IN THE UPPER TRIBUNAL **Appeal No: CH/1253/2018 (V)**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Jones

Attendances:

For the Appellant: Mr Buckingham of Counsel, instructed by the Government Legal Department

For the First Respondent: Ms Ruth Knox, Welfare Rights Advisor, Raise benefits and money advice

The Second Respondent did not participate and was not represented

DECISION

The Upper Tribunal allows the appeal of the Appellant, the Secretary of State for Work and Pensions.

The decision of the First-tier Tribunal sitting at Liverpool on 28 July 2017 under reference SC068/15/04473 involved an error on a material point of law and is set aside.

The Upper Tribunal is in a position to re-decide the appeal and substitute its own decision. It therefore re-makes the decision and confirms the Second Respondent's decision of 9 March 2015. It decides that the Housing Benefit of the First Respondent should be reduced by 14%.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007

REASONS FOR DECISION

COVID-19, Remote hearing and Public Hearing

1. I heard this case remotely on 7 April 2020 (prior to the coming into force of the Tribunal Procedure (Coronavirus) (Amendment) Rules on 10 April 2020). The appeal was conducted via Skype for Business with the parties participating through video-camera. The Second

Respondent did not participate or attend the hearing, as it had not participated throughout the appeal.

2. Pursuant to s.29ZA of the Tribunals, Courts and Enforcement Act 2007 (inserted by the Coronavirus Act 2020) the Upper Tribunal used its reasonable endeavours to make a recording of these proceedings using the Skype for Business recording facility and preserve it for a reasonable time in case a member of the public wishes to view or listen to the proceedings.

3. Notice of the remote hearing was published on 6 April 2020, 24 hours via HM Courts and Tribunal Service's hearing list for the Administrative Appeals Chamber ('AAC') on the public website. The online notice contained a form of words that invited any media representative or any other member of the public who wished to witness the hearing to contact the AAC email address so as to enable themselves to be joined to the hearing. No person in fact joined the hearing. Nonetheless, I am satisfied that reasonable notice was given to the public as to how to attend or witness the hearing such that it did constitute a public hearing for the purposes of Rule 37 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The parties' representatives did not object to that proposition.

4. In any event, to the extent that the hearing was conducted in private, I am satisfied that it was in the interests of justice to do so in the light of the exceptional public health considerations and because the response of the Upper Tribunal, as with other parts of the courts and tribunals, has been and remains in a phase of rapid development and administrative support has been impaired. I am satisfied that the hearing could have proceeded as a private hearing. It was in the interests of justice, particularly where the public can access a copy of the recording and this decision will be issued to the parties and publicly.

5. The General Stay ordered by the Chamber President on 25 March 2020 which expired on 15 April 2020, expressly exempted from its scope remote hearings which had already been arranged. This hearing had previously been arranged as a physical hearing to take place in Manchester. So far as may be required, I lift the stay to enable the converting of the hearing from a physical hearing to a remote hearing, within the period of the General Stay.

6. This decision follows a remote hearing which has been consented to by the parties. As required, I record that:

(a) the form of remote hearing was V (Skype for Business). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was suitable for remote hearing, with representatives on both sides and involving short matters of law and evidence. Further delay would be inexpedient as this is an appeal in relation to a determination of the Second Respondent that was historic (from 2015), had been appealed to the Upper Tribunal once before and had last been decided by the First-tier Tribunal in July 2017;

(b) the documents that I was referred to were contained in a small hard copy bundle to which all had access: we were all working off the paper file which had been served on all parties well in advance of the hearing;

(c) the order and decision made are as set out above.

The nature of the appeal

7. The Secretary of State for the Department of Work and Pensions ("the Appellant" or "SSWP") appeals against the decision of the First-tier Tribunal ("the First-tier") dated 28 July 2017. By that decision the First-tier allowed an appeal against the decision of Liverpool City Council ("the Second Respondent") dated 9 March 2015 that the First

Respondent's Housing Benefit would be reduced by 14% on the basis that her accommodation had a spare bedroom.

8. The First-tier overturned the Second Respondent's decision of 9 March 2015 and held that the First Respondent's spare room 'due to its unusual dimensions and shape cannot appropriately accommodate a full size single bed, as distinct from any smaller size bed'.

9. In essence, this is another case which turns on whether a room is a bedroom within the meaning of the Housing Benefit Regulations 2006.

Disposal

10. I allow this appeal for the reasons set out below. I am satisfied that the First-tier Tribunal erred in law in a material manner in making its decision of 28 July 2017. I set aside the First-tier's decision and re-make the decision dismissing the First Respondent's appeal against the Second Respondent's decision.

11. I confirm the decision of the Second Respondent dated 9 March 2015 that the First Respondent's spare bedroom is a bedroom within the meaning of Regulation B13 of the Housing Benefit Regulations 2006 and that her Housing Benefit entitlement should be reduced by 14% on the basis that her accommodation has a spare bedroom.

