DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant (the Secretary of State for Work and Pensions).

The decision of the Middlesbrough First-tier Tribunal dated 8 July 2016 under file reference SC227/14/00635 involves an error on a point of law and is set aside. The decision that the First-tier Tribunal should have made is as follows:

> *The appeal is dismissed.*
>
> *The decision made by the Council on 21 February 2014 was correct and stands.*
>
> *The Tribunal was satisfied on the facts that the room in question has the necessary attributes to be considered a bedroom under regulation B13 of the Housing Benefit Regulations 2006. It follows that the claimant was under-occupying his accommodation by two bedrooms and subject to a reduction of 25% in the amount of his maximum eligible rent for the purposes of his housing benefit entitlement.*

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal has a long back story.

2. On 21 February 2014 Redcar and Cleveland Borough Council ('the Council') decided that the claimant's maximum eligible rent for his housing benefit award was to be reduced by 25%. This reduction in his entitlement was made under regulation B13 of the Housing Benefit Regulations 2006 (SI 2006/213; 'the 2006 Regulations') – the so-called 'bedroom tax'. The decision was based on the finding that he was "under-occupying" his tenanted property by two bedrooms.

3. There have been three substantive First-tier Tribunal (FTT) decisions on the claimant's appeal against that decision by the Council.

4. On 23 October 2014 the first FTT dismissed the claimant's appeal (pp.91 and 94-100). However, a District Tribunal Judge set aside the first FTT's decision for failure to make sufficient findings of fact (pp.131-132).

5. On 17 March 2015 the second FTT again dismissed the claimant's appeal, on this point at least (pp.169-170 and pp.223-226). That second FTT reconvened on 20 August 2015 and likewise confirmed the Council's decision (p.218 and pp.220-222). On 7 July 2016 Upper Tribunal Judge Jacobs allowed the claimant's further appeal, concluding that the second FTT had failed to deal with the conflicting and confusing evidence about the dimensions of the room in question.

6. On 16 November 2016 the third FTT allowed the claimant's appeal (p.270 and pp.272-275), finding that the room in question upstairs was not a bedroom properly so called. This time the Secretary of State for Work and Pensions appealed to the Upper

Tribunal (pp.283-288) with the permission of District Tribunal Judge Jacques, who had not been the tribunal judge sitting as the third FTT (p.289).

7. So, this is the second time that the same case has been before the Upper Tribunal.

Summary of my decision

8. In summary my decision is to allow the further appeal to the Upper Tribunal by the Secretary of State for Work and Pensions. I set aside the First-tier Tribunal's decision. I also re-make the decision originally under appeal rather than remit it for a further and fourth (or arguably fifth) FTT hearing. My decision is that the disputed room is a bedroom for the purposes of the 2006 Regulations.

The Upper Tribunal oral hearing

9. I held an oral hearing of this appeal at the Employment Tribunal venue in Leeds on 1 November 2019. The Secretary of State was represented by Mr Simon Lewis of counsel. The claimant (technically the First Respondent) attended the hearing and was represented by Mr Joe Halewood, an experienced housing welfare consultant and welfare rights representative, who has vigorously and valiantly pressed the claimant's case from the outset. The Council (technically the Second Respondent) did not send a representative to the hearing and indeed has played no active role in this second round of Upper Tribunal proceedings.

The background to the present appeal

10. The context to this appeal can be summarised shortly for present purposes. The property in question was built in 1967. There are three room upstairs (excluding the bathroom). The claimant has lived there all his life and his parents were the first tenants. The local authority treated the property as a 3-bedroom unit but originally there was no heating in the third room upstairs. The claimant, who was born in 1971, slept in the third room until the mid-1980s. His parents had separated in 1980, leaving the claimant, his mother and sister in residence but his sister then left home in the mid-1980s. A radiator was not installed in the third room until around 1999 (at least at the oral hearing Mr Halewood dated this change as taking place in 1999, while the documentation suggests it occurred in either 2002 (p.151) or 2006 (p.134); the precise date matters not – what is clear is the change took place more than a decade after the claimant had stopped sleeping in the room as a child). Following his mother's death in 2008, the claimant succeeded to the tenancy. The net result was that by the time of the Council's decision the third room had not actually been used as a bedroom for more than 25 years. But the actual usage of a room is not the test.

