NCN: [2022] UKUT 58 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CH/1970/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

LONDON BOROUGH OF WALTHAM FOREST

Appellant

- v –

PO

Respondent

Before: Upper Tribunal Judge Ovey

Hearing date: 10th May 2021
Decision date: 25th June 2021

Representation:

Appellant: Mr. Paul Stagg
Respondent: Mr. Desmond Rutledge

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 12th March 2019 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions generally

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The new tribunal hearing the case should not include the members of the previous tribunal.**

Directions to the new tribunal

3. **The issues for consideration (subject to any additional issues which may be raised by the parties prior to the hearing of the appeal) are as follows:**

(1) Whether the appropriate deduction applicable to the Respondent's housing benefit pursuant to regulation B13 of the Housing Benefits Regulations 2006 was 25%:

(a) for any part of the period between 1st April 2013 and 8th August 2018 ("the period of the alleged overpayment"); and

(b) from 9th August 2018 onwards.

(2) Whether any non-dependant deductions are applicable to the Respondent's housing benefit during any part of the period of the alleged overpayment.

(3) Whether any resulting overpayment is recoverable from the Respondent.

4. In considering the first issue, the tribunal must approach it in the following manner:

(1) The tribunal must ascertain the dates on which each young woman placed with the Respondent was resident in the Respondent's home.

(2) The tribunal must ascertain the dates of birth of each of those young women.

(3) The tribunal must ascertain the periods for which a 14% or 25% deduction is appropriate, applying the rules below.

(4) For all periods during which one of those young women was living with the Respondent (regardless of whether that young woman had reached the age of 18), the Respondent is entitled to an additional bedroom for that young woman and so the relevant deduction under regulation B13 is only 14%.

(5) For all periods during which there was no placement with the Respondent, subject to (6) below, a 25% deduction is applicable from the earliest of the following three dates until the date on which the next placement commenced:

(a) 52 weeks from the date on which the young woman previously placed with the Respondent moved out;

(b) 52 weeks from the date on which the young woman previously placed with the Respondent ceased to be a "qualifying young person" within the meaning of regulations 2 and 19 of the 2006 Regulations, section 142 of the Social Security Contributions and Benefits Act 1992 and regulations 2 to 8 of the Child Benefit (General) Regulations 2006; and

(c) 52 weeks from the date of the young woman's 18th birthday.

(6) For the avoidance of doubt, sub-paragraph (4) prevails over sub-paragraph (5), so that no period of 25% deduction under the latter sub-paragraph can begin prior to the date on which the young woman previously placed with the Respondent moved out of the Respondent's home.

5. In relation to the second issue, non-dependant deductions can only possibly be applicable in relation to any period during which:

(1) a young woman was living with the Respondent;

(2) she had reached the age of 18 years; and

(3) she was not a "qualifying young person" within the meaning of the legislation set out above.

Directions to the Respondent

6. The Respondent shall, by 28 days from receipt of this decision, provide the following information in writing to the Council so far as it is within her knowledge:

(1) (Subject to paragraph 7) the full names of the three young women who were placed with her and who are referred to at page 137 of the papers before the Upper Tribunal ("the placement list"), namely, YA, SM and VA.

(2) Whether the dates of placement set out in the placement list are correct, and if not, what the correct dates are.

(3) The dates of birth of the young women.

(4) In relation to any period during which any of those young women was living with her and was over the age of 18:

(a) whether the young woman in question was engaged in education or training, and if so, what the nature of that education and training was;

(b) whether the young woman in question was engaged in employment, and if so, the identity of her employer, the nature of her work, the hours worked by her and the amount earned by her;

(c) in relation to any period of illness which prevented the young woman in question from engaging in any of those activities, the dates of that period of illness; and

(d) whether the young woman in question was in receipt of any social security benefits in her own right, and if so, which benefits.

7. The Respondent may, if she wishes, seek the approval of the Family and Homes Directorate (or other appropriate body) of the Council to the disclosure of the full name of VA and may decline to provide the name if advised by that body that she may not lawfully do so.

REASONS FOR DECISION

Preliminary

1. This is an appeal by the London Borough of Waltham Forest ("the Council") against the decision of the First-tier Tribunal given on 12th March 2019. By its decision the tribunal allowed the respondent's appeal against the Council's decision made on 13th August 2018 that the respondent was subject to a 25% reduction in her eligible rent for housing benefit purposes, with the consequence that she had been overpaid housing benefit since 31st July 2017, and decided that she was entitled to be treated as a foster carer for those purposes, with the consequence (as the tribunal concluded) that there had been no overpayment.

2. Behind that summary of the decision lies:

(1) A complex legislative thicket; and

(2) A certain degree of confusion at times on the part of the Council as to the operation of the relevant legislation.

3. Fortunately, the parties to this appeal have been very ably represented by experienced counsel, who have agreed upon the operation of the legislation in the circumstances which I have to consider and upon the course I should take. They have also come close to agreement on the directions I should make if I were to refer the matter back to the First-tier Tribunal for rehearing, as they both submit would be the appropriate course. I agree with them on that point and am extremely grateful to them both for their assistance.

