IN THE UPPER TRIBUNAL **Case No.** CH/25/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: A. Rowley, Judge of the Upper Tribunal

Decision: I allow the appeal. As the decision of the First-tier Tribunal (made on 15 October 2015 at Cheltenham under reference SC129/15/00286) involved the making of an error in point of law, it is **set aside** under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is **remitted** to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

1. Before I deal with the substantive appeal, I must address a preliminary matter. The claimant has requested an oral hearing of her appeal to the Upper Tribunal. There is no absolute right to an Upper Tribunal oral hearing. I have a discretion to exercise in the light of the overriding objective of dealing with cases fairly and justly. I am also required to consider both parties' views. The local authority has not requested an oral hearing. I have been able to decide the appeal in the claimant's favour without the need for an oral hearing, the application for which is accordingly refused.

   <u>The issues on this appeal</u>

2. This appeal is concerned with the local authority's decision dated 23 April 2015, which ended the claimant's claim for housing benefit with effect from 6 April 2015. My decision addresses, in particular, the factors to be considered in deciding whether a dwelling is "normally occupied" as a home, the "temporary absence" provisions of regulation 7(16) and 7(17) of the Housing Benefit Regulations 2006, and what should be taken into account when determining whether a tenancy is on a commercial basis. I will set out the relevant legal principles before considering the factual background and why I consider the tribunal erred in law.

3. I must stress that this decision deals with the relevant regulations as they stood at the time of the decision under appeal. Amendments were made to those regulations by the Housing Benefit and State Pension Credit (Temporary Absence) (Amendment) Regulations 2016 with effect from 28 July 2016 (subject to transitional provision). Nevertheless, the general principles remain, and it is those principles which this decision primarily addresses.

   <u>The law</u>

   Occupation of the dwelling

4. Section 130 of the Social Security Contributions and Benefits Act 1992 provides that to be entitled to housing benefit, a claimant must be liable to make payments in respect of a dwelling which he occupies as his home. Section 137(2)(h) provides that regulations may make provision as to the circumstances in which a person is or is not to be treated as occupying a dwelling as his home. The relevant regulation is regulation 7 of the Housing Benefit Regulations 2006.

5. The general rule is set out in regulation 7(1) and (2), the relevant parts of which provide as follows:

"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;
…
and shall not be treated as occupying any other dwelling as his home.
(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."

6. Pursuant to regulation 7(1), housing benefit is generally paid for only one home at a time, that being the home normally occupied by the claimant and any member of his family. There is no statutory definition of "normally occupied." I respectfully agree with Upper Tribunal Judge Wikeley's observation that a tribunal acts at its peril if it defines the relevant legal test incorrectly (*MM v SSWP (IS)* [2012] UKUT 358 (AAC)).

7. Over the years, consideration has been given to what factors may be relevant to the question of which home is "normally occupied" by a claimant when more than one property is involved. Of course, the amount of time that the person spends in the property is highly relevant. But other factors may come into play. Some are helpfully listed in "Housing Benefit and Council Tax Reduction Legislation":
(a) The reason for absence from the property.
(b) Where the person's belongings are kept and if the premises are under his control (see *R(H) 9/05*).
(c) The reason why the person is not living in the premises full-time and whether he intends to live there permanently (*CH/567/2011*).
(d) Where the person is registered to vote, registered with GPs and dentists, is liable for council tax and utilities bills etc.
(e) Whether the person has any local ties such as memberships of clubs and associations.

8. It will be incumbent upon a decision maker, charged with determining whether a dwelling is "normally occupied" by a claimant as his home, to consider these and any other factors relevant to the case.

9. The general rule - that if a person ceases to normally occupy a dwelling as his home then entitlement to housing benefit in respect of that dwelling will cease - is subject to exceptions. One of those concerns temporary absence from the home. The relevant provisions, as at the time of the decision under appeal, were as follows:
"7.
…
(13) Subject to paragraph (17) a person shall be treated as occupying a dwelling as his home while he is temporarily absent therefrom for a period not exceeding 13 weeks beginning from the first day of that absence from the home only if-
(a) he intends to return to occupy the dwelling as his home; and
(b) the part of the dwelling normally occupied by him has not been let or, as the case may be, sub-let; and
(c) the period of absence is unlikely to exceed 13 weeks.
…
(16) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home ("absence"), if –
(a) he intends to return to occupy the dwelling as his home; and

(b) while the part of the dwelling which is normally occupied by him has not been let, or as the case may be, sublet; and
(c) he is –
…
(iii) undergoing, or as the case may be, his partner or his dependant child is undergoing, in the United Kingdom or elsewhere, medical treatment, or medically approved convalescence, in accommodation other than residential accommodation[1];
…
and
(d) the period of his absence is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period.
...
(17) A person to whom paragraph (16) applies shall be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks beginning from the first day of that absence."