The relevant legislation

11. For present purposes the material provisions are to be found in regulation B13(1)-(5) of the 2006 Regulations (as amended). Those provisions read as follows at the time of the Council's decision (there have been some subsequent amendments but not that affect the present case in any way):

> "**B13.— Determination of a maximum rent (social sector)**
>
> (1) The maximum rent (social sector) is determined in accordance with paragraphs (2) to (4).
> (2) The relevant authority must determine a limited rent by—
> (a) determining the amount that the claimant's eligible rent would be in accordance with regulation 12B(2) without applying regulation 12B(4) and (6);
> (b) where the number of bedrooms in the dwelling exceeds the number of bedrooms to which the claimant is entitled in accordance with paragraphs (5) to

(7), reducing that amount by the appropriate percentage set out in paragraph (3); and

(c) where more than one person is liable to make payments in respect of the dwelling, apportioning the amount determined in accordance with sub-paragraphs (a) and (b) between each such person having regard to all the circumstances, in particular, the number of such persons and the proportion of rent paid by each person.

(3) The appropriate percentage is—

(a) 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and

(b) 25% where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled.

(4) Where it appears to the relevant authority that in the particular circumstances of any case the limited rent is greater than it is reasonable to meet by way of housing benefit, the maximum rent (social sector) shall be such lesser sum as appears to that authority to be an appropriate rent in that particular case.

(5) The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable)—

(a) a couple (within the meaning of Part 7 of the Act);

(b) a person who is not a child;

(ba) a child who cannot share a bedroom;

(c) two children of the same sex;

(d) two children who are less than 10 years old;

(e) a child."

The relevant case law

12. Neither regulation B13 nor the 2006 Regulations more generally defines the word "bedroom". There have been several important cases involving the interpretation of regulation B13. In terms of the proper meaning of the word "bedroom", the leading cases have for some time been the decision of a three-judge panel of the Upper Tribunal in *Secretary of State for Work and Pensions v Nelson and Fife Council* [2014] UKUT 525 (AAC); [2015] AACR 21 and of the Court of Session in the Scots case of *Secretary of State for Work and Pensions v IB* [2017] CSIH 35. More recently, in *Secretary of State for Work and Pensions v GM and Liverpool City Council* [2018] UKUT 425 (AAC), I referred to counsel's summary of the relevant principles to be extracted from those two authorities in these terms (at paragraphs 29 and 30):

"29. In her skeleton argument, Miss Bond helpfully summarised the relevant principles to be applied in the light of *Nelson* and *Secretary of State for Work and Pensions v IB* [2017] CSIH 35 as follows:

'(1) "Bedroom" is an ordinary and familiar English word which is not defined in the legislation. The statutory test based on this word should not be re-written or paraphrased. The word "bedroom" should be construed and applied in its context having regard to the underlying purposes of the legislation: *Nelson* at [19].

(2) The underlying purposes of the test and the context in which the word "bedroom" is used are important and often determinative factors to be taken into account in determining whether on the facts of a given case the test is satisfied: *Nelson* at [21].

(3) The underlying purpose of regulation B13 is to limit the housing benefit entitlement of those under-occupying accommodation. The trigger for a reduction is set by reference to the entitlement of a tenant to bedrooms for the occupation of the categories of people listed in regulation B13. What regulation B13 therefore requires is an assessment of the claimant's entitlement to bedrooms. It is only when that entitlement to bedrooms is less than the number of bedrooms in the home that a reduction can be made: *Nelson* at [24]-[26].

(4) The use or potential use of the relevant room or rooms can be by any of the people listed in the categories set out in regulation B13, which means that it has to be considered whether the relevant room or rooms could be used by any of the listed people: *Nelson* at [27(i)-(ii)], [28].

(5) The classification and description of the property is a matter of fact to be determined objectively by reference to the property's vacant state without paying regard to how it is actually used from time to time: *Nelson* at [28]; *IB* at [20].

(6) A starting point for determining how the property could be used and the number of bedrooms it contains is the landlord's description but this is only a starting point and is not determinative: *Nelson* at [30]; IB at [22].

(7) In the event of a dispute a number of case sensitive factors will need to be considered including (a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy: *Nelson* at [31].

(8) It may include deciding whether a room is suitable to accommodate a bed with, for example, sufficient space, height, light, privacy to be classified as a bedroom: *IB* at [22].

(9) It may involve taking into account the number of rooms in the property, their size, layout and function as living / dining space, kitchen, washing / toilet facilities and what other space is available in the property as a whole: *IB* at [22].

(10) Evidence of how similar rooms / spaces are used in other properties in the area may assist: *Nelson* at [32].

(11) To be a bedroom the room need not generally be reasonably fit for full-time occupation of this nature, as opposed to short-term or irregular occupation as a visitor or overnight guest, such as an overnight carer: *Nelson* at [57]-[60].'

30. In addition, one might add to those statements of principle the following further proposition, also drawn from Miss Bond's skeleton argument:

'(12) For a room to function as a bedroom properly so-called there must be adequate room for a bed and also 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 undressing. There are a range of different ways in which those requirements may be met. It all depends on the size and configuration of the room in question. A room with space only for a single bed and chest of drawers may be sufficient: *M v Secretary of State for Work & Pensions* [2017] UKUT 443 (AAC) at [65]-[66].'"