4. Given the measure of agreement that has been reached, I shall try to keep this decision short, but I need to bear in mind that the new tribunal which will be hearing the case will have to apply complex and detailed directions and may be assisted by an explanation of the reasons for which those directions have been made.

The background facts

5. The respondent is a single woman living in a three bedroom properly which she rents from a housing association.

6. By a letter dated 27th May 2010 (bundle p.151) the Council informed the respondent that she had been approved as a regulation 28 foster carer for one supported lodgings placement. She received a formal notice of approval dated 4th June 2010 (p.154) which states expressly that the decision of the Fostering Service was that:

> "In accordance with Regulation 28(5)(a) of the Fostering Services Regulations 2002, … your application to foster has been approved."

The notice of approval also set out the terms of the approval, namely, that the type of approval was supported lodgings placement, the maximum number of children was 1 young person, the age range was 16+ and placements would be of females only.

7. It is common ground that the Council's Fostering Service placed a number of young women with the respondent over the next few years.

8. By a letter dated 27th March 2018 (p.155) the Council informed the respondent that it had considered her "re-approval from a supported lodging to a regulation 27 foster carer" and had approved her as "a foster carer to care for 1 child aged 0-18, with preference of young women age 16 plus".

9. Arising from those facts, there has developed a lengthy and complicated dispute as to whether the respondent is subject to a 25% deduction in respect of the eligible rent or whether the deduction is limited to 14% only.

The legislative framework

Housing benefit generally

10. Since the case turns on the respondent's entitlement to housing benefit, it is convenient to begin with the relevant housing benefit legislation. It is common ground that the social sector scheme rules (that is, the rules commonly known as "the bedroom tax", but also referred to as the "removal of the spare room subsidy" or the "under-occupation charge") apply.

11. It follows that under reg. B13(1) of the Housing Benefit Regulations 2006, S.I. 2006 No.213, as amended, a maximum rent must be determined in accordance with paragraphs (2) to (4). Under reg. B13(2):

> "The relevant authority must determine a limited rent by –
>
> …
>
> (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) …".

12. The appropriate percentage in reg. B13(3) is 14% if the number of bedrooms in the property exceeds the number of bedrooms to which the claimant is entitled by one and 25% if the excess number of bedrooms is two or more.

13. Reg.B13(5) concerns people who occupy the property as their home. The claimant is entitled to one bedroom, in addition to his or her own bedroom, in respect of various categories of such people, including "a person who is not a child".

14. The claimant is also entitled under reg. B13(6) to one additional bedroom in specified circumstances, including the case where "a relevant person is a qualifying parent or carer". The definition of "relevant person" in reg. B13(9) includes the claimant.

15. Other relevant definitions are found in reg.2. "Qualifying parent or carer" is defined to mean:

> "… a person who has a bedroom in the dwelling they occupy as their home additional to those used by the persons who occupy the dwelling as their home and who –
>
> (a) has a child or qualifying young person placed with them as mentioned in regulation 21(3) who by virtue of that provision is not treated as occupying their dwelling; or
>
> (b) has been approved as a foster parent under regulation 27 of the Fostering Services (England) Regulations 2011 … but does not have a child or qualifying young person placed with them and has not had a child or qualifying young person placed with them for a period which does not exceed 52 weeks."
>
> "Child" is defined as a person under the age of 16, while "young person" has the meaning prescribed in reg. 19.

16. At this point the outlines of the dispute between the Council and the respondent begin to emerge. She is occupying a three bedroom house. At first sight, she is entitled to one bedroom only and so a reduction of 25% falls to be made in her maximum rent. That reduction will be limited to 14%, however, if she is fostering a child or qualifying young person or has done so within the previous 52 weeks. An alternative way of limiting the reduction to 14% is if a person who is not a child occupies the property as her home, but the respondent did not contend before the First-tier Tribunal that that was the position. In broad terms, the respondent's case was that she was a qualifying parent or carer at all material times, either because she was fostering a qualifying young person placed with her by the Council or because she was entitled to the benefit of the 52 weeks provision.

17. It is therefore necessary to look at regs. 19 and 21 to see the definition of "young person" and the circumstances in which a young person placed with the claimant is not treated as occupying the claimant's dwelling under reg. 21(3). Those provisions in turn take the reader to the Social Security Contributions and Benefits Act 1992 for the definition of "qualifying young person" and to the Children Act 1989 for the placement provisions relevant for these purposes. It is also necessary to look at the Fostering Services (England) Regulations.

Qualifying young person

18. Reg. 19 of the Housing Benefit Regulations cross-refers the reader to s.142 of the Social Security Contributions and Benefits Act for the definition of "qualifying young person. Under that provision, a qualifying young person is:

> "… a person, other than a child [i.e., a person under 16] who –
>
> (a) has not attained such age (greater than 16) as is prescribed by regulations made by the Treasury, and
>
> (b) satisfies conditions so prescribed."

