address whether the revised tenancy agreements would have resulted in an increase of benefit because, if not, the arrangement would not amount to a contrivance.

10. Mr Gower submits that Mr Parry is simply trying to reargue the case because the First-tier Tribunal did not make the alleged errors. In relation to the question of the amount of benefit, Mr Gower submits, first, that an agreement can be contrived even if it is unsuccessful and, secondly, that in fact the claimant would have received more benefit under the new agreement because the "one bedroom, self-contained rate" of the Local Housing Allowance would have applied. In reply, Mr Parry effectively submits that, if an error of law is not apparent on the face of the First-tier Tribunal's decision, it is simply not clear from the statement of reasons how the First-tier Tribunal reached its decision. That, in itself, would be an error of law.

11. I do not accept that the First-tier Tribunal failed to apply the approach required by CH/39/2007 and the authorities to which Mr Commissioner Jacobs (as he then was) referred in that case. It is necessary to distinguish between the purpose of the original subtenancy agreement and the purpose of the new tenancy agreement. The original subtenancy agreement, as the First-tier Tribunal found, was a perfectly proper one, designed both to provide the claimant with the housing she needed and to enable the original tenant to pay her contractual rent. On the other hand, the new tenancy agreement, made when the claimant discovered that she had not been awarded as much housing benefit as she and her son-in-law had expected, was intended to increase the amount of housing benefit payable to the claimant without either increasing her accommodation or (contrary to Mr Parry's argument) altering the portions of the overall rent that the claimant and the original tenant were contractually required to pay. Quite why she thought that that might lead to an increase in her entitlement to housing benefit I am not sure. The First-tier Tribunal accepted that she was acting in the light of advice given to her niece by the local authority but clearly thought that she and her niece might have misunderstood the advice. In any event, the intention behind the new tenancy agreement was plainly to "take improper advantage" of the housing benefit scheme through a legal device that conferred no other immediate benefit on anyone and so I am satisfied that, for the reasons given in both the decision notice and the statement of reasons, the First-tier Tribunal did not

err in finding that regulation 9(1)(l) was potentially engaged. I add that, in the light of its findings, it was unnecessary for it expressly to deal with the question whether the agreement was a sham. The agreement was a legal device intended to increase the claimant's entitlement to housing benefit that clearly needed to be effective if it was to work and so was intended to be effective and was clearly not a sham (whether or not it in fact worked).

12. However, I accept Mr Parry's submission that regulation 9(1)(l) is to be read as applying only where a liability is created that could, but for regulation 9(1)(l) itself, in fact give an advantage under the housing benefit scheme. The point of the provision is to prevent a person from obtaining an improper advantage, rather than to prevent him or her from obtaining benefit to which he or she would have been entitled whether or not the particular liability in issue had been created. The latter approach would unnecessarily undermine the underlying purpose of the Regulations, which is to provide financial help to those who need it in order to pay rent or similar housing costs. I do not accept Mr Gower's submission that the regulation is to be read to the contrary effect because "[a] clear intention on the part of one or all of the parties to an agreement to abuse the scheme reveals those parties to be bad actors, if they obtain an award of housing benefit because the manner of contrivance they adopted was not an effective one, they may likely continue to contrive further abusive arrangements until they achieve the outcome they desire." It has to be remembered that, as in this case, there may be an intention to gain an "Improper advantage" without there being any evidence of dishonesty.

13. This raises the question whether the new tenancy agreement in this case could have led to an increase in the claimant's housing benefit. It would be surprising if it did, because, as I have said, it increased neither the claimant's accommodation nor the net amount of rent that she was liable to pay after taking account of the rent due to her from her subtenant in respect of the different accommodation occupied by the subtenant (although it would have increased both if the subtenancy were surrendered) and, much more importantly, the amount of her "maximum rent (LHA)" was in any event restricted by regulation 13D to what was in effect a notional reasonable rent for accommodation for one person, even though she occupied two bedrooms (and would have had three if the subtenancy were surrendered).

14. Mr Gower is, in my judgment, right to say that the claimant would have been entitled to the "one bedroom self-contained accommodation" rate of the Local Housing Allowance under the new tenancy agreement if regulation 9(1)(l) does not apply, because she had the exclusive use of two rooms (see regulation 13D(2)(b)(ii)). However, on the First-tier Tribunal's findings of fact (see paragraph 7(a)(v) of the Decision Notice), she was also entitled to that rate under the original agreement because she had exclusive use of two rooms at that time as well. The lower "one bedroom shared accommodation" rate seems to have been awarded only because the claimant did not initially mention how many bedrooms had been let to her and the point was not picked up on reconsideration. As the First-tier Tribunal pointed out, the original subtenancy agreement failed to specify exactly what parts of the house had been sublet, but other evidence could be taken into account to supplement it. In these circumstances, the new agreement did not confer any advantage on the

claimant at the expense of the housing benefit scheme and it was not capable of doing so.

15. Although there is no evidence on the point in the documents before me, it is possible that the claimant had had exclusive use of more than one bedroom in her previous accommodation, so that her daughter could stay there, and so had been entitled to the one bedroom self-contained accommodation rate of Local Housing Allowance there, too, and that that was why the amount awarded to her when she moved was less than she had expected. Whether or not that was so, had she then simply appealed against the amount of benefit, rather than relying on her understanding of advice given to her niece and entering into a new legal agreement, this case might have been resolved much earlier. However, I suspect that neither she nor her niece had been given sufficient detail of the criteria for calculating the maximum rent (LHA) to cause them to realise that the wrong amount had been awarded to her, and the local authority did not realise that it was an issue because it did not know that she had exclusive use of two bedrooms in her new accommodation.

16. In any event, for the reasons that I have given, I am satisfied that the First-tier Tribunal erred in law because it did not consider whether, on its findings of fact, the new tenancy agreement had in fact conferred an improper advantage on the claimant. Had the First-tier Tribunal done so, it would have realised that the claimant's housing benefit should have been calculated on the basis of the one bedroom self-contained accommodation rate from 1 December 2018 when it was first awarded and, as the correctness of that first award was in issue before it, it should have awarded housing benefit on that basis for an indefinite period from that date. This is because it would also have found that the new tenancy agreement was not capable of conferring any advantage on the claimant under the housing benefit scheme and accordingly would have found that regulation 9(1)(l) did not apply to her from 20 February 2019 or at all.

17. Accordingly, I allow the claimant's appeal and give the decision set out above.

MARK ROWLAND
Deputy Judge of the Upper Tribunal
Signed on the original on 30 July 2021