

HOUSING SYSTEMS: BRIEFING

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Exempt Accommodation and Housing Benefit

Introduction

In simple terms 'exempt accommodation' is a term used in the Housing Benefit Regulations to describe supported accommodation provided by non-profit making organisations where some of the 'normal' HB rules do not apply.

Where a claimant lives in 'exempt accommodation':

- It is harder for a HB Office to restrict the rent*.
- If they are getting Universal Credit, their rent is still supported by Housing Benefit^.
- They can be excluded from some of the wider Welfare Reforms – see website for more details.

*This is because the costs of providing supported housing tend to be higher than for general needs housing so the 'usual' processes of controlling the level of HB that can be awarded are inappropriate.

^It is generally felt that the Local Authority is best placed to make these decisions as to what is / isn't 'exempt accommodation' as they have local knowledge.

In this Briefing we look at the system for controlling 'exempt accommodation' rents. This system is designed to ensure that any HB awarded reflects the higher costs of providing this type of accommodation, balanced against ensuring the level is no higher than that for suitable alternative accommodation.

The reason why 'exempt accommodation' has become such a 'hot topic' in recent years is because:

- The introduction of Universal Credit has forced HB Offices to look at whether or not a UC claimant living in supported housing should have their rent supported by HB or UC – i.e. whether they live in 'specified accommodation'. And one of the categories of 'specified accommodation' is 'exempt accommodation'.
- There has been an increase in smaller organisations setting up supported housing schemes and expecting their residents to be able to receive HB to cover the higher levels of rent being charged.
- The demise of Supporting People budgets has forced supported housing providers to re-think how their services can be funded.
- Unscrupulous profit making landlords have recognised that where a claimant lives in 'exempt accommodation' a higher level of rent can be covered, and have tried to take advantage of these rules.
- Due to the subsidy rules, i.e. the money HB Offices can claim back from central government, Local Authorities often find themselves footing the bill for the higher HB award. With limits on Local Government budgets this has led to many HB Offices being very cautious when dealing with supported housing schemes.
- The HB Regulations have not been amended to take account of the move to separate the functions of care provider and landlord.

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NOTE: This Briefing does not look at 'specified accommodation' or issues arising when claimants are getting Universal Credit – please see the Housing Systems website for more details on this issue

Links in this Briefing for more information link to the Housing Systems website and you will need to log in to see them.

If the organisation you work for is not yet a subscriber and you would like a free trial – please contact us: info@housingsystems.co.uk

IMPORTANT: The contents in this Briefing are not a statement of law and should not be relied upon.

What is exempt accommodation?

The definition of 'exempt accommodation' can be found in paragraph 4(10) of Schedule 3 to the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006.

This states that for a HB claimant to be classed as living in exempt accommodation:

Either:

- The accommodation has been funded in the past by a resettlement grant under section 30 of the Jobseekers Act 1995 from the Department of Social Security (now the Department for Work and Pensions (DWP)). This could apply to some hostels and similar kinds of accommodation.
[Click here](#) for more information.

Or

- The claimant must be living in a property that is provided by (ie their tenancy/license agreement is with*):
 - a housing association,
 - a registered charity,
 - a non-profit making voluntary organisation, or
 - in England only, a non-metropolitan county council

AND

- '*...that body or a person acting on its behalf also provides the claimant with care, support or supervision....*'

*This means the immediate landlord and the organisation to whom they are responsible to pay their rent (CH/3900/2005 and UKUT 12(AAC)), and not for instance a superior landlord or managing agent.

See following pages for more information.

In some situations, a landlord may fall in more than one of the above categories, e.g. a Housing Association may also be a registered charity. In these situations, it is sufficient to verify that the accommodation is included within one of the above categories, not all of them.

In summary

Copied from the HB Guidance Manual:

The accommodation should be accepted as 'exempt accommodation' and eligible rent and HB entitlement should be assessed under the 'old' HB scheme rules if you are satisfied that

- *the landlord falls within one of the prescribed categories, i.e. non-metropolitan county council in England, housing association, registered charity, or voluntary organisation, and*
- *the landlord or a person acting on its behalf is responsible for supplying care, support or supervision beyond the level of assistance that would be expected from any landlord to any tenant, and*
- *that the tenant has an actual or potential need for the available support which must be connected with giving of advice and assistance to the claimant in coping with the practicalities of everyday life, and*
- *the care, support or supervision is an obligation of the landlord, e.g. set out in the tenancy agreement, although this is not essential, and*
- *there is an explanation about how much this ineligible service charge is, or how the cost of it is funded.*

This Briefing aims to explain the terms used, and the process the HB Office should go through, when making these decisions. And we offer advice about challenging such decisions.

Living in the right 'type' of property – definitions

Housing Association

For the purposes of working out whether a claimant is living in 'exempt accommodation' a 'Housing Association' is defined in HB Regulation 2 as:

'Housing Association' has the meaning assigned to it by section 1(1) of the Housing Associations Act 1985'

Section 1(1) of the Housing Associations Act 1985 states:

'a society, body of trustees or company-

(a) which is established for the purpose of, or amongst whose objects or powers are included those of, providing, constructing, improving or managing, or facilitating or encouraging the construction or improvement of, housing accommodation, and

(b) which does not trade for profit....'

Most organisations satisfying the definition of 'Housing Association' will also be Registered Housing Associations. But it is possible to be a 'Housing Association' for these purposes without being registered as such, and it is possible for a Registered Housing Association not to satisfy the definition i.e. where they trade for a profit (which is possible in England).

Where a Housing Association is unregistered the HB Office will normally seek a copy of their constitution or the rules which govern their activities, an explanation of why they are unregistered, and, when appropriate, a summary of their accounts.

Even though a Housing Association is recognised as non-profit making and therefore meets this definition, the HB Office may still investigate their relationship with any partner organisations. If the HB Office finds that excessive profits are being made by these organisations from the dealings with the housing provider (especially where there are common staff/board members) – then the HB Office can decide that the provider is not in fact a 'Housing Association'. For more information on 'Disguised Profits' [click here](#).

NOTE: Not-for-profit does not mean that the organisation cannot not make any profit at all or cannot carry a surplus – but it is what they do with these profits / surplus that counts. See 'Relevant case law' below.

