HB | ANORAK
Housing Benefit training, appeals & technical advice

HB size criteria

and

shared custody

Analysis of legislation and key decisions

of the Courts and Upper Tribunal

Contents

1 Introduction

Housing Benefit (HB) for both private and social tenants is limited by reference to the number of people occupying the home and their relationship to the claimant and each other. If the home is larger than required by the occupiers according to "size criteria" specified in the Regulations, it is likely that the HB award will not cover the full rent.

The treatment of the children of separated couples has proved to be one of the most troublesome aspects of the size criteria: the legislation used to decide which home a child occupies is tortuous and confusing and has been the subject of several important decisions of the Courts and Upper Tribunal down the years.

In this note I have set out to analyse the subject thoroughly by reference to the key legislation and case law. My conclusions unfortunately are not encouraging for claimants with equal or significant minority care where someone else is entitled to Child Benefit for the child.

I offer one glimmer of hope: up to now appeals by shared custody parents relying on the Human Rights Act have not fared well: in particular the Supreme Court decision in *Humphreys* (a Tax Credit case) found the indirect discrimination against men inherent in provisions equivalent to those discussed in this note to be justified. The Upper Tribunal has recently accepted that HB raises Article 8 issues in addition to the A1P1 issues engaged in Humphreys – if a man cannot provide enough space for his children to sleep over, his ability to have a family life at all is obviously jeopardised. This is quite separate from the means-testing matters discussed in *Humphreys.* As Giles Peaker has observed on the NearlyLegal blog, reduction of HB under the bedroom tax has only survived HRA challenges because the individual appellant was personally in receipt of a Discretionary Housing Payment. See for example the discussion of CSH/777/2013 here:

http://nearlylegal.co.uk/blog/2014/09/bedroom-tax-human-rights-ut-go/.

A claimant with equal or significant minority care of his/her children who has been refused a DHP could still arguably make a Human Rights case against the bedroom tax. But this note is focussed on the statutory provisions as they stand, leaving aside any possible Human Rights remedy.

2 Three size criteria schemes

2.1 Private tenants: pre-LHA method

2.1.1 HB Regulations 2006

The eligible rent for HB in the case of a private tenant[1] is based on an individual Rent Officer valuation (known as the Local Reference Rent or Claim Related Rent) if:

- The case is one of the small number remaining where the claimant has been getting HB for the same dwelling without a break since before 2008, or
- The claimant occupies unconventional accommodation (caravan, houseboat, or rent includes meals prepared and served)

In such cases the Council must make a referral to the Rent Officer at regular intervals. The information included in the referral is set out in Regulation 113 of the HB Regulations 2006. Reg 113(9) requires the Council to provide information about "occupiers" including the relationship of any other occupiers to the claimant or to each other and the age and sex of any occupier under the age of 18. The precise term "occupier" is not defined anywhere in the Regulations – I will discuss this later.

2.1.2 Rent Officers (HB Functions) Order 1997

Article 2 of the RO Order defines "occupier" as a person who is stated by the Council in its referral of the tenancy to the Rent Officer to "occupy the dwelling as his home". As we shall see, the principal HB Regs do contain provisions for determining whether or not a person occupies his home; the definition of "occupier" in Article 2 of the RO Order seems to assume that those provisions also determine who is or is not an "occupier". I will return to this point later when we consider the important case law.

Schedule 1 to the Order provides for the Rent Officer to make "determinations". Paragraph 2 requires the Rent Officer to determine whether the dwelling exceeds the "size criteria" for the "occupiers". If the dwelling does exceed the size criteria, the Rent Officer's "Claim Related Rent[2]" determined under para 6 will be for a notional smaller but otherwise identical dwelling. In addition, the Local Reference Rent[3]

[1] "Private tenant" means in most cases that the landlord is not a local authority or registered housing association, nor does the claimant occupy supported accommodation in the charitable/voluntary sector. There are some exceptions to those general principles but that is not a subject within the scope of this note.
[2] The CRR is a market valuation of the claimant's own accommodation
[3] The LRR is a market average calculated as half the sum of the highest and lowest rents in a sample that has been refined to exclude exceptionally low and exceptionally high rents. HB is normally based on the lesser of the LRR and CRR: if your accommodation is worth more than the LRR, you will only get the LRR; but if your accommodation is worth less than the LRR you will only get the CRR. As an aside, it is my personal view that many of the problems in the dysfunctional private rented sector

determined under paragraph 4 of the Schedule will be for a dwelling that does not exceed the size criteria.

