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Bedroom tax:

Exemptions and Tribunals

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1. The '1996 Exemption'

When the 'bedroom tax' regulations were made, the effect of an addition to the regulations made in 2006 was overlooked, itself a transitional provision. The existence and effect of these regulations was unnoticed by the DWP, local authorities and indeed anyone else until worked out by Peter Barker on rightsnet (known as HBAnorak). Once word had started spreading, the position was confirmed by the DWP.

As a result, 4(1)(a) of Schedule 3 of the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006[1] has the effect that any HB claimant who has been claiming continuously since before 1 January 1996, for the same property, should have their HB rate calculated without the 'Spare room subsidy' provisions. In effect these claimants were exempt from the bedroom tax under the initial regulations and have been since their introduction in April 2013.

However, the regulations have now been amended by a statutory instrument that came into force on 3 March 2013. The exemption has been removed, although not retrospectively. Anyone who falls under the exemption who has been subject to bedroom tax deductions in HB payments should receive a full backpayment.

This is to put a little more detail on the 'exemption', who is affected and what to do.

Who qualifies?

Any housing benefit claimant who has claimed continuously since on or before 1 January 1996.

There can have been up to a four week break in entitlement.

There can be an up to 52 week break in entitlement if the Claimant became a Welfare to Work recipient, and was so at the time entitlement stopped.

Same property?

It has to have been the same property throughout, save for exceptions specified at 4(3)(a)(ii)

the dwelling so occupied was not the same by reason only that the change was caused by a fire, flood, explosion or natural catastrophe rendering the dwelling occupied as the home on the first date uninhabitable; and [the HB claim was continuous as above]

The exceptions to the 'same property' rule are limited. Given the wording '*by reason only*', it is hard to see this being extended to any other 'force majeure' event that caused a move.

[1] http://www.dwp.gov.uk/docs/a8-3301.pdf

Successors?

The following will 'inherit' the exemption.

a) the partner, or family member, or relative occupying the same dwelling of someone who claimed HB on or before 01/01/1996, and claimed continuously to their death; and

i) who has claimed continuously themselves since the original claimant's death [or within 4 weeks]; and

ii) who lived at the property on the date of death of the previous claimant, and has lived there continuously since the death of the previous claimant;

b) The partner of a claimant who has left and ceased to reside as husband and wife, where the claim was continuous before the date the claimant left and has been continuous by the partner subsequently [or at least where partner claimed within 4 weeks of the previous claimant leaving].

Peter Barker has produced a flow chart for assessing exemptions, which is at the end of these notes.

Claiming the exemption

Councils have been asked by the DWP to consider reviewing their records to identify potentially affected claimants. Any claimant who is affected should supposedly have HB re-calculated and back paid to April 2013.

The odds on this happening quickly, or even at all are not good. Councils will not have the resources or in many cases the records to identify claimants with a pre 02/01/1996 claim, though some landlords have been asked to assist.

The chances of 'successors' being identified are slim. These claimants will probably have to identify themselves to the Council.

Tenants who consider that they would fall under this provision should at the very least immediately alert the benefit authority and ask for a re-assessment.

What happens where there aren't records for the whole period is a good question. The Council may refuse the claimed exemption on the basis of lack of evidence. An appeal to the First Tier Tribunal would be necessary to have the decision made on the balance of probabilities.

As there is a 13 month deadline for an appeal of the original (March 2013) decision, claimant tenants would be best advised to put in an appeal to the FTT with a request that the Council revise the original decision as it was made in error.

If any affected parties are in on-going rent arrears possession proceedings, the tenant falling under the exemption is of immediate use and grounds for a stay or adjournment pending the original decision being revised.

DHP received in the interim?

It appears that if the claimant has received DHP payments between April 2013 and now, these will not have to be repaid, or off set against the backdate of HB. Some councils are stating otherwise, but the mechanism by which this could be required is not clear.

'Compensation'

There have been suggestions floating around that tenants who were evicted (none known of) or downsized because the bedroom tax was imposed when they were actually exempt, might have a claim for compensation through maladministration. I can see no basis for such a claim. An 'error' is not maladministration per se and it is clear that no-one, including tenant's advisors, picked up on the effect of the 2006 regulations until Peter Barker did. If the maladministration alleged is that the 2006 provisions were not picked up by the DWP when preparing the bedroom tax regulations, then the failing alleged is actually not including the 'exempt' tenants in the bedroom tax deductions.

2. In the Tribunals

While the Judicial Reviews of the bedroom tax have not met with success so far, appeals of individual bedroom tax decisions in the First Tier Tribunal (Social Security and Child Support Tribunal) have met with widespread success. Indeed, sometimes when they possibly shouldn't have.