Registered Charity

A registered charity (within the meaning of Charity in Part 1 of the Charities Act 2006).

This means one that is registered with the appropriate charity regulator:

- In England and Wales the Charity Commission.
- In Scotland the Office of the Scottish Charity Regulator.

The HB Office has every right to request evidence that an organisation is a registered charity, or to check directly with the above regulators. For the purpose of these regulations, the charity must be registered to count.

Non-profit making voluntary organisation

Regulation 2 of the Housing Benefit Regulations 2006 defines a voluntary organisation as:

'a body, other than a public or local authority, the activities of which are carried on otherwise than for profit'.

The term 'body' is wide enough to cover different kinds of organisation: a company, a society, a partnership or an unincorporated association. The key is that it is not-for-profit.

To confirm whether or not an organisation falls under this definition a HB Office will want to check that:

- It is formally constituted.
- It does not formally or informally pay dividends or make profits from its operations or in selling, disposal or winding up of its assets or operations.
- It does not make payments to directors or any person, organisation or body connected to them which are quasi or disguised profits, or dividends from its operations or in selling, disposal or winding up of its assets or operations.
- It does not have arrangements with any person, organisation or body, formally or informally to make payments or dividends, quasi dividends or disguised profits from its operations or in selling, disposal or winding up of its assets or operations.
- The objects of the organisation and its arrangements are such that it is not possible for any person, organisation or body to make a profit from its operations or in selling, disposal or winding up of its assets or operations.

The HB Office has every right to ask to see the company's Articles/Memorandum of Association/Constitution and a summary of the company accounts to check that they are a not-for-profit company.

Not-for-profit does not mean that the organisation cannot not make any profit at all, or cannot carry a surplus – but it is what they do with these profits / surplus that counts. See below.

Not-for-profit – Relevant Case Law

In the Upper Tribunal's decision on *Wirral BC v Furlong, Perry and Salisbury Independent Living (SIL)* [2013] UKUT 0291 AAC the Judge accepted that charities are encouraged by their regulator to build up reserves so they can continue to operate in the event of an unforeseen disaster. The Judge accepted that a surplus in one year may be offset by a deficit in the next: it is not practicable for a not-for-profit body to ensure that every single transaction exactly breaks even. The issue is more about how any surplus is used – i.e. reinvested back into the organisation's charitable work rather than distributed to members.

Non-Metropolitan County Council

Why are Non-Metropolitan County Councils included in the list?

Where rent is paid to an English Non-Metropolitan County Council, the claimant does not receive a rent rebate from that same council (as they would if their landlord was a Local Authority) and the award takes the form of a 'rent allowance'. By default, as the County Council is generally not a Registered Provider of Housing (and not a Housing Association, charity or voluntary organisation) the assessment of the award is therefore subject to the Housing Benefit rules for private tenants.

So by including an English Non-Metropolitan County Council on the list of landlords that can be classed as providing 'exempt accommodation', the Regulations ensure that people who live in such schemes do not have their benefit restricted to those paid for private tenancies.

Please [click here](#) for more information on Non-Metropolitan County Councils and whether a Unitary Authority could ever be one.

Providing the claimant with care, support or supervision

Having established the status of the landlord being the right 'type', there is a further condition to consider. The definition of 'exempt accommodation' requires that the landlord (or someone acting on the landlord's behalf) provides the benefit claimant with 'care, support or supervision'.

Where a tenant is living in 'exempt accommodation' the HB Regulations allow a higher award of HB to be made: for this reason there has been considerable case law in this area, especially when looking at the definition of 'support'.

However, 'care' and 'supervision' are neither defined in the HB Regulations nor is their definition considered directly in any case law. So they take on their dictionary definition (R(H) 2/07).

A landlord may believe that they are providing 'exempt accommodation' – perhaps because they are providing supported housing, or the claimant is receiving a high level of care, or they are providing an Intensive Housing Management Service (please see Appendix B for more information).

But the HB Office should look at each claimant on a case by case basis. In order to help them establish whether the landlord provides the claimant with care, support or supervision to more than a minimal degree, they will often ask one or more of the following questions:

What are the care, support or supervision needs of the claimant?

Who assessed the care, support or supervision needs and how much is required? i.e. the type of assistance, number of hours per week, frequency etc.

How is the care, support and supervision provided? Does the landlord, or a person acting on their behalf, provide this or is it provided by a third party?

What do you, as the landlord, provide? –

How is this funded?

What is the charge for the care, support or supervision? Is it included in the rental charge? If yes, please provide a breakdown of the care, support and supervision charge in the rent.

Is there any contractual obligation for you to supply care, support or supervision?

If the support includes Intensive Housing Management, please provide a breakdown of the figure charged.

Does the claimant receive care, support or supervision from any other service provider beside that provided by the landlord? If yes what, who provides it and how much do they receive?

Does the claimant receive public funding for the care, support or supervision? If not, how has it been identified that this is required and that it is in fact being provided and by whom?

'Provides' – the Case Law

Meaning of 'provision of':

- A landlord can provide care, support or supervision by making arrangements for it, or by paying for someone to do it ([2009] UKUT 107 (AAC)).
- For care, support or supervision to be provided 'on behalf' of the landlord there must be a '*sense of agency between the (care provider and the landlord), or.... A contract, or something akin to it*'. A joint venture is not enough; nor is a contract between the care provider and a third party e.g. social services (R(S) v Walsall MBC, confirming R(H) 2/07).
- It does not matter if there is another organisation providing care, support and supervision, or that the landlord is not the majority support provider, as long as the landlord's own contribution is more than minimal (R(H) 7/07).
- If a support service available from the landlord on request is to be more than minimal it should not overlap with a similar service provided by staff from the commissioned care provider who is likely to be closer to hand (CH/779/2007).
- It is irrelevant that the landlord is (or is not) paid to provide the care, support and supervision by someone else ([2009] UKUT 107 (ACC))

Care, Support or Supervision – the Case Law

The key points to come from the case law are:

Meaning of 'care, support or supervision'

