



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2024-000071-UHC
& UA-2024-000197-USTA
[2024] UKUT 261 (AAC)**

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

Between:

R.R.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 28 August 2024
Decided on consideration of the papers

Representation:

Appellant: In person
Respondent: Mr R Jennings, Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to allow both appeals. The decisions of the First-tier Tribunal made on 3 May 2023 under file number SC246/22/01293 and on 29 August 2023 under file number SC246/23/00886 were each made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set those decisions aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The new First-tier Tribunal (FTT) should not involve the tribunal judges who considered the appeals on 3 May 2023 and 29 August 2023.**
- 3. If the Appellant has any further written evidence to put before the new FTT, this should be sent to the HMCTS regional tribunal office in Leeds within one month of the issue of this decision.**
- 4. The new First-tier Tribunal is not bound in any way by the decisions of the previous tribunals. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunals.**

These Directions may be supplemented by later directions by a Tribunal Legal Officer, Tribunal Registrar or Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This appeal is about the proper legal test for determining whether a “person normally lives in the accommodation with the renter” (and so counts as a non-dependent) under the Universal Credit scheme.
2. The particular context of this case concerns a young person whose parent claims the housing costs element of Universal Credit. What happens when the young person goes away to university (or a similar institution), returning to the family home from time to time, e.g. during vacations?

Why this is important

3. Whether a person is a non-dependant is important for the purposes of assessing a claimant’s entitlement to the housing costs element of Universal Credit.
4. In very broad terms, there are four component parts to any Universal Credit housing costs element calculation. The first part is the claimant’s monthly eligible rent. The second concerns the composition of their ‘extended benefit unit’, a concept which includes any persons who are classified as ‘non-dependants’ (subject to certain exceptions). The third is the number of bedrooms the claimant’s extended benefit unit is allowed under the rules (often referred to as the ‘size criteria’). The fourth is whether any deduction must be made for any non-dependant living with the claimant.
5. A claimant’s partner together with any child or qualifying young person form the basis of their extended benefit unit, along with any non-dependants. The definition of a non-dependant – a “person [who] normally lives in the accommodation with the renter” – is to be found in paragraph 9(2) of Schedule 4 to the Universal Credit Regulations 2013 (SI 2013/376). It has long been accepted that for the purpose of entitlement to social security benefits a person can only “normally” live or reside in one place (see *JP v Bournemouth BC (HB)* [2018] UKUT 75 (AAC); [2018] AACR 30).
6. A common example of a non-dependant is an adult child still living at home with their parent or parents. But what happens when the offspring in question lives elsewhere for part of the time, e.g. during University term-time, but comes home every vacation (and quite possibly at other times)? Are they a person who “normally lives” with their parent(s)? Or are they a person who “normally lives” at their University term-time address?

The context of the present appeal

7. The present appeal is a case in point. The Appellant, a single parent, lives in Huddersfield. She has two daughters, the elder of whom (‘A’) has been following a three-year undergraduate degree course in Manchester.

The DWP’s decisions in this case

8. On 23 October 2022 the DWP decision-maker decided that the Appellant did not meet the conditions to be entitled to the additional bedroom allowance for A within her Universal Credit housing costs element.
9. On 17 November 2022 that decision was upheld on mandatory reconsideration. The explanation given was that “you do not qualify any of the above conditions

set out, to allow an extra bedroom. Your daughter [A] spends 13 to 14 weeks at home during holidays and summer breaks. This meant that she spends more time at the University, than at home. Therefore, because she spends most of her time at university, you are disallowed for having an extra bedroom for her.”

10. It will be apparent that the decision-maker regarded the test for whether a person “normally lives” in one place as being determined by a (relatively crude) test of time spent at each location – in other words, the place where the person spent more time was the place where they normally lived.
11. On 5 December 2022, and as a result of this decision on entitlement, another DWP decision-maker decided that there had been an overpayment of Universal Credit. This was accordingly set off against an underpayment of the Universal Credit child element that was agreed to be due to the Appellant.
12. The Appellant then appealed to the First-tier Tribunal (‘FTT’) against both the entitlement and the overpayment decisions.