10. In other words, regulation 7(1) having set out the general rule, regulation 7(13) provides a general exception for a claimant who is temporarily absent, for whatever reason, from the dwelling he normally occupies as his home, so long as he satisfies each of the criteria in regulation 7(13)(a)–(c). Whilst the period of absence may exceed 13 weeks, entitlement to housing benefit can only continue for a maximum of 13 weeks in respect of that dwelling.

11. Regulation 7(17) effectively provides an exception to the exception of regulation 7(13) in the cases of certain categories of claimant. They are listed in regulation 7(16)(c). In those cases, the 13 week period is extended to 52 weeks so long as the criteria of regulation 7(16)(a), (b) and (d) are satisfied.

12. At the risk of over-simplification, the way the provisions work may be likened to a Russian doll, with the "outer layer" of the general rule encompassing inner layers of exceptions within exceptions to that general rule.

13. It is convenient that I should, at this stage, flag up the amendments made to regulations 7(13), (16) and (17) by the Housing Benefit and State Pension Credit (Temporary Absence) (Amendment) Regulations 2016. Prior to the amendments, no distinction was drawn between temporary absences from the relevant dwelling within and outside Great Britain. The intricate details of the amendments are outside the scope of this decision. Suffice to say that, in very general terms, they provide that the periods for which entitlement can continue will be shorter if the claimant is not only absent from the dwelling he normally occupies as his home, but is also absent from Great Britain. They would, accordingly, have had an impact on this case if they had been in force at the time of the decision under appeal.

14. Returning to the general principles, what if the claimant returns to, and occupies, the dwelling as a home during the allowable period of temporary absence? In *R v Penwith DC, ex p Burt* [1990] 22 HLR 292, QBD it was said that in those circumstances, even if the occupation is for a short time, the allowable period of temporary absence starts again. So, a decision maker must decide whether the return to the dwelling constitutes a re-occupation of the dwelling as a home. That is a question of judgment and each case will, of course, turn on its own facts. As to the period of re-occupation, it is of interest to note that the DWP suggests that

[1] "Residential accommodation" is defined in regulation 7(18)

occupation of the dwelling as a home for a period as short as at least 24 hours may be acceptable (GM A3.460).

15. How should one approach a claimant's absence from a dwelling in the light of regulations 7(1), 7(13) and 7(17)? The starting point is that it is regulation 7(1) that sets out the governing criterion, which is that a person is to be treated as satisfying the requirement of occupation only in respect of a dwelling "normally occupied as his home." Thus, the decision maker should consider, as a question of fact and degree, whether a dwelling is indeed normally occupied as a claimant's home. If it is not, there will be no entitlement to housing benefit in respect of it. If, however, it is, then the decision maker should also consider whether the claimant's absences are temporary ones for the purposes of regulations 7(13) and 7(17). Regulation 7(17) refers, in turn, to regulation 7(16), the criteria of which must be satisfied for the period specified in regulation 7(17) to apply.

Tenancy not on a commercial basis

16. Under section 130 of the 1992 Act, a claimant must be "liable to make payments" in respect of a dwelling which he occupies as his home. Section 137(2)(i) provides that regulations may make provision for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable. Regulation 9 of the 2006 Regulations is made under this power. These are its relevant provisions:

"9. (1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where-
(a) the tenancy or other agreement pursuant to which he occupies the dwelling is not on a commercial basis;

…

(2) In determining whether a tenancy or other agreement pursuant to which a person occupies a dwelling is not on a commercial basis regard shall be had inter alia to whether the terms upon which the person occupies the dwelling includes terms which are not enforceable at law."

17. In addition to regulation 9(2), some factors which may be relevant in assessing whether the agreement is on a commercial basis include those set out in "Housing Benefit and Council Tax Reduction Legislation":
(a) The relationship between the parties. The closer the relationship, the more critically the agreement may be examined (*R v Poole BC ex p Ross* [1995] 28 HLR 351, QBD).
(b) The living arrangements. If the living arrangements are of an unusual character, this may suggest that the agreement is not commercial (*R v Greenwich LBC ex p Moult* [1998] unreported, 19 June, CA).
(c) The amount payable. The DWP suggests that "charging a low rent does not on its own make an agreement non-commercial. Many charities, voluntary bodies, and some individuals, choose to let properties at below market rents or do not want to make a profit from letting, but their tenancies may still be commercial arrangements if that is what the parties to the agreement intended." (GM A3.262)
(d) Evidence of the making and amount of payments under the agreement. Lack of such evidence may suggest that the agreement is not a commercial one (*Moult*, see above).