A full list of First Tier Tribunal decisions that I have been able to obtain details for can be found at: http://nearlylegal.co.uk/blog/bedroom-tax-ftt-decisions/ There are 19 at present. I know of a handful of other successful appeal, but have not yet been able to obtain details or statements of reasons. These others seem to be on similar grounds.

Of course, FTT decisions aren't binding in any way, not even on other FTTs. So these decisions are interesting and provide lines of argument for other FTTs, even possibly County Court defences, but have no greater significance.

I'm not going to go through each individual Tribunal decision. Instead I want to pull out the lines of argument and basis for appeal decisions, using some tribunal decisions as examples.

Room size

This was an early target, in fact I and others were raising it back in February 2013[2]. The basis of the argument is that a room below a certain size cannot properly be considered as a bedroom. The measure for room size has so far mostly been found in Part X Housing Act 1985 – the statutory overcrowding provisions at s.326, where for the purposes of an assessment of overcrowding by space standards, the following is set out:

- more than 110 sq feet (10.2 sq metres approx) = 2 people
- 90 – 109 sq ft (8.4 – 10.2 sq m approx) = 1.5 people
- 70 – 89 sq ft (6.5 – 8.4 sq m approx) = 1 person
- 50 – 69 sq ft (4.6 – 6.5 sq m approx) = 0.5 people.
- Less that 50 sq ft = not suitable as sleeping accommodation

(In Scotland there is an identical provision in Housing Act (Scotland) 1987).

While the Housing Act 1985 provisions don't offer up a definition of a bedroom, and the room size standards are in the context of an overcrowding assessment of the whole property (such that a dining room or living room could be a 'bedroom' for the purposes of the assessment), these standards have had considerable success in the FTT.

Some councils (as landlords) accepted that anything below 50 sq ft could not be a bedroom and reclassified properties on that basis.

However, the FTTs have been keener on the 70 sq ft boundary. One of the clearest statement of reasons for this is in a decision made by the FTT in Fife, 26 August 2013 [3]:

> "under-occupancy can be seen as the flip side of overcrowding, and that it is relevant to have regard to statutory space standards. These indicate that a room of this size is appropriate for use as sleeping accommodation by a young child – as has indeed been the case in relation to room 1 – but not an adult. It is in effect regarded by section 137 of the 1987 Act as only half a room. I also accept, having regard to Circular A4/2012, that paragraph 613(5) generally presupposes that to be classified as a bedroom a room should be large enough to be appropriate for use as a bedroom by an adult- or by two children."

The room in this case was 64 sq ft, and had, in fact, been used as a bedroom by the appellant's children when young, under 16, but was no longer used as a bedroom.

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[2] http://nearlylegal.co.uk/blog/2013/02/room-without-review-thoughts-on-tackling-the-bedroom-tax/

[3] The first decision here: http://nearlylegal.co.uk/blog/2013/09/changing-rooms/ And Statement of reasons here: http://www.insidehousing.co.uk/journals/2013/09/20/d/x/z/First-Decision-Notice.pdf

Regulation B13 (5) provides:

> (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)—
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> (a) a couple (within the meaning of Part 7 of the Act);
> (b) a person who is not a child;
> (c) two children of the same sex;
> (d) two children who are less than 10 years old;
> (e) a child,
> and one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care (or in any case where each of them is).".

It is not entirely clear that B13(5) does presuppose a room large enough for use by an adult or two children. (5)(e) would include a child of any age and a child under 10 is 0.5 of a person for the purposes of the Housing Act 1985 provisions. It may be that the DWP guidance in Circular A4/2012 [4] that "With the agreement of the landlord a claimant may be able to take in a boarder or lodger to fill any unoccupied room" (para 63), is persuasive in the FTT accepting the room must be large enough for an adult.

Room size was a factor in two other FTT decisions in Fife and FTT decisions in: Islington, Liverpool, Aberystwyth and Monmouthshire. In a decision in Inverness a room of 54 sq ft was fond to be a bedroom despite its size, as it was actually being used as a bedroom, which indicates that the room size argument has its limits in practice.