Background

12. On 9 March 2015 the Second Respondent determined that the First Respondent's Housing Benefit entitlement would be reduced by 14% on the basis that her accommodation had a spare bedroom. Her property was designated /classified as a 3-bedroom property owned by a social sector landlord. At the time the First Respondent lived alone at the property but also had an overnight carer. She was therefore entitled to housing benefit for a property with two bedrooms.

13. The First Respondent (I mean no discourtesy by referring to her as 'R1') appealed to the First-tier for the first time and her appeal was dismissed on 29 April 2016 for reasons set out within the first Statement of Reasons ('SOR').

14. R1 was granted permission to appeal to the Upper Tribunal for the first time on 5 October 2016. On 4 April 2017 UT Judge White allowed R1's appeal against the decision of the first First-Tier and remitted the matter for hearing before a differently constituted tribunal. In essence, the UT disagreed with the first First-tier and held that there had been an error of law because there must be consideration of whether the room could accommodate a full-sized single bed.

15. On 28 July 2017 a second First-tier decided the remitted appeal. It allowed R1's appeal against the Second Respondent's determination and held that the spare room could not appropriately accommodate a full size single bed without access through the door being impeded nor adequate furniture and was not a bedroom within the meaning of the Regulations. Therefore, no deduction in Housing Benefit should be applied. That is the decision which is subject to the appeal before me. I begin by summarising the core reasoning of the second First-tier's which is contained in its SOR.

The First-tier's decision of 28 July 2017

16. The First-tier made the following findings within its statement of reasons (SOR) at [13] to [18]:

> 13.....the room in issue on any sensible analysis is small with a total area of 56 square feet....Room size is however not the only consideration, safe access and egress, space to dress/undress, natural light, electrical lighting, heating and a private door that can open and close to ensure privacy are all relevant considerations (see the *Nelson*

case) including space within the room to accommodate some basic bedroom furniture such as a small cupboard or chest of drawers, bedside table and lamp, power points and single adult bed and not a child's bed (which would not meet the criteria for the purpose of categorising the room as a bedroom) are also many of the main necessary requirements for a room to be properly classified/ categorised as a bedroom ie. if it can be used properly and safely as a bedroom.

14. After considering and weighing the totality of the information and evidence available to them.....the Tribunal found that the room was not only small (not the only consideration), it was also an unusual shape with unusual dimensions to such an extent that it could not properly accommodate an adult single bed, as distinct from a child's bed or a smaller bed and if an adult single bed was placed in the room then it was not possible (on the evidence available) if the bed was on the right to properly open the without trapping the occupant and if it was on the left then it would be possible to open the door more easily, but only then to about 50 degrees, it would still be difficult to leave the bedroom quickly should the need arise and with the bed on the left the room could only accommodate a small chest of drawers , but they would be unable to be opened due to the lack of space.

.....

16. In summary the room has a dog leg shape on the left wall facing the door, which had broadly the same effect, which ever side of the room left or right (more so on the right) a single adult single bed was placed ie. of impeding the door so that the door could not open properly and of potentially trapping the occupant in the room / making it very difficult to exit without difficulty. .....If the bed was placed against the left wall it prevented the door from opening properly but to a lesser degree but it used up the dressing space and prevented the chest of drawers for being opened.....Compounding this particular case which is very fact specific is not only the room's small size and unusual shape but also the

fact that the property is a maisonette and the only exit on the second and third floors is via the bedroom door.

…….

18. In conclusion, the Tribunal found it….on the evidence available too small to accommodate an adult single bed with some basic furniture and for the door to be open fully because it would be prevented from doing so by the bed. On the opposite side of the room, the dressing space was eroded and the chest of drawers could not be used. Wherever the bed was situated it not only affected the circulating space available but also made access/egress very difficult which could be a hazard in the case of an emergency by potentially hampering a quick exit…….'
[Emphasis Added]

The Appeal to the Upper Tribunal

17. The Appellant sought to be joined to the appeal and made an application for permission to appeal on 14 November 2017. There were three grounds of appeal:
    (i) The First-Tier ('FTT') failed to apply the correct test when determining whether the room in question was a bedroom (applying *Nelson*);
    (ii) The FTT placed too much weight on what furniture needs to be placed into a room when determining whether or not it is a bedroom;
    (iii) The FTT reached an incorrect conclusion that a single bed would impede access to the room, bearing in mind the failure to consider alternative layouts or types of bed.

18. UT Judge Jacobs granted the Appellant permission to appeal on 25 October 2018. He gave reasons:

'The First-tier Tribunal relied on the safety in evacuation argument, which I have generally supported when leaving the room in an

emergency would involve the claimant being trapped in a corner. It is not self-evident that that principle applies when the door would open as wide as in this case or when the claimant would not be trapped by both the bed and the door. Nor is the tribunal's reasoning of the amount of space available for an appropriate amount of other suitable furniture [self-evident].'