13. We also now have the benefit of the Court of Appeal's judgment in *Secretary of State for Work and Pensions v Hockley and Nuneaton and Bedworth Borough Council* [2019]

EWCA Civ 1080 (or '*Hockley*'). One principal reason why the present appeal has taken so long to resolve is that during its second visit to the Upper Tribunal it was stayed pending the outcome of Court of Appeal proceedings in *Hockley*. For present purposes, the central passage in the decision in *Hockley* is in the judgment of Nicola Davies LJ at paragraphs 36-42:

> "Discussion
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> 36. The regulations represent an instrument of social policy applicable to the usage of social entitlement. The intention of the legislation is to: ensure that social housing is used in the most effective way possible; improve the mismatch of property with those living within it; reduce overcrowding; place families in appropriately sized accommodation; increase mobility in the socially rented sector; incentivise work; introduce greater fairness between claimants living in the private and socially rented sector; and reduce public expenditure. The purpose of the regulations is to calculate what, if any, caps are to be applied to welfare benefits, in particular HB. The regulations do not provide social entitlement to physical housing.
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> 37. The methodology of the regulations is that the bedroom is used as a proxy for need. The size criteria/bedroom criteria are a means of quantifying cash entitlement. A 'bedroom' does not represent a precise proxy. The Secretary of State accepts that it is an imprecise means of measuring need but it serves the purpose because all persons in housing need a bedroom and thus it is useful. It is also accepted that mismatches can arise but can be met, for example, by DHPs.
>
> 38.'Bedroom' is an ordinary word which is neither defined nor qualified in the regulations. The word has to be construed and applied in its context having regard to the underlying purposes of the legislation. The underlying purpose of the regulations is to limit HB entitlement to those occupying social housing. The language of the regulations demonstrates that the criteria identified as limiting such benefit is the entitlement of a tenant to a bedroom for persons listed in subparagraphs (5) and (6). The assessment is to be carried out by the relevant authority in respect of a notionally vacant house. A point accepted by the first respondent. It is also accepted by the first respondent that B13(5) depersonalises the assessment to be performed such that the characteristics of the particular individuals are irrelevant. It follows that such an assessment is an objective one.
>
> 39. There is nothing in the regulations to indicate that any such assessment is required to take account of how a property and, in particular, the bedrooms in the property would be used by a particular family unit. Were that to be so, the purpose underlying the legislation would be frustrated as a tenant could, by use of the property, change the objective classification so as to reduce the relevant number of bedrooms. This further demonstrates the objective nature of the assessment and, with it, the interpretation of 'bedroom' within B13(5).
>
> 40. Such reasoning is consistent with that of the UT in *Nelson* and the Court of Session in *IB* which considered the underlying purpose of the legislation and the use of the word 'bedroom' in that context. It is not consistent with the approach of the UT in this case, which introduced a subjective element into that assessment, which I find is supported neither by the words of the regulation nor the intention of the legislation.
>
> Conclusion
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> 41. For the reasons given I find that pursuant to the size criteria (Regulation B13(5) of the Housing Benefit Regulations 2006, which entitles the housing benefit claimant

> to 'one bedroom for each of the following categories of person' in occupation of the property) the word 'bedroom' should be interpreted as meaning a room capable of being used as a 'bedroom' by any of the listed categories and not a room capable of being used as a 'bedroom' by the particular claimant. In holding that the correct interpretation was a room capable of being used as a 'bedroom' by the particular claimant, the UT erred in law and its decision was wrong.
>
> 42. The appeal is allowed. The decision of the UT is quashed. In applying Regulation B13 to the property at the centre of this case, I find that RH is entitled to a two-bedroomed property."

14. Mr Lewis made two main submissions based on *Hockley*. First, the Court of Appeal had confirmed that a room was a 'bedroom' within regulation B13 if it was capable of use as such by any one of the categories of persons identified in regulation B13(5)(a)-(e) (see paragraph 41 of *Hockley*) – so occupation by a child alone would suffice. Second, and so far as was material to the issues arising in this appeal, nothing the Court of Appeal said in *Hockley* cast any doubt on the principles laid down by the Upper Tribunal in *Nelson* and by the Court of Session in *IB*. Indeed, his first submission was reflected in the Upper Tribunal's decision in *Nelson* at paragraphs 27 and 28.

15. Mr Halewood also made two main submissions based on *Hockley*. First, he argued that *Hockley* was bad law and the outcome on the facts of that case was positively perverse. Second, he contended that the Court of Appeal in that case was in any event solely concerned with the "connection issue", namely is "a room in a dwelling classified without reference to the particular individual or class of individual who may occupy it or must the room in question be one that can be used as a bedroom by the actual occupants or class of occupants" (*Nuneaton and Bedworth Borough Council v RH and the Secretary of State for Work and Pensions (HB)* [2017] UKUT 471 (AAC) at paragraph 2). The Court of Appeal in *Hockley*, he argued, was not concerned with the "classification issue", namely whether the room could be used as a bedroom at all.

