

CH/2418/2015

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

1. **This appeal by the claimant does not succeed.** I confirm the decision made by the First-tier Tribunal (Social Entitlement Chamber) sitting at Southampton on 28th April 2015 (reference SC203/14/00736) to the effect that the claimant was not entitled to housing benefit as from 13th October 2014.

Hearing

2. I held an oral hearing of this appeal at Field House (London) on 16th February 2017. The appellant/claimant did not attend in person but was represented by her mother and appointee Ms T. The respondent local authority was represented by Mr Armour, its Benefit Services Manager. (Mr Armour is not legally qualified.) I am grateful to them for their assistance.

The Relevant Housing Benefit Provisions

3. In general terms, where a person is liable to make payments in respect of the occupation of their dwelling, the housing benefit scheme creates entitlement by way of payments of benefit to that person if they satisfy a means test and certain other conditions. Section 130(1)(a) of the Social Security Contributions and Benefits Act 1992 provides, amongst other matters, that a person is entitled to housing benefit if she is liable to make payments in respect of a dwelling in Great Britain which she occupies as her home. An award of housing benefit relates to a particular dwelling in particular circumstances and is not a general award in respect of housing costs wherever they might be incurred.

4. So far as concerns the present appeal, the position is governed by regulation 7 of the Housing Benefit Regulations 2006. The general rule is that a person who is absent from their home and intends to return within 13 weeks shall be treated as occupying their home (for the purposes of entitlement to housing benefit) for a period not exceeding 13 weeks. However there is an exception to this general rule, in respect of which the relevant provisions are as follows (references are to regulation numbers):

7(16) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home (“absence”), if –

- (a) he intends to return to occupy the dwelling as his home; and
- (b) ...; and
- (c) he is

...

- (ii) resident in a hospital or similar institution as a patient ...

7(17) A person to whom paragraph 16 applies shall be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks beginning with the first day of that absence.

Background and Procedure

5. For various reasons and in various ways the main issue in this appeal has become obscured by a mass of background and other material which, although important in itself, is and was not relevant as a matter of law to the decision that I have to take. That material includes the circumstances in which the claimant was taken to hospital at the beginning of the relevant period, her subsequent treatment and experiences in hospital, proceedings in the Court of Protection, the reasons why the claimant cannot leave hospital to go home, and events which took place after the date of the local authority decision that is under appeal. I resist the invitation by Ms T to the Upper Tribunal to express any opinion about these matters.

6. The claimant is a woman who was born on 18th September 1975. It seems that she has autistic spectrum disorder, irritable bowel syndrome and severe communication difficulties. When not in hospital she has lived since 2004 in a specially adapted housing association bungalow under some kind of co-ownership/rental scheme. Ms T takes the view that the bungalow is uniquely adapted for the claimant and that she could not live safely anywhere else. Until 12th October 2014 the claimant was entitled to and received housing benefit in respect of her occupation of the bungalow. Since then the housing association has maintained the property for her and it has been and is available for her if she were able to leave hospital and return home (and presumably her entitlement to housing benefit would resume).

7. The claimant was taken to hospital on 11th October 2013 and has been there ever since as a patient. She herself wished and wishes to return home but has been unable to do so. On 9th October 2014 the local authority decided that the claimant's was not entitled to housing benefit with effect from 13th October 2014, applying the 52 week rule in regulation 7(17) (see above). On 27th October 2014 Ms T appealed against this decision to the First-tier Tribunal on behalf of the claimant. The First-tier Tribunal considered the matter on 28th April 2015 and confirmed the decision of the local authority. It noted that, in the context of the Human Rights Act 1998, the relevant regulations indirectly discriminated against mentally ill patients (because they were more likely both to be entitled to housing benefit and to be in hospital for longer than 52 weeks) but found that it was bound by Court of Appeal authority to the effect that such discrimination was justified.

