IN THE UPPER TRIBUNAL **Case No.** CUC/2385/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Hearing: 22 February 2017, Manchester Crown Court (with subsequent written submissions)

Attendances: For the appellant, Miss Ruth Knox of the RAISE Benefits and Advice Service.

For the respondent, Mr Edward Brown, of counsel, instructed by the Government Legal Department.

Decision: Under section 12 of the Tribunals, Courts and Enforcement Act 2007, this appeal is DISMISSED. The decision of the First-tier Tribunal, sitting at Liverpool on 15 April 2016 (file reference. *SC 068/15/04050)* did not involve an error on a point of law.

REASONS FOR DECISION

Summary

1. The principal issue on this appeal is whether a room must be capable of accommodating a bedside table and separate clothes storage furniture in order to be considered a bedroom for the purposes of housing benefit and universal credit under-occupancy legislation. This might seem a narrow issue but, in practice, may determine whether an under-occupancy deduction is imposed for smaller rooms. I decide that a separate bedside table and clothes storage furniture is not required. A bedside cabinet that serves both purposes will do. In this case, the room, while undoubtedly small at 43 sq. ft, was of a regular shape and could accommodate a single bed and bedside cabinet. The same result might not be expected for small rooms of irregular shape.

Background

Ms M's award of Universal Credit

2. Ms M held a tenancy of a three bedroom mid-terrace house in which she lived with her partner and son. Ms M's son was aged under one when the Secretary of State decided her claim for Universal Credit (UC). Ms M was a social housing tenant.

3. Estate agent particulars for Ms M's home indicated that it contained:

- A reception room with a floor area of approximately 140 square feet;

- A bedroom with a floor area of approximately 122 square feet;

- A bedroom with a floor area of approximately 43 square feet (the disputed room); and

- A bedroom with a floor area of approximately 68 square feet.

4. On 9 June 2015, the Secretary of State made an award of UC that included an element for Ms M's housing costs. The Secretary of State decided that she was entitled to two bedrooms. Since Ms M's home had three bedrooms, the housing costs element was reduced by 14%. Ms M appealed to the First-tier Tribunal

Proceedings before the First-tier Tribunal

5. Ms M's notice of appeal to the First-tier Tribunal, drafted by the RAISE Benefits Advice Service, argued that the room in question, at 43 sq. ft, was too small to be considered a bedroom.

6. Subsequently, RAISE supplied the First-tier Tribunal with a written submission setting out her case in more detail:

- Since a room must be capable of use as a bedroom, "we can…infer that in addition to a bed some space has to be allowed for dressing and undressing, storing clothing and personal possessions and privacy";

- The Upper Tribunal's decision in *Nelson* "has been taken as indicating that overcrowding legislation has none, or very little, relevance to the definitions of a bedroom for the purposes of the bedroom tax". Nevertheless, the standards set by the overcrowding legislation can, in some circumstances, be persuasive as can other housing legislation such as the housing standards regime provided for under the Housing Act 2004;

- Ms M relied on the 'LACORS' guidance about the furniture that should be capable of being contained in a bedroom ('LACORS' means Local Authorities Coordinators of Regulatory Services). The guidance refers to a single bed, a bedside table, a chest of drawers, a single wardrobe, a table and a chair or stool. The dimensions of those items of furniture are specified in the guidance and it also refers to "bed-making space";

- If use of a room as a bedroom could lead to a local authority issuing a Housing Act 2004 hazard notice that would be a compelling reason for determining that the room is not a bedroom for benefits purposes;

- *Nelson* "pointed out that size remains a consideration" and said warning bells should sound if a room had a floor area of less than 50 sq. ft. even if used for a child;

- The submission appended various plans showing possible furniture configurations in the disputed room. These showed "once a bed is in place, the only other possible piece of furniture which can be placed in the room is a bedside table" and "there is no room for opening any storage furniture and in addition it impedes getting in and out of bed". Accordingly, the disputed room fell into the 'absurd' category referred to in paragraph 33 of Nelson;

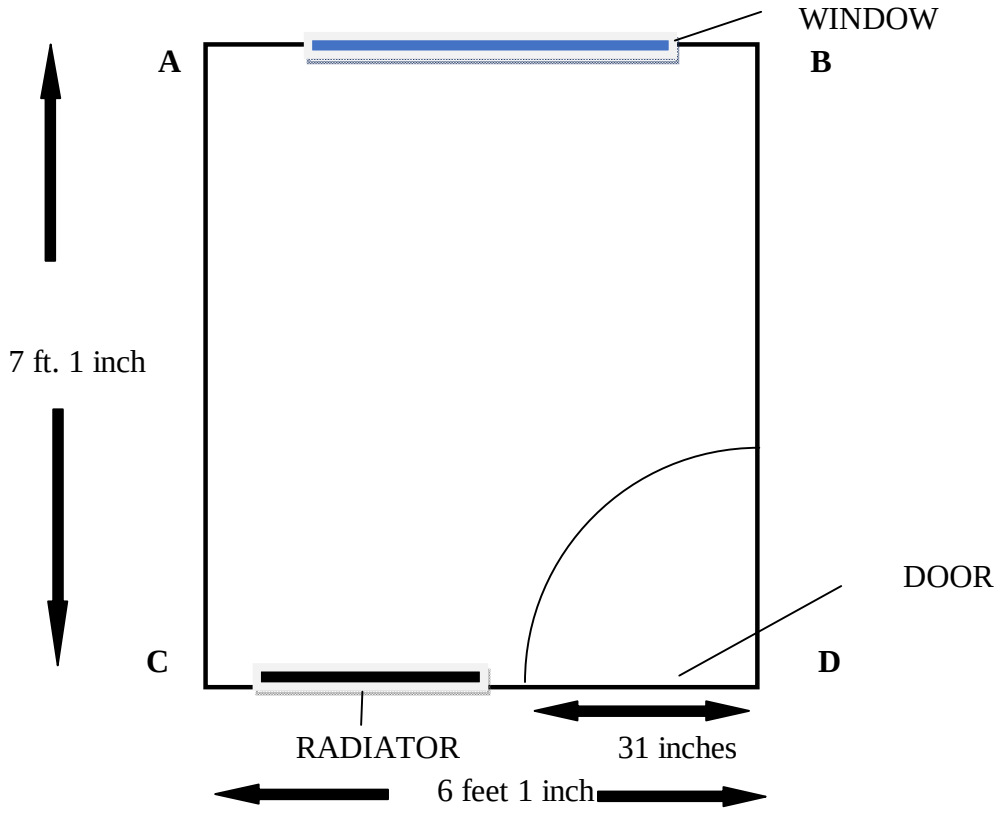
- The submission also referred to a wide range of what were described as official reports about the need for adequate space in bedrooms.