The size criteria are set out in Schedule 2 to the Order: bedrooms are allocated to "occupiers" under familiar rules. Thus the LRR/CRR will only allow a bedroom for a child if that child has been listed as an "occupier" in the first place.

2.2 Private tenants: LHA method

Eligible rent for conventional private tenants who claim HB or change address since April 2008 is based on the "Local Housing Allowance" (LHA). Like LRR/CRR, LHA rates are also determined by the Rent Officer under the 1997 Order, but not individually for each claimant: instead the Rent Officer sets LHA rates for five categories of accommodation (ranging from shared accommodation to four bedrooms) which apply across the board throughout a "broad rental market area" or BRMA. The LHA is based on the 30th percentile rent in an unrefined sample as at April 2012, uprated each year by a prescribed percentage[4].

The Council must determine which category of accommodation applies to the claimant by applying size criteria found in HB Regulation 13D(3). These size criteria rely on the term "occupiers". "Occupiers" are defined in Reg 13D(12) as *"the persons whom[5] the Council is satisfied occupy as their home the dwelling to which the claim or award relates, except for any joint tenant who is not a member of the claimant's household"* plus in certain cases members of the armed forces "away on operations".

2.3 Social tenants: Maximum Rent (Social Sector)

The MR(SS), more commonly known as the bedroom tax, is the method used to determine the eligible rent for HB where the claimant is a working age social tenant: that is a conventional Council or registered Housing Association tenant. Under Regulation B13 the eligible rent is reduced by 14% or 25% if the number of "bedrooms" in the dwelling exceeds the number to which the claimant is entitled under paragraphs (5) to (7). Paragraph (5) specifies the number of bedrooms to which the claimant is entitled for *"each of the categories of person whom the Council is satisfied occupy the claimant's dwelling as their home"*; paragraphs (6) and (7) provide for additional bedrooms to be allowed for foster carers and people who require overnight care.

today would have been avoided if we had not abandoned the LRR/CRR approach in 2008 but that is another debate.

[4] Unless rents have fallen or stalled and the current 30th percentile market rent is lower than the prescribed amount – for example in the Dover-Shepway BRMA all five LHA rates have fallen in April 2015

[5] sic: I think this should be "who"

3 Case law on "occupier" and "occupy"

3.1 LRR/CRR

3.1.1 Marchant

THE QUEEN v THE HOUSING BENEFIT REVIEW BOARD FOR SWALE BOROUGH COUNCIL ex parte SIMON STUART MARCHANT

Court of Appeal, November 1999

In this case involving shared custody of children the Council had not informed the Rent Officer that Mr Marchant's children occupied the dwelling as their home; accordingly the Rent Officer had not treated them as "occupiers" and had set a Local Reference Rent and Claim Related Rent based on accommodation smaller than that which Mr Marchant actually occupied.

The case turned on whether an "occupier" for the purposes of a Rent Officer determination meant someone who occupies a dwelling as his home in accordance with what is now Regulation 7 of the HB Regulations 2006, or whether it had a different meaning in this context. I will analyse Reg 7 later in this note, but it was common ground in *Marchant* that the children belonged to their mother's "family" for HB purposes, which in turn meant that they could be regarded as occupying only her home and not the claimant's home in accordance with Reg 7. The High Court had rejected Mr Marchant's application for a judicial review of the Council's decision[6]:

"I can find no justification for limiting the application of regulation 5(1) [now Reg 7] simply to questions of whether any housing benefit is payable to an applicant or not. There are no limiting words contained in the regulation nor can I see any need by reference to the rest of the regulation or the scheme of the legislation to imply such words. The heading to that part of the regulations refers to provisions affecting entitlement to housing benefit and not to provisions for determining entitlement to housing benefit. The immediate heading to regulation 5 reads "Circumstances in which a person is or is not treated as occupying a dwelling as his home". It seems clear to me that this provision was intended to answer the question of which home a person occupies as a dwelling for the purposes of housing benefit.

