

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

Before: Sir Crispin Agnew of Lochnaw Bt QC, Tribunal Judge

Attendances:

For the Appellant: Philip Simpson QC instructed by James Clark, Solicitor, of the Office of the Solicitor to the Advocate General

For the Respondent: Mr Chris Orr

For Local Authority: No appearance

The appeal against the decision of the tribunal given at Glasgow on 12 June 2014 is refused. The appeal is dismissed and the decision of the tribunal is confirmed.

REASONS FOR DECISION

General

1. I held an oral hearing at the request of the claimant's representative on 6 May 2015 at Edinburgh. In accordance with my directions, the parties put in Notes of Argument which can be found at pages 102 to 105 (Secretary of State) and pages 132 and 133 (Claimant). I refer to these Notes of Argument.

2. This is an appeal by the Secretary of State against the decision of the FtT given at Glasgow on 12 June 2014 in which the FtT allowed the appeal in part on the grounds that one downstairs bedroom was no longer a bedroom because it had been converted to a living room for the disabled claimant. The FtT said it found "it credible and reasonable that the appellant required her own living space because of her disability and was satisfied that due to its long established use as a living room, the room in question has ceased to be a bedroom". The FtT also accepted that the room had originally been used by the family as a bedroom.

Secretary of State's grounds of appeal and submissions

3. The Secretary of State appeals on the ground that having regard to the 3 judge decision in *SSWP v Nelson and Fife Council* [2014] UKUT 0525 (AAC) (the "Nelson decision") the test is not what use is made of the room, but whether the room could be used as a bedroom looking at the property as if it was vacant. It is argued that it is clear from the FtT decision that the house was let as a four bedroomed house and that the room in question could be used as a bedroom and therefore the tribunal had erred in applying a long established use test which was not supported by authority. In the Note of Argument the Secretary of State set out in full paragraphs 27 to 30 of the Nelson Decision and then summarised the import of the decision as follows:

4. "4. Putting these propositions in a slightly different order, the Upper Tribunal's decision was:
- a) the test is how many rooms are available to be used as bedrooms (paragraph 28(ii));
 - b) accordingly, the assessment should be done on the basis that the property is vacant (paragraph 28(ii));
 - c) a starting point for this assessment is the landlord's designation of the rooms, but that is not conclusive (paragraph 29);
 - d) the main relevant factors are the objective physical characteristics of the room (paragraph 31);
 - e) if rooms have been converted by material works from one use to another, this may be taken into account, in particular if the landlord's consent was obtained to those works and the landlord may thus be regarded as having changed the designation of the room (paragraph 29); but
 - f) in the absence of any works, mere use as one type of room rather than another is unlikely to have any material effect on the assessment of whether the room counts as a bedroom for the purpose of the relevant provision (paragraph 27(iii))."

Reference was also made to CSH/673/2014 in which the FtT's decision that a room used by a severely disabled adult daughter which was necessary for the continued occupancy by Miss (G) of her home as carer for her dependant daughter was overturned.

5. It should be noted that the FtT's decision was given on 12 June 2014 before the Nelson decision which was given on 18 September 2014.

6. At the oral hearing Mr Simpson basically emphasised the Note of Argument and reiterated that the tribunal was concerned with primarily the landlord's original designation of the rooms, which was important although he accepted as not conclusive and that it was only where a room had been physically converted by works that it might change from a bedroom.

Claimant's Note of Argument

7. Mr Orr's Note of Argument (page 132) submits that the Secretary of State's proposition means that if the landlord classified a room as a bedroom then that is and end of the matter. He goes on to refer to the Nelson decision and points out that properly read:

"This clearly allows that there is room for a redesignation.

The relevant facts in this case point to a reasonable medical basis for redesignation. The likelihood that the new use will be permanent or long term.

The examples given of redesignations that are given only related to examples involving physical alterations to the property for persons with physical disabilities. If this is taken to be the only type of case where redesignation is possible then I would regard that as unreasonable as it would discriminate with no rational basis between those with mental health problems or learning disabilities and those with physical disabilities.

If Nelson is taken to have excluded any redesignation in a case such as my clients then I would regard it as incorrectly decided"

8. I raised Mr Orr's discrimination point with Mr Simpson during the course of his submissions and asked him if he accepted that if a room could be re-designated by physical changes would it not also be reasonable to re-designate a room if it was required for mental health reasons. We discussed the example of a physically disabled person who required a room to be converted into a wet room to be compared with a mentally disabled person who medically required a "quiet" room and asked if it would be discriminatory to say that the physically disabled person could re-designate a room but a mentally disabled person could not re-designate. As I understood his position, it was that while this might be theoretically possible this was not one of those cases and that the tribunal had gone too far.