- The care, support or supervision being provided by the landlord must be more than 'de minimis' or minimal (R(H) 7/07).
- Three hours a week care, support, or supervision may be more than minimal (CH/1289/2007), but 10 minutes a week will not be (R(H) 7/07).
- 'Support' means the landlord does more than what an ordinary landlord would do i.e. that which goes beyond ordinary housing management - particularly if these activities would not normally be seen as the landlord's responsibility in general needs accommodation, and especially if it can be shown that the activity supports the claimant (CH/150/2007 and linked cases).
- Support is characterised by the giving of advice and assistance to a claimant on coping with the practicalities of life, and in particular occupation of the property (CH/150/2007 and linked cases). That support must make a real difference to the claimant's ability to live in the property (CH/200/2009). Support for 'exempt accommodation' purposes means "support in the practicalities of everyday living". Support given to disabled students on financial matters amounted to support, but pastoral/tutorial support to all students generally did not (CSH/250/2014).
- Support can include repairs and improvements that are related to the claimant's disabilities where they would not have been undertaken by a general needs landlord ie which the landlord was not (or would not have been but for the claimant's disability) obliged to carry out (CH/150/2007 and linked

cases); as can the fact that a claimant's disabilities impose a 'materially greater burden on the landlord' ([2009] UKUT 107 (AAC)).

- Provision of support for 'exempt accommodation' purposes is concerned with what happens during the tenancy after the tenant has moved in ie no account is taken of how the property was procured, built or adapted with a particular tenant or group of tenants in mind (R(H) 4/09).
- The landlord does not have to be under any statutory duty to provide care, support or supervision (CH/1286/2016).
- Making available some types of support may count as providing it even if the claimant does not take advantage of it as long as there is a real prospect that they might on something more than a very occasional basis. But where this is care or supervision – this must actually be being provided (R(H) 4/09; [2009] UKUT 109 (AAC)).
- Where the question of whether a claimant lives in 'exempt accommodation' is being considered shortly after the commencement of the tenancy, there will be no relevant past history to look at and the question in effect would be - what support does the landlord plan to provide? (R(H) 4/09).
- Even though several claimants may live in one scheme, the decision on whether a claimant lives in 'exempt accommodation' is made on an individual basis (CH/1289/2007).

Please [click here](#) for a form that can be used to list the care, support or supervision being provided to a claimant.

How is support paid for?

Generally the cost of providing care, support or supervision is not eligible to be met by Housing Benefit.

Therefore unless the full cost of providing any care, support or supervision is included as an ineligible service charge in the rent (and therefore paid for by the claimant themselves), or is being covered by the Supporting People budget, the HB Office may question how it is funded.

Indeed the HB Guidance Manual states when neither Supporting People nor Care in the Community are in payment '*....it would be reasonable to investigate the level of assistance being provided and whether funding is being received from other sources.*' And '*If there is no separate identifiable funding stream you may make a deduction from the eligible rent that covers the cost of the provision.*'

This 'separate identifiable funding stream' could be:

- By charitable donations
- By proceeds from activities designed to earn income (e.g. a shop or leasing accommodation to the local authority for use as temporary accommodation for homeless families)
- By grant funding (e.g. from The Lottery or Children in Need)
- From its surplus, but where this is due to profits made in previous years and can be traced back to being purely rent related then this could be problematic. This could raise a few eyebrows and has not yet been tested by case law.

Or it could be that the care, support or supervision is being provided by volunteers and therefore carries no, or little, cost.

Examples:

THomes, a Registered Housing Association, provide supported housing for people with mental health problems. The care and support provided to their residents is provided by WCare. WCare is commissioned by the local social services department.

THomes also provide an additional Housing Support Service that assists the claimant to live in the property and cope with everyday tasks – such as cooking, budgeting, cleaning, dealing with correspondence. This service is funded by a charge in the rent that the residents pay for themselves. THomes has also provided the HB Office with a list of repairs and household maintenance tasks they have undertaken in the previous 6 months that a general needs landlord would not complete.

THomes is the right 'type' of landlord and have demonstrated that they provide these residents with more than minimal care, support or supervision, so the HB Office should find that they are living in 'exempt accommodation'.

YHousing, a registered charity, provides supported accommodation to young people with complex needs. They use both paid staff and volunteers to support the young people. There is no charge for the support in the rent and this service is fully funded by donations. YHousing can demonstrate that they provide between 5 – 10 hours a week care, support or supervision to each young person – and have support plans and extensive notes as evidence.

YHousing is the right type of landlord and have demonstrated that they provide these residents with more than minimal care, support or supervision, so the HB Office should find that they are living in 'exempt accommodation'.

DHousing, a not-for-profit Housing Association, provide supported housing for people with severe learning difficulties. The care and support provided to their residents is provided by MCare. MCare is commissioned by the local social services department.

DHousing provide an Intensive Housing Management Service (IHM) and the charge for this is seen as an eligible charge by the HB Office as it is more akin to Housing Management. DHousing have stated that this is the only support they provided their residents.

They employ two members of staff to deliver the IHM service and they cover 35 residents.

It is likely that the HB Office would not consider the residents to be living in 'exempt accommodation'. Whilst DHousing is the right 'type' of landlord, and the residents are living in supported housing and need care, support and supervision, they are not receiving care, support or supervision to more than a minimal degree from their landlord.

What should the HB Office do?

The starting point for all HB calculations is working out the claimant's 'maximum HB': this involves working out the claimant's weekly eligible rent.

The HB Regulations governing how to work out a claimant's weekly eligible rent are different depending on whether the claimant's landlord is:

- A Local Authority – then the 'social sector' rules will be used~.
- A Registered Housing Association – then the 'social sector' rules will be used^.
- Another type of landlord (including: non-registered Housing Associations, registered charity, non-profit making voluntary organisation, or in England only, a Non-Metropolitan County Council) – then the Local Housing Allowance rules will be used*.

Claimants living in a Local Authority property cannot be considered to be living in 'exempt accommodation' as they are not the right 'type' of landlord, but LA rents are rarely (if ever) restricted.

^Unless the HB Office consider the rent to be unreasonably high – in which case the 'old rules' will apply ie the HB rules that were in place before 1996.

* Unless the landlord is a not-for profit landlord and the claimant is classed as living in 'exempt accommodation' – in which case the 'old rules' will apply i.e. the HB rules that were in place before 1996.