The First-tier Tribunal’s decision on the entitlement appeal

13. On 3 May 2023 the FTT dismissed the Appellant’s appeal against the entitlement decision. The material part of the FTT’s decision notice for the entitlement appeal was crisply stated:
 1. The appeal is refused.
 2. The decision made by the Secretary of State on 23/10/2022 is confirmed.
 3. [The Appellant] isn't entitled to an additional bedroom allowance within her housing costs element of Universal Credit.
 4. [The Appellant’s] daughter, [A] commenced a full-time degree course at University in Manchester in September 2021 and is therefore not part of [the Appellant’s] extended benefit unit, only returning to [the Appellant’s] address for 13-14 weeks a year during holiday periods.
14. In its subsequent statement of reasons, the FTT found the following facts:
 9. The Tribunal found as fact that [the Appellant], at the date of decision, is a 47 year old single parent living at ... For the purposes and relevant only to this appeal, [the Appellant] has 2 daughters [A and a younger daughter]. [A] is in advanced education having commenced a three year full-time degree course at University in Manchester in September 2021 with payment of Child Benefit for [A] ending on 7 September 2020. [The younger daughter] lives in the same household as [the Appellant] and is in full-time education at BTec level with payment of Child Benefit ... ongoing from 11 April 2022 at the weekly rate of £21.80. There are no other people in [the Appellant]’s household. [A] is away at University during term time but home in the holidays, namely Christmas, Easter and Summer holidays (page 33) which [the Appellant] states is 13/14 weeks of the year (page 35). ... The Respondent accepts that [the Appellant] previously received the additional bedroom allowance within her housing costs element of UC, after [A] started her degree course in September 2021 but asserts that this was an error and [the Appellant] has no entitlement to an additional bedroom allowance within her housing costs element of UC from September 2021 (pages I-J).

15. The FTT further reasoned as follows:

11. The Tribunal had to apply Schedule 4(9) of the UC Regulations 2013 when determining if [A] was a member of [the Appellant's] Extended benefit unit. [A] was 20 years old at the date of decision and a full-time student on a three year degree course living and attending University in Manchester. [The Appellant's] evidence was that [A] returns home during holiday times which she estimated to be 13-14 weeks per year therefore for the majority of the time [A] is attending and living at University in Manchester. The Tribunal therefore found that [A] is not a member of [the Appellant's] Extended benefit unit as she is not a child or qualifying young person for whom [the Appellant] is responsible nor a non-dependant. The Tribunal did consider if [A's] absence from [the Appellant's] Extended benefit unit could be treated as temporary as prescribed by Schedule 4 (11) but found that [A's] absence exceeded 6 months and the exceptions prescribed by Schedule 4(2) and 4(3) did not apply to [A].

The First-tier Tribunal's decision on the overpayment appeal

16. On 29 August 2023 a different FTT dismissed the Appellant's appeal against the overpayment decision. This FTT's decision notice recorded that "There has been an overpayment of the Housing Cost Element of Universal Credit for a spare bedroom. This was confirmed by a tribunal decision of 3 May 2023 ... This resulted in an overpayment of £105.60 for the assessment period 23.07.22 to 22.09.22. Whilst the appellant has objected to this amount being set off against the underpayment of the child element of £290, the respondent is within his right to do so and only pay the balance of £184.40 to her."
17. The second FTT's statement of reasons correctly explained that any overpayment of Universal Credit was recoverable from a claimant, regardless of fault (see section 71ZB of the Social Security Administration Act 1992). It added that there was no right of appeal against the DWP's decision to recover an overpayment, but only with respect to the amount of the overpayment. To that extent the FTT's decision on the appeal against the overpayment decision stood or fell with the outcome of the appeal against the entitlement decision.

The Appellant's appeal to the Upper Tribunal

18. The Appellant appealed to the Upper Tribunal against both of the FTT decisions. Her appeal against the FTT's entitlement decision was expressed in the following terms:
- I am entitled to full Housing Benefit since September 2021 due to a three-year course my daughter has started, coming home for more than the legal allowance of at least 13-14 weeks as she comes on festivals and weekends as well as holidays and my home is her main home which she intends to stay at after her course. The absence away from home was temporary for study purpose not as main home.
19. The Secretary of State's representative does not support the appeal to the Upper Tribunal. The Secretary of State takes the same approach as the DWP decision-maker at first instance and the FTT: "In this case the daughter spent three times as much time at the Manchester address as at her mother's address. Consequently I submit that she normally lived at the Manchester address" (Secretary of State's submission at paragraph 13). The Secretary of State's

representative also adds that “students who rent a house on a joint tenancy are liable for Council Tax. However, they pay no Council Tax as a consequence of the exemptions. They will however receive a Council Tax notice for zero. As these joint tenancies are not restricted to term time occupation only if for a year, this is why those in Halls might be considered to reside normally with their parents still and be just temporarily absent, while those who take tenancies might not be considered to reside with their parents as they have a main home elsewhere on which they are liable for Council Tax” (paragraph 15).

