IN THE UPPER TRIBUNAL **Case No.** CH/211/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Attendances:

The Secretary of State was represented by Mr Alistair Mills of counsel, instructed by the Government Legal Department.

The claimant's appointee appeared in person.

The local authority was not represented.

Decision: The Secretary of State's appeal is allowed. The decision of the First-tier tribunal dated 23 September 2014 is set aside and there is substituted a decision that the claimant's entitlement to housing benefit is to be assessed from 1 April 2013 on the basis that the eligible rent is reduced by 14%.

REASONS FOR DECISION

1. This is an appeal, brought by the Secretary of State for Work and Pensions with permission granted by Upper Tribunal Judge Lloyd-Davies, against a decision of the First-tier Tribunal dated 23 September 2014 whereby it allowed the claimant's appeal against a decision of Knowsley Borough Council dated 5 April 2013 to the effect that the claimant's entitlement to housing benefit was to be assessed from 1 April 2013 on the basis that the eligible rent was reduced by 14% because there were three bedrooms in the dwelling that he occupied as his home and he required only two. The First-tier Tribunal decided that there were two bedrooms in the dwelling and so there was to be no reduction in the eligible rent.

The legislation

2. By virtue of regulation 11(1) of the Housing Benefit Regulations 2006 (SI 2006/213) as much amended, the amount of housing benefit to which a person is entitled is calculated by reference to a claimant's "eligible rent" which, in the present case, is by virtue of regulations 12BA(1) and (2) and A13(1) the "maximum rent (social sector)" as determined in accordance with regulation B13. Regulation B13 provides –

> "B13.—(1) The maximum rent (social sector) is determined in accordance with paragraphs (2) to (4).
> (2) The relevant authority must determine a limited rent by–
> (a) determining the amount that the claimant's eligible rent would be in accordance with regulation 12B(2) without applying regulation 12B(4) and (6);
> (b) where the number of bedrooms in the dwelling exceeds the number of bedrooms to which the claimant is entitled in accordance with paragraphs (5) to (7), reducing that amount by the appropriate percentage set out in paragraph (3); and

(c) ….
(3) The appropriate percentage is–
(a) 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and
(b) 25% where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled.
(4) ….
(5) The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable–
(a) a couple (within the meaning of Part 7 of the Act);
(b) a person who is not a child;
(ba) …;
(c) …;
(d) …;
(e) ….
(6) The claimant is entitled to one additional bedroom in any case where–
(a) a relevant person is a person who requires overnight care; or
(b) ….
(7) ….
(8) ….
(9) In this regulation "relevant person" means–
(a) the claimant;
(b) …;
(c) …;
(d) …."

The facts and procedural history of this case

3. The claimant is a single man in his thirties. He suffers from severe learning difficulties and is autistic. He cannot read and write and cannot communicate by speaking although he can communicate through signs. He also suffers from a heart condition and a bowel complaint but those conditions are not really relevant to the present case. His mother has been appointed to act on his behalf in relation to his claim for housing benefit. In 2009, he became the tenant of a house rented from Knowsley Housing Trust, the tenancy agreement being signed by his mother on his behalf, and he claimed and was awarded housing benefit. A considerable amount of money was spent by the claimant's parents in doing the property up and furnishing it. They have also recruited, and until recently managed, a team of support workers who are funded by the local authority (and formerly the Independent Living Fund) and provide the claimant with care, help and support in the property for 24 hours a day on seven days a week.

4. The house is described in the tenancy agreement as "a three bedroom house". It is one of a small number of similar semi-detached houses in the area. The ground floor is very much larger than the first floor, which is effectively in the roof space and on which there are just two bedrooms and a small storage area or clothes cupboard off the landing. On the ground floor, the hallway from the front door has doors leading to the bathroom and to two other rooms. I am told that the front room is 10'6" by 10'3". Scaling up from the plans provided to me at the hearing, it would appear that the back room is slightly over 16' 0" by 10' 6". Access to the kitchen is

from the back room, which is used as the main living room. Beyond the kitchen are a utility room, a storage room and the back door. The house was taken on the basis that the claimant and an overnight support worker would each have a bedroom upstairs and he and a support worker on day-time duty would share the rooms downstairs, using the smaller room at the front of the house, which originally had a gas fireplace in it, as a dining room and a room where they could "chat" without the distraction of the television. That is how the property has in fact been used. Having two living rooms downstairs means that a support worker on duty during the day and the claimant each have space and are not always on top of each other when, for instance, the claimant is watching television.

