**SSWP v David Nelson and Fife Council**

**SSWP v James Nelson and Fife Council**

**[2014] UKUT 0525 (AAC)**

**Mr Justice Charles**

**Lady Stacey**

**Upper Tribunal Judge May QC**

**Attendances**

For the Appellant: Andrew G Webster

For the Individual Respondents: Fife Law Centre

Fife Council did not appear at the oral hearing

**DECISION:**

1. The appeal relating to Mr James Nelson:
   1. is allowed because in making it the First-tier Tribunal erred in law in the ways set out herein
   2. the Upper Tribunal does not remit his case to the First-tier Tribunal, but itself
   3. dismisses his appeal against the decision of Fife Council dated 27 March 2013 reducing the housing benefit payable to him by 14%
2. The appeal relating to Mr David Nelson:
   1. is allowed because as is now accepted by all the parties the decision of Fife Council dated 24 March 2013 and revised on 15 April 2013 and (understandably) the decision of the First-tier Tribunal under appeal failed to take account of the impact of paragraph 4 of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006, and
   2. no further order or direction is needed because Fife Council have rectified this error and have repaid the deductions that were wrongly made.

**REASONS FOR DECISION**

***Introduction***

1. The individual respondents to this appeal by the Secretary of State are brothers. They appealed to the First-tier Tribunal (the FtT) against decisions of Fife Council under Regulation B13 of the Housing Benefit Regulations 2006 (as amended) (the “Amended Housing Benefit Regulations”) reducing the housing benefit payable to them by 14%. The effect of this regulation in broad terms is that the amount of housing benefit payable to the claimant is reduced by a percentage if the number of bedrooms in his home exceeds the number of bedrooms to which he is entitled under the regulation.
2. In both cases it was accepted that there were two bedrooms in the homes to which the claimants were entitled and the argument before and the decisions of the First-tier Tribunal (the FtT) focused on a third room, which was smaller than the other two rooms used as, and accepted to be, bedrooms. The FtT decided in each case that the third room was not a bedroom because their floor areas were not large enough. In both cases issues as to use of the two rooms were also raised before the FtT but its decisions were not founded on those issues The Secretary of State argues that the FtT erred in law:
   1. in its approach to determining what is a bedroom for the purposes of the Amended Housing Benefit Regulations, and in any event
   2. by failing to give adequate reasons.

There is no cross appeal but it is clear that both of the individual respondents would wish to argue that the FtT reached the correct decision by reference to their alternative and additional arguments on use.

1. The central issue of law in these appeals relates to the approach that should be taken to determine what is a bedroom for the purposes of the Amended Housing Benefit Regulations. Although we were not referred to them we are aware that a number of different approaches have been taken by First-tier Tribunals. A number of cases have been stayed to await the decision by this three judge panel of the Upper Tribunal.
2. The validity of Regulation B13 of the Amended Housing Benefit Regulations has been and still is the subject of challenge under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Equality Act. These appeals do not raise such issues and are directed to the interpretation and application of that regulation.

*Housing benefit*

1. Housing benefit is a means tested benefit available to assist tenants in the public and private sector to pay their rent. These appeals are concerned with tenants in the public sector.
2. The relevant provisions were introduced by the Housing Benefits (Amendment) Regulations 2012 and their underlying purpose was to address the problem that some tenants in social housing were occupying more space than they needed. The solution introduced was to limit the housing benefit entitlement of those "under occupying" accommodation to an "appropriate maximum housing benefit". "Under occupation" is defined by reference to the “bedroom criteria”. Hence the need to identify what is a bedroom. The adoption of the bedroom criteria to determine the appropriate maximum housing benefit has been a matter of great public controversy.
3. A claimant's maximum housing benefit is calculated by reference to the amount of his “eligible rent”. In broad terms, this is the rent due subject to certain adjustments.
4. Here the relevant adjustments fall to be made under regulation 12 B(2) of the Amended Housing Benefit Regulations. The starting point for those adjustments is the aggregate of the payments specified in regulation 12(1) and thus for present purposes the rent payable under the tenancy agreement. Again in broad terms, the reductions relate to charges for water, sewerage or allied environmental services and service charges.