7. Subsequently, RAISE supplied the First-tier Tribunal with a further submission setting out their arguments as to the typical dimensions of various items of bedroom furniture.

The First-tier Tribunal's decision

8. The Tribunal heard Ms M's appeal on 15 April 2016. Miss M attended with her representative Ms Knox, who also represents her before the Upper Tribunal. A DWP Presenting Officer appeared for the Secretary of State. On 20 April 2016, the First-tier Tribunal decided to dismiss Ms M's appeal.

9. The Tribunal made certain findings about the disputed room. To aid understanding, a plan of the disputed room, approximately to scale, may assist:



10. The Tribunal's statement of reasons included the following findings about the disputed room:

- "it is a rectangular room with a door on the corner of the wall marked CD on the plans submitted which the Tribunal accepted as being accurate. The window is opposite the door on the wall marked AB. The radiator is adjacent to the door on the wall marked DC…The ceilings are the normal height and there are no sloping or unusual features. There are no built in cupboards or protuberances in the room, save for the skirting boards and the said radiator" (para.4(c));

- The windows open and there is adequate ventilation. The windows are double glazed giving adequate heat protection and sound protection. The window allows in natural light and there is a full electricity supply to the room" (para. 4(d));

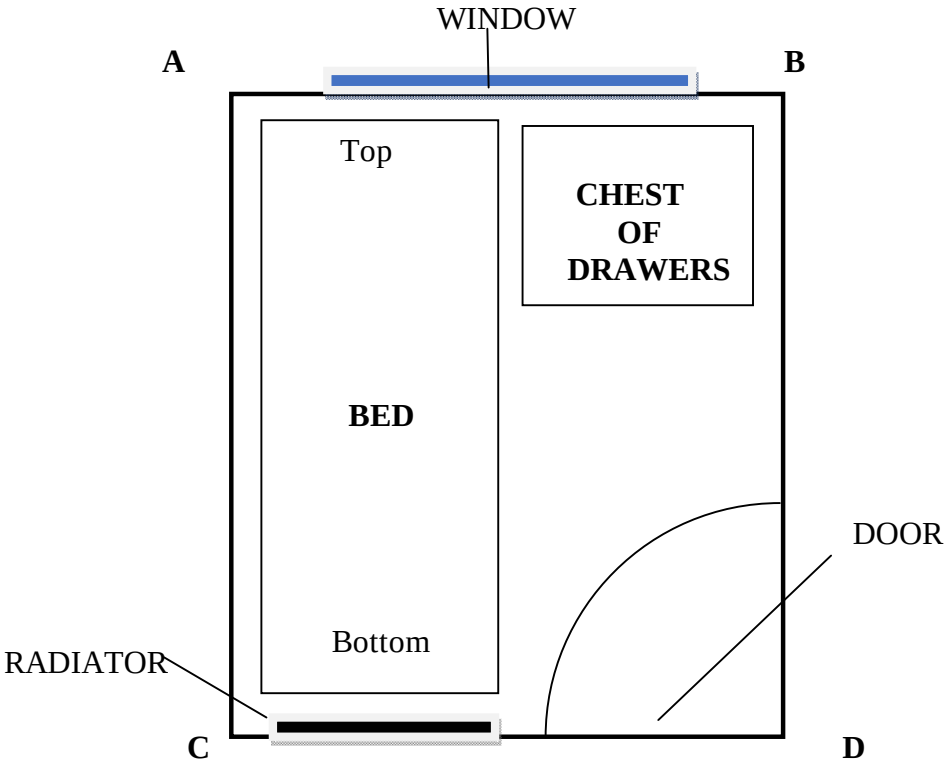
- The bedroom was "a regular shape with no odd or distinctive features" (para. 5);

- "The door was conveniently in the corner" (para. 5);

11. The Tribunal went on to make the following findings about the way in which furniture could be configured in the room:

> "A single bed would fit along the wall marked [AC]. The bed head would fit along the wall AB which would be under the window.
>
> The door would have sufficient room to open and close with the bed in place. With the door shut and a bed and chest of drawers in the room, there would be sufficient privacy to undress and dress. The door shut would give privacy to the occupant.
>
> A chest of drawers could be placed between the bed and the wall [BD] with the back of the drawers being adjacent to the bed on the wall AB…The top of that chest of drawers could be used to place a drink, alarm clock, book or other necessary items. The chest of drawers could be used to store clothes."

12. To return to the plan, on the Tribunal's conclusions the room would be furnished like this:



13. The Tribunal found that the room, with the furniture configured in this way, could properly be described as a bedroom in accordance with the Upper Tribunal's decision in *Nelson*. It did not matter that Miss M had never used the room as a bedroom nor did it matter whether or not the room could be used by an adult. It could be used by a child aged under 16.