These 'old rules' sometimes referred to as the 'Pre-1996 rules' are now outlined in Regulations 12, 13 and 13ZA of The Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006.

The Process

When the HB Office receive a HB claim they will first check that the claimant can in fact make a new HB claim following the introduction of Universal Credit. A new HB claim can be made where the claimant:

- Is single and Pension Credit age, or part of a couple that are both Pension Credit age.
- Is in a mixed age couple protected from the rules introduced in May 2019.
- Is protected from UC (ie 'fails') the Severe Disability Premium Gateway.
- Is living in 'temporary accommodation'.
- Is living in 'specified accommodation'.

(Please see the Housing Systems website for more details on any of the above).

If the claimant is able to make a new claim for HB, then the HB Office will need to decide which 'scheme' to use when assessing the claimant's weekly eligible rent.

Private tenancy

For those living in private rented accommodation (in all but a few exceptional cases), the Local Housing Allowance rules will apply unless the claimant is living in 'exempt accommodation', in which case the pre-January 1996 rules will apply (see page 12).

This will include those claimants whose landlords are charities and voluntary organisations (unless also a Registered Housing Association), non-registered Housing Associations and Non-Metropolitan County Councils.

Most HB claim forms will ask whether the claimant is living in 'supported housing' or 'exempt accommodation'.

Where the claimant has highlighted that they live in 'supported housing' or 'exempt accommodation', the HB Office will make further enquiries to see if the claimant should actually be classed as living in 'exempt accommodation' before they award any HB.

If the claimant has not highlighted that they live in 'supported housing' or 'exempt accommodation', or the HB Office (after making further investigations) does not believe the claimant lives in 'exempt accommodation', then the claimant's weekly eligible rent will be worked out by using the LHA rules.

If the HB awarded does not cover the rent being charged and the claimant believes they do live in 'exempt accommodation' then the claimant can challenge this decision (see page 14).

Registered Housing Association tenancy

Where the claimant lives in accommodation provided by a Registered Housing Association, then the HB Office should first make a decision as to whether the claimant's tenancy is an 'excluded tenancy' (see below).

If it is, then the claimant's HB should be assessed under the 'social sector' rules i.e. the only reductions that can be applied are: a Bedroom Tax reduction (but note that the Bedroom Tax does not apply to certain types of accommodation, including exempt accommodation), deductions for ineligible/excessive* service charges, and non-dependant deductions.

If the claimant's tenancy is not an 'excluded tenancy', then the HB Office should go on to consider whether the claimant lives in 'exempt accommodation'. If they do, then the pre-January 1996 rules will apply.

* Even where the HB Office accepts a gross rent as being reasonable it can still restrict the amount of HB awarded if they believe a charge for a particular service to be excessive (see page 18).

What is an excluded tenancy?

Schedule 2 of the HB Regulations provides a long list of what is considered to be an excluded tenancy.

For the purposes of this Briefing only one of these is relevant:

- Where the tenancy is with a Registered Housing Association and the HB Office does *not* consider the rent to be unreasonably high.

Generally the gross rent being charged by a Registered Housing Association is assumed to be reasonable: as such they are excluded from any rent restriction rules hence the name 'excluded tenancy'.

Therefore the only time the gross rent charged by a Registered Housing Association can be restricted is when the HB Office considers the rent to be 'unreasonably high'.

If the HB Office considers the rent for a Registered Housing Association property to be 'unreasonably high' ([click here](#) for more information) they *must* refer the rent to the Rent Officer, and they cannot restrict the rent unless they have done this.

What if the HB Office decides a claimant's tenancy is not an 'excluded tenancy'?

If the HB Office decides that the claimant does not have an 'excluded tenancy' i.e. that their rent is unreasonably high, then they **MUST** refer the rent to the Rent Officer.

The following could result:

- The claimant lives in 'exempt accommodation' so the claimant's weekly eligible rent may be restricted but cannot be below rents for similar suitable alternative accommodation (before taking off any ineligible service charges) – see below, or
- The claimant does not live in 'exempt accommodation' so the claimant's weekly eligible rent is the lower of the Local Reference Rent and Claim Related Rent as reported by the Rent Officer.

If the HB awarded does not cover the rent being charged and the claimant believes they do live in 'exempt accommodation' then the claimant can challenge this decision (see page 15).

Pre January 1996 Rules

Where a claimant lives in 'exempt accommodation' then the way their eligible rent is worked out falls under the 'pre 1996' rules.

HB Offices often refer to these rules as the 'old rules' or the 'old scheme'.

This is because the Regulations that apply are in 'old' HB Regulations - Reg 12, 13 and 13Z which are found in the HB Consequential Provisions Regulations.

These Regulations state that, where a claimant is living in 'exempt accommodation', then their eligible rent can only be reduced if their rent is 'unreasonably high'. And that this is decided by comparing the actual rent for their accommodation with the rent payable for 'suitable alternative accommodation'.

If this is the case then the HB Office must:

- Reduce the claimant's eligible rent to the level of rent for 'suitable alternative accommodation', or
- Make a smaller deduction

- unless the claimant falls within one of the protected groups as outlined in the Regulations ([click here](#)).

And the HB Office should not reduce the eligible rent below the cost of 'suitable alternative accommodation' (R v Brent LBC ex parte Connery).

If the HB awarded does not cover the rent being charged and the claimant believes they do live in 'exempt accommodation' then the claimant can challenge this decision:

When deciding how much of a reduction to apply, the HB Office:

- must take account of the claimant's individual circumstances,
- may take account of rent determinations made by the Rent Officer - but must not automatically restrict the level of rent to them,
- must not apply rigid rules that automatically treat every case the same ie they must not 'fetter their discretion', and
- must not allow subsidy considerations to override the HB Regulations and case law.

What is meant by 'suitable alternative accommodation'?

The following case law has looked at this:

Malcolm v Tweeddale DC HBRB

The HB Office must have '*sufficient information to ensure that like is being compared with like.....Unless that can be done, no safe assessment can be made of the reasonableness of the rent in question or the proper level of value.*'

R v East Devon DC HBRB ex parte Gibson (1993) and CH/4306/2003

When considering whether alternative accommodation is available, the HB Office must provide sufficient evidence to show that there is an active housing market providing the type of accommodation of a suitable type, rent and location for the claimant.