5. When regulations A13 and B13 were inserted into the 2006 Regulations in 2013, it became necessary for the local authority to decide whether there were two bedrooms in the dwelling or three, in order to determine whether there should be a 14% reduction in the claimant's "limited rent" under regulation B13(2)(b), it not being in dispute that the claimant was "entitled" to two bedrooms for the purpose of that subparagraph. In the light of the description of the property in the tenancy agreement and also the claimant's apparent acceptance in his original housing benefit claim form that the property had three bedrooms and one living room, the local authority decided that there were three bedrooms. Accordingly, the 14% reduction was implemented, although discretionary housing payments were awarded to make up the shortfall.

6. The claimant's mother appealed on his behalf. There was some correspondence between the claimant's mother and the local authority before the appeal was heard and she made a detailed written submission to the First-tier Tribunal, enclosing documents from which it is clear that Knowsley Housing Trust gave some thought during 2013 and 2014 to the question whether the property should be re-designated as a two-bedroomed house. She had argued that a distinction should be drawn between two-storey houses in the same road that she accepted were properly described as three-bedroomed houses and houses of the sort in which her son lived, which she described as two-bedroom dormer bungalows. She had also pointed out that what was usually used as a dining room had formerly been known as a parlour and had almost always been where families ate because neither the other living room nor the kitchen was big enough to accommodate an "eating" table, although she acknowledged that the room would sometimes be used as a bedroom when family numbers made that necessary. It appears that an internal recommendation adopting her suggestion was made but was not accepted at a more senior level. On 19 August 2014, a housing officer sent an email saying –

> "There was a discrepancy with the properties in […]. They are parlour type houses with 2 bedrooms upstairs and a room downstairs that is classed as a bedroom."

Whatever was meant by the word "discrepancy", it seems to me that that email confirms that the room downstairs remained classed as a bedroom by the Housing Trust, although it might previously have been regarded as a parlour.

7. One of the letters to Knowsley Housing Trust also explained why it was so important to the claimant having the dining room – it being explained that by reason of his disability he needed to have a proper table at which to eat – and that point was repeated in his mother's submission to the First-tier Tribunal. She further argued

that moving was not an option for the claimant because his autism meant that he could not cope even with minor changes so that "any change to his living arrangements would be catastrophic". She relied on a decision of the First-tier Tribunal given in a similar case in Rochdale in which the judge had followed *Bolton Metropolitan Council v BF (HB)* [2014] UKUT 48 (AAC) and, in the light of those decisions and guidance for rent officers, she argued that, as a matter of plain English, the dining room was not in fact a bedroom and was not being used as such and that therefore it was not a bedroom for the purposes of the legislation. In its submission, the local authority had also relied on the *Bolton* case for the proposition that the absence of a bed did not mean that a room was not a bedroom.

8. At the hearing before the First-tier Tribunal, there was no dispute about the facts and the First-tier Tribunal accepted the claimant's mother's evidence that she had not checked the description of the house in the tenancy agreement when it was signed and had considered the house perfect for her son's needs. I would add that, even if she had noticed that the house had been described as having three bedrooms, it would have been understandable if she had thought that the description was of no significance and did not need to be amended.

9. The First-tier Tribunal allowed the claimant's mother's appeal. It referred to the *Bolton* case and said –

> "5. There was no definition of the word 'bedroom' in the legislation. Judge West, in the above case, says that it is an ordinary English word, and should be construed as such. In this case, the Tribunal formed the view that as this room had never, during the current tenancy, contained a bed or been used for sleeping, it was not a bedroom, even though described as such in the tenancy agreement. The appellant's mother confirmed to the Tribunal the nature of its use, and her intentions for its use at the outset of the tenancy, before the 'bedroom tax' was brought into legislation.
>
> 6. The Tribunal in the above case was concerned with whether a living room could be described as a bedroom if it were used for sleeping in. In this case, the room was not used for sleeping in at all, and could not therefore be described as a bedroom.
>
> 7. The Tribunal looked at all the factors surrounding the tenancy. The Tribunal concluded that, taking all the circumstances into account, the property was a two bedroom property, and should be treated as such for the purposes of the Social Sector Size Criteria."