The DWP have appealed two of the Fife 'room size' decisions to the Upper Tribunal (Administrative) but no appeal has yet been heard. In addition, the DWP issued Circular HB/U6 2013 [5] which, despite the DWP's stated determination not to define a 'bedroom', stated:

> 4. This bulletin is to inform LAs that when applying the size criteria and determining whether or not a property is under-occupied, the only consideration should be the composition of the household and the number of bedrooms as designated by the landlord, but not by measuring rooms.
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> 5. In determining whether or not a room is a bedroom the landlord may consider a number of factors, but one of these must be whether or not a room is large enough to accommodate at least a single bed. Where this is not the case, the landlord should reassess whether or not that room

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[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226237/a4-2012.pdf

[5] http://www.disabilityrightsuk.org/sites/default/files/word/HB-U6-2013.doc

should be classified as a bedroom and ensure that the rent correctly reflects the size of the property.

6. Where rooms are designated as bedrooms landlords should classify it as such notwithstanding that the tenant may argue that it has been habitually used for something else (such as storage).

This looks a lot like trying to define a bedroom – 'large enough to accommodate a single bed'. As it is just an HB circular, of no statutory effect, the FTTs have been ignoring it.

If the DWP lose the Upper Tribunal appeals, there will be a clear and binding decision on room size, which would, in practice, require the Council as benefit authority to inspect and measure any disputed rooms.

Disability Discrimination and Article 14

While *MA & Others v SSWP* in the High Court and Court of Appeal has resulted in findings that the regulations are discriminatory against the disabled, but that the discrimination was, in effect, justified, the FTTs have at times taken a different route. One of the issues in *MA* was that the DWP defended on the basis that it was too difficult to produce regulations exempting people with varied need for an 'additional' bedroom for reasons related to disability. The number of claimants in *MA* perhaps aided the High Court to share that view. However, the FTTs are faced with specific individual circumstances and have been deciding on those.

The only disability related exemptions in the Regulations (as amended after Gorry and MA in the High Court) are and additional bedroom for an overnight carer where the claimant or their partner require overnight care, or where children are unable to share a room by reason arising from disability. No other disability related situations are exempted.

The first, and most clearly reasoned, of these FTT decisions was in Glasgow [6], in September 2013. The appellant had progressive multiple sclerosis, used an electric wheelchair and had multiple carer attendances during the day. At night her husband cared for her. The bedroom was fited with a tracking hoist, a hospital bed and required space by the side for the wheelchair. There was not room in the bedroom for a second single bed for the husband, who slept in the second bedroom. There was no overnight carer, save for the husband.

The FTT found that there was discrimination under Art 14 of the ECHR, combined with A1 P1, but distinguished MA (in the High Court judgment) on the basis that this was a discrete case. The FTT followed *Burnip & Gorry*, finding that the discrimination against the Appellant was not justified.

[6] http://nearlylegal.co.uk/blog/2013/10/yell-tak-the-high-road/ And the decision is at http://www.govanlc.com/CaseF.pdf

On remedy, the FTT decided that *Ghaidan v Godin-Medoza* [2004] UKHL 30 enabled a 'broad approach' via s.3 Human Rights Act 1997 in interpreting legislation so as to be compatible with convention rights, which was not reliant on finding an ambiguity in the statutory wording. The FTT decided to read the relevant regulation (B13(5)(a)) so as to read

> "(a) a couple (within the meaning of part 7 of the Act) (or one member of a couple who cannot share a bedroom because of severe disability) in order to give the regulation effect in a Convention compatible way. Not to read the regulations in this way would be incompatible with the Convention and the Human Rights Act."

The decision does not address Discretionary Housing Payments, one of the key issues in *MA*, nor does the decision deal with the Court of Appeal's finding in *Burnip/Gorry*, on which more below.

The DWP is appealing the Glasgow decision to the Upper Tribunal.

The Glasgow decision is one of the better reasoned of the Article 14 FTT decisions. The Redcar decision [7] doesn't even mention Article 14, simply stating, in relation to the Appellant's disabilities:

> The Local Authority have not taken into consideration her disabilities and her reasonable requirements, as a result [of] these, to sleep in a bedroom of her own.
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> [...] that the property has 3 bedrooms and although the appellant and her husband are a couple, her particular circumstances (ie the extent and effect of her disabling medical conditions and her resulting needs due to those disabilities) mean that they reasonably require one bedroom each and should therefore be assessed for housing benefit on that basis.

There is, of course, no basis in the Regulations for inventing a 'reasonable requirements' criteria for number of bedrooms. It is hard to see any way in which the Redcar decision could survive an appeal to the Upper Tribunal (although I have not heard of one).

An Edinburgh decision [8] follows similar lines to the Glasgow one. Husband and wife were unable to share a bedroom due to the husband's health conditions.

There are a number of difficulties with these decisions, with the High Court and now Court of Appeal decisions in *MA* being only the most obvious. The situations of the appellants in these appeals are not dissimilar to those of some of the Claimants in *MA*. However, the more significant issue is that of remedy.