19. The UT Judge made further observations on the issues on 18 October 2019:

'9.First the bed size, I have looked at the size guides on the Argos and Dreams Websites: both give dimensions for a single bed as 90 cms (34.43 inches) by 190 cms (74.8 inches). I am sure it is possible to find larger beds and she will no doubt wish to argue about headboards, allowance for skirting and the radiator, and the like.
10.Second, furniture. Yes, the claimant is entitled to more than just a bed. But as with the bed size, this come in different shapes and sizes. And there are other possibilities: clothes can be hung on a rail and it is possible to obtain beds with internal storage.
11. Third, safety. I have given decisions based on safety, where the claimant would be trapped in a corner between the bed, the wall and the door. That is not the case here.'

20. R1's representative, Ms Knox, made written submissions opposing the appeal on 13 February 2019. It was submitted that the appeal 'hinges on the size and possible placement of the bed' and conceded that 'In the light of *M v SSWP* [2017] UKUT 442 (AAC) we accept that, other than the bed, adequate furniture could be fitted into [R1]'s room'. Those submissions argued that even if a Divan bed of 75 inches with no headboard were placed in the room it would block the door and concluded 'We submit that to have a door blocked so that (at absolute best) it can only open to a 60% angle, is unacceptable.'

21. The Appellant made further written submissions on 31 October 2019 emphasising that the use or potential use of the relevant room can be by any of the people listed in sub-paragraphs (5) and (6) of Regulation B13 (not just adults) and pointed out that beds were available of less than 75 inches in length.

The Law

22. Regulation B13(1)-(7) of the Housing Benefit Regulations 2006 provides:

B13 Determination of a maximum rent (social sector)

(1) The maximum rent (social sector) is determined in accordance with paragraphs (2) to (4).

(2) The relevant authority must determine a limited rent by—

(a) determining the amount that the claimant's eligible rent would be in accordance with regulation 12B(2) without applying regulation 12B(4) and (6);

(b) 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); and

(c) where more than one person is liable to make payments in respect of the dwelling, apportioning the amount determined in accordance with sub-paragraphs (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—

(a) 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and

(b) 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 the 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 person whom the relevant authority is satisfied occupies the claimant's dwelling as

their home (and each person shall come within the first category only which is applicable)—

[(za) a member of a couple who cannot share a bedroom;

(zb) a member of a couple who can share a bedroom;]

(a) a couple . . .;

(b) 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,

. . ..]

[(6) The claimant is entitled to one additional bedroom in any case where—

[(a) one or more relevant persons in paragraph (9)(a), (b) or (e) is a person who requires overnight care;

(ab) one or more relevant persons in paragraph (9)(c) or (d) is a person who requires overnight care; or]

(b) [a relevant person is] a qualifying parent or carer.

(7) Where—

(a) more than one sub-paragraph of paragraph (6) applies the claimant is entitled to an additional bedroom for each sub-paragraph that applies;

(b) more than one person falls within [paragraph (6)(b)] the claimant is entitled to an additional bedroom for each person falling within that sub-paragraph, except that where a person and that person's partner both fall within the same sub-paragraph the claimant is entitled to only one additional bedroom in respect of that person and that person's partner.

……

23. In the Court of Appeal's decision in *Secretary of State for Work and Pensions v Hockley* [2019] EWCA Civ 1080; [2019] PTSR 2246, the Court held:

i) At [38] that 'bedroom' is an ordinary word which is to be construed and applied in its context having regard to the underlying purpose of the legislation, namely to limit Housing Benefit ('HB') entitlement to those occupying social housing.

ii) At [38] and [41] that the word bedroom should be interpreted as meaning a room capable of being used by any of the persons listed under the categories in B13(5) and (6) rather than being a room capable of being used as a 'bedroom' by the particular claimant. 'B13(5) de-personalises the assessment to be performed such that the characteristics of the particular individuals are irrelevant. It follows that such an assessment is an objective one.'

iii) At [40] 'Such reasoning is consistent with that of the UT in the decision in *Nelson* [2014] UKUT 525….'

24. In a decision of a three-judge panel of the Upper Tribunal in *Secretary of State for Work and Pensions v Nelson* [2014] UKUT 525 (AAC) it was held:

i) At [31] that 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 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.

ii) The Regulation does not support 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 [60]. The UT concluded, 'Rather, as we have said, we consider that the language and purpose 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'.