10. The Secretary of State for Work and Pensions, who had not taken any part in the proceedings before the First-tier Tribunal but nonetheless had a right of appeal, applied for permission to appeal, which was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Lloyd-Davies in the light of *Secretary of State for Work and Pensions v Nelson (HB)* [2014] UKUT 525 (AAC); [2015] AACR 21. The case was then stayed to await the decision of the Supreme Court in *R.(MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 W.L.R. 1550; [2017] AACR 9. That decision having been made, the stay in this case was lifted and the case was listed for hearing before me. At the hearing, the Secretary of State placed considerable reliance on the decision of the Court of Session in *Secretary of State for Work and Pensions v City of Glasgow Council* [2017] CSIH 35; [2017] AACR 38.

11. The claimant's mother reiterated the points she had made to the First-tier Tribunal and she also told me that she had carried out some research in the way houses of the type occupied by her son were in fact used. She said that there were ten of them, of which three were in private ownership. As far as she was aware, in only one of them was a room downstairs being used as a bedroom and that was by a next-door neighbour of her son who used a wheelchair. One of those in private ownership was even being let as a two-bedroom property and another had been described as a two-bedroom house in a planning application for an extension. She produced copies of the plans of that property in its existing state and on which the front downstairs room, like the rear downstairs room, is described as a "living room".

12. An appeal to the Upper Tribunal lies only on a point of law but, if the First-tier Tribunal has erred in law and the Upper Tribunal sets its decision aside, the Upper Tribunal may re-decide the case. Thus, there are potentially two questions in this case. Did the First-tier Tribunal err in law by having regard to immaterial factors or failing to have regard to material factors and, if so, what decision should be made having regard to the correct factors?

The case law

13. First, it is clear from the Supreme Court's decision in *MA* that it cannot be argued in this case that the claimant's rights under the European Convention on Human Rights would be breached by regulation B13 if the front downstairs room were to be treated as bedroom for the purposes of the regulation because, if that regulation would otherwise have that effect, he will be entitled to discretionary housing payments. Such payments may also be made even if not doing so would not breach the claimant's Convention rights.

14. As regards the *Bolton* case on which the First-tier Tribunal placed some weight, I agree with the Secretary of State that it is not really relevant. Indeed, I think the claimant's mother was inclined to accept that that was so. That case arose, not under regulation B13, but under regulation 13D of the 2006 Regulations as then in force. Under that regulation, as read with the definition of "person who requires overnight care" in regulation 2(1), the local housing allowance was calculated by reference to the number of bedrooms required by the claimant, which included one for a couple and an additional bedroom if a member of the couple required, and had arranged, overnight care from a person who had been "provided with the use of a bedroom in the dwelling additional to those used by the persons who occupy the dwelling as their home". The property in fact had two bedrooms but the claimant and his wife were using separate bedrooms and the claimant's daughter, who provided overnight care, slept in the lounge. The local authority decided that she was not being provided with the use of a bedroom and that the claimant's housing benefit should be calculated on the basis that he required only one bedroom. Upper Tribunal Judge West upheld the First-tier Tribunal's decision that the claimant's local housing allowance should be calculated on the basis that he required two bedrooms. He said of the daughter's bed that "the fact that the bed may have been folded up and put away in the course of the day when the room was being used as a lounge or living room does not mean that it was not a bedroom within the meaning of the regulations when she slept in it at night." That produced a sensible result on the

facts of the case and suggests that the word "bedroom" may have a different meaning in the definition of "person who requires overnight care" in regulation 2(1) from the meaning it has in regulation B13. Due to the structure of regulation 13D, which focuses only on the number of people living in a property and not also on the number of bedrooms, it did not matter that the implication of the Upper Tribunal's decision was that the number of bedrooms in the dwelling fluctuated as between day and night. Plainly, regulation B13 cannot be approached in the same way.