8. On behalf of the claimant Ms T applied for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal. On 1st July 2015 the District Tribunal Judge of the First-tier Tribunal gave such permission on the basis that Ms T had raised issues in relation to the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities and that "The points of law raised may be arguable. Whether there is any merit in them will be for the Upper Tribunal to decide". Notice of Appeal to the Upper Tribunal was received on 7th August 2015. It took some time to retrieve the case papers. On 17th December 2015

the Upper Tribunal Registrar invited the Secretary of State to become a party to the appeal because of the general nature of the issues raised. On 25th January 2016 the Secretary of State declined that invitation. On 12th February 2016, at the request of Ms T, I directed that there be an oral hearing of the appeal. On two occasions hearing dates were fixed but then postponed at the request of Ms T. The oral hearing finally took place on 16th February 2017.

9. The local authority opposes the appeal on the basis that it is obliged to apply the regulations and that under the regulations it has no discretion. There can be no doubt that on the wording of the regulations alone (set out above) the local authority and the First-tier Tribunal took the correct decision. I do not propose to make any further comment on that. However, the matters identified by the District Tribunal Judge of the First-tier Tribunal in giving permission to appeal to the Upper Tribunal must be considered.

UN Convention on the Rights of Persons with Disabilities (“The UN Convention”)

10. The UN Convention was ratified by the United Kingdom in 2009 and sets out what human rights mean in the context of disability over a wide range of activities and areas. Article 1 sets out the purpose of the Convention:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

11. In particular, article 19 relates to living independently and being included in the community. It states:

States parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation and segregation from the community;

- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

12. Monitoring and enforcement is undertaken by a relevant government body within each State Party. In the United Kingdom this is the Equality and Human Rights Commission together with the Scottish and Northern Ireland Human Rights Commissions and the Northern Ireland Equality Commission. State Parties must also provide periodic reports to the UN Committee on the Rights of Persons with Disabilities. The UN Convention is not incorporated directly into domestic law as is the European Convention on Human Rights. Like all international treaties to which the United Kingdom is a party and has ratified, its wording may be cited to help resolve ambiguities in domestic legislation (or to inform the exercise of discretion). However, there is no ambiguity or discretion in the wording of the housing benefit legislation and regulations relevant to this appeal.

13. Under article 1(1) of the Optional Protocol to the UN Convention (also ratified by the United Kingdom) a State Party to the Protocol recognizes the competence of the UN Committee on the Rights of Persons with Disabilities “to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention”. A procedure for dealing with such communications is detailed in the Protocol. Ultimately such matters are dealt with by discussion and report. The Optional Protocol does not create an enforcement mechanism in the courts of the United Kingdom (although domestic law might well do so) or assist in the application of the regulations relevant to this appeal. Resolution is really a matter for diplomatic or political processes.

The Human Rights Act 1998

14. The Human Rights Act 1998 effectively incorporates into English law the main provisions of the European Convention on Human Rights (“the Convention”). The main relevant provisions of the Act are as follows (references are to section numbers):

3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

6(2) Subsection (1) does not apply to an act [of a public authority] if-

- (a) as a result of one or more provisions of primary legislation the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights the authority was acting so as to give effect to or enforce those provisions.

6(3) In this section "public authority" includes –
 (a) a court or tribunal

7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

- (a) ...
- (b) rely on the Convention right or rights concerned in any legal proceedings

The Relevant Convention Provisions

15. For the purposes of the present appeal, the main relevant provisions of the Convention are as follows:

Article 8 (Right to respect for family and private life)

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights or freedoms of others.

Article 14 (Prohibition of discrimination)

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

More on Article 14

16. It is not every difference in treatment that constitutes discrimination within the meaning of Article 14. If a person is treated differently from another because of status, there is only discrimination for the purposes of Article 14 if the difference in treatment does not pursue a legitimate aim or is disproportionate to the aim pursued. There are many decisions of the European Court of Human Rights to this effect. In Belgian Linguistics (*No 2*) (1979-80) 1 EHRR 252 at 284 the European Court of Human Rights said:

“ ... Article 14 does not forbid every difference of treatment in the exercise of the rights and freedoms recognised ...

