

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**Before Upper Tribunal Judge Kate Brunner QC**

**This appeal by the claimant succeeds.**

**The decision of the First-tier Tribunal reference SC068/15/02568 involved an error of law.**

**I set aside that decision and remit the matter to a differently constituted First-tier Tribunal for a fresh hearing.**

**REASONS FOR DECISION**

1. The issue in this case is whether the claimant was in 'exempt accommodation' on the basis that his landlord was providing 'care, support or supervision' (*para 4, Schedule 3, Housing Benefit and Council tax Benefit (Consequential Provisions) Regulation 2006* ('the regulations')).

Factual Background

2. The claimant, who has learning difficulties and a record of serious offending, moved into the Sefton Council area in 2014 and made a claim on 7 August 2014. The social services department had responsibility for the care of the claimant and funded a significant care package from a provider called Next Stage. The package was in place to assist the claimant with daily living and social skills and to protect the public from offending by the claimant. It included round-the-clock supervision.
3. The claimant's accommodation was provided by 'My Space' (who rented it from a landlord). My Space charged weekly rent comprising a core charge, and a service charge. My Space employed a support officer who would visit the claimant on a weekly basis. My Space had been commissioned to provide tenancy support by the council which previously had care of the claimant. The letter setting out this understanding (p118) makes plain that the support anticipated would be in excess of usual housing support and was considered necessary to allow tenants with special needs to maintain their tenancies.
4. Sefton Council determined on 17 February 2015 that the claimant's accommodation did not fall within the meaning of exempt accommodation. As a result the Council was entitled to refer to rent to a rent officer as being unreasonably high. This decision was appealed and the First-tier tribunal ('FTT') heard the appeal on 28 January 2016. Evidence was heard from the claimant, a

representative from My Space, the claimant's carer and a tenant support officer. The FTT confirmed the decision.

5. A support officer from My Space gave evidence to the FTT. She said that she saw the claimant weekly, sometimes for 2 hours, followed a support plan (which is at p96), and addressed issues to do with maintenance, health and safety, and fire risks. The claimant said that the My Space support worker helped him 'learn about bills' and he enjoyed the visits.
6. The FTT analysed the evidence before it and concluded that the accommodation was not exempt, stating (para 34):  
  
*'the two limbs of the test in respect of exempt accommodation were not satisfied, that is because whilst it is not in doubt that My Space did provide the accommodation to the claimant they did not provide a support and care package, the only comprehensive care/support package in place was commissioned by the LA and provided by a separate organisation'.*
7. The claimant appealed to the Upper Tribunal. The claimant submits (p515) that My Space provided necessary support over and above usual tenancy support; that the FTT made incorrect factual findings and did not apply the correct legal test.
8. The Council submits (p508) that they had not contracted with My Space to provide any services, that any care being provided was superfluous and that the correct legal test was applied.
9. Leave to appeal was granted by Judge Wright on 1 June 2016, largely on the ground that it is arguable that the FTT did not give sufficient reasons for its findings.

#### Legal Framework

10. The legal test which the FTT had to apply was whether the claimant was in 'exempt accommodation' on the basis that his landlord 'My Space' was providing 'care, support or supervision'.
11. It is not in issue that My Steps fulfilled the criteria for being a 'housing association, a registered charity or voluntary organisation'. What is in issue is whether My Space provided 'care, support or supervision' within the meaning of the regulations. There are two questions to be answered:
  - (1) Did My Space provide care, support or supervision
  - (2) If so was it more than 'de minimis' (in other words, not so insignificant as to not count for the purposes of the legal test).

12. The second question does not appear in the regulations, but simply imports a general principle of statutory construction, as explained by Judge Turnbull in *R(H) 7/07 para 23*:

*However, in order to satisfy the definition the care, support or supervision which the landlord provides must in my judgment be more than minimal. It is a general principle of statutory construction that, unless the contrary intention appears, a statutory provision by implication imports the principle conveyed by the Latin maxim de minimis non curat lex (the law does not concern itself with trifling matters; or, as Brooke LJ put it in Sharratt v London Central Bus Co Ltd [2003] EWCA Civ 718, [2003] 1 WLR 2487, [2003] All ER 590 at [226], “the law does not care about very little things”): see Bennion, “Statutory Interpretation”, 4<sup>th</sup> ed, Section 343. There is no reason why that principle should not apply here. It cannot in my judgment have been intended that a landlord can bring itself within the definition by providing a token or minimal amount of care, support or supervision.*

