IN THE UPPER TRIBUNAL **Case No** CH/2290/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Exeter on 9 March 2016 under reference SC186/16/00200 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision as follows:

The claimant's appeal against the local authority's decision of 9 November 2015 refusing him housing benefit on the ground that he was liable to pay rent to his close relative who also resided in the dwelling is dismissed.

REASONS FOR DECISION

1. At the date of the local authority's decision, the claimant was renting a room in a flat from his half-brother. The local authority rejected the claim, relying on regulation 9 of the Housing Benefit Regulations 2006 which so far as relevant provides:

> "(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–
> ...
> (b) his liability under the agreement is to a person who also resides in the dwelling and who is a close relative of his or of his partner...".

2. The claimant appealed to the First-tier Tribunal, which on 9 March 2016 allowed his appeal on the papers but subsequently gave the local authority permission to appeal to the Upper Tribunal.

3. I gave the Secretary of State the opportunity to apply to be joined as a party. By a submission dated 15 September 2016 he indicated that he did not wish to do so, but that "he supports the decision made by the Tribunal and the position of the local authority." As those were to opposite effect, this is evidently a slip, but it is clear from the Secretary of State's subsequent reliance in the submission on R(SB)22/87, discussed further below, that he supports the authority's position. As there is or has been also a housing benefit circular to this effect, his position is unsurprising.

4. The claimant has indicated that he has nothing to add to what he has already said. In these circumstances I have not felt it necessary to give the authority the opportunity to comment further and proceed to decide the case.

5. Who is a "close relative" is defined by regulation 2:

> "In these Regulations...

> "close relative" means a parent, parent-in-law, son, son-in-law, daughter, daughter- in-law, step-parent, stepson, stepdaughter, brother, sister, or if any of the preceding persons is one member of a couple, the other member of that couple;"

I note that there is no provision that the definition should yield "where the context otherwise requires". That definition has to serve a number of purposes in the Regulations, not just those of section 9(1)(b). It feeds directly into the recently introduced regulation 7(13E) which provides for benefit to be extended beyond the 4 weeks normally permitted where a person is absent from Great Britain, if the reason for the absence is the death of (amongst others) a close relative. A "close relative" who resides with the claimant is also covered by reg 9(1)(e) which deals with rental liabilities to companies and trusts with which there is a specified degree of close connection.

6. "Close relative" also feeds into the definition of "relative":

> "relative" means a close relative, grandparent, grandchild, uncle, aunt, nephew or niece;"

That is used more widely: in preserved maximum rent provisions (old Reg 13(16)(d)); the treatment of child care charges (reg 28(7)(c) and (8)(m)); in identifying a disregarded sum in the calculation of income (sch 5 para 46); in defining or identifying certain capital to be disregarded (sch 6 paras 4 and 42) and in flowing through into the further definition of "young individual".

7. In R(SB)22/87 the claimant paid £23 a week for board and lodging to Mrs. N. who was his half-sister by birth. The adjudication officer interpreted the definition of close relative as including half-sister, and decided to exclude the claimant from boarder status because his accommodation and meals were provided by a close relative. The claimant appealed. The tribunal found that the claimant had been adopted as a child, decided that there was no legal relationship between the claimant and Mrs. N., that she was not a close relative of the claimant and that therefore the claimant was entitled to be treated as a boarder. The adjudication officer appealed to a Social Security Commissioner. It was held that: 1. on legal adoption, an adopted child's parents are his adoptive parents and not his natural parents; the children of his natural parents cease to be his brothers or sisters. It is the legal not the blood relationship which determines whether a person is a close relative (para 9); 2. in response to the tribunal's request for clarification, in regulation 2(1) the meaning of 'sister' includes half-sister, and the meaning of 'brother' includes half-brother (para 5). Mr Commissioner Rice expressed the view that female "children of a common parent ... are in everyday parlance regarded as sisters" and considered that had the draftsman intended to exclude those of the half-blood he would have expected him to have done so expressly. The appeal was dismissed. As point 1 resolved the case, point 2 was obiter. As a case on supplementary benefit, it cannot be assumed to be automatically applicable to housing benefit in any event.