19. The prescribed age and conditions relevant for this purpose are prescribed by the Treasury in Part 2 (Regulations 2 to 8) of the Child Benefit (General) Regulations 2006, S.I. 2006/223. The provisions are complex and I gratefully adopt Mr. Stagg's summary of their broad effect, which is sufficient for present purposes. Qualifying young persons are:

(1) those aged up to 20 in full-time education (but not those studying for a degree or equivalent): reg. 3;

(2) 16 year olds who have left relevant education or training: reg. 4;

(3) 16 and 17 year olds who have registered for work, education or training: reg. 5;

(4) Those aged up to 20 who would qualify but for a relevant interruption: reg. 6.

Reg. 7 sets out how the date at which a person ceases to be a qualifying young person is to be identified and reg. 8 imposes a condition that the person should not be in receipt of specified social security benefits.

Placement provisions in the Children Act

20. As it currently stands, reg.21(3) of the Housing Benefit Regulations provides, so far as material, that a young person shall not be treated as a member of the claimant's household nor as occupying the claimant's dwelling where he or she is placed with the claimant by a local authority under section 22C(2) of the Children Act 1989. Section 22C was added by the Children and Young Persons Act 2008 with effect from 1st April 2011 (with the exception of subs. (11), giving the Secretary of State power to make regulations, which came into force on 1st September 2009) and currently reads:

"(1) This section applies where a local authority are looking after a child ("C").

(2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).

(3) A person ("P") falls within this subsection if –

(a) P is a parent of C;

(b) P is not a parent of C, but has parental responsibility for C; or

(c) in a case where C is in the care of the local authority and there was a child arrangements order in force with respect to C immediately before the care order was made, P was a person named in the child arrangements order as a person which whom C was to live.

(4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so –

(a) would not be consistent with C's welfare; or

(b) would not be reasonably practicable.

(5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.

(6) In subsection (5) "placement" means –

(a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;

(b) placement with a local authority foster parent who does not fall within paragraph (a);

…"

21. "Local authority foster parent" is defined in section 105(1) as a person authorised as such in accordance, in England, with regulations made by virtue of paragraph 12F of Schedule 2 to the Act. "Child" is defined as a person under the age of 18, subject to an exception not material for present purposes.

22. The current regulations are the Fostering Services (England) Regulations 2011, S.I. 2011 No. 581. They provide a process for approval of an individual as a foster parent in reg. 27 and require by reg. 28 that the approval must be reviewed whenever the fostering service provider considers it necessary but in any case at intervals of not more than a year. Under reg. 30 a case record must be kept in respect of each foster parent which will include reports, recommendations and the foster care agreement and in addition will include a record of each placement with the foster parent, including the name, age and sex of each child placed and the dates of the placement.

23. In practice, therefore, if a local authority is unable to make arrangements for the placement of a looked after child in accordance with section 22C(2) of the Children Act, the child will be placed with a foster parent approved under reg. 27 of the 2011 Regulations.

24. S.22C is part of a group of sections, ss.22A to 22F, which were substituted for s.23, which was itself repealed. Although those provisions came into force in relation to England on 1st April 2011, reg. 21(3) of the Housing Benefit Regulations continued to refer, not to s.22C(2), but to s.23(2)(a) of the Children Act until 3rd November 2017. S.23(2)(a) differed from s.22C(2) in that it covered placement with all of "a family", "a relative" and "any other suitable person", so that (for present purposes) it extended to an unrelated local authority foster parent, whereas s.22C(2) does not at first sight do so.

25. The difficulty to which this gives rise is resolved, for periods prior to 3rd November 2017, by s.17(2) of the Interpretation Act 1978, which provides:

> "Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, -
>
> (a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;"

S.23 of the 1978 Act makes clear that "enactment" includes subordinate legislation. It follows that the reference in reg. 21 to s.23(2)(a) of the Children Act 1989 must be construed as a reference to that part of s.22C which re-enacts the previous provisions, albeit with modification. Mr. Stagg submits, and Mr. Rutledge agrees, that s.22C as a whole re-enacted s.23(2)(a). I have not attempted to analyse all the elements of s.23(2)(a) to work through that submission in its entirety, but, as I have said in the previous paragraph, s.23(2)(a) did envisage placements with a wider group of persons than those specified in s.22C(3), to which s.22C(2) expressly refers. I therefore accept the submission so far as is relevant for present purposes: that is to say, I accept that persons specified in s.22C(6), a group which potentially includes the respondent, are included as persons with whom a relevant placement may be made.

26. As will appear later, no placement relevant for the purposes of this appeal was made with the respondent after 3rd November 2017, so I need not go beyond the conclusion expressed above. Mr. Stagg further submits that in any event the

provisions of s.22C must be read as a whole, and the requirement in subs. (2) to make a placement in accordance with subs. (3) is expressly subject to subs. (4), which leads on to the alternative arrangements identified in subss. (5) and (6). I see the practical force of this argument, particularly given the context of housing benefit and the view I have taken of the effect of the relevant provisions up to 2nd November 2017. It would be surprising if the consequence of updating the statutory reference were to be to effect a substantive change in reg. 21. Nevertheless, as the point does not arise on this appeal, I do not express a concluded view on it.