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[7] http://nearlylegal.co.uk/blog/2013/10/the-absence-of-reasons-in-redcar/
[8] http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/EdinburgFTT.pdf

The Glasgow FTT decision interprets *Ghaidan v Godin-Medoza* as endorsing a 'broad approach' to 'reading in' for convention rights compatibility. But the decision in that House of Lords case involved reading 'living as husband and wife' to mean 'living together as if they were…' in relation to a same sex couple. This is an interpretation of the existing words of the statute. 'Reading in' for compatibility does not extend to adding in whole new phrases, as the Glasgow FTT did (and as the Edinburgh decision also did).

If the words of the statute cannot be read compatibly, then the remedy is a declaration of incompatibility, which the FTT cannot make, and which would make no difference to the position of the appellant.

What view the higher courts will take of these decisions will have to be seen, but it is very far from certain that the decision of the FTT will be upheld.

A variation on the Article 14 argument was found in a Liverpool decision [9]. In this, the appellant's adult daughter received overnight care from the other adult daughter, who stayed overnight in a room on a bed on the floor twice a week. The FTT found that this was a bedroom, despite not being used as such days a week, but that Article 14 discrimination arose in not treating the non-dependent daughter in the same manner as the appellant or appellant's partner would have been treated if they received overnight care. The difference in treatment was not justified. The FTT remedied this by 'reading in' the words 'or a non-dependent' after the word 'partner' in Reg B13(5).

Again, the 'reading in' in this case is not an interpretation of the existing words of statute, but the invention of whole new phrases.

Room Use

Room use, whether historic or current, has played a part in a number of FTT decisions on whether a room is actually a bedroom for the purposes of the regulations. But there is so far only one decision made wholly on room use.

The Rochdale decision [10] concerned a flat let as a two bed. The appellant lived there alone. His evidence was that the second bedroom had always been used as a dining room, as there was no room for a dining table in the living room, which contained the kitchen area. Despite the appellant having signed a housing benefit application describing the property as a two bedroom flat, and the tenancy agreement also stating this, the FTT accepted the tenant's evidence (including video of the room with a table and sideboard) and that he regarded the property as a one bedroom flat. "Landlords cannot arbitrarily reclassify room use and the tenant is free to use rooms as they wish".

[9] http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/SC068-13-10123-LIVERPOOL.pdf
[10] http://nearlylegal.co.uk/blog/wp-content/uploads/2014/01/BT-appeal-result1.pdf

This should be set against a Fife decision, William Thomson [11], in which the tenant's argument that a 'bedroom' was used for storing gardening equipment was rejected:

> I was attracted to Mr Sutherland's [for the appellant] general approach to the question of considering whether a room which was in all physical aspects capable of being used as a bedroom should nonetheless not be classified as one. His approach meets the objection of self classification by requiring (a) that there be well established alternative use of the room, and (b) that that alternative use is in reality not a matter of choice for the occupant but reasonably required for their continued occupation of the property as their home.
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> [...] I did not accept that it was necessary to effectively reclassify the room as a garden tool store in order for the appellant to be able to have reasonable enjoyment of his property consistent with his tenancy obligation. I consider that few tools are likely to be reasonably required to maintain the garden to a standard consistent with the tenancy agreement. The garden is small, barely four times the size of the disputed room said to be necessary to store the tools to maintain it. [...] it is not unreasonable to expect the tenant to obtain a small outdoor shed to store them in, as other tenants do.

This approach – that the alternative use be reasonably required for occupation of the property – has been adopted in other FTT decisions, disposing of room use.

The Westminster decision in Lall [12] has been held up as a clear room use case. However, the housing association landlord (or rather its predecessor) had bought the property in a dilapidated state. It was arranged that Mr Lall would become the tenant but that various alterations, including structural alterations would be carried out to make the property suitable for Mr Lall's needs. (Mr Lall is blind). The landlord consented to and participated in these alterations. Part of the purpose of the alterations was to make one room suitable for Mr Lall's reading and other equipment required.

So, from the start of the tenancy, the obtaining of the property by the landlord, and the alterations made, it was clear that the purpose of one of the rooms was for use in relation to that equipment and it was not intended as a room for (potential) use as a bedroom by the landlord.

The designation as a two bed was an error by the landlord's agent, which had been corrected by the housing association – so not a 'redesignation'. In these circumstances, unsurprisingly, the FTT found that "the room was never intended to be a bedroom" and was not used as such.

