Neutral Citation Number: [2016] EWCA Civ 29

Case Nos: C1/2014/2539 & C1/2015/0502

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HONOURABLE MR JUSTICE STUART-SMITH and HH JUDGE WORSTER (sitting as a judge of the High Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2016

Before:
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE TOMLINSON
and
LORD JUSTICE VOS

- -

Between:

The Queen on the Application of Susan Rutherford, Paul Rutherford and Warren Todd (a child, by his litigation friend Susan Rutherford)	**Appellant**
- and -	
Secretary of State for Work & Pensions	**Respondent**
The Queen on the Application of A	**Appellant**
- and -	
Secretary of State for Work & Pensions	**Respondent**
Equality and Human Rights Commission	**Intervener**

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Karon Monaghan QC, Caoilfhionn Gallagher and **Katie O'Byrne** (instructed by **Hopkin Murray Beskine**) for **A**
Richard Drabble QC and Tom Royston (instructed by **Child Poverty Action Group**) for the Rutherford appellants (**SR, PR and W**)
Tim Eicke QC, Gemma White and **Edward Brown** (instructed by the **Treasury Solicitor)** for the **Secretary of State**
Helen Mountfield QC and **Raj Desai** (instructed by the Equality and Human Rights Commission) for the **Intervener**

Hearing dates: 4 and 5 November 2015

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JUDGMENT

Lord Thomas of Cwmgiedd, CJ:

1. This is the judgment of the court to which each of its members has contributed.

The nature of the appeals

2. In these two appeals (1) the appellant A (a female victim of serious violence living in housing protected under the Sanctuary Schemes) and (2) the appellants Susan Rutherford (SR), Paul Rutherford (PR) (the grandparents of Warren (W), a severely disabled child) and W contend that the removal by the Secretary of State for Work and Pensions under Regulation B13 of the Housing Benefit Regulations 2006 (the 2006 Regulations) of part of their means-tested Housing Benefit in respect of their public sector housing was unlawful.

3. Regulation B13 was introduced into the 2006 Regulations by the Housing Benefit (Amendment) Regulations 2012 (the 2012 Regulations) which came into force on 1 April 2013. The effect of the 2012 Regulations was to reduce Housing Benefit if the accommodation in which a person lived exceeded the number of bedrooms deemed to be required as defined by a formula. The formula was varied by Regulation B13(5)-(7) which provided that an additional bedroom would be allowed for defined classes of persons. It was contended by each of the appellants that they should be part of that defined class.

4. As part and parcel of the scheme which reduced Housing Benefit in this way, provision was made for Discretionary Housing Payments (DHPs) to be made available to those who, although not falling within the defined class of persons allowed an additional bedroom under Regulation B13, might have needs which should reasonably be met by DHP. The benefits payable as DHPs are, as the name suggests, discretionary and are administered by the relevant local authority.

5. The appellants do not challenge either the validity of the overall scheme comprising the 2012 Regulations and the use of DHP or the 2012 Regulations themselves, but contend that Regulation B13 is unlawful insofar as it does not include them within a defined class of persons whose position has to be taken into account for the purposes of the reduction in Housing Benefit. They contend that their omission is unlawful discrimination under Article 14 of the European Convention on Human Rights (ECHR). A also contends that it is unlawful by reason of a breach by the Secretary of State of his public sector equality duty under s.149 of the Equality Act 2010. It should be noted at the outset that both these cases have proceeded on the accepted basis that Regulation B13 constitutes *prima facie* discrimination on grounds of sex (A) and disability (SR). The primary question for this court and the court below was, therefore, whether the Secretary of State was able to show that there was objective and reasonable justification for that discrimination which was not manifestly without reasonable foundation.

6. These issues in relation to the overall scheme and Regulation B13 were considered by this court in *R (MA and others) v the Secretary of State for Work & Pensions* [2014] EWCA Civ 13, [2014] PTSR 584 (Lord Dyson MR and Longmore and Ryder LJJ), on appeal from the Divisional Court ([2013] EWHC 2213 (QB), Laws LJ and Cranston J) in relation to the position of 5 claimants who advanced similar claims.

That decision was given on 21 February 2014. Permission to appeal to the Supreme Court in respect of that judgment was then given. The appeal is due to be heard in March 2016.

7. In the long period that has elapsed since the judgment of the Court of Appeal in *MA* whilst the appeal to the Supreme Court is pending,

   (i) the claim of SR was heard by Stuart-Smith J on 14 May 2014 and dismissed by him in a judgment dated 30 May 2014 ([2014] EWHC 1631 (Admin));

   (ii) the claim of A was heard by HHJ Worster and dismissed in a judgment dated 29 January 2015 ([2015] EWHC 159 (Admin)).

   Although their appeals were initially stayed, Underhill LJ and Sir Stanley Burnton gave each permission to pursue the appeals, so that the particular position of these appellants could be considered by the Supreme Court, if it thought fit, at the hearing of the appeal in *MA*: see their judgment dated 21 July 2015 [2015] EWCA Civ 772.

8. We are bound by the decision and reasoning in *MA* as regards the scheme and its analysis of another decision of this court in *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117 to which we refer at paragraphs 32 and following below. No useful purpose would have been achieved by our hearing argument on whether the principles set out in *MA* were correctly decided or whether its analysis of *Burnip* was correct. That applies also to arguments in relation to the use of further international instruments beyond those referred to in *MA*, the general approach to discrimination, and the appropriate standard of review for justification in the light of the decision of the Supreme Court in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016. All these questions will be in issue when the Supreme Court hears the appeals in *MA*. We, therefore, made it clear at the outset of the hearing that we would confine the principal argument before us to the question of whether, applying the principles decided in *MA*, Regulation B13 was unlawful as regards the appellants. In these circumstances, whilst we are grateful for the wider skeleton arguments submitted, particularly those from the Equality and Human Rights Commission, we have considered the main issue before the court on the basis of the approach taken in *MA*. We are content to leave all more fundamental arguments to be debated in the forthcoming Supreme Court hearing.