Fostering provisions

27. I have identified in paragraph 22 above the current Fostering Regulations for the purposes of s.22C and it will be seen that those are also the regulations referred to in reg. 2 of the Housing Benefit Regulations. It will be recalled from paragraph 6, however, that the respondent's original approval was under reg. 28 of the Fostering Services Regulations 2002. This gives rise to the question whether the respondent fell outside the definition of "qualifying parent or carer" because her approval was not under reg. 27.

28. Paragraph 12F of Schedule 2 to the Children Act, under which the 2011 Fostering Regulations were made, authorises regulations under s.22C and unsurprisingly the Regulations themselves came into force at the same time as most of s.22C. The 2002 Regulations were made under, among other provisions, s.23 and paragraph 12 of Schedule 2. This brings us back to s.17 of the Interpretation Act, which provides in (2)(b):

> "in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision."

Mr. Stagg submits, and Mr. Rutledge agrees, that s.22C and paragraph 12F were, for these purposes, effectively a re-enactment with modification of s.23 and paragraph 12.

29. Mr. Stagg and Mr. Rutledge were in part addressing a different point designed to establish that the respondent's approval was validly given under reg. 28 of the 2002 Regulations, which seems to me clearly to have been the case, since those Regulations were not revoked until 1st April 2011. As I understand the submission, however, and certainly this seems to me to be its logic, a further part of the argument is that an approval given under reg. 28 did not lapse on revocation but fell to be treated as given under reg. 27 of the 2011 Regulations. The review provisions of reg. 28 would accordingly apply, as Mr. Stagg and Mr. Rutledge agree was the case. I accept that submission and it follows that the respondent was not prevented from satisfying the definition of "qualifying parent or carer" because her approval was originally given under the 2002 Regulations.

The appeal to the First-tier Tribunal

30. With that explanation of the legislative background, I turn to the detailed facts of the case and the tribunal's decision.

31. On 19th June 2013 the Council reconsidered the respondent's award of housing benefit and decided, in the light of the material at pp.71-84 in the bundle, that she was an approved foster parent and the reduction of 25% previously applied to her claim should be reduced to 14% from 1st April 2013.

32. On 1st March 2017 the Council revised the respondent's award of housing benefit by applying a 25% deduction with effect from 1st October 2016. That decision is not in the bundle but is referred to in a letter from the Council to the respondent dated 30th March 2017 at p.93. It is not clear on what ground the decision was made, but the letter of 30th March 2017 stated that it was clearly incorrect as for a period of 52 weeks from the date of the last placement the respondent was entitled to a 14% reduction while she was between placements. The mistake was corrected in a decision dated 23rd March 2017(pp. 94-95). This appears to have been in reliance on a statement in a letter dated 7th March 2017 from the respondent stating that her last placement finished on 25th July 2016 and she was still a foster carer (p.90).

33. On 12th July 2018 the Council wrote to the respondent asking if she was currently fostering and if not, the date of the last placement.

34. By a decision dated 13th August 2018 (pp.36-37) the Council reviewed the respondent's housing benefit claim and applied a 25% deduction with effect from 31st July 2017, giving rise to an overpayment of £1,240.99. The Council stated in the decision that the respondent had failed to reply to the letter of 12th July 2018 and it seems that the Council therefore made its decision on the basis that the last placement was the placement ending on 25th July 2016. The overpayment was said to be recoverable because the respondent knew that the extra bedroom was only allowed for 52 weeks after the end of the last placement and therefore could reasonably have known that she was being overpaid.

35. The respondent replied by a letter dated 21st August 2018 (pp.45-46) stating that she had not received a letter dated 12th July 2018 and that her last placement was from 28th March 2017 to 25th April 2017.

36. The Council responded by a letter dated 31st August 2018 written on the basis that the respondent's letter meant not that the most recent placement had ended on 25th April 2017 but that her last ever placement ended on that date and so thereafter she was not between placements. As a result the Council identified an additional overpayment of £439.80.

37. On 13th September 2018 the respondent wrote to the Council stating that it had wrongly been assumed that the placement was a final placement and following reassessment she had been reapproved on 2nd March 2018. She provided a copy of the reapproval letter referred to at paragraph 8 above.

38. The consequence was that the Council revised both the decision of 13th August 2018 and the decision of 31st August 2018 and by a decision dated 26th October 2018 (p.26) decided that the respondent was subject to a 25% deduction from and after 1st April 2013 on the ground that she had failed to provide evidence that she was a foster carer during the period 1st April 2013 to 6th August 2018. On that basis there was an overpayment of £6,471.05.

39. It appears from the submission to the First-tier Tribunal that the Council's principal contention was essentially that the respondent's original approval was as a supported lodging foster carer under reg. 28 of the 2002 Regulations whereas the 27th March 2018 approval was as a reg. 27 foster carer "therefore at some point her status had changed". There was evidence from February 2013 that she was

approved under reg. 27 of the 2011 Regulations, but that was an agreement which was unsigned by the Council. It was submitted that the overpayment was caused by the respondent's failure to notify the Council of her change in fostering status.