16. I have no hesitation in adopting Mr Lewis's submissions in preference to those of Mr Halewood on this point. Whatever one's view of the outcome on the facts in *Hockley*, it is a decision of the Court of Appeal and the legal principles it sets out are binding on me as a matter of precedent. Furthermore, while the Upper Tribunal in *Hockley* had characterised the case as turning on the connection issue, rather than the classification issue, the Court of Appeal's judgment clearly addresses the latter question. The Court of Appeal's proposition (as stated at paragraph 41) that "the word 'bedroom' should be interpreted as meaning a room capable of being used as a 'bedroom' by any of the listed categories and not a room capable of being used as a 'bedroom' by the particular claimant" is plainly part of the *ratio*, i.e. a binding statement of law, in the Court's judgment in *Hockley*.

The First-tier Tribunal's decision in this case

17. The third FTT, which sat on 16 November 2016, issued a decision notice at the end of the hearing which was short and to the point: (i) the appeal was allowed; (ii) the Council's decision of 21 February 2014 was set aside; and (iii) the FTT found "that the third upper room is not a bedroom".

18. The FTT followed this up with a fuller statement of reasons, of which paragraphs [1]-[5] set the context. Paragraphs [6]-[17] were headed "Background". Paragraphs [6]-[10] started by summarising the law relating to the 'bedroom tax'. This passage concluded with the following statement by the FTT judge:

> "… What is a bedroom is a question for this tribunal. In making its decision I must consider the ordinary usage of the word 'bedroom'. It is for me to decide on the facts whether bedroom 3:
>
> - is a room that can reasonably be described as a bedroom.
> - is too small to be reasonably described as a bedroom."

19. Paragraph [11] summarised the claimant's ground of appeal to the FTT, namely that the room in issue must be of adequate size for either one adult or two children (a submission which on the case law authorities is now plainly unsustainable). Paragraph [12] referred to several of the floor plans produced in the proceedings. Paragraph [13] identified a conflict in the evidence as to the dimensions of the room and issues of access. This conflict and other factors were considered further in paragraphs [13]-[17].

20. Paragraph [18], despite being headed "Reasons", then itemised a mixture of facts and reasons:

> "[18.] The Tribunal finds these facts:
>
> i. Although it is possible to buy a smaller bed a standard single bed is 190 cm (6 feet 3 inches) x 90 cm (3 feet). Those measurements exclude space for a headboard and bedding.
>
> ii. Bedroom 3 must be considered as it is. Bedroom 3 and the cupboard both have opening doors. [The claimant] is the tenant. He does not own the property. The tribunal is prevented by law from taking account of circumstances that were not applying at the date of the decision under appeal (section 12(8)(b) of the Social Security Act 1998).
>
> iii. The notion that if bedroom 3 is not a suitable size bedroom, then the room can still be reasonably utilised as a bedroom by physically pushing the bed tight to the radiator every time access is needed to the cupboard, is disingenuous. I reject that suggestion.
>
> iv. Bedroom 3 is a small 'L' shaped room. I consider that it is reasonable to provide for the measurement of a single adult bed of 6 feet 6 inches x 3 feet inclusive of headboard and bedding (see Fig.2). In my view, bedroom 3 cannot accommodate a standard single bed of 190 cm (6 feet 3 inches) x 90 cm (3 feet), a headboard and bedclothes, in a way that enables access to the built-in storage cupboard over the stairwell."

21. The statutory reference in paragraph [18(ii)] of the statement of reasons should have been to paragraph 6(9)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, but nothing turns on that.

The Secretary of State's grounds of appeal

22. District Tribunal Judge Jacques gave the Secretary of State permission to appeal against the decision of the third FTT on two grounds. The first was that the FTT had erred in law by failing to follow the correct approach in determining whether the room in question was a bedroom. The second was that the FTT had erred in law by failing to give adequate reasons for its decision (that the room in issue was not a bedroom). Those grounds of appeal were detailed in the notice of appeal (by Mrs J Douglas on behalf of the Secretary of State – see pp.299-305) and further developed at the oral hearing by Mr

Lewis. His final submission was that I should allow the Secretary of State's appeal, set aside the decision of the third FTT and re-make the substantive decision under appeal to the effect that the disputed room was a bedroom within the meaning of that term as used in the 2006 Regulations.

23. Mr Halewood, in contrast, argued (in conclusion) that the third FTT had properly applied the relevant law, and in particular the decision of the three-judge panel in *Nelson*. In the event it so happened I was not with him on that submission, Mr Halewood contended that the room could not be described as a bedroom within the proper meaning of that term. However, Mr Halewood did not suggest that there was any value (assuming for the present the Secretary of State's appeal was successful) in remitting the substantive appeal for yet another FTT hearing.

