

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No. CH/454/2015**

**Before:** A Lloyd-Davies Judge of the Upper Tribunal

**DECISION**

The decision of the tribunal held on 24 October 2014 involved the making of an error of law. I set that decision aside and remit the case for rehearing by a differently constituted tribunal.

**REASONS**

1. The claimant lives in social sector rented accommodation and is in receipt of housing benefit (HB). By a decision dated 1 March 2013 the local authority decided that the claimant was under-occupying the accommodation by one bedroom and that the HB payable should be reduced by 14% under regulation B13 of the HB Regulations 2006 (as amended). The claimant appealed. The tribunal allowed the appeal finding that the room in question could not be classified as a bedroom. The local authority appealed with my permission. A copy of the decision of the three judge panel of the Upper Tribunal in *SSWP v Nelson* [2014] UKUT 525 (AAC) – which decision I shall refer to as “Nelson” – has been provided to the parties. Nelson decided, amongst other matters, that the provisions of the Scottish Housing Act 1987 relating to overcrowding (materially no different to those in the English Housing Act 1985) could not be imported to determine the meaning of a “bedroom” for the purposes of Regulation B13.

2. At the request of the claimant I held an oral hearing of the appeal. The local authority was represented by Miss Sackman of Counsel and the claimant represented himself. At the hearing the claimant identified one particular point, which had been raised in his extensive written submissions, but the significance of which had not been recognised by Miss Sackman or myself: I accordingly directed further written submissions on this point, to which I return below.

3. The tribunal found that the room in question had a square footage of about 63 sq. ft. with a sloping ceiling that reduced its usable space considerably; that it was used by the claimant’s son (who was born in 1995) as a bedroom until about 2010, but that such use was unsatisfactory since the son had a cabin bunk bed on a sleeping platform; and that the room in question was not a bedroom because it had been used as a store room since the claimant’s son had left. It further found that the room in question would not qualify as a bedroom for the

purposes of the provisions relating to the size of a bedroom for an adult in houses in multiple occupation.

4. Had the matter rested there I would have allowed the local authority's appeal on the basis of Nelson, inasmuch as:

- (a) the tribunal clearly took into account the use of the room at the date of the decision – see paragraph 16 of its statement of reasons;
- (b) it solely considered whether the room in question could be used by an adult; and
- (c) it took into account legislation relating to overcrowding.

Nelson makes it clear (at paragraph 27) that use is not determinative; (at paragraph 60) that the question of “bedroom or not” has to be considered by reference to any of the occupiers mentioned in paragraphs (5) and (6) of regulation B13, that is to say, not only an adult; and (at paragraphs 53 and 54) that legislation relating to overcrowding cannot be used to construe regulation B13.

5. The point that the claimant stressed at the hearing before me and upon which I directed further written submissions was to the effect that Nelson did not take into account the provisions of the (English) Housing Act 2004, the Housing Health and Safety Rating System established under that Act or the guidance given by LACORS (Local Authorities Coordinators of Regulatory Services) insofar as they dealt with space and overcrowding, and hence, that Nelson should not be followed. The first point to be made is that made generally in Nelson, namely, that legislation relating to space and overcrowding is not to be read across into HB legislation relating to under-occupation. Secondly, nowhere in the Housing Act 2004 or in the operating guidance and enforcement guidance given under section 9 of the 2004 Act in relation to space and overcrowding is there any mention of specific room sizes. Thirdly, it is clear from the operating guidance, the enforcement guidance and regulation 6(7)(e) of the Housing Health and Safety Rating System (England) Regulations 2005 that questions arising with regard to space and overcrowding can only be decided by reference to the actual occupiers at any time and not potential, hypothetical, future occupiers; that is to say, that where the current occupiers do not give rise to any space or overcrowding concerns, the regulations and guidance cannot bite, but can only be taken into account where the actual occupants give rise to such concerns; those applying the HB Regulations cannot be expected to apply standards which those charged with applying those standards cannot themselves apply. Fourthly, the LACORS guidance is just that, guidance relating to best practice in connection with space and overcrowding: it has no statutory effect and cannot be prayed in aid in construing regulation B13. Fifthly, as regards provisions relating to “houses in multiple occupation” (referred to both by the tribunal and by the claimant) these can have no effect where the dwelling concerned is not a house in multiple occupation: the claimant's accommodation is not a house in multiple occupation. For these reasons I do not consider that the argument relied on by the claimant carries any weight. (The claimant requested a further oral hearing on this point: since the point of law is, in my judgment, clear I do not consider that any such oral hearing is necessary.)

6. I therefore for the reasons given in paragraph 4 above set the decision of the tribunal aside. Miss Sackman urged me to substitute my own decision holding that the room in question should be a bedroom. She furnished me with evidence including diagrams of the room. I am concerned, however, especially given the room's sloping ceiling, that all the factors referred to in paragraph 31 of Nelson may not have been properly considered. I therefore remit this case to a differently constituted tribunal for determination: it should consider those factors, bearing in mind that the room should be capable of accommodating a single adult bed, a bedside table and somewhere to store clothes (see paragraph 33 of Nelson), as well as providing space for dressing and undressing.

**(Signed on the Original)**

A Lloyd-Davies  
**Upper Tribunal Judge**

**Dated:**

**23 February 2016**