(e) The parties' views, although, of course, this is not conclusive (*R v Sutton LBC ex p Partridge* [1994] 28 HLR 315).
(f) Bad faith. This speaks for itself.

Factual background

18. The claimant's case is that she entered into an assured shorthold tenancy agreement in respect of a dwelling in Totnes. The tenancy commenced on 6 May 2006. According to the local authority, the claimant was first awarded housing benefit in respect of that dwelling in 2007. It appears that the award was renewed annually from then on.

19. In October 2013 the claimant travelled to Slovakia to receive medical treatment. She lived with her mother there, paying no rent (page 19). However, she left all her personal belongings in the property in Totnes (page 8), and she continued to be registered with a GP in Totnes (see, for example, pages 23, 24), and a dentist in Newton Abbot (page17). It seems that she remained liable for council tax.

20. Having made some enquiries, in January 2014 the local authority accepted that the claimant fell within the terms of regulation 7(16)(c)(iii) of the 2006 Regulations, and her housing benefit award continued. It must follow that, at that stage, the local authority considered that the claimant still normally occupied the dwelling in Totnes as her home, and that she was temporarily absent as she was undergoing medical treatment.

21. In August 2014 the local authority informed the claimant that if she wanted her claim for housing benefit to "run continuous" she would have to return to the property within 52 weeks of her having left it, i.e. by 27 October 2014.

22. The claimant did so, returning to the UK on 8 October 2014. She left again on 11 October 2014. She appears to have stayed in the property in Totnes whilst she was in the UK (page 19). During her stay, amongst other things she saw her dentist (page 17) and went to the housing benefit office.

23. The claimant said that she returned to Slovakia as she needed to return to hospital there (page 15). It is her case that she continued to have medical treatment there (for example, page 21).

24. In April 2015 the local authority asked for further information, particularly about the claimant's medical treatment. Whilst the claimant sent a reply, the local authority did not consider it to be adequate.

25. In the meantime, on 20 April 2015 the local authority's investigating officer visited the claimant's landlord who, it appears, lived next door to the property which he had let to the claimant. In a witness statement dated 9 June 2015, the investigating officer recorded that the landlord had told her that the claimant regularly paid rent of £200 per month, and he provided bank statements to substantiate that. He had also said that the claimant was Slovakia undergoing treatment, and that he paid the shortfall in her council tax[2]. In response to a question from the officer, the landlord was reported to have said that if the claimant stopped paying rent he would, nevertheless, continue to let her stay in the property.

[2] Presumably after her council tax reduction, which was apparently operative until April 2015 (see pages 31 and 32).

26. The local authority made the decision under appeal on 23 April 2015. It said that the claim for housing benefit had been "cancelled" with effect from 6 April 2015 for two reasons. First, whilst under regulation 7 the claimant could be temporarily absent for up to 52 weeks to receive medically approved treatment, nonetheless there came a time when the local authority had to make a decision if the dwelling was still normally occupied as her main home. That time had come, and as the claimant had lived in Slovakia for the past 18 months, even though the treatment she was receiving was also available in the UK[3], her place of residence in Slovakia was classed as her main home. Secondly, as the claimant's landlord had said that he would allow her to keep her tenancy even if she stopped paying rent, the tenancy was not a commercial one.

27. The claimant appealed to the First-tier Tribunal. In support of her appeal, she relied upon a letter dated 11 June 2015 from her landlord. In the letter the landlord challenged the investigating officer's account of their conversation on 20 April 2015. He indicated that he had said that he would keep the tenancy open assuming the claimant paid the rent, and that if she could not pay the rent she would have to vacate flat. He said in terms that the tenancy was a commercial tenancy. He also said that the rent included the claimant's council tax.

28. There was evidence before the tribunal that the claimant intended to return to Totnes in September 2015 (page 45), and that her landlord had given her a "qualified" notice to quit, indicating that if she did not pay the rent for at least August and September onwards she would have to vacate the property by 30 September 2015. For completeness, I should add that the claimant returned to the property in October 2015.

Analysis of the First-tier Tribunal's decision

29. The claimant's appeal was heard on the papers on 15 October 2015. The tribunal refused the claimant's appeal.

Dwelling normally occupied as a home

30. Having referred to the temporary absence provisions of regulation 7(16) the tribunal simply went on say:

> *"However, the basis of the Respondent's decision was also that [the claimant's] place of residence was Slovakia. On [the claimant's] own evidence she left the UK in October 2013, made a short visit in October 2014 and was planning to return in September 2015. I therefore found that in April 2015 she was not habitually resident in the UK and was therefore not entitled to Housing Benefit."*

31. There are a number of errors with the tribunal's approach. First, whilst it considered the amount of time the claimant had spent at the property at Totnes during the period before the decision under appeal, the tribunal did so to the exclusion of all other factors. It did not take into account matters such as the claimant's belongings were kept at the property, why she was in Slovakia, she was registered locally with a GP and dentist and, according to her landlord, her rent included the council tax. Nor did the tribunal say what weight it attached to the fact that the claimant intended to return to the property in September 2015.