24. Accordingly, both representatives were agreed that one way or another the present Upper Tribunal appeal should resolve the matter once and for all, either by upholding the decision of the third FTT or by setting it aside and re-making the decision on the substantive appeal. The parties had prepared on this basis, not least as this was in accordance with the intimation in Upper Tribunal Judge Jacobs's directions on the appeal (pp.308-309).

The Upper Tribunal's analysis of the grounds of appeal

Ground 1

25. The Secretary of State's first ground of appeal was that the FTT had failed to follow the correct approach to determine whether the room in question was a bedroom. In particular, it was argued by Mr Lewis that the FTT had failed to follow the approach laid down in *Nelson* and as affirmed in *Hockley*. I agree that the FTT misdirected itself in law, and for the following three principal reasons.

26. First, and most notably, the FTT proceeded on the erroneous basis that the appropriate test to be applied was whether the room in question can "reasonably be described as a bedroom" (see statement of reasons, especially but not exclusively at paragraph [10]). However, the proper legal test is whether the room is *capable of being used* as a bedroom, not whether it could *reasonably be described* as a bedroom.

27. Second, both *Nelson* and *Hockley* make it plain that the test is whether the room in question is capable of use as a bedroom by any one of the persons listed in regulation B13(5), including by a child. Mr Lewis's submission was accordingly that a room which is only capable of occupation as a bedroom by a child is still a bedroom for the purpose of regulation B13. (I should add that Mr Lewis's submission was that the room in question in this appeal was, in any event, capable of occupation as a bedroom by an adult). Be that as it may, the FTT had simply not addressed the question of whether <u>any</u> regulation B13(5) category of person could use the room as a bedroom.

28. Third, *Nelson* and *Hockley* also confirm that the test is an objective one, and so involves consideration of the accommodation as it vacant, and not taking into account the actual use of the room by the current occupier. Here, however, the FTT appeared to have taken into account subjective matters relating to the accommodation, such as the claimant's own use of the room in question (see e.g. statement of reasons at paragraph [15]).

29. Mr Halewood's submissions on the appeal were principally directed towards the facts of the case and whether the room in issue was capable of use as a bedroom. These submissions will be considered below in the context of re-making the decision under appeal. However, as regard the logically prior question, i.e. had the FTT erred in law, Mr Halewood sought to argue that the FTT had properly followed and applied the test laid

down in *Nelson*. However, his arguments in that regard were not persuasive. In the first place, for example, Mr Halewood did not satisfactorily address Mr Lewis's point about the FTT eliding and conflating the legal test from being whether the room was 'capable of being used' as a bedroom into being whether it was 'reasonably described as a bedroom'.

30. For a further example, and secondly, in response to Mr Lewis's submission that potential use by any of the categories of person in regulation B13(5) must be considered, Mr Halewood argued that on this basis a tiny room, accessed by a sliding door, and that could only accommodate a 3' x 2' cot or Moses basket, would be a bedroom. Furthermore, he contended, a property with three such small (indeed, tiny) rooms could then be described as a 3-bed house, which was manifestly absurd (see by analogy *Nelson* at paragraph 33). However, as Mr Lewis responded, such a dramatic example fails to assist, not least as the room currently in dispute was plainly of a different nature. In addition, the Upper Tribunal's dismissal of the Secretary of State's extreme example in *Nelson* at paragraph 33 was by way of prelude to its exposition in the rest of the decision of the proper principles to be applied in determining whether a room is capable of being used as a bedroom – principles which I have found that the FTT failed properly to apply.

31. I therefore find Ground 1 is made out.

Ground 2

32. The Secretary of State's second ground of appeal was put in the following way in the notice of appeal (pp.304-305):

> "It is not submitted that the FfT should have addressed every single issue put forward by the parties in this matter. However, it is not clear exactly what legal test the FfT applied in this case, nor why it did not follow the approach in *Nelson*. Furthermore, the FfT either failed to make or failed to set out crucial findings of fact, such as whether the bed the claimant slept in as a child (referred to in para 15 of the SoR [statement of reasons]) was an adult sized bed or not. It also failed to address the question of whether the room could accommodate an adult bed and wardrobe, notwithstanding that this might have impeded access to the built-in cupboard. These were material points which should have been addressed by the FfT and in the absence of these it is difficult to follow the chain of reasoning that led the FfT to its conclusions."

33. Neither Mr Lewis nor Mr Halewood devoted much of their attention to this ground of appeal in their respective oral submissions. That was entirely sensible, for the simple reason that I do not consider that this second ground really adds very much at all. It stands or falls with the first and primary ground of appeal. As such, in my assessment it stands rather than falls.