9. Before turning to set out the relevant principles which we derive from *MA* and which are applicable to the present appeals, it is necessary very briefly to summarise the facts of each case.

The facts

The position of A

10. A has lived in a three bedroom house rented from the local council since 1989. In 1993-4 she had a brief, casual relationship with a man, X, who was subsequently convicted of attempted murder; he has been exceptionally violent to her. Whilst in prison he started to harass her and in 2002 he sought her out. A child was conceived as a result of his rape of her and was born in 2003. The child lives with her. The courts have refused contact between the son and X.

11. In 2012, X contacted A again and made threats of violence to her. The police and other agencies took the threats seriously and under one of the schemes which are known as the "Sanctuary Schemes" her property was adapted. She is protected under that scheme with the support of the police. In consequence of the violence of X and the continued threats from him, she suffers from PTSD and has suicidal ideation.

12. Sanctuary Schemes, which have been operating since 2006, provide for the adaptation of a house or flat to make it secure and for on-going security monitoring to enable people who have been subjected to violence, including what is often referred to a "domestic violence", to remain in their own home. There was powerful evidence before the judge from Polly Neate, the Chief Executive of Women's Aid, about the benefits and importance of Sanctuary Schemes.

13. The other evidence before the judge was that as at 30 September 2013, there were over 5,800 households in such schemes of which a small number (about 280) were affected by Regulation B13. Other evidence showed that the number of those within the Sanctuary Schemes was increasing. Further evidence showed that the overwhelming majority of those in these schemes were women, with a small proportion being single parents.

14. A has been in receipt of Housing Benefit which, prior to the 2012 Regulations, covered her rent. As a consequence of the 2012 Regulations she is deemed to be under-occupying the house in which she and her son live as there is a third bedroom; her Housing Benefit was to have been cut by 14%. She was paid DHPs to cover the shortfall, but her Housing Benefit was not in fact reduced due to transitional provisions. From the time it was appreciated that she had been in receipt of the full Housing Benefit and DHPs, DHPs were stopped and when the payment under the transitional provisions ceased, she was not paid DHPs until the overpayment had been recouped.

15. It was not clear on the evidence before the judge how many of those affected by Regulation B13 were in receipt of DHPs, but in the judge's view this was not a significant matter for the determination of A's case, as subject to the double payment issue, she would receive DHPs.

The facts in relation to SR

16. SR is the grandmother of the third appellant, W, who is now 15. He suffers from profound mental and physical disability caused by a very serious and rare genetic disorder (Potocki-Shaffer syndrome). He needs round the clock care from at least two people. SR has looked after him since he was about five months old; since her marriage to PR in 2010 he has helped her with this devoted, but highly burdensome, commitment. Neither is in good health. They live in a three bedroom house that has been adapted for their occupation. It is rented from the Pembrokeshire Housing Association which allocated it to them in 2009. They have been told that there is no alternative two or three bedroom house which would be suitable for W's needs.

17. SR and PR receive considerable help from professional carers funded by their local authority. Prior to 2012 some respite was provided when W was looked after for two nights a week away from his grandparents' home. However, an assessment recommended that W should stay at home with respite care being provided by carers

staying overnight at W's grandparents' home twice a week. The overnight carers provide care at intervals when W wakes up; they therefore need a bedroom in which to sleep. Without the help of the carers, SR and PR could not cope; W would have to go into a care home. The judge found that a room was needed for those providing respite care.

18. Until 1 April 2013 SR received Housing Benefit which covered the full rent on the home. From that date it was reduced by 14% as a result of the application of Regulation B13 which made express provision for the need for accommodation for overnight carers of a disabled adult but not for overnight carers of a disabled child. After an initial problem with the payment of DHP (described in the evidence before the court and summarised at paragraph 15 of the judge's judgment), DHPs have been made covering the shortfall.

The legislative provisions

19. The class of persons who are entitled to an additional bedroom are defined in Regulation B13 as follows:

> "(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) –
>
> (a) a couple (within the meaning of Part 7 of the Act);
>
> (b) a person who is not a child;
>
> (ba) a child who cannot share a bedroom; [added following *Burnip*]
>
> (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) [the claimant or the claimant's partner] is a person who requires overnight care; …."

20. The definition of a person who requires overnight care is set out in Regulation 2(1):

> "a person ('P') … whom the relevant authority is satisfied reasonably requires, and has in fact arranged, that one or more people who do not occupy as their home the dwelling to which the claim or award for housing benefit relates should –
>
> (i) be engaged in providing overnight care for P;

> (ii) regularly stay overnight at the dwelling for that purpose; and
>
> (iii) be provided with the use of a bedroom in that dwelling additional to those used by the persons who occupy the dwelling as their home."

21. DHPs are paid by virtue of Regulations made under s.69 of the Child Support, Pensions and Social Security Act 2000. The relevant Regulations are the Discretionary Financial Assistance Regulations 2001. Regulation 2 provides for the making of DHPs to those entitled to Housing Benefit and who appear to require further financial assistance. The authority making the payment has a discretion as to whether or not to make a payment in a particular case and as to the amount of the payment and as to the period for which the payment is to be made.