40. Against that background, the Council invited the tribunal to make directions requiring the respondent to provide a letter from the Council confirming her fostering history from 1st April 2013 and specifying (i) if the fostering was approved under reg. 27 and (ii) the start and end dates of each placement and the nature of the placement. If the respondent was unable to obtain the information, she was to be directed to give permission to the Council to contact the Children and Families division to retrieve the information on her behalf.

41. Thereafter a considerable amount of further evidence was adduced and associated submissions were made. Since I have decided to remit the case in any event, it is not necessary for me to go through it all in detail. In summary:

(1) it is clear that there have been other issues with the respondent's housing benefit, including questions as to her income and capital, and housing benefit has been suspended. This has led to difficulties with the respondent's landlord;

(2) the respondent says she is unaware of the alleged distinction between a reg. 28 foster carer and a reg. 27 foster carer and could not have known about it;

(3) the respondent says she has been required to give details of the young women placed with her in breach of data protection legislation and she is not willing to break the law;

(4) the respondent obtained from the Council's Family and Homes Directorate an anonymised list of young women placed with her, showing their age at the start of the placement and the start and end dates of the placement (p.137) and a letter dated 28th February 2019 confirming that she was a foster carer (p.142);

42. The hearing before the tribunal took place on 12th March 2019 and was attended by a representative of the Council and the respondent. The record of proceedings shows that the respondent gave oral evidence to the effect that she had been a foster carer since 2010, that "supported lodging" was a form of foster care used more for older adolescents and that after the last placement ending on 25th April 2017 "we all had to be reapproved" and could not have a further placement until after the reapproval process, which began in September 2017. It was her understanding that the 52 week period started again from reapproval. After that evidence the judge asked the Council representative whether he had any submissions or was content for the judge to make a decision and was told that the representative was content for him to make the decision. He allowed the appeal and set aside the decision made on 13th August 2018.

43. In the decision notice it was stated that the tribunal found that the respondent had been a foster carer since around 2010, became subject to the reapproval process in September 2017 and was finally reapproved on 2nd March 2018.

44. In the statement of reasons the judge said:

> "2. The [respondent] lives alone in a 3 bedroom property. The central issue in this appeal is whether or not she is a foster carer. The [respondent's] case is that she is and so should be allowed a spare bedroom for HB purposes. If this

> were the case she would be subject only to a 14% deduction of her HB. The [Council's] case is that she should not be treated as a foster carer, that it has insufficient evidence to decide otherwise, and that as such she has two spare bedrooms and is subject to a 25% deduction in her HB entitlement. The [Council] further submit that because the [respondent] has not proven her case she is a foster carer, she has received a recoverable overpayment amounting to £6,471,05 for the period 01/04/2013 to 06/08/2018 due to her failure to notify the authority with sufficient evidence of her fostering status …
>
> 17. The Tribunal accepts that [the respondent] has been a foster carer since 2010 and that she remains a foster carer at the date of decision and beyond as confirmed by the Families and Homes department in their open letter of 28/02/2019 (page 142). She remains entitled to be treated as an active foster carer for up to 52 weeks between placements provided that throughout that period of "grace" she intends accepting a further foster placement. Her last placement ended in April 2017. The re-approval process started in September 2017 during which time she was not allowed a further placement. She completed that re-approval process successfully as confirmed in [the] letter dated 27/03/2018 and as such the 52 weeks runs from that date.
>
> 18. [The respondent] has one spare room. She accepts this and is subject to the according 14% deduction. Her other bedroom as distinct from her own is necessary for her foster caring commitments and so she is not subject to the 25% deduction. She does not become subject to it until 27/03/2019, that is to say 52 weeks after the date of her re-approval letter, assuming that in the meantime she has not taken up a further foster placement. These findings set out above mean there is no overpayment."

45. The judge then went on to explain that it was not necessary to make the direction sought because he had sufficient information to make the decision, noting that he had evidence of a number of placements since 2010. The Council representative had agreed to a decision and the respondent was anxious to have a resolution of the various issues she faced.

The appeal

46. In seeking permission to appeal, the Council accepted that the tribunal was entitled to find that the respondent was at all material times a qualifying person or carer but contended that the tribunal had given insufficient consideration to the requirements of reg. 21. It was pointed out that the list of placements at p.137 showed that two of the young women placed with the respondent had attained the age of 18 during the placement and so could no longer be placed with the respondent under s.22C of the Children Act (or s.23). Other points on reg. 21 were also taken.

47. Permission to appeal was granted on 26th July 2019 on the ground that the Council had raised issues in relation to reg. 21, the interpretation of which required guidance from the Upper Tribunal.

48. The Council supplemented its submissions as to where the tribunal had gone wrong in its notice of appeal and the respondent, who was by then represented by the local community law centre, made very detailed and careful submissions in response. In the event, however, the Council instructed Mr. Stagg on the appeal and the respondent obtained legal aid and instructed Mr. Rutledge. I mean no disrespect

to those who prepared the earlier submissions when I say that I can go straight to the documents prepared by the parties' respective counsel.