15. I agree with the claimant's mother that *Stevenage Borough Council v ML (HB)* [2016] UKUT 164 (ACC), on paragraph [6] of which Mr Mills placed some reliance on behalf of the Secretary of State, is also not relevant. It was essentially concerned with whether a room was too small to be a bedroom and does not assist with the determination of the present case.

16. I turn, then, to *Nelson* and the *Glasgow* case which are both clearly relevant to this case. As those are, respectively, a decision of a three-judge panel of the Upper Tribunal and a decision of the Court of Session, I must follow both decisions although, strictly, this is a matter of comity rather than because the decisions are technically binding. Where there is a conflict between the decisions, I should follow the decision of the Court of Session because it is a court that is superior to the Upper Tribunal (whose jurisdiction in social security matters extends across Great Britain) and, although its decisions are not strictly binding in England and Wales (*Marshalls Clay Products Ltd v Caulfield* [2004] EWCA Civ 422; [2004] I.C.R. 1502 at [32]), it is necessary to avoid legislation that applies throughout Great Britain being applied in inconsistent ways depending on whether a case arises north or south of the Scottish border (see *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699; [2011] 1 W.L.R. 743; [2010] AACR 42 at [26] and [27]).

17. In *Nelson*, it was held –

> "24. The underlying purpose is to limit the housing benefit entitlement of those under occupying accommodation and the language as a whole shows that the trigger for a reduction is set by reference to the entitlement of a tenant to bedrooms for the occupation of the people listed in sub-paragraphs (5) and (6). Sub-paragraphs (7) to (9) set out how that entitlement is to be assessed.
>
> 25. It follows that read as whole regulation B13 requires the decision-maker to assess the entitlement to bedrooms as set out in those sub-paragraphs.
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> 26. It is only when that entitlement to bedrooms is less than the number of bedrooms in the home that a reduction can be made.
>
> 27. In our view, when read as a whole, regulation B13 provides that in determining whether there is under occupancy that triggers a reduction in housing benefit:
> i) the use or potential use of the relevant room or rooms can be by any of the people listed in sub-paragraphs (5) and (6),
> ii) the impact of this is that it has to be considered whether the relevant room or rooms could be used by any of the listed people, and
> iii) designation or choices made by the family as to who should occupy rooms as bedrooms or how rooms should be used is unlikely to have an impact on the application of the regulation.

(We have not expressed point (iii) in absolute terms because it was not the focus of argument in this case and without such focused argument we do not consider that it would be appropriate to say that such designation or choice can never be relevant and the qualification made in [29] below is relevant.)

28. As to the points made in [27](ii) and (iii). It is in our view clear:

i) that the underlying purpose of regulation B13 would be undermined if this was not the case, and

ii) that purpose and that interpretation of the regulation shows that the test is focused on the availability of rooms that could be used as bedrooms by any of the listed people and thus essentially the assessment of a property when vacant; rather than how it is actually being used from time to time. It seems to us that this is so because a part of the underlying purpose must be to free up homes that are being under occupied so that they can be used by others with an entitlement to the number of bedrooms in the property or to encourage the existing occupiers to make under occupied bedrooms available to others.

29. However, this does not mean that issues concerning the designation of rooms as between living room(s), kitchen, bathroom, lavatory, storeroom and bedroom do not arise. For example, issues could arise (a) as to what should be designated as the living/dining areas of a property, and (b) the impact of a conversion of room to a bathroom or wet room (which could normally only be done lawfully with the consent of the landlord).

30. We agree with the Secretary of State that a starting point for determining how the property could be used and thus the number of bedrooms it contains is its description by the original and later landlords when letting it. This could be in the tenancy agreement or marketing material. So, in Scotland a house is regularly described by reference to the number of apartments it has and so a “four apartment house” is a house which has a living room, three bedrooms, a bathroom with or without a separate lavatory and a kitchen. In England, that would regularly be described as a three bedroom house. But we do not agree that this description is more than a starting point because if, for example, in the application of regulation B13 that categorisation is disputed and found to be incorrect it should be reclassified for that purpose and, in many cases, for the purposes of setting the rent to be paid under the tenancy agreement. In particular when, as here, the current landlord and the relevant authority are the same legal person it is clear that it would need to revisit any categorisation for letting purposes if the application of regulation B13 showed that it was or might be inaccurate and, in particular, if it would or might affect the level of rent that should be charged. We acknowledge that in some cases this may not be so (eg a conversion of a room to a bathroom or wet room or kitchen).