14. Miss Knox argued the Upper Tribunal's decision in *Stevenage B.C. v ML* [2016] UKUT 0164 required a room to be capable of accommodating a single bed, bedside table, somewhere to store clothes and space for dressing and undressing. The First-tier Tribunal said that, in *Stevenage*, the Upper Tribunal was "summarising" paragraph 33 of *Nelson* but the present case was not an example of the 'absurd' case referred to in *Nelson*:

> "this case is different. The four walls would not touch the bed. A glass of water could be put on the chest of drawers near the bed. Alternatively, if the occupant wanted the clothes-storing furniture to be placed on the wall AB, then water could be placed by the bed as there would be no problem in relation to access as the door is at the other end of the room".

15. The First-tier Tribunal also decided that a separate bedside table, as well as clothes-storing furniture, was not always required "as it depended on the possible layout of the rooms". The Tribunal accepted that, on its furniture configuration, the available clothes-storing space was not great but "found it was not necessary for there to be room for a wardrobe, a chest of

drawers and bedside table and a bed in order for a room to be called a bedroom", nor was it necessary "for there to be room for both a wardrobe and a chest of drawers or either of those and a bedside table".

16. The Tribunal accepted, in accordance with *Nelson*, that this case rang 'alarm bells', since the floor area was less than 50 sq. ft. but nevertheless was satisfied that the disputed room was a bedroom for the purposes of the Universal Credit Regulations 2003.

17. In respect of Miss M's arguments about the relevance of the Housing Act 2004, the LACORS guidance and various official reports, the First-tier Tribunal found that these were been rejected as aids to the interpretation of "bedroom" in *Stevenage B.C. v ML*.

Proceedings before the Upper Tribunal

18. The First-tier Tribunal granted Miss M permission to appeal to the Upper Tribunal against its decision on the ground that it was "arguable" that, in all cases, a room must be able to accommodate a single bed, a bedside table and somewhere to store clothes in order to be a bedroom for the purposes of the regulations.

19. Miss M's notice of appeal to the Upper Tribunal argues the First-tier Tribunal misinterpreted the case law "as now established on Bedroom tax size appeals, in particular it misinterpreted paragraph 6 of *Stevenage B.C. v ML* [2016] UKUT 0164 by deciding that, in the list of furniture considered essential in a bedroom, a chest of drawers beside the bed renders a bedside table unnecessary".

20. The Secretary of State's written response supports the First-tier Tribunal's decision. He argues the First-tier Tribunal identified the relevant *Nelson* criteria, made extensive findings of fact and arrived at a conclusion, based on those findings, that was open to the Tribunal. The First-tier Tribunal dealt with *Stevenage* and the Tribunal's conclusion that a separate bedside table and clothes-storing area were not, as a general rule, required was consistent with the Upper Tribunal's decision in *TS v West Dorset DC* (CH/5497/14). In *TS* the Upper Tribunal rejected the argument that a separate wardrobe and chest of drawers are required and also decided that a separate bedside table is not necessarily required.

21. In Miss M's written reply, she introduced a further ground of appeal, namely, that "in following *Stevenage B.C. v ML* on the issue of account to be taken of the Health and Safety Rating System and the guidance given by LACORS, the tribunal erred in law". I granted permission to appeal on this ground. Miss M argues *Stevenage* should not in this respect be followed. It was in conflict with *Nelson* which decided that "whilst legislation cannot be "read over" it can be a material consideration as a "cross-check". In considering health and safety matters, it is open to a tribunal to consider statutory hazards in relation to notional occupiers. And non-statutory guidance is not legally irrelevant (*Valdaram v East Lindsey D.C.* [2012] UKUT 194 (LC)).

22. The reply went on to argue that, in finding that a separate bedside table was not required, the First-tier Tribunal misinterpreted paragraph 6 of *Stevenage* and "whatever piece of furniture is used to accommodate bedside items, it is in addition to what is needed to store clothing".

The hearing

23. Upper Tribunal Judge Lloyd-Davies directed a hearing of the appeal which was held before myself on 7 February 2017 at Manchester Crown Court.

24. Miss Knox, for Miss M, argues:

- *Nelson* concerned a room that was significantly larger than the disputed room in this case and care should be taken in applying its conclusions to rooms with a floor area of less than 50 sq. ft;

- In any event, *Nelson* holds that a room must be able to contain a bed, somewhere to store items and somewhere else to store clothing in order to be considered a bedroom. This finding has been repeated in subsequent Upper Tribunal decisions;

- *CH/5497/2014* was wrong in law in deciding that a bedside table is not necessarily required and, in any event, that part of the reasons was obiter because there was no dispute that the room in question could accommodate a bedside table;

- Miss Knox made submissions about the relevance of the Housing Act 2004 (amplified in post-hearing written submissions). If a Housing Act 2004 hazard assessment were carried out, the likely conclusion would be that the room was incapable of being used as a bedroom due to its size. It would be likely to trigger a Category 1 or 2 Hazard under the 2004 Act's scheme of risk assessment. Miss Knox concedes she must put this argument in conditional terms – "likely to trigger" – since the Housing Act 2004 provides for environmental health officers to determine whether a statutory hazard exists. However, environmental health officers are able to "assess an empty room" on what is an inevitably theoretical basis. It is possible to anticipate the likely hazard rating by reference to the statutory operating guidance and the LACORS guidance;

- The *Stevenage* point that the Housing Act 2004 could only ever be applied on a hypothetical basis was wrong. *Nelson* itself calls for an analysis elements of which are hypothetical.