"If one applies the test to each of the three children, they are members of a family. By reason of the section 137(1) of the Act, each is a member of the family consisting of the parent who is responsible for them and his brothers. Regulation 14 [now Reg 20] makes clear that the mother is responsible for the three children as she receives the child benefit in respect of them and the applicant is not.

"Hence regulation 5 provides that each child is to be treated as occupying the dwelling normally occupied as his home by himself and his family, i.e. his mother's home. He is not to be treated as occupying as his home any other dwelling house and that must exclude the applicant's house. Accordingly the children were not

[6] The case predates the jurisdiction of independent Tribunals to hear HB appeals

occupiers for these purposes of their father's home and in the application of the size criteria they could not be taken into account."

For Mr Marchant it was argued that HB Reg 7 is concerned solely with the question whether the HB claimant satisfies the threshold eligibility requirement for HB of occupying the dwelling as his home. Reg 7 is made under ss130(1)(a) and 137(2)(h) of the Social Security Contributions and Benefits Act 1992:

"A person is entitled to Housing Benefit if he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home"

"Regulations may make provision ... as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home".

If the claimant gets over that hurdle, the amount of his/her HB (including eligible rent) is determined under different provisions, it was argued, and so "occupy" in that different context is not strictly defined by Reg 7. But the Court of Appeal rejects Mr Marchant's appeal and confirms the decision of the High Court.

3.1.2 The Stroud and South Hams cases

In a Stroud Council case, **[2009] UKUT 67 (AAC)** (aka CH/2337/2008), the Upper Tribunal follows *Marchant* in a case concerning a student absent from his parents' home during term time. The claimant was his mother who argued that he should still be counted as an occupier on her HB claim.

The Council had argued that the starting point should be that a student is treated as being "resident" for Community Charge purposes in the place where s/he studies. The Judge is "surprised" that the Council should rely on a local taxation provision repealed 15 years earlier and declares it to be of "no relevance". The First-tier Tribunal had looked at the facts and concluded that the student occupied his mother's dwelling as his home, but without any reference to Reg 7. That too was incorrect. Instead:

"I agree with Miss Ainsworth that the tribunal should have had regulation 7 in mind in reaching its decision"

HB Reg 7 should have been used to decide whether the student occupied the claimant's home and in particular whether his lengthy absences in term time meant that he no longer occupied that dwelling. The UT concludes that, provided the claimant's home remained the student's underlying normal home, absences at college of up to 52 weeks at a time did not prevent him from being an occupier under the terms of Reg 7:

"Miss Ainsworth took me through the somewhat tortuous provisions of regulation 7 and the other regulations that deal with L's position. Regulation 7(17) treats someone to whom regulation 7(16) applies as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks. Regulation 7(16)(c)(viii) applies to a student to whom Regulation 7(3) and (6)(b) do

not apply. Regulation 7(3) applies to students to whom regulation 56(1) does not apply. Regulation 7(6)(b) is not relevant on the facts. Regulation 56(1) applies to full-time students. These are defined by regulation 53. It is common ground that L is a student within the regulation 53 definition. Therefore, she submitted, he is within the scope of regulation 7(17). That brings him also within the scope of regulation 7(1). That leaves the question to be decided as that in regulation 7(1). Is Mrs G's home 'the dwelling normally occupied as his home'?"

And finally, from **[2010] UKUT 129 (AAC)** (aka CH/2197/2009 or SK v South Hams Council):

"No assistance being given in the 2006 Regulations or the 1997 Order for a particular meaning of "occupiers of the dwelling" for the purposes of regulation 14(1)(c)[7], I agree that the starting point must be regulation 7. No doubt regulation 7(1) uses the terms of treating "a person" as "occupying as his home the dwelling normally occupied as his home" because the condition of entitlement in section 130(1)(a) of the Social Security Contributions and Benefits Act 1992 is in terms of whether "a person" is "liable to make payments in respect of a dwelling ... which he occupies as his home". However, that is no reason for regulation 7 not also to apply where the question of occupation by persons other than claimants is in issue. The Court of Appeal in Marchant expressly rejected the argument that for the purposes of regulation 14(1)(a) the dwelling did not need to be occupied "as the home" and endorsed the role of regulation 7 in the context of the rest of the regulations. I would be bound to follow that decision, but consider it correct anyway."