The explanation for the use of DHPs and the funds provided

22. The explanation for the use of DHPs is set out in *MA* as part of the history of the overall scheme (paragraphs 1-35). It was also described in the statements made in these cases by Beverley Ann Walsh, the Team Leader for Social Sector Housing within the Housing Policy Division in the Department of Work and Pensions. In summary:

    (i) The underlying policy objective of the overall scheme and the 2012 Regulations was to reduce under-occupation of housing in the public sector by awarding Housing Benefit on the basis of the need for occupation.

    (ii) DHPs were intended to meet actual need which was in excess of "deemed need" identified by the application of the size criteria in the 2012 Regulations in respect of Housing Benefit where specific provision was not made as under Regulation B13(5). The purpose was to allow a local authority decision-maker to consider the particular factual circumstances of each claimant and to determine to what extent the claimant had an actual need which exceeded the amount of the Housing Benefit payable as a result of the operation of the 2012 Regulations.

    (iii) In administering the scheme local authorities had to take into account their public sector equality duty under s.149 of the Equality Act 2010 and obligations under the Human Rights Act 1998. They were also bound to make decisions in accordance with the law by acting fairly, reasonably and consistently.

    (iv) There was an overall expenditure limit in the budget provision for DHPs of two and a half times the Government's contribution towards the DHPs expenditure of the relevant local authority. Once the local authority reached its overall limit, it could not award any more DHPs during the financial year.

    (v) DHPs were, in the opinion of the Secretary of State, the most effective way of providing assistance to claimants where reasonable needs might not be fully met by Housing Benefit. It enabled the local authority to act flexibly and was, in the view of the Secretary of State, therefore a more appropriate legislative

measure than detailed prescription of categories in Regulation B13. Those affected were protected as decisions to award DHP had to be made in accordance with all the relevant duties under public law, the ECHR and the public sector equality duty provisions.

(vi) In the financial year 2013/14 DHPs of £180 million were provided to local authorities. Of that, £125 million was allocated to local authorities and although not ring-fenced for specific initiatives was calculated so as to provide £30 million for Removal of the Spare Room Subsidy (RSRS).

(vii) In the financial year 2014/15 the total funding of DHPs was £165 million as announced in the autumn statement in December 2013. Of the £165 million the Government indicated that £60 million was awarded in respect of RSRS.

23. No fresh evidence was served to update the information provided to the judges below about the budgetary and fiscal position. However,

(i) our attention was directed to Housing Benefit Circular S1/2015 issued on 30 January 2015. It stated that the overall funding for DHPs was £125 million; that the Government was committed to maintaining the level of funding to support those affected by RSRS and this would remain at £60 million;

(ii) we were told by Mr Eicke QC who appeared on behalf of the Secretary of State that in the Summer budget statement made in July 2015 the Government had said that to ensure local authorities were able to protect the most vulnerable Housing Benefit claimants, the Government would provide £800 million funding for DHP over the next five years (see paragraph 1.53 of the Summer budget statement). The amount to cover those affected by the RSRS would remain at £60 million for the year 2015/16;

(iii) a post-hearing submission from those acting on behalf of A contended that there had in fact been a substantial reduction in the available funding for DHPs and explained what would actually happen if the capped fund for DHPs was exhausted.

24. We do not think that this further material assists the resolution of the issues before us. If detailed consideration were to be given to the budgetary and fiscal position in respect of DHPs, the only proper course would have been to set out the evidence in a formal way. It is a difficult exercise to deduce from budget statements a precise appreciation of the funds in fact allocated, any provision of extra funds, or the terms of any hard-and-fast cap on the provision of further funds. Experience has shown that the position is often much more complex and fluid than might at first sight appear. It might have been relevant to these appeals to know that particular claimants had not received payments because insufficient funds were provided for DHPs to be made to them or that there was a real risk that such funds would not be provided in the future. There was no evidence in respect of any such failure and no reliable evidence in respect of the future.

25. There was additional evidence in relation to the position of those who were in a similar position to SR and W:

(i) In a statement made in April 2014 by Emily Holzhausen, the Director of Policy at Carers UK, there were details of a case, which had been referred to Carers UK, where a single mother with a disabled child who had spinal surgery needed round the clock care; there was a spare room so that an aunt could stay on a regular basis. DHPs were awarded until March 2014, but further DHPs were refused from April 2014 and the claimants were told that an appeal was unlikely to be successful.

(ii) In a statement made in April 2014 Nicola Whiteman, the policy and investment manager of the Papworth Trust, a charity for the disabled and a social landlord, stated from information they had gathered that DHPs were not working in the way in which the Secretary of State intended in relation to disabled children.

The Secretary of State acknowledged that evidence, but submitted that there was nothing that called into question the overall adequacy of the provision and the funding of DHPs.

26. The position of the Secretary of State in relation to disabled children living with those with parental responsibility for the child was that there was no need for separate provision for overnight carers. Beverley Anne Walsh explained that provision had been made for overnight carers of disabled adults because such provision enabled those adults to live independently in the community. This was not a consideration that applied to children, as they would not live independently but with those who had parental responsibility. The Social Security Advisory Committee had not advised that the provision in respect of overnight carers should be extended to cover disabled children. When the Work and Pensions Select Committee had recommended that provision in respect of overnight carers should be extended to cover disabled children, the Secretary of State's written response was that the position could be covered by DHP.