31. When an issue arises as to whether a particular room falls to be treated as a bedroom that could be used by any of the persons listed in regulation B13(5) and (6) a number of case sensitive factors will need to be considered including (a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy.

32. For example, arguments may arise over whether a room or space is to be classified as a bedroom or as a cupboard or cellar. Returning to what we have said earlier this will be answered by a description of the room/space and by reference thereto why the decision on categorisation has been made. It may also be assisted by evidence of how similar rooms/spaces are used in other properties in the area.

> 33. Those reasons will address issues of degree and so reasonableness in the context of the underlying purposes of regulation B13. …"

In that case, the issue was whether the disputed room was too small to be a bedroom.

18. The *Glasgow* case was much more like the present case because the claimant was a woman with a severe learning difficulty and autistic traits who was unable to live on her own and the room in dispute had been used as a living room for a number of years, having been designated as such by the social worker who had planned the claimant's return to the house after a period of absence. The Upper Tribunal held –

> "15. I am of the opinion that the *Nelson* decision goes no further than saying that normally the family designation and choice is not a relevant factor, but leaves open the question of whether or not there might be exceptional circumstances when re-designation might be appropriate. The *Nelson* decision does recognise at paragraph 29 that issues as to the designations of rooms can arise and specifically refer to the conversion of a room to a bathroom or wet room which could normally only be done with the consent of the landlord. I therefore see no reason why designation on professional advice for a mental health or mental disability condition could not also be one of those circumstances that a tribunal can take into account in determining whether or not a room is available to 'be used as a bedroom' – paragraph 28(ii). If re-designation is limited to physical conversion only for a physically disabled person, but that this re-designation is not available to a mentally disabled person when required on profession advice, then I consider that would amount to discrimination for no rational reason."

19. The Secretary of State appealed to the Court of Session, arguing that the "proper approach was to have regard to whether the room, if vacant, could be used by any of the people listed in Regulation B13(5) and (6) as a bedroom taking into account its physical characteristics" and that the Upper Tribunal had erred in paragraph [27](iii) of *Nelson* in admitting to the possibility that a tenant's use might be relevant. For the claimant. reliance was placed on the use having been based on professional advice rather than mere personal preference. The Court allowed the appeal. It said –

> [19] There was no real dispute in this case about the purpose of the Regulations and we consider that purpose would be frustrated if a tenant who rented what was objectively classified, for example, as a three bedroom property could by his use or unilateral structural changes to the property change the classification to a two or one bedroom property.
>
> [20] In the present case the appellant did not challenge that the five rooms in the dwelling rented by the applicant contain one livingroom, kitchen and bathroom. That leaves four rooms which the appellant submitted are properly classified as bedrooms. In our opinion the classification and description of a property used as a dwelling is a matter of fact to be determined objectively according to relevant factors such as size, layout and specification of the particular property in its vacant state. That classification cannot be changed except by structural alterations made with the landlord's approval which have the result of changing the classification of the property having regard objectively to its potential use in a vacant state. Thus the classification of a property as having one or more bedrooms does not change

depending on the actual needs of the occupants or how they use the rooms for whatever reason from time to time. This may work both in favour of and against the applicant for housing benefit. For example, if the property considered objectively is classified as three bedrooms, the fact that the tenant always uses the livingroom as a bedroom should not result in reclassification of the property for the purposes of the 2006 Regulations as a four bedroom property. In contrast, if a tenant chooses or requires to use one of the three bedrooms as a storeroom for essential medical equipment, that should not result in a reclassification of the property from a three bedroom property to a two bedroom property. We note, for example, that one of the factual cases considered in *R.(MA)* was the application summarised in appendix 1 at page 4576. He had a three bedroom property and used one bedroom as a store for essential equipment required because of disability. It was not submitted by any party nor raised by any of the Justices that the property should be classified as having only two bedrooms which would determine the relevant reduction under Regulation B13. The issue of the interpretation of "bedroom" and the relevant factors to be considered was not of course raised directly in *R.(MA)*.