*The relevant regulation*

1. This is Regulation B13 of the Housing Benefit Regulations 2006/13. We set out the version in force since 4 December 2013. The differences between it and the earlier version in force from 1 April 2013 to 3 December 2013 are irrelevant in these appeals. It provides as follows:

“Determination of a maximum rent (social sector)

1. The maximum rent (social sector) is determined in accordance with paragraphs (2) to (4) is
2. The relevant authority must determine a limited rent by
   1. determining the amount that the claimant’s eligible rent would be in accordance with regulation 12 B(2) without applying regulation 12 B(4) and (6);
   2. 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);
   3. where more than one person is liable to make payments in respect of the dwelling, apportioning the amount determined in accordance with subparagraphs (a) and (b) between each such person having regard to all the circumstances, in particular, the number of such persons and the proportion of rent paid by each person;
3. The appropriate percentage is
   1. 14% when the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and
   2. 25% where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled.
4. Where it appears to the relevant authority that in the particular circumstances of any case a limited rent is greater than it is reasonable to meet by way of housing benefit, the maximum rent (social sector) shall be such lesser sum as appears to that authority to be an appropriate rent in that particular case.
5. The claimant is entitled to one bedroom for each of the following categories of persons 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) -
   1. a couple (within the meaning of Part 7 of the Act);
   2. a person who is not a child;

ba. a child who cannot share a bedroom;

c. two children of the same sex;

d. two children who are less than 10 years old;

e. a child.

1. The claimant is entitled to one additional bedroom in any case where -
   1. a relevant person is a person who requires overnight care; or
   2. a relevant person is a qualifying parent or carer.
2. Where
   1. more than one subparagraph of paragraph (6) applies the claimant is entitled to an additional bedroom for each subparagraph that applies;
   2. more than one person falls within a subparagraph of paragraph (6) the claimant is entitled to an additional bedroom for each person falling within that subparagraph, except that where a person and that person's partner both fall within the same subparagraph the claimant is entitled to only one additional bedroom in respect of that person and that person's partner.
3. For the purposes of determining the number of occupiers of the dwelling under paragraph (5), the relevant authority must include any member of the Armed Forces away on operations who ---------------
4. In this regulation "*relevant person"* means
   1. the claimant;
   2. the claimant's partner;
   3. a person (“P”) other than the claimant or the claimant's partner who is jointly liable with the claimant or the claimant's partner (or both) to make payments in respect of the dwelling occupied as the claimant's home;
   4. P’s partner.”
5. A “relevant authority” is defined as an authority administering housing benefit and a “child” is defined as a person under 16.
6. It is to be noted that the deduction is based on an entitlement given by reference to;
   1. defined persons and not by reference to how the rooms in a home are actually used from time to time, and
   2. bedrooms.

*Procedural issues*

1. In both cases the landlord is Fife Council who decided not to be represented before us on 18 September 2014 but had relied on an opinion of counsel as their written submission. The Secretary of State was represented by counsel and both of the individual respondents to the appeals by the Fife Law Centre. At the start of the hearing an adjournment was sought on behalf of the individual respondents. We refused that application for the reasons given at the time. It was also pointed out that those respondents could, if so advised, make further written submissions after the hearing. As it turned out, we wanted further information and made a direction dated 19 September 2014 for its production which included a direction that the parties were to make such further submission as they wish. We received further information including the tenancy agreements and further submissions from the Secretary of State on 7 October 2014 and the Fife Law Centre on behalf of both of the individual respondents on 22 October 2014.
2. The FtT heard both cases together on 26 August 2013 and the judge (S. G. Collins QC) gave a statement of his reasons (the Decisions) in both cases dated 14 November 2013. The paragraphs in the Decisions relating to the conclusion that the rooms under consideration were too small to be bedrooms are in effectively the same terms. Unless we state otherwise our references to paragraphs of the Decision are to the decision relating to Mr James Nelson.
3. It is now common ground that the decision made by Fife Council in respect of Mr David Nelson that was appealed to the FtT is fundamentally flawed because the impact of paragraph 4 of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 was overlooked. That impact was that in his case Regulation B13 was disapplied until 3 March 2014. This point was not raised before or (understandably) addressed by the FtT.
4. It was common ground that for that reason the appeal by Mr David Nelson must be allowed.
5. Part of the information we sought and have been provided with after the hearing relates to the further decision making in his case under Regulation B13. It has confirmed what we were told at the hearing namely that the original decision was superseded, on 18 April 2014, and
   1. the housing benefit that was incorrectly deducted was repaid to Mr David Nelson, and
   2. a new decision has been made to apply a 14% deduction from 3 March 2014.