49. Mr. Stagg was asked to advise the Council on the appeal in a form which could be disclosed to the Upper Tribunal, and did so. After his very helpful exposition of the legislation, Mr. Stagg's position was, in summary:

(1) the respondent was approved as a foster carer for the purposes of reg. 27 of the Fostering Services Regulations 2011 at all material times;

(2) the placement of a child or qualifying young person with the respondent would fall within reg. 21(3);

(3) it could not be said on the evidence that the placements with the respondent were throughout placements of a qualifying young person. That was a matter which would need investigation;

(4) once a young woman placed with the respondent under s.22C of the Children Act (or s.23) attained the age of 18, she ceased to be a child for the purposes of that Act and so could no longer be so placed, even if she remained with the respondent;

(4) if a young woman occupying a bedroom in the respondent's house did not fall within reg. 21(3), either because she had attained the age of 18 or because she was not a qualifying young person, she would have occupied the house as her home and the respondent would be entitled to an extra bedroom in respect of her under reg. B13(5);

(5) if such a young woman had attained the age of 18, the respondent's housing benefit might be reduced by a non-dependant deduction made under reg. 74 of the Housing Benefit Regulations;

(6) the ordinary process of approval under the 2011 Regulations did not set the 52 weeks period of grace in reg. 2 running again;

(7) the 52 weeks period runs from the date a young woman ceases to be placed under s.22C or s.23, i.e., from her 18th birthday, not from the date she moves out;

(8) having regard to the above and the information in the list of placements (which shows a period of more than 52 weeks during which no young woman was living with the respondent), the respondent was overpaid housing benefit for at least some periods;

(9) it is arguable that the respondent ought to have realised that the commencement and ending of placements and possibly the 18th birthdays of the young women concerned might have an effect on her entitlement to housing benefit;

(10) if so, the respondent would have come under a duty to disclose the changes under reg. 88 of the Housing Benefit Regulations and arguably contributed to the making of the overpayment, making it recoverable under reg. 100.

50. On that basis, the tribunal's error was, in broad terms, proceeding on the basis that the finding that the respondent was an approved foster parent throughout was sufficient to dispose of the question whether there had been an overpayment and failing to address the other issues which arose in the light of the information in the list of placements.

51. Mr. Rutledge produced a skeleton argument without having had sight of Mr. Stagg's advice (it seems that the coronavirus pandemic may have contributed to difficulties with the right document reaching the right person at the right time) and initially contended that the only issue the Council had raised before the tribunal was the question of the respondent's status as a foster parent and the Council ought not now to be allowed to raise many further wide-ranging issues. He also, however, addressed in detail the grounds originally relied on by the Council.

52. When Mr. Rutledge had the opportunity to consider Mr. Stagg's advice, it emerged that it was very substantially agreed. Thus, at the hearing before me, Mr. Rutledge agreed, or himself actively contended for, points (1) to (6) above. He also conceded that the tribunal erred in its treatment of the 52 week period in paragraph 17 of the statement of reasons. As I have said, Mr. Stagg and Mr. Rutledge were agreed that the appropriate course for me to take is to refer the case back to the First-tier Tribunal with directions for its determination.

53. Mr. Rutledge's principal submissions in the hearing were in fact directed to emphasising his client's deep frustration and anger. As he put it, her overall complaint was that whatever information she provided just made her position worse. He drew attention to the following:

(1) the information sought in the letter dated 12th July 2018 (p.98);

(2) the reaction in the letter dated 31st August 2018 when the respondent provided the requested information after receiving the decision dated 13th August 2018 (pp.27-52);

(3) the further response in the letter dated 27th November 2018 again in answer to information provided by the respondent;

(4) the letter dated 31st December 2018 (p.140) showing that the respondent's housing benefit had been suspended for failure to provide information;

(5) the respondent's protest at p.138 that she had responded, that the information required was highly confidential and she was not willing to provide it in breach of the data protection legislation;

(6) the Council's request dated 15th February 2019 for substantial information relating to the respondent's income and capital resources (p.106) under threat of termination;

(7) the fact that the claim had been suspended in its entirety although the initial alleged failure to provide information related only to the 14% or 25% reduction issue;

(8) the fact that there was no formal suspension decision and so no appeal;

(9) the fact that, as I am told, the Council started recovery of the alleged overpayment despite the First-tier Tribunal decision, although they stopped recover in November 2020.

54. Mr. Rutledge went on to pose the questions:

(1) was the Council correct to require the respondent to provide the information sought?

(2) what is the correct approach where there is an impasse about the provision of information;

(3) what should the First-tier Tribunal have done in those circumstances? In particular, should it have given directions?

Decision

55. In the light of the way in which the matter was presented to the First-tier Tribunal, it is understandable that the judge effectively proceeded on the basis that the only live issue was whether or not the respondent was an approved foster parent for the purposes of the definition of "qualifying parent or carer". I accept, however, that given the information before him, particularly in the list of placements at p.137, there were live questions as to whether any part of the respondent's housing benefit had been overpaid, depending upon the length of any placement strictly so called (that is to say, the period for which the young woman concerned remained a "child" for the purposes of the Children Act), whether the placement was of a "qualifying young person" as defined, whether more than 52 weeks had elapsed since the end of the previous placement and whether, while a young woman over 18 remained with the respondent, a non-dependant deduction fell to be made. The judge erred in law in not dealing with those questions.