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[11] http://www.insidehousing.co.uk/journals/2013/09/20/t/x/f/William-Thomson-Decision-Notice.pdf

[12] http://nearlylegal.co.uk/blog/2013/09/westminster-clear-up/

Room use also featured in decisions in Islington [13] and in Aberystwth [14] but as a factor, alongside room size.

Room use most recently featured in a decision from Monmouthshire [15]. Two 'bedrooms' as described by the landlord, were both under 70 sq ft. In addition, these rooms were argued to be 'box rooms', one used as office for a computer and storage, the other used as a room for painting and artwork. The smallest of the two had a seat which could be pulled down and slept on if necessary. It was occasionally used by the claimant's daughter if she stayed over and sometimes, rarely, by the claimant when his wife was restless due to her disability.

The FTT found they were not bedrooms due to room size, but also, referencing a decision of the Upper Tribunal that I'll come to below, that:

> Bedroom' is not defined by the legislation. This has most recently been pointed out in the Upper Tribunal decision 2014 UKUT 48 AAC. A(t) paragraph 19 of that decision the Tribunal helpfully refer to various definitions of a bedroom.
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> The Tribunal finds that neither of the two smallest rooms are bedrooms. They do not contain beds, they are not used for sleeping, they can only be occupied by a child under 10, a half person according to the overcrowding regulations. That on rare occasions the seat is pulled out so that it can be slept on does not make the room a bedroom and more that [sic. 'Any more than'] putting a sleeping bag on the floor of the living room would make that room a bedroom. The Appellant would not be able, due to the size of the room, to let the room to a lodger to assist with the reduction in Housing Benefit because it is not big enough. The property would in any event become overcrowded.

While the room size aspect of this decision is in line with the other FTT decisions discussed above, the room use element is more controversial.

The Upper Tribunal decision referred to is *Bolton Metropolitan Borough Council v BF (HB)* [2014] UKUT 48 (AAC) [16]. This was an LHA case. As background, the appeal concerned a 'two bedroom' property occupied by the claimant and his wife. It appears that both were receiving DLA, though this is not certain. The claimant had been discharged from hospital, suffering from pneumonia and chronic obstructive pulmonary disease. he had apparently been advised to sleep in a separate downstairs bedroom on a raised bed.

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[13] http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/Islington-Statement-of-reasons.pdf
[14] http://nearlylegal.co.uk/blog/2014/01/bedrooms-in-wales/
[15] http://nearlylegal.co.uk/blog/2014/02/on-folding-beds-and-sleeping-bags/
[16] http://www.bailii.org/uk/cases/UKUT/AAC/2014/48.html And discussion here: http://nearlylegal.co.uk/blog/2014/01/upper-tribunal-on-bedrooms/

The couple's daughter stayed at the property 3 or 4 nights a week to look after their needs. After the claimant was discharged from hospital and was sleeping in the other downstairs bedroom, the daughter would sleep on a camp bed in the living room.

The issue was that the claimant had been assessed for LHA on a one bed rate – that he and his wife could share a room. The Council argued that while the claimant (and indeed his wife) might be entitled to an extra bedroom for an overnight carer, under the Burnip amendments to the regulations, in fact the carer was not occupying a bedroom, so the claimant was not entitled to the two bedroom rate of LHA.

The Upper Tribunal found that the living room was a bedroom for the purposes of the regulations, effectively because someone was sleeping in it. The key part of the decision is:

> 18. In my judgment, on the facts of this case the claimant's daughter was provided with the use of a bedroom additional to those used by the persons who occupy the dwelling as their home. The fact that the room which she used was also the lounge of the house does not preclude it from being a bedroom. It was the room in which she had a portable bed and the room in which she slept when she was caring for her father, staying over, as the appeal tribunal found, three or four nights a week and helping him at night to get to the bathroom and with his nebuliser when he needed it. The legislation does not require that the "bedroom" must be a room primarily intended for sleeping in, such that a lounge or other living room is necessarily precluded from being a bedroom because it can be used for another purpose when it is not being used to be slept in.
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> 19. The word "bedroom" is not defined in the legislation. It is an ordinary English word and should be construed as such. According to the dictionary definition in the Shorter Oxford English Dictionary a bedroom is
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> "a room containing a bed", whilst in the Collins Dictionary it is
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> "a room furnished with beds or used for sleeping". In the Merriam Webster Dictionary it is
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> "a room used for sleeping"
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> and in Webster's Dictionary it is
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> "a room furnished with beds and used for sleeping".
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> (There is no essential or material difference between the room being furnished with one bed or more than one bed.) On any of those definitions it seems to me that the claimant's daughter had the use of a bedroom; the fact that the bed may have been folded up or put away in the course of the day when the room was being used as a lounge or

> living room does not mean that it was not a bedroom within the meaning of the regulations when she slept in it at night. It is sufficient if the room in question, of which the overnight carer has use, is furnished with a bed or is used for sleeping in. It would therefore make no difference if the claimant's daughter had, for example, slept on the sofa, or in a sleeping bag on cushions on the floor, as opposed to sleeping on a portable bed.