R v Oadby and Wigston Dc ex parte Dickman (1995)

Not all properties that are available may be suitable for the claimant due to their personal circumstances.

R v Macclesfield BC HBRB ex parte Tamsamani

This judgement confirmed that the HB Office must:

- act reasonably in determining a reasonable eligible rent,
- identify and establish the relevant facts,
have regard to all the circumstances of the case and evidence of rents to show that alternative accommodation has been considered – and what and where this is and why suitable, and
- be able to explain why they have restricted the rent.

CH/3528-3560/2007

The Judge in this case considered what constitutes 'suitable alternative accommodation' for each tenant. He said that there was an evidential burden on the HB Office to show that the alternative accommodation they had found was able to meet the accommodation needs of the individual, rather than just being similar to what they already have. The decision requires the HB Office to have a detailed knowledge of a person's accommodation requirements and ensure that the accommodation identified as a suitable alternative meets those detailed needs, such as room sizes, wheelchair access etc.

[2009] UKUT 162 (AAC)

The claimant's home must be compared with 'more suitable' rather than 'less suitable accommodation'.

CH/1961/2010

The HB Office must look at accommodation that is suitable given the particular housing needs of the claimant. In this case the HB Office looked only at rents in the private rented sector and did not take account of the fact that the claimant required support.

Challenging a HB Decision

There are various decisions that a HB Office may make that the claimant may wish to challenge. Often they will be challenging more than one of these decisions at the same time:

Private tenant

When challenging a rent restriction imposed on a private tenant the issues to consider are:

- Is the claimant living in 'exempt accommodation'?
 - Is the landlord the right 'type' i.e. a registered charity, non-profit making voluntary organisations and, non-registered Housing Association or Non-Metropolitan County Council? (see page 4)
 - Does the landlord provide the claimant with more than minimal care, support or supervision? (see page 6)
- Has the claimant been accepted as living in 'exempt accommodation' but the HB Office have still imposed a restriction?
 - If the claimant is living in 'exempt accommodation' then the rent can only be restricted to that of suitable alternative accommodation, and then only if the claimant (or a member of his/her claiming family) is not in a 'protected group' ([click here](#)) and that accommodation is available, and for certain claimants it is reasonable to expect them to move.

NOTE: The HB Office will refer the rent to the rent officer but this is only for subsidy purposes.

Registered Housing Association tenant

When challenging a rent restriction imposed on a Registered Housing Association tenant the issues to consider are:

- Is the tenancy an 'excluded tenancy'?
 - Is the rent unreasonably high? ([click here](#)).
 - If the rent is not unreasonably high, then the social sector rent rules apply.
- Has the HB Office followed the correct procedure i.e. have they referred the rent to the Rent Officer?
Was there something that triggered that referral?
 - Often the HB Office don't do this as it has subsidy implications ([click here](#)).
 - The HB Office cannot just refer a rent at any time ([click here](#)).
- Is the claimant living in 'exempt accommodation'?
 - Does the landlord provide more than minimal care, support or supervision? (see page 6)
- Is any restriction imposed correct?
 - If the claimant is living in 'exempt accommodation' then the rent can only be restricted to that of suitable alternative accommodation, and then only if the claimant (or a member of his claiming family) is not in a 'protected group' ([click here](#)) – if they are then that accommodation is available, and for certain claimants it is reasonable to expect the claimant to move.
- Is the restriction to a service charge? (see page 18)

General information about challenging a HB decision

As this is a challenge against a HB decision, then, unlike for DWP decisions, the claimant does not have to request a mandatory reconsideration first: they can go straight for an appeal.

Where the appeal is received by the HB Office within a calendar month of the date of the decision being challenged, then the HB Office must accept it.

An out of time appeal will be accepted where it is made within 13 months of the date of the decision and the HB Office considers it to be 'in the interests of justice': in which case they can revise the decision.

Where they accept the late appeal but still decide that their original decision was correct they must pass the Appeal to the Courts and Tribunals Service (HMCTS).

Where they do not accept the late appeal because the claimant has not demonstrated that it is 'in the interests of justice', they must pass the Appeal to the Courts and Tribunal Service to decide whether to allow the late appeal or not (which they generally do).

More information on appealing HB decisions on the Housing Systems website – [click here](#).

Initial request for appeal

Only a person affected by a decision can request an Appeal. Whilst it may seem logical that a decision such as that a rent should be restricted, or that the claimant does not live in 'exempt accommodation', affects the landlord, this is not the case. The only person affected by the decision is the claimant - so the request must come from them. They can either make the request for the Appeal themselves (although someone else can help them construct the letter requesting the appeal) or they can give authority to someone else to submit and progress an appeal on their behalf.

At this initial stage it is best to give as much information as possible. Before the HB Office pass the case on to the Courts and Tribunals service they will conduct an internal review. The HB Office could decide to review their decision in the claimant's favour without the need for a formal Appeal.

If the HB Office has not provided sufficient information as to why they have made their decision, then the claimant can request a 'statement of reasons'.

Appeal Tribunal

If the HB Office decide not to change their initial decision then they will forward the Appeal to the Courts and Tribunals Service. As soon as the claimant is aware this has happened they should start to prepare a more formal appeal submission.

A claimant living in a Registered Housing Association property is not seen as having an 'excluded tenancy' i.e. the HB Office have considered their rent to be unreasonably high

When appealing an 'excluded tenancy' decision, there are several issues to consider:

Has the HB Office taken account of:

- The needs of the claimant when choosing comparable accommodation?
- Accommodation with a similar security of tenure?
- Accommodation with similar services / facilities that are required by the claimant?
- The full range of rents for similar schemes and not just the cheapest?

Example: We came across a situation once where a HB Office were comparing a rent on a scheme for young people to that for older people – i.e. a young person's foyer against a sheltered housing scheme. The claimants appealed, showing that rents for young persons' foyers in the surrounding areas were in line with the rent they were paying and therefore argued that their rent was not unreasonably high and so was excluded from rent referral. They were successful.