It follows that no issue remains live on the original decision made by Fife Council. The new decision has not been appealed but Mr David Nelson wants to challenge it on the same basis as he challenged the original one. In their further submissions to us Fife Law Centre have (a) indicated that although Mr David Nelson was advised to appeal the new decision he did not do so because he was told by Fife Council that there was no such need, and (b) invited us to find that no deduction should be made from 3 March 2014 onwards on the basis of the arguments advanced to uphold the decision made by the FtT on the appeal relating to the original and now superseded decision.

1. For the reasons we give later, we have concluded the appeal relating to Mr James Nelson must be allowed because of a failure to give adequate reasons. It follows that if the appeal relating to Mr David Nelson had still been live it would have been allowed on the same basis.
2. However this does not mean that the points of law raised on these appeals relating to what is a bedroom for the purpose of Regulation B13 of the Amended Housing Benefit Regulations are academic because in the case of Mr James Nelson they must be addressed to determine whether we should decide his case ourselves or remit it with guidance on how the FtT should approach the remitted appeal in law. Also, and understandably, Mr David Nelson wants answers to these issues of law.

*Generally the approach in law to the application of the regulation*

1. When an ordinary or familiar English word such as “bedroom” is used in a statutory test and is not defined in the legislation:
   1. the test should not be re-written or paraphrased, and
   2. the ordinary or familiar word should be construed and applied in its context having regard to the underlying purposes of the legislation.

The decision of the House of Lords in *Utratemp Ventures Ltd v Collins* [2002] 1 AC 301 which was relied on by the Secretary of State is an example of this well established approach.

1. So a problem for courts and tribunals in giving guidance, and for fact finders in reaching and explaining their conclusions on the application of a test using ordinary or familiar English words that are not defined is that they cannot re-write the test and as Lord UpJohn explains in *Customs and Excise Commissioners v Top Ten Promotions* [1969] 1 WLR 1163, at 1171 they must adopt the following approach:

It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look at examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved, admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament

1. It follows that the underlying purposes of the relevant test using such language and the context in which the language is used are important and often determinative factors to be taken into account in determining whether on the facts of a given case the relevant test is satisfied.
2. It also follows that in most cases the decision maker’s understanding of the test and approach to its application in a given case is best provided by the reasons given for the decision (e.g. albeit in an obvious case it is a bedroom because it has room for two single beds and storage, good ventilation and either it has been or could be used as room in which two people have slept or could sleep).
3. The approach reflects the old adage that it is difficult to define an “elephant” but we know one when we see one and so we can explain why we think we have seen one by describing what we have seen.

*The application of this approach to Regulation B13*

1. The underlying purpose is to limit the housing benefit entitlement of those under occupying accommodation and the language as a whole shows that the trigger for a reduction is set by reference to the entitlement of a tenant to bedrooms for the occupation of the people listed in sub-paragraphs (5) and (6). Sub-paragraphs (7) to (9) set out how that entitlement is to be assessed.
2. It follows that read as whole Regulation B13 requires the decision maker to assess the entitlement to bedrooms as set out in those sub-paragraphs.
3. It is only when that entitlement to bedrooms is less than the number of bedrooms in the home that a reduction can be made.
4. In our view, when read as a whole Regulation B13 provides that in determining whether there is under occupancy that triggers a reduction in housing benefit:
   1. the use or potential use of the relevant room or rooms can be by any of the people listed in sub-paragraphs (5) and (6),
   2. the impact of this is that it has to be considered whether the relevant room or rooms could be used by any of the listed people, and
   3. designation or choices made by the family as to who should occupy rooms as bedrooms or how rooms should be used is unlikely to have an impact on the application of the regulation.

(We have not expressed point (iii) in absolute terms because it was not the focus of argument in this case and without such focused argument we do not consider that it would be appropriate to say that such designation or choice can never be relevant and the qualification made in paragraph 29 below is relevant.)