25. In *Secretary of State for Work and Pensions v GM* [2018] UKUT 425 (AAC) the Upper Tribunal ('UT') considered a room of 55 square foot in

which the First-tier Tribunal ('FTT') had held that the disputed room was not a bedroom due to being unable to contain a full-size single bed. The length of the room was 107", which less the door fully opened (28"), left 79". The FTT held that a bed with frame was 75" plus 3" for bedding making 78" but allowing for the skirting board and ventilation the room was too small for the bed without the door hitting it.

26. At [26] the UT held that the FTT had erred in law in proceeding on the unacceptably restricted basis that a standard bed with associated bedding was necessarily 78" in length; it was also held that the FTT failed to explain why the bed would necessarily snag on the door, indeed there was a strong case that it would clear an adult bed. The question of whether the FTT should have considered a child's bed was expressly reserved. The UT re-made the decision in the Secretary of State's favour.

27. In *Secretary of State of Work and Pensions v Cox* ((Appeal No: CH/2126/2017, dated 19 December 2019) there was space for an adult bed of 75" in length, but, because of the shaper of the room it could not be manipulated into place. Evidence was submitted by the Secretary of State that it was possible to purchase divan beds made in two sections which could be assembled in situ and also that there were other flexible beds available, which the UT held (allowing the Secretary of State's appeal) could not be ruled out given what was said in *Nelson*.

The Appellant's submissions

28. Mr Buckingham, Counsel on behalf of the Appellant, relied upon three arguments in his oral submissions. He submitted that the appeal should be allowed and the First-tier had erred in finding that the room in question was not a bedroom. He submitted that the First Respondent's third room was a bedroom for the purposes of the Housing Benefit Regulations 2006 and a 14% deduction should be applied as it was a spare bedroom.

29. First, he submitted that a standard adult bed – whether in a conventional frame at 79 inches or a divan of 75 inches - could fit within the room placed against the left hand side of the room without fouling the door so as to make it inaccessible. Even allowing the available length of the room to be reduced by 6 inches for a radiator and a 79 inch long bed, the door would open to a reasonable angle. The Upper Tribunal in *Cox* worked on the assumption that an adult bed was 75 inches long – this would add a further four inches to the length available in the room and the door would open to a wider angle. If only two inches were allowed for the radiator and 75 inches for the bed then the door would be able to open fully into 30 inches of length. Even if another couple of inches were given to radiator (total of 4 inches) the door would not open to 90 degrees but it would be very close as there would be 28 inches of perpendicular length available. A headboard was not reasonably necessary in order to use a bed – per [60] of the decision in Nelson – the room only had to be suitable for a visitor or overnight guest.

30. Second, he submitted that there were non-children's beds that are under 70 inches in length and there are also flexible folding beds which as it happens are not all as long as 75 inches. With a 70 inch bed on the left hand side of the room and allowing 6 inches for radiator, a 30 inch door would fully open into the room which was 107 inches long. Alternatively, an even shorter bed might fit in or rotated to be placed against the top wall (Axis AB) which is 69 inches long. These beds may not be ideal for long time occupiers but be adequate for occasional overnight use or for a visitor. It would be artificial to look and say that the room was not a bedroom – per [23] of *Nelson* it was difficult to define a bedroom by describing what is seen, but this room was a small bedroom. There was not an enormous amount of space in the room but there were cases of smaller rooms being confirmed as bedrooms.

31. He accepted his third submission was controversial - that accommodation of a full-size adult bed was not necessary to enable a room to be defined as a bedroom – per [38] and [41] of the Court of Appeal's judgment in *Hockley*. He submitted that the room could be a children's bedroom – it is not required to accommodate all adults or a couple only any of the categories under Regulation B13(5) or (6). If two children less than ten years old were accommodated in the room in a double bunk bed then it would have a smaller footprint than an adult 75 inch long bed. There were plenty of places where a children's bunk beds could be manoeuvred into the room.

The First Respondent's submissions

32. Ms Knox made three submissions on behalf of the First Respondent during the hearing. She submitted the appeal should be dismissed and the First-tier was entitled to come to the conclusion that it did that the room was not a bedroom within the meaning of the Regulations.

33. First, she made submissions as to what could be considered a standard adult bed. She submitted there was no absolute prescription – but she recognised that the Upper Tribunals in *Cox* and *Moran* looked at Divan bed of 75 inches in length. No doubt there could be argument about the additional length required for headboards – the point is that a headboard would normally be expected to be part of a divan bed but she did accept one could sleep without a headboard.

34. She submitted the question should also be raised as to whether a smaller bed than 75 inches would be acceptable – when looking at the size of examples available. There were examples of beds less than 75 inches but not much less than 75 inches and there were not many available. There was one short guest bed available from a high street retailer at 68 inches in length – a day bed or sofa bed. However, she submitted that there are not that many short beds available. She

submitted that the caselaw has stuck to the standard adult bed as 75 inches length as being reasonable – a shorter length would not be what people understand to be standard or reasonable.