HB Office not accepting that the claimant lives in 'exempt accommodation'

When appealing an 'exempt accommodation' decision, there are several issues to consider:

If the landlord is a Registered Housing Association:

- Give details about the scheme and its aims – what makes it different to a property available in the private rental market? e.g. any adaptations to the property, any special facilities that help facilitate the support provided.
- Explain how tenants are referred to the scheme, who assesses the tenant's need for care, support or supervision, and in simple terms what care, support or supervision is provided and by whom.
- Use a form (for an example [click here](#)) to show the nature and level of care, support or supervision that the Registered Housing Association provides the claimant.
- Consider not just the front line staff – but also any staff member who supports them eg admin support, manager support (ensure that the staff employed can provide the number of hours stated).
- Where the landlord provides some care, support or supervision directly to a claimant but they are not the majority support provider, then explain why the support they provide is additional and why it is required.
- Provide as much documentary evidence as possible e.g. support plans, records of repairs.

If the landlord is a registered charity, or a not for profit Housing Association or voluntary organisation etc:

All the above plus:

- Ensure the HB Office understand the nature of the business – provide a summary – keep in mind the definition of not-for-profit.
- Provide as much documentary evidence as possible e.g. Articles of Association, to show that the organisation is the correct 'type' of landlord.

If the HB Office has also restricted the rent – then please see below.

HB Office decided to restrict the rent as it is unreasonably high

Living in 'exempt accommodation' does not mean that the HB Office cannot restrict the rent at all. The level of rent being used to assess a claimant's entitlement to HB can still be restricted where the level of rent is higher than that of suitable alternative accommodation and the claimant does not fit into a 'protected group' ([click here](#)).

The claimant has the right to request an appeal of this decision.

A claimant may be able to challenge the HB Office's decision if:

- they have a tenancy with a Registered Housing Association and the HB Office have failed to refer the rent to the Rent Officer, or
- the rent is not higher than that for suitable alternative accommodation taking the particular needs of the claimant into account.

Registered Housing Association claimant – HB Office failed to refer the rent to the Rent Officer

Often a HB Office will decide to restrict a particular part of a Registered Housing Association's claimant's rent. Unless the part they are restricting is a service charge, this decision is being made outside of the HB Regulations because these regulations require the HB Office to refer the rent *before* applying any such rent restriction. The claimant therefore has a right of appeal.

Often the way a landlord provides a breakdown of their rent doesn't help – i.e. items that are actually 'rent' are listed as a 'service charge'.

Example: A HB Office was not happy with the 15% void allowance that was being charged by a Registered Housing Association: they deemed it to be excessive and restricted it to 10%. But a void allowance is not a service charge (what service does it provide a tenant?). So the landlord challenged the reduction on the grounds that the HB Office had not followed the correct procedures and that the overall rent was not unreasonably high and so, as an 'excluded tenancy,' the rent could not be restricted in the way the HB Office had done.

The rent is not higher than that for suitable alternative accommodation taking the particular needs of the claimant into account

If the claimant is living in 'exempt accommodation' then the HB Office can only restrict the rent to that of suitable alternative accommodation (and if the claimant is in a 'protected group' ([click here](#)) then they can only do that if suitable cheaper alternative accommodation is available and it is reasonable to expect them to move).

Sometimes HB Offices do not look at similar supported housing schemes: instead they look at the rent being charged on private rented accommodation where no support is provided.

So the claimant will need to explain why that type of accommodation is not suitable for them and offer (where possible) alternative schemes that would be suitable with details of the rent being charged if known.

The level of individual service charges is considered excessive

Where a claimant has a tenancy with a Registered Housing Association then, whether or not the HB Office accepts a gross rent as being reasonable, it also has to consider the service charges included in the rent and decide:

- Which service charges are eligible to be covered by HB ([click here](#) for more details).
- Whether a service charge is excessive and, if it is, how much to reduce it by (see below).

In other words the HB Office can restrict the amount of HB awarded if they believe a charge for a particular service to be excessive.

Service Charges

The Housing Benefit Regulations define service charges as:

‘periodical payments for services’

And define ‘services’ as

‘Services performed or facilities provided for, or rights made available to, the occupier of the dwelling.’

The Oxford English dictionary defines service as ‘the action of helping or doing work for someone’.

Eligible Services

The Housing Benefit Regulations work by defining what service charges are ineligible for Housing Benefit.

Those charges that are listed as ineligible include:

‘charges in respect of general counselling or of any other support services.’

‘charges which are not connected with the provision of adequate accommodation.’

Must be a condition of the tenancy

To be an eligible service charge, payment of it must be a condition on which the right to occupy the property depends.

Excessive Service charges

Even if a charge is eligible, a Housing Benefit Office can reduce the amount of an eligible service charge they are willing to pay for. They can do this where:

- They believe the cost is excessive having regard to the cost of comparable services.
- They believe that, although the cost itself reflects the service being provided, the service is excessive - i.e. not required to the extent it is being provided.

HB Regulations (para 4 of Schedule 1) state:

‘where the relevant authority considers that the amount of a service charge to which regulation 12(1)(e) (rent) applies is excessive in relation to the service provided for the claimant or his family, having regard to the cost of comparable services, it shall make a deduction from that charge of the excess and the amount so deducted shall be ineligible to be met by housing benefit’.

Challenging this decision

If a HB Office has made a deduction from a service charge that they believe to be excessive the claimant has the right to appeal this decision.

Is it a service charge?

The first issue to consider is whether the charge that has been reduced is actually a service charge. Often items are listed as service charges when they are in fact not. If this is the case then the HB Office cannot use para 4 of Schedule 1 to reduce it, because that only applies to service charges.

Charges that are often listed as a service charge but would more likely fall to be counted as rent include items such as: voids provision, management charge, health and safety issues, landlord's Council Tax.

In CH/3528/2006 – which was looking at whether the charge being made for voids and long-term maintenance was eligible to be covered by Housing Benefit or not - the Judge stated:

‘The first question is: is this payment a ‘service charge’ as defined by Regulation 12(8)? If it is not Schedule 1 does not arise and the charge may be taken into account as part of the rent....’

If the HB Office accept that these items are not service charges as defined by the HB Regulations then no individual reduction can be applied to them: the rent must be considered as a whole and can only be reduced if the rent is unreasonably high in comparison with rents for suitable alternative accommodation.

Is the charge excessive?