[21] The issue was raised directly at tribunal level in a number of cases. A three judge panel was convened in *SSWP* v *Nelson* against a background that there were a number of different approaches taken by First-tier Tribunals to the interpretation of the word "bedroom" in Regulation B13. We consider that there is merit in the approach of the Upper Tribunal to the extent that they recognised that the assessment should focus on the property when vacant rather than how it is actually being used from time to time (paragraph 28) and in their practical approach to considering what may be relevant factors illustrated in paragraphs 30 to 33. To the extent however that the Upper Tribunal entertained the possibility that the designation or choices made by family members as to who should occupy bedrooms or how rooms should be used had any relevance, we do not agree.

[22] In our opinion, in a disputed case in the first instance it is for the local authority who is responsible for administering the housing benefit system to come to a decision objectively about the classification of the property offered for rent in its vacant state. That may involve taking into account, for example, the number of rooms, their size, layout and function as living/dining space, kitchen, washing/toilet facilities and what other space is available. This may include deciding whether a room is suitable to accommodate a bed with, for example, sufficient space, height, light, privacy to be classified as a bedroom. The classification decision is not dependent on suitability for occupancy by more than one person. We accept that the landlord's description of the property as offered to rent will often be a useful starting point in the relevant factual assessment but it is not definitive.

[23] In this objective assessment, we do not consider that assistance can be drawn from paragraphs (5) and (6) of Regulation B13 in concluding whether a room is properly classified as a bedroom. We are not clear what assistance the Upper Tribunal in the *Nelson* decision derived from these provisions. For example, in a particular property there may be a room available which is not big enough for a double bed but the room is otherwise suitable as a bedroom to accommodate a child in a single bed. In our opinion that room may still properly be classified as a bedroom even although the particular occupants of the property have no child and the room is too small for the couple who live in the property and need a bedroom. We consider that what is required in assessing whether a room is a bedroom is an objective assessment of the property as vacant which is not related to the residents of the property or what their actual use or needs might be. The use and needs of the residents may vary from time to time and the number or residents may also vary. This may lead to what might be regarded as overcrowding or under occupation as

> defined by Regulation B13 at a particular time. None of that however affects the prior question which in our opinion is to be determined objectively as to the number of bedrooms in the property.
>
> [24] We are of the opinion that if a room is converted by the landlord or with his consent in such a way that it can no longer be classified objectively as a bedroom, for example, if it is converted into a wet room or if a wall is knocked down between two small bedrooms to provide a larger bedroom, the result of objective assessment of the property may be that it has one less bedroom after the conversion work. That result arises regardless of whether the physical reconfiguration is done because of the mental or physical disability of one of the occupants or merely as a way of upgrading the landlord's property or for some other reason. We would expect the landlord to reflect the conversion work in the lease terms and in the landlord's description of the property. That may impact on the rent which the landlord is able to charge.
>
> [25] It follows therefore that we consider both the First-tier Tribunal and the Upper Tribunal judge to have erred in law in concluding that the re-designation of a bedroom to a livingroom by or on behalf of IB with or without professional advice about that re-designation was a relevant factor. An applicant for housing benefit and the occupants of a dwelling may choose or need or be advised to use the property in a way which best suits their needs but in our opinion that is not relevant to the issue of what is a bedroom for the purposes of the 2006 Regulations.
>
> [26] We consider that our approach to the interpretation of the word "bedroom" for the purposes of the 2006 Regulations does not raise any discrimination issue. Discrimination may arise under the 2006 Regulations, because of the specific rules set out in Regulation B13 as to the number of bedrooms deemed to be appropriate by reference to the list set out in Regulation B13 paragraphs (5) to (9). In the developing case law which was considered in *R(MA)*, the alleged discrimination focused on the additional needs for an additional bedroom because of disability and other reasons. In the present case it is not submitted that IB requires an additional bedroom.

20. There are clearly two respects in which the Court of Session disagreed with the three-judge panel. The first, expressed at the beginning of paragraph [23], is an acceptance of the Secretary of State's argument that the composition of the claimant's household was irrelevant in determining whether or not a room was a bedroom. This is a controversial issue (see *Nuneaton and Bedworth Borough Council v RH (HB)* [2017] UKUT 471 (AAC)) that does not arise in the present case and I shall say no more about it.