35. Paragraph 60 of the decision in *Nelson* does suggest that short term or irregular occupation is acceptable but she could not understand its application to the size of beds. The concept of the irregular use of a bed is difficult to understand – even an overnight carer would be relatively long term in occupation and therefore Ms Knox could not accept the concept of a short-term use meaning a less than standard bed was reasonable or acceptable.

36. Second, she made submissions as to the ability to open the door based upon the layout of the room with a bed inside. She submitted that there were three possible positions for a bed in the room in the plan set out at page 53 of the bundle. The first position was parallel to left side or wall of the room (Axis AFED) or on the right hand wall (Axis BC) or theoretically in the front half of room where it was 79 inches wide – however this final option cut the room in half so was not a practical third possibility.

37. She submitted that the bed would impede the door opening to some extent on either of the realistic possibilities for the layout of the room. She submitted that the radiator comes out 4 inches from the wall and it was an ordinary radiator – so six inches was necessary not unreasonably to allow for an extra two inches for circulation and where otherwise the bed would be jammed against the wall causing fire hazards and a lack of circulation.

38. She submitted that however a bed would be placed it was going to impede the door opening. She accepted that it would not prevent someone entering the room entering or leaving the room – this was also true in a case of emergency. However, if one returns to the *Nelson*

concept – if a reasonable person were inspecting a room and they could not open the door fully because it hit the bed, they would not recognise it as a bedroom. Most people expect doors not to be blocked by furniture. One could sleep in the room but one would not call it a bedroom.

39. Even she could not argue that with the layout of the room with the bed against the left hand wall there was an obvious case for being trapped in the room – health and safety issue and environmental health officers would suggest it was only a minor hazard. Based on the length of the bed accepted at 75 inches and the radiator allowance at 6 inches the door would open somewhere between 60 and 70 degrees. However, if the door was impeded at all and the door could not fully open this was simply not acceptable in her submission.

40. Third, she made submissions as to the use of the room as a bedroom for children. She submitted there was an assumption that because bunk beds were for children they were smaller. She did look at ten different manufacturers – the shortest of the bunkbeds was 77 inches – with one exception – which was a short and it was 71 inches. A bunkbed requires a sturdy frame – whilst theoretically it is possible to find a manufacturer and retailer who will sell bunk beds of less than 75 inches it is difficult in practice and she did try to look at common manufacturers. Therefore, in practice, the use of children's bunk beds would make no difference to the decision because they were no shorter than a single adult bed.

Discussion

41. Much of the parties' oral submissions was directed at re-arguing the facts of the case. However, the first stage of my determination is to decide whether there was an error on a point of law in the First-tier's decision of 28 July 2017. This is pursuant to my jurisdiction under

section 12(1) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA 2007').

42. I am satisfied that the First-tier erred in law in a material manner when coming to the conclusion that R1's spare room was not a bedroom for the purposes of Regulation B13.

43. I am satisfied that the First-tier erred in law in two regards in its reasoning and conclusions at paragraphs [13] to [18] of the SOR as set out above. I am satisfied that in the highlighted (underlined) passages of the decision, the First-tier made two errors of law. These are the two grounds on which UT Judge Jacobs granted permission to appeal.

44. First, I am satisfied that the First-tier Tribunal incorrectly applied the test of access to the room as contained in *Nelson* - the fact that a door cannot fully open into a room but touches the bed does not mean there is not reasonable access or that it is unsafe. The First-tier placed undue emphasis on whether the door would touch the end of the bed if the bed were placed on the left hand side of the room. Further, it failed to consider whether the room was reasonably accessible to a person leaving and entering the room or gave insufficient reasons for finding that it was not, particularly in light of its finding that the door would open to an angle of 50 degrees (to which finding I will return). Therefore, it failed to apply the test in *Nelson* correctly and give sufficient reasons for relying on a lack of reasonable access or safety in evacuation to find that the room was not a bedroom.

45. There were insufficient reasons given by the First-tier, or another way of putting this is there was no reasonable evidence upon which the First-tier could rely to find, that a person could not reasonably access the room on entry and exit. The test in law is not whether a door can fully open or whether it touches the bed before it is able to open to a full 90 degree angle. The test in *Nelson* requires looking at all the circumstances of the case including reasonable access to the room. I

am satisfied that there was no reasonable evidence upon which to base a finding that a person could not walk in or out of the room directly and reasonably easily (as R1 had in fact been using the room as a bedroom in this way). Likewise, the safety on evacuation finding that the First-tier made was not based upon sufficient or reasonable evidence. As Judge Jacobs pointed out, the First-tier did not (and could not reasonably) find that a person would be trapped in the room by the bed, wall and door. Therefore, I am satisfied that a 50-degree angle of door opening on its own is not a sufficient reason to find that the arrangement of the room did not provide reasonable access or was too unsafe to use as a bedroom.