The public sector equality duty under s.149 of the Equality Act 2010

27. The public sector equality duty (PSED) is imposed under s.149 of the Equality Act 2010 which provides:

> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. …

> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

28. Section 149(7) of the Equality Act 2010 sets out the protected characteristics which include sex.

29. The Secretary of State had undertaken an Equality Impact Assessment dated June 2012 on the proposed policy in respect of Housing Benefit as required by the Act. The impact on gender was addressed in 3 paragraphs which noted a number of matters including the statistic that at December 2011 there were around 1.1 million more single female Housing Benefit claimants than single male claimants and the observation that the majority of the additional female claimants were lone parents of working age. In consequence, it was reported that any changes to Housing Benefit would be expected to have a bigger impact on female claimants; larger numbers of female claimants would be affected by the size criteria. The Equality Impact Assessment concluded:

> "However compared to the distribution of Housing Benefit caseload and all social rented sector Housing Benefit claimants, the measure does not have a significantly different impact on claimants of either gender.
>
> As there is no differential impact by gender, no mitigation has been specifically considered to address gender differences."

30. There was nothing in the Equality Impact Assessment in relation to women who were the subject of violence, including domestic violence, or to those who were within Sanctuary Schemes.

31. As we have said, the 2012 Regulations and an explanation for them and the public sector equality duty were considered in *MA* to which we now turn.

The decisions in Burnip and in *MA*

32. *Burnip* concerned two cases of single severely disabled persons occupying two bedroom flats, and one family with three children including two severely disabled daughters occupying a four bedroom flat. In the third case (*Gorry*), it was

inappropriate for the two disabled daughters aged 8 and 10 to share a bedroom because of their disabilities. In each case, their Housing Benefit had been reduced by the effect of the precursor of Regulation B13. The Court of Appeal (Maurice Kay and Hooper LJJ and Henderson J) held that the claimants had established a *prima facie* case of discrimination under Article 14 of the ECHR, and that the Secretary of State had failed to establish objective and reasonable justification for the discriminatory effect of the statutory criteria (paragraph 24 of Maurice Kay LJ's judgment). Henderson J (with whom the other members of the court agreed) held that DHPs could not be regarded as a complete or satisfactory answer to the problem (paragraphs 46 and 64). He also held in paragraph 64 that there was no question of a general exception from the normal bedroom test for disabled people of all kinds. The exception was sought for only a very limited category of claimants, namely those with a disability so severe that an extra bedroom is needed for a carer to sleep in, or in *Gorry's* case where separate bedrooms were needed for children whose disabilities were so severe they could not be reasonably expected to share a single room. He made clear that such cases were by their very nature likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring.

33. In *MA*, each of the 5 claimants were members of a household in which there was one disabled person. In each case, that disabled person needed the extra bedroom(s) for a variety of reasons occasioned by their disability. In short, Mr Carmichael needed the extra room for his disabled wife who needed a large specialist bed that he could not share. Mr O'Rourke was disabled and lived (in university vacations) with his step daughter. He needed the third bedroom to store equipment for his disability. Mr Drage suffered physical and mental health problems, and used all his three bedrooms to accumulate papers. JD lived with her 26-year old disabled daughter in a specially adapted 3-bedroom property. Mr Daly's 2-bedroom flat was occupied by himself and 2 or 3 days per week by his disabled 9-year old son. Each had had their housing benefit reduced in consequence of Regulation B13. Each claimed that the Regulation was discriminatory under Article 14 and had been adopted without consideration of the effect on the protected characteristic of disability in breach of the PSED. The Regulations were therefore unlawful to the extent that provision had not been made to bring them within one of the defined classes set out in Regulation B13. None challenged the overall policy objectives of the 2012 Regulations or the 2006 Regulations as a whole.

34. The Court of Appeal had to decide both whether there was discrimination on the grounds of disability and whether that discrimination was justified (paragraph 38). Lord Dyson MR accepted that Regulation B13, if read in isolation and without regard to that part of the overall scheme which provided for DHPs, plainly discriminated against disabled persons who had a need for an additional bedroom by reason of their disability (paragraph 39). In considering whether the discrimination was unlawful, it was not realistic, however, to confine the enquiry to Regulation B13; it was necessary to consider also the provision of DHPs as part of the whole package making up the scheme for dealing with the problem of under-occupation (paragraph 40). Ultimately, however, the Court of Appeal decided that, as a matter of substance, Regulation B13 discriminated against disabled persons on the grounds of disability. The central issue in the case was, however, whether that discrimination was justified.

35. Lord Dyson MR held that the Secretary of State was required to justify his different treatment of the need for additional accommodation of disabled and non-disabled persons and had to establish that there was an objective and reasonable justification for the different treatment (paragraph 48). The standard of review was the "manifestly without reasonable foundation" test; although the court had to exercise considerable caution before interfering with a scheme approved by Parliament, it had to scrutinise carefully the reasons advanced by the Secretary of State in justification (paragraphs 49-60).

36. The claimants in *MA* contended that Henderson J's reasoning in *Burnip* finding that there was no justification for the discrimination was determinative of the issue in *MA* (paragraph 64). The Master of the Rolls, however, distinguished *Burnip* on a number of bases adumbrated at paragraphs 64 and 71-72. The considerations identified by Henderson J did not apply or did not apply with equal force to the broader category of disabled persons with which *MA* was concerned (leaving out of account the sub-category of disabled persons to which one of the claimants, Mrs Carmichael, belonged, to whose position we return at paragraph 68 below). That broader category of disabled persons was relatively large, not easy to recognise, might be open to abuse and in some cases would require monitoring. The fund for DHPs had been increased and was being kept under review and would be topped up if necessary. The Secretary of State was entitled to take the view that it was not practicable to add an imprecise class of persons to whom the bedroom criteria would not apply; that could have been done but it would necessarily have added to the complexity (paragraph 73). The changing nature of a disabled person's needs could more easily be dealt with by DHPs (paragraph 74). DHPs were administered locally by local authorities which were accountable for the money spent and subject to greater financial discipline than they were for Housing Benefit which was almost invariably reimbursed by the Secretary of State (paragraph 75).