Conclusion on grounds of appeal

34. I therefore conclude that the Tribunal erred in law for the reasons set out at paragraphs 26-28 above. This was a material error of law such that I should set aside the FTT's decision. There was, as already noted, understandably no enthusiasm from either party for the matter to be remitted to a new First-tier Tribunal. I therefore proceed to re-decide the underlying appeal myself.

The Upper Tribunal's re-made decision

35. The decision under appeal is the Council's decision of 21 February 2014, namely that the claimant's maximum eligible rent for the purposes of his entitlement to housing

benefit is subject to a 25% reduction as he lives alone and so in effect is deemed by the 2006 Regulations only to require one bedroom while he occupies a 3-bedroom property.

36. Mr Lewis, for the Secretary of State, in short contends that the Council's decision was correct.

37. Mr Halewood, for the claimant, argues that the Council's decision is fundamentally flawed. In short, his submission is that two of the bedrooms in the claimant's property have always been what he conveniently described as "*Nelson* compliant", while the third upstairs room is no longer so compliant and accordingly is not a bedroom for the purposes of regulation B13.

38. The fact that the third FTT erred in law does not necessarily mean that the tribunal arrived at the wrong conclusion on the facts. Nor does the simple fact that two previous FTTs had decided the third room was not a bedroom mean that the third FTT came to an incorrect conclusion. Rather, in redeciding this appeal, I must consider the matter entirely afresh and apply the principles laid down in *Nelson* and *Hockley* and as summarised above at paragraphs 12 and 13.

39. A starting point is the landlord's description of the property, although this is not determinative. The housing association landlord regard the property in question as a 3-bedroom property (and accordingly charge rent on that basis). Indeed, in this context I note the first FTT found as a fact that the social landlord had been asked about reclassification of the third room (as a non-bedroom) but had expressly declined to do so, the FTT having (remarkably) taken direct evidence on the point at the hearing (see pp.77-79 and p.96, paragraph 17; see also pp.224-225 paragraphs 15-16). Moreover, the claimant himself had described the property as having 3 bedrooms when completing a housing benefit claim form (or review form) in September 2008 (p.4), at which date, of course, the number of bedrooms was not a contentious issue with significant housing benefit ramifications.

40. Given the dispute between the parties, it is necessary to make findings of fact on the various case sensitive issues identified in *Nelson*, namely those including (a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy.

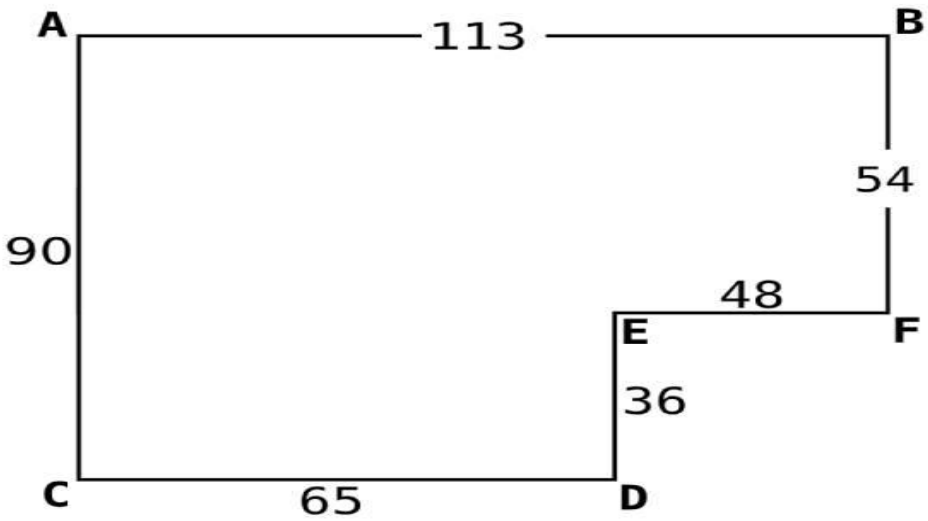
41. It is convenient to take the factors of size, configuration and overall dimensions together. There are four different room plans to be found in the papers (pp.72, 138, 157 and 258). While giving directions in the first Upper Tribunal appeal, Judge Jacobs highlighted some of the inconsistencies and difficulties with these plans (see p.253). For example, the plans at pp.138 and 157 are drawn on scaled paper but do not include complete room measurements. However, in terms of the actual measurements, I accept as accurate the imperial dimensions as shown on the plans at pp.72 and 258, which Mr Halewood confirmed he had himself measured on his hands and knees. Mr Lewis was not in a position to argue with these figures and did not seek to do so.

42. The room layout is as follows. The room is an L-shape design, or strictly an irregular inverted L-shape. It thus has the appearance of a perfect rectangle but with a smaller rectangular area omitted in the "bottom right hand corner" of the internal layout of the room. This "missing corner" is a space that extends over the stairwell, and in large part comprises a cupboard which has a door (apparently the same width – 31" – as the main door into the room) opening into the room.