... [T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles that normally prevail in

democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aims sought to be realised”.

17. In Stec v United Kingdom (2006) 43 EHRR 47 the European Court of Human Rights said:

“51. Article 14 does not prohibit a Member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article ... A difference in treatment is, however, discriminatory, if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

52. The scope of this margin will vary according to the circumstances, the subject matter and the background ... As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention ... On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy ...”

18. The Court summarised the position in Glor v Switzerland (30th April 2009 application 13444/04 at paragraph 71):

71. According to the case-law of the Court a difference is discriminatory under the meaning of Article 14 if it lacks objective and reasonable justification. The existence of such justification must be assessed with respect to the aim and to the effects of the measures in question, having regard to principles which generally prevail in a democratic society. A difference in treatment in the exercise of a right granted by the Convention must not only follow a legitimate aim: Article 14 is still violated if it is clearly established that that there is no reasonable relationship of proportionality between the methods employed and the aims sought to be realised

19. Article 14 is not a free-standing anti-discrimination provision. It only comes into play to secure “enjoyment of the rights and freedoms set forth in this Convention”. However, a breach of Article 14 does not only arise where there has been a breach of another article. Article 14 also applies to secure, without discrimination, the way in which the various rights are secured, and all that has to be shown is that there has been unlawful discrimination in connection with a right which comes within the ambit of one of the relevant articles (see eg Petrovic –v- Austria Case No 56/1996/775/976).

The Obrey Case

20. On 5th December 2013 the Court of Appeal upheld decisions of the Upper Tribunal in Obrey, Snodgrass and Shadforth v The Secretary of State for Work and Pensions and The Equality and Human Rights Commission [2013] EWCA Civ 1584. These cases involved seriously mentally ill patients who had been detained in hospital for periods in excess of 52 weeks, and in respect of whom the relevant local authorities had ended their entitlement to benefit after 52 weeks. The Court of Appeal declined to interfere with the Upper Tribunal's conclusion that the relevant housing benefit regulations indirectly discriminated against the mentally ill, but also upheld the Upper Tribunal's conclusion that the difference in treatment was justified because the regulations were not manifestly without reasonable foundation. Lord Justice Sullivan, with whom the other members of the Court agreed, said (paragraph 21):

21. ... Of course, the exceptions [in regulation 7(16) and (17)] could have been more nuanced and could have distinguished between those hospital patients who are physically ill and those who are mentally ill, but the failure to make what would have been a further exception to an exception does not mean that a "bright line exception" which is in favour of all hospital patients can sensibly be described as a measure that is of a "blanket and indiscriminate nature".

Conclusions

21. Ms T argued that the decision in Obrey was about comparing groups (the mentally ill and the physically ill) whereas the present appeal was about the claimant specifically and the great danger that she was and is in if her personal entitlement to housing benefit is not maintained.

22. Article 8 is clearly engaged in the present case (as it relates to respect for a person's home) and the housing benefit regulations can be seen as indirectly discriminatory in the sense accepted by the Upper Tribunal in the Obrey case. Nevertheless, the cessation of the claimant's entitlement to housing benefit has not amounted to a failure to secure "The enjoyment of the rights and freedoms set forth in this Convention" within the meaning of Article 14. As at the date of the local authority decision (and even today), if the claimant were able to leave hospital she could return to live in her bungalow. Her real problem here is not about her past housing benefit entitlement but about her inability to leave hospital.

23. I accept that the Court of Appeal decision in the Obrey case might not be the last word on this matter because much of the Court of Appeal's decision was based on a reluctance to interfere with the views of the Upper Tribunal as an expert tribunal. In an appropriate case the Upper Tribunal might reach a different view. However, the present case is not such a case.

22. For the above reasons this appeal by the claimant does not succeed.

H. Levenson
Judge of the Upper Tribunal
13th March 2017