37. Lord Dyson MR concluded at paragraphs 80-82 on the justification issue that the Secretary of State had justified the discriminatory effects of his policy. The "manifestly without reasonable foundation" test was a stringent one. It was not sufficient to expose some flaws in the scheme or to conclude that the justification is not particularly convincing. The court must be satisfied that there is a serious flaw in the scheme which produces an unreasonable discriminatory effect. The Secretary of State's reasons for structuring the scheme in the way he did (summarised at paragraph 65 from Beverley Anne Walsh's evidence in that case) were far from irrational. Central to his thinking was that the needs of certain groups of persons were better dealt with by DHPs than by Housing Benefit.

38. In *MA* there was no dispute as to the applicable principles for the operation of the PSED which were conveniently summarised in the judgment of McCombe LJ in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60 (see paragraph 83 of the judgment in *MA*). The issue was whether the Secretary of State had complied with his duties in regard to the protected characteristic of disability in issue. The Master of the Rolls considered that it was insufficient for the decision maker to have a vague awareness of his legal duties; he had to have a focussed awareness of each of the duties under the section and their potential impact. He concluded on the evidence in relation to the consideration that

the Secretary of State had given to the effect on disabled persons, that there had been no breach of the public sector equality duty (paragraphs 91-92).

The appeal in A

(a) The issues in A

39. The issue before the judge and on this appeal under Article 14 was whether the failure to make provision in Regulation B13 for female victims of domestic violence living in accommodation adapted under the Sanctuary Scheme was unlawful discrimination on the ground of gender, particularly as it had a disproportionate effect on the group which was overwhelmingly female as I have set out at paragraph 13 above. The second issue in *A* was whether the Secretary of State had complied with his PSED.

40. It was submitted that the case was closer to *Burnip* than *MA*.

41. It was accepted by the Secretary of State before the judge and before us that there had been no consideration of the position of those who lived in accommodation within the Sanctuary Schemes when the policy was adopted and the Regulations were first drafted. Once the issue had emerged, it was clear that the position of all of those protected under the Sanctuary Schemes was not the same and it was therefore appropriate to provide for those who needed an extra room by means of DHPs. The guidance issued by the Secretary of State referred to those who suffered from domestic violence and to those who might need assistance to stay in their home.

(b) The decision of the judge in A

42. The judge accepted that A could realistically assert that the category of persons within the sanctuary schemes was very limited, that the group was relatively few in number albeit growing, easy to recognise as they had to be part of a local Sanctuary Scheme, not open to abuse as the police and other agencies were involved, unlikely to undergo change and did not need regular monitoring in most cases. It was an important consideration in the case of a person in A's position who had been the victim of violence that the stress caused should not be aggravated by uncertainty such as could arise from payments that were discretionary in nature.

43. However, the judge held that it was clear from *MA* that these considerations were not as powerful as they had been in *Burnip*¸ that there was adequate funding for DHPs, and that the general position was covered in guidance issued by the Secretary of State. Although the proper protection of those under the Sanctuary Schemes was beneficial and important, the judge could not conclude, looking at the overall scheme, that the Secretary of State's policy of dealing with those in the Sanctuary Schemes affected by the Regulation B13 by DHPs was manifestly without reasonable foundation. As long as A received DHPs there was no unlawful discrimination.

44. It was not necessary for the discharge of the PSED to look at every eventuality. An Equality Impact Assessment had been undertaken, although the position of those who had suffered from domestic violence and those in Sanctuary Schemes had not been considered. The Equality Impact Assessment and all the other considerations given to the issue of the restriction in housing benefits, including the debates in Parliament, demonstrated that the Secretary of State had considered the possible adverse impact of

the measure on women. The Equality Impact Assessment considered gender which was the protected characteristic; there was a recognition that there would be hard cases and that was sufficient. To require more would be to micro-manage policy. There was no breach of the PSED.

(c) The submissions on Article 14

45. It was submitted in the appeal on behalf of A (as supported by the arguments advanced by the Equality and Human Rights Commission) that it was clear that those within the Sanctuary Scheme were few in number, easy to recognise, there was no room for abuse, there was no need to monitor and the cost would be modest. The provision of DHPs was not an adequate solution; under the Regulations there was a right to a sum certain which was important to the claimant and those in her position who suffered from anxiety and stress; there was abundant evidence that victims of domestic violence were particularly susceptible to this. Regulation B13 had a disproportionately prejudicial effect on women and was discriminatory. The judge had not analysed these matters and had not given the reasons advanced for justification the careful scrutiny which *MA* had made clear was required; nor had he applied the right test as he had not considered whether the discrimination was justified. He had failed to weigh up the gravity of the discrimination and its impact on A or take into account the duty of the state to take steps to combat gender-based violence. Moreover it had become clear since the decision in *MA* that the fund from which DHPs were paid was capped and not ring fenced; claimants would thus compete with other claimants and local authorities would have to decide on competing priorities. The Equality and Human Rights Commission drew attention to the effect of the failure of the Secretary of State to discharge his PSED; as in their submission he had not discharged that duty, he had ignored a fundamental factor in the approach to his decision and this further undermined the justification he sought to advance.