3.2 LHA: the Wirral case

In **CH/247/2010** (and two others decided with it) Judge Ward was dealing with one appeal involving a separated couple sharing custody of their children and two cases where the claimant was caring for a foster child[8]. All three cases turn on the question whether the *Marchant* approach to "occupiers" for LRR/CRR cases applies to that same term as it appears in Reg 13D for LHA purposes. The answer is a very forceful "yes":

"22. I have little hesitation in dismissing the argument that the LHA provisions are intended to create a self contained regime to which other parts of the 2006 Regulations are not relevant. The Marchant decision was concerned with whether the claimant could, under predecessor provisions, claim housing benefit by reference to size criteria for the house which took into account children who lived with him for half of the time and for the other half with their mother, from whom he was separated. The Court of Appeal, upholding the decision of Kay J, rejected a submission from Counsel for the claimant that regulation 5 (the predecessor to regulation 7) was only relevant to considering a claimant's benefit entitlement and this is binding authority on the Upper Tribunal. They went on to hold that regulations

[7] The requirement to refer to the Rent Officer following a change of circumstance, such as a change in the number of occupiers

[8] The Regulations were subsequently amended to reverse the effect of this decision in the particular case of a foster child, but the general point about the proper approach to the question of who is an occupier for LHA purposes remains good law

14 and 15 (the predecessor to regulation 20) meant that the claimant's children were to be treated as a member of the household of their mother (who received the child benefit) and that this resolved the question of which dwelling they occupied ...

"23. There is nothing in regulation 13D (introduced by SI 2007/2868 from 7 April 2008) that suggests that it was intended to introduce a significantly different approach from that which prevailed in relation to the provisions considered in Marchant. As the local authorities' representatives said, there are a number of terms used in regulation 13D which would not make sense unless taken in the context of the remainder of the regulations. Also, if it had been intended that regulation 13D was to create a self contained regime then in my judgment express words would have been used to make clear that it was to be applied notwithstanding anything in the remainder of the 2006 Regulations and the content of the regulation would have been formulated so as to avoid the need to do so.

"25. It follows, therefore, that the appeal by Miss O in CH/247/2010 must fail. Regulation 20 falls to be applied and, as she does not receive the child benefit in respect of the child, the child is treated for this purpose as not normally living with her, but with her father, who does. This in turn causes the child to be – for this particular purpose - within the "family" of her father; and so by regulation 7, as a member of a family, such a child is treated as occupying as her home the home normally occupied by that "family"."

3.3 Bedroom Tax

I am not aware of any UT decision so far that has expressly endorsed *Marchant* in the context of a bedroom tax appeal.

CSH/777/2013 was a shared custody case, but it starts from what seems to be an agreed position that the child did not occupy the claimant's dwelling according to the Regulations and his only hope of success lay in arguing that the Council's decision interfered unjustifiably with his human rights.

[2015] UKUT 34 (AAC) (MR v North Tyneside) is another shared custody case and while the Judge does not cite *Marchant* or the line of cases that have followed it he applies exactly the same reasoning: in identifying the persons who occupy the claimant's dwelling as their home for the purpose of Reg B13(5), the Council must use Reg 7 and must not regard occupation of the dwelling as having a separate, "freestanding" meaning for the purpose of Reg B13 alone.

"6. I accept the Secretary of State's argument that the tribunal's approach was based on a misunderstanding of the structure of the housing benefit legislation. The flaw was to treat the meaning of the words used in regulation B13(5) as freestanding, when they had to be read in the context of other provisions.