1. As to the points made in paragraph 27(ii) and (iii). It is in our view clear:
   1. that the underlying purpose of Regulation B13 would be undermined if this was not the case, and
   2. that purpose and that interpretation of the regulation shows that the test is focused on the availability of rooms that could be used as bedrooms by any of the listed people and thus essentially the assessment of a property when vacant; rather than how it is actually being used from time to time. It seems to us that this is so because a part of the underlying purpose must be to free up homes that are being under occupied so that they can be used by others with an entitlement to the number of bedrooms in the property or to encourage the existing occupiers to make under occupied bedrooms available to others.
2. However, this does not mean that issues concerning the designation of rooms as between living room(s), kitchen, bathroom, lavatory, storeroom and bedroom do not arise. For example, issues could arise (a) as to what should be designated as the living /dining areas of a property, and (b) the impact of a conversion of room to a bathroom or wet room (which could normally only be done lawfully with the consent of the landlord).
3. We agree with the Secretary of State that a starting point for determining how the property could be used and thus the number of bedrooms it contains is its description by the original and later landlords when letting it. This could be in the tenancy agreement or marketing material. So, in Scotland a house is regularly described by reference to the number of apartments it has and so a “four apartment house” is a house which has a living room, three bedrooms, a bathroom with or without a separate lavatory and a kitchen. In England, that would regularly be described as a three bedroom house. But we do not agree that this description is more than a starting point because if, for example, in the application of Regulation B13 that categorisation is disputed and found to be incorrect it should be reclassified for that purpose and, in many cases, for the purposes of setting the rent to be paid under the tenancy agreement. In particular when, as here, the current landlord and the relevant authority are the same legal person it is clear that it would need to revisit any categorisation for letting purposes if the application of Regulation B13 showed that it was or might be inaccurate and, in particular, if it would or might affect the level of rent that should be charged. We acknowledge that in some cases this may not be so (e.g. a conversion of a room to a bathroom or wet room or kitchen).
4. When an issue arises as to whether a particular room falls to be treated as a bedroom that could be used by any of the persons listed in Regulation B13 (5) and (6) a number of case sensitive factors will need to be considered including (a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy.
5. For example, arguments may arise over whether a room or space is to be classified as a bedroom or as a cupboard or cellar. Returning to what we have said earlier this will be answered by a description of the room / space and by reference thereto why the decision on categorisation has been made. It may also be assisted by evidence of how similar rooms / spaces are used in other properties in the area.
6. Those reasons will address issues of degree and so reasonableness in the context of the underlying purposes of Regulation B13. So, for example, in so giving effect to the statutory language, in our view the argument advanced by the Secretary of State before us that any room will be a bedroom for the purposes of the regulation if its floor space is big enough to accommodate a single bed (size not mentioned) even if all the sides of that bed would touch a wall or an outward opening door is absurd. The absence of any reference to the height of the room, its ventilation, its natural and electric lighting or whether it has a window is fatal to that argument. But assuming that when they are factored in they do not rule out the conclusion that such a room is a bedroom the consequence of the argument, namely that a person would have to get ready for bed and then jump from a passage through an outward opening door to get into bed, would have nowhere to put clothes or say a glass of water (other than under the bed where it abuts the door) shows that that description of a bedroom does not fit with its ordinary or familiar meaning. (We also note that it is at odds with the approach taken by the Secretary of State in paragraph 5 a bulletin dated 23 September 2013 (U6/2013) to local authorities to which we were referred by his further submissions).
7. The rejection of that argument advanced by the Secretary of State points the way to the reasoning that is necessary to make a properly informed decision on what is and is not a bedroom for the purposes of the regulation. This is because it points the way to what needs to be considered in connection with size and the other matters mentioned.
8. Issues as to whether a room of that size is a bedroom because it could be used as a bedroom for one child under 10, but not a teenager under the age of 16, are outside the ambit of this decision. However we note that paragraph 5 of bulletin U6/2013 and the Secretary of State’s submission to us seem to indicate that his view is that there must be room for a normal single bed and so if there was only room for say one cot or one young child’s bed he would not, or would not generally, regard the room as a bedroom.

*Size*

1. This was treated by the FtT as the determinative issue in these cases. The only issue raised on size was floor area.
2. In the case of Mr James Nelson in answering the question as to how many rooms there are in the property in the form he sent to Fife Council he said that it had three bedrooms and one of the rooms so classified by him was at the centre of the argument. In paragraph 17 of the Decision that room is described in the following terms:

17. The first of these rooms (“ room 1”) is about 8' x 8' in size, thus around 64 square ft.. It has a window and a walk-in cupboard. It was designed to be a bedroom and was used by the appellant's children as such when they were young. The most recent use of the room as a bedroom was by the appellant's son Gary, who slept there regularly until he was around 15 years of age, and then intermittently until he turned 16. The appellant is in the process of investigating whether this room could be turned into a wet room as he says that he struggles to use his bathroom. It is however unclear whether such a conversion can or will be done.