If it is a service charge, then the second issue to consider is whether the charge is excessive:

The Oxford English dictionary defines excessive as ‘more than is necessary, normal or desirable’; and comparable as ‘able to be likened to another; similar’; and similar as ‘having a resemblance in appearance, character, or quantity’.

Is the charge higher than that being charged for a comparable service on a similar supported housing scheme?
Is the service required to the extent it is being provided?

Has the HB Office provided an explanation of why they consider the charge excessive and the charges they have used as a comparison?

If the information for the HB Office does not give these details then the claimant should request a written statement of reasons asking the HB Office to explain why they consider the charge to be excessive and how they decided the level of the deduction i.e. what services/schemes they were making a comparison with, and why they used those particular services/services.

Where the charge is covering the costs of a needed service it is hard to see how this could be found to be unreasonably high.

Appendix A: Frequently Asked Questions

We provide an Intensive Housing Management Charge – that means we provide exempt accommodation, doesn't it?

There is currently a general feeling that if a landlord is providing services that go beyond those which a general needs landlord would provide (often wrapped up and called 'Intensive' or 'Enhanced' Housing Management), then that will be enough for a claimant to be classed as living in 'exempt accommodation' - but this will not always be the case-

'Support' has been defined in caselaw as helping a claimant to cope with the practicalities of life and especially to live in the property, and involves the landlord doing more than a general needs landlord would do.

We believe this means that the landlord must be providing direct support to a claimant - i.e. providing budgeting advice to help them pay their rental contribution - rather than just providing a more intensive rent collection service.

This is a contentious area, with different commentators often taking different approaches. We have outlined our thoughts in Appendix B of this Briefing. These are our thoughts and a HB Office may well take a different approach - as they are entitled to do.

Note: Even if the 'support' being provided as part of the Intensive Housing Management service is not more than minimal, then go on to consider what other services you provide and whether these could count as support – [click here](#) for more information.

We have a tri-partite agreement between ourselves, the local social services department and a care provider – does this mean that the care is being provided on our behalf?

Not usually. The requirement for the care, support or supervision to be provided by someone 'acting on the landlord's behalf' is that the care, support or supervision provider is answerable to the landlord rather than to a third party. In a tri-partite agreement the care, support or supervision is often commissioned by local authorities from specialist providers. In such a case, the care, support or supervision is being provided on behalf of the authority so, unless the care, support or supervision provider is also the landlord, the care, support or supervision is provided neither by nor on behalf of the landlord; and so the care, support or supervision the claimant receives from that provider cannot count when considering whether they occupy 'exempt accommodation'.

That does not mean that the claimant is not living in 'exempt accommodation': the HB Office should consider whether the landlord themselves is providing any care, support or supervision to the claimant to more than a minimal degree. There could well be services that the landlord is providing that could count as support ([click here](#) for more information).

The HB Office is asking for detailed information on the support we provide to a particular client – do we have to provide this?

In any Housing Benefit case, the HB Office is entitled to ask the claimant for documents, information and evidence that it reasonably requires in order to decide whether the claimant is entitled to HB and, if so, how much.

Where a HB Office is looking at whether or not a claimant lives in 'exempt accommodation' it will require evidence of any care, support or supervision being provided by the landlord (or on their behalf). This could include the claimant's support plan.

As it is the claimant's claim for HB, any request for further information should be made to the claimant. But often in cases of 'exempt accommodation' it is easier for all the parties if the landlord provides this information directly to the HB Office and answers any follow up questions.

As evidence of care, support and supervision might involve the disclosure of sensitive personal information about the claimant, it would be good practice for the landlord to ask for the claimant's permission to deal with the HB Office (and to represent the claimant in any appeal proceedings).

We believe that some of the support we provide is linked to our repair and maintenance service. What evidence can we show to verify this?

Repairs and maintenance can sometimes amount to support ([click here](#) for more details).

Evidence of support in the form of repairs and maintenance could include:

- The dates of the repair or maintenance tasks.
- In the case of a repair, why it was linked to the support needs/disability of the claimant.
- In the case of maintenance, why this was over and above what would normally be provided – i.e. why it was linked to the claimant's support needs/disability.

We provide a floating support service - could the tenants we support be seen as living in 'exempt accommodation'?

The provision of floating support can lead to a tenant being classed as living in 'exempt accommodation' as long as the support provided is more than 'de minimis' and that there is continuity of provision - ie the support lasts for longer than just the period helping the tenant move in to the property; although exactly how long the support provision would have to be for is currently untested by caselaw.

It is important to note that the majority of items classed as support should be deemed ineligible for HB. Therefore if the cost of providing the floating support service is included as a service charge as part of the claimant's rent, this would normally be deemed ineligible.

We are looking at setting up a new supported housing scheme and have asked our local HB Office to look at the rent to see if it would be eligible – they have refused. Can they do this?

Yes, a HB Office is unable to make a decision or comment about the likely outcome of a future claim for benefit, as to do so could leave them open to litigation.

Is sheltered housing provided by a Registered Housing Association 'exempt accommodation'?

This will depend on whether or not care, support, or supervision to more than a minimal degree is being provided by the landlord (or on their behalf).

In recent years the role of the 'warden' has diminished and been replaced by one of 'scheme manager' - i.e. looking after the management of the scheme as opposed to looking after the residents. So unless the scheme is providing 'extra care' and that 'extra care' is being provided by or on behalf of the landlord, is it hard to see how a tenant living in sheltered housing is receiving enough care, support or supervision from their landlord to be 'more than minimal' and therefore classed as living in 'exempt accommodation'.

NOTE: Some tenants may be seen as living in 'specified accommodation' – but this is not the same thing – [click here](#) for more details.

We are aware that the HB Office has referred one of our rents to the Rent Officer – we are a Registered Housing Association – what should we do?

If you believe that the claimant is living in 'exempt accommodation' and the rent is no higher than rent on similar supported housing schemes, then it is actually in the HB Office's best interests (due to the subsidy implications – [click here](#)) to withdraw the referral.

So we would recommend that the claimant (with your help) writes to the HB Office explaining why they believe the referral was not appropriate – i.e. that they have an 'excluded tenancy' as their rent is not unreasonably high ([click here](#)) compared to costs for similar accommodation given the circumstances of their case. They could point out that it is difficult to see how a rent can be 'unreasonably high' when all it is doing is covering the actual costs of providing the accommodation needed by the tenants.