"7. Regulation B13(5) provides that a claimant is entitled to one bedroom for each of the categories of person listed 'whom the relevant authority is satisfied occupies the claimant's dwelling as their home'. A child is one of those categories, which is

defined as 'a person under the age of 16' by regulation 2(1). That provision has to be read, not in isolation, but in the context of the housing benefit legislation as a whole.

"8. Regulation 7(1)(a) is part of that context."

3.4 Marchant and the bedroom tax: conclusion

3.4.1 Lessons from the case law

It seems to me that the case law overwhelmingly supports the application of the *Marchant* principle across the board: irrespective of whether the claimant's eligible rent is subject to LRR/CRR, LHA or bedroom tax, the question whether a person occupies the claimant's dwelling as his/her home must be answered by applying Reg 7 to that person.

I cannot see any merit in the argument that occupation for the purpose of the bedroom tax alone should be interpreted differently. If anything the language of Reg B13(5) is even closer to Reg 7 than are the equivalent provisions governing LRR/CRR and LHA: the starting point for LHA and LRR/CRR is the term "occupier", which has to be linked back to Reg 7 through further provisions referring to the person occupying the dwelling as their home (Reg 13D(12) and Article 2 of the RO HB Functions Order respectively), whereas Reg B13(5) relies directly on *"person whom the Council is satisfied occupy the claimant's dwelling as their home".*

3.4.2 FtT decision declining to follow MR case

I am aware of a recent First-tier Tribunal bedroom tax decision which holds that *MR v North Tyneside* is wrongly decided[9]. In this case the claimant was a significant minority carer for his child but the child's mother received Child Benefit. The Tribunal concludes that the child occupied both the claimant's dwelling and his mother's dwelling as his homes. The claimant was therefore entitled to a bedroom for the child under Reg B13.

I have three huge problems with this decision.

(i) Misunderstanding of the MR case

The statement of reasons says:

"The Tribunal gave consideration as to as to whether it is bound by decision [MR] and decided it was not because it did not deal with the legal test the Tribunal has to consider ... in essence the decision concentrated on the term "household" rather than the legal test in the regulations B13 – 'occupies the claimant's dwelling as their home'"

I disagree with that analysis of *MR*: as the extract from para 8 of the decision at 3.3 above shows, the UT correctly identified that occupation of the dwelling is the test

[9] Transcript available at http://nearlylegal.co.uk/blog/2015/05/a-home-without-a-household/

and identified Reg 7(1) as the starting point of that test. In the case of a child, the path from Reg 7 leads to "household" as part of the process of identifying the "family" to which the child belongs but only because Reg 7 relies on that.

(ii) Failure to identify the key Regulation on occupation

At paragraphs 45 and 46 of its decision, the FtT says: *"'occupies' and 'dwelling' and 'home' are not defined. They are ordinary English words"*

They may not be defined in Reg B13, but the whole point of the *Marchant* line of cases is that Reg 7 goes to great lengths to define what is meant by a person occupying a dwelling as their home, whether that person is the claimant or another occupier. Nowhere in the FtT's entire 76-paragraph decision is there a single mention of Reg 7 – quite an extraordinary omission in a decision concerned with occupation of a dwelling for HB purposes.

(iii) Misunderstanding of the significance of household membership

The FtT seems to have interpreted *MR* as holding that a person cannot occupy the claimant's dwelling as their home unless they belong to the claimant's household or family. The FtT disproves this by demonstrating several situations in which someone might occupy the claimant's dwelling as a home without belonging to the claimant's household or family:

- A single lodger paying a commercial rent for a room
- A separate family unit renting two rooms from the claimant

The FtT is missing the point here. Nowhere in *Marchant* or *MR* or any of the other cases discussed above is it suggested that all occupiers must necessarily belong to the claimant's household or family. The point is this:

- If a person does happen to belong to a "family", Reg 7 says that s/he is to be treated as occupying the dwelling occupied "by himself and his family" and (unless prescribed exceptions apply) no other dwelling
- Membership of a "family" relies in turn on membership of a "household" (as the analysis is Chapter 4 below shows)
- So if the person belongs to a "household" or "family" other than the claimant's household or family, and if that household or family occupies a different dwelling elsewhere, it follows that the person does not occupy the claimant's dwelling

In simple terms, the problem in shared custody cases is not that the child does <u>not</u> belong to the <u>claimant's</u> family *per se*: that does not in itself prevent a person from occupying the claimant's dwelling as their home. The problem is when the child <u>does</u> belong to <u>someone else's</u> household/family, because that will tend to place them in a different dwelling.