46. There was no or no reasonable evidence to support the finding by the First-tier that when the bed was placed on the left hand side of the room, a person could not leave the room easily and directly through the partially opened door. There was therefore insufficient evidence to rely upon or insufficient reasons given by the First-tier in making findings that it would be difficult or very difficult to exit the room and it would be hazardous (as it did at paragraphs 14 and 18 of the SOR). I am satisfied that the safety and access principles expounded in *Nelson* do not disqualify the room from being a bedroom when the door would open as wide as the First-tier found in this case or when the claimant would not be trapped by both the bed and the door.

47. I reject Ms Knox's submission that if a door cannot open fully to a ninety degree because it opens the bed it would be unreasonable to categorise a room as a bedroom. It is a matter to be determined by degree based on the reasonable ease of access and safety in evacuation from the room.

48. The second error of law was in the First-tier's reasoning as to the amount of space available for an appropriate quantity of other suitable furniture. I am satisfied that the First-tier failed to consider all the circumstances of the case and apply the test in *Nelson* in the correct

fashion. Ms Knox, for R1, accepted that the Frist-tier Tribunal placed too much weight on what furniture needed to be placed into a room when determining whether not it is a bedroom. She accepted in light of *M v SSWP* [2017] UKUT 443 (AAC) that other than the bed, adequate furniture could be fitted into the room ie. that either smaller furniture could be introduced or it could be rearranged in such a way as to fit.

49. Both of the conclusions which the First-tier arrived at in error of law were material matters upon which the First-tier relied as determinative in making its decision at paragraphs 13, 14 and 18 of the SOR set out above. Therefore, the two errors of law were not simply material to, but determinative of the outcome of the appeal before the First-tier.

The Appellant's alternative case

50. I have not addressed the Appellant's alternative ground of appeal – the submission that following the Court of Appeals judgment at [38] and [41] *Hockley* (and to some extent, [60] of *Nelson*) a bedroom should be interpreted as meaning any room capable of being used as a bedroom by any of the persons listed in the categories in B13(5) & (6). Mr Buckingham submits that the First-tier erred in stating that the test was whether an adult sleeping in a single bed could use the room as a bedroom.

51. Mr Buckingham, for the Appellant, submits that the category includes two children who are less than 10 years old or a child. As such it was submitted that a children's bunk bed, sleeping two under 10 year olds, could fit in the room rendering it a bedroom.

52. I accept that the First-tier suggested at [13]-[14] of the SOR that the test only related to an adult bed when it stated 'a child's bed (which would not meet the criteria for the purpose of categorising the room as a bedroom)' and 'it could not properly accommodate an adult single bed, as distinct from a child's bed or a smaller bed'. At [21] it went on

to imply the same 'another example would be, if it would only accommodate a small baby's cot, but no bed, then, it would not usually be classified as a bedroom. It is therefore a matter of judgment of the Tribunal where the room is too small to be reasonably be regarded as a bedroom'.

53. However, while implying it, the First-tier did not explicitly state that the test of a bedroom was only satisfied by the adult occupation of a room or that it had to fit an adult bed. Further, it made no specific findings of fact as to whether a child's bed or children's bunk bed could in fact fit in the room. It is arguable that it should have gone on to consider this alternative proposition but it does not appear that this argument was put forward by the Second Respondent at the hearing. It is also arguable that it is sufficient that a room fit a bed for a child (however this would include a teenager, a person under sixteen years old, who by definition could be as tall as an adult and objectively require an adult bed) or two children less than 10 years old in order to be a bedroom for the purposes of B13(5) and (6).

54. It must follow from the Appellant's case that the Court of appeal in *Hockley* in 2019 at paragraphs 38 and 41, arguably did nothing more than affirm the three Judge Upper Tribunal's decision in 2014 in *Nelson* at paragraph 60 as to the wide categories of person that might occupy a room so as to render it a bedroom.

55. Mr Buckingham submits that a particular room may not be large enough for a couple but may be large enough to accommodate a child (even if that they are, say, 15 years old). Or a room may not be large enough to accommodate a fully grown child, but is large enough to accommodate two children who are less than 10 years old. He therefore submits that I should disapprove of the earlier Upper Tribunal decision in which it is suggested that a room must be able to accommodate an adult bed per se in order to constitute a bedroom.

56. I decline the invitation.

57. I do not need to decide the point because it is unnecessary for determining this appeal which is to be allowed on the two grounds set out above. Therefore, I will not engage in analysis of the ratios in *Hockley* and *Nelson,* interpretation of Regulation B13 and their applicability to the issue of whether the capability of children's occupation renders a room a bedroom.

58. Further, setting aside the First-tier's decision on this ground would then lead to consideration of remaking the decision or remitting to a fresh First-tier. This would either involve considering fresh evidence on this appeal which was not before the First-tier - the dimensions of such a children's bunk bed - and then remaking the decision or remitting it to the First-tier for re-hearing.