25. Mr Brown, for the Secretary of State, argues:

- It follows from *Nelson* that the space standards used by the overcrowding legislation cannot be determinative, or the decisive factor, in evaluating whether a room is a bedroom. Parliament's intention would be thwarted if rooms with a floor area of less than 50 sq. ft. were automatically discounted;

- In so far as there was a conflict between Upper Tribunal decisions about the need for a bedside table, *CH/5497/2014* was to be preferred. It is consistent with *Nelson* which did not prescribe a rigid furniture checklist but instead calls for a room's overall configuration to be analysed in the light of the relevant factors identified in *Nelson*. *Nelson* simply does not hold that a separate bedside table is required in all cases;

- *Nelson* does not prevent housing legislation, including the Housing Act 2004, from being taken into account but its role in the interpretative exercise can be no more than a 'cross-check' or to ring 'warning bells' that particularly careful consideration must be given to whether a room is capable of being used as a bedroom.

26. Following the hearing, I issued case management directions requiring both parties to supply supplementary written submissions concerning the relationship, if any, between the meaning of "bedroom" in the UC Regulations 2013 and the overcrowding provisions of Part X of the Housing Act 1985. As indicated at the hearing, I treat as a further ground of appeal the question whether the First-tier Tribunal erred in law in its analysis of the relevance of Part X in interpreting "bedroom" where the disputed room had a floor area of less than 50 sq. ft. In my view, this is an appropriate case in which to give this matter further consideration. Since *Nelson* concerned a larger room the matter was not considered in-depth save for the warning that a room of less than 50 sq. ft. may sound alarm bells.

27. In his subsequent written submission, Mr Brown for the Secretary of State argues:

- The space standard in section 326 of the Housing Act 1985 takes no account of rooms with a floor area of less than 50 sq. ft and "it follows that the disputed room would not be treated as part of the space calculation for that legislation";

- The interpretative relevance of the overcrowding legislation was before the Upper Tribunal in *Nelson*. To read in an exclusion for sub-50 sq. ft. rooms would conflict with paragraph 55 of *Nelson*;

- The First-tier Tribunal, in accordance with *Nelson*, recognised that the room's floor area sounded a warning that the room might not be functional as a bedroom. But whether the room is so functional depends on the facts;

- The relevance of Part X of the Housing Act 1985 is that it operates as a "cross-check" but no more than that.

28. In her subsequent written submission, Miss Knox for Ms M argues:

- *Nelson* establishes the underlying purpose of the bedroom-related benefit restrictions as "to encourage tenants who occupy property larger than they may actually need to move to smaller dwellings, thereby freeing up such homes for larger households";

- On this appeal, "we are looking at a room or rooms not currently used as a bedroom to establish whether they could accommodate one or more additional occupants thereby fulfilling the purpose of the legislation";

- If Part X of the Housing Act 1985 were applied in this case the disputed room could not be considered as sleeping accommodation Miss M accepted that the living room would be treated as sleeping accommodation. Applying the Housing Act 1985 space standard, Miss M accepted that five people could be accommodated in Miss M's home without contravening that standard;

- Despite that, the disputed room's small size was not irrelevant. The fact that it fell below the minimum size considered adequate for a bedroom in any circumstances under the overcrowding legislation sounds "warning bells".

Legal Framework

The housing costs provisions of the Universal Credit legislation

29. Section 11 of the Welfare Reform Act 2012 provides for UC awards to include an element in respect of housing costs that is payments in respect of accommodation occupied by a claimant as their home. In that respect, UC is a replacement for housing benefit.

30. Regulation 25 of the UC Regulations 2013 specifies the criteria for entitlement to a housing costs element within a UC award. It is not disputed that Ms M meets these criteria nor that her landlord is a provider of social housing for the purposes of the Regulations.

31. Regulation 26(2) of the UC Regulations 2013 gives effect to Schedule 4 to the Regulations. Schedule 4 provides for the amount of the housing costs element for a claimant who is liable to make "rent payments" (referred to by the Regulations as "renters": Schedule 4.1.1).

32. Part 3 of Schedule 4 to the UC Regulations 2013 is headed "General Provisions about Calculation of Amount of Housing Costs Element for Renters". Within Part 3, we find paragraph 8:

> **"8. Size criteria applicable to the extended benefit unit of all renters**

(1) In calculating the amount of the renter's housing costs element…a determination is to be made in accordance with the provisions referred to in sub-paragraph (2) as to the category of accommodation which it is reasonable for the renter to occupy, having regard to the number of persons who are members of the renter's extended benefit unit (see paragraph 9).

(2) The provisions referred to in this sub-paragraph are the following provisions of this Schedule—

…(b) in respect of a calculation under Part 5, paragraphs 9 to 12."

33. A renter's "extended benefit unit" includes the renter and "any child or qualifying young person for whom the renter…is responsible" (Schedule 4.9.1).

34. Still within Part 3 of Schedule 4, is paragraph 10:

"10. Number of bedrooms to which a renter is entitled

(1) A renter is entitled to one bedroom for each of the following categories of persons in their extended benefit unit—

(a) the renter…

(b) a qualifying young person for whom the renter…is responsible;

…(d) two children who are under 10 years old;

(e) two children of the same sex;

(f) any other child.

(2) A member of the extended benefit unit to whom two or more of the descriptions in sub-paragraph (1) apply is to be allotted to whichever description results in the renter being entitled to the fewest bedrooms.

(3) In determining the number of bedrooms to which a renter is entitled, the following must also be taken into account—

…(b) any entitlement to an additional bedroom in accordance with paragraph 12…".

35. It is common ground that Ms M is not entitled to an additional bedroom under Schedule 4.12 to the UC Regulations 2013.

36. Schedule 4 to the UC Regulations 2013 deals separately with the amount of the housing costs element for tenants in the social rented sector and other tenants. Part 5 of Schedule 4 is headed "Social Rented Sector other than Temporary Accommodation" and it applies to

"renters who are liable to make rent payments to a provider of social housing" (Schedule 4.30.1).