4 Reg 7, family and household

4.1 Reg 7

This is an extract from Reg 7 of the HB Regulations 2006:

(1) Subject to the following provisions of this regulation[10], a person shall be treated as occupying as his home the dwelling normally occupied as his home–

> *(a) by himself or, **if he is a member of a family**, by himself and his family ...*

*and **shall not be treated as occupying any other dwelling** as his home"*

*(2) In determining whether a dwelling is the dwelling normally occupied as a person's home for the purpose of paragraph (1) **regard shall be had to any other dwelling occupied by that person or any other person referred to in paragraph (1)***

4.2 Reg 2 & s137 of the 1992 Act

Key definitions of terms used in the HB scheme can be found in these two places.

From HB Reg 2:

"family" has the meaning assigned to it by section 137(1) of the Act;

And from Section 137 of the Social Security Contributions and Benefits Act 1992 (which is the statute referred to as "the Act"):

"family" means–

> *(a) a couple[11];*
> *(b) a couple and a member of the same **household** for whom one of them is or both are **responsible** and who is **a child or a person of a prescribed description**;*

[10] Exceptions to the general rule in Reg 7(1) are as follows:

- Paras (3) to (5): deemed to be occupying a particular home in certain situations where there are two candidates
- Para (6): treated as occupying two homes
- Paras (7) and (10): treated as occupying a home after moving out
- Paras (8) & (9): treated as occupying a home before moving in
- Paras (11) to (17): treated as occupying during periods of temporary absence of 13 or 52 weeks depending on the reason for absence
- If none of these exceptions applies, default to the normal home as determined under paras (1) and (2)

[11] Further defined in s137 as any same-sex or heterosexual couple, either married/civil partners or living together as if they were

*(c) except in prescribed circumstances, a person who is not a member of a couple and a member of the same **household** for whom that person is **responsible** and who is a child or a person of a **prescribed description**;*

4.3 HB Regs 19 to 21

4.3.1 Reg 19: person of prescribed description

HB Reg 2 defines a "child" as a person aged under 16; a "person of prescribed description" is defined in Reg 19 as an older teenager who is still regarded as a child for Child Benefit purposes because s/he remains in non-advanced education and s/he is given the label "young person". If one of the prospective occupiers is a "young person" the analysis in this note applies to him/her as if s/he were a "child".

4.3.2 Reg 20: responsible

Reg 20 sets out a hierarchy of tests to determine who is responsible for a child/young person and, therefore, to whose family s/he belongs and which dwelling s/he occupies. Paragraph (3) says that the child/YP can only be the responsibility of one person in any given week.

- Paragraph (1) establishes the default rule: a person is responsible for a child or YP who "is normally living with him"
- Paragraph (2) deals with situations where it is not obvious where the child is "normally living": equally shared custody or arrangements that raise a "question" as to which "household" the child lives in
    - The tie-breaker in most cases is Child Benefit - the parent who receives or has made the sole claim for Child Benefit is responsible for the child
    - Exceptionally, in the event of no-one being entitled to Child Benefit and either no claim or competing claims having been made, the person who has "primary responsibility" for the child is responsible for HB purposes. Such cases will be rare indeed.

4.3.3 Reg 21: household

The term "household" is not defined, but Reg 21 provides for a person who is temporarily absent from the household for up to 52 weeks to be treated as if s/he is still a member of the household. Reg 21 also says that children who are being fostered or adopted by the claimant are not to be regarded as a member of the household or, since an amendment in June 2013, as an occupier of the dwelling: this reverses the effect of the Wirral foster care case (see 3.2 above).

The important point about "household" is that the absence of a definition does not really assist in a case where there is someone else getting Child Benefit because the claimant won't get past "responsibility" under Reg 20.