20. I simply observe at this juncture that the FTT appears not to have explored or made any findings of fact as to the nature of the daughter’s occupancy in Manchester. It is entirely unclear from the statement of reasons as to the basis of A’s residence in Manchester. The Secretary of State’s representative appears to assume that the Appellant’s daughter had her own (sole or shared) tenancy in the private rented sector in Manchester. In that context it may well be significant that – as the Appellant states in her reply to the Secretary of State’s response to her appeal – “[A] was in halls and even they closed during holidays ... Temporary tenancies such a student halls do not require students to pay council tax and are referred to as temporarily absent from their main address with family.”

The legislation governing non-dependants in the Universal Credit scheme

21. Paragraph 9 of Schedule 4 provides as follows:

Extended benefit unit of a renter for purposes of this Schedule

9.—(1) For the purposes of this Schedule, the members of a renter's extended benefit unit are—

- (a) the renter (or joint renters);
- (b) any child or qualifying young person for whom the renter or either joint renter is responsible; and
- (c) any person who is a non-dependant.

(2) A person is a non-dependant if the person normally lives in the accommodation with the renter (or joint renters) and is none of the following—

- (a) a person within sub-paragraph (1)(a) or (b);
- (b) where the renter is a member of a couple claiming as a single person, the other member of the couple;
- (c) a foster child;
- (d) a person who is liable to make payments on a commercial basis in respect of the person's occupation of the accommodation (whether to the renter, joint renters or another person);
- (e) a person to whom the liability to make relevant payments is owed or a member of their household;
- (f) a person who has already been treated as a non-dependant in relation to a claim for universal credit by another person liable to make relevant payments in respect of the accommodation occupied by the renter.

(g) a child or qualifying young person for whom no-one in the renter's extended benefit unit is responsible.

(3) "Foster child" means a child in relation to whom the renter (or either joint renter) is a foster parent.

22. Paragraph 10 then provides:

Number of bedrooms to which a renter is entitled

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

- (a) the renter (or joint renters);
- (b) a qualifying young person for whom the renter or either joint renter is responsible;
- (c) a non-dependant who is not a child;
- (d) two children who are under 10 years old;
- (e) two children of the same sex;
- (f) any other child.

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

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

- (a) the provisions of paragraph 11 as to treatment of periods of temporary absence of members of the renter's extended benefit unit;
- (b) any entitlement to an additional bedroom in accordance with paragraph 12;
- (c) for the purpose of any calculation under Part 4 of this Schedule, the additional requirements in paragraphs 26 to 29.

23. Finally, and so far as is material, paragraph 11 provides as follows:

Temporary absence of member of renter's extended benefit unit

11.—(1) A member of the renter's extended benefit unit who is temporarily absent from the accommodation occupied by the renter is to be included in a determination of the number of bedrooms to which the renter is entitled ("relevant determination") in the circumstances specified in sub-paragraphs (2) to (4).

...

(4) In the case of a non-dependant, the circumstances specified in this sub-paragraph are that—

- (a) the relevant determination relates to any time during a period specified in sub-paragraph (5); and
- (b) immediately before the start of that period, the non-dependant was included in the renter's extended benefit unit and, in the circumstances

specified in sub-paragraph (5) (a) to (c), the renter's award included the housing costs element.

(5) The specified periods are—

(a) the first month of the non-dependant's temporary absence from Great Britain and, if the circumstances of the non-dependant are such as would be disregarded for the purposes of regulation 11(2) (death of a close relative), a further one month;

(b) the first 6 months of the non-dependant's temporary absence from Great Britain in the circumstances described in regulation 11(3)(a) (absence solely in connection with treatment for illness or physical or mental impairment);

(c) the first 6 months that the non-dependant is a prisoner where the non-dependant has not been sentenced to a term in custody that is expected to extend beyond that 6 months.

(d) any period during which a non-dependant who is the son, daughter, step-son or step-daughter of a renter or joint renters is a member of the armed forces away on operations.

(6) Any non-dependant who is temporarily absent from the accommodation occupied by the renter in circumstances other than those specified in sub-paragraphs (4) and (5) is not to be treated as being a member of the renter's extended benefit unit if that absence exceeds, or is expected to exceed, 6 months.