This decision has been taken as providing a definition of 'bedroom', that it is a room furnished as a bedroom and/or a room used for sleeping. People have then argued that if this is applied to bedroom tax cases, tenant use is key. If the room is not furnished as a bedroom or not used for sleeping, it is not a bedroom.

My view is that this has to be approached with considerable caution.

It is clear that the UT is prepared to accept actual, current, use of a room as the deciding factor for the room to be classed as a bedroom.

Can this simply be taken to apply in reverse, so that actual current room use would be the deciding factor in classing a room as 'not a bedroom'?

The UT accepts that 'bedroom' is an 'ordinary english word and to be construed as such'. In this case, the UT refers to four dictionary definitions (although the Merriam-Webster definition is actually: "a room furnished with a bed and intended primarily for sleeping"). However, what the UT is not doing is setting these dictionary definitions as the only criteria for what is a bedroom.

This is clear because the UT's finding that the room would be a bedroom if someone was using it to sleep on the sofa or the floor contradicts two of the definitions, which require a bed. (In fact three of the definitions, if I'm right about the Merriam-Webster definition above). Only the Collins and the UT's version of Merriam-Webster would allow 'used for sleeping' in the absence of a bed.

Further, the UT holds that "The legislation does not require that the "bedroom" must be a room primarily intended for sleeping in", but at least one dictionary definition – the Merriam-Webster one I found above, not mentioned by the UT – requires just that, 'intended primarily for sleeping'.

So, what the UT is surely doing is using the dictionary definitions as examples of common meanings of 'bedroom'. This is the only approach that would allow the UT to find that using a room to sleep in was sufficient to make it a bedroom, even in the absence of a bed.

But, if the definitions are not exhaustive, and are just examples of ordinary English usage of 'bedroom', then it remains open for other ways of construing the word to also be found to be valid.

It decision also raises the question of at what point does a bedroom cease to be a bedroom after it has been used as one? Is it sufficient for a room to continue to be available for use as a bedroom to make it a bedroom? And if so, would an alternative use have to be such as to make the room unavailable for use as a bedroom? What kind of use might that be?

It is worth recalling that one of the Fife FTT decisions suggested (but did not confirm) criteria for alternative use, as above:

> (a) that there be well established alternative use of the room, and (b) that that alternative use is in reality not a matter of choice for the occupant but reasonably required for their continued occupation of the property as their home.

And, as this UT decision makes clear, the absence of a bed does not stop a room from potentially being a bedroom.

Overall, the UT decision makes clear that the UT adopts an approach based upon construing 'an ordinary English word' and therefore that FTTs should similarly take that approach. It further makes clear that the UT is open to considering room use as a relevant factor. This is an important development. (Although it may be easier to identify when use makes a room a bedroom than when use makes a room not a bedroom).

However, what this decision does not do is provide a closed definition of bedroom. The use of the dictionary definitions can only be as examples of usage of an 'ordinary English word', for the reasons I've explored above. This decision does not say that a bedroom must have a bed in it. It does not say that a bedroom must be used for sleeping in.

The decision also makes clear that a room may be used for other purposes, here as a living room, yet also be a bedroom.

I think that the strongest that can be said is that this decision would offer support to a clear, evidenced case that a room can't be used as a bedroom. Whether it would assist a case that a room simply isn't used as a bedroom I am less certain.

The Monmouthshire FTT above, that refers to the Bolton UT decision, is not a particularly reliable example of the FTT using the UT decision. The FTT simply gets the UT decision wrong when it says

> "That on rare occasions the seat is pulled out so that it can be slept on does not make the room a bedroom and more that [sic. 'Any more than'?] putting a sleeping bag on the floor of the living room would make that room a bedroom."

The UT did indeed find that putting a sleeping bag on the floor of the living room would make it a bedroom, if it was slept in.

Room use, both historic and current, is therefore clearly a factor, but it remains to be seen how decisive it is when it is the sole factor.

Separated families

There have been two FTT decisions on a requirement for extra bedrooms to accommodate children staying over with a separated parent.

In the Inverness decision [17], the appeal was dismissed, no entitlement to an 'extra' bedroom was found.