1. This is therefore a description of a room that was designed as a bedroom which could and indeed had been used as a bedroom for a child (one of the people listed in sub-paragraph (5) of the regulation). The Decision indicates that he described the room to the judge as a box bedroom. His case was that two other larger rooms were bedrooms. One was his and he needed the other for an overnight carer. That asserted need for, and so entitlement under the regulation to, a bedroom had been accepted by Fife Council and was not in issue before the FtT.
2. In their further written submissions Fife Law Centre dispute the accuracy of that description on the basis that they assert that Mr James Nelson’s son did not use “room 1” as a child but the room now used by him (as an overnight carer). We return to this when considering whether we should remit this appeal or decide it ourselves.
3. We called for the tenancy agreements in both cases. They are in a standard form used by Fife Council that allows for alterations to be made and the use of a room by a lodger, with consent of the landlord. They do not describe the properties other than by address but state that if the tenant asks for it a more detailed description of the property (referred to as the house) will be given. We do not know if such descriptions were sought but were told and accept that Fife Council manages both properties as 3 bedroom, 5 bedspace properties pursuant to a designation made in 1956 by their then owners, Glenrothes Development Corporation, that was adopted and has not been changed.
4. In the case of Mr David Nelson the form he filled in did not ask him to say how many rooms were in the property and there was a dispute about the size of the smallest room. We agree with the judge that this was surprising. However, the judge made a finding that the relevant room was 66.3 square feet (7.8 feet by 8.5 feet). We add that this appears to accord with the newspaper picture we were shown of Mr David Nelson sitting in the room which also shows that like the room in Mr James Nelson’s home it has a window and is of normal height. The Decision relating to Mr David Nelson records the submission made by the presenting officer that the room “had a fitted wardrobe, radiator, window and double socket”.
5. On those descriptions, it too is a room that was designed as a bedroom and a room which could be used as a bedroom for a child (one of the people listed in sub-paragraph (5) of the regulation). There is no finding on whether it had been so used. Again Fife Council had accepted that Mr David Nelson (and his wife) needed a bedroom for use by an overnight carer.
6. Mr David’s Nelson’s case was that he used and needed the smallest room (room 1) to store a wheelchair, other equipment and medication and so it was not a bedroom for the purposes of the regulations. Although he did not have to deal with this argument the FtT judge rejected it on the facts because he did not find Mr David Nelson to be a credible or reliable witness regarding either the present use of the room or of the need to use it for the purposes suggested. This was a finding of fact on credibility that the FtT was entitled to make.
7. How then did the individual Respondents succeed before the FtT? The answer is that the FtT accepted their arguments based on the Housing (Scotland) Act 1987 relating to overcrowding and Circular A4/2012 which is recorded in paragraph 21 of the Decision relating to Mr James Nelson as follows:

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

*The reasoning of the FtT*

1. In accepting this argument the FtT said:

24. With regard to the first argument, I would accept that room 1 is of a size that would normally be regarded as too small to be used as an adult bedroom. I accept the thrust of Mr Sutherland’s submission here, namely that under occupancy can be seen as the flipside 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 B13(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.

25. I am conscious that the word "bedroom" is not defined in the 2006 Regulations. In particular no minimum room size is prescribed. [ ---- *reference is made to what Lord Freud said in Parliament (which is cited in this Decision at paragraph 54 below*) *------* ]. Accordingly whether a given room is or is not a "bedroom" falls be determined on appeal by the Tribunal as a matter of ordinary usage of the word, applying the facts as it sees them. What is or is not a "bedroom" is therefore essentially a question of fact, not law.

26. It also seems to me to follow that just because the 2006 Regulations do not specify a minimum room size for a bedroom, this does not mean that there is *no* minimum size. It means that it is a matter for the judgment of the Tribunal where the room is too small to be reasonably regarded as a bedroom.