24. I now turn to consider the relevant case law.

The relevant case law on the meaning of “non-dependant”

25. Although the Universal Credit scheme has now been on the statute book for more than a decade, there appears to be no Upper Tribunal case law directly in point on the proper interpretation of paragraph 9(2) of Schedule 4 and in particular on the test to be applied for determining if a “person normally lives in the accommodation with the renter”. There is a simple but good reason for this. The notion of a non-dependant has been part of the legislative architecture of various means-tested benefit schemes for a much longer period. Although the precise wording may have changed from time to time, the underlying concept remains the same – the test turns in part on whether a person “normally lives” or “normally resides” with the claimant.

26. For example, in the housing benefit scheme a non-dependant is defined as “any person ... who normally resides with a claimant or with whom a claimant normally resides” (originally regulation 3(1) of the Housing Benefit (General) Regulations 1987 (SI 1987/1971)). In *CH/4004/2004* Commissioner Levenson held that “the extra word (‘normally’) must mean something [and] ... is a question of fact and degree” (at paragraph 13). On the facts of that case – in which the claimant’s cousin had been ‘sofa-surfing’ with the claimant, as he was temporarily homeless – the Commissioner ruled that no reasonable tribunal could have found that the cousin was “normally” residing with the claimant. There is certainly no suggestion that the period of time involved was decisive. Rather, a holistic assessment as what was “normally” the position was required.

27. A relevant authority rather closer on its underlying facts is *Stroud DC v JG (HB)* [2009] UKUT 67 (AAC), reported as *R(H) 8/09*. The claimant was the tenant of a three-roomed dwelling and was in receipt of housing benefit. She notified the local authority that her son had become a full-time student in another town. The council took the view that she was entitled to benefit only on the basis that she occupied her home on her own and that she was therefore entitled only to accommodation with two rooms. It referred the case to the rent officer, who determined her maximum rent on that basis. The FTT decided on the facts that the son was normally resident with the claimant and was a non-dependant, but that under regulations 3(1) and 74(7) of the Housing Benefit Regulations 2006 (SI 2006/213) no non-dependant deduction was to be made in respect of him, as he was a full-time student. The claimant herself was therefore entitled to housing benefit based on accommodation containing three rooms. The council appealed to the Upper Tribunal, where Judge Williams allowed the appeal but substituted a decision to the same effect.
28. The FTT had erred in law in that case as it had failed to consider regulation 7 of the Housing Benefit Regulations 2006, which was intended to answer the question of which home a person occupies as a dwelling for the purposes of housing benefit (see *R v Swale Borough Council HBRB* [2000] 1 FLR 246). Further, on a correct analysis of regulation 7, a full-time student was to be treated as occupying the dwelling he normally occupied as his home during any period of absence not exceeding 52 weeks. On the facts found by the FTT, the claimant's son normally occupied as his home the claimant's dwelling and as a non-dependant. However, as a full-time student, no non-dependant deduction was applicable, and the reference to the rent officer and resulting decisions were accordingly set aside.
29. Notably, for present purposes, the FTT in *Stroud DC v JG (HB)* [2009] UKUT 67 (AAC) had directed itself as follows as to the proper test to be applied: "In deciding the question whether L [the claimant's son] is normally resident with the Appellant, and therefore a non-dependant, the tribunal has to take account of all the material circumstances. It is a matter of fact and degree. It is not merely a mathematical exercise as to where he spends most time." That approach, of course, was entirely consistent with that taken in *CH/4004/2004*. Moreover, Upper Tribunal Judge Williams confirmed that was the correct approach (at paragraph 26) and indeed adopted the FTT's findings of fact, having applied that test (at paragraph 29).
30. A similar question arose in *SK v South Hams DC (HB)* [2010] UKUT 129 (AAC), [2010] AACR 40. Upper Tribunal Judge Mesher helpfully posed the question (and summarised the answer) as follows in the opening paragraph of his decision:
1. When a young person who has been living with a parent in receipt of housing benefit goes away to university or a similar institution, to be accommodated in a hall of residence during term time, planning to return to the family home in vacations, what effect does that have on the amount of the eligible rent under regulations 12C and 13 of the Housing Benefit Regulations 2006 (SI 2006/213), by reference to which the parent's maximum housing benefit is identified under regulation 70? This decision holds that in such circumstances the young person can in law remain throughout an occupier of the family home as his or her home, so that the eligible rent has to be calculated allowing for a bedroom for that person.