12. In answering the first question (did My Space provide care, support or supervision), the following principles can be derived from previous decisions of the Upper Tribunal:
- (1) support means the giving of advice and assistance to the claimant in coping with the practicalities of everyday life. It involves the landlord doing something more than the ordinary property management functions required in general needs social housing (*R(H) 4/09; (2009) UKUT 107 (AAC); (2012) UKUT 52 (AAC)*);
  - (2) it is implicit that support is not ‘provided’ unless there is in fact some need for it (*Salford CC v PF [2009] UKUT 150 (AAC)*). It should be noted that this was said in the context of determining whether purported support was a contrivance to claim exempt status;
  - (3) the landlord need not be the main provider of care (*R(H) 7/07*);
  - (4) there is no requirement that the landlord provides care pursuant to some contractual obligation (*R(H) 7/07*).
13. In answering the second question (was any support more than de minimis), Judge Turnbull held in *Bristol CC v AW [2009] UKUT 109 (AAC)* that a satisfactory test is to ask whether the support provided was likely to make a real difference to the claimant’s ability to live in the property.

14. In the body of case law referred to above there are discussions of evidential considerations. By way of example, the fact that another provider is contractually or statutorily obliged to provide care is potentially relevant in assessing the significance of what the landlord claims actually to do, when assessing the 'de minimis' test (*para 29 R(H) 7/07*). Other evidential factors which a tribunal is likely to need to explore to answer the two statutory questions include the terms of the tenancy agreement, the needs of the tenant, what services are actually provided, and whether those services are likely to make a real difference to the tenant's ability to live in the property.
15. None of these evidential considerations are legal tests, and they should not be elevated to legal tests. The Council has, no doubt in a laudable effort to provide simplicity and consistency, fallen into misrepresentation of the law. In submissions and correspondence with the claimant (eg at 112, 132(i)) the Council states:
- 'to satisfy the definition of exempt accommodation any additional support or supervision which the landlord provides must be: required by the claimant, not a duplication of functions and tasks already covered in the main support plan, more than minimal, necessary in order for the tenant to remain living at the property'*.
16. The Council's approach would mean that where one provider is contractually obliged to provide a particular facet of care or support, a housing association's provision of the same type of care or support cannot be taken account of when considering exemption. There is nothing in the regulations to support that contention.
17. The issue of duplication of services is dealt with in *R(H) 7/07* paragraph 29 (2) in this way:
- It is not suggested that Reside is under any statutory obligation to provide support to the claimant. It is common ground that the statutory obligations are those of the council. Again, as I have held above (in agreement with the tribunal), it is not a requirement of the definition that the landlord be under any statutory obligation to provide support, but the fact that someone else does have such an obligation is again potentially relevant in assessing the significance of what the landlord claims actually to do.*
18. Thus, duplication may be a useful evidential consideration to enable a Council or tribunal to address the two legal questions, but is not a legal hurdle in itself.

#### Decision

19. Some of the points raised by the claimant relate to the FTT's findings of fact. This tribunal does not interfere with findings of fact made by the FTT and can only set aside a decision if there has been an error of law.
20. Although the FTT gave a clear and careful analysis of much of the evidence, the FTT made an error of law.
21. The FTT appears to have accepted an erroneous submission by the presenting officer that the *'provider must be the person providing support'*. The presenting officer's submission about that test is summarised in the Record of Proceedings in this way: *'fails, because Sefton Council commissions the 24 1 to 1 care from Next Stage'* (p472). What followed according to the Record of Proceedings was a hearing where there was an emphasis on the contractual standing of My Space. In line with that emphasis, the FTT appears to have given significant weight to the finding (at paragraph 34) that :  
  
*'the only comprehensive care/support package in place was commissioned by the LA and provided by a separate organisation'*.
15. That was, as set out above, not the legal test which needed to be applied. There is no finding as to whether My Space in fact provided support within the meaning of the regulations, nor whether any support provided was more than 'de minimis'. The FTT did not apply the correct legal test and it follows that the decision of the FTT will be set aside.
16. I have considered whether I can substitute my own findings of fact, but there are insufficient factual findings or uncontested evidence to allow me to answer the relevant questions. In particular, it remains unclear to me exactly what the support officer was doing in weekly visits; whether the details recorded in the visit sheets (e.g. p198) increased once My Space knew that exempt status was not accepted, and, if so whether that reflects better recording or a change in practice; which aspects of support went further than usual social housing practice and how those aspects met the claimant's particular needs. A detailed analysis of each facet of support which My Space purports to provide is required.
17. The matter will therefore be remitted to the FTT for a new hearing. A new tribunal will need to consider evidence afresh. This ruling is no indication of how that new tribunal will find.

**Upper Tribunal Judge Kate Brunner QC**

**Signed on the original on 5 September 2016**