56. In particular, it appears that there was at least one gap of more than 52 weeks between placements. Further, by the date of the decision appealed against (13th August 2018) more than 52 weeks had elapsed since the last placement. The definition does not, in my view, permit the 52 weeks to start running again as a result of a reapproval process of the nature described. It may be that there was a period during which the Council was not placing young women with the respondent and other foster carers pending completion of a review under reg. 28 of the 2011 Regulations, but there is a separate formal process under that regulation for termination of approval and nothing to suggest that it was operated.

57. In view of the large number of questions which have to be determined before a decision can be reached whether or not in fact there was an overpayment and if so, for what period and what caused the overpayment, it is clearly appropriate to follow the course for which Mr. Stagg and Mr. Rutledge contend and to refer the matter back. I comment in passing that even if an overpayment is found to have been made, it cannot, in my view, be said to have been caused by a failure on the part of the respondent to disclose a change in her foster parent status, since it does not appear that there was any such change.

58. Mr. Stagg and Mr. Rutledge have reached a very large measure of agreement on the appropriate directions and I gratefully accept their formulation of the directions on which they are agreed. Those are the directions set out at paragraphs 3 to 5 above, with some very minor modifications. It can be seen from my previous consideration of the relevant legislation why those directions are required.

59. The point on which the parties are not agreed is, as foreshadowed in particular by Mr. Rutledge's submissions, the extent to which, if at all, the respondent should provide certain information to the Council despite her obligations of confidentiality. In approaching this issue, the broad outlines of the framework for the provision of information in the Housing Benefit Regulations should be noted. It is as follows.

60. A person who makes a claim to housing benefit or to whom housing benefit has been awarded is obliged by reg.86(1) to:

> "furnish such certificates, documents, information and evidence in connection with the claim or the award, or any question arising out of the claim or the award, as may reasonably be required by the relevant authority in order to determine that person's entitlement to, or continuing entitlement to, housing benefit".

61. Where a request is made under that provision by a relevant authority, the authority is under a duty by virtue of reg. 86(3) to inform the claimant or person entitled to benefit of the duty imposed by reg. 88 on persons in receipt of housing benefit to notify any relevant change of circumstance to the designated office and, without prejudice to the extent of the reg. 88 duty, to:

> "indicate to [the person] either orally or by notice or by reference to some other document available to him on application and without charge, the kind of change or circumstances which is to be notified."

62. The basic reg. 88 duty is:

> "(1) … if at any time between the making of a claim and a decision being made on it, or during the award of housing benefit, there is a change of circumstances which the claimant, or any person by whom or on whose behalf sums payable by way of housing benefit are receivable, might reasonably be expected to know might affect the claimant's right to, the amount of or the receipt of housing benefit, that person shall be under a duty to notify that change of circumstances by giving notice to the designated office …"

63. Clearly, therefore, the respondent was under a legal obligation to provide information relevant to her housing benefit claim to the Council. Equally, the Council has as one of its functions the proper administration of housing benefit. I have been referred to ss. 31 and 35 of and Schedule 2 to the Data Protection Act 1998 (now repealed) and to paragraph 3(2) of Schedule 2 to the Data Protection Act 2018 in the context of a submission by Mr. Rutledge that the Council was plainly entitled to obtain relevant information from the Family and Homes Directorate (or other equivalent department), but I have not heard full argument on the application of the data protection legislation and I express no concluded view in relation to its scope in this connection. Either party is at liberty to pursue the point further if thought necessary. It does seem to me, however, that the claimant is likely to benefit from protection given to establishing rights, such as the right to housing benefit, and performing legal obligations and the Council is likely to benefit from protection given to bodies exercising statutory functions. My preliminary view is that the administration of many social security benefits would grind to a halt if administering bodies cannot properly ask for and claimants cannot properly supply information about other individuals for the purpose of correctly determining a claim to benefit or its continuance.

64. I recognise, however, that particular concerns may arise in relation to third parties, such as the young women in the present case, who are under the age of 18 and who are placed under statutory provision with the claimant. Although the respondent has referred in particular to breach of data protection legislation, it may be that she has wider concerns about confidential information. It seems to me at least possible that departments responsible for fostering services may stress to foster parents the importance of keeping confidential information relating to children and young people placed with them. A claimant asked to provide detailed information under reg. 86 may understandably wish to seek the approval of the fostering authorities before doing so.

65. Finally as to matters of principle, it is established by *Kerr* v. *Department for Social Development* [2004] UKHL 23, [2004] 1 W.L.R. 1372 that the process of establishing entitlement to a social security benefit, whether initially or a matter of continuance, is "a co-operative process of investigation" in which both the claimant and the relevant authority play their part. The authority must ask the right questions and the claimant must answer them as far as possible, bearing in mind that the facts will usually be within the claimant's knowledge. Where the facts are available to the authority rather than the claimant, it is for the authority to take steps to find out the relevant information.