In a Liverpool FTT [18], however, an additional bedroom was found.

The appellant was separated from his partner in 2006, when their daughter was seven. He then lived in a one bed flat for two years before securing his current two bed property. Relations were amicable and a usual pattern of shared parenting was established with the daughter staying with the appellant and sleep at the property at weekends and over school holidays. This was the applicant's primary purpose in seeking a two bed flat originally, to enable his daughter to stay.

The FTT found:

> The Tribunal accepted, too, that it was possible for a person to be resident in more that one place at a time, as found in AM v Secretary of State for Work and Pensions [2011] UKUT 387 (AAC). The Tribunal found, as a fact, that both the Appellant's property and the property of his ex-partner, both constituted a home for the Appellant's daughter and that the Appellant's home could not be regarded merely as a place where the Appelllant's daughter transiently or temporarily resided. That this should be held to be so was crucial to the well-being of the Appellant's daughter, a child.
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> Significantly, the Respondent [Council] endorsed the findings of 'The father's Engagement Project. To find that the Appellant is not entitled to an additional bedroom to accommodate the Appellant's ongoing engagement with his daughter directly undermines the findings of that project.
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> Accordingly, the Tribunal found that the regulations had to be read subject to the imperatives dictated by Article 1 Protocol 1, Article 8 and Article 14 of the ECHR, to the effect that, in the circumstances of this

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17 http://www.cih.org/resources/PDF/Scotland%20Policy%20Pdfs/Bedroom%20Tax/Bedroom%20tax%20tribunal%20rulings%20-%20revised%2029%20Nov%202013.pdf

18 http://nearlylegal.co.uk/blog/wp-content/uploads/2014/02/liverpoolfamily.pdf

appeal, the Appellant was entitled to an additional bedroom to accommodate his daughter staying overnight with him.

The difficulty with this decision is that it appears to have been made *per incuriam,* without considering the Upper Tribunal decision in *TD v SSWP and London Borough of Richmond-Upon-Thames (HB)* 2013 UKUT 642 AAC [19] or indeed *R (Marchant) v Swale Borough Council* HBRB [2000] 1 FLR 246.

TD, which is an LHA decision, rejects an Article 14 discrimination argument in a 50/50 shared care situation. While no article 8 argument was made in that case, the finding that there was Article 14 discrimination but that the discrimination was justified would clearly present a mountain for an Article 8 argument to climb.

Marchant v Swale found that a child can only 'occupy' one home and that home must be the one where the child belongs to a "family" – normally with the child's mother who gets Child Benefit. The FTT does not deal with the issue of 'occupation', instead discussing whether a 'home' could be in two places.

Housing lawyers will also be familiar with the very high hurdle set by *Holmes-Moorhouse v LB Richmond upon Thames* [2009] UKHL 7 [20] in terms of any requirement for housing provision based upon shared care of children in a separated family.

Again, there is the issue of the remedy. The FTT doesn't even detail how it is reading the regulations to enable this extra room, it is as if the FTT is simply pretending that regulations do say what they want, not an approach likely to be condoned by higher courts.

Sadly, it has to be concluded that the Liverpool FTT decision would be highly likely to be overturned on appeal, at least pending the outcome of the Liberty backed Judicial Review on the issue of separated families.

Conclusions

While there have been a wide range of successful FTT appeals, the strength of the grounds in these appeals varies greatly. It is clear that the FTTs, faced with the individual impact on the bedroom tax on the specific appellant, are often keen to find a way around the regulations. The range of arguments raised in the FTTs also provides a useful store of argument to be tried in the Upper Tribunal and beyond, as well as in the County Court on possession cases.

Though I would hope to be wrong, my sense is that the 'room size' and potentially 'room use' arguments have the best prospect of success in the

[19] http://www.osscsc.gov.uk/Aspx/view.aspx?id=4072

[20] http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090203/holmes-1.htm

Upper Tribunal. As shown by its belated attempt to set out what is a bedroom, the DWP has created a very messy problem for itself by refusing to define the term, and the bedroom tax can't be easily administered on a case by case 'we'll know one when we see one' basis.

The Article 14 arguments have the huge problem of MA in the Court of Appeal to face, as well as the technical impossibility of the 'reading in' that the FTTs carry out.