59. The evidence produced to me during the appeal to the Upper Tribunal as to the dimensions of a child's bed or children's bunk bed was not before the First-tier as far as I am aware. Applying the principles in *Ladd v Marshall* [1954] 1 WLR 1489, there is no good reason why it was not. Even if I determined there was an error of law on this ground, I would decline to re-make or remit as I am satisfied such would be unjust.

60. The Second Respondent relied on the room being a bedroom by virtue of occupation of a single adult before the First-tier at the hearing of the appeal. It would not be fair to consider an alternative case at this late stage. Alternatively, remittal to the First-tier would prolong historic proceedings which have been ongoing for five years.

61. Further there was very limited evidence placed before me regarding a children's double bunk bed frame being anything less than 75 inches long – the length of an adult bed as conceded for the purposes of this appeal. There was only one model of children's bunk-bed identified by any of the parties as being less than 75 inches long, the rest being of equal length or longer.

62. Therefore, I decline Mr Buckingham's invitation to make a specific ruling that so long as a room can accommodate any of the categories listed in B13 (5) or (6) of the Regulations it is a bedroom. It is unnecessary to determine the Appellant's second and alternative submission that the First-tier erred in law because it failed to consider whether even if the room could not accommodate an adult's bed it was nonetheless a bedroom.

Remaking the decision

63. For the reasons set out above, I am satisfied that the First-tier erred in law in deciding that the room was not a bedroom. This also involved concluding that an adult single bed could not fit in the room and provide reasonable access for exit and entry and safety in evacuation.

64. I am satisfied it is in the interests of justice to re-make the decision pursuant to section 12(2)(b)(ii) of the TCEA 2007. This is firstly because I had all the necessary and sufficient evidence before me upon which to make the decision and both parties had the opportunity to address me upon it. Second, because this case is historic and has a long history, it is in the interests of justice that it now be concluded some 5 years after the Second Respondent's original decision.

65. As set out above, Ms Knox for R1 conceded two points at the outset of the hearing, that the room could accommodate sufficient furniture and that an adult single bed must not necessarily be 79" long.

66. For the purposes of re-making this decision, I rely upon the concession that adequate furniture will fit in R1's room, the only issue is the length of the bed used and the access and safety that this would permit through the door to the room.

67. Further, the First-tier's statement of reasons noted at paragraph 16, 'If the bed was placed against the left wall it prevented the door from opening properly but to a lesser degree but it used up the dressing space and prevented the chest of drawers from being opened'. Ms Knox accepted that the First-tier had erred in respect of finding that furniture would not fit in the room.

68. I accept the Appellant's submissions it would be possible to move the chest of drawers (rotated through 90 degrees) to where the bedside table was currently located on the plan– the former could then function both as a place to store clothes and as a bedside table.

69. I also admit much of the fresh evidence that was presented to me on the appeal following the principles in *Ladd v Marshall* because it was reliable, both parties were able to serve and rely on it, make submissions upon it and it was not evidence that was deemed to be necessary in determining the appeal before the First-tier.

70. Ms Knox also accepted that a Divan bed of 75 inches in length could be placed in the room without a headboard. Nonetheless she submitted that that to have a door partially blocked so that it can only opened to a 60% (or degrees angle) at best was unacceptable – because it would not fit a reasonable person's definition of a bedroom. However, she did not submit that such an angle was unsafe.

71. It is evident from the decision of the First-tier in accepting the submissions before it and the plan of the room (page 53 of the bundle), that an assumption was made during those proceedings that a standard adult bed will be 79 inches long or thereabout.

72. I am satisfied that this assumption is not reasonable as: a) Ms Knox has accepted in the written submissions made and at the outset of the hearing that a 75 inch Divan Bed (without a headboard) could be placed in the room; b) the UT has previously accepted the use of 75 inch long beds in *GM* and *Cox; c)* I have been served with evidence as to the wide

availability of 75 inch beds. It is evident that the UT in both *GM* and Cox were primarily, working on the assumption that a standard adult single bed was 75" in length. I accept the Appellant's submissions that a headboard is by no means essential to the reasonable use of a bed, particularly bearing in mind what was said in *Nelson* at [60] in respect of short-term or irregular occupants as a visitor or overnight guest.

73. As was not in dispute before the First-tier, the length of the room in question (axis BC on the plan before the First Tier at page 53 of the bundle) is 107 inches. The length of the room should be reduced by 6 inches to allow for a radiator which is placed on the top wall (Axis AB). Of this 6 inches, 4 inches is for the wall mounted radiator with a further 2 inches left for radiator clearance, circulation and ventilation. Any bed should be placed against the left hand side of the room against the left hand wall (Axis AF).