43. The width of the room at its greatest extent, along wall AB (see diagram), is 113" (or 9' 5"). On this exterior wall there is a window and a radiator approximately half way along.

The depth of the room from the main door to the window (wall AC) is 90" (or 7' 6"). However, because of the inverted L-shape the room is 65" (5' 5") wide as one enters (wall CD), opening to its full width after entering the room by a total of 3'. The "missing corner" (void DEF) is 36" x 48", meaning that the room's full width (of 113") is enjoyed only to the depth of 54" (wall BF). On that basis Mr Halewood computes the floor area of the room as 58.63 square feet. I agree with his arithmetic to that extent. Mr Halewood's plan at p.72 has a further annotation stating "usable floor space of 45.28 sq/ft", a figure arrived at by deducting the floor space within the arc of each the two doors opening into the room (31" x 31"). I disregard that figure. Floor space for a room is not conventionally measured on that basis.

Diagram (not to scale)



44. As regard access, there is one door in wall CD (off the landing) which opens inwards. The plan at p.72 states the door width is 31". It follows that even when fully open at 90 degrees it does not extend into the main part of the room where the width is 113". There is nothing to suggest that access is impeded in any way by e.g. a sloping ceiling. I note the second FTT found the height of the room (presumably uniform) to be 86" (p.224, paragraph 12).

45. As for natural and electric lighting, there is the window on the north wall AB. There is nothing to suggest the room is other than lit in the usual way by a light hanging from the ceiling. Ventilation is provided by the window and, when open, the door to the landing. Lastly, with respect to privacy, there is nothing untoward about the room.

46. I have also considered (and disregarded) the history of the room to the following extent. First, I do not place any weight on the fact that the claimant slept in the room as a child. I say that as at that stage the room did not have the radiator installed along the long external wall. I was not given precise dimensions for (or positioning of) the radiator, although Mr Halewood stated that it stood proud of the wall by as much as 6". Whatever its dimensions, I accept that in its absence there would have been more flexibility in the room in terms of the placement of a bed and any other furniture. Second, obviously I

disregard the fact that at various times the claimant has used the room as a store room or a dining room. Rather, classification must be determined objectively by reference to the property's vacant state and without regard to how it has been used from time to time.

47. In addition, of course, and crucially, I must consider whether the room is suitable to accommodate a bed with, for example, sufficient space, height, light, privacy to be classified as a bedroom. For present purposes, and indeed for the purposes of argument (and without seeking to lay down any principle of law) I accept Mr Halewood's argument that a standard single adult bed is 6' 3" (75") by 3' (36") and also that it is not feasible to place such a bed with the head of the bed on the external wall AB and the foot of the bed facing the main door in wall CD. This is because if the bed is in that position it would only be possible to open the door to the room by at most about 15", namely half its opening arc.

48. However, I do not accept his argument that such a bed would not fit the other way in the room, on the East-West axis. The head of the bed could be placed against the left-hand wall AC with the foot of the bed protruding into the narrower space at the right-hand end of the room by about 10" or so, facing wall BF. The bed could be positioned say 12" in from the window wall AB, thereby allowing for both the radiator itself and Mr Halewood's officially recommended 110m (4½") gap from a heat source. I recognise this would only leave a small gap between the bed and the corner by the cupboard at corner point E (approximately 6") and make access to the right-hand end of the room difficult. While Mr Halewood placed great emphasis on the question of access to the cupboard along wall EF, I have concluded this emphasis is misplaced for two reasons.

49. First, in practice access would not be impossible – for example, an adult could either sit on the corner of the bed and swing his or her legs over the end of the bed to access the space or alternatively move the bed slightly back towards wall AB as and when necessary to gain access to the cupboard. Alternatively, a small single bed (width 2' 6") could be used in the room, leaving a gap of 12" at corner point E, which would allow a child to pass through the gap. Furthermore, a headboard is not an essential part of a standard bed and I do not consider that a mattress or bedding would make an appreciable difference to this usage. Such a configuration would also allow a small bedside cabinet with drawers to be placed next to the bed, on the side facing the door in wall CD, and without snagging on the main door as it opens, which takes me to the second point.