37. Within Part 5, paragraph 36, headed "Under-occupancy deduction", provides:

> "(1) A deduction for under-occupancy is to be made under this paragraph where the number of bedrooms in the accommodation exceeds the number of bedrooms to which the renter is entitled under paragraphs 8 to 12.
>
> (2) Where a deduction is to be made, the amount of the deduction is to be determined by the formula—
>
> A x B
>
> where—
>
> "A"—
>
> (a) …is the amount resulting from step 2…in [paragraph 34] [steps 1 and 2 in paragraph 34 determine the relevant payments to be taken into account, on a monthly basis]…
>
> "B" is the relevant percentage.
>
> (3) The relevant percentage is 14% in the case of one excess bedroom.
>
> (4) The relevant percentage is 25% in the case of two or more excess bedrooms…".

38. In other words, a claimant whose accommodation exceeds the number of bedrooms to which the claimant is entitled by one is subject to a 14% reduction in the housing costs element of her UC award.

Part X of the Housing Act 1985 – the overcrowding legislation for England and Wales

39. Part X of the Housing Act 1985 links the concept of overcrowding to the number of persons sleeping in a dwelling. There are two types of statutory overcrowding under Part X. Section 324 of the 1985 Act provides that a dwelling is overcrowded if the number of persons sleeping in the dwelling contravenes the room standard specified in section 325 or the space standard specified in section 326.

40. Section 325's room standard is not concerned with children under the age of ten – they "shall be left out of account" (section 325(2)). The room standard is contravened when the number of rooms available as sleeping accommodation is such that two persons of the opposite sex, who are not living together as man and wife, "must sleep in the same room" (section 325(1)). For this purpose, it is not only bedrooms that are relevant: "a room is available as sleeping accommodation if it is of a type normally used in the locality either as a bedroom or as a living room" (section 325(2)(b)). It can be seen that it does not matter whether a living room

is normally used in the locality as a bedroom. All section 325(2) is concerned with is whether a room is normally used in the locality as a living room (or a bedroom).

41. Section 326's space standard is not as straightforward as the room standard. The space standard is contravened "when the number of persons sleeping in a dwelling is in excess of the permitted number". This matter is to be evaluated having regard to the number and floor area of rooms available as sleeping accommodation (section 326(1)). A living room counts as sleeping accommodation in the same way as it do for the room standard.

42. The "permitted number of persons" concept ignores a child under the age of one entirely and treats a child under ten "as one-half of a unit" (section 326(2)(a)). Section 326 also ignores "a room having a floor area of less than 50 square feet" (section 326(3)).

43. Determining the permitted number involves identifying two figures:

(1) firstly, the number specified in "Table I" specified against the number of rooms available as sleeping accommodation. Table I reads:

Number of rooms	**Number of persons**
1	2
2	3
3	5
4	7 ½
5 or more	2 for each room

(2) to identify the second figure, section 326(3) categorises rooms available for sleeping accommodation according to floor area. Different categories of room are allotted a number in "Table II". The sum of all such numbers, in relation to a particular dwelling, gives the second figure. Table II reads:

Floor area of room	**Number of persons**
110 sq ft or more	2
90 sq ft or more but less than 110 sq ft	1 ½
70 sq ft or more but less than 90 sq ft	1

50 sq ft or more but less than 70 sq ft	1/2

44. The lower of the two figures is the permitted number of persons for the purposes of the space standard. If the number of people sleeping in the accommodation exceeds that figure, the space standard is contravened.

45. An occupier of a dwelling who causes or permits it to be overcrowded commits a summary offence (section 327(1)). However, section 327(2) provides that the occupier is not guilty of an offence:

(a) if the overcrowding is within the exceptions specified in section 328 or 329. Section 328 is concerned with overcrowding that arises due to a child attaining the age of one or ten (and hence affects the permitted number). The section 329 exception is concerned with temporary arrangements for a member of the occupier's family to sleep at the dwelling, or

(b) the overcrowding is authorised by, or in accordance with, a licence granted by a local housing authority under section 330. Section 330 licences may be granted if it appears to the authority "that there are exceptional circumstances" (section 330(2)).

46. Section 331(1) provides that the landlord of a dwelling also commits a summary offence "if he causes or permits it to be overcrowded".

47. From this overview of Part X of the Housing Act 1985, it can be seen that:

(a) Part X does not in terms prohibit a room with a floor area of less than 50 square feet from being used as sleeping accommodation; but

(b) the presence of such a room or rooms may increase the likelihood of statutory overcrowding.

48. For example:

(a) take a two bedroom flat with a living room of 110 sq. ft. and bedrooms of 40 and 70 sq. ft. respectively. If the flat were occupied by a couple living as husband and wife and a child of 11, neither the room standard nor the space standard would be contravened:

> (i) Since two members of the opposite sex, not living as husband and wife, would not be required to sleep in the same room, the room standard would not be contravened;
>
> (ii) for the space standard, figure one would be 3. The number of rooms is 2 – the smaller bedroom being ignored as it is less than 50 sq. ft. – which corresponds to '3' in Table 1. Figure two would be also be '3' (the sum of the Table 2 numbers for rooms of 110 sq. ft. and 70 sq. ft). And so the space standard would not be contravened;

(b) but if we alter the flat by reducing the living room to 80 sq. ft. the flat would be statutorily overcrowded if used by the same family unit as sleeping accommodation:

(i) The room standard would remain un-contravened; but

(ii) The space standard would be contravened. Figure one would still be 3. Figure 2, however, would be 2. The 40 sq. ft. room is ignored and the remaining rooms are each scored as 1. Being the lower number, '2' is the permitted number for the purposes of the space standard. Accordingly, occupation by the same family unit would contravene the space standard.

The Upper Tribunal's decision in Nelson

49. The decision of a three-judge panel of the Upper Tribunal in *Secretary of State for Work & Pensions v David Nelson and Fife Council; Secretary of State for Work & Pensions v James Nelson and Fife Council* [2014] UKUT 0525 (AAC) ("Nelson") concerned housing benefit. No party argues there is any material difference between the relevant provisions of the Housing Benefit Regulations 2006, in particular regulation B13, and the under-occupancy provisions of the UC Regulations 2013.