27. In considering this I note that regulation B13 (5) expressly confers an entitlement to a bedroom for persons "occupying the claimant’s dwelling as their home". This suggests that a "bedroom" must generally be reasonably fit for full-time occupation of this nature, as opposed to short-term or irregular occupation as a visitor or overnight guest. In other words, it should generally be large enough not only to physically accommodate a bed, but also the storage of clothes and personal possessions (for example a wardrobe and chest of drawers), as well as providing a degree of personal space for the occupant, away from the rest of the household.

28. This last factor would again seem to be particularly relevant given that it is envisaged that a spare room might be occupied by a lodger, who is unlikely to be a member of the tenant’s family. In that regard I note that the respondent has guidance in relation to occupation of houses in multiple occupation (Fife Council: *Physical Standards for Houses in Multiple Occupation* (March 2012), Schedule 9, paragraph 1.4 and Annex A at [*reference given*]. This guidance stipulates that where there is a common kitchen and living room in a dwelling, a single room for one adult must be a minimum of 6.5 m² (rising to 10 m² where there is no such communal space). This guidance also makes reference to the need for "activity space" in bedrooms, that is, sufficient *useful* space, measured at floor level, to make proper use of the bed, wardrobe and chest of drawers.

29. In reaching my decision in this case I do not, of course, suggest that the statutory space standard in the 1987 Act or the HMO guidance is directly applicable to the appellant's house, let alone that it is necessarily determinative of the issue of whether the room is too small to be a bedroom. But I do consider that the standards are relevant in considering whether a room has sufficient size and space to be regarded as a bedroom for present purposes. Put another way, had Parliament intended that these long-standing statutory minimum standards should be *disregarded* by the Tribunal, I would have expected that to have been clearly stated in the legislation, and it has not been.

30. As I have already indicated, however, it is possible to envisage a situation where a room smaller than would be permitted by the above space standards could still be regarded as a bedroom, namely where it is being used only by an overnight carer per regulation B13(5), and thus not for full-time occupation by a person occupying the dwelling as their home. In such circumstances sufficient space for a single bed, together with adequate facilities for natural light and ventilation, maybe all that is required.

31. All this being so, however I am prepared to accept in this case, ------------ that room 1 does not properly fall to be classified as a bedroom for the purposes of paragraph B13(5). I find in fact that it is not a bedroom. In my judgement it is too small to be reasonably regarded as a bedroom. --------------------------

1. The Decision relating to Mr David Nelson contained equivalent passages.
2. We have not found that reasoning easy to follow.
3. However, we have concluded that essential starting points in the reasoning are the following conclusions in paragraphs 24 and 29 namely that:
   1. under occupancy can be seen as the flip side of overcrowding (paragraph 24),
   2. having regard to Circular A4/2012, that paragraph B13(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 (paragraph 24), and
   3. had Parliament intended that these long-standing statutory minimum standards should be *disregarded* by the Tribunal, the FtT would have expected that to have been clearly stated in the legislation (paragraph 29).

No reasoning is directly linked to those conclusions and in our view when read as whole, and having particular regard to what the judge says in the first sentence of paragraph 29, the FtT has failed to adequately explain how it reached those conclusions.

1. Accordingly, as mentioned earlier we accept that the FtT erred in law in failing to adequately explain how it reached its decision.

*The other ground of appeal and so the attack on the use made by the FtT of the impact of the statutory overcrowding provisions of the Housing (Scotland) Act 1987 and paragraph 63 of Annex C of Circular A4/2012*

1. It was argued by the Secretary of State (and through the opinion obtained by it) Fife Council that the FtT erred by treating the Housing (Scotland) Act 1987 as being *in pari materia* with the Amended Housing Benefit Regulations. We acknowledge that if taken in isolation, the conclusions that:
   1. under occupancy can be seen as the flip side of overcrowding (paragraph 24), and
   2. had Parliament intended that these long-standing statutory minimum standards should be *disregarded* by the Tribunal, the FtT would have expected that to have been clearly stated in the legislation, and it has not been (paragraph 29),

indicate that the FtT was, or may well have been, treating the two pieces of legislation as being *in pari materia*.