[3] In fact, the claimant had said "I would prefer treatment in the UK but after the hospital staff left me to die on the floor behind the hospital entrance I had no other choice than to seek help overseas and my GP probably agreed with that as she signed the S2 form which allow patient seeking treatment overseas too." (page 30)

32. Secondly, the tribunal defined the relevant legal test incorrectly, referring to the claimant's habitual residence in the UK. In doing so, in the words of Judge Wikeley it "acted at its peril" and, in my judgment, erred in law. I should add that habitual residence had not been raised as an issue on the appeal by the local authority.

33. I have considered whether or not these errors amounted to material ones, as the statutory 52 week "temporary absence" period would, on the face of it, have expired in October 2014, considerably prior to the decision dated 23 April 2015. I have concluded that the errors could well have affected the outcome of the case. As set out above, the claimant returned to the property for a short period in October 2014. That may possibly have given rise to the allowable period of temporary absence re-commencing.

Tenancy on a commercial basis

34. The tribunal found as follows:

"17. Further, the Tribunal preferred the evidence of the Local Authority that the tenancy was not on a commercial basis. The statement of the investigating officer was that the rent was £200 per month but that the landlord would not evict [the claimant] even if she did not pay the rent. I noted this evidence was disputed by the landlord and that a notice to quit was served. However the notice to quit postdates the date of the decision.
18. Further there was a conflict of evidence between the landlord and the tenant regarding the amount of the rent payable in that [the claimant] says that her rent is £250 every month (page 10). The terms of the tenancy agreement are therefore unclear between the landlord and the tenant.
19. The rent includes council tax which means that the actual rent payable is very low and likely to be less than the commercial rent sole occupancy of a dwelling. I therefore found, in all the circumstances, that the tenancy was not on a commercial basis and therefore that [the claimant] not entitled to Housing Benefit on that basis."

35. I have some concerns with the tribunal's reasons. First, the tribunal does not appear to have taken into account that low rent, in itself, is not necessarily an indication that the tenancy is not commercial. Nor, indeed, does it appear to have said what it made of the landlord's statement to the investigating officer that he only paid the *shortfall* in the claimant's council tax.

36. Secondly, the tribunal did not weigh in the balance the lack of evidence of any connection or relationship between the claimant and her landlord, the fact that the claimant appeared to have sole occupation of the property, and the fact that the landlord provided to the investigating officer bank statements which apparently showed regular payments of rent.

37. Thirdly, the tribunal's other basis for its finding that the tenancy was not a commercial one was, largely, its apparent preference of the hearsay statement of the investigating officer in the face of subsequent clarification by the landlord. In my view, the tribunal failed adequately to explain why it rejected the landlord's evidence on this issue.

<u>My decision</u>

38. For the reasons set out above the decision of the First-tier Tribunal involved the making of material errors in point of law, and I set it aside. I have considered whether I am in a position to remake the decision, but I have decided that fresh

findings of fact are required and for that reason it is appropriate for me to remit the matter to a new First-tier Tribunal for rehearing.

Directions for the rehearing

39. I give the following directions to the new tribunal. They may be added to or amended by a District Tribunal Judge.

40. The new tribunal should not involve any judge who has previously been involved in this appeal. It must apply the law as set out above to the facts as it finds them. It will not be bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different conclusion to that of the previous tribunal.

41. If the claimant has any further written evidence to put before the new tribunal, this should be sent to the new tribunal within one month of the date of the letter sending out this decision. The claimant may wish to address, in particular, the matters referred to in paragraphs 7, 14 and 17 above, and she may wish to provide documentary evidence in respect of them.

42. The new tribunal will note that the claimant has been awarded housing benefit in respect of her occupation of the relevant property with effect from 5 October 2015. It will, accordingly, be considering a closed period.

43. The claimant may find it helpful to get assistance from a law centre, neighbourhood advice centre or Citizens Advice Bureau (CAB) in relation to the new tribunal's rehearing of the appeal.

44. For the sake of completeness, I should add that the fact that this appeal has succeeded on a point of law says nothing one way or the other about whether the claimant's appeal will succeed on the facts before the new tribunal.

45. Finally, I should mention that the claimant has indicated that she is seeking compensation from the local authority. That is outside both my jurisdiction and that of the First-tier Tribunal. In any event, I understand that the matter is now in the hands of the Local Government Ombudsman.

A. Rowley, Judge of the Upper Tribunal

(Signed on the original)

Dated: 14 June 2017