50. Secondly, while easy access to a built-in cupboard may be optimal, as a matter of principle an occupant's restricted access to such a cupboard does not prevent the room as being capable of being used as a bedroom. In that context, I take into account that for a room to function as a bedroom properly so-called there must be adequate room for a bed and also for clothes storage, along with a flat surface of some sort as well as sufficient free space for dressing and undressing. There are — on which see *M v Secretary of State for Work and Pensions* [2017] UKUT 443 (AAC) — a range of different ways in which such requirements may be met, depending on the size and configuration of the particular room. Thus, case law shows that a room with space only for a single bed and bedside chest of drawers may be sufficient – a wardrobe in addition, while it may be desirable, is not essential. Restricted access to the corner cupboard cannot therefore be fatal to classification of the room as a bedroom. By the same token, the room might have a divan bed which may be positioned in such a way that it is difficult, or even impossible, readily to access some or all of the storage space underneath. If the *Nelson* and *M v Secretary of State for Work and Pensions* tests are otherwise met, such lack of access to storage space in a divan bed cannot in and of itself stop the room being used as a bedroom.

51. Finally, and equally relevantly, I do bear in mind that to be classified as a bedroom the room need not generally be reasonably fit for full-time occupation of this nature, as opposed to short-term or irregular occupation as a visitor or overnight guest, such as an overnight carer.

52. In reaching my decision I have also considered the facts and reasons given by the third FTT for finding the room was *not* a bedroom, which Mr Halewood sought to buttress. I have not found those arguments persuasive for the following reasons.

53. The FTT's first reason was that "although it is possible to buy a smaller bed a standard single bed is 190 cm (6 feet 3 inches) x 90 cm (3 feet). Those measurements exclude space for a headboard and bedding." However, this ignores the alternative option of using a small (i.e. narrower) single bed measuring 6' 3" x 2' 6". Furthermore, as already noted, a headboard is not essential and bedding will not make an appreciable difference on the facts of this case.

54. The FTT's second reason was that "bedroom 3 must be considered as it is. Bedroom 3 and the cupboard both have opening doors"; moreover, the FTT noted (correctly, of course) that the claimant is the tenant and does not have the authority to make structural adjustments. I agree that the room must be assessed as it is – but (see paragraphs 49 and 50 above) the room can still be used as a bedroom even if access to the cupboard is restricted to some extent.

55. The FTT's third reason was that "the notion that if bedroom 3 is not a suitable size bedroom, then the room can still be reasonably utilised as a bedroom by physically pushing the bed tight to the radiator every time access is needed to the cupboard, is disingenuous." This argument is not compelling for the same reason as set out in the previous two paragraphs. In any event, if a 2' 6" bed is used, access to the cupboard is not seriously impeded.

56. Finally, the FTT considered that "it is reasonable to provide for the measurement of a single adult bed of 6 feet 6 inches x 3 feet inclusive of headboard and bedding (see Fig.2). In my view, bedroom 3 cannot accommodate a standard single bed of 190 cm (6 feet 3 inches) x 90 cm (3 feet), a headboard and bedclothes, in a way that enables access to the built-in storage cupboard over the stairwell." This is no more than a repetition of the preceding reasons. It also overlooks the point that in assessing whether the room is capable of being used as a bedroom one must consider its use by any regulation B13(5) individual and/or an occasional user.

57. The essence of Mr Halewood's argument on behalf of the claimant was that the installation of the radiator in the 2000s had the effect of converting the property from 3-bedroom accommodation into a house with 2 bedrooms and a box room (or cot room). Applying the principles in *Nelson*, *IB* and *Hockley*, and based on my findings and reasons as set out above, I do not accept that submission. Instead, I consider the room could be used by either a single adult or a single child. Mr Halewood really had no answer to the proposition that – putting to one side whether the room was capable of use by an adult – the room was a bedroom if it could be used as such by a child. So, I am driven to the same conclusion on the facts as that reached by the second FTT, and summarised at paragraph 6 of its decision notice from 17 March 2015 (p.169), namely:

> *"The Tribunal considers that although the room is small it does not prevent it being used by a child i.e. somebody who is sixteen or under or by an overnight carer or an adult. The Tribunal in arriving at its decision took into account the [Nelson] case [2014] UKUT 0525 (AAC)."*

Conclusion

58. I conclude that the decision of the First-tier Tribunal involves an error of law for the reasons summarised above at paragraphs 26-28. I therefore allow the Secretary of State's appeal and set aside the decision of the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). There is no point in yet another re-hearing of the case by a new First-tier Tribunal (section 12(2)(b)(i)). Accordingly, I re-decide the appeal that was before the First-tier Tribunal (section 12(2)(b)(ii)). My substituted decision is as follows:

> *The appeal is dismissed.*
>
> *The decision made by the Council on 21 February 2014 was correct and stands.*
>
> *The Tribunal was satisfied on the facts that the room in question has the necessary attributes to be considered a bedroom under regulation B13 of the Housing Benefit Regulations 2006. It follows that the claimant was under-occupying his accommodation by two bedrooms and subject to a reduction of 25% in the amount of his maximum eligible rent for the purposes of his housing benefit entitlement.*

Signed on the original
on 25 November 2019

Nicholas Wikeley
Judge of the Upper Tribunal