50. The *Nelson* room had a floor area of 66 sq. ft. The issue was whether, in the light of the room's size, it fell within the meaning of "bedroom" in the Housing Benefit Regulations 2006. Mr Nelson persuaded the First-tier Tribunal that Scottish overcrowding legislation, which I understand is in relevant respects in the same terms as Part X of the Housing Act 1985, precluded categorisation of the room as a bedroom. The argument accepted by the First-tier Tribunal was described in paragraph 44 of the Upper Tribunal's reasons:

> "[Mr Nelson's representative] submitted that Room 1 was too small to be classified as a bedroom. In this regard he referred to the statutory overcrowding provisions of the Housing (Scotland) Act 1987. He submitted that in terms of section 137 of this Act a room of between 50 and 70 square feet (as this one was), was only to be regarded as sufficient for a child under the age of 10. He also pointed out that in paragraph 63 of Annex C of Circular A4/2012 the Secretary of State suggests that claimants with additional rooms should consider taking in a lodger. The inference from this was that an additional room should only be classified as a bedroom if it was big enough to accommodate an adult lodger. Room 1 was too small for this purpose and so should not be classified as a bedroom for the purpose of paragraph B 13 (5)."

51. The Upper Tribunal held that the First-tier Tribunal erred in law. The First-tier Tribunal's conclusion that "under occupancy can be seen as the flip side of overcrowding" was wrong in law for the reasons given in paragraph 53 of the Upper Tribunal's decision:

> "(i) the legislative intent behind [the overcrowding provisions in Part VII of the Housing (Scotland) Act 1987] to create a criminal offence if property is overcrowded is very different to that relating to the Regulation B13 of the Amended Housing Benefit Regulations,

> (ii) Part VII of the 1987 Act operates very differently to Regulation B13 in that Part VII treats living rooms as rooms available for sleeping, disregards children under the age of 1, expects adults of the same sex to share a bedroom and in Table II (which is the table that refers to floor areas) an aggregate for all the rooms defines the permitted number of persons who can sleep in a house,
>
> (iii) the significant differences in approach between the two statutory regimes and their underlying purposes mean that it would be wrong to transport only some elements of the 1987 Act regime into the application of Regulation B13, and
>
> (iv) the 1987 Act (a) does not have the consequence that of itself use of a room below the size referred to by a person (e.g. by an adult of a room less than 70 square feet) is an offence, and (b) it leaves a room having a floor area of 50 square feet or less out of account for its purposes."

52. However, the Upper Tribunal went on to state that the overcrowding legislation might have some relevance to the question whether a room is a bedroom for the purposes of the Housing Benefit Regulations 2006:

> "55…our rejection of [the First-tier Tribunal's] conclusions does not mean that size is not relevant or that in taking the approach we have described to the application of Regulation B13 the decision maker is precluded from having regard to the point that for different purposes Parliament has excluded a room of 50 square feet or less as a room available as sleeping accommodation and, for the purpose of calculating the relevant aggregate of people who can sleep in a house, has allocated a child over the age of one but under the age of 10 to a room of 50 and 70 square feet and one adult to a room of between 70 and 90 square feet. However, the differences in the legislative regimes means that the only effective relevance of this…is that the floor areas referred to in them provide cross checks that indicate that (or warning bells that) the room may be too small and thus the need to provide reasons why, in the particular case, either it is or is not too small."

53. Further reasons given by the Upper Tribunal for its decision in *Nelson* include the following:

- The "underlying purpose [of the under-occupancy legislation] was to address the problem that some tenants in social housing were occupying more space than they needed" (para. 6);

- "Bedroom", being an ordinary or familiar word of the English language, "should not be re-written or paraphrased, and the ordinary or familiar word should be construed or

applied in its context having regard to the underlying purposes of the legislation" (para. 19);

- "27…when read as a whole Regulation B13 provides that in determining whether there is under occupancy that triggers a reduction in housing benefit:

    (i) the use or potential use of the relevant room or rooms can be by any of the people listed in sub-paragraphs (5) and (6) [sub-paragraph (5) referred to a couple, a person who is not a child, a child who cannot share a bedroom, two children of the same sex, two children who are less than 10 years old, a child; sub-paragraph (6) referred to entitlement to an additional bedroom in certain cases];

    (ii) the impact of this is that it has to be considered whether the relevant room or rooms could be used by any of the listed people, and

    (iii) designation or choices made by the family as to who should occupy rooms as bedrooms or how rooms should be used is unlikely to have an impact on the application of the regulation."

- In paragraph 28::

    "As to the points made in paragraph 27(ii) and (iii). It is in our view clear:

    (i) that the underlying purpose of Regulation B13 would be undermined if this was not the case, and

    (ii) that purpose and that interpretation of the regulation shows that the test is focused on the availability of rooms that could be used as bedrooms by any of the listed people and thus essentially the assessment of a property when vacant; rather than how it is actually being used from time to time. It seems to us that this is so because a part of the underlying purpose must be to free up homes that are being under occupied so that they can be used by others with an entitlement to the number of bedrooms in the property or to encourage the existing occupiers to make under occupied bedrooms available to others."

54. In paragraph 54, the Upper Tribunal held that the legislator's use of an undefined familiar or ordinary English word "supports the view that Parliament intended to allow decision makers to take account of all relevant circumstances on a case by case basis". In paragraph 31, the Upper Tribunal identified certain "case sensitive factors" to be considered when determining

whether a room falls to be considered as a bedroom for use by any of the persons listed in regulation B13(5) of the Housing Benefit Regulations 2006. These factors were:

(a) size, configuration and overall dimensions;

(b) access;

(c) natural and electric lighting;

(d) ventilation;

(e) privacy.