21. The second, expressed at the end of paragraph [21] appears to be limited to an acceptance of the Secretary of State's submission that the language in paragraph [27](iii) of *Nelson* was inappropriate insofar as it left open the possibility that the actual use of the room by the tenant might be relevant. That was important in the *Glasgow* case because the Upper Tribunal had based its decision in that case on that possibility, but it had not been important in *Nelson* and, indeed, it can be seen from what was said at the end of paragraph [27] of *Nelson* that the possibility had been left open by the three-judge panel only because no argument had been received on the point.

22. In other respects, the decisions are in concordance and, in particular, make it clear that, although in many – perhaps, most – contexts a room is described by the way it is used by the occupier of the property, regulation B13 requires that a more objective approach be taken for the purposes of that regulation. The difference in the way the decisions are expressed seems to be entirely due to the issues arising in the cases and the way they were argued. Thus, in *Nelson*, where the Upper Tribunal considered that the landlord's designation was only a starting point but it appears to have considered that the only reason for departing from it would be the unreasonableness of using the room for its designated purpose, that was in the context of a case where the only ground for suggesting that the disputed room was not a bedroom was its claimed unsuitability for such use. In the *Glasgow* case, where the emphasis is on there being an objective assessment although it was accepted that "the landlord's description of the property as offered to rent will often be a useful starting point", the context was a case where not only had the property been let on the basis that it had four bedrooms, of which the disputed room was one, but also the claimant's family had originally used that room as a bedroom. The claimant did not argue that the room would not normally be regarded as a bedroom and, presumably for that reason, there was no discussion of the physical attributes of the room and the argument and discussion was confined to the ways in which a formerly uncontentious designation by a landlord could be changed.

23. To describe a landlord's designation, as expressed in a tenancy agreement, as a starting point seems to me to be partly an acceptance of the practical point that a landlord's view is likely to be the only evidence before a housing benefit decision-maker that is at least largely independent of the claimant, but it may also reflect an unexpressed view that a social sector landlord is likely to have a realistic view of the potential value of the property in terms of occupancy and an interest in using the property efficiently and therefore in a way consistent with the underlying purpose behind regulation B13. The *Glasgow* case makes it absolutely clear that the landlord's designation is not definitive but it does not assist with the question whether or not it is to be given any weight in an otherwise borderline case.

24. A further point worth emphasising is that it was accepted in *Nelson* that, when considering whether a room can reasonably be used in a way consistent with the landlord's designation, one material consideration is how similar rooms are used in other properties in the area (see paragraph [32] which is among the paragraphs with which the Court of Session expressed broad approval in the *Glasgow* case). This, it seems to me, is important. The 2006 Regulations do not provide that all rooms in a house bar one must be regarded as bedrooms if they could be used as such. They require a distinction to be drawn between bedrooms and other types of room. Therefore, insofar as the Secretary of State argued that the only question was whether the room could reasonably be used as a bedroom, I do not agree. Nonetheless, the test is objective and, if a type of room is conventionally used in more than one way, the fact that it is more often used in one particular way rather than an another is unlikely by itself to be determinative.

Applying the case law to this case

25. It is clear in the light of *Nelson* and the *Glasgow* case that the First-tier Tribunal 's approach to the present case was wrong in law in that it had regard to the

irrelevant fact of the claimant's actual use of the room. The First-tier Tribunal's decision was, of course, made before either of *Nelson and the Glasgow* case was decided and so the error may be understandable. Nonetheless the decision must be set aside.

26. However, although the First-tier Tribunal's approach was flawed, it does not follow that it reached the wrong conclusion. The question whether the disputed room was a bedroom must now be re-decided. There is no virtue in this case being remitted to the First-tier Tribunal because the facts are reasonably clear and undisputed and this is not the sort of case in which a tribunal judge sits with expert members. Consequently, it falls to me to re-decide the case.

27. It is clear from *Nelson* and the *Glasgow* case that the claimant's actual use of the disputed room is immaterial to the question whether it is a bedroom for the purposes of regulation B13 and so are his personal characteristics and the motives he and his parents had for his renting the property.