9. Mr Orr had nothing to add to his Note of Argument after I had raised these issues with Mr Simpson.

Discussion

10. The Nelson decision makes clear at paragraphs 27 to 30 that generally the test is whether the room could be used as a bedroom and regard is also had to the landlord's designation. Further designations or choices made by the family were "unlikely to have an impact on the application of the regulation". In the present case there is no doubt on the FtT's findings that the room was originally used as a bedroom and could have been used as such.

11. However, in paragraph 27 of the Nelson decision the tribunal states:

"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:

- i) ...
- ii) ... and
- iii) 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.)”

12. Sub-paragraph 27(iii) raises a potential issue in this case in that the tribunal recognises that they could not at present say that the choice made by a family “can never be relevant”. Paragraph 29 states:

“29. 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).”

13. Paragraph 29 recognised that issues of designation of a room can arise and that there can be an impact from the conversion of a room, for example into a bathroom or wet room, in deciding whether or not a room is a bedroom. It is clear to me from the FtT’s decision that the tribunal has in fact decided that the claimant has reasonably designated this room as a living room. Of particular relevance in this case are the following findings of the FtT:

“6. The appellant is a single woman. She is 54 years old when the decision under appeal was made. She has severe learning disability and autistic traits. She is unable to live on her own. ...

9. ... Shortly after returning to the property in 2009, the downstairs bedroom was converted into a living room for the appellant’s use. Mr and Mrs (X) use the original living room. Both parties require some privacy. In particular, the appellant can get unsettled and agitated and wants her own space to watch television programmes she likes and listen to music. She has a television in her bedroom but does not use it. She has carers who call twice a week to take her out and spends some time in her living room with them.

...

15. ... I concluded that whether or not a room is a bedroom is a question of fact to be decided in light of the circumstances pertaining to the case at issue. I found it credible and reasonable that the appellant required her own living space because of her disability and was satisfied that due its long established use as a living room, the room in question had ceased to be a bedroom.”

14. These findings are supported by the Money Matters appeal letter which says “Above tenant has health reasons meaning that she requires using the extra bedroom as living space” and includes a letter from the Glasgow City Council Social Work Services (page 52) which states:

"I was the social worker who was involved in planning around Mr and Mrs (X) moving in with (the claimant) to care for her. During the planning process it was planned that we should try and maximise the living space in order that (the claimant) could have her own lounge area and in turn provide a degree of private space for her carers. The reason for this is that (the claimant) likes to watch her TV and listen to Music as therapeutic activity. However, due to her disability, autistic traits and behavioural issues she can get very obsessive about certain programmes and or DVD's and CD's that she uses repeatedly. (The claimant) can also be vocally repetitive which can be challenge for her carers. It was therefore felt that both (the claimant) and her carers would benefit if (the claimant) had a separate lounge to use for the above therapeutic purpose and carer support and privacy."

15. I am of the opinion that the Nelson decision goes no further than saying that normally the family designation and choice is not a relevant factor, but leaves open the question of whether or not there might be exceptional circumstances when re-designation might be appropriate. The Nelson decision does recognised at paragraph 29 that issues as to the designation of rooms can arise and specifically refer to the conversion of a room to a bathroom or wet room which could normally only be done with the consent of the landlord. I therefore see no reason why designation on professional advice for a mental health or mental disability condition could not also be one of those circumstances that a tribunal can take into account in determining whether or not a room is available to "be used as a bedroom" – paragraph 28(ii). If re-designation is limited to physical conversion only for a physically disabled person, but that this re-designation is not available to a mentally disabled person when required on profession advice, then I consider that would amount to discrimination for no rational reason.

16. I therefore refuse the appeal. I consider that on the material before the FtT, in particular the Social Work Letter on page 52 that the FtT was entitled to find "it credible and reasonable that the appellant required her own living space because of her disability". The Social Work letter set out clearly that this designation of the room was "to use for the above therapeutic purpose and carer support and privacy". It was therefore not a family choice or designation, but was set in place by the Social worker who planned the claimant's return to living in her own home with carers. I consider that as this is a question of fact for the FtT that the decision on the reason for the designation is not one with which I can or should interfere. There was a reasonable factual basis for the decision. I see nothing in the Nelson decision that prevents this decision made on the exceptional facts in this decision.

17. I have had regard to CSH/673/2014, but I only have access to the UT decision, whereas Upper Tribunal Judge May would have had access to the whole file. It may well be that there are factual differences between that case and the present appeal that justified the decision. Judge May was not asked to consider the discrimination point raised in this appeal. I therefore consider it neutral for my decision in this appeal.

18. For all the above reasons I refuse the appeal. I hold that it is a relevant factor for a tribunal that a room has been designated on professional advice for a particular use by a claimant with mental health disability in deciding whether or not a room is now available for use as a bedroom. In the present case there was a sufficient factual basis for the FtT's decision and therefore I am not in a position to reach a different view on the facts.

(Signed)
Sir Crispin Agnew of Lochnaw Bt QC
Judge of the Upper Tribunal
Date: 6 May 2015