Indeed, the purpose of rent referral is to prevent claimants from being able to receive Housing Benefit to cover the cost of their rent when similar accommodation is available with cheaper rents. This ensures an element of control over the public purse and provides an 'anti-abuse provision'. If the rent is not higher than the rents for similar accommodation then there is no need to restrict, as there is no abuse of the system.

And they should add that they believe that they are living in 'exempt accommodation' explaining what care, support or supervision is being provided by their landlord.

Appendix B: Does an ‘Intensive Housing Management’ service count as support?

The term ‘Intensive Housing Management’ refers to the fact that on some schemes and for some tenants a more intensive housing management function must be provided in order for the tenant to make a success of their tenancy, and for the landlord to make a success of the scheme.

This could include:

- Increased turnover i.e. having more voids to deal with.
- The need for a higher standard property on re-let.
- A more intensive rent collection service (for any ineligible service charges or HB shortfall).
- Monitoring access to the scheme to keep it safe, ensuring unwanted visitors don’t enter the scheme, avoiding sub-letting/squatters etc.
- CCTV to keep the property safe.
- Dealing with a higher incidence of ASB issues.

‘Support’ has been defined in caselaw as helping the tenants to cope with the practicalities of life and especially to live in the property, and involves the landlord doing more than a general needs landlord would do.

We struggle to see how the items listed above can be classed as ‘support’ as they are not offering any direct support to a resident: they are more akin to Housing Management. So they would be an eligible service charge but would not (we believe) be seen as support.

If however the list was:

- Teaching the tenant the skills to look after the property to a high standard e.g. cleaning.
- Providing the tenant with budgeting skills to enable them to pay their rent.
- Encouraging the tenant to keep the property safe and discussing with them the implications of unwanted visitors.
- Helping the tenant work through neighbour disputes.
- Counselling on issues such as drugs and alcohol.

Then this could be seen as ‘support’, as they are offering the claimant direct support on the practicalities of life and do go beyond what a general needs landlord would do. But that would then mean that the charge relating to these services would be an ineligible service charge.

Often an Intensive Housing Management service will be providing a mix of services: some more akin to Housing Management and some that could be classed as support.

Could an ‘Intensive Housing Management’ charge therefore be part eligible for HB?

Yes. If a HB Office breaks down an Intensive Housing Management charge into the tasks actually provided, some will be more akin to housing management (and therefore eligible) and some will be more akin to ‘support’ and therefore not.

Can an Intensive Housing Management service be classed as support for the definition of ‘exempt accommodation’ but still be an eligible service charge?

A recent case – *Allerdale BC v JD and others (HB)* [2019] UKUT 304 (AAC) - looked at this issue i.e. whether the word ‘support’ could mean two different things in the two different contexts.

The landlord was contending that, as there are two different HB Regulations that used the word ‘support’ in different ways:

1. For the definition of ‘exempt accommodation’ – where the landlord must be providing the claimant with ‘care, support and supervision’, and
2. For the definition of ineligible services – where a ‘general counselling and support’ charge is ineligible,

- then the service provided by the landlord could be classed as support under one but not the other. And that therefore the support they provided that enabled the claimant to live in the property counted as support, meaning the claimant was living in ‘exempt accommodation’, but did not fall under the definition ‘general counselling and support’ so the charge for it fell as an eligible charge as it was ‘connected to the provision of adequate accommodation (para 1g, Schedule 1, HB Regulations).

The Judge agreed that there may be situations where the service provided counts as ‘support’ for the definition of ‘exempt accommodation’, but not for the definition of ‘general counselling and support’, and so could be an eligible service charge if seen as related to the provision of adequate accommodation. The Judge suggested that items relating to repairs and maintenance would fall into the category, but that more personal support would normally be seen as the type of support falling into ‘general counselling and support’ and so be ineligible. In particular he saw the items listed in para 2, Schedule 1B of the old HB Regulations (repealed in 2006) as still coming under the ‘general counselling and support’ definition.

It may be useful to split the items that fall under an Intensive Housing Management charge into three groups.

The first group would be those services that purely meet the personal needs of the residents: these would count as ‘support’ for the definition of ‘exempt accommodation’ and be ineligible for HB. These could include services such as: budgeting, signposting to other agencies, help finding work/training, help claiming benefits beyond HB and the passport benefits, helping develop/sustain relationships with family, life skills, counselling and even the time spent supporting a particular tenant keep to the requirements of the tenancy – i.e. keeping a property clean, safe and secure and paying their rent.

The second group would be those services that have a supportive impact on the claimant’s life but are directed at the property they are living in: these would count as ‘support’ for the definition of ‘exempt accommodation’ and would be eligible for HB as they relate to the provision of adequate accommodation.

These could include services such as: repairs, adaptations, odd jobs etc that go beyond what would normally be provided and are required due to the disability needs of the claimant

The third group would be those services that are not directed at a particular claimant, but that have an impact on other tenants or the business as a whole. Should these count as ‘support’ for the definition of ‘exempt accommodation’? And if they do, would they be eligible or ineligible for HB?

These could include services such as: rent collection, dealing with ASB issues, calling the Police, cleaning off graffiti.

We do not see these items as ‘support’: they are housing management issues and as such should appear in the rent. But if shown as a service charge they would still be eligible for HB. However some HB Offices may be persuaded to see these items as ‘support’ - but that would mean that they normally be ineligible for HB.

Our HB Office has requested a full breakdown of our Intensive Housing Management charge and asked to see job descriptions too! Do we need to provide these?

A HB Office can request any further information or evidence it reasonably requires to assess a HB award.

Where a landlord includes a general heading such as 'Intensive Housing Management' as a service charge, then the HB Office need to be clear on what this covers to decide whether it is eligible or not – and also whether any of the services could be seen as support.

Many HB Offices see an 'Intensive Housing Management' charge as one way that some housing providers are using to circumvent the reduction in Supporting People Subsidy and can be quite suspicious as to what is actually being provided.

So, yes, the HB Office has the right to ask you for a detailed breakdown and further evidence of the service being provided via job descriptions, and even to evidence the costs – if this is reasonable.

Rent Restrictions in Supported Housing