55. Part of the reason why size is relevant is that it affects the type of furniture than can be placed in a room. On this point, the Upper Tribunal said;

- "the argument advanced by the Secretary of State before us that any room will be a bedroom for the purposes of the regulation if its floor space is big enough to accommodate a single bed (size not mentioned) even if all the sides of that bed would touch a wall or an outward opening door is absurd" (para. 33);

- "The absence of any reference to the height of the room, its ventilation, its natural and electric lighting or whether it has a window is fatal to that argument. But assuming that when they are factored in they do not rule out the conclusion that such a room is a bedroom the consequence of the argument, namely that a person would have to get ready for bed and then jump from a passage through an outward opening door to get into bed, would have nowhere to put clothes or say a glass of water (other than under the bed where it abuts the door) shows that that description of a bedroom does not fit with its ordinary or familiar meaning." (para. 33)".

56. Having allowed the Secretary of State's appeal, the Upper Tribunal went on to re-decide the question whether Mr Nelson's disputed room was a bedroom for regulation B13 purposes. The Upper Tribunal decided that it was, relying on the following factors:

"(i) it can accommodate a single bed in a way that enables access to the built in cupboard and free floor space,

(ii) it is of a normal height,

(iii) it has a window,

(iv) it is heated and ventilated in a similar way to the other rooms used as bedrooms and living rooms, and

(v) albeit that it is a small room (8 ft by 8 ft) it does not have any physical features or drawbacks that prevent it being used as a bedroom for a child, an overnight carer or indeed an adult (on a full or part time basis)."

Upper Tribunal decisions about bedroom size and bedroom furniture

57. Case *CH/454/2015* concerned a room with a floor area of 44 sq. ft. Upper Tribunal Judge Lloyd-Davies set aside the First-tier Tribunal's decision that room was a bedroom for the purposes of the Housing Benefit Regulations 2006. The First-tier Tribunal erred in law by failing to address all the relevant factors in paragraph 31 of *Nelson*. The Upper Tribunal remitted the case to the First-tier Tribunal for re-hearing. The reasons for the Upper Tribunal's decision included:

> "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. In particular…the tribunal in the present case did not consider whether the room could accommodate not only a bed but also a bedside table and somewhere to store clothes, besides leaving room for dressing or undressing. In my judgment the tribunal, by failing to consider these issues, fell into error and its decision must be set aside".

58. Unlike CH/454/2015, *Stevenage B.C. v ML* [2016] UKUT 0164 was decided following an oral hearing. The appellant local authority were represented by counsel although the respondent claimant was unrepresented. This case concerned a room with a floor area of about 63 sq. ft. with a sloping ceiling "that reduced its usable space considerably". One issue was the extent to which the Housing Act 2004, regulations made under that Act and the LACORS guidance informed the interpretation of "bedroom" in the Housing Benefit Regulations 2006. Paragraph 5 of the reasons for Upper Tribunal Judge Lloyd Davies's decision states:

- "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";

- "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";

- Under regulations made under the 2004 Act, questions concerned with space and overcrowding can only be decided by reference to "the actual occupiers at any time and not potential, hypothetical, future occupiers" and "those applying the HB Regulations

> cannot be expected to apply standards which those charged with applying those standards cannot themselves apply";

- The LACORS guidance "has no statutory effect and cannot be prayed in aid in construing regulation B13".

59. The Upper Tribunal allowed the local authority's appeal and remitted the case to the First-tier Tribunal for re-determination. In doing so, Upper Tribunal Judge Lloyd-Davies said:

> "[the First-tier Tribunal to which the case was remitted] should consider those factors [in paragraph 31 of *Nelson*], 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".

60. In *TS v West Dorset D.C.* (case *CH/5497/2014*) a housing benefit claimant appealed to the Upper Tribunal against the First-tier Tribunal's decision that a room with a floor area of 59-60 sq. ft. was a bedroom. The First-tier Tribunal's decision was given before *Nelson* which may explain why the First-tier Tribunal failed to address the room's configuration, access, lighting and ventilation. That failure was an error on a point of law and Upper Tribunal Judge Ward set aside the First-tier Tribunal's decision.

61. In *TS* the Upper Tribunal did not remit the case to the First-tier Tribunal for re-determination. Instead the Upper Tribunal re-made the First-tier Tribunal's decision and, in so doing, decided for itself whether the disputed room was a bedroom. Judge Ward directed himself as follows in paragraph 10 of the reasons for his decision:

- paragraph 60 of *Nelson* – "a bedroom must generally be reasonably fit for full-time occupation" – showed that "there is no requirement for a table and chair before a room can constitute a "bedroom";

- A room does not need to be able to accommodate a wardrobe and a chest of drawers in order to constitute a bedroom;

- "*Nelson* does envisage that there will be somewhere to put bedside items – the example of a glass of water is given, but the point is equally applicable to say spectacles or an alarm clock: however, it does not follow from that that a bedside table is necessarily required – it all depends on the configuration of the room as a whole".

62. The parties disputed the sizes of the notional furniture that could reasonably be placed in the room as well as the furniture's accessibility. Judge Ward accepted the local authority's evidence that single adult beds of 190 cm x 92 cm were available and also their argument that such a bed could be placed in the room without impeding access to a notional chest of drawers. The Judge also accepted the local authority's argument that a wardrobe would be accessible

and that there would be sufficient free floor space (of 14490 sq. cm). The Judge decided that the room was a bedroom for the purposes of the Housing Benefit Regulations 2006.

Conclusions

63. I decide that the First-tier Tribunal did not make an error on a point of law in deciding that Miss M's disputed room was a bedroom for the purposes of the UC Regulations 2013. Ms M's appeal is dismissed.

The need for a separate bedside table and clothes storage

64. There is no magic in a bedside table. Its purpose is to provide a flat area next to a bed on which to place necessary items. A chest of drawers of appropriate height performs the same function as a bedside table if placed alongside a bed.