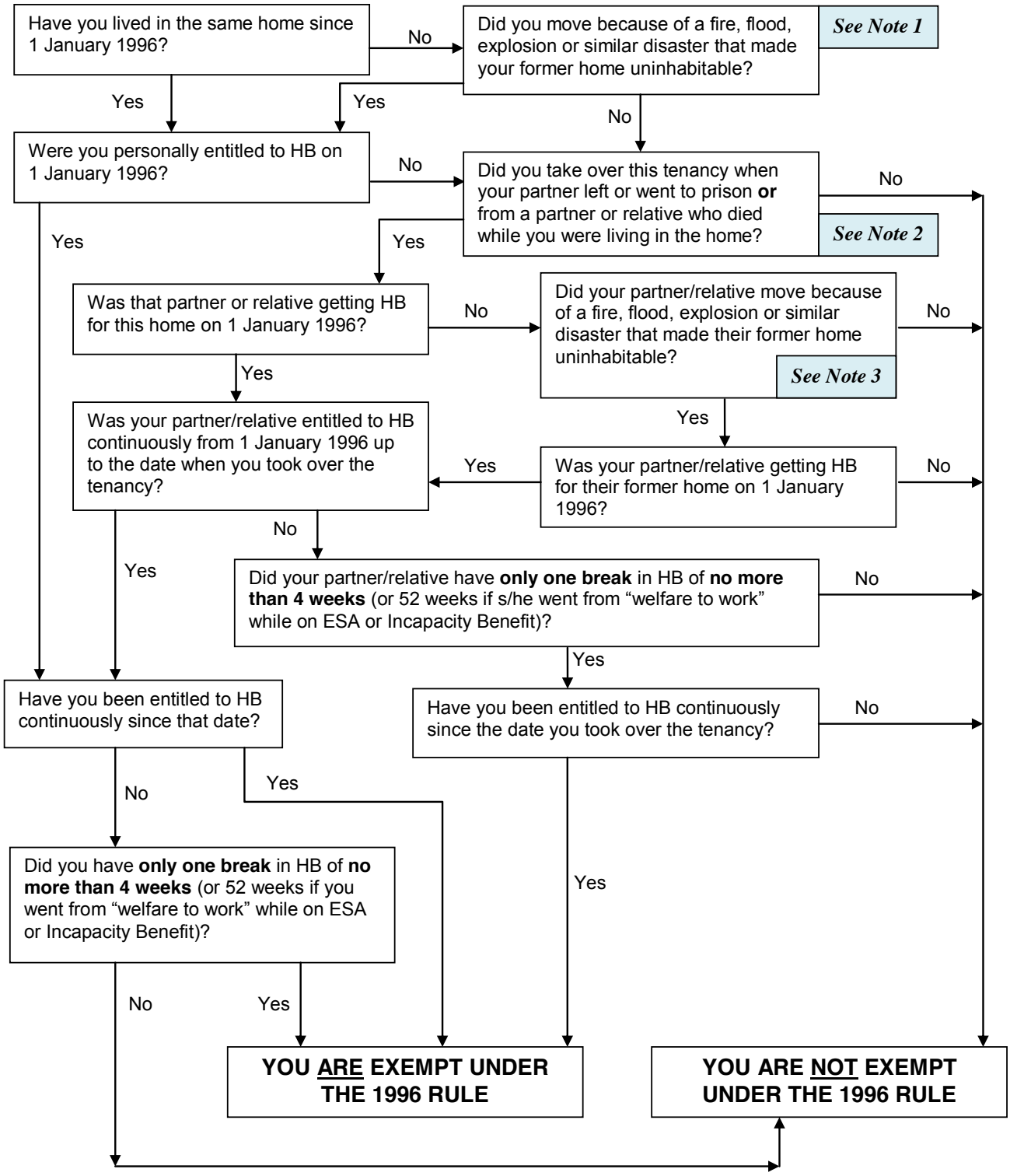
The separated families argument, I'm afraid I can see few prospects for, unless the ongoing Judicial Review turns up something surprising.

While the DWP appeared to be, at one point, threatening to appeal everything in sight, if the Councils didn't, it seems to have settled for a more reasonable approach of targeting a few key FTT decisions on each issue for appeal. We may have to wait quite some time for the results of that approach.

In the meantime, it makes sense for any tenant with an arguable case to appeal to the FTT. The way these decisions are going, they might well win.

Giles Peaker
3 March 2014.

EXEMPTION FROM MAXIMUM RENT (SOCIAL SECTOR) UNDER 1996 RULE



Note 1	*More than one move for any of these reasons is allowed*
Note 2	*If the partner/relative from whom you took over the tenancy also took over the tenancy from an earlier partner/relative, this is allowed as long as there has been **no more than one 4w/52w break** in the continuous HB entitlement of **all** successive tenants: **not** one break each*
Note 3	*More than one move for any of these reasons is allowed*