74. When considering the length of the room at 107 inches and allowing 75 inches for the bed and 6 inches of radiator, this leaves 26 inches of length perpendicular to the door for which to open into. This is greater than the 21 inches the First-tier allowed (because it allowed for a bed which was four inches longer and a further inch for the skirting board which would be subsumed within the radiator clearance).

75. To open the door fully to 90 degrees, the door would require 30 inches in length as it is 30 inches wide. Therefore, the remaining length of the room at 26 inches is insufficient for the door to open fully to 90 degrees when an adult divan bed is placed inside. However, the door will open to an angle of 60 degrees if 26 inches of perpendicular length is allowed for. Ms Knox accepted in written submissions it would open to 60% (54 degrees) - in fact this should be 60 degrees (the inverse Sin of 26/30). Plainly this is wider than the 50 degrees the First-tier allowed for – because the bed is assumed to be 75 inches rather than 79 inches. It will open wider than was assumed by the First-tier – and even wider if the 6 inches allowed for the radiator and clearance was reduced.

76. I am satisfied that a 60 degree angle of door opening when the adult bed is in situ provides reasonable access in and out of the room for any person so that the room can be used as a bedroom. It also provides safe access – the door hinge opens from the left-hand side of the room – the same side as the bed will be placed. Therefore, on entering the door a person automatically walks into the right hand side of the room where there is over thirty inches of width and space to the right of bed (even with a 38 inch rather than 35 inch wide bed in place) and is not trapped behind the door. The same would apply to a person exiting or evacuating the room in an emergency.

77. Therefore, I am satisfied that a door opening to 60 degrees on the facts of this case would provide comfortable and safe access to the room such as that it does not disqualify the room from being a bedroom as understood in *Nelson*. It is worth bearing in mind what was said on this issue at [9] of the first First-tier's statement of reasons on 29 April 2016:

'Even if it is the case that the door of the room would touch a bed which is 79 inches long the tribunal did not see how that would prevent someone walking into the room and closing the door behind them and using the room as a bedroom – as in fact the appellant herself did. This fact would not prevent the room being called a bedroom in the opinion of the tribunal because access to the room is realistically possible: it is not the equivalent of someone jumping from the corridor.'

78. In conclusion, I am satisfied that the First-tier erred in finding that the room was not a spare bedroom and misapplied *Nelson*. It is apparent that the door touching the end of the bed but opening to a 60 degree angle would not prevent access to the room giving sufficient width and access for a person to exit and enter reasonably even in an emergency. Given that the bed would also be placed on the same side of the room, against the same wall as the end of the door which is hinged to the room, the door will open away from the bed such that a person entering

or exiting will not be trapped behind it on entry or exit. There is no issue about safe access. The fact that the door does not open fully does not mean that R1 is trapped in a corner as UT Judge Jacobs observed.

79. The Appellant also provided some evidence that there are single (non-children's) beds available from retailers which are between 68" and 69" long. Mr Buckingham argues that such a short bed could be placed on the left hand side of the room shown on the plan (or perhaps even in the AB top axis) allowing sufficient length in the room perpendicular to the door for it to open fully to 90 degrees. However, I do not proceed to take into account this evidence for three reasons.

80. The first is that evidence of beds shorter than 70 inches was not evidence placed before the First-tier by the Appellant or Second Respondent and it is evidence prejudicial to R1 presented afresh on an appeal when the issue of the door fully opening was not before the First-tier. Second, I also decline to admit it as there is no good reason it was not placed before the First-tier by the Second Respondent at least by the time of the second appeal before the First-tier in 2017 if not earlier. It is not reasonable for the Appellant to introduce new issues not taken before the First-tier when it was not a party to those proceedings. Thirdly, it cannot be assumed that short beds are widely available, as they are conceded to be rare. Fourth, these beds would not accommodate a man or woman of above the average height for a British male (68 or 69 inches - five feet eight or nine).

Remaking

81. For the reasons set out above, I have decided that the Appellant's appeal should be allowed for material error of law on the part of the First-tier. I am satisfied that the First-tier's decision should be set aside. I am satisfied that it is in the interests of justice to re-make the decision. All of the factual and legal arguments were presented before me enabling me to have sufficient material to determine the questions

in issue. I am satisfied that the First Respondent's third room was a spare bedroom for the purposes of B13 of the Housing Benefit Regulations 2006 such that her Housing Benefit should be reduced by 14%.

Conclusion

82. For the reasons given above the First-tier's decision dated 28 July 2017 must be set aside for material error of law.

83. I therefore allow the Appellant's appeal and set aside the First-tier's decision of 28 July 2017. I remake the decision and confirm the Second Respondent's decision of 9 March 2015 reducing the First Respondent's Housing Benefit by 14% in accordance with B13 of the Housing Benefit Regulations.

Signed (on the original) Rupert Jones
Judge of the Upper Tribunal

Dated 15 April 2020