46. The principal contention of the Secretary of State was that one should look at the overall scheme including both Housing Benefit and DHPs. Seen in that way, there was justification for the discrimination because the DHPs eliminated the effect of the application of Regulation B13 for those within the Sanctuary Schemes. A would receive the full amount of housing benefit through DHPs which the Secretary of State was entitled to conclude was the better way as a matter of good administration of addressing the position of those under the Sanctuary Schemes. DHPs provided for greater flexibility. It had to be recalled that only a relatively small number of those within the Sanctuary Schemes needed special provision. The scheme for the payment of DHPs was working and A was receiving the proper amount. Provided that A received the funds, it mattered not whether the funds were provided by inclusion within the defined class in Regulation B13 or by means of DHPs. There were ample funds allocated for the provision of DHPs.

(d) Our conclusions on Article 14

47. A and those in a similar position to A, who have suffered from serious violence, require the kind of protection offered by the Sanctuary Schemes in order to mitigate the serious effects of such violence and the continued threats of such violence. It cannot seriously be disputed that A and those in a similar position, who are within the Sanctuary Schemes and in need of an adapted “safe” room, are few in number and

capable of easy recognition. There would be little prospect of abuse by including them within the defined categories in Regulation B13 and little need for monitoring. Moreover, with careful drafting, Regulation B13 could be amended to identify them as a discernible and certain class.

48. The central question in our judgment is whether these facts mean that, notwithstanding the decision in *MA*, we are bound by the decision in *Burnip*, to decide that the admitted discrimination has not been justified.

49. In MA, the court distinguished *Burnip* on the grounds we have mentioned, each of which is specifically not applicable to *A*'s case. But the question is whether the other reasons given in *MA* for the justification of the discrimination would allow us to depart from *Burnip*, or whether, however much those factors might apply in this case, the similarity between *A*'s case and *Burnip* is such that we would not be justified in deciding it differently.

50. Lord Dyson MR made it clear in paragraphs 64 and 71-2 that, if the court in *MA* was to differ from *Burnip*, it would need to deal with the main strands of the reasoning of Henderson J. Paragraphs 71-2 do just that, but in a way that cannot be applied in the case of *A*, save that it is possible for the Secretary of State to argue at least that the fund for DHPs is now more certain to provide the necessary top-up than had appeared in *Burnip*.

51. We have summarised above the Court of Appeal's other reasons for reaching a different conclusion in *MA* as to justification. They were contained in paragraphs 73-75 and 80-82 of *MA*, and concerned the rationality of the Secretary of State's justification for his policy. The Secretary of State's view that it was not practicable to add an imprecise class of disabled persons does not apply, of course, to the class of which *A* forms a part. But otherwise the Court of Appeal's reasons are broadly applicable here. The question is, therefore, whether these generic reasons are sufficient to allow the Secretary of State to show that the discrimination in Regulation 13B is not manifestly without reasonable foundation.

52. The factors relied on in *MA* are relied on again here, but the Secretary of State has in this case placed particular reliance on the fact that A and those in her position were receiving and would receive DHPs that meant that they always had the full amount that would otherwise have been payable as Housing Benefit. In other words, the scheme as a whole comprising Housing Benefit and DHPs was not actually discriminatory at all in its overall effect. In argument, we suggested to Mr Eicke QC that this approach might have led him to deny the existence of discrimination in the first place, rather than providing appropriate justification for that discrimination. His problem was that in both *Burnip* and *MA*, the court had actually decided that the discrimination in question was that contained in Regulation B13, not that occasioned by the scheme as a whole (see paragraphs 3-6 in the judgment of Maurice Kay J in *Burnip* referring only to the Housing Benefit provisions and not the provisions for DHPs when he dealt with discrimination, and paragraph 47 in *MA*).

53. In these circumstances, it seems to us that what has to be justified is the admitted discrimination in Regulation B13. Whilst we accept that the Master of the Rolls in *MA* found that the reasons given in paragraphs 71-75 of his judgment amounted to an "objective and reasonable justification of the scheme" (i.e. the scheme including both

Regulation B13 and DHPs), he was only able to approach the matter in that way because he had distinguished *Burnip* on the facts of the cases in *MA*. We cannot see how *A*'s case can be so distinguished, so we feel bound to follow *Burnip*. The Court of Appeal did not say that *Burnip* was wrong, and that was not argued before us. As Mr Drabble QC put the matter for *SR*, *MA* makes a clear distinction between a broad class for which DHPs are appropriate, and a narrow class for which DHPs are not appropriate. The case of A is within the narrow class covered by the decision in *Burnip*.

54. In these circumstances, whilst we saw great force in the Secretary of State's arguments, which we subjected to serious scrutiny, we feel constrained not to accept them. We acknowledge in particular that DHPs are discretionary, but that that discretion has to be exercised lawfully and in accordance with the guidance issued by the Secretary of State. If they were to be withheld inappropriately, the decision would be subject to review. We acknowledge that the evidence shows that the DHPs would cover the full deficit in Housing Benefit. We acknowledge that, even though the fund for DHPs is capped and may in theory be insufficient, there is no clear evidence that it will be; on the contrary, so far it has been sufficient. Thus, the evidence is that A has received what she would have received had those in her position been brought within a defined class in Regulation B13; she has not been disadvantaged. But that was the position in *Burnip*, and the same justification was not accepted.

55. *Burnip* obliges us also to decide that the Secretary of State was not entitled to decide that the better way of providing for A and those in a similar position was by way of DHPs, even though that would be a more flexible approach.

56. In these circumstances, we have concluded that the appeal in *A* must be allowed on the ground that the Secretary of State has failed to show that his reasons amount to an objective and reasonable justification for the admitted discrimination in Regulation B13.