1. But, on our reading of the Decision as a whole (and in particular of the penultimate sentence of paragraph 25 and of paragraphs 29 and 30) the FtT probably did not do this and so adopting the definition used in the opinion obtained by Fife Council (and recommended to us by the Secretary of State) did not consider that the 1987 Act and the Amended Housing Benefit Regulations formed part of a single code or were sufficiently connected so that definitions of size or size criteria in the 1987 Act are to be or can be used to determine what a bedroom is under Regulation B13.
2. However, we do not need to dwell on whether or not the FtT was applying the *in pari materia* principle or concept because whether or not this is the case the two conclusions set out in paragraph 50 above are wrong in law.
3. As to the first - under occupancy can be seen as the flip side of overcrowding – this is wrong in law because:
   1. the legislative intent behind the relevant part of the 1987 Act (Part VII) to create a criminal offence if property is overcrowded is very different to that relating to the Regulation B13 of the Amended Housing Benefit Regulations,
   2. Part VII of the 1987 Act operates very differently to Regulation B13 in that Part VII treats living rooms as rooms available for sleeping, disregards children under the age of 1, expects adults of the same sex to share a bedroom and in Table II (which is the table that refers to floor areas) an aggregate for all the rooms defines the permitted number of persons who can sleep in a house,
   3. the significant differences in approach between the two statutory regimes and their underlying purposes mean that it would be wrong to transport only some elements of the 1987 Act regime into the application of Regulation B13, and
   4. the 1987 Act (a) does not have the consequence that of itself use of a room below the size referred to by a person (e.g. by an adult of a room less than 70 square feet) is an offence, and (b) it leaves a room having a floor area of 50 square feet or less out of account for its purposes.
4. As to the second conclusion - had Parliament intended that these long-standing statutory minimum standards should be *disregarded* by the Tribunal, the FtT would have expected that to have been clearly stated in the legislation, and it has not been – this is wrong in law because it runs counter to:
   1. the well established approach known to Parliament that when it enacts a statutory test that uses familiar and ordinary English words, and does not define them, the court construes and applies the test in the way set out in paragraph 19 above, and
   2. in these cases the statement made by Lord Freud to the Grand Committee of the House of Lords on 15 October 2012 (summarised in paragraph 12 of Circular A4/2012) and set out in the written submissions on behalf of the Secretary of State as follows:

--- after discussions [ with various interested entities] we have concluded that most welcome the flexibility that comes with not including in the regulations a definition of what constitutes a bedroom. Some landlords made it clear that defining this in legislation would introduce a system that might involve them having to measure every room. So we are leaving it to landlords to specify the size of property, as they are best placed to do that. We expect the information that they provide to be reflected in the level of rent charged and to match what is agreed in the tenancy agreement.

We also agree with the Secretary of State that the choice by Parliament of a test using an undefined familiar or ordinary English word supports the view that Parliament intended to allow decision makers to take account of all relevant circumstances on a case by case basis.

1. However, our rejection of those two conclusions does not mean that size is not relevant or that in taking the approach we have described to the application of Regulation B13 the decision maker is precluded from having regard to the point that for different purposes Parliament has excluded a room of 50 square feet or less as a room available as sleeping accommodation and, for the purpose of calculating the relevant aggregate of people who can sleep in a house, has allocated a child over the age of one but under the age of 10 to a room of 50 and 70 square feet and one adult to a room of between 70 and 90 square feet. However, the differences in the legislative regimes means that the only effective relevance of this, and for example the Tudor Waters Report (which relates to the building of houses for soldiers returning from the First World War, and was referred to by the Fife Law Centre in its further submissions), is that the floor areas referred to in them provide cross checks that indicate that (or warning bells that) the room may be too small and thus the need to provide reasons why, in the particular case, either it is or is not too small.
2. It follows in our view that the floor areas relied on by the FtT cannot lawfully be treated as determinative of or effectively the decisive factor in reaching the conclusion whether or not a room is a bedroom for the purposes of Regulation B13 and that, as this is what the FtT did, it erred in law.
3. Further, we have concluded that a fair reading of the Decisions shows that the FtT relied on the following progression of reasoning in them:
   1. having regard to Circular A4/2012, that paragraph B13(5) generally presupposes that to be classified as a bedroom a room should be large enough to be appropriate to use as a bedroom by an adult - or by two children (paragraph 24),
   2. a "bedroom" must generally be reasonably fit for full-time occupation of this nature, as opposed to short-term or irregular occupation as a visitor or overnight guest (paragraph 27), and from these conclusions
   3. it was only such use by an adult that was relevant and use by a child or an overnight carer did not have to be considered.
4. In our view, each step of that reasoning process is wrong in law.
5. It seems from paragraph 19 of the Decision that the FtT’s conclusion that the Circular had that effect is based on paragraph 63 of the Circular. Assuming that the Circular is an admissible aid to the construction of Regulation B13 or as evidence that is relevant to the ascertainment of the intention of Parliament, we do not see how, when it is read as a whole, it supports that conclusion. In context, it is a reference to one of a number of options expressed in terms of possibilities in paragraphs 60 to 67. Also, paragraph 12 makes the point that a bedroom is not being defined in the legislation and there is no definition of minimum bedroom size.
6. As already indicated under the heading “*The application of this approach to Regulation B13*” we do not agree that the language or purposes of the regulation supports the conclusion that under it a bedroom must generally be reasonably fit for full-time occupation of this nature, as opposed to short-term or irregular occupation as a visitor or overnight guest. Rather, as we have said, we consider that the language and purposes of the regulation point firmly in favour of the view that each room should be assessed by reference to occupation by any of the persons referred to in sub-paragraphs (5) and (6) of Regulation B13.
7. It follows that in our view the FtT erred in law by failing to consider such uses.