31. Most of Judge Mesher's careful and extended analysis concerns the proper application of statutory provisions in the housing benefit scheme which are not directly relevant to the issues raised by the present Universal Credit appeal. He concluded that the FTT had erred in law "by failing to ask itself whether Jacob [the claimant's son] was required to be treated as occupying the claimant's dwelling as his home from 22 September 2008 under regulation 7(13) or (16) and (17), but instead asking itself which one dwelling he was normally occupying" (at paragraph 38). As to that latter question, Judge Mesher opined as follows:

38. ... If I had to ask as at 22 September 2008 which one dwelling Jacob normally occupied as his home I would have said in general terms that that was still the claimant's house. Despite his liability to pay for his hall of residence accommodation and the focus of interests there during term time, his enduring "base" was still his mother's home. The terms on which he, like many other students, had use of his room in the hall of residence, made it more of a temporary staging-post. It is an important part of the value of going away for further education that there is not an abrupt and complete leaving of the parental home, but a dual existence, at least at the beginning, where the student in effect has two homes.

Discussion

32. This appeal can be dealt with relatively shortly. The test for determining whether a person is a non-dependant is not determined by a crude measure of the time spent living at any one address. Rather, decision-makers and tribunals must make a holistic assessment of all relevant factors in deciding whether the person in question "normally lives in the accommodation with the renter" (paragraph 9(2) of Schedule 4 to the Universal Credit Regulations 2013 (SI 2013/376).
33. How does this play out in the case of a young person who goes away to university? A good starting point is to identify the legal basis of their living arrangements at university. Do they have a tenancy or licence in the private rented sector where they are at college? Or do they have a tenancy or licence in a university hall of residence? If the latter, are they able to stay (and do they stay) in residence during some or all of the periods of university vacation? It is well known that many universities rely on using their halls of residence to facilitate their conference trade during the vacations and so exclude students for periods out of term time. There is then a further range of markers on which findings of fact will need to be made. Where is the young person registered to vote? Where are they registered with a GP surgery and dentist? If their bank or building society communicates with them by post, which address do they use? Which address is their mobile phone contract registered at? Do they have a part-time job and, if so, where is it? Where do they keep the bulk of their clothes and belongings? Do they have a pet and, if so, where is it kept? This list should not be regarded in any way as exhaustive. A holistic assessment requires consideration of all such relevant factors.
34. In the present case the FTT singularly failed to explore any of these indicators, focussing exclusively on the length of time spent at each address.

Disposal

35. I therefore conclude that the FTT's decisions on the Appellant's appeals both involve an error of law. The decision of the first FTT on the entitlement appeal applied the wrong legal test, which in turn infected the outcome of the appeal on the overpayment case heard by the second FTT. The case therefore needs to be re-heard by a fresh FTT at a venue convenient to the Appellant. The new tribunal will have to make further and more detailed findings of fact about the living arrangements of the Appellant's daughter A at the material time.
36. I might add that if the new FTT finds that A is a non-dependant normally living with the Appellant, it does not necessarily follow that a non-dependent deduction applies. There are various circumstances in which such a deduction should not be made. One of these is where the non-dependant is aged under 21, which A was at the material time (paragraph 16(2)(a) of Schedule 4).

Postscript: the DWP's own guidance

37. Finally, it is noteworthy that the DWP's own guidance to decision-makers (DM) is as follows (*ADM Chapter F3: Housing Costs Element: Support for renters*, para F3034):

In a case where a student lives at a university address during term time and lives at their parents' home for some weekends and during the holidays, the DM should decide which address is where they normally reside. Whichever address is chosen will remain the student's normal residence even when they spend time at the other home.

A student still retains a bedroom, furniture and some clothing at their parents' home, they still get some mail there, are registered with the local dentist and are actually resident for 18 full weeks and most weekends. On this evidence the DM decides that the student normally resides at their parents' home and are only temporarily absent from it whilst at university.

Alternatively, the DM may decide that because the student has a tenancy agreement for a university address, they have some furniture and clothes there, they live there for 32 weeks of the year and are liable for gas, electricity and a tv licence that they normally reside at the university address and are only temporarily absent from it whilst back living with their parents.

38. Plainly the two examples given in the second and third paragraphs of that official guidance represent two cases that may be seen as sitting at opposite ends of a spectrum. In the real world more difficult value judgements may need to be made on cases in between those two extremes in deciding whether a person "normally lives" at one address or another, having balanced all relevant considerations. However, what the DWP guidance does make clear, consistently with the case law discussed above, is that a simplistic temporal test is not determinative for deciding whether a person is a non-dependant.

Conclusion

39. I therefore conclude that the decisions of the First-tier Tribunal involve an error of law. I allow the appeals and set aside the decisions of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

**Nicholas Wikeley
Judge of the Upper Tribunal**

Authorised for issue on 28 August 2024