(e) The submissions on the PSED

57. It was submitted on behalf of A that the judge had failed to appreciate that there had been no regard to the impact of Regulation B13 on female victims of domestic violence. The judge should have concluded from the statement in the Equality Impact Assessment that more women than men would be affected and that the changes were likely to operate to the detriment of women. That should have led the Secretary of State to consider the impact on women in more detail and in particular those at risk of violence, including domestic violence. Although that risk might be obvious, it was the duty of the Secretary of State to gather evidence and assess the impact of the policy on victims of violence, including domestic violence. The submission of the Equality and Human Rights Commission developed these core arguments; it was the duty of the Secretary of State to have regard to the impact on all persons who had a protected characteristic. However, the Secretary of State had not addressed the issue that gender based violence was a specific form of sex discrimination and therefore had not approached the discharge of his duty from the correct starting point. The court therefore did not have the properly considered view of the Secretary of State and it was bound to subject the decision to very close scrutiny.

58. The Secretary of State submitted that what he was required to do was to examine the differential impact by reason of the protected characteristic of sex. He was not required to examine each and every possible manifestation. The Equality Impact Assessment did have regard to gender, but it was right in the conclusion it reached that the measure did not disproportionately impact on women. The guidance manual did specifically identify the victims of domestic violence as potentially appropriate recipients of a DHP.

(f) Our conclusion on the PSED

59. It is clear that the Secretary of State did address the question of gender based discrimination. Those within the Sanctuary Schemes who would be adversely affected by Regulation B13 were in fact few in number. It was not in the circumstances a breach of the PSED to fail to identify in the Equality Impact Assessment this very small group of those within the Sanctuary Schemes who had a need for an extra room; this was a very tiny and specific group. Nor would that specific group within the Sanctuary Schemes have been identified if the Equality Impact Assessment had specifically addressed the issue of gender based violence, including domestic violence, as it is a very restricted category of person even within the Sanctuary Schemes. When the group was identified, the position of those in Sanctuary Schemes that were adversely affected was addressed by the provision of DHPs. Those so affected were those with the need for a safe room and those in accommodation which had been adapted and from which it was not reasonable to move.

60. We therefore consider that the appeal on the PSED issue fails.

The appeal in SR

(a) The issue in SR

61. The issue before the judge and on the appeal was whether the failure to make provision in Regulation B13 for accommodation for overnight carers of a disabled child was unlawful discrimination on the grounds of disability in the light of the fact that provision was made in Regulation B13 for accommodation for children and for accommodation for the overnight carers of a disabled adult.

(b) The arguments before the judge in SR

62. The claimants argued that W fell within a small and readily identifiable group, which was easy to recognise. If the category were included in Regulation B13, it would not be open to abuse and would not require monitoring. In short, it was submitted that the position was indistinguishable from *Burnip*, and DHPs were not a satisfactory alternative to an entitlement under Regulation B13.

63. The Secretary of State argued that, prior to the making of the 2012 Regulations, careful consideration had been given as to whether provision should be made for additional accommodation for overnight carers of a child in the same way that provision had been made for overnight carers of an adult. The position in relation to

adults was that where an overnight carer was necessary to enable an adult to live independently, payment for such accommodation had been made from different sources and the position could be simplified by providing the costs through one source, Housing Benefit, and including the class within Regulation B13. Care for a child was, in contrast, often provided within the household. Where overnight care was needed for a child in addition to that provided by the family, DHPs would be provided as this was a more flexible way of dealing with particular situations that might arise in relation to children. It was contended by the Secretary of State that the SR claimants could not establish that the distinction made was not one the Secretary of State was entitled to make; it was therefore not manifestly without reasonable foundation.

(c) The decision of the judge in SR

64. The judge accepted that it was possible to refine through careful drafting the category into which the SR claimants fell by reference to the definition for adults in Regulation B13(6) and (9); that therefore the category was neither too small nor too amorphous to be dealt with in Regulation B13. However, the fact that the overall scheme could have been structured differently to bring the SR claimants within Regulation B13 rather than by making provision through DHPs did not mean that the overall scheme was manifestly without reasonable justification.

65. In the judge's view, the fact that the DHPs were discretionary did not mean that they could not "plug the gap" and did not mean they had not plugged the gap. Although the SR claimants could not point to any detriment, they contended that they did not have the assurance of future payment. The position taken by the SR claimants ignored the practicalities as the local authority was bound to exercise its discretion in accordance with public law and human rights principles and with the guidance given by the Secretary of State which covered this type of case. No basis had been advanced on which it could be shown that the local authority could have denied making available full DHPs. Therefore at present there was adequate assurance that the SR claimants would continue to benefit from DHPs. That position might change; if so different considerations would apply.

66. Although the judge criticised some of the reasoning advanced by the Secretary of State in support of his policy, the distinction between accommodation for an overnight carer for adults and an overnight carer for children could be justified. Looked on as a whole the decision of the Secretary of State could not be characterised as irrational or manifestly without reasonable foundation. There was a logical distinction between the treatment of adults and children grounded on the parental responsibility to look after children; DHPs provided the flexibility necessary.

(d) The argument on the appeal in SR

67. SR submitted that there was no justification for meeting the needs of disabled adults and non-disabled children in Regulation B13, but not meeting the specific needs of disabled children in exactly the same way. The Regulation provided for disabled adults who might not have a really severe disability, but did not provide for those in the position of W with a severe disability. There was no difference between adults and children in relation to their choice as to where to live. The cases were not harder

to identify. Although parents had a responsibility for children, that was no reason for putting disabled children in a worse position than disabled adults.

