

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CH/4608/2014

**BEFORE UPPER TRIBUNAL JUDGE WARD**

**Attendances:**

For the Appellant: Mr Paul im Thurn, instructed by Millburns

For the Respondent Mrs Jackie Friend, Housing Benefit Officer

**Decision:** The appeal is allowed. The decision of the First-tier Tribunal sitting at Workington on 23 May 2014 under reference SC164/13/00847 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 16 of the Reasons.

**REASONS FOR DECISION**

1. This appeal is made with permission given by a District Tribunal Judge. The Secretary of State was offered, but declined, an opportunity to apply to become a party. My decision rules, contrary to the position of the respondent local authority, that where a local authority seeks to recover overpaid housing benefit from a landlord, it is open to the landlord on an appeal to raise matters going to whether the tenant was indeed overpaid, even though the tenant has taken no or insufficient steps to challenge the point in earlier proceedings as between the tenant and the local authority.

2. The key to understanding the complex legislation in my view is the understanding of what constitutes a “relevant decision”. The expression is defined by para 1(2) of Schedule 7 of the Child Support Pensions and Social Security Act 2000 (“the 2000 Act”). It extends to decisions (including decisions, as revised) taken on a claim and on supersession of such a decision but does not extend to determinations that an overpayment is recoverable: R(H) 3/04 (paras 33 and 34).

3. A “person affected” by a relevant decision (subject to defined exceptions) has a right of appeal to the First-tier Tribunal: 2000 Act, Schedule 7, para 6(3). However, an appeal by a person from whom it has been determined that an overpayment is recoverable against that determination arises not under para 6(3) but under para 6(6), which provides:

“Where any amount of housing benefit is determined to be recoverable under or by virtue of section 75 or 76 of the [Social Security Adjudication Act 1992], any person from whom it has been determined that it is so recoverable shall have the right of appeal to the First-tier Tribunal”.

It is because the determination that there is a recoverable overpayment is not a “relevant decision” that sub-paras (3) and (6) are not, as was suggested to me at the oral hearing, providing alternative gateways to an appeal.

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4. Who is a “person affected” is defined by regulation 3(1) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, No. 1002 (“the 2001 Regulations”) and that definition is exhaustive: see *Wirral MBC v Salisbury Independent Living* [2012] EWCA 84; [2012] AACR 37. It extends to (among others)

“(d) a person from whom the relevant authority determines that—  
(i) an overpayment is recoverable in accordance with Part 13 of the Housing Benefit Regulations or Part 12 of the Housing Benefit (State Pension Credit) Regulations;”

5. There are at very least (depending on the process of the particular case) some circumstances in which a person from whom an overpayment has already been determined to be recoverable might be a “person affected” by a “relevant decision” e.g. where following a determination of recoverability the underlying entitlement decision is changed on supersession, but this is not such a case.

6. As a matter of construction of the Social Security Administration Act 1992 and the Housing Benefit Regulations 2006, No.213, I agree with Mr im Thurn that the right conferred by para 6(6) of Schedule 7 of the 2000 Act extends to whether there was an overpayment at all. This is because the definition of an “overpayment” in regulation 99 of the 2006 Regulations so far as relevant provides (emphasis added):

“In this Part, “*overpayment*” means any amount which has been paid by way of housing benefit and **to which there was no entitlement under these Regulations** (whether on the initial decision or as subsequently revised or superseded or further revised or superseded).”

While it is undeniably open to a landlord appealing against a determination that an overpayment is recoverable to raise the landlord’s specific defence in regulation 101(1) or to argue that the overpayment arises in consequence of failure to disclose or a misrepresentation by someone else and thus that recovery should only be from that person pursuant to regulation 101(2), I can find nothing in the legislation that restricts the scope of such an appeal to those categories of case.

7. Mr im Thurn’s position is moreover entirely consistent with authority. In R(H)3/04 the Tribunal of Commissioners observed:

“49. The effect of the unambiguous primary legislation, in conjunction with the established law on the extent to which an exercise of power by a public authority may be challenged in answer to a claim for money in any private law proceedings before an ordinary court or tribunal, is thus in our view that:

(1) a person such as a landlord against whom a recoverable overpayment determination (that a particular amount of housing benefit overpaid in excess of entitlement is legally recoverable from him) has been made has a single but unqualified right of appeal to an appeal tribunal against **that** determination; and

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(2) in that appeal against that determination, he may raise by way of answer to the claim not only any maintainable dispute as to the factual or legal basis of the determination itself (e.g. that the overpaid amount has been wrongly calculated, or does not fall within the provisions for recoverability at all) but also any challenge to the lawfulness of the authority's actions in or leading up to the making of the determination that can be shown on public law grounds of the kind identified in paragraph 43 above to invalidate it.