66. Turning to the present case, it is helpful to start by noting that one of the crucial questions is the date on which each of the young women attained the age of 18. That date marks the end of a placement for the purposes of reg. 21(3). A young woman then living with the respondent may still have satisfied the definition of "young person" (in effect, a qualifying young person under reg. 19), in which case she would not fall within the definition of "non-dependant" in reg. 3, or, if she was a non-dependant, there may still have been no applicable deduction under reg. 74, but the facts relevant to that determination have to be established. At that point, however, the young woman also attained her majority and the issues of confidentiality which might apply in relation to a minor would generally fall away.

67. It is also helpful to note that information relating to the 18th birthdays of SM and VA is in fact contained in the submission on the appeal originally made by the respondent at p.207. SM's birthday is given and VA is said to have been under the age of 18 throughout the placement. The submission also contains the relevant placement dates, clarifying what appears to be an error on p.137. As YA lived with the respondent for a period of over a year and she is said at p.137 to have been 17 at the start of the placement, it seems to follow that her 18th birthday must have occurred during the period she was living with the respondent.

68. In those circumstances, I take the view that the respondent can properly be directed to give the date of birth of YA and VA.

69. More generally, the respondent is likely to have had knowledge of whether any young woman over the age of 18 was in education or training, or was in employment (and if so, with whom and on what terms), whether she suffered a period of illness and whether she was in receipt of social security benefits in her own right. Again I take the view that the respondent can properly be directed to give that information as far as it is within her knowledge.

70. As to the full names of the young women, I see no reason why the respondent should not give the full names of YA and SM. This information may be relevant if the Council needs to make investigations into such matters as whether either of them was in receipt of social security benefits in her own right and possibly in other contexts.

71. It is less obvious to me that the full name of VA is required. As the Family and Homes Directorate anonymised the names in the list of placements and VA was a minor at all material times, I take the view that the respondent should be able, if she wishes, to seek the agreement of the Directorate to disclosing her full name, although VA herself will now clearly be of full age. If agreement is not forthcoming, the Council will no doubt follow the matter up with the Directorate.

72. For those reasons I make the directions set out above.

73. It is not necessary for me to give final answers to the questions posed by Mr. Rutledge, but I offer a few short comments.

74. The information required by the Council for the purposes of this appeal, as opposed to information it may have required later in connection with the wider investigation it seems to have undertaken, was limited in extent and properly requested. The respondent was able to answer the request with the list of placements provided by the Family and Homes Directorate. The difficulties and need for further information which have subsequently emerged in the course of this appeal arose because the information supplied generated a need for further information which was not addressed by the Council before the tribunal and only fully emerged in the course of this appeal. In saying that, I note that in its proposed directions the Council referred to "the nature of the placement", but that appears to have been in connection with its then understanding that a supported lodging placement might not be an approved fostering placement. It was not directed to elicit whether and if so for how long a young woman was a qualifying young person.

75. My provisional view is that the Council could reasonably request information in relation to anyone aged over 18 in respect of whose occupation the respondent claimed to be allowed an additional bedroom. It necessarily follows that the Council could reasonably request information as to whether or not a young woman had attained the age of 18 and if she had, on what date.

76. It is also my provisional view that the Council could reasonably request information in relation to a person under the age of 18 for the purpose of establishing whether or not she was a qualifying young person. If the respondent was uncertain whether the requested information could properly be disclosed, it would be reasonable for her to seek the guidance of the Family and Homes Directorate and if she were told that it could not be disclosed, it would be reasonable for the Council to take steps to investigate the position directly with the Directorate. It does not appear to me reasonable to insist on the provision of information where such provision is reasonably thought to involve a breach of legal obligation.

77. It is to be hoped that where both parties are engaged in a co-operative process of investigation, as envisaged by *Kerr*, an impasse will not result. Certainly it is to be hoped that there will be no impasse in the present case in the future. I therefore say no more about how an impasse might be resolved than to recognise that there might be circumstances in which the giving of a direction by a tribunal might assist.

78. I also note the Respondent's frustration as explained by Mr. Rutledge, which is understandable. It does not, however, bear upon the disposition of this appeal.

79. These directions are of course intended to enable the new tribunal to determine whether or not any overpayment has been made. If it is found that there has been an overpayment, the question will arise whether it is recoverable. There is at present no evidence before the tribunal of the material referred to in reg. 86(3) which ought to have assisted the respondent in deciding whether or not there had been a change of circumstance at any point which she ought to notify to the designated office. It would clearly be helpful to the tribunal to have any material which there may be, and in particular any material which might bear upon the question of someone attaining the age of 18.

80. Mr. Stagg also suggests that it would be desirable for the First-tier Tribunal to consider any overpayment issue at the same time as any appeal which may be brought against any adverse decision on income or capital grounds which the

Council may have made following the wider investigation which seems to have begun at the end of 2018 or in early 2019. There clearly was such an investigation on foot, but it is wholly unclear what the outcome was and whether any such appeal is indeed on foot. In those circumstances I do no more than express the hope that all outstanding issues in relation to the respondent's housing benefit claim may be dealt with together.

E. Ovey
Judge of the Upper Tribunal
Signed on the original on 25th June 2021