*Disposal*

1. *Mr James Nelson.* It follows from what we have said that the appeal in his case must be allowed. The issue remains whether we should decide his appeal ourselves or remit it to a differently constituted FtT.
2. We have concluded that applying the approach we have described we can and should decide his appeal ourselves. In doing so we will make the assumption that as asserted in the further submissions from the Fife Law Centre his son did not use the smallest room.
3. However the uncontested parts of the description of that room set out in paragraph 17 of the Decision (see paragraph 37 above) and the additional information provided since the hearing (see paragraph 40 above) make it clear that the room was designed to be and has always been designated by the landlord as a bedroom, and that
   1. it can accommodate a single bed in a way that enables access to the built in cupboard and free floor space,
   2. it is of a normal height,
   3. it has a window,
   4. it is heated and ventilated in a similar way to the other rooms used as bedrooms and living rooms, and
   5. albeit that it is a small room (8 ft by 8 ft) it does not have any physical features or drawbacks that prevent it being used as a bedroom for a child, an overnight carer or indeed an adult (on a full or part time basis).
4. We add that for the reasons we have given (see paragraphs 27 to 29 above):
   1. it is not open to Mr James Nelson to exclude a consideration of this smallest room by his overnight carer (his son) by reason of the fact that he and his son have chosen that when his son is there overnight as a carer he does not at present (and has not in the past as a carer or as a child) used the smallest room as his bedroom, or
   2. to exclude its consideration on the basis that he hopes that it may be converted into a wet room; that conversion would only become relevant when and after it was put into effect.
5. It follows that in our view Mr James Nelson was quite right to describe this room as a bedroom in the form we have referred to and the decision of Fife Council dated 27 March 2013 to reduce his housing benefit by 14% was a lawful application of Regulation B13.
6. *Mr David Nelson.* The appeal relating to him must be allowed because as is now accepted by all the parties the decision of Fife Council dated 24 March 2013 and revised on 15 April 2013 and (understandably) the Decision of the FtT under appeal failed to take account of the impact of paragraph 4 of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006. Fife Council have rectified this error and no further order is needed because they have now repaid the deductions that were wrongly made.
7. Mr David Nelson did not, for the reasons explained to us, appeal the new decision to make a 14% reduction as from 3 March 2014 (see paragraph 16 above) and so that new decision is outwith our jurisdiction. We can however observe, as we were asked to express an opinion on that new decision that in our view any appeal against it would have been doomed to failure because:
   1. a finding of fact was made on the size of the smallest room,
   2. the reasoning set out in paragraph 64 above applies to it,
   3. Mr David Nelson’s alternative argument based on his use of that room (and his need to so use it) was rejected on the facts, and further and in any event,
   4. we consider that if Mr David Nelson had been believed by the judge at the FtT such a choice or designation and use of the smallest room would not preclude it from being a bedroom (see again paragraphs 27 and 28 above). Rather, in the overall scheme of the legislation, it would fall to be considered under the provisions relating to discretionary housing payments which are contained in the Social Security Discretionary Financial Assistance Regulations 2001 (SI 2001/1167).

Signed on the original:

(Signed)

MR JUSTICE CHARLES

Mr Justice Charles

(Signed)

LADY STACEY

Lady Stacey

(Signed)

DOUGLAS J MAY QC Upper Tribunal Judge May QC

26 November 2014