28. The physical characteristics of the room and its relationship to the other rooms in the house are, however, material to the objective approach that must be taken.

29. I have little doubt that the claimant's house would originally have been regarded as having only two bedrooms. Apart from what the claimant's mother says about the way that similar properties are used, I consider that she is right to point to the fact that the front room downstairs had a gas fire in it as an indication that it was a living room. I accept that it would generally have been used either as a parlour or, despite not being as conveniently situated next to the kitchen as the larger back room, as a dining room.

30. However, the removal of the gas fire has made more realistic the possibility of the room being used as a bedroom. Plainly it can still be used as a living room but now it can also be considered to be particularly suitable for use as a bedroom, despite the fact that it is downstairs. This is partly because the only bathroom is also downstairs and so is in fact more conveniently reached from this room than from the bedrooms upstairs, but it is also because the room is also as private as a bedroom in a flat would be, in that it has a door to the hallway but not to any other room, and it is plainly big enough to be a bedroom.

31. Moreover, there is no practical requirement that the room be used as a dining room or parlour. I accept that putting a table at which people could eat in the rear living room would take up a lot of the available space, but I do not accept that the house could not reasonably be used with that as the only living room if suitable furniture were chosen.

32. Thus, looking at the property objectively as it would be in its vacant state, it seems to me that it should be regarded as having a flexible layout so that it could equally as well be used as a two-bedroom house or as a three-bedroom house. The claimant's mother may well be right that most of the similar houses are used only as two-bedroom houses but I do not consider that it could be regarded as in any way peculiar to use the front downstairs room as a bedroom, given its features and its relationship to the other rooms in the house.

33. However, regulation B13 requires me to make a decision one way or the other as to whether the disputed room is a bedroom or not and I have come to the conclusion that, in a borderline case like this, the landlord's designation can be determinative and that, in this particular case I should regard it as so. The regulation applies only to tenancies in the social sector and, although it cannot be definitive, it seems consistent with the broad purpose of the legislation that some weight should be given to a social sector landlord's designation when, as in this case, the designation is consistent with an objective view of the property. There is no evidence as to Knowsley Housing Trust's reason for designating the property in this case as a three-bedroom house but it is a provider of social housing and it obviously gave the issue some thought in 2013 and 2014 and rejected a suggestion that the designation should be changed. I do not consider that its opinion as to the suitability of the house for a family requiring three bedrooms should be ignored even if I do not know the reasoning behind it.

34. I have considered whether, in this case, Knowsley Housing Trust should be treated as having designated the house as a two-bedroom house because it let the house in the knowledge that that was how it would be used. However, it seems to me that what is important is whether it regards the property as being part of its stock of three-bedroom houses. The fact that it may have let it to someone who does not require three bedrooms for use as such seems irrelevant, particularly if it did so because it accepted that the tenant needed an extra room due to circumstances that are, in the light of *MA*, *Nelson* and the *Glasgow* case, irrelevant when considering how many bedrooms a tenant requires or has for the purposes of regulation B13.

Conclusion

35. Accordingly, I am satisfied that the Secretary of State's appeal should be allowed and that the claimant's entitlement to housing benefit from 1 April 2013 is to be calculated on the basis that the eligible rent is reduced by 14%, which is what the local authority originally decided.

36. I was told by the claimant's mother that the discretionary housing payments that had originally been made to compensate for the reduction had been stopped and she argued that, if her son was not entitled to have the full eligible rent taken into account in the calculation of his housing benefit, he should still be receiving such payments. He plainly has a substantial case for their reinstatement and, in particular, it seems to me that it might be relevant that Knowsley Housing Trust apparently considered it appropriate to let a three-bedroom house to him because it recognised he needed the space even though he needed only two bedrooms as such. However, the effect of the legislation and the Supreme Court's decision in *MA* is that such issues are not usually matters for a tribunal. Any challenge to the local authority's decision would have to be taken by way of an application to the Administrative Court for judicial review, although the proceedings could then be transferred to the Upper Tribunal if the Administrative Court saw fit. I will therefore say no more about this issue.

Mark Rowland
24 May 2018