CIH Scotland commentary on recent bedroom tax tribunal rulings

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Main message

Recent bedroom tax rulings in Scotland and England have thrown up a number of issues of interest, but CIH Scotland believes that caution should be exercised in reading too much into the implications at this stage. All the rulings have been at First Tier Tribunal stage and, as such, do not influence any other judgements. Our understanding is that some cases are being appealed. The outcome of any appeals to Upper Tier Tribunals would be binding within Great Britain.

Previous cases from 2012

As things stand, the only wider implications of any previous ruling relate to the Gorry case, heard in the Court of Appeal in May 2012. This means that local authorities should allow an extra bedroom for children who are unable to share because of their severe disabilities. Regulations[1] to confirm this, along with accompanying guidance[2], appeared in November 2013, operative from 4 December 2013. As always, a council's decision in any particular case will depend on the specific circumstances in question.

In late January 2014, the Appeal Court will consider the cases of ten households who are seeking judicial review of the bedroom tax on the grounds of disability discrimination. The original cases were heard and rejected by the High Court in July 2013.

Recent cases

Fife (reported September 2013)

Case 1[3] – The claimant argued that a room was too small at 64 square feet, and that the Housing (Scotland) Act 1987 Act 'states a room of 50-70 square feet should only be sufficient for a child aged under 10'. The QC said it was 'relevant to have regard to statutory space standards' and therefore allowed the appeal on this ground.

But the QC rejected the additional argument that the room was needed to store medical equipment as he deemed that there was space elsewhere to do this.

Observations

- It is worth noting that according to the housing association in this case, the room measurements were not checked by the local authority nor by the

[1] The Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013 http://www.legislation.gov.uk/uksi/2013/2828/regulation/2/made

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260580/A21-2013__2013-11-21.pdf

[3] See details at http://nearlylegal.co.uk/blog/2013/09/of-bedrooms-that-arent/

tribunal; the association says the room is not straightforward to measure but that it is bigger than claimed.

- In guidance issued after the Fife rulings[4], the DWP maintained that it was not appropriate to use space standards in the overcrowding legislation for the purposes of the under occupation charge. Indications are that the DWP may appeal this case, Case 2 below and potentially further Fife cases). CIH believes that an Upper Tier Tribunal is more likely to suggest that whilst room size may be a relevant factor it should not be a sole, determining factor.
- In the meantime, the DWP says one factor is whether a room can fit a single bed. One observation here is that it would seem reasonable for this to be considered case by case, and that it is for landlords (when they let property and set the rent) and local authorities to come to sensible judgements on whether small rooms can be used as a bedroom. For example, in some cases, it may be reasonable to argue that if a single bed was all that a room could fit, this may not be adequate for use as a bedroom in daily use, as it would need to have space for more than just a bed.
- CIH believes that relevant factors, in addition to bedroom size, might include indications in original plans of the property (where accessible), and evidence of the landlord's intentions when making the let and setting the rent.

Case 2[5] – As in Case 1 above, the QC agreed with the tenant's claim that a bedroom, at 66 square feet, was too small.

But the QC rejected arguments about the room being needed for the storage of disability equipment, saying he was satisfied that the equipment could be stored elsewhere in the property.

Case 3 – This related to a blind woman living in a three-bedroom Kingdom HA property, receiving support from KHA under a contract awarded by Fife Council. It was argued by the tenant that the accommodation was 'exempt accommodation' and therefore not subject to HB rules. The Council argued that because the support was not tied to the tenancy agreement, it was not exempt accommodation.

The QC ruled that it *was* exempt accommodation, because the 2006 Regulations[6] say exempt accommodation includes 'accommodation provided by a housing association where the association (or a body contracted by the association) also provides the claimant with care, support or supervision.

Observation

- On the face of it, it seems hard to question the ruling, as the case appears to fit the definition in the regulations. What is arguably odd about the regulations is that they are worded in such a way as to include not only specialist supported accommodation (i.e. accommodation you wouldn't be living in if you

[4] DWP Circular U6/2013
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/244604/u6-2013.pdf

[5] See details of Fife cases 2-5 at http://nearlylegal.co.uk/blog/2013/09/changing-rooms/

[6] Sub-paragraph 4.10 (b), Schedule 3 of the Housing Benefit and Council Tax Benefit (Consequential Provisions) 2006 http://www.legislation.gov.uk/uksi/2006/217/schedule/3/made

didn't need the support) but also visiting/floating support *where that is coincidentally provided by the same body as provides the accommodation*. The regulations have the effect, therefore, that if – for example in this case – the housing association were to subsequently lose the support contract to another body, the house would no longer be exempt accommodation. [It is worth bearing in mind that historically, housing association accommodation was not affected by the regulations as it was rarely, if ever, referred (to the Rent Officer) for consideration under the regulations – it was generally only private sector accommodation which was referred.]

Case 4 – 1660s property; the housing association landlord said it had three bedrooms, but the claimant successfully argued only one was a bedroom. The QC said one room had been used as a sitting room since 1996 and there was no evidence to suggest it had ever been used as a bedroom. He said another room was being used as a dining room and a third room was an 'irregular L-shape' and had a floor area of only 67 square feet and with no evidence of use as a bedroom.