68. Particular reliance was placed on the way in which the court in *MA* had dealt with the position of one of the claimants, Mrs Carmichael. Mrs Carmichael needed, as we have said, a separate bed from her husband with space for manoeuvring her wheelchair. There was no room in the bedroom in which her husband slept and therefore she needed a separate bedroom. It was submitted on her behalf that she was in a small and easily identifiable class of disabled persons who needed a room because of her disability. Her position was indistinguishable from that of the children in the *Gorry* case, the third of the claimants in *Burnip.* The Secretary of State justified the distinction on the basis that whereas an adult couple would be expected to share a bedroom and to make the necessary arrangements, children required an additional level of protection. After *Burnip* and the judgment of the Divisional Court in *MA,* Regulation B13 had been amended to make specific provision for a child who could not share a bedroom.

69. The court's decision in *MA* to uphold the lawfulness of Regulation B13 in relation to Mrs Carmichael was expressly grounded on the fact that the Secretary of State had adduced evidence that showed that children needed to be treated differently to adults. The Master of the Rolls said at paragraph 79:

> "I do not accept that the differential treatment of adults and children is irrational or that there is no objective and reasonable justification for it. The best interests of children are a primary consideration … For that reason alone the Secretary of State was entitled to decide to provide for a greater degree of protection for children than for adults who are in the materially similar situation of having a disability related need for an additional bedroom."

70. It was submitted for SR that the reason given for excluding Mrs Carmichael from the defined class of persons requiring an extra bedroom must necessarily militate in favour of including a child such as W in that class. The Secretary of State had failed to carry across the logic of his argument, particularly given the universally accepted principle of acting in "the best interests of the child" (arising from the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities). Moreover, the Guidance given for DHPs did not identify disabled children needing respite carers as a group; the position of W was only covered in the Guidance because the house had been specially adapted (see the Guidance for DHPs at paragraphs 2.4-2.6). The failure to analyse the position of disabled children when devising the scheme by reference to the best interests of the child being a primary consideration underlined the defect in the argument that there was justification for the discrimination.

71. The Secretary of State contended that primary consideration had been given to the best interests of the child in formulation of the overall policy; there was a proper justification for treating the accommodation needed for carers of disabled adults and disabled children differently and in any event DHPs would be made in all appropriate cases, as had happened in the case of W.

(e) Our conclusions in SR

72. It is clear from the decision in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250 and in particular paragraphs 39-40 that the Secretary of State should have had specific regard to the best interests of children in the position of W as a primary consideration when devising the Regulations. The importance of the way in which the best interests of children should have been taken into account was underlined in the way in which the Master of the Rolls approached the case of Mrs Carmichael in *MA*, as appears from the passage to which we have referred.

73. On the evidence before the court justifying the different treatment in Regulation B13 of accommodation needed for carers of disabled adults and accommodation needed for carers of disabled children, the Secretary of State did not address how the distinction could be justified by reference to the best interests of a child as a primary consideration. He justified the distinction between making provision for a bedroom for disabled children but not for disabled adults by reference to the best interests of the child and explained the different treatment on that basis. On that basis, it seems to us very difficult to justify the treatment within the same regulation of carers for disabled children and disabled adults, where precisely the opposite result is achieved; provision for the carers of disabled adults but not for the carers of disabled children. In this context, moreover, the argument based on the promotion of independent living for adults, whereas children can be cared for within the family, has little purchase. We accept that DHPs were intended to provide the same sum of money, but we are not persuaded that this justifies the different treatment of children and adults in respect of the same essential need within the same Regulation, as neither the Regulation nor the policy behind the Regulations addressed the best interests of the child as a primary consideration. Moreover, the evidence of the two charities set out at paragraph 25 shows that the Secretary of State cannot in the case of the need for accommodation for the carers of disabled children demonstrate that DHPs will always be available. Furthermore it is regrettable that the position of carers for disabled children is not expressly dealt with in the Guidance which addresses the position only where there is specially adapted accommodation.

74. Thus we consider that the *SR* claimants succeed in this appeal for the reasons given in relation the case of *A*, and for the reasons just given that apply specifically to the position of disabled children requiring overnight carers.

Relief

75. It is important that the order to be made following this judgment can be finalised speedily in the light of the forthcoming Supreme Court hearing in *MA*. In these circumstances, we think it appropriate to cut through the detailed arguments that were addressed to us on the question of remedy. In both cases, we think that we should declare simply that "the Appellants have suffered discrimination contrary to Article 14 of the ECHR on the basis set out in the judgment of the court".

Permission to appeal

76. We also think it important to deal expeditiously with the question of permission to appeal in the light of the forthcoming hearing in the Supreme Court. We understood

from the oral submissions that were made to this court on the application for permission to appeal and on the substantive appeal that all parties would wish the Supreme Court to consider these cases alongside *MA* whatever conclusions we reached. That must be a matter entirely for the Supreme Court and we cannot seek to prejudge that. However, as our decisions may be affected by the outcome of the appeal in *MA*, we would propose to grant the Secretary of State permission to appeal, and to grant the appellant in *A* and the Equality and Human Rights Commission permission to appeal to the Supreme Court on the PSED issue, leaving it to the Supreme Court as to whether they wish to hear these appeals at the same time as the appeal in *MA* or to deal with them in another way. If any party wishes to resist the grant of permission, they may apply to do so, but we do not encourage them.

Disposal

77. For the reasons we have given, we will allow the appeals in both cases on the ground that the admitted discrimination in each case caused by Regulation B13 has not been justified by the Secretary of State. We would make it clear that we do so, because we have felt bound to follow the decisions of the Court of Appeal in *Burnip* and *MA*. No arguments were addressed to us to the effect that either decision was wrong. As we point out in paragraph 52 above, no argument was addressed to us to the effect that the scheme as a whole, comprising Housing Benefit and DHPs, is not discriminatory in its overall effect. We have no doubt that such arguments will be addressed to the Supreme Court.