8. In the present case, in a thoughtful decision, the tribunal judge noted the above before going on to identify further factors which caused him to conclude that half-siblings were not covered by regulation 2:

> (a) regulation 9 is a deeming provision and the claimant is going to have an actual liability to pay rent to his half-brother which is not going to be cancelled by a decision that the law treats him as not so liable;
>
> (b) ”there is a question as to whether this particular provision in regulation 9 is compatible with Article 8 of the ECHR as to respect for the claimant's private and family life and his home” (in which context he noted the impact of s.3 of the Human Rights Act 1998);
>
> (c) it was appropriate in this context to construe the Regulations with caution, resolving any doubt in favour of the claimant;
>
> (d) the definition includes both sons and step-sons and daughters and step-daughters but only includes brothers and sisters and not step-brothers and step-sisters. If (as is the case) the definition does not include step-brothers and step-sisters “there is no logical reason why it should include half-brothers and half-sisters unless they are expressly included.” He considered that in families where parents have re-married after a divorce “step-brothers and step-sisters are in quite a similar position to half-brothers and half-sisters” and thus what went for one category went for the other.

9. The local authority submits that while it accepts that a legal liability would remain with the claimant, the question is, rather, whether a claimant will be excluded from getting housing benefit by provisions in the Regulations that specifically exclude them. It then submits that a half-sibling does share one biological parent, whereas step siblings do not and in the authority’s view “the law is constructed around the “blood” relationship more than the living arrangements.” Consequently the legislator has needed to add step-children to the definition of “close relative”, reflecting the fact that they are the biological children of the claimant’s partner. There is however in the authority’s view no legal distinction which separates out half-brothers and brothers which is why reg 2 does not name them in terms.

10. The claimant’s position is that (a) whatever the regulations may say by way of deeming, he is in fact liable for the rent; and (b) he is in financial need of the benefit and his landlord/half-brother is in need of the rent.

11. Since, as noted, the definition of “close relative” has wider implications and is not intended to yield to a context, I start with the definition, leaving aside for now its specific application in the context of regulation 9. I prefer the authority’s position. The inclusion of step-parent and step-son/daughter can be seen as an acknowledgment of the relationship between the child’s actual parent and his/her new partner and the role of that in creating bonds of a degree of closeness. The importance of the role of the relationship between

partners in the definition can be seen in the extension of the provisions to "the other member of a couple". The legislator did not see fit to include step-brothers and step-sisters, the degree of whose connection via the relationship between their respective parents is one degree more remote. The tribunal judge considered that step-siblings and half-siblings might be in "quite a similar position", but whilst I accept that family relationships are infinitely various, it is a question of drawing a line somewhere and a rationale for the inclusion of the "step" provisions so far as they go is in my view, for the reason above, apparent. "Step" relationships were considered by the legislator to require express inclusion, as were relationships by marriage. The argument that relationships of the half blood also do is not made out when, as noted by Mr Commissioner Rice at para 5 of his decision, as a use of language it is indeed possible to refer to a half-brother as a "brother", even if in contexts where specificity is demanded "half-brother" might be used.

12. In CH/716/2002 Mr Commissioner Jacobs observed that because of the potential effects of regulation 9(1) "it is appropriate to give [the sub-paragraphs] the narrowest interpretation that is consistent with the policy of the protecting the scheme." So to rely, in order to justify giving the claimant the benefit of the doubt and applying a narrow construction, on the fact that it is a deeming provision, without also taking into account that reg 9(1) plays an important part in protecting the scheme (i.e. public funds) is not in my view a correct approach. The obvious mischief being guarded against is that what is essentially an intra-family, intra-dwelling arrangement should be subsidised through the public purse. Of course, that does have the effect that a person whose living arrangements would be entirely unexceptionable for housing benefit purposes if he instead lived somewhere else where his landlord was not his close relative may find himself deprived of housing benefit, but it is a bright line rule intended to prevent abuse of the scheme and like all bright line rules will inevitably give rise to some hard cases. I agree with the authority therefore that the fact that the present claimant is left liable for the rent without being able to claim housing benefit on it is not the question.

13. The argument based on Article 8 ECHR does not appear in the submissions to the First-tier Tribunal. Neither party nor the Secretary of State has attempted to address this in submissions to the Upper Tribunal. The judge considered that "there is a question" about compliance of the provision with Art 8 ECHR, but he did not rule on the point. I do not consider it is appropriate for me to address this point in the present case where nobody is asking me to do so and it was not the subject of a ruling below.

14. The views I have thus far reached give rise to no particular difficulty when applied to the definition of "close relative" when it is used in reg 9(1)(e), in 9(1)(b) or in reg 7(13E). Indeed the last of these rather supports the view I have reached as I consider it unlikely the legislator would have intended that the benefit of the compassionate provisions on the death of a close relative should not extend to the death of a sibling with whom a person had one parent in common.

15. Nor do they give rise to any difficulty when they flow through into the use made of the definition of “relative” elsewhere. In many cases it might no doubt be possible to draw the line in a different place but there is no incompatibility with where I have decided that the legislator has drawn it.

CG Ward
Judge of the Upper Tribunal
14 November 2016