Observations

- The ruling in this case appears to suggest that actual use of a room is a relevant factor – something with which the DWP does not agree.
- This seems to be a bizarre decision, for example based mainly on use of a room as a sitting room when a dining room already exists, and the landlord in question says that the current living room was always meant to be entirely usable as a bedroom.
- CIH Scotland believes that any appeal of this decision could decide that actual current use of a room is less important than an assessment of (a) whether a room could reasonably be used as a bedroom and (b) the landlord's original indications in letting the property and setting the rent.

Case 5 – The tenant argued that a spare room was used to store gardening equipment and had always been used for this purpose. The QC did not accept that the room had always been used for this.

Observation

- Although the rejection of the tenant's claim appears to be understandable, there is again a somewhat bizarre aspect to the ruling: the implication from the QC was that had he been convinced that the room had indeed always been used for this purpose, he would have upheld the claimant's appeal.

Westminster (reported September 2013)[7]

A disabled tenant's appeal was upheld because the judge accepted that a room was being used to store medical equipment.

Observation

- It might be supposed that the local authority did not believe it had any locus to accept that a room needed to be used for disability equipment because the

[7] See details at http://nearlylegal.co.uk/blog/2013/09/westminster-clear-up/

regulations do not appear to allow for this. This ruling therefore appears to be less a judgement on the local authority's competence in coming to the view it came to, and more a judgement on the reasonableness of the under occupation charge itself.

Redcar and Cleveland (reported October 2013)[8]

This appeal was upheld as the court agreed that a disabled woman needed a separate bedroom from her husband. As a result, the tenant was deemed to be under occupying only by one bedroom rather than two.

Observation

- As with the Westminster case, it might be supposed that the Council authority did not believe it had any locus to accept that a separate bedroom was needed as a result of the disability as the regulations do not allow for this. Again this ruling appears to be a judgement on the reasonableness of the under occupation charge itself rather than on whether the regulations were properly observed.

Glasgow (reported early October 2013)[9]

The appeal was from a disabled woman who uses an adapted bed and keeps medical equipment in her room. She argued that her husband needed to sleep in a separate room. The appeal was upheld as the court agreed that a separate bedroom was needed for each of the disabled woman and her husband. The court said that the house was therefore fully occupied, and that the under occupation penalty was incompatible with the appellant's human rights ('the applicant's flat is not larger than she needs. She does not have a spare or extra bedroom.').

Our understanding is that the DWP intends to appeal this ruling.

Observation

- Again, however reasonable the ruling may seem in human terms, it is not at all clear that the regulations allow for a separate bedroom for disabled adults. In coming to their original decision, it would seem that the landlord and local authority came to the only judgement they thought was possible under the regulations. So again, this ruling could be said to be more of a judgement on the reasonableness of the under occupation charge itself than on whether the regulations were properly observed.

Islington (reported late November 2013)[10]

In this case, a 60 year old tenant whose severely disabled son stays in her home two or three nights a week won her appeal against the imposition of a 25% penalty for

[8] See ruling at http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/m1a.pdf

[9] See details at http://nearlylegal.co.uk/blog/2013/10/yell-tak-the-high-road/

[10] See details at http://nearlylegal.co.uk/blog/2013/11/not-home-alone/

under occupying by two bedrooms. The judge ruled that one bedroom was occupied by her son, who lives in full time care when he is not at his mother's, and that the box room, which measured less than 50 square feet, should not be considered a bedroom as it was used to store equipment.

Initial indications seem to suggest that Islington Council does not plan to appeal to the Upper Tier Tribunal, but it is not known at this stage whether the DWP may seek to appeal.

Observations

- This is an interesting case as it partly centres on the occupation of a bedroom for part of a week. Again, in human terms the ruling would seem reasonable and understandable, but it seems that the regulations do not allow for these circumstances, potentially making a DWP appeal quite likely
- As with other First Tier Tribunal rulings, this case is not binding and has no clear implications for other 'shared care' disability cases nor for other situations in which someone – such as a child who stays with a separated parent – occupies a bedroom for part of the week (see Inverness case below).

Inverness (reported late November 2013)

A tenant unsuccessfully argued that he should not be penalised as his second bedroom was used for his three children to stay with him at weekends under access arrangements. The tribunal judge was sympathetic but said that according to the regulations, the under occupation penalty could be avoided only if the children were occupying the property as their main home, which was not the case.

Observation

- This seems to be an example of circumstances where, whilst there is broad sympathy for parents (most often fathers) with arrangements for children to stay with them, the regulations do not allow for the bedroom tax to be avoided. Only one parent can say that their home is the main home of their children.

Further general observations

- CIH Scotland is aware of some landlords raising the issue of whether the number of bedrooms or apartments is a contractual issue. The number is not normally specified in tenancy agreements but presumably is in the offer letter, so the legal position on this may not be clear.

- Approaches differ on whether a reclassification of the property size should lead to a rent reduction. Arguably, the organisation's rent policy is key here: where this is based on number of *apartments*, it could be argued that a reduction in the number of *bedrooms* does not change the number of apartments and that no rent reduction is therefore required.

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