65. In my judgment, paragraph 33 of *Nelson* recognises that, taking into account the normal and ordinary understanding of 'bedroom', a bedroom's function extends beyond merely a place to sleep. For a room to function as a bedroom properly so-called, a must also provide for clothes storage, a flat surface of some sort on which to place necessary items and avoid obvious safety risks as well as sufficient free space for dressing and un-dressing. Clearly, there are a range of different ways in which those requirements may be met.

66. In this context, a chest of drawers of appropriate height and placement can serve a dual function. It supplies a flat surface alongside a bed as well as space in the drawers underneath for storing clothes. In such circumstances, that single piece of furniture allows a room to satisfy two of the minimum functional requirements of a bedroom identified in *Nelson*. This is what the First-tier Tribunal effectively found in this case and its findings of fact were open to it on the evidence.

67. For the above reasons, I agree with Mr Brown for the Secretary of State that the First-tier Tribunal did not err in law in holding that a room does not, as a general rule, have to be able to accommodate a bedside table and separate clothes storage furniture in order to be a bedroom for the purposes of the UC Regulations 2003.

68. I accept that the decisions in *Stevenage* and *CH/454/2015* might be read as requiring a bedroom to be capable of accommodating a separate bedside table and clothes storage furniture. However, no such requirement can be found in paragraph 33 of the Upper Tribunal's decision in *Nelson* and, if the decisions are in conflict, I should normally follow *Nelson* since it was a decision of a three-judge panel of the Upper Tribunal. I agree with the reasoning in paragraph 33 of *Nelson* and follow it.

69. In paragraph 33 of *Nelson*, the Upper Tribunal explainied why it rejected the Secretary of State's argument that a room that could accommodate a single bed, but nothing else, was still a

bedroom. The argument was objectionable because it expected a person to dress and undress outside the bedroom, do without clothes storage in the bedroom and have nowhere safely to place a necessary item such as a glass of water. In rejecting the Secretary of State's argument, the Upper Tribunal identified certain essential functional characteristics of a bedroom, as I refer to above.

The relevance, if any, of Part X of the Housing Act 1985 in cases involving bedrooms of less than 50 sq. ft.

70. In *Nelson*, the Upper Tribunal held that "the "underlying purpose [of the under-occupancy legislation] was to address the problem that some tenants in social housing were occupying more space than they needed". That purpose will be achieved if an under-occupied dwelling is let to someone else on the housing waiting list with a larger 'extended benefit unit' than that of the present claimant/tenant.

71. Once floor areas are known, it is relatively straightforward to work out the family unit or units that may sleep in a dwelling without contravening the Housing Act 1985's space or room standard. That has been done by Miss Knox for her client Miss M's dwelling and, on her workings, the dwelling could accommodate 5 persons. Clearly, therefore, she cannot argue that Miss M's landlord would be unable to re-let the dwelling to a larger family unit without breaching the overcrowding provisions of Part X of the Housing Act 1985. Had she been able to do so, I may well have accepted that the disputed room should not be categorised as a bedroom because that would not serve the underlying purpose of the under-occupancy provisions. As it is, I make no ruling on this point.

The relevance, if any, of the Housing Act 2004 housing safety scheme and the LACORS guidance

72. The Housing Act 2004's system for assessing the condition of residential premises operates by reference to the existence of category 1 or category 2 hazards (section 1(2)).

73. Section 2(1) of the 2004 Act defines a "category 1 hazard" as:

> "a hazard of a prescribed description which falls within a prescribed band as a result of achieving, under a prescribed method for calculating the seriousness of hazards of that description, a numerical score of or above a prescribed amount".

74. A category 2 hazard is defined in similar terms.

75. The definitions enthusiastically repeat the term "prescribed" to frame all aspects of the concept of a category 1 or 2 hazard. Since "prescribed' means prescribed by regulations, we have a clue that identifying a category 1 or 2 hazard might not be a simple or obvious task. And that is borne out by the briefest examination of the relevant regulations, the Housing,

Health and Safety Rating System (England) Regulations 2005. Moreover, the Regulations in important respects confer power on an inspector to exercise his or her own judgement. For example, under regulation 6:

(a) the first step, following an inspection, is for an inspector to determine whether a prescribed hazard exists;

(b) then the inspector must decide whether it is appropriate to calculate the seriousness of the hazard. If the inspector decides it is not appropriate, it seems that is the end of the matter;

(c) if the inspector decides it is appropriate to calculate the seriousness of the hazard, the inspector must assess the likelihood, during the following 12 months, of a "relevant occupier suffering any harm as a result of that hazard as falling within one of the range of ratios of likelihood set out in column 1 of Table 1".

76. I could go on to describe the statutory formulae that are also to be applied in assessing the likelihood of harm but there is no need. It is quite clear that the 2004 Act scheme is designed to be operated by professional environmental health officers and, in so doing, they are required to exercise professional judgment. I fully agree with Upper Tribunal Judge Lloyd-Davies in *Stevenage* that the First-tier Tribunal (Social Entitlement Chamber) cannot properly carry out its own assessment of whether a dwelling presents a category 1 or 2 hazard nor can it properly try and predict if a local authority inspector would be likely to decide that such a hazard exists.

77. The LACORS guidance is not statutory guidance. It is not binding on anyone let alone the First-tier Tribunal in deciding whether a room is a bedroom for under-occupancy purposes. The present case did not raise any complicated issue of environmental health (e.g. as to adequacy of ventilation). The issue was simply whether the disputed room possessed certain of the essential characteristics of a bedroom identified in *Nelson* – clothes storage and availability of a flat surface. The LACORS guidance could not possibly have had a bearing on those questions. The First-tier Tribunal correctly declined to take it into account.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
1 November 2017