50. For the sake of completeness we would add that it appears to us entirely proper and consistent with the above principles to do as most tribunals appear to, and allow a landlord on an appeal against a recoverable overpayment determination to raise any genuine factual dispute that affects the recalculation of entitlement (e.g. as to the date a tenant vacated the premises) even though there may have been no appeal by the claimant against the decision superseding and terminating the award. The landlord ought in any event to have been notified of his separate right of appeal under paragraph 6(3) against that decision, as a "person affected" by the risk of ensuing recovery proceedings. But unless any issues on entitlement have already been so disposed of as to be binding on him, he must be able to raise them on the paragraph 6(6) appeal in the same way as any other precondition to the legal liability sought to be established against him, in a procedure not of his choosing: cf. the passage from Lord Fraser cited above." [This was a reference to *Wandsworth v Winder* [1985] 1 AC 461: the passage concerned is set out at para 45 of R(H)3/04.]

It is, in particular, hard to see any principled basis for permitting a landlord to dispute the "recalculation" of entitlement but not the factual basis on which entitlement has been removed altogether. I am in respectful agreement with the decision of the Tribunal of Commissioners in that case on this point, on which its correctness is left untouched by what is said in R(H)6/06 by a subsequent Tribunal of Commissioners.

8. There was some discussion before me of authorities drawn from DWP-administered social security, but I find them of little assistance in the present context. Although occasionally in such cases monies may be recoverable from a third party, it is unusual. Usually the same person is on the receiving end of entitlement and recoverability decisions, whereas in housing benefit payment of housing benefit to (and subsequent attempts to recover from) a landlord are by no means unusual. Further, the legislative framework for recoverability of an overpayment is significantly different between DWP-administered benefits (where typically there have been additional conditions affecting the DWP's legal ability to recover) and housing benefit cases.

9. I need not recite the full procedural history of this case. In brief, the tenant had been in receipt of housing benefit at the property since 1996, with some breaks. From 2004 to 2011, it was more or less continuously in payment. Thereafter, on 8 May 2012, later revised, a decision was taken on a further claim that the tenancy was not on a commercial basis. The tenant appealed against this and on 12 December 2012 her appeal failed. The landlord was not a party to that appeal. On

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19 December 2012 a further decision was taken, which removed entitlement from the tenant with effect from May 2004 on the grounds that the tenancy was not a commercial one. The tenant, having made an earlier unsuccessful appeal, took no steps to challenge it.

10. The local authority's argument, that if the right of appeal conferred by para 6(6) of Schedule 7 extends to a challenge to the underlying entitlement decision, that would make reg 3(1)(d) and (e) of the 2001 Regulations effectively redundant, is met by the point at [5] above.

11. On 18 April 2013 the local authority took a decision that it was entitled to recover both from the landlord (to whom housing benefit had been paid) and the tenant. Initially, the local authority took the view that both landlord and tenant had made a misrepresentation. By a notice dated 7 May 2013 the landlord sought to appeal, initially focussing on the allegation of misrepresentation. The local authority then withdrew the allegation of misrepresentation, but continued to assert that the claimed sum was recoverable from both the landlord and the tenant, relying on regulation 101(2)(a) of the 2006 Regulations. By the time the matter reached the First-tier Tribunal, the landlord's challenge was to the local authority's view that the tenancy had been a non-commercial one.

12. This was rejected by the First-tier Tribunal, where it was held (amongst other things) that *Wirral v Salisbury* precluded reliance on the landlord being a "person affected" in relation to the entitlement decision. No consideration was given to a right of appeal arising under para 6(6) of Schedule 7 at all and thereby the tribunal erred in law.

13. I need not linger over any other error of law the tribunal may have made.

14. The circumstances of this case are, to a degree, unusual. The landlord and tenant are mother and daughter, their personal circumstances are difficult and the £30,000-odd at issue is on any view a substantial sum. The reasons for my decision are however not dependent on these factors and apply equally to other landlords and in other circumstances. There is said to be a "floodgates" argument: I doubt though that the range of types of case where a landlord would wish to challenge entitlement will be all that great. In any event, there would be something profoundly unappealing about anyone, landlord or no, individual or corporate, having a possibly substantial liability imposed on them which they have not had the chance to challenge. Mr im Thurn does not need his arguments based on Article 6 of the European Convention on Human Rights as the regime created by the domestic legislation does in any event create such an opportunity.

15. For the sake of completeness, I reject the local authority's submission that the First-tier Tribunal's decision of 12 December 2012 could create any kind of issue estoppel against the landlord, not least because she was not party to it.

16. The landlord must be given the opportunity to contest the issue of whether the tenant is disentitled to housing benefit on the ground of the non-commerciality of the agreement. That requires further fact-finding, which I am not in a position to

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undertake. I direct that the case be reheard by the First-tier Tribunal and that the file be placed before a District Tribunal Judge for case management directions.

17. No inference should be drawn as to the outcome of the remitted case from the fact that the present appeal has been allowed on a point of law.

**(Signed on the Original)**

**C G Ward**  
**Judge of the Upper Tribunal**

**Dated:**

**29 February 2016**